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BEREC Report on the outcome of the public consultation on draft BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality rules

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Introduction

BEREC published the draft Guidelines on the Implementation by National Regulators of European Net Neutrality Rules ("the draft Guidelines") on 6 June 2016. At the same time, a public consultation was opened, running until 18 July 14:00 (CET).

The draft Guidelines and public consultation are in accordance with Article 5(3) of Regulation (EU) 2015/2120 ("the Regulation").[1] In particular, Article 5(3) stipulated that "By 30 August 2016, in order to contribute to the consistent application of this Regulation, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines for the implementation of the obligations of national regulatory authorities under this Article."

In accordance with BEREC's policy on public consultations, BEREC publishes a report summarising stakeholders' views and how they have been taken into account, which is the purpose of this report.

BEREC received 481,547 responses to the public consultation from various types of stakeholder. A list of contributors will be provided alongside the responses when they are published[2]. In this report, BEREC has grouped these under the following categories for ease of reference:

- Civil society, which BEREC has taken to include:
    - Responses from individuals
    - Campaigns supported by individuals
    - Organisations representing citizens/consumers
- Public/governmental institutions
- ISPs (providers of Internet Access Service (IAS) and their representative organisations)
- CAPs (Content and Application Providers and their representative organisations)
- Other industry stakeholders and their representative organisations, including business users of IAS, equipment manufacturers, and car manufacturers
- Independent experts, including academics, academic groups/associations/institutions and consultants.

The majority of the responses were received from campaigns organised by civil society respondents. These campaigns generally provided a sample or default text and respondents could indicate their support for all or part of the sample or default text. Some of the campaigns sent this text on behalf of each respondent (including the name and email address of the campaign supporter) and some respondents used the campaign-prepared text in a response sent from their own email address.

[1] 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 and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union ("the Regulation")
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2120&from=EN

[2] In addition, BEREC publishes those contributions from stakeholders on its BEREC website, taking into account any requests for confidentiality.

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

- Background and general aspects (Terminology)
- Article 1 – Subject matter and scope
- Article 2 – Definitions
- Article 3 – Safeguarding of open internet access
- Article 4 – Transparency measures for ensuring open internet access
- Article 5 – Supervision and enforcement
- Article 10 – Entry into force and transitional provisions

BEREC considered all of the responses and made changes in response to comments in about a quarter of the paragraphs of the Guidelines. Some stakeholders suggested that BEREC should go further than the Regulation, while some other stakeholders suggested that BEREC should allow practices that the Regulation actually prohibits. In general, there were often many responses making competing arguments and, in BEREC's view, the final Guidelines strike an appropriate balance in accordance with BEREC's interpretation of the Regulation, and BEREC has acted within its mandate given in Article 5(3) of the Regulation.

Given the high volume of responses, this report had to focus on a summary of the main topics and comments put forward, indicating the type of stakeholders that had provided the different views. The report also explains how those comments were taken into account. In addition, BEREC is separately publishing all non-confidential responses received.

Background and general aspects

Terminology

Stakeholder responses

Some ISPs and other industry stakeholders suggested that BEREC should not introduce any new definitions or concepts (e.g. sub-internet, specialised services, zero rating) to those used in the Regulation.

Some ISPs suggested that the Guidelines should refer to "open internet access" and not to "net neutrality", as the latter wording is not used in the Regulation. They also suggested that, in paragraph 2, BEREC should not refer to "specialised services", which had not been defined in the Regulation, but rather use the concept of "services other than internet access services" or the acronym "SoIAS". They also suggested using the term "IAS provider" instead of "ISP".

BEREC response

In general, BEREC has aimed to use terminology that is consistent with the Regulation as well as with previous BEREC publications on these issues. "Net neutrality" is a widely and internationally recognised concept which has been the focus of work by BEREC since 2010, and BEREC felt it was appropriate to continue to use this concept in reference to the Guidelines, also considering that suddenly adopting a different term at this stage would raise confusion.

From time to time, BEREC considered it necessary or practical to define new terms that were not used in the Regulation but are used in the Guidelines, such as “specialised services”. However, the concepts behind those terms are in line with the principles of the Regulation.

BEREC considers that the terms (e.g. CAP, ISP, specialised service) are generally clearly defined and serve as useful references throughout the Guidelines, so the high-level definitions provided for these terms in paragraph 2 have not been changed. However, BEREC did update the definition in paragraph 2 of the term “application” by removing the second sentence that referred to the distinction between application and “service” (electronic communication service), since the latter term is no longer used in the Guidelines and may risk causing confusion.

Article 1

Subject matter and scope

Stakeholder responses

Several civil society respondents, CAPs and other industry stakeholders agreed with BEREC’s interpretation of “end-users”, in particular the fact that business users and CAPs are included within the definition. They urged BEREC to maintain this interpretation or to strengthen it to remove any possible doubts that CAPs should be protected by NRAs when implementing net neutrality rules or to provide additional protection for individual or small-scale end-users.

However, several ISPs and other industry stakeholders disagreed with BEREC’s interpretation of “end-users”, arguing that it unjustifiably widens the scope from the intentions of the Regulation. For instance, the draft Guidelines imply that both the definitions “user” and “end-user” are covered within the scope, meaning that the rights of individuals, businesses, including consumers as well as CAPs are protected under the Guidelines. It was suggested that the Regulation uses the term “end-users” and it is incorrect to widen its scope to also include CAPs. Alternatively, it was suggested that the Guidelines should only apply to CAPs insofar as they use an/their IAS to distribute content or applications to end-users, but not in relation to the IAS used by consumers to access content.

Some ISPs argued that the Regulation does not cover IP interconnection agreements, that there is no justification for BEREC to lay down interconnection recommendations and that these issues should be addressed through separate regulatory provisions concerning interconnection. On this basis, they suggested deleting these provisions (parts or all of paragraphs 5 and 6) and, for instance, to simply state that the provision of interconnection is a distinct service from the provision of IAS, or only referring to “commercial practices” and including a reference to Recital 7.

However, some CAP and civil society respondents do not share this view. CAPs and civil society respondents suggested rewording of paragraph 6 to emphasise that NRAs should review interconnection markets and the policies and practices of ISPs, even if the Regulation does not directly apply to interconnection markets.

Furthermore, some CAPs and civil society respondents were concerned about the wording of paragraph 6, due to the potential threat of ISPs using control over interconnection points to force CAPs to pay more to deliver traffic. They argued that such fees have no purpose other than providing rent for ISPs, as they would have no incentive to use revenues from

interconnection fees to build out network capacity or reduce rates for end-users. They therefore asked BEREC to clarify that ISPs have an obligation to make necessary interconnection arrangements in order to meet the requests of their end-users. Some industry stakeholders addressed the issue of innovative IoT/M2M services such as connected car services. With regard to automated driving, these stakeholders remarked that these connected systems are designed in such a way that even when there is a lack of mobile communication connection they still function safely and avoid accidents.

BEREC response

Having considered stakeholders' responses, BEREC has decided to update paragraph 5 of the draft Guidelines to clarify the references to CAPs. In particular, BEREC clarifies how and when they are considered as "end-users". BEREC considers that the references and the guidance BEREC provides about CAPs are consistent with the Regulation and with the Framework Directive.

The Regulation does not make such a distinction between business customers and other customers under the definition of "end-users".

With regard to interconnection, BEREC does not consider that any modification or addition to the Guidelines is necessary. BEREC notes that IP interconnection is not considered to fall within the scope of Article 3(3), as stated in paragraph 50 (paragraph 47 of the draft Guidelines), but that NRAs may take into account the interconnection policies and practices of ISPs in so far as they have the effect of limiting the exercise of end-user rights under Article 3(1).

BEREC is committed to the promotion of new technologies and services such as IoT solutions or technologies used for automated cars (and it considers the Regulation does contribute to this objective and to the future development of such services). In practice, depending on their specifications and objective needs, these solutions could rely, for example, on IAS, on specialised services or on a private network.

If the connectivity part of the M2M solution is not provided using a public communications network, BEREC notes that the Regulation does not apply. For example, this might at present be the case with those car-to-car and car-to-infrastructure solutions - which currently are the most important element for automated driving - that do not rely on public communication networks but on short-range technologies without access to the internet (so-called "Intelligent Transport Systems" (ITS)).

Article 2

Definitions

"Provider of electronic communications to the public"

Stakeholder responses

Some uncertainty was raised by CAPs about the difference between 'a predetermined group' and 'services or networks being made publicly available' (in paragraph 10) and it was requested that BEREC provided further clarity on this distinction.

Some ISPs and other industry stakeholders disagreed with the Guidelines' approach to VPNs, which they considered to be not publicly available. They suggested that VPNs should therefore be outside the scope of the Regulation.

Other ISPs and other industry stakeholders disagreed with the position taken in the draft Guidelines towards VPNs and believed that the draft Guidelines go beyond the Regulation by limiting the kind of VPNs that could be delivered as specialised services. They suggested that paragraph 11 is unclear and argue that Recital 17 acknowledges that VPNs are not an IAS, even if they do provide access to the internet. They stated that there are various VPN services and network services provided by ISPs and other service providers. They described VPNs as non-IAS, providing reliability, higher availability, added value quality and fulfil end-to-end Service Level Agreements. They argued that, by taking a narrow, static view of what a VPN is (an application or service), who provides VPNs, and how they are delivered, the draft Guidelines are not future proof, would risk prejudicing developments in new ways of offering corporate services (noting SDN and NFV for example), including VPNs, which will blur the distinction by providing services virtually.

Some ISPs raised doubts about the definition of what services are considered public or non-public. For instance, they noted that BEREC has defined "provider of electronic communications to the public" to mean services which are offered to any customer who wants to subscribe to the service or network. They also noted that there is no consistent EU definition. They suggested that more clarity would be needed on this point.

Some CAP and civil society respondents raised concerns about categorising services as not being publicly available (paragraph 12). In particular, it was noted that, due to increasing deployment of Wi-Fi by telecoms providers, many of these places are accessible to the general public, leading to the inference that they are being made publicly available. The respondents considered this posed a risk of circumventing the Regulation. A suggested alternative approach was to allow for distinctions to be made, depending on the purpose of the Wi-Fi access and the length of time over which end-users would generally be using the connection. Notwithstanding these points, it was suggested that, if BEREC concludes that Wi-Fi hotspots are not publicly available, BEREC should clarify that these offers cannot be marketed as an IAS offer.

Alternatively, some ISPs and other industry stakeholders considered that Wi-Fi hotspots and corporate networks are not "publicly available", whilst also suggesting the list should include other examples, which BEREC should clarify.

BEREC response

With regard to VPNs, BEREC considers it appropriate to clarify the way in which they are treated within the Guidelines, in particular, specifying that the operation of a specific VPN would be a private network. Furthermore, a more complete reference to Recital 17 of the Regulation is included in paragraph 115 (paragraph 111 of the draft Guidelines), which explains how VPNs should be treated and when their provision by the ISP might need to comply with certain aspects of the Regulation.

With regard to the examples that "could be considered as services or networks not being made publicly available" in paragraph 12, it is stated that these "could be considered...subject to a case-by-case assessment by NRAs taking into account national practices". BEREC considers that providing examples in some instances is an appropriate way to fulfil the purpose of the Guidelines in helping to interpret and implement the Regulation. BEREC has expanded paragraph 12 to mention criteria which NRAs could take into account when making such case-by-case assessments.

In this case, the examples and the list of criteria are not meant to be prescriptive or exhaustive. In order to clarify the guidance, in the final version of the Guidelines BEREC has removed some text that could have been interpreted as forming a prior judgement on such cases and instead added some explanation about potential criteria or factors that could be used by NRAs when assessing whether or not services or networks are made publicly available.

"Internet access service"

Stakeholder responses

Some civil society respondents believed that IPv6 connectivity will eventually be needed in order to ensure access to "virtually all end-points". Therefore, they suggested changes to paragraph 16 to ensure that BEREC/NRAs monitor how the situation evolves, require connectivity via IPv6 to be offered if/when necessary, while providing for an exemption for legacy equipment on which only IPv4 is possible.

Some civil society respondents agreed with the position taken in paragraph 17 (sub-internet services would constitute an infringement of the Regulation).

However, some ISPs took issue with the concept of "sub-internet services". They argued that, on this subject, the draft Guidelines were confusing, since neither the Regulation nor the draft Guidelines defined this concept. Furthermore, they argued that the draft Guidelines unjustifiably overstep the scope of the Regulation in this regard, creating new rules and raising questions regarding the possibility of launching future innovative offers, such as eHealth and eGovernment. Therefore, they suggested deleting paragraph 17 (as well as deleting all or part of paragraphs 38 and 55 / paragraphs 35 and 52 of the draft Guidelines, which also refer to this concept).

Other ISPs and CAPs suggest that paragraph 17 (and paragraphs 38 and 55 / paragraphs 35 and 52 of the draft Guidelines) could be misinterpreted or could preclude other socially beneficial offers that enable access to only a pre-defined part of the internet. They suggest inserting a requirement to the Guidelines that the operator shall make the offer "open" to all similar websites or request clarification that the Regulation does not seek to restrict the offering

of non-IAS services by non-IAS providers (e.g. CAPs). They also suggest doing so by replacing the term “ISP” with “IAS provider”.

Other ISPs support the need to avoid circumvention of the Regulation but suggest that having a per se prohibition is not a proportionate approach, arguing that doing so would harm innovation and reduce consumer choice. Instead they suggest that regulators should assess sub-internet services on a case-by-case basis to determine whether they are providing genuine consumer choice or merely circumventing the Regulation. Therefore, they suggest that the Guidelines should only refer to sub-internet services that “intentionally” circumvent the Regulation.

There were some suggestions from civil society respondents to amend paragraph 18 to clarify that any restriction to the IAS must only be done on the terminal equipment (deleting ‘the nature of’ and removing reference to e-book readers, since these can come with web browser functionality capable of connecting to virtually all end-points of the internet). Similarly, civil society respondents also argued that the Regulation did not foresee any other type of connectivity service beyond an IAS and a non-IAS, or specialised service, so such connectivity services should not be excluded from the scope of the Regulation by the Guidelines.

In addition, there was a suggestion from ISPs that the provisions in paragraph 18 risk creating a discriminatory situation whereby limited access for device-based offers would be permitted, but limited application-based offers would not be permitted. However, such an approach would, according to this view, violate the principle of technological neutrality, despite this being safeguarded by the Regulation (Recital 2). There were also suggestions from ISPs to refer to the choice of end-users to limit the number of reachable end-points.

BEREC response

With regard to the suggestions made about the relationship between internet addressing schemes (IPv4 and IPv6) and the ability to reach end-points, BEREC remains of the view that the term “virtually all endpoints” (Recital 4) should not be interpreted, at present, as a requirement on ISPs to offer connectivity with both IPv4 and IPv6. However, BEREC does not believe that the Regulation discourages or restricts the deployment of IPv6. With regard to references to “sub-internet services”, whilst this term is not used in the Regulation, the concept behind it is. The Regulation specifies that providers of IAS should not restrict connectivity to any accessible end-points of the internet (ref. Recital 4 and Article 3(3)). Consistent with this, an ISP that enables access to only a pre-defined part of the internet would be infringing the Regulation. The BEREC Guidelines define such an infringement as a “sub-internet service”. Therefore, BEREC has not created any new concepts or rules with respect to these issues. Nor does BEREC believe that this would impede new or innovative services. However, since this section deals with definitions, please refer to the sections under Article 3 for further details about the implementation of the Regulation that may be relevant.

With regard to references to terminal equipment (paragraph 18 of the Guidelines), BEREC considers that such cases mentioned in this paragraph are outside the scope of the Regulation unless the services in question are used to circumvent the Regulation and did not consider it necessary to modify the draft Guidelines on these issues.

Article 3

Safeguarding of open internet access

Stakeholder responses

Several stakeholders questioned or commented on whether the BEREC Guidelines implied that there should be ex ante authorisation by NRAs for commercial practices (Article 3(2)), traffic management practices (Article 3(3)) and specialised services (Article 3(5)). For further details about their input to the consultation, please refer to the respective sections below.

BEREC response

Having considered stakeholders' responses, BEREC concluded that it would be appropriate to clarify at the start of the section on Article 3 that BEREC does not consider that the Regulation requires ex ante authorisation in relation to these issues. However, BEREC also states that this does not preclude exchanges between NRAs and market players, nor does it preclude NRAs from drawing on their powers or obligations to intervene under Article 5.

Article 3(1)

"Using terminal equipment of their choice"

Stakeholder responses

Some civil society respondents and other industry stakeholders widely supported the provisions in the draft Guidelines regarding end-users' ability to use terminal equipment of their choice. Some of these emphasised their view that equipment should only be obligatory if there is a valid technical reason and only if the equipment provided is solely for overcoming such technical issues or if the ISP also provides a compatible way in which the end-user can choose terminal equipment of their choice (e.g. routing devices).

However, some ISPs suggested that BEREC Guidelines should also point out in paragraph 25 (paragraph 23 of the draft Guidelines) that terminal equipment must however comply with the interfaces of public networks which network operators have then the obligation to publish under EU law (Radio Equipment Directive 2014/53/EU and Directive 2008/63/EC on competition in the markets in telecommunications terminal equipment).

There was a request from civil society respondents for a minor rephrasing in paragraph 26 (paragraph 24 of the draft Guidelines) to refer to whether end-users are able "in practice" to use the terminal equipment of their choice.

Among the CAPs and civil society respondents, there was agreement with the statement in the Guidelines that 'restricting tethering' was likely to constitute a 'restriction of choice' for end-users' terminal equipment (paragraph 27 / paragraph 25 of the draft Guidelines). In addition, some of these civil society respondents requested this point to be made clearer in the Guidelines.

Contrary to this point of view, among ISPs there was widespread opposition to this aspect of the draft Guidelines. For instance, they argued that BEREC had gone beyond any possible interpretation of the Regulation and that it is not the purpose of the Regulation to allow multiple users to connect to a network through a single device and subscription and that the ability to

access the internet from terminal equipment of the end-users' choice should not be confused with an unrestricted right to use that equipment in any way. They explained that, when the customer is tethering, only one piece of terminal equipment is connected to the network, all other devices are connected to this original terminal. Hence those other devices cannot be considered as "terminal equipment connected to the network" (referencing the definition of "terminal equipment" in the Directive 2008/63/EC). For these reasons, they believed that a prohibition of tethering does not undermine end-user rights, whereas the position on tethering in the draft Guidelines would risk jeopardising innovation for IAS providers and would impede ISPs' willingness to create and promote unlimited data offers, due to sustained and excessive use. Therefore, they recommended that BEREC removes the reference to tethering in paragraph 27 (paragraph 25 of the draft Guidelines) or specifically allow providers to set some limit on the use of tethering and/or 4G routers.

BEREC response

With regard to the comments on tethering, BEREC explains in paragraph 25 (paragraph 23 of the draft Guidelines) that Directive 2008/63/EC defines *"terminal equipment"* as *"equipment directly or indirectly connected to the interface of a public telecommunication network"* and referred to Recital 5, which states that *"Providers of internet access services 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"*. Based on these two stipulations, BEREC considered that the approach taken to tethering in the draft Guidelines is appropriate. BEREC still considers this to be the case, whilst noting that the guidance does not amount to a per se prohibition of restricting of tethering, only that the restriction of tethering is likely to constitute an infringement of the Regulation.

With regard to the other responses from stakeholders, BEREC considers that the draft Guidelines sufficiently covered the issues raised and that it is not necessary to modify the guidance in the final version.

"Legislation related to the lawfulness of the content, applications or services"

Stakeholder responses

Some civil society respondents considered paragraph 28 (paragraph 26 of the draft Guidelines) to be an incomplete account of the provision of Recital 6. Some also suggested adding a reference to Article 52 of the Charter of Fundamental Rights to this paragraph.

BEREC response

Having considered the responses from stakeholders, BEREC concluded that it would be appropriate to include additional information in this section of the Guidelines, making reference to the Charter of Fundamental Rights, consistent with Recitals 13 and 33 of the Regulation.

Furthermore, this update is done at different appropriate places in the document. In the new paragraph 20 related to Article 3 in general, BEREC refers to the fundamental rights of the Charter, and Recital 33 in the Regulation, and therefore did not consider that a specific reference to freedom of expression and media pluralism was necessary in paragraph 46 (paragraph 43 of the draft Guidelines), being covered now by this more general statement covering Article 3 as a whole. Also, these points are already covered by two bullets of paragraph 46 referring to the effects on the range and diversity of content and applications,

which has been clarified by adding two footnotes in paragraph 46. In the new paragraph 82 related to Article 3(3) (a), BEREC refers to the Charter of Fundamental Rights, and Recital 13 in the Regulation.

Article 3(2)

"Commercial practices"

Stakeholder responses

There was agreement among CAPs with the wide interpretation of "Commercial practices", but some changes to the wording of paragraph 33 (paragraph 31 of the draft Guidelines) were suggested by civil society respondents in order to provide what was seen as greater legal clarity.

BEREC response

BEREC considered that this section was consistent with the Regulation and is sufficiently clearly expressed. In particular, BEREC considered it captures relevant commercial behaviour, including both agreements between parties and unilateral practices.

"Shall not limit the exercise of end-users' rights"

Stakeholder responses

There was strong support from CAP and civil society respondents for paragraphs 34 and 36-38 (paragraphs 32-35 of the draft Guidelines) , in particular the references to preferential traffic management and price differentiation in paragraph 36 (paragraph 33 of the draft Guidelines) and the reference to Article 3(3) when applying Article 3(2) in paragraph 37 (paragraph 34 of the draft Guidelines), which they claimed would help to resolve what was seen as an inconsistency in the way that the Regulation was made and should provide legal clarity, ensuring consumers are protected against potentially harmful practices.

However, some ISPs argued that the reference to "application-agnostic" in paragraph 34 (paragraph 32 of the draft Guidelines) was not justified and should be deleted, since there was no reference to this concept in Article 3(2) of the Regulation. They noted that customers may wish to choose services in which there are different prices and volumes allocated to different applications.

Similar to the suggested changes for paragraph 33 (paragraph 31 of the draft Guidelines), some rephrasing was suggested by civil society respondents for paragraph 36 (paragraph 33 of the draft Guidelines).

However, according to some CAP and civil society respondents it was unclear in paragraph 36 (paragraph 33 of the draft Guidelines) how bundling the provision of IAS with an application would be distinguished from zero-rating of such an application by the ISP. The stakeholders wondered if this bundled offer would have to be only for a limited period of time, as in a promotional offer. It was also considered unclear if this would apply only while usage was below a data cap or also once it had been reached, and whether it would only apply to the specific example cited in paragraph 36 (paragraph 33 of the draft Guidelines) or to other commercial practices.

Some CAPs considered that in paragraph 34 and subsequently, the draft Guidelines gave the impression that restrictions in the end-user rights of CAPs might be justifiable in some cases. It seemed to the respondents that the draft Guidelines defined "end-user" to include CAPs, but then focused more on the rights of the end-users that are accessing the content and that therefore only highly qualified restrictions in the end-user rights of CAPs are taken into consideration. They argued that it should be made clear in the Guidelines that preferential treatment of content is in general prohibited and in exceptional cases it must be explained and proved that competing CAPs are not limited in their right of distributing content without discrimination.

Some ISPs suggested that the reference in paragraph 37 (paragraph 34 of the draft Guidelines) should be "materially", not "directly".

Regarding paragraph 38 (paragraph 35 of the draft Guidelines), some ISPs took issue with the concept of "sub-internet services", reiterating the points made in relation to paragraph 17.

Some of the civil society respondents argued that paragraph 39 (paragraph 36 of the draft Guidelines) was unclearly drafted and should be adjusted to clarify that price differentiation applied to categories of traffic would be harmful (e.g. deleting "without necessarily limiting it").

Some ISPs suggested adding to paragraph 41 (paragraph 38 of the draft Guidelines) that applications specifically needed for emergency services, information or customer care services, e.g. speed tests, information for roaming customers (as required by the Roaming Regulation), re-activating blocked subscriptions where the data cap is reached, or e-government services would be exempted from infringement of Article 3(3).

However, some ISPs and other industry stakeholders that BEREC's view of zero rating beyond a customer's data cap infringes Article 3(3) of the Regulation (paragraph 41 / paragraph 38 of the draft Guidelines). They were of the view that there is nothing in the Regulation to support this interpretation and that such a predetermination is contrary to the approach described in Recital 7 because a proper assessment of the impact on customer choice has not been conducted. They considered that zero-rating does not limit end-users' rights, nor restrict end-users' access to all end points of the internet and it does not reduce their choice.

Some CAP and civil society respondents took issue with the wording of paragraph 45 (paragraph 42 of the draft Guidelines), in particular the relation between impacts on 'end-user choice' and the 'rights' of end-users. In particular, it was argued that BEREC's interpretation that the impact on consumer choice must be 'material' for it to be considered a limitation on the exercise of end-users' rights is unnecessarily weak or vague and does not correctly reflect the Regulation (Article 3(2)). It was noted that there is a reference to end-users' choice being 'materially reduced' in Recital 7, but it was suggested that this is descriptive of the potential harm and should not be applied to the Guidelines in a way that may restrict NRAs' ability to intervene. In the view of those respondents, any ISP practice that reduces end-user choice will necessarily impinge on end-user rights.

Some other views on paragraphs 43-45 (paragraphs 40-42 of the draft Guidelines) were expressed by ISPs. For instance, they suggested that BEREC should provide further clarification to the evaluation process in paragraphs 43 and 44 (paragraphs 40 and 41 of the draft Guidelines) alluding to "other competent authorities" that need to be involved. They requested clarification that these "other competent authorities" are – at least for the analysis

of actual effects on markets and consumers – national competition authorities and not, for example, media regulators.

It was also suggested that the paragraph 45 (paragraph 42 of the draft Guidelines) should be amended, so that the test for assessing commercial practices would be carried out in line with well-established EU competition law methods and principles and would be based on the following factors:

1. Scale of the practice;
2. Materiality in reduction of end-user's choice;
3. Reduction of the choice in practice.

There was agreement among some CAPs and civil society respondents with the factors to take into account when NRAs assess whether ISPs' practices are compatible with the Regulation (and not limiting the exercise of end-users' rights) (paragraphs 46-48 / paragraphs 43-45 of the draft Guidelines).

However, some CAPs were concerned that paragraph 46 (paragraph 43 of the draft Guidelines) could imply that NRAs may make judgements about the relevance of the range and diversity of content provided by CAPs such that some content is considered not being of relevance due to not meeting a minimum quality level. If this was the case, the respondents disagreed with these provisions.

There were various comments made about the ability or willingness of regulators to act to prevent or resolve harmful practices. For instance, regarding NRAs' general ability to intervene effectively, BEREC was recommended to review the criteria it uses in the Guidelines taking into account that, if there is a requirement on NRAs to demonstrate there is a harmful effect, this may make it very difficult for NRAs to intervene effectively or prevent harmful practices. For instance, the effects of a practice may be difficult to establish because they may be part of a hypothetical scenario that cannot be readily compared to the actual state of affairs (e.g. a lack of investment in new entrants). Other respondents questioned why practices with harmful effects should only be resolved once the harm had already occurred. Instead, BEREC was advised to seek to prevent harm and analyse practices based on their foreseeable impact. To aid this kind of assessment, a list of factors was proposed, whereby a deviation from any of them could indicate foreseeable harm:

- User choice
- Application-agnosticism
- Low cost of application innovation and free speech
- Innovation without permission

Some civil society respondents also suggested modifying the last bullet point of paragraph 48 (paragraph 45 of the draft Guidelines) to refer to any kind of differentiation in treatment between applications, not only price differentiation.

However, contrary views to these were expressed by CAPs and ISPs referring in particular to paragraphs 37, 42, 43, 46 and 48 (paragraphs 34, 39, 40, 43 and 45 of the draft Guidelines). For instance, some CAPs and ISPs believed that the references to "strong" or "weak" market position in paragraph 46 (paragraph 43 of the draft Guidelines) were vague and could be misinterpreted. They also argued that it is only the "end-user rights" of Article 3(1) that are referenced in Article 3(2), and not the more general traffic management measures (e.g. "equal

treatment of traffic") of Article 3(3). Due to these types of views, they and other ISP respondents argued that commercial arrangements between CAPs and ISPs should only be subject to regulatory intervention if it is demonstrated that the scale of the commercial arrangement materially reduces end-user choice and thereby infringes the rights established by Article 3(1). They emphasised the view that intervention should not be *ex-ante* and should not depend on the scale or market position of the parties involved.

Regarding the last bullet point of paragraph 46 (paragraph 43 of the draft Guidelines), some ISPs raised a point that the Regulation does not address the issues of media pluralism and freedom of expression. Therefore, according to this view, the Regulation does not authorise NRAs or other competent authorities to observe this aspect of the "open internet", which are dealt with by other laws. Therefore, BEREC was advised to delete the last bullet point. On the other hand, many civil society and CAP respondents supported the inclusion of references to media pluralism and freedom of expression in the issues to be taken into account.

It was also argued that BEREC provides no evidence for the assertion in paragraph 48 (paragraph 45 of the draft Guidelines) that any price differentiation could "undermine the goals of the Regulation". For instance, references were made to differential pricing of music services and gaming, which provide choice and respond to the needs and demands of customers, not restricting their rights. The respondents considered that it is not a sufficient justification for prohibiting a commercial practice to show that it incentivises or influences end-users and that NRAs must demonstrate, through a proper assessment, that the practice in question limits end-users' rights or, in the words of Recital 7, lead to situations where end-users' choice is materially reduced in practice.

Some stakeholders argued that a holistic approach should be encouraged in paragraphs 46-47 (paragraphs 43-44 of the draft Guidelines), rather than suggesting that a prohibition could be judged solely on one dimension of the analysis.

BEREC response

Taking into account stakeholders' responses, BEREC has considered it appropriate to clarify certain aspects of this section. In particular, BEREC has clarified the importance of applying data volume and speed characteristics in an application-agnostic way, by rephrasing paragraph 34 (paragraph 32 of the draft Guidelines) and adding a new paragraph 35 on offers with uncapped access to the internet for a limited period of time.

Whilst the term "application-agnostic" is not used in the Regulation, BEREC considers that this concept, and its understanding of it, is clearly expressed in the Guidelines and that BEREC uses it in a way that is consistent with the principles of the Regulation.

BEREC also decided to add a reference in the new paragraph 35 of the Guidelines to the ability of end-users to access their ISP's customer services when their data cap is reached in order to purchase access to additional data, which BEREC considers a potentially beneficial and practical step that would likely not lead to a limitation of the exercise of end-users' rights. Furthermore, BEREC notes that the Article 3(3) (a) would allow for prioritisation of communication with emergency services.

BEREC has made a change to paragraph 36 (paragraph 33 of the draft Guidelines), rephrasing "...a mobile operator may offer free access to a music streaming application" to "...a mobile

operator may offer free subscription to a music streaming application", since BEREC considers "subscription" to be a more accurate description of the intended meaning.

With regard to the reference to Article 3(3) in paragraph 37 (paragraph 34 of the draft Guidelines), which some stakeholders welcomed, whilst others opposed, BEREC is of the view that Article 3(3) is applicable when considering Article 3(2). Indeed, Article 3(3) applies in the most general way to ISP's behaviour (i.e. "when providing internet access services").

BEREC has also deleted the word "directly" that appeared in paragraph 37 (paragraph 34 of the draft Guidelines), changing the phrase from "...will directly limit the exercise of the end-users' rights..." to "...will limit the exercise of the end-users' rights...", in order to more closely align the guidance with the wording of the Regulation.

With regard to paragraph 41 (paragraph 38 of the draft Guidelines) on zero-rating offers where all applications but the zero-rated one are blocked once the data cap is reached, BEREC decided not to make any amendments, but instead refers stakeholders to the clarification provided earlier in this section and to paragraph 55 (paragraph 52 of the draft Guidelines), which discusses these issues in more detail.

BEREC updated paragraph 45 (paragraph number 42 of the draft Guidelines) for clarity and to refocus on implementation by NRAs.

Also, with regard to comments on the market positions of CAPs and ISPs, BEREC notes that Recital 7 specifies that assessments should take into account such market positions.

In response to requests to consider the "foreseeable" effects of certain commercial practices, BEREC refers to the clarification above that BEREC considers the Regulation does not require ex ante authorisation, whilst noting that this does not preclude exchange between NRAs and market players, nor does it preclude NRAs from drawing on their powers to intervene under Article 5.

In response to the request for a more holistic approach (regarding paragraphs 46-47 / paragraphs 43-44 of the draft Guidelines), BEREC considers that the wording strikes an appropriate balance between suggesting factors to take into account and providing NRAs with flexibility to assess the particular aspects of any given case, and no revisions are needed. BEREC also notes that the Guidelines do not specify that the presence of any one of the suggested factors must be determined to limit the exercise of end-users' rights.

With regard to the requests to clarify or specify which organisations may be considered "other competent authorities", it is not for BEREC to decide on such matters, since this will be determined based on national legislation.

Other comments on zero-rating

Stakeholder responses

Concern about the practice of zero-rating was widespread among CAP and civil society respondents. This concern motivated the respondents either to support the current provisions in the draft Guidelines or to urge BEREC to reinforce the protection against potential harm, including by stating clearly that all forms or just certain forms or zero-rating/price differentiation are very likely to be harmful and should be prohibited.

Civil society respondents explained their views that zero-rating is just one form of "price differentiation/ discrimination" applied by ISPs to different categories of data. BEREC was advised to widely replace references to "zero-rating" with "price differentiation", since, according to this view, this would more fully capture the general practice that BEREC has acknowledged as likely to influence the rights of end-users (in paragraph 36) and provide a greater safeguard against harmful commercial practices that may emerge in the future.

Some CAP and civil society respondents argued that zero-rating (price differentiation) has a strong discriminatory effect, in particular when data caps are in place too, with effects similar to other forms of preferential treatment of certain traffic. Citing evidence from across Europe and elsewhere, they argue that zero-rating has a significant effect on end-users' behaviour, since they may be wary about exceeding data caps, but are unsure how much data they are using or how much data is left under their caps, making them even more cautious and more likely to select zero-rated services and can have harmful effects on competition. They note that zero-rating of some traffic can create an incentive for ISPs to maintain artificially low caps and to invest less in general internet capacity in favour of investing in preferential capacity. Therefore, they express their disagreement with the argument made by some ISPs that zero-rating practices can help to lower prices for end-users or increase investment in capacity.

On a similar basis some CAP and civil society respondents suggested that the Guidelines should ban all forms or certain forms of zero-rating. They note that the current case-by-case approach specified in the draft Guidelines could add complexity, uncertainty and lead to fragmentation of policies across Europe, which would be inconsistent with the stated aim of contributing to a consistent application of the Regulation as stated in Article 5(3).

Included in the forms of zero-rating/price differentiation that were viewed as generally harmful and could appropriately be prohibited within the Guidelines, were:

- Zero-rating/price differentiation for a fee;
- Zero-rating/price differentiation of selected applications within a class of similar applications; and
- Zero-rating of all applications within a class, even without charging.

The respondents in question argue that zero-rating for a fee gives ISPs an incentive to tighten data caps or increase per-byte prices in order to maintain or enhance the incentives for companies paying to be zero-rated. This would also have harmful effects on competition. To further illustrate this point, evidence from across Europe is provided showing that ISPs that have zero-rated their own applications have either restricted user bandwidth or increased prices per-byte, whereas in the Netherlands, where ISPs have been prohibited from zero-rating their own applications, the incumbent has increased data caps for mobile internet access at no additional cost.

With regard to zero-rating of selected applications within a class of similar applications, it was argued that this should also be prohibited, since it is known to distort competition and user choice and can be harmful to media pluralism.

These respondents also highlighted concerns with the practice of zero-rating all applications in a class, even without charging providers. It is noted that most practices considered to fall within this category in fact still only select a sub-set of applications in a class to zero-rate, while excluding many/most others (for instance that may not be so well known by consumers).

Alternatively, such forms of zero-rating impose (technical) criteria for an application to be zero-rated that, in practice, allow the ISP to discriminate against certain types of application within a class. This can distort competition and limit users' choice (e.g. for those that use encryption). Furthermore, even if it were possible to ensure all applications in a single class could be zero-rated, this would still lead to discrimination between different classes of application and thus a distortion of competition. Therefore, according to this view, this type of zero-rating should also be prohibited.

It was argued that all such forms of zero-rating interfere with the end-users' right of Article 3(1) to impart information, and therefore materially reduce end-users' choice in practice, so such practices should be banned under the provisions of Article 3(2).

However, some civil society respondents suggested that there may be some forms of zero-rating that would be compatible with the principles of net neutrality if they restrict speed or volume of data in a non-discriminatory way. For example, zero-rating use of certain bandwidths (not charging users when they select a low-speed mode for using the internet) or zero-rating all content during times of low traffic, since in both of these cases users would be free to choose how these use their internet connection.

ISPs generally took different view to most civil society respondents on the issue of zero rating. They were mostly of the view that zero-rating offers do not have a material negative impact on end-users; rather, quite the opposite. They argued that zero rating can give customers the confidence to access data hungry services such as music and video streaming, provide customers with an opportunity to try new services or to use them for customer service (e.g. topping-up the mobile data packet when the initial amount will be consumed or conducting speed tests without having to worry about data consumption cost) and can facilitate service innovation and become a new, highly beneficial means for ISPs to compete for subscribers' business.

However, amongst these ISP respondents, there were differing perspectives on how the draft Guidelines had approached this issue and what would be the impact of the draft Guidelines on the ability to provide zero-rating offers.

Some ISPs also requested clarification to distinguish zero-rating and sponsored data, as the latter was considered possible to implement in a neutral way.

Many of the ISP respondents, however, considered that BEREC had taken an unduly negative stance on zero-rating that may not be justified by the Regulation. For instance, some argued that the Regulation does not prohibit zero-rating or differential pricing, whilst the draft Guidelines appeared to take a generally negative view of such offers or even appeared to consider any such practice as inherently violating the Regulation. Some went further and concluded that the Regulation does not limit commercial offers and BEREC has no mandate to formulate new laws or issue assumptions in advance of what is legal and what is not, without case-by-case assessment (relevant for paragraphs 41, 42 and 48 / paragraphs 38, 39 and 45 of the draft Guidelines, for instance).

Some ISPs argued that, having outlined practices that would be considered negatively, BEREC should provide further clarity and balance by outlining the commercial practices that would be undisputedly customer-friendly and competition-neutral, or at least those which are most likely to be in line with the Regulation.

However, it was also suggested that all or parts of paragraphs 38, 39 and 45 should be deleted in the final version of the Guidelines.

BEREC response

In response to the views of stakeholders mentioned above, BEREC would like to clarify that BEREC's Guidelines are interpreting the Regulation which provides limits to commercial practices, including zero-rating, while not prohibiting them per se. However, BEREC is not in position to establish additional rules going beyond the Regulation.

Some stakeholders suggested that BEREC should go further than the Regulation, while some other stakeholders suggested that BEREC should allow practices that the Regulation actually prohibits. BEREC considers that it has struck the right balance regarding zero-rating based on the provisions of the Regulation and has acted within its mandate given in Article 5(3) of the Regulation.

Article 3(3) first subparagraph

Stakeholder responses

With regard to the provisions relating to traffic management, some of the CAP and civil society respondents agreed with many aspects of the draft Guidelines, for instance the agnostic principle for ISPs provision of services.

Some civil society respondents argued that traffic management could only be application-agnostic if it is not based on specific applications, on categories of applications or on criteria that depend on an application's characteristics. For instance, they proposed adding a definition explaining this (after paragraph 50 / paragraph 47 of the draft Guidelines).

It was also noted by some CAP and civil society respondents that paragraph 50 (paragraph 47 of the draft Guidelines) excludes IP interconnection practices from the implementation of Article 3(3) first subparagraph. However, for the same reasons mentioned in relation to paragraph 6 above (the potential threat of ISPs abusing control over interconnection points) the stakeholders argued that IP interconnection practices should be considered in scope to the extent that they should not undermine the intention of Article 3(3) and/or the paragraph should be deleted.

Some ISPs supported excluding IP interconnection practices from the scope of the traffic management regulations as stated in paragraph 50 (paragraph 47 of the draft Guidelines), although there was a suggestion for a clear statement that IP interconnection falls out of the scope of the Regulation, even beyond the retail provision of IAS.

Regarding paragraphs 51 (and 63) (paragraphs 48 and 60 paragraph 50 (paragraph 47 of the draft Guidelines), ISPs commented that quality segmentation between customers that have different Quality of Service (QoS) requirements (e.g. business customers) is a typical case for which the freedom provided by the Regulation should apply. Therefore, they argued that the BEREC Guidelines should explicitly confirm that different customers may, under Article 3(2), agree different connection speeds with their ISP. In addition, they stipulate that if a customer negotiates a bespoke arrangement for specific QoS requirements, the service would no longer be an IAS.

Some ISP respondents and other industry stakeholders that the traffic management regime introduced by the BEREC Guidelines will prevent or hamper the emergence of network evolutions based on 5G. They picture that in 5G networks different slices will be managed differently and serve various needs of the market such as enhanced levels of service. Therefore, they find that the second sentence of paragraph 53 (paragraph 50 of the draft Guidelines), regarding the processing of traffic in a way that is "agnostic to sender and receiver", should be deleted as it also goes beyond the Regulation.

However, responses from CAPs and civil society stakeholders support BEREC's view on reasonable traffic management and even find that the BEREC Guidelines "reflect the need to promote digital investment and innovation in the EU" and foster "an environment for the development and proliferation of compelling Internet content, applications, and services" through which "the demand for superfast broadband" will evolve, "including demand for 5G networks".

Additionally, some CAPs stated that they considered "a robust EU net neutrality policy to be a key pillar for the development of an open and interoperable 5G technology platform". Furthermore, they say that the demands made by European telecoms companies "have not yet been supported by evidence". They fear that if the BEREC Guidelines were to be watered down this would lead to the creation of internet "slow lanes" alongside faster internet "toll roads".

BEREC response

The ground-level of traffic management, i.e. equal treatment of traffic, is elaborated in the first subparagraph of Article 3(3). BEREC's guidance related to this subparagraph must be understood together with the guidance related to the following subparagraphs, i.e. reasonable traffic management in the second subparagraph and exceptional traffic management in the third subparagraph.

With regard to the term "application-agnostic", it appears that some stakeholders might have confused application behaviour with network behaviour. Application behaviour is unpredictable and is not covered by the Regulation. It is the treatment of traffic by the network that should be application-agnostic. BEREC also refers stakeholders to paragraphs 34 (paragraph 32 of the draft Guidelines) and new paragraph 35 of the Guidelines in which BEREC discusses this term.

In response to some stakeholders' requests for the Guidelines to allow differentiated traffic management between different IAS subscriptions, BEREC considers that the Regulation does allow for such differentiation to some extent, for example to fulfil contractual agreements on data volumes and speeds.

BEREC recalls that the Regulation is technology-neutral and applies to 5G just as it does to any other network technology. Therefore, if an ISP wishes to use network-slicing in a 5G environment, it could offer a specialised service in accordance with Article 3(5) or an IAS in accordance with Article 3(1) - (4), including the traffic management rules in Article 3(3). To clarify that 5G services can be delivered over specialised services using network-slicing, BEREC added a new footnote 26 to the final Guidelines. Therefore, ISPs are free to offer new services and business models in the environment of a 5G network whilst adhering to the principles laid down in the Regulation.

Article 3(3) second subparagraph

"Traffic management measures"

Stakeholder responses

Some ISPs argued that NRAs should focus on the outcomes of traffic management, rather than monitoring the technical options chosen by each ISP to achieve these outcomes. They stated that, since the Regulation clearly acknowledges the need and right for operators to manage their networks, BEREC should remove wording such as "prima facie, appears to infringe this principle".

However, some CAPs and civil society respondents considered that the content of paragraph 57 (paragraph 54 of the draft Guidelines) did not reflect the letter of the Regulation, which requires traffic management to be transparent, non-discriminatory and proportionate, and would not ensure application-agnostic traffic management (see comments from CAPs and civil society below for further details on this and related arguments).

Some ISPs considered that different network management rules should be allowed to apply to different categories of traffic (e.g. 5G) in order to allow development of future technologies and EU policy objectives (e.g. the EU's Gigabit Society).

With regard to innovative IoT/M2M services like connected car services, some industry stakeholders demanded that specific data connections for connected driver assistance systems and automated vehicles must be given priority over other applications that are not relevant for traffic or road safety. These stakeholders are of the opinion that the Regulation provides for two possible ways of implementing the requirements mentioned above: categories of traffic within the IAS and specialised services.

BEREC response

With regard to the reference in paragraph 57 (paragraph 54 of the draft Guidelines) to a measure "which, prima facie, appears to infringe" the principle of equal treatment set out in Article 3(3) first subparagraph, this was intended to be descriptive, rather than prescriptive. However, having considered the responses from stakeholders, BEREC decided to delete this part of the sentence in order to avoid any misunderstanding. Since this section is meant as an introduction to Article 3(3) second subparagraph, BEREC refers stakeholders to the sections below, in which traffic management measures are discussed in more detail and to section above related to Article 3 as a whole in which BEREC describes the general approach to Articles 3(2), 3(3) and 3(5).

Providers are free to also use "categories of traffic" for IoT/M2M services such as connected car services, provided that the conditions of Article 3(3) are met, including to respond to objective technical requirements in line with the Guidelines. BEREC notes that "categories of traffic" should be clearly distinguished from specialised services, as explained in paragraph 75 (paragraph 72 of the draft Guidelines).

"Transparent, non-discriminatory and proportionate"

Stakeholder responses

Some of the CAP and civil society respondents agreed with the provisions relating to the safeguards for encrypted traffic (paragraph 60 / paragraph 57 of the draft Guidelines) and the clarification provided in the Guidelines on "reasonable traffic management".

However, some CAPs and civil society respondents considered that the content of paragraphs 58 and 60 (paragraphs 55 and 57 of the draft Guidelines) did not reflect the letter of the Regulation, which requires traffic management to be transparent, non-discriminatory and proportionate, and would not ensure application-agnostic traffic management (see comments from CAPs and civil society below for further details on this and related arguments).

When considering whether a traffic management measure is proportionate in paragraph 61 (paragraph 58 of the draft Guidelines), some civil society respondents also urged BEREC and NRAs to take account of the risk of mis-classification of applications and that this risk will be higher according to the number of traffic classes applied by the ISP. They also argued that, when ISPs are able to use alternative types of traffic management, they should not favour a more intrusive type over a less intrusive type just because the less intrusive type is not "equally effective".

From the perspective of ISPs, they argued that the guidance in paragraph 60 (paragraph 57 of the draft Guidelines) not to treat encrypted traffic differently should be removed or amended since operators cannot recognise the exact type of content (voice, video, gaming), and therefore cannot manage it appropriately.

Some ISPs also considered that the factors set out in paragraph 61 (paragraph 58 of the draft Guidelines) to take into account in determining whether a traffic management technique is proportionate were not based on the Regulation and were overly restrictive. They considered that applying overly restrictive criteria will prevent operators from developing new traffic management techniques that could be more effective and provide competitive differentiation. According to these views, the only condition that is required in the Regulation is that traffic management is reasonable and follows the transparency, non-discriminatory and proportionate requirements. They stated that paragraph 61 (paragraph 58 of the draft Guidelines) also implied that operators must provide ex ante justification for a traffic management measure ("evidence to show it will have that effect..."). Therefore, BEREC was advised to delete the third and fourth bullet points in paragraph 58. BEREC was also requested to provide a clear statement that the traffic management assessment/evaluation should be done ex post, rather than ex ante.

BEREC response

With regard to the treatment of encrypted traffic, BEREC considers that discrimination based on whether or not traffic is encrypted would not be consistent with the Regulation.

In the first bullet point of paragraph 61 (paragraph 58 of the draft Guidelines) BEREC refers to the aim of "contributing to an efficient use of network resources and to optimisation of overall transmission quality". In some of the subsequent bullet points, BEREC referred to "the aim". Taking into account stakeholders' responses, BEREC decided to change these references to from "the aim" to "this aim" to clarify that they refer back to the first bullet point.

In addition, BEREC modified the text in the second bullet point, changing “will have” to “has”, to avoid the potential misinterpretation that this could refer to ex ante assessment. And BEREC also updated the text in the fourth bullet point to clarify that the bullet point refers to traffic management and not to investing in infrastructure.

Otherwise, BEREC considers that the text of this section of the draft Guidelines was consistent with the Regulation and no other amendments were needed.

“Objectively different technical QoS requirements of traffic categories”

Stakeholder responses

Some of the CAP and civil society respondents agreed with the provisions relating to the safeguards for encrypted traffic (paragraph 64 / paragraph 61 of the draft Guidelines). However, some believed the Guidelines need to provide further safeguards to end-users.

For instance, some CAP and civil society respondents were concerned that the Guidelines could permit certain types of discrimination, leading to anti-competitive practices, or emphasised their view that the burden of establishing whether a traffic management measure is reasonable should be on the ISP (paragraph 62 / paragraph 59 of the draft Guidelines).

In particular, it was argued by CAP and civil society respondents that substantial parts of the Guidelines under Article 3(3) second subparagraph (e.g. paragraphs 63-66 / paragraphs 60-63 of the draft Guidelines) do not reflect the principles stated in Article 3(3) of the Regulation and would not ensure application-agnostic traffic management. They suggested that traffic management should not focus on categories of applications, and neither on application layer protocols nor generic application type, but rather on broad categories of the traffic’s sensitivity to objective QoS-requirements (e.g. latency, jitter, packet loss and bandwidth). The reasoning provided for this view was based on the wording and intentions stated in the Regulations and because of the risk of potential discrimination amongst applications or types of application. For instance, there was concern the interpretation in the draft Guidelines could lead to intentional or inadvertent discrimination, distort competition, stifle innovation and slow all encrypted traffic. Due to these factors, some of the highlighted risks included potential slowing of internet telephony, misclassification of applications and burdensome negotiation between CAPs and ISPs to try to ensure applications won’t be caught up in traffic management measures.

Also, according to these views, BEREC has applied a higher safeguard regarding the more exceptional traffic management measures of Article 3(3) third subparagraph than it has applied to the more conventional measures of the second subparagraph, whereas the latter should be brought into line with the former.

However, taking a different view, ISPs suggested that the second sentence of paragraph 64 (paragraph 61 of the draft Guidelines) should be amended as they considered it would not be proportionate to require IAS providers to automatically apply the foreseen network management measures on traffic categories. They alternatively suggested that the paragraph should be amended to allow encrypted traffic to be treated differently (see also comments on paragraph 60 / paragraph 57 of the draft Guidelines).

BEREC response

This section concerns the stipulation in the Regulation that traffic management should be based on objectively different technical quality of service requirements. Therefore, BEREC

decided it would be appropriate to update the text of paragraph 63 (paragraph 60 of the draft Guidelines) to refer to this requirement, as suggested by some stakeholders.

BEREC also decided to update the text of paragraph 66 (paragraph 63 of the draft Guidelines) for clarity and to remove some of the specific examples ("such as SMTP, HTTP or SIP"). Taking into account these changes and the ones mentioned above, BEREC considers that the Guidelines are now sufficiently clear that traffic management should be based on objectively different quality of service requirements.

With regard to the subject of encryption, BEREC refers stakeholders to the discussion on this subject in the previous section.

Taking into account other responses from stakeholders, BEREC also decided to clarify the text of paragraph 67 (paragraph 64 of the draft Guidelines) on traffic used for network management and control.

"Not based on commercial considerations"

Stakeholder responses

Some of the CAP and civil society respondents agreed with the provisions relating to the prohibition on traffic management on the basis of commercial grounds (paragraph 68 / paragraph 65 of the draft Guidelines), although there was also a suggestion to add another example in this paragraph ("...or where the traffic management measure reflects the commercial interest of an ISP that offers or partners with a provider of a certain application.").

However, some ISPs and other industry stakeholders considered that the statement in paragraph 68 (paragraph 65 of the draft Guidelines) that traffic management measures based on commercial grounds "is not reasonable" is too simplistic and suggested rather that they should not be based "only". They also suggested that it was not possible to exclude commercial considerations from traffic management in the case of IAS provided to business customers.

BEREC response

Having considered the responses from stakeholders, BEREC decided to add a reference in paragraph 68 (paragraph 65 of the draft Guidelines) to measures that reflect the "commercial interests of an ISP that offers or partners with a provider of certain applications" in order to provide more examples of the potential commercial relationships of ISPs.

Otherwise, BEREC consider that the guidance in this section is consistent with the Regulation.

"Shall not monitor the specific content"

Stakeholder responses

Some civil society respondents and other industry stakeholders agreed with paragraphs 69-70 (paragraphs 66-67 of the draft Guidelines), but also suggested adding further references to:

- the General Data Protection Regulation (2016/679) and the Directive on privacy and electronic communications (Directive 2002/58/EC);
- protection for encrypted traffic;
- preference for least intrusive method of traffic management.

However, some ISPs argued that IP packet header and TCP header monitoring may not always be sufficient and further monitoring may be necessary while still being generic. For instance, they argued that deep packet inspection (DPI) is used to obtain statistical information (not related to individual customers) to estimate future capacity needs, so should be allowed. They also stated that when the traffic is encrypted, the IAS provider, albeit not negatively discriminating it, will not be able to verify its category in order to know how to treat it. In this way, the BEREC guidance cannot be followed when traffic is encrypted and they suggested that CAPs should be required to disclose the characteristics of their traffic and agree on network management measures with IAS providers.

BEREC response

BEREC considers that the Guidelines strike an appropriate balance between providing practical guidance for NRAs in accordance with the Regulation whilst not being unnecessarily prescriptive. BEREC also notes that, when defining and using terms, it attempts to explain how it understands those terms. From time to time, BEREC considers it necessary or practical to define new terms that are not used in the Regulation. However, this does not mean that the concepts behind these terms are inconsistent with the principles of the Regulation. In this case, BEREC considered it necessary and appropriate for the Guidelines to interpret what was meant by the "specific content", which BEREC distinguished from what BEREC understood as "generic content".

"Shall not be maintained longer than necessary"

Stakeholder responses

With regard to the interpretation of 'longer than necessary' in paragraph 73 (paragraph 70 of the draft Guidelines), concerns were raised by CAPs that it is likely to be difficult to differentiate between an admissible 'trigger function' for traffic management and inadmissible 'recurring' traffic management. As a result, BEREC was advised that this will require regular measurements by the NRA or qualified third parties. Similarly, it was argued that congestion management should be limited to circumstances of unpredictable load at irregular times, not used as a cover for underinvestment in network capacity.

However, ISPs and other industry stakeholders were opposed to certain aspects of the provisions in the draft Guidelines. For instance, they argued that paragraph 73 (paragraph 70 of the draft Guidelines) is misleading, would undermine automated network management and seems to question the importance of permanently managing the network for efficiency. They also considered that this paragraph went beyond the Regulation and is not consistent with Recitals 9 and 15, which cover reasonable traffic management and recognise that recurring traffic management can be necessary. Due to these points, they suggested deleting the final sentence of the paragraph and including a reference to the economic viability of extending capacity.

BEREC response

The Regulation states that in order to be deemed reasonable, traffic management measures "shall not be maintained for longer than necessary". The Guidelines reflect the importance of taking into account such factors. While providing practical advice for NRAs, the Guidelines do not make any per se prohibitions or prescriptive obligations; rather they focus on how NRAs may consider and assess these issues.

However, BEREC decided to update paragraph 73 (paragraph 70 of the draft Guidelines) with some re-phrasing for clarity, where it has been explicitly described that traffic management measures are “effective” on a permanent or recurring basis, whereas their necessity might be questionable.

Article 3(3) third subparagraph

Stakeholder responses

There was strong support from civil society respondents for this part of the draft Guidelines, but there was a suggestion to add another reference to the Data Protection Regulation (2016/679).

There was also a suggestion from civil society respondents to change paragraph 78 (paragraph 75 of the draft Guidelines) to allow network-internal blocking by the ISP if it is done at the request of the end-user and is under the control of the end-user, since they considered the most important principle was that the end-user could decide.

Similar to this last point, some ISPs and other industry stakeholders suggested certain types of practice that could be interpreted to fall under the categories mentioned such as ad-blocking, filtering or parental controls - are enhancements of end-user service or may be requested or applied by end-users voluntarily. They argued that such features might be unrelated to traffic management. They also suggested that exercising such choice should not be limited to the terminal equipment, as it should be technologically neutral. Therefore, they requested that paragraphs 77-78 (paragraphs 74-75 of the draft Guidelines) were amended to recognise these points.

Another suggestion from some civil society respondents and ISPs was for NRAs to support ISPs blocking content recognised as illegal under Union law or national legislation (as also referred to in paragraph 81 / paragraph 78 of the draft Guidelines), on a voluntary or self-regulatory basis, making reference to Recital 13. For the specific case of child sexual abuse content, a reference to Directive 2011/92/EU of 13 December 2011 combating child sexual abuse was suggested. It was also suggested that NRAs should also support the ability of ISPs to filter spam at any time.

BEREC response

With regard to some of the suggestions made by stakeholders about traffic management features that could be requested or controlled by end-users, BEREC notes that the Regulation does not consider that end-user consent enables ISPs to engage in such practices at the network level. End-users may independently choose to apply equivalent features, for example via their terminal equipment or more generally on the applications running at the terminal equipment, but BEREC considers that management of such features at the network level would not be consistent with the Regulation.

With regard to some other requests to include additional references, in particular to content recognised as illegal, BEREC considers that these matters are sufficiently covered elsewhere, in particular under Article 3(3) (a) and the corresponding section of the Guidelines. BEREC also notes that these issues would require an approach based on legislation, rather than being voluntary or self-regulatory.

Article 3(3) (b)

Stakeholder responses

Some civil society respondents raised some issues regarding the Guidelines under Article 3(3) (b). For instance, they suggested that BEREC clarifies the reference to "recognised security organisations" in paragraph 85 (paragraph 81 of the draft Guidelines) by providing a set of criteria or examples in order to appropriately identify such organisations. They also considered that pro-active, continuous security measures of the kinds referred to in paragraphs 84 and 85 (paragraphs 80 and 81 of the draft Guidelines) should not be permitted, arguing that such measures are not consistent with the provisions of Article 3(3) third subparagraph and would involve processing personal data to a greater extent than allowed by Article 3(4).

There was, however, strong support from some civil society respondents for paragraph 87 (paragraph 83 of the draft Guidelines) regarding the risk of a "broad concept" of security being used to circumvent the Regulation.

Some civil society respondents, CAPs, ISPs and other industry stakeholders welcomed the provisions in the draft Guidelines which permit networks to filter traffic in order to "protect the integrity and security of the network", and in particular the recognition of the importance of filtering spoofed addresses (Article 3(3) b) – an important technique for preventing common forms of denial of service (DoS) attack. However, they believed that the guidance that the traffic management measure is triggered only when security attacks are detected (paragraph 85 / paragraph 81 of the draft Guidelines) would counter long standing best practice for the prevention of source-address spoofing (detecting and blocking packets with spoofed source addresses before they leave the network of origin), and thereby to significantly undermine efforts against DoS attacks. They believe that permanent filtering of spoofed addresses should not in any way undermine network neutrality, and therefore urge BEREC to interpret source address spoofing as an attack upon the network in its own right, and that accordingly network operators may continue to maintain filters that identify and block source-spoofed packets whenever they occur.

More generally, some civil society respondents and ISPs considered that the text of paragraphs 83-84 (paragraphs 79-80 of the draft Guidelines) would weaken the ability of operators to fight against piracy or security problems. For instance, it was considered that it may leave ambiguous, or constrain, some forms of ISP action to preserve security and restrict spam/malware.

BEREC response

The draft Guidelines had intended to draw a distinction between the monitoring of traffic to detect security threats and the action that is taken when they are detected. However, taking into account the responses from some stakeholders, BEREC considered it appropriate to rephrase part of this section to provide greater clarity. For instance, in paragraph 85 (paragraph 81 of the draft Guidelines), in cases where security measures have to be active on a continuous basis in order to achieve their purpose (such as filtering of spoofed IP addresses), such measures should be deemed to be justified. The Guidelines are also updated in the same paragraph to allow security measures to be applied only when "concrete" security threats are detected.

With regard to the requests to clarify how to identify “recognised security organisations”, this is a matter that will be determined at the national level.

Article 3(3) (c)

Stakeholder responses

There was strong support from civil society respondents for the draft Guidelines’ approach to preventing impending network congestion and mitigating the effects of exceptional or temporary network congestion.

Some civil society respondents and ISPs argued that, based on an interpretation of paragraph 92 (paragraph 88 of the draft Guidelines), NRAs will get involved in the decisions of ISPs on how to dimension their networks. They considered this would not be proportionate and would be potentially intrusive into ISPs’ operations and is not foreseen by the Regulation. It was also stated that congestion may arise regularly in an “appropriately” dimensioned network as a result of the actions of a minority of users (e.g. P2P filesharers), and should not always require investment.

BEREC response

Consistent with Article 3(3) (c) and Recital 15, in the case of ISPs using measures that go beyond what would be considered “reasonable traffic management measures”, NRAs would be empowered to assess whether such measures are recurrent or long-lasting, whether capacity expansion would be economically justified and whether equivalent categories of traffic are still treated equally, and this is reflected in the Guidelines. However, taking into account the responses from stakeholders, BEREC rephrased paragraph 93 (paragraph 89 of the draft Guidelines) in order to emphasise that this would be specifically part of an NRAs’ scrutiny of congestion management practices, rather than a general expectation for NRAs to assess the dimensioning of ISPs’ networks.

Article 3(4)

Stakeholder responses

Some of the CAP and civil society respondents agreed with the provisions on the necessity and proportionality tests (paragraphs 94-97 / paragraphs 90-93 of the draft Guidelines). However, there were suggestions made among the CAP, other industry stakeholders and civil society respondents to include guidance and optional consultation with the European Data Protection Supervisor (EDPS) and Data Protection Authorities in the member states. It was noted that NRAs may not be empowered to enforce data protection legislation, so these bodies could be consulted by NRAs when they assess the privacy and data protection related impacts of traffic management.

BEREC response

BEREC modified paragraph 98 (paragraph 94 of the draft Guidelines) on “Compliance with Union law on data protection” to ensure that there is not an expectation for NRAs to assess an issue on which they are not empowered to intervene. The identification of appropriate competent authorities in each country will depend on national legislation.

BEREC cannot provide guidance on specific types or cases of processing of personal data. Any assessment by the competent authorities of the processing of personal data will have to consider its necessity and proportionality and take into account compliance with Union law on data protection.

Article 3(5) first subparagraph

Stakeholder responses

There was concern from many of the CAP and civil society respondents about over-use of specialised services. According to some, this could lead to unwarranted application-specific traffic management and the establishment of internet 'fast lanes' and could be detrimental to start-up innovation in Europe, whereby large or established companies can pay for prioritised service whilst small or new entrants might be unable to overcome the barriers this imposes for competing. A risk to media pluralism was also highlighted.

Taking into consideration these concerns, several of the respondents approved of the approach taken towards specialised services in the draft Guidelines and stated that the draft should not be 'watered down' in this regard.

However, others argued that changes were needed in the Guidelines in order to provide appropriate protection.

For instance, there was a suggestion to rephrase paragraph 98 (paragraph 94 of the draft Guidelines) to address the reference to "relatively high quality application", which was considered confusing, and to slightly redraft paragraphs 102-104 (paragraphs 98-100 of the draft Guidelines) for clarity/emphasis.

Some CAP and civil society respondents were in favour of emphasising that there should be checks (ex ante) to ensure that optimisation was objectively necessary and that required quality levels (i.e. not just "stated quality levels") could not be met over the normal internet. Some also argued that NRAs should check whether ISPs had followed industry practice in expanding network capacity and that the possibility of offering specialised services did not provide an incentive for lack of investment in general capacity. Similarly, they suggested that the Guidelines should include how to assess whether there is sufficient capacity for IAS when specialised services are provided, which they suggest could be assessed based on the frequency/extent of congestion.

Alternative views were expressed by ISPs. For instance, they stated that paragraph 98 (paragraph 94 of the draft Guidelines) contradicts Recital 16 of the Regulation ("there can be demand" vs. "there is demand") and requested clarification of this paragraph.

Some ISPs and other industry stakeholders stated that the reference to "objectively necessary" is not in Article 3(5) or Recital 16.

Some ISPs emphasised their view that assessment on whether the conditions have been met to provide specialised services can only be performed ex post (relevant for paragraphs 101, 107-108 and 111 / paragraphs 97, 103-104 and 107 of the draft Guidelines).

Some ISPs suggested deleting paragraph 104 (paragraph 100 of the draft Guidelines), since it was seemed to create uncertainty and imply that NRAs should decide what level of quality

is necessary and not the market. It was also noted that NRAs already have the ability to request information, which is covered in paragraph 108 (paragraph 104 of the draft Guidelines).

Similarly, some ISPs and other industry stakeholders argued that the draft Guidelines go beyond the Regulation by creating new conditions for offering specialised services. They argue that the optimisation or level of quality may depend on the needs or demands of end-users, for instance whether they request quality assurances or SLAs. They considered that this does not mean that the service could not necessarily be provided over the IAS, just that the quality assurance could not be provided. They argue that these points are clear in Recital 16, but the Guidelines introduce new conditions that would limit the specialised services to those not already delivered as best efforts services. Therefore, they recommend rephrasing part of paragraphs 105 (paragraph 101 of the draft Guidelines referring to ("…whether the application is delivered at the agreed and committed level of quality, or whether they are instead…").

As stated in the section above related to Article 3(3) second subparagraph, some industry stakeholders highlighted that the Regulation provides for two possible ways of implementing the requirements of innovative IoT/M2M services such as connected car services: categorisation of traffic within the IAS and specialised services.

BEREC response

With regard to questions about ex ante or ex post assessment, BEREC refers stakeholders to the introductory section on Article 3 in which BEREC discusses this over-arching issue.

Having considered stakeholders' responses, BEREC decided to modify paragraph 99 (paragraph 95 of the draft Guidelines) for greater clarity. In particular, BEREC deleted the reference to "a relatively high quality", which was potentially confusing. BEREC also decided to delete the reference to "a category of electronic communication", since this may not have been an accurate description when referring to services delivered as specialised services.

Consistent with the Regulation, NRAs are empowered to assess whether and to what extent the optimisation of specialised services is objectively necessary. NRAs would have to assess whether this is the case relative to the quality levels that could be achieved via the IAS. Therefore, the reference to "whether the application could be provided over the IAS" in paragraph 105 (paragraph 101 of the draft Guidelines) is a necessary part of an NRA's assessment.

Some stakeholders were concerned whether quality assurances would be taken into account. BEREC understands that the ability to provide assurances, for instance through SLAs, would be an important aspect of contracts in order to agree not just an expected level of quality but a certain level of consistency or reliability. BEREC considers that the Regulation incorporated such an understanding of "levels of quality", as do the Guidelines, and it is therefore not necessary to modify this aspect of the Guidelines.

However, taking into account other comments from stakeholders, BEREC decided to modify paragraph 105 (paragraph 101 of the draft Guidelines) in order to refer to "specific levels of quality" and "objectively necessary", which are more in line with the wording of the Regulation.

BEREC agrees that, for IoT/M2M services that require connectivity via electronic communication networks, specialised services could be used to implement the requirements by a given IoT/M2M service, provided that the conditions of Article 3(5) are met.

"Assessment according to Article 3(5) first subparagraph"

Stakeholder responses

Some civil society respondents argued that the Guidelines should state that NRAs "should" (rather than "could") request relevant information about specialised services from the provider (paragraph 108, paragraph 104 of the draft Guidelines).

Some civil society respondents also emphasised their view that it should be the key features of a specialised service that determine whether optimisation is objectively necessary and there should be an assessment of whether some minor modifications could be made that would allow it to function on the normal internet.

If a specialised service is not objected to, some CAP and civil society respondents emphasised their view that NRAs should then periodically review their decision to account for improvement in internet technologies. Furthermore, it was argued that BEREC should clarify that once an application delivered over the internet has been shown to be technically and commercially successful, then that application should not be a candidate for a specialised service (e.g. video-on-demand services, IPTV).

There was also a suggestion from civil society respondents to add a reference to VoIP in paragraph 113 (paragraph 109 of the draft Guidelines), whilst agreeing with the text of paragraph 114 (paragraph 110 of the draft Guidelines).

Some ISPs and other industry stakeholders reiterated the view that Article 3(5) first paragraph does not call for an ex-ante assessment of all optimized services (e.g. in reference to paragraph 106 / paragraph 102 of the draft Guidelines).

Some ISPs suggested to delete the last sentence of paragraph 107 (paragraph 103 of the draft Guidelines) and amend other paragraphs, since they considered that the Regulation does not state that the only way to deliver specialised services shall always be via the ISP, and they believe it is wrong to conclude so. They suggested that the key point was to establish the demand from CAPs, using end-user demand as a proxy.

Some ISPs and other industry stakeholders also argued that provisions, such as "strict admission control" and "logically separated from the IAS" in paragraph 110 (paragraph 106 of the draft Guidelines) are not consistent with the Regulation. Moreover, they argued that the term "logically separated" was debated by the co-legislators and rejected, so there was no legal basis for this definition and it is not necessary to ensure no negative impact on the IAS. They therefore suggested deleting all of the paragraph or just the second and third sentences.

Some ISPs and other industry stakeholders argued that optimisation for the provision of specialised services can take place at any specified level of the network and does not necessarily require prioritization in the network but can alternatively be pursued using other instruments (e.g. CDN) on top of the network.

With regard to paragraph 111 (paragraph 107 of the draft Guidelines), some other industry stakeholders reiterated the view that the draft Guidelines go beyond the Regulation by creating

new conditions for offering specialised services (also see the comments above on paragraph 104 / paragraph 100 of the draft Guidelines). They suggest deleting part of paragraph 111 (paragraph 107 of the draft Guidelines: “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”).

Some ISPs raised concerns about paragraph 112 (paragraph 108 of the draft Guidelines) as it seemed to require wide-ranging and repeated assessments by NRAs, which removes clarity and certainty and may be detrimental to service innovation. They suggested deleting the paragraph.

With regard to paragraph 112 of the draft Guidelines, some ISPs and other industry stakeholders reiterated their view that the draft Guidelines go beyond the Regulation by limiting the kind of VPNs that could be delivered as specialised services (for further details, see the arguments made in relation to paragraph 11). Therefore, they suggest deleting paragraph 112 of the draft Guidelines or rephrasing much of the first bullet to read: “A VPN service is typically used in the context of teleworking to connect to corporate services. In order to protect the information transferred, a VPN service encrypts all traffic between the VPN client and the VPN server located within the corporate network. Such services can be provided using an IAS or in parallel with IAS as specialised services.”

BEREC response

With regard to questions and comments about ex ante or ex post assessment, BEREC refers stakeholders to the introductory section to Article 3 above in which BEREC discusses this over-arching issue.

Having taken into account the responses from stakeholders and having reviewed this section, BEREC decided to refer more consistently to “objectively necessary” in relation to the QoS requirements of specialised services, which is consistent with the Regulation.

BEREC also made a minor change to paragraph 106 (paragraph 102 of the draft Guidelines) to better capture the possible ways in which the requirements of an application may be specified.

With regard to the comments related to a “logically separated” connection, BEREC considered this reference in paragraph 110 (paragraph 106 of the draft Guidelines) to be focused on a specific technology and thus too prescriptive and adjusted this to reflect that this is a possible way in which a specialised service could be delivered. However, BEREC also included a reference in this paragraph to specialised services not providing connectivity to the internet, since BEREC considered this a practical description that would help to identify specialised services.

BEREC also took into account stakeholders’ comments on the final sentence of paragraph 110 (paragraph 106 of the draft Guidelines), which referred to “extensive use of traffic management” and “strict admission control”. Since this was also too prescriptive and could exclude other possible technical solutions, BEREC decided to delete this sentence.

With regard to the references to “key features”, BEREC believes that this has been appropriately emphasised in the Guidelines.

BEREC also provides some examples in this section of services that may be considered specialised services. As in other sections, these are intended to be neither prescriptive nor exhaustive but rather intended to highlight certain relevant issues and provide greater context for NRAs.

With regard to paragraph 111 of the draft Guidelines, this was also intended to provide examples and context. However, taking into account the responses from some of the stakeholders, BEREC considered that the paragraph was unnecessary so it was deleted.

Instead, this paragraph now contains a short clarification regarding provision of VPN services based on some text moved to this place from paragraph 11 of the draft Guidelines.

Article 3(5) second subparagraph

Stakeholder responses

Some civil society respondents suggested that the introduction of specialised services should be notified to NRAs, with an assessment of whether there was sufficient capacity, with reference to paragraph 116 (paragraph 112 of the draft Guidelines). Others suggested that a case-by-case approach would conflict with the principle of the single market.

Some civil society respondents suggested an alternative way of performing IAS quality measurements when assessing the impact of specialised services (paragraph 121 / paragraph 117 of the draft Guidelines), based on comparing quality measurements for the IAS and specialised service over comparable network routes. They argued that the methods currently proposed in the draft Guidelines are unlikely to be feasible (this also would apply in a reference in paragraph 121).

Some CAP and civil society respondents disagreed with the drafting of paragraph 122 (paragraph 118 of the draft Guidelines). They argued that allowing specialised services to reduce the quality or 'cannibalise' the capacity of the IAS would not be justified, even when the effects are only experienced by the end-user receiving the specialised service (apart from in exceptional circumstances where this would not be technically possible). It was also argued that the current interpretation expressed in this paragraph contradicts the Regulation, contradicts paragraphs 117 and 121 (113 and 117 of the draft Guidelines) and runs counter to the legislative history of Article 3(5). It was noted that the Regulation requires specialised services to be offered 'in addition' to the internet and must not reduce the quality of the IAS. Regarding the legislative history and intentions of the Regulation, it was noted that Article 3(5) originally only prohibited a reduction in quality of the IAS to 'other' end-users, but this word 'other' was removed from the final text, showing that the legislators intended the protection to apply to all end-users, including the end-user receiving the specialised service.

It was also suggested that the drafting of paragraph 122 (paragraph 118 of the draft Guidelines) was not in line with Article 4(1) (d) of the Regulation (on transparency) nor with paragraphs 146 and 148 (paragraphs 142 and 144 of the draft Guidelines), as the average and maximum bandwidth agreed between the ISP and the end-user would no longer be met.

Some civil society respondents also argued that setting the threshold at the "minimum speed" would give ISPs an incentive to set the IAS at the minimum contractually agreed speed by default. Instead, in their opinion, it should still be possible to get the "maximum speed" unless there is an objective technical justification. They argued that reference to the "minimum speed"

contradicts Article 4 on transparency and may be problematic for mobile internet, for which "minimum speed" is not a requirement.

From the perspective of some ISPs and other industry stakeholders, there were general concerns that there was an overly restrictive and disproportionate approach to specialised services. They also suggested that the term "specialised services" risks being too narrow and not future-proof.

With regard to paragraph 118 (paragraph 114 of the draft Guidelines), some ISPs argued that this paragraph introduced an implicit obligation for ISPs to ensure a specific level of capacity. They were doubtful how ISPs would be able to prove that there was sufficient capacity and they argued that anyway the Regulation only provided for regulatory intervention if there was a degradation in the availability or general quality of IAS.

With regard to the reference "...such that the IAS is not degraded" in paragraph 116 (paragraph 112 of the draft Guidelines), ISPs stated that this provision is not consistent with the Regulation, which only referred to the availability and general quality. They argued that some degradation is inevitable at any given point in time if a new service is introduced. They also argued that, for instance in a mobile network, the internet access service of one user can be degraded by another user of the internet access service in the same cell, yet both users may have sufficient capacity to enjoy the service. Therefore, they suggested that the Guidelines should be more flexible and emphasise the criterion of "sufficient" capacity or "general quality", which is the test that is consistent with the Regulation, and not impose a higher threshold for allowing specialised services.

With regard to paragraph 120 (paragraph 116 of the draft Guidelines), ISPs explained that NRAs should not make assessments regarding network capacity if there are no recorded or anticipated problems in the market, since in their experience, third-party applications for broadband speed tests are generally better than NRA developed applications. Some ISPs even argued that NRAs should not have the power to investigate network capacity.

Regarding paragraphs 125 and 121 (paragraphs 121 and 117 of the draft Guidelines), some ISPs argued that it should be left to the NRA to decide the methodology to analyse on a case-by-case basis. There was also a suggestion to delete paragraph 121 (paragraph 117 of the draft Guidelines). Alternatively, some ISPs suggested that the provision of specialised services should be examined whilst taking into account how those services would be delivered without specialised services on the IAS, or taking into account the IAS capacity saved by having non-IAS provided outside the IAS and taking into account the investment already made into the network in anticipation of optimised services.

With regard to paragraph 122 (paragraph 118 of the draft Guidelines), some ISPs and other industry stakeholders considered that it would not be in end-users' interests to block capacity for IAS if it is not used for IAS.

BEREC response

With regard to questions and comments about ex ante or ex post assessment, BEREC refers stakeholders to the introductory section to Article 3 above in which BEREC discusses this over-arching issue. However, BEREC also made a minor adjustment to the wording of paragraph 118 (paragraph 114 of the draft Guidelines) in order to remove an impression that an ex ante assessment was necessarily foreseen.

With regard to short-term IAS quality measurements, BEREC considered it appropriate to specify that these may be performed “for individual users” (paragraph 121 / paragraph 117 of the draft Guidelines), which may be necessary to fully assess the impact of specialised services.

The Regulation states that the provision of specialised services should not be to the detriment of the availability or general quality of IAS. However, BEREC considered it appropriate to highlight in the Guidelines that there may be situations in practice in which there must be some impact on the IAS of end-users who have also chosen to receive specialised services, e.g. IPTV over xDSL. In referring to such unavoidable cases, BEREC emphasises that it is important that the end-user (i) is informed of such likely impact; (ii) may determine how to use the dedicated capacity; and (iii) can obtain the contractually agreed speeds.

With regard to the examples of ways in which NRAs may assess whether the provision of specialised services reduces IAS quality (paragraph 124 / paragraph 120 of the draft Guidelines), BEREC has made it more clear that these are suggestions that NRAs may follow by replacing “should” with “could”. BEREC considers that the Regulation still empowers NRAs to make the relevant assessments, but there is no need to require NRAs to follow these particular suggestions if they determine that an alternative approach would also be effective.

BEREC also made a minor change to the wording in paragraph 123 (paragraph 119 of the draft Guidelines) in order to be less categorical in the description of the number of users and traffic volumes in fixed networks.

With regard to paragraphs 126-127 (paragraphs 122-123 of the draft Guidelines), BEREC highlighted the potential risk of specialised services being provided in order to circumvent the provisions of the Regulation for IAS. The guidance BEREC provided is based on a description of this risk, but BEREC considers that it is sufficiently clear that these issues will be subject to NRAs’ assessments and the Guidelines do not go beyond the Regulation by prohibiting certain services outright.

Article 4
Transparency measures for ensuring open internet access

Article 4(1)
Stakeholder responses

Some civil society respondents suggested widely replacing “NRAs should” by “NRAs shall” when specifying actions for them to take under Article 4(1), which it considered more in line with NRAs’ obligations under Article 5.

Some civil society respondents also suggested that information should be comparable, not just between different offers from the same ISP, but also between different ISPs (paragraph 130 / paragraph 126 of the draft Guidelines), rather than “preferably” so.

Some civil society respondents also suggested rephrasing paragraph 133 (paragraph 129 of the draft Guidelines), namely replacing “might” with “may” to be more consistent with the language in Directive 93/13/EEC on Unfair Contract Terms.

With regard to paragraph 131 (paragraph 127 of the draft Guidelines), and much of Article 4(1) in general, some ISPs and other industry stakeholders did not consider the provisions necessary or appropriate. For instance, they stated the current regulatory framework, including the Universal Service Directive and Consumers Rights Directive, already mandates ISPs to provide a lot of specific information to end-users. They also suggested such provisions go beyond the Regulation, could imply contractual changes after minor updates to traffic management and would confuse end-users, so should be deleted.

Some ISPs and other industry stakeholders did not share BEREC’s interpretation (first sentence of paragraph 134 / paragraph 130 of the draft Guidelines) that Articles 4 (1), 4(2) and 4(3) should apply to any contract in the market, whether entered into before or after 30 April 2016, considering that there was no legal basis for this (also relevant for paragraph 190 / paragraph 186 of the draft Guidelines). Instead, they claimed that these provisions should apply only to contracts concluded or renewed from 30 April 2016.

Some ISPs and other industry stakeholders also considered that, since BEREC is obliged to provide guidance by 30 August 2016, this creates some legal uncertainty and raises the question of retrospective application, which may have undesirable effects (e.g. confusion, loss of trust, termination of contracts). Therefore, they suggested that the Guidelines should explicitly grant NRAs flexibility about the point in time when to consider the Guidelines as a possible benchmark for providers’ compliance (e.g. not earlier than 12 months after final adoption of the Guidelines).

Some other industry stakeholders also raised concerns about the impact of the Guidelines on existing contracts, in particular corporate contracts. They argued that new rules should only apply to new contracts.

Some ISPs requested further consultation on the national implementation of transparency obligations.

BEREC response

With regard to requests to replace suggestions in the Guidelines with more prescriptive language, in particular by replacing “NRAs should” with “NRAs shall”, BEREC considers that the original text was more appropriate for the Guidelines, of which NRAs should take utmost account, and that the use of the instruction “shall” is more appropriate in legislative documents.

With regard to paragraph 130 (paragraph 126 of the draft Guidelines), BEREC modified the wording to align more closely with the Regulation in order to clarify the legal basis for this particular guidance (moving some text from what was originally in paragraph 133 of the draft Guidelines).

With regard to the presentation of information in two parts (levels of detail) (paragraph 131 / paragraph 127 of the draft Guidelines), BEREC notes that Member States might already have distinct approaches to the provision of such information. Such approaches might be equally effective as those foreseen in the draft Guidelines). Therefore, BEREC considered it appropriate to amend the guidance to reflect that this particular approach “could” be followed, rather than necessarily being “preferable”. BEREC also made one other minor change to the wording of this paragraph to reflect a particular requirement of Article 4(1).

With regard to concerns raised about the application of the Regulation to existing contracts, BEREC reiterates its position that Article 4(1), 4(2) and 4(3) apply to both new and existing contracts as there is no clause related to transitional periods in the Regulation, and with regard to the “argumentum a contrario” in Article 4(4). BEREC has simply noted that modifications to contracts are subject to national legislation implementing Article 20(2) of the Universal Service Directive.

Article 4(1) (a)

Stakeholder responses

Some civil society respondents suggested paragraph 135 (paragraph 131 of the draft Guidelines) should specify some additional information to be provided to end-users on definitions of impending, exceptional and temporary congestion and how traffic management could affect them, distinguishing between the techniques applied in accordance with the second and third subparagraphs of Article 3(3).

However, according to some ISPs, the provisions in paragraphs 135-139 (paragraphs 131-136 of the draft Guidelines) were unreasonably restrictive. They suggested that more flexibility should be provided for network operators, noting that operators will need to change their traffic management practices from time to time with experience and to respond to changing traffic and congestion patterns. Therefore, BEREC should clarify that such changes do not trigger the right of the end-user to withdraw in paragraph 134 (paragraph 130 of the draft Guidelines).

BEREC response

In this section BEREC made some slight adjustments to align with the text of the Regulation, namely by replacing “concise” with “clear” and “techniques” with “measures”.

Article 4(1) (b)

Stakeholder responses

Some civil society respondents suggested that data volumes and speeds should be specified in numerical values.

With regard to the consequences of exceeding data caps, they suggested that consumers should be able to choose whether to have speed reduced or pay for additional volumes of data without a reduction in speed.

They also suggested that the Guidelines state that "unlimited" data offers should truly be "unlimited" and not used in combination with a "fair use" policy.

However, some ISPs asked BEREC to remove reference to detailed information being provided in contracts (to assess the IAS performance) arguing that the average customer cannot understand the details BEREC considers useful and the examples are not necessarily good indicators of IAS performance.

BEREC response

With regard to the concern that certain information would not be practical or understandable for end-users, BEREC emphasises that the provisions of the Guidelines in this section are meant to provide end-users with relevant information to understand the implications for their use of the IAS, not necessarily to provide the technical parameters.

With regard to some of the other suggestions for stakeholders, BEREC notes that they relate generally to individual commercial negotiations or to advertising regulation, for which BEREC cannot provide guidance.

Article 4(1) (c)

Stakeholder responses

Some civil society respondents suggested that additional guidance should be provided about the information that should be published by ISPs about the impact of specialised services on the IAS.

BEREC response

BEREC refer stakeholders to the section above on Article 3(5) second subparagraph above, where the issues raised are discussed in more detail with reference to paragraph 122 (paragraph 118 of the draft Guidelines).

Article 4(1) (d)

Stakeholder responses

Some ISPs argued that the recommendation to indicate a "single numerical value" as proposed in paragraph 140 (paragraph 137 of the draft Guidelines) is questionable. Considering the negative impacts, the little benefit for end-users and the lack of respective rules within the Regulation, they suggested providing speed ranges or deleting paragraphs 140 and 144 (137 and 141 of the draft Guidelines).

Some ISPs asked BEREC to amend the text regarding minimum and maximum speeds, arguing this requirement is unrealistic and counterproductive. They suggested that providers might have to indicate lower minimum and maximum speeds, even though it is possible to have better speed in practice.

More generally, some ISPs argued that the draft Guidelines proposed a more harmonized approach to contracts and speeds information than is necessary or appropriate. They considered that NRAs should be able to make decisions at the member state level. They also pointed out that an obligation to amend contracts would, in some jurisdictions (such as the UK) also mean that consumers have a right to cancellation.

However, some ISPs suggested that a more harmonised approach was needed, with a common methodology to determine speed thresholds. They also argued that the Guidelines should take into account that speeds can be affected by factors beyond the control of ISPs.

BEREC response

BEREC decided to make a minor additional reference in paragraph 140 (paragraph 137 of the draft Guidelines) to "transport layer protocol payload" when discussing how speeds should be specified for completeness/clarity.

BEREC refers stakeholders to the introductory section on Article 4(1) above where the general approach to providing information to end-users is discussed and to the section below in which information on connection speeds is discussed in more detail.

"Specifying speeds for an IAS in case of fixed networks"

Stakeholder responses

Some civil society respondents considered that NRAs should set requirements on the relationship between the **minimum** and normally available speeds to prevent ISPs from having an incentive to define excessively low minimum speeds.

However, according to some ISPs and other industry stakeholders the provisions of paragraphs 143 and 144 (paragraphs 140 and 141 of the draft Guidelines) were overly prescriptive. They argued that providing speed ranges with regard to Article 4(1) (d) is impractical, will not improve transparency on individual performance and will likely impact national broadband targets negatively. They suggested deleting paragraph 141. It was also suggested that a requirement to provide information in a contract should be interpreted in the context of national contract law.

Some civil society respondents argued that the **maximum speed** should be something that is achievable more than once per day, for instance under normal circumstances throughout the day. Others considered that achieving the maximum speed once per day would not meet expectations and would mean that advertising of maximum speeds would be misleading.

However, ISPs argued that in BEREC's interpretation of maximum speed in paragraph 145 (paragraph 142 of the draft Guidelines), end-users would be less accurately informed and ISPs would be forced to lower the offered maximum speed even if that speed is available in most cases. According to their views, BEREC's description of the maximum speed would mean that cable networks will be able to indicate higher maximum speeds than DSL networks, which might be obliged to even indicate speeds below the technically available

maximum. The proposed definition that refers to speed that is available “some of the time (e.g. at least once a day)” is, according to this view, not “technologically neutral” and unjustifiably goes beyond the Regulation. Some suggested that this criterion is deleted or that the maximum speed indicated in the contract for the DSL network should correspond to the technically available maximum speed of an individual line or should be based on general information, not specific to each end-user. They also suggested deleting paragraph 146 (paragraph 143 of the draft Guidelines).

Some civil society respondents suggested that BEREC should provide more guidance on how to define “**normally available speed**” and the relationship between it and the minimum and maximum speeds to avoid fragmentation in approaches developing across Europe. Additional guidance was also requested regarding the speed if and when specialised services were in use.

However, according to ISPs the “normally available speed” will further restrict the indication of maximum speed and this limitation applies even if the speed is available to customers. They also suggested that “normally available speed” will not reflect the experience of users during most times of the day. Considering these points, they suggested that the reference to maximum speed included in paragraph 148 (paragraph 145 of the draft Guidelines) should be deleted.

Regarding the provisions on **advertised speeds**, some civil society respondents suggested new guidance related to normally available speed here too if/when specialised services are in use.

Some ISPs and other industry stakeholders noted that paragraph 151 (paragraph 148 of the draft Guidelines) gives national regulators the possibility to require that the advertised speed should not exceed the maximum speed defined in the contract. They considered that there is no legal basis in the Regulation for such a requirement.

More generally, some ISPs argued that the Regulation does not cover advertising practices and the Guidelines seem not to acknowledge or build on existing consumer protection legislation or practices, including self-regulatory codes.

Some ISPs also considered that it does not make sense for the national reporting schemes to be reviewed again to satisfy the Guidelines, in particular when they already meet the criteria of the Regulation and to do so would not provide any customer benefit. They stated that research shows that customers find other parameters, such as continuity of service and getting the speed and capacity they require for the application they are running, are more important than maximum speed.

BEREC response

In this section of the Guidelines, BEREC provided examples and context to guide NRAs on their implementation of the Regulation. The approaches discussed are meant as suggestions or options for NRAs to use. Consistent with this, and having taken into account the comments from stakeholders, BEREC decided to modify the first sentence of this section in order to refer to “the speed that an end-user could expect to receive”, since the original text may have been misinterpreted as being overly prescriptive.

Paragraph 146 (paragraph 143 of the draft Guidelines) gives guidance to NRAs that they can set requirements on defining maximum speeds under Article 5(1). This is a national decision and BEREC considers this to be in line with the Regulation.

Having considered the responses from stakeholders, BEREC modified the text in paragraph 151 (paragraph 148 of the draft Guidelines) to make it clear that NRAs are not empowered by the Regulation to impose requirements in relation to advertised speeds, which would be determined separately by advertising regulation. However, BEREC still considers it appropriate to highlight that NRAs may set requirements on how speeds defined in the contract relate to advertised speeds.

"Specifying speeds of an IAS in mobile networks"

Stakeholder responses

Some civil society respondents would prefer paragraph 155 (paragraph 152 of the draft Guidelines) to specify that the **estimated maximum download and upload speeds** "should" be made available in a geographical manner (rather than "could").

However, regarding paragraphs 153-155 (paragraphs 150-152 of the draft Guidelines), some ISPs raised doubts about what the Guidelines intended should be provided and about the feasibility, proportionality or use of providing such information. For instance, they considered that there is no distinct method of measurement (when is the measurement taking place, who is responsible for defining all locations and where exactly is indoor to be measured) or whether measurements should be on an individual or average basis. They stated topography, surrounding buildings and a number of other factors may influence the speed provided at any point in time. They suggested that the estimated maximum speed should be defined as the maximum speed for particular technologies.

Some civil society respondents suggested that the Guidelines should state that if providers' **advertised speeds** are higher than those contractually defined as the estimated maximum speed, this could be considered an unfair commercial practice under Directive 2005/29/EC on Unfair Commercial Practices.

Some other industry stakeholders considered that paragraph 156 (paragraph 153 of the draft Guidelines) went beyond the Regulation and should be deleted and suggested rewording paragraph 157 (paragraph 154 of the draft Guidelines) to state that the requirement to specify the advertised speed requires an ISP to explain the advertised speed of the particular IAS offer included in the contract, whilst also allowing an ISP to also advertise other IAS offers of higher or lower speeds.

More generally, some ISPs argued that the Regulation does not cover advertising practices and the Guidelines seem not to acknowledge or build on existing consumer protection legislation or practices, including self-regulatory codes.

BEREC response

Having taken into account the responses from stakeholders, in paragraph 155 (paragraph 152 of the draft Guidelines) BEREC deleted the term "indoor and outdoor" coverage, considering that this detail went beyond what is required by the Regulation. BEREC notes that the way of performing speed measurements might already be defined in national markets. These might also be well established and already ensure that relevant information is provided

to end-users, consistent with the Regulation. BEREC considers that the remaining suggestions provided in this section of the Guidelines are sufficient to provide some guidance to NRAs and are consistent with the intentions of the Regulation.

Similar to the case for advertised speeds in fixed networks, BEREC modified the text in paragraph 157 (paragraph 154 of the draft Guidelines) to make it clear that NRAs are not empowered by the Regulation to impose requirements in relation to advertised speeds, which would be determined separately by advertising regulation. However, BEREC still considers it appropriate to highlight that NRAs may set requirements on how speeds defined in the contract relate to advertised speeds.

Article 4(1) (e)

Stakeholder responses

ISPs stated that ISPs already provide significantly more transparency to their customers compared to other types of service providers. Consequently, they considered that BEREC should refrain from making such prescriptive recommendations on what information should be provided by ISPs. Therefore, they suggested paragraph 158 (paragraph 155 of the draft Guidelines) should be deleted.

Other ISPs suggested that in order to fulfil the obligations under Article 4 (1) of the Regulation it would be sufficient to provide in a contract the address of the operator's website with detailed information corresponding to the requirements listed in Article 4 (1) of the Regulation. They also argued that “continuous or regularly recurring discrepancy” refers to the minimum or normally available speed and a failure to achieve maximum speeds should not be the basis for submitting complaints.

BEREC response

In response to the concerns and suggestions of stakeholders, BEREC considers that the Guidelines should provide some guidance to NRAs on these matters and BEREC considers it appropriate to provide examples which are not overly prescriptive, which are consistent with the intention of the Regulation, and which are in line with approaches already widely used by NRAs.

Article 4(2)

Stakeholder responses

Some civil society respondents suggested that BEREC should encourage ISPs to join the relevant Alternative Dispute Resolution schemes available to them.

However, ISPs noted that paragraph 159 (paragraph 156 of the draft Guidelines) suggests that national regulations shall ensure a single point of contact for complaints. They considered that this requirement is not justified, given that operators have customer service processes with dedicated points of contact.

There were also suggestions to delete “including the usual or maximum time it takes to handle complaints” from paragraph 159 (paragraph 156 of the draft Guidelines), as this information is not available when concluding a contract.

BEREC response

In response to the concerns and suggestions of stakeholders, BEREC considers that the Guidelines should provide some guidance to NRAs on these matters and BEREC considers it appropriate to provide examples which are not overly prescriptive, which are consistent with the intention of the Regulation, and which are in line with approaches already widely used by NRAs.

Article 4(4)

Stakeholder responses

Some civil society respondents were strongly in favour of NRAs establishing or certifying monitoring mechanisms.

Some also suggested BEREC should note that other legislation (not specified) may also be applicable to cases where non-conformity of the service occurs in a "non-significant" manner.

Some ISPs suggested that certification mechanisms are such that no preference is included for mechanisms of certain suppliers, or mechanisms that would promote some technologies over others, as discussed in paragraph 161 (paragraph 158 of the draft Guidelines).

Some ISPs insisted that monitoring mechanisms should be certified by NRAs according to Article 4(4). However, they suggested that definition of certification criteria and process must be certified by an independent third party in consultation with stakeholders. They also stated that paragraphs 163 and 165 (paragraphs 160 and 162 of the draft Guidelines) are in contradiction, since it is suggested that NRAs can use their existing methodologies, but then stipulated that the methodologies must take certain things into account. They also suggested adding a statement in paragraph 166 (paragraph 163 of the draft Guidelines) that it applies only in the national territory and within the ISP's sphere of control.

Alternatively, some ISPs suggested that quality of service monitoring tools could stem from ISPs.

In relation to paragraph 166 (paragraph 163 of the draft Guidelines, it was suggested by ISPs that measurements should be performed within the ISP leg, not beyond.

Some other industry stakeholders suggested a number of principles that monitoring mechanisms should follow.

BEREC response

Having considered the responses of stakeholders, BEREC does not see any need to amend this section of the Guidelines.

Article 5
Supervision and enforcement

Article 5(1)
Stakeholder responses

Some additional suggestions from CAPs included providing a clearer mandate for intervention, including timeframes within which NRAs should react or intervene in violations and providing guidance stating that if a complaint requires time to be investigated, NRAs could take preventive measures to avoid harm continuing to take place during the investigation.

Some civil society respondents also suggested the Guidelines should be more prescriptive on the enforcement role of NRAs. They were concerned that NRAs may be reluctant to intervene or, when they do, will do so in an uncoordinated way, leading to disparities emerging across Europe. They also suggested that more needs to be done to ensure a coordinated approach among the NRAs and to empower end-users to highlight and resolve infringements of net neutrality rules.

Civil society respondents also suggested emphasising that traffic management measures are in compliance with the relevant rules on data protection (paragraph 167 / paragraph 164 of the draft Guidelines). They also suggested making paragraph 168 (paragraph 165 of the draft Guidelines) more prescriptive, by specifying that NRAs “should” request the information in question from ISPs and end-users.

Some civil society respondents suggested NRAs could also apply their own monitoring tools on the networks (paragraph 171 / paragraph 168 of the draft Guidelines).

ISPs suggested that BEREC should clarify that reliable measurement mechanisms have to be based on a specific set of clear technical criteria. It was also suggested that paragraph 170 (paragraph 167 of the draft Guidelines) places unreasonable burden on operators and goes far beyond the Regulation.

BEREC response

Taking into account the comments received from stakeholders, BEREC added a new paragraph 168 referring to the need for BEREC to foster the exchange of experiences among NRAs, on an ongoing basis regarding the implementation of the Regulation. This will contribute to facilitating a consistent approach to implementation.

With regard to rules on data protection, BEREC refers stakeholders to the section above related to Article 3(4), where this is covered.

NRAs must be able to collect the information needed to assess the traffic management practices of ISPs. BEREC considers that the provisions of the Guidelines fulfil this aim and are consistent with the Regulation.

With regard to the other suggestions from stakeholders, BEREC considers that the Guidelines provide the appropriate level of guidance to NRAs without going beyond the scope of the Regulation.

Article 5(4)

BEREC corrected a reference in paragraph 186 (paragraph 182 of the draft Guidelines) to refer more broadly to Article 5, not just Article 5(4).