FACEBOOK

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Body of European Regulators for Electronic Communications
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RE: Comments of Facebook regarding Zero-Rated Offers and Open Internet Regulation in Light of recent judicial actions of the CJEU

INTRODUCTION

Facebook submits these comments in response to BEREC's 6 October call for stakeholder input to feed into the incorporation of the judgments on the Open Internet Regulation in the BEREC Guidelines.[1] As explained in greater detail below, Facebook believes that it is necessary to consider the relevant Court of Justice of the European Union ("CJEU") judgments in light of the specific facts they presented, rather than to interpret them as a wholesale prohibition of zero-rated offers from mobile operators. In addition, Facebook considers it necessary to give full effect to the entirety of Regulation 2015/2120 (the "Regulation"), including both the anti-discrimination and the freedom of contract provisions, and to consider only offers that actually result in a material reduction in end-user choice, as violative of the Regulation.

The threshold question at hand is whether zero-rating offers are inherently discriminatory and reduce end-user choice. Clearly they are not. Zero-rating offers have been widely available and enjoyed by consumers in the EU for years under the existing Regulation. BEREC's own 2020 Guidelines on the Implementation of the Open Internet Regulation[2] (the "Guidelines") provided guidance on zero-rating offers:

> When assessing whether the terms for joining an open zero-rating programme are non-discriminatory, NRAs may consider whether the same technical and commercial conditions are applicable to all CAPs[3] within the zero-rated category, for example, where admission to a programme does not depend on the number of users or the turnover of the CAP concerned. Furthermore, for a programme to be considered non-discriminatory, joining the programme should be possible irrespective of the location of the CAP, origin or destination of the information,

[1] BEREC BoR (21) 149, October 2021.
[2] BoR (20) 112, 11 June 2020.
[3] Content Application Providers, as defined in the Regulation.

> content, application or service offered within the category…... (Guidelines, paragraph 42c.)

This same principle can still be applied in light of the recent judgments so long as basic non-discriminatory principles are applied.

Indeed, this guidance (as set out in the Guidelines) is in line with Recital 7 of the Regulation, which states that NRAs and other competent authorities should be empowered to "intervene against agreements or commercial practices which, by reason of their scale, lead to situations where end-users' choice is materially reduced ***in practice***" (emphasis added). The offers in question in each case contained technical parameters that actually harmed the traffic of non-zero-rated CAPs by being degraded, throttled, blocked, or otherwise affirmatively acted upon in a discriminatory manner by the mobile operator, or conditioning the zero-rated offer on consumers accepting a reduction in service. Where these conditions are not present, it does not follow that zero-rating is inherently violative of the Regulation.

This case-by-case assessment is also inline with the 2020 Telenor Magyarország judgment [ECLI: EU:C:2020:708, Case C-807/18 and C-39/19] ("*Telenor")* by the Grand Chamber in which the CJEU noted that customer agreements:

> must be assessed on a case-by-case basis, in the light of the parameters set out in recital 7 of that regulation.... It follows that the intention of the EU legislature was not to limit the assessment of the agreements and commercial practices of a given provider of internet access services to a particular agreement or commercial practice, taken individually, but to provide for an overall assessment also to be carried out of that provider's agreements and commercial practices. (*Telenor,* Paragraphs 42-43.)

From all four cases (*Telenor* and the three recent judgments), it does not follow that zero-rated offers automatically result in discrimination to CAPs or that the offers materially reduce end-user rights. So long as a mobile operator is consistent with the Guidelines by articulating a clear technical set of requirements for CAPs wishing to be part of a zero-rated offer, and provides access to any requesting service on similar terms and conditions, then there is no actual discrimination violtive of the Regulation for which a remedy should be fashioned. Therefore, the prevailing authoritative case law of the CJEU requires the national regulators to undertake an assessment of the merits of each case, including its effects on both consumers and CAPs, which involves assessing the respective market positions of mobile operators and CAPs. This approach is also reflected in the Guidelines (*e.g.*, at paragraph 46).

Turning to the specifics of the three recent judgments, in each of these offers, consumers had to <u>forgo a right</u> they have under applicable law or regulation in exchange for zero-rating of certain content. For instance, in looking at one zero-rated offer that excluded data from tethered devices from the offer, the CJEU noted: "It is apparent...that the limitation on tethering, to which all the questions put by that court relate, applies solely on account of the activation of the 'zero

tariff' option…. Article 3 of Regulation 2015/2120 must be interpreted as meaning that a limitation on tethering, on account of the activation of a 'zero tariff' option, is incompatible with the obligations arising from Article 3(3)." ([ECLI:EU:C:2021:676, Case C-5/20,Paragraphs 31,33). Thus, the recent judgments can be read as the natural consequence of *Telenor*, with the consistent guidance being that NRAs shall continue to evaluate each offer individually. According to these judgments, where the mobile operator's offer involves some degradation of end-users' rights (through blocking, slowing, restrictions on roaming, or selecting their own devices) or actively degrading non-included content (such as differential blocking or throttling), then the offer should be considered violative of the Regulation. But, none of the judgments reaches the conclusion that zero-rated offers that merely count traffic differently, but do not degrade certain traffic, are inconsistent with the Regulation.

A legal assessment of a zero-rating offer which is focussed solely on Article 3(3) would contradict the case law of the CJEU in *Telenor*. Article 3(3) of the Regulation should be interpreted in the context of the other provisions of the Regulation. In particular, Recital 7 states that "*end-users should be free to agree with providers of internet access services on tariffs for specific data volumes and speeds of the internet access service*". An interpretation of Article 3(3) that prevents this freedom of agreement would not be in line with the legislative purpose of the Regulation. For instance, the goal of the introduction of this Regulation was to *increase,* not reduce, consumer choice. (*See,* [COM/2013/0627 final - 2013/0309 (COD)], original proposal of the Regulation, at Part 1.1.) Thus, interpreting Article 3(3) of the Regulation in a way that deprives consumers of a choice would directly contradict this goal and the spirit of the legislation and would neither be in line with Article 3(2) and Recital 7, nor with case law of the CJEU.

If BEREC were to consider it necessary to adopt an interpretation of the recent judgments which effectively prohibits commercial options where traffic of a specified category is not counted towards the data allowance, this result would deprive consumers of their right to subscribe to services which many end-users regard as beneficial. Such zero-rating offers allow the users to access/use content and applications of their choice without the inherent risk of depleting their data allowance/incurring additional charges. If the recent judgments were effectively read to prohibit all such offers, then consumers would realistically be left with only two choices in contracting for telecommunications services: (i) a completely metered plan, which may cost the consumer more than he/she currently pays for a tailored zero-rated offer (purchased on top of the end-user's base plan) for the same amount of data consumed; or (ii) a completely unlimited plan, which may be beyond the means of some consumers and require them to purchase more data than they actually need or want. Additionally, the zero rating of public service content such as governmental, educational or public interest websites could also be deemed unlawful, which would be detrimental to consumers on limited data plans.

RESPONSE TO SPECIFIC INQUIRIES

In light of the above, Facebook answers BEREC's three specific questions in the call for stakeholder input as follows:

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 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?

As noted above, the review of specific zero-rated offers must be on a case-by-case basis considering the specifics of each offer at hand, including whether there are affirmative actions taken by a mobile operator to limit user choice, whether there is harm through an actual material reduction in user choice from the offer, and whether it is in compliance with the entirety of the Regulation, not merely Article 3(3). Under these principles, the primary relevant benchmark for zero-rating offers where traffic is not treated differently, but merely *counted* differently, is not Article 3(3), but rather Article 3(2), read in conjunction with Recital 7 which requires regulators to act where end-user choice is materially restricted in practice, and not merely in theory. Cases where end-users' choice is not materially restricted in practice should not be regarded as an infringement of Article 3(3).

An automatic ban on any form of zero-rating offer, that is based solely on selective counting (rather than differential treatment) of traffic is also not supported by case law of the CJEU (see response to question 3 below).

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?

As noted above, the three recent judgments all concerned specific circumstances where zero-rating was combined with impermissible traffic management practices such as limitations on bandwidth (throttling of video streaming) or exclusion of roaming from zero-rating (practices which have been previously recognized as likely to infringe the Regulation in previous national enforcement cases) and therefore considered to be incompatible with Article 3(3). Thus, all three recent judgments concerned practices where traffic was not just *counted* differently, but also *treated* differently; and which the judgments found represented standalone breaches of Article 3(3) of the Regulation.

Telenor also did not prohibit selective counting, but instead emphasized the right and duty of the regulators to assess whether the zero-rating offer led to actual material discrimination. Therefore, the recent judgments should not be applied to cases of zero-rated offers where the offers themselves do not have impermissible traffic management measures in place. In each of the judgments, the end-user's ability to get a zero-rated offer was predicated on a degradation of another user right through an impermissible traffic management measure imposed on the basis of commercial considerations (roaming, throttling/degradation of the quality of service, or tethering restrictions). There can be zero-rated offers that are not predicated on an impermissible traffic management practice / removal of another end-user right (as set out in the Regulation) and these offers should be considered lawful where clear and non-discriminatory

opportunities are provided to all content providers who want them, as set forth in the current Guidelines.

Critically, the Regulation must be applied as a whole with no one Article taking precedence over another (*see e.g.*, *Van Gend & Loos* Case (ECLI:EU:C:1963:1, Case 26/62) where the CJEU looked at the "*spirit, the general scheme and wording*" of the relevant provisions). The CJEU has consistently ruled, following the *CILFIT* decision, that every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, with regard to its objectives and its state of evolution (ECLI:EU:C:1982:335, Case 283/81, para. 20). The interpretation of EU law must also aim at striking a fair balance between the various interests at stake (*Promusicae* ECLI:EU:C:2008:54, Case C-275/06, para. 68). As such, and in accordance with *Telenor,* offers that are consistent with Article 3(2) should be assessed in accordance with the intent of the entire Regulation (as reflected in part by Recital 7).

End-user freedom of choice of internet tariffs is an essential right enshrined in Article 3(2) of the Regulation. The CJEU has strongly emphasized this in the *Telenor* judgment (paragraph 33), and noted that this right, however, could not otherwise limit end-user rights. In this light, an interpretation of the Regulation that focuses solely on Article 3(3) and does not take Article 3(2) and Recital 7 into account would fall short of the requirements of systematic and proportionate interpretation of EU law. As noted in the introductory statement, protecting and expanding the right of end-users to agree with providers on tariffs and speeds is a principal objective of the Regulation, and was one of the guiding principles of the EU Commission that drafted the text.

If zero-rated packages were broadly deemed in violation of the Regulation, then consumers would likely have only two possible options for services: (i) completely metered or (ii) completely unlimited. That cannot be deemed as providing consumers a meaningful right of freedom of contract under EU law. It is our experience that in many EU markets, users have the right to subscribe to zero-rating as an add-on to their existing tariffs. Naturally this implies that consumers, when subscribing to the additional zero-rating offers, see a benefit in zero-rated tariffs and would suffer detriment if the national regulators forced these options off the market and forced them to either pay more for the same consumption (metered) or pay for more service than the actually need (unlimited). End-users cannot - and should not - be deprived of the right protected by Article 3(2) of the Regulation, which is the right to subscribe to a zero-rating service that is beneficial to them when it is not harmful to the market, which is the case when there is no actual discrimination against CAPs, and they have the opportunity to be zero-rated on competitively and technologically neutral terms if they so choose. When such an opportunity exists, neither consumer interests nor the market are harmed, and thus end-users should remain free to enter into a contract - and related tariff option - to receive zero-rated services consistent with Article 3(2) and Recital 7.

BEREC and the national regulators should confirm the framework for analyzing whether such a contract does not require consumers to give up another consumer right in order to receive zero-rated services (*e.g.*, tethering, video bandwidth or roaming, such as in the later court decisions) and consider whether any content provider was denied the fair and equitable opportunity to be part of an offer. In other words, an end-user's right to choose from multiple

offers and enter into a contract for services is not overridden by a theoretical (or hypothetical) harm that could be suffered by a CAP in being excluded from a package purchased by the consumer, when this hypothetical CAP expressed no interest in being included in this package or was not denied the opportunity to be included on the same, non-discriminatory basis as included content.

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 and C-39/19 – Telenor Magyarország)?

Telenor involved material discrimination between zero-rated and non-zero-rated services with degradation of non-zero-rated content. When a user ran out of data, access to all non-zero-rated content was severely degraded or blocked, but zero-rated content was still available, resulting in a period when certain content was materially discriminated against relative to other content. In addition to the CJEU finding that the offer was affirmatively discriminatory because it technically degraded only certain content, this practice also violated the existing BEREC Guidelines on zero-rating.

Nonetheless, in *Telenor,* the Grand Chamber of the CJEU prescribed the criteria that the national regulators *generally* should apply when assessing the legality of zero-rating offerings. According to paragraph 28 of the judgment, the national authorities, when performing their supervisory roles under Article 5 of the Regulation, should determine whether the conduct in question falls within the scope of Article 3(2) or (3) of the Regulation (or both provisions cumulatively). Where national regulators analyze compliance with Article 3(2), they should assess the services of the internet access provider and the corresponding agreements (paragraph 31). In paragraphs 34-46, the CJEU stated that the analysis of an offer may take various factors into account, such as commercial practices, scale and market positions of the actors in the relevant case (paragraph 41) and the number of customers concluding subscription agreements to such packages (paragraph 45). The CJEU repeatedly highlights that end-users have different expectations and preferences, which calls for the ability to reach individual agreements (paragraph 35). The CJEUalso makes clear that the intention of the Regulation was:

> *not to limit the assessment of the agreements and commercial practices of a given provider of internet access services to a particular agreement or commercial practice, taken individually, but to provide for an overall assessment also to be carried out of that provider's agreements and commercial practices.* (Paragraph 42.)

Due to the offer affirmatively degrading only some content, the CJEU found the selective throttling of non-zero-rated services after the basic data allowance had been used up to be in violation of Article 3(2) and also noted that this technical configuration by the mobile operator resulted in material discrimination and thus constituted a traffic management measure based on commercial considerations in violation of Article 3(3). But, as noted above, the CJEU did not say that all individual agreements are illegal – this was to be determined on the basis of an overall assessment of each offer. The

Guidelines are completely consistent with *Telenor* in this approach to reviewing offers using these same factors.

Notably, *Telenor* was a Grand Chamber decision, which indicates that the Court regards this decision as a decision of particular importance (see, Rules of Procedure, Court of Justice, Article 60(1).) That judgment did not prohibit selective counting, but instead emphasized the right and duty of the regulators to assess whether the zero-rating offer led to actual discrimination. The common element between *Telenor* and the recent decisions was the finding of actual harm to users through affirmatively discriminatory traffic management practices that technically degraded the treatment of some traffic.

In summary, both the recent judgments and *Telenor* accepted that transparent and non-discriminatory traffic management could be lawful. Thus, it can be concluded that there can be zero-rated offers that are consistent with the Regulation, even where there also exists traffic management. This could be the position for example, so long as the determination to include traffic is made based on the technical configurations of the services (as well as the expressed interest of CAPs), provided that all similarly configured services are treated equally.

CONCLUSION

Facebook would encourage BEREC to view the recent judgments, along with the *Telenor* judgment, within the specific context of the questions presented to the CJEU. In each case, the CJEU focused on the specific conditions of the offers under review that accompanied zero-rating rather than on zero-rating itself. The Regulation clearly encourages pro-consumer choices to which zero-rating offers can be a way to enhance the number of consumer options in selecting their telecommunications contracts. **It is only when the zero-rating offer comes accompanied with technical discrimination (such as loss of consumer rights or actual degradation of some content) that such offers may be problematic under the Regulation.**

Based on this precedent, BEREC can maintain the existing Guielines, which already proscribe material discrimination that technically degrades certain content. To the extent necessary, BEREC could reiterate that technical discrimination of content is not permissible even if agreed to by the consumer. At a minimum, BEREC could remind national regulators that when mobile operators provide non-exclusive access to CAPs on equal and non-discriminatory terms in accordance with the Guidelines, such offers remain clearly permissible under the Regulation, and that any evaluation of such an offer's compliance with the Regulation must be done on a case-by-case basis, as is required by CJEU precedent.