

# ZERO RATING AND NET NEUTRALITY

Comments by the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – (vzbv)) on BEREC's questionnaire regarding the ECJ ruling on zero rating and net neutrality.

## SUMMARY

Since 2016 net neutrality and its principles of non-discriminatory and equal access to data is secured by the Regulation 2015/2120. As seen over the past years in almost every European member state, the issue of price discrimination regarding zero-rating offers is the prime cause for difficulties when it comes to compliance and implementation of the Regulation. Price discrimination and zero-rating practices are one of the biggest risks to the enforcement of the net neutrality rules in Europe.

Regarding zero-rating offers, vzbv was always very outspoken towards its advocacy of banning those products as they exceed both the scope of the Regulation and the BEREC Guidelines on net neutrality.<sup>1</sup>

In recent rulings, the European Court of Justice (ECJ) found that zero-rating products offered by telecommunication service providers breach the net neutrality rules of Regulation 2015/2120. In response, BEREC is reviewing its approach on zero-rating with an upcoming review of the net neutrality Guidelines in 2022, which is welcomed by vzbv.

**Question 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?**

No, they are not in line with Art. 3 para. 3 of the Regulation 2015/2021. The requirement of equal treatment for all data traffic is a core element of net neutrality. Generally, zero-rating offers must be in line with the Regulation as a whole. If one argues that there is a possible design in which zero-rating offers do not involve some type of traffic management, it would already fail to be in line with Art. 3 para. 3 of the Regulation 2015/2120 as traffic is not treated equally and without discrimination when it comes to those practices. It doesn't need to meet the criteria of not allowed traffic management measures, if it even fails to comply with Art. 3 para. 3 of the Regulation 2015/2120. This is also in line with the ECJ ruling (30, C-34/20).

With certain zero-rating options, traffic does not need to be altered through traffic management in order to be deemed as unequal or discriminating. This could be achieved through the inherent value of different services and their underlying generated traffic. For example, the use of app A is zero rated, the use of app B is not. The use of app B is counted toward the monthly inclusive data volume, the use of

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<sup>1</sup> Verbraucherzentrale Bundesverband: Netzneutralität, <https://www.vzbv.de/netzneutralitaet>, 12.10.21.

app A is not. However, this inevitably means that data transfer is treated differently.

**Question 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 BEREC's research has shown, data caps are a decisive factor for consumers when choosing their tariffs.<sup>2</sup> So at first glance, zero-rating offers can be seen as an attractive option for consumers to optimize their contractual services. Zero-rating products are especially interesting if the monthly inclusive volume is limited and not sufficient for a nowadays common use of data-intensive services, such as music or video streaming. In the long term however, there is a risk that such zero-rating offers limit the diversity of product choices for consumers.

At the same time, zero-rating offers may lead to limited data volumes of internet tariffs as well as higher prices of other data volume and tariffs in general. Zero-rating offers (or tariffs that include zero-rating options) are even more interesting to the end-user, the more limited their data volume and the higher the prices for additional data volume are.

A user-friendly alternative to the zero-rating offers would be to increase the monthly inclusive volume of all tariffs by the amount that was calculated by the provider for the average usage of zero-rating offers. This would increase the freedom of choice of all consumers. Differentiated billing practices in line with Article 3 para. 2 of the Regulation 2015/2021 are for example, tariffs which can be customized regarding contract-length, data volume, speed, bundles, with or without subsidized equipment. Aside from illegal zero-rating practices, there are a variety of options for different types of products suitable for providers as well as end-users. All these options do as well include commercial considerations, such as acquiring new customers, retain regular customers, maximising profit, all in line with the Regulation.

**Question 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)?**

In vzbv's opinion the rulings complement each other. The Telenor Magyarország cases were the first cases, in which the ECJ was called to interpret EU Regulation 2015/2120. This is not an uncommon time frame.

As the Regulation went into force in 2016, National Regulation Agencies started investigating practice which might breach the Regulation. Court cases in Germany started in 2017/2018, with first ruling in 2019 and the inquiry to the ECJ. C-807/18 and C-39/19 address questions from an end-users perspective as the court found that commercial use of zero rating was liable to limit the exercise of end users' rights within the meaning of the Regulation (22, 35, 45, C-807/18 and C-39/19). The recent rulings however concentrate on the commercial incentive on zero-rating

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<sup>2</sup> BEREC: Net Neutrality Ecodem progress report, 2013, [http://bereg.europa.eu/eng/document\\_register/subject\\_matter/bereg/others/3911-berec-bor-electronic-voting-procedure-voting-report-net-neutrality-ecodem-progress-report](http://bereg.europa.eu/eng/document_register/subject_matter/bereg/others/3911-berec-bor-electronic-voting-procedure-voting-report-net-neutrality-ecodem-progress-report), 12.10.21

practices in general, which is a more wholesome approach as it included the safeguards of end-user rights as well.

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