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Telefónica answer to BEREC's call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines

Telefónica welcomes BEREC invitation to interested parties to provide feedback on the legal interpretation of the ECJ rulings concerning commercial zero rating propositions of Vodafone and DT in the German market.

For the sake of a sensible and ordered argumentation of the interpretation of the rulings, Telefónica is providing input to BEREC questions in a different order the questions were originally drafted.

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)?

First of all, it should be noted that rulings for the Telenor Magyarország case (C-807/18 and C-39/19), as well as those for Vodafone and DT in Germany (C-854/19, C-5/20 and C-34/20) are a response to requests for a preliminary ruling concerning very specific questions referred to the ECJ regarding commercial propositions by the above mentioned companies. As such, **any conclusion should be referred not to all zero rating offers per se, but to these specific offers (uncommon and exceptional in the European market) within the specific markets addressed by the prejudicial questions, which might differ from other EU national markets and commercial offers**.

Additionally, it should also be noted that Telenor Magyarország case ruling was delivered by the Grand chamber of the ECJ given the relevance and difficulties of the case, whereas German Vodafone and DT cases where delivered by the 8th Chamber of the ECJ composed of an ordinary formation of three judges. Another difference between Telenor's case and the German case is that the latest rulings were dispensed from an Advocate General opinion, and this is reserved for cases that do no raise new points of law. All of these, together with the continuous references to the Telenor case in the German cases rulings, confirm that German rulings do not aim revisiting the earlier ruling of the Telenor case and granted the efforts to establish consistency and uniform interpretation of EU law. The rulings of the German cases should be consistent and not depart from the law interpretation of the Telenor ruling.

Moreover, in the Telenor's case the ECJ analyses the compliance of Telenor's zero rating commercial proposition in the Hungarian market with Article 3 (2) and Article 3 (3) of the Open Internet Regulation. For this case, the ECJ concludes that when a commercial offer is proven to be non-compliant with Article 3(3) there is no need to assess whether such commercial proposition is compatible with the preceding Article 3(2)

In the German Vodafone and DT cases, based on the conclusion of the ECJ of the Telenor case as stated in the previous paragraph, once concluded that Vodafone and DT offers are not compatible with Article 3(3), the ECJ refrains from assessing compliance with Article 3(2) More precisely, the ruling of the German case states DT and VOD offers 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 Regulation and in the consideration that the exceptions provided for management measures are not applicable.

Moreover, Telenor case ruling should be the basis for the interpretation of the three rulings under consideration, all together providing **consistency and uniform interpretation of the EU Open Internet legislation.**

Summarizing, the German cases rulings should be considered and interpreted as being based on the 2020 Telenor case ruling.

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?

In the Telenor ruling, the ECJ determines that it is to be decided on a case by case basis if a practice, having regard to its characteristics, by an Internet Access Service (IAS) provider is to be assessed against Article 3 (2), or Article 3 (3) or both. National regulatory authorities are responsible for such decision subject to the review of national courts and taking into utmost account clarifications provided by the ECJ.

Following, ECJ states that according to Article 3(2) commercial practices by IAS providers and agreements between such provider and end-users must not limit the exercise of end user rights, adding compliance of commercial agreements with Article 3(2) must be assessed on a case by case basis, which according to recital 7 of the regulation should consider market specific considerations including reasons of scale, position of the providers of the IAS and of the applications involved materially reducing consumer choice.

In fact, national courts have already supported case by case analysis: 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 EU Regulation, as it did not allow a case by case assessment; is should be noted the Rotterdam District Court did not refer any preliminary questions to the ECJ. As a consequence of this ruling, the Dutch government amended its law on net neutrality enacted prior to the enforcement of the EU regulation.

Concluding based on the above, 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), that imposes an obligation of equal treatment of traffic setting the criteria for traffic management measures to be compatible with the Regulation. 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 if the traffic management technique at issue is not reasonable and thus incompatible with the Regulation.

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?

Entering into the assessment of Article 3(3), as stated the answer to the previous question, assessment of Article 3(3) and Article 3(2) differs. In fact, as already explained by the ECJ 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). And together with this purely commercial practice, there could be additional traffic management measures. In the Telenor ruling, the Telenor commercial offer included traffic management measures blocking or slowing down the traffic of certain applications and services in addition to the zero rating.

As stated in the answer to the previous question, should there be a traffic management practices, then Article 3(3) of Regulation shall apply not allowing any traffic management based on commercial considerations.

It is therefore relevant to distinguish a purely commercial zero rating offer based only on differentiated billing from traffic management measures.

Zero rating is a billing practice that takes place at the level of Business Support System outside the scope of network traffic management. More relevantly, this billing is processed and conducted at a different time, a posteriori, of the actual traffic flow, and as such does have no impact nor influence in the way the traffic is managed, neither on the service received by the end user --since the traffic has long passed the network and has been delivered to the end user. As such, zero rating has no effect on how traffic is handled and could not be the source of unequal treatment of traffic understood as impact on the service received by the end user.

Therefore, to conclude, if zero rating options do not involve traffic management measures that would fall to be considered under Article 3(3), it should not be considered as the source of unequal treatment of traffic, and therefore be automatically compliant with Article 3(3) thus remaining subject to a case-by-case compliance assessment of Article 3 (2).

Telefónica's final remarks

As closing general remarks regarding a potential wider interpretation of the ECJ ruling of the commercial zero rating propositions of Vodafone and DT in the German market, Telefónica would like to highlight:

Rulings for the Telenor Magyarország case (C-807/18 and C-39/19), as well as those for Vodafone and DT in Germany (C-854/19, C-5/20 and C-34/20) are a response to requests for a preliminary ruling concerning very specific questions referred to the ECJ regarding commercial propositions by the above mentioned companies. As such, **any conclusion are referred not to all zero rating offers per se, but to these specific offers (uncommon and exceptional in the European market) within the specific markets addressed by the prejudicial questions, which might differ from other EU national markets and commercial offers.**

In analysing the specific offers, the ECJ in VOD and DT cases, have not taken into account the differences between zero rating being conducted together with management traffic or without including these practices.

An expansion of the reach of the ECJ ruling would undermine interpretation of the existing regulation since entry into force in 2016. Additionally, it would contradict BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules and the decision of National Regulatory Agencies on zero rating offers widely available across Europe. Enforcement up to date of the Regulation has not deemed zero rating a problem per se. The EU Commission explains in the Implementation Report on the open internet access provisions of Regulation (EU) 2015/2120 from 2019, that despite zero rating is not directly mention neither address in the Regulation, they have been taken into account by co-legislators under Article 3 (2), referring to BEREC guidelines as explaining cases where zero rating could be within the limits of the Regulation. It should therefore be interpreted that the Regulation provides room for the provisioning of zero rating offers, and that such regulation does not provide a general prohibition to zero rating. In fact, NRAs have been conducting up to date case-by-case assessments of zero rating proposition to analyse compliance with regulation.

To conclude, Telefónica considers BEREC and National Regulatory Agencies should provide legal certainty, predictability and an efficient implementation of the Regulation, ensuring consumer and business welfare and choice innovative services provided by telecom operators, in particular, based on the new technical features of the 5G networks will bring along. To achieve this aim, Telefónica recommends BEREC to focus, when reviewing the Implementation Guidelines to address the consequences of the ECJ rulings on zero rating offers, on the following:

- Detailed description of the interplay of Articles 3(2) and 3(3) of the Regulation, clearly stating how such articles should be applied in the compliance assessment of purely commercial zero rate offers based

exclusively on differentiated billing, and other zero rating offers additionally including traffic management measures, with the former being assessed exclusively against Article 3 (2) as already compliant with Article 3(3), and the latter on both Articles.

- Clear differentiation between technical traffic management measured and purely commercial zero rating offers based on differentiated billing and thus having no impact on the service received by the end user.
- Explicit confirmation that zero-rating offers are not per se non-compliant with the Regulation and should continue to be assessed on a case-by-case basis.

Telefónica would like to thank again BEREC for the possibility to provide input on the legal interpretation of the ECJ rulings on zero rating, hoping the presented argumentations are taken into utmost consideration in the upcoming review of BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, confirming the Company commitment to remaining actively engaged in the extremely relevant review process of the Implementation Guidelines.