



BEREC's Call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines.

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The Body of European Regulators for Electronic Communications (BEREC) published on its website¹ Call for stakeholders input on the reading of ECJ rulings issued by the Court of Justice (ECJ) on 2 September 2021 regarding violation of the Open Internet Regulation (C 34/20 – Telekom Deutschland, C-854/19 – Vodafone and C-5/20 – Vodafone).

The submitted comments will serve as a basis for a potential revision of the BEREC Guidelines for Implementation of the Open Internet Regulation in line with the ECJ rulings.

Three questions were asked during the consultation. T-Mobile Czech Republic a.s. welcomes the opportunity to participate in the consultation and to present its views on the submitted questions in the text below.

¹ [Call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines \(europa.eu\)](https://europa.eu)



Q1: 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 aim of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access ("the Regulation") **was not to prohibit zero rating practices as such**. No article of the Regulation explicitly declares zero rating offers unlawful. To the contrary, recital 7 of the Regulation sets out a procedure for national regulatory authorities to **assess individual commercial offers to ensure that they comply with the Regulation**. Subsequently, national regulatory authorities and other competent authorities should intervene in cases where agreements or commercial practices jeopardized the substance of end-users' rights.

Most importantly, the Regulation does not give a mandate to NRAs to pre-define the structure of retail offers in a competitive market. The Regulation expresses the political compromise that commercial differentiation is permissible as long as **end-users' rights are respected**. Furthermore, the Regulation does not foresee the outcome of regulatory evaluations which need to be conducted **case by case to evaluate actual economic effects in the market**.

- In this context, the Commission's Q&A document published in 2015 must be mentioned². In one of the questions, the Commission explained the results of the net neutrality dialogue and the co-legislators' intention when adopting the Regulation. The Commission dealt with a question regarding **what zero rating is and how it is affected by the new rules**. The Commission explained: *"Zero rating, also called sponsored connectivity, is a commercial practice used by some providers of internet access, especially mobile operators, not to count the data volume of particular applications or services against the user's limited monthly data volume. Commercial agreements and practices, including zero rating, must comply with the other provisions of the Regulation, in particular those on non-discriminatory traffic management. Zero rating could in some circumstances have harmful effects on competition or access to the market by new innovative services and lead to situations where end-users' choice is materially reduced in practice. The new rules therefore contain the necessary safeguards to ensure that providers of internet access cannot circumvent the right of every European to access internet content of their choice, and the provisions on non-discriminatory traffic management, through commercial*

² https://ec.europa.eu/commission/presscorner/detail/en/memo_15_5275

practices like zero-rating. National authorities will be required to monitor market developments, and will have both the powers and the obligation to assess such practices and agreements, and to intervene if necessary to stop and to sanction unfair or abusive commercial agreements and practices that may hinder the development of new technologies and of new and innovative services or applications."

- Moreover, the Report from the Commission to the European Parliament and the Council on the implementation of the open internet provisions of Regulation (EU) 2015/2120 from 2019³ discusses the legality of zero rating in Chapter 4. It makes reference to the BEREC interpretation and its practice of case-by-case basis assessment. The Report is unequivocal in stating that if zero rating offers comply with the requirements of the Regulation, they are considered lawful.

BEREC responded to recital 7 of the Regulation in its Guidelines⁴ (including their updated versions⁵). These Guidelines provided a very sophisticated and detailed methodology for the NRAs for assessing individual retail offers, including offers with zero rating. **This procedure is a principal safeguard that only offers that do not limit end users' rights are compatible with the Regulation.**

From our experience, the Regulation and the BEREC Guidelines have been reflected in a number of national recommendations and administrative practices and have been respected by operators:

- At the Czech national level, the above-mentioned regulatory measures were reflected in the Statement of the Czech Telecommunication Office on selected issues of access to the Open Internet and the European Guidelines of Net Neutrality⁶ ("the Statement"). In the Statement the national regulator clearly states that: *"... the Office will assess the application of the zero rating individually, in terms of compliance with the Guidelines and with regard to the objectives of the Regulation, i.e. whether the offer restricts the choice of end user and whether the market environment is distorted by discrimination against certain content, applications or their providers. As part of the assessment of the zero rating offer, the Office will primarily assess the market position of the Internet access service provider in accordance with points 42–45 of the Guidelines, and in this context will assess the impact of the ISP on the market environment. Especially in the case of the application of zero rating by virtual operators (MVNO), when assessing the impacts of the application of zero rating on the markets, the Office will also take into account their property*

³ [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2019\)203&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2019)203&lang=en)

⁴ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules (europa.eu)

⁵ BEREC Guidelines on the Implementation of the Open Internet Regulation (europa.eu)

⁶ [vyjadreniceskehotelekomunikacnihouradukvybranymotazkampristupukotevrenemuiinternetuaevropskympravidlu \(4\).pdf](#)

connection with network operators (MNO) or content providers. When assessing the compliance of zero rating or similar practices with the European rules of net neutrality, the Office will also take into account possible combination of several types of zero ratings offers".

- The Czech Telecommunication Office reflected also the updated BEREC guidelines in 2020 and issued a new version of the Statement ⁷ in 2020. The Office deals with the issue of zero rating in the update, when it states:

"In the new version of the Guidelines (points 40 to 48), the issue of zero-rating business practice was elaborated in more detail. The Office has already dealt with this practice in its original Statement. With regard to the COVID-19 pandemic, it can be assumed that there will be a certain demand for the inclusion of various beneficial applications or web content into the zero-rating regime. The Office generally welcomes and supports all efforts to make similar functionalities available as widely as possible, and the form of non-charging for the data used can significantly help to make this available. In this context, the Office points out the need to comply with the requirements of the Regulation in these cases, which are further elaborated in the Guidelines. In particular, it is a matter of opening up the zero - rating option to providers of similar applications and / or content, if they so request, so that the provision of zero rating does not restrict the choice of the end user. "

To sum up, we take it as granted that it was never the purpose of the Regulation to prohibit or ex-ante limit the zero rating offers *per se*. Moreover, such offers were anticipated, and the Commission and the national regulators as well consistently allowed for different business models based on commercial or other considerations (e.g. COVID aid etc.) to be tested in the market, subject to a case-by-case ex-post evaluation by the NRA.

That is the reason why zero-rating offers not counting traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff based on commercial considerations are in line with Article 3 paragraph 3 subparagraph 1 of the Open Internet Regulation even if there is no differentiated traffic management. Such offers are in principle compliant with Article 3 paragraph 3 subparagraph 1. However, they still need to be assessed by Article 3 paragraph 2, that is they need to pass the case-by-case assessment.

When BEREC now reviews its 2020 Guidelines in light of the Judgments, it should focus exclusively on zero-rating practices **that include technical traffic management measures**. Zero-rating offers for commercial

⁷ [dodatekvvjadreniceskehotelekomunikacnihouradufinal \(1\).pdf](#)



consideration are not per se non-compliant with the Regulation as the ECJ did not arrive to such a conclusion neither in Telenor case, nor in the three recent judgments.

BEREC and the NRAs should provide for legal certainty, predictability and efficient implementation of the Regulation that respects the legislative framework laid down by the European Parliament and the Council, and ensures innovative services provided by telecom operators, in particular the 5G networks.

Q2: 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?

In our opinion, the conclusions of the ECJ in the three recent judgments leave space for the current practice of BEREC regarding the zero rating offers.

Its interpretations of the Regulations reflected in the Guidelines and followed by the Czech Telecommunication Office's Statements give the opportunity to create a number of commercial offers with zero rating elements. In these offers, part of data consumption is for free or charged differently from data consumption within the basic tariff. **Such offers of zero rating which do not include any technical traffic differentiation from the basic tariff are to be measured against Article 3 paragraph 2 of the Regulation.**

The room defined by the BEREC Guidelines in points 40-43 is, in our opinion, clearly conceived and sufficient. The basis of the regulatory approach is the individual assessment of each offer.

Based on TMCZ's experience, we can mention one offer that was highly appreciated by our customers and that was the StreamOn offer. It respected the basic principles of open access to the Internet and the national regulator did not find it in conflict with the Regulation. Those principles were:

- not including data traffic related to a specific entire category of applications into the tariff's data limit for the Internet access service;
- openness to all application providers of the respective category;
- equal treatment of data traffic in the tariff and in the offer, in particular blocking of zero rated data traffic if the tariff data cap is reached.

As stated by the Czech Telecommunication Office, these practices are not prohibited in general and the Office assesses them individually.



Q3: 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)?

It is evident that in the Telenor Magyarország judgment, the ECJ did not have the intention to outlaw the zero rating offers as such. The judgment is concerned exclusively with the practice of Telenor Magyarország and the ECJ sheds more lights on the distinction between paragraphs 2 and 3 of Article 3.

Should the recent small chamber judgments raise doubts about the legality of zero rating offers, TMCZ argues that the judgments **must be read in light of the Grand Chamber's ruling in Telenor which did not outlaw such practice**. The higher degree of scrutiny characteristic for the proceeding before the Grand Chamber (oral hearing and the opinion of the Advocate General) gave the ECJ enough space to elaborate on the zero rating practices and explain its reservations. However, the ECJ did not do that.

Conclusion of the non-compliance of zero rating offers with the Regulation would be a substantive stretch of both the Regulation and the ECJ's case-law and such interference with the contract autonomy and current practice should be duly substantiated. The truth is that the ECJ in the recent judgements is not entirely clear whether its conclusions apply to zero rating as such or the concerned practices of Vodafone and Deutsche Telekom. **However, we understand the brevity of the judgment and the lack of reasoning as evidence that the ECJ was concerned only with the practices of the three cases and did not have an ambition to depart from the Grand Chamber's case-law.**