

BEREC Report on the outcome of the public consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation

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EXECUTIVE SUMMARY

BEREC thanks stakeholders for their feedback and has carefully considered respondents' views. BEREC answers are elaborated further below.

Regarding the comments received on the topic of the applicability of Article 3(3) to commercial practices, BEREC considers that Vodafone Pass did not contain differentiated traffic management measures and that the equal treatment obligation applies to zero tariff options without technical discrimination. Therefore, there is no reason for a case-by-case assessment of zero-rating offers. BEREC considers that the implications of the European Court of Justice (ECJ) rulings are not only limited to zero-rating.

Regarding the comments related to zero tariff options and similar offers, BEREC maintains the notion of "similar offers", but clarifies that those are inadmissible. There is still room for price differentiation when traffic is treated equally.

With regard to legal certainty and the language used, BEREC understands that the ECJ rulings differ from the previous BEREC guidance, and Open Internet Guidelines (Guidelines) need to be updated. BEREC considers that the adoption of the draft Guidelines will provide certainty and ensure correct enforcement. Further clarifications have been provided to some paragraphs based on stakeholder contributions.

Concerning 5G and network investments, BEREC considers that the Open Internet Regulation (OIR) seems to be leaving considerable room for the implementation of 5G technologies. BEREC is not aware of any concrete example where the implementation of 5G technology as such would be impeded by the OIR. BEREC also considers it should look into the IP interconnection ecosystems in more detail.

On Articles 1 and 2, BEREC is of the opinion that the current definitions and guidance are still applicable.

Concerning the establishment of a hierarchy between Article 3(3) and Article 3(2), the draft Guidelines make it sufficiently clear that infringements of Article 3(3) and Article 3(1) cannot be justified based on commercial agreements and commercial practices. Paragraphs 19, 37 and 37a have been rephrased to further clarify this point.

With regard to terminal equipment, BEREC clarifies that its *Guidelines on Common Approaches to the Identification of the Network Termination Point (NTP) in different Network Topologies* are presently valid and that they do not present "point A" as the only option for setting the NTP.

Regarding commercial considerations on zero-rating offers, BEREC considers that the ECJ rulings make the obligation of treating all traffic without discrimination clear. Any exceptions to this rule must be based on the specific rules of the OIR and must be evaluated based on a strict interpretation.

On the comments related to the public good and customer care services, BEREC notes that the ECJ did not specifically make a distinction between commercial and non-commercial zero-rating. BEREC clarifies that national legislation could be used to justify practices for public interest needs. Therefore, no changes concerning the public good or customer care topics have been made.

With regard to price differentiation and application-agnosticism, BEREC considers that Article 3(3) allows price differentiation with equal treatment, and has provided clarification on the notion of application-agnosticism and the language used.

Furthermore, BEREC notes that there is no change to the OIR nor to the Guidelines regarding traffic management or specialised services. However, BEREC has provided further clarification in the Guidelines regarding traffic management.

Concerning exception Article 3(3)(a), BEREC considers that the obligation of the Roaming Regulation to a free access to information on tariffs as well as the obligation of the EECC on emergency communications can be considered examples of an exception under Article 3(3)(a). Hence, a clarification has been provided to the footnote.

Regarding the comments on transparency, BEREC refers to its Guidelines detailing Quality of Service Parameters.

With regard to the comments related to supervision and enforcement, BEREC will report on the enforcement of the ECJ rulings in the Implementation Report. As supervision of compliance with ECJ rulings is a non-recurring exercise, no updates to the Guidelines are required. Additionally, BEREC has emphasised that paragraphs 79 and 81 provide adequate guidance regarding notion of a very short period.

BEREC notes that there is no transitional period in the ECJ rulings, and believes that no universal transitional period can be determined in the Guidelines. The potential transitional periods are to be considered nationally based on specific circumstances. BEREC facilitates NRA coordination in this matter to foster the consistent application of the OIR.

On the comments raised on the right to terminate contracts, BEREC notes that the EECC provisions and matters of contract law are out of scope of the Guidelines. However, BEREC understands that changes that are to the benefit of end-users or directly imposed by law are exempted from end-users' rights to terminate contracts without compensation. BEREC notes that ISPs could change existing contracts with zero tariff options in a manner that replaces the zero-rating offer with, for example, application-agnostic unlimited data.

Finally, some specific comments were raised regarding five critical properties that underpin the internet (accessibility, interoperability, a decentralised internet, interconnection through common identifiers, technology neutrality) and IPv6. BEREC notes its activities around those topics. No changes to the Guidelines are required.

1 INTRODUCTION

BEREC has prepared an update to the BEREC Guidelines on the Implementation of the Open Internet Regulation (Guidelines) in light of the ECJ rulings issued on 2 September 2021. In June 2020, BEREC reviewed the Guidelines in accordance with its mandate under the OIR.

A draft of the updated Guidelines was issued for consultation from 15 March to 14 April 2022 (17:00 CET). Throughout this process, the European Commission has cooperated closely with BEREC.

In accordance with BEREC's policy on public consultations, this report summarises stakeholders' views in response to the consultation and how they have been taken into account.

BEREC welcomes all contributions and thanks all stakeholders for their submissions. In total, BEREC received 22 responses to the public consultation from various types of stakeholders categorised in this report as following:

- civil society (organisations representing citizens/consumers)
- CAPs (Content and Application Providers and their representative organisations)
- ISPs (Internet Service Providers and their representative organisations)
- industry (other industry stakeholders and their representative organisations)
- academic.

20 contributions¹ have been published, as two stakeholders provided a confidential version only. One additional contribution was received after the above-mentioned deadline and has thus not been taken into account for this public consultation. The contributions are available at the following link:

https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/

BEREC summarises the responses to the consultation under the following headings, which follow the structure of the OIR and Guidelines:

- Interpretation of the ECJ rulings;
- Background and general aspects;
- Article 1 – Subject matter and scope;
- Article 2 – Definitions;
- Article 3 – Safeguarding of open internet access;
- Article 4 – Transparency measures for ensuring open internet access;

¹ The stakeholders having submitted a public version of their contribution are listed in the annex.

- Articles 5 and 6 – Supervision and enforcement;
- Miscellaneous.

In this document, for practical reasons, the term ‘stakeholders’ will be used rather than the names of individual respondents to the consultation. To support the readability of the document, comments and questions raised by stakeholders are addressed and grouped per topic or per sub-topic as appropriate.

Many stakeholders welcomed BEREC’s draft Guidelines and the opportunity to provide feedback, even though there were differing views regarding the contents of the proposed changes.

Several civil society stakeholders, some ISPs, one CAP and an academic stakeholder supported BEREC’s reading of these rulings. They welcomed the proposed updates to the Guidelines and considered that these contribute to more clarity and are beneficial for end-users.

In contrast, some ISPs were not in favour of BEREC’s interpretation of the ECJ rulings, and several ISPs, one CAP and one industry stakeholder even disagreed with BEREC’s interpretation. In particular, these stakeholders were concerned that a general ban of zero-rating would result in a strong limitation of consumer welfare and would thus challenge the objective of the OIR to protect end-user rights.

The main topics of concern addressed by several stakeholders were how zero-rating of customer care and public good services are to be considered in light of the OIR, as well as the general ban of non-application-agnostic price differentiation measures. Other topics raised were about terminal equipment, 5G and network investment, supervision and enforcement. These topics will be further elaborated on in the next chapters.

BEREC has considered all of the responses and provided clarifications in response to comments in eight paragraphs of the Guidelines (namely **paragraphs 19, 34a, 35, 37, 37a, 40b, 48 and 81**). In general, there were often many responses making competing arguments and, in BEREC’s view, the final Guidelines strike an appropriate balance in accordance with BEREC’s interpretation of the ECJ rulings on the OIR.

2 INTERPRETATION OF THE ECJ RULINGS

As already mentioned in the introduction, several stakeholders maintained opposing views on the ECJ rulings, many supporting and many opposing BEREC's reading. Therefore, BEREC considers that this topic deserves further clarification.

In this context, one ISP pointed out the importance of the following principles when interpreting the OIR and the ECJ rulings: appropriateness, proportionality and technological neutrality.

BEREC acknowledges this comment. As these principles have been raised in relation to several specific comments, these are referred to in the following chapters as appropriate.

The applicability of Article 3(3) to commercial practices as well as zero tariff options and similar offers is addressed in further detail in this chapter.

2.1 Applicability of Article 3(3) to commercial practices

Some ISPs and one CAP were of the opinion that the ECJ decisions only prohibit cases such as those that were the subject of the 2021 ECJ rulings. This means not prohibiting zero-rating offers that include pricing practices but do not include technical discrimination.

Several other stakeholders (from all stakeholder groups) supported BEREC's reading of the ECJ rulings. Many of them welcomed that the Guidelines integrate the ECJ's interpretation of the OIR that zero-rating violates EU law because it is incompatible with the obligation of equal treatment of traffic and should be considered inadmissible. The rulings explicitly prohibit all zero-rating offers that zero-rate select applications or classes of applications.

There were diverging views on whether a case-by-case assessment is still required for zero-rating. More precisely, a civil society stakeholder did not see a need for this under Article 3(2) because of the general incompatibility of zero-rating options with Article 3(3). Two ISPs considered that the ECJ refers only to technical features of the zero-rating offers and thought that the Guidelines should give National Regulatory Authorities (NRAs) more powers to decide the eligibility of offers on a case-by-case basis. One of them proposed that the ECJ cases should be added as mere examples. Another ISP considered that the ECJ decisions may impact the application of certain provisions of the OIR, but the OIR is still very much intact and a case-by-case assessment should be carried out for zero-rating offers.

One CAP argued that the cases before the ECJ were fact-specific and that a zero-rating offer may only be problematic when accompanied with technical discrimination. In addition, an industry stakeholder did not support the deletion of the comprehensive assessment guidance for zero-rating offers since it was in line with the objectives of the OIR.

Several ISPs considered that BEREC has no legal reason to read the ECJ rulings as including commercial practices beyond zero-rating in the OIR. These stakeholders called on BEREC to read the ECJ decisions as not applicable to other differentiated pricing practices. Further, one of them considered that the revision of the Guidelines should be limited to a contextualisation of the ECJ rulings according to the previous rulings of the ECJ. Another ISP pointed out the decisions did not deal with the relationship between Articles 3(2) and 3(3) and did not annul

Article 3(2). Thus, BEREC should avoid extrapolating a (too) restrictive interpretation of the latter provision on the basis of these rulings and should not go beyond its mandate and ECJ case law.

BEREC thanks stakeholders for their feedback and has carefully considered respondents' views related to the interpretation of the ECJ rulings regarding the applicability of Article 3(3) to commercial practices.

BEREC considers that the most relevant statements of the ECJ are contained in the reasoning of the rulings, where the ECJ expressed that a zero tariff option as such violates the general obligation contained in Article 3(3) subparagraph 1 to treat all traffic equally. The reason for this is that the zero tariff option draws a distinction between internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications.

Consequently, the ECJ decided not to assess the individual limitations of use as they are incompatible with the equal treatment obligation as set out in Article 3(3), by the mere activation of the zero tariff option, and the *"incompatibility remains, irrespective of the form or nature of the terms of use"* (see ECJ, C-854/19 *Vodafone* paragraph 33; C-5/20 *Vodafone*, paragraph 32; C-34/20 *Telekom Deutschland*, paragraph 35). Hence, BEREC considers that the interpretation given by the ECJ is applicable to more cases than the specific cases that were brought before the ECJ.

Regarding the proposal for a case-by-case assessment of the zero-rating offers, BEREC believes that there is no reason for a case-by-case assessment in the scope of zero-rating offers according to the above ECJ statements. Also, the ECJ defines zero tariff options as *"a commercial practice whereby an internet access provider applies a 'zero tariff', or a tariff that is more advantageous, to all or part of the data traffic associated with an application or category of specific applications, offered by partners of that access provider"* (see ECJ, C-34/20 *Telekom Deutschland*, paragraph 17; C-5/20 *Vodafone*, paragraph 14; 854/19 *Vodafone*, paragraph 15).

Furthermore, *Vodafone's* zero tariff option *Vodafone Pass* did not contain differentiated traffic management measures. Thus, especially the two rulings concerning the *Vodafone Pass* indicate that the ECJ did not limit its interpretation of Article 3(3) to zero tariff options associated with traffic management measures. Rather, the ECJ states that the violation of the general obligation to treat all traffic equally *"results from the very nature of such a tariff option"* (see ECJ, C-854/19 *Vodafone*, paragraph 29; C-5/20 *Vodafone*, paragraph 28; C-34/20 *Telekom Deutschland*, paragraph 31). Therefore, the equal treatment obligation also applies to zero tariff options without technical discrimination.

Regarding the general applicability of Article 3(3) to commercial practices, BEREC does not agree with the opinion that there is no legal reason to read the ECJ rulings as including commercial practices beyond zero-rating. The ECJ has established in both its 2020 and 2021 rulings that Article 3(3) subparagraph 1 imposes on ISPs a *"general obligation of equal treatment"* (see ECJ, C-854/19 *Vodafone*, paragraph 26; C-5/20 *Vodafone*, paragraph 25, and C-34/20 *Telekom Deutschland*, paragraph 28; ECJ C-807/18 and C-39/19 *Telenor Magyarország*, paragraph 47) and that, in principle, *"any measure"* (see ECJ, C-854/19 *Vodafone*, paragraph 27, third sentence; C-5/20 *Vodafone*, paragraph 26, third sentence and

C-34/20 Telekom Deutschland, paragraph 29, third sentence; ECJ C-807/18 and C-39/19 *Telenor Magyarország*, paragraph 48) by an ISP that is discriminatory could be a violation of this general obligation. BEREC takes from this that the general obligation to treat all traffic equally is not limited to technical traffic management practices, but also applies to commercial practices.

Regarding the applicability of Article 3(3) in the scope of the zero-rating offers, please see further details in Section 2.2.

2.2 Zero tariff options and similar offers

Several civil society stakeholders suggested that the Guidelines should use the same clear language that is found in the judgements. For example, it should be clarified in **paragraph 48** point 2 that the judgements disqualify class-based differentiated pricing practices, irrespective of the criteria and effort required by CAPs to join.

Two other civil society stakeholders strongly welcomed that BEREC removed all previous references to zero-rating offers from the draft Guidelines and deleted all references to zero-rating in **paragraphs 36, 37, 37a, 40-43 and 48**, as well as deleting the Annex stating an assessment for zero-rated offers under Article 3(2). Furthermore, the draft Guidelines now include the core principles of the ECJ rulings regarding zero-rating in **paragraph 54a**. One of these stakeholders concluded that, as the draft Guidelines show, there are a variety of options for differentiated pricing practices in line with Article 3(2), and all these options do also include commercial considerations.

Some ISPs, one CAP and an industry stakeholder called for a more flexible reading of the ECJ rulings, pointing out that zero-rating is still allowed under certain circumstances. One of them considered that BEREC should *more* clearly recognise that there is still room for zero-rating. Referring to the judgements that mentioned only-zero-rating practices, BEREC must limit its updated Guidelines only to these and not extend the interpretation further. Therefore, the concept of ‘similar offers’ in **paragraph 49** should be deleted according to several stakeholders. The Guidelines should explicitly state the fact that they are being updated *because* of the ECJ rulings, and not because of any harm to consumers from zero-rating.

More specifically, two ISPs proposed the deletion of the sentence “*subsidising their own data*” in **paragraph 40b** due to arbitrarily extended interpretation, not triggered by any comment in the ECJ rulings nor by the OIR. In their view it is not excluded that a CAP could reward the ISP for setting up solutions aimed to improve the user experience when accessing its content. The interpretation of the ECJ decisions could be that an ISP should not discriminate between one CAP or another in its end user offers: the end user should not have any incentive to use one CAP or another. It doesn’t exclude that a CAP could reward the ISP for setting up solutions aimed to improve the user experience when accessing its content.

Another ISP was afraid that with the prohibition of zero-rating options, providers of zero-rated online TV services are at a more disadvantaged position compared to those using legacy technologies, e.g. DTTV. This ISP noted that not all zero-rated offers are introduced for purely commercial reasons (e.g. if they are provided to all existing TV service subscribers and no additional revenues are being earned) or are offered in the context of limited packages, and

similarly not all introduce a limitation in bandwidth on activation. This ISP thinks the ECJ judgements do not impose a general prohibition on zero-rated tariffs as a commercial practice. In this regard, this ISP recommended that **paragraph 35** of the Guidelines is amended to include the examples mentioned above.

BEREC thanks stakeholders for their feedback and has carefully considered respondents' views related to the applicability of Article 3(3) in the scope of zero-rating offers.

BEREC's reading of the ECJ rulings is that a zero tariff option as such violates the general obligation contained in Article 3(3) subparagraph 1 to treat all traffic equally. The reason for this is that the zero tariff option draws a distinction between internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications (C-854/19 Vodafone, paragraph 28; C-5/20 Vodafone, paragraph 27; C-34/20 Telekom Deutschland, paragraph 30). Please see further details in Section 2.1.

However, BEREC sees that there is still room for price differentiation when traffic is treated equally. Please see further details in Section 6.6.

More specifically, BEREC maintains the notion of "similar offers" in **paragraph 49**. This reflects the general obligation to treat all traffic equally which *"also applies to commercial practices of the ISP such as differentiated pricing"* (**paragraph 49**, 4th sentence). Consistent with this, **paragraph 40a** sets out that *"zero tariff options are a subset of differentiated pricing practices which are inadmissible"*. Accordingly, BEREC further clarified **paragraph 40b** that now refers to *"any"* differentiated pricing practices which are not application-agnostic. For these reasons, BEREC also maintains the phrase *"subsidising their own data"* as such a practice entails price differentiation. This is also in line with **paragraph 40** where BEREC sets out that *"differentiated pricing practices may come in different forms"*.

3 BACKGROUND AND GENERAL ASPECTS

One civil society stakeholder welcomed the introduction of an express mention in **paragraph 1** detailing the review of these Guidelines in light of the latest ECJ rulings.

BEREC thanks the stakeholder for the feedback regarding **paragraph 1**.

In this chapter, comments related to legal certainty and language used, as well as to 5G and network investments, are discussed in further detail.

3.1 Legal certainty and language used

Several ISPs highlighted that the Guidelines should provide certainty on the application of the OIR for ISPs to be able to define and provide innovative services, satisfying market demand in compliance with the OIR. Several of them highlighted that operators have developed and provided offers considered compatible or tacitly approved by the NRAs based on good faith interpretations of the legislation, but that these offers must now be removed, because the ECJ invalidated those interpretations. This leads to a high burden in terms of time, resources, and the potential risk of losing customers.

One ISP and one civil society stakeholder also expressed the view that the Guidelines should provide certainty on the application of the OIR for NRAs to correctly and homogeneously enforce the OIR across the EU.

Several ISPs and a CAP argued that the interpretation of the ECJ rulings restricts ISPs' commercial services currently offered to European citizens and do not allow consumers to benefit from them. One of them stated that BEREC's interpretation of the ECJ rulings highlights the lack of clarity and thus limited quality of the OIR, being subject to a wide interpretation.

In contrast, an academic stakeholder considered that under the interpretation of Article 3(3) and Article 3(2) adopted by the 2020 and 2021 ECJ rulings, application-agnostic discrimination does not violate Article 3(3). This allows ISPs to differentiate their services in ways that benefit consumers without harming competition, innovation and free speech.

On the language used, several civil society stakeholders, an ISP and an academic stakeholder suggested that BEREC should make use of more precise language. One of them submitted that expressions such as "likely" or "most probably" should be avoided, especially in cases that directly fall within the scope of practices covered by the ECJ rulings. Several civil society stakeholders expected that the clear, unambiguous rulings will be translated into clear, unambiguous BEREC guidance. This will contribute to a better enforcement of the Guidelines.

In contrast, a CAP and an industry stakeholder encouraged BEREC to avoid definitive statements in the Guidelines, for example statements that could be misread as wholesale bans on all forms of zero-rating offers. They submitted that, while certain types of zero-rating offers may now be considered "generally inadmissible", there is still room for individual NRAs to permit various types of zero-rating offers on a case-by-case basis. Several ISPs also considered that the proposed Guidelines have a wider reach than the ECJ appears to contemplate.

Several civil society stakeholders and a CAP also requested BEREC to align the language between individual paragraphs of the Guidelines.

BEREC thanks stakeholders for their feedback related to legal certainty and language used and has carefully considered their views.

Regarding the effects in the market of the ECJ rulings interpretation, it is BEREC's opinion that, in general, the application of both the OIR and the Guidelines is working well and that BEREC's Guidelines on the OIR continue to contribute to the consistent application of the OIR.

Regarding the views expressed by several stakeholders about the clarity and reach of the OIR, BEREC considers that the adoption of the draft Guidelines will provide certainty and ensure a correct enforcement of the OIR.

As stated in the Explanatory document on the Public Consultation², Article 5(3) explicitly obliges BEREC to issue guidelines for implementing the obligations of NRAs under the OIR

² Explanatory document on the Public Consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation, BoR (22) 31:

to contribute to the consistent application of the OIR and to promote an effective internal market in the electronic communications sector.

The goal of preliminary proceedings, initiated by national courts (*in casu* after appeals made by ISPs against decisions of NRAs), is to ensure a uniform application and interpretation of the EU law within the Union.

The recent ECJ rulings resulting from the preliminary proceedings differ from the guidance on the topic of zero-rating given in the 2016 and 2020 versions of the Guidelines. Therefore, the Guidelines on this topic must be updated to reflect the interpretation of the OIR given in the ECJ rulings.

In its 2021 rulings, the ECJ has selected a provision containing a principle with a general character to interpret the admissibility of the zero-rating offers involved. Because of that, BEREC considers it must also give guidance to NRAs for offers that are similar to the ones that gave rise to the preliminary rulings. In doing so, BEREC fulfils its task and obligation to contribute to the consistent application of the OIR throughout the Union.

BEREC recognises that the interpretation provided by the ECJ rulings and the updated Guidelines will lead to adaptations of offers on the market.

On the language used, BEREC considers it uses language that is adapted to the role and purpose its Guidelines have within the legal framework. Nevertheless, BEREC has further clarified some paragraphs based on stakeholder contributions.

Finally, in the sections below, BEREC will clarify, where appropriate, the relationship between individual paragraphs of the Guidelines and explain the changes it has made to the Guidelines, where this was considered necessary.

3.2 5G and network investments

One ISP stated that in the context of the deployment of new networks, the telecommunication industry is subject to high investment requirements to achieve connectivity targets. Advanced technical capabilities, for example network slicing, meet the evolving needs and allow monetisation of investments in networks.

Several ISPs identified the need for improved clarity and legal certainty regarding new, innovative technologies based on 5G, network slicing or different Quality of Service (QoS) to different categories of traffic.

One ISP emphasised that new, innovative offers might be legally deemed non-compliant with OIR after their launch, even if stakeholders expect consent from BEREC and NRAs. Associated costs in these cases endanger monetisation strategies and new investments.

One ISP stated that business models where CAPs reward ISPs for the effort performed to improve the user experiences when accessing the CAP contents are compliant with the OIR

https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/10208-explanatory-document-on-the-public-consultation-on-the-draft-berec-guidelines-on-the-implementation-of-the-open-internet-regulation

(referring both to users accessing content and CAPs providing content) and ECJ judgements (referring only to users accessing content) and should be left open to the market.

Another ISP stated that the call of European network operators to involve CAPs in network investments entails risks related to investment dynamics, net neutrality, competitive distortions, peering agreements, regional disparities and concerned technologies (5G/fibre). Exclusive deals between CAPs and large ISPs might jeopardise net neutrality and exclude alternative ISPs. Furthermore, current investments in network deployment with sufficiently available capital are independent of differentiation of internet traffic, and investment momentum demonstrates that strong fibre deployment does not rely on specific agreements with CAPs. While the two ECJ judgements were based on mobile tariffs, issues like the equal treatment of internet traffic are also crucial for fixed broadband connections.

BEREC thanks stakeholders for their feedback and has carefully considered respondents' views related to 5G and network investments.

BEREC will continue to follow discussions and developments regarding network investments and monetisation strategies in light of new technologies, as well as their relation to the OIR and the Guidelines. BEREC considers it should look into the relationship between different actors in the context of the IP interconnection ecosystems in more detail.

Regarding network slicing, QoS architectures, price differentiation and application-agnosticism, BEREC refers to Section 6.6. The BEREC Report on the diversification of the 5G ecosystem³ provides further information on 5G related developments.

BEREC considers that there is no need to change the draft Guidelines in light of views related to 5G and network investments. As expressed already in BEREC's 2018 Opinion⁴, the OIR seems to be leaving considerable room for the implementation of 5G technologies, such as network slicing, 5QI and Mobile Edge Computing. To date, BEREC is not aware of any concrete example given by stakeholders where the implementation of 5G technology as such would be impeded by the Regulation. This statement still holds true.

4 ARTICLE 1 – SUBJECT MATTER AND SCOPE

One civil society stakeholder welcomed the update and clarifications introduced in **paragraph 4**, replacing the reference to Directive 2002/21/EC (Framework Directive) with an updated reference to the EECC, and aligning the definitions of “user” and “end-user” with the ECJ ruling in the case of *Telenor Magyarország*.

An ISP understood that the applicable law in the case of *Telenor Magyarország* ruling was the Framework Directive, which has since been repealed by the EECC. The definition of “publicly available electronic communications services” in the EECC has been amended to include

³ Report on the diversification of the 5G ecosystem, BoR (21) 160: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/10130-report-on-the-diversification-of-the-5g-ecosystem

⁴ BEREC 2018 Opinion for the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality, BoR (18) 244: https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/8317-berec-opinion-for-the-evaluation-of-the-application-of-regulation-eu-20152120-and-the-berec-net-neutrality-guidelines

number-independent interpersonal communication services. This stakeholder thus considered it necessary for BEREC to clarify, in **paragraphs 4 and 5**, if CAPs also providing publicly available electronic communications services should still be considered, and therefore protected by the OIR, as end-users.

One civil society stakeholder would like to reiterate its previous suggestion for BEREC to strengthen the wording of **paragraph 6**, by replacing “*may*” with “*should*” and by recommending NRAs to monitor developments in interconnection markets to address potentially anti-competitive and discriminatory practices.

BEREC thanks the stakeholder for the feedback regarding **paragraph 4**.

BEREC notes that an ISP has concerns about the handling of different groups of end-users and CAPs under the OIR. BEREC perceives that the current definition is still applicable. BEREC also notes that Article 3(3) subparagraph 1 contains a general obligation for ISPs to treat all traffic equally, “irrespective of the sender and receiver”. In BEREC’s view this obligation also applies to traffic between end-users and providers of other publicly available electronic communications services. Therefore, BEREC considers that there is no need to change **paragraphs 4 and 5**.

Regarding interconnection (**paragraph 6**), BEREC reiterates its view already expressed in the Report on the outcome of the consultation on the evaluation of the application of Regulation (EU) 2015/2120⁵.

5 ARTICLE 2 – DEFINITIONS

One civil society stakeholder welcomed the clarification that where the OIR refers to the definitions of Article 2 of Directive 2002/21/EC, which has been repealed by the EECC, these references “*must now be read as references to the relevant parts of the EECC*”. Nonetheless, on a basis of legal clarity, they would suggest adding a clarification of the relevant EECC provisions in the text of the Guidelines. This stakeholder stated that services to “*access the internet provided by cafés and restaurants*” should not be considered under **paragraph 12**, as such services are publicly offered to an undefined public, and are often open networks (i.e., not password protected). In such cases, they should be considered as publicly available services, which must also comply with EU rules on net neutrality.

The same stakeholder also considered that **paragraph 18** should be clarified to ensure that no connectivity services are excluded from the scope of the OIR, and should not mention e-book readers, as these devices can still be used to access the internet. They also said that it should be made clear that the OIR does not foresee any other connectivity services beyond internet access services (IAS) and specialised services.

⁵ BEREC Report on the outcome of the consultation on the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines, BoR (18) 245, page 22:
https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8318-berec-report-on-the-outcome-of-the-consultation-on-the-evaluation-of-the-application-of-regulation-eu-20152120-and-the-berec-net-neutrality-guidelines

BEREC thanks this stakeholder for its feedback and has carefully considered the respondent's views related to Article 2, which concerns the definition of the terms used by the OIR.

Regarding examples of services or networks not being made publicly available (**paragraph 12**) and of services with limited endpoints (**paragraph 18**), BEREC reiterates its view expressed in its previous *Report on the outcome of the public consultation on draft BEREC Guidelines on the Implementation of the Open Internet Regulation (EU) 2015/2120*⁶.

BEREC had chosen to update the Guidelines in the light of the implementation of the EECC; as no legal text has modified the legal background for this subject, BEREC considers that there is no need to change **paragraphs 12 and 18**.

6 ARTICLE 3 – SAFEGUARDING OF OPEN INTERNET ACCESS

This chapter discusses several topics related to Article 3. Some of the comments related to Article 3 have already been touched upon in Chapters 2 and 3, and will be further elaborated on in this chapter.

6.1 Relationship between Articles 3(1), 3(2) and 3(3)

One civil society stakeholder very much welcomed the clarification in **paragraph 37**, with a new **paragraph 37a**, which states that the core principles of net neutrality in Article 3(1) and 3(3) cannot be bypassed by commercial agreements/practices.

One academic stakeholder explained in their contribution that the ECJ rulings make some clarifications concerning the relationship between Article 3(2) and Article 3(3) which the Guidelines do not tackle completely. The contribution stated that the 2020 and 2021 ECJ decisions should be read in conjunction and establish a hierarchy between Article 3(2) and Article 3(3). Therefore, ISPs' practices should be evaluated first under Article 3(3). If a practice is prohibited under those provisions, there is no need to also examine these practices under Article 3(2). Article 3(2) only comes into play if Article 3(3) is not relevant or the practice proves non-infringing due to one of the exemptions contained under Article 3(3) subparagraphs 2 and 3. These clarifications would be relevant beyond the evaluation of zero-rating and other forms of differentiated pricing. Therefore, the contribution recommended to fully describe these clarifications in the Guidelines and made specific proposals for changing the text of the Guidelines⁷. These concern the discussion of Article 3(2) (**paragraphs 31a and 31b** of the draft Guidelines with follow-on modifications to **paragraphs 37 and 37a**, as well as **paragraph 19** to ensure coherence within the Guidelines.)

⁶ BEREC Report on the outcome of the public consultation on draft BEREC Guidelines on the Implementation of the Open Internet Regulation (EU) 2015/2120, BoR (20) 111, page 8:

https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/9276-berec-report-on-the-outcome-of-the-publi_0.pdf

⁷ See „Comments on Draft BEREC Guidelines on the Implementation of the Open Internet Regulation. Response to BEREC's public consultation" from an academic stakeholder, 14 April 2022, p. 9-11

BEREC thanks the stakeholders for their feedback and has carefully considered respondents' views related to the relationship between Article 3(2) and Article 3(3).

Concerning the establishment of a hierarchy between Article 3(3) and Article 3(2), BEREC believes that the draft Guidelines make it sufficiently clear that infringements of the general principles contained in Article 3(3) subparagraph 1 and Article 3(1) cannot be justified on the basis of, or saved by, commercial agreements and commercial practices as described in Article 3(2). BEREC also agrees that the ECJ rulings have wide-ranging implications for the whole market.

Therefore, BEREC has reworded **paragraphs 19, 37 and 37a** of the Draft Guidelines to provide more clarity. More precisely, the notion "*should also*" has been replaced by "*must*" (in **paragraphs 19 and 37**) and the example in **paragraph 37a** has been clarified as follows (addition in red): "(e.g. blocking access to applications or types of applications *or non-application-agnostic differentiated pricing*)". The notion of "*technical practices, such as*" has been removed from this example.

6.2 Terminal equipment

One industry stakeholder referred to **paragraphs 25, 26 and 27** of the Guidelines on Article 3(1), which lay down the right of end-users "*to use terminal equipment of their choice*". The stakeholder considered that looking at the practice in many EU Member States, these Guidelines have not necessarily contributed in the past to the consistent, coherent and correct application of the OIR by NRAs. However, the stakeholder is of the opinion that the BEREC Guidelines on common approaches to the identification of the network termination point in different network topologies⁸ contribute to ensuring that end-users can decide for themselves which terminal device they want to connect to the "*socket on the wall*" by providing a network termination point (NTP) at the so-called "*point A*" ("*connection socket to the line*", passive network termination point) as a rule.

According to this stakeholder's opinion, a clarification that the NTP is located at the (passive) "*socket on the wall*" (point A) is indispensable for a uniform implementation of the right to free choice of terminal equipment. The stakeholder suggested therefore to amend **paragraph 25** by indicating that NRAs should consider point A as an NTP and ensure that network operators publish the specifications of the interfaces.

The stakeholder furthermore criticised the fact that the definition of the NTP relies on the assessment of an objective technical necessity for obligatory equipment which, according to their analysis, undermines the right of end-users to freely choose their terminal equipment.

The stakeholder suggested that BEREC should make it clear that the technical reasons asserted by network operators need to significantly outweigh the restriction of the end-users' freedom to choose their terminal.

⁸ BEREC Guidelines on Common Approaches to the Identification of the Network Termination Point in different Network Topologies, BoR (20) 46, ("the 2020 NTP Guidelines"); https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/9033-berec-guidelines-on-common-approaches-to-the-identification-of-the-network-termination-point-in-different-network-topologies

Additionally, in the stakeholder's opinion, the Guidelines lack an obligation for network operators to provide their customers with access credentials and configuration data necessary for the use of freely selected terminal devices and all contractually agreed services.

BEREC thanks this stakeholder for its feedback and has carefully considered the respondent's views related to terminal equipment.

The 2020 BEREC NTP Guidelines are presently valid, as there have been no new legal developments of the field of the NTP definition. Unlike as stated by the stakeholder, the 2020 NTP Guidelines do not present "point A" as the only option for setting the NTP, as there is an assessment of the NTP that is performed nationally and accordingly to the local network topology.

Therefore, BEREC will not amend this section of the Guidelines.

6.3 Commercial considerations on zero-rating offers

One civil society stakeholder welcomed the new **paragraph 54a** from the Guidelines and the fact that it clearly states that a zero tariff option violates the general obligation to treat all traffic equally in Article 3(3), since according to the ECJ rulings a 'zero-tariff' option draws a distinction between internet traffic, based on commercial considerations, by not counting towards the basic package traffic to partner applications. One ISP agreed with BEREC's approach of considering zero tariff options and similar offers as inadmissible and in violation of the OIR.

On the other hand, one ISP emphasised that only zero tariff options, as defined in the ECJ decisions, are clearly contrary to the general obligation of equal treatment of traffic, without discrimination or interference, as required by the OIR.

Some ISPs and another industry stakeholder warned that BEREC should not go beyond the wording of the ECJ decisions in its interpretation by also classifying "similar offers" as inadmissible. They also called on BEREC to consider distinguishing between the treatment of zero-rating practices based on commercial considerations and zero-rating practices that are not based on commercial considerations since the ECJ decisions and the definitions refer to a practice based on commercial considerations. This distinction is missing from BEREC's analysis of the ECJ definition, making it appear that all types of zero-rating offers would be inadmissible. A group of ISPs also noted that BEREC's guidance on sponsored data goes beyond the ECJ judgements and raises the issue of the accessibility of customer care services. Finally, one ISP warned that operators may introduce services for payment that are now free and this may have a negative impact on end-users.

One academic stakeholder proposed to update the Guidelines' text in **paragraph 33** according to the *Telenor Magyarország* ruling regarding the interpretation of the term "commercial practices", to reflect that commercial practices conducted by ISPs should not be evaluated by their motivation and that these do not only cover economic practices like pricing and contractual terms, but also technical practices.

BEREC thanks the stakeholders for their feedback and has carefully considered respondents' views related to commercial considerations of providers when evaluating providers' practices.

In BEREC's opinion, the OIR and the ECJ rulings make it clear that the obligation of treating all traffic without discrimination is the general rule. Any exceptions to this rule must be based on the specific rules of the OIR and be evaluated based on a strict interpretation of the exceptions. Therefore, the mere fact that a commercial practice involving differentiated treatment of traffic is not based on "commercial considerations", or involves differentiated handling of traffic in a situation which is not completely identical to the zero-rating programs at issue in the judgements, does not make that practice permissible under the OIR, unless it can be justified under one of the exceptions.

Considerations connected to differentiated treatment of customer care services and exceptions in the interest of the "public good" are treated in more detail further below (see Sections 6.4 and 6.5).

Based on consideration of stakeholders' contributions, BEREC does not consider it necessary to change the draft Guidelines.

6.4 Public good

Several ISPs called for a distinction to be made in the Guidelines between zero-rating practices based on commercial considerations and those that are not based on commercial considerations (public interest), and strongly called for the authorisation of zero-rating applied for the benefit of citizens.

Most of the contributions received on this topic emphasised the benefits of the existence of this type of offer for the public good, such as the applications that support connectivity in terms of access especially for under-connected individuals with low incomes or for ensuring the availability of health (in particular COVID-19 related) or educational applications.

Few ISPs were of the opinion that the ECJ specifically refers in its decisions to commercial practices, while the zero-rating practices in the public interest are not in any way commercially based. Therefore, these offers should not be prohibited as this would be contrary to the public interest and to the intention of the legislator in 2015.

One CAP encouraged BEREC to clarify in **paragraph 81** of the Guidelines that NRAs may more broadly assess various zero-rating offers on a case-by-case basis to determine if they should be permitted given the specific circumstances and details of a particular offer and its benefits, and not only whether the offer complies with national legislation or measures by public authorities.

Several ISPs argued that some of these applications were supported (although not mandated by law) by regulators and governments, representing a flexible and sensible interpretation of the OIR.

One ISP considered that in some cases, governments may mandate zero-rating of specific content or applications based on the exception referred to in Article 3(3)(a). However, two ISPs argued that in some 'public good' cases, it would not be practicable or desirable for the Government to have to intervene, define and mandate the most appropriate content and applications for zero-rating, especially in exceptional circumstances where such work is done in cooperation between the Government and the sector. Therefore, one of them urged BEREC

to provide a flexible interpretation allowing the provisioning of unrestricted access applications/content in the interest of the public good without the need of resorting to the exception provided in Article 3(3)(a).

Two ISPs called on BEREC to re-assess the proposed changes to its Guidelines and to continue to allow zero-rated access to platforms providing access to e-health, educational and similar services.

One academic stakeholder explained that zero-rating certain applications based on the unilateral decision of the provider cannot be allowed even based on the public interest unless it is explicitly covered by one of the exceptions under the OIR (in particular a mandatory legal basis under Article 3(3)(a)). According to the 2021 and 2020 decisions, Article 3(3) subparagraph 1 establishes a general non-discrimination rule, which applies to all technical and non-technical measures used by ISPs independent of motivation. Under the ECJ decisions, zero-rating a specific application or category of applications outside of these narrowly defined exceptions, on a commercial basis or not, violates the general non-discrimination rule unless it falls under the exceptions provided by Article 3(3) subparagraphs 2 and 3. Public interest alone does not preclude that NRAs verify whether the conditions established by Article 3(3) subparagraphs 2 and 3 are met.

BEREC thanks the stakeholders for their feedback and has carefully considered respondents' views related to the public good.

Regarding the distinction to be made in the Guidelines between commercial and non-commercial zero-rating, BEREC sees no such need considering the ECJ did not specifically make this distinction in its rulings.

Article 3(3) subparagraph 1, as interpreted in the 2021 ECJ rulings, contains a general obligation of equal treatment of traffic which forbids any differentiation between the internet traffic. Exceptions to this general obligation could only be based on Article 3(3) subparagraph 3 (a) in this particular case.

Therefore NRAs should assess, on a case-by-case basis, if such practices not based on commercial considerations are foreseen as an exception based on Article 3(3)(a). Please also see Section 6.8 for further information related to the exception provided in Article 3(3)(a).

Concerning the exception provided in Article 3(3)(a), national legislation could be used to justify practices for example when an application of public interest needs to be available also after the data volume of the subscriber has been exhausted. Also, national legislation might also be used to impose zero-rating of a public interest application prior to reaching the data cap. **Paragraph 81** of the Guidelines contains considerations in this regard.

For these reasons, BEREC will not amend the Guidelines concerning the public good topic.

6.5 Customer care services

Several stakeholders (ISPs and CAPs) were of the opinion that access to *customer care services* (applications and/or websites) should be allowed to be zero-rated. In other terms, end-users should be provided with a free-of-charge approach to *inter alia* purchase additional

data, have a real time cost-control of their expenditures, or to be informed about their contractual terms (and any changes thereof) and to be able to manage their subscription (change in settings).

They argued in favour of this option by claiming end-users' welfare and other legislative provisions (e.g. Roaming Regulation⁹, EEC and national regulations mandating ISPs to provide means to monitor consumption in real time). They also expressed that customer care services should not be considered as a 'commercial practice involving traffic management', but as a means to secure 'free and open' internet access as such for customers. Moreover, in their opinion, removal of the ISPs' own customer services from the list of likely to be admissible exceptions appears formalistic, unnecessary and disproportionate, as it does not address any risks regarding the objectives of the OIR. Limiting the current practice will have the opposite effect and *de facto* limit end-users' access to the open internet altogether. It goes even further by posing a risk to pre-paid and 'pay as you go' customers, who, when they run out of data, may also lose access to services. Without allowing for exceptions for customer care services, they see that there is a real risk that customers who run out of credit are left in a position where they cannot top-up – potentially leaving them in a dangerous and/or vulnerable situation.

Their suggestion is to amend the **paragraph 35** of the Guidelines to explicitly mention customer care services among the examples of commercial practices that would be typically admissible, otherwise risking that end-users would have to pay for services that are currently free-of-charge or even not be able to access them at all.

BEREC thanks stakeholders for their feedback and has carefully considered respondents' views related to customer care services.

BEREC reiterates the interpretation of the recent ECJ rulings on this matter previously mentioned, which contains a general obligation of equal treatment of traffic, irrespective of the commercial or non-commercial based practices. Therefore, BEREC considers keeping the current approach and sees no possibility to add this specific example to the list outlined in **paragraph 35**.

BEREC is well aware of the existence of the legal provisions which grant end-users free-of-charge access to some specific services and under specific conditions. In this instance, BEREC recalls the provisions of Article 3(3)(a), which allows exceptions based on Union or national law (see also **paragraph 81** of the current Guidelines).

BEREC stresses that, in order to be deemed as acceptable exception based on Article 3(3) (a), the service provided should meet several criteria which are further presented in Section 6.8.

6.6 Price differentiation and application-agnosticism

Several stakeholders welcomed the new wording of the Guidelines concerning price differentiation and application-agnosticism.

⁹ Regulation (EU) 2022/612 of the European Parliament and of the Council of 6 April 2022 on roaming on public mobile communications networks within the Union (recast): <https://eur-lex.europa.eu/eli/reg/2022/612/oj>

A CAP and a civil society stakeholder confirmed BEREC's reading by stating that zero tariff options are inadmissible regarding the obligation to "treat all traffic equally" in Article 3(3) subparagraph 1, and approved the examples of admissible differentiated pricing that relies on the "application-agnostic" criterion. The examples were approved by two ISPs: one of them appreciated the fact that the Guidelines leave room for differentiation to still take place in certain cases, thereby allowing network operators to work out the best tariff options for their respective customer bases; the other one agreed that there is room left for differentiated billing practices under Article 3(2) as stated in paragraphs **35 and 40c**, and welcomed the replacement of guidance on zero-rating offers with comprehensive guidance on differentiated pricing practices in **paragraphs 40-40c**.

Two ISPs expressed a need for further clarification: one on the meaning of "application-agnostic", and the other one on the necessity to assess differentiated pricing practices on the basis of the OIR and not on the basis of competition law or ex-ante market regulation.

A CAP suggested to clarify in **Paragraphs 35 and 138** that permissible "application-agnostic" zero-rating would include offers that treat all applications and/or websites on the internet the same. This could include, for example, a mobile operator zero-rating *all* text or video on the internet for its customers without discrimination between application or website.

One academic proposed a general comment on this section, expanding the assessment of differentiated pricing practices to include a description of the framework for evaluating differentiated pricing practices under the OIR. This comment also proposed to integrate a more detailed discussion of zero tariff options and their treatment by the ECJ, by incorporating the ECJ's definition of "zero tariff options" and the reasoning behind it.

Additionally, this academic proposed to discuss the role of other practices beyond the differentiated counting of traffic that are part of a zero-rating program and to provide specific examples. In this context, this stakeholder proposed different wording regarding the conditions under which differentiated practices violate Article 3(3), aimed at ensuring a higher degree of certainty.

In light of the above, this academic stakeholder suggested a list of modifications in the wording of **paragraphs 40-41 and 54a-56** in order to harmonise them with the ECJ rulings and to provide more clarification for the market.

Moreover, BEREC received several specific amendments on the topic of price differentiation and application-agnosticism:

- Concerning **paragraph 34a**, one civil society stakeholder recommended defining application-agnostic in the context of differentiated pricing practices as the pricing of traffic independent of application or classes of application.
- Concerning **paragraph 35**, one ISP suggested an amendment by adding a reference to differentiated pricing and to a possible QoS differentiation. Another group of ISPs also pointed to the topic of QoS differentiation in that regard, asking for clarification as to whether QoS differentiation on different categories of traffic is allowed. Specific changes regarding application-agnostic examples in the text of **paragraph 35** were suggested by one academic.

- Concerning **paragraphs 35 and 40c**, one civil society stakeholder suggested replacing the references to “typically” and “are typically admissible”, respectively, with the terms “potentially” or “may be admissible”, considering that the assessment of agreements and commercial practices in light of such examples is to be carried out by NRAs.
- Concerning **paragraph 40**, one ISP proposed to be more precise about the fact that zero tariff options are inadmissible if not application-agnostic. Other ISPs considered that the examples of commercial practices lack a clear statement as to their admissibility, and asked for clarification and possibly practical illustrations. One CAP encouraged BEREC to clarify in **paragraph 40** that the prohibitions on zero-rating do not apply if, for example, an ISP or MNO chooses to provide free access to a time-limited zero-rated trial for people who have not yet purchased a data plan, so that an unconnected consumer could have an opportunity to experience connectivity and see the benefits of purchasing data to access the internet.
- Concerning **paragraph 40b**, several civil society stakeholders suggested avoiding the word “likely” to have more definitive guidance, like in **paragraph 48**. One academic made a similar remark by saying that the wording of “likely inadmissible” creates uncertainty.
- Concerning **paragraph 48**, several civil society stakeholders proposed deleting the phrase “may also be taken into account”, arguing that it deviates from the judgements and threatens a harmonised implementation.

BEREC thanks stakeholders for their feedback and has carefully considered respondents’ views related to price differentiation and application-agnosticism.

The applicability of Article 3(3) to commercial practices also includes the possibility of price differentiation with equal treatment of traffic as described in examples of **paragraph 35** of the draft Guidelines. Aside from this, the exceptions to the general obligation for commercial practices could always be based on Article 3(3) subparagraph 3(a).

Therefore, BEREC reiterates that even after the ECJ rulings there is still scope for price-differentiated offers. In order to distinguish between admissible and inadmissible offers, the notion of application-agnosticism is crucial. In order to be precise about this concept, BEREC will add the following modification (addition in red) in **paragraph 34a**: “*application-agnostic means that the **commercial and technical** treatment of traffic is independent of application*”. BEREC disagrees that offers that discriminate e.g. “all text” or “all video” would be application-agnostic. Given this generic definition of application-agnosticism, it is not deemed necessary to extend the list of typically admissible commercial practices in **paragraph 35**.

Concerning the bullets in **paragraph 35** mentioning examples of practices that are typically admissible, BEREC added the following clarification to the first bullet (addition in red): “*application-agnostic offers where data consumption during a certain time period (e.g. during the weekend or off-peak times or a given number of hours per month) is not counted against the general data cap in place on the IAS tariff **or is priced differently***”. This addition increases consistency with the notion of “differentiated pricing practice” as generically set out in **paragraph 40**.

Against the background of these modifications, BEREC does not see a need to add “*if not application-agnostic*” at the end of the first sentence of **paragraph 40a**. More generally, given these changes, BEREC considers that a comprehensive restructuring and further refinement of the section “Guidance on assessment of differentiated pricing practices” is not necessary as BEREC’s changes enhance clarity for the market.

In order to better reflect the ECJ rulings and to enhance clarity for the market, the term “*likely*” is deleted in **paragraph 40b**. At the same time, this modification increases consistency with the second bullet of **paragraph 48**. Furthermore, it is clarified in **paragraph 40b** that “*any*” differentiation practices that are not application-agnostic are considered inadmissible. By adding “*for IAS offers*” in **paragraph 40b**, BEREC clarifies that the guidance on differentiated pricing practices relates to the provision of IAS and not to specialised services.

Regarding the language proposal for **paragraphs 35 and 40c**, BEREC considers that the current qualification as “*typically admissible*” is adequate for this kind of offer and that the current wording strikes a good balance.

Concerning the other modifications suggested in **paragraphs 40-41 and 54a-56**, BEREC does not see the need for these and considers it will maintain the current approach.

Regarding QoS architecture and network slicing, BEREC refers to its *Report on the outcome of the public consultation on draft BEREC Guidelines on the Implementation of the Open Internet Regulation (EU) 2015/2120*¹⁰, which provides an illustration of the options that are available under the OIR.

6.7 Traffic management

One ISP suggested some clarification in the text on admissible and non-admissible practices. This ISP argued that the fourth bullet in **paragraph 35** of the draft Guidelines can be interpreted as a statement that blocking is typically not admissible. However, they argued that neither the OIR nor the ECJ judgments consider blocking as problematic as long as it is applied to all traffic, and so the Guidelines should reflect that.

According to some other ISPs, **paragraph 48** seems to suggest that setting a data cap would be illegal as it has an effect similar to blocking the access once the data cap has been reached. By setting such general rules, it would become impossible to develop and maintain commercial practices, which are in fact allowed elsewhere by the OIR. They proposed – should BEREC maintain this paragraph – that it is reformulated as: “*Any agreements or practices which have an effect similar to technical blocking of **part of the traffic** are incompatible...*”.

Another industry stakeholder claimed that BEREC should be more ambitious in considering recommendations and guidance on specialised services other than IAS pursuant to Article 3(5).

¹⁰ BEREC Report on the outcome of the public consultation on draft BEREC Guidelines on the Implementation of the Open Internet Regulation (EU) 2015/2120, BoR (20) 111, page 13:
https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/9276-berec-report-on-the-outcome-of-the-publi_0.pdf

BEREC thanks stakeholders for their feedback and has carefully considered respondents' views related to traffic management.

In regard to the concern that the draft Guidelines may be read in a way that they entirely prohibit blocking of traffic, BEREC would like to note that the rules of the OIR and the guidance given in the Guidelines regarding traffic management have not changed. However, in order to address the concern raised by the stakeholder, BEREC has reworded **paragraph 35** and deleted the first bullet of **paragraph 48** of the draft Guidelines to provide more clarity.

BEREC notes that the rules of the OIR concerning specialised services have not changed and the ECJ decisions have not dealt with this area. BEREC also notes the existing guidance on specialised services that remains unchanged in the draft Guidelines. However, no specific proposals were given and therefore BEREC does not consider it necessary to change the draft Guidelines in response.

6.8 Exception provided in Article 3(3) subparagraph 3 (a)

One academic argued that zero-rating of specific applications or categories of applications might be subject to an exception under Article 3(3)(a), if the ISP is required by legislation (as described in **paragraph 81** of the draft Guidelines). However, the OIR does not generally allow the Member States to adopt laws deviating from the provisions of the OIR. As a result, such an exception needs to be interpreted narrowly to prevent the exception from swallowing the rule.

Second, to be justified by the exception, the legislation would have to specifically require the ISP to zero-rate the specific application or category of application, as the wording of Article 3(3)(a) requires. This exception does not permit Member States to simply allow ISPs to zero-rate certain apps.

Some ISPs considered that non-technical related measures "*which are not based on commercial considerations and don't result from a partnership with a content provider*" would be allowed. Therefore, they called on BEREC to make a distinction in the Guidelines that such practices do not need a legal basis in Article 3(3)(a).

These ISPs also raised the importance of clarification about this topic. They noted that **paragraph 81** of the Guidelines, in relation to the above-mentioned exception on compliance with Union legislative acts or national legislation, states that NRAs should assess whether an ISP applies such traffic management measures because it has to do so for legal reasons.

In regard to roaming, several ISPs expressed their concern that the Roaming Regulation sets the obligation on ISPs to provide free internet access to information on roaming tariffs (therefore zero-rating these web pages). They understand that the draft Guidelines forbid these same ISPs from providing free access to customer care services (i.e. "*applying a zero price to ISPs' own applications*") in order to buy additional data.

BEREC thanks stakeholders for their feedback and has considered the arguments and concerns in updating the Guidelines.

BEREC considers an exception according to Article 3(3) subparagraph 3 (a)–(c) as a precondition for non-application-agnostic zero-rating. The obligation of the Roaming Regulation to a free access to information on tariffs, as well as the obligation of the EECC on emergency communications, can be considered examples of an exception under Article 3(3)(a), meaning that non-application-agnostic zero-rating of this information continues to be allowed, also under the revised Guidelines. This has been clarified in the footnote related to **paragraph 81** of the Guidelines. Regarding the interpretation of Article 3(3)(a), BEREC agrees that this exception has to be interpreted narrowly. This means that any national law must not be used to circumvent the OIR.

7 ARTICLE 4 – TRANSPARENCY MEASURES FOR ENSURING OPEN INTERNET ACCESS

Several civil society stakeholders welcomed the example in the first bullet point as a useful addition, which benefits from the additional transparency in **paragraph 138**.

Another civil society stakeholder recommended amending the wording in the last bullet point of **paragraph 130**, aligning it with Article 103 EECC, so that comparison between different ISPs should always be possible, and not only “*preferably*”. They also recommended introducing wording that providers shall be obliged to include a summary of the information required in Article 4(1) OIR in their contract summaries, in line with Article 102 EECC.

In addition, they recommended amending **paragraph 133** to adequately reflect the legal wording used in Article 3(3) of Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Contractual Terms Directive): the term “*might*” should be replaced with “*may*”.

BEREC thanks stakeholders for their feedback and has carefully considered respondents’ views related to Article 4, concerning transparency measures.

BEREC does not plan to amend that section as the draft updated Guidelines have already been aligned with the provisions of the EECC. However, for stakeholders looking for more details on transparency requirements, BEREC would like to refer to its *Guidelines detailing Quality of Service Parameters*¹¹, which complement the provisions of the EECC in that regard.

8 ARTICLES 5 AND 6 – SUPERVISION AND ENFORCEMENT

This chapter discusses feedback regarding NRAs’ supervision, the transitional period to enforce the proposed amendments, as well as end-users’ rights to terminate their contracts.

¹¹ BEREC Guidelines detailing Quality of Service Parameters, BoR (20) 53: https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/9043-berec-guidelines-detailing-quality-of-se_0.pdf

8.1 Supervision

Several civil society stakeholders proposed that BEREC should update its guidance on annual reports by NRAs to require information about the enforcement of the judgements, and that this information should be reflected in the corresponding BEREC Report. This submission pointed out that enforcement based on the updated Guidelines has to be swift, thorough and appropriate to the harm the ECJ has affirmed in its rulings.

Another civil society stakeholder, following the recent developments on net neutrality, urged BEREC and NRAs for a renewed emphasis on the implementation and appropriate enforcement of the rules. This stakeholder also highlighted the importance of BEREC's efforts to step up enforcement and offer support to NRAs whenever needed. In this context, this stakeholder suggested BEREC consider amending **paragraph 187**, which establishes that “no guidance to NRAs is required” regarding penalties. It also suggested that these provisions are updated with clear references to the latest ECJ rulings on net neutrality.

One ISP warned that the small openings made in price differentiation admissible offers and in the exception of non-application-agnostic treatment of traffic could be used to circumvent the OIR to the detriment of competition, innovation and end-users' rights. The stakeholder believes that such offers should be allowed for a very short period and carefully assessed by the NRAs, inviting BEREC to take into consideration this aspect in its final draft of the Guidelines.

More generally, another ISP noted that whilst the 2021 rulings may impact the application of certain provisions, it should be clear that the instrument of the OIR is still very much intact, which therefore continues to apply.

BEREC thanks stakeholders for their feedback and has carefully considered respondents' views related to supervision.

Regarding reporting on the enforcement of the ECJ rulings, BEREC will include the relevant information in a dedicated chapter of the future *Reports on the implementation of Regulation (EU) 2015/2120 and BEREC Open Internet Guidelines*. Due to the non-recurring nature of the ECJ rulings, BEREC considers that the respective supervision shall not be reflected in the Guidelines.

About the guidance on penalties requested by a stakeholder, BEREC still considers that the provision of Article 6 is aimed at Member States and that no guidance to NRAs is required.

Regarding the concern related to price differentiation allowed for a very short period, BEREC considers that **paragraphs 79 and 81** already clearly reflect those comments.

8.2 Transitional period

Several ISPs touched on the subject of the transitional period in their contributions. These stakeholders argued that in order to avoid distortions of the market and to be able to adjust their portfolio of tariffs, the ISPs would need to have a suitable amount of time (a transition period), and that the Guidelines should provide for such a period. Views on a suitable time varied from one month from the publication of the new Guidelines to a minimum of six months,

during which time the current offers should not be seen violating Article 3(3), and up to a gradual phase-out of 24 months. One of the stakeholders proposed that the Guidelines should reflect that such a transitional period would last for the same amount of time for each provider in a certain domestic market, in order to prevent market distortions.

BEREC thanks stakeholders for their feedback and has carefully considered respondents' views related to a transitional period.

BEREC recalls that the ECJ has not set out a transitional period in its rulings, and that in principle, the ECJ's interpretation on the OIR has retroactive effect back to its entry into force.

BEREC notes the request for a transitional period in order to allow ISPs to modify their offers and to adjust to the new interpretation of the OIR and the subsequent revision of the Guidelines. However, BEREC does not see the need to integrate a universal transitional period into the Guidelines, as it is to be considered a national matter to set a transitional period that is fitting to the national context.

BEREC provides a forum for NRAs to share information, to align NRA supervision and enforcement actions, where possible, by aiming to enable the consistent application of the OIR. Further information regarding NRA actions will be provided in the *BEREC Report on the implementation of Regulation (EU) 2015/2120 and BEREC Open Internet Guidelines 2022*, which will be released in October 2022.

Moreover, BEREC takes note of the proposal for a consistent transitional period for all stakeholders in domestic markets. However, it does not see a fit for such a guidance in the scope of the Guidelines, as it is to be considered a national matter.

8.3 Right to terminate the contract

Some ISPs understood that these new provisions lead to contract modifications outside the will and intention of operators, as a result of the requirement to remove these services. This may lead to situations where customers theoretically have the opportunity to leave the operator/contract, and could potentially have a very large impact due to the high number of concerned customers throughout the EU. This stakeholder argued that operators should have the opportunity to process these changes without having to bear the aforementioned consequences. In relation to the implementation modalities, there should be a sufficiently long transitional period and a flexible application of this transition.

Several ISPs wished for BEREC to give clear guidance on how to modify the zero-rating offers already subscribed. Such guidance should take into account how the changes will affect the rights of both customers and ISPs, especially, the rights of end-users to unilateral contract termination.

One of these stakeholders asked for guidance on how to change the current offers during the transition period in a manner that is not considered a unilateral modification proposed by the provider giving the consumer right to terminate the contract. Another ISP asked for criteria that would allow a wide range of changes/modifications that could be assumed as positive or negative for customers. ISPs could then evaluate which is the less impacting or more sustainable modification to its offers. The latter stakeholder also stressed that the Guidelines

should state that the modification adopted by the ISP can be reserved only for the customers that previously subscribed to a zero-rating offer. Another ISP deemed that any changes should not create situations where subscribers have a right to terminate their contract.

Two ISPs suggested that ISPs should be permitted to apply zero-rating in existing contracts during a transitional period, to prevent a situation where customers are entitled to cancel those contracts. Some other ISPs requested flexibility and a sufficient transitional period for ISPs to process the changes in their offers, in reference to subscriber rights to terminate contracts.

BEREC thanks stakeholders for their feedback and has carefully considered respondents' views related to end-user rights to contract termination.

BEREC notes that the implementation of EECC provisions varies between Member States, and that guidance on EECC provisions and matters of contract law are out of scope of the Guidelines on the interpretation of the OIR.

BEREC furthermore notes that contractual changes proposed by ISPs that are to the benefit of end-users or that are directly imposed by Union or national law, are exempted from the end-users' right to terminate contracts without compensation following those changes, as set out in Article 105(4) EECC. BEREC notes that ISPs could change existing contracts with zero tariff options in a manner that replaces the zero-rating offer with for example application-agnostic unlimited data.

9 MISCELLANEOUS

Some stakeholders (of various categories) indicated that some of their input is based on their previous contributions to public consultations on net neutrality. Regarding the remaining provisions on which they do not comment on, they kindly referred to their previous submissions.

BEREC thanks stakeholders for their submissions and refers to its previous responses contained in the consultation reports released in 2020¹² and 2016¹³.

Further topics addressed by stakeholders in their submissions, that are not specifically related to the updates proposed by BEREC to its Guidelines, are covered in the following sections.

9.1 Five critical properties that underpin the internet

One civil society stakeholder welcomed BEREC's efforts to strengthen protections for the open internet by updating the Guidelines in response to recent ECJ rulings. In their view, the

¹² BEREC Report on the outcome of the public consultation on draft BEREC Guidelines on the Implementation of the Open Internet Regulation (EU) 2015/2120, BoR (20) 111: https://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/9276-berec-report-on-the-outcome-of-the-public-consultation-on-draft-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules

¹³ BEREC Report on the outcome of the public consultation on draft BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality rules, BoR (16) 128: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/6161-berec-report-on-the-outcome-of-the-public-consultation-on-draft-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules

internet's strength lies in the adaptability and relevance of its original architecture, which relies on five critical properties: being accessible, interoperable, decentralised, interconnected through common identifiers, and being technology neutral. They noted that these properties have underpinned the internet's success, contributing not only to the open internet but also the globally connected, secure, and trustworthy internet. Therefore, they believe that by reflecting these five core properties in the draft Guidelines, BEREC will ensure the continued functioning of the internet ecosystem and further its goals of fostering its role as an engine of innovation and realisation of end-user rights.

BEREC thanks this stakeholder for its submission to the consultation. BEREC appreciates that this stakeholder supports BEREC's work for an open internet and notes the call to also contribute to a globally connected, secure and trustworthy Internet. The five critical properties that underpin the internet as set out by the stakeholder are covered also in other BEREC activities:

1. accessibility and low barriers to entry: the NRAs of BEREC are promoting competition in markets to stimulate low prices to internet access, which is also supported and coordinated through participation in BEREC;
2. interoperability: BEREC has emphasised the importance of interoperability for example in its *Report on the ex ante regulation of digital gatekeepers*¹⁴;
3. a decentralised internet: BEREC is following the developments of internet interconnection and has a couple of times worked out extensive studies related to *IP Interconnection practices in the Context of Net Neutrality*¹⁵;
4. interconnection through common identifiers: BEREC has conducted work on this topic in its *Report Enabling the Internet of Things*¹⁶ (regarding IP addresses) and in the Guidelines (regarding the role of DNS);
5. technology neutrality: this is a fundamental characteristic that is also covered by the regulatory framework, the EECC, and which BEREC supports through its activities.

Finally, BEREC is currently conducting a broader study on the internet ecosystem and will launch a draft report on this topic in June 2022, analysing competition dynamics and openness of the internet.

9.2 IPv6

One industry stakeholder invited BEREC to promote the use of IPv6 in **paragraph 16** which would – from their point of view – support the achievement of the goals pursued by the

¹⁴ BEREC Report on the ex ante regulation of digital gatekeepers, BoR (21) 131:
https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/10043-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers

¹⁵ An assessment of IP interconnection in the context of Net Neutrality, BoR (12) 130:
https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/1130-an-assessment-of-ip-interconnection-in-the-context-of-net-neutrality

¹⁶ BEREC Report on Enabling the Internet of Things, BoR (16) 39:
https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5755-berec-report-on-enabling-the-internet-of-things

Guidelines. For example, blocking of IP addresses for security reasons as described in **paragraph 84** could be more precise via IPv6 as long as there is no Network Address Translation (NAT) used as sometimes is the case with IPv4. Additionally, specialised services and also the obligations on transparency could be fulfilled more easily by the use of IPv6 in the stakeholders view. The separation of traffic, which is mentioned in **paragraph 110** and which would be useful for the examples in **paragraph 113**, would fit very well to the possibilities of IPv6 and Segment Routing (SRv6). Further, the flow routing and monitoring mechanisms of SRv6 could be useful to meet the practices listed in **paragraph 130**.

BEREC appreciates the insights and evidence on the use and promotion of IPv6.

BEREC has discussed the adoption of IPv6 in an internal Report in 2021¹⁷. BEREC will provide a forum to further discuss and share information on relevant market deployments such as the IPv6 transition in BEREC members and participants without voting rights, as provided by the *BEREC Work Programme 2022*¹⁸ (Section 2.4.2.).

Currently, BEREC sees no need to change the Guidelines in this respect.

¹⁷ Internal report on a preliminary assessment of the transition to IPv6 in Europe and a proposal for next steps by BEREC on the matter, BoR (21) 25

¹⁸ BEREC Work Programme 2022, BoR (21) 175:

https://berec.europa.eu/eng/document_register/subject_matter/berec/annual_work_programmes/10136-berec-work-programme-2022

10 Annex – Stakeholders that submitted a contribution

The following stakeholders submitted a response to the public consultation. The stakeholders have been categorised, for the purpose this report, as follows:

- APRITEL (association of the Portuguese electronic communications services operators) – *[ISPs]*
- ATI (Alliance of the Technology Industry) Bulgaria – *[ISPs]*
- Barbara van Schewick – *[academic]*
- BEUC (The European Consumer Organisation) – *[civil society]*
- BREKO (Bundesverband Breitbandkommunikation) – *[ISPs]*
- EBU (European Broadcasting Union) – *[CAPs]*
- ECO (association of internet industry) – *[other industry]*
- Epicenter.works – for digital rights, EDRi (European Digital Rights), IT-Pol Denmark, D3 - Defesa dos Direitos Digitais, ApTI, Homo Digitalis, Državljan D / Citizen D, Freifunk Hamburg, Chaos Computer Club, Digitale Gesellschaft Deutschland, Digitalcourage – *[civil society]*
- ETNO/GIGAEurope/GSMA – *[ISPs]*
- GO Plc. – *[ISPs]*
- Huawei – *[other industry]*
- Internet Society – *[civil society]*
- Liberty Global – *[ISPs]*
- Meta – *[CAPs]*
- POST Luxembourg – *[ISPs]*
- Telefonica – *[ISPs]*
- VTKE (Alliance of Telecommunications Terminal Equipment Manufacturers) – *[other industry]*
- Vzbv (Federation of German Consumer Organisations) – *[civil society]*
- WIND-NOVA – *[ISPs]*
- Yettel Hungary – *[ISPs]*
- 2 confidential responses