Google's response to BEREC's call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines (BoR (21) 149)

20 October 2021

Recommended Approach to Zero-Rating under the Open Internet Regulation

Google welcomes this opportunity to respond to BEREC's Call for Stakeholder Input regarding potential revision of the 2020 BEREC Guidelines in light of intervening decisions issued by the Court of Justice of the European Union (ECJ or Court) on the topic of zero-rating.

Google considers that zero-rating can be beneficial for end-users and for competition when it is implemented in a manner that treats all traffic and providers fairly. Zero-rating can help broadband providers attract new customers, and offers a low-risk way for consumers to try new or unfamiliar content and applications.

Since 2015, BEREC and National Regulatory Authorities (NRAs) have subjected zero-rating programmes to case-by-case assessment under the Open Internet Regulation, taking into consideration a wide range of factors including openness, scale, transparency, impact on competition, number of complaints, and more.[1] The more "open" a programme is, the less likely it is to "give rise to concerns."[2]

The ECJ's recent decisions regarding the "Vodafone Pass" and "Stream On" programmes formerly offered by Vodafone and Telekom Deutschland in select Member States cast doubt on this approach, however.[3] In concluding that the zero-rated offerings of Vodafone and Telekom Deutschland were "incompatible with EU law,"[4] the ECJ appeared to narrow the category of offerings that pass muster under the EU Regulation. Industry is currently uncertain what types of zero-rating, if any, are allowed within the EU under the Court's decisions.

To preserve the benefits of nondiscriminatory zero-rating, BEREC should update its Guidelines to provide concrete guidance on what forms of zero-rating are permitted under the Open Internet Regulation as it has been interpreted by the ECJ.

One approach to removing the existing uncertainty while allowing beneficial zero-rating consistent with the Regulation and ECJ decisions, is a rule that *technically similar traffic should*

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[1] *See* BEREC Guidelines on Implementation of the Open Internet Regulation, BoR (20) 112, at Annex (setting out assessment criteria for zero-rating and similar offers) (*BEREC Guidelines*).
[2] *BEREC Guidelines* ¶ 42.
[3] *See* Court of Justice of the European Union, *'Zero Tariff' Options are Contrary to the Regulation on Open Internet Access*, Press Release No. 145/21, 2 Sep. 2021, *available at* https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-09/cp210145en.pdf (summarising judgements in Cases C-854/19, C-5/20, and C-34/20 regarding Vodafone and Telekom Deutschland) (ECJ Press Release).
[4] *See* ECJ Press Release at 1.

be treated similarly. This approach follows from Article 3(3) of the Open Internet Regulation, which requires that access providers must "treat all traffic equally . . . irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used." Article 3(3) explains with respect to traffic management measures that, "[i]n order to be deemed to be reasonable, such measures . . . shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic." The same principle of treating like traffic alike can be applied to data pricing. Indeed, doing so would accord with the plain language of Recital 8 of the Open Internet Regulation, which explains:

> When providing internet access services, providers of those services should treat all traffic equally, without discrimination, restriction or interference, independently of its sender or receiver, content, application or service, or terminal equipment. According to general principles of Union law and settled case-law, comparable situations should not be treated differently and different situations should not be treated in the same way unless such treatment is objectively justified.

BEREC, along with NRAs and industry stakeholders, have understood that because Article 3(2) specifically addresses end-user agreements and commercial practices, while Article 3(3) describes the application of its principles to network management, commercial terms like the pricing of data plans are governed primarily by the former and not the latter.[5] But the Open Internet Regulation does not clearly say that. Article 3(3) and Recital 8 can instead be read as applying to all aspects of internet access service. In Google's view, that broader reading is the one the ECJ recently adopted.

Although the controversies before the ECJ were not framed under Article 3, the Court began its analysis by noting that the questions presented were "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."[6] The Court next explained that if an ISP's practices violate Article 3(3), then they are invalid whether or not they satisfy the end-user rights test of Article 3(2).[7] The Court thus rejected the view that Article 3(2) addresses commercial practices like zero-rating to the exclusion of Article 3(3). Rather, the Court emphasised, "Article 3(3) of Regulation 2015/2120 precludes *any measure* which runs counter to the obligation of equal treatment of traffic where such a measure is based on commercial considerations."[8]

The Court applied Article 3(3) to the challenged zero-rating programmes, finding that:

> 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.

[5] *See, e.g.*, *BEREC Guidelines* ¶¶ 30-48 (discussing implementation of Article 3(2)).
[6] C-854/19 Judgment ¶ 16; C-5/20 Judgment ¶ 15; C-34/20 Judgment ¶ 18.
[7] C-854-19 Judgment ¶¶ 22-24; C-5/20 Judgment ¶¶ 21-23; C-34/20 Judgment ¶¶ 24-26.
[8] C-854-19 Judgment ¶ 25 (emphasis added); C-5/20 Judgment ¶ 24 (emphasis added); C-34/20 Judgment ¶ 27.

> 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.[9]

The Court finally returned to Article 3(2), declaring that "it matters little that such [a zero-rating] option falls within the scope of an agreement, within the meaning of Article 3(2) of Regulation 2015/2120 . . . or that it is intended to meet actual demand on the part of the customer or content provider."[10]

Having set out its legal rationale focusing on Article 3(3), the ECJ invalidated Vodafone's exclusion of roaming and tethered traffic from the no-charge offer, as well as Telekom Deutschland's throttling of zero-rated traffic. Importantly, only the Telekom Deutschland holding appears to involve disparate treatment of traffic within the network; as far as the decisions indicate, Vodafone treated roaming and tethered traffic exactly the same as other traffic, aside from pricing.

The three ECJ decisions might be read as identifying a ban on virtually all programmes that price traffic differently based on commercial considerations. In this view, only data pricing that treats all traffic the same—for example, zero-rating of all traffic at off-peak times—would be consistent with the Open Internet Regulation.

But Google does not believe such a reading is compelled. First, zero-rating of specific content such as government-supplied public health information could be required by national legislation in accordance with Article 3(3)(a) and Recital 13 of the Open Internet Regulation. For other programmes like promoting education, providing free or reduced-cost internet access service to institutions or particular end-users could be effective.

Looking at the question more broadly, applying Article 3(3) to commercial terms, as well as to network operations, prompts consideration of Recital 8. This recital articulates the principle that "comparable situations should not be treated differently and different situations should not be treated in the same way unless such treatment is objectively justified." This guidance explains why, under Article 3(3) and Recital 9, technically justified network management measures can be applied differently to different categories of traffic (like prioritising real-time voice traffic during times of congestion at the expense of less latency-sensitive traffic). The key, as explained in Recital 9 with respect to network management, is that "differentiating measures should be proportionate in relation to the purpose . . . and should treat equivalent traffic equally."

Under a rule requiring proportionate and equivalent pricing of technically equivalent traffic, an ISP might be able to justify zero-rating entire categories of applications such as all video streaming apps that wish to participate or all audio streaming apps that wish to participate. Alternatively, an operator might allow customers to pick their own zero-rated applications from a technically defined category of eligible apps. Plans that zero-rate "social" apps are currently popular in the EU, and these offerings could be permissible as well if eligibility for inclusion in the plan is based on objective characteristics of the apps' traffic, such as whether the traffic is

[9] C-854-19 Judgment ¶ 28; C-5/20 Judgment ¶ 27; C-34/20 Judgment ¶ 30.
[10] C-854-19 Judgment ¶ 30; C-5/20 Judgment ¶ 29; C-34/20 Judgment ¶ 32.

predominantly small quantities of text (to allow users to exchange text messages) or predominantly video bytes (to allow user to watch streaming video), rather than commercial considerations such as the apps' popularity or market niche. In all cases, zero-rating programmes should be fully transparent to end-users and open to all content or application providers in the relevant technical category.

Under this approach, it would not be permissible to offer preferential pricing for a closed group of applications selected by the carrier based on its own commercial reasons. Favouritism of the operator's own affiliated services similarly would violate the technical-similarity standard.

As applications increasingly integrate multiple features, their traffic may fit within several technical categories (for instance, text messaging, photo sharing, and video). To address this complication, ISPs should work with content and application providers to determine their inclusion or exclusion from specific zero-rating programmes under clear, technically based criteria. Indeed, the existing *BEREC Guidelines* encourage this today.[11]

Notably, were BEREC to recommend such a framework, it would be aligning itself with the principal net neutrality framework currently governing ISPs' operations in the United States. Section 3101(a)(5) of California's Senate Bill No. 822 prohibits zero-rating in exchange for consideration, while Section 3101(a)(6) forbids zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category. Finally, Section 3101(a)(7)(B) states that zero-rating Internet traffic in application-agnostic ways is not a violation of the law if no consideration, monetary or otherwise, is provided in exchange for the ISP's decision whether to zero-rate traffic. Read together, these provisions appear to allow category-based zero rating that is open to all traffic in the category without charge. Were the EU to align with that position, it would promote a Transatlantic consistency that could benefit ISPs as well as content and application providers that operate on a global scale.

Responses to Specific Questions

Question 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?

As explained above, Google believes that a proportionate zero-rating programme featuring equivalent treatment of technically equivalent traffic could be consistent with the Open Internet Regulation. Specifically, while the recent Court decisions establish that Article 3(3) does apply to

[11] *See BEREC Guidelines* ¶ 42c (stating that NRAs, in assessing a zero-rating programme, may consider the extent to which ISPs make publicly available the terms for joining the programme, as well as their contact information).

pricing as well as network management, BEREC need not construe the decisions as broadly prohibiting zero-rating. Instead Article 3(3) and its associated recitals can be interpreted as permitting pricing programmes that treat comparable traffic in a comparable manner, meaning that all technically similar content and applications must be eligible for participation in a zero-rating programme on similar terms.

Question 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?

The scope of Article 3(2) includes "price, data volumes or speed, and any commercial practices conducted by providers of internet access services." Zero-rating and similar programmes are subject to Article 3(2) as both price terms and commercial practices. Accordingly, in addition to satisfying Article 3(3), pursuant to Article 3(2) these programmes must "not limit the exercise of the rights of end-users laid down in paragraph 1," i.e., the rights "to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service."

Paragraph 48 of the *BEREC Guidelines* provides one example of how Article 3(2) might be relevant when Article 3(3) is satisfied. Paragraph 48 notes that "[i]n order to ascertain whether end-users' rights are likely to be harmed in the future, NRAs could take into account how the actual commercial practice affects the concrete possibilities for potential competitors to enter the relevant market." Imagine that established Technology A and emerging Technology B are technically dissimilar but are used to support functionally competitive digital services. A leading mobile operator, perhaps with a financial interest in services that use Technology A, offers to zero-rate apps using Technology A, but not apps using Technology B. In that situation, an NRA that allows zero-rating of traffic categories might justifiably find that the mobile operator's zero-rating programme satisfies Article 3(3) because Technology A and Technology B are objectively different, while also finding that the programme is impermissible under Article 3(2) because it substantially hinders the ability of services employing Technology B to compete with services using Technology A.

Question 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)?

First, the *Telenor* decision signalled the ECJ's perspective that Article 3(3) establishes separate requirements for zero-rating programmes, over and above those found in Article 3(2).[12] The ECJ indeed noted this precedent in its recent rulings.[13]

[12] *See* Joined C-807/18 and C-39/19 Judgment ¶ 23.
[13] C-854-19 Judgment ¶ 30; C-5/20 Judgment ¶ 29; C-34/20 Judgment ¶ 32.

Second, the *Telenor* decision showed that an ISP's pricing plan may violate both Article 3(2) and Article 3(3), but for different reasons, thus confirming their separate operation consistent with Google's response to Question 2, above.[14]

Third, the facts giving rise to the *Telenor* decision involved preferential treatment of a small number of partner applications, apparently without an equivalent opportunity for all technically similar applications to participate.[15] Accordingly, the zero-rating programmes did not treat similarly all traffic in the same technical category and they properly were invalidated.

[14] *See* Joined C-807/18 and C-39/19 Judgment ¶¶ 40-54.
[15] *See* Joined C-807/18 and C-39/19 Judgment ¶¶ 10-11.