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?

The answer to this question is yes, as NOS understands that the sole aspect to be analyzed in the context of compliance with Article 3 paragraph 3 is whether there is any technically unjustifiable traffic management differentiation - or any technical practice not justified by the exceptions identified under Article 3 paragraph 3 subparagraph 3 - in every zero-rating offer or option.

In our view that is not the case, since either traffic, the zero rated one and all the other, are not subject to different traffic management practices. A data allowance of any given data plan does not, in our view, represent a traffic management practice. Only the act of barring traffic when such data allowances are used falls into that category. Since, in that regard there is no difference in treatment, we do not see how can these offers represent a breach of paragraph (3) of article (3).

In fact, the scope of the whole Article 3 paragraph 3, including naturally subparagraph 1, regards, in our view exclusively to traffic management practices. This understanding is adequately framed by the Court of Rotterdam interpretation of the Regulation on cases ROT 17/468, ROT 17/1160 and ROT 17/1932, where the Court declares in paragraph 6.3 that: "[...] the first subparagraph of Article 3(3) of the Net Neutrality Regulation cannot be viewed separately from the second and third subparagraphs of that Article. This is also apparent from recitals 8 and 9 in the preamble to the Net Neutrality Regulation. These considerations 8 and 9 lie in view of the wording on which Article 3(3) of the Net Neutrality Regulation is based**. It is clear from the wording of these considerations that these considerations relate to traffic (management) and not to pricing.** [...]"

It must also be noted that the explicit separation of traffic management from any other aspect regarding billing or commercial practices underlying the design of an Internet Access Service, stated in this ruling of the Court of Rotterdam, stems from the fact that the concept of traffic management - or traffic treatment, as in the wording of Article 3 paragraph 3 subparagraph 1 – regards exclusively to the technical treatment of the traffic.

Indeed, as defined by BEREC in the document "*A framework for Quality of Service in the scope of Net Neutrality*" (ref. BoR (11) 53), traffic management "[...] *includes (1) nodal traffic control functions such as traffic conditioning, queue management, scheduling, and (2) other functions that regulate traffic flow through the network or that arbitrate access to network resources between different packets or between different traffic streams"*. That is, traffic management refers solely to the technical intervention in the network applied to traffic.

Also, In the judgement of the Court of Justice of the European Union regarding cases C-807/18 and C-39/19, it is also apparent that traffic treatment article 3(3) is to be

interpreted in a technical perspective, i.e. traffic management, and not in traffic measurement perspective, in contrast to the more recent rulings being discussed.

This is all the more evident in paragraph 51: "[...] *In the present case, first, the conduct at issue in the main proceedings includes measures blocking or slowing down traffic related to the use of certain applications and services, which fall within the scope of Article 3(3) of Regulation 2015/2120, irrespective of whether those measures stem from an agreement concluded with the provider of internet access services, from that provider's commercial practice or from a technical measure of that provider unrelated either to an agreement or a commercial practice.* ***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.* [...]"

It is, in fact, apparent by this statement that the CJEU views the zero-tariff intrinsic to the zero-rating practice as independent from the practices in the scope of article 3(3). That is, the CJUE does not judge the zero-rating practice *per se* uncompliant with the Regulation, but only the technical measure of partial blocking of the traffic.

Lastly, when analyzing this matter, it is also indispensable to retrieve the reasoning of the legislator regarding zero rating practices and their regulation, which can be found in the multiple instances where the European Commission was called to express its views. This reasoning is clear in the several answers the European Commission was asked to provide to the European Parliament.

As an example, following a question of whether the European Commission "[...] *believe that zero rating plans come into conflict with EU net neutrality laws? If so, what action is being taken to safeguard the consumer right of equal treatment of Internet traffic?* [...]" (Question E-006694-17), the Commission provided the following written statement:

"Regulation (EU) 2015/2120[(1)] **neither imposes a blanket ban of zero rating** nor does it allow such practice without any limits, i.e. zero rating commercial agreements and practices are only possible as long as they comply with the requirements of the regulation.

The regulation includes three safeguards to protect end-users from the possible negative effects of zero-rating practices: a)they cannot limit end-users' right to access and distribute content, applications and services of their choice via the Internet; b)**all commercial agreements and practices, including zero rating, have to comply with the principle of equal and non-discriminatory treatment of all traffic, which cannot be derogated from unilaterally or contractually**; c)national regulatory authorities are empowered and obliged to ensure, through monitoring and enforcement action, that the rights of end-users are not impaired, including the rights of providers of content, services and applications.

These safeguards ensure a future-proof approach that allows regulators to adapt to new practices, rather than just addressing the practices of today. Regulators and courts will analyze zero-rating and other practices on their merits, case-by-case, in their specific national circumstances, to ensure that the objective of effective end-user choice is not undermined in practice.

BEREC (Body of European Regulators for Electronic Communications) guidelines[(2)] for the implementation of the obligations of National Regulator Authorities (NRAs) include guidance on the treatment of zero rating practices to ensure a consistent approach by the NRAs, taking into account the specific circumstances of each individual case. [...]"

In effect, by explicitly not banning zero-rate practices, the European Commission clearly states that it does not consider **the concept of zero-rating practice is *per se* uncompliant with the rules imposed in article 3(3) or, in particular, a practice that collides *per se* with equal and non-discriminatory treatment of all traffic**, and any such practice should be analyzed on a case-by-case basis.

Hence, even if erroneously conceding that the concept of "traffic treatment" in the sense given by the Regulation could be interpreted in a broader sense than "traffic management", by hypothetically including other aspects than technical management, the notion presented by the legislator is that zero-rating is not *per se* a commercial practice intrinsically including any kind of improper "traffic treatment".

Additionally, by not "disallowing" the guidelines produced by BEREC and, in the contrary, referring to them as the starting point for any analysis on this matter, the Commission is validating the BEREC guidelines stance on (1) the need to evaluate zero rating on a case-by-case basis, and (2) the limitation of the scope of article 3(3) to traffic management practices.

In conclusion, NOS considers that zero-rating practices are not explicitly banned by the Regulation and or not per se uncompliant with article 3(3). Thus, if any such practice is deemed to be compliant with the traffic management rules included in this article, a detailed economic, competitive and legal analysis should be carried to investigate whether they are compliant with article 3(1) and 3(2), as prescribed in the recently updated guidelines produced by BEREC.

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?

The analysis of differentiated billing based on commercial considerations must not be carried against a background exclusively drawn from the recent rulings of the CJEU.

The composition of this "background" must, at least, include (1) the previous 2020 decision of the CJUE on Process C-807/18, which judges the legality a zero-rating offer, as well as the different declarations of the legislator, the European Commission, regarding the framework of zero rating offers, or in a broader sense, offers with differentiated billing.

As stated in the answer to the previous question, the legislator has repeatedly referred to the BEREC guidelines in matters of analyzing zero-rating offers, which content and reasoning has never been questioned by the legislator. It should be added that these guidelines have recently been object of detailed review, and the fundamentals of zero rating offers regulation, namely the need for a thorough case-by-case analysis of each practice, haven't been changed in its outcome.

In fact, these are the components of not only the background but also the complete framework inside which differentiated billing based commercial offers have been designed over the last 6 years, without any doubt having ever been raised, by these organizations (European Commission, BEREC and until recently the CJUE), on whether this practice was *per se* in conflict with the rules laid by the Regulation, and in particular with article 3(3).

It should be stressed that any back turn on this understanding would feed a legal uncertainty climate, would frustrate legitimate expectations, and would undermine the confidence of operators in designing innovative solutions, leading to a economical mood highly detrimental to the competitivity of the Union and with unpredictable impacts.

Analyzing in detail the elements of the background, it is important to safeguard that the rulings, albeit more recent, do not repeal previous preliminary rulings, namely the considerations of the CJEU on Process C-807/18 - Telenor Magyarország.

Also, the reasoning used by the Court in the recent rulings is partially substantiated on the Telenor ruling (v.g. paragraph 25 of process C-34/20 | paragraph 22 of process C-5/20 | paragraph 23 of process C-854/19) that supported the conclusion of the Court.

Thus, this means that the previous decision and the judgment criteria established by the Court on the Telenor case are not expressly overruled but, instead, support the recent decisions and have an inseparable link to these providing them with judicial background. This means that such precedent **can and should still be followed and should be considered by NRAs or National Courts.**

Furthermore, quoting paragraph 28. of the Telenor ruling it is possible to conclude that the national regulatory authorities maintain the possibility to determine on a case-by-case basis - subject to national courts review and in light of the clarifications of the CJEU – whether a "[…] *conduct of a given provider of internet access services, having regard to its characteristics, falls within the scope of Article 3(2) or Article 3(3) of that regulation, or both provisions cumulatively, and in the latter case the authorities commence their examination with one or other of those provisions.*".

This paragraph, quoted in all three of the decisions (C-34/20, C-5/20 and C-854/19), makes clear that the ruling of the CJUE, whilst having the nature of judicial precedent, assumes the role of an interpretative element to the case-by-case analysis of a provider's conduct by a NRA, and not the force of *res judicata*, consequently not being susceptible to bind the National Authorities to its conclusions.

Moreover, any CJEU decision hypothetically binding the national regulator on a definitive position regarding any and all Zero Tariff offers would be susceptible to represent a violation of Article 5 of the Regulation (EU) 2015/2120, that legitimates the independence of the national regulatory power "to closely monitor and ensure compliance with Articles 3 and 4 [and to] promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology.".

The possibility of a national regulator to evaluate certain offers on a case-by-case basis is duly supported on historic interpretation, since the of practice of Zero Rating was known to the Legislator, and the subject was debated during the discussion of the Regulation, culminating in the Legislator's decision not to introduce a blanket ban on zero rating. Again, this reasoning is also never questioned in the Telenor case decision,

Accordingly, it would be legitimate to any national regulator not to "follow" specific CJEU clarifications, thus adhering to the spirit of the legislator, the text and purpose of the regulation in respect to the principle of conforming interpretation[1].

Lastly, although the recent decisions provide a possible interpretation, they should not prevent the national regulator, when confronted with the concrete reality of a specific Zero Tariff offer, to determine whether if it falls within the scope of Article 3(2) or 3(3), or both.

In conclusion, NOS believes that there is ample space for the application of article 3(2) in differentiated billing practices. Moreover, NOS considers that its scope is not change, despite any interpretation given to the recent CJEU rulings

The recent rulings, in specific paragraphs – but, interestingly, not in each final declaration -of the recent Judgements of, the CJEU appears to provide an overly restrictive understanding of certain rules of the Regulation, in particular article 3(3),

[1] Regarding the principle of conforming interpretation of national law in accordance with sources of European law see Case 14/83 Von Colson v Land Nordrhein-Westfalen.

that goes significantly beyond the scope of the Regulation and the intentions of the European legislator, which if taken in a conservative stance, would lead to undue limitations on the freedom of choice of end-users and, ultimately, subvert the very purpose of the Regulation.

The recent rulings should be seen as an interpretation, and should never be taken isolated, but instead side by side with the previous ruling of the CJUE and the declared objectives of the legislator provided since the inception of the Regulation.

NOS also believes that any review of the guidelines should be supported by this perspective and any further changes should be minimal and not affect the very fundamental principles of the interpretation of articles 3(2) and 3(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 our view, although the 2020 CJEU ruling served as an interpretative gauge to the Deutsche Telekom and Vodafone cases, the recent rulings, in specific paragraphs – but not in each final declaration - appear to provide a restrictive understanding of certain rules of the Regulation, in particular article 3(3), that distance themselves from the Telenor Magyarország case, and that reasoning for each decision could result in a contradiction between precedents, opening a path for different interpretations in the same question of law.

The Grand Chamber of the CJEU in the Telenor case made it apparent that traffic treatment in article 3(3) must be analyzed in a technical perspective which includes traffic management but not traffic measurement, the latter of which deemed admissible under article 3 (2).

This understanding is patent under paragraph 51 that clearly refers that *"*[...] ***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."*

Thus, the Court in its reasoning in the Telenor case made a separation between the technical aspects underlying the zero-rated offers, making it clear that the zero-rating practice should be seen independently from the practices that result from the scope of article 3(3) *i.e.,* implying that the Zero-Rating practice *per se* does not violate article 3 (3).

This understanding by CJEU clearly contrasts with the recent rulings in the Deutsche Telekom and Vodafone cases, where the court that concluded that:

> ***Since such a tariff option is contrary to the obligations arising from Article 3(3)*** *of Regulation 2015/2120, that incompatibility remains,* ***irrespective of the form or nature of the terms of use attached to the tariff options on offer, such as the limitation on bandwidth in the dispute in the main proceedings****.*

Such reasoning opens an interpretative path to consider that any zero-tariff inherent to a zero-rated offer is contrary to Article 3 (3) irrespective of whether the technical aspects underlying are - or not - compliant with such article, which clearly represents a contradiction with the precedent ruling established by CJEU in the Telenor Case.

Consequently, in our opinion, such an interpretation represents an, undesirable opposition with the precedent established in the Telenor Case, susceptible of going against the very purpose of the preliminary ruling procedure, which is to ensure the uniform application of European law in the member states[2].

[2] v.g. Case 16/65 G. Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel

And, since the recent rulings do not repeal or overrule the precedent established in the Telenor Case, the contradiction between precedents will subsist and legitimate two different interpretations of the same issue of law in the European legal order and, consequently, within legal order of each member state, thus increasing legal uncertainty and compromising the legal expectations of operators and end users.

In this matter, it's our understanding that, although there is no *ex lege* difference between the judgment by the Chambers of the CJEU and the ones taken by the Grand Chamber (as it was the case in process Telenor Magyarország) any interpretation of the same question of law by the smaller Chambers should, at least, be consistent with the previous ruling of the Grand Chamber, hence the reason the 8th Chamber took the Telenor case into consideration, although with a restrictive approach.

Furthermore, since the reasoning of the recent judgments is inseparable from the precedent established in the Telenor case, is tenable that the precedent established can and should be taken into consideration by NRA and National Courts when evaluating a specific zero-rated offer.

Therefore, these recent rulings should be seen as an interpretative element, and should never be taken isolated, but on par with the previous ruling of the CJUE and the declared objectives of the legislator provided since the inception of the Regulation.

In conclusion, NOS considers that, although the declarations made by the Court in the recent decisions are not integrally conflicting, the reasoning represents an overly restrictive application of article 3 (3) entailing an apparent contradiction to the precedent established by the Telenor case, which may lead to the possibility for the NRAs and National Courts to adopt different interpretations of the same dispositions of the Regulation when it comes to Zero-Rating practices, leading to contradicting administrative and judicial decisions in the Member States and creating a disruption in the EU Markets regarding these practices.

In that sense, we reiterate that any possible exercise of revisiting the guidelines should not be limited to the most recent rulings and instead incorporate all the historical elements that form the legislative and regulatory body of work regarding Net Neutrality and in particular Zero-Rating practices, and this should necessarily include the Teleonor Case decision of the CJEU and the public positions published by the European Commission on this matter