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BEREC – Body of European Regulators for Electronic Communications

Subject: Telenor Hungary's input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines

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Telenor Hungary (Telenor Magyarország Zrt. 2045 Törökbálint, Pannon út 1.) highly appreciates and would like to thank BEREC the opportunity to share our view on the rulings of the Court of Justice of the European Union (CJEU) on zero-rating and on their implications. We hope that our input will help BEREC to select those actions within the Body's competence which serve BEREC's responsibilities towards end-users and industry in the best way. We do not think that these actions shall be limited to the review of the BEREC Guidelines on the Implementation of the Open Internet Regulation in line with the recent CJEU rulings.

In its call for input BEREC invites stakeholders to provide their reading of the three rulings of the CJEU on zero-rating and answer 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 like to address these questions together.

In our opinion the recent Judgements issued by the CJEU on 2 September 2021 do not generally prohibit zero-rating offers but prohibit the technical traffic management measures included in the zero-rating offers that were specifically the subjects of the referrals. This interpretation is supported by the conclusions of the Judgements which refer specifically to the technical measures of the zero-rating offers:



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“a limitation on bandwidth, on account of the activation of a ‘zero tariff’ option, applied to video streaming, irrespective of whether it is streamed by partner operators or other content providers, is incompatible with the obligations arising from Article 3(3).”

“a limitation on use when roaming, on account of the activation of a ‘zero tariff’ option, is incompatible with the obligations arising from Article 3(3).”

“a limitation on tethering, on account of the activation of a ‘zero tariff’ option, is incompatible with the obligations arising from Article 3(3).”

These conclusions indicate that those zero-rating offers are incompatible with the Open Internet Regulation which combine traffic management and a commercial consideration. Therefore, 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 if there is no differentiated traffic management.

If the rulings were to be interpreted in a broader way – i.e. that they shall also be applied to purely commercial practices – it would cause Article 3(2) of the Regulation to become redundant. A broader interpretation would be a departure from the Judgment in the Telenor Hungary case where the Grand Chamber of the CJEU had the opportunity to make a broader ruling that all zero-rating offers were incompatible with the Regulation, but did not.

That being said, for the sake of more legal certainty in this case it is crucially important to wait for the Judgements of the referring German Courts and their interpretations. Nevertheless, even if the rulings of the German Courts will reflect the same or similar interpretation to ours presented above, evidently we face a situation where BEREC „observes that the way in which the Court of Justice tackled the cases calls for an update of BEREC’s guidance on zero-rating” but the exact extent of this change is admittedly not clear for the Body of Regulators and „needs further scrutiny, as it brings up important legal questions” and „at this this stage BEREC thinks it is likely that less kinds of zero rating are allowed than under the interpretation of the Open Internet Regulation in the current BEREC Guidelines.” These observations in our opinion raise the issue if it was an inevitable action of BEREC to consider the question whether the Open Internet provisions of the Regulation are capable at all of direct effect, i.e. whether they fulfil – inter alia – the requirements of being clear and precise, which are necessary in case of an EU Regulation.

In our opinion it is justified to raise doubts about the clarity of the Regulation if the implications of the September 2 Judgements of the CJEU are that less kinds of zero rating will be allowed – even if this collective interpretation and review process will conclude that zero rating is not illegal per se. In our opinion it is also justified to raise doubts about the precision of the Regulation if for no other reason, then for that implication of the Judgement of the CJEU in the Telenor Hungary case that the concept of ‘end user’ of the Regulation does not encompass those persons that provide public communications networks or publicly available electronic communications services. Consequently, it does not encompass now those content or application providers which qualify as number independent interpersonal communications service providers.



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Therefore, to provide for the sufficient level of consistency, legal certainty and predictability with regard to this extremely important piece of legislation we respectfully recommend BEREC not only to review the Guidelines on the Implementation of the Open Internet Regulation but in the process of close collaboration with the European Commission to raise the issue of the possible deficiency of the direct effect of the Regulation.