Google's response to Ofcom's Call for Evidence: "Net neutrality review"

2 November 2021

Introduction

Google welcomes this opportunity to respond to Ofcom's Call for Evidence (CFE)[1] regarding the efficacy of the UK's net neutrality framework. The current rules,[2] based on the EU Open Internet Access Regulation (EU Regulation)[3] and associated BEREC Guidelines,[4] have been demonstrably successful in balancing the needs of consumers and industry stakeholders, while promoting free expression and competition. For these reasons, Google recommends they be retained substantially in their current form.

In general, Ofcom should avoid taking action that would disrupt the UK's thriving digital ecosystem. Regulatory stability best supports innovation and investment, as highlighted by the universal criticism of fluctuating net neutrality regulation in the United States. By contrast, Ofcom and national regulatory agencies (NRAs) in the EU have consistently enforced open internet protections,[5] creating positive outcomes for industry and consumers over the last six years. It would be a mistake to deviate from this successful approach.

Certainly, refinement of the UK's net neutrality rules may be warranted over time. In light of operator interest and confusion caused by recent decisions of the Court of Justice of the European Union (CJEU), Ofcom may wish to consider clarifying its rules with respect to zero-rating of particular content and applications. Specifically, Ofcom may wish to issue guidance that nondiscriminatory programmes which treat similar applications in a similar fashion are

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[1] Ofcom, *Net neutrality review: Call for evidence* (7 Sep. 2021), *available at* https://www.ofcom.org.uk/__data/assets/pdf_file/0015/224142/call-for-evidence-net-neutrality-review.pdf (*CFE*).

[2] *See* The Open Internet Access (EU Regulation) Regulations 2016, SI 2016/607, *available at* https://www.legislation.gov.uk/uksi/2016/607/contents/made (as amended by SI 2018/1243).

[3] 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 on roaming on public mobile communications networks within the Union, *available at* https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32015R2120 (*EU Regulation*).

[4] Body of European Regulators for Electronic Communications (BEREC), *BEREC Guidelines on the Implementation of the Open Internet Regulation*, BoR (20) 112, *available at* https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/9277-berec-guidelines-on-the-implementation-of-the-open-internet-regulation (*BEREC Guidelines*).

[5] *See* BEREC, *Report on the implementation of Regulation (EU) 2015/2120 and BEREC Net Neutrality Guidelines*, BoR (20) 166, *available at* https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9440-berec-report-on-the-implementation-of-regulation-eu-20152120-and-berec-net-neutrality-guidelines.

permissible. Ofcom also may wish to address questions around implementation of the specialised services permission that exists within the net neutrality framework.

Below, we develop these points in response to Ofcom's specific questions.

Responses to CFE Questions

Question 1: Functioning of the net neutrality framework

(a) Which aspects of the current net neutrality framework do you consider work well and should be maintained? Please provide details including any supporting evidence and analysis.

(b) Which aspects, if any, of the current net neutrality framework do you consider work less well and what impact has this had? What, if any, steps do you think could be taken to address this and what impact could this have? Please provide details including the rule or guidance your response relates to and any supporting evidence or analysis.

On the whole, the UK's net neutrality framework is working well. The rules have effectively facilitated an open internet for consumers, creators, and application developers, while giving internet service providers (ISPs) strong incentives to upgrade their services. In 2020, 96% of UK households had internet access, up from 89% in 2016.[6] According to Ofcom's annual reporting, average "peak time" download speeds nearly doubled from 33.6 Mbps in 2016 to 62.9 Mbps in 2019.[7] These speeds held up even throughout the heavy traffic demands of the COVID-19 pandemic.[8] Households are finding the internet more useful than ever before, with a record 89% of adults using it daily or almost every day in 2020.[9]

UK consumers have access to better broadband options than ever before, and affordability is improving. Ofcom has found that about 40% of UK homes already have access to gigabit-capable broadband.[10] And in recent years, the price difference between standard and high-speed services has shrunk: Promoted prices of dual-play standard broadband services remained flat between 2019 and 2020, while prices for superfast or ultrafast services fell by

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[6] *See* Office for National Statistics, *Dataset: Internet access – households and individuals*, *at* https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/datasets/internetaccesshouseholdsandindividualsreferencetables (last visited 1 Nov. 2021) (*ONS Dataset*).

[7] *See* Ofcom, *Monitoring compliance with the EU Open Internet Regulation: A report to the European Commission and BEREC*, at Figure 1 (8 July 2020), *available at* https://www.ofcom.org.uk/__data/assets/pdf_file/0033/197709/net-neutrality-report-2020.pdf (*2020 Ofcom Compliance Report*).

[8] *Id.* ¶ 2.15.

[9] *See ONS Dataset*.

[10] Ofcom, *Connected Nations Update: Summer 2021*, at 3 (9 Sep. 2021), *available at* https://www.ofcom.org.uk/__data/assets/pdf_file/0013/224212/connected-nations-summer-2021.pdf.

11%. In some cases, superfast services were cheaper than their standard broadband equivalents.[11]

Google anticipates further improvements as major fixed and mobile providers build out fibre and 5G networks. Many operators have announced such plans, including OpenReach, which is committing £15 billion towards an "ultrafast, ultra-reliable full fibre broadband network to 25 million premises."[12] Other full fibre ISPs, known as "AltNets," have likewise earmarked over £10 billion for builds covering urban, suburban, and rural areas.[13] These planned deployments are evidence that providers believe the current business environment is suitable for substantial investment—confirming that the net neutrality rules support a healthy broadband market. Indeed, broadband has remained profitable since adoption of the EU Regulation, with annual ISP earnings showing no overall pattern of decline.[14] This is consistent with global trends in which declining revenues from voice and messaging services (which are not subject to open internet rules) are generally offset by operators' healthy revenue gains from data services (which are subject to the rules).[15]

These benefits to consumers and industry have been seen not only in the UK, but also in other countries where the EU Regulation is enforced. In 2018, BEREC found the EU open internet framework to be "working well," with no need for substantial changes.[16] Indeed, European end-

[11] Ofcom, *Pricing trends for communications services in the UK*, at 3 (22 July 2021), *available at* https://www.ofcom.org.uk/__data/assets/pdf_file/0013/222331/Pricing-trends-for-communications-services-in-the-UK.pdf.

[12] Openreach, *Openreach to waive connection fees for low-income households*, 7 Sep. 2021, https://www.openreach.com/news/openreach-to-waive-connection-fees-for-low-income-households/.

[13] Mark Jackson, *AltNet Full Fibre ISPs Target 29.9 Million UK Premises by 202*5, ISPreview.co.uk, 8 June 2021, https://www.ispreview.co.uk/index.php/2021/06/altnet-full-fibre-isps-target-29-9-million-uk-premises-by-2025.html.

[14] *See, e.g.,* Virginia Media's annual reports, *available at* https://www.libertyglobal.com/investors/virgin-media/ (last visited 1 Nov. 2021) (showing year-on-year revenue increases from 2014 to 2019); Sky's annual reports, *available at* https://www.skygroup.sky/reports (last visited 1 Nov. 2021) (showing year-on-year revenue increases from 2014 until acquisition by Comcast in 2018); BT's annual reports, *available at* https://www.bt.com/about/investors/financial-reporting-and-news/annual-reports (last visited 1 Nov. 2021) (showing year-on-year revenue increases in 2016 and 2017, following enactment of the EU Regulation).

[15] *See* International Telecommunication Union, *Economic impact of OTTs on national telecommunication/ICT markets* (2020), at 14, *available at* https://www.itu.int/en/myitu/Publications/2020/07/09/15/47/Economic-Impact-of-OTTs-on-National-Telecommunication-and-ICT-Markets (*ITU Report*); *see also, e.g.,* Transcript of Q3 2021 AT&T Earnings Call, 21 Oct. 2021, at 4, *available at* https://investors.att.com/~/media/Files/A/ATT-IR-V2/financial-reports/quarterly-earnings/2021/q321/final-3q21-earnings-transcript.pdf (stating that AT&T has reached a "major inflection point" in its consumer wireline business, such that "broadband revenue growth now surpasses legacy declines").

[16] BEREC, *BEREC Opinion for the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines*, BoR (18) 244, at 2, *available at* https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/8317-berec-opinion-for-the-evaluation-of-the-application-of-regulation-eu-20152120-and-the-berec-net-neutrality-guideline (*2018 BEREC Opinion*).

users enjoy some of the best broadband services in the world, with an average speed above 90 Mbps in Western Europe, the highest of any global region.[17]

As Ofcom recognises, the COVID-19 pandemic has "accentuated and accelerated" trends of "increasing demand for capacity and growing quality of service expectations," as people use the internet to work or study from home, access public and medical services, stay in touch with family and friends, and enjoy entertainment.[18] Yet despite considerable surges in online traffic, broadband networks have functioned smoothly within a neutral framework. Government and industry have taken steps to prevent outages, including the development of technical standards for network operation in times of congestion, implementing short-term traffic management measures where objectively justified by technical criteria, and adding capacity to existing infrastructure—all consistent with the open internet rules.[19]

BEREC similarly has reported no major outages or disruptions in any EU Member State since the start of the pandemic. In fact, it found that networks have remained "remarkably resilient . . . even for extended periods during the strictest lockdowns."[20] As BEREC has noted, the EU Regulation authorises "exceptional traffic management measures, *inter alia*, to prevent impending network congestion and to mitigate the effects of exceptional or temporary network congestion, always under the condition that equivalent categories of traffic are treated equally," and only for as long as necessary.[21] But with networks across Europe still functioning well, no such "exceptional traffic management measures" have been necessary.

These successes demonstrate that the net neutrality rules are working as intended. As such, we would recommend maintaining the current framework, to avoid disruption to the UK's thriving digital ecosystem. We believe that regulatory stability is critical to broadband investment, as discussed further under Question 4 below.

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[17] Cable.co.uk, *Worldwide broadband speed league 2021*, https://www.cable.co.uk/broadband/speed/worldwide-speed-league/#speed (last visited 1 Nov. 2021).

[18] *CFE* ¶ 3.3.

[19] Ofcom, *Connected Nations 2020: UK Report*, at 11, 57-58 (17 Dec. 2020), *available at* https://www.ofcom.org.uk/__data/assets/pdf_file/0024/209373/connected-nations-2020.pdf (*2020 Connected Nations Report*).

[20] BEREC, *Draft BEREC Report on COVID-19 crisis – lessons learned regarding communications networks and services for a resilient society,* BoR (21) 88, at 32, *available at* https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9969-draft-berec-report-on-covid-19-crisis-lessons-learned-regarding-communications-networks-and-services-for-a-resilient-society.

[21] *See* BEREC, *Press Release: Coping with the increased demand for network connectivity due to the Covid-19 pandemic*, BoR (20) 71, at 1, *available at* https://berec.europa.eu/eng/document_register/subject_matter/berec/press_releases/9237-press-release-coping-with-the-increased-demand-for-network-connectivity; *see also EU Regulation* at Recital 15 & Art. 3(3).

Question 2: Use cases, technologies, and other market developments

(a) What, if any, specific current or future use cases, technologies or other market developments have raised, or may raise, particular concerns or issues under the net neutrality framework?

(b) What, if any, steps do you think could be taken to address these concerns or issues and what impact could this have? Please provide details of the use case, technology or market development and the rule or guidance your response relates to, as well as any supporting evidence and analysis.

Google believes that the current net neutrality framework provides appropriate flexibility to accommodate new and future technologies and use cases. Recital 2 of the EU Regulation sets out a principle of technological neutrality, such that the rules "neither impose nor discriminate in favour of the use of a particular type of technology."[22] In the EU, BEREC has thus refrained from tailoring its Guidelines too narrowly.[23] Ofcom should maintain a similar approach and avoid tailoring its rules to any particular technology or use case, so as to maintain their relevance and efficacy for the entire industry over the long term.

For example, Ofcom has "not been able to identify a case study or a situation where the current rules would present a realistic challenge to the introduction of new 5G services."[24] Likewise, BEREC has found that the rules leave "considerable room" for implementation of new technologies, including 5G applications like network slicing, 5QI, and Mobile Edge Computing.[25] In the absence of clearly demonstrated need for a new approach, Ofcom should avoid promulgating guidance that favours specific technologies or potentially limits application of the rules to future innovations.

Question 3: Value chain

Are there particular business models or aspects of the internet or other value chains that you think we should consider as part of our review? Please explain why, providing details including any supporting evidence or analysis.

Ofcom states that one of its key considerations in reviewing the net neutrality framework is "encouraging investment and innovation" in relevant markets.[26] We believe that a robust open internet framework is aligned to this goal. As recognised by regulators around the world, net neutrality rules safeguard the "virtuous cycle" of innovation, through which innovations at the network edge increase consumer demand, driving and funding network investments that in turn

[22] *EU Regulation*, Recital 2.

[23] *See, e.g., 2018 BEREC Opinion* at 15.

[24] *2020 Ofcom Compliance Report* ¶ 3.34.

[25] *2018 BEREC Opinion* at 2.

[26] *CFE* ¶ 2.14.

spark further investments at the edge.[27] This cycle can break down, however, where ISPs erect (or might erect) barriers to market entry, such as blocking, throttling, and paid prioritisation.[28] By preemptively foreclosing these harmful practises, open internet rules maintain the health of the internet along with a positive environment for investment across all parts of the digital ecosystem. Nondiscriminatory treatment of internet traffic over last-mile networks is thus tied to benefits like economic growth, innovation, competition, free expression, and, inextricably, broadband investment and deployment.

For example, ISPs sometimes suggest that they should be allowed to earn additional revenue by selling content and application providers priority status in traffic delivery, i.e., the right to go to the head of the line at congested or otherwise limited points in the network. Article 3(3) and Recital 8 of the EU Regulation prohibit such paid prioritisation that is not justified by objective, technical network management criteria, and for good reason. When there is network scarcity, prioritising some traffic necessarily degrades delivery of other traffic: The favoured traffic is literally moved ahead of the disfavoured traffic. If ISPs were allowed to charge for such privileged delivery, then they would have an incentive to maintain or create scarcity (such as limited bandwidth and/or high latency) in order to make their prioritised offerings valuable to potential customers. Conversely, upgrades to basic internet offerings would become less likely because they would endanger whatever revenue the ISP earns from selling prioritised services. For consumers, the result of paid prioritisation would be lower speeds and less capability for general-access broadband. For smaller application developers and start-ups, who likely lack the ability to pay for fast-lane treatment, the result would be a new barrier to successful market entry as consumers experience superior network performance when using prioritised rival applications. For the internet overall, the result would be less equality and less confidence to invest and innovate.

Maintaining the nondiscriminatory open internet, on the other hand, encourages capital expenditures by edge providers and networks alike. All these participants benefit from popular services and applications.[29] For instance, demand for streaming video such as Google's YouTube content has driven consumer upgrades to higher broadband speeds, generating additional revenue for ISPs. A 2013 study showed that half of users who used their connections

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[27] *See* FCC, *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, ¶ 7 (2015) *available at* https://www.fcc.gov/document/fcc-releases-open-internet-order (*2015 FCC Order*); *see also* BEREC, *BEREC high-level Opinion on the European Commission's proposals for a review of the electronic communications Framework*, BoR (16) 213, at 6, *available at* https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/6615-berec-high-level-opinion-on-the-european-commissions-proposals-for-a-review-of-the-electronic-communications-framework.

[28] *See 2015 FCC Order* ¶ 78 *et seq.*

[29] *See ITU Report* at 13 (explaining that the relationship between network operators and edge providers is "not a 'zero sum game' but rather a symbiotic relationship").

to upload video had upgraded their connection within the prior year.[30] Similarly, BT has reported that its EE network saw demand for 5G data service increase by "40% month on month between October and December 2020," with YouTube, Facebook, Netflix, and Instagram as "still the most popular services on EE's 5G network."[31] Increased demand has led a considerable number of end-users to upgrade their access services, as reflected in Ofcom's 2020 Connected Nations report: "[F]or those premises that are able to take superfast broadband or a higher speed (96% of all premises in the UK), around 60% / 16.7million of them do so," an increase from around 57% in 2019.[32]

Question 4: International case studies

Are there any international case studies or approaches to net neutrality that you think we could usefully consider? Please include details of any analysis or assessments.

A. Net neutrality in the United States

As discussed in our response to Questions 1-3 above, we would encourage Ofcom to avoid disrupting the UK's successful open internet framework. In particular, Ofcom should resist calls to roll back protections that have facilitated benefits for both consumers and industry not only in the UK, but in the EU as well.

Regulatory stability is critical to the health of the digital ecosystem. The United States provides a cautionary contrast to Europe and shows what can happen when a workable regime is disrupted. In a partisan environment, the US Federal Communications Commission (FCC) has twice adopted, but then lifted, net neutrality protections at the federal level, with limited rules in effect from 2010 to 2014[33] and a stronger framework (generally similar to the EU Regulation) in place from 2015 to 2018.[34] The second repeal of the federal rules led to further instability and fragmentation. Since 2018, approximately a dozen of the 50 US states have adopted net neutrality requirements of their own.[35] Most significantly, the State of California has enacted a

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[30] ICM Research, *Broadband Consumption Survey*, Figure 1.3 (June 2013), *available at* http://www.ccianet.org/wp-content/uploads/2013/10/Broadband-Consumption-Survey-Exec-Summary.pdf.

[31] Marc Allera, *An extraordinary year shows current net neutrality rules won't help create the digitally-inclusive society we all want*, BT, 9 Mar. 2021, https://newsroom.bt.com/an-extraordinary-year-shows-current-net-neutrality-rules-wont-help-create-the-digitally-inclusive-society-we-all-want-to-see/.

[32] *2020 Connected Nations Report* at 27.

[33] *See* FCC, *In the Matter of Preserving the Open Internet & Broadband Industry Practices*, Report and Order, 25 FCC Rcd. 17905 (2010), *available at* https://www.fcc.gov/document/preserving-open-internet-final-rule.

[34] *See 2015 FCC Order*.

[35] *See*, *e.g.,* Colorado Senate Bill 19-078, *available at* https://leg.colorado.gov/sites/default/files/2019a_078_signed.pdf; New York Executive Order No. 175, *available at* https://www.governor.ny.gov/sites/default/files/atoms/files/EO_175.pdf; Vermont Act 169, *available at* https://legislature.vermont.gov/Documents/2018/Docs/ACTS/ACT169/ACT169%20As%20Enacted.pdf;

framework comparable to the FCC's 2015 rules.[36] This State framework has been enmeshed in litigation virtually since its enactment.

The crux of the US political conflict is a regulatory issue not present in the UK: the FCC's reclassification of broadband internet access as a common carriage service subject to rate and service regulation under Title II of the federal Communications Act, 47 U.S.C. §§ 201-276. In 2015, the FCC deemed common carriage classification necessary to provide a legal foundation for net neutrality under the current US statutes, and a reviewing court upheld the FCC's approach.[37] However, ISPs strongly opposed that decision, arguing that Title II is a "destabilizing and counterproductive means of pursuing . . . important objectives."[38]

Notably, US ISPs' objections are not to net neutrality itself. Indeed, essentially all stakeholders in the US agree that stable federal open internet rules are desirable. Broadband providers and interest groups have repeatedly expressed their agreement with having net neutrality requirements, saying, for example:

- **AT&T:** "We have long been committed to the principles of an open Internet . . . and strongly advocate for Congress to adopt federal legislation . . . providing clear, consistent, and permanent net neutrality rules for everyone to follow."[39]
- **Charter Communications:** "We urge Congress to pass new legislation that preserves an open internet and ensures a regulatory framework made for the 21st century[.]"[40]
- **Comcast:** "[W]e really must have bipartisan congressional legislation to permanently preserve and solidify net neutrality protections for consumers and to provide ongoing certainty to ISPs and edge providers alike."[41]

Washington Substitute House Bill 2282, *available at* https://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/2282-S.SL.pdf.

[36] *See* California Senate Bill No. 822, *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB822.

[37] *See 2015 FCC Order* ¶ *49; United States Telecom Assoc. v. FCC*, No. 15-1063 (D.C. Cir. 2016).

[38] Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, to Marlene H. Dortch, Sec'y, FCC, in GN Docket No. 14-28 at 1 (filed 12 May 2014), *available at* https://ecfsapi.fcc.gov/file/7521122413.pdf.

[39] AT&T Blog Team, *Impact of California 'Net Neutrality' Law on Free Data Services*, 17 Mar. 2021, https://www.attpublicpolicy.com/congress/impact-of-california-net-neutrality-law-on-free-data-services/.

[40] Charter Communications, *Charter Remains Committed to an Open Internet; Title II is Not Net Neutrality*, 11 June 2018, https://policy.charter.com/blog/charter-remains-committed-open-internet-title-ii-not-net-neutrality.

[41] David L. Cohen, *It's Time for Congress to Act And Permanently Preserve the Open Internet*, Comcast, 14 Dec. 2017, https://corporate.comcast.com/stories/its-time-for-congress-to-act-and-permanently-preserve-the-open-internet.

- **Verizon:** "We continue to believe that the right answer is for Congress to move forward on legislation that once and for all adopts clear, enforceable, and strong net neutrality protections."[42]

Thus, there is widespread support in the US for a stable net neutrality regime like the UK's. US ISPs agree with edge providers and civil society that enforceable neutrality requirements promote a healthy climate for their businesses. Yet the US Congress has been unable to consummate the new legislation that all internet stakeholders seek.

Ofcom should take heed of this unwanted stalemate in the US. It should resist calls to roll back existing net neutrality rules or guidance in a way that would disrupt the UK's successful framework and, potentially, trigger years of instability and uncertainty like that seen in the US.

B. The impact of net neutrality rules on investment

Instability in the US net neutrality regime has had one benefit: It allows empirical testing of claims that open internet rules discourage investment in broadband. As noted above, the FCC established net neutrality protections throughout two periods: 2010 to 2014, and 2015 to 2018. In the three years following adoption of its 2010 rules, US "broadband providers invested $212 billion[,] . . . more than in any three year period since 2002."[43] Following the restoration of rules in 2015, there was likewise "an overall increase in aggregate broadband capital expenditures and deployment (in urban and rural areas alike) by the publicly traded ISPs that report these numbers."[44] The entire period of 2014-2019 saw steady year-on-year improvements to wired broadband speeds, coverage, and competition as ISPs continued to build out their networks.[45]

Nor did the recent repeal of neutrality protections lead to any measurable upswing in capital expenditures. Aggregate US broadband investment actually fell in the wake of the 2018 repeal, and US ISPs announced thousands of job cuts.[46] From US ISPs' public disclosures, it is clear

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[42] Rich Young, *Verizon supports FCC proposal to remove outdated utility regulation of broadband*, Verizon, 26 Apr. 2017, https://www.verizon.com/about/news/verizon-supports-fcc-proposal-remove-outdated-utility-regulation-broadband.

[43] *2015 FCC Order* ¶ 2.

[44] Brief of Access Now, Mozilla Corp. et al. as Amici Curiae Opposing Plaintiffs' Renewed Motions for Preliminary Injunctions at 2, *American Cable Association, et al. v. Becerra*, No. 2:18-cv-02684 (E.D. Cal. 2020), *available at* https://www.accessnow.org/cms/assets/uploads/2020/09/Amicus-Brief_30-September-2020.pdf (*Access Now Brief*).

[45] Written Testimony of Matthew F. Wood, Vice President of Policy and General Counsel, Free Press Action Fund, before the Committee on Energy and Commerce, US House of Representatives at 26-28 (filed 12 Mar. 2019), *available at* https://www.freepress.net/sites/default/files/2019-03/free_press_action_testimony_on_save_the_internet_act.pdf.

[46] *Access Now Brief* at 2; Jon Brodkin, *AT&T slashed billions from network spending, cut tens of thousands of jobs*, Ars Technica, 30 Jan. 2020, https://arstechnica.com/information-technology/2020/01/att-slashed-billions-from-network-spending-cut-tens-of-thousands-of-jobs/.

that their investment decisions are determined by other factors like new technologies, interest rates, competitive pressure, and public demand for communications services.[47]

The reality is that a legal guarantee of neutral delivery *encourages* investment in new and improved content and applications because superior edge services are able to compete on their own merits in the market. ISPs in turn benefit from increased demand for their services and associated revenue growth, without any apparent diminution of ISPs' incentives to improve their networks.

Question 5: Guidance and approach to compliance and enforcement

Are there specific challenges with the existing guidance that we should be aware of (e.g. ambiguity, gaps)? Assuming the rules stay broadly the same, which areas could Ofcom usefully provide additional clarity or guidance on? Please provide details.

Ofcom's guidance on the EU Regulation is clear, and Google believes that no modifications or clarifications are required. Should Ofcom wish to provide further guidance, however, two topics—zero-rating and specialised services—could warrant attention.

A. Zero-rating

Ofcom may wish to further illuminate what forms of zero-rating are permissible under the current rules, particularly in light of the recent decision of the CJEU regarding the "Vodafone Pass" and "Stream On" programmes formerly offered by Vodafone and Telekom Deutschland in the EU.[48]

In the past, zero-rating programmes have been subject to case-by-case assessment by NRAs, taking into consideration a wide range of factors including openness, scale, transparency, impact on competition, number of complaints, and more.[49] The more "open" a programme is, the less likely it is to "give rise to concerns."[50]

The CJEU's decisions cast doubt on this approach. In concluding that Vodafone's and Telekom Deutschland's zero-rated offerings were "incompatible with EU law,"[51] the CJEU appeared to narrow the category of offerings that pass muster under the EU Regulation. Industry is currently

[47] Brief of Access Now, Mozilla Corp. et al. as Amici Curiae Supporting Defendant-Appellee and Affirmance at 9, *ACA Connects v. Bonta*, No. 21-15430 (9th Ct.), *available at* https://blog.mozilla.org/netpolicy/files/2021/05/FINAL-Amicus-Brief-Access-Now-et-al-ACA-v-Bonta.pdf.

[48] *See* CJEU, *'Zero tariff' options are contrary to the regulation on open internet access*, Press Release No. 145/21, 2 Sep. 2021, *available at* https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-09/cp210145en.pdf (summarising judgements in Cases C-854/19, C-5/20, and C-34/20 regarding Vodafone and Telekom Deutschland) (*CJEU Press Release*).

[49] *See BEREC Guidelines* at Annex (setting out assessment criteria for zero-rating and similar offers).

[50] *BEREC Guidelines* ¶ 42.

[51] *See CJEU Press Release* at 1.

uncertain what types of zero-rating, if any, are allowed within the EU under the Court's decisions. The implications for operations in the UK are likewise unclear.

Google considers that zero-rating can be beneficial for end-users and for competition when it is implemented in a manner that treats all traffic and providers fairly. Indeed, Ofcom has indicated support for zero-rating offerings that are "clearly aimed at supporting consumers during challenging periods," and do not limit the rights of end-users.[52] Zero-rating also can help broadband providers attract new customers, and provides a low-risk way for consumers to try new or unfamiliar content and applications.

To preserve these benefits, Ofcom may wish to issue concrete guidance on what forms of zero-rating are permitted in the UK. The current assessment criteria, based on the 2016 BEREC Guidelines,[53] may not provide sufficient regulatory predictability for ISPs hoping to bring offerings to market. Further, the BEREC has indicated that it intends to revisit its own current guidance for zero-rating in light of the CJEU's 2021 decisions.[54]

One approach to removing the existing uncertainty would be to adopt a rule that *technically similar traffic should be treated similarly*. This follows from Article 3(3) of the EU Regulation, which requires that access providers must "treat all traffic equally . . . irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used." Article 3(3) explains with respect to traffic management measures that "[i]n order to be deemed to be reasonable, such measures . . . shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic." The principle of treating like traffic alike can be applied to data pricing as well as network operations. Indeed, doing so would accord with the plain language of Recital 8 of the EU Regulation, which explains:

> When providing internet access services, providers of those services should treat all traffic equally, without discrimination, restriction or interference, independently of its sender or receiver, content, application or service, or terminal equipment. According to general principles of Union law and settled case-law, comparable situations should not be treated differently and different situations should not be treated in the same way unless such treatment is objectively justified.

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[52] Ofcom, *Monitoring compliance with the Open Internet Regulation: Annual report*, ¶ 3.11 (1 Nov. 2021), *available at* https://www.ofcom.org.uk/__data/assets/pdf_file/0028/227485/Monitoring-compliance-with-the-EU-Open-Internet-Regulation_2021.pdf.

[53] Ofcom, *Ofcom's approach to assessing compliance with net neutrality rules: Frameworks for assessing zero rating offers and traffic management measures for compliance with the Open Internet Regulation*, ¶¶ 3.11-3.24 (16 May 2019), *available at* https://www.ofcom.org.uk/__data/assets/pdf_file/0014/148100/ofcom-approach-net-neutrality.pdf.

[54] *See* BEREC, *Call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines*, BoR (21) 149, *available at* https://berec.europa.eu/files/document_register_store/2021/10/BoR_(21)_149_Call_for_stakeholder_input_final.pdf.

Under a rule requiring similar treatment of technically similar traffic, an ISP could zero-rate categories of applications such as video streaming apps or audio streaming apps. EE's Video Pass and Music Pass add-ons, which have received Ofcom approval, are examples of this sort of programme.[55] Alternatively, an operator might allow customers to pick their own zero-rated applications from a technically defined category of eligible apps. Plans that zero-rate "social" apps are currently popular in the EU, and these offerings could be permissible as well if eligibility for inclusion in the plan is based on objective characteristics of the app's traffic, such as whether the traffic is predominantly small quantities of text (to allow users to exchange text messages) or predominantly video bytes (to allow users to watch streaming video), rather than commercial considerations such as the app's popularity or market niche. In all cases, zero-rating programmes should be fully transparent to the ISP's customers and open to all content or application providers in the relevant technical category.

Under this approach, it would not be permissible to offer preferential pricing for a closed group of applications selected by the carrier based on its own commercial reasons. For example, Three UK's former Go Binge programme zero-rated the Apple Music, Deezer, and Soundcloud audio streaming services, the Netflix and TV Player video streaming services, and the Snapchat photo sharing service, without discernible criteria for other services in these categories to participate.[56] In the US, AT&T at one time zero-rated its own DirectTV Now video streaming service without offering similar terms to other video services; such favouritism of the operator's own affiliated services also would be impermissible under the technical-similarity standard.[57]

As applications increasingly integrate multiple features, their traffic may fit within several technical categories (for instance, text messaging, photo sharing, and video). To address this issue, ISPs should work with edge providers to determine their inclusion or exclusion from specific zero-rating programs under clear, technically based criteria. Indeed, the BEREC Guidelines encourage this today.[58]

B. Specialised services

Ofcom also may wish to develop its treatment of specialised services. In its 2018 review of the EU open internet framework, BEREC determined that ongoing "public discussion about compatibility between net neutrality and [] emerging 5G technologies" recommended stronger

[55] *See 2020 Ofcom Compliance Report* ¶¶ 3.9-3.13.

[56] *See* Three UK, *What the heck is binge-watching?*, 30 July 2017, *http://www.three.co.uk/hub/go-binge-what-is-bingeing/*.

[57] Jon Brodkin, *AT&T zero-rating of DirecTV data may violate net neutrality, FCC says*, Ars Technica, 10 Nov. 2016, https://arstechnica.com/tech-policy/2016/11/att-zero-rating-of-directv-data-may-violate-net-neutrality-fcc-says/.

[58] *See BEREC Guidelines* ¶ 42c (stating that NRAs, in assessing a zero-rating plan, should consider the extent to which an ISPs make publicly available the terms for joining the plan, as well as their contact information).

guidance on what counts as a specialised service.[59] Accordingly, in 2020 BEREC refined its guidance regarding Article 3(5) of the EU Regulation, which sets out the essential requirements that (1) the specialised service must be justified by a necessity to meet the requirements of the content or applications being delivered, for a specific level of quality, and (2) there must be sufficient network capacity to provide the specialised service in addition to any internet access services provided.[60]

Ofcom might likewise address these requirements in further guidance for industry. In particular, Ofcom could helpfully address the following questions:

- Is the ISP ultimately responsible for determining that use of the specialised service is necessary to meet a required quality of service (subject to review in an enforcement proceeding), or can this responsibility be placed elsewhere, for instance with the application provider?
- In an enforcement proceeding against an ISP, what type of evidence would Ofcom expect the ISP to provide to support such a determination of necessity?

Question 6: Annual report

Do you find Ofcom's annual monitoring report useful or are there any changes you think we could usefully make either to the content or how we communicate this?

Google has no response to this question.

Question 7: Other

Is there any other evidence or analysis that you are aware of and/or could provide to aid our review? Please provide evidence to support your responses.

Google has no response to this question.

[59] *2018 BEREC Opinion* at 11.

[60] *See BEREC Guidelines* ¶¶ 99-127.