

## **OPEN INTERNET CODE OF PRACTICE:**

### **VOLUNTARY CODE OF PRACTICE SUPPORTING ACCESS TO LEGAL SERVICES AND SAFEGUARDING AGAINST NEGATIVE DISCRIMINATION ON THE OPEN INTERNET**

#### Introduction

This voluntary code of practice puts forward a set of commitments agreed by signatories in support of the open internet. They were developed by signatories following discussions with government, the regulator, industry and broader stakeholders and building on Communications Minister Ed Vaizey MP's statement in 2011 that the concept of an open internet should be guided by three principles:

- users should be able to access all legal content
- there should be no discrimination against content providers on the basis of commercial rivalry; and
- traffic management policies should be clear and transparent.

This voluntary code of practice should be read in conjunction with the existing voluntary code of practice on traffic management transparency<sup>1</sup> and the November 2011 Ofcom statement on its approach to net neutrality<sup>2</sup>.

#### Background

The way we use the internet is changing. The internet is increasingly being used by consumers as a means to access video based services and the uptake of these relatively high bandwidth services is in turn driving the rapid growth in overall traffic levels. Meanwhile significant investments are being made in new fixed and mobile high speed access networks which will, in turn, continue to drive traffic volumes across the internet.

The potential to provide managed services that would enable a specific piece of content, service or application to be delivered without risk of degradation from network congestion is one option open for consideration by Internet Service Providers (ISPs). Such services are still at a very early stage and it is difficult to predict how widely they will be offered or used. These services could provide real consumer benefit in terms of improved experience however the emergence of managed services does raise questions about what their impact will be on best efforts internet access and whether their emergence could lead to additional unintended outcomes that would be less welcome.

Concern about these issues has led to increased focus on the traffic management policies employed by ISPs to help meet and manage demand on their networks. Traffic management is not a new phenomenon but refers to a range of practices that have long been employed by ISPs to make efficient use of their networks and help provide a good experience for customers.

In this context, several issues have been raised, including:

- the importance of providing clear information to consumers about traffic management practices that could be relevant to the service choices they make

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<sup>1</sup> [www.broadbanduk.org/trafficmanagementtransparency](http://www.broadbanduk.org/trafficmanagementtransparency)

<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/net-neutrality/statement/statement.pdf>

- the continued ability of consumers to be able to access legal content, applications and services of their choice through products offered by ISPs
- the risk that any negative discrimination undertaken by ISPs could have harmful impacts on providers of content, applications and services available over the internet
- the potential overall impact of a new managed services market on “best efforts” internet access and the ability of the internet to remain as an open platform for innovation

In November 2011 Ofcom published a document setting out its views on these issues. In this document Ofcom recognised the positive role that traffic management can play in the internet’s success, increasing the efficiency with which operators manage network capacity. It also acknowledged that traffic management could be used to support new innovative managed services that will be of benefit to consumers, such as high quality IPTV services, prioritised over other traffic.

Ofcom however also recognised that certain uses of traffic management could potentially lead to some undesirable outcomes. For example, the use of traffic management to target and degrade specific and alternative services and to prevent consumers from being able to access the legal services, content and applications of their choice over the internet.

Ofcom further highlighted the importance of best efforts access to the internet in supporting innovation and would be concerned if ISPs were to prioritise managed services in a manner that left insufficient capacity for best-efforts access to the open internet. Ofcom nevertheless argued that its approach would be to seek for the benefits of both best efforts access and managed services to co-exist. However it acknowledged that ensuring the on-going ability of best efforts access to support innovation would need to be kept under review as managed services may evolve in the market.

Throughout Ofcom’s discussion, the importance of being transparent about the nature and elements of an ISP’s traffic management policy and the level of competition in the market were also underlined as essential to supporting positive outcomes.

Ofcom did not recommend the need for any regulatory intervention to ensure any specific outcomes in November 2011. Indeed the next steps Ofcom outlined all involve continual monitoring of activity in the market to ensure any issues that need to be addressed are identified.

Ofcom committed to monitoring:

- progress in delivering transparent information to consumers about traffic management practices, keeping under review the possibility of intervening more formally
- the ongoing quality of best efforts internet access and keeping the possibility of introducing a minimum quality of service under review
- the prevalence and nature of products which block services in order to determine whether this would prompt any further intervention

Signatories to this voluntary code of practice believe that the approach set out by Ofcom is broadly correct. The evolution of the managed services market is at a very early stage and the collective impact of potential innovation is impossible to predict and evaluate. Moving at this stage to define specific rules surrounding the evolution of unknown services would be premature and would be likely to chill innovation in services that could deliver significant consumer benefits; restrict consumer choice; inhibit efficiency; and possibly distort the commercial position between ISPs and content, service and application providers. Nevertheless some proactive steps can be taken at this stage to help ensure that innovation

leads to positive market outcomes and the positive coexistence of managed services with best efforts internet access.

Ensuring robust competition and providing effective transparent information about traffic management practices to users are viewed by signatories of this code as the key elements of an effective approach to these issues. However the signatories also believe it is important to set out at this stage their commitments with regard to ensuring access to legal services and safeguarding against negative discrimination towards the content or application(s) of specific providers.

## The Code of Practice

Signatories to this code agree to make the following commitments regarding access to legal services, safeguarding against negative discrimination and supporting traffic management transparency. These are rooted in practical commitments that individual ISPs are able to make. These commitments should be read in accordance with the following explanatory section regarding their application in practice.

- 1. Signatories to this code support the concept of the open internet and the general principle that legal content, applications and services, or categories thereof should not be blocked.**

**Whilst products that offer full internet access will be the norm, in order to support product differentiation and consumer choice, ISPs retain the ability to offer alternative types of products. In instances where certain classes of legal content, applications and/or services are unavailable on a product signatories to this code will:**

- i. Not use the term “internet access” to describe or market such products; and**
  - ii. Ensure that any restrictions are effectively communicated to consumers, building on the commitments made in the transparency code of practice.**
- 2. Signatories to this code realise the positive impact some forms of discrimination could have in supporting innovation and choice and retain the right to develop and offer managed services. In recognising however that some forms of discrimination may be harmful, signatories undertake that traffic management will not be deployed in a manner that targets and degrades the content or application(s) of specific providers. Signatories also recognise the importance of best efforts internet access being a viable choice for consumers alongside any managed services that might be developed and offered.**
  - 3. Signatories support the provision of clear and transparent traffic management policies as outlined in the voluntary code of practice for traffic management transparency.**

## What these commitments mean in practice

**Commitment 1** means that all signatories to this code will ensure that products that support full internet access, i.e. services that permit a consumer to access any content, applications and/or service(s) that are lawfully available on the internet are the norm within their portfolio of products.

In order to support product differentiation and consumer choice, ISPs retain the ability to offer alternative products. However, in instances where a product does not support full internet access, i.e. where certain classes of content, applications and/or services are blocked, the term “internet access” will not be used to describe or market such products. ISPs also commit to effectively communicating any restrictions on such products.

In setting out **Commitment 2**, ISPs retain the ability to deploy reasonable traffic management practices over their networks. Such practices might include:

- managing congestion on its network
- blocking services it is required to do so by law or a court order
- blocking sites and services included on the Internet Watch Foundation list
- deploying age verification/child protection/parental control tools for its consumers
- supporting the delivery of managed services
- ensuring elements of a consumer’s contract are observed (e.g. data caps, download limits, heavy user policy)
- safeguarding the security and integrity of its network

Commitment 2 aims to prevent negative discrimination whereby an ISP targets and degrades the content or application of a specific provider(s). Commitment 2 was developed to address this potential type of negative behaviour espoused by the Minister when he articulated the principle of “no discrimination against content providers on the basis of commercial rivalry”.

As set out in **Commitment 3** and the voluntary code of practice on traffic management transparency, ISPs remain committed to supporting the provision of clear and transparent information about their traffic management practices.

## How the commitments will be monitored

Signatories believe that this set of voluntary commitments complement the approach set out by Ofcom and the ongoing work and next steps it set out in November 2011.

Ofcom has stated that one of its ongoing pieces of work will be to monitor the prevalence and nature of products which block certain classes of legal content, applications and/or services. This process will provide a mechanism to benchmark signatories’ compliance with the provision set out in Commitment 1 that products offering full internet access will be the norm, coupled by the ability to offer alternative products that may not support access to all forms of content, services and applications.

Ofcom’s intention to monitor the provision of transparent traffic management information and to investigate the nature of traffic management practices as part of its communications infrastructure report will play a useful role in benchmarking signatories’ success in communicating the nature of its traffic management policies to consumers as per voluntary Commitments 1 and 3.

Commitment 2 covers potential individual cases of negative and targeted discrimination and accordingly signatories to this code recognise that it would be helpful for a process to be put in place that would enable potential concerns about possible instances of negative discrimination to be raised with relevant parties. Further details on the proposed system are set out in Annex 1.

Ofcom's stated intent to monitor the on-going ability of best efforts internet access to support innovation and to keep this under review as managed services may evolve in the market is also an important component of the wider context in which these commitments are being made.

Signatories recognise the importance of best efforts internet access being a viable choice for consumers alongside any innovation that may occur in the managed services market.

The signatories to this code therefore believe that it is right that Ofcom take ownership of this issue and also believe that the new proposed process will be a useful input to Ofcom as it continues its work in monitoring the nature and impact of traffic management practices in the market and the effective co-existence of managed services and best efforts internet access.

It is clear that the voluntary commitments being made in this code closely relate to ongoing monitoring work Ofcom has said that it will conduct. Signatories to this code are happy to discuss with Ofcom how its future work plans regarding open internet issues could support or input into a review of these voluntary commitments.

SIGNATORIES:

BE

BT

BSkyB

KCOM

giffgaff

O2

Plusnet

TalkTalk

Tesco Mobile

Three

July 2012

## Glossary

- **Full internet access:** as articulated in Ofcom's document, such a service permits a consumer to access any service lawfully available on the internet.

Providing such a service does not impinge on an ISP's ability to deploy reasonable traffic management practices over their networks. Such practices might include:

- managing congestion on its network
  - blocking services it is required to do so by law or a court order
  - blocking sites and services included on the Internet Watch Foundation list
  - deploying age verification/child protection/parental control tools for its consumers
  - supporting the delivery of managed services
  - ensuring elements of a consumer's contract are observed (e.g. data caps, download limits, heavy user policy)
  - safeguarding the security and integrity of its network
- **Legal services:** this definition excludes any service, content, application or protocol that an ISP is required to block by UK law or a court order and child abuse images as informed by the list provided by the Internet Watch Foundation.
  - **Blocked/blocking:** this definition relates to products where certain services are always unavailable as a consequence of an ISP's policy to block access to or contractually restrict access to a certain set of services on a particular product.
  - **Managed services:** as articulated in Ofcom's document, such services are delivered when ISPs prioritise certain traffic according to the value they ascribe to it. Managed services can involve an ISP offering a quality of service that can guarantee a certain level of performance, so that the content, service or application can be delivered without risk of degradation from network congestion. Such a quality of service arrangement can be made between an ISP and a content, application or service provider or directly between an ISP and a consumer. An example could be the prioritisation of an IPTV service.
  - **'Best-efforts' internet access:** as articulated in Ofcom's document, best efforts operates on the principle by which ISPs attempt to convey all traffic on more or less equal terms. The results in an 'open internet' with no specific services being hindered or blocked, although some may need to be managed during times of congestion.

## Annex 1

### A new process for raising concerns about possible negative discrimination

The signatories commit to providing a named contact within their organisation with whom any evidenced concerns about possible instances of negative discrimination could be raised by providers of internet-based content, applications and services. This should help to ensure that any legitimate issues can be addressed in an efficient manner on a bilateral basis.

In the event that concerns remain unresolved through this bilateral process they can then be lodged with the Broadband Stakeholder Group (BSG) to be recorded as outstanding unresolved issues. The BSG will then report to government and Ofcom at regular intervals as to the number and nature of concerns raised that remain unresolved. The BSG will not make any judgement on the validity or nature of the concerns raised as it will be for Ofcom to decide the merits of the issues raised and whether it wishes to undertake any further investigation.

It should be stressed that the signatories commit to this voluntary process in good faith and would expect any third party raising concerns to act accordingly by ensuring that any concerns raised are properly evidenced and supported. Signatories to this code therefore reserve the right to dismiss and/or reject a complaint if it is not properly evidenced or if it goes beyond the scope of Commitment 2. The BSG will not accept issues to be recorded without evidence that the issue has been raised direct with the ISP in question.

Clearly this process would not impinge on an individual content, service or application provider taking an issue of concern to Ofcom directly. It would be for Ofcom to decide how it would respond to such individual cases. Similarly, this process would not preclude consumers making use of existing processes to make complaints and raise issues regarding traffic management practices, namely through the Advertising Standards Authority, the Communications and the Internet Services Adjudication Scheme (CISAS) and the Ombudsman Services: Communications.

The purpose of this new process will be to:

- provide a useful mechanism for various industry players to constructively engage on specific issues and concerns should they emerge;
- provide a useful evidence base on actual market developments that will help inform Ofcom's evaluation of the nature and impact of traffic management practices and the co-existence of managed services alongside best efforts internet access services;
- build on the useful cross-industry discussions that have informed the development of this code to support useful and productive future dialogue on open internet issues.