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Input for the incorporation of the CJEU judgments in the BEREC Guidelines

T-Mobile Austria GmbH („Magenta“) welcomes the opportunity to provide input for the incorporation of the CJEU judgments on the Open Internet Regulation in the BEREC Guidelines. Magenta is one of the leading ISPs and MNOs in Austria and offers fixed and mobile broadband products. Part of the mobile portfolio is the so called “Magenta Stream” option, which is a zero-rating offer for social & chat, music and video applications. The option is open for all applications and the Austrian NRA has approved this offer.

- 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?**

According to the CJEU ruling C-807/18 and C-39/19 – Telenor Magyarország Art 3 para 3 of the Open Internet Regulation deals with technical traffic management, as the CJEU in the ruling clearly distinguishes between “*packages, agreements, and measures blocking or slowing down traffic (which) limit the exercise of end users` rights*”, that are subject to Art 3 para 2, and “*measures blocking or slowing down traffic (that) are based on commercial considerations*”, that are subject to Art 3 para 3. Zero-rating offers not involving technical discrimination are therefore allowed as long as they do not limit the exercise of end users` rights. BEREC laid out a framework for analyzing such offers in its Guidelines on the Implementation of the Open Internet Regulation (para 42 et seq.) and the NRAs applied this guidance. In Austria, RTR ruled that zero-rating offers not involving technical traffic management are in line with the Open Internet Regulation.¹ In its yearly Net Neutrality report, RTR conducts an in-

¹ https://www.rtr.at/TKP/aktuelles/entscheidungen/entscheidungen/R_5_17_Bescheid_A1-FreeStream.pdf

depth analysis into current zero-rating offers and states that this practice is not prohibited per se.² There are also numerous public statements of RTR, that zero-rating without technical traffic management is not in conflict with the Open Internet regulation.³

If zero-rating offers not involving differentiated traffic management are not in line with Art 3 para 3 subpara 1, then Art 3 para 2 would be irrelevant, as all offers from ISPs are based on commercial considerations. Such options increase the consumer value of products and aim to increase the commercial success of these products. Therefore, all zero-rating options are based on commercial considerations.

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?

The recent rulings should be read in the light of the Telenor case and must not be interpreted extensively (see answer to question 3). Otherwise Art 3 para 2 would be irrelevant as all zero-rating offers and potential future products like 5G slicing are based on commercial considerations. Art 3 para 2 lays out the basis for all products not involving technical traffic discrimination and the recent rulings do not affect this established legal principal. Zero-rating offers are widespread in today`s European markets, as ISPs relied on the established legal opinion of BEREC, all NRAs and the European Commission. A deviation from this legal opinion and a narrowing of the scope of application of Art 3 para 2 regarding differentiated billing based on commercial considerations would undermine legal certainty and regulatory predictability.

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 Telenor ruling in 2020 was issued by the Grand Chamber of the CJEU, while the recent rulings were drafted by the 8th Chamber without asking the Advocate General to submit an opinion. The CJEU Statute only permits this, if the Court considers, that the case raises no new point of law. Therefore, it is questionable, whether the CJEU wanted to deviate from its existing case. Unfortunately, the recent rulings do not provide an in-detail description of the technical details, that the court considered to be true, when analyzing the case. Hence it is possible that the court assumed that the products in question involved some kind of technical traffic discrimination. Against this background, the recent rulings have to be read in the light of the Telenor case, which does not state, that zero-rating is a violation of the Open Internet regulation in general. As long as no technical traffic differentiation is applied, zero-rating offers should fall under the scope of Art 2 para 2 and a case-by-case analysis.

²

https://www.rtr.at/TKP/aktuelles/publikationen/publikationen/netzneutralitaetsbericht/Netzneutralitaetsbericht_2021.pdf

³ <https://www.derstandard.at/story/2000120101006/rtr-zero-rating-verletzt-netzneutralitaet>

The planned revision of the BEREC Guidelines in the lights of these judgements should focus exclusively on zero-rating practices that include technical traffic management measures.

For further information or any questions, please do not hesitate to contact us.

Best regards,

A handwritten signature in blue ink, appearing to read 'A. Fischer-Post', with a stylized flourish at the end.

T-Mobile Austria GmbH

VP Corporate Affair