

# SAVEGUARDING NET NEUTRALITY

Comments by the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – (vzbv)) on the consultation paper on the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines

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## **Impressum**

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# I. INTRODUCTION

Securing net neutrality has become one of the most important topics of Internet policy in recent years. Net neutrality and its principles of non-discriminatory and equal access to data ensures the ecosystem of the Internet as a driver of innovation. In respect to that, the European legislator adopted the Telecom Single Market Regulation 2015/2120 (Regulation) which came into force on 30 April 2016. Since many parts of the Regulation are phrased in quite a vague way, the Body of European Regulators for Electronic Communications (BEREC) was given the task to provide clarification and guidance on the provisions of the Regulation. The goal was help to constitute a consistent application and harmonised enforcement of the Regulation and to give legal certainty to all market players as well as protect end-user rights. After a public consultation, where Verbraucherzentrale Bundesverband (vzbv) also contributed to ensure a balanced protection of consumer rights<sup>1</sup>, BEREC adopted the “Net Neutrality Guidelines” in August 2016.

vzbv strongly welcomes BERECs past and future efforts to safeguard net neutrality in Europe. The Regulation and as well as the Guidelines are an exemplary example on how to provide a sufficient basis to protect the non-discriminatory and equal access to the Internet. Nonetheless, in some areas the Guidelines are too imprecise and can therefore enable telecom operators in practices which result in a two-tier internet where the best services will go to those who can pay for them. By reviewing the Guidelines BEREC has the opportunity to redesign them more precisely so National Regulation Agencies (NRA) could enforce the net neutrality rules in a way, their immanent principle intended.

Since the Regulation will be evaluated in early 2019, BEREC invited stakeholders to participate in a public consultation on an evaluation of the application of the BEREC Net Neutrality Guidelines. Verbraucherzentrale Bundesverband (vzbv) thanks BEREC for the possibility to comment in order to assess the need for amendments from a consumer point of view.

The given comments are organised according to the requested structure.

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<sup>1</sup> Verbraucherzentrale Bundesverband: Safeguarding the open Internet, [https://www.vzbv.de/sites/default/files/berec-consultation\\_netneutrality\\_comments-vzbv-2016-07-18.pdf](https://www.vzbv.de/sites/default/files/berec-consultation_netneutrality_comments-vzbv-2016-07-18.pdf), 05.04.2018

## II. COMMENTS IN DETAIL

### 1. IN YOUR VIEW – HAVE THE GUIDELINES HELPED NRA’S APPLY THE REGULATION IN A CONSISTENT, COHERENT AND CORRECT WAY? PLEASE EXPLAIN

In Germany, the Federal Network Agency (German: Bundesnetzagentur) is responsible for enforcing the net neutrality rules of the Regulation and while the Guidelines enabled the Bundesnetzagentur to apply the general principles of the Regulation (e.g. traffic management and throttling) in a consistent way, the issue of price discrimination (e.g. zero-rating content), as seen in almost every European member state, is the prime cause for difficulties when it comes to compliance and implementation of the Regulation. Price discrimination and zero-rating practices are currently the biggest risk to the enforcement of the net neutrality rules in Europe. Internet Service Providers (ISP) are still able to favor certain Content and Application Providers (CAPs) as well as selling packages of content, where certain services are offered without data limits.

In Germany, there are currently two zero-rating offers under investigation by the Bundesnetzagentur. The products are offered by Deutsche Telekom AG (“StreamOn”) and Vodafone GmbH (“GigaPass”), who are two of the three mobile network operators here in Germany. Combined they hold 65.9 percent of shares in the German mobile market.<sup>2</sup>

The first zero-rating product, StreamOn by Deutsche Telekom, launched 19 April 2017, was under investigation until December 2017, when the Bundesnetzagentur prohibited parts of the product as violation against the regulation to ensure compliance with the European rules on roaming and net neutrality.<sup>3</sup>

The second zero-rating product, GigaPass by Vodafone, launched 26 October 2017, is currently still under investigation by the Bundesnetzagentur, with no definitive outcome. It is likely that Vodafone will follow Telekom’s example and appeal any decision made by the Bundesnetzagentur against their favor, which will then result in a lengthy lawsuit as well.

In both cases, the vzbv advocated for a complete ban of the products as they exceed both the scope of the Regulation and the Guidelines.<sup>4,5</sup>

Another difficulty National Regulation Agencies face when assessing a probable breach of the Regulation is the case-by-case assessment proposed by BEREC. This practice paves the way to divergent approaches. ISPs are able to put their zero-rating offers in the market, which lingers there for years despite possible illegitimacy due to the disproportionately long review and legal process. A case-by-case analysis could also lead to different results in European member states, fragmentation of the digital single market and legal uncertainty for ISPs, CAPs and consumers. This could in turn hamper invest-

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<sup>2</sup> Statistika: Marktanteile der einzelnen Netzbetreiber an den Mobilfunkanschlüssen in Deutschland von 1998 bis 2017, <https://de.statista.com/statistik/daten/studie/3028/umfrage/marktanteile-der-netzbetreiber-am-mobilfunkmarkt-in-deutschland-seit-1998/>, 09.04.2018

<sup>3</sup> Bundesnetzagentur: Bundesnetzagentur sichert Netzneutralität - Teilaspekte von „StreamOn“ werden untersagt, 2017, [https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2017/15122017\\_StreamOn.html](https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2017/15122017_StreamOn.html), 05.04.2018

<sup>4</sup> Verbraucherzentrale Bundesverband: Telekom-Tarif StreamOn verstößt teilweise gegen Netzneutralität, 2017, <https://www.vzbv.de/pressemitteilung/telekom-tarif-streamon-verstoess-t teilweise-gegen-netzneutralitaet>, 10.04.2018

<sup>5</sup> Verbraucherzentrale Bundesverband: vzbv fordert: Vodafone GigaPass verbieten, 2017, <https://www.vzbv.de/pressemitteilung/vzbv-fordert-vodafone-gigapass-verbieten>, 10.04.2018

ments and harm the continued functioning of the internet ecosystem as an engine of innovation which would lead to a reduction of consumers' choice, quality of service and indirectly to higher prices due to decreased competition.

According to Article 5 (3) of the Regulation, the goal of the guidelines should be "to contribute to the consistent application of this Regulation". This is not possible with a case-by-case approach with weak rules on zero-rating that are open for interpretation. As of now, BEREC's definition of illegitimate zero-rating is too narrow for the actual market situation. BEREC should therefore clarify the Guidelines and provide legal certainty by prohibiting all forms of harmful commercial price discriminating practices, such as zero-rating.

### **3. ON WHICH SUBJECTS WOULD YOU EXPECT THE GUIDELINES TO BE MORE EXPLICIT OR ELABORATED? HOW SHOULD THE TEXT OF THE GUIDELINES BE ADAPTED ON THESE POINTS, IN YOUR VIEW. PLEASE EXPLAIN.**

By a vast majority, the Guidelines bring the much needed clarity on how to interpret the Regulation. As mentioned above and again in detail by answering the following questions these subjects should be further improved:

- ❖ Price discrimination and zero-rating practices
- ❖ Free choice of terminal equipment
- ❖ Traffic management measures
- ❖ Transparency measures

### **7. DO YOU THINK THAT THE GUIDELINES SHOULD PROVIDE FURTHER CLARIFICATION IN RELATION TO THE DEFINITIONS IN THE REGULATION? IF YES, PLEASE PROVIDE CONCRETE SUGGESTIONS.**

As vzbv has already stated in its opinion on the Draft Guidelines<sup>6</sup>, e-book readers are still a poor example in paragraph 18 and should be removed, since it is often possible for consumers to use a web browser on such readers with connectivity to virtually all endpoints in the internet. Furthermore, it must be clear, that the Regulation does not foresee any other connectivity services beyond Internet Access Services (IAS) and specialised services. Therefore, where the number of reachable end-points is limited by the nature of the terminal equipment used with a service, this service should be provided through or as an IAS, if possible. If this service requires a guaranteed quality of service, it can be provided as a specialised service, but it must then comply with the corresponding rules.

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<sup>6</sup> Verbraucherzentrale Bundesverband: Safeguarding the open Internet, Comments by Verbraucherzentrale Bundesverband (vzbv) on the draft BEREC guidelines on implementation of net neutrality rules, 2016 [https://www.vzbv.de/sites/default/files/berec-consultation\\_netneutrality\\_comments-vzbv-2016-07-18.pdf](https://www.vzbv.de/sites/default/files/berec-consultation_netneutrality_comments-vzbv-2016-07-18.pdf), 12.04.2018

## **8. DOES THE CURRENT ASSESSMENT OF ZERO-RATING AS RECOMMENDED IN THE GUIDELINES, OFFER SUFFICIENT PROTECTION OF END-USERS' RIGHTS AS REFERED TO IN ARTICLE 3 (1) OF THE REGULATION? PLEASE EXPLAIN.**

As already mentioned in the above answers, the design of the Guidelines is not sufficient to protect the present and future thriving of the Digital Single Market as well as consumers' rights when it comes to price discriminating and zero-rating practices.

As BEREC research has shown, data caps are a decisive factor for consumers when choosing their tariffs.<sup>7</sup> So at first glance, zero-rating offers can be an attractive option for consumers to optimize their contractual services. Zero-rating products are especially interesting for consumers if the monthly inclusive volume is limited and not sufficient for a nowadays common use of data-intensive services, such as music or video streaming.

In the long term however, there is a risk that such zero-rating offers limit the diversity of product choices for consumers. At the same time, zero-rating offers may lead to limited data volumes of internet tariffs as well as higher prices of other data volume and tariffs in general. Zero-rating offers (or tariffs that include zero-rating options) are even more interesting to the end-user, the more limited their data volume and the higher the prices for additional data volume are. Prices for mobile rates in Germany are still relatively high compared to other EU member states<sup>8</sup> and often contain only a small amount of monthly inclusive data volume, which is not sufficient to regularly use data-intensive services. As an example: With the introduction of its zero-rating offer "GigaPass" in October 2017, Vodafone GmbH has increased the price of its Red tariffs (one of two tariffs where GigaPass is applicable) by three euros each, without raising the monthly inclusive data volume. By comparison, the inclusive data volume of the Red tariffs has been adjusted upwards in previous price increases.<sup>9</sup>

The two zero-rating offers in Germany StreamOn by Deutsche Telekom and GigaPass by Vodafone will be shortly described below to exemplary outline the multiple difficulties arising from the offers relating to compliance with the Regulation and the Guidelines with regard to possible infringements of end-user rights.

### StreamOn by Deutsche Telekom AG

StreamOn by Deutsche Telekom was launched 19 April 2017. It is a zero-rating offer which can be added without additional surcharges to certain middle and high priced tariffs. When adding StreamOn to the main tariff, most but not all of the data consumption of partner content is not counted towards the respective data cap.<sup>10</sup>

StreamOn violates the Regulation in several aspects. First, StreamOn involves traffic management measures with a bandwidth reduction to a maximum of 1.7 Mbit/s for

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<sup>7</sup> BEREC: Net Neutrality Ecodem progress report, 2013, [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/others/3911-berec-bor-electronic-voting-procedure-voting-report-net-neutrality-ecodem-progress-report](http://berec.europa.eu/eng/document_register/subject_matter/berec/others/3911-berec-bor-electronic-voting-procedure-voting-report-net-neutrality-ecodem-progress-report), 12.04.2018

<sup>8</sup> Rewheel: Digital Fuel Monitor 8th release; 2017; [http://research.rewheel.fi/insights/2017\\_nov\\_pro\\_2h2017\\_release/](http://research.rewheel.fi/insights/2017_nov_pro_2h2017_release/), 12.04.2018

<sup>9</sup> Teltarif.de: Vodafone Red M, 2018, <https://www.teltarif.de/a/vodafone/red-m.html>, 17.04.2018

<sup>10</sup> For many users, it might be surprising that only audio and video content is excluded from their inclusive data volume, but not image, text or other media data that results from the use of the streaming service. It is also unclear, for example, whether the search for titles via the apps of the streaming providers, advertisements preceding the video or audio streams or the "offline functions" 3 of the streaming offers count towards the customer's data volume, 2018, <https://www.telekom.de/hilfe/search-result?samChecked=true#q=streamon>, 17.04.2018

streaming video content. There is no legal basis with regard to the Regulation for the bandwidth reduction in the context of StreamOn. The applied traffic management is not based on objective requirements of technical qualities of the services transmitted, but on commercial considerations of Deutsche Telekom. The requirement of equal treatment for all data traffic is a core element of net neutrality. The German Federal Network Agency rightfully concluded that Deutsche Telekom violates Art 3 (3) subparagraph 1 of the Regulation by throttling data.

Article 3 (1) of the Regulation guarantees the consumer the right to use his Internet connection with any terminal equipment. Therefore, the network management of the provider should be agnostic to the use of video streaming services on various devices such as telephone, tablet, computer or television. However, with StreamOn, Deutsche Telekom disregards this right of end-users, as “the use of the option via other devices via tethering” is contractually excluded.<sup>11</sup> Also according to the BEREC Guidelines, a limitation of tethering “is likely to constitute a restriction on the use of terminal equipment” and therefore would be in conflict with the Regulation.<sup>12</sup>

Furthermore, StreamOn does not comply with the European roaming rules since StreamOn can only be used within Germany. If a consumer travels in Europe the consumed data of partner content is counted toward the monthly inclusive data volume of the tariff. The Bundesnetzagentur already concluded that all tariffs with the StreamOn option must be redesigned in such a way that consumers within the European Union could benefit from the roam-like-at-home principle.

In addition, it is currently doubtful whether the billing arrangements of the tariffs are fair and transparent. The terms and conditions for the participation of content partners do not provide a mandatory mention of the participating partner services. Furthermore, the zero-rating of individual applications can be suspended at short notice in accordance with the terms and conditions.<sup>13</sup> In order to meet the transparency obligations of Art. 4 (1) (b) of the Regulation, the consumer would need to be notified of such changes by their ISP. According to consumer statements, Telekom also reserves the right to discontinue the StreamOn offer at any time without allowing the consumer - who might just has switched to a higher-priced tariff because of the StreamOn option - a special termination right or a downgrade to a lower tariff.<sup>1415</sup>

StreamOn was under investigation by the Bundesnetzagentur until December 2017, when they prohibited parts of the product as violation against the Regulation to ensure compliance with the European rules on roaming and net neutrality.<sup>16</sup> As for all ongoing zero-rating cases in Europe, the German NRA was not able to prohibit the offer as a

<sup>11</sup> Deutsche Telekom: Welche Voraussetzungen gibt es für StreamOn, <https://www.telekom.de/hilfe/mobilfunk-mobiles-internet/mobiles-internet-e-mail/streamon/voraussetzungen-streamon?samChecked=true>, 17.04.2018

<sup>12</sup> BEREC net neutrality Guidelines: Paragraph 27

<sup>13</sup> Deutsche Telekom: Point 6.5 of the terms and conditions for the participation for content-partners for StreamOn

<sup>14</sup> Golem.de user forum: Kein Sonderkündigungsrecht!, 2017, <https://forum.golem.de/kommentare/handy/zerorating-bundesnetzagentur-startet-pruefung-von-telekoms-streamon/kein-sonderkuendigungs-recht/109347,4809531,4809531,read.html#msg-4809531>; 17.04.2018

<sup>15</sup> Golem.de user forum: Danke Golem!, 2017, <https://forum.golem.de/kommentare/handy/zero-rating-bundesnetzagentur-startet-pruefung-von-telekoms-streamon/danke-golem/109347,4809357,4809357,read.html#msg-4809357>, 17.04.2018

<sup>16</sup> Bundesnetzagentur: Bundesnetzagentur sichert Netzneutralität - Teilaspekte von „StreamOn“ werden untersagt, 2017, [https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2017/15122017\\_StreamOn.html](https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2017/15122017_StreamOn.html), 05.04.2018

whole, due to the unclear provisions laid out in the Guidelines. Furthermore, Deutsche Telekom has filed a lawsuit against the requirements imposed on its tariff option StreamOn. As a result, the original deadline for meeting the conditions, 31<sup>st</sup> March 2018, did not have to be kept by Deutsche Telekom. As a result, StreamOn will continue to be on the market while violating the net neutrality and roaming rules as well as creating market realities that undermine consumers' rights and limit their choices with probable irreversible impact to healthy competition, consumers' rights and the diversity of product choices. Any additional zero-rating product on the European mobile market will potentiate these issues.

#### ❖ GigaPass by Vodafone GmbH

GigaPass by Vodafone, launched 26 October 2017 and is currently still under investigation by the Bundesnetzagentur. Similar to StreamOn, Vodafone reserves itself the right to throttle to SD-quality<sup>17</sup>, which is a violation against Article 3 (3) of the Regulation and should be prohibited by the respective NRA.

Furthermore, GigaPass is currently only applicable in Germany and is therefore not in line with the roam-like-at-home-principle.<sup>18</sup>

The zero-rating offer GigaPass is structured differently compared to StreamOn. Vodafone splits its zero-rating options into different so-called "Passes". For new customers and contract renewals from 26 October 2017 onwards, a Pass is included in the Red and Young tariffs and can be activated free of charge. Each additional Pass for the categories Chat, Social and Music costs five euros regardless of the tariff, the video Pass costs ten euros. In principle, users of low-volume contracts would benefit the most from the zero-rating of partner offers. However, the data-intensive video Pass is only available for users in the Red M-XXL and Young M-XL tariffs. Therefore, it can be assumed that it is not the objective requirements of the service but commercial considerations that determine this tariff structure.<sup>19</sup>

In vzbv's opinion, the artificial division into the four categories Chat, Social, Music and Video limits the user's right to use any services and classes of service according to Article 3 (1) of the Regulation. From the perspective of consumers, it is not clear how the categories come about, how they differ from each other, or which services or types of use of the respective services fall into which category. For example, voice and video telephony, advertising and the opening of external links are not zero-rated even if the service is part of a respective Pass. Consumers can also not use the WhatsApp voice telephony feature in their zero-rating offer, but recorded voice messages fall into the Chat Pass and are therefore zero-rated. One explanation of this could be the fact that in case of calls to other EU countries, the voice telephony functions of the CAP is in competition with the telephony offers of Vodafone. It is also unclear, whether video via Facebook feed, Facebook live broadcasts, Facebook Instant Articles, the direct messages of the service Twitter, the search for titles on the apps of the streaming providers or the "offline features" of streaming offers will be deducted from the monthly inclusive data volume of the consumer's tariff.

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<sup>17</sup> Vodafone GmbH: 100 Vodafone InfoDok, Preisliste Mobilfunk

<sup>18</sup> Vodafone GmbH: 100 Vodafone InfoDok, Preisliste Mobilfunk

<sup>19</sup> See points 62 to 68 BEREC Guidelines on net neutrality



In addition, applications from the same CAP are partially classified in different Passes. It is hardly comprehensible to consumers that the Chat Pass is required for the Facebook Messenger, but the Social Pass for the actual Facebook app. These categories are an artificial demarcation of the Internet. This becomes particularly clear as not all European GigaPass offers have the same structure. In Romania, the Social and Chat Pass are put together and instead there is a fourth Maps Pass, which includes Google and Apple Maps.<sup>20</sup>

The FAQs regarding the GigaPass point out that the participating partner services are subject to change at any time and can only be checked on the Vodafone website. This creates the adverse situation for consumers to opt for a two-year contract for a Vodafone Pass for a fee, believing that they will be able to use a special service outside their data volume for that time. However, if this application is dropped from the Vodafone Pass, the consumer may not know it until months later, and even then there is no recourse option. Also, the Vodafone website does not list the names of the participating CAPs, but only unlabeled logos that many consumers may not know. This makes it difficult to understand which applications are currently part or no longer part of the offer.<sup>21</sup>

As with StreamOn, Vodafone prohibits tethering for their GigaPass option. While it is technically possible for users to connect devices of their choosing via the mobile network, the zero-rating is dependent on the use of applications that are only available to certain devices.<sup>22</sup> In the example of GigaPass, when the customer acquired the relevant Video Pass traffic generated by the Netflix Application on certain Google, Apple and Microsoft devices is zero-rated and not deducted from the monthly data cap. When a customer is using the same partner service via Netflix.com on a different device – like the free operation system Linux – the acquired Video Pass is not in effect and the full data volume is deducted from the monthly data cap. This in effect creates a different price for certain services, depending on the device that is used to access the internet.

With this practice, Vodafone and Deutsche Telekom are both trying to circumvent the right of end-users to use devices of their choice according to Article 3 (1) of the Regulation. Even with the technical possibility to use tethering, certain terminal equipment which can only indirectly be connected to the interface of a public telecommunications network is discriminated by excluding their use contractually. Article 3 (1) of the Regulation guarantees the user the right to use his Internet connection with any terminal equipment. Therefore, the network management and contract design of the provider of an Internet access service should be agnostic to the use of streaming services on various devices such as telephone, tablet, computer or television. It is not admissible under Article 3 (2) of the Regulation that the price for the provisioning of an IAS can be depended on the actual use of specific terminal equipment by the user. Therefore, it can also not be admissible that the price of individual applications can be made depended on the use of specific terminal equipment. Consequently, any contractual agreement

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<sup>20</sup> Vodafone GmbH: Wo sehe ich, welche Apps ich mit den Vodafone-Pässen nutzen kann? <https://www.vodafone.de/privat/service/vodafone-pass.html#wo-sehe-ich-welche-apps-ich-mit-den-vodafone-paessen-nutzen-kann>, 17.04.2018

<sup>21</sup> Vodafone GmbH: Wo sehe ich, welche Apps ich mit den Vodafone-Pässen nutzen kann? <https://www.vodafone.de/privat/service/vodafone-pass.html#wo-sehe-ich-welche-apps-ich-mit-den-vodafone-paessen-nutzen-kann>, 19.04.2018

<sup>22</sup> Vodafone GmbH: Was muss ich beachten, wenn ich die Vodafone-Pässe nutze?, <https://www.vodafone.de/hilfe/tarife/vodafone-pass.html#was-muss-ich-beachten-wenn-ich-die-vodafone-paesse-nutze>, 17.04.2018



between an ISP and a CAP that limits the rights of end-users to use terminal equipment of their choice is prohibited under Article 3 (2) and requires the NRA to intervene.

A plausible justification for the contractual exclusion of tethering - quite apart from the legal inadmissibility of the restriction - is not apparent. The volume of transmitted data does not change by the terminal equipment used. It can only be assumed that consumers should be obliged to the use of the smartphone app of the respective CAP.

From a consumer protection perspective, the current design of Vodafone GigaPass shows considerable transparency deficiencies. The above points, taken together, will make the zero-rating even more inexplicable and user-unfriendly than it already is, especially with regard to the impact on monthly mobile phone bill. From the point of view of the vzbv, these considerations outweigh the disadvantages for consumers compared to the advantages of the offer.

A user-friendly alternative to the zero-rating offers would be to increase the monthly inclusive volume of all tariffs by the amount that was calculated by the provider for the average usage of zero-rating offers. This would increase the freedom of choice of all consumers.

❖ In conclusion vzbv recommends BEREC to revise the following paragraphs:

vzbv welcomes that restrictions on tethering are not in line with the Regulation according to the BEREC Guidelines. In the interest of harmonized enforcement, it should be clarified that end-users have, in practice, the right to use the terminal equipment of their choice without any unequal treatment by technical and/or contractual means. In the assessment of commercial agreements between ISPs and CAPs the NRAs therefore should consider whether such agreements impose requirements for specific terminal equipment on end-users. The right of end-users to use terminal equipment of their choice would be limited if the price of the IAS is depended on the actual use of a certain terminal equipment.

BEREC should revise paragraph 39 since it is not in line with paragraph 48 that says that higher prices for data associated with specific applications are likely to limit end-users' rights. Price differentiation and discrimination for different categories of traffic does clearly limit and interferes with user choice as providers distort the level playing field between CAPs and their offered applications. Therefore the exercise of end-user rights as defined under Article 3 (1) and Recital 6 of the Regulation are violated.

BEREC should also broaden the scope of paragraph 40. Since the Regulation went into force and the BEREC Guidelines were published, new models of zero-rating offers have emerged in almost every European member state. Those offers are designed in various ways and can hardly be addressed by a one size fits all definition. Zero-rating must be categorised as a price discriminating practice even when the zero-rating option or bundle does not come with an actual pricing itself. The Consumer always has to pay the provider for the internet access service he needs as a basis to use all applications.

As for paragraph 42, BEREC recognizes that all forms of application-based differential pricing (including zero-rating practices) create an economic incentive for the consumer to use applications which are more attractively priced than competing ones. Such economic incentives could lead to distortion of competition between different CAPs. The barriers to enter the market for small and innovative CAPs would increase especially when ISPs are allowed to decide, which content gets privileged or when they are allowed to charge a fee for CAPs' content. In fact, such practices limit end-users' rights

regardless of the size of the affected market participants and the volume of the data and should therefore be considered a breach of the Regulation.

**9. HOW COULD THE ASSESSMENT METHODOLOGY FOR COMMERCIAL PRACTICES IN THE GUIDELINES (REF. IN PARTICULAR TO PARAS 46-48) BE IMPROVED? IS THERE A NEED FOR MORE SIMPLIFICATION, FLEXIBILITY AND/OR MORE SPECIFICATION? PLEASE PROVIDE CONCRETE SUGGESTIONS.**

Once again vzbv emphasizes that BERECS approach to zero-rating must be fundamentally changed. The Guidelines should therefore prohibit any kind of zero-rating practices.

For all other commercial practices, the assessment methodology should be applicable by NRAs not only in theory. As ongoing zero-rating investigations have shown, it is nearly impossible for NRAs to include paragraphs 46-48 into their review of those cases.

As seen in the German zero-rating case on StreamOn the Bundesnetzagentur was not able to definitively specify where StreamOn might have an effect on the range and diversity of content and applications which consumers might use or if the product in question contains characteristics which materially reduce end-user choice. As of now, NRAs are required to identify definitive and measurable effects, which is not possible for products that are new to the market or not yet launched. NRAs must be able to include the aspects laid out in paragraphs 46-48. As of now this would only be possible if the infringing product would have been on the market for a reasonable length of time, which naturally contradicts the intention of both the Regulation and the Guidelines. Even then, it is difficult to analyse negative market impacts and effects for end-users in a “what-if-scenario”.

BEREC should redesign the assessment methodology in a way which makes it possible for NRAs to apply them with legal certainty. It must be possible for NRAs to argue with logical market mechanisms that provide indications of the effects and impacts mentioned in the assessment methodology.

**10. IN YOUR VIEW DID THE ASSESSMENT METHODOLOGY FOR COMMERCIAL PRACTICES IN THE GUIDELINES INFLUENCE THE DEVELOPMENT OF NEW CONTENT AND APPLICATIONS OFFERED ON THE INTERNET? PLEASE EXPLAIN**

The multiple difficulties CAP's face since zero-rating offers emerged all over Europe will be again outlined by the two zero-rating offers in Germany StreamOn by Deutsche Telekom and GigaPass by Vodafone.

❖ StreamOn by Deutsche Telekom AG

StreamOn's terms and conditions for the participation of content partners only allow the participation of streaming services that meet certain technical requirements.<sup>23</sup> Innovative technologies such as peer-to-peer streaming of live or on-demand content cannot

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<sup>23</sup> Deutsche Telekom AG: Points 6.1 ,6.2 and 6.4 of the terms and conditions for the participation of content partners for StreamOn

meet Telekom's requirements. These technologies are particularly desirable for smaller streaming providers, because they allow for a large user base even without large server capacities.

Fast development and release cycles, which are usual for innovative startups, are counteracted, since any change to the streaming offer must be disclosed to Telekom with four weeks' notice.<sup>24</sup>

The registration process for partner services to StreamOn is particularly disadvantageous for smaller foreign and European streaming providers, who face administrative, financial and also linguistic hurdles. Smaller CAPs will not be able to afford contractual relationships with hundreds of mobile service providers in 31 European countries. This results in a direct disadvantage regarding practical accessibility of these providers compared to larger organizations and, consequently, a worsening of the diversity of offers, media pluralism and freedom of information.

In addition, larger CAPs could also make the decision to enter into partnerships with individual mobile service providers in certain countries, as was the case with the Spotify tariff in Germany. For example, a streaming service might opt for an exclusive strategy because they do not want to pre-deliver the beta versions of their applications to all mobile operators.

The incentives of the zero-rating offers depend on how many CAPs and services participate and especially how large their user base is. For example, T-Mobile USA with its zero-rating program "Music Freedom" preferred larger providers while smaller providers had to wait months or years for their application to be processed.<sup>25</sup> Year-long waiting periods for processing an application, as it was the case with "Music Freedom, could decide on the success of an innovative service.<sup>26</sup> It also results in a difficulty for smaller mobile service providers, especially in the case of later market entry, to obtain a competitive portfolio of partner services.

#### ❖ GigaPass by Vodafone GmbH

As mentioned above, the GigaPass structure of different content categories is an arbitrary subdivision of services and content. This not only leads to difficulties for transparency and distinction on the consumer side, but also on the side of the CAPs. CAPs whose applications do not fit into any of the four predefined categories are discriminated against providers who can be classified. Innovative multi-use applications for example must decide, which service of the application should be accessible via GigaPass. This can lead to a practice where one application is subdivided into different Passes. Consumers would have to buy multiple Passes to access the full spectrum of the application. By limiting a free access Vodafone and its zero-rating offer limit the freedom CAPs and services under Article 3 (1) of the Regulation.

The GigaPass partnering application process mainly discriminates smaller and non-commercial CAPs, especially if they are active in several European markets due to administrative, financial and language barriers. Therefore, the lack of transparency and

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<sup>24</sup> Deutsche Telekom AG: Point 6.5 of the terms and conditions for the participation of content partners for StreamOn

<sup>25</sup> Barbara van Schewick: T-Mobile's Binge On Violates Key Net Neutrality Principles, 2016, Page 26-28, <https://cyberlaw.stanford.edu/downloads/vanSchewick-2016-Binge-On-Report.pdf>, 17.04.2018

<sup>26</sup> Barbara van Schewick: T-Mobile's Binge On Violates Key Net Neutrality Principles, 2016, Page 27, <https://cyberlaw.stanford.edu/downloads/vanSchewick-2016-Binge-On-Report.pdf>, 17.04.2018

complex structuring of the registration procedure for GigaPass are likely to result in market entry barriers. There is no uniform standard application for potential partners throughout Europe. The information for partners is not even available in English in every country GigaPass is offered. Also, some national partner portals, such as the German version of GigaPass, contain a reference to a confidentiality agreement.<sup>27</sup> Under no circumstances should this confidentiality agreement be used by Vodafone to make various contracts with different CAPs. Such discrimination between different CAPs would not be compatible with the requirements and prohibition of discrimination in the Regulation.

Overall, the principle of the Internet “innovation without permission” is overthrown by zero-rating offers like StreamOn and GigaPass. The existence of such products thus create new market entry barriers, reduce the comparability of mobile offerings and is therefore negative for competition in the telecommunications sector and for the price level in the respective country. It also has a negative effect on the freedom of choice, diversity of content and freedom of information.

**11. DO YOU THINK THAT THE CURRENT APPLICATION OF THE REGULATION AND THE GUIDELINES CONCERNING COMMERCIAL PRACTICES, SUCH AS ZERO-RATING, SUFFICIENTLY TAKES ACCOUNT OF POSSIBLE LONG TERM EFFECTS OF SUCH PRACTICES? IF NOT, HOW COULD BEREC FURTHER FACILITATE THIS?**

Currently zero-rating products are reviewed by the respective NRA ex-post as well as case-by-case. The current design of the Guidelines regarding zero-rating offers allow providers to put their infringing products on the market for a lengthy period of time without major consequences and without a possibility for NRAs to properly interfere in an expectable time frame. The fact, that those practices distort the market, limit availability and diversity of choices for end-users, discriminate CAPs and create market entry barriers for small innovative businesses cannot be stretched enough.

In order to give clear guidance to National Regulation Agencies for coherently enforcing the European net neutrality rules as well as protecting the present and future thriving of the Digital Single Market as well as consumers’ rights, BEREC should prohibit all forms of zero-rating. As mentioned above, BEREC should focus on possibilities for providers to overall increase the monthly inclusive volume or even having no data caps at all.

**12. IS THERE A NEED FOR IMPROVEMENT OF THE GUIDELINES CONCERNING REASONABLE TRAFFIC MANAGEMENT (REF. IN PARTICULAR TO PARAS. 49-75)? IF YES, HOW COULD THIS TEXT BE IMPROVED? PLEASE PROVIDE CONCRETE SUGGESTIONS.**

Traffic management measures that are based on different “categories of traffic” as stated in paragraph 66 carry the risk that ISPs discriminate against competing offers and provide them with a competitive advantage. For example, this might be the case when an ISP decides to prioritise some time sensitive categories of traffic, like gaming

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<sup>27</sup> Vodafone GmbH: Vodafone Pass Partnerportal <https://www.vodafone.de/privat/service/vodafone-pass-partnerportal.html> 17.04.2018

applications, but not VoIP since these services compete with its own telephony products.

vzbv therefore strongly recommends, that in principle application-agnostic traffic management measures should be preferred over traffic management measures based on categories of traffic, like BEREC pointed out in paragraphs 74 and 81 too. It must be clear that it should be allowed for ISPs to apply measures based on categories of traffic only in exceptional cases when application-agnostic traffic management is not sufficient.

**13. IS THERE A NEED FOR IMPROVEMENT OF THE GUIDELINES CONCERNING TRAFFIC MANAGEMENT MEASURES GOING BEYOND REASONABLE TRAFFIC MANAGEMENT MEASURES (REF. IN PARTICULAR TO PARAS. 76-93)? IF YES, HOW COULD THIS TEXT BE IMPROVED? PLEASE PROVIDE CONCRETE SUGGESTIONS.**

BEREC rightly recognizes in paragraph 86 how the broad concept of security could be easily used by ISPs to circumvent the provisions of the Regulation. Therefore, it is important to give clear guidelines to the ISPs and to the NRAs. In this regard the reference to reports/complaints from “recognised security organisations” is too vague. It not clear by whom these organisations should be recognised and on what criteria.

**16. IS THERE A NEED FOR IMPROVEMENT OF THE GUIDELINES CONCERNING SPECIALIZED SERVICES (REF. IN PARTICULAR TO PARAS. 99-127)? IF YES, HOW COULD THIS TEXT BE IMPROVED? PLEASE PROVIDE CONCRETE SUGGESTIONS.**

BEREC is right to point out in paragraphs 105 and 111 that specialised services are likely to circumvent the provisions of the TSM Regulation, if these services require a level of quality that can also be assured over an IAS. This rule is very important to ensure that the provisions of the TSM Regulation are not circumvented. But BEREC should point out more clearly, that quality assurances given to end-users by ISPs are by themselves no criteria to implement specialised services.

Article 3 (5) second subparagraph of the Regulation clearly states that ISPs are only allowed to offer specialised services if the network capacity is sufficient to provide them in addition to any IAS. Therefore, paragraph 122 should stipulate that an IAS of an end-user should only be impacted by a specialised service he uses, if it is technologically unavoidable.

If there is no unavoidable technological reason the user should still experience the maximum possible speed when he uses a specialised service. Otherwise this would be an incentive for ISPs to reduce the speed of the IAS of the end-user to the contractually agreed minimum every time when the consumer uses a specialised service. This rule should apply to any end-user, and not just to those who are not the subscribers of both services.

Also paragraph 122 is still not in line with Article 4 of the Regulation regarding transparency as well as the provisions on non-conformity of performance.

Furthermore, paragraph 123 is too vague. The conditions under which the aggregated negative impact of specialised services in mobile networks is too high and when it is acceptable need to be explained more clearly and need to be better defined.

**19. WHAT HAS BEEN YOUR EXPERIENCE REGARDING THE APPLICATION OF THE TRANSPARANCY MEASURES IN THE REGULATION AND THE GUIDELINES, PARTICULARLY IN RELATION TO SPEED OF MOBILE INTERNET ACCESS SERVICES? IS THERE A NEED FOR IMPROVEMENT? IF YES, HOW COULD THIS BE IMPROVED BY BEREC? PLEASE PROVIDE CONCRETE SUGGESTIONS.**

The Regulation was implemented by the German legislator, adapting the German Telecommunications Act (TKG) on 27 April 2017. As many parts of the Regulation are phrased quite vague, the legislative process of amending the TKG was marked by strong differences of interpretation of the Regulation by various stakeholders.

With the amendment of the TKG, the German NRA's measuring tool was recognised as the certified monitoring mechanism. The Bundesnetzagentur also specified the indeterminate legal concepts laid out in Article 4 (4) in order to provide guide values for end-users, if they have to peruse judicial measures.<sup>28</sup> Within the process of specifying the legal concept, The Bundesnetzagentur has also taken the BEREC Guidelines into account. vzbv welcomed the fast implementation and specification of the new rules by the Federal Network Agency. However, end-users continue to lack legal certainty. In order to trigger civil law claims at least, courts still have to decide if a non-conformity of performance qualifies as substantial ground to enforce specific German Civil Code rules.

According to the new guidelines of the Federal Network Agency, the Internet connection provided is not in accordance with the contract if 20 measurements (via the certified measuring tool) constitute that:

- ❖ at least once 90 percent of the contractually agreed maximum speed is not reached on each of two measuring days, or
- ❖ the normally available speed is not reached in 90 percent of the measurements, or
- ❖ the speed falls below the minimum speed once on each of the two measuring days.

According to the BEREC Guidelines paragraph 145, the maximum speed is the speed an end user can expect at least some time (e.g. at least once a day). According to the specifications of the Federal Network Agency, the maximum speed specified in the contract must be achieved at least once within an appropriate measurement period. If the maximum speed is not reached during the measurement period, this deviation is only significant at more than ten percent. This means that if at least 90 percent of the contractually agreed maximum speed is not reached at least once within the measurement period, the deviation is considerable.

From a consumer point of view it is already inadequate that the maximum speed should only be expected once a day. This is especially unsatisfying because the maximum speed is regularly the speed that is advertised by providers. The application of a materi-

<sup>28</sup> Bundesnetzagentur: Mitteilung zu Abweichungen bei Breitbandgeschwindigkeiten im Festnetz, 2017, [https://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Unternehmen\\_Institutionen/Breitband/Breitbandgeschwindigkeiten/Breitbandgeschwindigkeiten-node.html](https://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Unternehmen_Institutionen/Breitband/Breitbandgeschwindigkeiten/Breitbandgeschwindigkeiten-node.html), 17.04.2018



ality threshold of ten percent is incomprehensible. The significance of the deviation results in the reverse conclusion from the requirements for the maximum speed. If this is not achieved at least once during the measurement period, the consumer also has no temporary access to the maximum speed.

BEREC should therefore clarify that the goal of the ISPs should be to reach the maximum speed of the Internet Access Service all the time and not just once a day. At the best the maximum speed is the same as the normal available speed.