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MobCom is one of three mobile operators that owns a 4G mobile network with national coverage in an EU member state. It is by far the largest provider in the end-user market and was recently considered to hold a dominant position by the National Regulatory Authority.

In September 2017 MobCom launched a zero-rating offer for on-line music as an optional add-on service to its mobile subscription. The "Surf Listen Free" (SLF) offer entitles the subscriber to stream all included music applications and services without affecting the volume of data included in the mobile subscription. However, the zero rated services are blocked when the monthly data cap is reached. The "Surf Listen Free" costs EUR 5 per month, but may be used with all the three mobile subscriptions offered by MobCom – both the small usage (1 GB mobile data), medium usage (5 GB) and the large usage (30 GB) subscriptions.

The applications included in the Surf Listen Free offer are the three streaming services Spofy, Tilad and Pineapple Music ("the Included Streaming Services"). For the purposes of this case study, it can be assumed that these three hold 95 % of the music streaming market. MobCom has stated that any other music streaming service in the same market as these players may request to be zero rated. In order to be included they must offer an on-demand music streaming service, support the technical zero rating platform of MobCom and enter into a Service Level Agreement. MobCom has publicly stated that, as a matter of policy, video-on-demand services such as YouTube will not be included in the zero rating offer.

The second and third largest mobile operators, Phone2 and Vodathree, have both lodged a complaint with the National Regulatory Authority stating that "Surf Listen Free" infringes the rules on net neutrality in Regulation (EU) 2015/2120, because MobCom uses its market power to dictate which music services subscribers can use their data on.

Please answer all the following questions:

Question 1:

Briefly mention some of the regulatory issues raised by zero-rating and give a short summary of how zero-rating is regulated in the EU.

Question 2:

Assess whether MobCom's "Surf Listen Free" offer complies with the net neutrality rules in Regulation (EU) 2015/2120 Article 3 (2) and 3 (3) based on paragraph 30 -56 of the BEREC Guidelines.

Question 3:

In December Phone2, which does not hold a dominant position, launches an identical zero-rating offer for music streaming services. Discuss if and how this could affect your assessment under 1).

Question 4:

MobCom has decided to block all other applications than the music streaming services included in "Surf Listen Free" once the data cap has been reached. Discuss if and how this could affect your assessment under question 2.

# Guidance notes for examiners

When evaluating the exams, the focus should not be on whether the students find the "correct" answer, but rather on the degree to which they are able to locate and discuss relevant aspects of the net-neutrality rules.

## **1. Briefly mention some of the regulatory issues raised by zero-rating...**

Given that the question asks the students to '*briefly mention*' issues, the answer to this question may be short. The following paragraphs provide an overview of issues that could be presented, but only a subset of this can be expected from the students.

The concept of zero rating is explained in paragraphs 37-40 of the BEREC Guidelines (the Guidelines). Some students may start by providing a definition of zero-rating based on the abovementioned paragraphs, while others may define it in other ways. How they choose to do this is not important, as long as they are able to give an assessment of what the concept of zero-rating actually entails.

The question asks the students to mention some regulatory issues that zero-rating raises. It should be expected that most of the students are able to provide at least one or two such issues, even more so considering that they have the regulations as well as the Guidelines at their disposal.

As a minimum requirement, the issue concerning zero-rating as limiting the freedom of users to access and distribute information and content should be mentioned. How they choose to phrase or "coin" this issue is not important, as long as it is evident what they are referring to. For instance, one could imagine that some might refer to the wording in art 3.1 of the net neutrality rules in the Regulation, while others might refer to ongoing debates concerning zero-rating and freedom of speech. As both would refer to the same general issue, both solutions are to be considered acceptable. The same applies to other issues, assuming they are relevant in this context.

Another relevant issue is how zero-rating affects other content providers. This is linked to the impact on freedom of expression or media diversity, and whether the offer increases the end-user's incentive to use certain content and applications. In relation to this, some students will be

able to identify the issue of zero-rating as having anti-competitive effects. In particular, because it would enable internet providers to selectively promote certain content providers as opposed to competing ones. According to the Guidelines, NRAs should, when assessing whether an internet service provider is limiting the rights of end user, consider " whether content providers are materially discouraged from entering the market or forced to leave the market".

Some students might be able to challenge the abovementioned notions on how data-traffic management should be regulated, for instance by arguing that there might be legitimate reasons for wanting to apply zero-rating to certain types of content. Making such counter-arguments displays a good level of insight into the issue of zero-rating.

Many students will probably connect the issue of zero-rating to the more general issue of net neutrality. This is reasonable, as these are closely connected issues. However, if a student chooses to focus only on net-neutrality, and disregard the issue of zero-rating, it would should be considered inadequate.

### **1.1 ... and give a short summary of how zero-rating is regulated in the EU.**

The EU Regulation does not mention zero-rating explicitly, but it covers zero-rating in connection with "commercial practices", cf. Article 3(2) of the Regulation. The rule is that these kinds of agreements must not violate the principles of open access to the internet as set out in Article 3(1). The Guidelines lists various aspects that should be used when assessing zero-rated offerings in connection to Article 3(2). Technical traffic management is covered in Article 3(3) of the Regulation.

The regulatory application of these articles is described in paragraphs 30–56 of the BEREC Guidelines. These paragraphs also outline a method for analysing zero-rating cases in order to assess the compliance with the rules. Zero-rating is described in more detail in paragraphs 40–48.

The way the BEREC Guidelines work is by stating that NRAs should apply these when interpreting the current net neutrality rules ("*take utmost account of*" the Guidelines, cf. Recital 19). Those able to identify this should be rewarded.

If a student is able to give a short summary containing most of the above-mentioned elements, this should be enough to give them a good score on this part of the question. It should also be kept in mind that Question 1 and 2 of the exam overlap to some degree. Students will probably differ in how they choose to solve this. When evaluating the students' efforts, one should see these answers in connection to each other.

## **2. Assess whether MobCom's "Surf Listen Free" offer complies with the net neutrality rules in Regulation (EU) 2015/2120 article 3 (2)**

### **2.1 Article 3(2)**

The main task is to assess whether MobComs Surf Listen Free offer complies with the net neutrality rules in the Regulation, Article 3(2). The Guidelines refer to various aspects that can be used in assessments of zero-rated offerings. Given the limited time available to the students, they cannot be expected to cover all of these aspects in their assessment. Some of the most relevant aspects include: zero-rating of individual applications as opposed to categories of applications, compliance with the objective of the Regulation to ensure the internet continues to function as a platform for innovation, the scale of the commercial practice, and the market position of the providers. It will probably be the case that it should be sufficient, in order to achieve a good grade, that the student is able to extract a few of the relevant aspects, and form a sensible discussion based on these.

#### **2.1.1 Market positions**

According to the Guidelines, the market positions of both the internet service provider and the content providers should be taken into account when assessing zero-rated offers, as "... a limitation of the exercise of end-user rights is more likely to arise where an ISP or a CAP has a 'strong' market position (all else being equal) compared to a situation where the ISP or CAP has a 'weak' market position...".

The Guidelines go on stating that the market positions should be analysed in line with competition law principles. Most of the students will probably notice that MobCom (the ISP) is considered by the NRA to have a dominant position in the end-user market for mobile network with national coverage. This implies that the NRA already has defined the market and analysed MobCom based on this market definition. It is important whether the student is able to show *why* the market position is relevant in the overall discussion.

The students are also informed that the CAPs in the case study together hold 95 % of the music streaming market. It is to be expected that the students will apply this information in different ways. In terms of delimitation of the content market, there are few sources to rely on.

As the students are not given nearly enough information to be able to make a comprehensive attempt at doing such an analysis, they cannot be expected to get much out of it if they try.

It would, as for the abovementioned market for internet service providers, be reasonable to assume that there is a relevant content market and that the market positions of the zero-rated applications therefore should be considered strong. However, being able to challenge this assumption by pointing to demand and/or supply-side substitutability assessments between for instance audio-visual streaming applications and music streaming shows good knowledge and understanding of the subject matter. As said above, the crucial element should be whether the student is able to see the importance of the market positions with regards to zero-rating.

### **2.1.2 Impact on end users**

One of the questions that needs to be addressed is to what extent end-users' choice is restricted by the zero-rating offer. Most students will probably be able to identify that the Zero-rating offer at least has the potential to steer the end-users choices. Some of the students may be able to point out that the conclusion to this question might vary with the size of the data cap. The lower the data cap compared with the additional data volume for use by the zero-rated content, the greater the end users' incentive to use the zero-rated offer.

As a minimum, the students should be able to see that a zero-rating offer will create an economic incentive for the end-users to use that music application instead of competing ones. This follows explicitly from the Guidelines. (See paragraph 42).

According to the Guidelines, it is more likely that zero-rating of an individual application would undermine the rights of the end-users than zero-rating of entire category of applications. Most students should be able to identify this as a relevant aspect in this part of the discussion.

Students that are able to link this to the question of market delimitation should be rewarded.

These aspects are closely linked, as it is necessary to limit the market in order to discuss whether a whole category actually is zero-rated or not. Some of the best students might also touch upon the question of whether the zero-rated offer could limit end users' freedom of choice in adjacent markets.

As the music streaming market encompasses more music streaming providers than the ones included in Surf Listen Free, it may be argued that it does in fact impose specific limitations on

the end-users' freedom of choice. On the other hand, it is made clear that MobCom intends to include these other providers, when they request it. Some students might conclude from this that the zero-rating offer can be seen as offered to a whole category of applications, while others might suggest that it would depend on how MobCom chooses to follow up on their statement. Of importance is not what conclusion they arrive at, but rather that they are able to spot this element and discuss its significance.

According to paragraph 43 of the Guidelines, an assessment of the impact on the end-users should include whether there is an effect on the range and diversity of content and applications, which consumer end-users may use, and if so, whether the range and diversity of applications, which end-users can choose from, is reduced in practice. For instance, if the zero-rated content does not include user-generated content or non-profit content, this could constitute favouritism of commercial content. In this regard, one could also argue that the zero-rated offer could limit the open internet as a platform for freedom of expression, even though this reduction is of limited importance in terms of music streaming. The exam question does not provide the students with much help in identifying this as a relevant issue, which probably means that not everyone will be able to recognize it as such. It should be considered an achievement if a student is able to make a reasonable effort at discussing this specific topic.

### **2.1.3 Impact on the content and application providers**

The assessment of the zero-rated offer shall also include an assessment of the impact of the offer on other content and application providers. The Regulation According to paragraph 46 of the Guidelines this includes assessing whether the zero-rating affects the range, diversity and access to different content and applications. Furthermore, importance shall be attached to whether a zero-rated offer makes it impossible or more difficult to enter the relevant market. In addition, the guidelines state that an assessment of the effects on CAP end-user rights, encompasses an assessment of "... whether the continued functioning of the internet ecosystem as an engine of innovation is impacted, for example, whether it is the ISP that picks winners and losers ...". The Guidelines, paragraph 46, bullet item 4 also states that the potential impact on diversity of media is a relevant factor in the overall assessment of a zero-rated offer.

The exam paper informs us that MobCom will let any other music streaming service enter into agreement with them, if they wish to be part of the zero-rated offer. Some students will probably make the argument that because of this statement one should consider the offer as applying to

all content providers in the music streaming category. Being able to spot the significance of MobComs statement should be rewarded. Others may argue that the zero-rated offer could force the remaining 5 % of the content providers to entering into agreements with MobCom, which they would not have done otherwise. This is also a reasonable argument that shows good insight into the subject matter. Allowing such zero-rated offers could also potentially create entrance barriers for services that are slightly different from those who would fit into the content category. In general, if a student is able to elucidate that zero-rating might influence what content is preferred, and could thus have an anti-competitive effect on excluded content providers, they must be considered to be on the right track. There are no clear answers to these questions, as it would depend on the degree to which MobCom in actuality allows the remaining content providers to be part of the zero-rated offer.

#### **2.1.4 The scale of commercial practice**

According to the Guidelines the scale of the practice (e.g. the number of end-users subscribing to such an offer) and the extent to which end-users have access to alternative offers and / or other ISPs is relevant when assessing a zero-rated offer.

The zero-rated offer is offered to everyone, and is therefore not limited to certain categories of the population in the market. However, it is limited to those who would actually end up using this subscription.

Considering that both the ISP and the content providers have strong positions in the market, the scale of the zero-rated practise could be quite comprehensive. However, we have no way of knowing exactly how many end-users will subscribe to the zero-rated offer in question.

As the ISP is not the only provider in the market (being considered as dominant implies that they do not have monopoly), there are other alternatives to choose from. Relevant in this respect is also the fact that this is an optional add-on service, which means that MobCom themselves also offer alternatives to the zero-rated offer.

It seems, at least from my point of view, to be quite unclear how big the scale of the practise would be, and thus how it should affect the overall assessment.



## 2.2 Article 3(3)

Some students may take note of the fact that Paragraph 41 of the Guidelines states that blocking or slowing down all applications, except for the zero-rating application, once the data cap is reached would infringe Article 3(3).

Most students will probably arrive at the conclusion that the relevant subscription does not produce any form of technical management, and therefore would not infringe on Article 3.(3) This would imply that they have been able to spot the difference between economic and technical data management, which is a good thing.

### **3. In December Phone2, which does not hold a dominant position, launches an identical zero-rating offer for music streaming services. Discuss if and how this could affect your assessment under 1).**

This question may be answered briefly. The task for the students is to identify that if this kind of zero-rating offer becomes more widespread, it affects the scale of the commercial practice, which in turn would influence the assessment of the zero-rating offer with regards to the net-neutrality rules. It's a plus if the student is able to see that this might also reduce the presence of alternatives to the zero-rating offer, since the larger the scale becomes the harder it would be to offer an alternative.

### **4. MobCom has decided to block all other applications than the music streaming services included in "Surf Listen Free" once the data cap has been reached. Discuss if and how this could affect your assessment under question 2.**

The answer to this question may be found in paragraph 55 of the Guidelines, which states that a zero-rating offer where all applications are blocked once the data cap is reached, except for the zero-rating applications, would infringe Article 3(3) first (and third) subparagraph.