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Contribution to BEREC`s Questions on zero-rating offers in the light of CJEU judgements

Berlin, 20.10.2021

The CJEU published three judgements on zero-rating offers in September 2020. With zero-rating offers, certain content and applications do not reduce a user's general data volume. The applicable law is the European Telecoms Single Market Regulation (EU/2015/2120), with Art. 3 of this regulation being of particular relevance. The German requests regarding the corresponding preliminary rulings of the CJEU focused on terms of conditions or practices with regard to zero-rating offers. In its judgements, the CJEU went beyond the questions referred by the German Courts. As such, a debate has commenced on zero-rating offers in their own right. To this end, BEREC (Body of European Regulators for Electronic Communication) has formulated three questions.

eco appreciates BEREC's early taking on of this debate and welcomes the opportunity to respond to the questions. The concrete development of services and products must be guided by the principles set out in the Telecoms Single Market (TSM) Regulation and the specific Guideline on the Open Internet. The judgements set limits for the interpretation of these general principles. For all stakeholders, such as users, content and software providers and Internet access providers, a proper and appropriate application of the TSM Regulation is of paramount importance. Its rules protect, inter alia, the open access and retrieval of information and offers, as well as innovations. With regard to these different interests, the application of the law and jurisdiction still has the task of achieving a fair balance. It is important to provide the urgently needed planning and legal certainty for all companies in the relevant market.

eco welcomes the opportunity to respond to BEREC's questions and issues raised in the context of the CJEU judgments.

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?



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Zero rating can be compliant with Article 3(3) subparagraph 1, considering that there is no discrimination if all CAPS have the opportunity to become content partners without any monetary requirement, under the condition that their content is lawful. If each CAP can participate at zero rating in keeping with the aforementioned definition, they then all have the ability to be treated as equal. In fact, this is purely dependent on their individual decision-making. Furthermore, in this regard, BEREC, BoR (20) 112, nos. 42 to 42e are in favor of freedom of expression and freedom of information, as well as media pluralism.

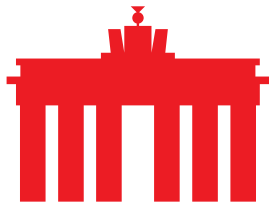
Another necessary safeguard is that end-users cannot enjoy further zero-rated content once they have consumed their general data allowance. This protection effectively balances the interests of all CAPS, both content partners and all non-partners. This relates to BEREC, BoR (20) 112, n. 41 and the reverse conclusion of n. 54 of the ECJ, C-807/18 and C-39/19 - Telenor Magyarország.

This also protects freedom of expression and freedom of information, including media pluralism, as an end-user will not only be attracted to content at zero cost.

This is in line with the regulation's objective to "protect end-users while ensuring the continued functioning of the Internet ecosystem as an engine of innovation," as stated in recital (1) of the regulation. In the opinion of eco, this has been well achieved and implements a balanced regulatory approach for end-users, CAPS and ISPs.

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? The ECJ has made it clear that net neutrality and service offerings do not exclude each other. The specific development of services and products must be based on the principles that have already been outlined. The rulings set boundaries for the interpretation of these fundamental principles. 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 reverse conclusion of ECJ No. 54, C-807/18 and C-39/19 – Telenor Magyarország, concludes that if end-users cannot enjoy further zero-rated content when they have exceeded their overall data allowance, a zero-rating option is in accordance with Article 3(2) of Regulation 2015/2120 in conjunction with Article 3(1) and Article 3(3) of that regulation.



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This judgement reflected the objective of the regulation “to protect end-users and simultaneously to guarantee the continued functioning of the Internet ecosystem as an engine of innovation”, as stated in recital (1). In light of the TSM Regulation, balancing the interests of end-users, CAPS and ISPs is both the obligation and the responsibility of the CJEU. In the present rulings, the interests of ISPs have been insufficiently considered, and sufficient justification has not been provided. It is therefore not improbable that, in a further judgement, this aspect will be further elaborated upon and substantiated and that the verdict will unveil another legal interpretation. eco therefore considers almost no correlation to exist between the present rulings (C-34/20 et al.) and the ruling of Telenor Magyarország.

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.