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**BEREC**

**Call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines**
**BoR (21) 149**

## I. Introductory remarks

I welcome the opportunity provided by BEREC to comment on the recent ECJ judgements (issued on 2 September 2021, C-34/20 – Telekom Deutschland; C-854/19 – Vodafone; C-5/20 – Vodafone) on the Open Internet Regulation (Regulation (EU) 2015/2120). Since I have been actively involved in the net neutrality debate from an academic point of view for almost ten years (see *Fetzer* (2012), (2013), (2017), (2020), (2021)), I would like to take the opportunity of contributing to the call for stakeholder input (BoR (21) 149) initiated by BEREC.

## II. Specific questions raised by BEREC

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?*

Zero rating is usually based on an agreement involving an Internet Service Provider (ISP) and an end-user. Therefore, the legality of such an agreement on zero rating primarily must be assessed

based on Art. 3 para. 2 Regulation (EU) 2015/2120. This provision entitles end-users and ISP to exercise their freedom of contract. On a fundamental rights level, for businesses this is also protected by Art. 16 of the Fundamental Rights Charta. Undoubtedly, the freedom of contract is not granted limitless, neither in the Fundamental Rights Charta nor in Art. 3 para. 2 Regulation (EU) 2015/2120. According to Art. 3 para. 2 Regulation (EU) 2015/2120 ISP and end-users can only agree on commercial and technical conditions and the characteristics of internet access services, if such agreements do not limit the exercise of the end-user rights laid down in Art. 3 para. 1 Regulation (EU) 2015/2120. Accordingly, zero-rating options can only be permissible, where they do not interfere with the end-users' rights protected by Art. 3 para. 1 Regulation (EU) 2015/2120. As a matter of fact, the Regulation (EU) 2015/2120 does not contain an explicit provision on zero rating. Consequently, the question whether zero-rating options always constitute an unduly restriction of end-users rights and are therefore generally prohibited by Art. 3 para. 2 Regulation (EU) 2015/2120, can only be answered by construing Article 3 of the Regulation using methods of statutory interpretation:

The text of Art. 3 para. 1 Regulation (EU) 2015/2120 does not provide any conclusive argument as to whether zero rating should constitute an impermissible restriction of end-user rights and thus be strictly prohibited under Art. 3 para. 2 Regulation (EU) 2015/2120. Also, the systematic interpretation of Art. 3 para. 2 in connection with Art. 3 para. 1 Regulation (EU) 2015/2120 does not lead to an unambiguous result. However, the historical interpretation of Regulation (EU) 2015/2120 provides a first indication that zero rating should not be prohibited in principle as an impermissible restriction of Article 3 para. 1 Regulation 2015/2120: Although zero rating was discussed during the legislative process, no strict ban was implemented (https://www.europarl.europa.eu/news/de/headlines/society/20151022STO98701/was-bedeutet-netzneutralitat); also see European Commission, Report from the Commission to the European Parliament and the Council on the implementation of the open internet access provisions of Regulation (EU) 2015/2120, COM(2019) 203 final p. 3). If, however, the European legislature was aware of the existence of zero rating but did not formulate an explicit ban of such practices, this indicates that the legislature did not consider zero rating to be a restriction of Article 3 para. 1 Regulation (EU) 2015/2120, which should be generally prohibited.

More importantly, the teleological interpretation of Art. 3 shows that the Regulation (EU) 2015/2120 does not contain such general prohibition: In para. 1 the provision grants end-users the right "to access and distribute information and content, [to] use and provide applications and services, and [to] use terminal equipment of their choice [via their Internet access service], irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service." Thus, the purpose of the provision is primarily to protect end-users (especially their choices) and consequently also the internet as a space for open innovation. Based on this objective, it must therefore be assessed on a case-by-case basis whether a specific zero-rating practice restricts end-users' choices. This is the decisive test when assessing the legality of zero rating. Hence, the overall purpose of Regulation (EU) 2015/2120 can

only be achieved, if the National Regulatory Agencies retain the ability to decide on the legality of a zero-rating tariff in any individual case.

If, however, a zero-rating practice passes this test, meaning it does not restrict end-users' rights, traffic management measures necessary to execute the (legal) agreement between an ISP and its end-users' cannot be considered a per se violation of Art. 3 para. 3 Regulation (EU) 2015/2120. If one were to understand Art. 3 para. 3 Regulation (EU) 2015/2120 as an absolute ban of any differentiated treatment of internet traffic which is based on an agreement in line with Art. 3 para. 2 Regulation (EU) 2015/2120, but not with Art. 3 para. 3 subparagraphs 2 or 3 Regulation (EU) 2015/2120, Art. 3 para. 2 Regulation (EU) 2015/2120 would be obsolete. Consequentially, in this case any differentiated treatment of data traffic would only be permissible under the conditions of Article 3 para. 3 Regulation (EU) 2015/2120, i. e. irrespective of any contractual agreement and irrespective of whether such differentiated treatment affects end-user rights under Article 3 para. 1 Regulation (EU) 2015/2120. Consequently, the question would arise why the European legislator adopted the provisions of Article 3 para. 1 and para. 2 of Regulation (EU) 2015/2120 at all.

Moreover, such a reading of Art. 3 Regulation (EU) 2015/2120 would not only be inconceivable from a systematic point of view, it would also largely disregard the meaning and purpose of the regulation. According to recital 1 Regulation (EU) 2015/2120 the Regulation is intended to protect end-users and at the same time to ensure that the "internet ecosystem" can continue to function as an "engine of innovation". Inherent in this objective is a balancing of various interests. This is also indispensable since some zero-rating offers may be in the interest of all end-users within the meaning of Article 3 para. 1 Regulation (EU) 2015/2120 (also see European Commission, Report from the Commission to the European Parliament and the Council on the implementation of the open internet access provisions of Regulation (EU) 2015/2120, COM(2019) 203 final p. 3).

However, even if one were to assume that the ECJ's view is correct, according to which Article 3 para. 3 Regulation (EU) 2015/2120 is the prior standard of review for zero rating, the court fails to provide a justification that zero rating actually constitutes a "traffic differentiation" within the meaning of said provision. After all, zero rating does not technically differentiate traffic once the included data allowance of an end-user has been used up. Unlike in the *Teleonor* decision, especially in the case of the *Telekom* case the data traffic was slowed down uniformly after the included data volume was exhausted. Therefore, a differentiated treatment of certain content, applications or services did not happen at any time from a technical perspective. Instead, a distinction was made solely regarding billing. Looking at Article 3 para. 3 Regulation (EU) 2015/2120, however, it can be argued that it only covers technical differentiations of certain applications, services and content (see also recitals 3 and 8 Regulation (EU) 2015/2120). If the provision is understood in this sense, the requirements of Article 3 para. 3 Regulation (EU)

2015/210 are at least not met in the case of zero-rating tariffs, where all services are charged uniformly once the included data volume has been used up.

2. *Against the background of the rulings, where do you see room for the scope of application of Art. 3 (2) regarding differentiated billing based on commercial considerations?*

If one follows the line of reasoning by the ECJ, not only would any zero-rated offers be illegal, but also tariffs with a limited data volume and rates that provide customers with different bandwidths would no longer be permissible. In the case of limited data tariffs, ISPs must slow down or block data traffic after the included data volume has been used up. Applying the reasoning of the ECJ, however, traffic management measures are impermissible if they are based on commercial considerations, irrespective of whether internet access providers and end-users have concluded a contract on this in accordance with Article 3 para. 2 Regulation (EU) 2015/2120. According to the ECJ, the only standard of review is Article 3 para. 3 Regulation (EU) 2015/2120. However, tariffs with different included data volumes are always based on commercial considerations. This also applies to different bandwidth tariffs: An ISP reduces the bandwidth of an internet access if a customer books a lower bandwidth than his physical network access allows from a technical point of view. This bandwidth reduction also constitutes a traffic management measure based on commercial reasons. Yet, such practice would be impermissible under Art. 3 para. 3 Regulation (EU) 2015/2120 if the ECJ's case law were applied consistently. It is true that these two tariff structures are expressly considered permissible in Art. 3 para. 2 Regulation (EU) 2015/2120. However, since in the opinion of the ECJ any traffic management measure must always be measured primarily against Art. 3 para. 3 Regulation (EU) 2015/2120, Art. 3 para. 2 Regulation (EU) 2015/2120 would no longer be relevant. These examples show that a narrow interpretation of the ECJ's decision is not only unconvincing from a dogmatic point of view. Such interpretation would also ultimately lead to results that run counter to the interests of those who are to be protected, among others: consumers. Consequently, internet access providers would only be allowed to offer unlimited rates with the maximum technically available bandwidth if they do not want to violate Regulation (EU) 2015/2120. It is foreseeable that this would increase the price level, especially for those who do not need an unlimited Internet connection in terms of volume and speed. Hence, Art. 3 para. 2 Regulation (EU) 2015/2120 remains – at least – the primary standard for zero-rating tariffs which only differentiate in terms of billing but not the technical transmission of data. The legality of such tariffs must be assed based on Art. 3 para. 2 Regulation (EU) 2015/2120. The National Regulatory Agencies must decide on a case-by-case basis whether a zero-rating tariff restricts end-users' rights under Art. 3 para. 1 Regulation (EU) 2015/2120. Zero-rating tariffs that do not restrict those rights and treat all traffic (on a transmission level) equally are then permissible under Art. 3 para. 2 Regulation (EU) 2015/2120.

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)?*

The new decisions by the ECJ are not consistent with the rulings in 2020: The court did not see a general prohibition of zero rating based on Regulation (EU) 2015/2120 in its 2020 Telenor ruling. Rather the court considered Telenor's offer to be inadmissible only after examining the specifies of Telenor's offer. On the contrary, the new decisions understand Regulation (EU) 2015/2120 as a general ban of zero-rating practices independent of the specific structure of such offers.

## III. Conclusion

The new decisions by the ECJ rest on the assumption that any zero-rating tariff must be primarily in line with Art. 3 para. 3 Regulation (EU) 2015/2120 whereas Art. 3 para. 2 Regulation (EU) 2015/2120 is not relevant. It is questionable whether this fundamental understanding of the relationship between Art. 3 para. 3 and para. 2 Regulation (EU) 2015/2120 is reflecting the structure and the purpose of Art. 3 Regulation (EU) 2015/2120. However, at least zero rating which only differentiates the billing of internet traffic, but its transmission must solely be assessed under Art. 3 para. 2 Regulation (EU) 2015/2120. In this case no traffic management in the sense of Art. 3 para. 3 Regulation (EU) 2015/2120 is applied. Consequently, this is especially true for zero-rating tariffs which treat all internet traffic equally after the included data allowance has been used up by an end-user.

**Appendix**

**Fetzer/Peitz/Schweitzer (2012),** Die Netzneutralitätsdebatte aus ökonomischer Sicht, in: Wirtschaftsdienst 2012, 777-783

**Fetzer/Peitz/Schweitzer (2013),** Flexible Geschäftsmodelle in der Telekommunikation und die Netzneutralitätsdebatte, in: Wirtschaftsdienst 2013, 695-701.

**Fetzer (2017),** Zulässigkeit von Zero-Rating-Angeboten und Traffic-Shaping-Maßnahmen – Zulässigkeits-regelungen der europäischen Netzneutralitätsverordnung, in: MMR 2017, 579-583.

**Fetzer (2020),** Die Neutralitätsdebatte erreicht den EuGH – Zugleich Besprechung von EuGH, Urteil v. 15.9.2020 – C-807/18 und C-39/19, in: ZUM 2020, 912-918.

**Fetzer (2021),** Der EuGH verbietet Zero Rating – Anmerkung zu EuGH Urteil v. 2.9.21 – C-34/20, in: ZUM 2021, 937-940.