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Interpretation of aim and scope of the USD with negative impact on services for business customers

I. Introduction:

The implementation of the revised Universal Service Directive¹ (USD) is in progress in various member states. In Germany, the draft revised Telecommunications Act is currently under public consultation. Though the national legislator has pointed out the aim to stay close to the provisions of the Articles of the USD, IEN realizes some difficulties in the interpretation of the aim and scope of the USD.

The national consumer protection regulation is based on the Universal Service Directive.² This directive primarily aims to protect consumers. Under certain conditions the revised directive also aims at protecting micro-enterprises and SME's. However, the objective is clearly not to protect large corporate users. To IEN's understanding, this interpretation of the scope is convincing. Business users, operating in the higher end of the business market, can exercise buying power. In contract negotiations, their position differs considerably from the position of consumers: The large business user is well informed and well represented, and able to set firm requirements to its suppliers.

Although a clear distinction between consumers and SME's on the one hand, and large business users on the other hand, has not been made in the definitions of the Universal Service Directive and the Framework Directive,³ IEN takes the view that the considerations of the European legislator reveal that it did have a clear distinction in mind.

¹ Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009.

² Directive 2002/22/EC of the European parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

³ Directive 2002/21/EC of the European parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

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This could be proven by the following considerations:

1. Recital 30 of the USD:

Specifically, consumers should enjoy a minimum level of legal certainty in respect of their contractual relations with their direct telephone service provider, such that the contractual terms, conditions, quality of service, condition for termination of the contract and the service, compensation measures and dispute resolution are specified in their contracts. (...) The measures to ensure transparency on prices, tariffs, terms and conditions will increase the ability of consumers to optimise their choices and thus to benefit fully from competition.

2. Recital 49 of the USD:

This Directive should provide for elements of consumer protection, including clear contract terms and dispute resolution, and tariff transparency for consumers. It should also encourage the extension of such benefits to other categories of end-users, in particular small and medium-sized enterprises.

3. Recital 21 of the revised USD:

Provisions on contracts should apply not only to consumers but also to other end-users, primarily micro enterprises and small and medium-sized enterprises (SMEs), which may prefer a contract adapted to consumer needs. To avoid unnecessary administrative burdens for providers and the complexity related to the definition of SMEs, the provisions on contracts should not apply automatically to those other end-users, but only where they so request. (...)

4. Recital 47 of the revised USD

In order to take full advantage of the competitive environment, consumers should be able to make informed choices and to change providers when it is in their interests. It is essential to ensure that they can do so without being hindered by legal, technical or practical obstacles, including contractual conditions, procedures, charges and so on. This does not preclude the imposition of reasonable minimum contractual periods in consumer contracts. (...)

All these considerations refer to the **consumer** as a subject of protection. Some of the considerations also mention SME's and micro-enterprises. It is noteworthy that neither in this passage nor elsewhere in the directive even a single consideration is devoted to the position of the large business user. SME's however are clearly being identified as type of user that possibly might qualify for a similar protection as consumers. As such, the purpose

was clearly to offer consumers and coevally, protection to business users in the higher end of the business market should not be offered.

Seite 3 | 3
25.11.2010

Nevertheless, the provisions of the revised USD use the term “subscriber”, “user” or “end-user” instead of using the term “consumers” (and SMEs). Literally taken, large business users also qualify as “end-users”, “users” or “subscribers” which leads to the (miss-)interpretation of national legislators, that any clarification or differentiation as regards large business customers might decrease the impact of the respective article.

However, the inclusion of services being offered to large business customers in the scope of the USD hampers these business models and leads to the increase of prices. Though the German legislator expressed the understanding and awareness of this problem, it was made clear that the literal translation of the USD is considered as binding. As the German Telecommunications act does not contain any preliminary considerations that could provide clarification on this issue, it is essential that the Commission immediately provides explanation about the aim and scope of the USD to the member states.

II. Issues in other member states

IEN members face the same interpretation issues in other member states, such as the Netherlands, UK and France. When transposing the provisions of the revised USD the national legislators feel bound by the specific wording of the Articles and as such, though acknowledging the need to distinct between the different customer groups, they see no room for explicit exceptions of large business customers as regards provisions for consumer protection.

III. Articles of specific concern in the revised USD in Germany:

- Art. 20 USD – subject terms of contract
- Art. 21 USD - transparency obligations
- Art. 22 para. 1 & Art 29 para. 1 USD – quality of service
- Art. 23a & Art. 27a para. 2 USD – disabled end-users
- Art. 30 para. 4 USD – transferability of numbers
- Art. 30 para. 5 USD – contract term