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Draft Contribution on the Open Internet Guidelines Draft of BEREC - BoR (22) 30

Berlin, 11.04.2022

BEREC has published a draft update to its Open Internet Guidelines on the Implementation of the Telecom Single Market-Regulation (TSM-R - EU/2015/2120). Guidelines of BEREC constitute recommendations to national regulatory authorities (NRA), who should take them into account. The significant change in BEREC's draft update is the deletion of the comprehensive assessment guidance for zero-rating offers. In BEREC's opinion this deletion follows the recent rulings of the European Court of Justice (CJEU). Its surprising rulings of 2. September 2021 ([C-854/19](#), [C-5/20](#) and [C-34/20](#)) can be read, that the zero-rating offers not only in these cases but in general, are not in accordance with the TSM-R. The eighth chamber of the court comes to the conclusion, that these offers based solely on commercial considerations and to this end violate the requirement to treat all data traffic equally (net neutrality). These rulings were surprising, because they did not focus on the questions referred for the preliminary rulings from Germany. The questions concerned terms and conditions of zero rating – offers, for example treatment of content providers, tethering and data roaming. The rulings of 02.09.2021 took a much broader interpretation, that zero ratings are not compatible with Art. 3 (3), subclause 3, sentence 2 TSM-R. That arises the question, why the Grand Chamber has not interpreted this rule likewise in its judgements on the 15th September 2020 (C-807/18, C-39-19).

Following the statements of the CJEU in the above rulings, and BEREC's indication that it intends to follow a strict interpretation of the rulings, the intention of BEREC to delete the comprehensive assessment guidance for zero-rating offers, does not surprise. The rulings of the CJEU can be read like BEREC does; although eco believes that a more flexible reading is also possible and indeed preferable. Consequently, the NRAs would then no longer have to assess zero-ratings offers anymore. The assessment could, in certain cases, be challenging and complicated and therefore bind staff and time in a significant degree.

In former and current Open Internet Guidelines BEREC had developed a variety of requirements for zero-rated offers. In addition, it had created a corresponding, comprehensive assessment guidance for the national regulatory authorities. In eco's view, the comprehensive assessment



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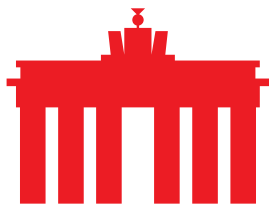
guidance was in line with the objectives of the TSM-R. On the one hand, the regulation safeguards the open access and retrieval of information, the perception of offers, and on the other hand, it leaves room for innovation. With the incompatibility of zero-rating offers from BEREC`s point of view the possibilities for Internet Access Providers have been reduced considerably. Though, we believe that there is still room for zero-rating offers to be permitted; and this appears to be recognized by BEREC itself, for example in paragraph 35 of the updated Guidelines.

eco encourages BEREC to better clarify, in the updated Guidelines, certain points to ensure they reflect the flexibility still permitted for zero-rating under the CJEU rulings. The Guidelines should explicitly state the fact that they are being updated because of the CJEU rulings, and not because of any harm to consumers from zero-rating offers in the market.

Accordingly, BEREC should avoid definitive statements that could be misread as an explicit, outright ban on all forms of zero-rating offers. BEREC should more clearly recognise that while certain types of zero-rating offers may now (as a result of the CJEU rulings) be considered “generally inadmissible” that there is still room for individual NRAs to permit other types of zero-rating offers.

Furthermore, in eco`s view, BEREC should also be more ambitious in considering and presenting recommendations and guidance on specialised services other than internet access services pursuant Art. 3 (5) TSM-R. The aforementioned rulings have generated legal uncertainty for providers, in which manner and kind they can still offer these special services, which are explicitly allowed by the TSM-R. Furthermore, this guidance would serve the aim of the regulation to protect individual rights and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation, Recital (1) of TSM-R. Furthermore, Recital (16) of TSM-R states:

“There is demand on the part of providers of content, applications and services to be able to provide electronic communication services other than internet access services, for which specific levels of quality, that are not assured by internet access services, are necessary. Such specific levels of quality are, for instance, required by some services responding to a public interest or by some new machine-to-machine communications services. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services should therefore be free to offer services which are not internet access



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services and which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet the requirements of the content, applications or services for a specific level of quality.”

eco also takes the view that since the judgements mentioned above only concern zero-rating practices, BEREC must limit its updated Guidelines only to zero-rating practices and not extend the interpretation further. For example, the Guidelines’ use of a concept such as ‘similar offers’ in paragraph 49, could lead to a potential expansion of the scope of inadmissible offers beyond zero-rating offers. eco therefore recommends that the wording ‘and similar offers’ be deleted.

In addition, BEREC should make an explicit distinction in the Guidelines between zero-rating practices based on commercial considerations and zero-rating practices that are not based on commercial considerations. The CJEU’s definition refers to a practice based on commercial considerations and applied on partners’ applications – these elements are missing from BEREC’s analysis of the ECJ definition, making it appear that all types of zero-rating offers would be inadmissible.

The application of the TSM-R must continue to protect individual rights and simultaneously facilitate the continued functioning of the internet ecosystem as an engine of innovation in order to achieve a fair balance. To this end, BEREC should provide recommendations and guidance for Internet Service Providers on the admissible manner and of special services pursuant to Art. 3 (5) TSM-R and in accordance with the relevant rulings of the CJEU. It is important to establish the urgently needed planning and legal certainty for companies in this market.

About eco: With over 1,100 member companies, eco is the largest Internet industry association in Europe. Since 1995 eco has been instrumental in shaping the Internet, fostering new technologies, forming framework conditions, and representing the interests of members in politics and international committees. eco’s key topics are the reliability and strengthening of digital infrastructure, IT security, and trust, ethics, and self-regulation. That is why eco advocates for a free, technologically-neutral, and high-performance Internet.