April 2022

BoR PC05 (22) 19

ETNO-GSMA-GIGAEurope response to the public consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation

Introduction

ETNO, the GSMA and GIGAEurope, who represent the telecoms sector in Europe, welcome the opportunity to comment on BEREC's Draft Guidelines on the Implementation of the Open Internet Regulation. It is a crucial milestone to implement and enforce Regulation 2015/2120 on the Open Internet, especially in light of the European Court of Justice (ECJ) rulings concerning the interpretation of the specific Articles of the Regulation.

The GSMA, ETNO and GIGAEurope hope the following detailed comments can serve as a constructive contribution to BEREC's deliberations on the draft Guidelines on the Implementation of the Open Internet Regulation.

Please find below a summary of the main issues we would like to raise in the context of this consultation:

- We call on BEREC to ensure that the updates to the Guidelines **remain within the scope of the interpretation provided by the ECJ decisions** and do not create additional rules not embedded in those decisions;
- To that end, we call on BEREC to **make the distinction in the Guidelines between zero-rating practices based on commercial considerations and zero-rating practices that are not based on commercial considerations** and/or applied to partner applications;
- We urge BEREC to ensure there is an effective carve out that allows for zero-rating of applications that are used for the **benefit of EU citizens**. This could be achieved by BEREC making the distinction in the Guidelines between zero-rating practices based on commercial considerations and those which are not;
- We urge BEREC to maintain **a customer friendly approach to data purchasing**, which gives customers the ability to explore the internet in a customer friendly and hassle-free manner. The possibility to purchase additional data allowance should not be considered as a 'commercial practice involving traffic management', but as a means to secure 'free and open' internet access as such for customers;
- We call on BEREC to take into consideration the expected **operational implication and costs the changes to the Guidelines introduce in relation to existing offers** that have already been validated by national regulators (i.e. burden in terms of time, resources, and the potential risk of losing customers). It is important for operators to have **enough time to process these changes and as such an adequate transitional period and a flexible approach to implementation during this transition** that takes into account specific situations.
- We call on BEREC to ensure that **all National Competent Authorities (NCAs) act simultaneously.** In addition, we call on NCAs not to prejudice the outcome of the consultation process by taking early action; and to act in a harmonised manner once the final Guidelines are established.

Overall context

The ECJ rulings have been a cause for concern for operators across Europe, given that zero-rating offers are currently available and active in almost all EU markets, and bring significant benefit to consumers and society at large. It is important not to underestimate the significant uncertainty caused to consumers, operators and indeed national regulatory authorities by these unexpected rulings. The situation is indicative of a deep underlying and perpetuating lack of clarity caused by the shift in interpretation of the Open Internet Regulation (OIR).

We would like to restate that a more restrictive interpretation of the Open Internet Regulation that would go well beyond the three judgments of September 2021 would alter the spirit of the norm, risk to unduly reduce the prospects for innovation and new revenues for the telecommunication sector and increase constraints on internet service providers (ISPs) while the other internet actors – acting elsewhere in the value chain - are not subject to such constraints. This, *in fine*, would increase even more the gap between ISPs and other internet actors in their ability to innovate for the benefit of consumers.

With this in mind, **BEREC and NCAs should provide for clarity, legal certainty, predictability and an efficient implementation of the Open Internet Regulation**. NCAs should abide by the adopted Guidelines to the maximum extent possible. The core principle and rationale of the Guidelines is to ensure a harmonised approach towards such important issues as setting the future framework for zero-rating price models. BEREC and NCAs should continue to ensure that the Open Internet Guidelines also support innovative services that can ultimately benefit European citizens and businesses.

This is particularly true when it comes to new technical features such as those enabled by 5G networks and network slicing. Such technical features will allow operators to provide consumers with the best products and services allowing (groups of) consumers to benefit from mobile networks that can be tailored to their specific needs and expectations. Thus, in order to ensure a wide and beneficial deployment of this technological innovation, the reviewed Open Internet Guidelines should take this aspect into account, providing a futureproof and legally secure framework that allows for the continued possibility of innovative service offerings based on 5G – in line with the intentions of the European legislators – under the OIR: **promoting innovation and a market driven technological network evolution as well as fostering the adoption of 5G solutions need to be incentivised**.

We would also like to emphasise the expected operational implications and costs that the new provisions introduce in relation to existing offers that have already been validated by national regulators (i.e. burden in terms of time and resources). The change in approach will also lead to contract modifications, as a result of the removal of services, which may lead to situations where customers theoretically have the opportunity to leave the operator/contract. **It is important for operators to have enough time to process these changes and as such an adequate transitional period and a flexible approach to implementation, that takes into account specific situations, is required during this transition**.

ETNO, the GSMA and GIGAEurope would like to restate that the revised BEREC Guidelines should take stock of the rulings rendered by the ECJ, **while fully respecting the limits of these rulings.** BEREC should in any case avoid extending the scope or interpretation of these rulings.

ETNO, the GSMA and GIGAEurope would like to further elaborate on that below.

1. The interpretations given to the Judgements should not go beyond the zero-rating subject

a. <u>"Similar offers" and sponsored data</u>

As clearly mentioned in our previous position paper, the 2020 and 2022 judgments concern only zero-rating practices at stake and the scope should not be extended further.

In the updated Guidelines, paragraph 49, BEREC states "*(…)* ***As the ECJ has established in its 2020 and 2021 judgements, Article 3(3) first subparagraph imposes on providers of internet access services a "general obligation of equal treatment" and that, in principle, "any measure" by an ISP which is discriminatory could be a violation of this general obligation****. The ECJ applies the principle of equal treatment of traffic to the practice of zero-tariffs as such. BEREC takes from this that the general obligation to treat all traffic equally is not limited to technical traffic management practices but also applies to commercial practices of the ISP such as differentiated pricing. Hence, it also includes unequal treatment by way of zero tariff options* ***and similar offers*** *(for more details see paragraph 54a below). (…)"*

We consider that BEREC has no legal remit within which to extend the interpretation rendered by the judgments to other type of offers beyond zero rating. The interpretation of the European legislation is an exclusive competence of the Courts, and it is thus not incumbent on BEREC or individual NCAs to offer further interpretation. Hence, we consider that the Guidelines should not add uncertainty by using a concept such as "similar offers" in paragraph 49 above, as this particular wording also leads to a potential extension of the scope of inadmissible offers beyond zero-rating offers. In that regard, we would like to restate that the Regulation should be based on the ECJ rulings interpretation only. ETNO, the GSMA and GIGAEurope thus request the deletion of the wording "and similar offers".

Another clear example is the inclusion of sponsored data in the draft Guidelines, in paragraph 40.b) *"Differentiated pricing practices which are not application-agnostic are likely to be inadmissible such as applying a zero price to ISPs' own applications or* ***CAPs subsidising their own data****."* This conclusion is an interpretation of BEREC alone, that cannot be taken from the Court ruling, and thus lacks legal grounding. For that reason, it should not be included in the Guidelines. ETNO, the GSMA and GIGAEurope thus respectfully request the deletion of the wording "or CAPs subsidizing their own data".

Indeed, contracts with providers of content, applications or services (CAPs) is not forbidden under the Open Internet Regulation. The BEREC guidelines clearly equate end users with CAPs[1]. In that respect sponsored data for instance can be seen in analogy with 0800 value added service (VAS) voice calls, which on face value are 'for free' from the perspective of the end user, but are paid for by the call receiver, and which have never been considered as "free" or "zero rated" in the whole of the value chain. Moreover, it would constitute undue interference with commercial practices, if NCA's would decide which parties can be charged and which parties cannot be charged for data traffic.

b. <u>Zero-rating practices based on commercial consideration</u>

We also note another example, in paragraph 40.a) where it is stated *"Zero tariff options* ***are a subset of differentiated pricing*** *practices which are inadmissible"* that is rather the conclusion of BEREC and goes again beyond the ECJ interpretation.

[1] BoR (20) 112, BEREC guidelines on the Implementation of the Open Internet Regulation, guideline 4.

In that same paragraph, BEREC refers to the ECJ definition of zero tariff options as *"**a commercial practice** whereby an internet access provider applies a 'zero tariff', or a tariff that is more advantageous, to all or part of the data traffic associated with an application or category of specific applications, **offered by partners** of that access provider."* We consider it extremely important to stress that the ECJ definition refers to a practice **based on commercial considerations and applied on partners' applications. We notice that BEREC never refers to these essential elements in its analysis of the ECJ definition** and so seems to consider that all types of zero-rating offer would be inadmissible.

This is for example the case for paragraph 54.a), which does not make that aforementioned distinction and therefore wrongly concludes that a zero-tariff option (either based or not based on commercial considerations and applied to partners' applications) would violate the obligation to treat all traffic equally (see below):

"*The ECJ in its rulings of 2 September 2021[2] concluded that a zero tariff option violates the general obligation to treat all traffic equally according to Article 3(3) first subparagraph. The ECJ established that "a '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."[3] (see also paragraph 40a above). According to the ECJ, "that failure, which results from the very nature of such a tariff option on account of the incentive arising from it, persists irrespective of whether or not it is possible to continue freely to access the content provided by the partners of the internet access provider after the basic package has been used up."*[4]

To further elaborate on this, it is important to reiterate that the ECJ states that art. 3(3) of Regulation 2015/2120 precludes any measure which runs counter the obligation of equal treatment of traffic where such measures are based on commercial considerations.[5] In addition, the exceptions foreseen to this general rule, such as the reasonable traffic management measures, must be based on technical objective differences and not on commercial considerations. The ECJ does not say that all zero-rating practices make a distinction based on commercial considerations but says that the zero-rating practices as considered in the rulings do operate a distinction based on commercial considerations and so should be forbidden. So not all zero-rating practices are to be considered illegal. In particular, zero-rating of customer services to allow customers to buy additional bundles or zero-rating for public good purposes and not for commercial purposes, following their consumption, etc. are not based on commercial considerations and so should be allowed. We will come back to these examples further below.

c. Traffic management measures going beyond reasonable traffic management

On the related issue of traffic management going beyond reasonable traffic management (i.e. traffic management complying with the exceptions in (a), (b), or (c)) we note that paragraph 81 of the Guidelines in relation to exception (a) on compliance with Union legislative acts or national legislation states that "*If an ISP applies traffic management measures which cannot be regarded as reasonable or if an ISP provides a price differentiation which is not application-agnostic for example access to a certain application free-of-charge (footnote 40), NRAs should assess whether an ISP does so because*

[2] ECJ, C-854/19 *Vodafone (roaming)*; C-5/20 *Vodafone (tethering)*; C-34/20 *Telekom Deutschland (bandwidth adaption)*.
[3] ECJ, C-854/19 *Vodafone (roaming)*, paragraph 28; C-5/20 *Vodafone (tethering)*, paragraph 27; C-34/20 *Telekom Deutschland (bandwidth adaption)*, paragraph 30.
[4] ECJ, C-854/19 *Vodafone (roaming)*, paragraph 29; C-5/20 *Vodafone (tethering)*, paragraph 28; C-34/20 *Telekom Deutschland (bandwidth adaption)*, paragraph 31.
[5] ECJ, C-854/19 Vodafone (roaming), paragraph 25.

it has to do so for legal reasons, namely to comply with the legislation or measures by public authorities specified in that exception."

If we come to the same conclusion as BEREC that such a tariff plan would be allowed, the reasoning behind such a statement is not the same. BEREC considers that such an exception would **only** be allowed under article 3(3) subparagraph 3 lit. a OIT i.e. if this is provided by law. ETNO, the GSMA and GIGAEurope consider that non-technical related measures which are not based on commercial considerations and don't result from a partnership with a content provider - whether or not they are imposed by law - would be allowed.

In conclusion, we call on BEREC to ensure that the updates to the Guidelines remain within the scope of the interpretation provided by the ECJ decisions and do not create additional rules not embedded in those decisions (e.g. Sponsored data – subtitle a))

To that end, we call on BEREC to make the distinction in the Guidelines between zero-rating practices based on commercial considerations and zero-rating practices that are not based on commercial considerations and/or applied to partner applications (title b)).

2. Impact on zero-rating for the benefit of citizens

We strongly call for the authorisation of Zero-Rating applied for the benefit of citizens, such as:

- **Applications for Public Good:** for example, those used by many ETNO, GSMA and GIGAEurope members to help give unrestricted access to vital resources during the pandemic (e.g. covid tracing apps; educational apps; health information apps) – many of which were supported (although not mandated by law) by regulators and governments; or applications linked to charitable causes (such as Vodafone's dream lab – which uses users computing power to help drive cancer and covid research). This should be supported by clear guidance on what is considered 'public good' to avoid ambiguity.
- **Customer care services:** for example operator's own Apps and Websites**,** given that these are informational and are also used by subscribers to purchase data once their allowance is depleted. Such customer related zero-rated access should therefore remain admissible. One can compare this case with the provision of the RLAH Regulation, where such practice is clearly considered as a practice benefiting the end-user's interests.

In some 'public good' cases, the Government may mandate zero-rating. However, in most cases, it would not be practicable or desirable for the Government to have to intervene and identify and define the most appropriate content and applications for zero-rating, especially in exceptional circumstances where such work is done in cooperation between Government and the sector without specific or formal legal requirements.

We therefore urge BEREC to ensure there is an effective carve out that allows for zero-rating of applications that are used for the benefits of EU citizens.

Per our recommendation above, this could be achieved by BEREC making the distinction in the Guidelines between zero-rating practices based on commercial considerations and zero-rating practices that are not based on commercial considerations.

A failure to do so would be detrimental to end-users and society as a whole, which is not in line with the aims and spirit of the Open Internet Regulation.

3. Prohibition on zero-rating of purchasing additional data/ Accessing Customer Care Websites

Customers who have used up their monthly data allowance must have the ability to purchase more. The BEREC guidelines currently provide for an exception related to providers' own customer service. Current para. 35, second bullet reads: *"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".* Providers have naturally adapted to the current set of guidelines, and thus catered to and informed customers accordingly that they may buy additional data through own websites, own applications etc. This practice is customer friendly and works well both for customers and providers.

In the draft updated guidelines, said exception is seemingly no longer available. Rather, the draft guidelines provide vague wording on application agnostic treatment of traffic beyond the data cap: *"Examples of commercial practices which are typically admissible would include: […] offers where the speed is throttled for all traffic after the data volume has been used up instead of blocking all traffic; a sufficient speed could still allow accessing the internet in an application-agnostic manner, this would also allow access to provider's online self-service portal or the application allowing end-users to purchase additional data volume."*

The suggested feature would require providers to alter or adjust their technical setup, without any real gain for the open internet. For example, some customers, notably in the B2B segment, are requesting a full stop of data usage when the cap is reached. They would thus not be allowed anymore to update their offers once the cap is reached. Depriving customers of the ability to purchase additional data or access the providers customer service could also be contrary to the providers' obligations vis-à-vis the customers under the RLAH regime.

We are also concerned about the arbitrary implementation of the Regulation. While the Roaming Regulation sets the obligation on ISPs to provide free internet access to information on roaming tariffs and on access to emergency services (zero rating these web pages), BEREC's implementation forbids these same ISPs from providing free access to customer attention services (i.e. "applying a zero price to ISPs' own applications") in order to buy additional data. It is inconsistent, to protect consumers' welfare and right to freely access information on the Internet, while at the same time not allowing them the ability to purchase data to continue accessing the Internet.

Removal of the own customer services exception appears formalistic, unnecessary and disproportionate. The current practice of catering for additional data purchases will not pose a threat to the equal treatment of traffic principle as a guarantor of the open and free internet. Nor does it entail a big carve-out of the application agnostic principle. In fact, limiting the current practice will have the opposite effect and de facto limit customers' access to the open internet altogether.

It goes even further by posing a risk to pre-paid and 'pay as you go' customers, who, when they run out of data, may also lose access to services. Therefore, without allowing for exceptions for customer service sites and/or apps, there is a real risk that vulnerable customers who run out of credit are left in a position where they cannot top-up – potentially leaving them in a dangerous and/or vulnerable

situation. For example, the ability to log into Wi-Fi, or go to a shop to top-up, will not be possible in scenario where, a vulnerable customer runs out of data in an area not covered by open/free WiFi, and may therefore be left unable to access the service they need to top-up their credit.

On this basis, we urge BEREC to maintain a customer friendly approach to data purchasing and customer care services, which gives customers the ability to explore the internet in a customer friendly and hassle-free manner. The possibility to purchase additional data allowance should not be considered as a 'commercial practice involving traffic management', but as a means to secure 'free and open' internet access as such for customers. Any other result would be to the detriment of the customers.

4. Operational implications

Regarding the list of examples of commercial practices which are typically admissible, paragraph 35, third point, *"offers based on different IAS tariffs with different application-agnostic QoS levels (for parameters such as speed, latency, jitter and packet loss), volumes, contractual length, bundles and with or without subsidised equipment since within one tariff all traffic is treated equally"* indicates that applying different QoS to different categories of traffic is no longer allowed. It is our understanding that the Open Internet Regulation will allow many slicing opportunities and specific pricing plans and product definitions that are suited to specific usage requirement (e.g. plans where, for gaming apps a specific higher QoS is provided that would be irrelevant to other usages). It is also our understanding that this is in line with BEREC's approach to slicing but it would be useful if clarity could be provided.

Regarding paragraph 40, it would also be useful if BEREC could provide some additional clarification in relation to the example of different forms of differentiated pricing practices. In particular, some practical illustrations would be appreciated in respect of the following statement: "*For example, an additional data allowance within the IAS tariff does not count towards the general data cap in place on the IAS tariff. This additional data allowance can be unlimited or limited. Furthermore, the price for the allowance provided in addition to the general data allowance can be zero, positive or negative.*"

Regarding paragraph 48, which states that "*Any agreements or practices which have an effect similar to technical blocking of access (see paragraph* ***Error! Reference source not found.****) are incompatible with the obligation of the equal treatment of traffic as set out in Article 3(3) and cannot be justified under the principle of freedom of contract, recognised in Article 3(2) of the Regulation",* this formulation seems to suggest that setting a data CAP would be illegal as it has an effect similar to blocking the access once the data cap has been reached. By setting such general rules, it becomes impossible to develop and maintain commercial practices, which are in fact allowed elsewhere by the Regulation. We propose – should BEREC maintain this paragraph – that it is reformulated as: *"Any agreements or practices which have an effect similar to technical blocking of* ***part of the traffic*** *are incompatible…"*

On the more general principles, operators have developed and provided offers considered compatible or tacitly approved by the national regulators based on good faith interpretations of the legislation that were shared between operators and regulators. These offers must now be removed; which leads to a high burden in terms of time, resources, and the potential risk of losing customers. For example, in some countries an open platform for zero rating was implemented following open discussion with or even upon request of the NCA. Such 'zero rating' open platforms were designed to guarantee the

equal treatment between applications and therefore it remains unclear why zero rating under such circumstances conflicts with the ECJ rulings.

Moreover, these new provisions lead to contract modifications outside the will and intention of operators, as a result of the requirement to remove these services, if it is determined they do not comply with the updated BEREC Guidelines, which may lead to situations where customers theoretically have the opportunity to leave the operator/contract. This could potentially have a very large impact due to the high number of concerned customers throughout the EU.

Operators should have the opportunity to process these changes without having to bear the aforementioned consequences. In relation to the implementation modalities, there should be a sufficiently long transitional period and a flexible application of this transition, also taking into account specific situations. It should also be clear that the potentially inadmissible offers should be considered on a case-by-case basis in light of the judgments.

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About ETNO

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

About GSMA

The GSMA is a global organisation unifying the mobile ecosystem to discover, develop and deliver innovation foundational to positive business environments and societal change. Our vision is to unlock the full power of connectivity so that people, industry, and society thrive. Representing mobile operators and organisations across the mobile ecosystem and adjacent industries, the GSMA delivers for its members across three broad pillars: Connectivity for Good, Industry Services and Solutions, and Outreach.

About GIGAEurope

GIGAEurope brings together private operators who build, operate and invest in gigabit communications networks that enable Europe's digital connectivity. GIGAEurope supports a strong and harmonised European Digital Single Market, with a clear focus on enabling regulatory and market conditions that allow for sustainable investment and innovation in gigabit infrastructure and IoT.

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