



BROADBAND INTERNET ACCESS AS A UNIVERSAL SERVICE: DIGITAL EQUALITY

SÍNDIC

EL DEFENSOR
DE LES
PERSONES

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Síndic de Greuges de Catalunya

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1. INTRODUCTION: PURPOSE OF THE REPORT

This report is made up of three parts. The first is an update of a decision from March, 2006, on the social need and legal viability of including broadband Internet access as an obligation of universal service in the provision of electronic communication, which was the foundation for the Síndic de Greuges's (Catalan Ombudsman's) special report *Broadband Internet Access: a Right That Must Be Made Universal*, presented to the Parliament of Catalonia in June 2006.

In the more than six years since, many regulations—European, State and Autonomous Community—with impact on this subject have been approved. The regulatory framework has changed a great deal since then. Specifically, in the final conclusions of the 2006 decision, it was recommended that the Catalan Ombudsman petition, before the competent authorities, for the inclusion of Internet connection via broadband technology as an element of universal service within the electronic communications industry. The Catalan Ombudsman has followed through on this recommendation.

The inclusion of broadband Internet access as a universal service obligation in the provision of electronic communications is included in Law 2/2011 of March 4, on sustainable economy, in the modification of Law 32/2003, of November 3, regarding telecommunications in general; and is developed in Royal Decree 726/2011, of May 20, which modifies the Regulations on conditions for electronic communication service provision, universal service, and the protection of users, approved by Royal Decree 424/2005, of April 15. These legal and regulatory provisions were modified anew by Decree Law 13/2012, of March 30, which transposes directives in the area of internal markets for electricity and gas, and in electronic communications, and by which measures were adopted for the correction of deviations due to

differences between costs and income in the electricity and gas industries.

Thus, the first part of this report offers a summary of the regulations in force regarding the inclusion of broadband as an element of universal service in the electronic communications industry. This includes the state regulations approved following the implementation of Directive 2009/136/EC of the Parliament and the Council, of November 25, 2009, which modified Directive 2002/22/EC, on universal services and rights of users vis-à-vis electronic communication networks and services; Directive 2002/58/EC, concerning personal data processing and the protection of privacy in the electronic communications sector and Regulation (CE) no. 2006/2004 on cooperation in consumer protection.¹

In fact, Directive 2009/136/EC, of November 25, makes for a significant change in criteria regarding the establishment of universal service elements in the territory of the European Union, because it makes more flexible the determination of content for this public service obligation by the Member States.

The opening section also features a summary of objectives in the Digital Agenda for Europe, developed in 2010, among which is the universalization of fast and ultra-fast broadband throughout Europe by 2020.

Likewise, reference is made to the state and autonomous community regulations which, approved later in March 2006, have an impact on the universalization of the use of electronic media for public administrations in their relations with citizens and the business community.

These regulations recognize the specific rights of citizens in cases of administrative activity by electronic means, considered from the

¹ OJEC L 337, February 18, 2009.

standpoint of the right to digital equality, understood as a universal right to Internet access with broadband connections compliant with standards of quality, accessibility and affordability. This right must be guaranteed by public authorities to prevent formation of digital divides between different segments of society.

The second part of the report, briefer than the first, analyzes the viability of including mobile telephony as a universal service provision in the field of electronic communications, in accordance with the regulatory framework offered by the European Union.

Here it is worth mentioning that thanks to the unstoppable advancement in this industry,

mobile telephony already makes an ample contribution to the universalization of basic broadband Internet access, and, to an increasing degree, fast and ultra-fast broadband access.

The third and final issue discussed in this report is the guarantee of universal service provision and, in particular, specification of the bodies and public institutions that guarantee provision of Internet connection through broadband technologies and that, pursuant to the rules in force, carry out duties in the supervision and control of the requisites to be met in universal electronic communications service provision.

Last, the final section contains conclusions and certain recommendations.

2. THE OBLIGATION TO PROVIDE BROADBAND INTERNET ACCESS AS A UNIVERSAL SERVICE: FROM THE COMMON EUROPEAN FRAMEWORK TO THE STATE UNIVERSAL SERVICE FRAMEWORK. GOALS OF THE 2020 DIGITAL AGENDA FOR EUROPE

2.1. Directive 2009/136/EC of Parliament and the Council, of November 25, 2009, which modified Directive 2002/22/EC, concerning universal service

2.1.1. Periodic review of universal service from 2008

Within the framework of deregulation of public services, among which are electronic communications, the obligation of universal service emerges to cover market shortcomings, in such a way that once the provisions or elements that make them up are guaranteed by the scheme of competition among suppliers, they no longer form part of universal service. In this case, it is understood that there is no part or segment of the population that does not have access to these services under the required legal conditions and therefore, the guarantees offered by universal service become unnecessary. Specifically, pursuant to Article 22.1 of Law 32/2003, of November 3, concerning telecommunications in general, universal service is the set of services whose provision is guaranteed for all end users regardless of their geographic location, with a certain quality and affordable price.

The specific contents of universal service provisions are determined at the European level, and are subject to periodic reviews. According to Article 15 of Directive 2002/22/EC, of March 7, concerning universal service, the European Commission must regularly review the scope of universal service obligations, with a view to proposing their modification or redefinition to the European Parliament and the Council of Europe. This review must be performed in keeping with the social, economic and technological evolution, considering, among other things, mobility and communications speeds according to the predominant technologies used by the majority of subscribers.

Along this line of reasoning, Annex V of the Universal Service Directive stipulates that, when it comes to examining the suitability of revising the scope of universal service obligations, the Commission must consider the following elements: *a)* the social and market evolution regarding the services used by consumers; *b)* the social and market evolution regarding the availability of services for consumers and their capacity to choose these services, and *c)* the technological evolution in terms of the formats in which services are supplied to consumers.

Further, when analyzing the suitability of modifying or redefining the scope of universal service obligations, the Commission must weigh the following items: *a)* the availability of certain specific services for the majority of consumers, and their generalized use, or, on the other hand, their lack of availability and use by a minority of consumers, with the consequent social exclusion; and *b)* the net benefits derived from the availability and use by consumers of certain specific services and the justified nature of public intervention in the event that these services are not supplied to the public in normal conditions of business operation.

Nevertheless, in this initial section of the report we are only interested in the second periodic review of the universal service of electronic communications carried out by the European Commission in 2008, given that it was as of this review that Directive 2009/136/EC, of November 25, 2009, and which modified Directive 2002/22/EC, was approved. Later, reference will be made to the third periodic review carried out at the end of 2011² and the conclusions drawn therefrom.

The data gathered by the European Commission in the 2003-2007 period showed that, although in 2007 broadband had not yet achieved the

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of November 23 [COM (2011) 795 final] under the title Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC.

levels of coverage and dissemination that would make possible consideration of its inclusion within universal service, these levels were being approached at a reasonable pace. The same data clearly revealed the shrinking numbers of narrowband connections.

Pursuant to this information, in 2008 the Commission acknowledged that the coverage of broadband networks was already quite high in most Member States, although it was experiencing delays in some of them. Internet use was nearing the level of a service used by the majority: 49% of EU households were using it, 36% of them via broadband.

It was also found that mobile broadband could make a positive contribution to reinforcing overall broadband penetration, since it was undergoing considerable development in certain Member States, and wireless LAN technologies were beginning to play a significant role in Internet access. The marked reduction in prices for access via wireless and mobile technologies, in addition to the growing service offering and communications speeds, indicated by year-end 2007 that the use of mobile broadband would grow faster than fixed broadband.

Therefore, although broadband was not being used at that time by a majority of consumers (the first of the two criteria mentioned in Annex V of the Universal Services Directive), its adoption was approaching the threshold of majority use. In light of these figures, the Commission held that, within a relatively short term, narrowband would no longer meet the requisite of being “sufficient to functionally access Internet”, as stipulated in Article 4(2) of the Universal Service Directive. It concluded that it was necessary to continue follow-up of the situation, without changing universal service to include broadband Internet access or mobile communications, in accordance with the interpretation of the concept of *universal service* of Directive 2002/22/EC, of March 7. However, it also concluded that reflection on the concept of *obligatory universal service* was necessary:

“[...] It seems clear that the replacement of fixed vocal telephony and the increased dissemination and significance of broadband in daily life bring up issues regarding the universality of access to electronic communication services in the future. Therefore, now is the right time to begin reflection on the concept of obligation of universal service

within the overall approach to high-speed Internet for everyone, in which there could also be an influence of community, national and regional/municipal support, public and private industrial associations and other mechanisms”.³

2.1.2. Directive 2009/136/EC of the Parliament and the Council, of November 25, 2009

Following the 2008 revision of universal service, Directive 2009/136/EC of November 25, 2009, of the Parliament and the Council, was approved. It modified Directive 2002/22/EC, on universal service and users’ rights relating to electronic communications networks and services; Directive 2002/58/EC, concerning personal data processing and protection of privacy in the electronic communication sectors, and Regulation EC no. 2006/2004 on cooperation in consumer protection.

Based on the information and conclusions of the abovementioned periodic review, Directive 2009/136/EC, of November 25, did not include the guarantee of broadband connection in the universal service provision. In other words, the European standard of universal service does not entail Internet connection by broadband technologies.

Specifically, Directive 2009/136/EC modified Article 4 of Directive 2002/22/EC, of March 7, with regard to the guaranteed supply of access from a fixed location to a public telephone network, and established that:

- “1. Member states shall ensure that at least one company meets all reasonable connection requests from fixed locations to the public communications network.
2. The connection provided must make it possible to carry out data, fax and voice communications at speeds sufficient to functionally access the Internet, considering the predominant technologies used by the majority of subscribers and the technological viability.
3. Member states shall ensure that at least one company meets all reasonable connection requests for provision of telephone service available to the public through connection to the network referred to in section 1, which makes it possible to make and receive local and international telephone calls”.

Thus, there is no stipulation of broadband connection as a universal service to be provided, although express mention is made of the need

³ Communication of the Commission of 2008, on the second periodic review of the scope of universal service, p. 9.

to have present, for functional Internet access, the predominant technologies used by the majority of subscribers and technological viability (Article 4.2 of the Universal Service Directive), as was already made in the original version of Article 4.

In fact, as has been seen, the periodic review of the scope of universal service obligations of 2008 was not conclusive with regard to the incorporation of broadband as a guarantee of universal service. In application of the criteria that Directive 2002/22/EC contains for a service provision to be universal (the risk of social exclusion in light of predominant degree of availability of certain services for consumers—use by the majority—and the identification of general net benefits derived from its availability and the consequent public intervention to make up for the market's ineffectiveness in providing them (principle of subsidiarity before the market's failure), the European Commission considered that at that time, broadband was not of general use, and therefore, there were no grounds to incorporate it into universal service.

Despite that, it must be said that Directive 2009/136/EC, in its modification of the Universal Service Directive, establishes a more direct and specific regulation to facilitate access for disabled and elderly users and to guarantee universalization of the service. It emphasizes this specific segment of society, and includes special provisions regarding certain aspects of the terminal equipment meant to facilitate access for disabled end users.⁴

2.2. Universal service flexibility: European standard and national standards. Basic broadband as a national universal service benefit

From the previous regulatory framework it can be concluded that, at this time, the European guarantee of functional access to Internet included as a universal service provision (connection to the public telephone network from a fixed location that must guarantee users the possibility to access data services and allow functional access to Internet) does not establish connection with broadband technologies.

As of the approval of Directive 2009/136/EC, of November 25, there have been two different standards of universal service: first, one that could be called the *European standard of universal service*, which does not include broadband; and second, the so-called *national standard of universal service* or that of each Member State, which can include broadband Internet connection, in accordance with the criterion of flexibility introduced by the 2009 Directive, which allows Member States to include broadband connections into the financing system for universal services.

Therefore, Directive 209/136/EC, through it avoids modification of the universal service content at the European level, does allow for the existing divergences among national standards of universal service (for example, this could refer to the newest members of the EU). This makes possible the application of a criterion of flexibility that allows Member States to incorporate broadband connections into universal services, if they are of majority use. Specifically, the Directive establishes that the Member States will be competent to determine the data communications speed that allows functional access to Internet, in light of the specific circumstances of the national markets (5th and 6th whereas clauses):

“(5) Data connections to the public communications network at a fixed location should be capable of supporting data communications at rates sufficient for access to online services such as those provided via the public Internet. The speed of Internet access experienced by a given user may depend on a number of factors, including the provider(s) of Internet connectivity as well as the given application for which a connection is being used. The data rate that can be supported by a connection to the public communications network depends on the capabilities of the subscriber's terminal equipment as well as the connection. For this reason, it is not appropriate to mandate a specific data or bit rate at Community level. Flexibility is required to allow Member States to take measures, where necessary, to ensure that a data connection is capable of supporting satisfactory data rates which are sufficient to permit functional Internet access, as defined by the Member States, taking due account of specific circumstances in national markets, for instance the prevailing bandwidth used by the majority of subscribers in that Member State, and technological feasibility, provided that these measures seek to minimize market distortion.

⁴ It modifies Article 7 of Directive 2002/22/EC in order for the Member States to guarantee that disabled end users have access to electronic communication services, for which they may adopt specific measures considering national circumstances.

Where such measures result in an unfair burden on a designated undertaking, taking due account of the costs and revenues as well as the intangible benefits resulting from the provision of the services concerned, this may be included in any net cost calculation of universal obligations. Alternative financing of underlying network infrastructure, involving Community funding or national measures in accordance with Community law, may also be implemented”.

“(6) This is without prejudice to the need for the Commission to conduct a review of the universal service obligations, which may include the financing of such obligations, in accordance with Article 15 of Directive 2002/22/EC (Universal Service Directive), and, if appropriate, to present proposals for reform to meet public interest objectives”.

On another note, the highly relevant matter of whether the category of universal service is the most appropriate for the universalization of access to Internet by broadband technologies. As already mentioned, in the second periodic review of the universal service in 2008, the European Commission emphasizes this issue:

“This Communication sets out some reflections for the future role of universal service in the provision of e-communications services. It raises the question whether the concept and scope of universal service at EU level should be changed and if so, whether universal service is an appropriate tool to advance broadband development, or whether this should be left to other EU policy instruments or to national measures. It provides the basis for a discussion on the range of relevant issues in order to open a substantial European debate that would allow all stakeholders to express their views and discuss alternative approaches, in the course of 2009”.⁵

This debate is still relevant today, because the Commission has undertaken a clear strategy in the sector of electronic communications contained in the *Digital Agenda for Europe 2020*, with a view to universalizing basic broadband to all European users by 2013 at the latest, through universal coverage with mixed technology, combining fixed and wireless technology.

2.3. The Digital Agenda for Europe: the 2020 goal of fast and ultra-fast broadband universalization in a single digital market

The Digital Agenda for Europe 2020 has the general objective of achieving sustainable economic and social benefits that can be derived

from a single digital market based on fast and ultra-fast Internet connection and interoperable applications. It is the first of seven initiatives to be carried out within Europe 2020, a strategy for smart, sustainable and inclusive growth.

The aim of the Agenda is to design a course of action that will make it possible to get the most from the economic and social potential of ICT's, especially Internet, as an essential pillar of economic and social activity. It seeks to promote innovation, economic growth and improvement in the daily lives of citizens and companies.

As concerns Internet, the European Commission stated in the opening of the Digital Agenda that:

“The development of high-speed networks today is having the same revolutionary impact as the development of electricity and transportation networks had a century ago. With the on-going developments in consumer electronics, the lines between digital devices are fading away. Services are converging and moving from the physical into the digital world, universally accessible on any device, be it a smartphone, tablet, personal computer, digital radio or high-definition television. It is projected that by 2020 digital content and applications will be almost entirely delivered online”.

Notwithstanding the above, a number of difficulties have been identified that prevent Europe from prospering in the field of ICT's and capitalizing on the potential benefits of the digital economy. The Agenda lists the seven most significant obstacles which, on their own or in combination, underscore the need for overall, united political action at the European level. The obstacles are: fragmented digital markets, lack of interoperability, rising cybercrime and risk of low trust in networks, lack of investment in networks, insufficient research and innovation efforts, lack of digital literacy and skills, and missed opportunities in addressing social challenges.

Specifically regarding the lack of investment in broadband networks, the Digital Agenda indicates that “more needs to be done to ensure the roll-out and take-up of broadband for all, at increasing speeds, through both fixed and wireless technologies, and to facilitate investment in the new very fast open and competitive Internet networks that will be the

⁵ Communication of the Commission, of 2008, concerning the second periodic review of the scope of universal service, p. 13

arteries of a future economy.” The Commission holds that European institutions and members states’ “action needs to be focused on providing the right incentives to stimulate private investment, complemented by carefully targeted public investments, without re-monetizing our networks, as well as improving spectrum allocation.

To overcome this specific obstacle to the single digital market, the Digital Agenda has set, as a goal for 2020, generalized access to competitively priced fast and ultra-fast Internet. The objective is “to bring basic broadband networks to all Europeans by 2013” and seeks to ensure that, “by 2020, all Europeans have access to much higher Internet speeds of 30 Mbps or above (fast broadband) and 50% or more of European households subscribe to Internet connections of 100 Mbps or above (ultra-fast broadband).”⁶

To reach these ambitious targets the Digital Agenda states that it is necessary to develop a comprehensive policy, based on a mix of technologies, focusing on two parallel goals: “on the one hand, to guarantee universal broadband coverage (combining fixed and wireless) with Internet speeds gradually increasing up to 30 Mbps and above and over time to foster the deployment and take-up of next generation access networks (NGA) in a large part of the EU territory, allowing ultra-fast Internet connections above 100 Mbps.”

Consequently, the Commission believes that strong public intervention is indispensable “to guarantee universal broadband coverage with increasing speeds”, as “the spill-over benefits created by such networks for the economy and society justify (these public policies)”. It holds that “strong public intervention must guarantee universal broadband coverage at rising speeds”, avoiding “fast broadband networks concentrated in a few high-

density zones with significant entry costs and high prices.” “These policies should lower the costs of broadband deployment in the entire EU territory, ensuring proper planning and coordination and reducing administrative burdens.” The Commission cites, for instance, “the competent authorities should ensure: that public and private civil engineering works (...) provide for broadband networks (...); clearing of rights of way; and mapping of available passive infrastructure suitable for cabling.”⁷

Within this universalization of broadband Internet access at rising speeds, “wireless (terrestrial and satellite) broadband can play a key role” as it can “ensure coverage of all areas including (...) rural regions.” According to the Digital Agenda, “The central problem to develop wireless broadband networks today is improving efficient access to the radio spectrum, which is already suffering a certain degree of congestion. For this reason, the Commission believes that European spectrum policy must “promote efficient spectrum management.”⁸

As already stated, the deployment of NGA networks are also called to play a key role.⁹ These are networks that are much faster than those of the first generation (associated with cable television and telephony networks). To promote this deployment and stimulate the open and competitive network market, the Commission published its Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks.

Last, the Digital Agenda includes a number of actions to be carried out by the European Commission, among others, adoption of a communication on broadband within the year 2010¹⁰, and others to be carried out by the Member States, namely: create and make operative, by 2012 at the latest, national bro-

⁶ It is worth noting that in 2010, when the Digital Agenda was adopted, Europe had “only 1% penetration of fiber-based high-speed networks whereas Japan was at 12% and South Korea was at 15%.

⁷ Along these lines, it is worth returning to the above-mentioned Decree Law 13/2012, of March 30, which transposes directives in the area of internal markets for electricity and gas, and in electronic communications, and by which measures were adopted for the correction of deviations due to differences between costs and income in the electricity and gas industries.

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting the shared use of radio spectrum resources in the internal market, September 3, 2012, COM(2012) 478-final.

⁹ New generation access (NGA).

¹⁰ Communication on broadband that establishes the common framework: European broadband: investing in digitally-driven growth COM(2010) 472 final).

adband plans that meet the goals for coverage, speeds and assimilation defined in the Europe 2020 Strategy; taking measures, including those of a legislative nature, to facilitate investment in broadband; making full use of structural and rural development funds (ERDF) that are already allocated for investment and ICT infrastructure, and apply the European spectrum policy program to guarantee a coordinated allocation of the spectrum necessary to meet the goal of 100% 30 Mbps Internet coverage by 2020.

2.4. Periodic review of universal service from 2011: the debate on the appropriateness of universal service

To resolve the matter mentioned above on the suitability in the near future of universal service in the electronic communications industry, and specifically, the universalization of broadband, the European Commission agreed in 2008 to carry out a public consultation among the stakeholders. The consultation was performed between March and May 2010 to conclude whether it was necessary to review the European Union's approach to and general principles on universal service in electronic communications, a sector characterized by growing competitiveness. The intent was to clarify whether the obligation of universal service had to become a proactive instrument in the field of broadband, and therefore, whether it had a role to play in achieving "broadband for everyone", or whether this universalization had to be resolved with other strategic measures at the national and European Union levels.

The results of the consultation were featured in the Communication from the European Commission of November 23, 2011, which also included the third periodic review on the scope of universal service. According to the Communication, "a wide range of views were expressed in the consultation, with no consensus emerging as to the future role of universal service obligation in furthering Europe's broadband objectives." In fact, the governments and national regulatory authorities taking part in the consultation supported maintaining the key features of the universal service obligation regime.¹¹

On another note, the Commission took into consideration data from 2011 that indicated Member States' need to be acutely aware of the application of flexibilization criteria for the scope of universal service with regard to broadband speeds, so that it does not have negative effects on the markets or hinder technological innovation in this field. It highlighted that the broadband market in the EU-27 was not yet a mature one, but rather one characterized by innovation and a dynamic evolution, and that it was likely that, as a result of technological, competitive and regulatory evolution, broadband coverage would expand considerably.

The aforementioned data can be summed up as follows: "While fixed broadband networks are, on average, available to 95.1% of the EU population, this figure is only 82.8 % in rural areas across the EU and 60 % or less in rural areas of Bulgaria, Slovakia, Poland, Romania and Cyprus. The cost of rolling out or upgrading broadband infrastructure in underserved areas is significant. A study commissioned by the Commission estimates the total EU-wide net cost of ensuring the availability (coverage) and affordability (subsidized social tariffs) of a 2 Mbps broadband connection (based on a combination of wired and wireless technologies) through universal service obligation to be approximately € 13.6 bn over a five-year period.¹²

Therefore, the Commission drew attention to the content of Directive 2009/136/EC, of November 25, which recognized the broad diversity existing among the EU-27, and granted to Member States the flexibility necessary to determine data communications speeds corresponding to the universal service obligation, depending on the national and financing conditions of the associated net costs. However, it also issued the following precaution:

"[...] to prematurely mandate broadband at EU or national level risks distorting markets and holding up private investment in broadband. While telecoms companies can be expected to invest in profitable new networks, a fundamental question arises whether extensive USO, placing a heavy burden on the sector alone in the interests of social inclusion, would be appropriate and sustainable, while other private and public entities

¹¹ The European Parliament expressed a similar position in its Resolution 5 of July 2011, regarding universal service and the 112 emergency number, in which it highlighted the importance of the universal service obligation as a safety net that made social inclusiveness possible.

¹² Communication 2011, p. 5.

and society as a whole draw benefit from ubiquitous broadband”.¹³

In fact, within the same Communication of 2011, in the section concerning the third review of the scope of universal service, there is discussion on the viability of including broadband within this obligation, which as a result of the existing data, concludes that, on a domestic level, the use of broadband is still at a minority level and the requisite imposed by the universal service directive of use by a substantial majority of the population is not met. According to the Commission, considering the disparities between national demands, it is even more apparent that the costs involved in broadband universal service obligation at the EU level would be disproportionately borne by telecom suppliers, and in the end, by consumers in the Member States. The costs of

ensuring universal broadband coverage would be particularly high in countries with a sparse population, difficult terrain and/or less developed infrastructure. Therefore, including broadband access within the scope of universal service at the EU level, at this stage, would not meet the second criterion in the USD, namely conveying a general net benefit to all European consumers.¹⁴

Thus, the 2011 review of universal service concludes, on one hand, not to include broadband as a component of European universal service in the electronic communications sector¹⁵ and, on the other, maintains the fundamental characteristics of the universal service obligation in this sector, although debate on this topic is still open and it must be readdressed in the next periodic review in 2013.

¹³ Communication 2011, p. 6.

¹⁴ Communication 2011, p. 8.

¹⁵ Communication 2011, p. 14: “The Commission currently does not see a need to change the basic concept and principles of universal service as an instrument for preventing social exclusion. At this stage, it would not be appropriate to include mobility or mandate broadband at a specific data rate at the EU level”.

3. PROVISION OF UNIVERSAL BROADBAND INTERNET SERVICE CURRENT REGULATIONS FOR BASIC BROADBAND CONNECTIONS AND THE WAY FORWARD

3.1. Current regulations: is basic broadband sufficient for functional access to the Internet?

Broadband access is characterized by high speed and permanent access to the Internet, either through fixed connections (cable, fiber optics, PLC), fixed wireless (public satellite access, Wi-Fi, WIMAX) or mobile connections (mobile broadband: mobile telephone, 3G technology or above, UMTS/WIMAX, USB, laptop computer card). At the international and European levels, distinction is now being made between basic, fast and ultra-fast broadband, depending on different communications speeds (Mbps), as has already been seen in the Digital Agenda 2020.

In Spain, the regulations in force for Internet connection via broadband technologies as a universal service obligation originate in Law 2/2011, of March 4, on sustainable economy, which modified Law 32/2003, of November 3, on telecommunications in general, to introduce, “broadband at a speed of 1 Mbit per second, provided through any technology, as an integral element of universal service. The conditions for broadband connection service to the public network shall be established by royal decree”¹⁶ (opening statement).

Article 52 of the Sustainable Economy Act stipulates:

“1. Connection to the public communications network with capacity for functional access to the Internet, guaranteed by the universal telecommunications service, must allow a broadband download data transfer rate of 1 Mbit per second. This connection can be provided through any technology.

The Government, [...], by Royal Decree, [...] shall be able to modify this speed in accordance with the social, economic and technological evolution, considering the services used by a majority of users”.

According to the single final provision (term for calling the relevant bidding process) of Order ITC/3379/2010:

“1. Within a period of three months from the entry into force of the implementing rules specifying the legislation which substantially modifies the concept of universal telecommunication service with the incorporation of broadband connection, the relevant bidding processes shall be called for the designation of the supplier or suppliers responsible for providing the elements of universal service referred to in the aforementioned Order ITC/3808/2008, of December 23.

2. Once the procedures referred to in section 1 have been concluded, the new designations will set aside Order ITC/3808/2008, of December 23, even though the prior designation period, which concludes on December 31, 2011, has not yet expired”.

To implement these legal provisions, Royal Decree 726/2011, of May 20, was approved, which modifies the Regulations on conditions for electronic communication service provision, universal service, and the protection of users, approved by Royal Decree 424/2005, of April 15.

The modification made by Royal Decree 726/2011, of May 20, was meant to specify the terms for incorporation of broadband as a universal service provision, and also partially transpose into the internal legal code the changes introduced in the framework of universal service by Directive 2009/136/EC, of November 25.

¹⁶ Previously, Article 7 of Law 56/2007, of December 28, on measures to promote the information society, had modified section a of Article 22.1 of Law 32/2003, of November 3. The literalness of this tenet seemed to imply that the universal service obligation would have to include broadband connection in the future: “[...] the connection must allow broadband communications in the terms defined by the legislation in force”.

As concerns broadband, the new royal decree stipulated that the provision of this element of universal service refer to the possibility to (Article 28.1.b):

“b) Establish data communications at a speed sufficient to functionally access the Internet. For this purpose, and pursuant to the terms of Article 52 of Law 2/2011, of March 4, on sustainable economy, network connections must allow broadband data communications at a speed of at least 1 Mbit per second.

This figure refers to the overall data link speed for users accessing the Internet, and includes the net data transport value offered by the link to each user, as well as tasks of synchronization, control, operations, correction of errors or other specific access functions. For DSL technology this overall speed is considered the modem synchronization speed.

With regard to each user, the designated operator must guarantee that this overall data speed that the connection provides, when averaged over any 24-hour period, must be no lower than one megabyte per second. The definitions and methods by which to measure this parameter of average speed offered to each user can be established by order of the Ministry of Industry, Tourism and Commerce.

This regulation was recently modified again by Decree Law 13/2012, of March 30, which transposes directives in the area of internal markets for electricity and gas, and in electronic communications, and by which measures were adopted for the correction of deviations due to differences between costs and income in the electricity and gas industries.

Nevertheless, the legislative modification of the General Telecommunications Act (LGT) made by this Royal Decree Law calls for identical data communication speed by broadband (Article 22.1 of the LGT, with the new version derived from Royal Decree Law 13/2012):

“Under the aforementioned concept of universal service, it must be guaranteed, in the terms and conditions that the government determines by the regulations, that:

a) All end users are able to obtain connection to the public electronic communications network from a fixed location as long as their service requests are considered reasonable pursuant to the regulations established. The connection provided must make it possible to carry out data, fax and voice communications at speeds sufficient to functionally access the Internet. The connection to the public communications network with functional access to the

Internet must make possible broadband download data transfer rate of 1 Mbit per second. The Government may modify this speed in accordance with the social, economic and technological evolution, considering the services used by a majority of users”.

What is introduced by this most recent modification, as a new feature of universal service is the offer of special tariff packages for certain segments of society (Article 22.f of the LGT, with the new wording of the Royal Decree Law 13/2012):

“[That services] are offered to consumers who are natural persons, in accordance with conditions that are transparent, public and non-discriminatory, options or packages that differ from those applied in normal conditions of business operation with a view to guaranteeing, especially, that persons with special social needs can have access to the Internet and the services that make up the universal service concept. With the same objective, and when it is appropriate, price limitations, common tariffs, geographic averaging or other schemes similar to the benefits included in this article can also be applied”.

This brings forth the question of whether this regulation and guarantee of basic broadband Internet connection, as it refers to a download data transfer rate of one megabyte per second, is sufficient to meet the future objectives of greater capacity (fast and ultra-fast) broadband referred to in the Digital Agenda for Europe 2020 and its first landmark for 2013: universalization of basic broadband.

Consideration must be given to whether a download data transfer rate of one megabyte per second allows functional access to the Internet from a fixed location, as is set forth by the legislation in force, or it will be necessary to progressively increase communications speed as a universal service, taking into account, in any event, the impact of this increase on the investments made by suppliers and net general benefits, in accordance with the European principles of universal service.

3.2. Universalization of Internet connection by broadband technologies: the way forward

The issue brought to light by the future universalization of broadband with rising data communications speeds is the role that must be played by the most significant and typical obligation of public service in the telecommunications industry: universal service.

In the second periodic review of the scope of universal service in 2008, the European Commission made the following statement:

“As broadband becomes an essential tool of everyday life, we are confronted with the question of how to implement a true “broadband for all” policy and what the role of universal service policies might be in meeting this challenge”.¹⁷

Therefore, the fundamental question is whether universal service at the European Level has become an appropriate tool to favor development of broadband—and if so, when and how to recur to this category—or if other community policy instruments would be more efficient, and if so, which ones.

Based on these considerations, Directive 2009/136/EC was approved, which modified Directive 2002/22/EC, of March 7, and established the criterion of flexibility concerning broadband as a universal service provision, in light of the situation of each Member State of the Union. With this flexibility criteria, the content of universal service in the electronic communications sector was no longer homogeneous around the European Community.

In 2011, with the third periodic review of the scope of universal service, the Commission also warned Member States about the inclusion of broadband as a universal service obligation in the following manner:

“Given the large sums needed to ensure broadband coverage through USO and the potential impact on industry and consumers, Member States need to carefully analyze whether national conditions warrant the extension of USO to broadband, taking into account the risk of social exclusion as well as possible distortion of competition and undue burden on the sector”.¹⁸

For this reason, with regard to the application of the universal service obligation to broadband-speed Internet at the national level, the Commission established common directives and recommended that the Member States establish a cohesive body of criteria similar to those used at the European scale to modify the scope of the universal service obligations. These criteria could help guarantee cohesion and minimize market

distortion, if the possibility existed, while also meeting the objective of averting social exclusion.

Along these lines, the Commission suggests that the member states weigh the possibility of including broadband connections into the universal service obligation when the data rate in question is used at the national level: a) in at least half of the country’s households; and b) in at least 80% of the households with a broadband connection. In the same vein, it also recommended that Member States assess: a) the expected market availability of broadband without public intervention b) the social and economic disadvantages incurred by those without access to a broadband connection, including disabled end-users; c) the cost of public intervention via USO and comparison of this cost against the use of other approaches; and d) the benefits of public intervention and its effects on competition, market distortions and broader policy objectives. Thus, intervention would only be justified where overall benefits outweigh overall costs.

Once these common directives were established, the Commission again concluded in 2011—as already noted—that it would be up to the Member States, pursuant to the specific national conditions, and in accordance with the subsidiarity principle and the flexibility criterion introduced by the 2009 Directive, to determine as a universal service provision a given data communications rate in the network connections that offer functional access to the Internet, in other words, a given basic broadband rate.

This notwithstanding, recurring to the universal service instrument is considered residual in the application of the subsidiarity principle. Consequently, when the market and other regulatory and financial instruments do not make universal broadband coverage possible.

In the end, it will be necessary to await the 2013 universal service review to conclude whether the universal service obligation is appropriate for the universalization of basic broadband, or if market forces and free competition are sufficient, without ever endangering social inclusiveness and the right to digital equality.²⁰

¹⁷ Communication 2008, p. 10.

¹⁸ Communication 2011, p. 11.

¹⁹ Communication 2011, (p. 12), in which it is stated that on average, over 80% of fixed broadband network subscribers in the EU have broadband rates that are higher than two megabytes.

²⁰ Communication 2011, (p. 12): “The importance of broadband access for European citizens is expected to continue to grow. While its inclusion now within USO at the EU level would be premature, the Commission will continue to monitor broadband market developments, including their social context. It will take these developments into account when it next reviews the scope of universal service”.

4. USE OF ELECTRONIC MEDIA BY PUBLIC ADMINISTRATIONS AND BROADBAND: REGULATORY FRAMEWORK. THE RIGHT TO DIGITAL EQUALITY

4.1. The use of electronic media by Catalan public administrations: regulatory framework

Since 2006, a number of laws—at the state and autonomous community level—have been approved that justify the need to universalize access to broadband Internet, as they call for a preferential use of electronic channels for communication between citizens and public administrations.

The main ones can be listed as follows: Spanish Law 11/2007, of June 22, concerning electronic access by citizens to public services, partially implemented by Royal Decree 1671/2009, of November 6; Spanish Law 26/2010, of August 3, on the legal system and procedures for public administrations of Catalonia, and Law 29/2010, of August 3, concerning the use of electronic media in the public sector of Catalonia.

These laws acknowledge specific rights of citizens before administrative action by electronic means, which must be considered in all cases from the perspective of the right to digital equality, or stated otherwise, the universal right to access the Internet with basic—and in the future, fast and ultra-fast—broadband connections that meet the legal requisites of quality, accessibility and affordability.

European bodies, through, among others, Directive 2006/123/EC of the European Parliament and the Council, of December 12, concerning services in the internal market (Services Directive), also firmly support the use of electronic media in relations between competent administrations and economic service activity providers, as a mechanism to simplify and reduce administrative burden, which must facilitate a single services market and higher economic growth. One example of this is the so-called *one-stop shop*; or a single center for electronic, remote processing of many administrative procedures which Catalan Law 26/2010, of August 3, also establishes for relations between the Administration and citizens.²¹

This regulatory framework—at the European, Spanish state and Autonomous Community levels—is therefore a clear demonstration of a decided strategy for the public administrations to use new technologies in all areas, which will not be possible without universal access to broadband infrastructures at progressive data communication speeds until reaching the landmarks defined by the Digital Agenda for Europe 2020.

Communication and administrative activity by electronic means require, in the short term, fast broadband infrastructures to fulfill the principles governing relations between citizens and public administrations, such as expediency, efficacy, efficiency, security and equality.

²¹ Specifically, pursuant to Article 40: “1. Citizens may gather information regarding public services and administrative procedures for which Catalan public administrations are competent, and perform the pertinent formalities, by electronic means, and remotely, through a common website or one-stop shop.
2. This particularly refers, in administrative procedures concerning access to an economic activity or its exercise, to interested parties being able to perform formalities through a one-stop shop, remotely and by electronic media, and collecting the following information through this channel:
a) The requisites, procedures and formalities necessary to access the establishment or exercise of economic activity.
b) The information on the bodies of the respective competent public administrations as concerns the access to the different economic activities.
c) The media and conditions of access to public registers and databases that concern economic activities.
d) Channels for claims and appeals in case of dispute.
e) Information on sectoral associations and other organizations that provide practical support on different economic activities.
3. The one-stop shop may operate in an interadministrative network to facilitate access to administrative procedural formalities which are competency of the different public administrations”

4.2. Access to public service by electronic media and broadband technologies. The right to digital equality

Electronic communications are services of general interest, the provision of which, though they be subject to the rules of competition, can not be withheld from citizens. In light of the irregularities of the market, public authorities must make provisions for the proper mechanisms to guarantee these basic services to all citizens, in equal conditions of access throughout the national territory. This social component is intrinsic to the idea of universal service in the electronic communications sector. These services are of a variety considered indispensable for an individual's development, and for this reason, are considered basic or essential services.

In the aforementioned second periodic review of universal service from 2008, the European Commission acknowledged that, although free competition among suppliers favors increasingly affordable access to all kinds of services, such as mobile communications and broadband, there are geographic areas in which it will not be likely that the market offer these services within a reasonable time period, implying a clear risk of digital exclusion. It was stated that:

“As the take-up of broadband Internet access spreads and as more and more social and economic transactions shift to on-line delivery, there will come a time when “info-exclusion” becomes a significant issue.

It is in recognition of this problem that bridging the digital divide has been embedded as a policy priority in the i2010 initiative. Access to broadband communications is not just needed for competitiveness and economic growth but is becoming a prime objective of consumer welfare and digital inclusion”.²²

Therefore, recognition of the lack of universalization of electronic communications in terms of equality and the risk of “info-exclusion” is indisputable.

That Internet access by broadband technologies must further reinforce and facilitate active participation in society, even vis-à-vis public institutions, is also undeniable. Citizens increasingly use electronic services in the fields of health care, education, professional activities, and business exchanges, but also to exercise fundamental rights and public freedoms, such as

participation in public affairs. The Internet is also a vehicle for communication and relations that is essential for the growth of small and medium enterprises.

At the same time, Internet is a platform for interrelation, and the services offered through it are indubitably the result of technological advancements which, on one hand, facilitate creation of new economic sectors, and on the other, have an impact on the conditions of citizens' well-being. That is why the European Commission deems it of the highest importance that electronic communications be available to citizens and companies, regardless of their geographic location, at an affordable price and specific quality.

Therefore, digital equality does not only mean equality in the provision of public services of general interest through electronic media, but also equality in access to technologies that allow us to form relationships and develop socially and professionally by electronic resources without excessive economic cost that would mean that certain social groups find themselves separated from access to electronic communications, or, in particular, in a situation of inferiority or discrimination with regard to access to the use of broadband Internet.

In the access to certain public services, and also private sector services linked to an individual's personal and social development, significant differences can be found between different territories and social segments, in the form of difficulties of access, and to an increasing degree, different data rates. In fact, we face different social paces in the access to electronic communications and the services provided within them, because equality in the accessibility to the most advanced technologies, such as broadband, is not completely guaranteed.

In light of all this, it is necessary to reflect on the way public authorities, regulators among them, must act before this technological progress which involves, in parallel, situations of material inequality in the access to and enjoyment of these technologies and services. Clearly, public authorities must devote all the resources available to them to ensure this right to equality, and prevent digital divides

²² Communication 2008, p. 10.

and the info-exclusion that could affect certain social segments and even certain business sectors.

To universalize basic broadband, and even fast broadband, one of the most pressing actions to be carried out is the modification of the regulations that impede establishment of infrastructures for the implementation of new generation networks, already begun with the

approval of the Royal Decree Law 13/2012, of March 30, although it should continue with the approval of new legislation in the realm of telecommunications that would grant the legal security required by the sector, suppliers and users of electronic communications, and that guarantee, in any case, the right to digital equality, either through the instrument of universal service, or through alternative instruments and financing.

5. WHY INCLUDING MOBILE TELEPHONY AS A UNIVERSAL SERVICE OBLIGATION IS UNFEASIBLE. THE GUARANTEE OF UNIVERSAL SERVICE UNDER A FREE COMPETITION SCHEME

5.1. Criteria of inclusion and periodic review of universal service. The first review, in 2005

Ever since the first European review of the elements or services that made up universal service in the realm of electronic communications, it has been debated whether it was necessary to include mobile telephony, along with broadband Internet connection, within it. As indicated in the foregoing section, the European Commission is required to review the scope of universal service every three years, in accordance with social, economic and technological evolution, considering, among other items, mobility and data communication speeds allowed by the predominant technologies used by a majority of subscribers.

Pursuant to Article 15 of Directive 2002/22/EC, concerning universal service, in these reviews the Commission shall weigh two specific elements when it comes to determining the inclusion of an activity into universal service: a) that they be specific services available to and used by a majority of consumers, whose lack of availability or non-use by a minority of consumers would result in social exclusion, and b) that the availability and use of specific services convey 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 circumstances.

In 2005, in its communication concerning the first periodic review of universal service, the Commission²³ first examined whether it was necessary to modify the regulations on universal service to include mobile and broadband communications in them.

As a result of the public consultation process prior to the Commission's report, it was determined that, on the basis of national mobile license conditions, (2G) mobile networks in the EU-25 covered at least 95% of the population. Based on these figures, the Commission concluded that supply of mobile communications under a competition scheme resulted in the consumers having generalized, affordable access to these types of communications. Therefore, the conditions necessary to include communications in universal service did not exist.²⁴ In other words, the open and competitive nature of the mobile communications markets allowed affordable, generalized access of consumers without any segment of the population being left in a situation of social exclusion due to a lack of access to mobile telephony.

Even so, in the aforementioned communication a number of issues were raised, such as whether access from any location, not just a fixed one, as had been the case until then, should be included in universal service. Along the same lines, some concerns were expressed, such as whether expansion of the universal service scope and its financing would not make for a hindrance of competition among suppliers, blocking investment and halting innovation.

Most significantly, the Commission concluded in 2005 that the situation of access to mobile communications did not meet the conditions that the 2002 Universal Service Directive set for it to be included in this public service obligation. Consequently, no modification of universal service to include mobile communications was proposed, although it was agreed to open a future debate on universal service provision in this sector as of 2006.

²³ COM (2005) 2003 and SEC (2005) 660.

²⁴ Report regarding the outcome of the Review of the Scope of Universal Service in accordance with Article 15(2) of Directive 2002/22/EC; Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of April 7, 2006 [COM (2006) 163 final], p. 3.

5.2. The second review, in 2008: verification of shortfalls in requisites for mobile communications' inclusion within universal service

As already mentioned, in the second periodic review of universal service, summarized in the September 2008 Communication,²⁵ the Commission also offered general considerations on the most appropriate role of universal service as an instrument to face broader challenges at the European level—specifically, guaranteeing access to broadband—to open a debate around future policies.

In 2008, the Commission reiterated that, according to Directive 2002/22/EC, concerning universal service, the expression *access from a fixed location* referred to an end-user's primary residence (whereas clause 8)²⁶ and the lack of a requirement for suppliers to use fixed technology, given that, in accordance with the principle of technological neutrality, constraints cannot be placed on the technical resources—fixed or wireless—through which the connection is provided. For this reason, universal service does not cover personal mobility; in other words, access in any location.²⁷

In this second review, the Commission confirmed that the use of mobile phones had undergone considerable growth in recent years. To wit, while in early 2004, the average mobile telephone use by the EU-25 population was at 81%, by the end of 2007 the average was 112% of the EU-27 population. The same figures accredited that a growing number of users were abandoning land lines to switch to mobile phones, to the extent that around 24% of EU-27 households were exclusively using mobile telephony (data from year-end 2007), though the proportion varied by Member State. Furthermore, although affordability had to be

seen in the light of specific national conditions, it was noted that for a European consumer it was then, on average, cheaper to access mobile services (€13.69 monthly) than the cost of a monthly rental of a fixed line (€14.90).²⁸

Based on prior figures, the European Commission reaffirmed its conclusion expressed in the first review of universal service, and also concluded that the supply of mobile communications under a competition scheme meant that European consumers already had affordable generalized access to this type of telephony.

Consequently, the Commission found that the conditions necessary to include mobile communications (mobile telephony) in universal service were not being met.

5.3. The third review, in 2011: reaffirmation of universal provision under a market competition scheme

In the third and most recent periodic review of universal service, taken up in the Commission's Communication of November 13, 2011²⁹, it is stated that overall mobile subscriber penetration reached 124.2% in October 2010, and that, with regard to affordability, the average monthly price had gone down by approximately 30% from 2006. Since the second periodic review of universal service in the 2008-2009 period, an increase in the roll-out and drop in price of mobile telephone service had been observed.

According to the Commission, these data confirm the analysis of the previous reviews according to which, thanks to competitive mobile communications, consumers had generalized, affordable access to these services, which eli-

²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of September 25, on the second periodic review of the scope of universal service in electronic communications networks and services in accordance with Article 15 of Directive 2002/22/EC [COM/ (2008) 572 final].

²⁶ In this whereas clause the directive stated:

"A fundamental requirement of universal service is to provide users on request with a connection to the public telephone network at a fixed location, at an affordable price. The requirement is limited to a single narrowband network connection, the provision of which may be restricted by Member States to the end-user's primary location/residence, and does not extend to the Integrated Services Digital Network (ISDN) which provides two or more connections capable of being used simultaneously. There should be no constraints on the technical means by which the connection is provided, allowing for wired or wireless technologies, nor any constraints on which operators provide part or all of universal service obligations."

²⁷ Along these lines, the aforementioned 2008 Communication, p. 2.

²⁸ Data from the aforementioned Communication of the European Commission, page 4.

²⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC [COM (2011) 795 final].

minated any risk of social exclusion. Therefore, the criteria to include mobile telephony within the scope of the universal service obligation is not met. Nonetheless, this does not rule out the use of wireless technology to supply access from a fixed location in accordance with the universal service obligation.

In the end, the Commission pledged to continue supervising the special needs of disabled persons, specifically for matters related with

mobile telephony services, and to publish the results in the next review.

The competition scheme among suppliers in the electronic communications market therefore guarantees the universalization of a benefit in this sector—that of mobile telephony—and therefore, this benefit, element or specific service does not have to be guaranteed as a universal service obligation or by the financing scheme that would come with it.³⁰

³⁰ According to the information in the Telecommunications Market Commission's Proposed 2012 Action Plan, the penetration of mobile telephony in Spain reached the figure of 126 lines per 100 inhabitants (p. 6) in August 2011.

6. GUARANTEE OF UNIVERSAL SERVICE PROVISION. GUARANTEEING INTERNET CONNECTION THROUGH BROADBAND TECHNOLOGIES

In the realm of electronic communications, universal service is basically defined by three particular criteria: a) availability of a set of essential services, b) guarantee of quality in their provision and c) affordable price.

In the European framework of electronic communication regulation, as has already been seen, the member states are required to guarantee the benefits of their national standard of universal service. For this reason, the competencies of the various administrations and institutions involved in the guarantee of universal service must be systemized in accordance with the criteria that characterize them.

6.1. Guaranteeing affordable prices through the Government's Delegate Commission for Economic Affairs

One of the key factors in regulation of general-interest services is determining the prices end-users will have to pay; in other words, guaranteeing affordability in the provision of the universal service.

For this reason, the Universal Service Directive established a number of measures to supervise the prices of operators appointed for the provision of the universal service, or those available on the market, if no companies have been designated with relation to the services identified as universal. This is established by Directive 2009/136/EC, which modifies Article 9.1 of the 2002 universal service directive and expands the scope of price supervision for the services included in universal service (Articles 4 to 7 of the Directive), whether or not they are provided by operators designated by member states. It should be remembered that the new directive has its origin in the different realities of European states in the provision of different universal service elements, some of which can be provided directly by the market without specific operators being designated for this purpose.

First, the Directive imposes the obligation on Member States to supervise the evolution and levels of prices for services deemed to be universal, and especially with relation to the national levels of consumer prices and income. Second, the Directive includes the possibility that member states impose the obligation of geographic averaging, that is, that universal service prices be uniform throughout an entire national territory, regardless of the costs of providing the service to each zone, or similar schemes. In the same manner, states can impose price limitations. Third, the Directive includes the imposition of obligations for segments of specific users with special needs. This is the case of special tariff packages for disabled or low-income end-users.

As regards this administrative supervision and monitoring, and in accordance with Article 52.2 of Law 2/2011, of March 4, on sustainable economy, the Government's Delegate Commission for Economic Affairs (CDGAE) is responsible for guaranteeing the affordability of prices of universal service benefits in the field of electronic communications and, specifically, Internet connection via broadband technologies:

“2. The Government's Delegate Commission for Economic Affairs, at the proposal of the ministers of Industry, Tourism and Trade; and Economy and the Treasury, and with the prior report of the Telecommunications Market Commission, must guarantee the price affordability of items included within the universal service obligation. Specifically, it may set a maximum price for connections that allow broadband communications included within universal service.”

The aforementioned Royal Decree 726/2011, of May 20, specifies that it will be understood that prices included in universal services are affordable for users when the following objectives are met (Article 35.1):

“a) That the prices of the services included within universal service in areas of high cost (rural, insular, remote, etc.) are comparable to the prices of these services in urban areas, taking into account, among

other factors, the costs and groups with special social needs in accordance with these regulations.

b) That there is a guaranteed elimination of the barriers in the form of prices that impede persons with disabilities from accessing and using the services included in universal service in conditions equivalent to the rest of users.

c) That there be a sufficient, standard-priced offering of public telephones in the public, common-use domain, in the entire territory covered by each designation. The prices of calls made from these terminals must be comparable to those made by subscribers in application of the foregoing section a), taking into account the unit costs of their provision through public pay telephones.

d) That price packages be offered in which the amount for admission fees, the amount for similar concepts and fixed periodic subscription fees do not limit the possibility of being a user of the service.

e) That the directory assistance service referred to in Article 31 be accessible to all users of the telephone service, and available to the public at prices that do not make for a limitation on users' needs for it."

To meet these objectives, the operator designated for the provision of universal service must offer their subscribers (Article 35.2):

"a) Programs for access prices and usage of services included in universal service that allow users to conduct maximum supervision of their expenditure [...].

b) The possibility for users to choose the billing frequency that best adapts to their preferences, within the possibilities offered by the operator, which must include, at a minimum, monthly frequency.

c) The possibility for users to restrict and block, through a simple procedure and at no additional cost, international calls and those made to premium services. All of this is without prejudice to the ability to continue making the same kinds of calls through mechanisms of operator selection when they have contracted the service with another supplier, without any restriction or blockage of this type of calls.

d) Publicity and information on the conditions of service provision, especially with regard to the principle of their accessibility and affordability.

e) A basic, free level of detail in invoices, in order for consumers to be able to verify and supervise the expenses generated by the use of the services, as well as correctly follow up on their own expenditure and use, and have in this way a reasonable control over their bills.

f) Mechanisms for pre-payment, as well as the possibility to satisfy the connection fee by staggered payments, when it is so determined by the Secretary of State for Telecommunications and the Information Society."

Therefore, the role of the CDGAE is to guarantee the affordable nature of prices in the terms described, although it does not substitute the Telecommunications Market Commission (CMT) in its market analysis duties, which also include price supervision.

This way, the universal service operator may be subject to a double price control: on one hand, that exercised by the CMT, with the aim of resolving the effects of the lack of effective competition on the market, something that may eventually lead the CMT to regulate prices; and on the other, that exercised by the CDGAE, to guarantee affordability of the universal service. In this regard, in the opening statement of Order PRE/531/2007, of March 5, which published the Agreement of the Government's Delegate Commission for Economic Affairs, of January 25, 2007, which approved the conditions to guarantee the affordability of the offers applicable to the items included in universal service, it was confirmed that: "The purpose of the agreement is not to substitute but to supplement the regulations approved by the Telecommunications Market Commission. Thus, while this body imposes obligations on the operators with significant power on the market, with the aim of promoting effective competition among the different actors therein, the CDGAE focuses exclusively on the affordability of universal service prices".

The general conditions for the affordability of the offers applicable to services included in universal service are specifically listed in this Order PRE/531/2007, of March 5, by which the Agreement of the Government's Delegate Commission for Economic Affairs, of January 25, 2007, was published.

Therefore, the CDGAE supervises and guarantees the affordability of the fees for connection, subscription and calls, to prevent any price modifications that would restrict the possibilities for access and use of telephone and broadband Internet services provided in the framework of universal service.

Last, it is up to the CMT to prepare an annual report on the evolution and level of public tariffs available to the services relevant to universal service obligations and that are provided by designated companies, especially as con-

cerns the national levels of consumer prices and income (Article 35.3 of Royal Decree 726/2011, of May 20).

This notwithstanding, the recent Royal Decree Law 13/2012, of March 30, which modifies Law 32/2003, of November 3, regarding telecommunications in general, establishes, in the new version of Article 22.1.f of the General Telecommunications Act, that:

“The Ministry of Industry, Energy and Tourism must supervise the evolution and level of public tariffs for the concepts that form part of universal service, whether they be provided by the designated operator, or are available to the market in the event that operators have not been designated in relation with these services, specifically with regard to the national levels of consumer prices and income.”

Close attention must be paid to the future approval of the Draft Bill for creation of the National Markets and Competition Commission (CNMC), for the possible impact of a new distribution of functions in the electrical communications market, now in the hands of the CMT.

6.2. Guaranteeing the quality of services and users' rights: the Secretary of State for Telecommunications and the Information Society

The central government also has the competency to review and expand the services included within universal service in the field of electronic communications and to review the levels of quality of these services (Article 22.4 LGT).

The Ministry of Industry, Energy and Tourism is responsible for the supervision and exercise of the central administration's powers regarding the obligations of public service, and specifically, universal service (Article 20.4 LGT). In the same manner, this ministry has the competency to act in accordance with the functions and prerogatives that the public contracting legislation in force grants to the administration in the framework of an administrative concession, given that this legislation is applicable, on an additional basis, to the provision of public service obligations by designated operators (Article 20.2 LGT).

Royal Decree 726/2011, of May 20, specifies that the designated operator must duly provide, for their group of end-users, throughout the territory and for all services included by this designation, the levels of service quality established by ministerial order, and must keep up reasonable uniformity in the different areas of the territory and in relation

with the different types of users. When the service quality levels are applied to the body of users, pursuant to the terms of the foregoing paragraph, and cause significant deviations for certain areas or types of users that imply for these groups levels that are worse than those generally established, the Ministry of Industry, Tourism and Commerce can establish more restricted areas of analysis and set for these areas minimum service quality levels that limit these deviations with the objective of resolving undesirable practical effects derived from the establishment of these generally-established levels (Article 34).

Order ITC/912/2006, of March 29, by which the conditions relative to service quality in the provision of electronic communication services imposes minimum levels of quality on the operators responsible for universal service, among which is the obligation to deliver quarterly quality reports to the Secretary of State for Telecommunications and the Information Society (SETSI).

The SETSI also holds competencies for the safeguard and guarantee of electronic communications users' rights. In accordance with Royal Decree 899/2009, of May 22, which approves the electronic communications users' charter of rights, the SETSI, following a prior report of the CMT, can approve the general contracting conditions relative to the provision of electronic communications that are subject to public service obligations (Article 11).

Nonetheless, the most significant guarantee that users benefit from vis-à-vis the SETSI is that having to do with the possibility that, without prejudice to the mediation and conflict resolution procedures that, if necessary, may have been established by the bodies competent for consumer affairs, subscribers can address their complaints to this Secretariat of State, through which a conflict resolution procedure shall be opened. This procedure is now regulated by Order ITC/1030/2007, of April 12, on the conflict resolution procedure between electronic communication final users and operators, and customer service by operators (Article 27 of Royal Decree 899/2009, of May 22).

6.3. Guarantee of compliance with specific obligations by operators and the financing of universal service: the Telecommunications Market Commission

The Telecommunications Market Commission (CMT) must establish and supervise the specific obligations to be fulfilled by operators in the electronic communications market, in addition to conducting promotion of competition on markets, the resolution of conflicts between operators and

if necessary, the exercise as an arbitrator in disputes between them (Article 48.3 LGT).

The CMT exercises the functions regarding universal service and their financing assigned to it by Title III of the General Telecommunications Act (Article 48.3.c), as well as the binding resolution of conflicts arising between operators in the realm of financing for universal services (Article 48.3.d).

Specifically, the CMT is responsible for determining whether the obligation to provide the universal service can involve an unjustifiable burden for the operators responsible for providing it (Article 24.1 LGT). It is also responsible for management of the national universal service fund, the purpose of which is to guarantee the financing of this service (Article 24.4 LGT).

6.4. Guaranteeing provision by designated operators: violation and penalization scheme

Last, the operators designated for the provision of universal service are responsible for it being carried out under the established regulatory conditions. Therefore, the general legislation in telecommunications affairs defines specific violations for operators with public service obligations (Title VIII LGT).

To wit, severe violations would be cases of: serious or reiterated unfulfillment of public service obligations and severe and repeated violation of consumer and end-users' rights (Article 53.1 LGT); reiterated unfulfillment of the obligation to maintain the established levels of quality for the provision of service (Article 53 LGT).

The penalties called for in all cases involve fines and, if relevant, the barring of the operator from provision of electronic communication services or operation of such networks (Article 56 LGT).

6.5. Institutional guarantee: the intervention of the Catalan Ombudsman's Office

The institutional guarantee that is represented by the Catalan Ombudsman is fully justified due to the impact on citizens' rights that could be brought about by the provision of general interest activities by private operators, who provide essential services and exercise, before citizens, a position of supremacy or power that puts them on a level similar to that of a public administration in the provision of general-interest services with universal service obligations.

7. CONCLUSIONS AND RECOMMENDATIONS

The following **conclusions** can be drawn from all of the foregoing considerations:

1. The European Union does not establish a standard for universal service provision in the electronic communications sector. Directive 2009/123/EC, of November 25, introduces criteria of flexibility, by which it is up to the Member States to determine the data communication rate that allows functional access to the Internet, considering the specific circumstances of national markets and the use of these technologies by a majority of the population.
2. The Digital Agenda for Europe has the goal of universalizing ultra-fast broadband by 2020, and makes it mandatory to progressively increase data rates to create a true single digital market.
3. The first milestone of the Digital Agenda for Europe is for all Europeans to be covered by basic broadband networks by 2013.
4. The 2020 objective of the Digital Agenda for Europe makes it necessary to implement new-generation networks, that are much faster than those of the first generation, and take the public and private actions necessary to do so.
5. The national universal service standard, in accordance with the legal code in force, includes basic broadband at a download data transfer rate of one megabyte per second (Law 2/2011, of March 4, on sustainable economy, in modification of the General Telecommunications Act of 2003).
6. It is debatable whether basic broadband at a data rate of one megabyte per second is sufficient to guarantee functional access to the Internet as a provision of universal service in the electronic communications sector.
7. The central government can update this basic broadband data rate in accordance with the social, economic and technological evolution, taking into account the services used by a majority of users (Law 2/2011, of March 3, on sustainable economy, in modification of the General Telecommunications Act of 2003, and recently modified anew by Royal Decree Law 13/2012, of March 30).
8. The European Union has opened a debate on the suitability of universal service as an instrument for the universalization of basic, fast and ultra-fast broadband access to the Internet.
9. The universalization of mobile telephony is guaranteed by the free competition of the market, and therefore, the conditions for it to be considered a feature of universal service in the electronic communications sector do not exist in accordance with the Universal Service Directive of 2002.
10. There is a clear and firm support for the generalization of administrative action through electronic channels, in accordance with the regulatory framework in force, that requires the progressive adaptation to new technologies by citizens, and small and medium enterprises.
11. There are situations of inequality and digital exclusion as a result of differences of access and broadband Internet data speeds that affect the right to digital equality.
12. The guarantee of universal service provision (accessibility, quality and affordable price), is distributed among various public bodies at the state level: the Government's Delegate Commission for Economic Affairs, the Secretariat of State for Telecommunications and the Information Society and the Telecommunications Market Commission as a regulatory body for the sector.

In light of the foregoing, this report concludes with the following **recommendations**:

1. Urge the Spanish government to review the “broadband Internet connection” element of universal service in order to determine the need to increase the basic broadband speed from one to two megabytes (or more) to meet the objectives of the Digital Agenda for Europe 2020 (fast and ultra-fast broadband) and the universalization of basic broadband in 2013.

Also urge the Spanish government to plan—in accordance with the different electronic communications operators—the possible progressive increase of data communication speeds that take the aforesaid European objectives into consideration.

2. Urge the Spanish government to evaluate alternative systems by which to achieve and finance universal access to electronic communications by broadband technologies beyond the category of universal service, as proposed by the European Commission.

Given the functions assigned to the Catalan Ombudsman’s Office, it is recommended that it take part in the debates and assessment of these alternative systems for the financing of electronic communication universalization that could take place in Catalonia.

3. Urge the Spanish, and Autonomous Catalan governments to assess and quantify the cost

of investments necessary for the establishment of new-generation access networks in Catalonia, and for their development to be prioritized in areas where they are more necessary to mitigate territorial and social differences in broadband Internet access.

4. Urge the Spanish and Autonomous Catalan governments to identify and modify, to the extent necessary, the legal and regulatory standards that must facilitate the establishment and development of new-generation access networks.

It is also recommended that the Spanish government be asked to draft a new telecommunications or electronic communications law that includes the most recent modifications, and any other that may be indispensable to grant legal security to operators, consumers and third parties affected by the implementation of new-generation infrastructure networks.

5. Last, in light of the current economic crisis and the impact it is having on the small and medium enterprises of Catalonia, consideration could be given to action by the Catalan Ombudsman, in conjunction with the competent business organizations in Catalonia, to defend the rights of small businesses and young entrepreneurs before the various suppliers present in the electronic communications sector.

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