

Decision

on zero-rating and similar commercial practices in Portugal

July 2018



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I. Draft decision and consultation procedures

1. By determination of 23 February 2018, the Autoridade Nacional de Comunicações (National Communications Authority - ANACOM) approved the draft decision (DD) on zero-rating and similar commercial practices in Portugal,¹ and also decided to submit it to the previous hearing of the interested parties, pursuant to Articles 121 and 122 of the Code of Administrative Procedure (*Código do Procedimento Administrativo* - CPA), as well as the general consultation procedure, pursuant to Article 8 of Law 5/2004 of 10 February, in its current version - Electronic Communications Law (hereinafter ECL), setting a deadline of 25 working days in both procedures so that the interested parties could express their opinion.
2. The public consultation and prior hearing of the interested parties took place between 28 February 2018 and 19 April 2018. The initial deadline of 25 working days was extended by 10 working days following a request submitted on 21 March 2018 by NOS Comunicações, SA (identical requests were subsequently submitted by MEO - Serviços de Comunicações e Multimédia, SA and by VODAFONE Portugal - Comunicações Pessoais, SA).
3. Under the procedures for public consultation and prior hearing of interested parties, ANACOM received contributions from the following entities, companies and citizens:
 - unidentified citizen;
 - Associação D3 - Defesa dos Direitos Digitais and epicenter.works (D3/epicenter.works);
 - Associação Portuguesa para a Defesa do Consumidor (DECO);
 - Cristina Mendonça;
 - Daniel Costa;
 - Associação de Empresas de Software Open Source Portuguesas (ESOP);
 - Fábio Domingos;
 - Faculdade de Ciências Humanas da Universidade Católica Portuguesa;
 - Filipe Felizardo;
 - ISOC Portugal Chapter;
 - João Castro;

¹ Available at https://www.anacom.pt/streaming/SPD23Fev2018ZeroRating.pdf?contentId=1429926&field=ATTACHED_FILE.

- Lycamobile Limited (LYCAMOBILE);
 - MEO – Serviços de Comunicações e Multimédia, S.A. (MEO);
 - NOS Comunicações, S.A. (NOS);
 - NOWO Communications, S.A and ONITELECOM - Infocomunicações, S.A. (NOWO/ONI);
 - Observatório da Comunicação (OberCom);
 - Rádio e Televisão de Portugal (RTP);
 - Sindicato dos Engenheiros (SERS);
 - Sindicato Democrático dos Trabalhadores dos Correios, Telecomunicações, Media e Serviços (SINDETELCO);
 - Associação Portuguesa de Ciências da Comunicação (SOPCOM);
 - Transparência e Integridade (TI-PT);
 - VODAFONE Portugal – Comunicações Pessoais, S.A. (VODAFONE);
 - Xavier Paes.
4. All contributions were received within the period of the public consultation and the prior hearing of the interested parties.
5. ANACOM prepared a report on these procedures that contains a summary of the statements received, as well as the regulator's understanding of the questions raised by the respondents. That report forms the basis and is an integral part of this Decision.

II. Regulatory framework

6. Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015² (hereinafter "TSM Regulation") establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the internet access service provision ("IAS") and related end-users' rights, seeking to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation.
7. The TSM Regulation also makes it incumbent upon the Body of European Regulators for Electronic Communications (hereinafter "BEREC") to issue guidelines for the

² Regulation which lays down measures concerning open internet access and amends Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and amending Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union. Available at <https://www.anacom.pt/render.jsp?contentId=1373317>.

implementation of the obligations of national regulatory authorities ("NRA") which stem from this Regulation. In this context, on 30 August 2016, BEREC approved and published the document "BEREC Guidelines on the implementation by National Regulators of European Net Neutrality Rules"³ (hereinafter "Net Neutrality Guidelines"). The ultimate goal of these guidelines is to contribute to the consistent application of the TSM Regulation in the European Union (EU) and thus help to establish a framework of regulatory certainty for market agents.

8. Article 3 of the TSM Regulation provides that "*End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service*" (see paragraph 1), whereas any agreements between providers of internet access services (hereinafter "IAS providers") and end-users shall not limit the exercise of such rights (see paragraph 2).
9. In this respect, IAS Providers shall treat "*all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used*", without prejudice to the potential implementation of reasonable traffic management measures (see paragraph 3 of the same legal article).
10. According to paragraph two of Article 3(3), for traffic management measures to be considered reasonable they must be transparent, non-discriminatory and proportionate and cannot be based on commercial considerations, but on objectively different technical quality service requirements of specific categories of traffic.
11. Article 3(3), third paragraph, provides that IAS providers may not impose more stringent traffic management measures than the measures provided for in the second paragraph and may not, in particular, block, slow down, alter, restrict, or degrade specific content, applications or specific services, or specific categories thereof, or discriminate or interfere with them. In this context exceptions are envisaged which involve compliance with legislative acts, decisions of courts or public authorities, the preservation of the

³ Document BoR(16)127 of 30 August 2016, available at http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules.

integrity and security of the network and the prevention of imminent network congestion.

12. According to Article 5(1) of the TSM Regulation, national regulatory authorities shall closely monitor and ensure compliance with Articles 3 and 4, and shall promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. The same article sets out that national regulatory authorities shall publish reports on an annual basis regarding their monitoring with regard to the obligations set out in Articles 3 and 4 and respective findings, and provide those reports to the European Commission and to BEREC. According to the Net Neutrality Guidelines, the first of these reports should cover the period between 30 April 2016 and 30 April 2017, and be published no later than 30 June 2017.
13. Accordingly, by determination of 29 June 2017, ANACOM's Board of Directors approved the report on the application of articles 3 and 4 of the TSM Regulation⁴ (hereinafter "Annual Report"). Without prejudice to its conclusions which have not, as yet, indicated the existence of situations of non-compliance with the obligations arising from the TSM Regulation, in particular those provided for in Article 3, from the outset, it was noted that it would be necessary to examine some of the commercial practices adopted by the IAS providers in more detail, in particular but not exclusively those relating to zero-rating, in order to assess their compatibility with the legal regime.
14. In addition to safeguarding the principle of net neutrality, the TSM Regulation introduces a *"fundamental change in approach"* for international roaming services by amending Regulation (EU) 531/2012 of the European Parliament and of the Council of 13 June 2012 (hereinafter "Roaming Regulation"), laying down a set of rules underlying the application of the "Roam Like at Home" principle (RLAH - application of the same tariffs abroad as in the country of origin). The TSM Regulation now sets out the incorporation of *"Union-wide roaming as an integral part of domestic tariff plans offered in the various domestic markets"* (Recital 25) and establishes *"(...) a new retail pricing mechanism for Union-wide regulated roaming services in order to abolish retail roaming surcharges (...)"* (see Article 1).
15. Article 6a of the Roaming Regulation stipulates that *"(...) roaming providers shall not levy any surcharge in addition to the domestic retail price on roaming customers in any Member State for any regulated roaming calls made or received, for any regulated*

⁴ Available at <https://www.anacom.pt/render.jsp?contentId=1414213>.

roaming SMS messages sent and for any regulated data roaming services used, including MMS messages, nor any general charge to enable the terminal equipment or service to be used abroad", and Recital 5 of that Regulation states that "when abolishing surcharges for retail roaming services in the Union, the same tariff conditions apply to the use of mobile services, whether roaming in another Union country, or in the country of origin (i.e. in the country of the customer's mobile service subscription) (...)" (our emphasis). The Roaming Regulation does, however, allow IAS providers to apply "(...) a "fair use policy" to the consumption of regulated retail roaming services provided at the applicable domestic retail price level, in order to prevent abusive or anomalous usage of regulated retail roaming services by roaming customers" and that "fair use policies should enable roaming service customers to consume volumes of regulated roaming services at the retail level at the applicable domestic retail price, consistent with their tariff plans." (our emphasis, Article 6b (1)).

16. Commission Implementing Regulation (EU) 2016/2286 of 15 December 2016⁵ (hereinafter "Implementing Regulation (EU) 2016/2286"), approved in accordance with Article 6d of the Roaming Regulation, additionally sets out that
 - a. *"With the abolition of retail roaming surcharges in the Union, the same tariff conditions apply for the use of mobile services while roaming abroad in the Union and at home (i.e. in the country of the mobile subscription of the customer) (...)" (Recital 5).*
 - b. *"Any fair use policy applied by a roaming provider in order to prevent abusive or anomalous usage of regulated retail roaming services shall be subject to the conditions set out in Articles 4 and 5 [of the same Implementing Regulation] and shall ensure that all such roaming customers have access to regulated retail roaming services at domestic price during such periodic travel in the Union under the same conditions as if such services were consumed domestically." (Article 3), whereas "(...) the roaming provider should as a general rule not impose a limit on the volumes of mobile services available to the roaming customer other than the domestic limit, when that customer is*

⁵ Regulation laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment.
Available at http://eur-lex.europa.eu/legal-content/PT/TXT/?uri=uriserv:OJ.L_.2016.344.01.0046.01.POR&toc=OJ:L:2016:344:TOC.

periodically travelling in the Union (...).” (Recital 12).

- c. "Without prejudice to any applicable domestic volume limit, in the case of an “*open data bundle*”⁶, any roaming customer shall be able to consume when periodically travelling in the Union a volume of data roaming retail services at the domestic retail price equivalent to at least twice the volume obtained by dividing the overall domestic retail price of that “*open data bundle*”, excluding VAT, corresponding to the entire billing period by the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) 531/2012”⁷.

- d. *"In the case of pre-paid tariff plans, as an alternative to the fair use policy requirement in paragraph 1, the roaming provider may limit the consumption of data roaming retail services within the Union at the domestic retail price to volumes equivalent to at least the volume obtained by dividing the overall amount, excluding VAT, of the remaining credit available and already paid by the customer to the provider, at the moment of commencing roaming, by the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) 531/2012."*

17. Under Article 16(1) of the Roaming Regulation, the NRAs are responsible for the strict monitoring and supervision of providers of roaming services provided under Article 6b (which refers to Article 6d) of that Regulation.

18. This document contains an analysis of some of the commercial practices adopted by IAS providers in mobile Internet access related to zero-rating and similar practices, and sets out ANACOM's position on the compatibility of these practices with the TSM Regulation as well as with the Roaming Regulation and Implementing Regulation (EU)

⁶ As defined in Article 2(c) of Implementing Regulation (EU) 2016/2286, “*open data bundle*”, also called “*open data package*”, consists of a “*tariff plan for the provision of one or more mobile retail services which does not limit the volume of mobile data retail services included against the payment of a fixed periodic fee, or for which the domestic unit price of mobile data retail services, derived by dividing the overall domestic retail price, excluding VAT, for mobile services corresponding to the entire billing period by the total volume of mobile data retail services available domestically, is lower than the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012*” [Roaming Regulation].

⁷ Article 4(2) of the Implementing Regulation in its English version: “*Without prejudice to any applicable domestic volume limit, in the case of an open data bundle, the roaming customer shall be able to consume when periodically travelling in the Union a volume of data roaming retail services at the domestic retail price equivalent to at least twice the volume obtained by dividing the overall domestic retail price of that open data bundle, excluding VAT, corresponding to the entire billing period by the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012.*”

(<https://www.anacom.pt/render.jsp?contentId=1401619&languageId=1>).

2016/2286, in exercise of the powers and responsibilities provided for under these Regulations.

III. The TSM Regulation and zero-rating and similar practices

19. Zero-rating is a commercial practice where the consumption of data of a particular content, application or service (or range of content/applications) is not accounted for for the purposes of calculating the consumption of data volume associated with the offer subscribed to by the customer; normally no charge is made for the traffic associated with this content, application or service. The traffic associated with it is often unlimited and provided at no cost to the user.
20. It should be noted that, in addition to practices that can be classified as zero-rating, there are other practices which, while not involving provision of content on a purely free-of-charge basis, may be understood as being equivalent or having similar effects - for example: (i) practices which entail free access to specific applications or content with an additional traffic limit that is higher than the basic tariff cap; and (ii) those which allow the user to subscribe to specific applications or content for an associated traffic charge - more than zero - which differs from the basic offer price, and which may or may not apply a traffic limit.
21. As mentioned above, according to Article 3(2) of the TSM Regulation, agreements between IAS providers and end-users on commercial and technical conditions and the characteristics of the internet access service such as price, data volumes or speed, and any commercial practices conducted by IAS providers, shall not limit the exercise of the rights of end-users laid down in paragraph 1 of the same article - i.e. to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service.
22. In addition, the Net Neutrality Guidelines make it clear that Article 3(2) of the TSM Regulation contains two relevant aspects: on the one hand, the freedom to conclude agreements (contractual relationships) between IAS providers and end-users relating to commercial conditions (e.g. pricing) and technical conditions (e.g. data volume and speed) as well as characteristics of the IAS, and on the other hand, the provision that

such agreements and commercial practices shall not limit exercise of the end-users' rights referred to above.

23. The Net Neutrality Guidelines also gives examples of the practices which are in line with the TSM Regulation and other practices which do not comply with the TSM Regulation, such as offers in which access to certain applications and/or content is contractually barred, since this would constitute a sub-internet service. According to BEREC, a sub-internet service is a service which restricts access to services or applications, or which enables access to only a pre-defined part of the internet, and, except where qualified as a specialised service, is incompatible with the TSM Regulation.
24. Note is also made of the case of practices involving price differentiation, which may influence the exercise of rights by end-users without effectively limiting these rights. In this context, reference is made, as an example, to differentiated prices applied to certain applications, or sets of applications, or the identification of these as zero-rated. In these cases, although end-users are not prevented from accessing applications or content beyond those defined as zero-rated (or those subject to a lower price), there may be an economic incentive to use such applications or content, rather than other options. Furthermore, this incentive may be more significant if such "favouring" refers to specific applications or content, rather than applied to a whole category of applications or content.
25. The TSM Regulation does not prohibit zero-rating, equivalent or similar practices across the board, but calls for a case-by-case examination of each offer taking into account the rights of end-users in particular, specifically in terms of the options available and position enjoyed by the IAS providers and by the content, service and application providers in the market. Nevertheless, certain zero-rating practices are explicitly contrary to the TSM Regulation, particularly where there is differentiated application of traffic management practices, with impact in terms of effectively limiting the exercise of end-user rights.
26. It should be noted that traffic management measures are in question when the IAS provider chooses to block traffic from all content unless they are covered by specific data caps or are zero-rated.
27. In this context, it should be pointed out that Article 3(3) of the TSM Regulation provides for an obligation on IAS providers to ensure fair treatment of all Internet traffic without discrimination, restrictions or interference. And although the Regulation in question

provides for the possibility of applying reasonable traffic management measures to meet these criteria of reasonableness, such measures must be transparent, non-discriminatory and proportionate and cannot be based on commercial issues, but on the objectively different technical quality of the service requirements of specific categories of traffic.

28. The TSM Regulation allows exceptions to the prohibition of traffic management measures, which are provided for in Article 3(4)(a) to (c), so that for such practices, adopted by the IAS providers, to be acceptable, they should fall within the aforementioned exceptions.
29. In addition to the foregoing, under the Net Neutrality Guidelines, and as specified in Article 3(3) of the TSM Regulation, for example, a zero-rating practice is expressly prohibited where, after the traffic cap is reached for the majority of content or applications, traffic associated with such content or applications is blocked or slowed down whereas traffic associated with content or applications covered by zero-rating remains unaffected

IV. Analysis of zero-rating offers and similar practices

IV.1. Annual Report

30. In the context of the abovementioned Annual Report published by ANACOM at the end of June 2017, and in particular with regard to zero-rating and other commercial practices which may be somewhat equivalent, ANACOM concluded that, according to the information compiled from the IAS providers, the practices in question are evident in various tariffs of the mobile IAS, regardless of whether these are incorporated into bundled offers or are available on a standalone basis, and more prevalent in so-called "tribal" tariffs, specifically those designed for young people under 25 years of age.
31. Although strictly zero-rating practices and the other referenced practices may be subject to the same type of analysis, in certain cases, it must be considered that the latter have some associated particularities that set them apart from zero-rating practices, especially the requirement for a specific subscription, usually paid on a regular basis, and the availability of that offer to a group of subscribers that is likely more limited.

32. In the Annual Report, it was essentially concluded that there is a need for greater clarification regarding some particular aspects associated with the offers fitting the zero-rating category, especially with regard to the treatment given to traffic from applications/content included in the practices of zero-rating when the general traffic cap of the retail offer is reached, so that these offers can be evaluated in terms of compliance with the TSM Regulation. This analysis confirms the performance of ANACOM, which was anticipated from the outset in this Annual Report.

IV.2. Zero-rating offers and similar practices adopted by IAS providers in Portugal

33. The present analysis is carried out based, above all, on the information obtained from the principal IAS providers active in Portugal in the area of mobile Internet access - MEO - Serviços de Comunicações e Multimédia, S.A. (MEO), NOS Comunicações, S.A. and group companies (NOS Madeira Comunicações, S.A. and NOS Açores Comunicações, S.A.) (NOS), NOWO Communications, S.A. (NOWO), and VODAFONE PORTUGAL - Comunicações Pessoais, S.A. (VODAFONE) -, through their responses to the questionnaire sent out by ANACOM in March 2017 to collect information essentially, but not exclusively, for the preparation of the Annual Report, as well as in responses to requests from ANACOM in August and November 2017 for additional clarifications centred on zero-rating and similar offers.
34. Notwithstanding the information collected from the IAS providers, ANACOM also monitored the information made available by these providers on their websites, also covering use of applications in Roaming in the European Economic Area (EEA).
35. From the responses received and from the survey carried out by ANACOM of the information provided on the websites of the IAS providers, there was a certain heterogeneity found in the treatment of the applications covered by zero-rating offerings from the different providers, with note made of variations in the type of treatment given by the same undertaking to its own different offers, with regard to blocking access to specific applications once the general traffic limit of the offer has been reached
36. As regards the use of specific applications in EEA roaming which are free of charge in the national territory, according to information published on the websites of IAS providers, for the same provider, the same type of rule normally applies irrespective of offers subscribed to domestically.

37. At the same time, it should also be noted that most IAS providers highlight that the way in which this matter is approached, particularly with regard to the selection of applications/content incorporated in zero-rating offers, corresponds to their customers' preferences; they did not identify any problems arising as a result.
38. To provide examples, details are given of some commercial offers from the main IAS providers active in Portugal, in provision of mobile Internet access (whether comprising bundled offers or available on a standalone basis) which include applications/content with zero-rating or similar characteristics, and which were available in January 2018.

a. "Smart Net" offer from MEO⁸

39. The "Smart Net" offer has been available from MEO since mid-2017.



Source: MEO website, on 19 January 2018 (<https://www.meo.pt/internet/internet-movel/telemovel/pacotes-com-telemovel>).

40. In general, the "Smart Net" offer consists of specific data blocks of 10 GB⁹ per month, which may only be acquired by those who have access to mobile Internet and which customers can add to the base Internet allowance upon payment of a specific monthly charge (promotional price of 4.99 euros, normal price of 6.99 euros, including VAT, for post-paid service packages and 6.99 euros, including VAT, for pre-paid tariffs).
41. There are several "Smart Net" variations that differ according to the set of applications which can be used under the specific data allowance. The "Smart Net" offers are identified as follows:
- a. "Messaging" for communication applications,
 - b. "Social" for social network applications,
 - c. "Video" for video content applications,

⁸ Available at <https://www.meo.pt/internet/internet-movel/telemovel/pos-pagos-unlimited>.

⁹ Gigabytes.

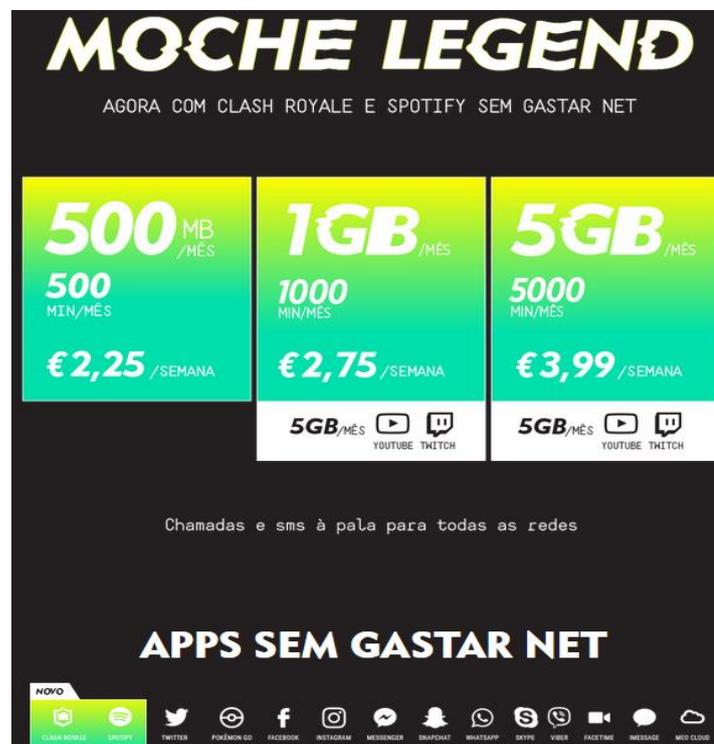
- d. "Music" for applications related to music streaming and
 - e. "Email&Cloud" for email services and cloud storage applications.
42. According to the information on MEO's website, *"[the] traffic included in Smart Net is valid for use in the Portuguese territory."*
43. Also according to the information indicated on the same website, the customer can choose the "Smart Net" which they prefer and switch/disable "Smart Nets" in the month following activation, free of charge.
44. According to the clarifications sent to ANACOM by MEO in December 2017, the traffic associated with the applications/content incorporated in the "Smart Nets" is counted only against the respective data limit, and the remaining traffic is counted against the customer's general data limit, while it is available.
45. According to the information provided by MEO, there is no blocking of Internet access traffic in general, since, customers who have exceeded the general data caps of any offer can, by default, continue to use the service in "pay-per-use" mode or, in the case of pre-paid tariffs, provided that and for as long as they have available balance.
46. However, customers can request traffic barring after the general data cap is exceeded. In this situation, if they have purchased a "Smart Net" and if the cap available under that offer has not been reached, they will be able to use it, but only for the applications included in the offer, until used up.
47. It appears that an equivalent situation occurs in the case of pre-paid tariffs, after the customer has used up their balance, and if there is still traffic available under the "Smart Net" offer cap.
48. According to information provided by MEO, the "Smart Net" offers were designed based on the applications most used by Portuguese consumers, but no details were given as to the specific metrics that would have been used to gauge this use.
49. The company reported that it is also open to the inclusion of other content in their "Smart Net" offers and can be contacted for this purpose. Furthermore, the website contains the following information: *"To find out about the possibility of having your service/application included in our Smart Net offer, contact us by email at:*

smartnet@telecom.pt.¹⁰

50. As regards the inclusion of other content, MEO explained that the criteria used for this purpose (which were not yet tested at the time of giving clarification in December 2017) involve technical data that “*content and application providers*” (hereinafter “CAP”) will be required to supply so that this traffic can be correctly calculated in the respective “Smart Net”, and also involve qualitative evaluation of the content type according to the existing themes (for example, games that do not fall under any of the “Smart Net” offers).

b. “Moche Legend” offer from MEO¹¹

51. The “Moche Legend” offer (which is split into three separate tariffs) has been available from MEO for several years, although it has only recently started including traffic associated with specific applications with data allowances that are separate from other general allowances available. This is an offer targeted at a youth segment (under 25 years of age).



MOCHE LEGEND
AGORA COM CLASH ROYALE E SPOTIFY SEM GASTAR NET

500 MB /MES	1GB /MES	5GB /MES
500 MIN/MES	1000 MIN/MES	5000 MIN/MES
€ 2,25 /SEMANA	€ 2,75 /SEMANA	€ 3,99 /SEMANA
	5GB/MES YOUTUBE TITCH	5GB/MES YOUTUBE TITCH

Chamadas e sms à pala para todas as redes

APPS SEM GASTAR NET

NOVO

CLASH ROYALE SPOTIFY

TWITTER FORÉMÓN GO FACEBOOK INSTAGRAM MESSENGER SNAPCHAT WHATSAPP SKYPE VIBER FACETIME MESSAGE MEO CLOUD

Source: MEO website on 12 January 2018 (<https://www.moche.pt/tarifarios/moche-legend/>).

52. The different versions of the “Moche Legend” tariff include a general data allowance (of

¹⁰ Available at <https://www.meo.pt/internet/internet-movel/telemovel/pacotes-com-telemovel>.

¹¹ Available at <https://www.moche.pt/tarifarios/moche-legend/>.

500 MB¹², 1 GB and 5 GB per month). The prices of the tariffs, per week, vary between 2.25 euros and 3.99 euros, including VAT.

53. Additionally, for each of the tariffs in question, “*Apps sem gastar net*” (Applications without spending data) are available, as stated on the website, and the notes included therein indicate that the tariff is subject to a fair use policy: “*15 GB per month for traffic from the following applications Spotify, Clash Royale, Twitter, Pokémon GO, Facebook, Instagram, Facebook Messenger, Snapchat, WhatsApp, Skype, Viber, Facetime, iMessage, MEO Music and MEO Cloud, valid in the Portuguese territory*”.
54. Also according to the information available on MEO's website, this offer includes “*5 GB per month of traffic for the YouTube and Twitch application in the Moche Legend 1 GB and Moche Legend 5GB tariffs, valid in the Portuguese territory*”.
55. As regards the “Moche” offers, MEO made clear that when the overall mobile data cap is exceeded, traffic is not blocked, and the speed of Internet access is not reduced to any content, including content included in 5 GB and 15 GB monthly allowances. The customer can continue to access any general content, on a “pay-per-use” basis and in pre-paid mode, for as long as the customer has a balance available, as well as access content included within the specific caps for as long as these caps are not exceeded.

c. Other offers from MEO¹³

56. The offers “M50 Giga” (fibre), “M50” (ADSL and satellite), “M40 Giga” (fibre) and “M30 Net” (fibre) correspond to bundles of services which include fixed and mobile IAS. As regards the mobile component, specifically the IAS over mobile phone, the overall data allowance of these offers varies between 3 GB (in the case of the “M30 Net” offer), 5 GB (in the case of the M40 Giga offer) and 10 GB (in the case of other offers), per month.

¹² Megabytes.

¹³ Available at <https://www.meo.pt/pacotes/mais-pacotes/fibra>, <https://www.meo.pt/pacotes/mais-pacotes/adsl> e <https://www.meo.pt/pacotes/mais-pacotes/satelite>.



Source: Website of MEO on 12 January 2018 (<https://www.meo.pt/pacotes>).

57. All these offers include, in addition to the general data allowance, a specific mobile data traffic allowance of 20 GB for use in relation to a set of applications relating to communications and social network access. According to the operator's website, this entails "20 GB of included traffic to Facebook, Instagram, Snapchat, Facebook Messenger, WhatsApp, Skype, Pinterest, iMessage, Facetime, Viber, Twitter, LinkedIn, Tumblr and Hangouts. Free traffic for these apps is valid in the Portuguese territory".¹⁴
58. The overall value of the offers mentioned above varies between 49.99 euros and 83.99 euros per month, including VAT.
59. According to information on MEO's website, some applications offered by the provider - such as "MEO Music", "MEO GO", "MEO Cloud" and "MEO Drive" - are available under all mobile IAS tariffs, but according to a clarification provided to ANACOM, the applications in question do not have associated traffic allowances, where used in the Portuguese territory, and their use is not counted for the purposes of the general Internet access cap.

d. The "Yorn X" offer from VODAFONE¹⁵

60. The "Yorn X" offer is aimed at the youth market (under 25 years of age) and has for some time provided a number of specific applications with allowances which are separate from the general allowances.

¹⁴ Upon contacting the customer services of MEO on 30 January 2018, on the "M50 Giga" package, the provider reported that the data limits for these applications and the general data limits of the offers are independent, and that the applications included in the specific 20 GB cap may continue to be used where the general date limit is exceeded.

¹⁵ Available at <https://www.yorn.net/yorn/index.html>.



The image shows a promotional page for 'YORN X' tariffs. At the top, there are three main options:

- 500 MB por mês**
- 1GB por mês + 5GB de YouTube Twitch**
- 5GB por mês + 5GB de YouTube Twitch** (includes Spotify Premium until 1 Feb 2018)

Below these, it says 'APPS SEM GASTAR DADOS' and lists various app icons. Underneath, it specifies '10.000 MINUTOS, SMS ou MMS/mês para Yorn/Vodafone'. At the bottom, there are three weekly price options:

100 MINUTOS ou SMS/mês para outras redes	500 MINUTOS ou SMS/mês para outras redes	5.000 MINUTOS ou SMS/mês para outras redes
€2,25 por semana	€2,75 por semana	€3,99 por semana

Source: VODAFONE website, on 19 January 2018 (<https://www.yorn.net/yorn/tarifario/yornx.html>).

61. The "Yorn X" offer is divided into three tariffs: offer with a general cap of 500 MB, 1 GB and 5 GB per month. The prices of the tariffs, per week, vary between 2.25 euros and 3.99 euros, including VAT.
62. As noted on its website, "the 1 GB and 5 GB tariffs include 5GB/month of traffic on YouTube and Twitch, (...)".
63. All offer tariffs include "apps sem gastar dados" (applications without spending data) (as evidenced by the IAS provider on its website) for a specific set of applications. According to the notes included on the website, this traffic is subject to a fair use policy: "traffic generated by the apps Pokémon GO, Facebook, Instagram, Snapchat, Facebook Messenger, WhatsApp, Skype, iMessage, FaceTime, Viber, Spotify, Vodafone Call+ and Message+ is included in the tariff and so is not deducted from your MB package. (...) traffic generated by the apps included in the tariff is subject to a Fair Use Policy, with a limit of 10 GB/month."
64. Although the website does not mention whether the applications listed in the two previous paragraphs can be used outside the Portuguese territory, in contact made, on the 25 January 2018 to VODAFONE's customer service, the provider reported that both the traffic included in the 10 GB cap and the additional 5 GB cap for "YouTube" and

"Twitch" are for domestic use only.

65. In clarification provided to ANACOM, VODAFONE explained that under the "Yorn X" tariffs, once the monthly data cap has been reached, general traffic is blocked, except for applications included in the additional monthly data packages of 5 GB and 10 GB - this traffic is blocked only when this limit is reached. It is noted that on the company's website, as of 30 January 2018, it is stated that *"once the MB package is depleted, the Mobile Internet Tariff is applied with access to 100 MB (valid for 5 days) for 1.99 euros"*.
66. In a communication addressed to ANACOM, VODAFONE states that the offers in question were launched prior to entry into force of the TSM Regulation, and were designed based on the preferences expressed by young users at whom these tariffs are targeted, although it did not provide detailed information on the subject
67. The company emphasised that the offers in question provide users with a beneficial solution, responding to their specific needs without preventing them from accessing other content and/or applications not covered by a specific data offer. In addition, it stated that these tariffs provide data allowances giving access to a wide range of applications of the same type or category, where the content-owners are different and compete with each other, so that the user's right of choice is safeguarded and also competition between content providers is guaranteed.
68. In addition, this IAS provider notes that if access to one of the tariff components (data allowance for access to a set of applications) was tied to the use of another (monthly data allowance), this would significantly reduce the benefits obtained by users from subscribing to these tariffs, resulting in their dissatisfaction, with a consequent increase in the number of complaints associated with net neutrality

e. Other offers from VODAFONE¹⁶

69. VODAFONE's "Vodafone PLUS" and "Vodafone UP" offers¹⁷ comprise specific data allowances for traffic associated with certain applications/content. There are also offers which comprise a bundle of services and which include the IAS over mobile phones;

¹⁶ Available at <https://www.vodafone.pt/main/particulares/tarifarios/plus/?icmp=tarifarios:title:all:plus>, <https://www.vodafone.pt/main/particulares/tarifarios/up/?icmp=tarifarios:title:all:up> and <https://www.vodafone.pt/main/particulares/tv-net-voz/pacotes/>.

¹⁷ In the final phase of this document, VODAFONE discontinued this offer and introduced other tariffs which, however, are not mentioned in this document.

these include general allowances of 3 GB, 5 GB and 10 GB per month (except for the "Tv Net Voice + Mobile + Mobile Internet" bundled offer of 3 GB) and also feature specific data allowances for traffic associated with certain applications/content.



O tarifário com Chamadas/SMS, 3GB, 20GB em Apps e desconto no 2º número



Adira ao Vodafone Up com 3 opções de internet e agora com 20GB para aceder a Apps



Source: VODAFONE website, 16 January 2018

(<https://www.vodafone.pt/main/particulares/tarifarios/plus/?icmp=tarifarios:title:all:plus>, <https://www.vodafone.pt/main/particulares/tarifarios/up/?icmp=tarifarios:title:all:up> and <https://www.vodafone.pt/main/particulares/tv-net-voz/pacotes/>).

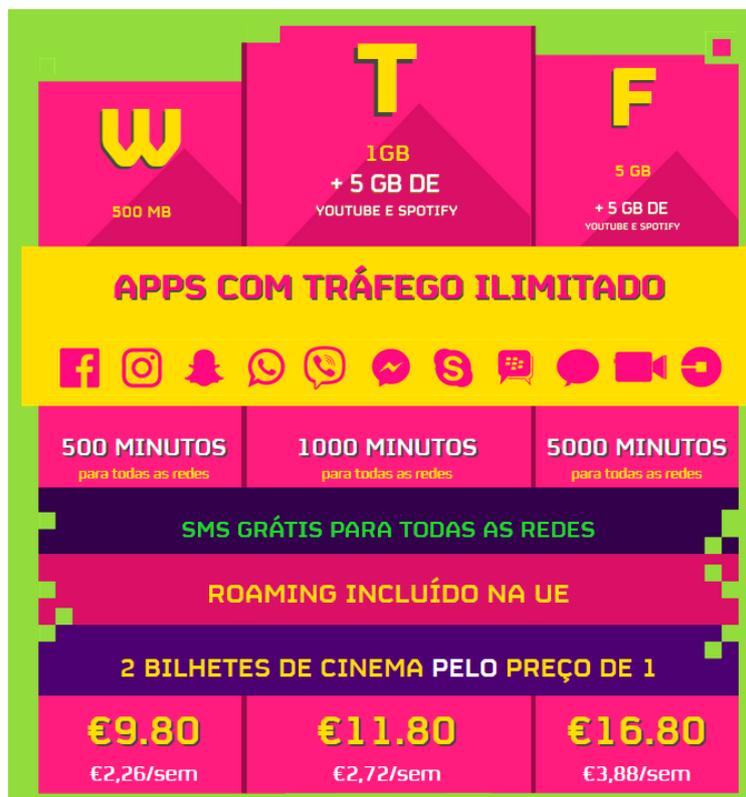
70. All these offers include a specific mobile data allowance of 20 GB of traffic for use associated with a set of applications relating to communications and social-network access. According to the operator's website, "the 20 GB package includes traffic to Facebook, Instagram, Snapchat, Facebook Messenger, WhatsApp, Skype, iMessage, FaceTime, Viber, Call+, Message+ and Tv Vodafone" (the last three are applications belonging to the IAS provider).
71. Although the website does not provide information about the use of these applications outside the national territory, when contacted on 25 January 2018, VODAFONE's customer services reported that under the "Vodafone PLUS" and "Vodafone UP" tariffs, the applications included in the additional 20 GB allowance can be accessed in roaming in the EEA, subject to a fair use policy (FUP) of 1.33 GB specifically associated with these applications

72. The monthly price of the offers ranges from 22.90 euros for "Vodafone PLUS" and 67.90 euros including VAT, in the case of a bundle of services which includes a greater number of services.
73. In addition to the offers mentioned, all VODAFONE offers provide access to the "My Vodafone", "Vodafone Start" and "MB Phone" applications. According to the company, the first two applications are "self-care" customer-support tools, which customers can use to manage consumption and applications, check invoices and subscribe to services, etc. The "MB Phone" application is also considered by VODAFONE as a "self-care" service, although with different features, since it allows customers to top up their balance and pay bills of electronic communications services.
74. With regard to the "My Vodafone", "Vodafone Start" and "MB Phone" offers, it was indicated that the data traffic associated with access and use is not counted by VODAFONE in determining the maximum traffic volume allowed under the data plan subscribed to by each customer, and when the general mobile data cap is exceeded, all content is blocked except for these applications.

f. "WTF" offer from NOS¹⁸

75. The "WTF" offer is split into three separate tariffs for the youth market (under 25 years), which provide general data caps and specific caps for certain applications/content.

¹⁸ Available at <http://www.wtf.pt/>.



Source: NOS website, on 19 January 2018 (<http://www.wtf.pt>).

76. Options available include a general 500 MB cap ("W" tariff), a general 1 GB cap ("T" tariff), and a general 5 GB cap ("F" tariff) per month. The monthly charge associated with the "WTF" offer varies according to the characteristics of each tariff, between 9.80 euros and 16.80 euros, including VAT in both cases.
77. The "T" and "F" tariffs also include a specific allowance of 5 GB per month to access "YouTube and Spotify".
78. All tariffs (including the "W" tariff) also include a selection of "apps with unlimited traffic", according to information provided by NOS on its website; these apps generally fall into the categories of social-network access and communications : "with WTF you have free traffic for the following Apps: Facebook, Instagram, Snapchat, WhatsApp, Viber, Facebook Messenger, Skype, BlackBerry Messenger, iMessage and Facetime", including also, on a promotional basis and for a limited period of time.
79. On the website it is stated that "free traffic for apps is for use only in the Portuguese territory".
80. In a clarification sent to ANACOM, NOS indicated that the applications subject to the

specific cap of 5 GB per month under the WTF offer are blocked whenever the customer reaches the basic data limit, and regardless of whether the specific limit has been reached. The operator also pointed out that this does not occur with applications which have unlimited traffic, where the customer can continue to use them, even if the basic data limit has been exceeded.

81. NOS considered that this commercial practice responds to the wishes of its customers, without giving any detail on the subject and not identifying any harm that might result, either for the end-customer or for content and application providers. The company also noted that the "WTF" offer is only one of multiple offers from NOS, whereby it considered that freedom of choice for end-customers is not curtailed.

g. The "Indie" offer from NOS¹⁹

82. The "Indie" offer is an offer of a bundle of services that includes the fixed and mobile IAS. It is also an offer characterised by the availability of a general data allowance, in addition to a set of applications/content subject to a specific data allowance.



¹⁹ Available at <https://www.nos.pt/particulares/pacotes/todos-os-pacotes/Paginas/nos-indie.aspx>.

Gigas e gigas de apps

20GB para gastares nas apps que mais usas⁽¹⁾

Vais ter sempre dados para as apps que são mesmo importantes para a tua vida. Tens 20GB de dados para usar em qualquer uma destas apps.

Facebook, Instagram, WhatsApp, Snapchat, Skype, BlackBerry Messenger, iMessage, Facetime, NOS TV

E ainda 1.000 minutos ou SMS para todas as redes por cartão

Milhares de filmes e séries

NOS Play
Milhares de filmes e temporadas completas das tuas séries favoritas para veres quando quiseres e em todos os ecrãs.
Sabe mais sobre o NOS Play >

Bilhetes de cinema
Vê os melhores filmes do cinema com 2 bilhetes pelo preço de 1, com o teu cartão NOS⁽²⁾.
Sabe mais sobre o Cartão NOS >

Source: NOS website, 13 December 2017 (https://www.nos.pt/particulares/pacotes/todos-os-pacotes/Paginas/nos-indie.aspx#hww_flor2).

This offer includes a general 3 GB monthly allowance for mobile phone access, plus an additional 20 GB per month to use on a selection of social networking and communications applications (Facebook, Instagram, Snapchat, WhatsApp, Facebook Messenger, Skype, BlackBerry Messenger, iMessage and Facetime), as well as on NOS's own video streaming applications (N Play and NOS TV).

83. According to information on the NOS website, "*Free traffic to these apps is valid in the Portuguese territory. Once net data on the mobile phone (3 GB) is depleted, data for apps is blocked until the next renewal of the allowance or purchase of additional Internet traffic on the mobile phone.*" As regards the rule applying after the offer's general data cap has been reached, this information was confirmed in a clarification provided by the company, which stated that after the general data cap for Internet access is reached, all traffic is blocked, including traffic to applications included in the additional 20 GB cap, even if this cap has not been reached.
84. The lowest monthly price of the offer, which also includes the subscription television service and the fixed IAS, is 49.99 euros, including VAT.

IV.2.1. Commercial conditions of Internet access services (Article 3(2) of the TSM Regulation)

85. Over the following paragraphs a general assessment is made of the characteristics of the offers referred to, taking into account the provisions of the TSM Regulation and the Net Neutrality Guidelines.

86. As borne out by the description of the offers made above, there is clear differentiation between the price of general Internet access included in the basic offers and the price of specific offers with zero-rating or similar characteristics, insofar as the price associated with traffic included in these specific offers tends to be much lower (or even zero in the case of zero-rating applications/content). It should be noted, by way of example, and in order to facilitate comparison, that the "Smart Net" offers are sold at the promotional price of 4.99 euros per month, including VAT, for 10 GB, while acquiring an additional cap of the same 10 GB of Internet to be used without any restriction on the MEO network (in bundles with mobile phone and post-paid mobile tariffs) has a price of 19.99 euros per month, including VAT. Similarly, in the case of NOS, customers are able to acquire additional data packages for Internet access in a general manner, for example the price associated with a 15 GB allowance in some packages is 24.99 euros per month, including VAT (it should be recalled that the base price for the NOS "Indie" offer, which already includes 3 GB, and an additional 20 GB allowance for specific applications, as well as the subscription television service and fixed IAS, is 49.99 euros per month, including VAT).
87. Notwithstanding the greater or lesser tariff differentiation, it is necessary to assess whether the commercial practices described have a detrimental effect on users and on the functioning of the Internet itself and whether, as a result, they are sufficiently important to warrant regulatory intervention.
88. In this context, it should be recalled that, in the scope of the Annual Report, and in relation to the criteria adopted by IAS providers in selecting which applications and content to include in zero-rating and similar offers, two providers indicated that they served the target audience of these offers (young people), having chosen the most popular applications according to the preferences expressed by users of this market segment, although they did not give any details about how these preferences were determined. One of the providers also pointed out the lack of commercial links or relations between themselves and the final owners of the applications concerned, with the exception of the applications which they themselves had developed, whereas a single provider mentioned the existence of some partnerships with CAPs in order to provide services with lower costs to end-users. This IAS provider nevertheless clarified that although the agreements were concluded in order to differentiate their offer, none of them imposes exclusivity on any of the parties.

89. It is also necessary to take into account the market positions of IAS providers and CAPs party to the offers under analysis.
90. With regard to IAS providers, although there may be differences in their relative market positions, the introduction of offers with the characteristics of those mentioned above cannot be expected to produce significant changes in these positions. In fact, the introduction of new offers by all IAS providers seems to attest to their ability to react to changes in supply and demand, but their similarity and some simultaneity in the launching of these offers make it unlikely that these offers will be disruptive. Whereas the existence of preferential agreements with some CAPs could provide one IAS provider with a strategic advantage over the others, this does not appear to be the case, given the non-exclusivity of the agreements concluded and, above all, if the conditions governing the agreements can be replicated. Under these circumstances, it is likely that any IAS provider would be able to conclude similar agreements, so this situation does not appear to be an obstacle to the free development of the market. In fact, the applications and contents that are covered by the different zero-rating offers or similar offers are, in the most part, common to the different IAS providers (with the exception of the provider's own applications and contents).
91. As regards the content and application providers involved in these offers, it should be noted that the selection of certain specific applications/content may have an effective impact on the application/content market and its development, since end-users may be influenced towards a preference for one particular application/content over another, simply because one is offered free of charge (where traffic is not counted against the general traffic cap) or at a substantially lower unit price. Ultimately, this situation could, in the long run, contribute to a reduction in the options available in the market, since providers who are under-represented in the offers of IAS providers could be eliminated. On this point, there are at least two factors that must be taken into consideration to determine the real relevance of the offers in question in terms of the development of the application/content market:
- i. the existence of additional allowances for Internet access which, due to their configuration, provide a viable alternative to guarantee indiscriminate access to applications/contents not included in the specific offers of IAS providers; and

- ii. the possibility that CAPs have to request the inclusion of their applications/contents, and or the possibility that users themselves are able to put requests to IAS providers for the inclusion of given content and application providers in their specific offers.

92. As regards (i), it is necessary to take into account the specific offers of each IAS provider and, based on the general data allowance for Internet access included in the offer, to assess whether this could be considered sufficient to guarantee unconditional use of the Internet access service. In this context, while recognizing that there are several situations in which the allowance provided for general use is up to 30 times less than the allowance provided for specific applications, it is necessary to highlight not only the lack of objective data on this subject, but also the subjectivity associated with this assessment, as each user has a specific usage profile, so it is not possible to formulate an unambiguous conclusion that is applicable to all users. Indeed, although unrestricted use of the Internet access service can be satisfied through a lower allowance of general Internet access, since usage corresponds, in reality, to the applications/contents selected by IAS providers in their specific offers, there will be other users for whom free use of the service would entail a higher allowance of general access to the Internet, possibly at least identical to that available from the IAS providers under their specific offers.

93. From the survey carried out of the offers of IAS providers, a significant level of variability is found in the characteristics of mobile Internet access offers, in particular with regard to the allowances and caps of Internet access included. As an example, it is recalled that MEO's basic offers, which can be supplemented with "Smart Net" offers, vary significantly in terms of Internet access caps, which can range from 200 MB to 30 GB a month, depending on the offer in question. It is also worth mentioning that users have the option of purchasing additional internet access allowances, which can be added to their base tariff, ranging from 500 MB (4.99 euros per month) to up to 30 GB (29.99 euros per month)²⁰. Similarly, VODAFONE and NOS also have offers that are characterized by the variability of the Internet caps, with additional allowances sold for access to the Internet, which users can purchase to add to their base tariff.

94. However, it is also important to recall the trends that have been observed most recently,

²⁰ Available at <https://www.meo.pt/internet/internet-movel/telemovel/pos-pagos-unlimited>.

which have seen not only the emergence of specific offers with zero-rating characteristics, as now under examination, but also an apparent increase in caps on Internet access available in the base offers. In fact, although most allowances included in the offers did not exceed 1 GB a relatively short time ago, there is currently a proliferation of offers with allowances included in the most significant base offers, as detailed in the previous point (and as shown in the following tables). While it appears that there is a tendency towards a continued increase in Internet access caps included in the basic offers, which mitigates any limitations on use which might arise from a lower general cap, it must be ensured that this trend continues, and also that there is greater approximation between general data allowances and specific data allowances.

Table 1 - Trends on the average Internet traffic allowance/cap in mobile phone offers

	2012	2013	2014	2015	2016	2017
Average	1.1	1.2	1.5	1.7	2.1	5.2
Minimum	0.0	0.1	0.1	0.1	0.1	0.2
Maximum	4.9	30.0	30.0	30.0	30.0	40.0

Maximum: GB

Source: ANACOM, provider websites

Table 2 – Trends in average traffic allowances/caps in offers with zero-rating characteristics

	2016		2017	
	General	<i>Zero-rating</i>	General	<i>Zero-Rating</i>
Average	1.9	15.0	5.0	18.3
Minimum	0.5	10.0	0.5	10.0
Maximum	5.0	20.0	10.0	20.0

Unit: GB

Source: ANACOM, provider websites

95. At the same time, the availability of certain applications/content in specific offers with zero-rating or similar characteristics means that use of the general allowance included in base offers will tend to focus on applications/contents that have far lower levels of usage, assuming that the applications/content in specific offers have been selected based on user preferences, as has been indicated by the IAS providers (i.e. comprising applications/content which would have been previously sought by users); this means that the general traffic allowance can be lower, notwithstanding situations of use which deviate significantly from the standard patterns of use, as referenced above.

96. In the light of the above and of the available data, there does not appear to be strong evidence to date suggesting that the specific offers made available by IAS providers constitute a barrier to the sustainable and innovative development of the Internet and do not prevent users from exercising their rights of choice and freedom in the way they use their contracted Internet access services.
97. As regards the possibility that content and application providers not included in the specific offers of IAS providers may request inclusion of their applications/content, or the possibility that users themselves can ask the IAS providers to include certain content and application providers in their specific offers, as referred to in point (ii) above, such possibilities could provide a means of ensuring fair and non-discriminatory treatment of traffic and of ensuring respect for the rights of end-users, insofar as they allow a wider range of specific offers from IAS providers and guarantee their openness to the right of choice of users. In this way, specific offers from IAS providers will also not be an obstacle to the development of the business of content and application providers which have not been initially selected for inclusion in the specific offers, as they offer equality in treatment. When it is ensured that other content and application providers can be included, the influence of greater mass take-up of offers with zero-rating or similar characteristics on the Internet ecosystem is somewhat limited, in particular as regards ongoing innovation and development of applications/content, limiting or even eliminating the effects which may discourage certain content and application providers to enter or exit the market.
98. It should also be noted that the existence of this possibility might even address possible biases which could arise from situations where the general Internet access allowances included in the basic offers was insufficient to ensure the free and unrestricted use of the Internet access service. In fact, by making it possible for any content and application provider to be included in the specific offers of IAS providers (albeit respecting the general characteristics of the applications/contents already covered by a particular offer, for example general categories such as "communication" or "audio streaming"), an increase in transparency is achieved and a more neutral outcome accomplished than would otherwise be the case where the CAPs' choice is restricted by the decisions made by IAS providers.
99. In this context, it should be noted that, in relation to the "Smart Net" offers, and notwithstanding the lack of information on the options taken by the other IAS providers,

MEO clarified that it was willing to include other content and could be contacted for this purpose by content and application providers. This information is also given on the provider's website.

100. In any event, it is recognized that there may be situations in which it is not clear to potential stakeholders (CAPs) what they must do so that their content can be incorporated into zero-rating or similar offers, and any complexity associated with the procedures required for such incorporation could operate as an obstacle to market entry and to the safeguarding of the Internet ecosystem.
101. In this context, ANACOM believes that IAS providers should be recommended to publish information on the conditions that must be met in order to verify the integration of new content in their zero-rating offerings. However, it should be assured that the information that CAPs provide to the IAS providers is only what is strictly necessary to assess the technical compatibilities to be verified for the integration of the content and/or applications concerned, without compromising the CAPs' activity. The time within which the provider undertakes to respond to the requests submitted must also be published.
102. It is also important to point out the situations where only applications/content belonging to the IAS provider are available in zero-rating or similar offers. Examples of such situations include "MEO Go", "MEO Cloud" and "MEO Drive" applications offered by MEO in various tariffs, as well as the "NOS Indie" offer, which includes NOS's own video streaming applications (N Play and NOS TV), and VODAFONE offers which include "Tv Vodafone". There is a need to evaluate whether this differentiation, which favours the own content of the IAS provider, has, in practice, a restrictive impact on the behaviour of users and if this contributes to influence the development of the market as a whole and the development of the Internet itself.
103. In this respect, it must be taken into account the extent to which the applications/contents of the IAS providers are representative in relation to other applications/content. Using these examples, it is a question of examining the extent to which the own applications of MEO, NOS and VODAFONE, where included in a zero-rating offer, have advantages over other applications/contents in comparable categories, for example navigation applications. On a global scale, it is to be expected that the applications/content made available by these IAS providers will have a very low level of representation compared to the players in the global market, such as Google. In this context, the zero-rating of the

specific applications mentioned in the previous points is not expected to significantly influence the development of the market. Nevertheless, this may occur in the case of less well-known applications/content which may be affected by non-inclusion in the offers of IAS providers under conditions equivalent to those of the provider's own applications/content. However, even in these situations (which can be minimised where, subject to certain conditions, IAS providers allow users to add applications/contents of their choice to offers which include zero-rating or similar applications), it is important to bear in mind that general traffic allowances may also respond to any distortions that may exist, so that innovation is not jeopardised and that content and application providers are not given incentive to exit (or not enter) the market. To this end, it is very important that these allowances include sufficient volume of traffic to allow full access to the Internet, and all its content and applications, truly reflecting the interests and choices of users in a way that is not restricted by the offers themselves.

104. It is also necessary to assess the effect that these practices may have on users' rights, in particular whether they may entail a material reduction in their right of choice. In general, it is considered that one of the main factors supporting the choice of a certain application/content by users is essentially the functionality of the application itself, or the content provided. In this respect, even if a certain application is made available under zero-rating condition, there will be no incentive for take-up by the user if the application does not correspond to their needs. However, this will be a subjective assessment that may vary from individual to individual, so it is not possible to affirm in a general way that the zero-rating of a particular application/content does not influence user freedom of choice, and likewise it is not possible to affirm the contrary.
105. Furthermore, many users will be able to choose several similar applications from different content and application providers, and it is not unusual for applications with similar characteristics to be used by the same user and at the same terminal. For example, it is possible that even if users have a navigation/map application from the operator itself with zero-rating, they can continue to use another navigation application (e.g. "Waze") on the basis of the general Internet access allowance, provided that the volume of data is compatible with unrestricted use.
106. However, there are situations in which these general caps do not appear to provide access to the Internet on terms that are adequate and comparable to those which apply to content/applications covered by the zero-rating or similar schemes. One example is

the availability of music streaming applications with unlimited traffic, associated with offers in which the overall traffic cap is very low, to the order of 200 MB or even 500 MB monthly. In this case, the general data allowance available will only enable the use of an application with similar characteristics - Spotify (based on the normal usage rate of this application) - for less than about 15 to 30 minutes/day, and assuming no other content/application is accessed, which could clearly influence users to use the application belonging to the IAS provider.

107. Although ANACOM will continue to monitor this matter, seeking in particular to ascertain the motivations for the choice of users, and in particular whether the fact that an application/content is zero-rated is an essential factor for its choice, IAS providers, in mobile Internet access, should nevertheless reduce differences between general data caps and specific caps, in particular by increasing general data caps, even in cases where there are no specific data caps (only content/applications provided without traffic limits), in order to support the viability of effective Internet access.

IV.2.2. Equal treatment of traffic (Article 3 (3) of the TSM Regulation)

108. According to the information collected after the request for information made to IAS providers in August 2017, mentioned above, all IAS providers questioned (VODAFONE, MEO and NOS) identified situations related to the mobile Internet access offers which they sell²¹ (in particular those with zero-rating or comparable characteristics) in which they manage traffic in order to apply differential treatment to certain applications.

109. In particular, for illustrative purposes, it should be noted:

- a. For example, in VODAFONE's "Yorn X" tariffs, the traffic of applications included in the additional data packages of 10 GB and 5 GB per month is, according to information provided by the company to ANACOM, blocked only when the respective limit has been reached, even after the general Internet access cap has already been exceeded and traffic has been blocked to content in general;
- b. The applications "My Vodafone", "Vodafone Start" and "MB Phone", made available by VODAFONE, continue to be accessible, according to information

²¹ Regardless of whether it is a stand-alone offer or included in a bundle.

provided by the company to ANACOM, even after the general data allowance subscribed to by the customer has been depleted, and access to all other content is blocked;

- c. The applications included in MEO's "Smart Net" offer remain accessible for as long as the specific cap has not been reached, even if the overall data cap has already been reached and the daily activation of daily allowances has been blocked at the customer's request or because the customer has no balance;
- d. In NOS's "WTF" offer, applications with unlimited traffic remain accessible even if the overall data cap has been reached and access to other traffic has been blocked.

110. As mentioned above, although the TSM Regulation does not prohibit zero-rating or comparable and similar practices; it does require the fair treatment of traffic by prohibiting the corresponding management, it being understood that, in accordance with the provisions Article(3)(3) of the TSM Regulation, once the traffic cap has been reached for most of the content or applications, it is forbidden to block or delay the traffic for such content or applications and not for those included in zero-rating or that are covered by specific caps.

111. In this context, it is reiterated that the application of Article 3(3) of the TSM Regulation unequivocally results in an obligation for IAS providers to treat all Internet traffic fairly, without discrimination, restriction or interference.

112. Although the TSM Regulation allows for the application of reasonable traffic management measures to meet these reasonable criteria, they should be transparent, non-discriminatory and proportionate and they cannot be based on commercial considerations but on the objectively different technical quality of the service requirements of specific traffic categories. However, the traffic management measures adopted by IAS providers, where some content/applications can be accessed while the rest are blocked, clearly do not have underlying technical issues, but merely commercial issues. As such, it is understood that the criteria of reasonableness required by the TSM Regulation are not fulfilled for the traffic management practices mentioned to be

considered acceptable and in accordance with the said Regulation.

113. In addition, traffic management not only fails to meet the criteria of reasonableness laid down in the second paragraph of Article 3(3), but it is not covered by the exceptions provided for in points (a) to (c) of the fourth paragraph of Article 3 either (which relate to compliance with EU or national legislation, or court decisions, the preservation of network integrity and security, and the prevention of congestion), and for this reason they are also non-compliant with the TSM Regulation.
114. In addition, it should be noted that the practices mentioned - situations of zero-rating or similar offers, in which all content/applications are blocked (or have slower speed) when the overall data cap is reached, with the exception of zero-rated or similar content/applications – correspond to one of the examples explicitly referenced in the Net Neutrality Guidelines as being incompatible with the TSM Regulation.
115. Although in some cases the offers in question are not strictly zero-rated, but similar (in that they include applications which, while not of unlimited use, count against specific additional allowances, in some cases upon the payment of specific charges), it should be noted that neither the TSM Regulation nor the Net Neutrality Guidelines confine the obligation to treat all traffic equitably to offers which are strictly zero-rating offers, but take a much broader approach.
116. Even if the example referred to in these Guidelines was strictly limited to zero-rating offers and was not applicable to some of the offers under consideration, offers where access is only allowed to certain applications or categories of applications (specifically when the overall internet access cap is reached), even if for short periods of time, would ultimately acquire characteristics of a sub-Internet service – such characteristics are not compatible with the TSM Regulation.
117. In fact, although these offers are not sold in isolation, they are always dependent on the user having an IAS, and cannot therefore be categorized, a priori, as sub-Internet services, in practice, as soon as the general cap is exceeded and access is limited to the applications/categories of applications included in the specific offers of zero-rating or similar offers, they do become a sub-Internet service, which is clearly contrary to the TSM Regulation.
118. However, it should also be noted that, irrespective of compatibility with the TSM

Regulation, the expectation of users will be that they are able to fully exhaust their available capacity, be it the general data allowances or any specific allowance. And this expectation will be greater in situations where there are costs associated with the acquisition of specific data allowances - such as the case of MEO's "Smart Net" offers.

119. One way of meeting customers' expectations while complying with the TSM regulation could be the absence of any block or delay applied to IAS traffic when the overall traffic limit is exceeded, for example as already happens in the case of several offers, where the customer can still use their Internet access by paying a daily value (or possibly per MB or GB), in which case they may also continue to use the specific cap contracted in relation to zero-rating or similar applications/content. However, this option may not be applicable to pre-paid customers in situations where their balance has been exhausted, requiring another approach from IAS providers in these cases.
120. A further option, which is also compatible with the TSM Regulation, would involve making it possible to use the specific allowance, when the general cap is exceeded, to access any type of application/content, including those outside the original scope of this specific allowance. In any case, the solution adopted must be transparent to customers and subject to the regime applicable to contractual amendments.
121. In the event that, as an alternative, the IAS provider chooses to block all traffic (general traffic and traffic encompassed by zero-rating or similar offers) as soon as the general data cap is exceeded, this situation must be completely transparent to the customer (including, as applicable, in contracts and on provider websites); this applies also in situations where the blocking results from customer request, e.g. in cases where the customer does not intend to continue to have access to the Internet after reaching the general traffic cap, so that it is completely clear that this block will also affect traffic associated with applications/content covered by zero-rating or similar offers. One way of making this option clearer to the user could be to create an alert associated with the consumption of the general traffic limit (for example, when it reached 80%), indicating that when this limit has been exceeded, if the user has blocked the automatic activation of the daily general allowance or has no account balance, all traffic would be blocked, including traffic associated with any specific allowance or content/applications not subject to traffic limits.
122. Also, in terms of differential treatment given to traffic associated with certain

applications/contents, the specific case is recalled of the applications/content that also continue to be accessible after general Internet access is blocked; these relate to services provided by the IAS provider, such as the service to check data use, or to acquire additional data, etc. Examples of these applications are, according to VODAFONE's response to a request for information from ANACOM (dated August 2017), "My Vodafone", "MB Phone" and "Vodafone Start".

123. In this context, it should be noted that the Net Neutrality Guidelines indicate permission to access "customer services" as a potentially acceptable practice, even when general Internet access is blocked, but only so that the customer is able to purchase additional data allowance. Notwithstanding their potential usefulness for customers, the applications in question (which are referred to in the previous paragraph as an example) in some cases go beyond the scope mentioned, and in such cases fair and non-discriminatory treatment of traffic in provision of the IAS is not guaranteed. and, at the same time, compliance with conditions laid down in the TSM Regulation is not ensured, particularly as regards Article 3(3) of the Regulation.

124. In the light of the above, and although IAS providers are free to decide upon the introduction of certain measures when the general Internet access cap is exceeded (i.e. they may opt to block traffic entirely, or to reduce speed) or decide not to take any action to block or slow down the traffic in question, these providers must ensure, for each offer, fair and non-discriminatory treatment of Internet access traffic - whether traffic included in the general allowance or traffic included in any specific allowances; As a consequence, **IAS providers are required to amend their procedures, where applicable, in order to ensure compliance with the TSM Regulation, in particular in the case of offers identified above (or any other offers, albeit not identified in this analysis, where the same type of practices are employed)**. That is, there can be no situations where only applications/content which are zero-rating or associated with specific data allowances can be accessed and traffic associated with the general data cap is blocked or slowed down, with a possible exception given to applications that enable customers to acquire additional data traffic when their allowance has been depleted and caps reached, as referenced above.

125. As regards offers that are advertised on the websites of IAS providers as featuring, for example, "apps without spending data" or "apps without spending net" or "free apps", but where it is additionally indicated in notes, whether or not included on the same

website pages, that there is a fair use policy entailing the application of certain traffic limits in relation to the applications to which these notes refer, ANACOM reserves its analysis of said disclosure models to a separate process.

IV.2.3. Application of Roam Like at Home rules in the European Economic Area (EEA) to zero-rating offers and similar practices

126. As previously mentioned, the Roaming Regulation (as amended by the TSM Regulation) and Implementing Regulation (EU) 2016/2286 have established a set of rules which underlie the application of the “Roam Like at Home” (RLAH) principle when users establish roaming communications between EEA countries.

127. According to the Recitals in the preamble to Implementing Regulation (EU) 2016/2286: *"With the abolition of retail roaming surcharges in the Union, the same tariff conditions apply for the use of mobile services while roaming abroad in the Union and at home (i.e. in the country of the mobile subscription of the customer) (...)"* (Recital 5) and that *"(...)" the roaming provider should as a general rule not impose a limit on the volumes of mobile services available to the roaming customer other than the domestic limit, when that customer is periodically travelling in the Union (...)"* (Recital 12).

128. The Regulation also sets out, among other obligations, that *"A roaming provider shall provide regulated retail roaming services at domestic price to its roaming customers (...), while they are periodically travelling in the Union"* and that *"any fair use policy applied by a roaming provider in order to prevent abusive or anomalous usage of regulated retail roaming services shall be subject to the conditions set out in Articles 4 and 5, and shall ensure that all such roaming customers have access to regulated retail roaming services at domestic price during such periodic travel in the Union, under the same conditions as if such services were consumed domestically."* (Our emphasis) (Article 3);

129. As demonstrated by the description of the offers given in point III.2., in most situations, the IAS providers state on their websites that the traffic of certain applications included in their offers is valid "for use in the Portuguese territory", thereby preventing the use of such applications in roaming in the EEA under conditions equivalent to those applicable in Portugal.

130. Given the specificities inherent to the different offers, analysis of the situation described above in light of the RLAH rules must be carried out separately in relation to:

- a. offers, such as MEO's "Smart Net" offer, which, as mentioned above, consists of specific data allowances, which can only be acquired by those who have access to the mobile Internet and can be added to the customer's base Internet allowance upon payment of a specific monthly amount (referred to below as "Type 1 offers");
- b. Offers in which the tariff itself includes (without additional payment) access to certain specific content/applications with an additional traffic limit above the general data cap of the tariff subscribed to by the customer (e.g. "Vodafone Plus", "Yorn"²², "M50 Giga" and "Moche Legend"²³ tariffs)²⁴ (referred to below as "Type 2 offers");
- c. offers, which include a general data allowance but where the traffic associated with the use of certain specific applications are zero-rated, i.e. it is not deducted from that limit, and is of unlimited use (e.g.: "NOS Cinco"²⁵ tariff) (referred to below as "Type 3 offers");
- d. offers covered by (b) and (c) above (e.g. "WTF" and "NOS Indie" tariffs) (referred to below as "Type 4 offers").

IV.2.3.1. Type 1 offers

131. Type 1 offers are, in practice, data add-ons (not free) for access to certain specific applications. Thus, being unable to use this additional data traffic in roaming in the EEA under the same conditions which apply to use in the Portuguese territory constitutes an infringement of the rules of the Roaming Regulation (in particular, the RLAH principle), obviously, if these offers are acquired by customers who have subscribed to tariffs that allow the use of the contracted services in roaming. Indeed, even where additions of this kind can be classed as "*open data bundles*", customers should be able to use these

²² In the Yorn tariffs, although a set of "apps without spending data" are disclosed, in notes a limit of 10 GB/month (Fair Use Policy) is indicated for the use of these apps. In this way, all the applications included in these tariffs have a specific limit, whereby they are type 2 offer.

²³ In the "Moche Legend" tariffs, although a set of "apps without spending data" is disclosed, in notes a limit of 15 GB/month (Fair Use Policy) is indicated for the use of these apps. In this way, all the applications included in these tariffs have a specific limit, whereby they are type 2 offers.

²⁴ Available, as of 31 January 2018, at <https://www.vodafone.pt/main/particulares/tarifarios/plus/detalhes.html>, at <https://www.yorn.net/yorn/tarifario/yornx.html>, at <https://www.meo.pt/pacotes/mais-pacotes/fibra> and at <https://www.moche.pt/tarifarios/moche-legend/>.

²⁵ Available at <https://www.nos.pt/particulares/pacotes/todos-os-pacotes/Paginas/pacotes.aspx>.

add-ons in roaming in the EEA, even if subject to a possible fair use policy.

132. It should also be noted that the BEREC Guidelines on "Retail Roaming"²⁶ ("Roaming Guidelines"), of 27 March 2017 set out that the use, in roaming in the EEA, of add-ons purchased by the customer is to be treated under terms equivalent to their domestic use.

133. In the example of MEO, and contrary to what was found in relation to traffic included in the "Smart Net" offers (which, on the company's website, is indicated as "*valid for use in the Portuguese territory*"), for other paid data add-ons (e.g. "Internet for the whole family" or "Internet for 15 days"), it is explicitly stated that it is possible to use these roaming data allowances in the EEA, while the company reserves the right to apply a surcharge to roaming traffic in those countries, in accordance with the rules of the fair use policy applied in the same countries (which are not yet implemented).²⁷

IV.2.3.2. Type 2, 3 and 4 offers:

134. What these three types of offers have in common is the fact that, in the national territory, the price of the contracted tariff includes specific additional limits for certain applications and/or unlimited traffic also for certain applications.

135. In these type 2, 3 and 4 offers, the fact that it is impossible to use the additional specific allowances for certain applications and/or unlimited traffic for certain applications in roaming in the EEA under conditions equivalent to those applicable when within the Portuguese territory, constitutes, as in the case of type 1 offers, an infringement of the rules of the Roaming Regulation (in particular the RLAH principle). In fact, in the case of Type 2 and 4 offers, customers should be able to use the add-on allowances in roaming

²⁶ Available at

http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/7005-berec-guidelines-on-regulation-eu-no-5312012-as-amended-by-regulation-eu-20152120-and-commission-implementing-regulation-eu-20162286-retail-roaming-guidelines.

.. "*When customers purchase an add-on to their bundle for additional mobile retail services beyond the allowances included in their bundle, such an add-on shall be subject to a separate but similar treatment as the bundle for the purposes of determining whether the roaming provider may apply limits to the consumption of data roaming services, consistent with Article 4 (2) CIR*" (Guideline No. 51);

.. "*When an operator provides additional add-ons e.g. in terms of volume to the customer (e.g. specific promotion), the customer shall be able to consume this allowance under the same conditions as at home.*" (Guideline No. 52).

²⁷ Information available on MEO's website during ANACOM monitoring, the results of which are reported in section IV.2.1. of this Decision.

in the EEA, although, where there is an “*open data bundle*”, they may be subject to possible application of a fair use policy. In the case of offers which include zero-rated applications (type 3 or type 4 offers), they fall under the concept of “*open data bundle*”, in which case the IAS providers can always apply a specific fair use policy when these applications are used for roaming in the EEA.

136. Where tariffs include different data rates (applications that at national level have specific limits for certain applications and/or unlimited traffic for certain applications) and if each of those specific data tariffs is an “*open data package*”, ANACOM understands that, in accordance with the RLAH rules, when subscribers to this tariff are roaming in the EEA the IAS provider can apply an equally specific data FUP instead of each specific national tariff, and thus replicate the different tariff limits/schemes applicable in national territory while roaming in the EEA. The minimum levels of these specific FUPs for the use of applications in roaming in the EEA that the IAS provider intends to implement should be calculated in accordance with the rules already mentioned above,²⁸ and it should also be borne in mind that Article 6b(1) of the Roaming Regulation provides that FUPs “*shall enable roaming customers in the EEA to consume volumes of data services at the applicable domestic retail price, consistent with their tariff plans.*” (our emphasis)²⁹.

137. While in the case of tariffs which include zero-rated and similar offers the Roaming

²⁸ Article 4(2) of the Implementing Regulation (<https://www.anacom.pt/render.jsp?contentId=1401619&languageId=1>) states that customers should be able, when traveling periodically in the Union, to consume a volume of retail roaming data services at the domestic retail price equivalent to at least twice the volume obtained by dividing the overall domestic retail price of that “*open data package*”, excluding VAT, corresponding to the entire billing period by the regulated maximum wholesale roaming rate referred to in Article 12 of Regulation (EU) No 531/2012.

²⁹ Recitals 8 and 13 of the Implementing Regulation also reinforce the need to apply FUP for roaming in the EEA to allow customers data limits that are consistent with the tariff plan applicable at the domestic level:

.. (8) Regulation (EU) 531/2012 provides that any fair use policy has to enable the roaming provider’s customers to consume volumes of regulated roaming services at the applicable domestic retail price that are consistent with their domestic tariff plans.” (Emphasis added).

.. “(13) Under certain domestic tariff plans, described hereafter as *open data bundles*, the data consumption may be unlimited or may provide data volumes at a low implicit domestic unit price relative to the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012. (...) the domestic customer periodically travelling in the Union should nevertheless be able to consume retail volumes of such services equivalent to twice the volumes that can be bought at the wholesale roaming data cap by a monetary amount equal to the overall retail domestic price, excluding VAT, of the mobile services component of the domestic tariff plan for the entire billing period in question. This represents a volume that is consistent with that domestic tariff plan, as it adapts to the domestic retail price of the tariff plan in question, and may therefore be applied in the case of open data bundles, including when bundled with other mobile retail services. The application of a multiplier of two adequately reflects the fact that operators often negotiate wholesale data roaming prices below the applicable caps, and that customers often do not consume the entire data allowance provided under their tariff plan.” (...)” (Emphasis added).

Regulation and the Implementing Regulation do not state the reference price to be taken into account for the calculation of each of these specific data FUPs in roaming in the EEA, ANACOM considering that the origin of FUP is underpinned by goals of preventing abusive use and achieving the sustainability of domestic tariffs, understands that this calculation could, in compliance with the principle of proportionality, be made for each specific FUP, based on the corresponding partial price (that is, on a proportional price, relating only to the part of the overall periodic fixed price of the mobile services of the tariff specifically linked to the use of the data cap or the unlimited use applications concerned).³⁰ This understanding would oblige the IAS providers to specify the reference prices for the purposes of calculating FUPs, and it should be noted that a similar obligation exists in relation to most of the tariff packages which include other services besides the mobile service.

138. Therefore, ANACOM understands that the implementation of partial FUPs calculated in the manner described above would comply with the RLAH rules.

139. However, in practical terms, the total volume of roaming consumable data in the EEA that resulted from the sum of the partial FUPs (calculated on the basis of the IAS providers' partial prices) would, as a rule, be equivalent to the value resulting from implementing a single FUP calculated on the basis of the periodic fixed price of mobile tariff services.

140. Thus, without prejudice to the fact that, in the case of "*open data packages*", IAS providers are not prevented from implementing, in this type of offer, specific FUPs for the different types of data included in the tariff scheme (which could be calculated based on partial prices indicated for that purpose), ANACOM considers it appropriate to apply a single FUP, since in practice this does not result in a total data volume for use by customers in roaming in the EEA that is lower than the sum of the said partial FUPs, thus the objectives that underpin the FUP forecast are not distorted and customers are not penalized.

141. In applying a single FUP in the context of these Type 2, Type 3 or Type 4 offers, IAS providers, in addition to calculating their minimum value by reference to the overall periodic fixed price of mobile services of the tariff, will have to check that they are "*open*

³⁰ This view is also in line with the rationale of proportionality applicable to Type 1 offers, addressed in particular in the aforementioned BEREC Guideline no. 51, a rationale that ANACOM accepts could also apply to Type 2, 3 and 4 offers.

data packets" based on the sum of the different data traffic limits included in the tariff and not just based on the overall data capping thereof.³¹

IV.2.3.3. Conclusions on offers

142. In light of the above, providers of internet access services which have offers with zero rated applications and/or offers with add-on data limits (whether or not included in the price of the contracted tariff) for access to specific applications, **are to amend their procedures, where applicable, in order to ensure their compliance with the Roaming Regulation**. To that purpose, providers shall in particular ensure that, while roaming in the EEA, their customers are able to use such zero-rated applications or applications with specific traffic allowances in a manner which is equivalent to domestic usage, an obligation which naturally applies only if these offers are acquired by customers who have subscribed to tariffs which enable the contracted services to be used in roaming within the EEA.
143. Where customers purchase add-ons not included in the tariffs subscribed to (Type 1 offers) so as to use certain specific applications and/or where they subscribe to offers which include unlimited traffic for certain applications, it must be possible to use these zero-rated add-ons and/or applications under the same conditions when the customer is roaming in the EEA. In the event that these add-ons fall within the definition of "*open data bundles*", IAS providers can nevertheless implement a fair use policy to apply when the customer uses those applications in roaming in the EEA. The minimum limit shall be calculated in accordance with Article 4 of Implementing Regulation (EU) 2016/2286, also bearing in mind the aforementioned BEREC Guideline no. 51.
144. In the case of type 2, type 3 and type 4 offers, where there are different charging mechanisms depending on whether the customer, when in their own country, uses the data service in general and/or certain specific applications (e.g. tariffs with a certain cap for the use of data in general and with one or more extra caps specifically for access to certain applications or with unlimited traffic for certain applications). These different charging mechanisms (e.g. cap for data in general and additional caps for the use of specific applications) should be applied under similar conditions when the customer is roaming in the EEA. If there are "open data packages", without prejudice to the IAS

³¹ If the tariff includes general data traffic (or certain applications) for unlimited use, it is always an "*open data package*", pursuant to Article 2 of Implementing Regulation (EU) 2016/2286 of 15 December 2016.

provider not being prevented from implementing, in the context of this type of offer, specific FUPs in the forms and under the conditions indicated in points 136 and 137 of this Decision, ANACOM considers it appropriate to apply a single FUP calculated on the basis of the periodic fixed price of mobile tariff services, in the forms and under the conditions set out in paragraphs 139, 140 and 141

145. IAS providers are also accordingly required to adapt the information posted on their websites and provided at points of sale, as well as in customer support services and other information channels made available to end users, on the conditions of offer and use of their services, as well as their contractual conditions, in order to comply with the rules in force on this matter, i.e. the provisions of Article 47 of the ECL. This adaptation must take place not only in relation to the situations identified in the DD but also in all those in which information on the impossibility of using the offers in question in roaming in the EEA is disclosed.

V. International practices in implementation of the TSM Regulation, in particular as regards zero rating and similar practices

146. Since the adoption of the TSM Regulation (and in some cases earlier) some national regulatory authorities have been analysing issues related to it, in particular as regards zero-rating offers launched by some IAS providers. Although in many cases no final conclusion has yet been reached in the analysis, the specific cases in some countries where national regulatory authorities have taken decisions on this point are relevant, in order to highlight the arguments used and their relationship to the provisions of the TSM Regulation.

147. In this respect, note is made of Belgium, Hungary, the Netherlands, Sweden, Italy, Norway, Austria and Germany.³² According to available information,³³ although some national regulatory authorities (NRAs) introduced regulation on these matters prior to the entry into force of the TSM Regulation (Slovenia and the Netherlands), most of those

³² It should be noted that the national regulatory authority in Slovenia also intervened in relation to zero-rated offers. Notwithstanding, the decisions in question were taken under national law and the national regulatory authority did not assess compliance with the TSM Regulation and therefore it was decided not to refer to it in this survey.

³³ BEREC annual report on the implementation of the TSM Regulation (available at http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/7529-berec-report-on-the-implementation-of-regulation-eu-20152120-and-berec-net-neutrality-guidelines), websites of national regulatory authorities, and publications of Cullen International.

who have decided on the subject have adopted a case-by-case approach.

Belgium

148. In January 2017, the Belgian regulator considered that two offers launched by an IAS provider³⁴, whereby end-users could choose an application whose traffic is zero-rated until the overall Internet access cap is reached, were in line with the TSM Regulation and the Net Neutrality Guidelines. This conclusion was supported by the fact that separate treatment was not applied to the zero-rated application, after consumption of the general Internet allowance in its entirety, whereas the national regulatory authority noted that the overall Internet access cap was significant; as such, the existence of certain zero-rated applications would not have a limiting impact on user behaviour, and the market positions of the providers of internet access services and content and application providers involved in the offer in question would not indicate an impact on users' rights.

Hungary

149. The Hungarian national regulatory authority determined in November 2016 and January 2017 that two IAS providers³⁵ cease offers with characteristics of zero-rating, taking the view that they were discriminatory in nature and were not in accordance with the regulatory framework of net neutrality. In particular, the regulator noted that the offers in question resulted in discriminatory treatment of Internet traffic by allowing unlimited access to some specific applications without regard to the general internet access cap, while all other traffic was blocked, or access speed reduced, when this general cap was exceeded. The national regulatory authority considered that these offers created a disadvantageous situation for other applications not included in the offers, constituting a discriminatory restriction of traffic and causing users to use applications pre-selected by the IAS provider over any others, for which they would have to pay an additional charge when the general Internet access cap is exceeded.

Netherlands

150. The Dutch national regulatory authority intervened with respect to zero-rating offers,

³⁴ Proximus.

³⁵ Magyar Telekom and Telenor Hungary.

initially in 2015, prior to the entry into force of the TSM Regulation, and later in 2016, in both cases preventing the zero-rating of content/services (initially through a fine applied to an IAS provider³⁶ for making the HBO-GO application available, and later through a request, to another IAS provider³⁷, that the availability of music streaming services be discontinued under zero-rating). According to the NRA, existing national legislation, in line with the non-discriminatory treatment of traffic under the TSM Regulation, bars any form of price discrimination, including zero-rating, whereby it concluded that all zero-rating practices would be prohibited. This decision was challenged by one of the IAS providers³⁸ in court, claiming that its offer provides music streaming services in general with zero-rating, without selecting specific applications. In April 2017, the court ruled that the national law on which the NRA based its decision was not in accordance with European law in this matter, thereby annulling the national regulatory authority's decision, stating that NRAs must assess the impact of zero-rated offers on a case-by-case basis, taking into account the effect on user choice. Following a subsequent analysis, in October 2017, the NRA concluded that the service in question do not violate European rules on net neutrality, given that it is available to all music streaming service providers and does not limit the possibility of user choice.³⁹

Sweden

151. The Swedish regulator intervened with respect to an offer of two IAS providers⁴⁰ characterized by zero-rating access to social media applications and music streaming. During the NRA's investigation, one of the IAS providers⁴¹ chose to withdraw its offer. Regarding the other IAS provider⁴², in January 2017, the regulator had to require that it cease provision of such an offer as it would imply traffic management practices based on commercial justifications and was not in accordance with the provisions of the TSM Regulation, in particular with regard to specific exceptions where management of traffic is allowed. The national regulatory authority also took the view that the offers would not

³⁶ Vodafone.

³⁷ T-Mobile.

³⁸ T-Mobile.

³⁹ Available at <https://www.acm.nl/en/publications/t-mobile-can-continue-offer-its-data-free-music-service>.

⁴⁰ Telia and Tre.

⁴¹ Tre. In 2017, this IAS provider re-marketed the offer, informing the NRA that it would adjust its characteristics in accordance with the NRA's interpretation of the TSM Regulation, and therefore the national regulatory authority did not issue a decision on it, but continues to follow the process.

⁴² Telia.

be in compliance with the Net Neutrality Guidelines insofar as access to competing applications was blocked when the general Internet cap was exceeded. This decision was challenged in court by the IAS provider in question. In March 2017, the court suspended the national regulatory authority's decision, and the final decision remains pending. The Swedish national regulatory authority has opened another investigation into a similar offer from another IAS provider,⁴³ in which services of music streaming were not blocked after the general Internet access cap was exceeded, as opposed to the remaining content - the IAS provider chose to withdraw the offer before the NRA made any decision.

Italy

152. In March 2017 the Italian NRA issued a warning to a IAS provider⁴⁴, requiring it to withdraw availability of its music and communications applications under a zero-rating scheme, and concluded that this represented discriminatory treatment insofar as these applications could continue to be used once the general access cap was exceeded, while all other traffic was blocked or slowed down. The regulator proposed to further investigate the issue of vertical integration, as zero-rating applications are owned by the IAS provider. It is also noted that the NRA's reference to another IAS provider's⁴⁵ voluntary withdrawal of an offer with similar characteristics as the regulator commenced investigations into it.

Norway

153. The Norwegian regulator decided in July 2017 that an offer launched by a IAS provider⁴⁶, with zero-rating of music streaming services, was compatible with net neutrality rules. According to available information, this offer allows the use of music streaming which is not counted against the general internet access cap, along with other applications. The NRA's decision is essentially based on the fact that zero-rated traffic is treated in the same way as other traffic when the general cap is exceeded and that there is a possibility of including other streaming music services. Subsequently, analysis also focused on the offer of another IAS provider⁴⁷ which, like the previous one, allows the use of music

⁴³ Hi3G.

⁴⁴ Wind Tre.

⁴⁵ Telecom Italia.

⁴⁶ Telenor.

⁴⁷ Telia.

streaming, through a set of applications, without the traffic being counted for the purpose of the general Internet access cap. In December 2017, the national regulatory authority concluded that this offer was also compatible with the principle of net neutrality, highlighting the reduced scale of zero-rating offers in the country and the existence of alternative offers for end users, thereby refraining from intervention with corrective measures. However, it critically commented, among other things, on the reduced data allowances in Norway compared to other countries, which encourages the use of these offers to the detriment of others.

Austria

154. In Austria, a zero-rated music and video streaming offer from an IAS provider was the subject of analysis⁴⁸. The offer in question is characterized by the fact that its zero-rated video content has reduced bandwidth compared to other content, causing videos to be viewed with low resolution. In this sense, in December 2017, the Telekom-Control Kommission determined that the offer could continue to be marketed because it did not directly violate net neutrality rules, however the IAS provider would have to discontinue the speed reduction and/or reduction in video and image resolution, since the regulation prohibits any traffic management measures which have a negative impact on data streaming for end-users.⁴⁹

Germany

155. The German regulator has analysed an offer from an IAS provider⁵⁰ consisting of a service that can be added, free of charge, to certain customer tariffs with a contract that encompasses fixed access and mobile access, and on the basis of which the consumption of audio and video streaming from providers with which the IAS provider has an agreement is not counted towards the general Internet access cap. The offer is open to participation by other content and application providers, which must, however, meet certain requirements established by the IAS provider. At certain tariffs, the access bandwidth for video streaming is reduced, while for the remaining traffic it is not. If customers wish to watch high-definition content, they should turn off the bandwidth reduction option, in which case the data consumption is counted for the purposes of the

⁴⁸ A1 Telekom Austria AG.

⁴⁹ Available at <https://www.rtr.at/en/pr/PI20122017TK>.

⁵⁰ Deutsche Telekom.

general internet access cap. This condition is not applied under the most expensive tariffs. After a series of analyses, in December 2017 the national regulatory authority submitted a final decision determining that the offer in question was not compatible with the principles of net neutrality and Roam Like at Home, insofar as traffic is to be treated equally and the traffic from the StreamOn services cannot be deducted from the subscriber's tariff cap when the customer is roaming in the EEA. The IAS provider has been given until the end of March 2018 to make the necessary adjustments to the offer in order to comply with the rules of the European Union

156. In light of the above, the national regulatory authority's actions appear to be largely based on two arguments: (i) the issue of traffic management, in particular the discriminatory treatment between zero-rated offers and Internet access in general and (ii) the impact that offers may have on end-user choice. More recently, there has also been a decision to safeguard the application of the Roam Like at Home principle, as also introduced in the Roaming Regulation amended by the TSM Regulation.

157. It should also be noted that BEREC continues to monitor this issue in the various countries, seeking to contribute to greater consistency and homogeneity in the application of the provisions of the TSM Regulation.

VI. Determination

158. Whereas:

- a. In accordance with Article 3(2) of the TSM Regulation, agreements between IAS providers and end-users on commercial and technical conditions and the characteristics of internet access services shall not limit the exercise of the rights of end-users to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service.
- b. In accordance with Article 3(3) of the same Regulation, when providing Internet access services, IAS providers shall treat all traffic equally, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used, and in particular shall not block, slow down, alter, restrict, interfere

with, degrade or discriminate between specific content, applications or services, or specific categories thereof, except as necessary, and only for as long as necessary, in clearly identified situations.

- c. According to Article 6a of the Roaming Regulation, the tariff regime applied in roaming should be the same as that applied in the domestic market, in order to guarantee the Roam Like at Home principle underlying roaming services. In the case of an "open data package", IAS providers can apply a fair use policy in accordance with Article 4(2) of the Implementing Regulation, and the FUPs, in accordance with Article 6b(1) of the Roaming Regulation, should "(...) enable roaming customers in the EEA to consume volumes of data services at the applicable domestic retail price, consistent with their tariff plans".
- d. A survey was made, albeit not exhaustive, of the offers made available by the main providers of internet access services in mobile Internet access, specifically those which, in addition to including a general data allowance for traffic in general, also include specific data allowances or do not include any traffic limits for certain applications or content (zero-rating applications/content or comparable).
- e. It has been found that in some of these offers (under the terms detailed above), the treatment given to the traffic associated with the applications/content included in specific data allowances or applications/content not subject to any traffic limit is different from the treatment given to general traffic which is covered by general data allowances. This results in situations in which the IAS provider, on its own initiative or at the request of the customer, takes traffic management measures to block the traffic of all applications/content after the general cap has been depleted, except for the traffic associated with applications/content covered by the specific cap or not subject to traffic limits.
- f. The situation referred to in the preceding paragraph, which involves traffic management, constitutes a breach of the TSM Regulation, specifically of Article 3(3), since the criteria of reasonableness that would allow the adoption of traffic management measures are neither met, nor do they fall within the exceptions provided for in the said provision.
- g. Compliance with the regime laid down in the TSM Regulation and respect for the expectation of users that they will be able to make full use of all the traffic allowances

that they have contracted (general or specific) can be reconciled, particularly in situations where IAS providers choose not to block any or slow down any IAS traffic when the general traffic limit is exceeded, as already happens in the case of several offers, where the customer is still able to use their Internet access for a daily charge (or possibly a charge per MB or per GB) - in such cases the customer may also continue to use any specific allowances they have contracted or which are made available in respect of zero-rating applications or content - or in situations where, when the general traffic allowance is blocked, the specific allowance may be used to access any application/content, even outside the original scope covered by that allowance.

- h. It has been found that, in the case of some offers with specific data allowances, the volume of data contained in these allowances is several times higher than the volume of data which forms part of the general data allowance of the offer – this is a situation which is of greater concern in offers where general data allowances are very low, since they may be insufficient to allow full access to the Internet.
- i. It has been found that some offers contain specific data caps (which may or may not be included in the tariff of the mobile service contracted by the customer) or zero-rated applications that include the condition that "*traffic (...) is valid in the Portuguese territory*", thus indicating that such applications cannot be used in roaming in the EEA under conditions equivalent to those applicable in Portugal, which is not compatible with Article 6a of the Roaming Regulation.
- j. The other aspects analysed in this document, related to the commercial conditions of the IASs, with respect specifically to zero-rated or similar applications/content, concern matters that ANACOM will continue to monitor, but where there is as yet no justification for it to intervene.
- k. Nevertheless, it is recognized that any complexity associated with incorporating new content in zero-rating or similar offers may constitute a barrier to the availability of such content and to the safeguarding of the Internet ecosystem.
- l. The present analysis does not exhaust all the issues associated with net neutrality and international roaming that are susceptible to monitoring and oversight by ANACOM.
- m. The interested parties and the market in general have been heard during the course

of the public consultation and prior hearing of the interested parties, which lasted from 28 February 2018 to 19 April 2018, in a total of 35 working days.

- n. The entities, companies and citizens who gave their opinions during the public consultation and prior hearing of the interested parties expressed very varied opinions, some supporting the analysis and proposals of ANACOM's determinations, others arguing for a more proactive approach, in particular the prohibition of zero-rating offers. Other opinions favoured the opposite extreme contesting the need for any intervention by ANACOM and opposing the measures provided for in its DD.

The Board of Directors of ANACOM, taking into account the reasons explained in the above points and better explained in the rest of the document, which precedes them, pursuant to the powers established in Article 8(1)(a)(h) of ANACOM's Articles of Association (approved by Decree-Law 39/2015 of 16 March), in the exercise of the powers provided for in Article 9(1)(a)(g)(n) and (2)(b), and pursuant to Article 26(1)(q) of the same Articles of Association, to Article 5(1) of the TSM Regulation, and Article 16(1) of the Roaming Regulation, determines:

- i) To order modification, within a period not exceeding 50 working days, of the procedures adopted in offers which include the mobile IAS (naturally including mobile phone Internet services), where applicable, in particular in the offers identified in the present decision, specifically as regards traffic treatment in cases where there has been differential treatment, subsequent to depletion of general data allowances, between traffic associated with applications/content included in specific data allowance or made available without traffic limits and traffic associated with other applications/content included in general data allowances, as well as in any other offers not identified in the present analysis but where the same type of practices are applied. This will ensure compliance with the TSM Regulation (Article 3(3)), in particular by avoiding discrimination between content and/or applications covered by general data allowances, where made subject to blocking or delays upon depletion of these allowances, and content and/or applications covered by specific data allowances or not subject to data traffic limits, as not subject to any block or delay when the overall data cap is reached.
- ii) To order modification, within a period not exceeding 50 working days, of the procedures adopted in offers which include the mobile IAS (naturally including

mobile phone Internet services), where applicable, in particular in the offers identified in the present decision, where there are applications/content subject to conditions in roaming in the EEA which are not equivalent to those provided in the Portuguese territory, as well as in any other offers not identified in the present analysis but where the same type of practices exist, in order to ensure their compliance with the Roaming Regulation. In this context:

- ii.a) IAS providers which make Type 1 offers available (offers with zero-rated applications and/or offers of extra add-on data caps not included in the price of the contracted IAS tariff for access to specific applications), must guarantee compliance with RLAH rules. In particular they must ensure that when roaming in the EEA their customers are able to use these zero-rated applications or applications with specific traffic caps under the same conditions that apply domestically. For this, IAS providers can, if these add-ons can be defined as “*open data bundles*”, apply a fair use policy which also applies to the use of the applications in question in roaming in the EEA, under the terms set out in point IV.2.3.1, above.

- ii.b) IAS providers that provide Type 2, Type 3 or Type 4 offers (offers that in addition to general data traffic include in the price of the contracted IAS other data tariffs, such as zero-rated applications and/or specific applications with specific additional caps) must ensure compliance with the RLAH rules, ensuring in particular that their customers, when roaming in the EEA, are able to use these zero-rated applications or applications with specific traffic caps under the same conditions as they are used at home. To that end, IAS providers can apply a single FUP for roaming data in the EEA (calculated on the basis of the overall periodic fixed price of the mobile services applicable to the national tariff), without prejudice to them still being allowed to implement specific FUPs for the different types of data included in the tariff (which could be calculated on the basis of specified partial prices). When applying a single FUP in the context of tariffs that do not include any unlimited use of traffic (type 2 offers), IAS providers, in addition to calculating their minimum value by reference to the overall periodic fixed price of mobile tariff services, will have to confirm that they are “*open data packages*” based on the sum of the different data traffic

limits included in the tariff and not based solely on the overall data cap of the tariff.

- iii) To order, within the same period of 50 working days, that information posted on the relevant websites and at points of sale, as well as in customer support services and other information channels made available to end users is duly adapted with respect to the conditions governing the offer and use of their services, as well as the respective contractual conditions.
- iv) To order providers of the mobile IAS to send to ANACOM, within a period not exceeding 30 working days, detailed information on:
 - the specific manner in which they propose to accomplish compliance with the stipulated provisions of (i) and (ii), and in particular the details of the amendments which they propose to introduce for that purpose in their respective offers;
 - the information referred to in point (iii) as regards offers subject to amendments; and
 - the specific conditions that they will impose or consider imposing on undertakings potentially interested in having their respective applications/contents included in the zero-rated and similar offers of the provider of internet access services.
- v) To order that the above deadlines apply from the date of publication of the decision.
- vi) To recommend to IAS providers that, in their mobile Internet access offers, they bring the traffic volumes included in the general data caps closer into line with traffic volumes under the specific data caps, thereby ensuring users have a free choice between the various content range, applications and services available through Internet access, preferably by raising general data caps.
- vii) To recommend that IAS providers publish the specific conditions imposed on potentially interested entities for including their respective applications/content in zero-rating and similar offers, including the deadline for responding to such requests.

Lisbon, July 2018.