

**The Impact of the ECJ's 2020 and 2021
Zero-rating Judgments on Zero-rating and
Differentiated Pricing in the European Union**

White Paper Submitted to the Public Consultation
on the Draft BEREC Guidelines
on the Implementation of the Open Internet Regulation

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Introduction

I welcome the opportunity to submit this White Paper to BEREC’s public consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation.¹

I submit this White Paper as a professor of law and, by courtesy, electrical engineering at Stanford University whose research focuses on Internet architecture, innovation, and regulation. I have a Ph.D. in computer science and a law degree and have worked on net neutrality for the past 21 years.

My book “Internet Architecture and Innovation,” which was published by MIT Press in 2010, is considered the seminal work on the science, economics and politics of network neutrality. My papers on network neutrality have influenced discussions on network neutrality all over the world.

I have testified on matters of Internet architecture, innovation and regulation before the California Legislature, the US Federal Communications Commission, the Canadian Radio-Television and Telecommunications Commission, and BEREC.

The FCC’s 2010 and 2015 Open Internet Orders relied heavily on my work. My work also informed the 2017 Orders on zero-rating by the Canadian Radio-Television and Telecommunications Commission, and the 2016 Order on zero-rating by the Telecom Regulatory Authority of India.

I have not been retained or paid by anybody to participate in this proceeding.²

I would welcome the opportunity to discuss these important issues further.

¹ https://bereg.europa.eu/eng/news_consultations/ongoing_public_consultations/9342-public-consultation-on-draft-berec-guidelines-on-the-implementation-of-the-open-internet-regulation.

² Additional information on my funding is available here:
<http://cyberlaw.stanford.edu/about/people/barbara-van-schewick>.

Terminology

The following shorthands and definitions are used throughout the paper.

Definitions and Shorthands

“Application-agnostic” means not differentiating on the basis of source, destination, Internet content, application, service, or device, or class of Internet content, application, service, or device.³

“Applications” is used as a shorthand for applications, content, services, and other uses that may not fit clearly into one of these categories.

“Class of applications” means Internet content, or a group of Internet applications, services, or devices, sharing a common characteristic, including, but not limited to, sharing the same source or destination, belonging to the same type of content, application, service, or device, using the same application- or transport-layer protocol, or having similar technical characteristics, including, but not limited to, the size, sequencing, or timing of packets, or sensitivity to delay.⁴

“Class of applications” and “category of applications” are used interchangeably.

“Zero-rating” means not counting internet traffic towards a subscriber’s data volume.

“Zero-rating option” or “zero-rating program” means all of the terms and practices associated with a zero-rating offering. They include the actual zero-rating (i.e. the practice of not counting internet traffic towards a subscriber’s data volume) as well as any other practices or terms of use that are part of the offering (e.g., limiting the bandwidth available to the zero-rated applications before a subscriber has used up their data volume).

³ This definition is taken from the California Network Neutrality Law, California Civil Code §3100(a), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822. See also van Schewick (2015), Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like, Stanford Law Review, Volume 67, Issue 1, pp. 124-131 and fn. 444.

⁴ This definition is taken from the California Network Neutrality Law, California Civil Code §3100(c), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822. See also van Schewick (2015), Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like, Stanford Law Review, Volume 67, Issue 1, pp. 125 and fn. 444.

The following terms are used interchangeably to describe the category of zero-rating programs that the 2021 decisions identify as incompatible with Art. 3(3):⁵

- “zero tariff” option” (as defined by the 2021 decisions);
- “zero-rating programs that zero-rate select applications or classes of applications based on commercial consideration;” and
- “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” (BEREC’s phrasing).

References to ECJ Decisions and Open Internet Regulation

“Article” and “recital” refers to articles and recitals in the Open Internet Regulation, unless noted otherwise.

“Regulation” means the Open Internet Regulation.⁶

“ECJ” means European Court of Justice.

“2020 decision,” “2020 ruling” or “2020 Telenor decision” means the ECJ’s 2020 judgment in *Telenor Magyarország Zrt. v Nemzeti Média*.⁷

“2021 Vodafone Roaming decision” means the ECJ’s 2021 judgment in *Vodafone GmbH v Bundesrepublik Deutschland*.⁸

“2021 Vodafone Tethering decision” means the ECJ’s 2021 judgment in *Verbraucherzentrale Bundesverband eV v Vodafone GmbH*.⁹

“2021 Telekom decision” means the ECJ’s 2021 judgment in *Telekom Deutschland GmbH v Bundesrepublik Deutschland*.¹⁰

⁵ The three terms describe the same concept. For an explanation, see Part 1, Section I.

⁶ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services.

⁷ ECJ Judgment of September 15, 2020, *Telenor Magyarország Zrt. v Nemzeti Média- és Hírközlési Hatóság Elnöke*, C-807/18 and C-39/19, EU:C:2020:708, available via <https://curia.europa.eu/juris/documents.jsf?num=C-807/18> (“2020 Telenor Decision”).

⁸ ECJ Judgement of September 2, 2021, *Vodafone GmbH v Bundesrepublik Deutschland*, C-854/19, ECLI:EU:C:2021:675, available via <https://curia.europa.eu/juris/documents.jsf?num=C-854/19> (“2021 Vodafone Roaming Decision”).

⁹ ECJ Judgement of September 2, 2021, *Verbraucherzentrale Bundesverband eV v Vodafone GmbH*, C-5/20, ECLI:EU:C:2021:676, available at <https://curia.europa.eu/juris/documents.jsf?num=C-5/20> (“2021 Vodafone Tethering Decision”).

¹⁰ ECJ Judgment of September 2, 2021, *Telekom Deutschland GmbH v Bundesrepublik Deutschland*, C-34/20, ECLI:EU:C:2021:677, available via <https://curia.europa.eu/juris/documents.jsf?num=C-34/20> (“2021 Telekom Decision”).

“2021 decisions” or “2021 rulings” means the 2021 Vodafone Roaming decision, the 2021 Vodafone Tethering decision, and the 2021 Telekom decision.

The following parts of the 2021 decisions are identical:

- 2021 Vodafone Roaming decision, paras. 15-31;
- 2021 Vodafone Tethering decision, paras. 14-30;
- 2021 Telekom decision, paras. 17-33.

The following parts of the 2021 decisions are identical except for the references to the specific practice under review in the case:

- 2021 Vodafone Roaming decision, paras. 32-34;
- 2021 Vodafone Tethering decision, paras. 31-33;
- 2021 Telekom decision, paras. 34-36.

To improve readability, only a reference to the 2021 Vodafone Roaming decision is included when discussing the identical parts of the decisions.

Part 1: The scope of the ECJ’s 2021 zero-rating decisions

Question 1 in BEREC’s call for stakeholder input asked whether 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.

The answer is no. This question is unambiguously answered by (1) the plain language and (2) the logic of the ECJ’s 2021 zero-rating decisions, and (3) this holding is part of the *ratio decidendi* of the decision and therefore has precedential value.

As a result, zero-rating options based on commercial considerations that do not count traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff cannot be in line with Article 3 paragraph 3 subparagraph 1 of the Open Internet Regulation. This is true even if there are neither differentiated traffic management (e.g. slowing down of select applications) nor any other special terms of use involved.

In other words, any zero-rating program that zero-rates only select applications or classes of applications violates Art. 3(3), subparagraph 1. It is the discriminatory counting of traffic at the heart of such zero-rating programs that violates Art. 3(3). This violation of Art. 3(3) invalidates the entire zero-rating program. Thus, neither the reasoning nor the outcome of cases reviewing such zero-rating programs depends on any of the other details of the program.

I. This question is explicitly answered by the plain language of the ECJ’s 2021 zero-rating decisions.

The 2021 decisions define the term ““zero tariff” options,”¹¹ note that “the questions referred to the Court [...] are based on the premise that such a tariff option would *itself* be compatible with EU law, in particular Art. 3,”¹² and conclude that these ‘zero tariff’ options violate Art. 3(3).¹³ Thus, the Court’s finding that ‘zero-tariff’ options violate Art. 3(3) applies to all zero-rating programs that meet the Court’s definition of ‘zero-tariff’ option.

All three 2021 zero-rating decisions:

- (1) define the term ““zero tariff” option” as “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;”¹⁴
- (2) explain that such ‘zero tariff’ options are based on commercial considerations;¹⁵ and
- (3) explicitly conclude that “such a tariff option is contrary to the obligations arising from Article 3(3) of Regulation 2015/2120, [and] that incompatibility remains, *irrespective of the form or nature of the terms of use attached to the tariff options on offer.*”¹⁶

This language in the 2021 decisions is substantively identical to the language used in Question 1 of BEREC’s call for stakeholder input. Thus, Question 1 is directly answered by the plain language of the 2021 decisions.

First, as can easily be seen, the definition of ‘zero tariff’ option used by the 2021 decisions is identical to BEREC’s description of the zero-rating plans in Question 1 (see Table 1 below). According to the Court, ‘zero tariff’ options violate Art. 3(3).¹⁷

¹¹ 2021 Vodafone Roaming decision, para. 15.

¹² 2021 Vodafone Roaming decision, para. 16 (emphasis added).

¹³ 2021 Vodafone Roaming decision, paras. 28, 31.

¹⁴ 2021 Vodafone Roaming decision, para. 15.

¹⁵ 2021 Vodafone Roaming decision, paras. 28, 31.

¹⁶ 2021 Vodafone Roaming decision, para. 33 (emphasis added). As the preceding sentence shows, the term “such a tariff option” means a ““zero-tariff” option” as defined by the court. (Ibid., para. 32, second sentence). See also 2021 Vodafone Tethering decision, para. 32 (same); 2021 Telekom decision, para. 35 (same).

¹⁷ 2021 Vodafone Roaming decision, paras. 28, 31.

As a result, the following terms can be used interchangeably to describe the category of zero-rating programs that the 2021 decisions identify as incompatible with Art. 3(3):

- ‘Zero tariff’ option (as defined by the 2021 decisions);
- Zero-rating programs that zero-rate select applications or classes of applications based on commercial consideration; and
- 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 (BEREC’s phrasing).

Table 1: The Definition of ‘Zero-Tariff’ Option in the 2021 Decisions

2021 ECJ Decisions	BEREC Question 1
<p>“[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.”¹⁸</p> <p>“A ‘zero-tariff’ option [...] draws a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications.”¹⁹</p>	<p>“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”</p>

Second, whether ‘zero tariff’ options could comply with Art. 3(3), subparagraph 1 if they do not involve “differentiated traffic management or other terms of use” is directly answered by the substantively identical language in the 2021 ECJ decisions.

This can easily be seen from Table 2 below. If the ‘zero tariff’ options defined by the Court violate Art. 3(3), subparagraph 1 “irrespective of the form or nature of the terms of use attached to the tariff options on offer,” then the absence of such terms of use does not change the incompatibility of such options with Art. 3(3), subparagraph 1.

¹⁸ 2021 Vodafone Roaming decision, para. 15.

¹⁹ 2021 Vodafone Roaming decision, para. 28.

Table 2: Relevance of Other Terms of Use

2021 ECJ Decisions	BEREC Question 1
<p>“Since such a tariff option is contrary to the obligations arising from Article 3(3) of Regulation 2015/2120, that incompatibility remains, irrespective of the form or nature of the terms of use attached to the tariff options on offer.”²⁰</p>	<p>Such “zero-rating options ... 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”</p>

The phrase “irrespective of the form or nature of the terms of use attached to the tariff options on offer” in the 2021 decisions does not explicitly mention “differentiated traffic management.”

But the 2021 Telekom decision makes clear that the term “form or nature of the terms of use” includes differentiated traffic management: That’s because the decision explicitly characterizes “the limitation on bandwidth in the dispute in the main proceedings“ (i.e. a form of differentiated traffic management) as a “form or nature of the terms of use.”²¹

In addition, the 2021 decisions explicitly point out that the incompatibility of such zero-rating options with Art. 3(3), subparagraph 1 is *independent of* any discriminatory traffic management that allows subscribers to continue to use the zero-rated applications once they have used up their data volume.²²

II. Any other answer would be incompatible with the logic of the decisions.

According to the ECJ’s 2021 decisions, zero-rating programs that do not count traffic from specific (categories of) applications towards subscribers’ data caps and that do so based on commercial considerations violate Art. 3(3).

As the rulings explain, these zero-rating programs violate Art. 3(3), subparagraph 1, because they treat traffic from applications included in the zero-rating program differently from

²⁰ 2021 Vodafone Roaming decision, para. 33. As the preceding sentence shows, the term “such a tariff option” means a “zero-tariff” option” as defined by the court. (Ibid., para. 32, second sentence). See also 2021 Vodafone Tethering decision, para. 32 (same); 2021 Telekom decision, para. 35 (same).

²¹ 2021 Telekom decision, para. 35 (“Since such a tariff option is contrary to the obligations arising from Article 3(3) of Regulation 2015/2120, that incompatibility remains, irrespective of the form or nature of the terms of use attached to the tariff options on offer, *such as the limitation on bandwidth in the dispute in the main proceedings.*”) (emphasis added).

²² 2021 Vodafone Roaming decision, para. 29 (“It should be pointed out that that failure [to comply with Art. 3(3), subparagraph 1], which results from the very nature of such a tariff option on account of the incentive arising from it, 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.*”) (emphasis added).

traffic from applications not included in the program: traffic from applications included in the program is not counted towards the subscriber’s data volume; traffic from applications not included in the program does count towards the data volume.²³

This violation of Art. 3(3), subparagraph 1 is not justified by any of the exceptions in Art. 3(3), subparagraph 2 or Art. 3(3), subparagraph 3, because these zero-rating programs are based on commercial considerations.²⁴

Thus, the incompatibility of such zero-rating programs with Art. 3(3) stems directly from the core feature of these programs – the differential counting of traffic towards subscribers’ data volume that discriminates between apps or classes of apps. It is the result of their “very nature.”²⁵

Nothing in the court’s reasoning relies on the form or nature of any of the other terms of use associated with these programs, including any differentiated traffic management associated with them.

Thus, according to the logic of the decisions, whether and what kind of “differentiated traffic management and other terms of use” (Question 1) are part of the zero-rating program is irrelevant for finding the program in violation of Art. 3(3), subparagraph 1.

As a result, zero-rating programs that zero-rate select applications or classes of applications based on commercial considerations violate Art. 3(3), subparagraph 1 “even if there is no differentiated traffic management or other terms of use involved” (Question 1).

III. This holding is part of the ratio decidendi of the decisions.

In each of the three 2021 decisions, the referring court had asked whether a specific practice that was part of a zero-rating program violated European law:

- limits on the use of the zero-rating program when roaming outside of the subscriber’s home country;²⁶
- limits on the use of the zero-rating program during tethering;²⁷ and
- discriminatory traffic management that limits, as part of a zero-rating program, the bandwidth available to video streaming.²⁸

²³ 2021 Vodafone Roaming decision, para. 28.

²⁴ 2021 Vodafone Roaming decision, paras. 27, 28, 31.

²⁵ 2021 Vodafone Roaming decision, para. 28 & para. 29 (“[T]hat failure [...] results from the very nature of such a tariff option on account of the incentive arising from it.”).

²⁶ 2021 Vodafone Roaming decision, para. 8.

²⁷ 2021 Vodafone Tethering decision, para. 8.

²⁸ 2021 Telekom decision, para. 7.

Each of these practices was part of a zero-rating program that does not count traffic from specific (categories of) applications towards subscribers’ data caps based on commercial considerations.²⁹

The 2021 decisions determined that the discriminatory counting of traffic inherent in these zero-rating programs violates Art. 3(3) and, consequently, found the entire zero-rating program in violation of Art. 3(3), including the specific practice under consideration.³⁰

Thus, the decisions did not directly analyze whether the specific practice under consideration violated European law. Instead, the court’s holding followed from the evaluation of another practice that was part of the zero-rating program – the differential counting of traffic.

As a result, the 2021 decisions’ finding that zero-rating programs violate Art. 3(3), if they do not count traffic from specific (categories of) applications towards subscribers’ data caps based on commercial considerations, is a necessary part of the chain of reasoning leading to the holding. In other words, it is part of the ratio decidendi of the 2021 decisions, which has precedential value for national courts.

Part 2: The impact of the ECJ’s 2020 and 2021 decisions on zero-rating and differentiated pricing

In light of the ECJ’s 2021 and 2020 zero-rating rulings, differentiated billing based on commercial considerations is only possible under the Regulation if it complies with (a) Art. 3(3), (b) Art. 3(2), as well as with (c) any obligations imposed by other parts of the Regulation such as the transparency rule in Art. 4(1).

Zero-rating programs are a form of differentiated pricing. According to the 2021 decisions, zero-rating programs that meet the Court’s definition of ‘zero tariff’ option violate Art. 3(3). In other words, zero-rating programs violate Art. 3(3), if they zero-rate only select applications or classes of applications based on commercial considerations, or, in BEREC’s phrasing, do “not count[] traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff based on commercial considerations.”³¹ While the 2021 decisions do not explicitly address forms of differentiated pricing other than zero-rating, the decisions’ reasoning equally applies to other forms of differentiated pricing as well.

²⁹ As explained above, the term “zero-rating program that does not count traffic from specific (categories of) applications towards subscribers’ data caps based on commercial considerations” is identical with the 2021 decisions’ definition of the term “‘zero tariff’ option.” See Part 1, Section I. Each of the 2021 decisions describes the specific zero-rating program under review as a ‘zero tariff’ option. 2021 Vodafone Roaming decision, para. 28 (“[a] ‘zero tariff’ option, *such as that at issue in the main proceedings*”) (emphasis added); 2021 Vodafone Tethering decision, para. 27 (same); 2021 Telekom decision, para. 30 (same).

³⁰ See Part 3, Section II.B. and fn. 108, which traces the steps in the Court’s argument in detail.

³¹ These terms are identical to the 2021 decisions’ definition of the term ‘zero tariff’ option. See Part 1, Section I.

In light of the 2021 decisions, most forms of zero-rating and differentiated pricing based on commercial considerations violate Art. 3(3).

There remain, however, forms of zero-rating and differentiated pricing based on commercial consideration that do not violate Art. 3(3). They can be offered in line with Art. 3(2), if they do not limit the exercise of the rights of end users under Art. 3(1).

I. How to evaluate practices under Art. 3(3) and Art. 3(2)

According to the ECJ’s 2021 and 2020 zero-rating rulings, differentiated billing based on commercial considerations is subject to both Art. 3(3) and Art. 3(2). The decisions clarify how these provisions relate to each other and how to evaluate practices under these provisions.

The ECJ’s 2021 and 2020 decisions create a clear hierarchy between Art. 3(3) and Art. 3(2), where Art. 3(3) takes precedence over Art. 3(2).

According to the 2021 and 2020 decisions, Art. 3(3), subparagraph 1 establishes a general nondiscrimination rule, which applies to all technical and nontechnical measures used by providers of internet access services.³² As a result, all measures that fall within the scope of Art. 3(2) are also subject to Art. 3(3).

This means Art. 3(3), subparagraph 1 applies to the following practices:³³

- practices that are also subject to Art. 3(2), i.e. practices that stem from:
 - “agreements between providers of internet access services and end users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed;”³⁴ and
 - “commercial practices conducted by providers of internet access services;”³⁵as well as
- practices that are not subject to Art. 3(2), i.e.
 - practices unrelated either to an agreement or a commercial practice.

The only exceptions to Art. 3(3), subparagraph 1 are the exceptions for traffic management listed in Art. 3(3), subparagraph 2 and 3. Thus, the only way to justify a violation of

³² This follows directly from the 2021 decisions, which apply Art. 3(3), subparagraph 1 to the differential counting of traffic towards subscribers’ data volume that is the core feature of zero-rating programs. 2021 Vodafone Roaming decision, para. 28. As explained in Part 3 below, a close reading of the 2020 decision indicates that the 2020 decision had already concluded that Art. 3(3), subparagraph 1 establishes a general nondiscrimination rule that applies to both technical and non-technical measures. This reading of the 2020 decision is supported by various aspects of the 2021 decisions. See Part 3, Section I.

³³ See also 2020 Telenor decision, para. 51 (in the context of the application of Art. 3(3), subparagraph 1 to a technical practice).

³⁴ Art. 3(2).

³⁵ Art. 3(2).

Art. 3(3), subparagraph 1 is to show that it falls under one of the exceptions in Art. 3(3), subparagraph 2 and 3.³⁶

Whether a practice violates Art. 3(3) does not depend on whether the practice “limit[s] the exercise of the rights of end-users” under Art. 3(1).³⁷ That’s because in contrast to Art. 3(2), the plain language of Art. 3(3) does not include this requirement.³⁸ As a result, evaluating a measure under Art. 3(3) does not include evaluating the effect of those measures on the exercise of the rights of end users under Art. 3(1).³⁹

A practice that violates Art. 3(3) cannot be saved by Art. 3(2). According to the 2020 decision, Art. 3(3)’s general non-discrimination rule is non-negotiable: It cannot be modified by agreements between providers of internet access services and end users or by commercial practices of these providers.⁴⁰ This means violations of Art. 3(3) do not become permissible because they are included in the fine print of the contract. In other words, Art. 3(3) trumps Art. 3(2).

As a result, any evaluation of a practice has to start with Art. 3(3). A practice that violates Art. 3(3) does not also have to be evaluated under Art. 3(2), even if that practice falls within the scope of Art. 3(2).⁴¹

This leaves for full evaluation under Art. 3(2) only practices that:

- 1) are within the scope of Art. 3(2), i.e.:
 - “agreements between providers of internet access services and end users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed;”⁴² or
 - “commercial practices conducted by providers of internet access services;”⁴³

and
- 2) do not violate Art. 3(3), because:
 - EITHER the practice does not violate Art. 3(3), subparagraph 1,
 - OR the practice is justified under Art. 3(3), subparagraph 2 or 3.

Such practices comply with Art. 3(2), if they “do not limit the exercise of the rights of end users laid down in [Art. 3(1)].”⁴⁴

³⁶ 2020 Telenor decision, paras. 48-50; 2021 Vodafone Roaming decision, paras. 25, 27.

³⁷ The cited language is from Art. 3(2). 2020 Telenor decision, para. 50.

³⁸ 2020 Telenor decision, para. 50.

³⁹ 2020 Telenor decision, para. 50.

⁴⁰ 2020 Telenor decision, para. 47; 2021 Vodafone Roaming decision, paras. 24, 26.

⁴¹ 2020 Telenor decision, para. 28; 2021 Vodafone Roaming decision, para. 23.

⁴² Art. 3(2).

⁴³ Art. 3(2).

⁴⁴ Art. 3(2).

In other words, providers of internet access service may contractually agree with end users on technical and commercial conditions and on the characteristics of internet access services only when those conditions and characteristics do not violate Art. 3(3) and do not limit the exercise of the rights of end users in Art. 3(1), as required by Art. 3(2). They may engage in commercial practices under the same conditions.

Even if such practices comply with Art. 3(2), they still need to comply with other provisions, including the transparency obligations in Art. 4(1).

II. What this means for differentiated billing based on commercial considerations

A. Differentiated billing based on commercial considerations that violates Art. 3(3)

According to the 2020 and 2021 ECJ decisions, differentiated billing based on commercial considerations is subject to both Art. 3(3) and Art. 3(2). However, differentiated billing that violates Art. 3(3) does not need to also be evaluated under Art. 3(2).⁴⁵

Differentiated billing based on commercial considerations that violates Art. 3(3) includes:

- Zero-rating options based on commercial considerations which zero-rate only some applications or classes of applications, or, in BEREC’s phrasing “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.”⁴⁶

This category of zero-rating programs includes programs that:

- zero-rate individual apps or some apps in a category without being open to all applications in the category;
- are open to all apps in a category, subject to conditions established by the provider of internet access service (what BEREC calls “open zero-rating programs”); or
- zero-rate all apps in a category.

Zero-rating programs in this category violate Art. 3(3) regardless of any of the other details or practices that are part of the program. (In the words of the Court, the violation of Art. 3(3) is independent of the “form or nature of the terms of use attached to the zero-rating option.”)⁴⁷

In particular, it is irrelevant:

- whether the zero-rating option is offered as an add-on for which the subscriber pays separately, or whether the zero-rating program is already included in the subscriber’s internet access plan;

⁴⁵ See Part 2, Section I.

⁴⁶ The descriptions in the text are identical with each other and with the 2021 decisions’ definition of the term “zero tariff” option.” See Part 1, Section I.

⁴⁷ 2021 Vodafone Roaming decision, para. 33. See also Part 1, Section 1.

- whether the zero-rating option triggers or otherwise includes differentiated traffic management *before* the subscriber has used up their all of their data volume for the billing period (e.g., the zero-rated applications are limited to a certain speed, as in Deutsche Telekom’s StreamOn program);
- whether the zero-rating option triggers or otherwise includes differentiated traffic management *after* the subscriber has used up their data volume (e.g., whether or not the subscriber can continue to use just the zero-rated applications *after* the subscriber has used up their data volume for the billing period).

Differentiated billing based on commercial considerations that violates Art. 3(3) also includes:

- Zero-rating options where the application provider pays to be zero-rated (also called “sponsored data”).
- Other forms of application-specific differentiated pricing that have the same characteristics as the zero-rating options listed above.

1. Zero-rating options based on commercial considerations which do not count traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff

Zero-rating options based on commercial considerations which zero-rate only select applications or classes of applications violate Art. 3(3). This is the category of programs that the 2021 decisions identified as incompatible with Art. 3(3). Paraphrasing the 2021 decisions, BEREC’s call for stakeholder input defines this category of programs as “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.”⁴⁸

Since these zero-rating programs already violate Art. 3(3), they do not also need to be evaluated under Art. 3(2).⁴⁹

According to the 2021 decisions, these zero-rating options violate Art. 3(3), subparagraph 1’s requirement to “treat all traffic equally [...] irrespective of [...] the applications or services used or provided,”⁵⁰ because they “draw[] a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications.”⁵¹

In other words, such zero-rating options violate Art. 3(3), subparagraph 1 because they treat traffic from some applications (i.e. traffic from the zero-rated partner applications) differently from traffic from other applications (i.e. traffic from the applications that are not zero-rated). Traffic from the zero-rated partner applications is not counted towards the data volume

⁴⁸ See Part 1, Section I.

⁴⁹ See Part 2, Section I.

⁵⁰ Art. 3(3), subparagraph 1.

⁵¹ 2021 Vodafone Roaming decision, para. 28.

included in the basic package (“basic data volume”), while traffic from all other applications is counted towards the data volume.

This category of zero-rating programs includes the following three kinds of zero-rating options:

- **Zero-rating options that zero-rate individual apps or some apps in a category without being open to all applications in the category.**

Zero-rating options that zero-rate individual apps or some apps in a category (e.g., music) without being open to all applications in the category zero-rate only a subset of the applications in the category; other applications cannot apply to become part of the zero-rating program, even if they are part of the same category. For example, an internet access provider might zero-rate a limited number of music apps without offering a way for other music apps to also become part of the zero-rating program.

The ECJ’s 2021 decisions did not review any specific zero-rating programs that are not open to all applications in the category. The specific zero-rating programs reviewed in the 2021 decisions were all open to all applications in the category.⁵²

Zero-rating options that are not open to all applications in the category fall, however, under the general definition of zero-rating programs that the court identified as incompatible with Art 3(3): They do not count traffic generated by specific partner applications towards the data volume of the basic tariff and are based on commercial considerations.

In addition, the reasoning in the 2021 decisions directly applies to them. Just like the specific zero-rating programs evaluated in the 2021 decisions, these zero-rating options violate Art. 3(3), subparagraph 1, because they treat traffic from the partner applications (i.e. traffic from the zero-rated applications) differently from the traffic from other applications (i.e. traffic from the applications that are not zero-rated), because only the traffic from the zero-rated applications is not counted towards the subscribers’ basic data volume.

- **Zero-rating options that are open to all apps in a category, subject to conditions established by the provider of internet access service (what BEREC calls “open zero-rating programs”⁵³).**

Like zero-rating programs that are not open to all applications in a category (e.g., music), zero-rating programs in this category will generally include only a subset of the applications in the category. However, under the terms of the program, other applications in the category can apply to be part of the program, and the internet access provider

⁵² See fn. 54 and fn. 55 and accompanying text.

⁵³ BEREC (2020), BEREC Guidelines on the Implementation of the Open Internet Regulation, BoR (20) 112, para. 42.

claims it will admit all applications that are part of the category and meet other conditions established by the provider. For example, an internet access provider might zero-rate a limited number of music apps, but allow other music apps to become part of the program if they meet the provider’s technical requirements for inclusion in the program.

The incompatibility of open zero-rating programs with Art. 3(3) is established directly by the three 2021 rulings, which all evaluated open zero-rating programs: Deutsche Telekom’s StreamOn program was open to all music and video apps that met Deutsche Telekom’s conditions for inclusion in the program.⁵⁴ Similarly, the version of Vodafone Pass reviewed by the ECJ was open to all applications in the category covered by a particular kind of Pass (i.e. Video Pass, Music Pass, Chat Pass, and Social Pass), subject to the conditions established by Vodafone.⁵⁵

Interestingly, the 2021 decisions do not even mention that the specific zero-rating programs under review were open to other apps in the category,⁵⁶ which suggests the Court found this feature of the programs irrelevant for its Art. 3(3) analysis.

Instead, the Court focuses exclusively on the fact that such zero-rating programs treat traffic from different applications differently: As the Court explains, Deutsche Telekom’s StreamOn zero-rating offering violates Art. 3(3), subparagraph 1, because it treats traffic from partner applications (i.e. applications included in StreamOn) differently from traffic from applications that are not part of the program.⁵⁷

That is, traffic from online music and video applications that are part of StreamOn is not counted towards the basic data volume; traffic from all other applications is counted. These other applications include online music and video applications that are not part of StreamOn AND applications that aren’t music or video applications. (The Court uses the same reasoning in the Vodafone decisions.)⁵⁸

This focus on the discrimination between applications that are part of the zero-rating program (here: StreamOn) and applications that are not is required by the text of

⁵⁴ See Bundesnetzagentur (2018), Net Neutrality in Germany: Annual Report 2017/2018, p. 9, para. 18 (“Generally, participation in “StreamOn” is open to any audio or video content provider. However, the content provider must conclude an agreement with Deutsche Telekom and meet the requirements set out in the general terms and conditions for content providers.”).

⁵⁵ <https://www.iphone-ticker.de/vodafone-pass-das-mobile-2-klassen-internet-kommt-117093/>, dated September 26, 2017 (“Laut Vodafone soll jeder Anbieter sogenannter App-Partner werden können: ‘Vorausgesetzt, das Angebot ist legal und passt in eine der vier Kategorien.’”); Bundesnetzagentur (2018), “Bundesnetzagentur fordert Anpassungen bei ‘Vodafone Pass’” (June 15, 2018), https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2018/20180615_Vodafone.html?nn=876660 (“Die Anforderungen der Bundesnetzagentur an eine transparente, offene und diskriminierungsfreie Teilnahme an „Vodafone Pass“ sind nunmehr erfüllt.”).

⁵⁶ See 2021 Vodafone Roaming decision, paras. 6-8; 2021 Vodafone Tethering decision, paras. 7-8 (both describing Vodafone Pass); 2021 Telekom decision, paras. 6-10 (describing StreamOn).

⁵⁷ 2021 Telekom decision, paras. 30-31.

⁵⁸ 2021 Vodafone Roaming decision, paras. 28-29; 2021 Vodafone Tethering decision, paras. 27-28.

Art. 3(3), subparagraph 1: The plain language of Art. 3(3), subparagraph 1 requires providers of internet access service to “treat all traffic equally.”⁵⁹ Thus, the provision focuses on the differential treatment of the traffic as such. Whether additional music and video applications could potentially be added to the program in the future does not change the discrimination in the present and is therefore irrelevant.

Focusing on the discrimination in the actual treatment of traffic instead of the program’s openness to additional applications is also required by the goals of the Regulation: Programs that zero-rate only some applications interfere with competition and user choice because subscribers with data allotments prefer applications that do not consume their data volume over applications that do.

Thus, the discriminatory impact starts the moment any app is included in the program. The harm to an application that is not currently part of a zero-rating program (and to subscribers that would like to use the application) exists regardless of whether the application could become part of the zero-rating program in the future.

- **Zero-rating options that zero-rate all apps in a category.**

Zero-rating options that zero-rate all applications in a category differ in that they do not discriminate among applications within a particular category. Instead, they zero-rate traffic from all applications in the selected category (e.g., music), and do not zero-rate traffic from all applications in the other categories (e.g., gaming). For example, an internet access provider might zero-rate all music applications.

Despite including more apps, these programs still violate Art. 3(3), subparagraph 1, because they still discriminate between applications. That discrimination happens to apps that belong to different categories, but that is irrelevant. Art. 3(3), subparagraph 1 prohibits discrimination between different categories of applications as well.

This result flows directly from the three 2021 rulings and is required by the Regulation itself.

While none of the specific zero-rating programs reviewed in the 2021 cases zero-rated all apps in a category,⁶⁰ the Court’s definition of zero-rating programs that violate Art 3(3) explicitly includes programs that zero-rate entire “categories of applications,”⁶¹ and the Court’s reasoning equally applies to such programs as well.

⁵⁹ Art. 3(3), subparagraph 1.

⁶⁰ The specific zero-rating programs reviewed in the 2021 decisions were all open to applications in the category that met the provider’s conditions for inclusion in the program, but included only a subset of the applications in the category. See fn. 54 and fn. 55 and accompanying text.

⁶¹ “[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.”

Just like the zero-rating programs in the 2021 cases, zero-rating programs that zero-rate all apps in a category (e.g., music) violate Art. 3(3), subparagraph 1 because they treat traffic from some applications differently from traffic from other applications: They do not count traffic from applications in the zero-rated category (here, online music) towards the plan’s data volume, but count traffic from every application in all the other categories.⁶²

This result is also required by the Regulation itself: Interpreting Art. 3(3), subparagraph 1 to allow discrimination among categories of applications would directly contradict the text of Art. 3(3), subparagraph 1, which requires “equal treatment of traffic [...] *irrespective of application*,” not equal treatment of traffic belonging to the same category. Treating all music apps differently from all gaming apps still treats a music app differently from a gaming app. This discrimination turns on the application used, so it is not “irrespective of application.”

Interpreting Art. 3(3), subparagraph 1 to allow discrimination between categories of applications would also be inconsistent with Art. 3(3), subparagraph 3, which explicitly allows discrimination “between [...] specific categories” of content, applications, or services if one of three narrow exceptions to Art. 3(3), subparagraph 1 applies. If Art. 3(3), subparagraph 1 already allowed discrimination between specific categories of content, applications, and services, an exception for this kind of discrimination would not be necessary.

Any zero-rating program which zero-rates only some applications or classes of applications and does so based on commercial considerations violates Art. 3(3), regardless of any of the other details or practices that are part of the zero-rating program. (In the words of the Court, the violation of Art. 3(3) is independent of the “form or nature of the terms of use attached to” the zero-rating option.)⁶³ The violation of Art. 3(3) results directly from the discriminatory counting of traffic at the heart of such programs and invalidates the entire zero-rating program.⁶⁴ As a result, the details of how such programs are implemented affect neither the program’s compatibility with Art. 3(3) nor the outcome of the case.⁶⁵

(emphasis added) (2021 Vodafone Roaming decision, para. 15)

A “zero tariff” option [...] *draws a distinction within internet traffic*, on the basis of commercial considerations, *by not counting towards the basic package traffic to partner applications*.

Consequently, such a commercial practice *does not satisfy* the general obligation of equal treatment of traffic, without discrimination or interference, [...] in *Art. 3(3), subparagraph 1*.” (emphasis added) (2021 Vodafone Roaming decision, para. 28).

⁶² 2021 Vodafone Roaming decision, para. 28.

⁶³ 2021 Vodafone Roaming decision, para. 33; 2021 Vodafone Tethering decision, para. 32; 2021 Telekom decision, para. 35.

⁶⁴ See Part 3, Section II.B.

⁶⁵ See also Part 1.

In particular, that means:

- It is irrelevant whether the zero-rating option is offered as an add-on for which the subscriber pays separately, or whether the zero-rating program is already included in the subscriber’s internet access plan. This directly follows from the ECJ’s two 2021 decisions on Vodafone’s Vodafone Pass offering, which included both (1) zero-rating options for which the subscriber had to pay separately and (2) zero-rating options that were included in the basic plan.⁶⁶
- It is irrelevant whether the zero-rating option triggers or otherwise includes differentiated traffic management *before* the subscriber has used up their all of their data volume for the billing period. This directly follows from the ECJ’s 2021 decision on Deutsche Telekom’s StreamOn offering. When a subscriber activates StreamOn, the bandwidth for all video streaming is limited to 1.7 Mbit/s; this differentiated traffic management was an integral part of the StreamOn zero-rating add-on.⁶⁷
- It is irrelevant whether the zero-rating option triggers or otherwise includes differentiated traffic management *after* the subscriber has used up their data volume, e.g., whether or not the subscriber can continue to use just the zero-rated applications *after* the subscriber has used up their data volume for the billing period.⁶⁸ This follows directly from the Court’s 2020 decision, where the zero-rating option under consideration included differentiated traffic management after the subscriber had used up their data volume,⁶⁹ and from the 2021 decisions, where none of the zero-rating options under consideration included such differentiated traffic management.⁷⁰

2. Zero-rating options where the application provider pays to be zero-rated (also called “sponsored data”)

Zero-rating options where the application provider pays to be zero-rated also violate Art. 3(3) and therefore do not need to be evaluated under Art. 3(2).

While none of the zero-rating options under consideration in the ECJ’s three 2021 decisions required application providers to pay to be included in the program,⁷¹ the decisions’

⁶⁶ 2021 Vodafone Roaming decision, para. 7; 2021 Vodafone Tethering decision, para. 7.

⁶⁷ 2021 Telekom decision, para. 8 (describing differentiated traffic management in StreamOn) and para. 35 (finding the differentiated traffic management irrelevant for the violation of Art. 3(3)).

⁶⁸ 2021 Vodafone Roaming decision, para. 29.

⁶⁹ 2020 Telenor decision, paras. 10-11, 51-54.

⁷⁰ 2021 Vodafone Roaming decision, paras. 7, 29; 2021 Vodafone Tethering decision, paras. 7, 28; 2021 Telekom decision, paras. 6, 31.

⁷¹ 2021 Telecom decision, para. 9. While the two Vodafone decisions do not discuss whether application providers have to pay to be included in the zero-rating program, the current description of the Vodafone Pass program on the Vodafone website states that “[t]here is no fee for any content provider to join a Pass.” <https://www.vodafone.com/about-vodafone/how-we-operate/suppliers/pass-partner-portal> (accessed October 24, 2021).

reasoning directly applies to zero-rating programs that include apps in exchange for payments from application providers.

According to the three 2021 decisions, all zero-rating options based on commercial considerations which “do not count traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff”⁷² violate Art. 3(3) because they “draw[] a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications. Consequently, such a commercial practice does not satisfy the general obligation of equal treatment of traffic, without discrimination or interference,” in Art. 3(3), subparagraph 1.⁷³

Just like the zero-rating options in the 2021 decisions, zero-rating programs that charge application providers for inclusion in the program draw a distinction between internet traffic from partner applications that are zero-rated and those that are not. This violates Art. 3(3), subparagraph 1. And just like the zero-rating options in the 2021 decisions, such zero-rating programs are based on commercial considerations and cannot be justified by the exceptions in Art. 3(3), subparagraph 2 and 3.

Zero-rating program that require application providers to pay to be included in the program violate Art. 3(3), subparagraph 1, regardless of whether the provider of internet access service offers the opportunity to pay to be zero-rated only to select applications, to all applications in a category, or to any application that pays the fee.

Nothing in the Court’s reasoning in the three 2021 decisions relies on the relative openness of the zero-rating program or the reason for including the partner applications in the program. As explained above, what matters under Art. 3(3), subparagraph 1 is the discrimination between (1) the traffic of applications that are zero-rated and (2) the traffic of those that are not.⁷⁴

Regardless of differences in who is allowed to pay to be zero-rated, any of these zero-rating programs will result in an internet access service that zero-rates only the traffic from applications that pay, while counting all other applications’ traffic against the subscriber’s data volume. It is this distinction between applications that violates Art. 3(3), subparagraph 1; whether additional applications could potentially be included in the program in the future is irrelevant. There will always be apps not included, and therefore, the programs will always violate Art. 3(3).

⁷² This term is identical with the 2021 decisions’ definition of “zero tariff” options” that violate Art. 3(3). See Part 1, Section I.

⁷³ 2021 Vodafone Roaming decision, para. 28.

⁷⁴ See the discussion of zero-rating programs that zero-rate all apps in a category in Part 2, Section II.A.1.

3. Other forms of differentiated pricing that discriminate among applications or classes of applications

In addition to zero-rating, there are other forms of differentiated pricing based on commercial considerations that violate Art. 3(3), subparagraph 1.

In general, differentiated pricing includes some differences in pricing either within the plan or between plans. For example, a plan includes differentiated pricing within the plan if different components of the plan have a different bandwidth-adjusted price (i.e. the price per KB, MB, or GB of internet traffic differs between the different components).

Zero-rating is a special form of differentiated pricing within the plan – it bundles (1) a flat rate for the zero-rated data (i.e. the subscriber pays a fixed price for the zero-rated data, regardless of the amount of zero-rated data used) with (2) a price for a limited amount of data that can be used for everything (the data volume included in the internet access service).⁷⁵

The ECJ’s three 2021 decisions all focus on zero-rating options. However, their reasoning directly applies to other forms of differentiated pricing as well. Like zero-rating, other forms of differentiated pricing are subject to, and violate, Art. 3(3), subparagraph 1’s general nondiscrimination rule, if they treat traffic from some applications or classes of applications differently from traffic from other applications or classes of applications.

For example, plans that allow subscribers to buy additional data that can only be used for specific applications or categories of applications would violate Art. 3(3), subparagraph 1. So would plans that charge different bandwidth-adjusted prices for different applications or categories of applications.

For example, in 2017 Portuguese provider MEO offered add-on data packets for an extra fee that gave users an additional 10GB that could only be used for a select group of applications. Subscribers who bought the video add-on for a fee of €4.99/month add could use these additional 10GB for four select video applications only, including for Netflix and YouTube.⁷⁶ These add-ons violate Art. 3(3), subparagraph 1, because the data volume included in the add-on could only be used for these select applications, but not for any others, so the add-on treated traffic from

⁷⁵ In some plans, the price for the flat rate for the zero-rated data is included in the overall price of the internet access service. In other plans, the subscriber pays extra for the zero-rated option. For example, Vodafone’s Vodafone Pass offering included one Vodafone Pass of the subscriber’s choice in the price of the basic internet access service and gave subscribers the option to pay extra for additional Vodafone Passes. Either way, the bandwidth-adjusted price (e.g., the price per KB, MB, or GB of internet traffic) is likely to differ for the zero-rated data and the data that is part of the data volume. On Vodafone Pass, see 2021 Vodafone Roaming decision, para. 7; 2021 Vodafone Tethering decision, para. 7.

⁷⁶ <https://pplware-sapo-pt.translate.goog/internet/novos-pacotes-internet-smart-net-ja-conhecem/? x tr sl=pt& x tr tl=en& x tr hl=en& x tr pto=nui,sc>.

some applications (those included in the add-on) differently than traffic from other applications (applications not included in the add-on).⁷⁷

MEO’s add-ons included only a few applications in each category. However, just like the zero-rating programs discussed above, such add-ons would violate Art. 3(3), subparagraph 1, even if they were open to all applications in a category or included all applications in a category. That’s because all of these add-ons treat traffic from some applications differently than traffic from other applications, no matter how open they are.⁷⁸

B. Differentiated billing based on commercial considerations that does not violate Art. 3(3)

There are, however, differentiated billing practices based on commercial considerations that do not violate Art. 3(3). Plans including such practices could be provided in line with Art. 3(2), as long as they do not limit the exercise of the rights of end users in Art. 3(1).

Differentiated billing practices based on commercial considerations that do not violate Art. 3(3) include:

- Application-agnostic zero-rating;
- Other forms of application-agnostic differentiated pricing; and
- Internet access service plans with different prices for different groups of subscribers, as long as the group is defined by application-agnostic criteria (e.g., seniors, students, or low-income individuals, but not people who use gaming applications).

The list of practices and examples provided in this section is not meant to be exhaustive; it simply illustrates that (1) there are forms of zero-rating and differentiated pricing that do not violate Art. 3(3), subparagraph 1, and that (2) these practices allow providers of internet access to differentiate their services in ways that benefit consumers without harming competition, innovation, and free speech.

⁷⁷ All of MEO’s add-ons charged the same bandwidth-adjusted price: the add-ons provided a data volume of 10GB for €3,99 (introductory offer) and for €6,99 (after introductory offer expired). It is not clear whether MEO charged a different bandwidth-adjusted price for the data volume included in the basic internet access plan. Treating traffic from some applications differently from traffic from other applications by charging a different bandwidth-adjusted price for traffic from the applications included in the add-on than for traffic from all other applications would create an additional violation of Art. 3(3), subparagraph 1.

As explained in the text, the add-ons violate Art. 3(3), subparagraph 1 even if MEO charges the same bandwidth-adjusted price for the add-ons and the data volume included in the basic plan. The add-ons always violate Art. 3(3), subparagraph 1, because the data included in the add-ons can only be used for the applications included in the add-on.

On the price of MEO’s add-ons, see <https://pplware-sapo-pt.translate.google.com/internet/novos-pacotes-internet-smart-net-ja-conhecem/? x tr sl=pt& x tr tl=en& x tr hl=en& x tr pto=nui,sc>.

⁷⁸ See the discussion of zero-rating programs that zero-rate all apps in a category in Part 2, Section II.A.1.

1. Application-agnostic zero-rating

Application-agnostic zero-rating programs are zero-rating programs that do not make distinctions among applications or classes of applications;⁷⁹ instead, they zero-rate all traffic equally.⁸⁰ As a result, they do not violate Art. 3(3), subparagraph 1, and therefore also have to be evaluated under Art. 3(2).

For example, a provider of internet access services might zero-rate all traffic a subscriber sends and receives during certain times of day, e.g., between midnight and 6am: Everything a subscriber does online between midnight and 6am does not count against their data cap, while everything they do outside of this time window counts against the data cap.

Thus, during the zero-rating window, the provider “treat[s] 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,”⁸¹ as required by Art. 3(3), subparagraph 1, by not counting all traffic towards the cap. Similarly, outside of the zero-rating window, the provider treats all traffic equally by counting all traffic towards the cap, regardless of the application or class of application the traffic belongs to.

Such zero-rating offers make distinctions between a subscriber’s traffic depending on the time period when the traffic is sent or received: they do not count traffic towards the cap during the zero-rating window, while counting it towards the cap outside of that window. However, this discrimination within the plan does not violate Art. 3(3), subparagraph 1, since it is based on application-agnostic criteria (i.e. on characteristics that have nothing to do with the application or class of application) – here, it is the time when the subscriber is using the internet access service.

This result is consistent with the examples in recital 7 of “agreements on commercial and technical conditions and the characteristics of internet access services”⁸² subject to Art. 3(2). According to recital 7, “end-users should be free to agree with providers of internet access

⁷⁹ “Application-agnostic” means not differentiating on the basis of source, destination, Internet content, application, service, or device, or class of Internet content, application, service, or device. “Class of applications” means Internet content, or a group of Internet applications, services, or devices, sharing a common characteristic, including, but not limited to, sharing the same source or destination, belonging to the same type of content, application, service, or device, using the same application- or transport-layer protocol, or having similar technical characteristics, including, but not limited to, the size, sequencing, or timing of packets, or sensitivity to delay. These definitions are taken from the California Network Neutrality Law, California Civil Code, §3100(a) and (c). See also van Schewick (2015), Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like, Stanford Law Review, Volume 67, Issue 1, pp. 124-131 and fn. 444 (defining application-agnostic and application-specific discrimination and explaining the policy rationale for banning discrimination among applications and classes of applications and allowing application-agnostic discrimination.)).

⁸⁰ To the extent they include discrimination, that discrimination is based on application-agnostic criteria.

⁸¹ Art. 3(3), subparagraph 1.

⁸² Art. 3(2).

services on tariffs for specific data volumes and speeds of the internet access service.” Such agreements include technical discrimination between different components of the plan based on application-agnostic criteria, but no discrimination within each component of the plan.

For example, one common type of plan includes a specific data volume that the subscriber can use at the contractually agreed upon speed. Once a subscriber has used up that data volume, their bandwidth is technically limited to a much lower speed. For example, Deutsche Telekom’s MagentaMobil M mobile internet access plan includes 12 GB of data at LTE Max/5G download speeds and upload speeds of up to 50 MBit/s. Once a subscriber has used up their data volume, their speed is limited to 64 KBit/s (download) and 16 KBit/s (upload), respectively.⁸³

Such plans consist of two components: (1) use of the internet access service before the subscriber has used up their data volume and (2) use of the service after the subscriber has used up their data volume. Before the subscriber has used up their data volume, all traffic travels at the contractually agreed upon higher speed; after the subscriber has used up their data volume, all traffic is limited to a much lower speed.

While such plans do not discriminate between traffic within each component, they discriminate between the plan’s different components, treating traffic differently depending on whether it is sent before or after the subscriber hits their cap. That discrimination between components, however, does not violate Art. 3(3), subparagraph 1, because it is based on application-agnostic criteria (whether the subscriber has used up their data volume).

If these existing examples of contractual agreements on data volume and speed are compatible with Art. 3(3), subparagraph 1, then the application-agnostic zero-rating described above is also consistent with Art. 3(3), subparagraph 1. Both involve the same kind of discrimination: application-agnostic discrimination between different components and no discrimination within each component.

Apart from zero-rating data during certain times of day, there are other innovative ways to provide application-agnostic zero-rating.

For example, Canadian internet service provider Fido allows subscribers of its mobile internet access service to pick five hours a month where everything they do is exempted from the cap, no matter how much data they use.⁸⁴ Again, this offer constitutes application-agnostic zero-rating and does not violate Art. 3(3), subparagraph 1.

Like plans that zero-rate all traffic during certain times of day, this plan zero-rates all traffic during a certain window (here, the five hours chosen by the subscriber). As a result, the offer consists of two components: (1) use of the internet access service during the five hours of

⁸³ <https://www.telekom.de/mobilfunk/tarife/smartphone-tarife> (last visited October 24, 2021).

⁸⁴ <https://www.fido.ca/why-fido/extra-data> (last visited October 24, 2021).

zero-rating chosen by the subscriber and (2) use of the internet access service outside of these five hours.

There is no discrimination between traffic within each component: all traffic sent and received during the five hours of zero-rating is zero-rated equally; all traffic sent and received outside of the five hours of zero-rating is counted towards the data volume.

The plan treats traffic differently depending on the component: it zero-rates traffic during the five hours of zero-rating, while not zero-rating traffic outside of the five hours. This discrimination between components does not violate Art. 3(3), subparagraph 1 because it is based on application-agnostic criteria (i.e. five hours, chosen by the subscriber).

2. Other forms of application-agnostic differentiated pricing

Beyond application-agnostic zero-rating, other forms of application-agnostic differentiated pricing do not violate Art. 3(3), subparagraph 1, either, and would also have to be evaluated under Art. 3(2).

A plan that includes application-agnostic differentiated pricing includes differentiated pricing, but that pricing is application-agnostic – i.e. it either treats all traffic equally or discriminates among traffic only based on criteria that are independent of applications or classes of applications.

For example, a plan includes differentiated pricing if the different components of the plan have a different bandwidth-adjusted price (i.e. the price per KB, MB, or GB of traffic differs between different components of the offer). Allowing subscribers to buy additional data when they have used up the data volume included in their internet access plan will usually involve differentiated pricing based on commercial considerations. That’s because the bandwidth-adjusted price for the data volume included in the plan is usually different from the bandwidth-adjusted price for buying additional data once the subscriber has reached their cap.

Such plans do not violate Art. 3(3), subparagraph 1, if:

(1) there is no discrimination within each component – i.e. the data bought at the different prices can be used for all applications and classes of applications equally and all traffic within a component receives the same quality-adjusted price; and

(2) the discrimination among different components is based on application-agnostic criteria – i.e. the price of the different components is independent of specific applications or classes of applications.

Like the application-agnostic forms of zero-rating discussed above, a plan that uses such differentiated pricing for buying more data useable for any application does not violate Art. 3(3), subparagraph 1.

Such offers consist of two components: (1) the data volume included in the plan, and (2) the additional data volume bought after the subscriber used up their data volume.

There is no discrimination of traffic within each component: both the data volume included in the basic plan and the additional data bought later can be used for all applications and classes of applications equally, and all traffic within a component receives the same bandwidth-adjusted price.

There is discrimination of traffic between the different components, since both components have a different-bandwidth-adjusted price. However, this discrimination does not violate Art. 3(3), subparagraph 1 because the difference in the price of each component is application-agnostic: it is not tied to specific applications or classes of applications; instead, it varies depending on whether the subscriber has used up their initial data volume.

While plans that allow subscribers to buy additional data packages once a subscriber has reached their cap are fairly common, a provider could also use application-agnostic differentiated pricing in more innovative ways. For example, it could give its subscribers the option to buy an add-on that allows the subscriber to use a certain amount of data per day in addition to the data volume included in the basic plan that the subscriber can use over the course of a month. In 2018, an ISP in India called Jio offered a Cricket World Cup promotion, offering a cheap add-on that gave users 2GB of data a day for 51 days (the duration of the Cricket World Cup Season) without rollover. That was enough to watch every Cricket World Cup match online. However, despite the branding, subscribers were free to use the daily data add-on for whatever services or videos they liked.

Such an add-on involves differentiated pricing based on commercial considerations if the bandwidth-adjusted price for the add-on is different from the bandwidth-adjusted price for the data volume included in the basic plan.

Such a plan, too, includes two components: (1) the data volume included in the basic plan that can be used over the course of a month and (2) the data volume included in the add-on that can be used over the course of a day without rollover for a certain number of days (e.g., 2 GB per day for 51 days).

The data volume included in each component can be used for all applications and classes of applications equally, and all traffic receives the same bandwidth-adjusted price. Thus, there is no discrimination within each component.

If the bandwidth-adjusted price differs between the components, the offering discriminates between the components. However, this discrimination does not violate Art. 3(3), subparagraph 1, because the difference in price is application-agnostic: the difference in price between the components is based on criteria that have nothing to do with specific applications or classes of applications; instead, it varies with the period over which the data volume in each component can be used.

3. Internet access service plans with different prices for different groups of subscribers, as long as the group is defined by application-agnostic criteria

Finally, offering internet access service plans with different prices for different groups of subscribers would not violate Art. 3(3), subparagraph 1 and would therefore also have to be evaluated under Art. 3(2), as long as the different plans themselves do not violate Art. 3(3) and the group is defined by application-agnostic criteria.

For example, providers of internet access services could offer less expensive plans to students, seniors, or low-income individuals. Such plans could have the same speed, quality, and data volume as the plans available to the general population, but for a lower price.

Since the data included in the plans can be used equally for all applications and categories of applications and all traffic within a plan receives the same speed/quality/bandwidth-adjusted price, there is no discrimination within the plans that would violate Art. 3(3), subparagraph 1.

The speed/quality/bandwidth-adjusted price differs between the plans available to different groups, so the provider of internet access service discriminates between traffic belonging to different plans. However, the discrimination between plans is based on application-agnostic criteria: the definition of the group is based on criteria that are not tied to specific applications or categories of applications – enrollment in school or university for students, age for seniors, or income for low-income individuals. Discrimination between plans based on application-agnostic criteria does not violate Art. 3(3), subparagraph 1.

By contrast, a plan that is available at a different price only to gamers (i.e. subscribers that actually use gaming apps) would violate Art. 3(3), subparagraph 1, because it distinguishes between traffic belonging to different plans based on application-specific criteria (here, the use of gaming applications).⁸⁵

This interpretation, which allows differentiation between different plans based on application-agnostic criteria under Art. 3(3), subparagraph 1, is supported by examples included in Art. 3(2) and recital 7. These provisions envisage agreements on plans with different speeds and data volumes. Plans with different data volumes often have different bandwidth-adjusted prices. For example, the bandwidth-adjusted prices in the current MagentaMobil smartphone tariffs by Deutsche Telekom range from €6,66/GB (6GB for €39,95) to €2,5/GB (24 GB for €9,95).⁸⁶ That means Deutsche Telekom treats traffic differently by charging a different per-GB price depending on the plan.

⁸⁵ Making a plan available only to subscribers who use gaming applications is different from creating a plan with characteristics that might be particularly attractive to gamers and marketing the plan to gamers, as long as the plan is available to subscribers regardless of the applications or classes of applications they use.

⁸⁶ <https://www.telekom.de/mobilfunk/tarife/smartphone-tarife> (last visited October 24, 2021).

However, such plans do not violate Art. 3(3), subparagraph 1. First, the data included in the plans can be used equally for all applications and categories of applications and all traffic within a plan receives the same speed/quality/bandwidth-adjusted price, so there is no discrimination within the plans. Second, the differentiation among plans (charging a different price per GB depending on the plan) is based on application-agnostic criteria (here, how much people pay). Of course, such agreements still need to comply with Art. 3(2) and not limit the exercise of the rights of end users under Art. 3(1). In addition, the rest of the plans also needs to comply with Art. 3(3) and the plans need to comply with the other provisions of the Regulation.

Part 3: The relationship of the ECJ’s 2020 and 2021 decisions

The 2020 and 2021 decisions do not contradict each other, neither in the reasoning nor in the results. The 2021 decisions flow directly from the 2020 ruling. In the 2020 ruling, the ECJ’s Grand Chamber developed the legal framework for evaluating zero-rating programs under Art. 3(3) and Art. 3(2). In the three 2021 rulings, the ECJ’s Eighth Chamber applied that legal framework to three new, different sets of facts.

Various aspects of the 2021 rulings show that the Eighth Chamber viewed them as a straightforward, uncontroversial application of the legal framework developed by the Grand Chamber’s 2020 decision.

I. The 2021 decisions applied the legal framework developed by the 2020 decision.

The Grand Chamber’s 2020 ruling established the legal framework for evaluating zero-rating programs under Art. 3(3) and 3(2). In particular, the decision clarified the relationship between the two provisions and explained how to evaluate zero-rating programs under each provision.⁸⁷

Most importantly in the present context, a close reading of the 2020 decision indicates that the 2020 decision had already concluded that Art. 3(3), subparagraph 1 establishes a general nondiscrimination rule that applies to both technical and non-technical measures. This reading of the 2020 decision is supported by various aspects of the 2021 decisions.

A. The 2020 decision found that Art. 3(3), subparagraph 1 applies to technical and nontechnical measures.

The 2020 decision characterized Art. 3(3), subparagraph 1 as a general nondiscrimination rule:

“[T]he first subparagraph of [Art. 3(3)], read in light of recital 8 [...], imposes on providers of internet access services a general obligation of equal treatment, without discrimination, restriction or interference with traffic, from which derogation is not

⁸⁷ See Part 2, Section I.

possible in any circumstances by means of commercial practices conducted by those providers or by agreements concluded by them with end users.” (para. 47)

Nothing in this sentence or in other parts of the 2020 decision indicates that the Court thought the “general obligation of equal treatment [of] traffic” was limited to technical measures.

While Grand Chamber’s decision does not explicitly address the question, the use of such broad, unqualified language, combined with the lack of any limiting language elsewhere in the decision, strongly suggests that the 2020 decision viewed Art. 3(3), subparagraph 1 as a general nondiscrimination rule applying equally to technical and non-technical measures.

B. The 2021 decisions were a straightforward application of the legal framework developed by the 2020 decision; they did not raise any new questions of law.

The substance as well as procedural aspects of the 2021 rulings indicate that both the Court and the Eighth Chamber read the 2020 decision as finding Art. 3(3) applicable to technical and non-technical measures. Both clearly viewed the 2021 rulings as straightforward, uncontroversial applications of the legal framework developed by the Grand Chamber’s 2020 ruling that did not raise any new questions of law.

The 2021 decisions first describe the legal framework applicable in this case (paras. 22-27) before applying it to the specific zero-rating programs under consideration (paras. 28-34).⁸⁸ The description of the framework in the 2021 rulings carefully ties every aspect of the framework to the Grand Chamber’s 2020 decision, summarizing the relevant findings from that decision, followed by a reference to the relevant paragraphs.⁸⁹ In particular, the description of the framework repeats, word for word, the language in para. 47 of the 2020 decision characterizing Art. 3(3), subparagraph 1 as “a general obligation of equal treatment ... [of] traffic” that cannot be “derogated” by commercial practices or agreements.⁹⁰

The first paragraph applying the legal framework to the zero-rating option under consideration in the case then applies, without further discussion, Art. 3(3) to the differential counting of traffic inherent in zero-rating options that zero-rate only some applications or categories of applications.⁹¹ This suggests that the Court thought that the Grand Chamber’s 2020 decision had already decided that Art. 3(3) applied to technical and non-technical measures, so that no further discussion of this question was necessary.

⁸⁸ The paragraph references in the text are to the 2021 Vodafone Roaming decision.

⁸⁹ Out of the six paragraphs summarizing the existing legal framework in the 2021 decisions, four reference the 2020 decision (paras. 22, 23, 26, 27). The remaining two paragraphs do not introduce any new ideas, but highlight a consequence of the previous paragraph (para. 24) or summarize the key idea of the following two paragraphs (para. 25).

⁹⁰ 2021 Vodafone Roaming decision, para. 26.

⁹¹ 2021 Vodafone Roaming decision, para. 28.

Two of the three members of the Eighth Chamber were part of the Grand Chamber that adopted the 2020 decision, so they were familiar with the thinking behind that decision.⁹²

In addition, two procedural aspects of the 2021 decisions indicate that the ECJ had decided that the 2021 cases simply applied the legal framework established by the 2020 ruling without raising any new questions of law.

First, the 2020 ruling was decided by the Court’s Grand Chamber, which consists of a group of fifteen judges, including the President and Vice President of the Court and three Presidents of the Court’s chambers of five judges. The Grand Chamber decides particularly complex or important cases.⁹³

By contrast, the 2021 rulings were decided by a chamber of three judges, the smallest formation of the Court. As the Court’s Rules of Procedure show, this means that neither the Court, when it decided to assign the 2021 cases to the Eighth Chamber, nor the Eighth Chamber itself, as it was considering the cases, deemed the cases difficult or important enough to merit assignment to the Grand Chamber.⁹⁴

Second, the Court decided to adopt the judgments in the 2021 cases without an opinion by the Advocate General. Under the Court’s Statute and Rules of Procedure, this procedural option is only available if the Court finds that the case raises no new questions of law.

Under the Court’s Statute and Rules of Procedure, the ECJ usually adopts its own judgment after having received a written opinion by the Advocate General, which analyzes in detail the legal issues raised by the case and independently suggests how the Court should resolve the case.⁹⁵ The ECJ’s Statute allows the Court to deviate from this general rule and

⁹² Judges N. Wahl (Rapporteur of the 2021 decisions & President of the Eighth Chamber) and F. Biltgen were part of the Grand Chamber that decided the 2020 decision and of the panel of the Eighth Chamber that decided the 2021 decisions.

⁹³ Rules of Procedure of the Court of Justice of the European Union (“CJEU Rules of Procedure”), available at https://curia.europa.eu/jcms/jcms/P_91447/, Art. 27 (describing the composition of the Grand Chamber); Art. 60(1) (describing the assignment of cases to the different formations of the Court). CJEU (2021), Presentation, Section “Composition,” available at https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ (“[The Court] sits in a Grand Chamber [...] in particularly complex or important cases.”).

⁹⁴ CJEU Rules of Procedure, Art. 60(1) (“The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber [...]”); Art. 60(3) (“The formation to which a case has been assigned may, at any stage of the proceedings, request the Court to assign the case to a formation composed of a greater number of Judges.”).

⁹⁵ See Statute of the Court of Justice of the European Union (Consolidated Version published May 1, 2019) (“Statute of the CJEU”), available at https://curia.europa.eu/jcms/jcms/Jo2_7031/en/, Art. 20(4); CJEU Rules of Procedure Art. 82(1); CJEU (2021), Presentation, Section “The public hearing and the Advocate General’s opinion,” available at https://curia.europa.eu/jcms/jcms/Jo2_7024/en/.

decide a case without a written opinion from the Advocate General, if the Court decides, after hearing the Advocate General, that the case raises no new questions of law.⁹⁶

Thus, the Court’s decision to forego an opinion by the Advocate General in this case demonstrates conclusively that the Court had decided that all questions of law relevant to the 2021 cases had already been resolved by the Grand Chamber’s 2020 ruling.

II. The 2020 and 2021 decisions do not contradict each other.

Neither the reasoning nor the results of the 2020 and 2021 rulings contradict each other. In particular, nothing in the 2020 decision suggests that the differential counting of traffic in the packages under consideration complied with Art. 3(3), and applying the holding from the 2021 decisions to the facts of the 2020 case does not change the result of the 2020 decision.

A. The reasonings of the decisions do not contradict each other.

The 2020 and 2021 decisions all evaluated zero-rating programs that selectively zero-rated some applications or classes of applications based on commercial considerations.⁹⁷ Such programs do not count traffic from zero-rated applications towards subscribers’ data volume, while continuing to count traffic from all other applications.

According to 2021 decisions, this differential counting of traffic violates Art. 3(3), subparagraph 1.⁹⁸

The reasoning of the 2020 decision does not contract this finding. The specific zero-rating programs in the packages under consideration in the 2020 case combined discriminatory zero-rating with discriminatory traffic management: Telenor, the internet access provider in the case, zero-rated certain applications until a subscriber had used up their data volume. Once the subscriber had used up their data volume, Telenor blocked or slowed down traffic from all

⁹⁶ See Statute of the CJEU, Art. 20(5) (“Where it considers *that the case raises no new point of law*, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General.”) (emphasis added). See also CJEU (2021), Presentation, available at https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ (“*If it is decided that the case raises no new question of law*, the Court may decide, after hearing the Advocate General, to give judgment without an Opinion.”) (emphasis added). The proposal to dispense with an opinion by the Advocate General is made in the preliminary report by the Judge-Rapporteur; the decision to do so is made by the Court, after hearing the Advocate General. CJEU Rules of Procedure, Art. 59(2) & Art. 59(3).

⁹⁷ The description of zero-rating programs used in the text is identical to the definition of the term “‘zero tariff’ option” in the 2021 decisions. See Part 1, Section I. Each of the 2021 decisions describes the specific zero-rating program under review as a ‘zero tariff’ option. 2021 Vodafone Roaming decision, para. 28 (“[a] ‘zero tariff’ option, *such as that at issue in the main proceedings*”) (emphasis added); 2021 Vodafone Tethering decision, para. 27 (same); 2021 Telekom decision, para. 30 (same). See also fn. 54 and fn. 55 and accompanying text. On the zero-rating program under review in the 2020 decision, see fn. 99 and fn. 104 and accompanying text.

⁹⁸ 2021 Vodafone Roaming decision, paras. 28, 33.

applications that were not part of the zero-rating program, while allowing the subscriber to continue to use the applications that were part of the zero-rating program.⁹⁹

The 2020 decision found that this discriminatory traffic management violated Art. 3(3).¹⁰⁰

Nothing in the 2020 decision suggests that the differential counting of traffic that was part of the package under consideration complied with Art. 3(3), which would directly contradict the 2021 rulings.

Instead, the decision simply did not address whether the differential counting of traffic before the subscriber had used up its data volume also violated Art. 3(3).

This does not contradict the 2021 decisions, either: In the 2020 case, evaluating the differential counting of traffic under Art. 3(3) was not necessary, since it would not have changed the outcome of the case.

That’s because the 2020 decision did not invalidate only the discriminatory traffic management part of the zero-rating program and left the zero-rating part of the program intact. Instead, the decision explicitly concluded that the violation of Art. 3(3) by the discriminatory traffic management meant that the entire package violated Art. 3(3). In other words, the discriminatory traffic management invalidated the entire package, including the differential counting of traffic that was part of the package. This is evident from the plain language of the rulings’ holding and summary paragraph, which state that “packages” that (1) zero-rate only the applications that are part of the zero-rating program until the subscriber used up their data volume and (2) block or slow down only the applications that are not part of the zero-rating program after the subscriber used up their data volume “are incompatible with Art. 3(3),” where the discriminatory traffic management is based on commercial considerations.¹⁰¹

Since the entire package already violated Art. 3(3) because of the discriminatory traffic management, there was no need to decide whether the differential counting of traffic that was part of the package independently violated Art. 3(3) as well.

⁹⁹ 2020 Telenor decision, paras. 9-11.

¹⁰⁰ 2020 Telenor decision, paras. 51-54.

¹⁰¹ See the identical text in the holding and summary paragraph of the 2020 ruling: “Article 3 [...] must be interpreted as meaning that packages made available by a provider of internet access services through agreements concluded with end users, and under which (i) end users may purchase a tariff entitling them to use a specific volume of data without restriction, without any deduction being made from that data volume for using certain specific applications and services covered by ‘a zero tariff’ and (ii) once that data volume has been used up, those end users may continue to use those specific applications and services without restriction, while measures blocking or slowing down traffic are applied to the other applications and services available [...] are incompatible with Article 3(3) of that regulation where those measures blocking or slowing down traffic are based on commercial considerations.” (emphasis added) (2020 Telenor decision, para. 54 and holding)

The 2020 Court was barred from considering whether stand-alone zero-rating (i.e. a package that zero-rated traffic from selected applications or categories of applications, but did not technically discriminate against the applications that were not part of the zero-rating program) would also violate Art. 3(3).

That’s because when deciding requests for preliminary rulings under Art. 267 of the Treaty of the Functioning of the European Union, the ECJ is limited to deciding the question before it based on the facts before it. Thus, the Court had no opportunity to address whether stand-alone zero-rating violates Art. 3(3), because such a zero-rating program was not before the Court.

By contrast, the 2021 decisions had to decide whether differential counting of traffic as such (i.e. in the absence of discriminatory traffic management) violates Art. 3(3). That’s because none of the three packages under consideration in the 2021 decisions included the specific kind of discriminatory traffic management at issue in the 2020 decision; moreover, two of the packages did not include any discriminatory traffic management at all.¹⁰²

B. The results of the decisions do not contradict each other; they reinforce each other.

Applying the findings from the 2021 decisions to the facts of the 2020 decision would not change the outcome of the 2020 case.

To the contrary, it reinforces it.

The 2020 ruling declared the entire package (i.e. the combination of zero-rating and discriminatory traffic management connected to the zero-rating program) incompatible with Art. 3(3), because the discriminatory traffic management violated Art. 3(3). Thus, the discriminatory traffic management that was part of the zero-rating program invalidated the entire package, including the differential counting of traffic that was part of the zero-rating program.¹⁰³

Applying the findings of the 2021 decisions to the facts of the 2020 case leads to the same result: it invalidates the entire package, just for a different reason. The zero-rating programs under consideration in the 2020 ruling included a limited number of applications. The ‘My Chat’ package included six online communication applications; the ‘My Music’ package included four streaming music applications and six radio services. Telenor zero-rated only the applications included in the zero-rating program.¹⁰⁴

¹⁰² As part of Deutsche Telekom’s StreamOn zero-rating program (under review in the 2021 Telekom decision), Deutsche Telekom limited the bandwidth available to all video streaming applications before a subscriber had used up its data volume, but did not apply any discriminatory traffic management after the subscriber had used up its data volume. 2021 Telekom decision, paras. 6-7; 2021 Vodafone Roaming decision, para. 7; 2021 Vodafone Tethering decision, para. 7.

¹⁰³ See fn. 101 and accompanying text.

¹⁰⁴ 2020 Telenor decision, paras. 10-11.

According to the 2021 decisions, this differential counting of traffic from select applications or categories of applications violates Art. 3(3).¹⁰⁵

This kind of zero-rating always violates Art. 3(3), independent of the other details or practices that are part of the zero-rating program.¹⁰⁶ In particular, this violation does not depend on whether the zero-rating program includes differentiated traffic management.¹⁰⁷ Since the zero-rating as such violates Art. 3(3), the entire zero-rating program violates Art. 3(3).¹⁰⁸ Thus, the discriminatory counting of traffic that is part of the zero-rating program invalidates the entire zero-rating program, including any traffic management that is part of the program.

¹⁰⁵ 2021 Vodafone Roaming decision, paras. 28, 33.

¹⁰⁶ 2021 Vodafone Roaming decision, paras. 29, 33. On the following, see also the discussion in Part 1.

¹⁰⁷ 2021 Vodafone Roaming decision, paras. 29, 33; 2021 Telekom decision, para. 35 (“Since such a tariff option is contrary to the obligations arising from Article 3(3) of Regulation 2015/2120, that incompatibility remains, irrespective of the form or nature of the terms of use attached to the tariff options on offer, *such as the limitation on bandwidth in the dispute in the main proceedings.*”) (emphasis added)

¹⁰⁸ In each of the 2021 cases, the Court was asked by the referring Court about the legality of a specific practice other than zero-rating that was part of a zero-rating program. Without evaluating the specific practice itself, the Court found the practice in violation of Art. 3(3) because it was part of a zero-rating program that violated Art. 3(3).

To trace the steps of the Court’s argument in more detail:

- (1) After defining the term ‘zero-tariff’ option (para. 15), the Court notes that “the questions referred to the Court, which seek to enable the referring court to rule on the legality of the *terms of use attached to a ‘zero tariff’ option*, are based on the premiss that *such a tariff option would itself* be compatible with EU law, in particular Article 3” of the Regulation.” (para. 16)
- (2) The Court proceeds to evaluate the differential counting of traffic at the heart of a ‘zero tariff’ option and concludes that “[a] ‘zero tariff’ option, *such as that at issue in the main proceedings,*” violates Art. 3(3). This violation results from the “very nature” of ‘zero tariff’ options (paras. 28-31).
- (3) Moving from the legality of the ‘zero tariff’ option to the legality of the specific practice associated with it, the Court notes that the specific practice under review “applies solely on account of the activation of the ‘zero tariff’ option” (para. 32) and that a ‘zero tariff’ option violates Art. 3(3) regardless of the specific details of the option and of the other practices and terms associated with it (para. 33).
- (4) “In the light of all the foregoing considerations,” the Court concludes that the specific practice violates Art. 3(3) (para. 34). In other words, the Court concludes that if a specific practice is part of a zero-rating program that violates Art. 3(3), the specific practice itself also violates Art. 3(3).

All references are to the Vodafone 2021 Roaming decision, and all emphasis is added.

The 2021 decisions explicitly apply this insight to the facts of the 2020 case: As the decisions point out, the differential counting of the traffic from select applications or categories of applications violates Art. 3(3), regardless of whether the provider selectively blocks or slows down only the applications that are not part of the zero-rating program once the subscriber has used up their data (as in the 2020 decision) or not (as in the 2021 decisions).¹⁰⁹

Thus, the 2021 decisions’ finding that zero-rating traffic from select applications or categories of applications based on commercial considerations violates Art. 3(3) does not change the outcome of the 2020 case: It simply adds an additional, independent reason for finding the whole 2020 package incompatible with Art. 3(3).

¹⁰⁹ 2021 Vodafone Roaming decision, para. 29; 2020 Telenor decision, paras. 51-54.