

Preserving the Open Internet – the UK Approach

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Introduction

The Broadband Stakeholder Group here in the UK brings together all the main stakeholders committed to broadband roll-out - fixed and mobile operators, broadcasters, equipment manufacturers, Ofcom the regulator and the Department of Culture, Media, and Sport which looks after broadband policy. The role of the BSG, which I have the pleasure to chair, is to be an independently minded critical friend of Government and Ofcom in broadband matters. We do not normally take sides. But on matters Open Internet we do!

The great strength of the internet is its openness and low barriers to innovation. The term “Open Internet” is one that the digital minister, Ed Vaizey and I agreed some years ago was a better term for the UK than the American term – net neutrality. The American situation, as I will come to, is very different. The concept of an Open Internet is guided by three principles; users should have access to all legal content, ISPs should not discriminate on the basis of commercial rivalry and traffic management policies should be clear and transparent.

The UK approach

The appropriateness of different approaches to traffic management goes to the heart of the debate. There are some who call for all traffic to be equally treated– full stop. We do not take that view. We believe that traffic management is on the whole beneficial in ensuring end users receive a similar level of service but is actually required in order to deliver some services such as high quality video or VoIP services.

The UK approach, which has proved to be eminently successful, has required no statutory regulation as has been the approach in some other countries. The UK approach is based firmly on self-regulation. The UK approach encourages and allows differentiation of service through innovation. Provided that ‘best efforts’ internet access is preserved we see no reason why specialised services cannot exist – benefiting OTT players, service providers and the consumer. This has become a central bone of contention in the USA. The importance of digital content networks in speeding applications/services/content to the consumer somewhat muddies the waters anyway.

So yes to appropriate traffic management of different categories of traffic but no to discriminatory traffic management or blocking of traffic from specific providers.

The UK approach is based on three things – a properly competitive landscape, transparency for the consumer and a self-regulatory code of conduct. You need all three for it to work.

The UK competitive landscape

First of all, the competitive landscape. Thanks to Ofcom's Telecoms Strategic Review 2005, there is considerable competition between broadband providers/internet service providers in the UK market. Thus a consumer, if he or she does not like what is being offered and is not satisfied with the level of service, he or she can always switch providers. Ofcom in 2003 turned away from twenty years of sole reliance on infrastructure competition and opted for service level competition. British Telecom's access network was operationally separated from BT Retail, christened Openreach and required to provide service to all internet service providers/broadband providers on an equivalent basis to their servicing of BT Retail. BT Retail gets no vertically integrated favours. Competitors are allowed to put their equipment in BT exchanges and thus unbundle the local loop, using BT's copper to cover the final mile to the customer at home or in business. Virgin Media, emerging from a cable television birth, was and is not required to open its network and competes with BT in about half of the UK market.

The big argument is between infrastructure (US; facilities-based) competition and service level competition. The US model is based on infrastructure, facilities-based competition as the FCC is of the view that requiring Verizon or AT&T or Comcast to open its networks to competitors reduces their willingness to invest in broadband. As a result many parts of the USA have monopoly or duopoly providers of broadband. In the UK today we have over 500 internet service/broadband providers using BT's last mile network under the operational separation rules. This includes very big players like Sky, the major pay-tv satellite operator, and Talk Talk, along with a large number of very small, often localised, players.

Given this plethora of service level competition, and the very effective switching processes put in place by Ofcom, the end user is able to switch to other providers if not satisfied with the current provider in relation to Open Internet issues. In the USA this is not so easily the case.

Code of Practice

BSG was asked in 2011 to work with its stakeholders to develop a code of practice on traffic management transparency. This is key to the UK's approach. Effective competition is useless if consumers are unaware of their service providers approach to traffic management. We developed, with industry and consumer representatives a self-regulatory approach to transparency of traffic management, displayed in a document called Key Fact Indicators.

These provide simple, easy to understand and comparable statistics on their service provider's traffic management policies which are readily available both on our website and individual operators' sites. These have been strength tested and improved through consumer research that Ofcom undertook.

So at this stage we had competition and transparency – the vital ingredients. But we, industry, Government and regulator, recognised that understandable and justified concerns remained. This led us to facilitate the creation of the Open Internet Code.

This builds on and incorporates the Traffic Management Code but places 3 additional commitments on signatories. These are:

- First. That signatories' products offer full internet access as the norm – that is they should have access to all legal content. If this is not the case then signatories commit not to refer to the product as 'internet access'
- Second. That signatories will not deploy traffic management in a manner that targets and degrades the content or applications of specific providers and recognise that best efforts internet access must remain a viable choice for consumers
- Third. Recommit to providing clear traffic management policies.

A complaints process underpins this whereby content providers could complain about actions undertaken by signatories to this Code – who now account for well over 90% of fixed and mobile subscribers.

We have continued to facilitate discussions on these issues between the various players through an Open Internet Forum that meets regularly. These discussions have improved understanding and relationships between content and infrastructure providers helped ensure that no formal complaints have ever been made under the process – although some have been resolved informally.

I view this as reassuring. Content providers are not shrinking violets – and as a former BBC TV and radio producer I should know! If they had a complaint they would make sure that we know about it – let's remember that Fight for the Future led Netflix and others to place a buffering wheel on their home pages just over a year ago to make their point in the US – where there is little competition and even less transparency!

So, there we have it; competition, transparency and self-regulation obviating the need for regulation whilst providing a level of certainty that benefits both content and infrastructure providers.

However.

Despite our success here in the UK, our approach has been undermined in some ways with the Connected Continent Regulation passed by the EU in the summer. This regulation is directly applicable in the UK. Unfortunately, they have pursued a more prescriptive approach than is necessary or desirable in the UK and potentially hinders the ability of network providers to provide innovative services.

On some level I understand the desire of European policy-makers – not every EU Member State has the level of competition that we benefit from. This means that the incentives for network providers to negatively discriminate are greater and necessitate some level of regulation.

But my argument is that you don't solve the problems created by a lack of competition with burdensome regulation for everyone. That's just addressing one symptom. The real solution, which will be to the benefit of all players, has to be boosting competition by lowering barriers for entry and creating space for new entrants, just as we did so well in the UK 10 years ago.

That's not the end of self-regulation in the UK though – we, with close support from Her Majesty's Government and Ofcom, are currently conducting a review with WIK, a consultancy based in Germany, on how effective our approach has been so far and how we can continue once the new Regulation comes into force.

This review is the first in-depth analysis of the Regulation in Europe and will help BEREC, the European body of telecoms regulators, come up with guidance for how the Regulation will work in practice.

Although we have not completed the review we are confident having completed our initial compliance analysis, which is now being reviewed by a legal expert, that our approach remains valid under the new Regulation. For one thing, in many areas we have provided more detailed information and assurance to consumers.

We are also using this opportunity to look at how the Codes have operated – and the fact that no blocking or throttling takes place on the basis of commercial rivalry in the UK is evidence of that success. But we don't want to rest on our laurels and will examine whether we should expand the Code to cover issues like ISP interconnection or zero-rating – or whether competition law already addresses these adequately.

We will be publishing this review in the coming weeks after which we will start work on a process for renewing and reforming our self-regulatory approach. Let me or my CEO Matthew Evans know if you would like a copy.

Conclusion

We firmly believe that the UK has found a way to address Open Internet issues without recourse to statutory regulation or regulator commands – whilst keeping lawyer's fees to a minimum! It is working. But you do need a foundation of significant competition between broadband providers. That is the sine qua non of the UK's self-regulatory approach. And you do need codes of practice that all players are willing to buy into. Here in the UK we have been fortunate to achieve both thus taking much of the heat and aggro out of a contentious subject.

Thank you.