

MCA NOTIFICATION TO THE MARKET ON ZERO-RATING PRACTICES

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1. Introduction

Following routine market monitoring carried out in 2018, the Malta Communications Authority (hereafter 'MCA') noted the availability of zero tariff offers provided by GO Plc (hereafter 'GO') under the names "GO Music WildCard", "GO TV Anywhere" and "GO TV Anywhere Lite". GO Music WildCard offered music streaming for free to mobile subscribers eligible for the offer, while the TV Anywhere products offered zero-rated live-tv content over a mobile broadband connection.

In 2018, the MCA investigated all GO's zero-rated offers to determine their compatibility with Regulation (EU) 2015/2120 (hereinafter 'OIR'). The assessment was carried out on the basis of a number of criteria in accordance with the BEREC Guidelines as published at the time. The assessment primarily took into account the market positioning of the Internet Access Service (hereafter 'IAS') provider and the Content and Application Provider (hereafter 'CAP') and established that considering the prevailing market conditions, GO's zero-rated offers were deemed permissible under the OIR subject to certain conditions. The MCA maintained its ongoing market monitoring to ensure that the zero-rated offers do not pose a material impact on the Electronic Communications sector and the Content and Application Providers markets.

In September 2021, the European Court of Justice (ECJ) delivered its judgments in Cases C-854/19, C-5/20 and C-34/20 Vodafone and Telekom Deutschland. In these judgements,

the ECJ concluded that ‘Zero tariff’ options are contrary to the OIR¹. The MCA is hereby notifying the providers of Internet Access Service that zero-rating practices that do not treat traffic equally are not compatible with the OIR and are therefore no longer permissible.

2. Legal background

The OIR, which has been in force since 30th April 2016, establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users’ rights. The main articles related to permissible traffic management under the OIR are outlined hereunder:

- Article 3(1) establishes the right of end-users to open internet access;
- Article 3(2) prohibits agreements and commercial practices that limit the right to open internet access for end users; and
- Article 3(3) provides rules related to traffic management and describes when traffic management measures are considered reasonable, as well as any justifications for limitations or differentiation going beyond such measures pursuant to national legislation or court orders, integrity/security of the network and congestion.

The Recitals to the OIR specify that regulators have the power to intervene if agreements or practices “by reason of their scale, lead to situations where end-users choice is materially reduced in practice,”² thereby circumventing the objectives of the OIR. Consequently, regulators are required “to intervene when such agreements or practices would result in the undermining of the essence of end-user rights.”³

The OIR does not directly mention zero-rating. Hence, Article 3(2) of the OIR only requires that agreements on price, data volumes and speed do not limit the exercise of end-user's right to net neutrality set out in Article 3(1) of the OIR.

¹ Link to ECJ press release: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-09/cp210145en.pdf>

² See OIR, Recital (7).

³ Ibid.

European Court of Justice (ECJ) Judgements

The ECJ published three (3) landmark judgements on 2nd September 2021, relating to the requirement of equal treatment of traffic as per Article 3(3) of the OIR. In these judgements, the ECJ determined that zero-tariff options are incompatible with the obligations arising from Article 3(3) of the OIR.

As per the ECJ judgements:

“a ‘zero tariff’ option is 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. Those data are therefore not counted towards the data volume purchased as part of the basic package. Such an option, offered in the context of limited packages, thus allows internet access providers to increase the attractiveness of their offer.⁴

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Consequently, such a commercial practice does not satisfy the general obligation of equal treatment of traffic, without discrimination or interference, laid down in the first subparagraph of Article 3(3) of Regulation 2015/212.⁵ ”

Recital (8) and Article 3(3) of the OIR impose on providers of Internet Access Service “a general obligation of equal treatment, without discrimination, restriction or interference with traffic, from which derogation is not possible in any circumstances by means of commercial practices.”

⁴ ECJ Judgement C-5/20, paragraph 14; ECJ Judgement C-34/20, paragraph 17 and ECJ Judgement C-854/19, paragraph 15.

⁵ ECJ Judgement C-5/20, paragraph 27; ECJ Judgement C-34/20, paragraph 30 and ECJ Judgement C-854/19, paragraph 28.

Updated BEREC Guidelines

In June 2022, BEREC published an update to its Guidelines⁶ reflecting the new interpretation provided by the ECJ judgements. Primarily, the new guidelines identify those instances where zero-tariff options are applied to specific traffic streams and are therefore incompatible with the OIR. The Guidelines also provide an outline of how agnostic traffic pricing could be permissible within the OIR in the light of the ECJ judgements.

The MCA has taken utmost account of the Guidelines in its application of the applicable provisions of the OIR. Adherence to the Guidelines contributes to the consistent application of the OIR and therefore, to regulatory certainty for stakeholders.

3. Impact of the ECJ judgements on the local market scenario

The MCA is committed to ensure that all market players comply with the OIR. In view of the zero-tariff options that existed in some of GO's offers as identified earlier, the MCA has communicated with GO in recent months, requesting GO to take the appropriate remedial measures, including the discontinuance of its zero-tariff offers and the withdrawal of existing offers from active contracts. The phasing out of these practices is as follows:

- Stopping advertising of zero-rated offers by the 30th June 2022;
- Terminating zero-rated traffic from all active subscriptions by 30th September 2022;
- Notifying all eligible subscribers that all zero-rated offers will be terminated by 30th September 2022. GO notified the MCA that it would be informing all impacted subscribers in line with existing procedures and requirements; and
- Requiring GO to ensure that its subscribers have adequate clarity by providing them with clear written information on the phasing-out of the zero-rated tariffs and the established termination date.

GO has undertaken to comply with the MCA's request and is currently in the progress of phasing out its zero-rating practices and related tariffs, subject to specified timelines.

⁶ <https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/guidelines/berec-guidelines-on-the-implementation-of-the-open-internet-regulation-0>

4. The continued role of the MCA in the implementation of the OIR

The MCA is committed to ongoing monitoring and supervision of the market, thus ensuring compliance with the OIR thus safeguarding the rights of end-users and stakeholders alike.