

Comments of ANACOM to the Communication from the Commission on the Review of the scope of Universal Service

COM(2005)203

I. Framework

On 24 May 2005, the European Commission (EC) published, for public consultation, a Communication on the “Review of the scope of universal service in accordance with Article 15 of Directive 2002/22/EC” - COM(2005)203, attaching a working document thereto – SEC(2005)660.

In addition to the assessment of a possible extension within the scope of Universal Service (US) to mobile communications services and to broadband internet access, the Communication launches a debate on the US provision, in view of the review of the Regulatory Framework for electronic communications scheduled for 2006.

Thus, in the first part of the Communication, the EC examines and assesses, as required by Article 15 of Directive 2002/22/EC, the scope of the US, aiming at a possible change or redefinition in the light of technological, social and economic developments, particularly taking into account mobility and data rates.

Such assessment having taken place, **the EC concludes that neither mobile services nor broadband services fulfil the conditions for inclusion in the scope of US**, therefore there being no justification for altering legislation in force on these obligations.

In the second part of the Communication, the Commission presents a set of “longer-term issues”, weighting a possible adoption of future alterations to the legal framework of the US. Such issues regard, in the context of the US, the definition of broadband internet access and of mobile communications as a future model of US provision, above the current model of network access from a fixed location for voice related and basic internet services (an issue closely related to the adoption of new technologies such as the transmission of voice over Internet (VoIP), the decisions to be taken concerning the maintenance of public pay phones and directories and directory enquiry services, the need for harmonized measures as far as users with disabilities are concerned and, also, the US’s own model of financing.

The present document seeks to comply with the request made by the Commission for comments on the conclusions and longer-term issues presented in the Communication and on the EC Staff Working Paper¹.

II. Review in the scope of the Universal Service

As mentioned above, the European Commission concluded that neither the terrestrial mobile service nor the broadband Internet access may, at this time, be included within the scope of the universal service. According to the Commission, the conditions that could justify the extension of the US scope have not been fulfilled, in the current context of development and penetration of mobile service and broadband. The assessment carried out by the EC, the performance of which took due account of the penetration rate of services in discussion and the use thereof by final consumers, is provided for in paragraph 1 of article 15 of the US directive, according to which the scope of universal service should be reviewed by 25 July 2005 (two years after the date of entry into force of the directive), and, subsequently every three years.

In the current context, the decision of the European Commission not to alter the scope of the universal service for the time being, as regards both mobile communications and broadband internet access, is acceptable.

Naturally, each Member State may extend the scope of the basic services throughout its territory, going beyond the definition of minimum services pre-established for the US, resorting to the legally permitted financing means. This possibility is provided for in recital 46 of the US directive, as well as in article 100 of Law no. 5/2004, of 10 February – Law of Electronic Communications (LEC). This is thus an instrument available to Member States enabling them to “update” the definition agreed for the minimum services of the US and to adjust the telecommunications markets to the evolution of the new information technologies.

We shall now examine individually each proposal presented by the EC.

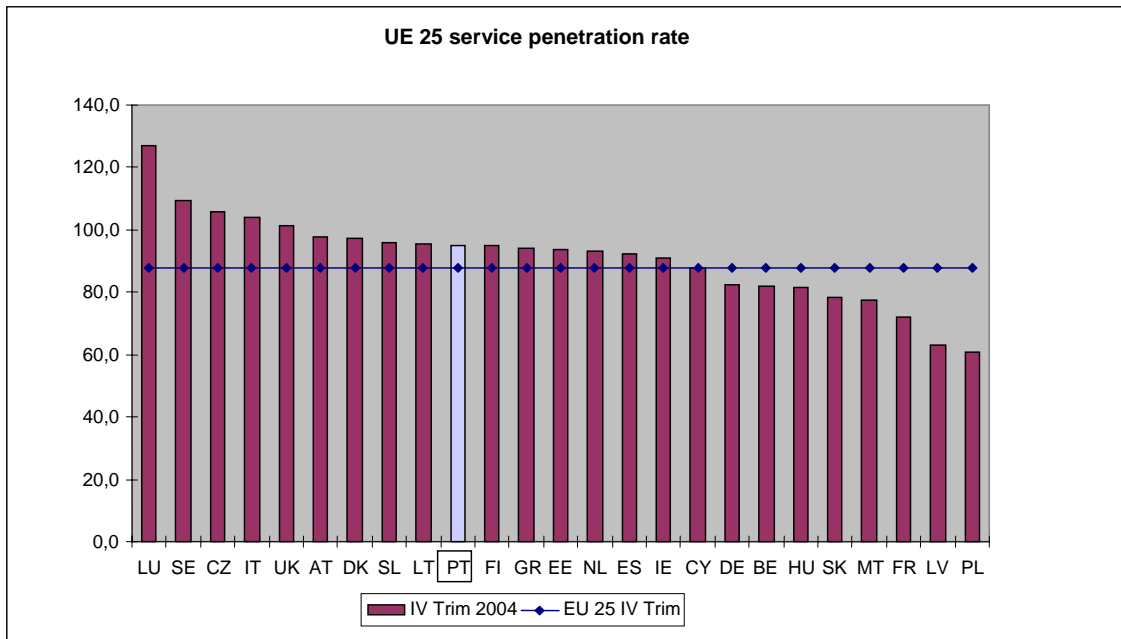
2.1 Services of mobile communications

The EC concluded that the conditions for the inclusion of mobile communications within the scope of the US have not been fulfilled, as the competitive provision of

¹ The present comments, in particular those concerning the review in the scope of the US and the respective financing model, are without prejudice to the position of the Portuguese Government on this subject. The position taken by this Authority is based on market regulation criteria and guided by judgements resulting from our experience as Regulatory Authority. Thus, it is important to stress that our contributions have no intention of encroaching upon any political decision or government position on the issues under discussion. In fact, and taking into account that the scope of the US, having been laid down by law, may only be amended by the same means, that is, by a legal instrument, such decision should present eminently a political nature, and not a regulatory one. The same reasoning applies to the issue of US financing, as the option concerning the compensation mechanism does not concern a regulatory decision (the role of this Authority is set at an earlier stage, that is, it must assess the existence of net costs which may be deemed as an excessive burden), but a governmental one.

mobile communications has resulted in consumers already having widespread affordable access to mobile communications.

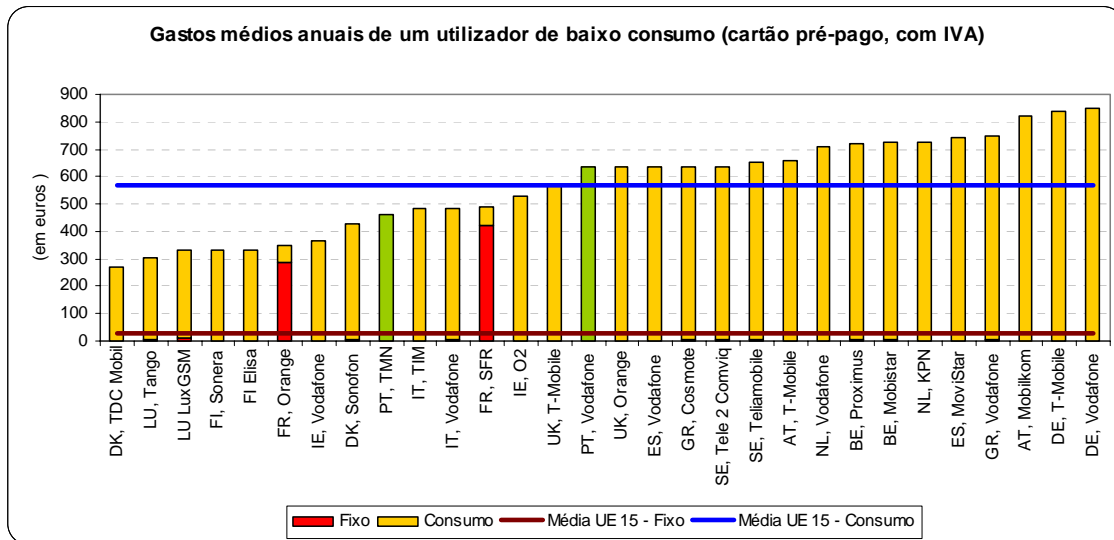
The penetration rate of mobile services in Portugal, by the end of the year 2004, increased to 95%, remaining above the EU average, which reached 88% (see chart). The penetration rate of mobile communications shows that the competitive provision enabled the reduction of costs for consumers, making prices relatively affordable.



Source: ANACOM, INE, Eurostat, Mobile Communications by Baskerville, from Informa Telecomms Group

Affordable pre-paid packages allowed low income consumers to obtain a basic connection to the network. The average annual expenditure of a Portuguese consumer is close to the average annual expenditure of consumers of the remaining European countries (of EU 15) (see chart).

Average annual expenditure of a low consumption user (pre-paid card, VAT included)



(in euros) Fixed Consumption Average EU 15 - Fixed Average EU 15 - Consumption

Source: Teligen Basket February 2005

In the light of these data, we conclude that Portuguese consumers have generally gained access to mobile communications, and on these grounds we agree with the assessment and position of the EC not to include mobile services within the scope of the universal service.

2.2 Broadband Internet Access

As far as broadband access is concerned, the EC concluded that only a minority of European consumers currently make use of broadband services (6,5% of the European population). Consequently, one of the criteria for alteration of the scope of the universal service has not been met, as provided for in Annex V and Recital 25 of the US directive, and thus summarized: “a minority of consumers is likely to risk social exclusion as it is unable to afford specific services which are not only available to but also used by a majority of consumers”.

Having regard to the fact that Portugal presents penetration and usage rates of broadband services which are very similar to the Community average, we agree with the assessment and position of the EC not to include the broadband services within the scope of the universal service.

In case the inclusion of broadband services within the scope of the US is settled upon, in the context of a future review, such an extension should be assessed taking due account, *inter alia*, of the following factors:

- a) The technical conditions of the network. Even if the client’s telephone number is attached to a numbering block connected to the ADSL provision, there may be limitations or incompatibilities with the existing services, as the ADSL technology depends heavily of the conditions of the means of transmission (pair of copper wires), in the component of access (for example, length, cross-

sectional area, state of preservation) and component of surrounding environment (namely at the level of interferences and noise);

- b) The existence of a diversified set of offers, from metered offers, intended for low-intensity users, to offers without traffic limitation, better adapted to intensive-use clients;
- c) The low penetration rate of the service in most Member States of the EU, as this is still a growing market. In this sense, and as the 6,5% percentage shows, as it represents the real introduction within the population, the EU as a whole does not meet the criterion of usage by a “majority of consumers”. As a result, broadband is still not deemed essential for the normal participation in the society, that is, the lack of access does not imply social exclusion. The rate of penetration shall be one of the crucial factors that shall decide whether broadband services are to be included within the scope of universal services. The continuous and strong growth of this service will lead it to be used, at a given time, by a “majority of consumers”, re-launching the opportunity to discuss the inclusion of broadband internet access within the scope of the US.
- d) The effects of networks of the new generation in the market of electronic communications.

III. Longer-Term Issues

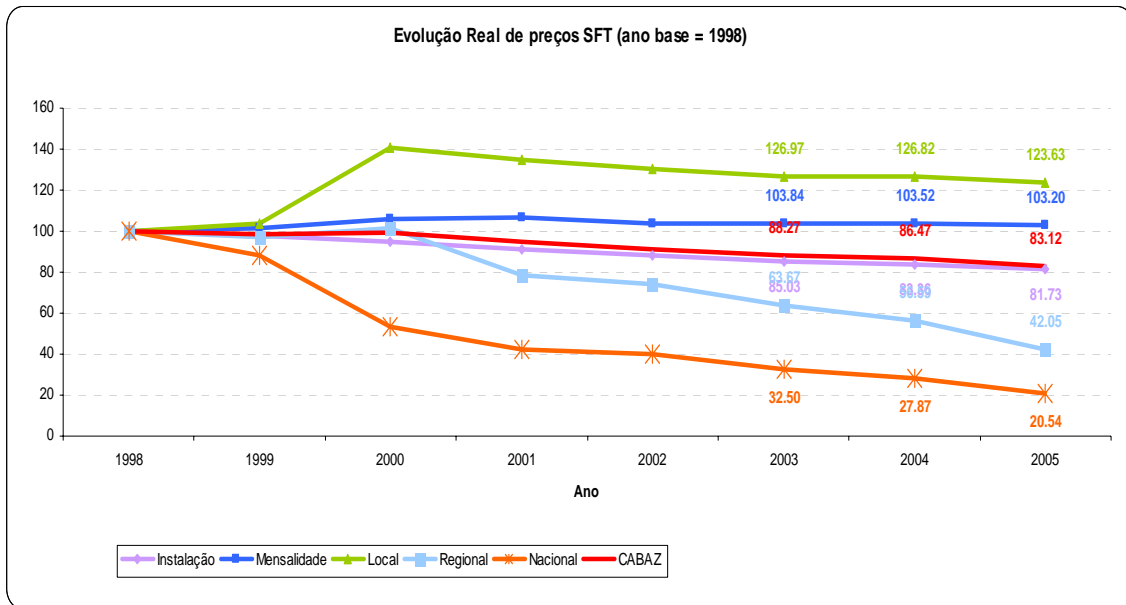
(a) Taking into account existing and expected technological developments, should universal service at some point in future separate the “access to infrastructure” element from the “service provision” element and address only access to the communications infrastructure, on the grounds that competitive provision of services, (e.g., telephone service provided using VoIP technology (Voice over Internet Protocol) will ensure their availability and affordability?

This is a complex issue for which there is no immediate or definitive answer, given the evolution of technological platforms and services available in the market.

In our view, and based on currently available data, the service provision should continue to be ensured. It is indeed a fact that, in real terms, the prices of fixed communications of the universal service provider have generally decreased. From 1998 to 2005, the basket price (including installation and monthly payment of the telephone line, as well as local, regional and national calls) decreased by 16,9%, the price of national calls having decreased by 79,5% and of regional calls by 57,9%, whereas the price of local calls increased by 23,6% (see chart).

Nevertheless, the most important issue in the assessment of the question on the separation of the “access to infrastructure” element from the “service provision” element is the fact that, even with a perfect competition and with low prices, there will always be a segment of the population with low income that could be excluded from the access to the services under consideration.

Real Evolution of FTS prices (base year = 1998)



Installation Monthly Payment Local Regional National BASKET

Source: Calculation of ANACOM based on PTC traffic data for 2004

Furthermore, the feeling is also that in the near future the tendency shall be the aggregated sale of both access and traffic, and the existence of an effective SLRO and flat tariff provision shall enhance for all operators the possibility to follow this practise. Thus, in such cases, the price associated to the telephone line ceases to be autonomous, as operators shall assess the profitability of packages as a whole (traffic + access). As a result, if voice traffic (service provision) is excluded from the scope of the US, the assessment of the accessibility of access prices *per si* would present an added complexity.

As regards the question of competitive provision of new services, such as the telephone service provided using the VoIP technology, we feel that it is premature to weight this service within the scope of the US, given the early stage of implementation thereof. In addition, the provision of voice services through the VoIP technology is not as yet totally defined as regards the sector regulation, and thus issues such as the quality of service, access to the 112 telephone number, pre-selection, portability, and in particular, numbering, should be highlighted.

In Portugal, the VoIP service has already some significance at business level, although in the case of small and medium-size companies, the existing projects are small and hardly relevant in the national voice market. To this extent, we deem that, for the time being in Portugal, the voice service over new technologies, namely over IP, is not as spread as to enable it to replace the fixed telephone service provided over traditional support. In the light of the above, it is our opinion that, at this moment, the scope of universal service should remain along the current lines, without prejudice to a review of this position in the course of the next three to five years, having due regard to the evolution of the sector and, in particular, to the expansion of broadband and VoIP technology services.

(b) In as much as consumers are increasingly mobile while using communications services, should universal service continue to address access at a fixed location, or should it address access at any location (including access while on the move)?

It should be taken into account that as regards the obligation of Member States to ensure the compliance with all “reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location” (paragraph 1 of article 4 of the US directive), obligation which reflects the current scope of the US², it may be met nowadays by resorting to the use of mobile technology. As referred to in recital 8 of the US directive, US providers may resort to any technology, either wired or wireless, that enables them to provide such service at a fixed location.

In so far as the principle of technological neutrality permits the telephone service at a fixed location to be provided by any viable technology, either wired or wireless (thus including the mobile technology), the same principle, on the same grounds, shall permit that the US changes its “centre of gravity” from an access at a fixed location to an access while on the move (or, at least, a combination of both).

However, and taking into account what was said above as far as mobile communications are concerned, it is our opinion that the universal service should remain centred at a fixed location, to the extent that the high level of competition at the level of mobile networks enable end-users in general to access mobile communications at competitive prices. Conceptualizing the US provision as an “adjustment”, or (using the own terms of the EC Communication) as a safety net that allows a minority of consumers to “catch up” with the majority who already enjoy basic services, the fact is that the market of mobile services, having regard to the intense level of competition that characterizes it, did not bring about a “class of excluded people” – the so-called “minority” -, and therefore there is no need for such an “adjustment”.

In fact, considering the US as a precondition for the construction of the Information Society, it continues, and is expected to continue, to be based on the fixed service as the means of access to the Internet at affordable prices. This requirement is currently not ensured by the mobile service. On the other hand, there are also some elements that distinguish fixed and mobile communications, as regards the assessment of quality and availability of service, which should be taken into account.

In the light of the above, mobility is thus not deemed as an essential element for the definition of US.

² The current scope of the US consists of the “connection at a fixed location to the public telephone network and access to publicly available telephone services at a fixed location” (paragraph 1 of article 4 of the US directive), allowing “end-users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit functional Internet access” (paragraph 2 of article 4 of the US directive).

(c) With widespread affordable access to mobile communications, the demand for public payphones is declining. Is it still appropriate to include provisions on public payphones, and as they are currently conceived, within the scope of universal service?

It is an undeniable fact that the use of the public payphones service has been declining. This is a service the traffic and revenues of which are presenting a downward trend, as a result of the erosion caused by the general access to the service of mobile communications, and it is increasingly difficult for the US provider to recover from the investments made. It is also true that the service of public payphones is integrated in an increasingly competitive and technologically dynamic market, where alternative, widely available and affordable offers may be found, thus making the need for access to that service quite relative.

However, public payphones remain, as referred to by ANACOM in the determination of 15/07/04³, a service with special relevance for populations temporarily apart from their residence (namely tourists and workers) as well as for citizens with less income, lower level of education or of a more advanced age band.

In fact, having regard to the specific need to ensure the availability of services through public payphones within the scope of the US, as well as to the need to reassess and revitalize such services in an environment of an open and competitive market, the determination of 14/12/2004⁴ on the imposition of obligations in narrowband retail markets, maintained the following obligations: (i) ratio of 1 to 3 in the price between calls which originate in PTC public payphones and calls which originate in subscriber's phones; (ii) the referred determination of 15/07/04 and measures provided for therein, which special emphasis is to:

- Obligation upon the Universal Service Provider to guarantee that the public pay telephones it operates enable the access, free of charge, to the different emergency systems, using the single European emergency call number "112" and other emergency and helpline numbers defined in the National Numbering Plan, without the use of coins, cards or other means of payment, as well as the access to the comprehensive directory enquiry services, under the terms defined in point c) of paragraph 1 of article 89 of the LEC;
- Obligation to publish information as regards the accepted means of payment and, where applicable, on the adopted procedures for the devolution of small change, in all public payphones, or, where that is not possible, at locations close thereto;

³ <http://www.anacom.pt/template12.jsp?categoryId=120919>

⁴ http://www.anacom.pt/streaming/OMR29.11.20041.pdf?categoryId=120742&contentId=246306&field=ATTACHED_FILE

- The publication of a declaration on the development strategy for the public pay phone park (recently, in May 2005, the US provider submitted to this Authority the mentioned publication for 2005);
- Where a new public pay phone is installed, the US provider shall set off the installation in terms of universal access, encouraging the implementation of facilities adapted for users with special needs;
- Where the US provider intends to withdraw public pay phones, it shall display a visible notice regarding such withdrawal, by the public pay phones to be withdrawn or, where this is not possible, at locations close thereto, and at the least one month ahead of the date of withdrawal;
- The recommendation that prior to possible action that may result in the withdrawal of all public pay phones installed at a given location, the US provider hears the users who are potentially affected, consulting for this purpose, namely, the respective local authorities or, where a location of a special social interest is concerned, the respective responsible entities.

Within this context, it is our opinion that the inclusion of the installation and operation of public payphones in the scope of the universal service remains relevant. Without prejudice, we consider that different situations at Community level may lead to different solutions. Therefore, we feel that it should be left for each Member State to decide whether or not to include the provision of public payphones within the scope of the universal service, with the proviso that where the Member States opts for the integration within the US, such services should be financed by means of mechanisms established for the US financing.

(d) In view of the competitive provision of directory enquiry services in many countries, for how long will there be a need to keep directories and directory enquiry services within the scope of universal service?

Some operators have made available directory enquiry services with information on their subscribers, and there are also some printed or electronic publications with information on non-residential subscribers. Likewise, some directories and other directory enquiry services have become available for the market, through increasingly diversified offers, supported over new technological platforms (Internet, IP solutions and 3rd generation mobile communications). However, such services may not be included in the US provision, as they have shown to be “partial” in the sense that they only include personal data of the respective subscribers. In addition, having due regard to the expected evolution of such platforms and the demands of users, it is not possible to foresee a date for the withdrawal of these directory enquiry services from the scope of the US, for the time being and with good reason.

Thus, and taking into account that in Portugal, as is generally the case with the countries of the EU, there is no offer competitive with that of the “white pages”, we deem it necessary to maintain these services within the scope of the US. In addition, such directory enquiry services and directories ensure the adequate use of communication services. To exclude the directory enquiry services from the scope of the universal

services, having regard to the need, in the past, of interventions of ANACOM to ensure that the directory enquiry services made available information on all subscribers of the fixed telephone service and of the mobile telephone service, would probably not ensure the interests of users and would contribute to the increase of conflicts among operators. We thus consider that the inclusion of the directories and directory enquiry services within the universal service to be relevant.

(e) Taking into account the complexity of the ever evolving communications environment as described above, and noting the challenges presented to date for existing universal service provision, it is likely that advanced services will bring both benefits and new difficulties for users with disabilities. Should special measures for such users in the context of universal service provision be further harmonised at EU level?

As provided for in article 91 of the LEC, universal service providers shall make available specific provisions in order to ensure access for disabled end-users, equivalent to that enjoyed by other end-users. The US provider makes currently available a diversified offer for clients with special needs, for example: the 112 emergency number service with handling of calls from deaf or speech-impaired citizens, 118 *braille* service, PT Decibel (for clients with hearing disabilities). Within this context, it should be stressed that the document on imposition of obligations in retail markets, determination of 14/02/2004⁵, maintained the obligation on the US provider to make available microphone amplifier equipment and call warning lights, free of charge, for the use of clients with special needs.

As regards the harmonization of measures at EU level proper, such harmonization may lead to a slow implementation of new measures, on the one hand taking into account the rhythm of development of electronic communications. On the other hand, in the past, the implementation of special measures to ensure the compliance with the described obligations has been achieved. We thus favour a higher degree of harmonization, at EU level, of special measures for users with special needs, within the context of US provision, notwithstanding the fact that we do not feel that such a harmonization is strongly needed in order to comply with the US obligations.

(f) Is a universal service funding scheme an appropriate means to address the objective of social inclusion in a competitive communications environment? (g) Is funding from general taxation a viable alternative?

The US funding from general taxation is today already an option provided for in our Community and national law. In fact, the US directive, in article 13, provides for two methods for US financing: financing through public funds (which includes the model

⁵ <http://www.anacom.pt/template12.jsp?categoryId=142639>

mentioned in the question - funding from general taxation); and financing through a fund that joins contributions from the several market operators.

In our view, both models should remain enshrined in the legislation, thus avoiding a limit of choice on the part of Member States for one of the financing methods.

Moreover, in the current system, the existence of any of the financing methods safeguards competition, complying with the requirement of minimizing market distortions (no. 2 of article 3 of the US Directive).