Statement of "A1 Bulgaria" EAD

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?

Yes, as if the regulation intended to ban them, there would have been an explicit provision in this regard. As it is duly noted by Regulation 2015/2120 in its recital 7: "National regulatory and other competent authorities should be empowered to intervene against agreements or commercial practices which, by reason of their scale, lead to situations where end-users' choice is materially reduced in practice", which definitely means that those commercial practices should be analized on a "case-by-case" basis and only commercial practices which deprive end-users of choice should be banned.

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?

Zero-rating offers for commercial consideration, that include technical traffic management measures under Article 3(3) that would exclude roaming, tethering or limit video bandwidth, are non-compliant with the Regulation, according to the discussed decisions of the EU court.

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)?

All three decisions are assessing and banning specific commercial practices. It is important to be noticed that in the Telenor judgement, the court explicitly states that commercial practices should be assessed on a "case by case basis", which is visible form the following paragrpahs: par. 39": "It follows that the possible existence of a prohibited limitation of the exercise of end users' rights, as set out in paragraph 30 above, must be assessed by taking into account the effects of the agreements or commercial practices of a given provider of internet access services on the rights not only of professionals and consumers who use or request internet access services in order to access content, applications and services, but also of professionals who rely on such internet access services in order to provide such content, applications and services.".

Par: 41 "Furthermore, recital 7 of Regulation 2015/2120 makes clear that the assessment of whether the exercise of end users' rights is limited involves determining whether the agreements and commercial practices of such a provider lead, by reason of their 'scale', to situations where end users' choice is materially reduced, taking into account, in particular, the respective market positions of the providers of internet access services and of the providers of content, applications and services that are involved.".

Par: 43 "Whether such an agreement is compatible with Article 3(2) of that regulation must be assessed on a case-by-case basis, in the light of the parameters set out in recital 7 of that regulation.".