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Contribution of the Alliance of the Technology Industry in Bulgaria regarding the public consultation on draft BEREC Guidelines on the Implementation of the Open Internet Regulation

Thank you for the opportunity to present our views on the Draft BEREC Guidelines on the Implementation of the Open Internet Regulation referred herein after as the Draft Guidelines.

Alliance of the Technology Industry (ATI) represents the interests of electronic communications companies, vendors and equipment suppliers, network and system integrators, academic and scientific community. ATI contributes for creation of favourable regulatory and market conditions for the development of the technology industry in Bulgaria, stimulating free competition in the field of electronic communications and ultimately - in the interest of Bulgarian users of communication services.

In this regard we would like to emphasize at the outset that we view the cases presented in the preliminary questions to EUCJ, that are the base line of BEREC's reasoning for these proposed changes to the BEREC Open Internet Guidelines, as illustrations of commercial practices that aim to restrict or differentiate the way provided given volume/packages of data to the end-user. As such, these cases, in our opinion, represent clear examples of the scenarios that were taken into account under the provision of article 3 of Open Internet Regulation. It is precisely these types of practices of traffic management due to technical features that this act aimed to clarify.

The example of the German referring court, in fact **refer only to the technical features** of the zero-rating offers:

*"**a limitation on bandwidth**, on account of the activation of a 'zero tariff' option, applied to video streaming, irrespective of whether it is streamed by partner operators or other content providers, is incompatible with the obligations arising from Article 3(3)."*

*"**a limitation on use when roaming**, on account of the activation of a 'zero tariff' option, is incompatible with the obligations arising from Article 3(3)."*

*"**a limitation on tethering**, on account of the activation of a 'zero tariff' option, is incompatible with the obligations arising from Article 3(3)."*

As rightly stressed by paragraph 43 of BEREC Guidelines, the aim of the Regulation is to "*safeguard equal and non-discriminatory treatment of traffic" (Article 1) and to "guarantee the continued functioning of the internet ecosystem as an engine of innovation*". Also, it aims to restrict "commercial practices which, by "*reason of their scale, lead to situations where end-users choice is materially reduced in practice", or*

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which would result in "the undermining of the essence of the end-users' rights". This could be achieved by taking into extent to which end-users' choice has been restricted by the agreed commercial and technical conditions included in the zero-rating practice.

As stated by the Guidelines it is for national regulatory authorities – subject to review by the national courts and in the light of the clarifications provided by the ECJ – to **determine on a case-by case basis whether the conduct of a given provider of internet access services, having regard to its characteristics, falls with the scope of Article 3 (2) or Article 3 (3) or both** (para 28, C-807/18 and C39/19).

If the recent judgments were effectively read to prohibit all such offers as seems to be done in the Draft, then end users would realistically be left with only two choices in contracting for electronic communication services a completely metered plan or a completely unlimited plan. Additionally, the zero rating of public service content such as governmental, educational or public interest websites could also be deemed unlawful, which would be detrimental to consumers on limited data plans. In the light of Covid 19 pandemic it was of great public interest to specific price differentiation tariffs to certain educational platforms.

The Regulation clearly encourages pro-consumer choices to which zero-rating or price differentiation offers can be a way to enhance the number of consumer options in selecting their electronic communications contracts. It is only when the 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.

Under these principles, the primary relevant benchmark for such offers where traffic is not treated differently, but merely counted differently, is not Article 3(3), but rather Article 3(2), read in conjunction with Recital 7 which requires regulators to act where end-user choice is materially restricted in practice, and not merely in theory. Cases where end-users' choice is not materially restricted in practice should not be regarded as an infringement of Article 3(3). In this regard the meaning of "application-agnostic" needs to be further clarified. Only a couple of examples are given and they are very specific, related to different levels of QoS and different categories of traffic. In the same time, this term is used 15 times in the draft and is basically the backbone of the proposed amendments to the BEREC Guidelines on the Implementation of the Open Internet Regulation. In order for consistent application of Regulation (EU) 2015/2120 to be achieved, the term needs to be further clarified and possibly more examples to be given.

Indeed, the overall goal of said provision was in no way to generally ban zero-rating or price differentiation as a practice *per se.* Such an approach would, in our opinion, have adverse effects of the regulation, which, instead of protecting the consumers' rights against detrimental to them commercial practices of the MNOs, restrict beneficial to the consumers commercial propositions aimed at providing more flexibility when using data towards certain, more preferred applications.

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We therefore strongly oppose on the reading of BEREC of said EUCJ ruling leading to a complete ban of zero-rating and price differentiation practices and urge BEREC and NRAs to stick to current approach to assess every single practice on a case-by-case basis. At the best, the examples the rulings of EUCJ could be incorporated in the Guidelines as clear examples and not going to such broader interpretation that aims at changing the regulation itself by going in such detailed guidance there leaves no room for NRAs to make their independent assessmentt.