NOVA WIND

# Comments to the Draft Update to the BEREC Guidelines on the Implementation of the Open Internet Regulation

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**General remarks**

We thank BEREC for holding this Public Consultation and providing stakeholders with the text of the Revised Draft Guidelines BoR (22)30 and with the Explanatory Document BoR (22)31 describing the proposed modifications.

We understand that the 2021 ECJ rulings[1] triggered this second round of review of the Guidelines (after the 2020 one) relating to the enforcement of articles 3(2) ("agreements") and 3 (3) first subparagraph ("equal treatment of traffic") of EU Regulation 2015/2120 laying down measures concerning open internet access et al.

The three cases of the ECJ rulings concern internet access service offers that include a particular "zero rating" element that eventually the Court found to be incompatible with the equal treatment obligation of EU Regulation 2015/2120.

It should be noted here that there is no explicit reference to zero rating in the EU Regulation and that it is only the accompanying BEREC Guidelines that provide direction to NRAs on how to:

- assess zero rating offers under article 3(2), as a particular commercial practice (paragraphs 37-45). Here the Guidelines highlight that based on the variety of zero rated offers, national regulators should carefully analyse whether ISPs limit the exercise of rights of end-users, to what extent choice is restricted as well as the competition implications of the zero rated offers in question. Overall, they suggest a case-by-case approach;

- assess zero rating under article 3(3), only in one case: "*a zero rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero rated application(s), [as it] would infringe Article 3(3) first (and third) subparagraph*" (paragraph 52).

We acknowledge that the recent ECJ rulings shed a new light to the 2015 provisions and call for a revision of the current Guidelines in the interest of fostering a consistent application of the framework throughout the EU markets and by all EU operators. However, we are concerned that some proposals for modification may not go into the right direction and ultimately not serve the purpose of allowing end-users to fully benefit from an Open Internet.

[1] C 34/20 – Telecom Deutschland, C-854/19 – Vodafone and 5/20 Vodafone (and also C-807/18 & C-39/19 of 2020)

**Commercial Considerations & zero rating**

In its ruling, the ECJ notes "*that a 'zero tariff' option, such as those at issue in the main proceedings, draws a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications*." Thus, the ECJ definition clearly refers to a practice **based on commercial considerations**

The ECJ then mentions that "*Such a commercial practice is contrary to the general obligation of equal treatment of traffic, without discrimination or interference, as required by the regulation on open internet access*".

At the same time, however, BEREC's draft text implies that **any zero rating tariff options** "*and similar tariffs options*" are inadmissibible where elements of the tariff are not application-agnostic (paragraph 40c). This interpretation is problematic in two ways. **First** it extends the scope of "inadmissible" zero-rated practices to include practices that are not based on commercial considerations, going beyond the wording of the ECJ judgement. **Second**, it introduces the undefined concept of "similar tariffs" under the same prohibition. If read in combination with the statement in BoR (22) 31 that "*the same conclusion is very likely to be applicable also to some other offers not directly addressed by the EC rulings*", this provision leads to the arbitrary extension of the scope of "inadmissible" offers to an undefined category of practices going beyond zero rating offers.

**Commercial practices & zero rating**

As far as operators' practices are concerned, we would like to stress the fact that an increasing number of zero rated "care" services, not based on commercial considerations, are provided via the ISPs' own applications. The apps we refer to here are related to customers' telecom products and services and are not designed to promote the ISPs' other services such as food delivery, insurance services etc

This way of interacting with customers contributes to creating a user-friendly digital customer environment, integral part of the Digital Age, while it is also the most adequate way to deliver on the various regulatory obligations of ISPs.

For example, given the secure nature of this channel of communication (the customer identification is required to enable access), these applications are the best way to deliver on the obligations in the European Electronic Communications Code, as transposed into the Greek General Authorization Regulation, for the customer to be informed about his/her contractual terms (and any changes thereof), to be able to manage his/her subscription (change in settings, inclusion in universal directory, no call lists etc), to consult and pay bills, to opt out from third party charging, etc. As the customer must have access to this information free of charge, use of these apps to deliver this information must also be free of charge and should not count towards the customer's data cap.[2]

[2] Another example, in Greece, is in the Draft Regulation on security measures when operators handle subscribers' or users' requests related to access to communication data, where one of

Apart from the General Authorization Regulation, the Greek Hellenic Authority for Communication Security and Privacy (ADAE) initiated a public consultation for the adoption of a Regulation regarding security measures to be taken when operators handle subscribers' or users' requests related to access to communication data. According to the Draft Regulation, one of the means by which the subscribers or users may securely verify their request is through the operator's application.

Furthermore, obligations imposed by the Roaming Regulation can be successfully implemented by granting zero rated access to the ISP's own applications giving, for example, the possibility for roaming customers to top up their data allowance once their data cap is reached. In fact, the current Guidelines provide that *"Examples of commercial practices which are likely to be acceptable would include: […] the ability for an end user to access the ISP's customer service when their data cap is reached in order to purchase access to additional data" (paragraph 35).* However, this provision has now been deleted in the Draft under consultation without justification.

Also, regarding the transparency requirements of the Open Internet Regulation itself, the obligation to provide free of charge information about the speed of the subscription at any location and to run free speed tests is also implemented by operators in several member states through the ISPs' own applications.

Finally, we cannot fail to mention the importance of ero-rated access to particular applications for public health, education and other similar purposes. Such access was proved to be vital during the outbreak and throughout the COVID pandemic, ensuring access to a variety of online services, ranging from access to health information & tracing to e-school/e-learning platforms. Providing free access to these services was explicitly supported by NRAs and governments across the EU (although not mandated by law). The wording under revised paragraphs 35 & 81 does not seem to adequately address these cases.

More generally, BEREC should also take into account that customers tend to prefer in general the use of applications in order to manage their services, access health and educational services etc.. Posing a financial burden to the use of these applications will most certainly have a negative effect on several fields, such the protection of the environment, digitisation and consumer protection. Nowadays, paperless and rapid access to information, documentation and services is a necessity.

**Conclusive remarks**

As stated in its preamble, the Open Internet Regulation aims to protect end-users and to guarantee the continued functioning of the internet ecosystem as an engine of innovation. Also, it empowers NRAs and other competenet authorities "*to intervene when agreements or commercial practices would result in the undermining of the essence of the end-users' rights*"(Whereas 7).

In our view, the proposed amendments to the 2020 Guidelines would radically change the way end-users are empowered to make informed choices, use digital services and access

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health, educational and other similar services. The suggested new feature would require operators to modify their setup and find new ways of complying with “care” regulatory requirements while requiring payment for services that is currently provided for free.

Actually, it would mean penalizing end-users using these digital apps, at a time where the whole eco-system is moving online with the communications sector being at the forefront of it.

In this sense, we call BEREC to re-assess the proposed changes to its Guidelines, and to consider distinguishing the treatment between zero rating practices based on commercial considerations and zero rating practices that are not based on commercial considerations and to continue to allow zero rated access to operators ’own non-commercial applications, as well as platforms providing access to e-health, educational and similar services.

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