Call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines – response of Slovak Telekom 18.10.2021

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?

Answer: Slovak Telekom (hereinafter "ST") is of the opinion that Article 3 paragraph 3 of the Open Internet Regulation cannot be seen in isolation i.e., without its link to Article 3 paragraph 2 of the Open Internet Regulation.

Article 3 paragraph 2 clearly allows agreements between providers of internet access services and end-users regarding commercial and technical conditions and the providers of the internet access services design these services accordingly i.e. specify their price, speed, data allowance etc. Specific internet access service is called "tariff" or, if activated as complementary service to some tariff, it is called "tariff ad-on". Providers of internet access services typically offer more tariffs and tariff add-ons to reflect various needs of the end-users. The end-users are free to choose between the tariffs, as well as between internet access providers.

Article 3 paragraph 3 sets a general obligation of equal treatment of traffic, without discrimination, restriction or interference, and on top of it also specifies that potential necessary reasonable traffic-management measures should not be based on "commercial considerations" but should be based on "objectively different technical quality of service requirements of specific categories of traffic".

In other words, only the commercial considerations that entail an element of traffic management falls into the scope of Article 3 paragraph 3, which is also confirmed by the previous „zero-rating" ruling of the Court of Justice taken in 2020 (C-807/18 and C- 39/19 – Telenor Magyarország).

Mobile internet access providers in Slovakia including ST have been providing zero-rating tariffs and/or add-ons for many years and to our knowledge none of them contains any element of traffic-management, e.g. blocking, slowing down, degrading etc. of any specific type of traffic. It means that all traffic download and uploaded by the end-users is from the traffic management point of view treated exactly the same way, regardless from the content being carried over by the specific data packets. The zero-rating is only a billing feature, which means that part of the traffic, related to specific content, e.g. video, does not count towards the respective data cap, while other traffic does.

As noted above, according to ST these zero-rating tariffs/add-ons do not fall into the scope of Article 3 paragraph 3 but, lacking any traffic management element, to the scope of Article 3 paragraph 2. Clearly, the Slovak NRA has been of the same view, which is confirmed in their annual reports on monitoring of the Open Internet Regulation. For example, in the last published report, covering the period from May 2019 to April 2020, the Slovak NRA claims to zero-rating offers available on the Slovak market: *"Based on the results of the analysis and surveys carried over by the NRA in selected ISPs we conclude that no incompatibility of the commercial offer zero-rating with the Open Internet Regulation has been identified".*[1]

[1] Page 3 of the Slovak NRA annual report on Monitoring of the Regulation (EU) of the European Parliament and the Council for the period 1.5.2019 – 30.4.2020, available (in Slovak language version only) here: https://www.teleoff.gov.sk/data/files/49664_rocna-sprava-2019-2020.pdf

Therefore we can conclude that the Slovak NRA has clearly and formally set the legitimate expectations of mobile operators in terms of compliance of the zero-rating offers in Slovakia with applicable net neutrality rules.

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?

Answer: Based on the argumentation outlined in the answer to the previous question ST is of the opinion that potential use of differentiated billing based on commercial consideration, if simultaneous traffic management is not in scope, falls fully under Article 3 paragraph 2.

Of course, any such billing practice may still be found incompatible with applicable net neutrality rules in case that this practice possibly limits 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.

ECJ decisions C-807/18 and C-39/19 in this respect provide further guidelines, as in both decisions ECJ states that the compatibility of a commercial agreement with Article 3 paragraph 2 must be assessed on a case-by-case basis, in the light of the parameters set out in recital 7 of the Open Internet Access Regulation.

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)?

Answer: ECJ 2020 decisions in both cases provide grounds for the interpretation of the recent ECJ 2021 decisions. In particular, ECJ 2020 decisions did not come to conclusion that zero-rating is incompatible with Open Internet Regulation *per se*. Furthermore, as already mentioned in ST answers to the previous two questions, they establish the valuable link between Article 3 paragraph 2 and Article 3 paragraph 3.

Having that being said, when zero-rating offers do not contain any traffic management element, which is a typical situation, the potential incompatibility of commercial elements with Open Internet Regulation in Article 3 paragraph 2 would be based only on general non-discrimination obligation, in this case in relation to the content consumed or delivered by the end-users.

In this respect we would like to point out that non-discrimination does not mean that all the content is treated exactly the same way – in case of zero rating in terms of billing – but that, in line with the principles of the competition law, the same transaction (i.e. content type/category) is treated similarly and that the different transaction (i.e. content type/category) is treated dissimilarly. Only in case when e.g. specific supplier of some content is treated differently than other suppliers of the same content category, the potential non-discrimination concern may arise and further investigation of the case by regulator may be appropriate.

With regards,

ePodpis: Mgr. Marek Chovanec

Marek Chovanec
Head of Regulatory Affairs
Slovak Telekom, a.s.