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ISPA AUSTRIA'S CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE INCORPORATION OF THE ECJ JUDGMENTS ON THE OPEN INTERNET REGULATION IN THE BEREC GUIDELINES

ISPA – Internet Service Providers Austria welcomes the opportunity to provide comments to the recent CJEU judgements C-34/20 *Telekom Deutschland*, C-854/19 *Vodafone* and C-5/20 *Vodafone*. We are a voluntary business representation and act as the voice of over 220 internet service providers from various fields all along the internet value chain. In our role as the voice of the Austrian internet industry we would like to answer the following questions:

1) **Do you think that zero-rating options not counting traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff based on commercial considerations could be in line with Article 3 paragraph 3 subparagraph 1 of the Open Internet Regulation even if there is no differentiated traffic management or other terms of use involved? Why or why not?**

First it is important to point out, that tariff options not counting traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff ("zero-rating") are by nature commercial conditions of an internet access service which a provider offers, but not technical measures, as the provider does not directly interfere with the data traffic on its network.

Such tariff options were already well-known at the time the Open Internet Regulation was enacted. If the legislator thus intended to prohibit zero rating entirely, a respective provision would have been included in the Regulation, or at least a reference in the recitals. In the absence of such a provision, a zero-rating tariff must however – under the conditions provided in Art 3 - in general be considered compliant with the Regulation. If zero-rating tariffs would on the other hand *prima facie* be prohibited, the detailed differentiation in Art 3 would lose any meaning.

Article 3(3) subparagraph 1 of Regulation 2120/2015 ("Open Internet Regulation") generally requires Internet Access Providers (IAPs) to treat all traffic equally without discrimination, restriction or interference. This has hitherto been interpreted by the CJEU as referring to the *technical* treatment of traffic. Such interpretation follows on the one hand implicitly from the Court's judgement in *Telenor*[1] where it clearly distinguishes between "packages, agreements, and measures blocking or slowing

[1] Joined Cases C-807/18 and C-39/19 *Telenor Magyarország Zrt.* [2020] ECLI:EU:C:2020 ("Telenor")

down traffic (which) limit the exercise of end users' rights" (that are subject to the conditions in Art 3(2)), and measures (directly) blocking or slowing down traffic based on commercial considerations that are subject to the conditions in Art 3(3). More explicitly, Advocate General Campos Sánchez-Bordona clearly states that the dividing line between Art 3(2) and Art 3(3) is, that whereas paragraph 3 only refers to technical conditions, paragraph 2 refers to both technical and commercial conditions.[2] Furthermore, whereas Art 3(3) subparagraph 2 provides that *technical* traffic management measures shall in principle not be based on commercial considerations, according to Art 3(2) and as recital 7 provides, *commercial* agreements and practices shall only be considered unlawful, where they either directly entail discriminatory traffic management measures by the IAP or unlawfully limit the end user's rights granted by the Regulation. Commercial agreements and practices on the specific characteristics of an internet access service (billing, data volumes etc) are thus not *in principle* ruled out merely because they are based on commercial considerations (see also below under Pt. 2).

The Advocate General therefore concludes that "Article 3(3) contains a general provision requiring a prior analysis of all agreements and commercial practices. Once any traffic management measures that do not meet the conditions laid down in paragraph 3 have been ruled out, it can then, if appropriate, be examined whether those agreements and practices are lawful in the light of paragraph 2."[3] Such assessment would then require a case-by-case assessment, in the light of the parameters set out in recital 7 of that Regulation[4] and involve a "detailed evaluation of the market and the impact of the measure at issue."[5] According to the current BEREC Guidelines, a complex set of factors must in this context be considered by the National Regulatory Authorities (NRAs), whereas amongst others, the more „open" a zero-rating programme is, meaning that it is open to all content and application providers (CAPs), the less likely it is to infringe Art 3.[6]

In the three most recent rulings, (C-854/19, C-5/20 und C-34/20) the Court again deals with the question, whether specific zero-rating tariff options are in violation of the Open Internet Regulation. First it is important to point out, that the Court decided to abstain from a submission of the Advocate General's opinion in all three cases. According to Art 20(5) of the CJEU Statute, this is only permitted when the Court considers, that the cases raise no new point of law. It follows that all the judgements must be interpreted in the light of *Telenor*, as the Court did not intend to deviate from its previous rulings, even more so, as *Telenor* has been decided by the Grand Chamber of the CJEU. If zero-rating tariff options would per se be in violation of the Open Internet Regulation, the Grand Chamber would have already used this reasoning to answer the questions referred to it in *Telenor.*

In all three rulings, the Court states that the tariff option at issue does not satisfy the general obligation of equal treatment of traffic, laid down in the first subparagraph of Article 3(3). This infringement, according to the Court, is based on the "incentives" arising from these commercial agreements. These incentives can however not be provided by all zero-rating tariffs. This from the

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[2] Opinion of Advocate General Campos Sánchez-Campos Joined Cases C-807/18 and C-39/19 *Telenor Magyarország Zrt.* [2020] ECLI:EU:C:2020:154 63
[3] Opinion of Advocate General Campos Sánchez-Campos Joined Cases C-807/18 and C-39/19 *Telenor Magyarország Zrt.* [2020] ECLI:EU:C:2020:154 62
[4] *Telenor* (n 1) 43
[5] Opinion of Advocate General Campos Sánchez-Campos (n 2) 67, FN 32
[6] BEREC Guidelines on the Implementation of the Open Internet Regulation para 42

interpretation of these judgements in light of *Telenor*: First it is important to reiterate, that according to the CJEU in *Telenor* any commercial agreement must only be assessed subject to Art 3(2) after no violation of Art 3(3) has been found.[7] Considering that the Court furthermore has stated that an assessment of a zero-rating tariff under to Art 3(2) must be conducted on a case-by-case basis, it follows, that not all zero-rating tariffs can be in violation of Art 3(3), as otherwise, no case-by-case assessment of these tariffs would be necessary under Art 3(2).m Zero-rating tariffs must therefore under certain conditions be in accordance with Art 3(3) sub-paragraph 1. Taking further into account that the Court did not intend to deviate from its previous jurisprudence, it must be concluded that the Court did not intend to prohibit zero-rating tariffs per se in its recent rulings.

Ultimately, tariffs not counting traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff based on commercial considerations should therefore be considered to be in line with Article 3 paragraph 3 subparagraph 1 of the Open Internet Regulation, as long as they do not create “incentives” for unequal treatment of traffic. In lack of further elaboration by the Court on the actual parameters it has used to determine these “incentives” in the three recent judgements, it is however difficult to see where exactly it draws the line which makes it difficult to use these judgements for future assessments of other zero-rating options.

2) Against the background of the rulings, where do you see room for the scope of application of Article 3(2) regarding differentiated billing based on commercial considerations?

As already pointed out above, Art 3(2) requires both an analysis of the technical and commercial conditions of an agreement or commercial practice. Only where agreements and commercial practices do not entail discriminatory treatment of content, applications or services by the IAS, it can be in accordance with Art 3(2).

Differentiated billing based on commercial considerations, including zero-rating, however does not per se entail such discriminatory treatment, neither within one service category – as long as it is open to all CAPs of this category - nor vis-à-vis other service categories as the differentiated billing of one category (e.g. music streaming) does not constitute an incentive for the user to lesser use of another category (e.g. video calls). Rather, differentiated billing primarily intends to meet the different demands users already have.

If differentiated billing would thus in principle be considered unlawful, this would prevent IAPs from developing new products, supporting customer’s choice by allowing them to choose a tariff option that best fits their habits and needs. Such a strong interference in the IAP’s right to conduct a business under Art 16 CFR appears unjustified and unproportionate and not in the interest of the customers. Therefore, where agreements on differentiated billing based on commercial considerations do not otherwise limit the end user’s rights, they should be in accordance with Art 3(2) and thus with the Open Internet Regulation.

[7] *Telenor* (n 1) 28

3) **How do you see the relationship of the rulings at hand to the ruling of the Court of Justice taken in 2020 (C-807/18 and C-39/19 – Telenor Magyarország)?**

The CJEU judgements C-34/20 *Telekom Deutschland*, C-854/19 *Vodafone* and C-5/20 *Vodafone* must be interpreted in light of *Telenor* considering that, if the CJEU had intended to deviate from its previous case law, it would have required a submission by the Advocate General. Whereas in *Telenor* the Grand Chamber has provided a detailed assessment of the relevant tariff option, in the most recent judgements the CJEU remains rather vague in its reasoning, giving the impression that zero-rating tariffs would in general be in violation of Art 3. As already pointed out above, this would however be in clear contradiction with *Telenor.* The phrase "a 'zero tariff' option, such as that 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" must thus be interpreted as referring only to the tariffs at hand in the respective procedures, but not to all zero-rating tariffs per se.

Unfortunately, no further details are given as to what discriminatory "incentives" these tariff options have and how they are to be determined by the regulatory authorities. A further elaboration on these incentives would have provided more guidance for the case-by-case analysis of zero-rating tariffs, which NRAs must conduct according to *Telenor*. The planned revision of the BEREC guidelines could thus provide more clarity in this area by further specifying the parameters in paragraph 46.

ISPA Austria would like to reiterate that we are very thankful for this opportunity to contribute. For further information or any questions please do not hesitate to contact us.

Sincerely,

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