

European Open Internet Regulation: Proportionality and flexibility required in commercial practices (zero rating)

Regulation should not restrict the service portfolio available to end-users. It is important that operators have the possibility to develop and offer differentiated services in order to enhance users' options and expand the choice between different providers.

Allowing operators to develop differentiated offers will promote the creation of new services and content. Moreover, a richer and more diverse internet boosts demand for internet access, and this in turn promotes network investment.

In this paper we focus on one specific element of the Open Internet Regulation (OIR) in EU/EEA, namely commercial practices and more specifically zero-rated services.

Zero-rating is a commercial practice, which allows customers who subscribe to an internet access service to access certain online content (music, video, gaming etc.), or a certain type of service (e.g. email or browsing) for free or without this usage counting towards their data allowance. A related practice is when a third party agrees to pay for the data their service consumes (sponsored data) with the same result for the subscriber as for zero rating. Generally where there is some form of differential pricing of data traffic or technical limitation related to data volumes and/or speed then this would fall within the scope of commercial practices.

Analysis of commercial practices

We believe that high-level principles against blocking and anti-competitive discrimination (enforced by competition authorities) of the EU/EEA regulation are sufficient and appropriate to prevent undesirable commercial practices. However, the OIR calls for a specific evaluation of commercial practices.

In Recital 7 the OIR makes clear that: “... competent authorities should be empowered to intervene against agreements or commercial practices which by reason of their scale, lead to situations where end-users’ choice is materially reduced in practice. To this end, the assessment of agreements and commercial practices should inter alia take into account the respective positions of the involved providers of internet access services and of content, services and applications.”

Hence where a regulator considers there might be an issue with a commercial offer, it should check whether the conditions mentioned in Recital 7 are fulfilled, namely does the commercial offer materially reduce the choice of the end users in practice, taking into account the market position of the parties involved and whether it undermines the essence of the end users rights.

How zero-rating can influence end-user choice

First, adding a zero-rated offer to an existing portfolio of services broadens end user choice rather than reducing it. All else being equal, customers will have the ability to retain their existing offer. Zero-rated offers therefore give consumers the possibility to access services for a lower price, making internet services accessible for a wider range of consumers.

Second, from a competition perspective, mobile operators are not subject to SMP regulation in retail markets, implying that they have not the power to restrict or drive consumers' choices, because competition would fix the problem.

Third, if a zero-rated service is designed to be open by zero-rating categories of services, or if all content application providers have the same rights and ability to conclude commercial agreements with an internet service provider, then it is difficult to conclude that choice is restricted. This is for instance the case of the Telenor Yng service which zero-rates all relevant music services in the Norwegian market.

The need for diversity and proportionality

Experience from implementation of the OIR suggests that zero-rating outside the boundary of the customers data cap is not allowed. We note that this is discrimination from a traffic management perspective and not per se about the commercial practice itself. However, such a ban can be problematic.

Consider the example of a zero-rated emergency service application when a customer's data quota is used. If operators cannot discriminate from a traffic management perspective, contact to the emergency service would not be allowed. One could also imagine zero-rating traffic related to an application that functions with a specific device, e.g. a lock on a door. Again, with no data quota left, the user would be unable to use the device.

A proportionality assessment of any commercial practice evaluation is therefore required. Such an assessment is one of the most basic legal principles applicable under EU law and is also mentioned as a requirement for traffic management practices in Recital 11 of the OIR.

