ETNO-GSMA response to the call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation (Regulation) in the BEREC Guidelines

ETNO and GSMA welcome the opportunity to provide its inputs regarding the consequences to be drawn from the recent judgments of the European Court of Justice (ECJ) concerning certain zero rating offers (C-854/19, C-5/20 and C-34/20) (Vodafone and DT rulings).

These rulings are a response to requests for a preliminary ruling concerning the interpretation of Article 3 of the Regulation and in the case of C-854/19 also the Roaming Regulation (i.e. Regulation (EU) No 531/2012 as amended by Regulation (EU) 2015/2120) and should be interpreted in the context of the questions referred to the Court. Further, the above rulings assess specific features of zero rating offers and thus any conclusion should be referred to the offers and features under scrutiny not to all zero rating offers *per se*. This is even more true as the specific conditions attached to aforementioned zero rating offers that were subject to the preliminary ruling questions are not commonly observed in zero rating offers throughout Europe as they included specific conditions related to roaming, tethering and video bandwidth. In this context, ETNO and GSMA also refer to their earlier contribution to BEREC of 28 September 2021.

In its call for input, BEREC asks several questions to which ETNO and GSMA members prefer to answer the other way round as such approach seems to be more relevant given that the Vodafone and DT rulings refer on several occasions to the landmark judgment delivered in 2020 by the Grand Chamber of the ECJ in the Telenor Magyarorszag case (C-807/18 and C-39/19).

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)?

The ruling of the ECJ in the Telenor Magyarorszag cases (**Telenor ruling**) plays an important role for the recent Vodafone and DT rulings as it provides a useful interpretation of Articles 3 (2) and Article 3 (3) of the Regulation and their correlation.

First of all, also this ruling is a response to requests for a preliminary ruling concerning the interpretation of Article 3 of the Regulation and should be interpreted in the context of the questions referred to the ECJ, so that other national courts would not be bound as such by said rulings in case of distinguishing factual situations and would remain free to refer a new question to the ECJ for a preliminary ruling. This ruling indeed assesses zero rating offers of Telenor, at stake and thus any conclusion should be referred to the particularities of these offers and not to all zero rating offers *per se*. In fact, with respect to the application of traffic management (Article 3 (3) of the Regulation), the Telenor judgment concerns the "*measures blocking or slowing down traffic*" […] *applied in addition to the 'zero tariff' enjoyed by the end users concerned*" making it "*technically more difficult, if not impossible, for end users to use applications and services not covered by that tariff*" (para 51, C-807/18 and C39/19).

Secondly, the Telenor ruling has been delivered by the Grand Chamber of the ECJ given the legal difficulty and/or the importance of the matter (Article 60 (1) of the Rules of Procedure of the Court)

and should therefore serve as a basis for the interpretation of the rulings delivered in the Vodafone and DT cases by the 8th Chamber of the ECJ sitting in ordinary formation of three judges. The recent Judgments also dispensed with the requirement for an Advocate General opinion, indicating the authoritativeness of Telenor, since this dispensation is reserved for situations in which the ECJ considers that the case does not raise new points of law (Article 20, paragraph 5, of the Statute of the Court). This is confirmed by the fact that, as already indicated above, the Vodafone and DT rulings refer on numerous occasions to the Telenor ruling. The fact that the ECJ did not rule in Grand Chamber in the Vodafone and DT cases most likely confirms that it did not consider revisiting its earlier judgment in the Telenor case. Moreover, as a rule, the ECJ endeavors to establish concordance and consistency between its judgments in the interests of legal certainty and uniform interpretation of EU law. In line with the foregoing, any interpretation of the recent Vodafone and DT rulings should thus be consistent with Telenor ruling and should not depart from the conclusions drawn in the Telenor case in which the ECJ did not take a principle stance against zero rating as being incompatible with the Regulation.

Thirdly, in the Telenor ruling the ECJ assesses the compatibility of Telenor zero rating offers at stake[1] both with Article 3 (2) and Article 3 (3) of the Regulation and the Court concludes that where the conduct of a provider of internet access services is incompatible in its entirety with Article 3 (3) of the Regulation, it is possible to refrain from determining whether that conduct is also incompatible with Article 3 (2) of the Regulation (para 28, C-807/18 and C-39/19).[2]

Based on the Telenor ruling, in the Vodafone and DT rulings, the Court does not assess the compatibility of Vodafone and DT's zero rating offers with Article 3 (2) Regulation, as the Court concludes above all on their incompatibility with Article 3 (3).

Namely, the Court considers that Vodafone and DT's zero rating offers at stake[3] do not satisfy the general obligation of equal treatment of traffic, without discrimination or interference, laid down in the first subparagraph of Article 3 (3) of Regulating (e.g. para 28, C-5/20) and the exceptions provided

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[1] **"MyChat"** : a package which enables customers to purchase 1 GB of data and use it without restriction until that data has been used up ; the customers can benefit of the use of six specific online communication applications, namely Facebook, Facebook Messenger, Instagram, Twitter, Viber and Whatsapp, which are covered by a 'zero tariff'. **Once the 1 GB of data has been used up, subscribers may continue to use those six specific applications without restriction, whereas measures slowing down data traffic are applied to the other available applications and services**.

"MyMusic" : a package available in three different formats, 'MyMusic Start', 'MyMusic Nonstop' and 'MyMusic Deezer', which enables customers to listen to music online using four music streaming applications in particular – Apple Music, Deezer, Spotify and Tidal – and six radio services in 'zero rate'. **Once that data volume has been used up, subscribers may continue to use those specific applications and services without restriction, whereas measures blocking or slowing down data traffic are applied to the other available applications and services**. (par. 10, C-807/18 and C-39/19).

[2] Regrettably, the Court did not consider the notion of harm to the rights of internet users as laid down in Article 3 (1) of the Regulation, which are not automatically or *per se* constrained or violated by the zero rating, while they are meant to be a primary goal of the Regulation to be protected in the context of commercial practices.

[3] **Vodafone Pass"** : a package which enables customers to subscribe, in addition to a basic package, to free 'zero tariff' options called 'Vodafone Pass' ('*Video Pass*', '*Music Pass*', '*Chat Pass*' and '*Social Pass*'). Those tariff options permit the use of services of Vodafone's partner undertakings without the data volume consumed by using those services being deducted from the data volume included in the basic package. The general terms and conditions provide that those tariff options are valid only in the national territory. **Abroad, the data volume consumed when using the services of the partner undertakings is offset against the data volume included in the basic package.** Vodafone reserves the right also to offer, in the future, tariff options in other Member States. In that case, a 'fair use policy' providing for a maximum monthly use of 5 GB per tariff option in those other States must be applied. **Also, the data consummation during use by sharing connection (wireless access point or "hotspot") is deducted from the volume of data included in the package.**

"Stream On" – DT: Activation of that option allows the data volume consumed by audio and video streamed by Telekom's content partners not to be counted towards the data volume included in the basic package. **By activating the 'StreamOn' tariff option, the end customer accepts bandwidth being limited to a maximum of 1.7 Mbit/s for video streaming, irrespective of whether the videos are streamed by content partners or other providers.**

for management measures cannot be taken into consideration since, in accordance with the second subparagraph of Article 3 (3) of Regulation, such measures cannot be based on commercial strategies pursed by the internet access provider (e.g. para 30, C-5/20). Indeed, in all three cases, the zero rating offers proposed by Vodafone and DT included non-equal treatment of traffic such as excluding roaming, tethering or limiting the video streaming bandwidth.

To conclude, the rulings at hand should be read and interpreted in the light of the landmark ruling of the Court taken in 2020 in the Telenor cases.

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?

As already mentioned, the rulings at hand should be interpreted in the context of the Telenor ruling. The Telenor ruling assesses Telenor's zero rating offers at stake both under Article 3 (2) and Article 3 (3) and provides an extensive interpretation of Article 3 (2) and its application.

Namely, the Court points out that 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 C-39/19).

With regard to Article 3 (2), the Court points out that it covers agreements entered between service providers and end-users as well commercial practices 'conducted' by service providers; both must not limit the exercise of end users' rights, i.e. to access information and content and use applications and services, but also to distribute information and content and provide applications and services.

The Court states that the compatibility of a commercial agreement with Article 3 (2) must be assessed on a case-by-case basis in the light of the parameters set out in recital 7 of the Regulation (para 43, C-807/18 and C-39/19). Further, according to the Court, recital 7 of the Regulation makes clear that the assessment of whether the exercise of end users' rights is limited involves determining whether the agreements and commercial practices lead, by reason of their 'scale', to situations where end users' choice is materially reduced, taking into account, in particular, the respective market positions of the providers of internet access services and of the providers of applications that are involved (para 41, C-807/18 and C-39/19).

With regard to Article 3 (3), the Court points out that the first subparagraph of this Article read in the light of recital 8 of the Regulation imposes on providers of internet access services a general obligation of equal treatment of traffic, without discrimination, restriction or interference, 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 (para 47, C-807/18 and C-39/19). However, while being required to comply with that general obligation, providers of internet access services are still able to adopt reasonable traffic-management measures which should be based on 'objectively different technical quality of service requirements of specific categories of traffic' and not on 'commercial considerations'. Any measure, which without being based on such objective differences, results in the content, applications or services offered by the various content, applications

or services providers not being treated equally and without discrimination, must be regarded as being based on such 'commercial considerations' (para 48, C-807/18 and C-39/19) and thus prohibited.

Pursuant Article 3 (3), third paragraph and Recital 11 of the Regulation, any traffic management practices which go beyond such reasonable traffic management measures, by blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, or specific categories of content, applications or services, should be prohibited, subject to the justified and defined exceptions laid down in the Regulation.

Based on the above, it could be concluded that zero rating offers are subject to two different assessments: Article 3 (2), which assesses the impact of the commercial practice or agreement on the rights enshrined in Article 3 (1); and Article 3 (3), which is only engaged where the commercial practice or agreement includes a non-equal treatment of traffic, which, to be compatible with the Regulation, must comply with the criteria set out in Article 3 (3). These two articles have also different applications, while the prohibition provided in Article 3 (2) does not apply automatically and requires a case-by-case effect assessment, the prohibition provided in Article 3 (3) is stricter and does not require any further assessment should the practice of handling and managing the traffic on the network of the ISP not be reasonable.

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?

First of all, it should be noted that the term 'partner application' deserves clarification. Zero rating offers can take different forms. For example, they may include operator applications, applications of other service providers without necessarily any partnership with such application providers and third party partner applications where there is a specific agreement with partners to zero rate their applications. By the definition provided by the ECJ, the latter seems to be concentrating its judgement on the specific case of partnerships related to zero rating (see para 17, C-34/20, "*offered by partners of that access provider*").

Secondly, as already mentioned above, assessments under Article 3 (2) and Article 3 (3) are different. Indeed, as explained by the Court in the Telenor ruling, a zero-rating offer not counting traffic generated by specific applications towards the data volume of the basic tariff, could be a purely commercial practice (differentiated billing) based on an agreement with the provider of internet access services or deriving from a commercial practice conducted by such internet service provider.

Further, as explained by the Court in the Telenor ruling, in addition to the zero rating, there could be a non-equal treatment of traffic. Indeed, with regard to Telenor offers at stake, the Court concludes that they include measures blocking or slowing down traffic related to the use of certain applications and services which are applied in addition to the 'zero tariff' enjoyed by the end users concerned (para 51, C-807/18 and C-39/19).

Thirdly, should there be a non-equal treatment of traffic, then Article 3 (3) of Regulation shall apply which does not allow any traffic management based on commercial considerations. Further, as stated out in the Vodafone and DT rulings, a failure to fulfil the obligation of equal treatment of all traffic

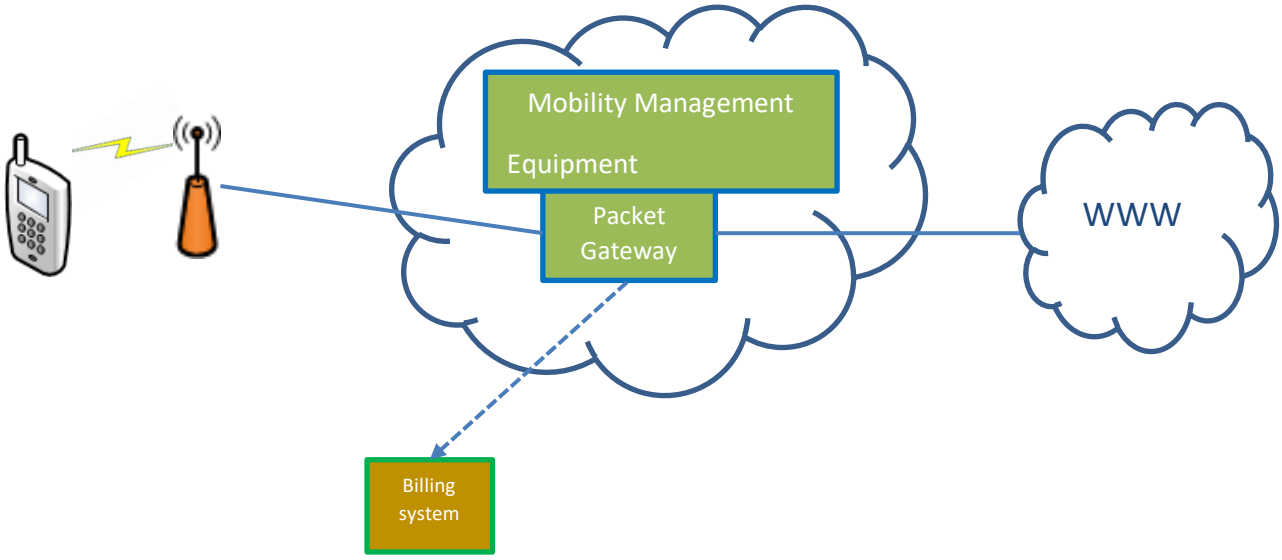
cannot be justified under the principle of freedom of contract, recognized in Article 3 (2). (e.g. para 23, C-5/20).

To answer that question, it is thus important to distinguish zero rating offers based only on differentiated billing, from a non-equal treatment of traffic which in their turn could be based on technical or commercial considerations.

The commercial practice of zero rating versus non-equal treatment of traffic

The general treatment of Internet traffic shows that zero rating is a practice of billing which not only is conducted at the level of the Business Support Systems (BSS) outside the sphere of traffic handling and network management as is targeted in Article 3 (3) of the Regulation, but also is processed and conducted at a moment which is entirely *a posteriori* of the actual traffic flow and as such cannot have any influence on the way the traffic is managed as is targeted by Article 3 (3).

When Internet traffic – irrespective of the commercial characteristics of such traffic – is transported over the network of the ISP, there is in principle no differentiation made in its treatment. The network is agnostic of the notion whether such traffic is considered as zero rated traffic or not. The data usage will simply be counted, registered and classified for later processing. This happens entirely agnostic from the traffic handling and management on the network. The data are then at a later stage – in batches – transferred to a billing system, which is a Business Support System (BSS) that is outside the scope of the mobile network. The billing system will process the data and attribute the billing features to it in accordance with the applicable commercial offer. It is only at that stage that the practice of zero rating will occur, namely at the moment that the billing system will apply a zero rating tariff to the therefore as relevant categorised traffic volume data and that this traffic as a consequence will not be billed or accounted for in a data allowance linked to the end-users' subscription (where relevant). By the time the billing system performs this action the traffic has since long passed and has been treated from a network/traffic management point of view in exactly the same way as any other traffic (equal treatment). This can be depicted as follows:



From this derives that:

- The practice of zero rating is not traffic related: zero rating occurs at a moment posterior to the transport of the internet traffic in the network, which thus is unbiased by this commercial practice (as the commercial practice is not executed at that moment in time);
- The systems needed to realise the billing is a Business Support System (BSS) application which is not part of the network and as is derived from the previous conclusion is also only in the possession of the relevant data to perform the zero rating at a time the traffic has since long passed the network and has been delivered to the end user;
- The traffic management systems that are in charge of ensuring that the traffic reaches its destination on the other hand are an integrated part of the mobile network and can only be effective in actions of legitimate throttling or blocking if they can interfere on the very moment that the traffic is effectively transported and handled by the network.

Conclusion: Zero rating in itself is a commercial practice of differentiated billing and is not related to practices of traffic handling. It is operated at the level of the business applications that is outside the scope of the mobile network and traffic handling and occurs only at a time a posteriori of the effective handling the internet traffic. As such, zero rating as a commercial practice has no effect on the way the traffic is handled and could thus not be the source of unequal treatment of internet traffic.

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Therefore, if zero rating options do not involve non-equal treatment of traffic, then such options shall be assessed under Article 3 (2) and not under Article 3 (3) as the latter covers only the options involving non-equal treatment of traffic while zero rating may also be a purely commercial practice based on a differentiated billing.

To conclude, in the cases where a zero rating offer falls within the scope of a commercial practice within the meaning of Article 3 (2) of the Regulation and does not include measures of non-equal treatment of traffic (within the meaning of Article 3 (3)), such an offer should be only subject to a case by case assessment in the light of recital 7 of the Regulation. For such offers, the question of compatibility with Article 3 (3) does not thus raise.

As a more general note regarding the discussions whether the Vodafone and DT rulings could be interpreted as putting under question the legality of zero rating offers *per se*, ETNO and GSMA would like to submit the following.

First of all, a general and wider interpretation of the recent rulings would undermine the interpretations given to the Regulation since its entry into force. It would also contradict BEREC Guidelines (case by case assessment based on the assessment grid proposed by BEREC) and the decisions so far adopted by different European regulators on zero rating offers proposed by operators across Europe. As a reminder, until now none of the European regulators has ever considered zero rating offers as problematic *per se*. On the contrary, national regulators have logically conducted a case

by case assessment for each zero rating offer at stake as shown in annual reports of different regulators. This would also be contrary to the principles of *res judicata*, legal certainty and legitimate expectation given that the legality of zero tariff options as such had neither been called into question by the Telenor ruling nor by the EU legislator (as will be shown below) and have been the subject of final and binding decisions on the parts of NRAs and the Courts in Europe.

Further, in EU Commission's Implementation Report on the open internet access provisions of Regulation (EU) 2015/2120 from 2019, the European Commission explains that although zero rating offers do not appear directly in the Regulation, they have been taken into account by co-legislators under Article 3 (2). The European Commission also refers to BEREC guidelines which explain in which cases zero rating offers could be compliant with the Regulation. It follows from the foregoing that the Regulation is designed for zero rating offers and that such offers should not be considered as prohibited *per se*[4].

Secondly, with such a general and wide interpretation, the case by case assessment of commercial agreements provided in recital 7 of the Regulation would lose all its sense, the same way as BEREC guidelines on the matter. Further, it would cause Article 3 (2) of the Regulation, as it currently applies to zero-rating offers based on differentiated billing, to become redundant. In this context, the Rotterdam District Court ruled in its judgment of 20 April 2017 that the Dutch law prohibiting by principle any traffic discrimination, including zero rating offers, was contrary to the Regulation, as it did not allow a case by case assessment – without preliminary referring any questions to the ECJ. Following this judgment, the Dutch government amended its law on net neutrality.

Thirdly, this seems to be difficult to reconcile with the legislator's intent as zero rating was a much debated issue during the adoption of the Regulation. Indeed, the result of such discussions were that operators could propose zero rating offers. In particular, during legislative debates, the request of the Dutch government to prohibit such offers (so the Regulation would not contradict the Dutch national law) was not retained by co-legislators. The same, in its internal *think tank* of 2015 the European Parliament indicates[5]: « *Similarly, the TSM Regulation does not prohibit zero rating practices. […] However, the text attempts to avoid such commercial agreements being used to circumvent the central goal of the legislation to safeguard the right to open internet access. Therefore national regulators must be empowered to assess the legality* ».

To conclude, when reviewing the 2020 Guidelines in light of the Telenor, Vodafone and DT rulings, ETNO and GSMA think that BEREC should focus on the following:

- More clarity on the interactions of Article 3(2) and 3(3) of the Regulation as explained above, to set out that zero rating offers are subject to two different assessments, based on Article 3 (2) and based on Article 3 (3) depending on whether the offer involves (i) a zero rating based purely on a differentiated billing agreement with end-users or a commercial practice conducted by providers of internet access service *or* (ii) whether such agreements in addition include non-equal treatment of traffic which, to be compatible with the Regulation, should

[4] https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2019)203&lang=en
[5] http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/571318/EPRS_BRI(2015)571318_EN.pdf

comply with the criteria set out in Article 3 (3) (including not being based on commercial considerations).

- More clarity as to the difference between purely commercial zero rating offers based on differentiated billing, and non-equal treatment of traffic, as explained above.
- A clear statement that the ECJ rulings are limited in their application to the specific measures or conditions of use considered in the Judgments, that would exclude roaming, tethering or limit video bandwidth, upon activation of a zero-rating offer.
- Confirmation that purely commercial zero-rating offers based on differentiated billing are not per se non-compliant with the Regulation and should continue to be assessed on a case-by-case basis.

Going forward BEREC and NRAs should provide for legal certainty, predictability and an efficient implementation of the Regulation that respects the legislative work done by the European Parliament and the Council, the consistency of ECJ rulings where we consider for various reasons explained above the Telenor ruling to be the lead case and all following ECJ cases to be interpreted in light of the Telenor ruling and ensures that innovative services provided by telecom operators can benefit European citizens and businesses.