



Liberty Global response to BEREC's draft Guidelines on the Implementation of the Open Internet Regulation

Liberty Global welcomes the opportunity to provide feedback on the draft update to the BEREC Guidelines on the Implementation of 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. This 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 (CJEU), we urge BEREC to ensure the revised Guidelines support case-by-case analysis on the basis of the Open Internet Regulation, and avoid the pitfalls of an overly prescriptive approach. Only this way the revised Guidelines will meet cornerstone principles for any regulation: appropriateness, proportionality and technological neutrality. For example, these principles dictate that any interpretation of Article 3(2) and Article 3(3) of the Open Internet Regulation should reflect the fact that both paragraphs have been adopted by the European legislature in coexistence, reflecting the text and spirit of the Open Internet 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 Open Internet Regulation, as well as the CJEU case law.

Gigabit connectivity drives digital transition

Europe's electronic communications networks and services fulfil a vital economic and societal role. The 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.^{1 2}

Operators are building new networks and upgrading existing ones. This can be viewed within the wider context of digital transformation. The fourth industrial revolution will build upon previous waves of digital disruption. New applications serve only to increase the demand for gigabit-capable broadband networks – allowing for the continued functioning of the internet ecosystem as an engine of innovation. It is investment in networks which underpins applications, business models and innovation that, in turn, drives growth in every other part of the economy and directly benefits consumers. Innovation in the communications sector will not cease, and future networks will not be limited to the network infrastructure and technologies that we know today.

As Europe embraces the possibilities of the digital transition, with ambitious 2025 and 2030 strategic objectives, it is vital that the right environment is created for broadband rollout. Connectivity is essential to achieve the promise of digital transition. The European Commission's main goal for fixed connectivity is shifting from high-speed internet coverage by 2025 to gigabit connectivity by 2030. For mobile, the emphasis is on expanding 5G coverage. Liberty Global supports the goals of the European Commission

¹ 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).

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



to ensure that all Union households are covered by a gigabit connection by 2030 and that all populated areas can benefit from 5G.

Revised Guidelines must be robust and future proof

To realise the European Commission's gigabit connectivity targets operators will have to continue investing. Regulatory and legal certainty are a prerequisite to an investment-friendly environment – regulation should be robust and future-proof.

The Open Internet Regulation plays an important role in this context as it 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'.³ The Open Internet 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.⁴

Technological neutrality and the principles of appropriateness and proportionality are cornerstones of both the Open Internet Regulation and of the Code. They serve to realise a stable and predictable legal and regulatory environment.⁵ The harmonized implementation and application of the Open Internet Regulation and the BEREC guidelines is key to ensure Europe's consumers benefit from continuous innovation and investment in gigabit connections and innovative networks and services. We urge BEREC to ensure these principles remain the cornerstone of the revised Open Internet Guidelines.

Court rulings leave the Open Internet Regulation intact

In a recent string of case-law, the CJEU ruled on a number of key aspects of the Open Internet Regulation. 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 it finds is contrary to Union law.

The CJEU 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 CJEU 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 Open Internet 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 Open Internet Regulation continues to apply – with its text and spirit reflecting its multi-faceted objective as laid down by the Union legislature. BEREC must reflect this in the revised Guidelines – we urge BEREC not to go beyond the

³ Consideration 1 of Regulation (EU) 2015/2120 (Open Internet Regulation).

⁴ Articles 1 and 3 of Directive (EU) 2018/1972 (Code).

⁵ Considerations 2 and 19 of the Open Internet Regulation; considerations 13 and 14 of the Code.



text and spirit of the CJEU case law, and BEREC's mandate, as it will undermine regulatory and legal certainty.

Key outcomes of the CJEU's 2021 cases

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?⁶
- Can zero-rating offers be restricted to domestic territories only (e.g. excluding intra-EU roaming)?⁷
- Can tethering be restricted in the context of zero-rating?⁸

The CJEU answered all three questions in the negative.

It should be noted that the questions answered by the CJEU in each of the cases at hand, primarily, concern the application and interpretation of Article 3(3) of the Open Internet Regulation on a standalone basis. Although in the operative parts of each of these rulings, reference is made to Article 3(2) of the Open Internet Regulation, the CJEU 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 Open Internet Regulation. Instead, in each of these rulings, the CJEU answers the question at hand on the basis of Article 3(3) of the Open Internet Regulation directly – and practically in isolation.

Conversely, in a previous ruling on zero-rating the CJEU did consider zero-rating in the context of both Article 3(2) and 3(3). In that ruling, the CJEU explicitly addressed the legality of the practices under consideration in light of both paragraphs individually.⁹ In a nutshell, the CJEU confirmed that there can be no zero-rating 'beyond the cap'.¹⁰ The CJEU did not – however – rule that zero-rating by itself should be considered contrary to the Open Internet 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 Open Internet Regulation at all. The CJEU, however, did not do so – implicitly confirming that treating zero-rating by default as suspect is not in line with the Open Internet Regulation. Again, BEREC must reflect this in the revised Guidelines – we urge BEREC not to go beyond the text and spirit of the CJEU case law, and BEREC's mandate, as it will undermine regulatory and legal certainty.

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

In light of the relative silence of the CJEU in its 2021 rulings on the relationship between Articles 3(2) and 3(3) of the Open Internet Regulation in these cases, as well as taking into account the fact that the CJEU possesses the power to annul any provision it finds contrary to Union law – and clearly avoids

⁶ Case C-34/20, *Telekom Deutschland*, Judgment, para. 37.

⁷ Case C-854/19, *Vodafone*, Judgment, para. 35.

⁸ Case C-5/20, *Vodafone*, Judgment, para. 34.

⁹ Joined Cases C-807/18 and C-39/19, *Telenor Magyarország*, Judgment, para. 55.

¹⁰ *Ibid.*, para. 43-45



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.

Instead, the principles of appropriateness and proportionality dictate that any interpretation of Article 3(2) and 3(3) of the Open Internet Regulation should reflect the fact that both paragraphs have been adopted by the European legislature in coexistence, reflecting the text and spirit of the Open Internet 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 Open Internet Regulation, as well as the 2021 rulings. The scope of application of Article 3(2) regarding differentiated billing based on commercial considerations is unaltered by the 2021 rulings. BEREC must reflect this in the revised Guidelines – we urge BEREC not to go beyond the text and spirit of the CJEU case law, and BEREC’s mandate, as it will undermine regulatory and legal certainty.

About Liberty Global

Liberty Global (NASDAQ: LBTYA, LBTYB and LBTYK) is a world leader in converged broadband, video and mobile communications services. We deliver next-generation products through advanced fibre 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 \$7.5 billion, while the VodafoneZiggo JV and the VMO2 JV generate combined annual revenue of more than \$19 billion.*

Liberty Global Ventures, our global investment arm, has a portfolio of more than 75 companies and funds across content, technology and infrastructure, including strategic stakes in companies like ITV, Univision, Plume, Lionsgate and the Formula E racing series.

*Revenue figures above are provided based on full year 2021 Liberty Global consolidated results (excluding revenue from the UK JV Entities) and the combined as reported full year 2021 results for the VodafoneZiggo JV and estimated US GAAP full year 2021 results for the VMO2 JV. For more information, please visit www.libertyglobal.com.