Response to call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines

We would like to thank BEREC for the opportunity to submit feedback to this consultation[1] and congratulate it for the decision to update the Net Neutrality Guidelines. This submission is supported by 11 digital rights NGOs (signatories below).

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?

No. It is apparent that the Court takes the view that the general non-discrimination provision of Article 3(3), first subparagraph, prohibits broader classes of practices than merely traffic management. This is in line with the text itself in that the first subparagraph speaks of treatment of traffic ("Providers of internet access services shall treat all traffic equally [...]"), whereas only the second and third subparagraphs, particularising the first, make use of the term "traffic management", as such only regulating this particular type of treatment of traffic. Rather than restricting the meaning of the term to traffic management, the Court considers a practice discriminatory on the basis that it "draws a distinction within internet traffic, on the basis of commercial considerations" alone (para. 30 C-34/20).

Furthermore, the Court notes that "failure [to conform with Article 3(3) subparagraph 1] results from the very nature of such a tariff option on account of the incentive arising from it" (para. 31 C-34/20), i.e. the violation of the Regulation by the zero-options in question is inherent to them.

It is particularly noteworthy that the Court provides word-for-word identical reasoning in three judgments that deal with zero rating of specific (categories of) partner applications in combination with quite different supplementary terms (limitations on

1 https://berec.europa.eu/eng/news_consultations/ongoing_public_consultations/8955-call-for-stakeholder-input-to-feed-into-the-incorporation-of-the-ecj-judgments-on-the-open-internet-regulation-in-the-berec-guidelines

roaming, tethering and bandwidth for all video content). Since zero-rating of specific (categories of) partner applications as such is contrary to the obligations arising from Article 3(3), this incompatibility remains irrespective of the additional terms attached to the offered tariff option (e.g. para. 35 C-34/20). As the additional terms do not have any relevance for the ruling of the Court in the three judgments, it is apparent that the Court has effectively found a violation of Article 3(3) for all zero-rating options not counting traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff.

In accordance with paragraphs 47 to 50 of the ruling in cases C-807/18 and C-39/19 (Telenor Magyarország), when assessing violations of Article 3(3), "no assessment of the effect of those measures on the exercise of end users' rights is required", and as such no whole-market evaluation is necessary for a finding of incompatibility with the Regulation.

It is of note that the Court does not provide any alternative means of arriving at its responses to the referred questions. Therefore, these arguments cannot be considered "obiter dicta", they are essential to the Court's reasoning and authoritative interpretations of the Regulation.

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 the Court notes, the failure of such tariff options to conform with the Regulation is inherent to them "on account of the incentives arising from [them]" and "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" (para. 31, C-34/20). As such, the Court is concerned in particular with the incentives created by the fact that the use of particular, differentially billed, applications and services is more attractive to the user of a tariff option that privileges certain services or service categories.

It is of note that the concrete tariff options in the cases referred to the Court concern "open" zero-rating offers, where entire categories of applications that can be joined by providers of applications and services subject to certain conditions are treated differentially. The argument that such an "opening" of a zero-rating offer could meet

the test of Article 3(3), first subparagraph, as interpreted by the Court, can therefore not be made.[2]

However, differentiated billing practices according to Article 3(2) ("Agreements [...] on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed") that do not distinguish among applications or classes of applications (i.e. application-agnostic differentiated billing) and where therefore the incentive to use particular applications or services or categories of applications or services does not arise would meet this test.

Examples of such differentiated billing practices would be agreements where the end-user is provided with different traffic classes delivered with different QoS characteristics and at different prices where the choice as to which traffic class to use for each service is made entirely autonomously by the end-user, or where a user is provided with data volume at different prices depending on the time of day, or where an end-user is provided with a service that takes an overall lower priority among all traffic in cases of congestion (and this is reflected in the pricing of the offer).

Additionally, tariff options that are only available to a limited customer base, such as subsidised tarifs for low-income citizens or schoolchildren (e.g. for the purpose of facilitating distance learning) that do not treat specific (or categories of) applications differentially from other internet traffic based on commercial considerations would be permitted.

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 recent rulings expand in particular on paragraph 47 of the ruling in Telenor Magyarország, which characterises the first subparagraph of Article 3(3) as a general nondiscrimination rule.

In Telenor Magyarország, the Court assessed packages that blocked or slowed down applications that were not zero-rated once the customer had used up its data volume. The Court assessed the zero-rating offers in question according to Article 3(1) and 3(2), and, in assessing them according to Article 3(3), focused in particular on the traffic management practices that took effect once the customer had used up its data volume (paragraph 51 of the judgment).

2 For a detailed explanation of the problems and limitations of “open" class-based zero-rating offers, see https://epicenter.works/document/1522

By contrast, the recent rulings assessed offers that did not include technical discrimination once the customer had used up the data volume, and the Court performed its analysis of compatibility with Article 3(3) with respect to the inherent incentives associated with these offers. It thus applies the general nondiscrimination rule of the first subparagraph to economic discrimination.

We view these approaches as complementary in much the same way as the assessment of offers according to Articles 3(1) and 3(2) on the one hand and according to Article 3(3) on the other hand within the ruling in Telenor Magyarország itself is complementary.

Sincerely,

epicenter.works – for digital rights

IT-Pol Denmark

Access Now

Bits of Freedom

Chaos Computer Club (CCC)

CitizenD

D3 – Defesa dos Direitos Digitais

Digitale Gesellschaft

EDRi – European Digital Rights

Gesellschaft für Freiheitsrechte (GFF)

Homo Digitalis

Open Media

Vrijschrift.org