EUROPEAN COMMISSION
Information Society and Media Directorate-General

Electronic Communications Policy

Report on the public consultation on

'The open internet and net neutrality in Europe'

9 November 2010

This document does not represent an official position of the European Commission, but is intended to stimulate debate on the part of stakeholders and the public. It does not prejudge the form or content of any future proposal by the European Commission.

1. INTRODUCTION

On 30 June 2010, the European Commission launched a public consultation on 'The open internet and net neutrality in Europe', in order to provide an evidence base for its forthcoming report to the European Parliament and Council on these issues. The consultation closed on 30 September 2010 and attracted 318 responses from a wide range of stakeholders, including operators, internet content providers, Member States, consumer and civil society organisations as well as a number of individuals. The full list of respondents together with the non-confidential responses can be found on the website.

This report provides a concise, non-exhaustive overview of the responses on the key issues raised by the consultation.

2. OVERVIEW OF RESPONSES

2.1. The open internet – current problems, future problems and the suitability of the EU framework

There appears to be consensus among network operators, internet service providers (ISPs) and infrastructure manufacturers that there are currently no **problems with the openness of the internet and net neutrality in the EU (question 1)**. In their view, traffic management exists to support the efficient operation of today's internet and does not have a negative impact on the consumer; indeed, some contend that traffic management actually enables the development of services at lower cost. They maintain that there is no evidence that operators are engaging in unfair discrimination in a way that harms consumers or competition. This general view is supported by a number of Member States.

However, the Body of European Regulators for Electronic Communications (BEREC) notes that there have been cases where equal treatment of all data was not ensured. Some of these cases, in BEREC's view, may raise concerns for a competitive market and for society as a whole. Although net neutrality had not been intensively discussed in many countries, BEREC reported cases of: i) throttling of peer-to-peer (P2P) file-sharing or video streaming in France, Greece, Hungary, Lithuania, Poland and the United Kingdom; and ii) blocking, or charging extra for, voice over internet protocol (VoIP) services in mobile networks by certain mobile operators in Austria, Croatia, Germany, Italy, the Netherlands, Portugal and Romania. BEREC's analysis is supported by VoIP providers which allege blocking of VoIP and P2P applications or their being subjected to unjustified tariffs.

This finding is also supported by consumer and civil society organisations which refer to a number of alleged instances of blocking or slowing down of content.

However, it appears that many of these issues were resolved voluntarily, without any formal proceedings, although some such practices still remain. Understandably, respondents found it difficult to predict **future problems (question 2)** relating to net neutrality with any degree of certainty. Nevertheless, many were in agreement that any future regulatory approaches will need to take account of the new internet business models that will emerge over the coming years. A number of respondents pointed to managed services, such as internet protocol television (IPTV), as an area that could present difficulties. For example, some content providers voiced concerns that network operators could favour certain services over others, to the detriment of competition and innovation.

In addition, some content providers maintain that although the internet has been relatively open until now, this may not necessarily be the case in the future. They are concerned that the new market structures under consideration, such as charging parties other than the end user, have the potential to damage the openness of the internet and reduce the incentives for investment in content. In particular, they contest the 'free-riding' argument, arguing that content providers actually invest heavily in their content and are economically incentivised to send content to end-users as efficiently as possible because they themselves pay for access to the internet, while some also invest substantially in network and data infrastructure of their own. On the other hand, some respondents (in particular telecoms operators) consider that such concerns are not justified, as the competitive process, alongside with transparency measures ensuring consumer choice, can avoid potential problems.

In terms of future developments, BEREC foresees possible issues in three areas: i) the scope for discrimination leading to anti-competitive effects; ii) the potential longer-term consequences for the internet economy affecting innovation and freedom of expression; and iii) consumer confusion/harm due to lack of transparency.

In general, respondents consider the EU telecoms framework to be **capable of dealing with the issues identified (question 3)** and only very few advocate additional regulation at this stage. However, many note that the framework in still in the transposition phase and that it would be premature to adopt a firm position before this process has been completed. According to this view, which is supported by BEREC, the framework should first be implemented and interpreted at national level, and only then should an assessment be made of whether the provisions can be operationally effective in practice. Several respondents noted that the provision on minimum quality of service is of particular importance in this context.

2.2. Traffic management – necessity, transparency and managed services

There is consensus among respondents, even those that had previously alluded to blocking of P2P or VoIP services, that **traffic management is a necessary and essential part of the operation of an efficient internet (question 4)**. They agree that its use for the purposes of addressing congestion and security issues is entirely legitimate and not contrary to the principles of net neutrality. Nevertheless, some respondents consider that abuse of traffic management by certain operators for the purposes of, for example, granting preferential treatment to one service over another, would be unacceptable, particularly where the services are similar in nature. In addition, a number of respondents, especially consumer organisations, raise privacy concerns relating to traffic management techniques such as Deep Packet Inspection (DPI). This is supported by the European Data Protection Supervisor, which considers that by intercepting traffic data, traffic management mechanisms may breach the fundamental right of confidentiality of communications and insists that the Commission take into account privacy and data protection aspects when considering policies on net neutrality. However, operators as well as infrastructure manufacturers maintain that the use of DPI is not a necessary precondition for traffic management.

Respondents are also generally agreed on the need for **transparency** in relation to traffic management, which is necessary for enabling consumers to make informed decisions about their internet provision. Many advocate further dialogue between industry, national regulators and the Commission in order to agree on EU-wide transparency principles and a set of standardised information. However, a broad range of stakeholders as well as individuals consider that transparency by itself would not be **sufficient to allay current**

and future net neutrality concerns (question 5), especially in light of the difficulties that consumers can face when switching network provider.

Respondents consider that the same traffic management principles should **apply to both fixed and mobile networks (question 6)** and that the EU framework should remain technology-neutral. However, many stakeholders across the board suggest that in practice there may be differences in how those principles are applied in order to reflect the diverse characteristics of the two types of network, in particular the inherent capacity constraints of mobile networks.

Respondents cite a number of **other forms of prioritisation (question 7)**, with several referring to Content Delivery Networks (CDNs), which help content providers deliver a higher access speed and quality of service to their consumers. On a technical level, CDNs can help to alleviate traffic load on the network. According to BEREC, CDNs in themselves do not raise net neutrality issues, but any future discriminatory treatment in their favour might well do so.

Opinion is divided on whether the same quality of service conditions should apply to all **managed services (question 8)**. Operators and ISPs argue that they should be allowed to determine their own business models and arrangements with other commercial parties. This stance is supported by certain Member States. In contrast, others, in particular content providers, argue that the distinction between managed services and the best-efforts internet is unclear at present. For this group, a level playing field is essential, in which any managed services are offered to all content and application providers on equal terms and without discrimination. Meanwhile, BEREC is concerned about potential anti-competitive effects of such services and about their longer-term impact on the best-efforts internet.

There is general agreement that **additional regulatory measures on managed services (question 9)** would not be required at the present time. However, a number of respondents call upon the Commission to provide a definition of managed services in its guidance, while many advocate an industry-led code of conduct as a way of ensuring fairness and non-discrimination in this area.

2.3. Market structure

There is general agreement that the **commercial arrangements that currently govern the provision of internet access (question 10)**, such as peering arrangements and paid transit, have worked well until now. However, opinion is divided on future approaches. A number of respondents cite inefficiencies in the two-sided market and advocate a new business model for the internet that takes account of advances in broadband technology and enables innovation in the area of managed services. In contrast, content providers are concerned that a change in market structure that leads to their being charged additionally for network access would invest operators with too much power and would represent, according to a few respondents, a 'tax on innovation'. Consumer organisations also state their concerns about the market power of large operators. BEREC agrees that the current arrangements are adequate, but notes that market developments need to be monitored to ensure that regulatory interventions can take place in the future if the need arises.

2.4. Consumers and quality of service

Many respondents, including operators and some content providers, consider that regulatory intervention to set **minimum quality of service standards for internet**

access (question 11) would be counterproductive and stifle innovation. In their view, a competitive market with sufficient transparency and switching is fully able to provide an adequate level of service. In contrast, other respondents consider that intervention would be warranted where consumers are prevented from accessing their chosen services over the public internet. Respondents had various ideas about how to **determine minimum quality of service (question 12)**, such as adopting EU guidelines based on 'functional internet access', encouraging industry to agree on a code of conduct, and using available international standards. However, some respondents warn that effective **monitoring of quality of service (question 13)** would be a difficult task, given the array of parameters that can affect speed and delivery of internet traffic. In the scenario that several regulatory authorities decided to impose minimum requirements, BEREC would advocate the development of a common approach, at least for the high level principles and/or broad approaches.

Respondents provided a wide range of suggestions as to what **transparency for consumers (question 14)** should consist of, including clear information on terms and conditions, the right to use any lawful application and the means of switching providers. Some advocated a two-level model for transparency, whereby all consumers are provided with easily understandable information on their service, but those that are interested in actively monitoring their service are provided with additional access to the necessary information. A number of respondents indicate that the relevant provisions of the Universal Service Directive (under Article 20) would be sufficient to address transparency requirements.

2.5. The political, cultural and social dimension

Relatively few responses were received on other concerns relating to **freedom of expression, media pluralism and cultural diversity on the internet (question 15)**, since most respondents had outlined their views in earlier replies. Operators that did express an opinion maintained that these issues are determined by the actual content on the internet, over which they do not exercise control. In contrast, some consumer organisations, content providers and other content organisations foresaw potential problems, especially as regards freedom of expression, if the effect of new business models such as managed services were to limit the free flow and exchange of information online.

Annex 1: consultation questions

1) Is there currently a problem of net neutrality and the openness of the internet in Europe? If so, illustrate with concrete examples. Where are the bottlenecks, if any? Is the problem such that it cannot be solved by the existing degree of competition in fixed and mobile access markets?

2) How might problems arise in future? Could these emerge in other parts of the internet value chain? What would the causes be?

3) Is the regulatory framework capable of dealing with the issues identified, including in relation to monitoring/assessment and subsequent enforcement?

4) To what extent is traffic management necessary from an operator's point of view? How is it carried out in practice? What technologies are used to carry out such traffic management?

5) To what extent will net neutrality concerns be allayed by the provision of transparent information to end users, which distinguishes between managed services on the one hand and services offering access to the public internet on a 'best efforts' basis, on the other?

6) Should the principles governing traffic management be the same for fixed and mobile networks?

7) What other forms of prioritisation are taking place? Do content and application providers also try to prioritise their services? If so, how – and how does this prioritisation affect other players in the value chain?

8) In the case of managed services, should the same quality of service conditions and parameters be available to all content/application/online service providers which are in the same situation? May exclusive agreements between network operators and content/application/online service providers create problems for achieving that objective?

9) If the objective referred to in Question 8 is retained, are additional measures needed to achieve it? If so, should such measures have a voluntary nature (such as, for example, an industry code of conduct) or a regulatory one?

10) Are the commercial arrangements that currently govern the provision of access to the internet adequate, in order to ensure that the internet remains open and that infrastructure investment is maintained? If not, how should they change?

11) What instances could trigger intervention by national regulatory authorities in setting minimum quality of service requirements on an undertaking or undertakings providing public communications services?

12) How should quality of service requirements be determined, and how could they be monitored?

13) In the case where NRAs find it necessary to intervene to impose minimum quality of service requirements, what form should they take, and to what extent should there be co-operation between NRAs to arrive at a common approach?

14) What should transparency for consumers consist of? Should the standards currently applied be further improved?

15) Besides the traffic management issues discussed above, are there any other concerns affecting freedom of expression, media pluralism and cultural diversity on the internet? If so, what further measures would be needed to safeguard those values?