



## **Response by the IWF to BEREC's draft guidelines on the implementation of the net neutrality rules**

*This document outlines the response from the Internet Watch Foundation (IWF) to BEREC's public consultation on the draft guidelines regarding the implementation of the net neutrality rules. This document focusses on the provisions in Article 3 of the Regulation and the related Recitals and their potential impact on the fight against online child sexual abuse material.*

### **Relevance for the fight against online child sexual abuse material**

The Regulation aims to protect end-users' rights in terms of the content they can access and the 'neutrality' of their internet connection. The text requires providers of internet access services to treat all traffic equally when providing internet access services.

In particular, ISPs shall not block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories thereof, unless this interference can be considered as 'reasonable traffic management' or if it is allowed under the exceptions mentioned in the Regulation.

Several ISPs take action to disrupt the availability of child sexual abuse material by blocking their customers' access to known child sexual abuse webpages until these pages are removed at source. One source of information for the list of webpages depicting child sexual abuse is the Internet Watch Foundation's URL list. The IWF is a UK registered charity and acts as one of the largest hotlines in world aiming to disrupt the availability of child sexual abuse material. More information about the IWF and its URL list can be found below.

Whether or not voluntary blocking of child sexual abuse material by ISPs is (a) included in the scope of the Regulation and (2) if so would be affected by the 'net neutrality' provisions in the Regulation has been an issue frequently raised by the IWF and ISPs throughout the negotiations on the text.

### **The views received from the legislators**

The IWF has consistently raised its concerns with potential ambiguity with EU and UK decision-makers and has repeatedly asked for clarification from the legislators. The feedback received from the legislators has been that voluntary measures to tackle child sexual abuse material will remain possible under the new Regulation.

Stakeholders from the European Parliament, European Commission and the Council of the EU have confirmed that the Regulation is not intended to regulate how ISPs or Member States tackle child sexual abuse material online. Self-regulatory schemes which give effect to EU law, for example under the Child Protection Directive, would be covered by the exceptions.

In the United Kingdom, the responsible Minister (Ed Vaizey, Minister of state at the Department of Culture, Media and Sport) stated in a response to a Parliamentary Question:

*“My Department supports the blocking of access to child sexual abuse material by industry and we are actively seeking to ensure that all European regulation, including the electronic communications framework - which is currently under review - does not impede this. The Government’s primary concern during negotiations on the Connected Continent (or Telecoms Single Market) Regulations was that the Internet Watch Foundation’s (IWF) ability to block access to illegal images of child abuse was protected, and we are confident we have ensured this. Going forward, we will continue with our aim to ensure any future European regulation allows the blocking of such content.”*

### **What does the Regulation say?**

The most relevant parts of the text are **Recitals 6** and **13** and the relevant exception in **Article 3(a)**.

The recitals state that the Regulation does *not seek to regulate the lawfulness of the content, applications or services, nor does it seek to regulate the procedures, requirements and safeguards related thereto*. The recitals also stipulate that situations may arise in which *providers are subject to measures that comply with Union law, implementing or applying Union legislative acts or national legislation, such as measures of general application, court orders, decisions of public authorities vested with relevant powers, or other measures ensuring compliance with such Union legislative acts or national legislation (for example, obligations to comply with court orders or orders by public authorities requiring to block unlawful content)*.

Recital (6) *End-users should have the right to access and distribute information and content, and to use and provide applications and services without discrimination, via their internet access service. The exercise of this right should be without prejudice to Union law, or national law that complies with Union law, regarding the lawfulness of content, applications or services. This Regulation does not seek to regulate the lawfulness of the content, applications or services, **nor does it seek to regulate the procedures, requirements and safeguards related thereto**. Those matters therefore remain subject to Union law, or national law that complies with Union law.*

Recital (13) *Situations may arise in which providers of internet access services are subject to Union legislative acts, or national legislation that complies with Union law (for example, related to the lawfulness of content, applications or services, or to public safety), including criminal law, requiring, for example, blocking of specific content, applications or services. In addition, **situations may arise in which those providers are subject to measures that comply with Union law, implementing or applying Union legislative acts or national legislation, such as measures of general application, court orders, decisions of public authorities vested with relevant powers, or other measures ensuring compliance with such Union legislative acts or national legislation (for example, obligations to comply with court orders or orders by public authorities requiring to block unlawful content) [...]***

The exception in Article 3 (a) allows for traffic management if this is a measure complying with – or giving effect to - existing legislation. This could therefore include existing legislation regarding the illegality of accessing and distributing child sexual abuse material or relevant EU legislation.

Article 3 *Providers of internet access services shall not engage in traffic management measures [...] except as necessary in order to:*

*Comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of internet access services is subject, or with **measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers.***

### **Response to BEREC's Guidelines (BoR (16) 94)**

BEREC has been mandated to issue guidelines for National Regulators. BEREC launched a public consultation on their draft *Guidelines on the Implementation by National Regulators of European Net Neutrality Rules*.

The numbers below refer to the paragraphs in the draft guidelines.

(26) This paragraph directly references Recital 6 from the Regulation:

*“The TSM Regulation does not seek to regulate the lawfulness of the content, applications or services (ref. Recital 6)”.*

However, the full sentence of the Recital reads: *“This Regulation does not seek to regulate the lawfulness of the content, applications or services, **nor does it seek to regulate the procedures, requirements and safeguards related thereto.**”*

Whilst there is a reference to the ‘applicability of such legislation’ in (27), we do believe that given the issues introduced above a complete reference to the Recital would be preferable.

(78) In response to Recital 13 and the exception in Article 3, the draft guidelines state that:

*“If an ISP applies traffic management measures which cannot be regarded as reasonable, NRAs should assess whether an ISP does so because it has to do so for legal reasons, namely to comply with the legislation or measures by public authorities specified in that exception.”*

The actual text of Recital 13 references compliance with relevant legislation but also mentions **“measures that comply with Union law, implementing or applying Union legislative acts or national legislation, such as measures of general application, court orders, decisions of public authorities vested with relevant powers, or other measures ensuring compliance with such Union legislative acts or national legislation (for example, obligations to comply with court orders or orders by public authorities requiring to block unlawful content) [...]”**.

The text of the exception in Article 3 allows traffic management in order to comply with Union legislative acts to which the provider of internet access services is subject, or with **measures that comply with Union law giving effect to such Union legislative acts or national legislation**. The text explains this 'includes' (but arguably is therefore not limited to) orders by courts or public authorities vested with relevant powers.

It therefore seems that the draft guidelines, by only referring to legislation or measures by public authorities, is more restrictive than the actual text of the Regulation: It is unclear whether compliance with measures that give effect to Union legislative acts is included in the draft Guidelines' description.

Given the importance of a continued fight against online child sexual abuse material, the IWF hopes the final guidelines will include the full scope of the exceptions of the Regulation in order to not impede ISPs ability to take voluntary action against child sexual abuse material online. It is our understanding that preventing ISPs to combat child sexual abuse material is not the aim of the Regulation, is not provided in the text of the Regulation and wasn't the intention of the legislators.

Please don't hesitate to contact us with any questions or queries about our work.

The **Internet Watch Foundation (IWF)** is the one of the largest hotlines in the world for combating online child sexual abuse material. It was set-up in 1996 as a self-regulatory body by the online industry and works closely with law enforcement and partner hotlines around the world. The IWF is funded by the online industry and the European Union.

In 2015, the IWF processed 112,975 reports and identified 68,092 webpages depicting child sexual abuse material. In 69% of these cases, the websites depicted children assessed as 10 or under and 34% depicted level 'A' abuse, namely rape and sexual torture.

The IWF issues Notice and Takedown requests for child sexual abuse material hosted in the United Kingdom. Child sexual abuse webpages hosted outside the UK are added to the IWF URL list until these are removed at source by the relevant national authorities. The URL list is updated twice daily and only includes the most specific level (URLs). Many ISPs voluntarily use the IWF list to prevent their customers from stumbling upon known child sexual abuse webpages. Over 98% of UK home broadband connections are covered by the IWF list.

More information about the IWF can be found here: [www.iwf.org.uk](http://www.iwf.org.uk)

More information about the IWF URL list can be found here:  
<https://www.iwf.org.uk/members/member-policies/url-list>