

Explanatory document on the Public Consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation

15 March 2022

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1. Introduction

The Body of European Regulators for Electronic Communications (BEREC) has prepared an update to the BEREC Guidelines on the Implementation of the Open Internet Regulation (BEREC Open Internet Guidelines) in light of the recent European Court of Justice (ECJ) rulings on the Open Internet Regulation (OIR). BEREC is now inviting all stakeholders to submit their observations and contributions regarding the draft Guidelines revisions.

BEREC takes note of the three rulings (C 34/20 – *Telekom Deutschland*¹, C-854/19 – *Vodafone*² and C-5/20 – *Vodafone*³) issued by the ECJ on 2 September 2021 regarding violation of the European Union (EU) open internet rules. The ECJ rulings state that the practices by two German providers (*Telekom Deutschland* and *Vodafone*) are incompatible with the OIR⁴.

The three cases referred to in the ECJ rulings consist of internet access services' offers including a 'zero tariff' option (commonly also referred to as 'zero-rating' options). Such practices entail that the traffic generated by specific (categories of) applications is not counted towards the data volume of the basic package.

The main finding from the reasoning of the rulings is that zero tariff options are incompatible with the equal treatment obligation as set out in Article 3(3) of the OIR since traffic is not treated equally. The ECJ did not assess the individual limitations of use as the "*incompatibility remains, irrespective of the form or nature of the terms of use*"⁵.

BEREC aims at fostering the independent, consistent and high-quality regulation of digital markets for the benefit of Europe and its citizens. To contribute to the consistent application of the OIR and promote an effective internal market in the electronic communications sector, Article 5(3) of the OIR explicitly obliges BEREC to issue guidelines for implementing the obligations of National Regulatory Authorities (NRAs) under the Regulation. In June 2020, BEREC reviewed the Open Internet Guidelines in accordance with its mandate under the OIR. In light of the recent ECJ decisions and as announced in the BEREC Work Programme 2022⁶, the BEREC Open Internet Guidelines are to be updated to reflect the interpretation of the ECJ rulings.

BEREC has performed this evaluation based on BEREC's experience with the application of the OIR and the BEREC Open Internet Guidelines. In October 2021, BEREC launched a call for stakeholder input to offer them the opportunity to share their views on the ECJ rulings on zero-rating with an appropriate justification supporting their understanding. BEREC received substantive responses from 26 stakeholders, 23 of which were published⁷. BEREC welcomed

¹ <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-34/20&jur=C>

² <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-854/19&jur=C>

³ <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-5/20&jur=C>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2015:310:FULL&from=EN>

⁵ ECJ, C-854/19 *Vodafone (Roaming)*, paragraph 33; C-5/20 *Vodafone (Tethering)*, paragraph 32; C-34/20 *Telekom Deutschland*, paragraph 35.

⁶ BEREC Work Programme 2022, Section 2.4.3., https://berec.europa.eu/eng/document_register/subject_matter/berec/annual_work_programmes/10136-berec-work-programme-2022

⁷ https://berec.europa.eu/eng/news_and_publications/whats_new/9054-berec-publishes-the-received-stakeholders-input-to-feed-into-the-incorporation-of-the-ecj-judgments-on-the-open-internet-regulation-in-the-berec-guidelines

the contributions received helping to feed into the incorporation of the ECJ rulings on the OIR in the BEREC Open Internet Guidelines.

The objective of this consultation document is to:

- provide information regarding the on-going public consultation and the work done in BEREC (Chapter 2);
- provide information regarding the draft guidelines and explain the major clarifications and changes performed (Chapter 3);
- outline BEREC's reading of the ECJ rulings to open the reasoning for these proposed changes to the BEREC Open Internet Guidelines (Chapter 4).

2. Public consultation

BEREC invites all stakeholders to submit their observations and contributions regarding the draft BEREC Open Internet Guidelines. The public consultation is open from 15 March 2022 to 14 April 2022.

In accordance with the BEREC policy on public consultations, BEREC will publish a summary of all received contributions, respecting confidentiality requests. All contributions will be published on the BEREC website, taking into account requests for confidentiality and publication of personal data. Stakeholders can request confidentiality of all or part of the documents submitted to a public consultation, upon submission. If there is no clear indication that all or part of the documents are confidential, BEREC will presume that the documents can be made available to the public. Please note that it is also possible to submit both a confidential and a public version of a given contribution.

All stakeholders are invited to submit their contributions to the following email address OI-Guidelines-Consultation@bereg.europa.eu by **14 April 2022 17:00 CET**. Contributions should be sent preferably in English.

After submitting the contribution via email, an automatic confirmation reply will be generated. If this confirmation email is not received, the submission of the contribution was not successful and should be sent again.

We strongly encourage all stakeholders to submit their contributions as early as possible. Contributions received after the above-mentioned deadline will not be taken into account.

For further information regarding Open Internet rules in the EU, please visit the BEREC website's dedicated page on the topic at https://bereg.europa.eu/eng/open_internet/.

3. Description of the proposed major clarifications

The following table describes and explains the proposed major clarifications to the current BEREC Open Internet Guidelines:

Topic	Paragraph number(s)	Overall description of the change	Explanation
Legal references	1	References added to the four ECJ rulings on the OIR.	The Guidelines have been reviewed in light of the ECJ rulings on the OIR.
Legal references	4	References added to the relevant paragraphs of the four ECJ rulings on the OIR.	ECJ has confirmed the concept of 'end-user'.
Legal references	4, 7, 8, 25, 87 and 144	Referring to the EECC when appropriate.	The European Electronic Communications Code (EECC) replaces the older directives referred to in the Guidelines.
Commercial and technical conditions regarding services provided by ISPs	35	Examples revised to reflect commercial practices that are typically admissible in light of the ECJ rulings.	Article 3(3) OIR equal treatment of traffic obligation is relevant and thus application-agnostic offers, where no discrimination in traffic is made between different (categories of) applications, are admissible.
Zero-rating	36, 37, 37a, 40-43 and 48	Deletion of the zero-rating specific guidance and examples under Article 3(2) OIR.	Zero tariff options are generally incompatible with the Article 3(3) OIR equal treatment of traffic obligation and no Article 3(2) OIR case-by-case assessment is needed.
Price differentiation applied to categories of applications	39	Deletion of paragraph 39	Price differentiation applied to categories of applications is not an application agnostic practice and should be evaluated first of all against Article 3(3) OIR equal treatment of traffic obligation.
Guidance on assessment of differentiated pricing practices	40-40c	New guidance for NRAs for assessing differentiated pricing practices.	In light of the ECJ rulings, new guidance was required.

Equal treatment obligation	37 and 49	Clarification added that the equal treatment obligation relates to any measure, both of technical and non-technical nature. Hence, it also includes unequal treatment by way of zero tariff options and similar offers.	ECJ clarified the “general obligation to treat all traffic equally” in Article 3(3), subparagraph 1 OIR, to be applicable to both technical and non-technical measures.
Zero tariff option	54a	Paragraph added to clarify that zero tariff option violates the general obligation to treat all traffic equally.	See above
Price differentiation beyond the data cap	55	Amendment of the third bullet point to reflect that price differentiation beyond the data cap violates the equal treatment obligation both, in a technical and non-technical manner.	ECJ clarified the “general obligation to treat all traffic equally” in Article 3(3), subparagraph 1 OIR, to be applicable to both technical and non-technical measures.
Comprehensive assessment for less clear cases	56	Deletion of paragraph 56	Cases which involve technical discrimination do not leave room for a deeper assessment as they are forbidden. Thus, paragraph 56 does not provide any added value.
Union and national legislation	81	Clarification added to reflect that Union or national legislation or public authorities may require ISPs to offer access to a certain application free-of-charge.	As the Article 3(3) OIR equal treatment of traffic obligation applies also to the pricing practices, an explanation was added to provide guidance on the applicability of the exception a).
Zero-rating specific example	138	Zero-rating specific example replaced with an application-agnostic pricing example	Zero tariff options are generally incompatible with the Article 3(3) OIR equal treatment of traffic obligation.
Step-by-step assessment for zero-rated offers	Annex	The step-by-step assessment was deleted.	Zero tariff options are generally incompatible with the Article 3(3) OIR equal treatment of traffic obligation and no 3(2) case-by-case assessment is needed.

4. BEREC's reading of the ECJ rulings

The ECJ ruled in its three rulings on questions raised by national courts concerning several conditions of use attached to the zero tariff options. However, the most relevant statements of the ECJ are contained in the reasoning of the rulings, where the ECJ expressed that a zero tariff option as such violates the general obligation contained in Article 3(3) subparagraph 1 OIR to treat all traffic equally.⁸ Reason for this is that the zero tariff option draws a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications. Consequently, the ECJ did not assess the individual limitations of use as they are incompatible with the equal treatment obligation as set out in Article 3(3) of the OIR, by the mere activation of the zero tariff option, and the “*incompatibility remains, irrespective of the form or nature of the terms of use*”⁹.

The reasoning of the ECJ, expressed in its considerations, is equally binding as the operative part¹⁰. These considerations contain statements on zero tariff options. Zero tariff options are regarded as incompatible with the equal treatment obligation according to Article 3(3) of the OIR since traffic is not treated equally.

Vodafone's zero tariff option Vodafone Pass did not contain differentiated traffic management measures. Thus, especially the two rulings concerning the *Vodafone Pass* indicate that the ECJ did not limit its interpretation of Article 3(3) of the OIR to zero tariff options associated with traffic management measures. Rather, the ECJ states that the violation of the general obligation to treat all traffic equally “*results from the very nature of such a tariff option*”¹¹.

Therefore, the equal treatment obligation applies also to zero tariff options without technical discrimination and zero tariff options violate the equal treatment obligation as stated by the ECJ.

The same conclusion is very likely to be applicable also to some other offers not directly addressed by the ECJ rulings like zero tariff options not involving partnerships between internet service providers (ISPs) and content and application providers (CAPs) that introduce a price discrimination between content, applications or services.

There is still room for price differentiation when traffic is treated equally:

“Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications

⁸ ECJ, C-854/19 *Vodafone (Roaming)*, paragraph 28; C-5/20 *Vodafone (Tethering)*, paragraph 27; C-34/20 *Telekom Deutschland*, paragraph 30.

⁹ ECJ, C-854/19 *Vodafone (Roaming)* paragraph 33; C-5/20 *Vodafone (Tethering)*, paragraph 32; C-34/20 *Telekom Deutschland*, paragraph 35.

¹⁰ The binding effect of any ECJ ruling forces the domestic court which is dealing with the case (and other domestic courts before which the same legal issue is raised) to comply with the substance of the ECJ ruling, not only with the ruling's operative part but also with (the reasoning in) its main body. Moreover, the Court's rulings must also be followed by European institutions and all Member States, including national institutions such as NRAs.

¹¹ ECJ, C-854/19 *Vodafone (Roaming)*, paragraph 29; C-5/20 *Vodafone (Tethering)*, paragraph 28; C-34/20 *Telekom Deutschland*, paragraph 31

or services used or provided, or the terminal equipment used.” (Article 3(3), subparagraph 1 of the OIR)

BEREC considers that offers concerning application-agnostic internet access service (IAS) tariffs, such as those mentioned below, are typically admissible in light of the ECJ rulings:

- IAS tariffs with different speeds, different volumes or for different user groups;
- zero tariffs during weekend or off-peak times;
- a lower quality tariff option selected by an end-user.

BEREC considers that the 2021 rulings are in line with the 2020 *Telenor Magyarország* ruling¹² and constitute a clarification of the 2020 ECJ's principles on zero tariff options. In the 2020 *Telenor* ruling, the ECJ emphasised the principle of the “*general obligation to treat all traffic equally*” in Article 3(3), subparagraph 1 of the OIR, to be applicable to applications and services covered by ‘a zero tariff’.

The ECJ in the 2020 *Telenor Magyarország* ruling only decided on the referred questions. However, in 2021, the ECJ clarified this further and decided not only to answer the questions referred to it by the German courts but also to clarify its 2020 ruling on the underlying admissibility of zero tariff options as such (providing an answer (on matters of EU law) it considers to be of use to enable the referring court to determine the case before it¹³).

The interpretation of a provision of the EU law given by the ECJ is applicable retroactively from the date the interpreted provision entered into force¹⁴, unless the ECJ limits the temporal effect of its preliminary ruling (which it did not do in the 2021 cases).

¹² <https://curia.europa.eu/juris/document/document.jsf?text=&docid=231042&pageIn-dex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=848352>

¹³ See inter alia, ECJ, C-279/06 *CESPA*, §31 (and citations therein) and ECJ, C-115/08 *CEZ*, §81: “*The fact that the national court has, formally speaking, worded the question referred for a preliminary ruling with reference to certain provisions of Community law does not preclude the Court from providing to the national court all the elements of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions [...]*”.

¹⁴ See inter alia, ECJ, C-61/79 *Amministrazione delle finanze dello Stato v Denavit italiana Srl.*, paragraph 16: “*the interpretation which (...) the court of justice gives to a rule of community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction, are satisfied.*”