A Regulatory Assessment of GO Plc's zero-rating offers GO TV Anywhere, GO TV Anywhere Lite and GO Music Wild Card

Decision

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1. Contents

2. Introduction

The Malta Communications Authority has conducted an investigation of GO's zero-rated offers, namely the "GO Music WildCard", "GO TVAnywhere" and "GO TVAnywhere Lite".

The term 'zero-rated' is being used to describe the above-mentioned offers given that GO, the internet access service provider (IAS Provider), is providing content that does not consume from the end user's monthly data cap. In other words, the data used for the zero-rated content accessible in relation to the offers under investigation does not affect the consumer's remaining data allowance.

This document consists of three main sections. The first section provides background to the legal aspects of the Regulation as well a detailed discussion on the principles guiding the investigation.

The second section presents an assessment of the zero-rated 'TV Anywhere' offers. Following a description of each offer, the paper will outline the MCA's conclusions as to whether these go against the principle of net neutrality.

The third section addresses GO's 'Music WildCard' offer and outlines the MCA's conclusions on the compatibility of this offer with the Regulation.

3. Legal Basis

Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 ('Regulation') establishes the common rules to safeguard equal treatment of traffic when providing an Internet Access Services and the related end-user rights in terms of their freedom to access and transmit content of their choice amongst others. These rules are provided for in Articles 1 to 6 of the Regulation. In accordance with Article 6 of the Regulation and with its powers under the Malta Communications Authority Act (Cap. 418 of the Laws of Malta), the MCA as the designated competent authority responsible in ensuring compliance with the aforesaid rules, has undertaken the investigation outlined in this document.

Of relevance to issues considered in this paper are Articles 3 and 4 of the Regulation which respectively deal with the safeguarding of the open internet, and the transparency measures for ensuring open internet access. In accordance with the applicable norms IAS providers and end-users may enter into agreements which regulate both the commercial and technical conditions of an IAS offer. Such agreements are permissible provided that these shall not limit the exercise of end-user's right 'to access and distribute information and content, use and provide applications and services, and user terminal equipment of their choice' as laid down in Article 3(1) of the Regulation.

Furthermore the Body of European Regulators for Electronic Communications (BEREC) has also published a set of guidelines in the report entitled 'BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules'[1]. These guidelines serve to complement the Regulation by providing an extensive interpretation toolkit of the Regulation and a tool box to be used by NRAs when assessing various market offers and conditions in relation to different aspects of this Regulation.

[1] Link to the BEREC report: https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules

3.1. The principles guiding the investigation

In carrying out its investigation, the MCA looks for elements in the offer that would breach the Regulation.

BEREC Guidelines unequivocally call for a ban of zero-rated offers that:

a) Apply some form of traffic management which is not in line with the provisions of Article 3(3) and Article 3 (4) of the Regulation and hence discriminates against certain content, services or applications either by slowing down (i.e. degradation of transmission quality) or by blocking their alternatives. Such a practice would constitute a breach of the Regulation.

b) Limit the access to just the zero rated content once the data cap is reached while blocking and/or hindering the delivery of all metered applications by blocking or slowing them down in contrast with the treatment of the zero-rated content.

The MCA gives weight to economic and internet freedom considerations when investigating a zero-rated offer.

The internet freedom considerations take into account the degree to which the zero-rated offer materially reduces end-users' choice in practice. Such an evaluation would depend on determining to what degree the offer restricts the range and diversity of applications that consumers can choose from their mobile internet connection. To this effect, the MCA assesses how the choice of the consumer between the different CAPs offering various content is impacted by the offer under investigation.

The economic considerations delve into the impact of the zero-rated offer on competition between IAS providers, by looking at whether the zero-rated offered by the IAS provider can be matched or replicated by other IAS providers on the market. Also of relevance is the impact of the zero-rated offer on competition between CAPs. These considerations will then feed in the assessment to determine the risk of foreclosure of competing IAPs and CAPs (as a result of an IAP allegedly picking winners).

In light of these two considerations, a set of criteria has been established for the carrying out of the investigation, namely:

i. the market position of the internet service providers;
ii. the scale of the commercial practice;
iii. the impact on the market position of CAPs;
iv. the potential for market foreclosure and the impact on the end-user; and
v. the potential for or effective circumvention of the aims of the Regulation.

Ultimately, determining whether an offer constitutes a definite breach of the Regulation would depend on whether, at a downstream level, end-users are being channelled to the content and services that are zero-rated, in a way that distorts content consumption at the expense of other commercial or non-commercial alternatives.

Any investigation of zero-rated offers has to be addressed on a case-by-case basis, considering national circumstances. The MCA suggests that IAS providers intending to launch further zero-rated offers on the market discuss on an informal basis, any possible conflict the proposed offers may face in view of existing regulations and market conditions. The Authority anticipates that this could be beneficial to all stakeholders as it potentially minimises the risk of having to implement changes to the mechanisms of offers after these are published and in force. Such informal discussion would not replace a formal review of the offer when such is launched.

The MCA finally notes that, to-date, it has not deemed it necessary to publish additional guidelines to the above for the purposes of investigating zero-rated offers. It is however not excluded that the MCA sees a need for additional guidelines in the future.

3.2. Regulatory oversight of local markets

The MCA is committed to closely follow the local broadband markets in order to ensure that compliance with the Regulation is maintained and, where this is not the case, will ensure that compliance is efficiently restored.

3.3. Information requested from GO

This investigation is based on information that GO has published on its website and on additional information supplied by GO following a request by the MCA. It is noted that the MCA has received additional information from GO on the Music WildCard, TV Anywhere, and TV Anywhere Lite offer through written email correspondence in June and July 2018.

The nature of information requested by the Authority is deemed to be commercially sensitive, particularly information related to market shares, commercial relationships with third parties and future plans related to similar offers. The MCA notes that disclosure of such information would be of a disadvantage to GO's commercial position in the market, and hence is not publishing the response provided by GO. Similarly, figures directly derived from this information which could directly or indirectly reveal such information, are redacted.

The information requested by the MCA relevant to this investigation is outlined below:

a) The number of mobile subscribers that are registered TV Anywhere service;

b) The number of mobile subscribers that are registered TV Anywhere Lite service;

c) The number of devices that are registered to access GO TV Anywhere platform which are not serviced by a GO (fixed of mobile) connection;

d) The number of mobile subscribers that are eligible to the Music WildCard offer;

e) The number of mobile subscribers who have actually made use of the Music WildCard offer;

f) Details of any commercial relationship that GO might have with Spotify and/or Deezer[2] in view of the Music WildCard offer;

g) GO's future plans on the zero-rated line-up.

[2] At the time when these questions where presented to GO, only Spotify and Deezer were included in the GO Music WildCard offer.

4. GO TV Anywhere and GO TV Anywhere Lite

4.1. Description of Service

TV Anywhere

TV Anywhere is an add-on service available to residential GO Interactive TV customers. This service is accessible through GO's TV app, which is available on both mobile devices and desktop devices offering content from around sixty five (65) TV channels to devices connected through broadband Internet connections.

GO residential Interactive TV customers with an eligible mobile plan[3] can stream these TV channels whilst connected to GO's mobile data without consuming any of the data allowance included in their plan and hence the content is zero rated. In the eventuality that the subscriber's data allowance included in the bundle is fully consumed, standard mobile data charges will be applicable for all types of mobile traffic including the GO TV Anywhere service.

This offer is applicable until the 31st of December 2018.

TV Anywhere Lite

TV Anywhere Lite is an add-on service available to GO 'Mobile Freedom Plan' subscribers, providing access to ten (10) TV channels. These channels are accessible through GO's TV app on a maximum of one (1) device per mobile connection when connected to any Wi-Fi or mobile data service.

Mobile Freedom Plan subscribers can stream these TV channels whilst connected to GO's mobile data without consuming any of the data allowance included in their plan. In the event the subscriber's data allowance included in the bundle is fully consumed, mobile data charges will also start being applied for the streaming of the GO TV Anywhere Lite services.

This offer is applicable until the 31st of December 2018.

[3] The mobile plans eligible for this offer are GO's 'Lite Talk', 'Freedom Lite Data', 'Freedom Essential', 'Freedom Beyond', 'Smart Talk+', 'Smart Data+', 'Smart Talk', 'Smart Data', 'MA-X', 'MAX'.

4.2. Assessment of GO's TV Anywhere offers

Section 3.1 outlines two types of zero rated offers which are in breach of the Regulation. The commercial offers presented by GO do not allow the situation whereby the zero rated content is delivered to the end-user while the other metered content is blocked. Furthermore, there is no evidence that GO is applying any specific traffic management which goes beyond the provisions of Article 3(3) of the Regulation. Therefore a detailed assessment in line with the 5-point criteria as outlined in Section 3.1 is necessary as presented in this section.

Criteria (i) and (ii): The market position of GO and the scale of the practice

GO has a strong position in the mobile market with its share of the local subscriber base standing at 36% as at the end of June 2018. This means that the TV Anywhere offer could have a wide range of impact on competition dynamics, including on the various content and application providers. It is noted that around ✂ ✂ of GO's pay-tv subscribers have actively used one of the zero-rated TV Anywhere plans in June 2018. This means that the overall impact of the zero-rated offers under investigation can be attributed to ✂ ✂ of Malta's mobile telephony subscriber base.

BEREC's Guidelines on the assessment of zero-rated offers specify that the market positions should be analysed in line with competition law principles. This means that the operators' market shares would form the basis as to determine whether the market power of the IAS provider, in this case GO, and the scale of the practice would influence market outcomes from a Net Neutrality standpoint.

Against this background, the MCA believes that the current penetration level of the offers under investigation does not influence market outcomes from a Net Neutrality stand point.

Criterion (iii): The impact on the market position of CAPs

Internet-based video streaming services are a small but growing alternative to traditional TV, with the different platforms having access to channel content that is generally paid for or subscription-based. The major players in this segment have over the years got into mobile media, launching mobile apps over which they offer a video streaming platform that provides on-demand content to their users/subscribers. The availability and variety of the channel line-up depends on the country where the service can be received. In addition to providing on-demand productions, some players may offer additional features to their users, such as programme recording. The major players in this field include Netflix, Amazon Prime, YouTube, iTunes and FilmOn.

The business model adopted by different players varies significantly. Some players opt for a model that is described as Transactional (TVoD), which comprises rental digital video, a one-off rental for a limited time, including both streaming and download-to-rent (DTR) and retail or download-to-own video (DTO), also known as electronic-sell through (EST). Most providers of transactional on-demand services, such as iTunes or Google Play offer both rental and retail film content.

Other players opt for a business model that is Subscription (SVoD)-based, providing unlimited access to content for a fixed monthly sum. Such providers include Netflix and Amazon Prime.

Others even adopt the free/advert-supported model, with these including catch-up services such as BBC iPlayer and All4[4].

When it comes to the streaming content per se, the choice varies significantly from one player to another. Most popular is the large selection of movies and series that end-users can get from a library or catalogue that is rotated periodically. Some players even produce their own series.

Therefore, video streaming services available over Netflix, Amazon Prime, YouTube, iTunes and FilmOn and other smaller alternatives may be regarded as the relevant CAP market for the purposes of the current investigation.

As regards the market position of these CAPS, there is insufficient information available on market shares or similar data that could provide a basis for drawing a conclusion as to what the impact of GO's TV Anywhere apps would be on the market position of relevant CAPs. The critical issue to be assessed further down is therefore whether GO's zero-rated TV Anywhere apps ensure equal treatment of CAPs offering

[4] Reference: https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-film-on-digital-video-2017-10-20.pdf

online video streaming services and whether any discriminatory treatment affects the market positions in this content market.

Criterion (iv): The potential of market foreclosure and the impact on the end-user

It is relevant to underline at this stage that the content available over any of the TV Anywhere apps differs significantly from the online video-streaming content highlighted above. This is because the content available over GO's TV Anywhere apps consists of linear TV programming that is already available over other platforms delivering TV content to the traditional TV set using platforms such as DTTV, DSL and cable networks. Given the difference in the TV Anywhere content available from the local IAS provider, GO, and that provided by the online video-streaming players, registration to GO's TV Anywhere apps is not likely to influence consumer preferences when it comes to CAPs. If anything, the data consumption related to the usage of online video streaming services is likely to remain unchanged, irrespective as to whether or not the end-user is registered to the TV Anywhere or TV Anywhere Lite apps.

Further to the above, the viewing of zero-rated TV content via GO's TV Anywhere app would only be possible once the end-user has at its disposal an active data cap with its mobile subscription or when the end-user purchases a mobile data add-on[5]. Therefore, the availability of GO's zero-rated TV Anywhere apps may in fact entice end-users to opt for mobile telephony plans that encompass an element of data allowance. Higher take-up of such data services could in fact be a positive development for CAPs, by providing another avenue for subscriber growth.

To this effect, the MCA considers that GO's decision to zero-rate linear TV programming is not likely to foreclose rival CAP offerings, given that the TV Anywhere content is completely different from what is typically offered over online video platforms. In other words, the availability of TV Anywhere and TV Anywhere Lite on a zero-rated basis would not distort end-user demand for online video content offered by CAPs.

[5] Of note is that GO does not discriminate against other traffic when offering its TV Anywhere app-based services, either by throttling (i.e. degrading transmission quality) or by blocking non-zero-rated internet traffic once the data cap / data allowance is consumed.

It is also noted that GO's zero-rated TV Anywhere apps do not involve payments from a CAP. This is a particularly relevant point, in that, in the absence of any such payments, it cannot be plausibly argued that GO's zero-rated offer is meant to foreclose competition in the CAP market.

Given also that the relevant addressable market for any CAP would typically be national, particularly in the case of small countries such as Malta, the availability of GO's zero-rated offers and their current take-up is unlikely to pose national level foreclosure to these CAPs. The situation would be completely different, and to this effect very worrying from a competition point of view if, say, GO decided to zero-rate content from a particular CAP to all of its mobile telephony subscribers. Such an action would raise legitimate concerns regarding national-level foreclosure on an alternative CAP, as for example with respect to Netflix, which is already active locally and offering packages to end-users, and other content providers aspiring to provide their offers locally.

Given the difference in the content provided by local IAS providers and online video-streaming players, end-users are not likely to be influenced in their choice of content supplied by different CAPs. Therefore, GO's zero-rating of the TV Anywhere apps cannot be seen as impacting negatively on the end-users' freedom of choice, at least at this juncture of market development. In a scenario where end-users are getting increasingly mobile and located away from their homes, the availability of a service enabling them to access a service they have already paid for[6] , specifically in the case of TV Anywhere, cannot be deemed to be detrimental in terms of choice but rather be considered as an additional value for money.

Criterion (v): Potential or existing circumvention of the aims of the Regulation

The purpose of the Regulation is described in the first recital of the Preamble thereto: "This Regulation aims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. It aims to protect end-users and simultaneously to

[6] GO's TV Anywhere app is 'bundled' with the IPTV plans currently offered by this operator. GO's IPTV plans are offered under competitive terms, but understandably at a premium when compared to the standard pay TV plans given their broader channel line-up. This means that the consumer would only avail of GO's TV Anywhere app, as an 'ancillary' mobile TV service, the end-user pays this premium. GO's TV Anywhere app is only available on an opt-in basis, with the end-user having the final say in registering for this app and eventually downloading it.

guarantee the continued functioning of the internet ecosystem as an engine of innovation."

To this effect, the MCA considers that GO is not implementing traffic management practices such as to give any form of preference to its zero-rated applications. Meanwhile, also in view of the discussion throughout the current assessment, the general conclusion is that GO's zero-rating of the TV Anywhere and the TV Anywhere Lite apps is non-discriminatory with respect to end-user rights and other IAS providers.

The MCA also understands that new ways of using the Internet will emerge along the way, as has been the case for many years through the rapid growth of the use of the internet as a communications platform for an ever wider range of content and applications. However, this has to be done in view of maintaining the internet's function as an engine of innovation. To this effect, the MCA considers that GO's current approach to the zero-rating of the TV Anywhere apps poses no negative discrimination such as to pose an adverse effect on innovation.

4.3. Conclusion and proposed way forward on the TV Anywhere offers

The MCA comes to the conclusion that based on the current market analysis and product characteristics, GO's TV Anywhere and TV Anywhere Lite apps do not violate the Regulation.

It is considered that the apps under investigation enhance the value of local mobile broadband and TV offerings, and thus contribute to a more economically efficient market outcome. The most obvious benefit for end-users is the free access to TV content on the move, and in the case for IAS providers and CAPs, the consolidation of the client base of mobile broadband services.

The situation may however need to be reviewed again in the future, if GO or any other IAS provider decide to offer the content of an online video streaming CAP on a zero-rated basis and/or if the market dynamics for the apps under investigation change, and/or if the apps under investigation are offered as a permanent fixture.

The MCA deems it reasonable for GO to provide the MCA with quarterly updates to ensure that any changes in the market dynamics are immediately noted. This will allow the MCA to closely monitor market developments and to address potential market shortcomings in a timely manner.

5. GO Music WildCard

5.1. Description of Service

GO Music WildCard is an offer available to GO mobile customers on selected plans[7] that provides the facility to stream music content from specific application providers. Initially, GO had only included Spotify and Deezer as the zero-rated applications on the Music WildCard offer. Eventually, GO has also added the Apple Music and the Amazon Music platforms to the list of zero-rated applications on the Music WildCard offer. It is noted that in the event that the subscriber consumes the data allowance included in the bundle, usage of Spotify, Deezer, Apple Music and Amazon Music will entail data consumption as per standard out-of-bundle data rates.

Also, GO's Music WildCard does not entail any discounts on the fees related to premium subscriptions, which enable end-users to have more control in shaping their playlists.

The zero-rate Music WildCard offer is applicable until the 31st of December 2018.

5.2. Assessment of GO Music WildCard

The Music WildCard Offer

Section 3.1 outlines two types of zero rated offers which are in breach of the Regulation. The Music WildCard offer does not allow the situation in which the zero rated content is delivered to the end-user while the other metered content is blocked. Furthermore, there is no evidence that GO is applying any specific traffic management which goes beyond the provisions of Article 3(3) of the Regulation. Therefore a

[7] The mobile plans eligible for this offer are GO's 'Freedom MAX', 'MA-X', 'Smart Data', 'Smart Talk', 'Smart Data +', 'Smart Talk +', 'Pay monthly Freedom Plans'.

detailed assessment in line with the 5-point criteria as outlined in Section 3.1 is necessary as presented in this section.

Criteria (i) and (ii): The market position of GO and the scale of the practice

GO has a strong position in the mobile market with its share of the local subscriber base standing at 36% as at the end of June 2018. This means that any the Music WildCard offer could have a wide range of impact on competition dynamics, including on the various content and application providers. It is noted that around ✂ ✂ of GO's 222,105 mobile telephony subscriptions are eligible for the offer. Furthermore, subscribers amounting to ✂ ✂ of GO's mobile telephony subscribers have actively used the Music WildCard offer in June 2018. This means that the overall impact of the zero-rated offer under investigation can be attributed to ✂ ✂ of Malta's mobile telephony subscriber base.

BEREC's Guidelines on the assessment of zero-rated offers specify that the market positions should be analysed in line with competition law principles. This means that the operators' market shares would form the basis as to determine whether the market power of the IAS provider, in this case GO, and the scale of the practice would influence market outcomes from a Net Neutrality standpoint.

Against this background, the MCA believes that the current penetration level of the offer under investigation, at ✂✂ of the retail mobile data market, does not influence market outcomes from a net neutrality stand point.

Criterion (iii): The impact on the market position of CAPs

Music streaming is a service provided by several popular applications, including those included in GO's Music WildCard offer, which offer either an ad-supported free music streaming / downloading service or a paid, ad-free music streaming / downloading service.

Therefore mainstream music available over Spotify, Deezer, Amazon Music and Apple Music, and other competing applications, such as Tidal and Google Play may be regarded as the relevant content market for the purposes of the current investigation.

As regards to the market position of the content providers, there is however insufficient information available on market shares or similar data that could provide a basis for drawing a conclusion as to what the impact of GO's zero-rated Music WildCard app would be on the market position of relevant CAPs[8].

The critical issue at this stage would therefore be whether the Music WildCard offer ensures equal treatment of the relevant CAPs, and whether any discriminatory treatment could be identified to the detriment of those CAPs other than Spotify, Amazon Music, Apple Music and Deezer.

In this regard, the MCA considers that GO's decision to zero-rate music streaming content only from a specific subset of CAPs that deliver music streaming, could in a way be considered discriminatory vis-a-vis other providers in this content category which do not feature within the Music Wildcard offer. In fact, although there is reason to believe that most of the customers accessing music streaming services make use of the chosen four music streaming services, especially given that Spotify consistently having globally topped the chart in the industry, other alternative CAPs, (existing or future ones) are excluded from the Music WildCard offer. The MCA also notes that while GO attempts to counteract this by including an invitation to other streaming providers to get in touch with it so that these could also be included on the platform, the fact remains that the current four providers on the platform were chosen unilaterally by GO. Therefore, the MCA is taking note of this differential treatment, which preferably should be avoided.

On the other hand, the MCA acknowledges the small size of the local market in a global scenario while taking into account that the Music WildCard offer is only temporary in nature, applicable only till the end of 2018. It would therefore stand to reason to conclude that the Music WildCard offer would have limited impact on the competition between the CAPs involved.

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[8] In September 2017, an article in fortune.com outlined Spotify as the largest of these music streaming services with over 60 million paying customers worldwide , followed by Apple Music, Amazon Music Unlimited, Deezer, Google Play Music, Soundcloud, Tidal and Pandora. Link: http://fortune.com/2017/09/11/spotify-apple-music-tidal-streaming/

Criterion (iv): The potential for market foreclosure and the impact on the end-user

The main consideration here is whether the IAS provider implementing the zero rating practice is effectively locking customers to its service and/or discriminating between its subscribers to such an extent as to foreclose the local music streaming / downloading market for CAPs and other IAS providers.

The MCA notes that GO is offering the Music WildCard app upon subscription to a plan in its mobile telephony product portfolio, without discriminating between pre-paid and post-paid plans, and as long as the end-user's subscription includes an active data bundle allowance. If a data allowance is active, the end-user can stream/download from GO's chosen music apps as much music as necessary. When the included data bundle allowance is consumed or expired, the relevant end-user's tariff plans or Pay Per Use (PPU) data charges will apply. No 'locking' of customers is implemented for eligibility to the Music WildCard offer.

An important element of this assessment is determining whether the zero-rated Music WildCard offer translates into a 'loyalty-enhancing effect' for the zero-rated content, potentially at the expense of alternative CAPs in the market. The current investigation refers to a paper published by Oxera which underlines that a key factor to investigate when seeking to determine the impact of the loyalty-enhancing effect of zero-rated offers is '*the relationship between the end-user's data usage terms (such as the monthly allowance or data caps and the associated excess usage charges) and their demand for data*'. In this regard, Oxera underlines that '*the more limited the end-users' data allowance is (relative to their demand), the more likely it is that they will choose to consume the zero-rated CAP over rival offerings—i.e. the greater will be the concern of CAP foreclosure*'.

Preliminary investigations on mobile data usage patterns show that an end-user actively using mobile data services consumed an average of 12GB in 2017, which one could approximate to 1.0GB per month. Focusing however on consumption patterns for GO subscribers that are actively using mobile data services, the average consumption is ✂ ✂ in the same year. Meanwhile, it is observed that the lowest monthly data cap offered by GO in the market throughout 2017 was 200MB for pre-paid plans and 1GB for post-paid plans. This goes to suggest that, for post-paid subscribers, GO's zero-rated offer is not likely to foreclose rival CAP offerings from their choices, given that the lowest monthly data allowance is higher than the average mobile data requirements. In other words, assuming that mobile data consumption of post-paid end-users is done for music streaming purposes, the availability of the Music WildCard would not distort their demand for CAPs competing with say, Deezer and Spotify, considering that a substantial part of the data allowance would still be available for use to stream / download music from alternative CAPs to Spotify and Deezer.

The situation may be different in the case of pre-paid subscribers, given that their data allowance benchmarks below their average monthly data requirements. Nonetheless, the concern of CAP foreclosure here would depend on two assumptions that are unlikely to materialise in the short-to-medium term, namely that (i) all mobile data consumption is driven by music streaming / downloading requirements; and (ii) all pre-paid subscribers are on plans that allow for the 200MB data allowance.

Oxera's paper underlines that '*the foreclosure effect of the zero-rating offer will depend on the aggregate loyalty-inducing effect, which is based on the degree of the effect on an individual, multiplied by the number of people that fall under the offer (i.e. could experience the effect)*'.

In view of this the MCA considers that GO's zero-rating offer is not resulting in a sufficiently strong loyalty-inducing effect in favour of Spotify and Deezer, even in the case of pre-paid customers, and this for several reasons. Firstly, not all pre-paid subscribers are on plans with the 200MB data allowance and surely not all of them actually consume mobile broadband data for the sole purpose of streaming / downloading music from the CAPs outlined in Section 2 of this document. In fact, the latest MCA Consumer Perception Survey for mobile telephony carried out in 2017 shows that only 55% of end-users with a mobile subscription make active use of a mobile broadband data service. Furthermore, half of those saying that they actively use mobile data services also add that they do not use OTT-based services. Secondly, GO accounts for a 36% share of the local subscriber base, which also means that alternative CAPs to Deezer and Spotify have certainly no difficulty to reach the remaining 64% of the local mobile subscriber base.

Overall, the MCA considers that GO's Music WildCard may steer the choices of pre-paid mobile customers to consume data via GO's selected music streaming CAPs, given their lower data caps. This is not to say that the end-users' freedom of choice is being impacted negatively, at least at this juncture of market development.

Nevertheless, there are grounds to emphasise on the need to ensure that the zero-rated approach of service providers encompasses the widest selection possible when it comes to a category of apps.

For example, one course of action for an IAS provider to ensure the widest possible selection of zero-rated music streaming services would be to open up the zero rating offer to all content providers within a given category. An alternative means of action available to an IAS provider to reduce the impact of zero rating on the end-user would be to increase the data cap limits of the bundle associated with the offer.

On a final point, the MCA notes that GO's zero-rated Music WildCard app does not involve payments from Spotify and Deezer[9]. This is a particularly relevant point, in that, in the absence of any such payments, it cannot be plausibly argued that GO's zero-rated offer is meant to foreclose competition in the CAP market.

Criterion (v): Potential or existing circumvention of the aims of the Regulation

The purpose of the Regulation is described in the first recital of the Preamble: "This Regulation aims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. It aims to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation."

To this effect, the MCA reiterates its view that GO does not differentiate traffic management practices to give any form of preference to its zero-rated applications. Meanwhile, also in view of the various considerations throughout the current assessment, the general conclusion is that GO's Music WildCard is non-discriminatory with respect to end-user rights and other IAS providers.

The MCA also understands that new ways of using the Internet will emerge along the way, as has been the case for many years through the rapid growth of the use of the internet as a communications platform for an ever wider range of content and applications. However, this has to be done in view of maintaining the internet's

[9] At the time of preparing this paper, GO was only offering Spotify and Deezer in its zero rating offer and the MCA only has information related to Spotify and Deezer. The MCA would re-evaluate its position when further information about details about the existence of commercial agreements between GO and Amazon Music and Apple Music are available to the MCA.

function as an engine of innovation. To this effect, the MCA considers that GO's current approach to the zero-rating of music streaming / downloading has to be amended to ensure that there is no negative discrimination of music streaming / downloading of traffic from CAPs that are alternatives to Spotify, Amazon Music, Apple Music and Deezer.

5.3. Conclusion and proposed way forward on the Music WildCard offer

The MCA determines that GO's Music WildCard offer is generally can be allowed in line with the BEREC Guidelines and the Regulation when considering that the offer is temporary and the scale does not influence market dynamics. It is therefore recommended that GO is not prevented from offering the Music WildCard offer.

Nonetheless, the MCA deems it reasonable to take the following course of action in view of future developments:

1. GO is to provide the MCA with quarterly statistics to ensure that any changes in take-up of its zero-rated offers are immediately noted. This will allow the MCA to closely monitor market developments. Appendix 1 lists the information requested from GO.

2. Future zero-rated music streaming/downloading offers should be extended to all music streaming CAPs on the market. This approach is theoretically cost neutral to GO or any other IAS provider, since music traffic generated by a single user is not expected to depend on the platform delivering the content.

   GO's current approach to the zero-rating of music streaming / downloading has to be amended to ensure that there is no negative discrimination of music streaming / downloading of traffic from CAPs that are alternatives to Spotify, Amazon Music, Apple Music and Deezer.

3. In view of the recent addition of Amazon Music and Apple Music to the Music WildCard offer, the MCA reserves the right to request further information related to this development and reserves the right to express its views at a later stage if findings necessitate action.

Annex 1: Quarterly Information Request

In view of the conclusions listed in sections 4.3 and 5.3 of this paper, the MCA requests the following information to be provided to the MCA on a quarterly basis. GO to monitor quarterly. The information is to be provided to the MCA within four (4) weeks after each calendar quarter.

a) How many GO mobile subscribers, are registered to GO TVAnywhere?
b) How many of GO's mobile subscribers have registered to GO TVAnywhere Lite?
c) How many of GO's mobile subscribers are eligible for the Music WildCard offer?
d) How many of GO's eligible mobile subscribers have actually made use of the Music WildCard offer?
e) With reference to GO's Music Wildcard offer, does GO have any relationship with any of the content providers featuring in the offer.