# Deutsche Telekom response to BEREC regarding ECJ judgments on zero rating

Thank you for giving us the opportunity to provide input on the recent rulings issued by the European Court of Justice ("**ECJ**") on 2 September 2021 (C 34/20 – Telekom Deutschland, C-854/19 – Vodafone and C-5/20 – Vodafone - together "**ECJ Rulings**") regarding the Open Internet Regulation 2015/2120 (the "**Regulation**"), in particular in light of the case law of the ECJ and the articles of the Regulation. We would like to comment as follows:

## A. Introduction

"Zero-rating" is both a broad label and concept for various kinds of offerings existing on the mobile internet access markets. All zero-rating offers have in common that when the option is purchased and activated certain internet traffic generated by specific (categories of) partner applications does not count towards the data volume of the basic tariff. However, **zero-rating offers differ substantially in many key aspects** - both technically and commercially - and thus in their impact on competition and consumer interests.

The diversity of zero-rating offers in the markets and their different effects call for a **nuanced and differentiated regulatory approach**. Only such a differentiated approach reflects the commercial and technical diversity of offerings and the intentions of the European legislator. Not less important, a **proportionate regulation** under the rule of law can only be achieved by such a differentiated approach.

Deutsche Telekom appreciates that BEREC, in the past, has been very clear in its guidance to the national regulatory authorities that when assessing zero-rating offers the technical and commercial conditions of such offerings must be looked at closely and specifically, in particular with regard to the key issues of which traffics are included, whether the offers are open or closed for content providers and how traffics are being treated once a general data cap as been exhausted (see for such detailed and differentiated assessment: para. 40–48 of the BEREC Guidelines on the Implementation of the Open Internet Regulation dated 11 June 2020, BoR (20) 112 ("**BEREC Guidelines**").

Deutsche Telekom is of the opinion **that such differentiated approach can still be upheld** after taking the ECJ Rulings into account in particular on the basis of a detailed analysis of the provisions and explanations of the Regulation and the *Telenor Magyarország* ruling of the ECJ from 15. September 2020 (Joined Cases C-807/18 and C-39/19 – "**Telenor Ruling**"). However, any too broad interpretation of the ECJ Rulings would lead to an abundance of zero-rating offers and potentially even other favorable end customer offers by Internet access providers and would therefore substantially harm the end consumer and the telecommunication markets in general.

In our response, we will describe below first our general understanding of Art. 3 of the Regulation (Question #1) and then show why this is in line with the ECJ Rulings (Questions #2 and #3).

## B. General analysis of Art. 3 of the Regulation (Question #1)

Art. 3 of the Regulation implements the electronic network specific principles of non-discrimination under European law and therefore stipulates the fundamental obligation of all Internet

access service providers ("**ISPs**") to treat all data traffic equally. This principle of equal treatment is intended to ensure that the Internet remains "an open platform" for services and content of all kinds and requires that the ISPs must treat all Internet communications equally, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.

Art. 3 of the Regulation implements this principle of equal treatment of all data traffic as follows:

- **Paragraph 1** establishes the right of end users to free access to the open Internet, whereby end users are both consumers as well as content providers.

- **Paragraph 2** governs the contractual relationship between end users and ISPs. Their agreements, namely on "*price, data volumes or speed*," may not restrict the rights of end users as stipulated in paragraph 1.

- **Paragraph 3** finally regulates **the technical transport of data** in the network of the ISPs. In this respect in implementing the electronic network specific principles of non-discrimination, according to Art. 3 (3)(1) of the Regulation the ISPs **shall treat all traffic equally**, when providing Internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used. Article 3 (3)(2) and (3)(3) of the Regulation then define – as an exception to the principle of equal treatment – certain traffic management measures that are permissible or exceptionally justified.

Art. 3 (2) of the Regulation first of all recognizes the permissibility of agreements between ISPs and end customers on the commercial and technical conditions of Internet access services and thus implements the general principles of contractual freedom and consumer choice in the Regulation.

Art. 3 (3) of the Regulation on the other hand deals with the technical transport of data and therefore with all traffic measures implemented by an ISP.

The relationship between Art. 3 (2) and (3) of the Regulation – i.e. the relationship between contractual freedom and consumer choice on the one hand and the principle of equal treatment of all data traffic on the other hand – has been quite unclear in particular with respect to traffic measures that are implemented as a consequence of a contractual agreement (like e.g. in case certain Internet traffic is slowed down by the ISP as a consequence of a tariff agreed between the ISP and the end customer). Such contractually agreed traffic measures could either only be covered by Art. 3 (2) of the Regulation or – additionally – by paragraph 3.

In this respect the ECJ has decided in the Telenor Ruling that technical measures used to block or slow down data traffic fall under Art. 3 (3) of the Regulation, regardless of whether they are based on an agreement with the ISP (Telenor Ruling, para. 51). The ECJ has, however, in the Telenor Ruling reviewed in parallel, whether the respective contractual agreement violates Art. 3 (2) of the Regulation. The ECJ has further made it clear in the Telenor Ruling **that only traffic measures based on contractual agreements are to be reviewed on the basis of Art. 3 (2) and (3) of the Regulation, whereas pure contractual arrangements without any impact on the**

**technical transport of data are to be assessed solely on the basis of paragraph 2** (Telenor Ruling, para. 51 ff.).

This analysis is also supported by the wording of Art. 3 (3) of the Regulation, which in subparagraph 1 and recital 8 requires that the ISPs "*shall treat all traffic equally*" and speaks in subparagraph 2 and 3 of *"traffic management measures"* that are permissible or exceptionally justified. The use of the term "*traffic*" and *"traffic management measures"* makes it clear that Art. 3 (3) of the Regulation only applies to traffic measures implemented by ISPs but not to pure commercial agreements between ISPs and end users.

This implies the following for the legal review of zero-rating offers:

- Zero-rating offers which include certain technical measures providing for an unequal treatment of the traffic are to be reviewed on the basis of Art. 3 (2) and (3) of the Regulation ("**Technical Zero-rating Offers**"); whereas

- Zero-rating offers which consist only of tariff elements and provide for an equal treatment of the Internet traffic ("**Commercial Zero-rating Offers**") are only to be reviewed on the basis of Art. 3 (2) of the Regulation.

The difference between these zero-rating options becomes clear when the different products on which the ECJ cases have been based on are reviewed: In the Telenor Ruling the zero-rating offer was a Technical Zero-rating Offer as it provided preferential treatment for certain services pre-selected by the ISP after the exhaustion of the agreed data cap with the consequence that the traffic of such services was then transported without restriction, whereas the traffic of all other services was slowed down. By contrast, in the Deutsche Telekom ECJ Ruling the zero-rating offer "*StreamOn*" was a Commercial Zero-rating Offer as it is not limited to specific services and does not treat any Internet traffic of the participating partners differently before or after the exhaustion of the agreed data cap.

Any legal review of a zero-rating offer therefore needs to generally differentiate between these 2 types of zero-rating options **as only the Technical Zero-rating Offer needs to be reviewed on the basis of Art. 3 (3) of the Regulation whereas Commercial Zero-rating Offers only need to meet Art. 3 (2) of the Regulation** (as these offers are already structurally in line with Art. 3 (3) of the Regulation)**.** As a consequence Commercial Zero-rating Offers, which merely provide that certain data traffic is not counted toward the data volume purchased by the end user and therefore contain a purely commercial solution (like e.g. the StreamOn product of Deutsche Telekom) are only to be reviewed on the basis of Art. 3 (2) of the Regulation.

This approach is in line with the current position of BEREC, which reviews zero-rating offers mainly on the basis of Art. 3 (2) of the Regulation except in cases where the zero-rating offer also has an impact on the technical transport of data (BEREC Guidelines, para. 40 seqq.). This approach is further in line with the current position of the EC Commission, which also backs this approach (Report on the implementation of the open internet access provisions of Regulation (EU) 2015/2120, COM(2019)203, p. 3 seqq.).

The Regulation does not detail the review required according to Art. 3 (2) in connection with Art. 3 (1) of the Regulation. According to the BEREC Guidelines, a comprehensive case-by-case examination must be carried out taking into account all effects of the respective Commercial Zero-rating Offer in particular with respect to the market development and the effects for the consumers and the content providers (BEREC Guidelines, Rn. 46). In our view, a Commercial

Zero-rating Offer, like e.g. StreamOn, that has the following characteristics must generally be regarded to be compliant with Art. 3 (1) and (2) of the Regulation:

- All content providers have non-discriminatory and low-threshold access to become a zero-rated content partner.

- Such non-discriminatory and low-threshold access can be demonstrated in particular by the number and diversity of partner services. In particular, national regulators should take into consideration that the offer is open to all content providers, regardless of their offer, market position or size. The openness of an offer is shown in particular if it includes smaller (niche) providers (providing them with a platform to compete with the large content providers), providers that have recently entered a market and both public and private undertakings.

- There is no specific technical treatment of the partner services before or after the data cap has been reached.

If these conditions are met all content providers benefit from such open offers, even those service providers, which do not participate as partners: The partner services benefit because the end users can use their services (practically) without restriction. Unlike with other mobile tariffs, users are not limited in their use of these partner services by their data volume in this respect. Non-partner services also benefit due to conserving the inclusive data volume by not counting the partner services against the data package, more data volume is available for all other applications.

Such open offers are also exclusively beneficial for end users: Their usable data volume increases significantly and the end users thus have the opportunity to use their mobile internet access significantly longer and more diversely without having to buy additional data volume. They thus receive more information and more entertainment and can communicate more extensively with their friends and families.

## C. Rulings of the ECJ on Zero-Rating Offers (Question #2 and #3)

The analysis of Art. 3 of the Regulation set out above is in line with both the Telenor Ruling and, if considered in light of the necessary nuanced and differentiated approach to the diversity of zero-rating offers, also with the **objective rationale of the Open Internet Regulation**, referred to in the recent ECJ Rulings.

However, there are differences of legal findings in these rulings, in particular with regard to the impact of zero-rating offers on the Open Internet. By contrast to legislation, the interpretation of differing legal findings in preliminary rulings pursuant to Article 267 TFEU, such as in the Telenor Ruling on the one hand and in the ECJ Rulings on the other hand, **is not subject to a posterior principle**. A more recent preliminary ruling, therefore, does not overrule or supersede an older preliminary decision solely due to a more recent date, in particular if these rulings are issued shortly one after the other. Rather, in such case the **authorities as BEREC (not bound inter partes by these rulings) are obliged erga omnes to find an interpretation of alignment with EU law (and the objective rationale of differing legal findings in these preliminary rulings to the extent possible)**. In any case, the authorities and national courts (not bound inter partes by the respective preliminary rulings) are not obliged to follow an incorrect legal interpretation by one preliminary ruling differing from another.

## I. Interpretation of the Telenor Ruling

From a procedural perspective, the Telenor Ruling has been issued by the Grand Chamber of the ECJ on the basis of an oral hearing and an opinion of the Advocate General, i.e. under high procedural safeguards of legal and factual correctness.

The Telenor Ruling is based on the following line of argument:

- Starting point is that all provisions of Art. 3 of the Regulation seek to safeguard equal and non-discriminatory treatment of traffic in the provision of Internet access services and related end users' rights.

- The Court then concludes that a conduct of an ISP can fall **within the scope of Art. 3 (2) or Art. 3 (3) of the Regulation, or both provisions cumulatively**, and in case a national regulatory authority considers that a particular form of conduct is incompatible in its entirety with Art. 3 (3) of the Regulation it may refrain from determining whether that conduct is also incompatible with Art. 3 (2) of the Regulation.

- The ECJ then reviews the Telenor zero-rating offer in question – as being a commercial agreement – on the basis of Art. 3 (2) of the Regulation. The ECJ comes to the conclusion that a zero-rating offer as the one in question can violate Article 3 (2) of the Regulation, which must be assessed on a case-by-case basis, in the light of the parameters set out in recital 7 of the Regulation.

- The Court then comes to the conclusion of a violation of Art. 3 (2) of the Regulation as the zero-rating offers in question are liable to increase the use of certain specific applications and services, namely those which may be used without restriction on a "zero tariff' once the data volume included in the tariff purchased by customers has been used up, and are, accordingly, liable to reduce the use of the other applications and services available, having regard to the measures by which the provider of the internet access services makes that use technically more difficult, if not impossible.

- The ECJ then analyzes Art 3 (3) of the Regulation. In this respect, the Court first states that this provision, read in the light of recital 8 of the Regulation, imposes on ISPs a general obligation of equal treatment, without discrimination, restriction or interference with traffic, from which derogation is not possible in any circumstances by means of commercial practices conducted by those providers or by agreements concluded by them with end users but only in case the exceptions provided for in Article 3 (3)(2) and (3)(3) of the Regulation apply.

- The Court further assumes a violation of Art 3 (3) of the Regulation through the zero-rating offer in question **as it includes measures blocking or slowing down traffic** related to the use of certain applications and services in particular as 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.

In the Telenor Ruling the ECJ therefore **clearly distinguishes between the mere commercial agreements of an offer** (such as tariffing or differentiated billing) **and measures technically interfering with the transportation of data packages** (such as differentiated traffic management). The Court assesses whether both commercial and technical features of a tariff

("packages, agreements, and measures blocking or slowing down traffic") are compatible with Article 3 (2) of the Regulation. In addition, the Court assesses whether all technical features of a tariff relating to the actual transport of data packages are also compatible with Article 3 (3) of the Regulation. In this respect **the ECJ requires an unequal treatment of traffic as a condition for applying Art. 3 (3) of the Regulation** in the Telenor Ruling.

**The Telenor Ruling is clearly in line with our understanding of Art. 3 of the Regulation** according to which zero-rating offers – as commercial agreements – always need to be reviewed under Art. 3 (2), and only in case such zero-rating offers provide for an unequal treatment of traffic additionally a violation of Art. 3 (3) of the Regulation is possible.

## II. Interpretation of the ECJ Rulings

From a procedural perspective, the ECJ Rulings have been made without an oral hearing, without an opinion of the Advocate General and only by three judges of the small chamber.

In its ruling regarding Deutsche Telekom's offer "*StreamOn*" (Case C-34/20), the ECJ had to decide on a request for preliminary ruling by the administrative court of Cologne. The German court, in essence, asked the ECJ to clarify whether a limitation of bandwidth for video streaming included in an earlier version of "*StreamO*n" complies with the Regulation (Case C-34/20, para. 15).

As also highlighted in BEREC's consultation, the ECJ has not based its decision solely on this legal question but rather extended the scope of its assessment to the question whether the zero-rating tariff option **itself is compatible with the Regulation** (Case C-34/20, para. 15). Consequently, the ECJ assesses whether the StreamOn offer itself (notwithstanding said bandwidth limitation for video streaming) complied with the general obligations of ISP to treat all traffic equally.

The ECJ engages in the following line of argument:

- In a first step, the ECJ restates the Telenor Ruling that an incompliance with the obligation of equal treatment of all traffic (Art. 3 (3) of the Regulation) cannot be justified under the principle of freedom of contract, recognized in Article 3 (2) of the Regulation.

- In a second step, the ECJ reiterates, again with reference to the Telenor Ruling, that any unequal treatment of traffic through traffic management measures may only be justified by objective (technical) differences and not be based on commercial considerations.

- In a third step**,** the ECJ claims that the zero-rating offer in question draws a distinction within Internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications. Consequently, such a commercial practice does not satisfy **the general obligation of equal treatment of traffic, without discrimination or interference,** laid down in Article 3 (3) (1) of the Regulation (Case C-34/20, para. 30).

- Further the ECJ points out that this 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.

- Therefore, based on this assessment, the Court concludes that the (presumed) unequal treatment may neither be justified by agreement (Article 3 (2) of the Regulation) nor as traffic management (Article 3 (3) (2) of the Regulation) as objective reasons were missing.

The interpretation of the ECJ Rulings – in particular of para. 30 of Case C-34/20 – is rather unclear.

One understanding of this section is that the ECJ (erroneously) assumed that data traffic is actually treated differently by Deutsche Telekom in its StreamOn offer so that the scope of application of Art. 3 (3) of the Regulation would be opened. This is suggested in particular by the last sentence of para. 30 of Case C-34/20 which refers to a non-equal treatment of traffic. In this case the ECJ Rulings would be **based on a factual misunderstanding about the product in question, as StreamOn does not treat traffic differently as part of its zero-rating offer. Even then, however, presuming this as a factual misunderstanding, the legal rationale of the ECJ Rulings would be in line with our understanding of Art. 3 of the Regulation** as laid out above.

Alternatively, a different understanding of the ECJ Rulings is possible. It is also conceivable that the ECJ (while understanding that the zero-rating in question does not involve any distinction in the technical data transmission) assumed that a purely tariff-based distinction such as differentiated billing (i.e. the non-counting of certain traffic against the data package) would constitute a non-equal treatment of traffic within the meaning of Art. 3 (3) of the Regulation.

Such understanding of the Regulation **would however contradict the Telenor Ruling and would not be in line with Art. 3 of the Regulation**:

- As described above, the ECJ in the Telenor Ruling clearly distinguishes between the merely commercial agreements of an offer and measures technically interfering with the transportation of data packages and also made it clear that Art. 3 (3) of the Regulation only applies to measures concerning the non-equal treatment of traffic by the ISP through measures such as blocking or slowing down traffic related to the use of certain applications and services.

- First of all, **it seems hardly possible that the ECJ intended to deviate in this major point from the Telenor Ruling**. The ECJ Rulings refer several times to and rely upon the Telenor Ruling. In case the ECJ would have intended to deviate from the Telenor Ruling, the Court would have been held to make this fundamentally new and differing interpretation of Art. 3 (3) of the Regulation clear in its decision and would have needed to argue in its decision why it deviates from the Telenor Ruling as well as from the clear wording of Art. 3 (3) of the Regulation. Also the fact that the ECJ has decided by the small chamber of three judges and without an oral hearing and the involvement of the Advocate General clearly argues against the idea that the ECJ Rulings intend to fundamentally deviate from the Telenor Ruling which have been made by the Grand Chamber of the ECJ on the basis of an oral hearing and an opinion of the Advocate General.

- Moreover, even in case the ECJ Rulings had the intention to deviate in this major point from the Telenor Ruling, **this does not mean that the ECJ Rulings would overrule the Telenor Ruling**. As pointed out before, no such procedural principle exists that a more recent decision overrules or supersedes an older decision solely due to a more recent date. Rather, in such case the authorities as BEREC (not bound inter partes by these rulings) are obliged erga omnes **to find an interpretation of alignment with EU law** (and the objective rationale of different legal findings in these preliminary rulings to the extent

possible). In any case the authorities and national courts (not bound inter partes by the respective preliminary rulings) are not obliged **to follow an incorrect legal interpretation by one preliminary ruling differing from another**.

- In the event of divergence of case law between two chambers of the same court, the oral proceedings held and the opinion of the Advocate General as well as the larger chamber in the Telenor Ruling enjoy a higher degree of scrutiny and thus a greater guarantee of correctness than the decision in the ECJ Rulings issued by the small chamber without any oral involvement of the parties and the Advocate General. Also in the Telenor Ruling the ECJ provides for a coherent interpretation of Art. 3 (1) to (3) of the Regulation, while the decision of the small chamber in the ECJ Rulings lacks any argumentation which would support the deviation from the Telenor Ruling and the substantial expansion of Art 3 (3) of the Regulation.

Such understanding **would further not be in line with Art. 3 of the Regulation:**

- As stated above, the wording of Art. 3 (3) of the Regulation restricts the application of this provision to technical data traffic measures and does not deal with pure commercial tariffs. In this respect Art. 3 (3) and recital 8 of the Regulation requires in subparagraph 1 that the ISPs "*shall treat all traffic equally*" and speaks in subparagraph 2 and 3 of *"traffic management measures"* that are permissible or exceptionally justified. The use of the term "*traffic*" and *"traffic management measures"* makes it clear that Art. 3 (3) of the Regulation only applies to traffic measures implemented by ISPs, but not to pure commercial agreements between ISPs and end users.

  This follows in particular from Art. 3 (3) (2) and (3) of the Regulation which define certain (technical) traffic management measures that are permissible or exceptionally justified. To apply these rules on reasonable or justified traffic management as a justification or exception to instances where traffic is not managed at all, would render the provision meaningless and clearly shows that Art. 3 (3) of the Regulation only covers cases of unequal treatment of traffic. In this respect, the ECJ Rulings lack any argumentation, why Art. 3 (3) of the Regulation should be extended beyond the equal treatment of traffic.

- Such "broad" interpretation of the ECJ Rulings that any (commercial) distinction within Internet traffic on the basis of commercial considerations is a violation of Art 3 (3) of the Regulation and cannot be justified by Art. 3 (2) of the Regulation **would make all zero-rating offers unlawful with the consequence that all zero-rating offers throughout Europe would need to be banned by the European regulators.** This – beyond the legal arguments brought forward above - needs to be rejected also for the following reasons:

  - Such general ban of zero-rating tariffs would, **be detrimental for the consumers as they would lose access to a tariff which offers them free data volume** as well as for the content providers as the consumers would have less data volume available for using their content services. In this respect such ban would clearly violate the general principles **of contractual freedom and consumer choice**.

  - Such ban would further have **a negative effect on downstream service competition as the ISPs would have fewer possibilities to structure competitive rates**.

- Furthermore, such general ban of a certain tariff structure would lead through the back door **to a massive regulatory intervention into end customer tariffs – i.e. an old concept**

**that has been abandoned by the EU legislator on purpose already two decades ago in order to rely upstream on a resilient access regulation**.

- Also such general ban of zero-rating tariffs would obviously contradict the basic idea of the Regulation, which is to protect the open Internet as a driver of innovation. Furthermore, recital 3 dealing with this topic makes it clear that in particular traffic management practices (and not commercial agreements on volumes) are a major threat for the open Internet being a driver for innovation:

  > *"The internet has developed over the past decades as an open platform for innovation with low access barriers for end-users, providers of content, applications and services and providers of internet access services. The existing regulatory framework aims to promote the ability of end-users to access and distribute information or run applications and services of their choice. However, a significant number of end-users* ***are affected by traffic management practices which block or slow down specific applications or services****."*
  >
  > *[Highlighted by the authors.]*

- A general ban of zero-rating tariffs as could be understood from the (unclear) ECJ Rulings in that regard **would be completely detrimental as it would raise the access barrier** for end-users, providers of content, applications and services and their ability to distribute information or run applications and services of their choice. Furthermore, also **recital 3 again makes it absolutely clear that the legislator of the Regulation sees the main risks for the open Internet in unlawful traffic management practices of the ISP**. This again underlines **that Art. 3 (3) of the Regulation shall only cover traffic management and nothing else**.

- Finally, such "broad" interpretation of the ECJ Rulings would not only make all zero-rating offers unlawful **but any kind of tariffing or agreements in which certain volumes or speeds are agreed as all such tariffs are based on commercial considerations – with the consequence that the ISPs could only offer – very expensive – flat rates**. This is quite clear when looking at the structure of volume tariffs as all such tariffs provide for a certain data volume and substantially lower the speed – for commercial reasons – once the data volume is consumed. This would be additionally to the previous arguments also **a clear violation of Art. 3 (2) and recital 7 of the Regulation as such provisions explicitly allow agreements between the ISPs and the end users on price, data volume and speed.**

  In so far it must be absolutely clear that Commercial Zero-rating Offers are in principle nothing else than a (standard) volume tariff only with a different method to calculate the data volume (which is contractually expanded by not counting certain traffic towards the purchased data volume) provided to the end customer. Thus, in essence the Commercial Zero-rating Offers are special volume tariffs and need to be treated not differently with respect to Art. 3 (3) of the Regulation.

- More generally speaking, any request following from a "broad" interpretation of the ECJ Rulings that the implementation of contractual and business relationships must not follow commercial considerations would not make any sense and has never been intended by the Regulation.

## D. Detailed Responses to Questions #1 to #3

As follows from the above, any assessment of zero-rating offers (as well as other offers from ISPs) must clearly distinguish between the commercial parameters of the offer on the one hand and instances of differentiated technical traffic management on the other. In our view, the BEREC Guidelines already generally reflect this distinction, and any further development or refinement of these Guidelines should stay within this coherent framework as it corresponds with the correct interpretation of the Regulation and is also in line with the leading Telenor Ruling.

On that basis, the specific questions raised in the consultation have to be answered as follows:

1. Question #1: Zero-rating options which do not involve differentiated traffic management (but only differentiated billing) are generally compliant with Art. 3 (3) of the Regulation and only need to be reviewed on the basis of Art. 3 (2) of the Regulation. Only zero-rating options which do provide for a technically different treatment of traffic (i.e. different transportation of different data packages) have to be additionally measured against Art. 3 (3) of the Regulation.

2. Question #2: Differentiated billing is a purely commercial feature of an offer and does not affect the way data packages are being transported through the network. Therefore, they are outside the scope of application of Art. 3 (3) of the Regulation but must not interfere with the end user rights (Art. 3 (2) of the Regulation).

3. Question #3: The Telenor Ruling is the leading case for evaluating zero-rating offers and shapes the interpretation of all respective ECJ Rulings.