The Consumer Voice in Europe

BEREC CALL FOR STAKEHOLDER INPUT - INCORPORATION OF CJEU JUDGMENTS ON OPEN INTERNET REGULATION IN BEREC GUIDELINES

BEUC's response

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Why it matters to consumers

Protecting net neutrality both by law and in practice ensures consumers can access and surf the internet in a non-discriminatory way. Safeguarding the right to access an open and neutral internet also preserves the internet as a decentralised engine of innovation. It allows for more competition and therefore more consumer choice. Now that the Court of Justice of the EU has provided an authoritative interpretation of the Open Internet Regulation, clarifying how EU net neutrality rules apply in practice, it is crucial to refine ambiguous wording in the current legislation by reviewing the relevant guidelines in accordance with the latest rulings.

Summary

BEUC generally welcomes the decision to review the BEREC Guidelines on the Implementation of the Open Internet Regulation in line with the latest rulings of the CJEU (C 34/20 – Telekom Deutschland, C-854/19 – Vodafone and C-5/20 – Vodafone) where the Court considered that offers applying a 'zero-tariff' to specific apps - and therefore limitations that derive from the activation of these options - are illegal under EU law. BEUC considers that "zero-rating" offers are a violation of the principle of net neutrality and the Open Internet Regulation, regardless of differentiated traffic management measures. Such offers do not meet the conformity test of Article 3(2) on account of the inherent incentives that from them arise; however, other differentiated billing practices could meet the test of Article 3(2). Moreover, both the approaches of the current rulings and previous CJEU case-law on net neutrality are complementary.

BEUC – The European Consumer Organisation welcomes the opportunity to respond to the Body of European Regulators for Electronic Communications (BEREC)'s call for input to feed into the incorporation of the Court of Justice of the European Union (CJEU) judgments on the Open Internet Regulation in the BEREC Guidelines. Below, BEUC provides answers to the three questions placed by BEREC to stakeholders where we provide our reading of the three rulings. Given the limited scope of the questions, we refer to BEUC's consolidated positions as well regarding the principle of net neutrality.

For the purposes of this paper, Regulation 2015/2120 on the Open Internet Regulation will be hereafter referred to as "the Regulation".

1. "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(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?"

No. Zero-rating offers stand out as a clear violation of the principle of net neutrality and of the Regulation. Although the letter of the law does not expressly refer to the concept of zero-rating as such, Articles 1 and 3, as well as recitals 1 and 7 of the Regulation provide elements to consider this should be a forbidden practice. Moreover, the consistent reasoning of the Court in its relevant case-law provides for authoritative interpretations of the Regulation in this regard.

In accordance with the general principles of EU law and its settled case-law, comparable situations should not be treated differently, and different situations should not be treated in the same way unless such treatment is objectively justified. According to Article 3(3), first subparagraph of the Regulation, "providers of internet access services should treat all traffic equally, without discrimination, restriction, or interference, independently of its sender or receiver, content, application or service, or terminal equipment". **Article 3(3) thus establishes a clear prohibition of "general, unconditional and objective nature",** in so far as it "proscribes any traffic management measure which is not reasonable (within the meaning of paragraph 3) and does not contribute towards the fair and non-discriminatory treatment of that traffic" (*Opinion, Joined Cases C807/18 and C39/19 Telenor Magyarország, Advocate General Campos Sánchez-Bordona, para. 66*).

On its first ruling on net neutrality, *Telenor Magyarország* (cases C-807/18 and C-39/19), the **Court confirmed that, in case of infringement of Article 3(3) of the Regulation, there is no longer a need to specify whether the provisions of Article 3(2)** have also been infringed or to carry out a detailed evaluation of the market and of the impact of the measure: "no assessment of the effect of those measures on the exercise of end users' rights is required" (para. 47 to 51).

On the current rulings at hand (*Cases C-854/19 Vodafone, C-5/20 Vodafone and C-34/20 Telekom Deutschland*), the Court considered that a **"zero-rating" option is a clear violation of the general prohibition of Article 3(3) as it "draws a distinction within internet traffic, on the basis of commercial considerations,** by not counting towards the basic package traffic to partner applications", therefore amounting to "a commercial practice that does not satisfy the general obligation of equal treatment of traffic, without discrimination or interference" protected by Article 3(3) of the Regulation (para. 30, C-34/20).

Moreover, the Court pointed out that **the failure to comply with Article 3(3) is inherent to the very nature of zero-rating options on account of its incentives, regardless of which, or any, limitations derived from them**: "the 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" (para. 31, C-34/20).

The Court therefore **confirmed the nature of Article 3(3), first subparagraph as a truly "general, unconditional and objective" prohibition**, which a**pplies to a broader scope of practices regarding the treatment of internet traffic**. Indeed, the

Court went beyond traffic management by establishing that a **discriminatory practice** on the basis that it "draws a distinction within internet traffic, on the basis of commercial considerations" **alone shall suffice to consider an infringement** (para. 30 C-34/20). The Court also made a point of recalling having previously stated in *Telenor Magyarország* (para. 28) that "where the conduct of a provider of internet access services is incompatible with Article 3(3), it is possible to refrain from determining whether that conduct complies with obligations arising from Article 3(2)", clarifying that "**a failure to fulfil the obligation of equal treatment of all traffic cannot be justified under the principle of freedom of contract**" (para. 23 to 24, C-854/19).

Moreover, the language of the Court is **consistent with the letter of the law**: Article 3(3), first subparagraph expressly mentions that it shall apply to treatment of traffic: "Providers of internet access services shall treat all traffic equally [...]". Only the second and third subparagraphs mention the term "traffic management ", further elaborating on the scope of application of Article 3(3) - not restricting it. **These terms are, therefore, not mutually exclusive, but of complementary nature.**

2. "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?"

According to Article 3(2), together with Recital 7 of the Regulation, it is clearly stated that **commercial practices** between providers of internet access services and providers of online content or services **cannot undermine the end-user rights established in Article 3(1)**.

In the rulings at hand, the Court expressly recalled the importance of *Telenor Magyarország*, specifically quoting paragraph 28, where it stated that "where the conduct of a provider of internet access services is incompatible with Article 3(3), it is possible to refrain from determining whether that conduct complies with the obligations arising from Article 3(2)", proceeding to clarify that a "**failure to fulfil the obligation of equal treatment of all traffic cannot be justified under the principle of freedom of contract**"(para. 23 and 24, C-854/19).

The three cases referred to the Court concern "open" zero-rating offers, where entire categories of applications that can be joined by providers of applications and services are subject to certain conditions. As interpreted by the Court, **such zero-rating offers do not meet the conformity test of Article 3(3), first subparagraph.**

In detail, the Court said that the **nature of these offers inherently fails to meet the conformity test with Article 3(3) of the Regulation**, **regardless of which, or any, limitations may derive from their application**: "the 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" (para. 31, C-34/20).

The Court therefore places its **main concern on the incentives that may arise on account of the application of zero-rating offers,** incentives which could be created when differentially billed individual applications and services encourage consumers to **make primary or exclusive use of certain applications, regardless of limitations**.

Nonetheless, **certain differentiated billing practices may be considered in conformity with the letter of Article 3(2):** agreements customized "on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed". Such differentiated billing practices would be those **agreements where such incentives** to use specific applications or services or categories of applications or services **do not inherently arise**, such as application-agnostic differentiated billing (for example, customized offers where the end-user, according to different price rates, is provided with different Quality of Service characteristics or with a service that takes an overall lower priority among all traffic in cases of congestion).

3. "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, C-39/19 – Telenor Magyarország)?"

These judgments should be understood as **complementary** as they present **two distinct but complementary approaches**. While *Telenor Magyarország* focuses essentially, on the one hand, on the application of Article 3(1) and (2) and the assessment of offers under Article 3(2), **the current rulings focus on the application of the general prohibition of Article 3(3)**. On the one hand, *Telenor Magyarország* assessed zero-rating offers according to Article 3(1) and 3(2), and, in assessing these according to Article 3(3), focused on practices of traffic management and its limitations. On the other hand, the recent rulings at hand assessed the zero-rating offers focusing on the **treatment of traffic and its inherent incentives**, **regardless of which, or any, limitations.**

This also **appears to be the view of the Court**: in the current rulings at hand, the Court invokes as relevant its previous considerations in *Telenor Magyarország*, expressly recalling paragraph 28 of the judgment, to reiterate that "where the conduct of a provider of internet access services is incompatible with Article 3(3), it is possible to refrain from determining whether that conduct complies with the obligations arising from Article 3(2)", clarifying that a "failure to fulfil the obligation of equal treatment of all traffic cannot be justified under the principle of freedom of contract" (p.23 to 24, C854/19). This is relevant as, unlike in *Telenor Magyarország,* which focused on a particular type of treatment of traffic (traffic management), **the current rulings have a broader scope of application** ("traffic treatment").

The Court thus proceeds to build on this basis, ultimately considering that **a "zero-rating" option violates Article 3(3) as it "draws a distinction within internet traffic, on the basis of commercial considerations".** The Court then considers that these offers inherently fail to meet the conformity test of Article 3(3), a **failure that "results from the very nature of such a tariff option on account of the incentives arising from [them]"** and "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" (para. 30-31, C-34/20).

It should be recalled that, already in his *Telenor Opinion*, Advocate General Campos Sánchez-Bordona considered that **zero-rating options**, when applied in respect of certain applications, **amount to "discriminatory traffic management measures [which] will be unlawful for infringement of [article 3(3)]**, inasmuch as it will have breached an obligation of fair treatment, which is a mandatory condition for enjoyment of the rights under rights [Article 3(1)] ".

In the current rulings, the Court appears to have therefore **clarified that, when assessing zero-rating offers with respect to their inherent incentives, their incompatibility with Article 3(3) is inherent to their nature**, an incompatibility which **remains irrespective of which or any limitations derived from the offers in question**. The violation of Article 3(3) therefore persists, simply on account of the incentives *lato sensu* that arise from such offers, which in the current case, encourage the consumers to make primary or exclusive use of certain applications, regardless of limitations.

The Court thus complements and brings into line its previous case-law by clarifying that **zero-rating options, on account of the incentives arising from it, should fall under the prohibition of general, unconditional, and objective nature of article 3(3).**

END

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