

## Zero rating vs net neutrality – a (still)

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### uncertain future in the EU and Serbia

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Tariffs offered by mobile companies usually contain a maximum volume of monthly data (megabytes) to which the client is entitled. Consumption of this data takes place every time the customer goes online, without the phone being connected to a WIFI network. Zero-rating, a common practice across the mobile sector, is an exception to this rule. It is an arrangement offering access to particular content, applications or services which does not count against the user's contracted package of data. This enables an unlimited use of the relevant services, without the user having to worry about consumption of his data allowance. WhatsApp, Viber or Twitter are examples of applications often covered by zero-rating offers.

Whilst at first sight it might seem that zero-rating has only advantages, there are concerns that it endangers net neutrality.

Governed in the European Union ("EU") by [Regulation \(EU\) 2015/2120](#) ("**Regulation**"), net neutrality is a principle that aims to protect end-users' right to access/distribute the content and use/provide the applications and services of their choice, in an indiscriminate manner. For these purposes, internet suppliers are instructed to treat all traffic equally "*...without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used*" (art. 3.3. of the Regulation) and prohibited from conducting commercial practices which may limit the end-users' choice (art. 3.2. of the Regulation). Traffic management measures such as blocking, slowing down, interference with, degradation or discrimination between specific content, applications or services, are typical examples of practices against net neutrality.

Although the Regulation does not expressly mention zero-rating, the Body of European Regulators for Electronic Communications ("**BEREC**") acknowledges that the arrangement has the potential to negatively affect net neutrality. As BEREC states, "*There are different types of zero-rating practices which have different effects on end-users and the open internet, and hence on the end-user rights protected under the Regulation*" (BEREC's [guidelines](#) on the implementation of the net neutrality rules – para. 40). In this sense, BEREC considers that:

- zero-rating offers where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated app(s) would go against the first and third subparagraphs of art. 3.3 of the Regulation, which protect equal treatment of traffic and prevent traffic management measures that interfere with or discriminate between specific content, applications or services; and
- zero-rating applied to a particular application within a category (instead of to all the applications within such category) creates an economic incentive to use that particular application instead of competing ones, which has potential of undermining the end-users rights and reducing their choice.

In light of the above, BEREC recommends that the admissibility of zero-rating is approached on a case-by-case basis by National Regulatory Authorities ("**NRAs**") and analyzed against a number of criteria and factors, including:

- the respective market positions of the providers, applications and services involved, as well as the scale of the practice or the existence of alternatives;
- whether the relevant arrangement leads to situations where end-users' choice is materially reduced or would result in the undermining of the essence of the end-users rights; or
- the aim of the Regulation, which is to safeguard equal and non-discriminatory treatment of traffic and guarantee the continuing functioning of the internet ecosystem as an engine of innovation.

Although BEREC's guidelines do provide some guidance, a consistent approach across the EU is lacking. Varying sensibilities among NRAs and availability of different zero-rating offer structures do not help unification. Some NRAs (e.g. the Dutch one) have displayed a position favorable to a broad prohibition of zero-rating practices, others (e.g. the Belgian NRA) have adopted a case-by-case approach, while some are still to formulate position.

Serbia does not have net neutrality rules such as those contained in the Regulation and RATEL, the Serbian NRA, has not yet issued any position on zero-rating. Mobile providers operating in Serbia do offer zero-rating in relation to social networks and chat apps. However, considering Serbia's commitment to align its regulations with those adopted in the EU, one may expect that the legislation and RATEL will address net neutrality. However, given the uncertainty at the EU level, it is difficult to anticipate what that position will be.

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