

Title: The Open Internet Access (EU Regulation) Regulations 2016 IA No: DCMS_0004 RPC Reference No: RPC-3362(1)-DCMS Lead department or agency: Department for Culture, Media and Sport Other departments or agencies: N/A	Impact Assessment (IA)			
	Date: 08/04/2016			
	Stage: Final			
	Source of intervention: EU			
	Type of measure: Secondary legislation			
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Summary: Intervention and Options				RPC Opinion: GREEN

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
N/A	N/A	N/A	Not in scope	Non qualifying provision

What is the problem under consideration? Why is government intervention necessary?

EU Regulation (EU) 2015/2120 lays down provisions concerning open internet access ("net neutrality") and mobile roaming charges. The Regulation stems from the European Commission's proposal COM (2013) 627 for legislative measures to achieve a single telecoms market and a 'Connected Continent'. The open internet access provisions come into effect on 30 April 2016. They require the UK to designate and empower a National Regulatory Authority (for the UK, Ofcom) to monitor and ensure compliance with the Regulation, and to lay down penalties for breach of the Regulation. This Statutory Instrument (SI) implements those requirements relating to the open internet access provisions.

What are the policy objectives and the intended effects?

Net neutrality supports the Government's policy goal of ensuring an open and secure internet that supports innovation and growth. The Regulation requires that providers of internet access services to the public must treat all internet traffic equally (except in certain defined circumstances, such as blocking illegal content to comply with national or EU law, or traffic management measures that are necessary to mitigate the effects of exceptional or temporary network congestion). Providers must also abide by stipulations related to transparency about levels of service in contracts with end-users.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing:

Not legislating to designate Ofcom as the NRA, allow them the necessary powers to ensure compliance, and to set out a penalties regime for breaches would result in infraction proceedings by the European Commission (and open the UK to legal challenge).

Option 1: Preferred Option:

Secondary legislation to allow Ofcom the requisite powers to enforce the requirements of the Regulation, and to set out an appropriate, proportionate and dissuasive penalties regime in UK law.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** Month/Year

Does implementation go beyond minimum EU requirements?		No		
Are any of these organisations in scope?	Micro Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)		Traded: N/A		Non-traded: N/A

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister: Ed Vaizey **Date:** 24.05.2016

Summary: Analysis & Evidence

Policy Option 1

Description: Open Internet Access SI - Secondary legislation to allow Ofcom the requisite powers to enforce the requirements of the Regulation, and to set out an appropriate, proportionate and dissuasive penalties regime in UK law.

FULL ECONOMIC ASSESSMENT

Price Base Year 2016	PV Base Year 2016	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: 9.98

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	Optional
High	Optional		Optional	Optional
Best Estimate	N/A		N/A	N/A

Description and scale of key monetised costs by 'main affected groups'
N/A

Other key non-monetised costs by 'main affected groups'
Business impact in relation to the statutory instrument enabling Ofcom to monitor and ensure compliance with the Regulation is unquantified due to the uncertainty of the exact nature of the information requests, but industry consultation has shown that requests from Ofcom will only produce a minimal cost on businesses, assuming that the requests will be included in the existing information requests regime. Ofcom also intends to work with the industry to minimise the burden of these requests.

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	Optional
High	Optional		Optional	Optional
Best Estimate	N/A		1.0	10.0

Description and scale of key monetised benefits by 'main affected groups'
When implementing the EU Regulation the UK would not have to face infraction proceedings such as a minimum lump sum fine of £9,982,000 as well as daily penalty payments and possible court costs. The daily penalty payments depend on the seriousness, the duration of the infringement and the special factor 'n' corresponding to the GDP and the number of votes it has in the Council of the Member States.

Other key non-monetised benefits by 'main affected groups'
The UK government would also not be liable to legal challenge from parties seeking to redress such providers' practices, which could be substantial.

Key assumptions/sensitivities/risks	Discount rate	3.5
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It is assumed that Ofcom will work in collaboration with industry to ensure that information request reporting on traffic management is light touch, subsumed into existing regulatory requests, and serviceable through existing business processes - and that (given widespread compliance with the existing voluntary codes on open internet) the number of information requests in cases of suspected breach of the Regulation will be minimal. Risks should be mitigated by a proportionate approach of the SI.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: 0.0	Benefits: 0.0	Net: 0.0	
			N/A

Evidence Base (for summary sheets)

Problem under consideration

The European Commission emphasised the need to monitor market and technological developments in relation to “net freedoms” in the European Union to preserve an internet in line with those freedoms, i.e. an “open” and “neutral” internet.

The concept of net neutrality is defined in part in the Framework Directive on electronic communications as the ability of end-users to access and distribute information or run applications and services of their choice.

The concept of net neutrality means that all end-users should have equal access to all kinds of online content (such as email and high-quality video) without operators being able to throttle (“slow-down”), block or discriminate against any type of content. The issue of net neutrality became increasingly important due to the massive expansion of content being downloaded and streamed on the internet. There are concerns that major players may try to buy or leverage content prioritisation at the expense of smaller companies and start-ups, and that end-users’ rights to access and distribute information might be undermined¹.

Ensuring net neutrality (in particular, a prohibition of blocking and throttling with certain legitimate exceptions) would mean that all end-users will have unrestricted access to use and distribute applications and services provided over the internet within the limits of contracted data volumes and speeds. On the one hand, such a guarantee is particularly important for SMEs and start-ups who (compared to large OTT “Over the Top Technology” providers) mostly do not possess the leverage to ensure that ISPs make their services available. On the other hand, the possibility for ISPs to provide services other than internet access services, such as specialised services with guaranteed quality of service² creates major opportunities for innovation and delivery of new services³. Different ways of regulating traffic management practices create uncertainty which hampers product and business-model innovation and, consequently, the introduction of new business models⁴.

Obstacles to net neutrality include, for example⁵:

- the blocking or throttling of traffic by certain network operators, which takes the form of restricting access to internet services (online television, videoconferences, etc.) or to specific websites, or categories of websites. The Body of European Regulators for Electronic Communications (BEREC) and the National Regulatory Authorities (NRAs) may receive users’ complaints from consumers and/or content and service providers;
- traffic congestion, which requires reasonable management. There are various different traffic management techniques to alleviate congestion;
- lack of transparency, which prevents consumers from making informed choices in terms of services. NRAs are therefore empowered to set minimum quality of service requirements.

Rationale for intervention

EU Regulation (EU) 2015/2120⁶ lays down provisions related to open internet access (“net neutrality”) and mobile roaming charges. The latter not the subject of the statutory instrument and thus this impact assessment. The open internet access provisions come into effect from 30 April 2016. The Regulation

¹ Korolyn Rouhani-Arani for Taylor Wessing <http://united-kingdom.taylorwessing.com/en/first-eu-wide-net-neutrality-rules-set-to-come-into-effect>

² Recital 16 of the EC Regulation (<https://ec.europa.eu/digital-single-market/en/news/regulation-european-parliament-and-council-laying-down-measures-concerning-european-single>) sets out that providers of internet access services should be free to offer services which are not internet access services and which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet the requirements of the content, applications or services for a specific level of quality.

³ See more: EU Commission Impact Assessment, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013SC0331>

⁴ See more: EU Commission Impact Assessment, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013SC0331>

⁵ See more: EU Commission Impact Assessment, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013SC0331>

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1453121314844&uri=CELEX:32015R2120>

requires that providers of internet access services to the public must treat all internet traffic equally, except for in certain defined circumstances (e.g. reasonable traffic management measures to mitigate the effects of exceptional or temporary network congestion). Providers are however allowed to engage in blocking content etc. where doing so is necessary to comply with EU or national law (e.g. to block or combat illegal activity / content).

There is also an exemption to allow providers to use traffic management to preserve the integrity of the network and end-users' terminal equipment (e.g. to allow for anti-cybercrime, anti-virus and anti-hacking measures). Providers must also abide by stipulations related to transparency about levels of service in contracts with end-users.

Action on open internet access was proposed by the European Commission on two grounds. Firstly, to secure a high level of protection for end-users of electronic communication services, and guarantee the continued functioning of the internet ecosystem as an engine of innovation. Secondly, to prevent divergence in the regulatory framework following a number of Member States introducing relevant domestic legislation.

The Regulation requires that National Regulatory Authorities (NRAs) in Member States should be designated to monitor and ensure compliance by providers. It also requires that Member States set out an appropriate regime of penalties in cases of breach of the Regulation. As part of their duties, it lays down that NRAs must be able to require providers to supply information about their traffic management practices.

The UK is obliged to implement the EU regulation (or face infraction proceedings). The Statutory Instrument (SI) therefore ensures the Regulation's provisions can be implemented by designating Ofcom as the NRA for the UK, allowing them the necessary powers to monitor and ensure compliance with the Regulation, and setting out a penalties regime (consistent with Ofcom's wider regulatory framework supervision).

Policy objective

Net neutrality supports the Government's policy goal of ensuring an open and secure internet that supports innovation and growth. The EU Regulation will provide a legal framework to prevent internet service providers from exploiting necessary traffic management arrangements over their networks in order to gain unfair competitive advantage, by "throttling" (slowing down) or blocking competing services (e.g. Skype, by providers of paid-for call services). The UK was central to shaping the negotiations of the EU Regulation to deliver an ambitious, consumer focused package. The Regulation presents a balanced, principles based package that protects the open internet while supporting innovation.

Description of options considered

- **Option 0: Do nothing:** Not legislating to designate Ofcom as the NRA, allow them the necessary powers to ensure compliance, and to set out a penalties regime for breaches would result in infraction proceedings by the European Commission (and open the UK to legal challenge).
- **Option 1: Preferred Option:** Secondary legislation to allow Ofcom the requisite powers to enforce the requirements of the Regulation, and to set out an appropriate, proportionate and dissuasive penalties regime in UK law.

Monetised and non-monetised costs and benefits of Option 1

Monetised costs by 'main-affected groups'

Non-monetised costs by 'main-affected groups'

The impact of the EU Regulation itself on business and the UK market for internet services is not within scope of this assessment. However, potential business impact in relation to the Statutory Instrument (SI) enabling Ofcom to monitor and ensure compliance with the Regulation is in scope. Thus, the main affected groups are internet service providers.

In effect, the only costs to business will be incurred where Ofcom requests information from providers of internet access services to the public about their internet traffic management practices.

Ofcom have advised that their information requests would take two broad forms. Firstly, general regular monitoring of internet access providers' traffic management. Secondly, specific investigations of particular providers where a breach of the Regulation is suspected.

On general monitoring, Ofcom are likely to make periodic requests to operators for information about the capacity and utilisation of their networks, and of the ways in which traffic management policies are applied to manage that capacity. Ofcom have stated they would expect that this information would be generated as a matter of course as part of operators' network management, and would expect to work in collaboration with the industry to ensure this is the case as the approach to regular monitoring is defined.

On specific investigations, where Ofcom may have reason to believe practices at an operator may be in conflict with the EU Regulation, they may wish to issue more detailed requests covering network capacity / utilisation etc., and details of the function and impact of traffic management policies which may affect end-users' ability to access services of their choice. Again, Ofcom advise that they would expect such information to be available from the network management technologies employed by operators.

We have consulted the main internet access providers (incl. Sky, BT, Talk Talk, Telefonica, Virgin and Three) on Ofcom's proposed approach to information requests as above. Their responses have confirmed Ofcom's view that this information should be relatively easily supplied. Although they could not monetise compliance with such information requests, they have confirmed that costs should be negligible and the impact minor provided that Ofcom subsume these requests into their existing information requests regime (as part of the normal regulatory process). Where costs could escalate would be if Ofcom were to increase the frequency and levels of detail of reporting to such an extent that new and bespoke data collections systems and processes would be required. However, Ofcom have confirmed that they intend to work with the industry to minimise the burden of these requests. They are already in informal discussion with providers about including these requests in the existing reporting for Ofcom's annual Connected Nations report (this is a suggestion from the providers).

In the draft SI we have included a caveat on information requests that "Ofcom are not to require the provision of information under this regulation except...where the making of a demand for the information is proportionate to the use to which the information is to be put in carrying out Ofcom's functions". This will provide an avenue of challenge for providers in any case of disproportionate costs.

In assessing the proportionality of exercising its formal information gathering powers in any particular case, Ofcom will ordinarily consider:

- the extent to which the information sought is necessary in order for Ofcom to exercise properly its functions, and likely to be relevant to the exercise of those functions;
- whether the information is obtainable from other sources and/or in alternative formats that would cause less of a burden on recipients;
- whether any burden imposed on the recipient of a request is, in the relevant circumstances, proportionate to the reasons for gathering the information.

In some cases, it may be necessary to request comparable information from a range of network operators - as far as possible Ofcom will work with network operators to design such requests so as to allow them to provide comparable data which is available from the network management technologies they employ.

In the UK all the major UK providers of internet access services are thought to be largely in compliance with most of the open internet provisions of the EU Regulation, through the existing voluntary framework of the Open Internet Codes of Practice. There is little or no evidence of current traffic management practices that would breach the Regulation. It is unlikely therefore that there will be many instances where Ofcom will need to undertake specific investigations requiring a more detailed level of information from providers. However, as Ofcom have suggested and providers consulted have confirmed, this information should still be easily obtainable.

Monetised Benefits for 'main affected groups'

When implementing the Regulation the UK would not have to face infraction proceedings such as a minimum lump-sum fine of £9,982,000 well as daily penalty payments and possible court costs. The daily penalty payments depend on the seriousness, the duration of the infringement and the special factor 'n' corresponding to the GDP and the number of votes it has in the Council of the Member State.

To date the UK has never been fined for non-compliance with an EU Directive or as a result of any other type of infraction cases - a record we are very keen to maintain.

Non-Monetised benefits for 'main affected groups'

The UK government would also not be liable to legal challenge from parties seeking to redress such providers' practices which could be substantial.

Rationale and evidence that justify the level of analysis used in the IA (proportionality approach)

Any costs to business are limited to those related to servicing Ofcom's information requests about their traffic management practices. The main provider base is small, and is used to supplying information to Ofcom as part of the existing information requests regime. Providers should be able to access the information easily (as it is generated by them as a matter of course), and reporting can be subsumed into existing reporting mechanisms to Ofcom. It is therefore deemed that these costs should be negligible, and significantly below the £1m p.a. threshold to qualify for the fast-track Better Regulation process.

Risks and assumptions

- It is assumed that Ofcom (as they have stated) will work in collaboration with the industry to ensure that information request reporting in traffic management is light touch, subsumed into existing regulatory requests, and serviceable through existing business processes.
- It is assumed that given widespread compliance with the existing voluntary codes on open internet, the number of information requests in cases of suspected breach of the Regulation will be minimal.
- The risks of burdensome information requests should be mitigated by the SI's requirement for such requests to be proportionate.

Small and Micro-Businesses Assessment

Analysis of small business impacts makes clear that there are potential costs for smaller businesses (up to 50 employees, and/or less than 10 million Euros turnover), including micro-businesses (up to 10 employees, and/or less than 2 million Euros turnover), but these are likely to be minimal. In the EU regulation there is no option to exempt small and micro businesses from this new regulatory measures.

Furthermore, the impact on those businesses will be very limited, since the great majority of internet service providers are larger businesses. No data is available on the number of small and micro-businesses in this sector but there is evidence that the number is small. The Internet Service Providers Association (ISPA) represents 144 individual members (not including virtual ISPs), the majority of whom (126) focus on delivering internet connectivity. This includes the 4 largest consumer-facing ISPs that collectively serve about 90%+ of fixed-line consumer subscribers (Sky, Talk Talk, BT and Virgin); a large number of ISPs that specialise in delivering communications services to businesses, with different services for SMEs and large corporates; and niche providers that focus on a targeted area (e.g. a rural location) or customer base (e.g. student or military accommodation). Within this number, there are providers that resell connectivity from wholesale providers and those that build and operate their own networks using a variety of technologies.

Furthermore, in the UK it is best-practice that providers of internet access are in compliance with the open internet provisions of the EU Regulation and with non-compliance small and micro-businesses would be prone to legal challenges of bigger providers. Ofcom and Broadband Stakeholder Group studies have confirmed there is little or no evidence of current traffic management practices that would breach the Regulation.

Wider impacts

The Statutory Instrument (SI) will provide a legislative basis to enforce the EU regulation in the UK, which will be of general benefit for UK consumers (as end-users of internet access services) and businesses that wish to ensure their services are not blocked (helping protect innovation in digital markets).