



13 April 2022

VIA EMAIL (OI-Guidelines-Consultation@berec.europa.eu)

Body of European Regulators for Electronic Communications

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RE: Comments of Meta regarding the Draft Updates to the BEREC Open Internet Guidelines

Meta submits these comments in response to BEREC's 16 March call for stakeholder input on BEREC's Guidelines on the Implementation of the Open Internet Regulation ("Guidelines") in light of the recent European Court of Justice ("ECJ") rulings on the Open Internet Regulation ("Regulation").¹

The ECJ Rulings Should Not Be Read as Broadly Prohibiting Zero-Rating

As discussed in our comments to BEREC's previous consultation on the ECJ rulings,² Meta believes that the recent ECJ decisions do not require BEREC to implement a wholesale prohibition of zero-rated offers from mobile operators. The cases before the ECJ were fact-specific, and Meta's position remains that it is only when a zero-rating offer comes accompanied with technical discrimination (such as loss of consumer rights or actual degradation of some content) that such offers may be problematic under the Regulation. Therefore, we caution against updates to the Guidelines that would, in effect, broadly prohibit most zero-rating offers - including offers that are nondiscriminatory, and that are beneficial to consumers.

Furthermore, the proposed updates fail to consider the significant consumer, connectivity, and access benefits that will be lost if the Guidelines are changed to broadly prohibit zero-rating offers in the EU.

We recognise, however, that BEREC may update parts of its Guidelines in light of the ECJ decisions. As discussed below, if BEREC proceeds with the proposed updates in their current form, we encourage BEREC at a minimum to clarify and incorporate certain points into the Guidelines to reflect the flexibility for at least some forms of zero-rating still being permitted.

The Proposed Updates to the Guidelines Would Deprive Consumers of Meaningful Benefits of Zero-Rating

¹ BEREC BoR (22) 31, March 2022.

² Comments of Facebook regarding Zero-Rated Offers and Open Internet Regulation in Light of recent judicial actions of the CJEU, BEREC BoR (21) 149, October 2021.

As currently drafted, the proposed updates to the Guidelines would deprive consumers of important benefits of zero-rating. We agree with BEREC's previous conclusion, made after careful evaluation, that zero-rating offers should be allowed subject to review on a case-by-case basis by individual national regulatory authorities ("NRAs") under the Guidelines. Zero-rating offers have been widely available and enjoyed by consumers in the EU for years under the Regulation, and changing the Guidelines to summarily prohibit non-discriminatory zero-rating offers is not in the public interest, and would deprive consumers of their right to subscribe to services which many end-users regard as beneficial.

Zero-rating programs continue to be an important tool for supporting more consistent connectivity around the world. For under-connected individuals who cannot afford to have unlimited mobile data, zero-rating offers can help them stay connected more consistently. Zero-rating can help consumers' data and access to the internet last longer, and rather than drop off the internet when a consumer runs out of data (or has not yet purchased data), zero-rating programs can help bridge these gaps by providing a consistent baseline of connectivity.³ Additionally, as demonstrated throughout the COVID-19 health crisis, zero-rating can provide people with increased access to important resources such as health and vaccine information, education resources, local government sites, job tools, and small business pages. These types of zero-rating use cases are especially beneficial for lower-income individuals and have been provided for years by mobile operators in various EU states to the benefit of their customers.

As BEREC considers updates to its Guidelines, it is important to take into account the many different types of zero-rating programs that can be offered, the significant benefits these programs can provide to consumers, and the importance of maintaining flexibility through review on a case-by-case basis rather than a wholesale prohibition.

If BEREC Proceeds with its Proposed Updates to the Guidelines, at a Minimum BEREC Should Clarify that the ECJ Rulings Do Not Fully Foreclose All Zero-Rating Offers

If BEREC proceeds with its proposed updates to the Guidelines, at a minimum, BEREC should clarify certain points to ensure the Guidelines reflect the flexibility still permitted for some forms of zero-rating under the ECJ rulings. Indeed, the Guidelines should specify that the catalyst for changing BEREC's previous approach to zero-rating offers was the ECJ rulings themselves.⁴

To provide clarity, we encourage BEREC to avoid definitive statements in the Guidelines that could be misread as wholesale bans on all forms of zero-rating offers. Instead, consistent with BEREC's Explanatory Document, the Guidelines should more clearly recognise that while certain types of zero-rating offers may now (as a result of the ECJ rulings) be considered

³ See, e.g., "New Survey Explores Key Benefits of Zero-Rating" (Feb. 2021) (finding that key benefits of zero-rating include keeping consumers connected more consistently and helping their data packs last longer), available at: <https://www.ipsos.com/en-us/new-survey-explores-key-benefits-zero-rating>.

⁴ See, e.g., BEREC BoR (22) 31, March 2022, (page 2) ("These Guidelines have been reviewed in light of the European Court of Justice (ECJ) rulings concerning the interpretation of the specific Articles of the Regulation.").

“generally inadmissible,” there is still room for individual NRAs to permit various types of zero-rating offers on a case-by-case basis.

For example, Meta encourages BEREC, at a minimum, to consider the following clarifications to the proposed Guidelines:

1. Paragraphs 35 and 138: BEREC should clarify that permissible “application agnostic” zero-rating would include offers that treat all applications and/or websites on the internet the same. This could include, for example, a mobile operator zero-rating all text or video on the internet for its customers without discrimination between application or website. We encourage BEREC to make clear in its proposed updates to the Guidelines that permissible offers could more broadly include these various other forms of “application agnostic” offers and would not necessarily be limited to “time of day” offers, subject to review by individual NRAs.
2. Paragraphs 40(a) and 48: The Explanatory Document notes that changes to these two paragraphs were made because “Zero tariff options are *generally* incompatible with the Article 3(3) OIR equal treatment of traffic obligation.”⁵ This explanation reflects that there continues to be some flexibility with respect to potential forms of zero-rating offers, even under a broader, more restrictive interpretation of the ECJ rulings. Thus, we encourage BEREC to align the language in the proposed updates to the Guidelines to reflect this. For example, these modifications would include the italicized text in brackets below:
 - Paragraph 40(a): “Zero tariff options are a subset of differentiated pricing practices which are *[generally]* inadmissible *[subject to certain exceptions]*.”
 - Paragraph 48: “Commercial practices which apply a different price to the data associated with a specific application or class of applications are *[generally]* incompatible with the obligation of equal treatment of traffic as set out in Article 3(3) *[subject to certain exceptions]*.”
3. Paragraph 40: In the draft Guidelines, BEREC’s discussion of impermissible differentiated pricing offers can be read to refer to situations where an end-user has purchased a data plan. We encourage BEREC to clarify that the prohibitions on zero-rating do not apply if, for example, an ISP or MNO chooses to provide free access to a time-limited zero-rated trial for people who have not yet purchased a data plan, so that an unconnected consumer could have an opportunity to experience connectivity and see the benefits of purchasing data to access the internet.
4. Paragraph 81: BEREC acknowledges that individual NRAs may assess a particular zero-rating offer on a case-by-case basis to evaluate whether the offer is provided to comply with national legislation or measures by public authorities specified in that exception. We encourage BEREC to clarify that NRAs may more broadly assess

⁵ BEREC BoR (22) 31, March 2022 (Explanatory Document) (emphasis added).

various zero-rating offers to determine if they should be permitted given the specific circumstances and details of a particular offer. Given the many different forms of zero-rating that might be proposed to benefit consumers, it would not be feasible for BEREC to provide a finite list of permissible types of zero-rating offers. Accordingly, it is important that NRAs continue to have flexibility to allow zero-rating, at a minimum, where an NRA or government wishes to allow a form of zero-rating in support of public interest objectives.

Conclusion

As explained in detail in Meta's previous comments, we believe the ECJ rulings should not be read to broadly prohibit zero-rating offers. Doing so would deprive consumers of significant connectivity and access benefits. If BEREC's conclusion, however, is that it must update the Guidelines in light of the ECJ rulings, Meta encourages BEREC to clarify in its updated Guidelines that there continues to be a degree of flexibility with respect to certain forms of zero-rating offers, which NRAs can continue to review on a case-by-case basis.



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