

**【Tentative Translation】**

**Guidelines on the Application of the Telecommunications  
Business Act for Zero-Rating Services**

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**Ministry of Internal Affairs and Communications**

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# 1 Purpose

## 1-1 Background

In Japan, within mobile communications in which a meter-rate charge system or a flat-rate charge with data cap system is applied, there are several Mobile Network Operators (MNO) and Mobile Virtual Network Operators (MVNO) that provide zero-rating services, which do not count use of predetermined applications and content as data usage.

Zero-rating and sponsored data are expected by some telecommunications carriers to become a financial resource for raising funds to cover the cost of augmenting infrastructure in response to increasing Internet traffic in addition to driving the differentiation of service content. They are also expected to lead to expanded options for consumers.

On the other hand, it has been pointed out in other countries that zero-rating can affect the options available to consumers, and studies are being conducted on the negative impacts that zero-rating can have. Such studies are even considering the prohibition of zero-rating services. (See Chapter 4 of the Study Group on Network Neutrality Interim Report.)

Thus, with great changes in the domestic and international environment surrounding the Internet, the Ministry of Internal Affairs and Communications (MIC) organized a “Study Group on Network Neutrality” (chair: MORIKAWA Hiroyuki, professor at the University of Tokyo; hereinafter the “Study Group”) in October 2018. The Study Group’s purpose is to study rules on so-called “network neutrality”; in other words, rules on how ISPs (Internet Service Providers, which include mobile telephone operators) handle Internet data traffic “fairly (indiscriminately).”

The Study Group noted the importance for telecommunications carriers and others concerned to secure “network neutrality” by respecting and guaranteeing the following four “users<sup>1</sup> rights regarding use of the Internet” so that the Internet can maintain the “openness” that has existed thus far and contribute to better social impartiality and fairness as the foundation for “Society 5.0.”

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<sup>1</sup> “Users” includes not only consumers but also business operators that provide various services through the Internet. When only “consumers” are being specified in these Guidelines, the word “consumers” rather than “users”, which include business operators, is used. (It should be noted that “general consumers” refer to ordinary consumers who possess general rather than detailed information and knowledge of services as well as consumers who have only an ordinary level of common sense.)

- (1) free to access contents and applications (Users are entitled to use the Internet flexibly and to access the contents and applications freely.)
- (2) free to provide each other with their contents and applications (Users are entitled to provide their contents and applications freely to other Users.)
- (3) free to use and connect terminals (Users are entitled to connect to the Internet freely through any terminal equipment that complies with the technical standards.)
- (4) free to use communication and platform services (Users are entitled to use communication and platform services fairly for appropriate prices.)

Furthermore, business practices and actions including zero-rating services by ISPs could be interpreted as outwardly restricting users' rights by, for example, restricting or prioritizing some Internet traffic, and as infringing the prohibition of unfair and discriminatory treatment stipulated in the Telecommunications Business Act (Act No. 86 of 1984; hereinafter the "Act"). Therefore, the Study Group studied the clarification of requirements allowed as rational measures and practices from the standpoint of securing predictability from the following five basic viewpoints.

- (a) Ensure fairness in network use
- (b) Ensure fairness in network cost sharing
- (c) Realize consumers' choice based on sufficient information
- (d) Ensure reliable and stable telecommunication services through development of a sound competitive environment (including prevention of unfair influence by dominant business operators across the layer)
- (e) Promote innovations and sustained network investments

A point of discussion presented in the Study Group was as follows: "Zero-rating and sponsored data are expected to have positive effects such as promoting competition in the communication layer by contributing to acquiring users, and encouraging users to use contents. However, negative effects are also expected: telecommunication carriers may influence competition of content providers (selecting winners); if telecommunication carriers with market power and major content providers established exclusive relationship, it will restrain competition in the two layers."

The "Study Group on Network Neutrality Interim Report," which was prepared based on discussions by the Study Group over the course of eight sessions (released on April 10, 2019; hereinafter the "Interim Report"), states with regard to zero-rating services "Zero-rating and sponsored data are emerging services. Uniform prohibition of such business practices is not advisable. It is effective to present certain criteria from the viewpoint of ensuring predictability, then examine and analyze individual cases and address problem cases ex post facto based on the Telecommunications Business Act, etc." In light of this, the Study Group requests that the MIC make the following responses.

## Chapter 6: Policy Initiatives in the Future

### (ii) Formulation of guidelines concerning zero-rating

In order to increase predictability and create an environment where telecommunication carriers and content providers can provide zero-rating and other services in proper and flexible partnership, the MIC will compile and operate “Interpretation guidelines for application of the discipline of the Telecommunications Business Act regarding provision of zero-rating” (including matters concerning information disclosure to consumers) with participation of parties concerned near the end of the year.

Receiving the recommendations of the Interim Report, the MIC established a “Working Group on Rules for Zero-Rating Services” (Chair: OHASHI Hiroshi, professor at the University of Tokyo; hereinafter the “WG”) under the Study Group in July 2019. The WG studied rules that would help secure fair competition among providers, fairness in the burden of expenses, and the appropriate provision of information to users in order to create an environment where telecommunication carriers and content providers can provide zero-rating and other services in proper and flexible partnership.

To ensure the above-mentioned “users’ rights regarding the use of the Internet,” and based on the studies of the Study Group and WG that were conducted from the standpoints of maintaining and developing an Internet ecosystem to realize innovations and sustained network investments and of promoting sound competition within and among layers, the MIC established the application of the Act with regard to zero-rating service in the form of guidelines and presented the guidelines to the public.

### 1-2 Purpose and positioning of the Guidelines

The purpose of the Guidelines is to promote understanding among concerned businesses, etc. (not limited to telecommunications carriers that provide [or intend to provide] zero-rating services, etc. but also including businesses that provide content, applications, and platforms for zero-rating services, etc., as well as consumers and others) by clarifying the application of the Act with respect to acts conducted by telecommunications carriers that provide zero-rating services, content providers (businesses that provide content and applications to consumers), and platform providers (businesses that provide platforms for servers, etc. for content distribution to content providers); to ensure users’ rights; and to realize a fair competitive environment as well as the maintenance and development of the Internet ecosystem.

Specifically, the Guidelines aim to ensure the appropriateness, fairness, and transparency of conditions for providing zero-rating services and achieve greater transparency in the operation of the Act and other regulations by arranging, classifying,

and presenting examples of desirable actions as well as acts that could be subjected to the “order to improve business activities” provided in Article 29 of the Act, etc.

In addition, although the Guidelines arrange, classify, and present examples of acts concerning zero-rating services that are assumed at the present time to be problematic particularly in terms of the Act, it must be remembered that the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947); “Guidelines for Promotion of Competition in the Telecommunications Business Field” (revised on January 9, 2018), which give examples of actions that may be problematic in terms of the Act; and the “Guidelines for Consumer Protection Rules in the Telecommunications Business Act,” which explain the content of consumer protection-related provisions in the Act and present actions that telecommunications carriers should take voluntarily in connection with those provisions, also naturally apply with respect to zero-rating services.

Moreover, the “actions that may be problematic” that are presented in the Guidelines are meant as examples only. Therefore, it must be remembered that judgment on whether a specific individual activity by a telecommunications carrier, etc. infringes on related provisions of the Act should be made on a case-by-case basis with reference to related provisions and, also, that there may be cases in which an activity will become subject to an order to improve business activities, etc., even if it is not an activity that is mentioned in the Guidelines.

In the future, the MIC will, from the standpoint of further ensuring a fair competitive environment and user benefit, respond to changes such as the emergence of new business models and development of new services and also review the Guidelines appropriately and flexibly based on the effects that zero-rating services have on the telecommunications market and the content/ platform market.

The Guidelines were prepared with the provision of zero-rating services in mobile communications in which a meter-rate charge system or a flat-rate charge with data cap system is applied in mind. However, it is expected that the Guidelines will be used as a reference even when equivalent services are provided in fixed communication in the future.

### 1-3 Definition and coverage of the Guidelines

The zero-rating services covered by the Guidelines are as follows.<sup>2</sup>

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<sup>2</sup> There are cases in which the use of customer support pages that telecommunications carriers set up for their customers and similar services is handled in a manner in which it is not counted as

- Data communication services that, where a meter-rate charge system or flat-rate charge with data cap system is adopted, do not count (or count at a discount) use of predetermined content, applications, or platforms (hereinafter “content, etc.”) in data usage related to billing. (This is regardless of whether or not there is consideration payment from a content provider/ platform provider to a telecommunications carrier.)

## 1-4 Study considerations

### (1) Promotion of MNO and MVNO competition

Although the use of radio waves is indispensable to the operation of mobile communications business, the frequency bands that can be used in mobile communications business are limited. Thus, in the interest of realizing the sound development of mobile communications business sectors by ensuring the fair and efficient use of radio waves and promoting competition among providers, the MIC has endeavored to realize a fair competitive environment between MNOs and MVNOs by, for example, promoting making it available for MVNOs to rent MNOs’ networks, because only a limited number of providers can become MNOs, based on the provisions of the Act and the Radio Act (Act No. 131 of 1950).

Interconnection to MNOs network that has been allocated frequency is necessary for MVNOs business operation. Thus, in light of the strong bargaining power that businesses controlling a relatively large share have in interconnection negotiations, regulations concerning the prior notification of contracts for interconnection and other matters are established with respect to interconnection charges, the terms and conditions of interconnection, etc. when MNOs that have Category II designated telecommunications facilities provide networks to MVNOs. Additionally, it is established that interconnection charges under the Category II designated telecommunications facilities system must not exceed the sum of the reasonable costs plus reasonable profit under efficient management, dividing it by demand. In the case of data transmission switching functions, total line capacity calculated rationally from data transmission volume is used as demand.

In view of such circumstances, maintaining a fair competitive environment for the provision of zero-rating by MNOs and MVNOs is also required. For example, it is

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data usage. Such pages and services are necessary for users to use telecommunications services smoothly, and the possibility that they will cause a problem in terms of competition, etc. with other content providers and platform providers is low. Additionally, because telecommunications carriers are parties in communication, their checking of packets does not cause problems in terms of the secrecy of communication. Thus, such cases are excluded from the scope of the Guidelines.

thought that if, within a zero-rating service provided by an MNO or MVNO that is a corporation with a specific affiliation to an MNO, network-related expenses (e.g., to secure line capacity) that would result in a loss if internal assistance or intra-group assistance were not provided are made, other MVNOs would be placed in a disadvantageous competitive position in terms of speed and other forms of quality. Therefore, monitoring from the standpoint of securing a fair competitive environment is necessary.

(2) Relationship between content providers/platform providers and telecommunications carriers

For content providers, being covered by zero-rating services can be expected to increase consumer access; however, it is not easy for small- and medium-sized content providers to negotiate with telecommunications carriers on their own. Thus, if zero-rating-eligible platforms are already available, it should be expected that the number of content providers desiring to use them will increase, and, as a result, the bargaining power vis-à-vis telecommunications carriers of the platform providers possessing a lot of attractive content will likely increase. Moreover, if the coverage of zero-rating services is concentrated in certain areas of content, the bargaining power vis-à-vis telecommunications carriers of the content providers having involvement in those areas will also likely increase.

Accordingly, attention is needed here from the standpoint of securing healthy competition in the telecommunications market and content/platform market.

(3) Relationship between zero-rating services and bandwidth control, etc.

Although the rate of growth of Internet traffic in Japan is slowing, it is still showing an annual rate of increase of between 20 and 40%. It is expected that content will continue to become more enriched and diversified in the future. Therefore, in order to maintain and improve the quality of communication, it is necessary for the telecommunications carriers to continue to take measures including continuous investment in network equipment.

Under such circumstances, some telecommunications carriers are implementing bandwidth controls during periods of network congestion and other times. While based on the general principle that “ISPs and others should cope with traffic increase by expanding and reinforcing network facilities including backbone lines and may implement bandwidth controls only in exceptional circumstances,” these controls, etc., are implemented for the purpose of ensuring stable network operation and telecommunications quality.

It is anticipated that the provision of zero-rating services will lead to increased



traffic associated with the use of covered content, etc. However, there are some cases among overseas carriers whereby carriers implement bandwidth controls, etc., for covered content, etc., only or all content, etc., including that not covered by zero-rating services, using such means as “throttling” (controlling bandwidth), and so-called “lossy compression” (lowering the quality of still images and other content below a certain level). In light of this, clarifying thinking in Japan with respect to such cases before they emerge should prove beneficial.

First, there are users who will be affected by bandwidth controls, etc. (excluding bandwidth controls, etc., implemented temporarily due to network congestion or other cause; the same applies below within 1-4.).<sup>3</sup> With regard to the implementation of bandwidth controls, etc. in the provision of zero-rating services, implementing the above-mentioned controls on zero-rating service users only and in a manner that does not cause loss of quality for non-zero-rating service users is not significantly problematic. However, if bandwidth controls, etc., are implemented indiscriminately on zero-rating service users and non-users, this will bring a loss of quality even for non-users who do not enjoy the benefits of zero-rating services. This presents a problem in terms of fairness in use between both user types.

Next, there is content, etc. that is subject to bandwidth control, etc.. If a telecommunications carrier implements bandwidth controls, etc., solely on content, etc. covered by zero-rating services with the prior consent of zero-rating service users, content providers/platform providers, this is not a problem. However, if it implements bandwidth controls, etc. on content that also includes content, etc. not covered by zero-rating services without the prior consent of content providers/platform providers, this may result in a loss of quality (e.g., reduced picture quality of videos or still images, etc.) even for content providers/platform providers who do not enjoy the benefits of zero-rating services. This is problematic from such standpoints as maintaining fairness among content providers/platform providers and preserving the integrity of copyrighted works.

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<sup>3</sup> The Association on Guidelines for Traffic Management formulated “Guidelines for Traffic Management” that concern bandwidth controls, etc., during times of network congestion.

## 2 Main Regulations Applied and Actions that may be problematic

### 2-1 Relationship between telecommunications carriers and content providers/platform providers, etc.

#### 2-1-1 Main regulations of the Telecommunications Business Act that are applied with regard to the conclusion of contracts, etc. by telecommunications carriers and other providers

##### (a) Fairness in use (prohibition of unfair and discriminatory treatment) (Article 6 of the Act)

It is established that telecommunications carriers must not engage in unfair and discriminatory treatment with regard to the provision of telecommunications services (including the conclusion of contracts). In this case, “unfair and discriminatory treatment” means engaging in unfair and discriminatory treatment directed at certain persons. Creating distinctions in treatment based on reasonable grounds is not prohibited.

For example, the setting of charges--including whether to charge based on data usage (meter-rate charge system) or to charge a uniform amount regardless of data usage (flat-rate charge system)--is left to the business decision of the carrier. No particular problems arise so long as the method of calculating charges is proper and explicit, no unfair and discriminatory treatment takes place, and the interests of users are not impaired.

On the other hand, zero-rating services apply different handling of data usage counting depending on the content, etc. that consumers use, and consequently they handle consumers differently depending on the content, etc. that the consumers use. Accordingly, when a telecommunications carrier will provide a zero-rating service, it must be verified that such discriminatory treatment is based on reasonable grounds.

Additionally, if a telecommunications carrier does not establish reasonable and clear selection criteria for content, etc. covered by zero-rating services or has established such criteria but not publicized them, the likelihood that selection is being made arbitrarily and, as a result, unfair and discriminatory treatment of certain consumers is taking place rises.

An instance of unfair and discriminatory treatment falls under the requirements of an order to improve business activities (Article 29 paragraph (1) item (ii) of the Act).

(b) Order to improve business activities (Article 29 paragraph (1))

In the following cases, the Minister for Internal Affairs and Communications may order telecommunications carriers to improve the means of conducting their business activities, etc., to the extent necessary for ensuring the interests of users or the public interest.

- If the telecommunications carrier treats certain persons in an unfair and discriminatory manner (item (ii))
- If the charges and other terms and conditions for the provision of the telecommunications services provided by the telecommunications carrier lead to unfair competition with other telecommunications carriers or are extremely inappropriate in light of social and economic circumstances, and thereby impair the interests of users (item (v))
- If the telecommunications carrier hinders other telecommunications carriers from properly conducting their operations by treating certain telecommunications carriers in an unfair and discriminatory manner in interconnecting or sharing telecommunications facilities or in providing wholesale telecommunications services or by conducting other unfair managements related to these operations, and is thereby likely to seriously impair the public interest (item (x))
- If the telecommunications carrier does not manage its operations properly and reasonably, and is thereby likely to hinder the sound development of telecommunications or securing convenience for the people (item (xii))

Judgments on what constitutes the extent necessary to ensure the interests of users or the public interest in orders to improve business activities pertaining to the provision of a zero-rating service should take into account the impact that the provision of the zero-rating service has on competition and consumer choices in the telecommunications market and content /platform market. Specifically, said judgments should be made with comprehensive consideration given to the position of the telecommunications carrier as well as content provider/platform provider in relevant markets (e.g., position in terms of market competition, dependence on other telecommunications carriers' networks, etc.), actions to secure transparency and fairness for users, details of charge plan (including the setting [or non-setting] of additional charges relating to service provision, etc.), the amount of data traffic consumed by using the content, etc., and similar matters.

For example, if a telecommunications carrier with users of a certain number or more includes only certain content, etc. having many users in the content market in the coverage of zero-rating services and excludes other content without a rational reason, it is considered highly likely that the impact of this act on market competition, the

interests of users, etc. will be larger than acts by other carriers.

Additionally, if a charge plan that includes zero-rating service is completely meter-rate, or if a low data cap applies even if the charge plan is flat-rate, it becomes more likely that users will use the content, etc. covered by the zero-rating service, and that, in effect, this will reduce their opportunities to use other content, etc. Likewise, if the amount of data traffic volume consumed is large as a result of using covered content, etc., it is highly likely that users will put priority on using covered content, etc., rather than similar content of the same type that is not covered. This will consequently have a large impact on the selection of content, etc., as, for example, users will be strongly led toward covered content, etc.

Accordingly, decisions on the issuance of orders to improve business activities will be made after fully ascertaining and studying such factors concerning the provision of zero-rating services in order to determine impacts on the interests of users, public interest, etc.

It should be noted that when it is recognized that a violation of such an order impairs the public interest, said violation may become grounds for revoking the “registration of telecommunications business” provided in Article 9 of the Act and “approval of business” provided in Article 117 paragraph (1) of the Act (Article 14 paragraph (1) item (i) and Article 126 paragraph (1) item (iii) of the Act).

(c) Regulations concerning carriers running Category II designated telecommunications facilities (Article 30, Article 32, Article 34, and other provisions of the Act)

The Act provides that a telecommunication carrier running telecommunications facilities must, from the standpoint of ensuring the public interest, accept requests from other telecommunications carriers to interconnect telecommunications facilities, except when the interconnection is likely to hinder telecommunications services from being provided in a smooth manner and when the interconnection is likely to unreasonably harm the interests of the requested telecommunications carrier (Article 32 of the Act).

Particularly in the case of mobile communications business, because of the difficulty of entering the business due to the limited nature of radio waves and other factors, an oligopolistic market is formed. In such a market, it could be said that telecommunications carriers running facilities that accommodate a relatively large number of mobile telephones and other terminals have strong bargaining power in interconnection negotiations with other telecommunications carriers and thus have an advantageous position. Article 34 of the Act ensures the appropriate and smooth interconnection with the telecommunications facilities of other telecommunications

carriers by designating the transmission line facilities of telecommunications carriers whose share of mobile telephones and other terminals in a service area exceeds a certain percent (10%) (Category II designated telecommunications facilities), and obligating MNOs that run those facilities (hereinafter, "Category II carrier") to establish, notify, and announce general conditions of contracts concerning those facilities (Article 34 paragraph (2) and paragraph (5) of the Act).

The Act also stipulates that the Minister for Internal Affairs and Communications may order changes to a general conditions of contract of a Category II carrier when, for example, the interconnection charge exceeds the amount of money calculated by the means specified as that for calculating reasonable costs plus reasonable profits, and when the terms and conditions of interconnection are disadvantageous in comparison with those applicable when the MNO interconnects its own facilities (Article 34 paragraph (3) of the Act).

Moreover, the Act prohibits certain acts (e.g., prohibition of use of information that came to the telecommunication carrier's knowledge in interconnecting its telecommunication facilities with those of other telecommunications carriers for purposes other than pertinent operations, prohibition of treatment of certain telecommunications carriers in a discriminatory manner, etc.) by persons among Category II carriers who are designated by the Minister for Internal Affairs and Communications as being dominant carriers in the market. If such acts are committed, the Act states that the Minister for Internal Affairs and Communications may order the telecommunications carrier to suspend or change that act. (Article 30 paragraph (3) and paragraph (5) of the Act). Additionally, from the standpoint of monitoring and deterring unfair internal mutual assistance, the Act establishes that said telecommunications carriers must announce the status of income and expenditure for their telecommunications services and other accounting particulars (Article 30 paragraph (6) of the Act).

It should be noted that when it is recognized that a violation of an order to suspend or change an act issued by the Minister for Internal Affairs and Communications impairs the public interest, said violation may become grounds for revoking the "registration of telecommunications business" provided in Article 9 of the Act and "approval of business" provided in Article 117 paragraph (1) of the Act (Article 14 paragraph (1) item (i) and Article 126 paragraph (1) item (iii) of the Act).

(d) Obligation to provide services to approved telecommunications carriers (Article 121 and other provisions of the Act)

Telecommunications carriers that operate or intend to operate a telecommunications business providing telecommunications services by running telecommunications facilities must their so-called public utility privileges, which include the right to use land, etc. to lay wires and cables, approved by receiving authorization from the Minister for Internal Affairs and Communications based on the public nature and other factors concerning that business.

To ensure the proper use of telecommunications facilities that were installed using such privileges, the Act establishes that telecommunications carriers that have been approved must not refuse to provide telecommunications services related to said business without justifiable grounds, and that, if an approved telecommunications carrier violates this provision, the Minister for Internal Affairs and Communications may order the approved telecommunications carrier to improve the means of conducting its operations or take other measures, to the extent necessary for ensuring the interests of users or the public interest (Article 121 of the Act).

It should be noted that when it is recognized that a violation of an order to suspend or change an act that was issued by the Minister for Internal Affairs and Communications impairs the public interest, said violation may become grounds for revoking the “registration of telecommunications business” provided in Article 9 of the Act and “approval of business” provided in Article 117 paragraph (1) of the Act (Article 14 paragraph (1) item (i) and Article 126 paragraph (1) item (iii) of the Act).

## 2-1-2 Actions that may be problematic in terms of the Telecommunications Business Act

### (a) Regarding the relationship between telecommunications carriers and content providers/platform providers

If an act like those described below takes place with regard to the provision of zero-rating services in the relationship between a telecommunications carrier and content provider/platform provider, the MIC may have the telecommunications carrier that committed the act report on their business (Article 166 paragraph (1)) and may conduct an inspection. (In particular, the need for an inspection rises when a telecommunications carrier with users of a certain number or more provides zero-rating services in cooperation with a content provider /platform provider, as this act can have a much larger impact on not only competition in the content/platform market but also

the telecommunications market as well as on consumer choices.<sup>4)</sup>

After conducting an inspection, the MIC will comprehensively consider the act-related impact on competition in the telecommunications market, etc., and on consumer choices with attention to the position of the telecommunications carrier as well as content provider/platform provider in relevant markets, the carrier's actions to secure transparency and fairness for users, details of its charge plan, the amount of data traffic consumed by using the content, etc., and similar matters, and may implement an order to improve business activities if necessary.

- A telecommunications carrier, without a rational reason, includes only certain content, etc. in coverage by zero-rating services and excludes other content, etc. in the same category,<sup>5</sup> and thus handles consumers discriminatorily as a result. (Article 29 paragraph (1) item (ii) and other provisions of the Act)
- A telecommunications carrier substantially excludes small- and medium-sized providers, etc. with poor capital strength by demanding an excessive cost burden without a rational reason on content providers/platform providers as a condition for coverage of content, etc. in zero-rating services, and thus handles consumers discriminatorily as a result. (Article 29 paragraph (1) item (ii) and other provisions of the Act)
- A telecommunications carrier excludes content, etc. from its own zero-rating services without a rational reason because “the content, etc. of the content provider, etc., is covered by, or desires to be covered by, another telecommunications carrier's zero-rating services.” (Article 29 paragraph (1) item (xii) and other provisions of the Act)

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<sup>4</sup> The MIC will consider conducting an inspection after comprehensively considering the act's impact on competition in the telecommunications market, etc. (However, for example, under Article 27 paragraph (3) item (i) of the Act, among the telecommunications carriers that can be designated as persons to which the provisions of paragraph (2) of the same Article apply, MVNOs whose percentage of the number of users of mobile telecommunications services within the total number of users of mobile telecommunications services does not exceed 0.7% are considered to have little impact on the proper competitive relationship among telecommunications carriers and are thus stipulated as being exempted [MNOs and corporations with a specific affiliation to it are not exempted.]

<sup>5</sup> In particular, a telecommunications carrier with users of a certain number or more must provide the same opportunities to providers who provide content, etc. that belongs to the same category in order to avoid having an excessive impact on the consumers' selection of content, etc., and to avoid hindering sound competition in the content/platform market. For example, if, in the selection of covered content, etc., such a carrier substantially excludes small- and medium-sized providers, etc., who provide content, etc., belonging to the same category based on the number of users of content, etc., this is thought to be not acceptable as a “rational reason.”

- A telecommunications carrier prohibits a provider who provides content, etc. that is covered by the carrier's own zero-rating services or who desires to gain coverage of those services by the carrier's own zero-rating services from getting that content, etc. covered by the zero-rating services of another telecommunications carrier without a rational reason. (Article 29 paragraph (1) item (xii) and other provisions of the Act)

(b) Regarding the relationship between MNOs and MVNOs that provide telecommunications services under contracts to lease those MNOs' telecommunication lines, etc.

If an MNO conducts an act like those described below against an MVNO with regard to the provision of zero-rating services, the MIC may have the telecommunications carrier that committed the act report on their business (Article 166 paragraph (1)), conduct an inspection, and, if necessary, implement an order to improve business activities, etc.

- In providing interconnection or wholesale telecommunications services to telecommunications carriers that wish to provide zero-rating services, a telecommunications carrier treats a certain telecommunications carrier discriminatorily by, for example, setting interconnection or wholesale charges that are high compared to the charges it levies on its own concerned providers and others, thereby hindering the proper execution of business by that telecommunications carrier. (Article 29 paragraph (1) item (x) and other provisions of the Act)
- In interconnection with an MNO that is a Category II carrier, the MNO substantially prohibits or limits MVNOs' provision of services that are similar to the zero-rating services it provides to its own users by setting disadvantageous interconnection conditions compared to when the MNO interconnects its own telecommunication facilities with Category II designated telecommunications facilities. (Article 34 paragraph (3) of the Act)
- An MNO refuses to provide interconnection or refuses to provide telecommunications services relating to its approved telecommunications business for the reason that the MVNO is attempting to provide zero-rating services<sup>6</sup> (and for no other justifiable reason). (Article 32 and Article 121 paragraph (1) of the Act)

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<sup>6</sup> It is considered that claiming that the MVNO's provision of zero-rating services may hinder the smooth provision of telecommunications service or may unfairly harm the MNO's profits is not acceptable as a justifiable reason.



- A telecommunications carrier sets charges for consumers that are significantly below reasonable costs in order to eliminate or weaken a competing carrier that will provide zero-rating services that are similar to its own services. (Article 29 paragraph (1) item (v) and other provisions of the Act)

## 2-2 Relationship with the “secrecy of communications”

### 2-2-1 Basic concept concerning the secrecy of communications

#### (1) Regulations concerning protection of the secrecy of communications

The Act stipulates the protection of the secrecy of communications handled by telecommunications carriers based on the provisions of Article 21 paragraph (2) of the Constitution (protection of the secrecy of communications) (Article 4 paragraph (1) of the Act).<sup>7</sup>

Punishments is applied to violations of the secrecy of communications, and those punishments are increased when a telecommunications carrier violates said secrecy (Article 179 of the Act).

Additionally, when it is deemed that there is a hindrance in ensuring secrecy of communications with respect to the telecommunications carrier’s means of conducting operations, an order to improve business activities will be issued by the Minister for Internal Affairs and Communications (Article 29 paragraph (1) item (i) of the Act).

#### (2) Scope of the secrecy of communications

The secrecy of communications protects content and metadata of each communication from violation. Metadata of communication, which are any information that makes it possible to presume existence and/or content of communications, include dates and times and locations of communication, r identification information such as users’ names, addresses/whereabouts, telephone numbers, and so on (i.e. number of communications, traffic volume; header information and other components; the existence or nonexistence of communication, etc. )

#### (3) Regarding violations of the secrecy of communications

- Three violation patterns

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<sup>7</sup> Additionally, from the standpoint of maintaining users’ trust in telecommunications business, Article 4 paragraph (2) of the Act imposes an obligation to protect secrecy that goes beyond the provisions of paragraph (1) as an obligation in the course of the duties of persons who are engaged in telecommunications business.

Acts that violate the secrecy of communications are broadly classified into three patterns: “Unauthorized perception” “Unauthorized use”, and “Unauthorized disclosure”. Unauthorized perception is perceiving a secret of communication activity for the purpose of knowing it. “Unauthorized use is using a secret of communication contrary to intention of a communication party (a sender and/or a recipient of the communication ). Unauthorized disclosure is leave a secret of communication in a state that others available.

Mechanisms that mechanically or automatically detect communications that match certain conditions and through which said communications are mechanically or automatically processed for use against the intent of the parties in communications may also be applicable in “Unauthorized perception” and “Unauthorized use” as they are used here.

- Consent of parties in communications

When the valid consent of the parties in communication exists, the use of secrecy of communications is not a violation. With regard to this point, the existence of valid consent in principle refers to cases in which there are users’ recognition and acknowledgement of the violation of secrecy of communication, and therefore specific and clear consent<sup>8</sup> is required. The reason for this is that, by nature, general conditions of contracts establish items for which the parties’ consent can be presumed and the consent that abandons the advantage of secrecy of communication is normally not compatible with that nature. It is also because comprehensive prior consent is provided based on predictions of future fact and thus becomes vague in terms of targets and scope.

However, because telecommunications carriers can generally assume that users will approve violations of the secrecy of communications, in cases in which it cannot be stated that there is no compatibility with consent based on the contract, etc., and there is no danger that unforeseen disadvantage to users will occur, they can make the claim as a matter of exception that valid consent exists, even when only comprehensive prior consent based on a contract, etc., exists. In making the judgment on whether or not it can be said that a danger of unforeseen disadvantage does not exist, it is necessary to consider whether or not requirements have been satisfied, including those that the content of consent can be changed at any time after the user has provided consent in general conditions of contracts, etc.; that other terms and conditions are the same regardless of the existence of consent (or the change); and that the content of the general

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<sup>8</sup> Specifically, this refers to “specific” consent given when the person giving consent recognizes that the consent concerns the handling of the secrecy of communication and consent for which the fact of consent is externally “clear,” such as consent given by operation on a screen or in a document.

conditions of contracts etc., that ex post facto changes to the content of consent can be made and how to make those changes have been adequately made known and explained to users.

- Justifiable reasons for noncompliance with the law

Even when the consent of parties in communication does not exist, violations of the secrecy of communications are permitted when the act is a case with justifiable reasons for noncompliance with law in the sense that (1) the act corresponds to an act performed in accordance with laws and regulations, (2) the act corresponds to an act committed in the pursuit of lawful business, or (3) an act corresponding to self-defense or averting present danger.

Of these, for an act's illegality to be rejected as an (2) act committed in the pursuit of lawful business, the act must be recognized in terms of (1) legitimacy of purpose, (2) necessity of act, and (3) appropriateness of means when viewed with respect to the smooth provision of telecommunications services for all citizens, who are its users, based on the special nature of telecommunications services used by the entire nation as social infrastructure.

Examples of acts committed in the pursuit of lawful business include the act of checking communication history to the minimum degree necessary for charging and billing; acts necessary to maintain and continue telecommunications business, such as routing control using communications header information; and measures necessary for the stable operation of networks, such as bandwidth controls of large volume communications.

#### 2-2-2 Zero-rating services and the secrecy of communications

When telecommunications carriers provide zero-rating services to consumers, it is necessary to identify whether data communications are related to content, etc. covered by zero-rating services, and thus organizing cases that violate the secrecy of communications at that time is required. However, in this case, non-users of zero-rating services have no relationship with the provision of zero-rating services. Thus, the act of checking packets relating to communications to identify whether they involve content, etc. covered by zero-rating without distinguishing between users and non-users of zero-rating services violates the secrecy of communications for not only zero-rating service users but also non-users and cannot be described as having necessity or appropriateness. Consequently, it is considered that said act cannot be recognized as an act committed in the pursuit of lawful business.

Accordingly, when telecommunications carriers provide zero-rating services, it is necessary to organize the relationship with the secrecy of communications for each of

(1) the use of information pertaining to the secrecy of communications in order to distinguish zero-rating service users and non-users in the communications of subscribers of the telecommunications carrier, and (2) the use of information pertaining to the secrecy of communication to ensure that data communications relating to covered content, etc. are not counted in data usage in the case of users of zero-rating services.<sup>9</sup>

With regard to (1), the act of using those items among information pertaining to the secrecy of communications to the minimum degree necessary for the purpose of charging and billing in accordance with the plans and options that subscribers sign up for has been recognized as an act committed in the pursuit of lawful business heretofore. Likewise, the act of using items among information pertaining to the secrecy of communications to the minimum degree necessary to identify whether or not a subscriber is a zero-rating services user in order to distinguish zero-rating service users and non-users is necessary and appropriate for charging and billing. Thus, its illegality is rejected as an act committed in the pursuit of lawful business. Nevertheless, even in such cases, that telecommunications carriers will use items among information pertaining to the secrecy of communications to the minimum degree necessary should be properly made known and explained to consumers in terms of the scope and content of the information to be used, the purpose of its use, and other matters.

In the case of (2), zero-rating services are provided in response to telecommunications carriers' business strategies, consumer demand for lower communications charges, etc., and therefore are not necessarily essential from the standpoint of providing smooth telecommunications services to all citizens, who are users of telecommunications services. Thus, the act of using information pertaining to the secrecy of communications for the purpose of identifying the content, etc. used by zero-rating service users in order to provide those services cannot be recognized as an act committed in the pursuit of lawful business. For this reason, when implementing (2), it is necessary to obtain specific and clear consent from individuals after adequately explaining the scope and content of the information to be used, the purpose of its use, and other matters to

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<sup>9</sup> Forms of provision that violate the secrecy of communications to a lesser degree may appear in the future as a result of advancements in technical development, etc. However, the relationship with the secrecy of communications must be studied on a case-by-case basis.

consumers who intend to use zero-rating services.<sup>10 11</sup>

### 2-2-3 Actions that may be problematic in the relationship with the secrecy of communications

The relationship with the secrecy of communications in telecommunications carriers' provision of zero-rating services can become problematic in the following cases.

- When specific and clear consent is not obtained from individual consumers who intend to use a zero-rating service. Also, when the scope and content of information pertaining to the secrecy of communications to be used, the purpose of its use, and other matters are not clearly and adequately explained, even if consent was obtained.
- When identifying the use of content, etc. covered by zero-rating services even by non-users without distinguishing zero-rating service users and non-users.
- When using information pertaining to the secrecy of communications to a degree that exceeds the scope of minimum degree necessary that is recognized for an act committed in the pursuit of lawful business when distinguishing between zero-rating service users and non-users. Also, when using information pertaining to the secrecy of communications that is intended for the purpose of distinguishing between zero-rating service users and non-users for a purpose other than said distinguishing.
- When using information pertaining to the secrecy of communications that is intended for the purpose of identifying the content, etc. that zero-rating service users use in a way that goes beyond the scope and purpose for which the users have provided consent.

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<sup>10</sup> If a telecommunications carrier that makes only its own content, etc., available in the coverage of its zero-rating services analyzes traffic of zero-rating service users from the standpoint of a party in communication and removes it from counting in data usage, there is no issue in terms of the relationship with the secrecy of communications (this is limited to cases in which communications based on the content, etc., is completed between the telecommunications carrier and the user). However, whether making only its own content, etc., available in the coverage of its zero-rating services is problematic in terms of fairness in use and competition is a question that will be judged comprehensively based on 2-1.

<sup>11</sup> Even if such consent is obtained, given the fact that the secrecy of communications is protected in the Constitution as a basic human right as well as the importance of such protection, information pertaining to the secrecy of communications that will be used should be limited to minimum degree necessary to provide zero-rating services.

## 2-3 Regarding dealings with consumers

### 2-3-1 Main provisions of the Telecommunications Business Act pertaining to the protection of consumers' interests

- (1) Relating to obligation of explanation prior to contract (Article 26 of the Act [including cases applying mutatis mutandis in Article 73-3 of the Act; hereinafter the same])

Pursuant to the provisions of Article 26 of the Act, a telecommunications carrier or notifying person entrusted with intermediation, etc. (hereinafter referred to as “telecommunications carrier, etc.” in 2-3) is obligated to explain an outline of the terms and conditions that consumers should have at least a minimum level of comprehension when intending to conclude a contract (or intermediation, etc.) for the provision of telecommunications services (obligation of explanation).

The telecommunications services that are subject to the obligation of explanation are designated by the Minister for Internal Affairs and Communications based on Article 26 paragraph (1) of the Act. In the case of those services that are mobile communications services (telecommunications services provided by using transmission-line facilities interconnected to mobile terminal facilities at one end), mobile phone terminal services (services with audio that are provided to mobile phone terminals, including smartphones) and dedicated wireless Internet services (Internet interconnection services that are provided to dedicated data communications terminals, such as tablet computers and mobile Wi-Fi routers), etc. are designated as services particularly requiring the protection of users' interests with consideration for service content, charges and other terms and conditions, scope of users, and conditions of use. Therefore, because zero-rating services are provided within the charge plans, etc. of mobile communications services, it is necessary to explain the details and other particulars of the zero-rating services as part of the mobile communications services' terms and conditions.

A telecommunications carrier, etc. that provides zero-rating services must explain the following items to persons<sup>12</sup> who intend to receive zero-rating services when the telecommunications carrier, etc. intends to conclude a new contract or amended contract or conduct intermediation, etc. for it. (Basic items requiring explanation [Article 22-2-3

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<sup>12</sup> With regard to contracts concerning the provision of telecommunications services, this refers to a person who has been solicited to apply for a contract from a telecommunications carrier or a person entrusted with intermediation, etc., a person who intends to apply for a contract with a telecommunications carrier (either directly or through a person entrusted with intermediation, etc.), or a person who intends to agree to a contract offered from a telecommunications carrier (either directly or through a person entrusted with intermediation, etc.).

paragraph (1) of the Regulations for Enforcement of the Telecommunications Business Law (Ministerial Ordinance of the Ministry of Posts and Telecommunications No. 25 of 1985) (hereinafter the “Regulations for Enforcement”)]

(a) Details of telecommunications services (item (iii))

This refers to the specific details of telecommunications services that a user can receive based on a telecommunications service contract. The telecommunications carrier, etc. must explain items that include specific service names and types, quality, and usage restrictions.

In particular, if there are restrictions on the use of telecommunications services, the explanation must include those limitations (other usage restrictions [item (iii)-g]). For example, if, when bandwidth controls, etc., to avoid network congestion or speed restrictions when a predetermined data cap is exceeded are activated, those restrictions will affect access to zero-rating-covered content, etc. (e.g., the content, etc. will be subjected to speed restrictions), the details of those restrictions must be explained. Specifically, items considered as details of restrictions relating to bandwidth controls, etc., include criteria corresponding to controls and the time zones and locations that are subject to controls.

(b) Telecommunications charges (item (iv))

This refers to telecommunications charges of charge plans, etc. applied to individual consumers. When multiple charge classifications for specific distances, destination, etc. exist, it is established that basing explanations on the main charge classifications that the general consumers are expected to use is permissible. However, in the case of providing zero-rating services, the telecommunications carrier, etc. must explain that accessing covered content, etc. will not affect telecommunications charges because it is not counted in data usage and is not billed. Additionally, when access even to content covered by zero-rating services will be counted in data usage or when precise counting will not be conducted, and, as a result, said access will be billed, the telecommunications carrier, etc. must explain the browsing methods, etc. that will be subjected to counting.<sup>13</sup>

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<sup>13</sup> Regarding zero-rating services, telecommunications carriers must accurately count data usage in order to appropriately conduct telecommunications charge billing. Therefore, it is desirable for telecommunications carriers to implement appropriate measures while taking into account technical developments, etc.

When providing explanations, the telecommunications carrier, etc. must explain an outline of the terms and conditions with the method and extent necessary to gain the user's understanding, taking into account to the user's knowledge and experience and purpose for concluding the contract (the so-called principle of suitability [Article 22-2-3 paragraph (4) of the Regulations for Enforcement]). As for explanations to users thought to require special consideration, when making solicitations, etc. for telecommunications services that the user did not initially intend to purchase to senior citizens, persons with disabilities, minors, and other users thought to require particular consideration, the telecommunications carrier, etc. must, based on the user's actual usage, etc., provide an explanation that allows the user to adequately understand the contract's content and to make an appropriate decision, including whether or not the service is necessary.

In addition to new contracts, the obligation of explanation also applies when intending to conclude an amended contract or updated contract as well as to conduct intermediation, etc. for it (Article 22-2-3 paragraph (2) of the Regulations for Enforcement). "Amended contract" refers to a contract in which a portion of an existing contract will be changed. It includes contracts that will undergo a change in the content, etc. covered by zero-rating services.

When a change to a contract that will be made by the telecommunications carrier involves the addition of content, etc. covered by zero-rating services, no explanation is required, as the change will be beneficial to the user. However, when the change involves the deletion of content, etc. covered by zero-rating services, this change must be explained to the user, as it corresponds to a change that is disadvantageous to the user.<sup>14</sup>

It should be noted with regard to the method of explanation that it is permissible to make explanations using alternative methods<sup>15</sup> if the user agrees to this in advance.

In the event of a violation of these regulations, the Minister for Internal Affairs and Communications may order the telecommunications carrier, etc. to improve the means of conducting their business activities, etc. to the extent necessary to ensure the

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<sup>14</sup> If only a very small part of covered content, etc. will be deleted due to unavoidable circumstances, such as the end of provision of content, etc. due to the content provider's termination of service, it cannot necessarily be claimed that this corresponds to a disadvantageous change. However, appropriate notification should be made to users even in such cases.

<sup>15</sup> The principle method of explanation is to issue a document (explanatory document) noting items for explanation and then provide an oral explanation based on the document. However, it is permissible to provide explanation by sending an email, webpage, CD-ROM, or other recording medium that lists the items for explanation, etc.; by showing an advertisement used in direct mailing, etc. (for example, when the user sees a direct-mail advertisement and applies by post); or by telephone, when the user agrees to that method in advance (and only when the user's intent has been confirmed).



interests of users or the public interest (Article 29 paragraph (2) and Article 73-4 of the Act). It should be noted that when it is recognized that a violation of such an order impairs the public interest, said violation may become grounds for revoking the “registration of telecommunications business” provided in Article 9 of the Act and “approval of business” provided in Article 117 paragraph (1) of the Act (Article 14 paragraph (1) item (i) and Article 126 paragraph (1) item (iii) of the Act).

(2) Relating to the procedure for processing complains (Article 27 of the Act)

Article 27 of the Act stipulates that telecommunications carriers bear the obligation of properly and promptly process complaints and inquiries to ensure that users can continually use the telecommunications services that are used in daily living with peace of mind. The telecommunications services that are subject to the obligation to process complaints and inquiries are the same as those subject to the obligation of explanation provided in Article 26 paragraph (1). In other words, because zero-rating services are provided within the charge plans, etc. of services subject to the obligation, the details and other particulars of zero-rating services are also subject to the obligation.

Because the descriptions, user categories, user numbers, and other factors of provided zero-rating services vary, it is difficult to establish a uniform method for the proper processing of complaints, etc. for all telecommunications carriers, and therefore specific decisions are to be made on an individual basis.

In the event of a violation of these regulations, the Minister for Internal Affairs and Communications may order the telecommunications carrier to improve the means of conducting their business activities, etc. to the extent necessary to ensure the interests of users or the public interest (Article 29 paragraph (2) of the Act). It should be noted that when it is recognized that a violation of such an order impairs the public interest, said violation may become grounds for revoking the “registration of telecommunications business” provided in Article 9 of the Act and “approval of business” provided in Article 117 paragraph (1) of the Act (Article 14 paragraph (1) item (i) and Article 126 paragraph (1) item (iii) of the Act).

(3) Relating to prohibited conduct of telecommunications carriers (Article 27-2 of the Act [including cases applying mutatis mutandis in Article 73-3 of the Act; hereinafter the same])

Article 27-2 of the Act prohibits telecommunications carriers, etc. from engaging in non-disclosure of fact, misrepresentation, etc. in telecommunications services that are subject to the obligation of explanation of terms and conditions. In other words, it is

prohibited to intentionally fail to disclose or misrepresent material particulars about the contracts for providing zero-rating services that would affect consumers' decisions.

In the event of a violation of these regulations, the Minister for Internal Affairs and Communications may order the telecommunications carrier, etc. to improve the means of conducting their business activities, etc. to the extent necessary to ensure the interests of users or the public interest (Article 29 paragraph (2) and Article 73-4 of the Act). It should be noted that when it is recognized that a violation of such an order impairs the public interest, said violation may become grounds for revoking the "registration of telecommunications business" provided in Article 9 of the Act and "approval of business" provided in Article 117 paragraph (1) of the Act (Article 14 paragraph (1) item (i) and Article 126 paragraph (1) item (iii) of the Act).

(4) Relating to measures for guidance, etc. to persons entrusted with intermediation, etc. (Article 27-4 of the Act)

Telecommunications carriers are obligated to execute measures to provide guidance, etc. to agencies, such as appointing a person in charge of supervising the operations of the agencies. In the event of a violation of this regulation, the Minister for Internal Affairs and Communications may order the telecommunications carrier to improve the means of conducting their business activities, etc. to the extent necessary to ensure the interests of users or the public interest (Article 29 paragraph (2) of the Act). It should be noted that when it is recognized that a violation of such an order impairs the public interest, said violation may become grounds for revoking the "registration of telecommunications business" provided in Article 9 of the Act and "approval of business" provided in Article 117 paragraph (1) of the Act (Article 14 paragraph (1) item (i) and Article 126 paragraph (1) item (iii) of the Act).

Reference

Relating to prohibition of misleading representations (Article 5 of the Act against Unjustifiable Premiums and Misleading Representations [Act No. 134 of 1962] {hereinafter referred to as the "Premiums and Representations Act"})

Article 5 paragraphs (1) and (2) of the Premiums and Representation Act prohibit entrepreneurs, including telecommunications carriers, from representation that, in connection with the transaction of goods or services that they provide those goods or services to be (1) significantly superior or significantly more advantageous than the actual ones or (2) significantly superior or significantly more advantageous than those of other entrepreneurs who are in a competitive relationship with the entrepreneur

concerned contrary to the fact in terms of their quality, standard, price, or any other matter to general consumers, thus possibly inducing customers unjustly and interfering with general consumer's voluntary and rational choice-making (prevention of representations which misleadingly give significantly superior and significantly more advantageous images to goods or services). It should be noted that cases corresponding to representations which misleadingly give significantly superior and significantly more advantageous images to goods or services are subject to the provisions of the Premiums and Representations Act regardless of whether the misleading representation was made intentionally or negligently.

Zero-rating services are their own services that are provided by telecommunications carriers, and therefore telecommunications carriers must comply with applicable regulations in their transaction.

Additionally, when the Commissioner of the Consumer Affairs Agency finds it necessary in order to evaluate whether any Representation falls under representations misleadingly give significantly superior, the Commissioner of the Consumer Affairs Agency may designate a period of time and require the relevant Entrepreneur to submit data as reasonable grounds for the Representation the entrepreneur has made. In such cases, if the entrepreneur fails to submit the data, or the data submitted isn't deemed to be reasonable grounds for those representations, the representation concerned is deemed to fall under misleading representation in relation to a orders for action (Article 7 paragraph (2) of the Premiums and Representations Act) and presumed to fall under misleading representation in relation to a payment order for surcharge (Article 8 paragraph (3) of the Premiums and Representations Act). Furthermore, if it is deemed that an entrepreneur is making a representation which misleadingly give significantly superior or significantly more advantageous images to goods or services, the Commissioner of the Consumer Affairs Agency will execute measures that include orders for action against the entrepreneur.

### 2-3-2 Actions that may be problematic in dealings with consumers<sup>16</sup>

- Solicitation that makes it appear there are no restrictions on zero-rating services

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<sup>16</sup> Some of the cases presented in 2-3-2 can become violations of the Premiums and Representations Act based on the method of advertising, etc. For example, regarding access to content, etc. covered by zero-rating services, it can be assumed that such case may arise where advertising provides representation that makes consumers misunderstand that precise counting is always made, despite the fact that there are cases in which data usage is not counted precisely (Article 5 of the Premiums and Representations Act). It should be noted that "representation" under the

use even though the possibility that bandwidth controls, etc., will be implemented exists. (Article 26 and Article 27-2 of the Act)

- Not explaining that cases in which covered content, etc. is listened to or watched via an unofficial application, etc., or an external link is accessed from covered content, etc., for example, can be counted in data usage. (Article 26 and Article 27-2 of the Act)
- Not explaining that data usage used to view displayed advertisements, etc., when accessing covered content, etc. can be counted. (Article 26 and Article 27-2 of the Act)
- Regarding access to content, etc. covered by zero-rating services, despite the possibility that data usage may not be counted precisely due to changes in distribution servers or other reason, not explaining this fact or explaining that access to all content covered by zero-rating services is counted as unbilled. Or, when counting after discounting traffic volume to covered content, etc., not sufficiently explaining the count ratio. (Article 26 and Article 27-2 of the Act)
- When senior citizens, etc. who had only used phone functions before visit to conclude a smartphone contract, recommending high-priced zero-rating services with large data caps to them, despite knowing that they have never used a mobile Internet connection service before, and concluding a contract after only explaining those contracts in the same manner used to explain them to other users. (Article 26 of the Act)
- Waiting long periods of time to respond to earnest inquiries concerning zero-rating services from consumers (for example, not responding to an inquiry that does not require any particular research or confirmation for two or three days without a justifiable reason; delaying response to an inquiry for which research or confirmation could be completed within a week without a justifiable reason; or taking more than a month to conduct research or confirmation that could be completed within a week without a justifiable reason). (Article 27 of the Act)

In the event that improper business management, etc. takes place, such as when data usage counting by a telecommunications carrier is extremely imprecise or diverges significantly from the terms and conditions, etc. presented in the telecommunications

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Premiums and Representations Act can include not only advertising such as posters and fliers but also sales pitches made at stores as well as images and audio appearing in television and radio advertisements.

carrier's contract with consumers, the MIC may have the telecommunications carrier report on their business, and, if necessary, implement an order to improve business activities. (Article 29 paragraph (1) item (xii) and Article 166 paragraph (1) of the Act)

### 3 Desirable Actions by Telecommunications Carriers

The following lists examples of acts that will not immediately be deemed problematic even if they are not implemented in terms of the Act but which are nonetheless recommended as actions to be taken by telecommunications carriers in view of the Act's purpose of promoting fair competition, protecting users' interests, etc. (Given their impact on market competition, users' interests, and the like, it is particularly important for telecommunications carriers with users of a certain number or more to take the following acts.)

- From the standpoint of complying with the provisions of Article 6 of the Act (fairness in use), etc., it is desirable that telecommunications carriers establish and publicize reasonable and clear criteria for the selection of content, etc. to be covered by zero-rating services, and also that they set up contact points for inquiries and maintain a system for the proper and smooth holding of discussions with content providers/ platform providers.
- From the standpoints of complying with the provisions of Article 6 of the Act (fairness in use), etc., and of ensuring the users' interests, it is desirable to execute initiatives that take maintaining communications quality for persons who do not use zero-rating services and other matters into account, such as strengthening networks in response to increases in traffic corresponding to the provision of zero-rating services.
- From the standpoint of helping users choose appropriate services, it is desirable that telecommunications carriers that provide zero-rating services measure data usage relating to content, etc. that is covered by zero-rating services and data usage relating to content, etc. that is not covered for each user and that they provide information that users of those services can easily understand.
- It is desirable that telecommunications carriers consider the healthy development of young people when providing zero-rating services to them by, for example, recommending the use of services compatible with such parental

controls as management of usage times and usage situations and filtering.<sup>17</sup>

- From the standpoint of complying with the provisions of Article 6 of the Act (fairness in use), etc., it is desirable that, when telecommunications carriers implement communications speed restrictions after data caps have been exceeded, they implement those restrictions uniformly, on content, etc. regardless of whether it is covered by zero-rating services or not.
- From the standpoint of complying with the provisions of Article 6 of the Act (fairness in use), etc., it is desirable that, when telecommunications carriers implement bandwidth controls, etc. on so-called heavy users, they implement those controls, etc., uniformly after data usage exceeds the data cap that serves as the threshold for controls, on content, etc. regardless of whether it is covered by zero-rating services or not.
- From the standpoint of complying with the provisions of Article 6 of the Act (fairness in use), etc., it is desirable that, when telecommunications carriers implement communications bandwidth controls, etc., during times of network congestion, they implement those controls, etc., uniformly, on content, etc. regardless of whether it is covered by zero-rating services or not.

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<sup>17</sup> Although filtering is provided as an example, mobile telephone operators are obligated to provide filtering services (except when caregivers report that they will not use them) by the Act on Establishment of Enhanced Environment for Youth's Safe and Secure Internet Use (Act No. 79 of 2008).

## 4 Monitoring of Compliance, etc.

### (1) Offering of opinions to the Minister for Internal Affairs and Communications

The Act prescribes that a person that has complaints or other opinions on the charges and other terms and conditions for the provision of telecommunications services of telecommunications carriers may offer the opinion to the Minister of Internal Affairs and Communications (Article 172 paragraph (1) of the Act).

It further provides that the Minister for Internal Affairs and Communications must process the offerings in a sincere manner and notify the person that offered the opinion of the result of the process (Article 172 paragraph (2) of the Act). Specifically, the Minister of Internal Affairs and Communications will conduct an investigation of the opinion offer form's content and implement necessary measures in accordance with laws and ordinances (order to improve business activities based on Article 29 of the Act and others) based on the "Guidelines on Operation of the Opinion Offering System in the Telecommunications Field" (December 2007).<sup>18</sup>

Content providers /platform providers can use the opinion offering system when, for example, they have a complaint or opinion concerning the conditions for selecting content, etc. to be covered by zero-rating services, the provision of that content, etc., and other acts by telecommunications carriers.

### (2) Mediation or arbitration by the Telecommunications Dispute Settlement Commission

When, in the conclusion of a contract between a telecommunications carrier and content provider/platform provider for the provision of telecommunications services that the content provider/platform provider requested to use for content distribution, the parties fail on the amount of the money, to be received or paid by the parties, the terms and conditions, or other details of them, the parties may apply to the Telecommunications Dispute Settlement Commission for mediation or arbitration (Article 157-2 of the Act).

Refer to "Manual for Telecommunications Disputes Settlements: Dispute Settlement Systems and Actual Practices" by the Telecommunications Dispute Settlement Commissions for details.<sup>19</sup>

### (3) The No-Action Letter System

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<sup>18</sup> [http://www.soumu.go.jp/joho\\_tsusin/eidsystem/law01\\_03.html](http://www.soumu.go.jp/joho_tsusin/eidsystem/law01_03.html)

<sup>19</sup> [http://www.soumu.go.jp/main\\_sosiki/hunso/guidance/manual.html](http://www.soumu.go.jp/main_sosiki/hunso/guidance/manual.html)

The MIC has in place procedures for receiving inquiries concerning whether or not specific acts that telecommunications carriers intend to take violates the Act and other laws and ordinances under the jurisdiction of the MIC and issuing responses to them (Prior Confirmation Procedures on the Application of Laws and Regulations [the “No-Action Letter” System]).<sup>20</sup>

In principle, the MIC must respond in writing within 30 days of the day that it receives inquiries on whether or not a specific act concerning its own business activities that a business, etc. intends to put into practice is subject to a) provisions establishing the basis for the disposition in response to an application or the notification of certain matters to administrative organizations, for which special provisions are applicable if violated, or b) provisions establishing the basis for the adverse disposition, based on the Act and other laws and ordinances under the jurisdiction of the MIC. Monitoring by Meetings for Telecommunications Market Validation, etc.

The MIC will establish a working group on network neutrality within Meetings for Telecommunications Market Validation and monitor compliance with network neutrality-related rules, including these Guidelines. The MIC will use interviews and questionnaires as well as collect reports and take other steps as necessary with the cooperation of telecommunications carriers and others that provide zero-rating services.<sup>21</sup>

Additionally, the MIC will engage in appropriate and necessary coordination concerning dealings with consumers, including sharing information with the Consumer Affairs Agency and other concerned ministries and agencies.

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<sup>20</sup> The Prior Confirmation Procedures on the Application of Laws and Regulations are procedures for confirming in advance with the MIC whether a specific act concerning its own business activities that a business, etc. intends to put into practice is subject to laws and ordinances under the jurisdiction of the MIC (Regulations for the Prior Confirmation Procedures on the Application of Laws and Regulations under the jurisdiction of the MIC [Ministry of Internal Affairs and Communications Directive No. 197 of 2001]).  
[http://www.soumu.go.jp/menu\\_sinsei/hourei\\_tekiyou/index.html](http://www.soumu.go.jp/menu_sinsei/hourei_tekiyou/index.html)

<sup>21</sup> The MIC will study the information required for monitoring and methods for collecting it as needed and will revise the Telecommunications Business Reporting Regulations (Order of the Ministry of Post and Telecommunications No. 46 of 1988) and other regulations when necessary. For example, in order to ascertain the effects, etc. of zero-rating services, the MIC will consider asking telecommunications carrier with users of a certain number or more to report on numbers (number of contracts) of zero-rating users and non-users; actual traffic volume for content, etc. covered by zero-rating services and content, etc. not covered by those services; and other matters.