



**Vodafone response to the  
BEREC call for stakeholder input, to feed into the incorporation of  
the ECJ judgments on the Open Internet Regulation in the BEREC  
Guidelines**

**20 October 2021**



## Executive Summary

Vodafone would like to thank BEREC for the opportunity to provide feedback to its call for stakeholder input on the interpretation of the various judgments handed down by the Court of Justice of the European Union ('**CJEU**') on the interpretation of the Open Internet Regulation (the '**Regulation**'), (together, the '**Judgments**'). This is a topic of significant importance to industry, and Vodafone appreciates that BEREC is considering the matter in-depth.

As a preliminary point, Vodafone accepts that in light of the Judgments, the specific traffic management measures or other terms of use that were included in the zero-rating offers that were subject to the Judgments (exclusions of tethering or roaming; or bandwidth limitations for certain categories of traffic), cannot be considered compliant with the Regulation. Vodafone can confirm that these specific practices have, in any case, been technically disappplied in practice in the offers under consideration, prior to the Judgments being issued.

However, Vodafone's position is that, based on the facts of cases, and in consideration of the jurisprudence to date (in particular *Telenor*), the most cogent reading of the Judgments is that the CJEU was considering the legality of specific types of zero-rating offers, that include differentiated traffic management measures or other terms of use such as those in the Judgments. The Judgments do not purport to impose a general, unqualified and *per se* prohibition on zero-rated tariffs as a commercial practice. As a consequence, zero-rating offers, that enable differentiated billing of traffic, should continue to be assessed on a case by case basis, taking into account the criteria BEREC has carefully established since the entry into force of the Regulation.

This interpretation is supported by the independent legal opinion provided by Robert O'Donoghue QC, Member of the Brussels Bar (Flemish), and Allan Cerim (Barrister at Brick Court Chambers). Their full Opinion, which addresses in detail each of the questions raised by BEREC, is appended to this response at **Annex A**, and we hope this assists BEREC in its legal analysis of the matter.

Vodafone also emphasises that there are existing forms of zero-rating that are both beneficial to end-users and society *and* adhere to the principles of net neutrality. In particular, our Vodafone Pass offers have consistently been designed and adjusted to comply with the latest BEREC Guidelines on Net Neutrality, as well as NRA decisions and statements in their Annual Reports on zero-rating. There are millions of Pass offers that are active across the EU today as a consequence of this guidance.

In addition, Vodafone, along with many other operators, have used zero-rating tariffs, offered as part of a broader commercial contract with a customers, in order to further the public good and promote data democratisation for lower income customers.

For example, our charitable Vodafone Foundation arm has enabled applications, such as the cancer and Covid-19 research app 'DreamLab', to be zero rated, so as to ensure that as many people can access those apps as possible. Additionally, Vodafone also enabled zero-rated access

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<sup>1</sup> For more information, see: <https://www.vodafone.com/vodafone-foundation/focus-areas/dreamlab-app>. DreamLab is available in 9 EU countries.



to many critical services, such as health and education content, to support end-users during the Covid-19 pandemic, in many cases with the support of Governments and NRAs.

In addition, a number of commercial zero-rating practices benefit lower income groups, consistent with the principles of data democratisation. Many customers rely on zero-rating offers to facilitate unhindered access to the applications they need, where an unlimited offer may not be affordable to them. Therefore, removing such zero-rating practices would negatively impact those vulnerable groups who rely on such commercial offers.

A discussion of these zero-rating offers, and the benefits they bring, can be found in a statement by Tanja Reineke, Vodafone Group Head of Marketing and Wholesale and commercial architect of many of our zero-rated offers, at **Annex B**.

Vodafone remains open and ready to liaise with BEREC, and to explore any of the points raised in this response in more detail as helpful. Please address any follow up questions or comments to Nicola Perry ([nicola.perry1@Vodafone.com](mailto:nicola.perry1@Vodafone.com)).

**Attachments:**

- Annex A: Legal Opinion by Robert O'Donoghue QC, Member of the Brussels Bar (Flemish) and Allan Cerim, Brick Court Chambers.
- Annex B: Witness Statement on Zero-Rating by Tanja Reineke, Vodafone Group Head of Marketing and Wholesale.

***End.***