

**Call for stakeholder input
to feed into the incorporation of the ECJ
judgments on the Open Internet Regulation
in the BEREC Guidelines**

October 2021

The Body of European Regulators for Electronic Communications (BEREC) is currently assessing the details of the [rulings](#) issued by the Court of Justice (ECJ) on 2 September 2021 regarding violation of the Open Internet Regulation ([C 34/20](#) – Telekom Deutschland, [C-854/19](#) – Vodafone and [C-5/20](#) – Vodafone). This assessment will help to prepare the review of the [BEREC Guidelines on the Implementation of the Open Internet Regulation](#) in line with the ECJ rulings.

The three cases referred to in the ECJ rulings consist of internet access services' offers including a 'zero-tariff' or 'zero-rating' option. Such practices entail that the traffic generated by specific (categories of) applications is not counted towards the data volume of the basic package. BEREC has observed that all three rulings refer to the obligation of equal treatment of traffic (Article 3(3) of the Open internet Regulation) and the practice of differentiated billing based on commercial considerations.

During its 48th plenary meeting (30 September 2021, Dubrovnik), the Board of Regulators has decided to launch a call to all interested stakeholders to offer them the **opportunity to share their views on the ECJ rulings on zero-rating with an appropriate justification supporting their understanding.**

Therefore, BEREC invites stakeholders to provide their reading of the three rulings, in particular in the light of the case law of the ECJ and the following considerations of the three rulings:

- *“Thus, the questions referred to the Court, which seek to enable the referring court to rule on the legality of the terms of use attached to a ‘zero tariff’ option, are based on the premiss that such a tariff option would itself be compatible with EU law, in particular Article 3 of Regulation 2015/2120, by which the legislature intended to enshrine the principles of an open internet and internet neutrality.”*
- *“A ‘zero tariff’ option, such as that at issue in the main proceedings, draws a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications. Consequently, such a commercial practice does not satisfy the general obligation of equal treatment of traffic, without discrimination or interference, laid down in the first subparagraph of Article 3(3) of Regulation 2015/2120.*

It should be pointed out that that failure, which results from the very nature of such a tariff option on account of the incentive arising from it, persists irrespective of whether or not it is possible to continue freely to access the content provided by the partners of the internet access provider after the basic package has been used up.”

- *“It is apparent from the information provided by the referring court that the limitation on [bandwidth/ tethering/use of the tariff option outside the national territory] to which all the questions put by that court relate, applies solely on account of the activation of the ‘zero tariff’ option.*

Since such a tariff option is contrary to the obligations arising from Article 3(3) of Regulation 2015/2120, that incompatibility remains, irrespective of the form or nature of the terms of use attached to the tariff options on offer, such as the limitation on

[bandwidth/tethering/use of the tariff option outside the national territory] in the dispute in the main proceedings.

In the light of all the foregoing considerations, the answer to the questions referred is that Article 3 of Regulation 2015/2120 must be interpreted as meaning that a limitation on [bandwidth/tethering/use when roaming], on account of the activation of a ‘zero tariff’ option, applied to video streaming, irrespective of whether it is streamed by partner operators or other content providers, is incompatible with the obligations arising from Article 3(3).”

Questions:

- 1) Do you think that zero-rating options not counting traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff based on commercial considerations could be in line with Article 3 paragraph 3 subparagraph 1 of the Open Internet Regulation even if there is no differentiated traffic management or other terms of use involved? Why or why not?
- 2) Against the background of the rulings, where do you see room for the scope of application of Article 3(2) regarding differentiated billing based on commercial considerations?
- 3) How do you see the relationship of the rulings at hand to the ruling of the Court of Justice taken in 2020 ([C-807/18](#) and [C-39/19](#) – Telenor Magyarország)?

Please substantiate your answers **with detailed legal arguments referring to the relevant paragraphs** of the current or previous ECJ rulings (and articles of the Open Internet Regulation or the Treaty or other case law of the Court of Justice, if necessary).

In addition, please **describe in detail the relevant technical and non-technical parameters** of the offers in question (e.g. applied traffic management measures, etc.), if you refer to them in your legal argumentation.

BEREC gives stakeholders the opportunity for an early involvement and to contribute, on equal footing, in an open and transparent way to its ongoing analysis. Nothing in this document represents BEREC’s views on the Court’s rulings and their implications on the BEREC Guidelines, which have yet to be determined.

All stakeholders are invited to submit their inputs by **20 October 2021 17:00 CET** to **ECJ_Inputs@berec.europa.eu**. Contributions should be sent preferably in English. Please note that BEREC does not intend to provide individual responses to inputs received or publish a consultation report. Non-confidential stakeholder inputs will be published. Stakeholders, who request confidentiality of all or part of the documents submitted to the call for input, shall indicate this upon submission of the materials. If there is no clear indication that all or part of the documents are confidential, BEREC will presume that the documents can be made available to the public.

The draft of the reviewed Guidelines is planned to be adopted for public consultation at 51st BEREC plenary meeting (March 2022).