



Computer & Communications Industry Association (CCIA Europe) Submission to BEREC Consultation on Zero-rating 20 October 2021

The Computer & Communications Industry Association ('CCIA Europe') welcomes the opportunity to provide comments to BEREC's call for stakeholder input on the possible revision of the 2020 guidelines on the Open Internet Regulation in light of the recent rulings from the EU Court of Justice ('CJEU') on zero-rating.

On balance, we believe that the 2020 guidelines are still relevant for assessing the lawfulness of zero-rating practices, but additional clarification may be required to address some aspects and questions that the CJEU raised in its recent rulings so as to clarify that these rulings do not conflict with the Telenor Magyarország decision.

We hope the considerations below will be helpful as you reflect on the possibility to revise the current guidelines.

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?

CCIA Europe believes that zero-rating offers based on commercial considerations, which do not involve disproportionate traffic management measures to differentiate equivalent traffic, fall outside the purview of Article 3(3). In such scenarios, zero-rating offers should be assessed against Article 3(2) and in light of one of the main objectives of the Open Internet Regulation i.e. preserving end-users' choice when exercising their right to access and distribute information and content, use and provide applications and services, and use terminal equipment.

CCIA Europe reads the decisions of the EU Court of Justice ('CJEU') as prohibiting (i) limitations on bandwidth, (ii) limitations on use when roaming, (iii) limitation on tethering. In other words, the CJEU does not prohibit all zero-rating offers per se, but rather prohibit traffic management practices in the context of three distinct zero-tariff offers, or as the CJEU puts it, "*on account of the activation of a 'zero tariff' option*".¹

¹ See paragraph 36 of C-34/20, paragraph 34 of C-854/19, and paragraph 33 of C-5/20

To that effect, we note that the CJEU explicitly isolates each of the zero-tariff options “such as that at issue in the main proceedings”² and concludes that the resulting traffic management practices of said zero-tariff options - be it a limitation on bandwidth, tethering, or use when roaming - shall be prohibited.³

Furthermore, all three cases explicitly build on the Telenor Magyarország decision⁴ which did not prohibit selective counting in its entirety, but instead emphasized the right and duty of the regulators to assess whether the effects of the zero-rating offer were to materially restrict end-user choice. In the present cases, the CJEU could not reasonably rely on the Telenor decision had it chosen to reverse its case-law.

We do not believe that the practice of selective counting for commercial reasons should always be considered to a form of unlawful traffic discrimination under Article 3(3).

First, this appears inconsistent with the Telenor decision to the extent that the CJEU emphasized the right and duty of the regulators to assess whether the zero-rating offers result in effects that materially restrict end-users’ rights under Article 3(1) and (2) of the Regulation, unless traffic management measures based on commercial grounds distinguish zero-rated from non-zero-rated offers.

Second, and if we take the view that the Court meant to extend Article 3(3) to commercial terms such as zero-rating, we believe that proportionate pricing of technically equivalent traffic may be possible insofar as Recital 9 - which provides guidance on Article 3(3) alongside Recital 8 - explains that “differentiating measures should be proportionate [...] and should treat equivalent traffic equally”. This may be the case where ISP customers are free to choose their own zero-rated service from a range of applications consuming technically equivalent traffic. It may also be the case where clear and non-discriminatory practices are provided to all Content and Application Providers (‘CAPs’) who wish to join the offer, as envisaged under paragraphs 42-45 of the BEREC Guidelines.

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?

CCIA Europe consider that zero-rated offers which do not involve any limitations with respect to bandwidth, use when roaming, or tethering or any other traffic management measures prohibited under Article 3(3) may be lawful to the extent that (i) they are proportionate and treat all equivalent traffic equally, and (ii) they do not limit the exercise of the end-users’ rights to access

² See paragraph 30 of C-34/20, paragraph 28 of C-854/19, and paragraph 27 of C-5/20

³ See *Ibid.* 1

⁴ Telenor Magyarország Zrt. v Nemzeti Média- és Hírközlési Hatóság Elnöke, Joined Cases C-807/18 and C-39/19

and distribute information and content, use and provide applications and services, and use terminal equipment of their choice.

As mentioned in our previous answer, this should be the case where clear and non-discriminatory practices are provided to all Content and Application Providers ('CAPs') who wish to join the offer, as envisaged under paragraphs 42-45 of the BEREC Guidelines, or where ISP customers are free to choose their own zero-rated service from a range of applications consuming technically equivalent traffic.

Zero-rating offers may also be possible where traffic management practices are in place providing that the determination to include traffic is made based on the objective technical requirements of the services (as well as the expressed interest of the content or application providers) and that all technically similar services are treated equally.

More generally, and as explained earlier, Article 3(2) and Recital 7 remain very relevant to assess the lawfulness of zero-rating practices, consistent with paragraph 28 of the Telenor decision. With respect to C-34/20, C-854/19, and C-5/20, the CJEU did not prohibit all zero-rating offers per se, but rather prohibit traffic management practices⁵ in the context of three distinct zero-rated offers.

Finally, we recall that a main objective of Article 3 is the preservation of end-users' freedom of choice. By prohibiting all zero-rating offers on the basis of Article 3(3), it could reduce end-users' choices as they would likely be left with one of two choices: either all of their data allowance is metered, or unlimited.

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)?

While the facts of the cases differ (to the extent that the practice in the Telenor case only involved differentiated treatment of traffic between zero-rated and non-zero-rated services), the 2021 rulings unequivocally build on the Grand Chamber's Telenor Magyarország decision insofar as the Court excludes commercial considerations from the assessment under Article 3(3)⁶ and that an Article 3(3) assessment may suffice where a zero-rated offer may fall under Article 3(2) and Article 3(3).⁷

It is important to note that the 2021 cases did not overturn the Grand Chamber's finding according to which it is for the national authorities "to determine on a case-by-case basis whether the conduct of a[n IAS provider] (...) falls within the scope of Article 3(2) or Article 3(3) of that regulation, or both provisions cumulatively".⁸ In fact, the 2021 implicitly endorses this finding as

⁵ i.e. limitations on bandwidth, limitations on use when roaming, limitation on tethering

⁶ Paragraph 48 Telenor case, and paragraphs 25-28 Vodafone case

⁷ Paragraph 28 Telenor case, and paragraphs 23, 24 Vodafone case

⁸ Paragraph 28 of the Telenor case

per its selective reference to paragraph 28 of the Telenor cases in paragraph 25 of the Vodafone case.

Most importantly, the Grand Chamber's Telenor decision did not prohibit selective counting as such.

In summary, NRAs may be faced with two main scenarios when assessing when a zero-rated offer is lawful:

- A zero-rating offer does not involve any traffic management measures that is not permitted under Article 3(3) in which case only an Article 3(2) test applies; this may be the case where the traffic management measures are based on the technical requirements of the services (as well as the expressed interest of the content or application providers) and that all technically similar services are treated equally. We believe this should also apply where clear and non-discriminatory practices are provided to all Content and Application Providers ('CAPs') who wish to join the offer, as envisaged under paragraphs 42-45 of the BEREC Guidelines.
- A zero-rating offer does involve traffic management measures on commercial grounds, in which case a cumulative assessment under Article 3(2) and Article 3(3) should be performed but an Article 3(3) test may suffice.

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