

REDUCING CONSUMER CHOICE, IN THE NAME OF PRESERVING CONSUMER CHOICE¹

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In all supermarkets and shopping centers, from entering until leaving, we find offers of varying degrees of attractiveness: from discounts, products in promotion or free samples to test new features. It is something normal, to which we are used and which most people enjoy.

Can you imagine that one of these shopping centers, for example, Tesco or Walmart, was fined 200,000 Euros for allowing us to taste its “own brand” olives? It is very likely that the first reaction would be surprise; only then would we try to understand the reasons for such punishment. If we were told that this sanction is because that with such activity Tesco/Walmart was actually intending to reduce consumer choice, and that Tesco/Walmart should not be able to influence our behavior, perhaps the surprise would become indignation or even anger. It is hard to understand why Tesco/Walmart could be banned from letting us test their olives.

However, this is what has happened in the Netherlands with Vodafone, in the world of Internet. Vodafone offered the customers in that country the chance of watching HBO (well known by TV serials such as *Game of Thrones*) without deducting the data traffic consumed for this service from their monthly data allowance, something known as *Zero Rating*. The ACM, which regulates telecommunications in that country,

fined Vodafone on the grounds that this promotion reduces the choice of customers, as incredible as this reasoning may seem.

Unfortunately, the case of the Netherlands is not the exception anymore, and this trend threatens to spill over to the rest of the countries of the European Union and Latin America. For example, in mid-2014, the Chilean regulator banned an offer by Movistar that allowed clients to access Facebook through a Zero Rating scheme.

For its part, the European Union allows *Zero Rating* only if it does not lead to situations where end-users' choice and market competition is significantly reduced. Even if the European Commission indicates that these offers do not block competing content, and can promote a wider variety of offers for price-sensitive users encouraging them to use digital services², the fact remains that it will be NRAs (such as ACM in the

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² Telecoms Single Market Regulation. Roaming charges and open Internet: questions and answers. European Commission Fact Sheet, Brussels, 30 June 2015, page 5. http://europa.eu/rapid/press-release_MEMO-15-5275_en.htm

Netherlands) the ones deciding when those situations happen.

Zero Rating is a historically common commercial practice in the telco sector³, which has recently started to be used also in mobile access to Internet. Mobile data offers often consist of monthly fee for a certain maximum data amount (for example, 1 Gigabyte). Once the client exceeds this maximum, some operators block access to Internet for the rest of the month, but most only reduce the speed of the access⁴. Even after reaching the contracted limit, customers of the latter operators may still access e-mail or social networks albeit more slowly, but will not be able to listen to music or watch videos with a satisfactory quality, because these contents require large amounts of data (obviously, the user can continue accessing these contents without restriction through WiFi networks).

In any case, the existence of that data maximum in most mobile data offerings means that it might be attractive for the customer to access specific contents without the data consumed being counted in the monthly allowance, or once the cap has been exhausted.

Zero Rating can be used by telco operators to increase the appeal of its service (for example, by including certain applications or contents which do not eat data from the monthly allowance of the customer) or by content providers (for example, to

³ The most common example is the Freephone service, in which the caller can call for free to a number, being the receiver of the call the one who pays for it.

⁴ Of course, clients are usually given the option of paying a certain fee to keep using data services in regular conditions once the limit is reached

promote its contents, or because their business model is based on advertising). In the instance sanctioned by the AMC, the inclusion of HBO contents in the offer clearly makes the product sold by Vodafone more attractive; at the same time, HBO can present its product to the customer base of Vodafone without them consuming their valuable data allowance. Which of HBO and Vodafone in the end assumes the cost of the "free" data will depend on the bargaining power of each, which, in turn, will depend on the relative attractiveness of each product for customers: do people buy Vodafone to watch HBO, or is it HBO the one which profits from the customers base of Vodafone?

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There seems to be no case of consumer harm being caused by this practice. How is user choice limited by the possibility of watching HBO for free on his/her device through Vodafone network? On the contrary, it seems that the possibility of having free trials is welfare enhancing, as most people like to enjoy things without cost. It does not seem that watching *Game of Thrones* on their mobile without having to pay reduces social welfare. In fact, it opens an additional option for users with no extra cost for them. And if people

think watching HBO impoverishes them, they will always have the choice not to do it.

It seems that the underlying logic for ACM to ban *Zero Rating* was to prevent telco operators from choosing services and content instead of the user. From that point of view, it may also be understood the additional turn of the screw given by the AMC, which in the same decision bans telco operators from *influencing* the decisions of their clients.

So, it is to preserve the neutrality of the network, to impede that telco operators (instead of Society) choose winners and losers in the Internet world, that actual and potential Vodafone users in the Netherlands are not allowed to watch HBO for free. And for the same reason politicians want to prevent that users in other countries of the EU and Latin America see their choice limited by these seemingly beneficial offers.

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However, the truth is that, if they want to remain competitive and keep attracting customers, telco operators have no choice but to anticipate the data usage that people desire. Since network capacity is neither infinite nor easily expanded,

particularly in wireless access due to the need of spectrum, not all contents wanted by every person may be pushed through it, but only those that are more valued by the customers of each telco operator. The unenviable task of operators is to anticipate these preferences and try to meet them in a context of limited capacity. Which is, in essence, what every firm does with its available capacity, be it for carrying passengers around in airplanes or for displaying merchandise on the shelves in supermarkets.

As much as Vodafone wants, it would not be able to implement *Zero Rating* for every content, because it will need to somehow obtain funds to deploy and maintain its mobile network. If the *Zero Rated* contents or services are not those desired by people, Vodafone's sacrifice will have been useless and become a ruinous investment. Therefore, Vodafone has incentives to get it right, to allocate the available capacity to what people want.

The situation is similar if it is HBO who is paying Vodafone so that some of its (HBO) content is provided for free to Vodafone customers. It seems clear that Vodafone and its customers will profit from this type of agreement, and that Vodafone would happily accept similar arrangements with several other content providers. But this does not change the fact that the network capacity is limited, and that, therefore, in some moment, Vodafone will have to take undesirable decisions (even for him, who would clearly prefer not having to take them) to try to satisfy most of its customers, or otherwise risk losing them to other Internet access providers, if these adjust better to the contents desired by customers.

The only thing about what we can be sure is that Vodafone is the best placed to design their commercial offer for its own mobile network because if it wrongly proposes unpriced content, it will itself suffer the consequences through a loss of customers and a decrease on the use and the value of its assets. In this sense, Vodafone's incentives to get the right contents transmitted is more aligned with the interest of its customers than any political decision could ever be, because neither politicians nor regulators will lose an iota of value as a result of a bad decision, something that would actually happen to Vodafone.

Only thus can be understood the paradox of a regulator banning an offer that is obviously favorable to the customer. By banning zero rating, on the grounds of promoting choice, policymakers are removing the choice of receiving content for free.

Not only that: what would actually happen, especially if Vodafone would have been successful with this offer, is that the other operators in the market would have been obliged to react with new offers (be it Zero Rating or of another kind) to try to retain their customers. In turn, this would have once again increased the choice for users, and spurred a new wave of innovation in Vodafone and other operators. In this way, the usual virtuous circle of dynamic competition and innovation is achieved through the use of Zero Rating practices.

This also means that the decision of ACM to ban the Zero-Rated HBO service provided by Vodafone not only reduces the choice for users of that free content, but it also reduces it in dynamic terms, because competitors of Vodafone do not need to innovate for counteracting the effects of Vodafone offer (and do not forget that all operators would be

subject to the same pressure as Vodafone to get it right). Thus, as a consequence of ACM decision, fewer offers tend to appear in the market and hence less choice for the consumer is available.

In summary, the effect of banning Zero Rating is, in line with what common sense tells but contrarily to what the regulators seem to expect, the reduction of choice for end users, in both static terms (impossibility of accessing HBO for free from Vodafone network) and dynamic terms (less choice becomes available as competitors do not have to react to Vodafone's offer). Let us hope policymakers abandon this strange way of preserving user choice.