Теленор България ЕАД
ж.к. Младост 4
Бизнес Парк София, сгр. 6
1766 София
www.telenor.bg

Telenor Bulgaria EAD

Note on the consultations regarding the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines

Thank you for the opportunity to present our views on the interpretation that should be given to the recent CJEU preliminary rulings, cases C-854/19, C-5/20 and C-34/20, regarding certain practices of MNOs in order to properly incorporate those into BEREC Guidelines on Open Internet.

BEREC, while seeking our overall opinion on said CJEU rulings, invites us to consider the following questions:

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? 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? 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)?

We would rather address all these questions together in our opinion below.

We would like to emphasize at the outset that we view the cases presented in the preliminary questions to CJEU as illustrations of commercial practices that aim to restrict or differentiate the way provided given volume/packages of data to a consumer are used according to location, i.e. when roaming, or equipment, i.e. tethering, or bandwidth. As such, these cases, in our opinion, represent clear examples of the scenarios that were taken into account under the provision of article 3 of Open Internet Regulation. It is precisely these types of practices of traffic management due to commercial considerations that this act aimed at banning.

As rightly stressed by paragraph 43 of BEREC Guidelines, the aim of the Regulation is to "*safeguard equal and non-discriminatory treatment of traffic" (Article 1) and to "guarantee the continued functioning of the internet ecosystem as an engine of innovation*". Also, it aims to restrict "commercial practices which, by "*reason of their scale, lead to situations where end-users choice is materially reduced in practice", or which would result in "the undermining of the essence of the end-users' rights"*. This could be achieved by taking into extent to which end-users' choice has been restricted by the agreed commercial and technical conditions included in the zero-rating practice.

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Indeed, the overall goal of said provision was in no way to generally ban zero-rating as a practice *per se.* Such an approach would, in our opinion, have adverse effects of the regulation, which, instead of protecting the consumers' rights against detrimental to them commercial practices of the MNOs, restrict beneficial to the consumers commercial propositions aimed at providing more flexibility when using data towards certain, more preferred applications, while ensuring that such propositions remain as open as possible to all CAPs to join zero-rating programs.

We therefore strongly oppose a narrow interpretation of said CJEU ruling leading to a complete ban of zero-rating practices and urge BEREC and NRAs to stick to current approach as adopted in the Guidelines which is to assess every single practice on a case-by-case basis. This approach would also be in line with paragraphs 41 and 42 of mentioned CJEU judgment, Grand Chamber, on Telenor Magyarország case. At the best, the examples the rulings of CJEU could be incorporated in the Guidelines as clear examples.