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A1's response to the call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation (Regulation) in the BEREC Guidelines

Vienna, October 20, 2021

Dear Madam or Sir,

A1 welcomes the opportunity to provide input on the consequences to be drawn from the recent judgments of the European Court of Justice (ECJ) concerning certain zero rating offers proposed by Vodafone and DT in Germany (C-854/19, C-5/20 and C-34/20) (Vodafone and DT rulings).

As you are well aware, these recent judgements are a formal response to requests for a preliminary ruling concerning the interpretation of Article 3 of the Regulation and in the case of C-854/19 also the Roaming Regulation (i.e. Regulation (EU) No 531/2012 as amended by Regulation (EU) 2015/2120) and should be interpreted in the context of the questions referred to the Court. Further, the above rulings assess zero rating offers by Vodafone and DT at stake and thus any conclusion should be referred to these offers and not to all zero rating offers per se. This is even more true as the conditions attached to aforementioned zero rating offers are not commonly observed in zero rating offers proposed within Austria by A1 or even other operators throughout Europe as they include specific conditions related to roaming, tethering and video bandwidth.

In its call for input BEREC asks several questions to which A1 would like to answer as follows:

1.) 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)?

We believe that the ruling of the ECJ in the Telenor Magyarorszag cases plays an important role for the recent Vodafone and DT rulings as it provides a useful interpretation of Articles 3 (2) and Article 3 (3) of the Regulation and their correlation.

1.) *These rulings are a response to requests for a preliminary ruling concerning the interpretation of Article 3 of the Regulation and it is our view that they should be interpreted solely in the context of the questions referred to the ECJ. Consequently other national courts would not be bound as such by said rulings in case of distinguishing factual situations and would remain free to refer a new question to the ECJ for a preliminary ruling. These rulings indeed assess zero rating offers of Telenor, at stake and thus any conclusions should be referred to these offers and not to all zero rating offers per se. In fact, with respect to the application of traffic management (Article 3 (3) of the Regulation), the Telenor Magyarorszag judgment concerns the "measures blocking or slowing down traffic" […] applied in addition to the 'zero tariff' enjoyed by the end users concerned" making it "technically more difficult, if not impossible, for end users to use applications and services not covered by that tariff" (para 51, C-807/18 and C39/19).*

2.) *The **Telenor Magyarorszag ruling has been delivered by the Grand Chamber of the ECJ** given the legal difficulty and/or the importance of the matter (Article 60 (1) of the Rules of Procedure of the Court) and should therefore serve as a basis for the interpretation of the rulings delivered in the Vodafone and DT cases by the 8th Chamber of the ECJ sitting in ordinary formation of three judges. This is confirmed by the fact that, as already indicated above, the Vodafone and DT rulings refer on numerous occasions to the Telenor ruling. **The fact that the ECJ did not rule in Grand Chamber in the Vodafone and DT cases most likely confirms that it did not consider revisiting its earlier judgment in the Telenor Magyarorszag case.** Moreover, as a rule, the ECJ endeavours to establish concordance and consistency between its judgments in the interests of legal certainty and uniform interpretation of EU law. In line with the foregoing, any interpretation of the recent Vodafone and DT rulings should thus be consistent with Telenor ruling and should not depart from the conclusions drawn in the Telenor case in which the ECJ did not take a principle stance against zero rating as being incompatible with the Regulation.*

Based on the Telenor Magyarorszag ruling, in the Vodafone and DT rulings, the Court does not assess the compatibility of Vodafone and DT's zero rating offers with Article 3 (2) Regulation, as the Court concludes above all on their incompatibility with Article 3 (3).

Namely, the Court considers that Vodafone and DT's zero rating offers at stake[1] do 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 Regulating (e.g. para 28, C-5/20) and the exceptions provided for management measures cannot be taken into consideration since, in accordance with the second subparagraph of Article 3 (3) of Regulation, such measures cannot be based on commercial strategies pursed by the internet access provider (e.g. para 30, C-5/20). Indeed, in all three cases, the zero rating offers proposed by Vodafone and DT included technical traffic management measures such as excluding roaming, tethering or limiting the video streaming bandwidth.

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?

As already mentioned, the rulings at hand should be interpreted in the context of the Telenor ruling. The Telenor ruling assesses Telenor's zero rating offers at stake both under Article 3 (2) and Article 3 (3) and provides an extensive interpretation of Article 3 (2) and its application.
Namely, the Court points out that it is for national regulatory authorities – subject to review by the national courts and in the light of the clarifications provided by the ECJ – to determine on a case-by case basis whether the conduct of a given provider of internet access services, having regard to its characteristics, falls with the scope of Article 3 (2) or Article 3 (3) or both (para 28, C-807/18 and C-39/19).

With regard to Article 3 (2), the Court points out that it covers agreements entered between service providers and end-users as well commercial practices 'conducted' by service providers; both must not limit the exercise of end users rights, i.e. to access information and content and use applications and services, but also to distribute information and content and provide applications and services.
The Court states that the compatibility of a commercial agreement with Article 3 (2) must be assessed on a case-by-case basis in the light of the parameters set out in recital 7 of the Regulation (para 43, C-807/18 and C-39/19). Further, according to the Court, recital 7 of the Regulation makes clear that the assessment of whether the exercise of end users' rights is limited involves determining whether the agreements and commercial practices lead, by reason of their 'scale', to situations where end users' choice is materially reduced, taking into account, in particular, the respective market positions

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[1] **Vodafone Pass"** : a package which enables customers to subscribe, in addition to a basic package, to free 'zero tariff' options called 'Vodafone Pass' ('*Video Pass*', '*Music Pass*', '*Chat Pass*' and '*Social Pass*'). Those tariff options permit the use of services of Vodafone's partner undertakings without the data volume consumed by using those services being deducted from the data volume included in the basic package. The general terms and conditions provide that those tariff options are valid only in the national territory. **Abroad, the data volume consumed when using the services of the partner undertakings is offset against the data volume included in the basic package.** Vodafone reserves the right also to offer, in the future, tariff options in other Member States. In that case, a 'fair use policy' providing for a maximum monthly use of 5 GB per tariff option in those other States must be applied. **Also, the data consummation during use by sharing connection (wireless access point or "hotspot") is deducted from the volume of data included in the package.**
"Stream On" – DT: Activation of that option allows the data volume consumed by audio and video streamed by Telekom's content partners not to be counted towards the data volume included in the basic package. **By activating the 'StreamOn' tariff option, the end customer accepts bandwidth being limited to a maximum of 1.7 Mbit/s for video streaming, irrespective of whether the videos are streamed by content partners or other providers.**

of the providers of internet access services and of the providers of applications that are involved (para 41, C-807/18 and C-39/19).

With regard to Article 3 (3), the Court points out that the first subparagraph of this Article read in the light of recital 8 of the Regulation imposes on providers of internet access services a general obligation of equal treatment of traffic, without discrimination, restriction or interference, from which derogation is not possible in any circumstances by means of commercial practices conducted by those providers or by agreements concluded by them with end users (para 47, C-807/18 and C-39/19). However, while being required to comply with that general obligation, providers of internet access services are still able to adopt reasonable traffic-management measures which should be based on 'objectively different technical quality of service requirements of specific categories of traffic' and not on 'commercial considerations'. Any measure, which without being based on such objective differences, results in the content, applications or services offered by the various content, applications or services providers not being treated equally and without discrimination, must be regarded as being based on such 'commercial considerations' (para 48, C-807/18 and C-39/19) and thus prohibited.
Pursuant Article 3 (3), third paragraph and Recital 11 of the Regulation, any traffic management practices which go beyond such reasonable traffic management measures, by blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, or specific categories of content, applications or services, should be prohibited, subject to the justified and defined exceptions laid down in the Regulation.
Based on the above, it could be concluded that zero rating offers are subject to two different assessments: Article 3 (2), which assesses the impact of the commercial practice or agreement on the rights enshrined in Article 3 (1); and Article 3 (3), which is only engaged where the commercial practice or agreement includes a traffic management measure or condition of use which, to be compatible with the Regulation, must comply with the criteria set out in that article. These two articles have also different applications, while the prohibition provided in Article 3 (2) does not apply automatically and requires a case-by-case effect assessment, the prohibition provided in Article 3 (3) is stricter and does not require any further assessment should the practice of handling and managing the traffic on the network of the ISP not be reasonable.

3.)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?

The admissibility of a "zerorating" agreement also follows from the following teleological considerations: The TSM Regulation explicitly states that its objectives are (i) to protect end-users and (ii) to ensure the functioning of the Internet "ecosystem" as a driver of innovation (recital I, sentence 2 TSM Regulation). However, the regulation is also always subject to the principle of proportionality. The last few years have shown that "zerorating" offers by providers are possible without noticeably impairing the innovation engine of the internet. This was realized under the supervision of the respective national regulatory authorities which fulfilled their monitoring duties, ensured that any non-compliant practices could be stopped in advance and in the end secured that all accompanying wholesale offers be non-discriminatory and transparent vis-à-vis the content providers. Against the background that the effects on the market and the internet were monitored via regular requests for information it is important to note that a general impairment of competition could not be observed in Austria (and probably elsewehere within the EU).

Amongst operator's there appears to be a common technically defined understanding that the practice of zero rating is not traffic related: *zero rating occurs at a moment posterior to the transport of the internet traffic in the network, which thus is unbiased by this commercial practice (as the commercial practice is not executed at that moment in time)*. *ETNO and GSMA have portrayed this in a very explanatory picture with more background information which we fully share and support* (and invite to read for further insight).

In short: Zero rating in itself is a commercial practice of differentiated billing, and is not related to practices of other traffic management or conditions of use.. It is operated at the level of the business applications that is outside the scope of the mobile network and traffic handling and occurs only at a time a posteriori of the effective handling the internet traffic. As such, zero rating as a commercial practice has no effect on the way the traffic is handled and could thus not be the source of unequal treatment of internet traffic.

To conclude, A1 is fully convinced that the rulings at hand should be read and interpreted in the light of the landmark ruling of the Court taken in 2020 in the Telenor Magyarorszag cases. In this respect A1 fully supports the positions filed by its European associations ETNO, as well as GSMA.