Annex A

LEGAL OPINION

A. INTRODUCTION/OVERVIEW

1. On 6 October 2021, the Body of European Regulators for Electronic Communications ("**BEREC**") called for stakeholder input to assist its deliberations in assessing the details of the rulings issued by the Court of Justice ("**CJEU**") on 2 September 2021 regarding violation of the Open Internet Regulation[1] (Case C 34/20 – *Telekom Deutschland ("**DT**"*), Cases C-854/19 and C-5/20 – *Vodafone*).[2] This assessment is intended to help to prepare the review of the BEREC Guidelines on the Implementation of the Open Internet Regulation (the "**Regulation**") in line with the CJEU rulings.

2. BEREC posed three specific questions:

   a) "*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?*

   b) 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?

   c) *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)?*"

[1] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union

[2] Note that this Opinion focuses its attention on *Vodafone* case C-5/20 (which is referred to throughout as "***Vodafone***"). C-854/19 has also been considered and is referred to expressly by reference to its case number where consideration of C-854/19 in addition to C-5/20 is appropriate and useful – see below at paragraph 22.

("**the CJEU Judgments**").

3. BEREC also requested that a response should "*substantiate your answers **with detailed legal arguments referring to the relevant paragraphs** of the current or previous ECJ rulings (and articles of the Open Internet Regulation or the Treaty or other case law of the Court of Justice, if necessary)*" (emphasis in original).

4. Vodafone Group has asked for our legal input in respect of the above questions. We set out below our response to the three questions posed. For the reasons discussed in Section C below, we think it is important, and logical, to first start with Question 3 (Section C), followed by our responses to Questions 1 (Section D) and 2 (Section E). But it seems to us important first to set out some context (Section B), since, in law, context is all. Section F has a short conclusion answering the three questions.

B. THE CONTEXT

5. Before turning to the specific questions, we wish to make two preliminary, over-arching points.

6. First, the Regulation aims to protect the rights of both consumers and traders. It is clear from *Telenor* that "*end-users*" is to be defined in line with the definition in the telecoms Framework Directive,[3] and that this definition includes content and application providers, e.g., Facebook, Spotify: see *Telenor*, CJEU Judgment, [36]-[38]. Accordingly, there are at least two categories of protected "*end-users*," including, notably, end-users with the right to distribute information and content and provide applications and services. Between these two categories of "*end-user*" the Regulation does not establish any clear hierarchy - both are protected. The existence of two categories of end-users therefore presents internet service providers ("**ISPs**") with the task of striking the balance between facilitating the access rights of consumers and protecting the distribution rights of service providers. Zero-rating tariffs, in our view, strike that balance lawfully, as is developed below.

7. Second, and relatedly, the Regulation seeks to strike a balance between the principles of

[3] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

internet access and non-discrimination. In particular, the EU legislature has sought to mediate the tension between guaranteeing the rights of end-users to access and distribute content, against the right of service-providers not to be discriminated against on the basis of traffic. This tension manifests itself in two ways:

a) First, the tension between internet access and traffic management. Whilst Article 3(1) of the Regulation enshrines in general terms the access and distribution rights of end-users, Article 3(3), at subparagraphs 2-3, empowers ISPs to take reasonable traffic measures for reasons including, *inter alia*, the management of network congestion (Article 3(3)(c)). As will become clear, it is this tension, in our view, with which the CJEU was principally dealing in *Telenor*, *Vodafone*, and *DT*. All three cases are united by the same factual common denominator, namely that the tariffs in question contained measures which slowed down the speed of certain categories of applications (video streaming) or restricted other features of internet access such as tethering. Accordingly, mediating the tension between internet access and traffic management requires one to locate the boundary between reasonable and unreasonable traffic management measures, an exercise with which the court was concerned in the CJEU Judgments. As the Advocate General noted in *Telenor*, this balancing exercise is a "*delicate*" one ([AG46]).

b) Second, the extent to which measures other than traffic management measures constitute infringements of the rights contained in Article 3(1), namely end-users' access and distribution rights. In our view, this is the most difficult conflict for the Regulation to negotiate. On the one hand, Article 3(1) furnishes end-users with rights, whilst Article 3(2) allows end-users to enter into agreements with ISPs on different terms to other end-users. Article 3(2)'s respect for freedom of contract empowers ISPs to differentiate between tariffs on the basis of, inter alia, price, speed, and data volume. On the other hand, Article 3(3) contains a prohibition on traffic-based discrimination. In our view, the CJEU Judgments do not expressly deal with and resolve an important question, namely which side of the line zero-rated tariffs fall on. As will become clear, it seems to us that zero-rated tariffs do not constitute traffic-based discrimination, and must therefore be examined under Article 3(2).

C. QUESTION 3: INTERRELATIONSHIP BETWEEN *TELENOR* AND *VODAFONE/DT* JUDGMENTS

(1) Precedential relationship between the judgments

8. It is useful to take Question 3 first, because we rely on the overarching observations that we make in this section about the precedential relationship between the rulings when offering our analysis of the issues raised by Questions 1 and 2.

9. A number of points bear emphasis here about the formal relationship between *Telenor* and *Vodafone/DT* as precedents of the CJEU.

10. First, there is an important institutional component in assessing the import of the CJEU judgments. *Telenor* involved a Grand Chamber of the CJEU, where the court sits in its full formation of judges, whereas *Vodafone/DT* involved an ordinary chamber formation of the CJEU. A Grand Chamber ruling is intended to signify that the CJEU considers its ruling to be important and, all else equal, such a ruling is more controlling an authority than a later ruling from a non-Grand Chamber formation of the CJEU. Thus, in our view, in the event of divergence between *Telenor* on the one hand and *Vodafone/DT* on the other, the former would prevail as the ruling of higher "rank."

11. Second, the first point above is bolstered by the fact that in *Telenor* there was a full Advocate General Opinion (which is referred to in several places in the CJEU ruling) whereas in *Vodafone/DT* the CJEU dispensed with the need for an Advocate General Opinion. This provides further support to the authoritativeness of the *Telenor* ruling, and, correspondingly, the narrower and more limited implications of the *Vodafone/DT* rulings.

12. Third, it is important to note that *Telenor* and *Vodafone/DT* were preliminary rulings under Article 267 TFEU. This has three main implications:

    a) The first is that such rulings are only legally binding on the referring court in question. They do not even bind the parties to the national proceedings, since it is the job of the national court who made the reference in question to interpret and apply the CJEU preliminary ruling in its own judgment, and (subject to issues of national law) it is only the national court's ruling that binds the parties to the proceedings. Whilst an interpretation by the CJEU of EU legislation such

as the Regulation is obviously important, it is not legally binding save in the sense outlined here. In particular, it is always open to another national court (or the same national court in another case) to make a further preliminary ruling request to the CJEU or to reach its own view on the legal position, on the basis that it is sufficiently clear without an interpretative ruling from the CJEU.[4]

b) The second is that because a preliminary ruling request arises in the context of a particular *inter partes* dispute before the referring court and, therefore, is focused only or mainly on the facts of the particular dispute before the national court in question. We return to this point below under Question 1, since it has particular significance in the present case.

c) The third is that the CJEU has no role in relation to establishing the facts of the case, which is a matter for the national court only. Indeed, since a preliminary ruling is made before the facts are finally established, it follows that the CJEU's answers may relate to a factual (or legal) situation that is ultimately not relevant for deciding the main dispute before the national court, e.g. if the national courts makes final factual findings that ultimately do not engage the principles established by the CJEU.

13. Fourth, even leaving aside the fact that *Telenor* is a Grand Chamber ruling and *Vodafone/DT* are not, it is clear that *Vodafone/DT* do not in any sense purport to 'overrule' *Telenor*, since there are multiple references to *Telenor* in the judgments: see, e.g., *Vodafone*, [21], [22], [25], [26]. So, on its face, there is not only no inconsistency between *Telenor* and *Vodafone/DT*, but the latter judgments adopt and rely on *Telenor*.

14. Fifth, it is also important to bear in mind that EU law respects the principle of *res judicata*. In particular, where a decision under national law is final (i.e. it can no longer be challenged), EU law does not, in general, oblige a national court to set aside such a decision even if that decision would be contrary to EU law (see, to that effect, Case C-234/04 *Kapferer*). In particular, EU law does not require a national court to dis-apply domestic rules of procedure conferring finality on a decision, even if to do so would

[4] Indeed, there are cases where a national court that requested a preliminary ruling has found the answer from the CJEU so unclear or unhelpful that it has made a further preliminary ruling request in the same case. This occurred in Case C-206/01, *Arsenal Football Club plc v Matthew Reed*, [2002] ECR I-10273.

enable it to remedy an infringement of Community law by the decision at issue (see, to that effect, Case C-126/97 *Eco Swiss* [1999] ECR I-3055; [46] and [47]).

15. Article 5 of the Regulation imposes an obligation on National Regulatory Authorities ("**NRAs"**) and national courts to supervise ISP compliance with, and enforce, Articles 3 and 4 of the Regulation. In line with this obligation, NRAs and national courts may adopt decisions in relation to particular tariff schemes. In light of EU law's respect for the principles of *res judicata*/legal certainty, where the NRAs or national courts have adopted decisions in relation to particular tariff schemes that are now final, EU law will typically respect the finality of such decisions. The practical consequence of this is that the *Vodafone/DT* judgments may not apply to certain existing schemes that have been the subject of a final decision. This of course would not apply to any new tariff schemes or existing tariff schemes that could still be challenged under national law. This may mean that any alleged inconsistency between *Telenor* and *Vodafone/DT* does not particularly matter for any tariff already considered by a NRA/court whose decision is now final.

(2) Substantive relationship between the judgments

16. In our view, the judgments in *Telenor* and *Vodafone/DT* are consistent and collectively establish the following framework for considering the compatibility of zero-rated tariffs under Articles 3(2) and 3(3) of the Regulation:

    a) Article 3(3) will be engaged only where there is traffic-based discrimination. Where a measure discriminates on a basis other than the treatment of traffic, Article 3(3) is not engaged. This is clear from the wording of Article 3(3),[5] and the CJEU Judgments.[6]

    b) Where Article 3(3) is engaged, the first step in any inquiry is to consider whether a measure is discriminatory under Article 3(3) subparagraph 1 (see *Telenor* at [28], *DT* at [25], and *Vodafone* at [22]) and, if it is, whether it falls

[5] Article 3(3) subparagraph 1 reads "*Providers of internet access services shall treat all traffic equally*" (emphasis added).

[6] The CJEU in *Telenor* reiterated at [18] that "*Article 3(3) lays down a general obligation of equal and non-discriminatory treatment of traffic*" (emphasis added). The same was reiterated in Vodafone at [18], and in DT at [21].

within the exception contained in subparagraph 2.

c) The CJEU Judgments all suggest that zero-rated tariffs that combine the commercial offer of zero rating with additional technical measures[7] or terms of use[8] engage in traffic-based discrimination. In our view, the rulings do not suggest, and would be incorrect to suggest, that tariffs involving the commercial offer of zero rating without additional technical measures or terms of use as found in the tariffs subject to the CJEU Judgments (such as limitations on bandwidth for certain categories of applications or tethering), also involve traffic-based discrimination. Instead, these zero-rated tariffs differentiate on the basis of billing only, and so fall outside the scope of Article 3(3).

d) Where Article 3(3) is not engaged, or where a measure is found not to amount to traffic-based discrimination according to Article 3(3), then Article 3(2) is engaged. The CJEU authorities establish that where Article 3(2) is engaged, and the obligation to respect the rights laid down in Article 3(1) is therefore also engaged, it is important to conduct an analysis which focuses on the effects of the ISPs conduct, i.e. whether the conduct/measure/tariff impacts the end-users' rights under Article 3(1) (*Telenor* at [30]). This Article 3(2) assessment must be undertaken on a case-by-case basis (*Telenor* at [43]).

17. In any event, if inconsistencies arise between the rulings then those inconsistencies should be resolved in line with the position set out in *Telenor*, both on the basis of the precedential superiority of *Telenor* that we outlined above and the fact that, in our view, the ruling in *Telenor* lays down the more analytically sound approach.

18. We express our views on the particular issues that arise about the substantive relationship between rulings in our responses to Questions 1 and 2, below.

D. QUESTION 1: ZERO-RATING OPTIONS NOT COUNTING TRAFFIC

[7] The CJEU in *Telenor* finds that zero-rated tariffs which combine the zero-rating element with "*blocking or slowing down traffic*" are contrary to Article 3(3): [54]. The CJEU in *DT* finds that zero-rated tariffs which combine the zero-rating element with a "*limitation on bandwidth*" are contrary to Article 3(3): [36].

[8] The CJEU in both *Vodafone* cases found that zero-rated tariffs which, upon their activation, impose a term of use which provide for a limitation on tethering or roaming are incompatible with Article 3(3): C-5/20 at [33] and C-854/19 at [34] respectively.

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19. In our view, zero-rating tariffs that do not count traffic generated by specific (categories of) partner applications towards the data cap of the basic tariff based on commercial considerations could be in line with the first sub-paragraph of Article 3(3) of the Regulation, especially if there is no differentiated traffic management or other terms of use involved such as those found in the CJEU Judgments.

20. There are several reasons for this conclusion.

21. First, in *Telenor*, the CJEU made clear that NRAs/national courts must determine "*on a case-by-case basis*" the application of Article 3 of the Regulation: [28] and [43]. The starting point is that there is therefore no blanket rule applying to all zero-rated tariffs.

22. Second, it is important to recall that the judgments in *Telenor* and *Vodafone/DT* only address the particular tariff measures at issue in those cases, and do not purport to address any and all tariff schemes that may have elements of zero-rating:

    a) *Telenor* makes clear that the CJEU was only dealing with one particular type of zero-rated tariff, namely where the zero-rated tariff continues after the data package has been used up, and there is blocking or slowing of non-preferred content/applications/services. This is clear from [54], which highlights that a particular type of tariff was being considered:

    > *"Article 3 of Regulation 2015/2120 must be interpreted as meaning that packages made available by a provider of internet access services through agreements concluded with end users, and under which (i) end users may purchase a tariff entitling them to use a specific volume of data without restriction, without any deduction being made from that data volume for using certain specific applications and services covered by 'a zero tariff' and (ii) once that data volume has been used up, those end users may continue to use those specific applications and services without restriction, while measures blocking or slowing down traffic are applied to the other applications and services available.." (emphasis added)*

    b) Whilst both the *Vodafone* and *DT* judgments make certain apparently general statements about zero-rated tariffs (see, for example, *Vodafone*, [28]), it is in our view also clear that the CJEU was in both of those cases only confining its remarks to the particular schemes at issue there. It seems to us that, on a proper reading of *Vodafone/DT*, the CJEU found that zero-rated tariffs provided the factual and contextual backdrop against which the unlawful additional measures

operated. In our view, there are two particular features of the schemes at issue in *Vodafone/DT* that are noteworthy:

i. First, the terms of use in the both Vodafone cases. The feature of the zero-rated tariff considered in *Vodafone* (C-5/20) on which the CJEU focussed in its judgment was the limitation on tethering for end-users that arose on account of the activation of a zero tariff option. This limitation operated such that data consumption upon usage via tethering would count towards the basic tariff data volumes rather than the zero-rated data volume ([8], [13]). We also note that the feature of the zero-rated tariff considered in C-854/19 on which the CJEU focussed in its judgment was the term of use which provided for a limitation on use when roaming on account of the activation of the zero-rated tariff. This limitation operated such that data consumption upon usage whilst roaming would count towards the basic tariff data volumes rather than the zero-rated volume ([8], [34]). The CJEU found that it was this limitation on tethering (C-5/20 at [31]) or limitation on roaming (C-854/19 at [34]) arising on account of the activation of the zero tariff option that was contrary to Article 3(3)– therefore, it is the fact of there being an *additional* condition of use applicable only to zero-tariff packages that rendered those packages discriminatory. It seems that any such additional term of use would fall foul of Article 3(3), irrespective of the "*form or nature*" of the term (*Vodafone* at [32]).

ii. Second, the technical measures present in the tariff option in *DT*. A feature of the tariff options in *DT* was that not only did use of the partner apps not count towards the data volume limit, but there was also a reduction in transfer speed for video streaming which applied to the services, content and applications offered by both partners and non-partners. It is particularly obvious in the conclusion of the CJEU in *DT* at [36] that it was the "*limitation on bandwidth on account of the activation of a 'zero tariff' option*" (emphasis added) that was incompatible with the obligations arising from Article 3(3).

In other words, it was the combination of a technical measure or additional term

of use *and* a commercial offer (zero rating) that was crucial, and not zero rating in isolation or zero rating generally: the zero-rated tariff was the conduit through which the unlawful bandwidth reduction, tethering limitation or roaming limitation operated. Thus, in our view, when the CJEU refers to "zero tariff" or "zero rating", it is referring to the particular tariffs at issue in that case which, crucially, in *DT*, also involved technical measures which slowed down access for certain categories of application (video) above certain limits, and, in *Vodafone*, unique terms of use limiting the use of internet access. The Court was not considering all zero-rated tariffs.

That is why, for example, the CJEU says in *Vodafone* at [28] and in *DT* at [30] that it is concerned with "*a 'zero tariff' option, such as that in issue in the main proceedings*" (emphasis added).[9] Therefore, in our view it is only these zero tariff packages which combine a zero tariff element with an additional technical measure or term of use such as those in the CJEU Judgments that should be seen as inconsistent with Article 3(3) by their "*very nature*" (*Vodafone* at [28]).

c) Finally, it is worth reiterating the point made in Section C above that it is inherent in the nature of the preliminary ruling procedure that it focuses on the matters in dispute in the case before the referring national court.

23. Third, and relatedly, it would in our view be incorrect to interpret Article 3(3) in a way which assumes that all zero-tariff packages are necessarily discriminatory in the sense of failing to "*treat traffic equally*". As explained above, the packages at issue in *DT* and *Vodafone* were found to be discriminatory as a result of the technical measure and/or term of use that was combined with the zero tariff element of the package. Zero tariff packages *per se* were not found to be discriminatory and, in our view, should not be found to be so. This is for two reasons:

a) First, zero rating itself, which is not combined with additional technical measures or terms of use such as those in the CJEU Judgments, is a mere commercial offer: it differentiates based on the billing of different categories of

[9] See also Vodafone at [33] ("such a tariff option").

traffic[10] - not on the basis of traffic treatment. Therefore, it is not a relevant form of differential treatment for the purposes of Article 3(3) subparagraph 1, which is concerned only with traffic-based discrimination (the obligation being that ISPs must "*treat all traffic equally*" (emphasis added)).

b) Second, even if it is found to be a relevant form of differential treatment for the purposes of Article 3(3) subparagraph 1 on the basis that it relates to the treatment of "*traffic*", in our view this does not necessarily suggest that the treatment is discriminatory. It is telling that there are examples of NRAs finding, in line with *Telenor's* case-by-case approach, that zero-rating can be applied in a non-discriminatory way - for instance, the ACM in the Netherlands found that a zero-rating service offered by T-Mobile was "*offered in a non-discriminatory manner*".[11] NRAs are expressly authorised, and indeed expected, under Article 5 of the Regulation to ensure compliance with Article 3. This finding by the ACM therefore suggests that, in principle, it is possible to offer tariffs with a zero-rating element without falling foul of Article 3(3) subparagraph 1. Further, it should be noted that, practically speaking, the consequence of such NRA determinations must be that, in light of the European legal order's respect for the principles of *res judicata* and legal certainty, at least some tariff options with zero-rating elements will continue to be regarded as non-discriminatory.

24. Fourth, it is significant that in *Telenor* the CJEU (and Advocate General) made clear that the rights granted to "*end-users*" under Article 3(1) involve not only the right to access all content, applications, and services, but also the right to supply and distribute such content, applications, and services.[12] At the very least, this must mean that open class-based zero-rated offers which allow any content or application provider who meets set criteria to join the list of zero-rated applications must be permissible under the first subparagraph of Article 3(3), since they: (i) further the right of end-users to supply and distribute content; and (ii) involve no discrimination between end-users who are

10 We note that differentiation on the basis of billing is a justifiable form of differential treatment under Article 3(2), which expressly allows differential treatment on the basis of characteristics such as "*price, data volumes, or speed*" so long as that differentiation does not limit the exercise of Article 3(1) rights by end-users.

11 https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=60715

12 See, e.g., [AG37].

accessing such content. Any "favouring" of particular content/apps/services under such an open system is not a function of the zero-tariff itself but involves the consumer exercising a free choice between an open suite of content/apps/services - this free choice being the very right that is conferred by the Regulations under Article 3(1) ("*End-users shall have the right to … use … applications and services … of their choice")*. Accordingly, this is one example of a zero-rated tariff that is permissible if not combined with additional technical measures or terms of use such as those applied in the tariffs subject to the CJEU Judgments.

25. Fifth, if the arguments above are not accepted, such that it is BEREC's view that the implication of *DT/Vodafone* must be that zero-rating as a purely commercial arrangement will fall foul of Article 3(3), then in our view this outcome would be contrary to the ruling in *Telenor*. We have explained that *Telenor* established that the starting point is that no blanket rule applies to all zero-rated tariffs, and that the judgment in *Telenor* is hierarchically superior to those in *DT/Vodafone*. Therefore, in the event that *Telenor* and *Vodafone/DT* are found to be inconsistent in their approach to the discriminatory nature of zero-rating *per se*, it is the *Telenor* approach that has greater precedential force. Accordingly, we would suggest that it is the *Telenor* approach that should be preferred by BEREC when preparing its Guidelines on the Implementation of the Open Internet Regulation.

E. QUESTION 2: DIFFERENTIATED BILLING BASED ON COMMERCIAL CONSIDERATIONS

26. In our view, against the background of the CJEU Judgments, we consider that Article 3(2) has a central role to play in assessing the legality of zero-rated tariffs. In our view, zero-rated tariffs which do not contain additional traffic management measures or conditions of use are capable of complying with Article 3(2), which compliance must be assessed on a case-by-case basis.

(i) The legality of zero-rated tariffs without additional measures should be assessed under Article 3(2)

27. In our view, there are two routes to this conclusion.

28. First, in our view it is appropriate to consider tariffs which contain an element of zero-

rating *per se* (i.e. those which are commercial offers and are not combined with additional technical measures or terms of use such as those in the CJEU Judgments) under Article 3(2) in addition to, or instead of, Article 3(3). In other words, compatibility with Article 3(3) is not necessarily a prior question to that of compatibility with Article 3(2) in the context of zero-rated tariffs. This is for the following reasons:

a) The CJEU's expression of the interrelationship of Articles 3(2) and 3(3) suggests that Article 3(3) compatibility is not necessarily a prior inquiry to Article 3(2) compatibility. It is true that the CJEU has expressed that it is *possible* to refrain from determining whether an ISP's conduct complies with the obligations arising from Article 3(2) of the Regulation if that conduct is found to be incompatible with Article 3(3) (*Telenor* at [28]).[13] However, the CJEU has not said that it is *necessary* to refrain from an Article 3(2) determination at all. In *Telenor,* the Court considered the issue of the zero-rated tariff's compatibility with the Regulation under both Article 3(2) and Article 3(3) - it therefore seems that a zero-rated tariff can properly be considered under both heads.

b) This is consistent with our understanding of the substantive relationship between Articles 3(2) and 3(3). If a tariff does not discriminate on the basis of traffic, it falls outside the purview of Article 3(3); see paragraph 16(a) above. Instead, the tariff's legality falls to be examined under Article 3(2) and the effects-based analysis it requires; see paragraph 30 below.

c) Any suggestions in *DT* and *Vodafone* that Article 3(3) compatibility is necessarily a prior question to Article 3(2) compatibility in <u>all</u> cases of zero-rated tariffs should be found to be incompatible with *Telenor*. The CJEU in both *DT* and *Vodafone* expanded upon *Telenor* by suggesting that that a failure to fulfil the obligation of equal treatment of traffic cannot be justified under the principle of freedom of contract as recognised in Article 3(2) (*DT* at [23], *Vodafone* at [22]). In our view, this should not be taken to mean that Article 3(3) compatibility is a prior question in all zero-rating cases, for two reasons:

[13] See also *DT* at [25], *Vodafone* at [22].

i. First, as we have explained above, our view is that zero-rating *per se* does not treat *traffic* differently. Instead, it differentiates on the basis of billing. Therefore, the differentiation at play in tariffs with elements of zero-rating, that do not combine this with technical measures or terms of use, is not a relevant form of differentiation for Article 3(3) subparagraph 1 (which is concerned with traffic-based discrimination). Article 3(3) is therefore not engaged, and there is no scope for considering compatibility with Article 3(3) as a prior question. Article 3(2) is therefore the appropriate Article under which to assess zero-rated tariffs that are mere commercial offers.

ii. Second, if it is not accepted that Article 3(3) is not engaged in the case of zero-rated tariffs that are mere commercial offers, and these statements by the CJEU in *DT* and *Vodafone* are taken to suggest that Article 3(3) compatibility is necessarily a prior question in all cases, then in our view this is inconsistent with the structure of the reasoning *Telenor*. The CJEU in *Telenor* considered the issue of the tariff's compatibility with the Regulation under both Article 3(3) and Article 3(2), and found incompatibility under both heads – this suggests that it is not the correct approach to end the assessment after finding incompatibility with Article 3(3). As we explained above, the judgment in *Telenor* is hierarchically superior to those in *DT* and *Vodafone*, and the approach to the relationship between Articles 3(2) and 3(3) expressed in *Telenor* should therefore be preferred.

29. Second, even if it is appropriate to view compatibility with Article 3(3) as a necessarily prior question to compatibility with Article 3(2) compatibility in every zero-rate tariff case, our view, expressed above, is that not all tariffs containing elements of zero-rating will fall foul of Article 3(3) subparagraph 1. In our view, tariffs which contain elements of zero-rating as a purely commercial offer, without additional technical measures or terms of use such as those in the CJEU Judgments, will not necessarily fall foul of Article 3(3) subparagraph 1 as they can be applied in a non-discriminatory manner. Consequently, these measures should continue to be considered pursuant to Article 3(2) as a matter of course.

(ii) Zero-rated tariffs are capable of complying with Article 3(2)

30. In our view, zero-rated tariffs that are purely commercial offers are capable of being compliant with Article 3(2) of the Regulation. Article 3(2) requires that agreements and commercial practices should not limit the exercise of the rights of end-users laid down in Article 3(1). The CJEU suggested in *Telenor* that this assessment, in contrast to that undertaken in respect of Article 3(3) subparagraph 1, is an "effects" analysis: the analysis focuses on the impact of the agreement or commercial practice on the end-users' rights, rather than the nature of the agreement or commercial practice itself.[14] Bearing in mind that the assessment is ultimately made on a case-by-case basis,[15] our view is that, if this effects analysis was performed on zero-rated tariffs that are purely commercial offers, then there would be scope for finding that these measures actually *facilitate* rather than limit the exercise of the rights by end-users. "End-users" includes both professionals/consumers who access content, applications and services, and professionals who distribute content, applications and services: *Telenor* at [39].

31. In our view, zero-rated tariffs further rights of both categories of end-user:

    a) First, professionals and consumers who access content/applications/services. In a competitive market, zero-rated tariffs allow consumers to use, overall, more data. It is likely that zero-rated applications will include major applications such as Facebook, Whatsapp or Spotify: those applications that the consumer would, but for the zero-tariff, dedicate a large portion of their basic data allowance to. Therefore, the zero-rated tariff in fact facilitates the consumer accessing a greater range of content, applications and services falling outside of the zero-rated offer because they may not feel to compelled to conserve their basic data allowance for use on the apps they most often use.

    b) Second, service-providers who provide content/applications/services. The above consumer-based analysis suggests that zero-rated tariffs result in consumers having an increased level of data-liquidity. Consequently, zero-rated tariffs could also facilitate service providers distributing the content, applications and

14 *Telenor* at [39] and [43].

15 *Telenor* at [43].

services that they provide, as there will be an increased level of market opportunity and real demand – data that would normally be allocated by a consumer for use on the major applications could instead be allocated to the content, applications or services provided by smaller market players.

32. We should highlight, however, the risk that, if the views that we have expressed are not accepted by BEREC, Article 3(2) will be rendered redundant in the context of zero-rated tariffs in light of the *DT/Vodafone* rulings. This is because, if it is found that the *DT/Vodafone* rulings mandate (i) that all zero-rated tariffs fall foul of Article 3(3), and (ii) that Article 3(3) compatibility is necessarily a prior question in all zero-rated tariff cases to Article 3(2) compatibility, then zero-rated tariffs will never fall to be considered under Article 3(2). In our view, this would be a flawed result, for two reasons:

a) First, this outcome risks undermining the purpose of Article 3(2) in the context of zero-rated traffic, namely the "*freedom of every end user to choose the services through which he or she intends to exercise the rights safeguarded by"* the Regulation (*Telenor* at [33]).

b) Second, this outcome fails to give proper effect to the clear division of labour between Article 3(3) and Article 3(2) that is envisaged by the EU legislature and has been recognised by the CJEU. Article 3(3) can be viewed as a provision that focuses on the nature of an ISP's product or service – a traffic management measure which blocks, slows down, alters, restricts, interferes with, degrades or discriminates between applications or services will fall foul of Article 3(3), irrespective of whether the result of this is, in practice, to impact the end users' rights under Article 3(1) (*Telenor* [49] – [50]). By contrast, Article 3(2) requires the relevant agreement or commercial practice to be assessed, on a case-by-case basis, according to the effect of that agreement or practice on the rights afforded by Article 3(1) to end-users: *Telenor* at [39] and [43]. Therefore, to interpret the *DT/Vodafone* judgments in a way that renders Article 3(2) redundant in zero-rated tariff cases undermines the division of labour between the Articles that was outlined in *Telenor.* As explained above, the *Telenor* ruling is hierarchically superior to *DT* and *Vodafone* rulings, and BEREC should therefore strive to interpret the judgments in line with the position envisaged by the CJEU in

Telenor.

c) Finally, it is a cardinal principle of statutory construction that the legislature intended to give effect to each provision of a piece of legislation such as the Regulation. We consider that a finding that all zero-rated tariffs are unlawful under Article 3(3) would render Article 3(2) nugatory in this context. This cannot be what the EU legislature has intended.

33. For those reasons, we consider that zero-rated tariffs, which do not contain additional measures such as those in the CJEU Judgments, do not fall foul of the prohibition against traffic-based discrimination in Article 3(3) because they do not constitute traffic-based discrimination. They must therefore be examined under Article 3(2) on a case-by-case basis taking into account the effect of the tariff on end-user's rights contained in Article 3(1). In most competitive retail markets, our view is that, subject to further evaluation, zero-rated tariffs further rather than limit the rights contained in Article 3(1).

F. CONCLUSION

34. In light of the foregoing, our answers to the three questions posed by BEREC are as follows:

a) We consider that zero-rated tariffs are in principle capable of complying with the prohibition against traffic-based discrimination contained in Article 3(3) of the Regulation. In our view, zero-rated tariffs which do not contain additional measures such as those in the CJEU Judgments do not constitute traffic-based discrimination and therefore do not fall within the scope of Article 3(3). Rather, we consider that such tariffs amount to differential treatment on the basis of billing, as envisaged by Article 3(2).

b) In our view, Article 3(2) is the governing Article to determine the legality of a tariff, except in the case of traffic-based discrimination which falls to be examined under Article 3(3). The type of measures which are caught by Article 3(3) are the additional, traffic-based measures found in the CJEU Judgments (such as limitations on bandwidth for certain categories of application or

tethering). Zero-rated tariffs which do not contain such limitations fall to be examined under Article 3(2), pursuant to which the legality of the tariff must be assessed by reference to the effect of the tariff on the access and distribution rights enshrined in Article 3(1). In most competitive retail markets, we consider that zero-rated tariffs further the rights enshrined in Article 3(1), and are therefore lawful as a matter of EU law.

c) We consider that the CJEU Judgments are consistent. Between them, the cases establish the analytical framework contained in our answers to Questions 1 and 2. In other words, other than traffic-based discrimination which falls to be examined under Article 3(3), the legality of tariffs must be assessed under Article 3(2) read together with Article 3(1).

35. If we can assist further, please do not hesitate to be in touch.

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