OBSERVATIONS AND CONTRIBUTIONS REGARDING THE DRAFT REVISION OF BEREC'S GUIDELINES ON THE IMPLEMENTATION OF THE OPEN INTERNET REGULATION.

About APRITEL

APRITEL is the association that represents the Portuguese electronic communications services operators.

This document presents the comments and views of our associates regarding such proposals.

General Comment

APRITEL welcomes the opportunity to comment on the draft revision of BEREC's Guidelines on the Implementation of the Open Internet Regulation.

The revision of these guidelines is justified by BEREC in light of the recent Court of Justice of the European Union (ECJ) decisions, namely the three rulings (C 34/20 – *Telekom Deutschland*[1], C-854/19 – *Vodafone*[2] and C-5/20 – *Vodafone*[3]), issued on 2 September 2021, regarding the violation of the European Union (EU) open internet rules.

These decisions have been a source of serious concern across the electronic communications sector operating in the EU, as they provide an understanding of the Regulation 2120/2015 which was not apparent in previous interpretations and guidance that have been presented and/or followed by BEREC, Regulators, National courts, Telecom providers, the European Commission – in several instances where it has been called to pronounce about *zero rating* offers – and even the ECJ in a previous ruling regarding the Telenor case.

By including billing differentiation practices in the scope of the traffic management rules subject to article 3(3) of the Regulation and consequently disallowing non application agnostic zero rating practices, these rulings introduced a high level of uncertainty, burdening all involved stakeholders' reasoning and decision processes, impacting on (1) a significant number of offers that have been developed based in previous interpretations and guidance,

which are supplied to millions of customers across the Union, and (2) the design of new and innovative solutions, which efficiently and rationally address the needs of the market, the limits of technical resources and the potential enabled by new technologies, such as 5G.

This uncertainty arises from previous case law and guidance regarding zero rating offers:

- Zero rating and similar commercial practices already existed by the time the Regulation 2120/2015 entered into force and were not explicitly prohibited under the Regulation.

- In accordance with Article 5(3) of the Regulation, in 2016 BEREC published guidelines *"[…] designed to provide guidance on the implementation of the obligations of NRAs. Specifically, this includes the obligations to closely monitor and ensure compliance with the rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users rights as laid down in Articles 3 and 4. These Guidelines constitute recommendations to NRAs, and NRAs should take utmost account of the Guidelines.[2] The Guidelines should contribute to the consistent application of the Regulation, thereby contributing to regulatory certainty for stakeholders. […]".*

- In line with the Regulation, the Guidelines stated that, under the Regulation zero rating offers weren't prohibited. Instead, with the exception of offers where "[…] *applications are blocked (or slowed down) once the data cap is reached except for the zero-rated application(s) […]"*, which would infringe Article 3(3), zero rating offers should be evaluated under a "[…] comprehensive assessment of such commercial and technical conditions […], namely encompassing the analysis of the competitive impacts of the offers and the effects on end-user rights;

  In 2020, the guidelines were reviewed providing further insight on the methodologies to be implemented when analyzing zero rating offers without changing the principles underlying the Regulation.

- In different addresses to the European Parliament, the European Commission, when called to provide the reasoning regarding zero rating practices regulation, also stated that zero rating offers were not per se prohibited and explicitly stated that the BEREC guidelines should be the reference when analyzing such practices.

  For instance, following a question of whether the European Commission "[…] *believe that zero rating plans come into conflict with EU net neutrality laws? If so, what action is being taken to safeguard the consumer right of equal treatment of Internet traffic?* […]" (Question E-006694-17), the Commission provided the following written statement:

  "Regulation (EU) 2015/2120[(1)] neither imposes a blanket ban of zero rating nor does it allow such practice without any limits, *i.e.* zero rating commercial agreements and

practices are only possible as long as they comply with the requirements of the regulation.

The regulation includes three safeguards to protect end-users from the possible negative effects of zero-rating practices: a) these practices cannot limit end-users' right to access and distribute content, applications and services of their choice via the Internet; b) all commercial agreements and practices, including zero rating, have to comply with the principle of equal and non-discriminatory treatment of all traffic, which cannot be derogated from unilaterally or contractually; c)national regulatory authorities are empowered and obliged to ensure, through monitoring and enforcement action, that the rights of end-users are not impaired, including the rights of providers of content, services and applications.

These safeguards ensure a future-proof approach that allows regulators to adapt to new practices, rather than just addressing the practices of today. Regulators and courts will analyze zero-rating and other practices on their merits, case-by-case, in their specific national circumstances, to ensure that the objective of effective end-user choice is not undermined in practice.

BEREC guidelines[(2)] for the implementation of the obligations of National Regulator Authorities (NRAs) include guidance on the treatment of zero rating practices to ensure a consistent approach by the NRAs, taking into account the specific circumstances of each individual case. […]"

- In 2017, the Court of Rotterdam, in cases ROT 17/468, ROT 17/1160 and ROT 17/1932, produced an important understanding regarding article 3(3), clearly separating traffic management from billing differentiation:

  "[…] the first subparagraph of Article 3(3) of the Net Neutrality Regulation cannot be viewed separately from the second and third subparagraphs of that Article. This is also apparent from recitals 8 and 9 in the preamble to the Net Neutrality Regulation. These considerations 8 and 9 lie in view of the wording on which Article 3(3) of the Net Neutrality Regulation is based. It is clear from the wording of these considerations that these considerations relate to traffic (management) and not to pricing. […]".

  Under this reasoning, zero rating practices which do not engage in technical traffic management practices prohibited by the Regulation, should only be evaluated under articles 3(1) and 3(2), following the procedures advocated in the BEREC guidelines.

- It must also be noted that the explicit separation of traffic management from any other aspect regarding billing or commercial practices underlying the design of an Internet Access Service, such as the stated in this ruling of the Court of Rotterdam, results from the fact that the definition of traffic management - or traffic treatment, as in the wording of Article 3 paragraph 3 subparagraph 1 – regards exclusively to the technical treatment of the traffic.

  In fact, as defined by BEREC in the document "*A framework for Quality of Service in the scope of Net Neutrality*" (ref. BoR (11) 53), traffic management "[…] *includes (1) nodal traffic control functions such as traffic conditioning, queue management, scheduling, and (2) other functions that regulate traffic flow through the network or that arbitrate access to network resources between different packets or between different traffic streams"*. That is, traffic management refers solely to the technical intervention in the network applied to traffic.

- The same reasoning is apparent in cases C-807/18 and C-39/19:

  This is all the more evident in paragraph 51: "[…] *In the present case, first, the conduct at issue in the main proceedings includes measures blocking or slowing down traffic related to the use of certain applications and services, which fall within the scope of Article 3(3) of Regulation 2015/2120, irrespective of whether those measures stem from an agreement concluded with the provider of internet access services, from that provider's commercial practice or from a technical measure of that provider unrelated either to an agreement or a commercial practice. Those measures blocking or slowing down traffic are applied in addition to the 'zero tariff' enjoyed by the end users concerned, and make it technically more difficult, if not impossible, for end users to use applications and services not covered by that tariff.* […]"

  With this reasoning, it is apparent that the ECJ views the concept of zero-tariff practice as independent from the technical management practices under article 3(3). That is, the ECJ does not judge the zero-rating practice *per se* uncompliant with the Regulation, but only the technical measure of partial blocking of the traffic.

In fact, these elements demonstrate the inconsistencies of the recent rulings, considering previous case law and BEREC guidance.

Bearing in mind the detrimental effects of the most recent rulings of the ECJ, namely regarding the introduction of innovative services and consumer welfare, any revision should not discard the principles underlying the legislators reasoning.

The draft presented by BEREC deepens the initial concerns, as it discards any possible nuances on the interpretation and implementation of the rulings, stemming from all relevant elements and framework available since the entry in force of the Regulation, including the ECJ ruling on the Telenor case. More worryingly, the dispositions of the proposed revision appear to have wider reach than the ECJ appears to contemplate.

With this background, APRITEL considers that the revision of the guidelines should be limited to:

1. a contextualization of the recent rulings, in light of the previous rulings of the ECJ, and other relevant elements such as those provided above;
2. providing further guidance regarding bandwidth adaptation, data consumption in roaming and traffic shaping following the rulings of the ECJ.

Without conceding on this general understanding, in the next section of the document APRTEL presents a set of comments on specific guidelines where BEREC introduced changes that appear to cast a wider reach than the recent ECJ decisions.

Specific remarks

Access to customer care

The current guidelines state in paragraph 35 the following:

> *35. Examples of commercial practices which are likely to be acceptable would include:*
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> - *application-agnostic offers where an end-user gets uncapped15 access to the internet (and not just for certain applications) during a limited period of time, e.g. during night-time or at weekends (when the network is less busy);*
> - ***the ability for an end-user to access the ISP's customer services when their data cap is reached in order to purchase access to additional data.***

In the revised guidelines the ability to access the ISP's customers after the data cap is reached appears to no longer be possible, as these dispositions have been redacted. On the other hand, BEREC seems to suggest an alternative:

> *35. Examples of commercial practices which are typically admissible would include:*
>
> - *[…]*

- ***offers where the speed is throttled for all traffic after the data volume has been used up instead of blocking all traffic; a sufficient speed could still allow accessing the internet in an application-agnostic manner, this would also allow access to provider's online self-service portal or of the application allowing end-users to purchase additional data volume.***

This revision does not result from the ECJ decisions and is disproportional, since this type of practice is not based in commercial criteria, but solely to ensure that customers have a means of access to a tool that allows them to continue to use their services. Also, it appears to be unnecessary and formalistic, as it doesn't address any risks regarding the objectives of the Regulation

Hence, APRITEL requests ***the ability for an end-user to access the ISP's customer services when their data cap is reached in order to purchase access to additional data*** to be reinstated as an example in paragraph 35.

Public Good Offers

In the context of the proposed revision of the BEREC's Guidelines on the Implementation of the Open Internet Regulation, it should be taken into consideration that many European operators have used zero-rating tariffs, offered as part of a broader commercial contract with customers, in order to further the public good (e.g. zero-rating access to health or educational apps that have been so vital during the Covid-19 pandemic).

The ECJ specifically refers to commercial zero-rating in its decisions while these zero-rating practices are not, in any way, commercially based.

Still, if the ECJ decisions are to be given a wider interpretation, they can also be applied to these zero-rating practices.

The revised guidelines do not make this distinction and by failing to do so BEREC will incorrectly capture other forms of zero-rating, such as zero-rating of public good services, in the scope of 'banned practices'. This would be a perverse outcome that is contrary to the public interest as well as contrary to the intention of the legislator in 2015.

Therefore, APRITEL considers this distinction should be done in the guidelines in order to effectively carve out these forms of zero-rating, given the negative impact this would have to end-users, without any real gain under the Open Internet Regulation.

Admissible commercial practices

In Paragraph 40a BEREC states that:

> *40a. Zero tariff options **are a subset** of differentiated pricing practices which are inadmissible. The ECJ defines zero tariff options as "a commercial practice whereby an internet access provider applies a 'zero tariff', or a tariff that is more advantageous, to all or part of the data traffic associated with an application or category of specific applications, offered by partners of that access provider." Those data are therefore not counted towards the data volume purchased as part of the basic package.*

Additionally, regarding traffic management, BEREC states in Paragraph 49:

> *49. A basic principle of the Regulation relates to the obligation on ISPs to treat all traffic equally when providing IAS. As the ECJ has established in its 2020 and 2021 judgements, Article 3(3) first subparagraph imposes on providers of internet access services a "general obligation of equal treatment" and that, in principle, "any measure" by an ISP which is discriminatory could be a violation of this general obligation. The ECJ applies the principle of equal treatment of traffic to the practice of zero-tariffs as such. BEREC takes from this that the general obligation to treat all traffic equally is not limited to technical traffic management practices but also applies to commercial practices of the ISP such as differentiated pricing. Hence, it also includes unequal treatment by way of zero tariff options **and similar offers** (for more details see paragraph 54a below). Typically, infringements of Article 3(3) first subparagraph which are not justified according to Article 3(3) second and/or third subparagraphs would also constitute an infringement of the end-user rights set out in Article 3(1) (see paragraphs 37 and 37a).*

By including in the scope of these dispositions to offers that aren't *zero tariff*, based on somewhat vague definitions, such as "similar offers" or subsets of other practices, BEREC is introducing additional levels of uncertainty that are undesirable and are not under the scope of the ECJ rulings, and hence should be avoided. In fact, the ECJ rulings are directed exclusively to zero tariff practices, as it is described in Paragraph 54a:

> *54a.The ECJ in its rulings of 2 September 2021 concluded that a zero tariff option violates the general obligation to treat all traffic equally according to Article 3(3) first subparagraph. The ECJ established that "a '**zero tariff' option draws a distinction within internet traffic**, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications." (see also paragraph 40a*

above). According to the ECJ, "that failure, which results from the very nature of such a tariff option on account of the incentive arising from it, persists irrespective of whether or not it is possible to continue freely to access the content provided by the partners of the internet access provider after the basic package has been used up."

Final remarks

Should the revised BEREC's guidelines not deviate from the proposal presented by BEREC and end up rendering current zero tariffs and similar commercial practices incompatible with Regulation 2120/2015, ISPs will require a transitional period to adjust their portfolio of tariffs, after which the prohibited commercial practices will cease to be commercialized.

Indeed, considering how profuse zero tariffs and similar commercial practices have become — it's worth recalling, once again, that this type of offers already existed long before Regulation 2120/2015 entered into force — it will be of the utmost importance to set a sufficiently long period of adaptation of the commercial offers currently available in order to prevent a sudden disruption in the market and not defraud the legitimate expectations of both users and ISPs.

Given the efforts involved in such an overall of ISP's portfolios, APRITEL considers that this transitional period shall not be inferior to 6 months.

After the transitional period, users benefiting from tariffs no longer available for new subscriptions shall be allowed to continue with those tariffs until the renewal of their agreements or the end of the loyalty period, at which moment they will have to choose a new tariff. This will allow the prohibited commercial practices to be gradually phased-out over the course of the following 24 months.