

Broadband Stakeholder Group Response to BEREC
consultation on draft Guidelines on implementation of net
neutrality rules



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The Broadband Stakeholder Group (BSG) is the UK government's leading advisory group on broadband. It provides a neutral forum for organisations across the converging broadband value-chain to discuss and resolve key policy, regulatory and commercial issues, with the ultimate aim of helping to create a strong and competitive UK knowledge economy. The full list of BSG sponsors and Executive can be found here: <http://www.broadbanduk.org/about/bsg-sponsors-and-executive/>

The BSG also facilitates discussions between ISPs and content providers through the Open Internet Forum which brings together signatories of the BSG Open Internet Code of Practice, UK Government, regulator Ofcom, content providers and other interested parties.

Executive Summary

The BSG welcomes this opportunity to respond to BEREC's consultation on the draft Guidelines on implementation of the Open Internet provisions of EU Regulation 2120/2015 (thereafter "the Regulation").

The BSG has taken a central role in the UK debate on the Open Internet, and published in 2011 and 2012 self-regulatory Codes of Practice via which the majority of UK Internet Service Providers (ISPs) made tangible commitments on the transparency of their traffic management policies and on preserving the Open Internet, respectively. In summer 2015, the BSG commissioned consultancy WIK to review the 2011 Traffic Management Code and the 2012 Open Internet Code of Practice both as a form of good practice and to check compliance with the Regulation. This report¹ found that the Codes had been highly effective, allowing consumers to "have the broadest choice of music and video streaming services across OECD countries".

¹ WIK, [Review of the Open Internet Code](#), 2015

On the basis of the WIK's report recommendations, the BSG reviewed the two Codes in collaboration with the Open Internet Forum, which includes ISPs, content providers, UK Government and Regulator Ofcom. In June 2016, the BSG published the new Open Internet Code of Practice² which merges the two Codes and updates the ISPs' commitments in line with the Regulation. Signatories to the Code represent over 90% of UK subscribers of fixed and mobile contracts.

The new, consolidated Open Internet Code is built around 4 commitments for ISPs which mirror the Open Internet requirements of the Regulation. Additional guidelines of interpretation are included in the Code to ensure consistent interpretation of the commitments by the signatories and the content providers who have contributed to the drafting of the Code. All players in the Open Internet Forum agreed that adding a UK context to the Regulation was worthwhile echoing WIK's conclusion that the Codes added value "over and above the requirements laid out in the Regulation".

We believe that the work of the BSG and of the Open Internet Forum in understanding and interpreting the Regulation to produce a revised Code of Practice for UK ISPs will be of value to BEREC in the finalisation of its own Guidelines for national regulators. We are keen to ensure that the BSG Code Commitments, guidelines and definitions are consistent with EU interpretation.

The Code reflects the key principles of the Regulation as well as its objectives: safeguarding the Open Internet whilst encouraging innovation and consumer choice. However, we have some concerns with the draft BEREC Guidelines, and these revolve around the drafting potentially creating additional restrictions on the delivery of certain services, going beyond the scope of the Regulation and which we believe would go beyond the remit of BEREC.

We have summarised these concerns below and individual members of the Broadband Stakeholder Group may be submitting some specific and additional comments on the draft.

Article 2 – Definitions

We found the statement under paragraph 11 to be incorrect; Virtual Private Networks (VPNs) are not typically provided by ISPs, and don't always use public networks. In fact, VPNs could in some cases be provided as specialised services or be delivered over WiFi. Therefore, the assumption that all VPNs should be subject to Article 3(1)-(4) is incorrect. When networks used for VPNs are not available to the

² Broadband Stakeholder Group, [Open Internet Code of Practice](#), June 2016

public (e.g. corporate networks), these should be subject to the same conditions as private WiFi networks.

Commercial practices

According to Article 1.1, the Regulation sets “common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of Internet Access Services and related end-users’ rights”. It is our interpretation that the Regulation does not cover ISPs’ commercial behaviour in general, as suggested by paragraph 31 but only commercial practices related to IASs and related end-users’ rights. We believe paragraph 31 should be further contextualised to reflect this.

Traffic management

The Guidelines failed to recognise the different nature of international and domestic data traffic. In order to respond to the increasing demand for data in the context of Roaming Like At Home (RLAH), and to continue to offer attractive and affordable offers to consumers, some traffic management and restrictions (to address excessive use for example) will be essential. We believe it is important that NRAs assess how reasonable and proportionate traffic management policies are in light of the challenges of delivering RLAH.

In order to optimise transmission quality, ISPs need to identify categories of traffic. Paragraph 57 of the draft Guidelines state that the mere fact that traffic is encrypted, is not in itself a reason to treat that traffic differently. However, the Guidelines must also acknowledge that in such circumstances the operator may be unable to determine the nature of the traffic and in which case it may (inadvertently) be treated differently to equivalent types of traffic.

Paragraph 75 seems to suggest that network-internal blocking is not compliant with the Regulation, whether end-user instigated or not, but that terminal equipment-based restrictions are allowed. We believe that the Regulation is technology neutral and that the Guidelines should reflect this principle. The Guidelines fail to distinguish between network-based blocking where unilateral restrictions are imposed by the ISP on websites/content and where this choice is exercised by the user (e.g. ad blocking). In the latter, we do not believe that this practice contradicts Article 3(1) which outlines the rights of end-users.

Article 3(5) – Specialised services

Paragraph 101 and 107 state that NRAs should verify if a non-IAS could be delivered over an Internet access service to the level of quality intended. This text is problematic because it misunderstands the fundamental difference between a best effort service and an optimised service: as a best effort service

there is unpredictable bitrate and time. It is precisely for these reasons that some users might wish or need to have access to specific services with specific quality of service, reliability and availability parameters. Consequently it seems to imply that the regulator should verify whether the level of quality is needed or whether it would be “good enough” as a best effort service. This would significantly go above the safeguard as we read of Article 3(5) first subparagraph and Recital 16 that non-IAS should not be used to circumvent the non-discrimination and traffic management rules of IAS. Further, it is our reading that this verification does not constitute a pre-authorisation system to be implemented by NRAs but an ex-post verification. We believe the current wording is open to interpretation and could be clearer to reflect the Regulation.

Article 4 – Transparency measures for ensuring Open Internet access

Paragraph 127 describes two levels of detail for information to include in contracts between ISPs and users of IASs: high level information and detailed technical information. The Regulation does not specify that ISPs need to provide “detailed technical parameters and their values” to users, but rather requires information to be “comprehensible”. This is justified as users generally do not require detailed information to be included in contracts. Providing users with information available at their request or on ISPs’ websites should be sufficient. We therefore believe the second bullet point under paragraph 127 should be removed.

With regard to traffic management measures, the BSG Open Internet Code includes a specific commitment for ISPs to provide clear and transparent information. This information needs to be understandable, appropriate, accessible, current and comparable. ISP signatories to the Code agreed to publish a consistent key facts indicator (KFI) table on their respective websites to summarise the traffic management practices used on the broadband products they market. The KFI table is available on ISPs’ websites to allow consumers to compare information before they purchased broadband products. We believe this approach is sufficient and effective to inform consumers about traffic management used on their IAS and provided in a way that makes it comprehensible to end-users. Since their introduction in 2011, the BSG has not received any complaints from users on the level of detail of information provided to them regarding traffic management practices used by their providers.

Specifying speeds for an IAS in case of fixed networks

Minimum speed

Paragraph 141 stipulates that NRAs could set requirements on defining minimum speed under Article 5(1), for example that the minimum speed could be in reasonable proportion to the maximum speed. This is overly prescriptive; instead, NRAs should be permitted to set their own parameters, in line with

pre-existing industry codes of practice, as these are likely to have greater relevance to end-users in each relevant market.

Advertised speed

Paragraph 148 give NRAs the possibility to require that advertised speeds should not exceed the maximum speed defined in the contract. The Regulation does not specify this requirement. We believe this requirement to be unnecessary, if information on maximum speed is clearly communicated to individual users.

Specifying speeds of an IAS in mobile networks – Maximum speed

Paragraph 150 stipulates that the estimated speed for a mobile IAS should be specified so that the end-user can understand the realistically achievable maximum speed for their subscription in different locations in realistic usage conditions. BEREC should be aware that mobile data speeds in any given location can vary considerably as a result of a number of factors which are outside of the control of the Mobile Network Operator (MNO). Providing end users, therefore, with even an estimated view of the speeds available to them at a given location or time may not be particularly informative. While it may be possible to provide a non-binding, indicative range, such a requirement will require significant developments to each MNO's coverage checker to offer this level of detail in the granularity required. Furthermore, each NRA may have pre-existing guidance concerning how to substantiate or interpret speed claims. With these factors in mind, NRAs should work with MNOs to determine the best approach to complying effectively with the transparency requirements in light of arrangements that may already be in place.

BEREC must also give due consideration to factors beyond the reasonable control of IAS providers, such as end-user device limitations preventing the end user ever achieving advertised speeds and also the potential for fraudulent activity. For example, estimated maximum speed may be impacted by deliberate manipulation via the end user, which would be beyond the reasonable control of the IAS provider. IAS providers should then be permitted to assess the end-user's device prior to providing compensation or the right to early termination, in order to ensure against the end-user deliberately manipulating the service provided in order to artificially trigger early termination without penalty.

Notifying Customers of Changes

Article 4 states that "Providers of internet access services shall ensure that any contract which includes internet access services specifies at least the following..."

Paragraph 130 of the draft BEREC Guidelines has interpreted this to be relevant to all existing contracts, regardless of whether they were entered into before or after April 30 2016. This interpretation is

excessive, as it would require modifying all existing contracts. This could then grant an end-user the right to terminate without penalty under Article 20(2) of the Universal Services Directive, even though the modification is to the end-user's benefit.

For further information please contact:

Samira Gazzane

Policy Manager, Broadband Stakeholder Group

samira.gazzane@broadbanduk.org