



## Liberty Global position paper on the Court of Justice rulings on the Open Internet Regulation

*The Open Internet Regulation aims to provide balanced, well-principled and harmonized rules, enshrining the equal and non-discriminatory treatment of internet traffic in law. This law pursues a twofold main objective: 'to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation'. In light of this objective and the recent string of case law by the Court of Justice of the European Union, BEREC's revised Guidelines need to support case-by-case analysis on the basis of the Regulation, and avoid the pitfalls of an overly prescriptive approach.*

### Our evolving networks fulfil a vital role

Europe's electronic communications networks and services fulfil a vital economic and societal role. The ongoing COVID-19 pandemic has underscored their importance for the ability of European consumers, both residential and business, to work from home, to engage in eLearning and to have meaningful connections with friends, family and colleagues.<sup>1 2</sup>

Liberty Global's continuous investment and innovation in the previous years resulted in resilient and high-capacity networks. These evolved over time to meet the ever-increasing demand for connectivity and to adjust to new services and use cases. Our networks today provide lower latency, higher speeds, and

greater security and resilience, benefiting end-users and the wider society.<sup>3</sup> To realise the European Commission's digital targets we will continue investing – a stable and predictable regulatory environment is instrumental.

### The balanced and well-principled Open Internet Regulation is fit for purpose

The Open Internet Regulation (Regulation) foresees the harmonized implementation and application of a balanced and well-principled set of rules, aiming 'to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation'.<sup>4</sup>

The Regulation complements the European Electronic Communications Code (Code), which is also aimed at promoting innovation and investment in the telecoms sector, to the benefit of consumers.<sup>5</sup> Technological neutrality and the principles of proportionality and appropriateness are cornerstones of both the Regulation and of the Code – and are instrumental to realise a stable and predictable regulatory environment.<sup>6</sup>

As Liberty Global held in previous submissions to the European Commission and BEREC, the harmonized implementation and application of the current regulatory framework is key to ensure Europe's consumers benefit from our continuous innovation and investment in next-generation networks and services.

<sup>1</sup> European Commission and BEREC, *Joint Statement on coping with the increased demand for network connectivity due to the Covid-19 pandemic*, BoR (20) 66 (2020).

<sup>2</sup> <https://www.libertyglobal.com/whats-new/covid-19-our-response/>; <https://www.libertyglobal.com/covid-19-a-message-from-our-ceo/>.

<sup>3</sup> Oxera, *Gigabit broadband: what does it mean for consumers and society?*, (2019).

<sup>4</sup> Consideration 1 of Regulation (EU) 2015/2120 (Open Internet Regulation).

<sup>5</sup> Articles 1 and 3 of Directive (EU) 2018/1972 (Code).

<sup>6</sup> Considerations 2 and 19 of the Open Internet Regulation; considerations 13 and 14 of the Code.



## Court rulings raise relevant questions on the application of the Regulation

In a recent string of case-law, the Court of Justice of the European Union (CJEU) ruled on a number of key aspects of the Regulation.

Simultaneously, with regard to certain aspects of zero-rating offers, these rulings appear to put into question the application and implementation of the Regulation.

Liberty Global commends BEREC for engaging with relevant stakeholders in assessing the impact and implications of these rulings and for considering the potential amendment of its Guidelines. Whilst these Guidelines are in principle non-binding, especially for market participants, Liberty Global recognises their relevance for the application of the Regulation by national regulators.<sup>7</sup>

The questions referred by BEREC to its stakeholders seek to: (1) establish whether zero-rating offers can continue to be deployed in accordance with the Regulation in the wake of the rulings concerned, (2) establish the current practical scope of Article 3(2) and (3) to establish the relationships between the aforementioned rulings.<sup>8</sup> Liberty Global will address these questions jointly as they are strongly interrelated.

## The CJEU's exercise of its powers

The CJEU has the ultimate authority on the interpretation and application of EU law. This includes the explicit ability to annul any provision, instrument, or part thereof, which if found is contrary to Union law. The Court can exercise this power upon request or at its own initiative, irrespective of the procedure concerned, including in preliminary reference procedures such as those at the heart of

BEREC's current analysis. Liberty Global notes that in neither of the cases at hand, the Court exercised its power of annulment – reflecting the aforementioned principles as such intervention was apparently deemed appropriate nor proportionate. Accordingly, whilst these rulings may impact the *application* of certain provisions of the Regulation, it should be clear that the *instrument* – as intended and adopted by the Union legislature – is still very much *intact*. Therefore, the balanced and well-principled Regulation continues to apply – with its text and spirit reflecting its multi-faceted objective as laid down by the Union legislature.

## Key outcomes of the CJEU's 2021 cases

The implications of these rulings need to be viewed in context – the questions referred by means of the preliminary reference procedure. More importantly, since it is not uncommon for the Court to reformulate or questions referred to it, these rulings need to be viewed in context of the questions actually answered by the Court. To this end, account needs to be made of the operative parts of these rulings.

Liberty Global notes that the CJEU effectively answered the following three questions:

- Can bandwidth restrictions be applied to an entire content category (video *in casu*), when an end-user opts for zero-rating of partner video content?<sup>9</sup>
- Can zero-rating offers be restricted to domestic territories only (e.g. excluding intra-EU roaming)?<sup>10</sup>
- Can tethering be restricted in the context of zero-rating?<sup>11</sup>

<sup>7</sup> Article 5 (3) of the Open Internet Regulation.

<sup>8</sup> BEREC, Call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines, 6 October 2021.

<sup>9</sup> Case C-34/20, *Telekom Deutschland*, Judgment, para. 37.

<sup>10</sup> Case C-854/19, *Vodafone*, Judgment, para. 35.

<sup>11</sup> Case C-5/20, *Vodafone*, Judgment, para. 34.



The Court answered all three questions in the negative. It should be noted that the questions answered by the Court in each of the cases at hand, primarily, concern the application and interpretation of Article 3(3) of the Regulation on a standalone basis.

Although in the operative parts of each of these rulings, reference is made to Article 3(2), the Court does not address the juxtaposition of these two paragraphs and specifically leaves the latter paragraph out of consideration in addressing the legality of each of the practices concerned under the Regulation. Instead, in each of these recent rulings, the Court answers the question at hand on the basis of Article 3(3) of the Regulation directly – and practically in isolation.

### The importance of prior case-law

Conversely, in a previous ruling on zero-rating the Court's Grand Chamber did consider zero-rating in the context of both Article 3(2) and 3(3). In that ruling, the Court explicitly addressed the legality of the practices under consideration in light of both paragraphs individually.<sup>12</sup> In a nutshell, the Court confirmed that there can be no zero-rating 'beyond the cap'.<sup>13</sup> The Court did not – however – rule that zero-rating *by itself* should be considered contrary to the Regulation. This is important, since on the basis of the facts of the case and the questions referred by the national court, the CJEU could have issued a *de facto* moratorium on zero-rating on the basis of Article 3(3) or have ruled that such practices need not be examined in light of Article 3(2) of the Regulation at all. The Court, however, did not do so – implicitly confirming that treating

zero-rating by default as suspect is not in line with the Regulation.

### Continued application of Article 3(2) to zero-rating cases cannot be illusory

In light of the relative silence of the Court in its 2021 rulings on the relationship between Articles 3(2) and 3(3) of the Regulation in these cases, as well as taking into account the fact that the Court possesses the power to annul any provision it finds contrary to Union law – and clearly avoids doing so in respect of Article 3(2) – Liberty Global urges BEREC to avoid extrapolating a (too) restrictive interpretation of the latter provision on the basis of these rulings. Such an interpretation is not merited on the basis of the rulings at hand and particularly inappropriate in light of the 2020 ruling. Instead, the principles of appropriateness and proportionality dictate that any interpretation of Article 3(2) and 3(3) should reflect the fact that both paragraphs have been adopted by the European legislature in coexistence, reflecting the text and spirit of the Regulation. Any interpretation which would make that coexistence devoid of meaning, by for example making paragraph 3(2) completely illusory in the context of zero-rating, would go contrary to the aforementioned principles, the text and spirit of the Regulation, as well as the rulings at hand. Therefore, in response to BEREC's second question, Liberty Global submits that the the scope of application of Article 3(2) regarding differentiated billing based on commercial considerations is unaltered by the 2021 rulings.

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<sup>12</sup> Joined Cases C-807/18 and C-39/19, *Telenor Magyarország*, Judgment, para. 55.

<sup>13</sup> *Ibid.*, para. 43-45



## The Court finds zero-rating must be assessed on a case-by-case basis

In view of the continued validity of the Article 3(2) as a provision of Union law in light of the above, Liberty Global is of the opinion that BEREC's questions must be answered as follows. In light of the case-law of the CJEU, in particular the comprehensive 2020 ruling, national regulators must, when assessing zero-rating, 'determine on a case-by-case basis whether the conduct of a given provider of internet access services, having regard to its characteristics, falls within the scope of Article 3(2) or Article 3(3) [...], or both provisions cumulatively, and in the latter case the authorities commence their examination with one or other of those provisions. Where a [national regulator] considers that a particular form of conduct [...] is incompatible in its entirety with Article 3(3) [...], it may refrain from determining whether that conduct is also incompatible with Article 3(2) [...]'.<sup>14</sup>

Accordingly, zero-rating must be assessed on a case-by-case basis and *only* where a national authority finds that a zero-rated offer is incompatible in its entirety with Article 3(3), can it forego an analysis under Article 3(2). It should be noted, however, that the Court recognised the 'intention of the EU legislature was not to limit the assessment of the agreements and commercial practices of a given provider [...] but to provide for an overall assessment also to be carried out of that provider's agreements and commercial practices'.<sup>15</sup> Therefore, Liberty Global submits that national regulators must conduct substantive case-by-case assessments of all zero-rating offers under investigation – this obligation is unaffected in the wake of the Court's recent case-law.

## About Liberty Global

Liberty Global is a world leader in converged broadband, video and mobile communications services. We deliver next-generation products through advanced fiber and 5G networks that connect over 85 million subscribers across Europe and the United Kingdom. Our businesses operate under some of the best-known consumer brands, including Virgin Media-O2 in the UK, VodafoneZiggo in The Netherlands, Telenet in Belgium, Sunrise UPC in Switzerland, Virgin Media in Ireland and UPC in Eastern Europe. Through our substantial scale and commitment to innovation, we are building Tomorrow's Connections Today, investing in the infrastructure and platforms that empower our customers to make the most of the digital revolution, while deploying the advanced technologies that nations and economies need to thrive. Our consolidated businesses generate annual revenue of more than \$7 billion, while our joint-ventures in the U.K. and the Netherlands generate combined annual revenue of more than \$17 billion.

Liberty Global Ventures, our global investment arm, has a portfolio of more than 50 companies across content, technology and infrastructure, including strategic stakes in companies like Plume, ITV, Lions Gate, Univision and the Formula E racing series. Revenue figures above are provided based upon 2020 results and on a combined Virgin Media and O2 UK basis. For more information, please visit [www.libertyglobal.com](http://www.libertyglobal.com).

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<sup>14</sup> *Ibid.*, para. 28.

<sup>15</sup> *Ibid.*, para. 42.