Response by EDRi and epicenter.works to BEREC's public consultation for the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines

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European Digital Rights (EDRi) is an association of 39 civil and human rights organisations from across Europe. We defend rights and freedoms in the digital environment.

The NGO epicenter.works is actively engaged in the field of net neutrality throughout the European Union.

We welcome the opportunity to give feedback to the questions posed[1] by the Body of European Regulators for Electronic Communications (BEREC) on the evaluation of the application of Regulation (EU) 2015/2120[2] (the Regulation) and the BEREC Net Neutrality Guidelines[3] (the Guidelines).

We strongly oppose the reopening of the Regulation and believe the current Guidelines broadly give adequate tools to NRAs to ensure net neutrality.[4] Our proposed amendments to the Guidelines are to be understood as being proposed only in the context of them being reopened. For ease of reading, where we propose amendments to the Guidelines we highlight any *additions* or ~~deletions~~.

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1   http://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/8012-consultation-paper-on-the-evaluation-of-the-application-of-regulation-eu-20152120-and-the-berec-net-neutrality-guidelines
2   https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R2120
3   http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules
4   https://edri.org/net-neutrality-wins-europe/

A. General experience with the application of the Regulation and BEREC Net Neutrality Guidelines

1. In your view – have the Guidelines helped NRA's apply the Regulation in a consistent, coherent and correct way? Please explain.

The Guidelines broadly represent[5] a strong step in the right direction towards an open, free, competitive, and neutral internet and we congratulate BEREC on its achievements on the way to ensuring net neutrality in Europe. Yet, there are several aspects of the Regulation and the Guidelines that National Regulatory Authorities (NRAs) have not adequately addressed in practice, which may suggest a need to improve the Guidelines.

From our perspective, the most significant issue with the enforcement of the Regulation is is commercial practices that undermine the rights of end-users, particularly zero-rating. The Guidelines should be more explicit in prohibiting all forms of application-specific price differentiation and give more guidance to NRAs on this matter.

Indeed, it is our position, that zero rating specific applications or classes of applications generally limits the exercise of the rights of end users as laid down in the Regulation. Here, end users include not just the subscribers of internet access services (IAS), but also content and application providers (CAPs). With the experience of one and a half years of enforcement of the new rules, we observe that the case-by-case approach to the assessment of price-differentiated offers in BEREC's current reading of the Regulation as expressed by the Guidelines is not working. According to the BEREC implementation report[6] and the recent ANACOM draft decision that summarised previous regulatory interventions[7], there has been not even a single case in which a price differentiation offer has been found in breach of the Regulation. Even in cases where EDRi member organisations have found evidence that the essence of end-user rights has been undermined[8], NRAs have so far failed to act according to their supervision and enforcement duties. We believe BEREC and NRAs can and should do much more. To this end, EDRi members and observers[9] are bringing complaints or trying to encourage their

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5   https://edri.org/net-neutrality-wins-europe/
6   See page 8-10: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/7529-berec-report-on-the-implementation-of-regulation-eu-20152120-and-berec-net-neutrality-guidelines
7   See page 40-44: https://www.anacom.pt/render.jsp?contentId=1430814
8   See submission of epicenter.works and D3 to the consultation on the ANACOM draft decision about zero-rating and similar offers in Portugal.
9   https://www.bof.nl/press/acm-risks-net-neutrality-in-all-of-europe/
     https://xnet-x.net/en/zero-rating-offers-contrary-to-net-neutrality-in-spain/

respective NRAs to take measures to ensure respect of net neutrality, particularly with regards to zero-rating practices. A fragmented regulatory practice with respect to zero rating could furthermore represent an obstacle for developing the Digital Single Market, if European CAPs offering services in Member States with little zero-rating and large data caps are unable to offer the same services in Member States where zero rating is the dominant practice among IAS providers, especially if the zero-rating programmes have hidden discriminatory elements against non-domestic CAPs.

In addition, we have observed a broader, general issue with monitoring and enforcing the Regulation and the Guidelines. Whilst the Guidelines set out clear rules on supervision and enforcement, the language refers to powers, competences, and discretions rather than duties, responsibilities and obligations. We have advised in our policy analysis on the draft Guidelines[10] that given the funding and capacity situations under which some NRAs fulfill their duties, a clear mandate which also requires the NRA to act within a certain timeframe would ensure a higher and more equal level of enforcement throughout the digital single market. For example, in Germany, the "StreamOn" product of Deutsche Telekom was launched in April 2017 and it took the German regulator Bundesnetzagentur 9 months to come to a regulatory decision. A very similar product called "Free Stream" by Telekom Austria was launched in November 2017 and prohibited by the Austrian regulator RTR within one month. These ambiguities must be resolved before NRAs can be relied upon to apply the Regulation effectively and in a harmonised way.

2. Did the Guidelines provide additional clarity regarding how to apply the Regulation? Please explain.

Overall the Guidelines provided clarity in key points of the Regulation. However, the way in which the Regulation and the Guidelines are implemented and enforced by NRAs remains insufficient and in some cases opaque. BEREC's own implementation report[11] and our experience from several Member States demonstrate that not all NRAs are doing their job properly. There are huge discrepancies in the amount of effort and expertise that NRAs contribute to their new duties under the Regulation. We want to thank BEREC for strengthening European cooperation between regulators and for creating a harmonised

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https://epicenter.works/content/net-neutrality-violations-ceased-after-akvorrat-intervention-data-volumes-increased-up-to-17

10 https://edri.org/files/netneutrality/consultation_berec_edripolicyanalysis.pdf

11 BEREC net neutrality implementation report 2017: http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/7529-berec-report-on-the-implementation-of-regulation-eu-20152120-and-berec-net-neutrality-guidelines

and reliable regulatory framework. Yet, we believe that these efforts need to be intensified in order to guarantee end-user rights throughout the Union and achieve the goal of the Regulation in light of the increasing dangers to net neutrality in light of the upcoming 5G technology.

According to BEREC's implementation report, only six NRAs have updated their websites with additional net neutrality information and only one NRA has created their own online complaint mechanism.[12] This explains the great discrepancy between complaints received by NRAs.[13]

3. On which subjects would you expect the Guidelines to be more explicit or elaborated? How should the text of the Guidelines be adapted on these points, in your view. Please explain.

The Guidelines should be far more detailed and explicit on the issue of commercial practices and agreements restricting end-user rights according to Article 3(1) of the Regulation. Currently, this issue is by far the most pressing net neutrality violation we observe in Europe. The Regulation has clearly foreseen illegal commercial practices that undermine end-user rights and obliges NRAs to intervene when the essence of these rights is undermined.[14] Yet, two years after the Regulation came into effect and one and a half years after the Guidelines were published, we are aware of no NRA that has applied these rules against infringing commercial practices appropriately[15], even though the number of such offers has drastically increased throughout the EU. More so, we see a hesitation among NRAs to even assess such offers, let alone be the first NRA to apply the new framework and rule against them.

We see a significant increase of net neutrality violations in Europe which are modeled after paragraph 42 of the Guidelines. We call them **open class-based price-differentiation (or zero-rating) offers**. These offers aim to give the preferential treatment of zero-rating[16] or cheaper application-specific data volume[17] to a category of applications.

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12 See question 2 of the BEREC implementation report 2017.
13 See question 24 of the BEREC implementation report 2017.
14 See Article 3 paragraph 2 and the last sentence of Recital 7 of the regulation.
15 See BEREC implementation report and paragraphs 126-137 of the ANACOM draft decision from 23.02.2018 for the period following October 2017: https://www.anacom.pt/render.jsp?contentId=1430814
16 See, among others, Vodafone Pass in UK, CZ, DE, GR, HU, IT. RO and ES, the offers of Deutsche Telekom in DE, NL, PL and HR, Telekom Austria in AT and HR, Telenor in NO and BG.
17 See, among others, "Smart Net" of MEO and offers of providers NOS and Vodafone in Portugal.

These categories are defined by the IAS provider and often arbitrarily include or exclude certain applications or functions of applications. Such offers are often group strategies of multinational ISPs and strengthen the position of incumbent market players.[18] The Vodafone Pass offer, present in many European markets, serves as an example: the Facebook app is part of the "Social Pass", but the Facebook Messenger app is part of the "Chat Pass"[19], a distinct category under the zero-rating offer The "Chat Pass", in turn, does not include the telephony function of WhatsApp.[20] In the UK, Vodafone has compiled an entire page of the common customers' misconceptions about which functionalities of which app is included in each category.[21] In Romania, Vodafone has introduced a different categorisation of applications altogether and has combined the Social and Chat passes and introduced Maps and E-Mail passes.[22] Such arbitrary categories undermine the rights of end-users under the Regulation to offer services and distribute information without limitation by agreements between end-users and IAS providers.

Additionally, we would like to highlight the case of the mobile telecoms provider MEO's "Smart Net" offers in Portugal. In certain circumstances, these offers amounted to sub-internet offers, a practice that was recently prohibited by the Portuguese regulator ANACOM. However, the regulator left the door wide open to the continued commercial practice of application-specific data volumes at a price of 0,70€/GB compared to prices of 1,33 €/GB up to 53,98 €/GB for general purpose data volume. Two weeks before ANACOM issued its draft decision, MEO added a contact e-mail address for interested CAPs in the fine-print of the offer. MEO has not published commercial or technical conditions for the participation of CAPs in its programme and although several net neutrality friendly CAPs have inquired in early March about potential participation, MEO has not responded.[23]

Therefore, we argue that these open class-based price differentiation (or zero-rating) programmes do not apply the differential pricing or zero-rating to an "entire category of applications" as specified by paragraph 42 of the guidelines. **We urge BEREC to clarify this language and lay down concrete criteria to curtail such commercial practices where they undermine the rights of end-users**.

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18 The NGO epicenter.works has mapped these offers: https://epicenter.works/document/1127
19 https://www.vodafone.co.uk/pass/
20 https://www.vodafone.de/privat/service/vodafone-pass.html#welche-vodafone-paesse-gibt-es-und-wie-viel-kosten-sie
21 https://support.vodafone.co.uk/Vodafone-products-and-services/Vodafone-Passes/Managing-your-Pass/1060513502/What-usage-isn-t-covered-by-Vodafone-Passes.htm
22 https://www.vodafone.ro/personal/servicii-si-tarife/alege-vodafone/vodafone-pass/index.htm
23 See the submission of epicenter.works and D3 to the consultation of ANACOM's draft decision from 23.02.2018

In order to be admissible in these open class-based offers, a CAP must have legal personality compatible with the conditions of the IAS provider in question in order to be able to enter into a respective agreement. In the case of Vodafone Pass, the CAP must agree to non-disclosure terms before the commercial and technical conditions of the programme are revealed to him or her.[24] This severely undermines the principles of the open internet, which is based on open standards, and the goals of the Regulation to "guarantee the continued functioning of the internet ecosystem as an engine of innovation".

The terms and conditions for the participation in the zero-rating programmes of Deutsche Telekom, Vodafone, and Telekom Austria require the CAP to continuously cooperate with the IAS provider to keep their service identifiable in the operator's network. CAPs must provide the IAS provider prior notice of 28 to 30 days in cases of changes to their infrastructure, and in some cases must also give the provider access to beta versions of the service.[25] Any failure to do so incurs liability on the part of the CAP that may include liability for any wrongly billed data volume.[26] The different ISPs offer the CAP different technologies in order to identify their service, which can require separate adjustment efforts for participation in each programme.[27] Because of these administrative, financial, technical, and legal burdens, as well as language barriers, CAPs will be limited in the number of open class-based price differentiation (or zero-rating) programmes they can participate in and may choose to participate in the programmes of only the largest IAS providers in each market, via which they can reach the largest number of users.

Smaller telecom companies like Telekom Austria have attracted fewer and more local CAPs with their programmes compared to bigger telecom companies like Deutsche Telekom or Vodafone that operate these programmes as a group strategy in four to six countries. Both operators actively market their programmes with the number of CAPs that are already participating.[28] While smaller CAPs are not offered the opportunity to participate in several of these open-class based programmes at once, larger CAPs like

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24 This analysis is built upon a leak of the Vodafone Pass documents. For a reference to the process with the NDA see: http://www.vodafone.com/content/partner-portal.html
    Further analysis of the product in German can be found here: https://epicenter.works/document/893
25 See paragraphs 6.5 of the StreamOn TOS: https://www.telekom.de/hilfe/downloads/allgemeine-geschaeftsbedingungen.pdf and point 3.2.2 of the Vodafone Pass TOS
26 See paragraph 10 StreamOn TOS or 6.2 Vodafone Pass TOS
27 For example, in certain circumstances, streaming protocol RTMP is not supported by some programmes and only Vodafone offers "DNS Snooping" as an identification method to CAPs.
28 Telekom Austria's Free Stream includes mostly smaller CAPs from local radio stations and private television: https://www.a1.net/free-stream

Netflix can circumvent these new barriers with an agreement to partner in several markets at once.[29] In order to compete with incumbents already participating in such offers, every CAP is incentivised to enter into as many of these agreements as possible, but is restricted in doing so by the barriers mentioned above.

Therefore, we would like to highlight the dangers that such open class-based offers pose to competition within and the coherence of the digital single market. **BEREC urgently needs to assess the effects of these new types of net neutrality violations for the provision of cross-border services. Such analysis should be complemented by a study of the effects of zero-rating and similar practices on the availability and affordability of IAS data volume.**[30]

As recommended in our response[31] to the consultation on draft Guidelines, BEREC should prohibit all forms of application-specific differential pricing, since this practice enables ISPs to restrict user choice and distort competition between CAPs, thus violating the net neutrality principle, the rights of end- users under Article 3(1) and the obligation of the ISP under Article 3(3) to refrain from discriminating between applications or services. By contrast, price differentiation which is not application-specific is less likely to restrict user choice or competition between CAPs. Creating bright-line rules on what is prohibited in terms of price differentiation, and what is not, would greatly contribute to legal certainty for all involved stakeholders, e.g. IAS providers, CAPs and consumers, and also facilitates effective enforcement of the Regulation. We implore BEREC to at least clearly prohibit price differentiation based on individual applications and application-based price differentiation for a fee, these being the most egregious, harmful violations of the net neutrality principle.

Thus, we recommend a review of the guidelines with the core objective to explicitly prohibit price differentiation practices, *including* zero-rating as the case-by-case basis approach has so far failed in most European countries. In addition, we propose several amendments to the current guidelines throughout this consultation response, in line with previous consolidated EDRi positions.

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29 https://media.netflix.com/en/press-releases/netflix-and-deutsche-telekom-strike-international-partnership

30 Epicenter.works has provided such analysis based on preliminary data from the Commission in Annex 2 of its submission to the consultation of ANACOM's draft decision from 23.02.2018.

31 https://edri.org/files/netneutrality/consulation_berec_edriresponse.pdf

4. For ISPs: Did you discontinue certain products or services following the adoption of the Regulation or the Guidelines?

N/A

5. Did the application of the Regulation, or the implementation of the Regulation by the Guidelines, prevent you from launching certain products or services?

In order to capture the potential damages caused by the implementation of the Regulation in the Digital Single Market, the question should not focus on the launch of new services, but on the growth in users that such services have experienced.

Zero-rating is broadly harmful to innovation. Start-ups, for example, suffer in such a non-competitive market.

6. Do you have any additional comments on the application of the Regulation and Guidelines?

We have identified a number of key areas in which the application of the Regulation and the Guidelines fall short of expectations:

Firstly, in regard to zero-rating practices, there is discrimination between classes of applications or application-specific discrimination. In addition, there is technical discrimination in mobile internet offers in instances where users have reached their data limit. These are becoming common practices.

Secondly, the transparency requirements which internet providers are required to specify in their contracts regarding the maximum, average, and minimum speeds are frequently not met. Furthermore, the requirements for transparency regarding the explanation to users of traffic management practices that the IAS provider imposes are frequently not met.

Thirdly, the implementation of fines and penalties appears erratic throughout Europe. Indeed, Austria, Norway, and Portugal have not yet implemented penalties for violations of Article 3 of the Regulation, which, according to Article 6 of the Regulation, were due by 30 April 2016. We have also noticed that there are countries where there are no fines imposed for violations of various provisions of the Regulation. For instance, in Germany there are no fines for the infringement of end-user rights according to Article 3(1).

In countries such as Bulgaria, the very low fines (250 Euros) do not meet the criteria of the Regulation, which states in its Article 6 that "the penalties provided for must be effective, proportionate and dissuasive."

Finally, the lack of an effectively communicated complaint mechanism in many countries poses problems, as well as a lack of responses to complaints using existing available platforms and channels, as does a lack of sufficiency of resources, independence, and competence in certain cases. Whereas in most Member States the standards are applied by the corresponding independent national regulatory agency, in Spain, the corresponding agency, the CNMC, is only responsible for resolving conflicts between operators about network neutrality, but the responsibility for the correct implementation relies on the Secretariat of State for the Information Society and Digital Agenda, which is under the jurisdiction of the Ministry of Energy and Digital Agenda. In Spain, there are practices that undermine net neutrality. The Ministry has not set up an effective complaint mechanism on net neutrality – although it is an obligation under the Regulation – and plaintiffs face a difficult bureaucratic blockade. EDRi member X-net filed complaints through different national means to no effect. We consider this would require oversight from EU institutions regarding enforcement.[32]

B. Definitions (article 2 of the Regulation)

7. Do you think that the Guidelines should provide further clarification in relation to the definitions in the Regulation? If yes, please provide concrete suggestions.

Yes, as per our response to the public consultation on the draft BEREC guidelines[33], we recommend adding the following:

> 16. Where restrictions to reach end-points stem from the use of two different internet addressing schemes, IPv4 and IPv6, this typically does not mean the services cannot be defined as an IAS. While it is not possible to connect two different points with different types of addresses without any translation function, BEREC considers that the term "virtually all end points" should, at present, not be interpreted as a requirement on ISPs

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32 https://xnet-x.net/en/inaction-minetad-defend-net-neutrality/, https://xnet-x.net/inaccion-minetad-defender-neutralidad-de-la-red/, https://xnet-x.net/ofertas-zero-rating-contra-neutralidad-de-la-red/, https://xnet-x.net/en/zero-rating-offers-contrary-to-net-neutrality-in-spain/, https://xnet-x.net/carta-ministerio-agenda-digital-neutralidad-red-espana/, https://xnet-x.net/berec-borrador-directrices-neutralidad-red/

33 https://edri.org/files/netneutrality/consultation_berec_edriresponse.pdf

> to offer connectivity with both IPv4 and IPv6. *The number of end-points only available via IPv6 is likely to increase over time, and this would eventually lead to a requirement that connectivity via IPv6 should be offered. If national regulators impose a general requirement for IPv6 connectivity in IAS, appropriate exemptions should be made for legacy (existing) equipment where only IPv4 connectivity is possible due to technical limitations.*

This is due to the fact that it is foreseeable that IPv6 connectivity will eventually be needed in order to ensure access to virtually all end-points on the internet. We already brought forward these arguments in 2016 and want to stress that in light of the rapidly progressing transition towards IPv6, the need for such a clarification has grown since. If a requirement for IPv6 connectivity is imposed, appropriate exemptions should be made for legacy equipment where IPv6 is not technically possible.

On the crucial debate regarding potential limits of the scope of the Regulation in the guideline creation process in 2016 we want to highlight again our recommendation to paragraph 18:

> 18. Services where the number of reachable end-points is limited by ~~the nature of~~ the terminal equipment used with such services (e.g. services designed for communication with individual devices, such as ~~e-book readers as well as~~ machine-to-machine devices like smart meters etc.) are considered to be outside the scope of the Regulation unless they are used to circumvent this Regulation. They could use an IAS (but not provide an IAS nor constitute a substitute to an IAS), use a private network or constitute a specialised service. If these services are using an IAS or constitute a specialised service the connectivity service will be subject to the relevant rules applicable to IAS and specialised services in the Regulation.

Whilst we welcome BEREC's decision not to introduce a third category of access service which the Regulation does not foresee, e-book readers often incorporate a browser functionality that offers connectivity to (virtually) all websites. Therefore, they do not qualify as a terminal equipment which by its nature would restrict the number of reachable end-points. In addition, it is important to stress that "the nature of the terminal equipment" is an ambiguous term which creates a degree of uncertainty on a very important question. As the trend towards IoT devices is growing, clear language in the Guidelines in regard to such

devices is necessary. Such a lack of clarity risks creating the possibility of circumvention of the entire purpose of the legislation in this new category of applications. In order to contribute to harmonised implementation, the wording should be clarified by BEREC to make it clear that it is the terminal equipment itself which restricts, or could restrict, the number of reachable endpoints.

C. Commercial practices such as zero-rating (articles 3(1) and 3(2))

8. Does the current assessment of zero-rating as recommended in the Guidelines, offer sufficient protection of end-users' rights as referred to in article 3(1) of the Regulation? Please explain.

The enforcement of zero-rating and similar commercial practices is dysfunctional throughout the EU. We see that **end-user rights are not sufficiently protected** by the Guidelines or by how the Regulation and the Guidelines are being enforced. Whereas there has been a strong increase in offers that include zero-rating practices or application-specific data volumes, BEREC's own implementation report[34] and the Portuguese NRA ANACOM's draft decision[35] show that regulatory interventions have been focused on the enforcement of technical discrimination (Article 3(3) of the Regulation). Yet, we observe a great variety of such offers particularly in markets with low competition and high prices for general-purpose data volume, often operated by and with participation of the most dominant telecom operators and incumbent CAPs. In this context, we refer to our previous comments in response to question 3.

Furthermore, we would like to recall that Recital 7 of the Regulation lists a number of factors such an assessment should take into account and states conditions under which a regulator is required to intervene. In its Guidelines, BEREC did not laid down recommendations to guide NRAs's required interventions. We recommend that BEREC further develop this part of the Guidelines in line with Recital 7 of the Regulation and we request that BEREC provide a European perspective towards commercial practices that are harmful for the Digital Single Market, as we have outlined in our response to question 3.

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34 See pages 8-10: https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/7529-berec-report-on-the-implementation-of-regulation-eu-20152120-and-berec-net-neutrality-guidelines
35 See pages 40-44: https://www.anacom.pt/render.jsp?contentId=1430814

It is our opinion that there should be a preemptive prohibition of zero rating. We recall[36] that the Regulation could also be read as prohibiting price discrimination, on the basis that this would amount to a discrimination on the basis of the services being used and that it would limit the right to distribute information.

9. How could the assessment methodology for commercial practices in the Guidelines (ref. in particular to paras 46-48) be improved? Is there a need for more simplification, flexibility and/or more specification? Please provide concrete suggestions.

In order to mitigate negative effects of class-based zero-rating and differential pricing offers, we propose the following amendment of paragraph 42 of the Guidelines:

> 42. The ISP could either apply or offer zero-rating to an entire category of applications (e.g. all *e-mail or VoIP* ~~video or all music streaming~~ applications) or only to certain applications thereof (e.g. its own services, one specific social media application, the most popular video or music applications). In the latter case, an end-user is not prevented from using other music applications. However, the zero price applied to the data traffic of the zero-rated music application (and the fact that the data traffic of the zero-rated music application does not count towards any data cap in place on the IAS) creates an economic incentive to use that music application instead of competing ones. The effects of such a practice applied to a specific application are more likely to "undermine the essence of the end- users' rights" or lead to circumstances where "end-users' choice is materially reduced in practice" (Recital 7) than when it is applied to an entire category of applications. *The category of applications has to be defined by means of technical criteria so that traffic belonging to the category can be identified without specific interaction between CAPs and IAS providers.*

As we have outlined in our previous answers to question 3 and 8, class-based zero-rating and differential pricing offers (such as Vodafone Pass) limit the technological choices of CAPs. The arbitrary division of applications into categories restricts the development of innovative services and already severs bundled functionality of existing applications, (e.g. Vodafone Pass separates video calls in messaging appliations from the messaging itself, and separates messengers from Social Media platforms).

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36 https://edri.org/files/NN_analysis_20150715.pdf

Similarly, in order to be admissible, such offers typically require applications to be offered to the IAS provider's entire customer base in a particular country and thereby excludes applications, such as privacy friendly messengers that are based on a decentralised architecture[37] or e-learning applications for student groups.[38] Some zero-rating offers (such as StreamOn from Deutsche Telekom in Germany or Free Stream of A1 in Austria) also restrict CAPs by limiting the architectural choices they can make in offering their service.[39] [40] Such restrictions can also influence the business model of CAPs. For example, Spotify was not able to enter into the commercial agreement with Deutsche Telekom StreamOn in their intended way to only zero-rate their premium customers.[41]

Open class-based zero-rating such as these can have a severe effect on the end-user rights according to Article 3(1)the Regulation and the Guidelines must give more specific guidance to NRAs in order to mitigate these effects. Particularly, as these commercial agreements influence the cross-border provision of services in the digital single market such guidance seems highly necessary. Therefore, we propose to add a new paragraph to the BEREC Guidelines:

(new) 42a. The Regulation distinguishes between commercial practices and agreements and limits the effects both can have on the rights of end-users according to Article 3(1) of the Regulation. Such commercial agreements shall not impose limitations on the technological or geographical choices of CAPs to make their application admissible to the agreement. Additionally, commercial agreements between CAPs and ISPs that associate the price of data volume with particular applications dependent on the use of certain terminal equipment materially limit the right of end-users to use the terminal equipment of their choice.

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37 The prominent Twitter alternative Mastodon offers a privacy friendly service which requires a decentralised architecture: https://mastodon.social/about
38 For example, the University of Vienna provides such a service: https://zid.univie.ac.at/ustream/
39 Peer-to-peer messengers offer a high level of privacy and are resilient against censorship. The architecture of such services is designed to avoid identification by the network operator. See, for example: https://briarproject.org/
40 See the complaint filed by this service to the German regulator as well as this media coverage about the case: https://netzpolitik.org/2017/ablehnung-bei-streamon-der-telekom-streaming-ist-nicht-gleich-streaming/
41 https://www.teltarif.de/streamon-spotify-telekom-gruende-fehlt/news/68711.html

Additionally, we maintain our recommendations provided in the consultation on the draft BEREC guidelines[42], where in paragraph 46 we recommended the addition of the phrase "foreseeable" when discussing effects:

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46. The *foreseeable* effects on consumer and business customer end-user rights, which encompasses an assessment of inter alia:
◦ whether there is an effect on therange and diversity of content and applications which consumer end-users may use and, if so, whether the range and diversity of applications which end-users can choose from is reduced in practice;
◦ whether the end-user is incentivised to use, for example, certain application
◦ whether the IAS subscription contains characteristics which materially reduce end-user choice (see in more detail in paragraph 45)

The *foreseeable* effects on CAP end-user rights, which encompasses an assessment of, inter alia:
◦ whether there is an effect on the range and diversity of content and applications which CAPs provide, and to what extent the range and diversity of applications may not be effectively accessed;
◦ whether CAPs are materially discouraged from entering the market or forced to leave the market, or whether there are other material harms to competition in the market concerned (see in more detail in the fourth bullet of paragraph 45 with regard to offers);
◦whether the continued functioning of the internet ecosystem as an engine of innovation is impacted, for example, whether it is the ISP that picks winners and losers, and on the administrative and/or technical barriers for CAPs to enter into agreements with ISPs

The *foreseeable* effect on freedom of expression and media pluralism (ref. Recital 13)

On the other hand, paragraph 46 of the Guidelines makes it difficult to assess the influence of commercial practices on innovation which would otherwise not take place or the provision of new services in general which fall outside of the particular commercial agreements that IAS providers offer to a category of CAPs. Its phrasing, based on "whether there is an effect", could be interpreted as requiring the NRA to identify actual, observable effects (e. g. on competition, end-user rights, etc.).

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42 https://edri.org/files/netneutrality/consultation_berec_edriresponse.pdf

In this reading, the NRA would only be able to intervene once the harmful effects of such practices have already occurred. In the interest of effective enforcement and in light of the goal of the Regulation to safeguard innovation, NRAs should be able to intervene as soon as harm is foreseeable, as reflected in our suggested amendment.

In light of the experience of recent regulatory decisions, we propose that BEREC amend paragraph 46 and introduce as an assessment criterion the price for data volume to use applications included or excluded in the particular offer. Particularly in markets where zero-rating is widespread and the price discrepancy between application specific and general-purpose data volume is high, such a criterion is crucial in the assessment.[43] The exercise of end-user rights of CAPs to provide a particular service is significantly influenced by the price at which their application can be accessed. A potential widening of such price gaps poses a significant danger in limiting the end-user rights of a CAP to distribute information and offer services, as well as the rights of consumers to impart such services or information.

Regarding the end-users' right to access services using terminal equipment of their choice as protected by Article 3(1) of the Regulation, we note that any prohibition of the use of tethering must be considered to undermine the essence of this right. With its reference in Recital 5 to Commission Directive 2008/63/EC, which clearly states that terminal equipment is equipment that is "directly *or indirectly* connected to the interface of a public communications network" (Article 1(1)(a) of the Commission Directive), the Regulation makes it abundantly clear that users' freedom to relay traffic within their own network when making use of an IAS is covered by Article 3(1). Agreements between IAS providers and end-users which restrict the use of tethering must therefore be considered in violation of Article 3(2) of the Regulation. However, in their assessment of offers which include such provisions, NRAs have not always prohibited this practice even though the issue was raised.[44] We therefore consider paragraph 27 of the Guidelines, which concerns tethering, to be insufficiently clearly phrased and propose the following amendment:

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43 In the Portuguese offer "Smart Net" from MEO, the GB price for application-specific data volume of 0,7€/GB is significantly lower than any general-purpose data volume, priced at between 1,33€/GB and 53,98€/GB (https://epicenter.works/document/1111). The Portuguese regulator did not take into account the price of different types of data volume in its assessment of the offer. See also similar submissions to the German regulator on the StreamOn product by Deutsche Telekom: https://epicenter.works/document/483

44 See the submission of VZBV in the case StreamOn: https://www.vzbv.de/sites/default/files/downloads/2017/05/26/17-05-19_bnetza_vzbv-stellungnahme_streamon.pdf

> 27. Moreover, NRAs should consider whether there is an objective technological necessity for the obligatory equipment to be considered as part of the ISP network. If there is not, and if the choice of terminal equipment is limited, the practice would be in conflict with the Regulation. For example, the practice of restricting tethering ~~is likely to consititute~~ *constitutes* a restriction on choice of terminal equipment because ISPs "should not impose restrictions on the use of terminal equipment connecting to the network in addition to those imposed by manufacturers or distributors of terminal equipment in accordance with Union law" (Recital 5).

10. In your view, did the assessment methodology for commercial practices in the Guidelines influence the development of new content and applications offered on the internet? Please explain.

We refer to our answers to question 9. One important indicator to assess the harm of open class-based price discrimination practices could be the cross-border growth of European CAPs.

11. Do you think that the current application of the Regulation and the Guideline concerning commercial practices, such as zero-rating, sufficiently takes account of possible long term effects of such practices? If not, how could BEREC further facilitate this?

No, we do not think so. We consider that the case-by-case approach put forward and as implemented by NRAs is being detrimental to "the continued functioning of the internet ecosystem as an engine of innovation." (cf. Recital 1 of the Regulation). As referred to in our policy analysis of the draft guidelines,[45] the legality of each zero-rating offer needs to be assessed individually by 31 authorities. This legal uncertainty discourages long-term planning and innovation, and is therefore detrimental to investment in the European startup economy.

To avoid this, BEREC should tighten its reading of Recital 7, in accordance with Article 3(2) of the Regulation, to clearly forbid all forms of commercial practices that restrict end-user rights and legal certainty by clarifying that zero-rating of only some applications in a class and zero-rating for a fee (i.e where application providers pay to have their data zero-rated) are prohibited.

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45 https://edri.org/files/netneutrality/consultation_berec_edripolicyanalysis.pdf

D. Traffic Management (article 3(3))

12. Is there a need for improvement of the Guidelines concerning reasonable traffic management (ref. in particular to paras 49-75)? If yes, how could this text be improved? Please provide concrete suggestion

As previously stated in our response[46] to to the public consultation on the draft BEREC Guidelines implementing the net neutrality rules, we recommend that BEREC add a additional paragraph to define the term 'application-agnostic' with regards to traffic management in order to ensure a unified understanding of the concept including examples of the various forms this type of traffic management entails.[47]

(new) 47a. ==*Traffic management is application-agnostic when it is not based on specific applications, on categories of applications nor on criteria that depend on an application's characteristics. Application-agnostic traffic management can entail consumption-based congestion management or user-controlled forms of traffic management, as long as ISPs do not restrict for which applications this is undertaken.*==

Furthermore, we recommend that BEREC take heed of our comments on paragraph 66:

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66. Based on this, reasonable traffic management may be applied to differentiate between objectively different "categories of traffic", ==for example by reference to an application layer protocol (such as SMTP, HTTP or SIP) or generic application types (such as file sharing, VoIP or instant messaging)==, only insofar as:
◦ ==the application layer protocol or generic application type are linked to== *they are based on* objectively different technical QoS requirements.

In its current form, it can give way to harmful and fine-grained types of exceptional traffic management which could be applied in situations without temporary or exceptional congestions. BEREC would overstep its mandate by rendering the distinction between reasonable and exceptional traffic management moot. The legislator clearly intended to have reasonable traffic management based on classes based on QoS requirements and not

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46 https://edri.org/files/netneutrality/consultation_berec_edriresponse.pdf
47 https://tools.ietf.org/html/rfc6057

based on application layer protocols or generic application types (cf. Recital 9 of the Regulation: "any such differentiation should, in order to optimise overall quality and user experience, be permitted only on the basis of objectively different technical quality of service requirements"- for example in terms of latency, jitter, packet loss, and bandwidth – of the specific categories of traffic. This language is also reflected in Article 3(3) subparagraph 2: "based [...] on objectively different technical quality of service requirements of specific categories of traffic" (exceptional vs. reasonable management).

Moreover, the current phrasing renders moot the distinction between reasonable traffic management measures under Article 3(3) subparagraph 2, and exceptional traffic management measures under Article 3(3) subparagraph 3, including the safeguards the legislator foresaw for the latter type. Finally, we consider that it is inconsistent with the BEREC's reading of Article 3(3) subparagraph 3 in Paragraph 74 of the Guidelines.

13. Is there a need for improvement of the Guidelines concerning traffic management measures going beyond reasonable traffic management measures (ref. in particular BoR (18) 33 paras 76-93)? If yes, how could this text be improved? Please provide concrete suggestions.

As per our response to the public consultation on draft BEREC Guidelines[48], we consider that paragraphs 85 and 86 are not in line with the Regulation. They allow ISPs to apply proactive security measures. However, the Regulation clearly allows reactive measures in Article 3(3) subparagraph 3 "only for as long as necessary". Specifically, the continuous pro-active security monitoring allowed by paragraph 86 would involve processing of personal data to a greater extent than allowed by Article 3(4). The proposed text also fails to provide any guidance on the choice of least restrictive alternative or how (or who, or when) this choice would be overseen.

Regarding the provision that exceptional traffic management measures under Article 3(3), third subparagraph can only be applied "as necessary, and only for as long as necessary" we also propose clarifications of the guidelines regarding exceptions (a) and (b).

In 2017, national legislative proposals were introduced[49] and national legislation was passed[50] that confer upon IAS providers the option to provide products which block certain content.

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48 https://edri.org/files/netneutrality/consultation_berec_edriresponse.pdf
49 See proposed amendment of § 17 TKG as part of legislative proposal 326/ME (XXV.GP) in Austria.
50 See section 104 of the Digital Economy Act 2017 in the United Kingdom.

This legislation presumably seeks to use the exception provided by Article 3(3)(a) whereby IAS providers can make use of exceptional traffic management measures to "comply with [...] national legislation that complies with Union law, which the provider of internet access services is subject". However, since these measures can only be applied "as necessary, and for as long as necessary", we consider that national legislation making such blocking measures not compulsory but merely optional are in contravention with the Regulation. We urge BEREC to clarify in its Guidelines that, in accordance with the principle of supremacy of EU law and direct applicability of Regulations, such national legislation should not be applied when assessing the legality of traffic management practices.

We therefore propose the addition of a paragraph 82a to the Guidelines:

> *(new) 82a. As traffic management practices under this subparagraph can only be applied "as necessary, and only for as long as necessary", national legislation which confers the option, but no compulsion to implement such practices should not be applied by NRAs in accordance with the principle of supremacy of EU law.*

As mentioned in the BEREC Report on the implementation of Regulation (EU) 2015/2120 and BEREC Net Neutrality Guidelines and several national reports on the implementation of the Regulation, some IAS providers block traffic to and/or from ports in order to protect end-user equipment from security threats under exception (b) of Article 3(3). However, such threats can also be mitigated by other means, namely by patching the security vulnerability on the end-user equipment, e.g. by the application of software of firmware updates. This is particularly the case where this equipment is provided by the IAS provider itself. The Guidelines should therefore clarify that, in order to only apply exceptional traffic management measures "for as long as necessary", IAS providers must make an effort to remove the underlying cause of the measure, i.e. patch the security vulnerability.

We therefore propose the addition of a new paragraph 84a to the Guidelines:

> *(new) 84a. Where IAS providers block particular ports or services to mitigate security risks for end-users, NRAs should ensure that IAS providers take steps to remove the underlying cause for the security risk where this is in the power of the IAS provider (e.g. because the security vulnerability is present in equipment provided by the IAS provider).*

14. Does the text of the Guidelines concerning traffic management influence the development of network technologies offered on the market? Please provide concrete examples.

N/A

15. Do any terms used in article 3(3) concerning traffic management need further explanation in the Guidelines? If yes, please specify.

Yes, with regards to differences in class-based traffic management, BEREC should clarify that classes should not be defined so narrowly as to facilitate the differentiation among classes as a vehicle to discriminate among similar types of applications.

Moreover, see our answer to question 12 regarding 'application-agnostic' traffic management.

E. Specialised services (article 3(5))

16. Is there a need for improvement of the Guidelines concerning specialized services (ref. in particular paras 99-127)? If yes, how could this text be improved? Please provide concrete suggestions.

We welcome the wording of the Guidelines with regards to the section on specialised services, and note the large proportion of deletions and amendments that were taken on board as compared to the draft Guidelines that were subject to consultation. We urge BEREC not to revert that language. If the Guidelines were to be improved, we would recommend the following changes to bring further clarity to the text.As the Guidelines should make a clear distinction between traffic management on the IAS and specialised services which serve different purposes in the Regulation, in paragraph 103 we recommend an addition:

> **103.** According to Recital 16, the service shall not be used to circumvent the provisions regarding traffic management measures applicable to IAS, *for example by granting general priority over comparable content, applications and services available via the IAS.*

Similarly, a clarification of the role of specialised services in relation to the IAS in ensuring end-users' rights in paragraph 104:

104. All these safeguards aim to ensure the continued availability and general quality of best effort IAS. ==*The end-user rights in Article 3(1) can only be ensured if the possibilities for best effort delivery over the IAS are not compromised by commitment of network capacity to specialised services.*==

In paragraph 105 we recommend:

105. NRAs should "*verify*" whether the application could be provided over IAS at the ~~agreed and committed level~~ ==*specific levels*== of quality, and whether the requirements are plausible ==*and objectively necessary*== in relation to the application, or whether ==~~they~~== ==*the agreed levels of quality*== are instead set up in order to circumvent the provisions regarding traffic management measures applicable to IAS, which would not be allowed.

As we have stated previously, we welcome BEREC's strong focus on ensuring that the agreed levels of quality for the specialised service do not circumvent the provisions regarding traffic management for IAS. Adding "agreed levels of quality" to the last part of paragraph 105 would underline that NRAs should examine any agreed levels of quality critically in order to ensure that the purpose is not to circumvent rules on specialised services. Paragraph 106 would benefit from the amendments:

106. Initially, the requirement of an application ==*can be specified*== ~~is set~~ by the provider of the specialised service, although requirements may also be inherent to the application itself. For example, a video application could use standard definition with a low bitrate or ultra- high definition with high bitrate, and these will obviously have different QoS requirements. A typical example of inherent requirements is low latency for real-time applications.
==*Contractually specified requirements for specific levels of quality should always be independently assessed by the regulator, so that they are objectively necessary to meet genuine requirements of the application and are not set artificially high to circumvent the provisions regarding traffic management or the general restrictions on specialised services in Recital 16.*==

Indeed, contractually specified levels of quality can be set artificially high so that the application cannot be delivered over the normal internet. This would circumvent the provisions of the Regulation regarding traffic management and specialised services. Therefore, the regulator should independently assess whether the contractually specified level of quality is objectively necessary to meet an application's requirement. In paragraph 111 we recommend:

111. NRAs should verify whether, and to what extent, optimised delivery is objectively necessary to ensure one or more specific and key features of the applications, and to enable a corresponding quality assurance to be given to end-users. ~~To do this, the NRA should assess whether an electronic communication service, other than IAS, requires a level of quality that cannot be assured over an IAS. If not, these electronic communication services are likely to circumvent the provisions of the Regulation and are therefore not allowed.~~ *If an application can objectively function on the normal internet, then the optimisation is not "necessary to meet the requirements of the application for a specific level of quality," and it should not be allowed as a specialised service. Since the last condition in Recital 16 is based on comparable applications available via the IAS, the regulator should also assess whether the application can function on the normal internet with minor modifications that do not change the key features of the application. An example could be using adaptive video bitrate and buffering video instead of constant video bitrate for ultra high-definition video. Otherwise, there is a risk that certain specific levels of quality can be set to circumvent the general provisions regarding specialised services.*

Indeed, if an application can function on the ordinary internet, the optimisation will be granting general priority over comparable applications available, or potentially available, via the IAS, which is not allowed by Recital 16. Since the condition in Recital 16 says "comparable applications", it is important that the regulator does not just assess the service requirements initially specified by the provider of the service, but also considers whether a minor modification could make the application function on the normal internet. This is important to prevent circumvention of the Regulation's ban on offering better treatment to internet applications for a fee by unilaterally defining quality requirements that are higher than what the normal internet can offer.

Similarly, in paragraph 112 we recommend:

> **112.** The internet and the nature of IAS will evolve over time. A service that is deemed to be a specialised service today may not necessarily qualify as a specialised service in the future due to the fact that the optimisation of the service may not be ~~required~~ *objectively necessary,* as the general standard of IAS may have improved. On the other hand, additional services might emerge that need to be optimised, even as the standard of IAS improves. Given that we do not know what specialised services may emerge in the future, NRAs should assess whether a service qualifies as a specialised service on a case-by-case basis. *Implicit in Recital 15 about traffic management is an expectation that IAS providers continually expand their network capacity to meet the increasing demand for applications and services delivered via the internet. When verifying whether the optimisation for a specialised service is objectively necessary, the regulator should also consider whether the ISP has followed industry practices for expansion of its network capacity, so that the possibility of offering specialised services does not give the ISP an incentive not to invest in network expansion.*

As previously noted, it is important that the regulatory practice on specialised services does not give the IAS providers an incentive not to invest in their network. An optimisation for a specific service should not be regarded as objectively necessary if it is only necessary because the IAS provider has failed to follow industry practices on expansion of network capacity. Moreover, with the ongoing discussions about 5G and network slicing, it is important for BEREC to emphasise, with reference to Recital 15 of the Regulation, that the 5G technology should be used to expand the network capacity for IAS and not just specialised services.

In order to provide clarity in certain scenarios enabled by the 5G technology, we make further suggestions in our answers to questions 22 and 23.

17. Does the text of the Guidelines concerning specialized services influence the development of specialised services offered on the market? Please provide concrete examples.

We thank BEREC for raising this question in this public consultation. In the political debate we acknowledge that parts of the telecom industry have argued that potential new services might be introduced with the 5G mobile network standard would be incompatible with the current EU net neutrality rules. Yet, we have not seen credible examples of these new services or inconsistencies between them and the current regulatory framework.

In this sense, we refer to EDRi's response to BEREC's consultation on its 2019 programme.[51]

18. Do any terms used in article 3(5) concerning specialised services need further explanation in the Guidelines? If yes, please specify.

It will be necessary to clarify the nature and relationships of services in IAS and specialised services by adding a clear definition that covers the meaning of Article 3(5) of the Regulation so as prevent the misclassification of services.

F. Transparency (article 4)

19. What has been your experience regarding the application of the transparency measures in the Regulation and the Guidelines, particularly in relation to speed of mobile internet access services? Is there a need for improvement? If yes, how could this be improved by BEREC? Please provide concrete suggestions.

We have identified a need for improvement. As previously suggested[52], the provisions on safeguarding of the open internet should be complemented by effective end-user provisions which address issues particularly linked to IAS. These provisions should apply in addition to provisions set out in the Directive 2002/22/EC of the European Parliament and of the Council and Member States on universal services which is currently being reviewed as part of the Telecoms Package.

NRAs should ensure that ISPs adhere to certain good practices regarding the information which should be easily accessible and identifiable for what it is, accurate and up to date, meaningful to end-users, i.e. relevant, unambiguous and presented in a useful manner, comparable at least between different offers - but preferably also between different ISPs - so that end-users are able to compare the offers (including the contractual terms used by different ISPs) and ISPs in such a way that it can show differences and similarities, and should not create an incorrect perception of the service provided to the end-user.

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51 https://edri.org/files/consultations/berecworkprogramme2019_edriresponse_20180420.pdf
52 https://edri.org/files/netneutrality/consultation_berec_edripolicyanalysis.pdf

20. How could BEREC further assist consumers, ensuring that they get the internet access service that they pay for?

As previously suggested[53], we recommend that BEREC clarify in Paragraph 128 that the information provided by the ISP according to Article 4(1) has to be published on the website of the ISP. In order to allow for informed consumer choice, we would recommend BEREC to require with regard to Paragraph 131 that the ISP informs the user about the definitions used to classify congestion as impending, exceptional or temporary (similar to Paragraph 184). Furthermore, we would welcome BEREC strengthening its very meaningful recommendation to the NRAs in Paragraph 147: to define the normally available speed the same way BEREC did, by replacing "could" with "should".

G. New technologies (horizontal)

21. Do you think the Regulation and the Guidelines provide sufficient flexibility to adopt new technologies which are likely to be used in 5G? Please explain, preferably with examples.

Absolutely. 5G and Net Neutrality are not mutually exclusive. As per our letter to the Vice-President of the European Commission, Commissioner and ICT Ministers "high quality connectivity and net neutrality go hand in hand"[54], "Net neutrality rules will ensure that the number of innovative internet-based services and applications will continue to increase. With global demand for faster and better access to the internet on the rise, internet access providers will continue to have a strong incentive to develop and invest in enhanced network capacity. This so-called "virtuous circle" illustrates the long-term economic benefit for telecommunications companies to invest in infrastructure.There have been claims[55] that they net neutrality impairs the deployment of 5G. However, no (credible) evidence has been presented. We believe this is to be a mere lobbying tactic. One of these lobbying tactics was the so-called "5G manifesto", which the 2017 BEREC Chair publicly rejected on several occasions. We welcome BEREC's commitment to ensuring misleading claims that seek to undermine the web remains open and free, without discrimination. In this sense, we refer to EDRi's response to BEREC's consultation on its 2019 Work Programme.[56]

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53 https://edri.org/files/netneutrality/consultation_berec_edripolicyanalysis.pdf
54 https://edri.org/files/netneutrality/letter_5g-netneutrality_20160808.pdf
55 https://edri.org/enditorial-5g-terrible-telecoms-providers-claim/
56 https://edri.org/files/consultations/berecworkprogramme2019_edriresponse_20180420.pdf

22. Considering the rules for traffic management and specialized services in the Regulation, are the Guidelines providing sufficient clarity to the adoption of new network technologies such as "network slicing" and "edge computing"? Please explain in detail.

The support of "network slicing", i.e. the provision of multiple "virtual" networks with different performance characteristics over a single networking infrastructure, in the 5G specifications poses new dangers to the practical enforcement of the Regulation, in particular Article 3(5). The implementation of network slicing functionality requires the introduction of different QoS policies applied to individual packets on the network in order to satisfy the quality requirements of each network slice, in particular on the Radio Access Network. While the details are largely left to implementation, the 5G specifications mandate specific functionality such as the capability of user equipment to be aware of multiple types of network slices and be able to access multiple slices simultaneously[57] as well as the dynamic creation, modification, and destruction of network slices[58], and foresee the existence of at least one type of network slice with more demanding QoS requirements than the typical mobile broadband service (eMBB).[59]

It should be noted that where IAS providers choose to provide specialised service with different QoS requirements on the same network, the Regulation confers a preference onto the internet access service over any specialised service, whereby specialised services should not have "a negative impact on the availability or general quality of internet access services for end-users". However, network slicing functionality, combined with the increased use of programmable or automated configuration of network equipment, enables the violation of this provision in ways that are systematic, but localised in time as well as in space. The Guidelines should reflect these possibilities.

As the 5G specifications provide for the possibility of third parties to provide applications or services from within an operators' network, the Guidelines should clarify that these resources should not be used to circumvent the Regulation to provide preferential access to a restricted number of services that would otherwise be accessible via the internet.

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57   3GPP TS 23.501 V15.1.0, section 5.1.5
58   3GPP TS 22.261 V16.3.0, section 6.1.2
59   A slice for "ultra-reliable low latency communications", see #GPP TS 23.501 V15.1.0, section 5.15.2.2

23. If not, which specific points are unclear in the Guidelines and how could BEREC improve this? Please provide concrete suggestions.

In accordance with the reasons explained above, we propose that in paragraph 125 of the Guidelines the word "persistent" is replaced with "persistent or systematic", and that in paragraph 127 after the words "access to the internet" the words "or access to services also available on the internet" are inserted.

> 125. NRAs should intervene if persistent *or systematic* decreases in performance are detected for IAS. This could be detected if the measured performance is consistently above (for metrics such as latency, jitter or packet loss) or below (for metrics such as speed) a previously detected average level for a relatively long period of time such as hours or days), or if the difference between measurement results before and after the specialised service is introduced is statistically significant. In the case of short-term assessments, the difference between measurement results with and without the specialised service should be assessed similarly.

> 127. In deciding whether a specialised service is considered as a replacement for an IAS, one important aspect that NRAs should assess is whether the service is actually providing access to the internet *or access to services also available on the internet* but in a restricted way, at a higher quality, or with differentiated traffic management. If so, this would be considered a circumvention of the Regulation.

H. Other comments

24. Do you want to share any additional comments?

In addition to our comments on the implementation and enforcement of the Regulation and Net neutrality Guidelines, we commend BEREC for having adopted a net neutrality measurement tool and methodology that broadly follow our recommendations[60] presented in expert meetings by IT-Pol & epicenter.works on behalf of EDRi and the consultation response[61] that some of the EDRi members wrote and/or supported.

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60 https://edri.org/files/netneutrality/measurement_berecstakeholdermeeting_edriresponses_20170314.pdf
61 https://epicenter.works/sites/default/files/berec_netneutralityregulatoryassessmentmethodology_2017-07-05.pdf

We also welcome the open tender procedure for the development and implementation for implementing BEREC's net neutrality measurement tool.[62]

In this context, we would like to recommend one final amendment to the Guidelines. According to Article 4(4) of the Regulation, any remedies available in case of non-conformity of the performance of their contracts are dependent on the existence of a monitoring mechanism certified by the NRA. Yet, BEREC reads the Regulation such that it does not oblige NRAs or Member States to certify such a monitoring mechanism. With the perspective of a successful BEREC measurement tool project we propose that BEREC change this recommendation and urge its members to adopt monitoring operations. Paragraph 161 of the Guidelines should be appropriately amended.

Finally, we would like to recall that La Quadrature du Net, Bits of Freedom, epicenter.works, EDRi, Access Now and others have developed Respect My Net[63], an online tool to allow users report net neutrality violations. Separately, EDRi and several EDRi members/observers are bringing complaints or trying to encourage NRAs to take measures to ensure that IAS providers respect net neutrality. There is a need for NRAs to prioritise the implementation of the Regulation, particularly in view of the political support in the EU in favour of ensuring net neutrality that we have witnessed since the roll-out of the FCC order on net neutrality in the USA. Civil society supports BEREC's efforts towards ensuring an independent and thorough implementation and enforcement of the EU net neutrality rules.

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62 https://berec.europa.eu/eng/berec_office/public_procurement/4826-open-tender-procedure-for-the-development-and-implementation-of-the-net-neutrality-nn-measurement-tool
63 https://respectmynet.eu