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Public Consultation on the Draft BEREC Guidelines on the Implementation of the
Open Internet Regulation

Response of Viasat, Inc.



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INTRODUCTION AND SUMMARY

Viasat, Inc. (“Viasat”) welcomes the opportunity to offer this response to BEREC’s Public Consultation on its draft Net Neutrality Guidelines regarding the application and implementation of Regulation (EU) 2015/2120.¹ Viasat applauds BEREC for taking a fresh look at its prior guidance on net neutrality issues and considering clarifications aimed at “protecting end-users’ rights and simultaneously guaranteeing the continued functioning of the internet ecosystem as an engine of innovation.”²

One area that likely warrants further clarification is the treatment of inflight Wi-Fi connectivity supported by Viasat and other service providers. Inflight Wi-Fi is an innovative and increasingly vital service that consumers have come to rely on for uninterrupted, gate-to-gate connectivity while they travel. Inflight Wi-Fi connectivity is distinct from ordinary mass-market internet access services in various respects—not only because it is provided only to a predetermined set of users (i.e., airline passengers during a flight) rather than offered to the public at large, but also because the technical realities of such a service pose unique network management challenges that do not apply to mass-market internet access service offerings.

While BEREC’s Draft Guidelines already provide a reasonable basis for service providers to conclude that inflight connectivity is not subject to the requirements that apply to mass-market internet access services, BEREC should consider specifically stating that inflight

¹ See BEREC, Public Consultation on the Draft BEREC Guidelines on the Implementation of the Open Internet Regulation, 10 October 2019, available at https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/8849-public-consultation-on-the-draft-berec-guidelines-on-the-implementation-of-the-open-internet-regulation (“Public Consultation”); BEREC, Draft BEREC Guidelines on the Implementation of the Open Internet Regulation, October 2019, available at https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/8850-draft-berec-guidelines-on-the-implementation-of-the-open-internet-regulation (“Draft Guidelines”).

² Public Consultation at 2.

connectivity qualifies as a non-public electronic communications service and is exempt on that basis.³ Such a clarification would avoid unnecessarily chilling the continued development of these services and constraining the technological innovations that make efficient and effective inflight connectivity possible—and would help pave the way for making these beneficial services more widely available.

BACKGROUND

As a leading provider of broadband and other communications solutions to consumers, businesses, and government users across Europe and around the world, Viasat has been at the forefront of pioneering the development and commercial availability of inflight Wi-Fi connectivity in recent years. Pursuant to contracts with commercial airlines, Viasat leverages state-of-the-art Ka-band satellite networks to furnish high-capacity broadband links to aeronautical terminals (called “earth stations in motion,” or “ESIMs”) mounted on the top of commercial aircraft. Within the aircraft, Wi-Fi access points enable passengers and crew to connect to the Viasat-furnished satellite broadband link and access internet content and applications over that shared connection. Through a variety of technological innovations, Viasat has helped revolutionize the experience of staying connected on flights—enabling passengers to stream video and audio, stay in touch with family and friends, work productively on the go, access email and VPN networks, shop online, and communicate with cabin crew quickly and efficiently. Viasat also has been able to furnish this service from gate to gate, ensuring that passengers can remain seamlessly connected wherever they are on their journey.

As consumers in the European Union and throughout the world increasingly expect to have access to high-speed connectivity anytime and anywhere, Viasat has seen demand for

³ See Draft Guidelines ¶¶ 8-12.

inflight Wi-Fi grow exponentially in the past few years. Today, Viasat provides broadband connections to over 1,600 aircraft, with hundreds more expected in the near future. Through these aeronautical links, Viasat currently is connecting over 150 million personal electronic devices on airplanes annually. Recent surveys indicate that, of those passengers that have had access to in-flight Wi-Fi in the past year, 65 percent chose to use it, and “55 percent of all airline passengers described it as a ‘crucial’ part of their inflight experience.”⁴ And demand for these innovative services is only expected to keep growing—as confirmed by a recent study by the London School of Economics which predicts that, “[b]y 2035, it is likely that inflight connectivity will be ubiquitous across the world.”⁵

Importantly, delivering such ubiquitous in-flight connectivity in a manner that comports with consumers’ general expectations for broadband poses particular challenges from a technical perspective. Among other things, these onboard networks must be managed in a way that ensures that all passengers on a particular flight can enjoy connectivity over the same, shared satellite link, and that no single passenger or set of passengers can engage in usage patterns that unreasonably interfere with the ability of other passengers to access internet content and applications. Absent such active management of inflight Wi-Fi networks, the ability to deliver high-quality connectivity to *all* passengers on the airplane would risk being significantly impaired. Facilitating the cutting-edge technologies and traffic management methods that allow for viable inflight connectivity thus falls squarely within BEREC’s stated goal of “protecting

⁴ Inmarsat, *In-flight Connectivity Survey 2018* at 3, available at <https://www.inmarsat.com/aviation/commercial-aviation/in-flight-connectivity-survey/>.

⁵ Dr. Alexander Grous, London School of Economics and Political Science, Sky High Economics, “Chapter One: Quantifying the commercial opportunities of passenger connectivity for the global airline industry” at 3, available at <http://www.lse.ac.uk/business-and-consultancy/consulting/assets/documents/sky-high-economics-chapter-one.pdf>.

end-users’ rights and simultaneously guaranteeing the continued functioning of the internet ecosystem as an engine of innovation.”⁶

DISCUSSION

In light of the above, it is critical that inflight Wi-Fi connectivity not be subject to network management restrictions developed in the markedly different context of mass-market internet access services. As discussed below, BEREC’s current Draft Guidelines already include provisions that can be read to indicate that the provision of inflight Wi-Fi is beyond the scope of Regulation (EU) 2015/2120. But BEREC should strongly consider making the exemption for inflight connectivity clear and express when issuing its final guidelines—as the U.S. Federal Communications Commission (“FCC”) had done when adopting its own bright-line net neutrality rules—to avoid chilling the deployment and provision of these innovative and vital services to airline passengers.

I. SERVICE PROVIDERS ALREADY MAY REASONABLY INTERPRET THE DRAFT GUIDELINES TO EXEMPT INFLIGHT WI-FI CONNECTIVITY

As an initial matter, Viasat submits that it would be reasonable for service providers to interpret general statements in BEREC’s Draft Guidelines as exempting inflight Wi-Fi connectivity from ill-fitting net neutrality obligations. The net neutrality requirements in Regulation (EU) 2015/2120 apply only to certain “providers of electronic communications to the public,” and BEREC’s Draft Guidelines describe that category of service providers in a manner that appears to exclude inflight connectivity providers. Specifically, the Draft Guidelines state that “[e]lectronic communication services or networks that are offered only to a predetermined group of end-users could be considered to be not publicly available,”⁷ and suggest that “the range

⁶ Public Consultation at 2.

⁷ Draft Guidelines ¶ 10.

of users” and “the contractual relationship under which the service is provided” also are relevant factors when considering whether the service is non-public and therefore exempt.⁸

In Viasat’s view, inflight Wi-Fi connectivity is best understood as non-public under each of these factors. The group of possible end users is certainly “predetermined,” as it consists solely of the airplane’s crew and ticketed passengers, and the airline itself. Similarly, the “range of users” is far smaller than the general public, and indeed is limited by the number of seats on the airplane. And, as noted above, the service provider typically has a “contractual relationship” with the *airline* to furnish connectivity on the airplane, as distinct from a broad offer of retail internet access service to the public at large. In this way, inflight Wi-Fi connectivity is closely analogous to the example of a non-public service mentioned in the current Draft Guidelines: “access to the internet provided by cafés and restaurants.”⁹ In both instances, access to internet content and applications is being provided through a premises operator to a discrete set of end users rather than to the general public.¹⁰ Service providers thus may reasonably read the Draft Guidelines as exempting inflight Wi-Fi connectivity from the requirements applicable to “providers of electronic communications to the public.”

Even if inflight connectivity were deemed a “public” service, other carve-outs in Regulation (EU) 2015/2120 and the Draft Guidelines may still apply to the service. The rules permit providers to offer “specialised services”—i.e., “services other than internet access services which are optimised for specific content, applications or services, or a combination

⁸ *Id.* ¶ 12.

⁹ *Id.*

¹⁰ As discussed below, the FCC has dubbed its analogous exemption the “premises operator” exemption, and has specifically identified both “coffee shops” and “airlines” as falling within this exemption. *See infra* at 6-7.

thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.”¹¹ Inflight Wi-Fi connectivity may well fit within that definition, particularly to the extent that such connectivity does not provide access to the entire internet and entails optimisation techniques necessary to deliver a baseline quality of service to all passengers on a flight.

Moreover, even in the offering of true internet access services to the public, providers may engage in “reasonable traffic management measures” that are “transparent, non-discriminatory and proportionate,” or that “prevent impending network congestion.”¹² This exception would seem to cover network management practices aimed at facilitating the provision of inflight Wi-Fi connectivity, where those practices are adequately disclosed and driven by a desire to ensure that a few passengers do not create undue congestion that undermines all other passengers’ access to internet content.

II. NEVERTHELESS, BEREC SHOULD CLARIFY THAT INFLIGHT WI-FI CONNECTIVITY IS EXEMPT AS A NON-PUBLIC ELECTRONIC COMMUNICATIONS SERVICE

While the reasonable interpretations of the Draft Guidelines set forth above provide comfort that the provision of inflight Wi-Fi connectivity does not implicate any net neutrality requirements, Viasat respectfully urges BEREC to make abundantly clear that this service is a non-public electronic communications service that is categorically exempt from the rules for mass-market services. Such a clarification would help mitigate the risk that a particular national regulatory authority might reach a contrary conclusion and attempt to apply ill-fitting regulatory obligations to these services. By removing this uncertainty, BEREC can facilitate the expansion

¹¹ Regulation (EU) 2015/2120, art. 3(5); *see also* Draft Guidelines ¶ 101.

¹² Regulation (EU) 2015/2120, art. 3(3); *see also* Draft Guidelines ¶¶ 57-75, 88-93.

of inflight Wi-Fi connectivity for the benefit of airline passengers traveling in the European Union.

Notably, adopting this clarification would be consistent with the United States’ historical approach to these issues. In its *2010 Open Internet Order*, the FCC adopted an analogous exemption from its net neutrality rules for “premises operators” that provide connectivity “as an ancillary benefit to patrons” rather than to the public at large.¹³ In identifying examples that qualify for this exemption, the FCC mentioned not only services offered in “coffee shops”—akin to the Draft Guidelines’ reference to “cafés”—but also services offered on “airlines.”¹⁴ Later, in its *2015 Open Internet Order*, the FCC reaffirmed this “premises operator” exemption, and once again identified “airlines” as an example alongside “coffee shops, bookstores, . . . private end-user networks (e.g. libraries and universities), and other businesses that acquire broadband Internet access service from a broadband provider to enable patrons to access the Internet from their respective establishments.”¹⁵ The FCC also specifically found that a broad exemption for services provided on airlines and in similar settings brings substantial public interest benefits—particularly because “applying the open Internet rules to the provision of broadband service by premises operators would have a dampening effect on these entities’ ability and incentive to offer these services.”¹⁶

The same rationale applies here. Any ongoing uncertainty over the applicability of net neutrality regulations to inflight Wi-Fi connectivity—and specifically to the network

¹³ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 ¶ 52 (2010).

¹⁴ *Id.*

¹⁵ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶ 191 (2015).

¹⁶ *Id.*

management practices necessary to make such services viable and effective for all passengers—would threaten to stifle the continued expansion of these beneficial services. This chilling effect ultimately would harm consumers, who, as noted above, increasingly count on gate-to-gate connectivity and believe that inflight Wi-Fi is “crucial” to their travel experience.¹⁷ BEREC’s consultation regarding its Draft Guidelines presents an ideal opportunity to clarify the status of inflight Wi-Fi and help pave the way for such services to flourish for the benefit of E.U. citizens.

CONCLUSION

For the reasons discussed herein, Viasat respectfully submits that BEREC should make abundantly clear that inflight Wi-Fi connectivity qualifies as a non-public electronic communications service and is exempt from Regulation (EU) 2015/2120 on that basis.

¹⁷ *See supra* at 3.