



## SKY'S RESPONSE TO THE DRAFT BEREC GUIDELINES ON IMPLEMENTATION BY NATIONAL REGULATORS OF EUROPEAN NET NEUTRALITY RULES

### Introduction

1. Thank you for the opportunity to provide comments on the BEREC Guidelines on Implementation by National Regulators of European Net Neutrality Rules (the “**Draft Guidance**” or “**Guidance**”) aimed at consistent implementation of Regulation (EU) 2015/2120 (the “**Regulation**”).
2. Sky plc (“Sky”)<sup>[1]</sup> is a holding company for a number of subsidiaries, which are active in a variety of economic sectors in Italy, Germany, Austria, the UK and Ireland, including the creation, broadcasting, wholesale, and/or retail supply of Sky and/or third party TV channels. Sky also provides electronic communications services (in the UK and Ireland only).
3. Sky is a world-class business, anchored in Europe, with a unique set of strengths in content creation, technology innovation and service delivery. With over 21 million customers in 5 countries, Sky invests nearly €7 billion annually in TV content, more than anyone else in Europe, and we are one of the largest distributors of content over the internet in the EU. Our company is built on providing customers with more choice, better content and a superior TV experience.
4. Sky offers broadband and telephony in the UK and Ireland, being the second largest provider in the UK with over five million broadband customers. Sky will also be launching a mobile offering later this year.
5. We hope that our experience of providing first class digital content and customer service as well as our position as an internet service provider will offer BEREC a useful insight into the practical application of the Draft Guidance.
6. We have set out our response to the Draft Guidance using the headings contained therein.

### Article 2 - Definitions

7. Sky believes that the inconsistency between the terminology used in the Draft Guidance and that in the underlying Regulation is likely to cause confusion and may result in an inconsistent interpretation of the rules. We therefore ask BEREC to mirror the language used in the Regulation when drafting the guidance in order to ensure consistency.

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<sup>[1]</sup> Sky's registration number in the Transparency Register of the European Commission is 62536168216-12.

### Article 3 - Safeguarding of open internet access

#### Article 3(3)

8. We believe that the obligation under Paragraph 89 for NRAs to monitor that ISPs properly dimension their network is disproportionate and very far reaching. If network congestion is agnostic as to traffic type then we question whether this is a net neutrality issue. The Recital simply states that ongoing network congestion due to capacity restrictions does not allow ISPs to invoke the exception. However, the Draft Guidance goes further and suggests that NRAs should be monitoring whether ISPs properly dimension their network, which in our view is an entirely different proposition. We therefore ask BEREC to amend Paragraph 89 to ensure that no obligation is placed on NRAs to “monitor that ISPs properly dimension their network”.

#### Article 3(5)

9. We are concerned by the fact that Paragraph 119 focuses solely on mobile networks. With the increased proliferation of gaming and the potential for new data hungry applications mean that there can be unexpected peaks. We therefore ask BEREC to clarify why Paragraph 119 only refers to mobile networks and suggest that the text is amended to read as follows: “119. *The general quality of IAS for end-users should not be deemed to incur a detriment where the aggregate negative impact of specialised services is unavoidable, minimal and limited to a short duration.*”

### Article 4 - Transparency measures for ensuring open internet access

#### Article 4(1)

10. We are concerned with how some of the rules in the Regulation have been interpreted in the Draft Guidance. In particular, we are concerned with how the guidance sets out actions for NRAs to adhere to as well as the subsequent consequences that ISPs would face for failing to comply. In our view, NRAs are best placed to determine how ISPs under their jurisdiction should comply with the rules and therefore we don't believe that the Guidance should prescribe ways in which information should be presented.
11. We also believe that it would be disproportionate and impractical for the Guidance to stipulate how information relating to speed should be referred to in consumer contracts. We stress that there should be flexibility in how this is approached and therefore propose amending the guidelines to say that contracts may include reference to such information. For example, reference can be made a) to the speed provided at the point of sale or b) to a webpage explaining the activities that can be undertaken with a specific speed.
12. For the remainder of the Draft Guidance, we have proposed changes to a number of Paragraphs.
13. Paragraph 124 – We stress that the Draft Guidance should strive to ensure consistency with the rules set out in the Regulation and we are concerned that some of the requirements in the guidelines are not reflected in the Regulation.
14. Paragraph 127 – We do not consider it necessary to include the second level of detail in customer contracts. We believe that the first level of detail is sufficient to meet consumer needs and ensure compliance with the Regulation.

15. Paragraph 129 – As this is not cited in the Regulation, we propose that it be removed from the Guidance. Instead, reference should be made to remedies at national law.
16. Paragraph 130 – The Guidance should clarify that the Regulation does not have retrospective effect. If Art 4(1), 4(2) and 4(3) apply to contracts concluded before the coming into force of the Regulation then it would be necessary in some jurisdictions to amend contracts and offer a cancellation right. We therefore question this interpretation of this. Furthermore, we believe that Article 4(4) should be applicable from when the Regulation came into force as opposed to its formal publication.

#### Letter (a)

17. Paragraph 131 – We believe that the Guidance should reflect the language in the Regulation, which in our view is clear and comprehensive. The terms “concise” and “comprehensive” are contradictory and each word serves a different purpose. It is crucial that all information is communicated clearly, accurately and effectively to consumers, and doing so “concisely” would risk undermining the comprehensiveness of the contract. We therefore ask BEREC to replace the word “concise” with “clear” in the Guidance.
18. Paragraph 132 – We are again concerned at the “concise and comprehensive” language, and BEREC’s dismissal that this could be covered by a general condition. Creating individual T&Cs on a customer by customer basis is neither proportionate nor practical, and risks imposing an undue burden on IASs.
19. Paragraph 133 – We believe that this paragraph is superfluous and that it should be removed from the Guidance.

#### Letter (d)

20. Paragraph 137 - It would be impractical to specify speed references in each individual customer contract as this would require a bespoke contract to be created for each customer. For example, when we sell broadband today a customer calls our contact centre and a line speed test is carried out on their broadband line. This download speed is read to the customer on the telephone and then confirmed in an email. However, generic terms and conditions are sent to the customer and these will not include reference to the exact speeds. It is not practical to include speed references in each customer contract as this would require a bespoke contract to be created for each customer and a revised contract every time a line is adjusted.
21. We believe there should be flexibility in how this is approached and ask BEREC to clarify that incorporation of speed information into the contract by reference is permissible.

#### Specifying speeds for an IAS in case of fixed networks

##### Minimum speed

22. Paragraph 141 – This is not covered by the Regulation and, accordingly, it should be left to the discretion of NRAs. We therefore ask BEREC to remove this from the Guidance.

##### Maximum Speed

23. Paragraph 143 – This is not covered by the Regulation and, accordingly, it should be left to the discretion of NRAs. We therefore ask BEREC to remove this from the Guidance.
24. Paragraph 144 – In our view the concept of “normally available speed” is unclear. The speed could vary significantly depending upon a number of factors and over the lifetime of the contract (for example technology advances).
25. Paragraph 145 – In our view it should be left to NRAs to decide on parameters and we do not believe that the Guidance should prescribe examples.

#### Advertised Speed

26. Paragraph 147 – As explained above, we believe that BEREC should amend the Guidance to say that advertised speed can be incorporated in contracts by reference.
27. Paragraph 148 – We believe that this paragraph should be removed as NRAs are best suited to set the necessary requirements. Indeed, many NRAs already have existing codes in place to deal with such circumstances.

#### Specifying speeds of an IAS in mobile networks

##### Estimated Maximum Speed

28. Paragraph 150 – We stress that the requirement to specify speed based on location would be challenging to implement and we therefore welcome further clarification in this area.
29. Paragraph 152 – As above, we feel that NRAs are best placed to decide how the requirements can be met in their local territory and propose that BEREC removes this paragraph from the Guidance.
30. Paragraph 154 – As above, we believe that this paragraph should be removed from the Guidance.

##### Letter (e)

31. Paragraph 155 – We do not believe that the examples offered in this paragraph add value to the text and propose that BEREC removes them from the Guidance. Instead, we believe that NRAs are best placed to dictate the remedies via national law.

##### Article 4(2)

32. Paragraph 156 – As explained above, we believe that NRAs are best placed to identify the specific scenarios that apply to their territories. We therefore propose that all the examples should be removed and the text in Paragraph 156 should read as follows:

*NRAs should ensure that ISPs adhere to certain good practices regarding procedures for addressing complaints.*

#### Article 5 – Supervision and enforcement

##### Article 5(1)

##### Monitoring

33. Paragraph 167 – We do not believe that the examples given after the words “for instance” are necessary. NRAs are familiar with their own existing reporting requirements and they are able to apply them without imposing additional reporting requirements on ISPs.
34. Paragraph 168 – As above, this is unnecessary and may result in higher levels of prescription than intended by the Regulation. We propose removing this paragraph.
35. Paragraph 173 – As above, the examples are unnecessary and should be removed from the text.

#### Enforcement

36. Paragraph 174 – As above, we think that this should be left to the NRA to decide and remedies will very much framed by national law. We therefore would suggest removing the examples from paragraph 174.
37. Paragraphs 175/176 – We believe that these matters should be dealt with by the NRAs and therefore propose that BEREC removes these paragraphs from the Guidance.

#### Conclusion

We welcome the clarification provided by the BEREC Draft Guidance in a number of different areas. However, as we explained in our submission, we are concerned that some of the provisions in the Draft Guidance go beyond the scope of the Regulation. We are particularly concerned with some of the provisions in Article 4 of the Draft Guidance and ask BEREC to take account of our proposed changes above in order to avoid imposing unnecessary and disproportionate obligations on ISPs. We stress that in most cases NRAs are best placed to set the relevant requirements for ISPs as they have comprehensive knowledge of local markets and are able to do so without imposing undue burden on businesses. Finally, when drafting the revised guidance, we ask BEREC to mirror the language used in the Regulation in order to ensure consistency.

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Sky Plc.