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## **Net Neutrality Review: Consultation**

### **Virgin Media O2 Response**

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**20 January 2023**

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## Executive Summary

Together, Ofcom and the Government have an opportunity to reform the approach to net neutrality in the UK. Not only is there a pressing need to do this - the timing is also right. Ofcom, other regulators and Government are considering digital market regulation more broadly. At the same time the statute book is under review following the UK's departure from the EU. It is therefore an opportune point at which to take account of the substantial changes that have occurred since the net neutrality rules were put in place, realise the full potential of the digital economy and establish the UK as a world leader in digital services and connectivity.

Ofcom deserves credit for recognising that the internet ecosystem has evolved and for reviewing the net neutrality rules. We appreciate the clarifications that Ofcom has set out and the proposals that it has made for revisions to its guidance. We also welcome its acknowledgement of the opportunities that could be realised with more substantive reform of the rules.

Ofcom states at the outset that it wants to ensure that *'net neutrality continues to support innovation, investment and growth, by both content providers and ISPs'*<sup>1</sup>. We agree wholeheartedly with this stated objective. A modern, equitable, fit for purpose net neutrality regime should be balanced and fair, provide explicit protections only where necessary and engender an equitable attribution of opportunity, cost and risk.

The current rules do not, however, foster such an outcome. Nor will the relatively modest amendments that Ofcom is proposing to make to its guidance. The regime is out of date and does not reflect market realities. As a consequence, it is hindering investment and innovation, distorting the market and driving economically inefficient behaviour. This leads to poor consumer outcomes and it is holding the UK back from achieving its economic potential. Put simply, a bolder approach is needed. The full opportunity for all in the internet value chain will only be realised with more substantive reform of the underlying law.

The clarifications and proposals put forward by Ofcom represent a good starting point. However, they fall short of the reforms required to achieve Ofcom's own, and the Government's objectives. Ofcom should grasp the unique opportunity to go further; to re-establish itself as a pre-eminent regulator of the internet and to pave the way for the UK to become a world leader in digital markets and services. This reform is dependent on several factors.

First, and as an immediate step, Ofcom should (and can) go further in amending its guidance. A more flexible, permissive approach to interpreting the current rules would give providers of connectivity greater scope to innovate and allow them to manage their networks in an economically efficient and logical manner.

Second, Ofcom should work with stakeholders and Government to make the positive case for more substantive reform of the rules. Simply refining the guidance is not enough; the changes that have occurred in the internet ecosystem require more substantive changes to the underlying legislation. This should include coordination and alignment with concurrent initiatives via which other regulators and Government departments are considering the approach to digital and media regulation more broadly.

Key to this is a shift in mindset, away from outdated and unproven theories of harm, to an outcomes-based and 'market-led' approach to net neutrality, free from arbitrary and distortive

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<sup>1</sup> Consultation, page 3 Overview

## NON-CONFIDENTIAL

restrictions and with greater reliance on the healthy competition that exists within the market. This would reflect more appropriately the realities of the market, improve efficiency and ensure the correct value attribution in what is a highly complex ecosystem.

The digital and media industries now use the internet extensively for delivery of their content and services – a distribution mechanism that was in its infancy when the concept of net neutrality was conceived. As Government and regulators consider the approach to the regulation of digital markets, the starting point for assessment cannot be to continue to assume that net neutrality regulation is 'a given'. Rather, it is necessary to take a fresh look at the interfaces across the internet ecosystem and tailor the future regulatory approach accordingly. The forthcoming Bills that result from this exercise could then include consequential amendments to telecoms law to establish a more equitable, balanced ecosystem.

At the recent conference arranged by Ofcom to support this consultation process, the desire expressed by the largest CAPs to retain the existing net neutrality regime was notable. They set out the view that the rules are working as intended and that, as a consequence, the internet ecosystem is functioning well. Yet these same CAPs also described how they improve their customer experience relative to their smaller competitors, because they have access to sufficient capital and resources to establish their own CDN networks and other delivery enhancing facilities. One benefit of net neutrality reform could be the ability to provide network services that deliver CDN-like facilities to the 'long tail' of smaller CAPs, who have neither the capital or resources to enhance or differentiate their delivery of their own accord. As things stand, the current net neutrality rules effectively foster a two-tier internet ecosystem, rewarding those with scale and scope economies to the detriment of their small, innovative competitors.

Reform of the net neutrality regime needs to look beyond ISPs' networks to consider the role of the rules, and their effect, in the wider ecosystem.

Appropriate reform of the UK's net neutrality framework would unlock innovation, provide more choice and value for all in the value chain and incentivise the implementation of the latest technology. This would improve financial and social outcomes for consumers, businesses and CAPs and provide a boost to the economy. Indeed, a recent report by Strand Consult<sup>2</sup> found that removing UK net neutrality rules could generate an additional £340 million annually in free cash flow. Changing the rules would make the UK a more attractive place to invest and innovate in the future, and provide a substantial boost to the UK's international competitiveness.

We urge Ofcom and, in due course, Government to be bold and to grasp the opportunity to establish a sovereign, contemporary UK net neutrality regime, that allows all stakeholders in the internet ecosystem to prosper, the UK to establish itself as a digital leader and, ultimately, consumers to realise the benefits.

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<sup>2</sup> Strand Consult: *Net neutrality regulation is failing UK consumers, innovators and investors* (January 2023), at <https://strandconsult.dk/net-neutrality-regulation-is-failing-uk-consumers-innovators-and-investors/>

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## 1 - Introduction

Virgin Media O2 (“**VMO2**”) welcomes the opportunity to respond to Ofcom’s Net Neutrality Review consultation (the “**Consultation**”). We applaud Ofcom for undertaking the review and for exploring whether and how its guidance and approach to enforcement can be updated to reflect more closely developments in the internet ecosystem and the latest market structures and characteristics.

We also commend Ofcom’s preliminary exploration of further reaching reforms to the net neutrality regime. We are encouraged by Ofcom’s conclusion that there may be a case for affording ISPs further flexibility where practices are not permitted under the current rules.

Together, these aspects of the review form a welcome starting point. But more needs to be done.

Ofcom sets out its overarching policy objectives for the review, as follows:

- to safeguard citizens' and consumers' access to an open internet
- to safeguard the open internet as an engine of innovation; and
- to safeguard well-run, efficient and robust networks

These are laudable objectives, with which we concur. However, they will not be realised to their full extent without significant reform of the net neutrality framework, including the underlying legislation<sup>3</sup> (the “**Regulation**”), to reflect the latest market realities, correct the distortions to which the rules have led and thereby address the poor consumer and economic outcomes inherent in the value chain.

Ofcom should have few concerns about the first of its policy objectives; it is already being met and, as we shall explain in this response, the characteristics of the market are such that it will continue to be met should the reforms that are required be implemented. In so far as content, applications and online services are concerned, the second objective is also being met, and will continue to be met. In fact, a more balanced, contemporary approach to net neutrality could actually result in better outcomes against these two objectives.

The third object is where Ofcom’s (and Government’s) focus should lie. It is notable that explicit in Ofcom’s description of the third of these objectives is its desire for “*providers of connectivity services to be able to manage their networks in an efficient manner, ensuring the widest availability of services at the best quality of experience to consumers and citizens, with the lowest cost*”<sup>4</sup> and for “*providers of connectivity services [to] continue to invest and innovate in their networks and services, to ensure their networks are fit to meet consumers’ needs and support innovation in online services, today and in the future*”<sup>5</sup>.

Ofcom explains that this third objective is important to its fulfilment of its general duties under the Communications Act 2003 (the ‘**Act**’) to encourage investment and to have regard to the need for the efficient provision of network access and services<sup>6</sup>. Ofcom also notes that its objectives are interlinked and that it is necessary to achieve a balance between them, such that (for example)

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<sup>3</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No 531/2012, as subsequently transposed into UK domestic regulation via *The Open Internet Access (Amendment etc.) (EU Exit) Regulations 2018*

<sup>4</sup> Consultation, paragraph 4.2(c)(i)

<sup>5</sup> Consultation, paragraph 4.2(c)(ii)

<sup>6</sup> Communications Act 2003, Section 3(4)(d), 3(4)(e), 4(7) and (8)

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*“regulation does not inadvertently undermine network efficiency and robustness which would otherwise put at risk the infrastructure that an open internet and innovation depend upon”<sup>7</sup>.*

This, in our view, is key – and it encapsulates the fundamental shortcoming of the net neutrality framework in its current form. Put simply, the balance is wrong; over-regulation to achieve objectives one and two has acted to the detriment of objective three.

Nobody can deny that today’s market circumstances are very different to those in existence when the existing rules were conceived. The concerns held by regulators and net neutrality proponents are variously out of date or never materialised. More importantly, new consumer harms have emerged which the net neutrality rules are not capable of addressing – not least because it is not the ISPs but the CAPs that are either causing this harm or present the risk of using their market power to the detriment of consumers.

In this response, we consider the current market structures and characteristics and examine how they have evolved over time. We then explore the shortcomings of the current rules and the outcomes to which they have led, and set out how Ofcom should take a more enlightened approach to amending its guidance to improve market conditions in the short term. Finally, we make the case for more substantive reform of the underlying legislation and we encourage Ofcom to put forward and promote such changes to Government.

## **2 - Background and Context**

As Ofcom acknowledges in the Consultation, and as we set out in our response to the preceding Call for Evidence<sup>8</sup>, circumstances have changed significantly since the current rules were conceived. We do not repeat all of the points that we have made previously in this response. However, we do believe that there is contextual importance in reaffirming how the constitution and functioning of the internet ecosystem, and their consequent concerns and challenges, have changed fundamentally over recent years. To that end, it is instructive first to revisit the origins of net neutrality and the outcomes that it sought to achieve.

The genesis of net neutrality resides in the principle that the internet should be safeguarded as an open ecosystem, in which both consumers and those creating and distributing content, applications and services (content and application providers, or “CAPs”), should be free to access whatever content and services they choose, and undertake whatever activities they desire online. The concern, rightly or wrongly, was that those providing access to the internet might engage in restrictive behaviour or otherwise exercise some manner of control over access, frustrating the ‘access to any and all’ objective. The ‘prize’ for preventing such restrictions would, according to proponents, be an unleashing of innovation, propelling countries with hard net neutrality rules in place to the top of the digital leadership board. As a result, in a number of jurisdictions, regulation was imposed at the access layer, mandating equal treatment of all traffic and data and introducing a deeply entrenched principle of non-discrimination (in practice, prohibiting differentiation by ISPs). Other parts of the value chain, meanwhile, remained free to act, generally unencumbered by formal restraints – indeed, in other parts of the value chain the drive to differentiate has driven innovation.

More than six years have now passed since the Regulation became effective in the UK, providing a wealth of evidence against which to assess its efficacy.

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<sup>7</sup> Consultation, paragraph 4.3

<sup>8</sup> Virgin Media O2 [response](#) to Ofcom’s ‘Net Neutrality Review: Call for Evidence’, 2 November 2021

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The concerns that led to the introduction of net neutrality rules have not materialised. Some might proffer that this is a result of the rules imposed on ISPs having the desired effect. There is strong evidence to suggest, however, that it is a consequence of the existence of other consumer protection rules and of competitive market forces constraining ISPs' behaviour. It is also telling that in countries without hard net neutrality rules, there is little evidence of consumer harm emerging. And it is a fact that prior to the introduction of the Regulation, when no explicit net neutrality rules existed, there was no evidence of egregious ISP behaviour in the UK. Additionally, advances in technical standards and practices have diluted ISPs' theoretical ability to discriminate or otherwise 'control' access to the internet, even if they wanted to.

Moreover, the promised wave of innovation has not materialised. Rather, countries such as the UK that have hard net neutrality rules in place have fallen behind those that do not have or have softer rules in place.

Perhaps more critically, the rules have led to consequences that we do not believe were intended (or envisaged) when they were put in place, to the extent that they are damaging consumer welfare and disadvantaging the UK.

### 2.1 - A Changed Environment

The internet ecosystem has evolved significantly in the past decade. Technologies have advanced; consumers are more reliant on the internet; some Big Tech firms play increasingly important roles both as CAPs and as gatekeepers elsewhere along the value chain; and the demand for bandwidth (and thus traffic levels) and differentiated quality of service are expected to grow significantly.

The foundations of the current rules pre-date Netflix and Amazon Prime, they were drawn up before the launch of 4G services and at a time when consumers lived far less of their lives online. Yet they have not been updated since. In such a rapidly evolving environment this appears remiss.

The internet ecosystem has evolved in a way that few would have imagined. From what was a nascent environment, the internet now demonstrates many of the characteristics of mature markets, and along the way new players, interfaces and business models have emerged. However, the rules have simply not kept pace.

Most notably, there has been a profound shift in the ability to influence or control the market, both in terms of who has that ability and where in the value chain it resides. The internet ecosystem has also become considerably more complex. Scale players have emerged who have leverage over both ISPs and consumers. These large, multi-billion dollar organisations have developed what is akin to 'must have' content or services, or otherwise have very strong market positions, affording them the ability to leverage size and scale, to exploit their strategic position or otherwise determine outcomes. This has left ISPs with little or no leverage in negotiations<sup>9</sup> and consumers facing limited choice. The balance of power – and by implication the risk profile – have shifted.

While we have long disputed the notion of ISPs as the principal gatekeepers of the internet, any suggestion that 'control' over access to content and services online is the preserve of ISPs is now far from reality. In addition to the strong market positions of certain CAPs set out above, other players in the value chain now have the ability and in some cases the incentive to act as a gatekeeper of what consumers can access over the internet. For example, Apple and Google can – and do – control

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<sup>9</sup> For example, an ISP would face serious commercial and reputational consequences if it were to choose to restrict access to large content providers.

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what consumers can access through their iOS and Android operating systems and app stores embedded in devices. They have sought (or still seek) to, for example, control remuneration systems that use their platforms.

We acknowledge that these factors are outside of the scope of the current net neutrality rules, but they are key to understanding how the overall internet ecosystem functions, determining the relative position of ISPs and to establishing how the rules should change to reflect that. We welcome the fact that Ofcom has set out its intention to consider how the internet ecosystem is functioning as a whole, however, we reiterate the critical need for this review, and any resulting reforms, to be coordinated with the separate work being conducted by Ofcom, the CMA and other authorities on digital markets more broadly. Ofcom notes that its net neutrality review is complementary<sup>10</sup> to this separate work and that it is “...part of a wider suite of interrelated work that Ofcom and other organisations are carrying out in relation to fixed and mobile markets, as well as across the internet more generally”<sup>11</sup>. However, beyond this there is little clarity about how the various initiatives will interact. It is vital that stakeholders are clear about the linkage between them and have confidence that they are being conducted in an holistic, coordinated manner. We urge Ofcom to provide more clarity in this regard.

The ability of ISPs to determine the parameters of access to the internet has been further diluted by technological developments. For example, advances in technical standards relating to data transport, routing and security have shifted visibility and control over network traffic to the application and platform layer and many devices now have the capability to determine the conditions of access to applications and services. ISPs have limited, or no influence over these factors. Moreover, the prevalence of end-to-end encryption by applications and devices has reduced ISPs’ visibility of traffic considerably and thus their ability to act as gatekeepers.

It is also relevant to consider how the broader regulatory and competition landscape has evolved. The time and effort that Ofcom has dedicated to putting in place additional consumer protections, both formal and informal, is notable. For example, in the last few years ISPs have been required to send End of Contract and Annual Best Tariff Notifications to consumers and have signed up to the Fairness Commitments and a voluntary Automatic Compensation Scheme. They have also implemented the mobile ‘Text to Switch’ regime and introduced the European Electronic Communications Code (“EECC”)<sup>12</sup> phase 2 consumer protection provisions. And there is more to come, with the introduction of full Gaining Provider Led Switching on the horizon.

As well as providing a comprehensive suite of protection for consumers, these measures make switching easier, increase value and facilitate greater comparison between providers. Moreover, the intensity of competition in internet access services continues to increase. Consumers have a very wide range of fixed and mobile services and providers from which to choose, spurred on by the emergence of new, independent fibre providers. And they are getting ‘more for less’, with prices reducing in real terms and the absolute unit price of data consistently declining over time – a fact recognised by Ofcom itself<sup>13</sup>. These are far from the characteristics of a market in which consumers are exposed to harm, or even the potential for it. Importantly, we proffer that this has nothing to do with the existence of net neutrality rules.

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<sup>10</sup> Consultation, paragraph 2.39

<sup>11</sup> Consultation, paragraph 2.37

<sup>12</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018

<sup>13</sup> See for example, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0029/248546/pricing-trends-in-UK-Communications-services-report.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0029/248546/pricing-trends-in-UK-Communications-services-report.pdf) and [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0031/199075/bbpricing-update-july-20.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0031/199075/bbpricing-update-july-20.pdf)

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The intense retail competition for internet access services plays a key role in conditioning ISPs' ability and incentive to determine what content or services their customers can access. The ISP gatekeeper theory of harm depends on the ISP market being insufficiently competitive, such that consumers cannot punish their internet access provider for 'discriminatory' behaviour. That is far from the case in the UK market.

In parallel to these developments, traffic volumes have increased considerably. This traffic growth has coincided with notable concentration, with a majority of traffic now attributable to a small number of (very) large players. This trend shows no sign of abating.

We expect the internet ecosystem to continue to evolve at pace and scale. There is no sign of the demand for capacity letting up as more sophisticated applications and services are developed and consumers become more demanding of their connectivity solutions. Moreover, 5G has the potential to revolutionise connectivity and deliver 'smart' solutions in areas sectors such as transport, medicine, distribution and logistics. We also expect the metaverse to have a very substantial impact on the internet. While views on the precise nature of what it will bring diverge, it seems incontrovertible to suggest that it will only lead to further, rapid evolution of the internet ecosystem and of the demands placed on connectivity. These are further key reasons why a fit for purpose, flexible approach to the regulation of the internet is key.

### 2.2 - The current rules have led to market distortion and unfavourable outcomes

The significant changes that have occurred in the internet ecosystem have rendered the concerns that existed about ISPs at the time the current framework was conceived out of date; they have been disproven, dissipated or shifted to other parts of the value chain. As we have set out above, far from being a threat to the openness of the internet and innovation, ISPs now arguably face the additional prospect of being discriminated against by other players in the ecosystem. Moreover, some of those other players have both the ability and incentive to determine the conditions of access to online content and services - yet the Regulation (and Ofcom's guidance) remains focused on ISPs.

The failure of the regulatory approach to net neutrality to keep pace with market developments has also created significant distortions in the market and entrenched inefficiencies. It has also hamstrung ISPs, who face significant restrictions on innovation. Crucially, however, the damage is not confined to ISPs, with evidence of poor outcomes for consumers and the UK in general.

#### *2.21 – Distortion of the market and the creation of inequality*

We think that Ofcom sums up the problem very well at paragraph 3.9 of the Consultation:

*"As set out in Section 2, the net neutrality rules limit the actions ISPs can take, but do not restrict other parties in the value chain. Since the rules were put in place, players with strong market positions have developed throughout the internet value chain and are not constrained in the same way as ISPs".*

The restrictions on ISPs' activities and the imbalance in constraints between the players in the market manifest in a number of ways. In particular, they create consumer inequality. Less well-off consumers and those with lower demands of their connectivity effectively subsidise users with higher demands and those who are more affluent. ISPs typically scale their networks (and invest accordingly) to cater for the latter group. However, the effective 'one size fits all' requirement to which ISPs are subject means that all consumers have to contribute equally towards this.



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Basic users, who require access to a limited number of applications and services (such as email, web browsing or basic streaming) or otherwise have modest demands of their connectivity, are not able to purchase a package tailored to their needs and are instead forced to buy uniform packages and pay the costs of the ‘best efforts’ internet, which is configured to the needs of users with more demanding requirements. This has a disproportionate impact on vulnerable consumers, given their propensity to be less affluent.

At best, this is reflective of the relationship between the service used and the price paid by consumers being eroded by net neutrality rules; at worst it is stark inequality. Either way, it is difficult to see how this “*further the interest of consumers in relevant markets*”<sup>14</sup> or how it has regard to “*the needs of persons... .. on low incomes*”<sup>15</sup>.

From a structural perspective, the internet exhibits the characteristics of a classic two-sided market: An intermediary (the ISP) facilitates interactions between two distinct groups (consumers and CAPs) with value created via network effects. Ordinarily, this relationship would exist in an equilibrium determined by market and competitive forces.

However, in the case of the internet, strict net neutrality rules act to constrain activity on one side of the market, creating distortions and inefficiencies and preventing the establishment of this market equilibrium. Put simply, the rules constrain the actions of ISPs to the extent that they are permitted to commercially engage (albeit to a limited extent) with consumers on one side of the market, but are effectively barred from commercial engagement with CAPs on the other side.

In addition, large CAPs are, in effect, constraining their smaller competitors as a result of the restrictive nature of the rules. Only those with economies of scale can afford to enhance the delivery of their content and services, via direct investment in CDNs and other enhancement facilities; the large community of smaller CAPs are unable to purchase (and ISPs are prevented from offering) equivalent network based services.

The Regulation prevents legitimate commercial and competitive forces from functioning; the market is not able to function and evolve ‘on the merits’. This has led to incorrect attribution of value (and costs) and has distorted incentives. CAPs generally have limited compulsion to act in an efficient manner or even to engage with ISPs – and the largest CAPs can exist safe in the knowledge that ISPs cannot block or otherwise restrict access to their services. The effects of this are clear, in terms of the stark contrasts in innovation and investment and in the creation of inefficiencies, as we have set out elsewhere in this section.

### 2.22 – A chilling effect on investment

Ofcom sets out that one of its key objectives is to ensure that the regulatory approach to net neutrality supports investment<sup>16</sup> - and indeed acknowledges its duty to do so under the Act<sup>17</sup>. In this context, it notes that ISPs and mobile providers have invested consistently over the last five years and that this investment is expected to continue at a similar rate<sup>18</sup>. While this may be true, we think it is important to consider the *type* of investment that has taken place and the motivations for it.

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<sup>14</sup>The Act, *General Duties of Ofcom*, Section 3(1)(b),

<sup>15</sup> Ibid, Section 3(4)(i)

<sup>16</sup> See for example para 2.3 of the Consultation

<sup>17</sup> Ibid, para 2.18

<sup>18</sup> Ibid, para 3.47

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It seems apparent that the majority of investment by network operators that Ofcom refers to is ‘operational investment’ – that is, investment in capacity and network upgrades necessary in order to accommodate increasing traffic demands and deliver a competitive level of service to customers (in what is a highly competitive market), and to expand network footprints. Little of it, in our view, is investment in innovation – for example in new products and services, or in the next generation of 5G technologies. Put simply, capacity upgrades predominate, with capability upgrades lagging.

This lack of innovation investment is, in our view, attributable to a significant extent to net neutrality rules. Evidence shows that investment levels are higher in countries that have no or ‘light touch’ net neutrality rules. 5G deployments illustrate this well: Markets such as the US, South Korea, Japan, and China, variously have no or soft net neutrality rules, yet lead the world in 5G investment, technology advancement and quality. This contrasts with countries like the UK and the EU which are relative 5G laggards<sup>19</sup>. Moreover, the significant potential benefits presented by mobile edge computing require investment in new infrastructure. In the US, telcos themselves are building mobile edge computing centres, not just the big tech companies. While other factors beyond the absence of strict net neutrality rules may be present in these countries, the correlation is incontrovertible.

A key factor in this is the restrictions that the Regulation places on the management and monetisation of networks. In practice, the Regulation, and Ofcom’s application of it, provide very limited scope for traffic management. This forces ISP and mobile operators to make inefficient investments and prevents them from launching innovative services that utilise the full capabilities of their networks that would bring in additional revenue and provide additional value to consumers and CAPs. The launch of innovative services is also frustrated by the in effect blanket non-discrimination condition that prevents the establishment of new commercial models. These restrictions act to reduce the value of the network and the incentive to invest<sup>20</sup>.

The problem is particularly acute in the case of 5G. The (potential) benefits are widely recognised – indeed the UK Government has set out its aspiration to become a leading 5G nation and to realise the full potential of the technology<sup>21</sup>. This will not be achieved without material reform of the UK’s net neutrality framework. To put this into context, a recent Frontier Economics report for the Digital Connectivity Forum<sup>22</sup> finds that an additional £23-£25 billion beyond providers’ projected investments is needed to deploy full 5G in the UK.

### 2.23 – Innovation has been held back

For similar reasons, strict net neutrality rules (including the Regulation) restrict ISPs’ ability to innovate. Ofcom itself acknowledges that the rules limit the actions of ISPs<sup>23</sup> and that they “*may be seen as restricting their ability to innovate, develop new services and manage their networks*”<sup>24</sup>. There is no subjectivity here, in our view. If the actions of ISPs are restricted, they are, de facto, limited in the extent to which they are able to innovate.

The Regulation as it stands places significant barriers in the way of ISPs’ ability to develop and deliver new innovative retail offers for consumers. For example, the ‘one size fits all’ requirement applying to the treatment of traffic means that a consumer who has modest capacity requirements, or is only

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<sup>19</sup> See for example Strand Consult: *Net neutrality regulation is failing UK consumers, innovators and investors* (January 2023), at <https://strandconsult.dk/net-neutrality-regulation-is-failing-uk-consumers-innovators-and-investors/>

<sup>20</sup> Indeed, investors recognise this explicitly – see for example *Barclays Capital Inc. Net Neutrality – Positive optionality* (March 2022)

<sup>21</sup> See for example *New government plans to fire up innovation in 5G and 6G* (July 2022), at <https://www.gov.uk/government/news/new-government-plans-to-fire-up-innovation-in-5g-and-6g-as-uk-and-south-korea-launch-telecoms-technology-partnership>; and *Next Generation Mobile Technologies: A 5G strategy for the UK* (July 2017), at <https://www.gov.uk/government/publications/next-generation-mobile-technologies-a-5g-strategy-for-the-uk>

<sup>22</sup> Frontier Economics for the Digital Connectivity Forum: *The Investment Gap to Full 5G Rollout* (September 2022)

<sup>23</sup> Consultation, para 2.11

<sup>24</sup> Consultation, Section 1, Overview

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interested in securing access to specific content or services, has to purchase the same products as a consumer who has high usage demands or is willing to pay a premium for guaranteed delivery of specific content or services. Moreover, the ability to realise the full capabilities of 5G is in jeopardy, since the tailoring of services to the requirements of particular devices and applications is prohibited.

ISPs' ability to innovate in the way that content is delivered and in the services that they can offer to CAPs is also severely restricted. The very limited scope for traffic management and the de facto blanket non-discrimination requirement prevents them offering new services to CAPs and entering into bilateral commercial agreements with them – factors that would ordinarily be a common characteristic of a competitive market.

This stands in stark contrast to other parts of the internet value chain which, free from restrictive rules, have flourished and demonstrate very high levels of innovation. Indeed, some of the largest, most successful and valuable companies in the world have evolved from parts of the internet value chain that are unencumbered by strict rules on their activities. Moreover, international evidence demonstrates a clear linkage between the approach to net neutrality and internet innovation: countries in which successful, scale CAPs have emerged, invariably have 'light touch' net neutrality rules, or none at all<sup>25</sup>. For example, South Korea is leading the innovation in AR/VR and smart factories powered by 5G are in use in Japan and China. Again, this stands in stark contrast to the UK.

### *2.24 - The creation of inefficiencies*

The inflexibility of the Regulation, and its failure to reflect the practical realities of running networks, have driven inefficiencies and cause ISPs to make economically and technically illogical decisions. This is particularly true in the case of traffic management. As a result of the binary requirement to treat all traffic, devices and users in the same way, regardless of the practical effects of any differentiation, ISPs have to take a uniform, 'highest common denominator' approach to their network deployment and management practices. This is both irrational and creates unnecessary costs and complexity for all in the value chain.

The traffic, users and devices that use the internet are diverse and have highly variable requirements and characteristics. For example, email communication is less time sensitive than, say, a voice telephony call or a financial transaction; a property housing multiple ABC1 inhabitants has a different demand profile to a single person home in a lower socioeconomic demographic; a smartphone has different performance characteristics and requirements to a large screen 4k television. However, ISPs are, to all intents and purposes, prevented from differentiating between discrete devices, use cases or users, regardless of their widely varying demand characteristics.

A practical effect of this is that ISPs must provision their networks for peak traffic demand. While we acknowledge that there is a competitive imperative to this – and indeed, in a competitive market such as the UK, ISPs are strongly motivated to ensure that their subscribers receive a high quality, consistent level of service – the near blanket prohibition on any meaningful traffic management means that networks are configured to be able to manage high demand events that occur very rarely, without any mitigating measures. This is not economically or technically efficient, and forces ISPs to invest in capacity when they could be investing in innovative new services and technologies. Moreover, it does not happen in other network industries. For example, rail companies do not include sufficient capacity on their services to accommodate the increase in travel demand caused by key sporting events or infrequent music concerts. Perhaps more pointedly, fixed line telephony services were never required to be configured with sufficient capacity to enable a high percentage of

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<sup>25</sup> For example, the US, China. See [companiesmarketcap.com](https://companiesmarketcap.com) *Largest Internet companies by market cap* (accessed 10 January 2023)

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subscribers to make calls concurrently (this is why, for example, measures were implemented at telephone exchanges to manage demand in the event of high call volume scenarios, such as a popular television show involving an audience telephone vote, in order to maintain an acceptable minimum quality (and availability) of service for users in general). If ISPs were allowed to innovate, they would have the potential to provide services to better deal with exceptional spikes in demand, such as the releases of new games. This could mean that consumers maintain the ability to watch live video, for example, whilst the network responds to the sudden peak in demand from the game launch in the optimal way for all consumers.

This does not mean that ISPs should be allowed to (or would) use traffic management as a substitute for investment in capacity. Rather, it illustrates the case for ISPs to be afforded greater scope to deploy and manage their networks in an efficient and rational manner.

The inability to differentiate by device or equipment provides a further example of the inherent inefficiency. The Regulation requires traffic delivered to a handheld device, invariably with a small screen, to be treated in exactly the same way as when that same traffic is delivered to a high-end television in a consumer's home. When video or images are delivered to a handheld device, any increase in the quality of delivery beyond a certain level is imperceptible to the person using the device – yet ISPs must assume that the device requires the same level of quality and throughput as the high-end television (on which the increase in quality would be perceptible). Indeed, the handheld device may not even support that higher level of quality. This is not only inefficient for ISPs, but causes some consumers to incur unnecessary costs – particularly those mobile users who are data price sensitive and those who take subscriptions with limited data allowances.

Moreover, the ability to differentiate by device could actually improve the overall experience for mobile users. ✂

Ironically, for a regime that promoted openness, equality and innovation, the net neutrality rules have established an inequitable ecosystem (where some players, but not others are tightly and unjustly regulated), distorted incentives and fostered economic and technical inefficiencies. As a result, consumers, and the UK in general, are being prevented from realising the full benefit of a well-functioning, innovative and equitable internet ecosystem.

### 3 - The Case for Reform

There are a number of reasons why reform is required. Given the market distortions that have emerged and the foregone benefits to which the current rules have led, it is clear in our opinion that the status quo cannot continue. Ofcom acknowledges that the restrictive effect of the net neutrality rules on the activities of ISPs and could '*lead to poor consumer outcomes, including consumers not benefiting from new services as quickly as they should, or at all*'<sup>26</sup>. Ofcom also recognises that these (potential) downsides might become more pronounced in the future, as online service use expands, traffic increases, and more demands are placed on networks<sup>27</sup>. These are understatements, in our view. We believe that the issues are real and present today, rather than being 'potential' - but we welcome Ofcom's recognition that the existing regime is flawed.

Indeed, Ofcom's proposals to, in some cases, effectively disapply the rules where they are illogical, indicates that Ofcom itself considers that the current regime is simply incapable of catering for what

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<sup>26</sup> Consultation, Overview Section

<sup>27</sup> Ibid

## NON-CONFIDENTIAL

is now a complex and fast-moving ecosystem. The need to selectively disapply the law because it is not fit for purpose should on its own be a sufficient ground for reform.

Notwithstanding the adverse consequences created by the rules, they are clearly out of date and reflect a very different set of market circumstances. The CAP element of the value chain was still developing when the Regulation was conceived – and it was focussed on facilitating that development. The CAP ecosystem is now mature.

Ofcom's own findings exhibit numerous specific examples of issues resulting from what is effectively the market power of some CAPs. However, regulation remains imposed on ISPs. Indeed, in some cases, Ofcom appears effectively to concede that ISPs are regulated in lieu of regulation of CAPs. For example, at paragraphs 3.30-3.35, Ofcom notes that CAPs could use zero rating offers to abuse their market power, but goes on to discuss the need for restrictions on the behaviour of ISPs as a consequential remedy. While we are not necessarily advocating the regulation of CAPs, surely the logical approach to addressing such a concern is to apply some manner of constraint on CAPs' ability to enter into zero rating offers with ISPs, rather than ISPs facing blanket restrictions? At the very least, given that there will soon be legislative change for both the media ecosystem (where some CAPs are regulated) and digital markets (where other CAPs reside), there is an opportunity to address issues of market power by placing obligations specifically on the actors themselves. This would be much more proportionate, rational and effective when compared to perverse regulation by proxy via the net neutrality regime.

In fact, we believe that there is an explicit legislative imperative for reform. This is not, in our view, simply a case of reform being required to address consumer welfare and economic issues. The Act specifies Ofcom's duties, principally to "*further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition*"<sup>28</sup>. In satisfying this duty Ofcom must secure, inter alia, "*the availability throughout the United Kingdom of a wide range of electronic communications services*"<sup>29</sup>. Further, Ofcom must have regard, in performing its duties, to "*the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*"<sup>30</sup> alongside "*the desirability of encouraging investment and innovation in relevant markets*"<sup>31</sup> and "*the desirability of ensuring the security and availability of public electronic communications networks and public electronic communications services*"<sup>32</sup>. Critically in the context of the Consultation, Ofcom is also required to have regard to the securing of efficient investment and innovation<sup>33</sup>.

The UK's net neutrality rules appear clearly to be generating outcomes that conflict with Ofcom's duties set out in the Act.

Given the presence of these conflicts, it would appear incumbent upon the UK Government to review the net neutrality legislation and ensure that it embeds the same principles and objectives as the Act, and enables Ofcom to fulfil its primary legal duties as set out in the Act.

More immediately, Ofcom should revisit its proposals to amend the guidance, with its primary legal duties in mind – particularly those to act in the consumer interest (where appropriate) by promoting

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<sup>28</sup> Communications Act 2003, Section 3(1)

<sup>29</sup> Ibid, Section 3(2)(b)

<sup>30</sup> Ibid, Section 3(3)(a)

<sup>31</sup> Ibid, Section 3(4)(d)

<sup>32</sup> Ibid, Section 3(4)(ea)

<sup>33</sup> Ibid, Section 4(8)(aa)

## NON-CONFIDENTIAL

competition, to intervene proportionately and only where action is needed and to secure efficient investment and innovation.

### 3.1 - There is a Clear Mandate and Empowerment for Reform

Neither Ofcom nor Government should be apprehensive about fundamental reform of the UK's net neutrality framework (or, in the short term, taking a lighter touch approach to the existing rules). On the contrary, they should feel empowered to take such action. Aside from the tangible benefits for consumers and the UK in general that we have set out elsewhere in this response, there are regulatory and legislative mandates.

#### *3.11 - The law provides for reform*

As we have set out above, we believe that the outcomes to which the current net neutrality rules have led stand in stark conflict with the outcomes anticipated by the primary duties imposed on Ofcom in the Act. This, in our view, affords Government (and Ofcom) a clear mandate to review and reform the Regulation, and for Ofcom to take a different approach to interpretation and enforcement of the current rules. Perhaps most fundamentally, it is difficult to see even from Ofcom's own findings in the Consultation how Ofcom's application of the current net neutrality rules is "*...proportionate, consistent and targeted only at cases in which action is needed*"<sup>34</sup>.

Moreover, following the UK's departure from the EU, it is no longer constrained by European law; put simply, there is no requirement to maintain explicit, formal net neutrality rules. The UK has significant scope to establish a sovereign regime that best reflects national circumstances and objectives. We acknowledge that the UK-EU Trade and Cooperation Agreement<sup>35</sup> entered into at the point of the UK's exit from the EU, along with other international trade agreements<sup>36</sup>, require the UK to preserve the open internet. However, we also note that these agreements (i) provide for non-discriminatory, reasonable, transparent and proportionate network management, (ii) allow for protections to ensure the security of devices, networks and services and (iii) permit the implementation of measures aimed at protecting the safety of users online. More crucially, the agreements do not specify *how* these requirements should be met. It would appear to us, therefore, that the UK has a wide margin of sovereign discretion in the approach to meeting the requirements. Put another way, an effects based, rather than a 'letter of the law' approach to the requirements appears entirely feasible and, importantly, compatible with the broader 'outcomes focussed' approach that we are advocating.

#### *3.12 - International practice provides assurance*

Evidence from other jurisdictions illustrates that where no or modest net neutrality rules exist, the 'openness' of the internet has not been jeopardised. Where ISPs may have gatekeeper positions, there is little to suggest that they have abused those positions in such jurisdictions. This has much to do, in our view, with the fact that ISPs prefer to offer open and expansive access to CAPS' services, since that is what their customers expect and value; it is generally in ISPs' interests to maintain the open internet. In New Zealand and Australia<sup>37</sup>, net neutrality rules are, to all intents and purposes, absent – yet the internet ecosystem appears to be functioning without issue, insofar as unfettered

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<sup>34</sup> Communications Act 2003, Section 3(3)(a)

<sup>35</sup> Article 178, *Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the European Union and the European Atomic Energy Community, of the other part* (30 December 2020)

<sup>36</sup> Including Japan and the EEA/EFTA states of Iceland, Liechtenstein and Norway

<sup>37</sup> Indeed, the competition regulator stated that problems could be dealt with under existing competition law without the need for specific net neutrality regulations; SBS News (December 2017) (<https://www.sbs.com.au/news/article/will-the-us-net-neutrality-decision-affect-australian-internet-users/dix3rfkc2>)

## NON-CONFIDENTIAL

access to online content and services is concerned. The US repealed net neutrality legislation at the federal level in 2017 yet, once again, the ecosystem appears to be function without any particular issue.

Moreover, countries with a light touch approach to net neutrality regulation consistently demonstrate thriving digital economies and technological leadership. For example, South Korea<sup>38</sup> and Japan, both considered to be pioneers in high speed connectivity and 5G, have light touch net neutrality regimes. There is also clear evidence of improvements in investment and innovation in the US after the net neutrality rules were repealed<sup>39</sup>.

We note that Ofcom has undertaken a comparison of the approach to net neutrality in a number of other jurisdictions<sup>40</sup>. This is helpful in exploring the regimes that are in place elsewhere, however, it lacks an assessment of the effect of those regimes or the outcomes to which they have led. Moreover, Ofcom does not compare outcomes in the UK against those that could result from a regime without such stringent and restrictive rules. This would have been informative and would, we believe, provide Ofcom with additional assurance that a light touch approach to net neutrality regulation does not lead to poor outcomes – in fact it is more likely, in our assessment, to lead to better outcomes for the UK.

A number of studies exist on the effect of the various approaches to net neutrality regulation around the world<sup>41</sup>, and we do not consider them at length herein. However, in our observation, there is clear correlation between light touch net neutrality rules, higher levels of innovation and investment and positive consumer outcomes.

### *3.13 - Existing regulatory and competition tools, alongside market dynamics, will suffice to protect consumers and CAPs*

The UK has in place a very broad framework of formal rules and other regulatory measures that protect consumers. These include requirements on transparency (e.g. of contractual terms and conditions and service characteristics), rules to facilitate switching between providers and measures affording consumers recourse in the event that their services do not function as intended or if their provider changes the terms of the service. As we set out above, these rules have been strengthened substantially over the last few years, with the implementation of the EECC<sup>42</sup>. Moreover, consumers are afforded further protection via a suite of voluntary and ‘soft’ regulatory measures (such as the Automatic Compensation Regime, the Broadband Speeds Code of Practice and Ofcom’s Fairness Commitments).

While we consider these protections alone to be sufficient to preserve the open internet, consumers (and indeed CAPs) have a further safety net in the form of arguably one of the world’s pre-eminent competition law regimes.

Further still, the competitive dynamics of the UK market exert a very strong constraint on the behaviour of ISPs, providing yet more protections for consumers and CAPs. The retail internet access market in the UK remains highly contestable, with a wide range of choice of providers. Consumers

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<sup>38</sup> ITU Hub *How the Republic of Korea Became a World ICT Leader* (29 May 2020) (<https://www.itu.int/hub/2020/05/how-the-republic-of-korea-became-a-world-ict-leader/>)

<sup>39</sup> Strand Consult *Net neutrality regulation is failing UK consumers, innovators, and investors, Figure 3: Before and After NN Regulation in the USA, 2012-2022* (January 2023)

<sup>40</sup> Consultation, Annex 7

<sup>41</sup> See for example, Briglauer, W., Cambini, C., Gugler, K. et al, *Net neutrality and high-speed broadband networks: evidence from OECD countries*, Eur J Law Econ (2022) and Strand Consult *Net neutrality regulation is failing UK consumers, innovators, and investors*, (January 2023)

<sup>42</sup> The European Electronic Communications Code also introduced a requirement for providers to send End of Contract and Annual Best Tariff Notifications

## NON-CONFIDENTIAL

are getting 'more for less', with prices reducing in real terms and the absolute unit price of data declining over time. In a competitive market, ISPs are incentivised to provide unencumbered access to the CAP services and content that their subscribers want. Those who restrict access or otherwise fail to adhere to the principle of an open internet are very likely to be punished by market dynamics alone, even before any punitive action under formal rules or competition law.

The Regulation arguably duplicates these existing protections; in practice, ISPs are subject to 'double regulation', which is neither efficient nor sound regulatory practice. In our view, the removal of the Regulation, or at the very least a lighter touch approach to regulating the internet, would present a very low risk to consumers and CAPs. On the contrary, the removal of what are unjustified, arbitrary restrictions on ISPs' behaviour would result in benefits for all in the value chain that would far outweigh any potential risk.

### *3.14 - History demonstrates that a light touch UK net neutrality regime would not be problematic*

Prior to the introduction of the Regulation, the UK already had measures in place to protect consumers and preserve the open internet. In addition to the rules set out in the preceding paragraphs, ISPs had worked together – and voluntarily - with the Broadband Stakeholder Group to establish the Open Internet Forum and developed the Open Internet and Traffic Management Transparency Codes of Practice. These codes were endorsed by Ofcom and Government and together committed ISPs to allow their users to access all lawful online services and content and not to unduly restrict or otherwise interfere with that access. They also required ISPs to be transparent about any traffic management that they may employ and to publish the details of any conditions to which their services were subject (such as data limits or fair usage policies). These codes of practice remain in force to this day.

During this pre-Regulation period, there were no reported abuses of the commitments contained in the codes of practice, no substantive issues arose concerning ISPs abusing their 'gatekeeper' status and Ofcom had no cause to intervene formally or in any other substantive way in the market.

Shortly before the implementation of the Regulation, the economic consultancy WIK was commissioned by the Broadband Stakeholder Group to assess the effectiveness of the codes. WIK concluded that they had been highly effective in maintaining the open internet in the UK and that they had "*helped support a market environment where OTT services can thrive*"<sup>43</sup>. WIK also found that "*In fact, UK consumers have the broadest choice of music and video streaming services across OECD countries, and OTT services providing services functionally similar to typical electronic communication products thrive in the UK*"<sup>44</sup>. Ofcom's evaluation of the effectiveness of the codes concurred with WIK's findings.

In many respects the UK has the benefit of hindsight. This prior experience demonstrates that a light touch UK net neutrality regime was not problematic in the UK, and there is no evidence or any other reason to suggest that it would prove to be so in the future. A light touch regime would not only present a very low risk, but would also likely lead to significant incremental benefits, as it would deliver the end user protections, without the inefficiency and loss of innovation inherent in the current rules. Indeed, this raises the very obvious question of whether 'hard' regulation would have been introduced in the UK were it not for an EU requirement to do so. This is a particularly intriguing question, given that even Ofcom itself exhibited some reticence<sup>45</sup>.

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<sup>43</sup> <http://www.broadbanduk.org/wp-content/uploads/2015/11/WIK-Review-of-the-Open-Internet-CodesNovember-15.pdf>

<sup>44</sup> Ibid

<sup>45</sup> See for example *Ofcom's Approach to Net Neutrality* (Ofcom, November 24, 2011) [[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0011/50510/statement.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0011/50510/statement.pdf)] in which Ofcom noted that '*... we should be able to rely on the operation of market forces to address the issues of blocking and discrimination.*'



## NON-CONFIDENTIAL

In our view, the above factors demonstrate clearly that there is unlikely to be any meaningful risk in removing the Regulation or reforming it significantly – either in terms of reducing protections for consumers (or CAPs) or exposing Ofcom or Government.

### **4 - The Nature of Reform**

We believe that there is a better way to preserve the open internet, protect end users (where necessary) and realise the full potential of technology and innovation. Fundamentally, this requires a shift in mindset, away from over-prescriptive and out-dated interpretations of concepts enshrined in the letter of the law, towards a more market-led, outcomes-based approach, with reliance on existing regulatory and competition tools and market dynamics.

There are two key elements to this: A more permissive approach to interpretation and enforcement of the existing rules (that is more in line with Ofcom's duties in the Act), via updated Ofcom guidance, and more substantive reform of the underlying legislation. While the former is within Ofcom's immediate gift, we acknowledge that the latter is the preserve of Government and is unlikely to be a swift undertaking. However, Ofcom can – and must – play a key role in it; its influence will be key. We address each of these elements in the sections that follow.

### **5 - Proposed Amendments to Ofcom's Guidance**

We welcome Ofcom's proposals for amendments to its guidance. The fact that Ofcom intends to provide additional clarity and, in some cases, more flexibility for ISPs is a significant step in recognising the shortcomings of the current regime and addressing them. At the same time as the European Commission appears to be tightening the rules, this is a progressive move.

However, we believe that Ofcom must – and has the ability to – go further. The proposals set out do not address the issues inherent in the current regime to a sufficient extent and risk perpetuating the poor outcomes to which the rules have led. Further, they do not appear to enable ISPs to take any additional meaningful practical actions beyond those which they are permitted to carry out today.

We are also concerned about the additional reporting and monitoring requirements that Ofcom is proposing to introduce, and the increase in compliance costs for ISPs to which it will lead. This appears to be a quid pro quo for the proposed clarifications or additional flexibility relating to traffic management, premium retail offers and specialised services. This seems inconsistent with Ofcom's view that the Regulation is restricting ISPs' ability to operate; it would in fact constitute the imposition of *more* regulation on the part of the internet value chain that is already disproportionately regulated. It would also, surely, create an additional burden for Ofcom.

Ofcom is, by its own admission, clarifying that many of the practices set out in its proposals are already permissible today, and its proposals in these areas are, in the main, clarifications of existing rules. Given that, in Ofcom's view, the framework is generally working well for consumers, the expansion in reporting and monitoring appears to be disproportionate. We think that a more proportionate approach would be for additional monitoring and reporting requirements to apply on a targeted, case-by-case basis, where there was the suspected existence, or evidence of, consumer harm. This would avoid undermining the additional flexibility and clarity that has been proposed.

## NON-CONFIDENTIAL

Ofcom has significant discretion over how it interprets and enforces the Regulation, and has shown the willingness to exercise this discretion in certain areas. However, there is a need to do so more broadly. This, we believe, is consistent with a more outcomes or effects-based approach. We note, for example, that Ofcom proposes that the application of traffic management rules to internet traffic on certain transport installations will not be an enforcement priority, on public interest grounds. We conclude from this that Ofcom considers the rules to be inappropriate to this context. Surely, this public interest 'test' can be passed in other scenarios where the rules have led to clear consumer detriment, or are simply illogical?

We set out below our views on the proposals that Ofcom has made and our suggestions for how they could be enhanced.

### 5.1 - Zero Rating

We welcome Ofcom's attempt to provide some certainty on zero rating and its conclusion that zero rating offers are largely beneficial for consumers. We are particularly encouraged that Ofcom has not adopted the position of the CJEU and has not followed BEREC in taking a harder line approach to zero rating; from a principled perspective at least, Ofcom's permissive approach is progressive and in the best interest of consumers.

Indeed, we think that aspects of Ofcom's approach to zero rating should be applied to other elements of the net neutrality rules. In essence, Ofcom's assessment of the likely effects on end users of zero rating offers and examination of whether they materially affect consumer choice has many similarities with the 'outcomes based' approach that we believe Ofcom should take more generally. If Ofcom is content to apply this model to zero rating, can it not extend the principle to other aspects of the regime?

We note that Ofcom has, in practice, been following this approach for some time. The categorisation and processes proposed in the Consultation reflect, de facto, the approach that Ofcom has taken to the assessment of zero rating offers and related (informal) enforcement activities to date. In other words, Ofcom appears simply to be codifying its established practice. While this, in itself, is a welcome step, we do believe that Ofcom should go further.

Ofcom proposes in effect to designate as compliant zero rating offers via which ISPs zero-rate access to information and services from public sector bodies that are 'non-competitive' and provide a public benefit (Type 1). It proposes to take the same approach to offers that are genuinely open to all CAPs of a particular class (Type 2). This is a welcome clarification and a logical step. As Ofcom notes, there is clear consumer benefit in taking this approach and little to no risk of consumer harm.

Alongside this 'presumption of compliance' approach to Type 1 and Type 2 offers, Ofcom sets out its intention to assess all other zero rating offers on a case-by-case basis, on the proviso that they may raise 'concerns'. The overall approach therefore essentially formalises Ofcom's practice to date, such that there is no practical change to the circumstances in which zero rating offers are likely to be deemed permissible, or to require further scrutiny.

We think this is a missed opportunity. The greatest potential for (incremental) consumer benefit lies in the third category. However, there is little incentive for ISPs to launch innovative or value-added offers that would benefit consumers that sit outside of the Type 1 or 2 categories. This is due to the prospect of those offers being deemed non-compliant and the risk of being required, subsequently, to remove them from the market or of facing regulatory enforcement action. Exacerbating this is the fact that Ofcom's stated approach to the assessment of Type 3 offers is vague and subjective.

## NON-CONFIDENTIAL

Moreover, it is not clear how Ofcom's proposals constitute a "*lighter touch approach to reviewing such offers*"<sup>46</sup>.

Zero rating is becoming less common and has reducing relevance in the UK<sup>47</sup>. This, combined with the very strong competitive mobile market, should lead Ofcom to conclude that the enforcement of net neutrality rules in the context of zero rating should not be an administrative priority. In our view, the fact that, to date, Ofcom has found no cause to intervene in any notable way to restrict or prevent a zero rating offer is highly instructive. To the extent that Type 3 zero rating offers may be problematic from a competition perspective, we believe that this should be considered in the context of CAPs, rather than ISPs. Indeed, the potential problems that Ofcom describes are largely associated with CAPs, rather than mobile providers. Such problems should be addressed by existing competition tools, not by the imposition of restrictions on mobile providers.

Ofcom should instead take a permissive approach to Type 3 zero rating offers, with regulatory intervention at the ISP level only in exceptional cases.

For the same reasons, we believe that Ofcom should take a more permissive approach to zero rated access once a data allowance has been exhausted. We do, however, welcome Ofcom's de facto establishment of a safe harbour for access to an ISP's own website or app to allow a user to top-up a data allowance and for access to Type 1 content and emergency communications, once a data allowance has been used up. Again, this outcomes or effects based approach is logical and has clear consumer benefits. However, further benefits could be realised with a more permissive approach to other types of zero rated data when a data cap is reached.

### 5.2 - Traffic Management: Retail Offers

We welcome the over-arching clarification proposed by Ofcom that, in certain circumstances, retail packages with different levels of quality are permissible under the current rules. This is a helpful clarification and, in concept at least, could afford ISPs some certainty that they can offer such services to customers. It also has the potential to lead to better outcomes for consumers – for example providing them with greater choice and allowing them some scope to purchase a package that is more aligned with their needs and with the relevant quality and customer experience appropriate to the services included in the package.

However, while the clarity is welcome in principle, in practice the conditions that Ofcom is intending to impose may make these types of offer impractical and unattractive for ISPs. For instance, the extent to which Ofcom will regard the prioritisation to support higher quality tiers as having a problematic impact on lower quality tiers is vague and appears to be dependent on a subjective assessment. There is reference to "*significant or regularly recurring discrepancies*" (as set out in Article 4(1)(e) of the Regulation) and Ofcom sets out its intention to "*pay particular attention to monitoring any discrepancies between the actual and contracted levels of quality for customers on lower quality tiers*"<sup>48</sup>. This appears to afford Ofcom a very wide margin of discretion, which may deter providers from developing differentiated quality of service offerings.

Moreover, Ofcom's intention to expand its regulatory monitoring and reporting activities to assess the impact of differentiated quality of service offerings seems onerous, both for ISPs and Ofcom, and could also act as a deterrent to launching these offers. Ofcom confirms that such offers are already permissible today and is clarifying existing rules. This expansion therefore appears to be

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<sup>46</sup> Consultation, paragraph 5.17

<sup>47</sup> For example, as Ofcom itself notes, mobile data allowances have increased in general and the number of consumers with unlimited data allowances has increased more than three-fold since 2019

<sup>48</sup> Consultation, para. 6.54

## NON-CONFIDENTIAL

disproportionate. We think that a more proportionate approach would be for additional monitoring and reporting requirements to apply on a case-by-case basis, where there is evidence of, consumer harm. We therefore urge Ofcom to take a less intrusive approach to monitoring of differentiated quality of service offers, to avoid undermining the additional clarity that it has provided.

Fundamentally, the requirement that ISPs must apply the same quality level to all of the content and services accessed by a given subscriber using a differentiated quality of service subscription, rather than being able to offer different levels of quality for specific content, applications or services within a subscription, limits significantly the opportunity for ISPs, consumers and CAPs. It also has a detrimental impact on the overall customer experience by prohibiting the tailoring of specific content, applications and services to the most appropriate and efficient quality of service levels. Permitting such additional differentiation would deliver far greater levels of innovation, choice and value to all in the internet value chain, in our view.

As Ofcom notes, there are credible use cases for such an approach. For example, a guaranteed quality of experience for gaming applications would undoubtedly be attractive to some consumers, as would enhanced quality of service for video conferencing for home workers. This could include prioritisation of specific services or content. We do not see this as problematic if it is the choice of the end user and does not undermine the level of service experienced by others.

A more permissive approach to differential quality of service offerings, including the ability to differentiate by user, device or service, could also unlock significant innovation in some types of Network As A Service and network slicing, without the need to establish a Specialised Service.

We note that some (larger) CAPs have expressed concerns about internet 'fast lanes' emerging, such that ISPs will focus their efforts on delivering prioritised services, to the detriment of consumers who continue to rely on the 'best efforts' internet (and CAPs who choose not to purchase prioritisation). We think this is an erroneous concern, for two reasons. First, ISPs will continue to have a strong incentive to maintain a good quality of service for the 'best efforts' internet packages. The strong competitive market in the UK will act to condition ISPs who fail to deliver a suitable service to their customers. Moreover, various regulatory protections exist for customers whose service does not meet the standard contracted for (such as the Broadband Speeds Code of Practice and the contractual exit provisions in the EECC).

Second, we believe that these claims are motivated by the large CAPs' commercial interests. Many large CAPs have specific arrangements in place to ensure that, as far as is possible within their gift, their customers have a good end user experience when using their content, services or applications. These arrangements include CDNs, dedicated interconnection arrangements, and the hosting of content at the edge of/within ISPs' networks. Thus many of them consider that they do not need any (additional) prioritisation from ISPs. This, in our view, contrasts with smaller CAPs, who are less likely to be able to afford the arrangements put in place by larger CAPs and would likely benefit from being able to enter into arrangements with ISPs to guarantee or enhance the quality of delivery of their services. We think this is an important point in the context of ensuring that the market power of large CAPs does not become entrenched.

Beyond the changes that are within Ofcom's immediate gift, it is helpful that Ofcom considers that it may be beneficial to permit some retail offers with content and service specific levels of quality<sup>49</sup>. We also welcome Ofcom's view that the risks associated with such offers could be managed through case-by-case monitoring and enforcement, consistent with its proposed approach to zero rating

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<sup>49</sup> Ibid, para. 6.59

## NON-CONFIDENTIAL

practices<sup>50</sup>. This has many similarities to our proposed ‘outcomes based’ approach to net neutrality regulation.

We urge Ofcom to work with stakeholders to make the case to Government for change to the underlying legislation such that it permits these types of offers.

### 5.3 - Traffic Management: Dealing With Congestion

We welcome Ofcom’s clarification that ISPs will be permitted to take a differentiated approach to traffic in the congested parts of a network compared to the rest of the network (including where congestion is contained to traffic on a dedicated link from a single CAP). Clarification is always helpful.

However, overall, Ofcom’s proposals do not appear to allow ISPs to take action that is meaningfully different to that which is permitted at present. Moreover, the effective requirement for ISPs to provide evidence of their need to manage traffic and the additional monitoring and reporting requirements that Ofcom is proposing, could be onerous and may serve as a disincentive to making use of the clarifications that Ofcom has set out.

We think the inefficiencies and brake on innovation caused by the current (and proposed) approach to traffic management can only be solved by changes to the Regulation, underpinned by a change in mindset. First, the Regulation is encumbered by the European Commission principle that traffic management should only ever be a temporary and exceptional practice (when, in reality, traffic over the internet is inherently volatile and it is difficult to identify a steady state normality). Second, Ofcom appears to view congestion as circumstances in which networks cease to function, rather than a regularly occurring trait during periods of high demand (for example in the evening). This leads again to traffic management being regarded, for regulatory purposes, as a measure akin to ‘emergency action’, as opposed to something that should be a routine component of efficient network management. Third, the prohibition on differential treatment by device, user or application/service type, means that any traffic management that is applied is inherently a ‘blunt tool’ and can cause collateral effects beyond addressing the root cause of the congestion.

We think that a shift in mindset towards a more proportionate, technically and economically rational regulatory approach to traffic management would deliver benefits in terms of efficiencies for ISPs and better end user experiences for consumers. This is particularly important for mobile networks, where scarce spectrum resources means that a finite amount of capacity must be shared amongst multiple users. Appropriate traffic management would enable capacity to be better allocated across all users, to maintain the best customer experience for everyone. And as we have set out above, the use of traffic management to, for example, tailor content delivery to device types would actually help to maintain a good end user experience for all users, particularly in areas of high demand. This does not mean that ISPs will start to use traffic management as a substitute for investment in capacity. On the contrary, the competitive market in the UK acts as a strong incentive to ensure that subscribers receive a good, consistent minimum quality of service. However, that good minimum quality level is best achieved with proportionate, ‘outcomes based’ traffic management on a more routine basis, rather than something that is deployed as a last resort.

In this regard, we welcome Ofcom’s view that benefits could be realised through more substantive reform of the Regulation. Again, we do not repeat comments that we have made elsewhere about the need for, and benefits of legislative change, but we note the alignment between what we are advocating and Ofcom’s findings. In particular, Ofcom’s belief that “*A more focused approach to*

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<sup>50</sup> Ibid, para 6.61

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*dealing with congestion might ensure that scarce network capacity resources are used in a way that positively impacts consumer quality of experience or in times of congestion prevents or mitigates the harmful impacts on consumers. For example, it may be beneficial to permit ISPs to target their traffic management measures on less time or quality sensitive traffic*<sup>51</sup> should act as a strong impetus for more substantive reform. We therefore urge Ofcom to work with stakeholders and Government to make the case for this legislative change.

### 5.4 - Specialised Services

As with other aspects of the proposals, we applaud Ofcom for attempting to provide clarity on Specialised Services. The principles that Ofcom is proposing to adopt are welcome and, if enacted proportionately, could help to stimulate innovation. For example, the intention to take a pragmatic approach to the assessment of the impact of Specialised Services on general internet access is a notable step forward in principle, but much depends on what ‘pragmatic’ means in practice.

We also welcome Ofcom’s explicit confirmation that ISPs can offer specialised services to CAPs to improve the quality of delivery of their content and services.

Overall, we believe that there remains a risk that inappropriate restrictions on, and a lack of clarity about the use of Specialised Services means that ISPs will continue to be deterred from realising the full capabilities of their technology. While Ofcom can improve the situation by going further in its amendments to the guidance, the full benefits will only be realised through change to the Regulation.

A key issue is the condition that a Specialised Service must be objectively necessary. In Ofcom’s own words, Specialised Services are only permitted where “*service features [which] would not function fully if delivered by a general internet access*”<sup>52</sup>. This appears not only to be a very high bar to meet, but is also subjective - and the concept of ‘full functionality’ is likely to be interpreted in a different way by different stakeholders. It could also be burdensome for ISPs and CAPs. According to Ofcom’s proposals, it is likely that ISPs would need to engage with CAPs to undertake a case-by-case assessment of every proposed Specialised Service to satisfy themselves that the prioritised treatment is necessary.

Moreover, it is not clear that many services exist today that can only be delivered via, or that explicitly *require* delivery by a Specialised Service. Conversely, there are many services (or elements of services) that would benefit from an improvement in performance or end user experience if they were delivered via a Specialised Service, but their delivery over the general internet does not make them unusable<sup>53</sup>.

Equally challenging is the question of what constitutes degradation of general internet access by a Specialised Service. This is not only a complex assessment to make, but it will always have an element of subjectivity. For example, a Specialised Service may cause a drop in speed for an adjacent general internet access service, but that drop in speed may be imperceptible to/negligible for end users.

We also note that Ofcom’s proposals relating to Specialised Services include an intention to expand its reporting and monitoring regime. As we have set out elsewhere in this response,

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<sup>51</sup> Consultation, para 6.108

<sup>52</sup> Consultation, para. 8.51

<sup>53</sup> For example, a video streaming service may deliver a better quality end user experience if delivered via a Specialised Service – and some consumers and CAPs will likely be willing to pay for this – but others may be perfectly happy to consume an ‘inferior’ service delivered over the general internet.

## NON-CONFIDENTIAL

disproportionate informational requirements risk disincentivising ISPs from launching innovative new services – and they can be burdensome for Ofcom. It is therefore vital that Ofcom keeps this in mind when revising its approach. We think that a more proportionate approach would be for additional monitoring and reporting requirements to apply on a targeted, case-by-case basis, where there was the suspected existence, or evidence of, consumer harm.

Much potential for innovation is being held up by a combination of the restrictive approaches to Specialised Services and traffic management. For example, 5G services have great potential to deliver new connectivity options via network slicing. This could be used to support connected vehicles, remote healthcare facilities and automated manufacturing and distribution, to name but a few. Indeed, trials have already taken place to prove how 5G can be used to facilitate AR/VR services, drones, smart cities and more. Similarly, Network As A Service could provide additional optionality to CAPs and end users (particularly business users) alike. Yet the inflexibility of the Regulation both restricts the extent to which ISPs can offer these services and disincentivises their launch in the small number of cases where they would be permissible.

Again, a change to the underlying law, reflecting an effects based, outcomes focussed approach, would constitute a considerable step towards addressing these challenges.

### 5.5 - Scope of the net neutrality rules, terminal equipment and public interest exceptions

We welcome Ofcom's confirmation that it is unlikely to prioritise enforcement of the traffic management rules on internet services provided to transport facilities. These installations are inherently difficult to dimension and manage and the priority for providers is to maintain a satisfactory, consistent minimum level of service for all users. This can mean, for example, placing restrictions on end users' access or otherwise controlling usage in a way that does not 'treat all traffic in the same way'. Ofcom's proposals therefore represent a pragmatic approach which will deliver benefits to end users.

We also commend Ofcom's confirmation that it is unlikely to take enforcement action where there are tangible and important consumer benefits (such as in relation to the prioritisation of emergency communications, blocking of scams and provision of parental controls). This is a clear example of where the inflexibility of the Regulation is not only illogical, but actually harms consumers. We urge Ofcom to prioritise its exploration of how to formalise this safe harbour, to give all in the value chain the legal and regulatory certainty required. However, the clarification that this will not be an enforcement priority is a welcome and progressive step in the meantime.

We think that Ofcom has missed an opportunity by proposing to maintain the prohibition on tethering restrictions. Tethering can lead to very high, intense levels of data consumption, that is difficult to manage (and plan for) and exposes providers to (effectively) uncontrollable costs. It can also negatively impact other mobile users, when networks become congested as a result of individuals or small groups of users consuming a disproportionate amount of what is ultimately a constrained spectrum resource.

Consumers in general suffer as a result of a prohibition on tethering restrictions. The tethering of devices that use high amounts of data, or support multiple users, to mobile devices compromises the ability of mobile providers to offer unlimited tariffs at affordable prices. Mobile providers are limited in the extent to which they are able to prevent tethering abuse occurring and must take account of their exposure when setting prices. In other countries, providers routinely offer lower cost packages with limitations on tethering (alongside higher cost packages that allow for tethering), with service parameters and conditions made clear to customers. There is no evidence of consumer

## NON-CONFIDENTIAL

harms in these jurisdictions. On the contrary, an approach via which providers offer lower cost tariffs with tethering restrictions, alongside tariffs that permit tethering, increases consumer choice and value. It also leads to a fairer allocation of costs, avoiding a situation in which consumers who have low data needs subsidise the consumption of higher levels of data by more intensive users. Furthermore, it allows a more efficient, proportionate approach to be taken to capacity management.

We urge Ofcom to reconsider its proposals for tethering in the short term, for example to clarify that enforcement of rules relating to tethering restrictions will not be an administrative priority unless there is tangible evidence of consumer harm occurring. We also believe that Ofcom should work with stakeholders and the Government to make the case for legislative change to remove the prohibition on tethering restrictions.

### **6 - Legislative Change**

As we have set out above, we consider that a more permissive approach to the interpretation and enforcement of the current rules is necessary in the short term. However, to address the fundamental shortcomings of the regime and realise the benefits that it would bring, more substantive reform of the Regulation is required to provide for the longer term.

We think that a lighter touch 'commercial first' approach, relying on competition and market dynamics, with regulatory backstops and some differentiation to reflect the complexities and imbalanced incentives present in the internet ecosystem, would be more appropriate and proportionate and would lead to significantly better outcomes. A more balanced set of incentives would help to remove the distortions and inefficiencies inherent in the value chain.

#### 6.1 - Structure

The internet ecosystem in the UK functioned without issue prior to the Regulation being introduced – and indeed appeared to deliver better outcomes. Fundamentally, we believe that there is a strong case for a return to this model of reliance on existing consumer protection regulation, alongside voluntary codes of practice. There is, in our view, a very weak case for the maintenance of explicit net neutrality rules.

We consider that this would represent a more proportionate regulatory approach and would be more efficient for both Ofcom and ISPs to manage and execute. The absence of inflexible, explicit prohibitions on certain practices and commercial arrangements would allow for considerably more opportunity for ISPs to innovate and experiment, and to deploy capital resources in a more efficient way - with consequent benefits for consumers, CAPs and the UK in general.

We have discussed above how the strong levels of competition in the UK connectivity market would provide an additional layer of protection for consumers and CAPs and, ultimately, a specific legal/regulatory backstop would exist in the form of competition law. We also envisage that the codes of practice would maintain commitments from ISPs to preserve the open internet and not to block or otherwise unduly restrict access to any lawful online content or services. Aside from the competitive imperative for ISPs not to engage in such behaviour, these commitments would provide assurance to consumers and would provide confidence to the long tail of small CAPs with a less pronounced market position that they would continue to have access to all end users.



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Above all else, this approach would appear to be far more consistent with the requirement in the Act for regulatory activities to be “...*proportionate, consistent and targeted only at cases in which action is needed*”<sup>54</sup>. Moreover, voluntary approaches or ‘soft regulation’ have been proven to work well in the UK<sup>55</sup>. Ofcom has demonstrated aplomb in establishing and managing codes of practice and voluntary commitments. They are also easy and, crucially, faster to update or amend to reflect market changes or technological advances. This contrasts with static regulation, such as the current net neutrality rules, which represent a drag on the fast-moving internet ecosystem.

### 6.2 – Rebalancing incentives to facilitate commercial agreements

We are aware of the continuing debate about ‘charging’, or the prospect of ISPs obtaining a financial contribution from CAPs towards capacity and network upgrades. We think this is better thought of in terms of the current net neutrality rules creating distorted incentives and imbalances in value attribution, and preventing commercial/competitive outcomes that could be beneficial for ISPs and CAPs - and, importantly, consumers. In our view, an alternative, market-led, ‘commercial first’ approach to the relationship between ISPs and CAPs, with a regulatory backstop for certain scenarios, would go a long way to establishing a more equitable ecosystem for all participants.

We do not believe that the solution to this is the imposition of regulation on another part of the ecosystem in order to offset over-regulation of ISPs. Instead, the opportunity presented by the reviews of media and digital regulation should be used to optimise regulation across the media, digital and telecoms sectors.

The complexities of the internet ecosystem, and the wide variation in the types and scale of the participants in it, have shown that a ‘one size fits all’ approach to regulation is neither appropriate nor effective. In particular the nature, scale and influence (or market power) of CAPs varies substantially. Some exhibit scale and/or leverage to an extent that enables them to exert a level of control over ISPs in negotiations<sup>56</sup>; some providers of operating systems or walled gardens are able to exploit their gatekeeper positions; whilst on the other hand, there is a long tail of small, or sub-scale CAPs who have no leverage to use against other players in the value chain.

The current Regulation is insufficiently flexible to deal with this variability and has created distortions and imbalanced incentives in the ecosystem. In particular, CAPs in general have very limited incentive to deliver traffic in an efficient way and some have little or no compulsion to negotiate, let alone to enter into more equitable arrangements with ISPs. This is exacerbated by the fact that ISPs have little to no leverage over the very largest CAPs and are, in any event, prevented by the Regulation from taking action to address the issue (for example by managing traffic or entering into commercial agreements with CAPs). At the same time, ISPs also face restrictions on the agreements that they can enter into with their customers.

The Regulation, in effect, imposes an explicit requirement on ISPs to carry CAPs’ traffic (which, in effect, is akin to a significant market power condition, despite ISPs never having been formally designated as possessing such power). However, there is no equivalent ‘provision’ obligation on CAPs, despite certain of them clearly exhibiting a very high level of market power.

The problem is concentrated, and is most acute with the very largest/most powerful CAPs or those who generate the largest amounts of traffic. This suggests that a differentiated approach is warranted for these players.

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<sup>54</sup> Communications Act 2003, Section 3(3)(a)

<sup>55</sup> For example, the *Broadband Speeds Code of Practice* and *Open Internet and Traffic Management Code of Practice*.

<sup>56</sup> For example, some possess ‘must have’ content and deep customer relations which, combined with their size, allows them to negotiate with ISPs from a position of significant strength

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We believe that a model similar to that advocated by the Government and the Competition and Markets Authority in their development of a new, pro-competition regime for digital markets, alongside a 'commercial first' emphasis, would work well<sup>57</sup>. That is, where CAPs meet certain pre-determined, transparent and proportionate criteria, they would be subject to an obligation to negotiate with ISPs and not to unreasonably withhold agreement to fair and reasonable commercial arrangements (with Ofcom as the dispute resolution body).

The focus of such a model should be commercial negotiation, with the regulatory backstop of a formal requirement to negotiate/not unreasonably withhold commercial agreement being a last resort to be used only in exceptional cases. Put simply, market dynamics should be afforded the freedom to play out.

We do not believe that the regulatory backstop would constitute a burden for Ofcom, ISPs or CAPs. Indeed, we believe that the additional commercial freedom would permeate across the value chain and would provide sufficient incentives for ISPs and CAPs to reach agreement via commercial negotiations. Moreover, regulatory backstops in the form that we are proposing are tried and tested; Ofcom and the industry are familiar with them and they can work well. They are, in addition, invariably accompanied by guidance that acts to further facilitate and incentivise commercial agreement. Indeed, in our experience, regulatory backstops are rarely used, given, in part at least, that a commercially negotiated outcome is generally preferable to the cost, resource and time demands of a dispute.

A good example of this concept is the regulatory backstop in place for the Access to Infrastructure Regulations (the "**ATI Regulations**")<sup>58</sup>. The guidance accompanying the ATI Regulations sets out Ofcom's role as the dispute resolution body and makes clear that this function is a last resort. Indeed, the guidance is positioned as intending to: "*...assist Parties in reaching commercial agreement on issues falling under the ATI Regulations*"<sup>59</sup>. To date, this backstop has not been used.

This type of model would, in our view, play a key role in re-balancing incentives across the value chain and improving efficiencies. Moreover, it would enable ISPs and CAPs to enter into new commercial agreements, increasing the potential for innovation and delivering benefits to consumers and the UK in general.

Clearly, the finer detail of such an approach needs to be explored and discussed – and we would welcome further dialogue with Ofcom and Government in this regard. However, as a concept, we believe that it represents a fair and equitable approach for all in the value chain.

### 6.3 - Approach to assessing conduct

Critical to the effective functioning of the broader model that we have set out above is the manner in which it is executed and enforced. As we have stated elsewhere, the current regime is characterised by a default narrow 'letter of the law' approach to enforcement of the rules alongside, in some cases, an inconsistent application of greater consideration of the actual effects of any conduct or commercial practices under scrutiny.

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<sup>57</sup> <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation#:~:text=Strategic%20Market%20Status%20will%20be,on%20competition%20in%20the%20UK>

<sup>58</sup> The Communications (Access to Infrastructure) Regulations 2016

<sup>59</sup> Ofcom *Guidance under the Communications (Access to Infrastructure) Regulations 2016* (December 2016)

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We think that an outcomes, or 'effects based' approach to considering ISPs' conduct is far more conducive to establishing a fair and equitable internet ecosystem. Under this approach, practices that deliver consumer benefits, have an immaterial impact on outcomes, or for which non-beneficial effects are outweighed by consumer benefits, should be permissible, and intervention would only occur in response to clear evidence of harm.

Ofcom already deploys this approach to a certain extent (for example by taking a permissive approach to traffic management in transport installations) but, as we have set out elsewhere, there are other examples of where rigid application of high-level net neutrality principles actually acts to the detriment of consumers.

We therefore urge Ofcom to build on its exploration of the benefits of changing the law and, working with stakeholders, make explicit recommendations to Government for reform of the Regulation.