



## Sky response to Ofcom's net neutrality review consultation

### Summary

As a large ISP and a large content and application provider (CAP), Sky is well placed to comment on whether the UK's net neutrality regime is operating effectively. In our view, the rules and Ofcom's guidance, monitoring and enforcement have been generally successful in supporting a flourishing ecosystem of fixed and mobile services and content applications. Consumers and businesses have adopted these services in large numbers and at affordable prices, which has been beneficial for the UK economy as it increasingly moves online and becomes digitised.

On the whole, ISPs and CAPs work together responsibly to ensure that internet traffic is routed efficiently. ISP traffic related network costs are therefore broadly efficient and, as all ISPs face these network costs, they are recoverable in downstream broadband and mobile markets. ISPs can also innovate under the UK's net neutrality regime, albeit not to the material detriment of consumers and competition.

We welcome Ofcom's proposals in its review of its guidance, monitoring and enforcement of the UK's net neutrality rules (the rules themselves are not subject to Ofcom's review as these can only be changed by Government and Parliament). Ofcom's proposed revised guidance on how it will monitor compliance with and enforce net neutrality legislation provides greater clarity to ISPs about how Ofcom interprets the rules and underscores its permissive approach to ISP innovation and commercial activities that do not risk unfair and unreasonable discrimination, distortion of competition and harm to consumers.

We agree with Ofcom that there does not appear to be a compelling case for allowing ISPs to require CAPs to pay fees to carry their traffic via some form of mandatory negotiation and charging obligation (noting that charging by ISPs is allowed). We also support Ofcom's proposals to deprioritise enforcement of a discrete, narrow set of activities that are plainly in the public interest but may not fully accord with existing net neutrality legislation.

### **The UK's net neutrality regime is largely effective and does not require substantive change**

While Ofcom's review relates only to guidance, compliance and enforcement of the UK's net neutrality rules, Sky agrees with Ofcom that net neutrality in the UK works well and has largely been successful in supporting consumer choice and enabling CAPs to deliver their content to consumers<sup>1</sup>. This accords with Sky's position set out in our response to Ofcom's call for evidence to its net neutrality review at the end of 2021<sup>2</sup>. Adoption of fixed and mobile broadband services and CAP services at low, affordable prices has grown significantly under the net neutrality regime to the

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<sup>1</sup> Page 2, *Net Neutrality Review - Consultation*, 21 October 2022, Ofcom.

<sup>2</sup> *Ofcom's net neutrality review: Ofcom's call for evidence - Sky's response*, November 2021.

benefit of consumers, businesses and the UK economy. There is no compelling evidence to support substantive change in the UK's net neutrality regime.

Net neutrality rules support a balanced ecosystem where ISPs and CAPs have mutually beneficial incentives to collaborate to deliver internet traffic to end users efficiently. These collaborations are common practice and reduce network congestion, deliver significant cost reductions to ISPs and drive quality improvements to the benefit of all stakeholders (consumers and businesses, ISPs and large and small CAPs).

As internet traffic has grown, ISPs have continued to invest in increasing network capacity, but this does not mean that the cost of investing in incremental capacity is increasing. Unit costs of capacity have continued to fall as a result of steady, regular efficiency improvements, such as lower equipment costs. CAPs and their technology partners innovate to improve efficiency, including by minimising the data their services consume (for instance, through more efficient data compression techniques for streaming). As cited above, they also partner with ISPs to cache content closer to end users and, as a result, reduce the data capacity required in ISP networks. All ISPs incur the costs of investing in sufficient network capacity and these costs are passed onto consumers in downstream competitive retail fixed and mobile markets. These services are widely adopted, prices are low and affordable but, importantly, ISPs can recover their costs.

Net neutrality rules do not prevent ISPs from innovating unduly either. It is important however that Ofcom's guidance, monitoring and enforcement of the rules does not overstep the core principles of net neutrality by unnecessarily curtailing or chilling legitimate ISP innovation opportunities or by being unclear, overly burdensome or unwieldy.

### **Sky supports Ofcom's proposed revised net neutrality guidance and approach to enforcement prioritisation**

We consider Ofcom's proposed new guidance and approach to net neutrality monitoring and enforcement a welcome step forward.

*(i) Ofcom's proposed guidance provides greater clarity*

Ofcom's proposed revised guidance is largely clarificatory. It codifies more clearly what is permissible and, where Ofcom proposes to exercise greater scrutiny, the factors it will consider when assessing whether ISP proposals and activities are appropriate. To the extent that ISPs were previously less certain whether their innovations and new products and services would 'pass' the rules or how Ofcom would assess them, this new guidance should provide ISPs with more certainty and could reduce the risk of ISP innovation being unduly limited or delayed.

*(ii) The proposed guidance strikes an appropriate balance between supporting innovation by ISPs and protecting consumers access to the 'open internet'*

In our view, it is appropriate that Ofcom aims to ensure that ISP innovation is not unfairly stymied by its approach to enforcement of the net neutrality rules and that its application of the rules is limited to protecting consumers from the risk of ISPs inappropriately restricting access to the open internet or distorting competition unfairly between CAPs. Ofcom's proposed revised guidance makes this clearer and does not 'blanket ban' certain types of ISP services solely on the basis of a theoretical risk or an overly strict interpretation of net neutrality legislation. Ofcom's proposed revised guidance makes it clear that zero rating

offers, differentiated premium quality retail services and specialised non-internet services can be permissible in certain circumstances.

By way of example, Ofcom's proposed guidance explains clearly that zero rating can be permitted and under what conditions but also highlights the features of zero rating offers that would raise concerns. This relatively permissive approach is in stark contrast to the EU's current approach to zero rating which, through a series of court rulings, effectively bars all forms of zero rating – even if there is no material risk to consumers, access to the open internet or competition.

- (iii) *Ofcom is right to deprioritise the enforcement of activities that are in the public interest but which may not fully accord with net neutrality legislation*

Net neutrality rules already allow ISPs to be exempted from non-discrimination requirements in the treatment of certain types of traffic (e.g., voice access to emergency services). However, there remain a narrow set of discrete applications which are in the public interest which could be non-compliant under a strict interpretation of net neutrality rules. These include ISPs providing continued access to its data top-up services or public service websites once data allowances have been exhausted. Sky supports Ofcom's proposals to deprioritise enforcement of these activities as it is a clearly pragmatic, sensible approach which is in the public interest.

- (iv) *There does not appear to be a strong case for the mandatory charging of CAPs by ISPs to carry their traffic or for ISPs to restrict end user access to terminal devices*

We welcome Ofcom's thoughtful analysis of this issue, though note the fact that, as indicated by Ofcom, any change to the rules on charging would be a matter for Government and Parliament.

We agree with Ofcom that there does not appear to be a strong case for mandatory charging of CAPs by ISPs to carry their traffic or to allow ISPs to restrict end user choice and use of 'terminal equipment' (e.g., mobile handsets).

We note that charging for traffic by ISPs is not prohibited but, in effect, because of net neutrality rules, cannot be forced upon CAPs. ISPs and CAPs can negotiate charging arrangements in the round when collaborating in caching a CAP's content closer to end users via CDNs in (or at the edge of) an ISP's network. We think this framework strikes the right balance.

Sky also agrees with Ofcom that there is no strong evidence to support ISPs restricting consumer choice of customer equipment. Such a move could limit consumer choice and stifle innovation and competition in customer equipment markets and associated services. Some mobile ISPs argue that consumers on unlimited data packages can exploit these rules by tethering devices to their mobile networks and significantly increase their data consumption as a result. This, ISPs argue, can increase their costs significantly and result in higher prices for all their customers. However, ISPs can resolve these concerns through the design of their retail packages, including by moving away from unlimited packages where necessary or introducing appropriate fair usage policies. Either way, a relaxation of net neutrality rules just to deal with this issue would be a disproportionate step given the considerable economic benefits stemming from consumers having unrestricted choice of terminal equipment.

Sky finds that the current UK net neutrality regime works well and does not require substantive change. We support Ofcom's proposed revised approach to guidance, monitoring and enforcement as it provides more clarity, is appropriately permissive

and deprioritises enforcement of a narrow set of activities that may be non-compliant with the rules but are in the public interest.

**Sky**

**January 2023**