

**Comments on Draft BERC Guidelines
on the Implementation of the Open Internet Regulation**

Response to BERC's Public Consultation

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Introduction

I welcome the opportunity to submit comments on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation (“Draft Guidelines”).¹

I submit my comments as a professor of law and, by courtesy, electrical engineering at Stanford University whose research focuses on Internet architecture, innovation, and regulation. I have a Ph.D. in computer science and a law degree and have worked on net neutrality for the past 21 years.

My book “Internet Architecture and Innovation,” which was published by MIT Press in 2010, is considered the seminal work on the science, economics and politics of network neutrality. My papers on network neutrality have influenced discussions on network neutrality all over the world.

I have testified on matters of Internet architecture, innovation and regulation before the California Legislature, the US Federal Communications Commission, the Canadian Radio-Television and Telecommunications Commission, and BEREC.

The FCC’s 2010 and 2015 Open Internet Orders relied heavily on my work. My work also informed the 2017 Orders on zero-rating by the Canadian Radio-Television and Telecommunications Commission, and the 2016 Order on zero-rating by the Telecom Regulatory Authority of India.

I have not been retained or paid by anybody to participate in this proceeding.²

I would welcome the opportunity to discuss these important issues further.

I attach a White Paper that analyzes the questions raised by the ECJ’s 2020 and 2021 decisions in more detail. The White Paper discusses the scope of the ECJ’s 2021 decisions, the impact of the 2020 and 2021 decisions on zero-rating and other differentiated pricing practices, and the relationship between the ECJ’s 2020 and 2021 decisions.³ This White Paper is part of my comments.

¹ https://berec.europa.eu/eng/news_consultations/ongoing_public_consultations/9342-public-consultation-on-draft-berec-guidelines-on-the-implementation-of-the-open-internet-regulation.

² Additional information on my funding is available here: <http://cyberlaw.stanford.edu/about/people/barbara-van-schewick>.

³ Barbara van Schewick, 2022, The Impact of the ECJ’s 2020 and 2021 Zero-rating Judgments on Zero-rating and Differentiated Pricing in the European Union (White Paper Submitted to the Public Consultation on the Draft BEREC Guidelines on the Implementation of the Open Internet Regulation, April 14, 2022, attached to these comments) (hereinafter “attached White Paper”).

Terminology

The following shorthands and definitions are used throughout the paper.

Definitions and Shorthands

“Application-agnostic” means not differentiating on the basis of source, destination, Internet content, application, service, or device, or class of Internet content, application, service, or device.⁴

“Applications” is used as a shorthand for applications, content, services, and other uses that may not fit clearly into one of these categories.

“Class of applications” means Internet content, or a group of Internet applications, services, or devices, sharing a common characteristic, including, but not limited to, sharing the same source or destination, belonging to the same type of content, application, service, or device, using the same application- or transport-layer protocol, or having similar technical characteristics, including, but not limited to, the size, sequencing, or timing of packets, or sensitivity to delay.⁵

“Class of applications” and “category of applications” are used interchangeably.

“Zero-rating” means not counting internet traffic towards a subscriber’s data volume.

“Zero-rating option” or “zero-rating program” means all of the terms and practices associated with a zero-rating offering. They include the actual zero-rating (i.e. the practice of not counting internet traffic towards a subscriber’s data volume) as well as any other practices or terms of use that are part of the offering (e.g., limiting the bandwidth available to the zero-rated applications before a subscriber has used up their data volume).

⁴ This definition is taken from the California Network Neutrality Law, California Civil Code §3100(a), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822. See also van Schewick (2015), Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like, Stanford Law Review, Volume 67, Issue 1, pp. 124-131 and fn. 444.

⁵ This definition is taken from the California Network Neutrality Law, California Civil Code §3100(c), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822. See also van Schewick (2015), Network Neutrality and Quality of Service: What a Non-Discrimination Rule Should Look Like, Stanford Law Review, Volume 67, Issue 1, pp. 125 and fn. 444.

The following terms are used interchangeably to describe the category of zero-rating programs that the 2021 decisions identify as incompatible with Art. 3(3):⁶

- “zero tariff” option” (as defined by the 2021 decisions);
- “zero-rating programs that zero-rate select applications or classes of applications based on commercial consideration;” and
- “Zero-rating options not counting traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff based on commercial considerations” (BEREC’s phrasing).

References to ECJ Decisions, BEREC Documents, and Open Internet Regulation

“Article” and “recital” refers to articles and recitals in the Open Internet Regulation, unless noted otherwise.

“Draft Guidelines” means the Draft BEREC Guidelines on the Implementation of the Open Internet Regulation that are the subject of this consultation.⁷

“Guidelines” means the BEREC Guidelines on the Implementation of the Open Internet Regulation in general, not a particular version of the guidelines.

“Explanatory Document” means the Explanatory document on the Public Consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation.⁸

“Regulation” means the Open Internet Regulation.⁹

“ECJ” means European Court of Justice.

“2020 decision,” “2020 ruling” or “2020 Telenor decision” means the ECJ’s 2020 judgment in *Telenor Magyarország Zrt. v Nemzeti Média*.¹⁰

⁶ The three terms describe the same concept. For an explanation, see attached White Paper, Part 1, Section I.

⁷ Draft BEREC Guidelines on the Implementation of the Open Internet Regulation, BoR (22) 30, https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/10210-draft-update-to-the-berec-guidelines-on-the-implementation-of-the-open-internet-regulation.

⁸ Explanatory document on the Public Consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation, BoR (22) 31, 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.

⁹ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services.

¹⁰ ECJ Judgment of September 15, 2020, *Telenor Magyarország Zrt. v Nemzeti Média- és Hírközlési Hatóság Elnöke*, C-807/18 and C-39/19, EU:C:2020:708, available via <https://curia.europa.eu/juris/documents.jsf?num=C-807/18> (“2020 Telenor Decision”).

“2021 Vodafone Roaming decision” means the ECJ’s 2021 judgment in *Vodafone GmbH v Bundesrepublik Deutschland*.¹¹

“2021 Vodafone Tethering decision” means the ECJ’s 2021 judgment in *Verbraucherzentrale Bundesverband eV v Vodafone GmbH*.¹²

“2021 Telekom decision” means the ECJ’s 2021 judgment in *Telekom Deutschland GmbH v Bundesrepublik Deutschland*.¹³

“2021 decisions” or “2021 rulings” means the 2021 Vodafone Roaming decision, the 2021 Vodafone Tethering decision, and the 2021 Telekom decision.

The following parts of the 2021 decisions are identical:

- 2021 Vodafone Roaming decision, paras. 15-31;
- 2021 Vodafone Tethering decision, paras. 14-30;
- 2021 Telekom decision, paras. 17-33.

The following parts of the 2021 decisions are identical except for the references to the specific practice under review in the case:

- 2021 Vodafone Roaming decision, paras. 32-34;
- 2021 Vodafone Tethering decision, paras. 31-33;
- 2021 Telekom decision, paras. 34-36.

To improve readability, only a reference to the 2021 Vodafone Roaming decision is included when discussing the identical parts of the decisions.

The relationship between Art. 3(2) and Art. 3(3) according to the 2020 and 2021 decisions

The 2021 and 2020 decisions clarified the relationship between Art. 3(2) and Art. 3(3) in important ways. The decisions clarify how these provisions relate to each other and how to evaluate practices under these provisions. These clarifications are relevant beyond the evaluation of zero-rating and other forms of differentiated pricing.

¹¹ ECJ Judgement of September 2, 2021, *Vodafone GmbH v Bundesrepublik Deutschland*, C-854/19, ECLI:EU:C:2021:675, available via <https://curia.europa.eu/juris/documents.jsf?num=C-854/19> (“2021 Vodafone Roaming Decision”).

¹² ECJ Judgement of September 2, 2021, *Verbraucherzentrale Bundesverband eV v Vodafone GmbH*, C-5/20, ECLI:EU:C:2021:676, available at <https://curia.europa.eu/juris/documents.jsf?num=C-5/20> (“2021 Vodafone Tethering Decision”).

¹³ ECJ Judgment of September 2, 2021, *Telekom Deutschland GmbH v Bundesrepublik Deutschland*, C-34/20, ECLI:EU:C:2021:677, available via <https://curia.europa.eu/juris/documents.jsf?num=C-34/20> (“2021 Telekom Decision”).

The Draft Guidelines do not fully reflect all of these clarifications. Without this information, new stakeholders and regulators may have difficulty understanding how the Regulation and the Guidelines operate and how they might apply to new practices.

Thus, I recommend fully describing these clarifications in the Guidelines.

The following text first describes the relationship of Art. 3(2) and Art. 3(3) as described in the 2020 and 2021 decisions and then proposes language to include in the Guidelines.

Substantive discussion

The ECJ’s 2021 and 2020 decisions create a clear hierarchy between Art. 3(3) and Art. 3(2), where Art. 3(3) takes precedence over Art 3(2).¹⁴

According to the 2021 and 2020 decisions, Art. 3(3), subparagraph 1 establishes a general nondiscrimination rule, which applies to all technical and nontechnical measures used by providers of internet access services.¹⁵ As a result, all measures that fall within the scope of Art. 3(2) are also subject to Art. 3(3).

This means Art. 3(3), subparagraph 1 applies to the following practices:¹⁶

- practices that are also subject to Art. 3(2), i.e. practices that stem from:
 - “agreements between providers of internet access services and end users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed;”¹⁷ and
 - “commercial practices conducted by providers of internet access services;”¹⁸

as well as

- practices that are not subject to Art. 3(2), i.e.
 - practices unrelated either to an agreement or a commercial practice.

The only exceptions to Art. 3(3), subparagraph 1 are the exceptions for traffic management listed in Art. 3(3), subparagraph 2 and 3. Thus, the only way to justify a violation of Art. 3(3),

¹⁴ The following section is adopted from the attached White Paper, Part 2, Section I.

¹⁵ This follows directly from the 2021 decisions, which apply Art. 3(3), subparagraph 1 to the differential counting of traffic towards subscribers’ data volume that is the core feature of zero-rating programs. 2021 Vodafone Roaming decision, para. 28. As explained in Part 3 of the attached White Paper, a close reading of the 2020 decision indicates that the 2020 decision had already concluded that Art. 3(3), subparagraph 1 establishes a general nondiscrimination rule that applies to both technical and non-technical measures. This reading of the 2020 decision is supported by various aspects of the 2021 decisions. See attached White Paper, Part 3, Section I.

¹⁶ See also 2020 Telenor decision, para. 51 (in the context of the application of Art. 3(3), subparagraph 1 to a technical practice).

¹⁷ Art. 3(2).

¹⁸ Art. 3(2).

subparagraph 1 is to show that it falls under one of the exceptions in Art. 3(3), subparagraph 2 and 3.¹⁹

Whether a practice violates Art. 3(3) does not depend on whether the practice “limit[s] the exercise of the rights of end-users” under Art. 3(1).²⁰ That’s because in contrast to Art. 3(2), the plain language of Art. 3(3) does not include this requirement.²¹ As a result, evaluating a measure under Art. 3(3) does not include evaluating the effect of those measures on the exercise of the rights of end users under Art. 3(1).²²

A practice that violates Art. 3(3) cannot be saved by Art. 3(2). According to the 2020 decision, Art. 3(3)’s general non-discrimination rule is non-negotiable: It cannot be modified by agreements between providers of internet access services and end users or by commercial practices of these providers.²³ This means violations of Art. 3(3) do not become permissible because they are included in the fine print of the contract. In other words, Art. 3(3) trumps Art. 3(2).

As a result, any evaluation of a practice has to start with Art. 3(3). A practice that violates Art. 3(3) does not also have to be evaluated under Art. 3(2), even if that practice falls within the scope of Art. 3(2).²⁴

This leaves for full evaluation under Art. 3(2) only practices that:

- 1) are within the scope of Art. 3(2), i.e.:
 - “agreements between providers of internet access services and end users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed;”²⁵ or
 - “commercial practices conducted by providers of internet access services;”²⁶

and
- 2) do not violate Art. 3(3), because:
 - EITHER the practice does not violate Art. 3(3), subparagraph 1,
 - OR the practice is justified under Art. 3(3), subparagraph 2 or 3.

Such practices comply with Art. 3(2), if they “do not limit the exercise of the rights of end users laid down in [Art. 3(1)].”²⁷

In other words, providers of internet access service may contractually agree with end users on technical and commercial conditions and on the characteristics of internet access services only

¹⁹ 2020 Telenor decision, paras. 48-50; 2021 Vodafone Roaming decision, paras. 25, 27.

²⁰ The cited language is from Art. 3(2). 2020 Telenor decision, para. 50.

²¹ 2020 Telenor decision, para. 50.

²² 2020 Telenor decision, para. 50.

²³ 2020 Telenor decision, para. 47; 2021 Vodafone Roaming decision, paras. 24, 26.

²⁴ 2020 Telenor decision, para. 28; 2021 Vodafone Roaming decision, para. 23.

²⁵ Art. 3(2).

²⁶ Art. 3(2).

²⁷ Art. 3(2).

when those conditions and characteristics do not violate Art. 3(3) and do not limit the exercise of the rights of end users in Art. 3(1), as required by Art. 3(2). They may engage in commercial practices under the same conditions.

Even if such practices comply with Art. 3(2), they still need to comply with other provisions, including the transparency obligations in Art. 4(1).

Proposed language

I recommend inserting the following text at the beginning of the discussion of Art. 3(2), so regulators and stakeholders understand the position of Art. 3(2) within the overall regulation before reading about the details of Art. 3(2).

- 31a. According to the 2021 and 2020 decisions, Art. 3(3), subparagraph 1 establishes a general nondiscrimination rule, which applies to all technical and nontechnical measures used by providers of internet access services.²⁸ As a result, Art. 3(3) also applies to agreements between ISPs and end-users and commercial practices that are subject to Art. 3(2).²⁹ The rights set out in Art. 3(1) and the requirements of Art. 3(3) are non-negotiable: They cannot be waived or modified by agreements between providers of internet access services and end users or by commercial practices of these providers.³⁰ *[BvS: This is a critical clarification that should be moved from para. 37a to the beginning of the discussion of Art. 3(2).]*
- 31b. As a result, the evaluation of any agreement or commercial practice within the scope of Art. 3(2) has to start with Art. 3(3). Details about this assessment can be found in paragraphs 49-93. If such an agreement or commercial practice violates Art. 3(3), it is not

²⁸ Article 3(3) subparagraph 1 OIR states: “Providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.”

This follows directly from the 2021 decisions, which apply Art. 3(3), subparagraph 1 to the differential counting of traffic towards subscribers’ data volume that is the core feature of zero-rating programs. 2021 Vodafone Roaming decision, para. 28. As explained in the attached White Paper, Part 3, a close reading of the 2020 decision indicates that the 2020 decision had already concluded that Art. 3(3), subparagraph 1 establishes a general nondiscrimination rule that applies to both technical and non-technical measures. This reading of the 2020 decision is supported by various aspects of the 2021 decisions. See attached White Paper, Part 3, Section I.

²⁹ 2021 Vodafone Roaming decision, para. 28. See also 2020 Telenor decision, para. 51 (in the context of the application of Art. 3(3), subparagraph 1 to a technical practice).

³⁰ 2020 Telenor decision, para. 47; 2021 Vodafone Roaming decision, paras. 24, 26. See ECJ C-807/18 and C-39/19 *Telenor Magyarország*, paragraph 47, emphasising in its final part “derogation is not possible in any circumstances by means of commercial practices conducted by [...] providers of internet access services] or by agreements concluded by them with end users” from the “general obligation of equal treatment, without discrimination, restriction or interference with traffic”, laid down in Article 3(3), first subparagraph of the Regulation, read in the light of recital 8 of that Regulation. See also ECJ, C-854/19 *Vodafone (roaming)*, paragraph 24; C-5/20 *Vodafone (tethering)*, paragraph 23, and C-34/20 *Telekom Deutschland (throttling)*, paragraph 26.

necessary to also evaluate the agreement or commercial practice under Art. 3(2).³¹ This leaves for full evaluation under Art. 3(2) only agreements and commercial practices that do not violate Art. 3(3), because either the practice does not violate Art. 3(3), subparagraph 1, or the practice is justified under Art. 3(3), subparagraph 2 or 3. In other words, providers of internet access service may contractually agree with end users on technical and commercial conditions and on the characteristics of internet access services only when those conditions and characteristics do not violate Art. 3(3) and do not limit the exercise of the rights of end users in Art. 3(1), as required by Art. 3(2). They may engage in commercial practices under the same conditions. Even if such agreements and commercial practices comply with Art. 3(2), they still need to comply with the Regulation's other provisions, including the transparency obligations in Art. 4(1) (see, e.g., para. 138).

Implementing this suggestion triggers follow-on changes to paras. 37 and 37a. The text formatted in strikethrough should be deleted. If desired, the text in italics could be integrated in the proposed paras. 31a and 31b above.

37. ~~When assessing agreements or commercial practices, NRAs should also take Article 3(3) into account. In particular, Article 3(3), first subparagraph mandates that ISPs must treat all traffic equally (see paragraph 49). This is in line with the common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights as expressed in Article 1(1). [BvS: After the 2020 and 2021 decisions, the first sentence is inaccurate, since these decisions clearly establish that agreements and commercial practices have to be evaluated under Art. 3(3).]~~
- 37a. *Typically, infringements of Article 3(3) (e.g. technical practices, such as blocking access to applications or types of applications) will also limit the exercise of end-users' rights, and constitute an infringement of Articles 3(2) and 3(1). Neither the rights as set out in Article 3(1) nor the requirements of Article 3(3) can be waived by an agreement or commercial practice otherwise authorised under Article 3(2)*³². *This holds in particular because the principle of equal and non-discriminatory treatment as expressed in Article 1(1) applies to all traffic, when providing internet access services, and therefore also to traffic which is transmitted when the ISP carries out their obligations under an agreement or implements a commercial practice. [BvS: It is not clear whether this explanation is still needed since the*

³¹ 2020 Telenor decision, para. 28; 2021 Vodafone Roaming decision, para. 23.

³² See ECJ C-807/18 and C-39/19 *Telenor Magyarország*, paragraph 47, emphasising in its final part “derogation is not possible in any circumstances by means of commercial practices conducted by [...] providers of internet access services] or by agreements concluded by them with end users” from the “general obligation of equal treatment, without discrimination, restriction or interference with traffic”, laid down in Article 3(3), first subparagraph of the Regulation, read in the light of recital 8 of that Regulation. See also ECJ, C-854/19 *Vodafone (roaming)*, paragraph 24 (“Consequently, a failure to fulfil the obligation of equal treatment of all traffic cannot be justified under the principle of freedom of contract, recognised in Art. 3(2).”); C-5/20 *Vodafone (tethering)*, paragraph 23, and C-34/20 *Telekom Deutschland (throttling)*, paragraph 26.

2020 and 2021 decisions unequivocally held so. Also, the phrasing seems to suggest that Art. 3(3) only applies to the technical treatment of traffic, which contradicts the ECJ's finding that Art. 3(3) applies to technical and non-technical measures. Thus, if BEREC decides to keep this explanation, the wording should be adjusted to account for this fact.] ~~Details about this assessment can be found in paragraphs 49–93.~~

The following changes to para. 19 are necessary to bring the Guidelines in line with description of the relationship between Art. 3(3) and Art. 3(2) the 2020 and 2021 decisions.

19. Article 3 comprises measures intended to safeguard open internet access, covering the rights of the end-users of IAS, and obligations and permitted practices for the ISPs:

- Article 3(1) sets out the rights of end-users of IAS;
- Article 3(2) sets limits on the contractual conditions which may be applied to IAS and the commercial practices of ISPs providing IAS, and requires that these should not limit exercise of the end-user rights set out in paragraph 1. ~~When assessing agreements or commercial practices, Article 3(3) should also be taken into account (see paragraph 37 and 37a)~~ *Such agreements and commercial practices also have to comply with Art. 3(3) (see paragraphs 31a and 31b);*
- Article 3(3) ~~constrains ISPs' traffic management practices~~ *provides a general nondiscrimination rule that applies to all technical and nontechnical measures used by ISPs providing IAS*, setting a requirement that ISPs should treat all data traffic equally and making provision for the specific circumstances under which ISPs may deviate from this rule;
 - Article 3(4) sets out the conditions under which traffic management measures may entail processing of personal data;
 - Article 3(5) sets out the freedom of ISPs and CAPs to provide specialised services as well as the conditions under which this freedom may be exercised.

Art. 3(2)

Commercial practices

Substantive discussion

According to the 2020 Telenor decision, the term “commercial practice” describes unilateral practices by providers of internet access services. As the court explains, commercial practices “are to be ‘conducted’ by providers of internet access services. They are not, therefore,

supposed to reflect a concordance of wills between such a provider and an end user, unlike the ‘agreements’ to which that provision also refers.”³³

As the 2020 decision makes clear, the term “commercial practice” in Art. 3(2) is not limited to economic practices such as pricing or other contractual terms, but also includes technical practices. The 2020 decision discusses both non-technical and technical examples of commercial practices. For example, para. 35 of the decision describes the offering of specific internet access service plans as an example of a commercial practice, while para. 51 describes the blocking or slowing down of traffic as a measure that might “stem from an agreement concluded with the provider of internet access services,” “stem [...] from that provider’s commercial practice,” but could also be “unrelated to an agreement or a commercial practice.”

It is also worth noting that the term “commercial practice” does not denote any particular motivation (e.g., a differentiated pricing practice would be a commercial practice regardless of whether it is driven by a desire to increase profits (e.g., by making the offer more attractive to consumers) or by altruistic motives.

Proposed language

Commercial practices

33. Commercial practices may consist of all relevant aspects of ISPs’ commercial behaviour, including unilateral practices, of the ISP.³⁴ *[In footnote, add reference to 2020 Telenor decision, para. 34.] Commercial practices include both technical and non-technical measures or practices. For example, they include the offering of specific internet access service plans to consumers or the use of technical measures such as blocking or slowing down traffic. [Add footnote: See 2020 Telenor decision, para. 35 and para. 51 (describing “blocking and slowing down of traffic” as measures that potentially “stem from that provider’s commercial practice.”).]*

³³ 2020 Telenor decision, para. 34.

³⁴ NRAs should also consider whether the definition of “commercial practices” in Article 2(d) of the Unfair Commercial Practices Directive (UCPD) could also provide guidance in understanding the term, ref. “any acts, omission, course of conduct or representation, commercial communication, including advertising and marketing, by a trader, directly connected with a promotion, sale or supply of a product”, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>. However, it should also be noted that the goal of the UCPD is different from the goal of Regulation 2015/2120 in as much as the former mainly addresses commercial practices which are directly connected with a promotion, sale or supply of a product (i.e. mainly advertising and marketing) whereas the latter establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights.

Examples of application-agnostic offers for internet access services

Substantive discussion

I agree with BEREC's view that under the interpretation of Art. 3(3) and Art. 3(2) adopted by the 2020 and 2021 decisions, application-agnostic discrimination does not violate Art. 3(3).

As I explain in detail in the attached White Paper, differentiated billing practices based on commercial considerations that do not violate Art. 3(3) include the following practices:

- Application-agnostic zero-rating: see White Paper, pp. 24-26;
- Other forms of application-agnostic differentiated pricing: see White Paper, pp. 26-27; and
- Internet access service plans with different prices for different groups of subscribers, as long as the group is defined by application-agnostic criteria (e.g., seniors, students, or low-income individuals, but not people who use gaming applications): see White Paper, pp. 28-29.

Thus, there are forms of zero-rating and differentiated pricing that do not violate Art. 3(3), subparagraph 1, and these practices allow providers of internet access to differentiate their services in ways that benefit consumers without harming competition, innovation, and free speech.

The White Paper also explains why the application-agnostic practice listed in the 4th bullet point of para. 35 of the Draft Guidelines do not violate Art. 3(3): see White Paper, p. 25.

Proposed language

35. Examples of agreements and commercial practices which are typically admissible would include:

- 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 since all traffic is treated equally and no specific application or category of specific application is treated favourably;
- ~~offering offers based on~~ different IAS tariffs with different application-agnostic QoS levels (for parameters such as speed, latency, jitter and packet loss), volumes, contractual length, bundles and with or without subsidised equipment since within one tariff all traffic is treated equally, all traffic within a tariff receives the same quality-and-bandwidth-adjusted price, and the differences in quality-and-bandwidth-adjusted price among different tariffs are not dependent on the applications or classes of applications subscribers are using; [BvS: Such plans include both technical discrimination and economic discrimination, since the quality-and-bandwidth-adjusted price is likely to vary between different plans. The Draft Guidelines seem to discuss only why the technical discrimination is application-agnostic; I suggest adding the criteria that make the differentiated pricing application-agnostic.]

- application-agnostic tariff plans for a broad public (e.g. all consumers) or a targeted group (e.g. special tariffs for younger people, school children, students, seniors or low-income citizens), as long as the group is defined by application-agnostic criteria; [add footnote: A plan that is available at a different price only to gamers (i.e. subscribers that actually use gaming apps) would violate Art. 3(3), subparagraph 1, because it distinguishes between traffic belonging to different plans based on application-specific criteria (here, the use of gaming applications.) By contrast, creating a plan with characteristics that might be particularly attractive to gamers and marketing the plan to gamers would not violate Art. 3(3), as long as the plan is available to subscribers regardless of the applications or classes of applications they use.] [BvS: I suggest adding this clarifying language and footnote to help stakeholders distinguish between application-agnostic tariffs and application-specific tariffs in this category.]
- offers where the speed of all traffic is throttled equally (instead of blocked) ~~for all traffic~~ after the data volume has been used up ~~instead of blocking all traffic~~; if the throttled speed is not too low, such an offer would a sufficient speed could still allow subscribers to access ~~accessing~~ the internet in an application-agnostic manner once they have used up their data volume; this would also allow access to provider's online self-service portal or of the application allowing end-users to purchase additional data volume. [BvS: Suggested edits make this example easier to understand.]

Guidance on assessment of differentiated pricing practices

Substantive discussion

As I describe in the attached White Paper, the ECJ's 2020 and 2021 decisions have far-reaching implications for the evaluation of zero-rating and other forms of differentiated pricing practices under the Regulation in general. [White Paper, Part 2.]

As BEREC recognizes, the impact of the decisions is not limited to the three specific plans that the ECJ reviewed in its 2021 decisions. That's because the incompatibility of the programs at issue stemmed directly from the core feature of zero-tariff options as defined by the ECJ – the differential counting of traffic towards subscribers' data volume that discriminates between applications or categories of applications. Nothing in the court's reasoning relied on the form or nature of any of the other terms of use associated with these programs, including any traffic management associated with them. [White Paper, Part 1, Sections II. and III., pp. 9-11.]

The Court's finding that zero-tariff options violate Art. 3(3) is part of the ration decidendi of the 2021 decisions, which has precedential value for national courts [White Paper, pp. 10-11.]

as well as for member states, including NRAs.³⁵ BEREC is therefore correct to not limit the update to the Guidelines to the fact pattern in the three 2021 decisions.

Because of the importance of the 2021 ECJ decisions, it makes sense to include the ECJ’s definition of zero-tariff option and the court’s reasoning in the Draft Guidelines. However, quoting the relevant language from the 2021 decisions is not sufficient.

That’s because the definition of zero-tariff option is difficult to understand. Without the context of the full decision, regulators and stakeholders looking to the Guidelines for guidance may not necessarily understand what kinds of zero-rating programs constitute zero-tariff options and what role other features or terms of use of the zero-rating program play in their evaluation.

Moreover, the current discussion of the ECJ’s 2021 decisions is distributed among different parts of the guidelines,³⁶ which makes it harder to understand, and the discussion is not sufficiently connected to the general framework for evaluating zero-rating and other forms of differential pricing under the Regulation.

To alleviate these problems, I recommend combining the discussion that is currently distributed among Art. 3(2) and Art. 3(3) in one place. I propose expanding the section on the assessment of differentiated pricing practices to include a description of the framework for evaluating differentiated pricing practices under the regulation (proposed para. 40a & 40f) and integrate a more detailed discussion of zero-tariff options and their treatment by the ECJ into this section as follows (proposed paras. 40b-d):

- 40b: sets out the ECJ’s definition of zero-tariff options and the court’s reasoning.
- 40c: provides examples of zero-rating programs that meet the court’s definition of zero-tariff option. Discussing these examples explicitly will provide much-needed certainty to market participants and reduce the costs of enforcement. All of the examples discussed in this proposed paragraph are explicitly included in the court’s definition of zero-tariff options, but stakeholders or NRAs may not recognize this. As a result, not listing these examples would make it harder for stakeholders to understand the implications of the updated Guidelines for specific zero-rating programs and waste regulatory resources by forcing NRAs to assess zero-rating programs from scratch that the ECJ already evaluated.
- 40d: discusses the role of other practices beyond the differential counting of traffic that are part of a zero-rating program and provides specific examples based on the ECJ’s 2020 and 2021 decisions.

Zero-rating of the ISP’s own applications and unilateral zero-rating

The Draft Guidelines correctly explain that zero-tariff options as defined by the ECJ are “inadmissible” (para. 40a). By contrast, the next paragraph declares that “differentiated pricing

³⁵ See Explanatory Document, p. 6, fn. 10.

³⁶ See Draft Guidelines, paras. 40a (definition of zero-tariff option), 49 (zero-tariff options violate the general nondiscrimination rule in Art. 3(3), subparagraph 1), 54a (excerpts from the ECJ’s reasoning).

practices ... such as applying a zero-price to ISPs’ own applications” are merely “*likely* to be inadmissible” (para. 40b; emphasis added). This suggests that BEREC does not believe that an internet access provider that zero-rates its own application meets the definition of zero-tariff option; otherwise, the practice would unequivocally violate Art. 3(3), like all zero-tariff options.

More generally, the Explanatory Document suggests that “zero tariff options not involving partnerships between internet service providers (ISPs) and content and application providers (CAPs) that introduce a price discrimination between content, applications or services” are “not directly addressed by the ECJ rulings,” but finds that “the same conclusion [that such zero-rating offers violate the equal treatment obligation in Art. 3(3)] “is *very likely to be applicable*.”³⁷ It seems, BEREC interprets the definition of zero-tariff offer to apply only to zero-rating programs that zero-rate third-party applications and are based on an explicit agreement between an internet access provider and an application provider; by contrast, programs where an internet access provider zero-rates a third-party application unilaterally or zero-rates its own application would not meet the definition of zero-tariff options.

This interpretation is based on a misunderstanding of the term “partner” in the ECJ’s definition of zero-tariff offer and in the 2021 decisions: “[A] ‘zero tariff’ option is 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*.”³⁸

First, it is highly unlikely that the court intended to exclude the zero-rating of an ISP’s own application from the definition of zero-tariff option. That’s because all of the zero-rating programs evaluated by the 2021 decisions included not only applications offered by third parties, but also the ISP’s own applications in several of the zero-rated categories.

Deutsche Telekom’s StreamOn program reviewed by the ECJ zero-rates one music application and two video streaming applications offered by Deutsche Telekom itself: MAGENTA MUSIK 360, MagentaSport, and MagentaTV App.³⁹ In fact, Deutsche Telekom’s StreamOn website itself includes its own applications in the lists entitled “Musik- und Audio-Streaming-Partner” and “Video-Streaming Partner,” suggesting that Deutsche Telekom uses the term “partner” to denote an application’s inclusion in the zero-rating program rather than a third-party relationship.⁴⁰

Similarly, three of Vodafone’s four “Vodafone Pass” zero-rating programs reviewed by the ECJ include an application owned by Vodafone:⁴¹ “Vodafone Pass Music” includes Vodafone

³⁷ Explanatory document, p. 6.

³⁸ 2021 Vodafone decision, para. 15 (emphasis added).

³⁹ See the list of music-, audio-, and video-streaming partners included in StreamOn at <https://www.telekom.de/unterwegs/tarife-und-optionen/streamon#partner>.

⁴⁰ See *ibid*.

⁴¹ See the list of applications participating in each of the four “Vodafone Pass Programs” at <https://www.vodafone.de/privat/service/vodafone-pass.html>.

Music Shop, Vodafone’s music app,⁴² “Vodafone Pass Chat” includes Vodafone Chat, Vodafone’s chat app,⁴³ and “Vodafone Pass Video” includes the Vodafone GigaTV App.⁴⁴

The court explicitly classified the zero-rating programs under review as a zero-tariff option⁴⁵ and based its decision on the fact that such programs “draw a distinction within internet traffic, on the basis of commercial consideration, by not counting towards the basic package traffic to partner applications.”⁴⁶ It is this differential counting of traffic that treats applications included in the zero-rating program differently from those that are not that, according to the court, violates Art. 3(3), subparagraph 1.⁴⁷ Nothing in this argument relies on who owns the application in question. Instead, a review of the use of the term “partner” throughout the decision suggests that the court simply used the term “partner application” as a short-hand for “application included in the zero-rating program,” just like Deutsche Telekom does on its StreamOn website.

Any other interpretation would lead to absurd results. It would mean that zero-rating programs that are open to all applications in a category and include applications provided by third parties *and* by the internet access provider itself unequivocally violate Art. 3(3), subparagraph 1. By contrast, zero-rating programs that zero-rate only the internet access provider’s own applications would be only *likely* to violate Art. 3(3), even though open zero-rating programs are somewhat less harmful than programs that zero-rate only the ISP’s own applications. Taking the Draft Guidelines’ position literally, Deutsche Telekom and Vodafone could potentially save the zero-rating programs condemned by the 2021 decisions by removing all third-party applications from the programs, leaving only their own applications for zero-rating, and justify this step with the argument that the Guidelines leave open the possibility that programs that zero-rate only the internet access provider’s own applications do not violate Art. 3(3), subparagraph 1. Re-litigating such an obvious case would allow internet access providers to continue the most harmful forms zero-rating until the case is resolved, while wasting precious regulatory and judicial resources.

Second, nothing in the court’s reasoning turns on the existence of an agreement between the internet access provider and the provider of the zero-rated application. By contrast, the Draft Guidelines clearly prohibit zero-rating programs that require an agreement between the internet access provider and a content provider, but leave open the possibility that programs that unilaterally zero-rate third-party applications might be justified. This divergence would channel internet access providers’ energy into programs that are even more harmful than the ones that the Draft Guidelines already prohibit clearly: If internet access providers unilaterally chose which applications to include, they are likely to select established, popular applications or applications that are easy to identify. By contrast, they are less likely to include up-and-coming applications,

⁴² <https://www.vodafone.de/privat/apps-und-fun/music-app.html>.

⁴³ <https://www.vodafone.de/privat/service/chat.html>.

⁴⁴ <https://zuhauseplus.vodafone.de/digital-fernsehen/kabel/gigatv-app.html>.

⁴⁵ See, e.g., 2021 Vodafone Roaming decision, para. 28 (“A ‘zero-tariff’ option, *such as that at issue in the main proceedings*”) (emphasis added).

⁴⁶ Ibid.

⁴⁷ Ibid.

applications that target niche markets or marginalized communities, or innovative or encrypted applications that harder to identify.

Ultimately, BEREC can clearly prohibit zero-rating programs that zero-rate only the internet access provider’s own applications and otherwise meet the definition of zero-tariff option without resolving whether the ECJ meant to limit the term “partner application” in the definition of zero-tariff option to third-party applications that are included in a zero-rating program because of an agreement between the application provider and the internet access provider. The court’s reasoning in the 2021 decisions so obviously applies to such programs that it would be safe for BEREC to conclude that such programs clearly, not just “likely,” violate Art. 3(3), subparagraph 1 as well. The same applies to zero-rating programs that unilaterally zero-rate third-party applications without an agreement with the application provider and otherwise meet the definition of zero-tariff option.

The proposed language below includes this clarification (para. 40c, final sentence).

Zero-rating or other differentiated pricing in exchange for payment from application providers

According to the Draft Guidelines, “differentiated pricing practices ... such as CAPs subsidizing their own data” are “*likely* to be inadmissible” (para. 40b; emphasis added).⁴⁸

While none of the zero-rating options under consideration in the ECJ’s three 2021 decisions required application providers to pay to be included in the program,⁴⁹ the ECJ’s definition of zero-tariff option and the decisions’ reasoning directly apply to zero-rating programs or other differentiated pricing programs that include apps in exchange for payments from application providers. As a result, zero-rating options where the application provider pays to have traffic generated by its application zero-rated or receive a different price clearly violate Art. 3(3), and the Guidelines should say so (see proposed para. 40e).

In such a program, “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.”⁵⁰ While the “partners” in such a program have paid for inclusion in the program, the definition of zero-tariff option does not specify how one becomes a partner of the access provider. Thus, such programs meet the definition of zero-tariff option established by the ECJ.

⁴⁸ The text in this subsection is adopted from the attached White Paper, pp. 20-21.

⁴⁹ 2021 Telecom decision, para. 9. While the two Vodafone decisions do not discuss whether application providers have to pay to be included in the zero-rating program, the current description of the Vodafone Pass program on the Vodafone website states that “[t]here is no fee for any content provider to join a Pass.” <https://www.vodafone.com/about-vodafone/how-we-operate/suppliers/pass-partner-portal> (accessed October 24, 2021).

⁵⁰ 2021 Vodafone decision, para. 15 (emphasis added).

According to the three 2021 decisions, all zero-rating options based on commercial considerations which “do not count traffic generated by specific (categories of) partner applications towards the data volume of the basic tariff”⁵¹ violate Art. 3(3) because they “draw[] a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications. Consequently, such a commercial practice does not satisfy the general obligation of equal treatment of traffic, without discrimination or interference,” in Art. 3(3), subparagraph 1.⁵²

Just like the zero-rating options in the 2021 decisions, zero-rating programs and other differentiated pricing programs that charge application providers for inclusion in the program draw a distinction between internet traffic from partner applications that are zero-rated and those that are not. This violates Art. 3(3), subparagraph 1. And just like the zero-rating options in the 2021 decisions, such zero-rating programs are based on commercial considerations and cannot be justified by the exceptions in Art. 3(3), subparagraph 2 and 3.

Zero-rating programs and other differentiated pricing programs that require application providers to pay to be included in the program violate Art. 3(3), subparagraph 1, regardless of whether the provider of internet access service offers the opportunity to pay to be zero-rated only to select applications, to all applications in a category, or to any application that pays the fee.

Nothing in the Court’s reasoning in the three 2021 decisions relies on the relative openness of the zero-rating program or the reason for including the partner applications in the program. As explained in the attached White Paper, what matters under Art. 3(3), subparagraph 1 is the discrimination between (1) the traffic of applications that are zero-rated and (2) the traffic of those that are not.⁵³

Regardless of differences in who is allowed to pay to be zero-rated, any of these zero-rating programs will result in an internet access service that zero-rates only the traffic from applications that pay, while counting all other applications’ traffic against the subscriber’s data volume. It is this distinction between applications that violates Art. 3(3), subparagraph 1; whether additional applications could potentially be included in the program in the future is irrelevant. There will always be apps not included, and therefore, the programs will always violate Art. 3(3).

Other forms of differentiated pricing

Proposed changes to paras. 40b and 40c of the Draft Guidelines (proposed paras. 40e and f) apply the framework for evaluating zero-rating and other differentiated pricing practices established by the 2020 and 2021 decisions to other forms of differentiated pricing to provide guidance to stakeholders and regulators.

⁵¹ This term is identical with the 2021 decisions’ definition of “zero tariff” options” that violate Art. 3(3). See attached White Paper, Part 1, Section I.

⁵² 2021 Vodafone Roaming decision, para. 28.

⁵³ See the discussion of zero-rating programs that zero-rate all apps in a category in attached White Paper, Part 2, Section II.A.1.

The description of the application of Art. 3(3) to such practices follows directly from the 2021 decisions. The reasoning of the 2021 decisions directly applies to other forms of differentiated pricing that treat traffic generated by specific applications or categories of applications differently from traffic generated by other applications or categories of applications. In fact, the definition of “zero-tariff option” explicitly mentions the possibility that “*a tariff that is more advantageous* [is applied] to all or part of the data traffic associated with an application or category of specific applications, offered by partners of that access provider.” Thus, the ECJ itself already signaled the applicability of its definition and its findings to differentiated pricing practices beyond zero-rating.

The language proposed below closely tracks the reasoning of the 2021 decisions. All of this justifies stating the conditions under which such practices violate Art. 3(3) with a higher degree of certainty than the Draft Guidelines (see the use of the qualifier “likely to be inadmissible” in para. 40b of the Draft Guidelines). It also brings these paragraphs in line with the unqualified description of specific differentiated pricing practices that violate Art. 3(3) in para. 48 of the Draft Guidelines, which states that “[c]ommercial practices which apply a different price to the data associated with a specific application or class of application are incompatible with the obligation of equal treatment of traffic as set out in Art. 3(3).” Describing a practice as “likely inadmissible” in para. 40b and as “violating Art. 3(3)” in para. 48 creates uncertainty for stakeholders and regulators. Internet access providers are likely to rely on weaker statements to argue that the Draft Guidelines allow the practice in question, forcing regulators to intervene with respect to each specific practice. By contrast, internet access providers are likely to independently end practices that, according to the guidelines, clearly violate the Regulation.

The experience in the U.S. illustrates this phenomenon. The FCC’s 2015 Open Internet Order left zero-rating to be evaluated case-by-case under the Open Internet Rules’ General Conduct Rule. In response, U.S. broadband providers introduced a large variety of different zero-rating programs. By contrast, the California net neutrality law includes bright line rules that prohibit zero-rating of only some apps in a category of similar apps and zero-rating in exchange for payment from app providers.⁵⁴ When the California net neutrality law became enforceable, AT&T and Verizon did not wait for the California Attorney General to enforce the law, but independently stopped zero-rating their own online video programs and ended their sponsored data programs, which allowed app providers to pay to be zero-rated.⁵⁵

⁵⁴ SB 822, §3101(a)(5)&(6),

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822.

⁵⁵ See, e.g., <https://arstechnica.com/tech-policy/2021/03/att-lies-about-calif-net-neutrality-law-claiming-it-bans-free-data/>, <https://www.attpublicpolicy.com/congress/impact-of-california-net-neutrality-law-on-free-data-services/>, <https://cyberlaw.stanford.edu/blog/2021/03/in-a-win-open-internet-att-stops-zero-rating-its-own-video> (all AT&T); <https://www.verizon.com/personal/home/fios-tv-mobile-app/> (excluding zero-rating of Verizon’s FiOS TV Mobile App for California).

Proposed language

Guidance on assessment of differentiated pricing practices

40. ~~Among e~~Commercial practices ~~there are~~ include differentiated pricing practices. With these offers the price per amount of data (e.g. per GB) is not the same for all traffic across a particular IAS tariff. Differentiated pricing practices may come in different forms. This includes, for example, an additional data allowance within the IAS tariff that does not count towards the general data cap in place on the IAS tariff. This additional data allowance can be unlimited or limited. Furthermore, the price for the allowance provided in addition to the general data allowance can be zero, positive or negative. Differentiated pricing practices include both practices that violate the Regulation ~~tariffs which are permissible~~ as well as ~~those which are not permissible~~ practices that do not violate the Regulation.

40a. Differentiated pricing practices are subject to both Art. 3(3) and Art. 3(2).⁵⁶ If a differentiated pricing practice violates Art. 3(3), it is not necessary to also evaluate the practice under Art. 3(2).⁵⁷ As a result, a differentiated pricing practice should first be evaluated under Art. 3(3).

40b. According to the ECJ's rulings of 2 September 2021,⁵⁸

~~40a. Zero~~ tariff options are a subset of differentiated pricing practices which violate Art. 3(3).⁵⁹ ~~are inadmissible.~~ 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.”⁶⁰ Those data are therefore not counted towards the data volume purchased as part of the basic package. In other words, zero-tariff options do not count (or “zero-rate”) traffic generated by specific applications or categories of applications towards the data volume included in the basic internet access package.

The 2021 rulings concluded that a zero tariff option violates the general obligation of equal treatment of traffic, without discrimination or interference, in Article 3(3) first subparagraph, because “a ‘zero tariff’ option draws a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications.”⁶¹ According to the ECJ, “that failure, which results from the very

⁵⁶ 2020 Telenor decision and 2021 decisions.

⁵⁷ 2020 Telenor decision, para. 28; 2021 Vodafone Roaming decision, para. 23.

⁵⁸ ECJ, C-854/19 *Vodafone (roaming)*; C-5/20 *Vodafone (tethering)*; C-34/20 *Telekom Deutschland (throttling)*.

⁵⁹ 2021 decisions.

⁶⁰ ECJ C-34/20 *Telekom Deutschland (throttling)*, paragraph 17; ECJ C-5/20 *Vodafone (tethering)*, paragraph 14; ECJ 854/19 *Vodafone (roaming)*, paragraph 15

⁶¹ ECJ, C-854/19 *Vodafone (roaming)*, paragraph 28; C-5/20 *Vodafone (tethering)*, paragraph 27; C-34/20 *Telekom Deutschland (throttling)*, paragraph 30.

*nature of such a tariff option on account of the incentive arising from it, persists irrespective of whether or not it is possible to continue freely to access the content provided by the partners of the internet access provider after the basic package has been used up.”*⁶² *Zero-tariff options cannot be justified by the exceptions for traffic management under Art. 3(3), subparagraphs 2 and 3 since they are based on the commercial strategies pursued by the internet access provider.*⁶³

40c. Zero-tariff options that violate Art. 3(3) include, but are not limited to:

- *zero-rating programs that zero-rate individual apps or some apps in a category without being open to all applications in a category;*⁶⁴ *[BvS: For a substantive discussion of this category, see attached White Paper, p. 16.]*
- *zero-rating programs that are open to all apps in a category, subject to conditions established by the provider of internet access service;*⁶⁵ *and [BvS: For a substantive discussion of this category, see attached White Paper, pp. 16-18.]*
- *zero-rating programs that zero-rate all apps in a category.*⁶⁶ *[BvS: For a substantive discussion of this category, see attached White Paper, pp. 18-19.]*

⁶² ECJ, C-854/19 *Vodafone (roaming)*, paragraph 29; C-5/20 *Vodafone (tethering)*, paragraph 28; C-34/20 *Telekom Deutschland (throttling)*, paragraph 31.

⁶³ 2020 *Vodafone Roaming* decision, para. 31.

⁶⁴ The ECJ’s definition of zero-tariff options explicitly includes programs that zero-rate “an application:” “[A] ‘zero tariff’ option is 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* [...]” (emphasis added) (2021 *Vodafone Roaming* decision, para. 15).

⁶⁵ The incompatibility of open zero-rating programs with Art. 3(3) is established directly by the three 2021 rulings, which all evaluated open zero-rating programs. For *StreamOn*, see Bundesnetzagentur (2018), *Net Neutrality in Germany: Annual Report 2017/2018*, p. 9, para. 18 (“Generally, participation in “StreamOn” is open to any audio or video content provider. However, the content provider must conclude an agreement with Deutsche Telekom and meet the requirements set out in the general terms and conditions for content providers.”); for *Vodafone Pass*, see <https://www.iphone-ticker.de/vodafone-pass-das-mobile-2-klassen-internet-kommt-117093/>, dated September 26, 2017 (“Laut Vodafone soll jeder Anbieter sogenannter App-Partner werden können: ‘Vorausgesetzt, das Angebot ist legal und passt in eine der vier Kategorien.’”); Bundesnetzagentur (2018), “Bundesnetzagentur fordert Anpassungen bei ‘Vodafone Pass’” (June 15, 2018), https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2018/20180615_Vodafone.html?nn=876660 (“Die Anforderungen der Bundesnetzagentur an eine transparente, offene und diskriminierungsfreie Teilnahme an „Vodafone Pass“ sind nunmehr erfüllt. ”).

⁶⁶ The ECJ’s definition of zero-tariff options explicitly includes programs that zero-rate entire “categories of applications:” “[A] ‘zero tariff’ option is 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*. Those data are therefore not counted towards the data volume purchased as part of the basic package.” (emphasis added) (2021 *Vodafone Roaming* decision, para. 15).

Zero-tariff options violate Art. 3(3) regardless of whether the zero-rated application is offered by the internet access provider itself or by a third party, and regardless of whether the inclusion of the application in the program is based on a unilateral decision by the internet access provider or an agreement between the internet access provider and the application provider.

40d. Any zero-rating program that zero-rates only some applications or classes of applications and does so based on commercial considerations violates Art. 3(3), regardless of any of the other details or practices that are part of the zero-rating program. (According to the ECJ’s rulings, the violation of Art. 3(3) is independent of the “form or nature of the terms of use attached to the zero-rating option.”)⁶⁷ The violation of Art. 3(3) results directly from the discriminatory counting at the heart of such programs and invalidates the entire zero-rating program. As a result, the details of how such programs are implemented do not affect the program’s compatibility with Art. 3(3). [BvS: For a substantive discussion of these points, see attached White Paper, Part I., Sections II. and III. and pp. 19-20.]

For example, it is irrelevant:

- whether the zero-rating option is offered as an add-on for which the subscriber pays separately, or whether the zero-rating program is already included in the subscriber’s internet access plan;⁶⁸
- whether the zero-rating option triggers or otherwise includes differentiated traffic management before the subscriber has used up their all of their data volume for the billing period (e.g., the zero-rated applications are limited to a certain speed);⁶⁹
- whether the zero-rating option triggers or otherwise includes differentiated traffic management after the subscriber has used up their data volume (e.g., whether or not the subscriber can continue to use just the zero-rated applications after the subscriber has used up their data volume for the billing period).⁷⁰

⁶⁷ 2021 Vodafone Roaming decision, para. 33. See also attached White Paper, Part 1, Section 1.

⁶⁸ This directly follows from the 2021 Vodafone decisions, which included both (1) zero-rating options for which the subscriber had to pay separately and (2) zero-rating options that were included in the basic plan. 2021 Vodafone Roaming decision, para. 7; 2021 Vodafone Tethering decision, para. 7.

⁶⁹ This directly follows from the ECJ’s 2021 decision on Deutsche Telekom’s StreamOn offering. When a subscriber activates StreamOn, the bandwidth for all video streaming is limited to 1.7 Mbit/s; this differentiated traffic management was an integral part of the StreamOn zero-rating add-on. 2021 Telekom decision, para. 8 (describing differentiated traffic management in StreamOn) and para. 35 (finding the differentiated traffic management irrelevant for the violation of Art. 3(3)).

⁷⁰ This follows directly from the Court’s 2020 Telenor decision, where the zero-rating option under consideration included differentiated traffic management after the subscriber had used up their data volume, and from the 2021 decisions, where none of the zero-rating options under consideration included such differentiated traffic management. 2020 Telenor decision, paras. 10-11, 51-54; 2021 Vodafone Roaming decision, paras. 7, 29; 2021 Vodafone Tethering decision, paras. 7, 28; 2021 Telekom decision, paras. 6, 31.

~~40b. Differentiated pricing practices which are not application agnostic are likely to be inadmissible such as applying a zero price to ISPs’ own applications or CAPs subsidising their own data.~~

40e. More generally, differentiated pricing practices violate Art. 3(3), subparagraph 1 if they make distinctions among traffic generated by specific applications or categories of applications or, in other words, if they are not application-agnostic.

For example, differentiated pricing practices where the application provider pays to have the traffic generated by its application zero-rated or pays to have that traffic receive a different price violate Art. 3(3). Like the zero-tariff options evaluated by the ECJ in its 2021 decisions, these pricing practices draw a distinction between internet traffic from partner applications that are zero-rated and those that are not. This violates Art. 3(3), subparagraph 1. And like the zero-tariff options in the 2021 decisions, such pricing practices are based on commercial considerations and cannot be justified by the exceptions in Art. 3(3), subparagraph 2 and 3.

Commercial practices which apply a different price to the data associated with a specific application or class of application are incompatible with the obligation of equal treatment of traffic as set out in Art. 3(3). [BvS: Important clarification regarding the treatment of differentiated pricing practices copied from para. 48 of the Draft Guidelines; for a substantive discussion of such application-specific differentiated pricing, see attached White Paper, pp. 22-23.]

~~40ef. Different from (inadmissible) zero tariff options and similar tariff options, there are differentiated pricing practices that are typically admissible~~There are differentiated pricing practices that do not violate Art. 3(3). Offers including such practices can be provided in line with Art. 3(2), as long as they do not limit the exercise of the rights of end users in Art. 3(1). Differentiated pricing practices do not violate Art. 3(3) and typically do not violate Art. 3(2), if all elements of the tariff are application-agnostic (i.e. do not make distinctions among applications or categories of applications). Examples of such offers are mentioned above in paragraph 35. Such offers still need to comply with other provisions of the Regulation, including the transparency rule in Art. 4(1) (see, e.g., para. 138). [BvS: For a substantive discussion of application-agnostic zero-rating and other forms of application-agnostic differentiated pricing, see attached White Paper, Part 2, Section 2.B.]

41. A price-differentiated offer where all applications are blocked (or slowed down) once the data cap is reached except for the application(s) for which zero price or a different price than all other traffic is applied would infringe Article 3(3) first (and third) subparagraph (see paragraph 55) regardless of whether the price differentiation itself is application-agnostic. That’s because the offer technically discriminates between traffic from specific applications or categories of applications; this violation invalidates the entire differentiated pricing offer. The differentiated pricing included in such an offer also violates Art. 3(3), if the differentiated pricing treats traffic generated by specific applications or categories of

applications differently from traffic generated by other applications or categories of applications; this violation of Art. 3(3) also invalidates the entire differentiated pricing offer. [BvS: Para. 41 needs to be updated to reflect the 2021 decisions. The suggested edits clarify the relationship between technical and economic discrimination and their impact on the differentiated pricing offer in line with the 2020 and 2021 decisions. For a substantive discussion of these points, see also the attached White Paper, Part 3.]

Art. 3(3), subparagraph 1

Para. 54a Draft Guidelines

~~54a. The ECJ in its rulings of 2 September 2021⁷¹ concluded that a zero tariff option violates the general obligation to treat all traffic equally according to Article 3(3) first subparagraph. The ECJ established that “a ‘zero tariff’ option draws a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications.”⁷² (see also paragraph 40a above). According to the ECJ, “that failure, which results from the very nature of such a tariff option on account of the incentive arising from it, persists irrespective of whether or not it is possible to continue freely to access the content provided by the partners of the internet access provider after the basic package has been used up.”⁷³~~

[BvS: I suggest deleting this paragraph in response to changes to paras. 40-40b of the Draft Guidelines proposed above. In addition, this paragraph focusing on economic discrimination is currently located between paras. 54 and 55 of the Draft Guidelines, which discuss technical practices, which seems out of place.]

Para. 55 Draft Guidelines

~~55. Art. 3(3) applies to agreements between ISPs and end users and commercial practices subject to Art. 3(2), including to technical practices stemming from such agreements or commercial practices.⁷⁴ ~~In case of agreements or practices involving technical discrimination, this would constitute unequal treatment which would not be compatible with Article 3(3). This holds in particular for the following Examples of such technical practices that violate Art. 3(3) include:~~~~

⁷¹ ECJ, C-854/19 *Vodafone (roaming)*; C-5/20 *Vodafone (tethering)*; C-34/20 *Telekom Deutschland (throttling)*.

⁷² ECJ, C-854/19 *Vodafone (roaming)*, paragraph 28; C-5/20 *Vodafone (tethering)*, paragraph 27; C-34/20 *Telekom Deutschland (throttling)*, paragraph 30.

⁷³ ECJ, C-854/19 *Vodafone (roaming)*, paragraph 29; C-5/20 *Vodafone (tethering)*, paragraph 28; C-34/20 *Telekom Deutschland (throttling)*, paragraph 31.

⁷⁴ See 2020 Telenor decision, para. 51.

[BvS: I suggest the edits above to more clearly highlight the interplay of Art. 3(2) and Art. 3(3) with respect to technical practices that stem from agreements or commercial practices subject to Art. 3(2) in line with the 2020 Telenor decision.]

56. Art. 3(3) also applies to non-technical practices, including those stemming from agreements between ISPs and end users or from commercial practices subject to Art. 3(2). The application of Art. 3(3) to zero-rating and other forms of differentiated pricing practices is described in paras. 40-41 above.

[BvS: Suggested edit links to the proposed discussion of zero-rating and other differentiated pricing practices under Art. 3(2), which includes the discussion of how Art. 3(3) applies to these practices.]

Art. 3(3), subparagraph 3 (a)

Para. 81 of the Draft Guidelines suggests zero-rating of specific applications or categories of applications might be subject to an exception under Art. 3(3), subparagraph 3(a), if the internet access provider is required by legislation.

First, the Regulation does not generally allow the member states to adopt laws deviating from the provisions of the Regulation. 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 *require* the internet access provider to zero-rate the specific application or category of application, as the wording of Art. 3(3), subparagraph 3(a) requires. This exception does not allow members states to simply allow internet access providers to zero-rate certain apps.

Exception from Art. 3(3) for zero-rating in the public interest

Some stakeholders have suggested that internet access providers should be allowed to zero-rate applications if doing so is in the public interest, even if they are not required to do so by law. This theory finds no support in the Regulation or the 2020 and 2021 ECJ decisions.

There is no basis for a public interest exception from Art. 3(3), subparagraph 1. As a result, zero-rating specific applications or categories of applications in the absence of a legal requirement to do so violates Art. 3(3), even if the zero-rating might be characterized as being in the public interest.

First, according to the 2021 and 2020 decisions, Art. 3(3), subparagraph 1 establishes a general nondiscrimination rule, which applies to all technical and nontechnical measures used by

providers of internet access services independent of motivation.⁷⁵ This includes discriminatory practices stemming from an agreement or commercial practice as defined by Art. 3(2) and discriminatory measures unrelated to agreements or commercial practices.⁷⁶ Under the 2021 decisions, zero-rating specific applications or categories of applications thus violates the general nondiscrimination rule in Art. 3(3), subparagraph 1, regardless of whether it is part of a commercial practice or not. In addition, the term “commercial practice” in Art. 3(2) denotes unilateral practices; it is not limited to practices that have a commercial motivation.

Second, the only exceptions to Art. 3(3), subparagraph 1 are the exceptions for traffic management listed in Art. 3(3), subparagraph 2 and 3. Thus, the only way to justify a violation of Art. 3(3), subparagraph 1 is to show that it falls under one of the exceptions in Art. 3(3), subparagraph 2 and 3.⁷⁷ As the 2021 decisions explain, the exceptions provided for traffic management measures cannot be applied to practices that are based on commercial strategies pursued by the internet access provider.⁷⁸

However, this does not mean that zero-rating in the public interest can be justified by these exceptions. Art. 3(3), subparagraph 2 provides an exception for “reasonable traffic management measures.” Zero-rating in the public interest does not constitute a reasonable traffic management measure. For example, it does not serve a traffic management purpose (for this requirement, see, e.g., para. 61 of the Guidelines). The requirement that a traffic management measure “shall not be based on commercial considerations” does not mean that a measure that is not based on commercial considerations is justified under Art. 3(3), subparagraph 2. Instead, a *traffic management measure* is unreasonable if it is based on commercial considerations.

Even for traffic management measures, regulators do not need to prove that a traffic management measure is based on commercial grounds in order to find a violation of Art. 3(3), subparagraph 2. If the other requirements of Art. 3(3), subparagraph 2 are not met (e.g., the measure does not serve a traffic management goal or is not transparent, non-discriminatory and proportionate), it is irrelevant whether the practice is based on commercial considerations or not. (See also BEREC Guidelines, paras. 58-61 and 68.) That is the case with discriminatory zero-rating in the public interest; zero-rating that is not a traffic management measure cannot be justified under Art. 3(3), subparagraph 2, regardless of whether it is based on commercial considerations or not.

⁷⁵ This follows directly from the 2021 decisions, which apply Art. 3(3), subparagraph 1 to the differential counting of traffic towards subscribers’ data volume that is the core feature of zero-rating programs. 2021 Vodafone Roaming decision, para. 28. As explained in the attached White Paper, Part 3, a close reading of the 2020 decision indicates that the 2020 decision had already concluded that Art. 3(3), subparagraph 1 establishes a general nondiscrimination rule that applies to both technical and non-technical measures. This reading of the 2020 decision is supported by various aspects of the 2021 decisions. See *ibid.*, Part 3, Section I.

⁷⁶ See, e.g., 2020 Telenor decision, para. 51 in the context of technical discrimination.

⁷⁷ 2020 Telenor decision, paras. 48-50; 2021 Vodafone Roaming decision, paras. 25, 27.

⁷⁸ 2021 Vodafone Roaming decision, paras. 31, 27.

