



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to the European Commission's consultation on the Open Internet and Net Neutrality in Europe

September 2010

About Consumer Focus

Consumer Focus is the consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses and public services to put consumers at the heart of what they do. Consumer Focus gives a strong voice to consumers on the issues that matter to them and works to secure a fair deal on their behalf.

We work with consumers and a range of organisations to tackle the problems customers face and to achieve creative solutions that make a difference to people's lives.

We welcome European Commission's consultation on net neutrality and are grateful for the opportunity to engage in a debate on this issue which is so crucial to consumers.

Summary of recommendations

Consumer Focus regards net neutrality as a key principle of the internet. It safeguards an enhanced participation by citizens in society, secures access to knowledge and diversity, and promotes innovation, economic growth and democratic participation. The importance of the principle of net neutrality for citizens has been confirmed in a summary of responses to the European Commission's consultation on the Post-i2010: priorities for new strategy for European information society 2010/2015.¹

We believe that any discussion on traffic management policy should reflect a wider debate over the right to access a 'best effort' public internet. It is essential that any policies proposed on traffic management should be scrutinised for potential detriment to consumers and especially those most disadvantaged groups. We strongly believe that the European Commission should take the lead in furthering the interests of European citizens and safeguard access to an open public internet. We fear that relying purely on transparency requirements and leaving it to market forces will lead to the development of a two-tier internet. Few would be able to access premium managed services and many would be left in the slow lane with a low quality and restrictive public internet.

We strongly recommend that any traffic management policy is based on the key principles of net neutrality that entitle consumers to an internet connection:²

- of the speed and reliability advertised
- that enables them to:
 - send and receive content of their choice
 - use services and run applications of their choice
 - connect hardware and use software of their choice that does not harm the network
- that is free from discrimination with regard to type of application, services, or content or based on sender or receiver address

There should also be:

- competition among network, application, service and content providers
- transparency over network management practices deployed by providers

In order to achieve this we recommend that the European Commission:

- follows the examples of the national regulatory authorities in Canada and Norway and adopts net neutrality and traffic management guidelines to serve as a benchmark for assessing what is or is not acceptable practice
- conducts an impact assessment of traffic management practices to assess their short and long term implications for European consumers' and citizens' access, choice and ability to contribute to online content and services
- carries out a review of the existing transparency and consumer information measures, and in-depth research on consumers' experience and understanding of traffic management across member states, with the aim to adopt a best practice approach to information provision on traffic management in the Internal Market

¹ <http://bit.ly/bkckxo>

² Transatlantic Consumer Dialogue (TACD) Resolution on net neutrality, April 2010, <http://bit.ly/b38quK>

- addresses the problem of barriers that prevent consumers from switching Internet Service Providers
- improves market surveillance and monitoring mechanisms in order to verify information on traffic management provided to consumers, and to detect potential abusive behaviour
- addresses the issue of access to easily accessible, low cost and timely complaints handling and redress mechanisms to process consumers' complaints and rule on redress in cases of detriment
- adopts a joined-up approach in policy making and enforcement to ensure the policy in the EU on net neutrality reflects wider interests of both consumers and citizens in communication market, and is in-line with EU laws and Digital Agenda objectives to enhance development of internet communication technologies and digital inclusion

Specific questions

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

As the internet turns into an essential tool for modern life, internet traffic is growing and the pressure for traffic degradation and prioritisation is increasing. The growing online multimedia market and consumer demand for bandwidth – heavy applications are straining the existing ‘best effort’ approach, and network operators and Internet Service Providers (ISPs) are investing in traffic management technologies to deal with the congestion. However in parallel to traffic management practices applied by network providers to ease congestion, there are some examples of practices that may raise concerns about fair market competition and its impact on consumers. These include for example:

- blocking Voice over Internet Protocol (VoIP) services such as Skype by major UK mobile providers
- concerns over BBC iPlayer traffic being throttled
- blocking some peer to peer (P2P) traffic under the pretext of security threats
- restrictive access to competitors’ content and services on mobile platforms

In parallel, consumers’ awareness of traffic management practice is growing. Typical problems experienced by UK consumers in relation to traffic management include loss of internet connection, a slower connection speed, freezing of screen when on the internet, poor connection, or inability to access certain applications and websites.³ Consumers become conscious of connection speeds and usage allowances by, for example, caps on the amount of data they can download. In addition, traffic management practices are experienced by mobile users as mobile operators may restrict access to some online content and services. For example our cross-country research on consumers’ experiences with shopping via mobile phone found that many shoppers were prevented from buying online content.⁴

However in the existing regulatory environment it is difficult for consumers to determine (1) the extent of traffic management practices and their impact on their internet access, (2) what part of the network chain is at fault (for example ISP, internet connection speed, content provider or end of users’ equipment and software) and, (3) what is genuine traffic management and what is unfair practice.

We believe that the new transparency requirements that will come into UK law through the transposition of the revised Framework Directive⁵ will help, to some extent, to alleviate the transparency problem, though it will not alone resolve the issue of traffic congestion.

³ Consumer Expectations of the Internet, Synovate 2009.

⁴ <http://consumerfocus.org.uk/g/4m0> Marzena Kisielowska-Lipman, Consumer Focus December 2009.

⁵ <http://bit.ly/destUK>

In our view, the European Commission should address the issue of investment in the development of sufficient infrastructure capable of meeting the growing demand for online content and services. We believe that appropriate investment in the infrastructure, such as deployment of superfast broadband, is more likely to ease the congestion problems than investment in the development of traffic management technologies.

Any proposal to drive investment in infrastructure should be balanced and fair for all parties affected, and above all should put the consumer at its heart. The infrastructure policy should also reflect wider issues of digital inclusion and broadband take-up beyond physical connectivity, such as affordability, usability and driving motivations, expectations, creativity and innovation.

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

The success of the internet was founded on the notion of open access and the 'end-to-end principle' that allowed all data flows to be transmitted without any form of priority. These two principles drove creativity and innovation, and led to an unprecedented growth of the multi-layered model of the market that revolutionised communication services, to the benefit of both consumers and businesses.

Many of the well-established internet based businesses such as social networking sites, derived from low investment, with no initial incentives to value their content and services financially. Financial value was enabled only because of the network effect created by a critical mass of contributors and consumers.⁶

We are concerned that allowing network operators and ISPs to set traffic management parameters by default, without a clear benchmark of legitimacy and fairness, is likely to bring unwelcome changes to the multi-layered and consumer-driven market.

The potential for unfair discrimination is increasing due to the convergence of network providers with providers of television, radio and telephony services. Providers of integrated communications and multi-media platforms are likely to have financial incentives to prioritise transmission of affiliated content and services at the expense of competing products. For example, an internet provider that provides video distribution services has incentives to allocate greater bandwidth to its own services at the expense of potentially competing internet applications. Similarly, an internet provider that also supplies telephony might degrade or block a VoIP provider.⁷ Such practices may lead to fourfold effect:

- market foreclosure of new entries for content and for service providers who do not secure integration or exclusive agreement with network operators
- limited incentives to invest in the expansion of network infrastructure of the 'public' internet capable of supporting competing and more innovative business models
- undermining business confidence in developing innovative cutting-edge products that may require long-term investment
- consumer detriment in terms of limiting choice and the potential for price maintenance

⁶ Christopher Marsden, Net Neutrality and Consumer Access to Content, Scripted, volume 4, issue 4, September 2007.

⁷ Transatlantic Consumer Dialogue (TACD) Resolution on net neutrality, April 2010, <http://bit.ly/b38quK>

Therefore we fear that the lack of clear guidelines on net neutrality and traffic management from the European Commission is likely to diminish the innovative and competitive nature of the existing market, forcing consumers to accept services and products that could be of a lesser value.

We are particularly concerned about the impact of such practices on consumers living in rural and underdeveloped urban areas with limited competition for network providers, whose choice of content or services may be restricted to those offered by a network operator which holds a dominant position in the area.

We are also concerned that discrimination may impact the growth of the internet infrastructure as it will be against the financial interests of network providers to invest in expansion of the infrastructure's capacity to support content and services of competing players.

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

We believe that the existing regulatory framework is insufficient to deal with potential anti-discriminatory traffic management practices, taking account of the conditions of the existing ICT market that is fast moving, multi-layered and dominated by small and medium size enterprises.

Competition law takes effect only in cases where a company is proven to have abused its significant market power (SMP) and relies on a narrow definition and interpretation of the relevant market in which such power arises. However, in the complex and changing ICT market it is difficult to define the appropriate market.⁸ Therefore we are concerned that competition law may be ill-equipped to deal with cases of anti-competitive behaviour of an ISP that does not hold SMP in the overall market, but has a dominant position in a particular geographical location where consumers have limited choice of providers.⁹

Secondly, competition law can only deal with some aspects of traffic management such as blocking internet access as a whole, or intentionally degrading competing content and services of unaffiliated providers.¹⁰ It is not adequate to address issues of network operators (1) degrading all the non-prioritised traffic in order to launch and promote prioritisation services, (2) setting up unreasonable restrictions for end-users running some applications and (3) refusing unaffiliated internet content providers access to prioritisation services.¹¹

Thirdly, the competition rules can only apply ex-post once the anti-competitive behaviour takes place; they are costly and can take a long time to resolve the issue. In the meantime consumers may be tied into a low value deal that may be difficult to switch from due to barriers such as contract early termination charges, or software and equipment costs in the case of bundled services.

Fourthly, in the UK context, we believe there is an enforcement gap in the existing regulations to verify traffic management practices claimed on the basis of security threats or illegal activity.

⁸ This was also acknowledged in Ofcom's discussion paper on Net Neutrality and Traffic Management, p, p.26

⁹ Christopher Marsden, Net Neutrality and Consumer Access to Content, Scripted, volume 4, issue 4, September 2007.

¹⁰ Legal analysis of network neutrality under EU competition rules and the Regulatory Framework for Electronic Communications, Peggy Valcke, Liyang Hou, David Stevens, Eleni Kosta.

¹¹ Legal analysis of network neutrality under EU competition rules and the Regulatory Framework for Electronic Communications, Peggy Valcke, Liyang Hou, David Stevens, Eleni Kosta.

At present much P2P traffic is blocked under claims of security threats such as malware or spyware. However, Ofcom lacks the regulatory powers to assess such cases as they fall within the responsibilities of the Home Office and the Information Commissioner, whereas the latter have limited technical expertise to adjudicate when such cases arise.¹²

And finally, we do not believe that the new transparency requirement that will come to force under the revised Framework Directive will solve the problem of discriminatory traffic management practices on its own. Informing consumers about practices will work as long as switching barriers are addressed, jointly with an obligation placed on operators to justify every traffic intervention on their networks. The latter approach has been adopted in other countries.¹³

We recommend that the European Commission jointly with the Body of European Regulators for Electronic Communication (BEREC) develop guidelines on net neutrality and traffic management that should be adopted by the industry across member states. Such guidelines are essential to ensure coherent and harmonised policies on net neutrality of the Internal Market and prevent market segmentation. Following the adoption of the guidelines National Regulatory Authorities and BEREC should oversee industries compliance. Should such measure prove ineffective we recommend adopting a regulatory approach.

In addition we recommend the European Commission addresses the issue of enforcement gaps in member states, where applicable, in cases where traffic management is being justified on the basis of security or illegal content/services claims.

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

We recognise that reasonable traffic management practices are necessary to ensure proper functioning of the internet to the benefit of end-users. These include measures to tackle legitimate congestion issues and quality services chosen by a consumer. However these need to be distinguished from discriminatory practices arising from anti-competitive behaviour and commercial interests that may harm competition, restrict access to the public internet and infringe the civil rights of users to free speech and privacy.

We are concerned that the revised Framework Directive mandates traffic management practices by default, so long as they meet transparency requirements, in the absence of clear guidance on what constitutes a legitimate traffic management practice.¹⁴

Currently consumers may experience different types of traffic management practice that raise concerns over fairness. These include:¹⁵

- Transparency failures where ISPs may fail to tell consumers and application developers which services they offer, estimated bandwidth, latency, etc. The

¹² Christopher Marsden, Net Neutrality and Consumer Access to Content, Scripted, volume 4, issue 4, September 2007.

¹³ <http://bit.ly/ajJjmd>; Network neutrality. Guidelines for Internet neutrality, Post-og teletilsynet, 24 February 2009.

¹⁴ <http://bit.ly/destUK>

¹⁵ Christopher T Marsden, Net Neutrality and Consumer Access to Content, Scripted, V4, Issue 4, September 2007 <http://bit.ly/cRFc9>

lack of transparency has been confirmed by, for example, Ofcom's study on broadband speeds¹⁶

- Blocking and 'throttling' (traffic shaping) where certain content and services are blocked and/or service quality downgraded. These practices include Skype blocking or downgrading P2P networks
- 'Walled gardens' or preferred partners applied, for example, in mobile telephony, where network providers can offer preferential treatment to one application provider over others. It leads to development of so called 'gate keepers' that restrict open and interoperable access and prevent consumers from accessing some online content and services
- Mobile termination rates (MTRs) that enhance market segmentation and could limit new entrants to the market, therefore limiting the number of mobile broadband providers available

Traffic management is also used by content providers, many of whom invest in the development of Content Delivery Networks (CDN) in order to diminish the effects of traffic congestion and provide an improved quality of service by enabling service providers' content to be near the end-user. However CDNs are not neutral and are accessible only to those willing to pay for them.

In addition there is a growing trend towards managed services and platforms that offer access to premium services with guaranteed service quality. There are also examples of joint initiatives between network operators and content providers in the UK, such as Project Canvas,¹⁷ to develop multimedia and communication platforms. These would facilitate seamless access to a range of third-party services to consumers which raise issues of openness and interoperability between platforms.¹⁸

The existing regulatory framework does not specify what is acceptable practice what is potential for abuse. To give clarity and ensure a unified benchmark for legitimate traffic management in member states we recommend that the European Commission and BEREC develop guidelines that would subscribe to the principles of:

- **Transparency:** traffic management practices should be disclosed to consumers in comprehensible ways
- **Proportionality:** the measures in place should have the minimum impact on network operation and be proportionate to the problem encountered
- **Non-discrimination:** streams with comparable technical properties should be treated in an equivalent manner and access providers should not discriminate between providers of the same content or service
- **Open access and adaptable networks:** consumers should be able to use and run lawful content, applications, software and services of their choice, and connect to hardware of their choice as long as it does not harm the network
- **Fair competition:** consumers should be entitled to benefit from competition between network, application, service and content providers
- **Redress:** consumers should have the right to compensation in cases where network operators and ISPs breach contract's terms and conditions in relation to traffic management policies

Similar guidelines on net neutrality and traffic management have been developed by national regulatory authorities in Canada¹⁹ and Norway²⁰ and adopted by the industry.

¹⁶ <http://bit.ly/abEBPu>

¹⁷ <http://bit.ly/dkLCT9>

¹⁸ <http://bit.ly/aD8D2m>

¹⁹ Ofcom's discussion paper, pp.20-21, footnote 18.

²⁰ Network neutrality. Guidelines for Internet neutrality, Post-og teletilsynet, 24 February 2009.

The need to endorse similar principles is being considered by the Federal Communications Commission in the USA and the French communications regulator ARCEP.²¹

Once the guidelines are established we recommend BEREC and the member states' national regulatory authorities should monitor and report regularly on the industry's compliance. Should such guidelines prove insufficient to prevent unfair and discriminatory traffic management practices we would advocate that regulatory measures be introduced that are legally binding for the industry.

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

We are concerned about the European Commission's interpretation of the provision of transparent information to end users phrased in the above question. The new Revised Framework Directive mandates transparency of information about traffic management practices to a consumer regardless whether it is a managed service or access to the public internet.

Secondly we recommend the European Commission clarifies what it regards as the 'best effort' public internet and defines criteria for the latter to facilitate an informed debate. We are concerned that in the light of the recent market developments of managed services the lack of any criteria for the 'best effort' internet may lead to the degradation of the quality of the latter, and hence may compromise the interest of the public in access and participation in the digital society.

As far as the transparency requirement is concerned we regard it as an important step towards ensuring consumers are informed about net neutrality issues, but it is insufficient, by itself, to prevent discriminatory practices. We would like to point out that in the UK the existing Ofcom Code of Practice on broadband speeds, which requires ISPs to provide consumers with information about traffic management and traffic shaping,²² does not solve the issue of net neutrality. It also raises problems in the areas of compliance and consumer understanding and utilising the information provided. For example Ofcom's research on broadband speeds found many ISPs did not comply with the Code's information provision requirements. In addition even in cases where information was given, only a minority of consumers were at ease with making practical use of the information, by comparing connection speeds or reliability of connection.²³ Consumers may also find it difficult to assess what part of a service's chain is at fault. For example, Synovate research indicates that consumers who experienced problems with internet connection attributed them to different causes, such as ISPs, internet connection speed, computer hardware, computer memory, websites, download limits of their internet plan and others.²⁴

Therefore we recommend that the European Commission takes account of all factors that are likely to ease anticompetitive behaviour and affect net neutrality such as (1) switching barriers, (2) mobile termination rates (MTR), (3) complaint and redress mechanisms, (4) market surveillance, and (5) infrastructure investments.

²¹ Discussion points and initial policy directions on Internet and network neutrality, ARCEP May 2010.

²² <http://bit.ly/brj51b>

²³ Ofcom's discussion paper, p.37.

²⁴ Consumer Expectations of the Internet, Synovate 2009.

Typical switching barriers faced by consumers include contract cancellation fees, costs of setting up the new network in case of bundled services (eg software, equipment, installation costs), and time costs associated with informing third parties about new contact details (telephone number/and or email address).

In addition we also would like to point to the negative effect of high mobile termination rates (MTRs) that act as a deterrent to competition as they may limit the number of mobile broadband providers available and hence impact on consumers' choice. We support the European Commission's efforts to reduce MTRs and await its market assessment report and further work on the matter.

In parallel we would like to draw the European Commission's attention to the need for easily accessible, low cost and timely complaints handling and redress mechanisms to facilitate consumers' complaints and to rule on redress in cases of detriment. This is particularly relevant to consumers in areas dominated by one service provider, or those who cannot afford to switch to a provider that offers better service quality at a premium price. According to Synovate research on consumer expectations of the internet only 10 per cent of consumers in the UK were willing to change to a more expensive provider in case of traffic blocking or service limitation.²⁵ Effective complaint and redress mechanisms would work as a deterrent and provide incentives for companies to abide by the law.

We also recommend the European Commission, jointly with BEREC, enhances market surveillance and monitoring mechanisms in order to monitor the level of competition in the communication sector of the market, and intervene if necessary.

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

We would like to point to the Net Neutrality Guidelines adopted in Norway that does not differentiate between the types of internet access and applies to mobile broadband, as well.

We recommend the European Commission follows up the Norwegian model and adopts net neutrality and traffic management principles applicable to both 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?

Please see answers to questions 1 and 4.

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?

As stated in question 4, we are concerned that the promotion of so called managed services in the environment with no clear benchmark for legitimate traffic management

²⁵ Consumer Expectations of the Internet, Synovate 2009.

practices may compromise competition of the Internal Market and impact on consumers' choice. Hence we recommend the European Commission develops net neutrality and traffic management guidelines to be adopted in members states.

In addition we recommend the European Commission carries out an impact assessment study of traffic management practices and their impact on market competition and consumers' access to online services and digital inclusion.

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?

As stated in Q3 we believe the existing regulatory framework is insufficient to deal with the issues of net neutrality and traffic management, including in relation to monitoring, assessment and subsequent enforcement. Therefore we recommend the European Commission follows the examples of national regulatory authorities in Canada and Norway and adopts net neutrality and traffic management guidelines to serve as a benchmark for assessing what is or is not acceptable practice.

Should self-regulation or co-regulatory approached prove ineffective we would urge for the development of a regulatory model that is legally binding on the industry.

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?

Please see answers to questions 2, 3 and 4.

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?

In the UK context, Ofcom, in its discussion paper on net neutrality took account of a possible scenario of a two-tier internet model developing in which access to the public internet will be offered for free on a 'best effort' basis whereas priority access to so called managed services will be available for a fee.²⁶ However we are concerned that neither the European Commission nor, at the national level, Ofcom specify the definition of what the 'best effort' internet ought to be.

We understand that priority services may be valued by some consumers because they can offer them guarantees on quality of service in particular for real-time streaming multimedia applications as for example VOIP, IP-TV, P2P or online games. Priority services can also facilitate fair distribution of costs for broadband users, eg those exceeding an average usage or accessing bandwidth-hungry applications paying more in comparison to an average user.

However we are concerned that the promotion of managed services may result in much of the infrastructure being deployed to such services and this could have an adverse effect on the quality of the public internet. This in turn may have an adverse effect on consumers' access to the internet and choice.

Therefore we recommend the European Commission undertakes an impact assessment of traffic management practices to report their short and long term implications for consumers' and citizens' access, choice and contribution to online content and services. Should the result of the impact assessment raise doubts over maintenance of the 'best effort' internet or ability to access online content and services valued by consumers and online public services we would advocate the imposition of a minimum Quality of Service (QoS) by the national regulatory authorities.

Should such a situation arise we believe that the imposition of a minimum QoS would secure guaranteed parameters for 'best effort' internet including, for example, guaranteed level of access to online content and services, guaranteed speeds, accepted traffic management practices, and others that would safeguard maintenance of the public internet.

We also recommend the European Commission, jointly with BEREC, takes an active role in the process of setting up quality of service parameters for internet services. We would recommend that the European Commission considers a co-regulatory approach that has been proposed by the French regulatory authority that considers the possibility of joint co-operation in this field between network providers and ISPs and consumer organisations.²⁷

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

Please see answer to question 11.

²⁶ Ofcom Discussion paper on net neutrality, June 2010.

²⁷ Discussion points and initial policy directions on Internet and network neutrality, ARCEP May 2010.

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?

Please see answer to question 11.

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

We recognise the European Commission's efforts to ensure that consumers are presented with transparent information about traffic management practices.

At present transparency of traffic management presents a potential challenge to consumers in the UK in identifying when it takes place, its impact on services they use, assessing what part of the chain is at fault, and what constitutes fair or unfair practice.

The problems are caused by:

- the ISPs lack of transparency about their traffic management practices
- the way the information is presented
- consumers' technical ability to verify such information

We hope that the revised Framework Directive that introduces the transparency requirement on traffic management will serve as the starting point for improving the quality of consumer information so that it is meaningful and empowers switching.²⁸

However to achieve this goal it is important to take a holistic approach in the context of the existing measures on consumer information provisions rather than narrowly focusing on information on traffic management only.

We propose the information on traffic management provided by network operators or ISPs should be real-time to enable consumers to monitor and track their consumption. In addition the information should include not only information about the QoS (eg 10GB) but also Quality of Experience (QoE) (eg 10GB will enable you unlimited surfing, receiving 6,000 emails, five hours streaming, downloading 500 songs). There are already first attempts within the industry to try to provide more usable information for consumers which we would recommend the European Commission examines in relation to traffic management.²⁹

In summary, we propose that the information provided by network operators or ISPs should include the following:

- Information on the price of the package, quality of service and quality of experience, for example connection speed rate and services consumers can receive at different times throughout the day
- Description of traffic management practices, including the reasons and circumstances that might justify their introduction
- How traffic management can affect a user's internet experience for different types of internet services, eg the list of services, applications and content that cannot be accessed via retail offers

²⁸ <http://bit.ly/destUK>

²⁹ <http://bit.ly/cIC8Y8>

- Real-time information on usage caps and costs of exceeding that usage, and notification when close to exceeding the cap
- Options for upgrade including information on additional costs
- Any changes made to ISPs' existing traffic management policies stated under contract terms and conditions and the impact on a user's experience
- Contact details for the technical support helpline and the complaint handling mechanism
- National Regulatory Authorities contact details

In addition it is important that ISPs publish the levels of QoS they provide to end-users to facilitate reliable comparisons between services and providers.

In search of the best models for delivery of consumer information on traffic management we suggest to investigate innovative solutions that have been developed in other sectors such as financial services and energy (smart meters) markets. For example in the UK the Financial Services Authority (FSA) has introduced a summary box model in delivering information on financial services to consumers.³⁰ Similarly smart meters technology that has been installed in the energy sector enables access to real-time information essential in information provisions on traffic management practices. For example real-time usage monitoring tools have been considered by the Canadian Radio-Television and Telecommunications Commission under the 'determination on internet traffic management' that is binding for ISPs.³¹

We recommend the European Commission conducts a review of the existing transparency and consumer information measures, and in-depth research on consumers' experience and understanding of traffic management, with the aim to adopt a best practice approach to information provision on traffic management

In addition we recommend the European Commission and national regulatory authorities initiate a joint taskforce with consumer groups and the industry to find the best practical models that would deliver an optimal outcome for consumers.

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?

In relation to traffic management in the context of copyright enforcement Consumer Focus has acute concerns in relation to the right to freedom of expression and other core human rights guaranteed to European citizens in the European Convention on Human Rights (ECHR). Specifically Consumer Focus is concerned about the impact of Section 3 to 16 and Section 17 and 18 of the Digital Economy Act 2010 (DEA) on the human rights of UK citizens. These provisions are subject to new Article 1(3) of the Universal Service Directive 2002/22/EU (as amended by the Telecoms Package), which states that "National measures regarding end-users' access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy and due process, as defined in Article 6 of the European Convention for the Protection of Human

³⁰ <http://bit.ly/9UGTpN>

³¹ <http://bit.ly/ajJjmd>

Rights and Fundamental Freedoms.”³² It is to date not clear whether the provision of the DEA itself comply with the E-Commerce Directive and the ECHR, or whether the provisions can be implemented in compliance with the E-Commerce Directive and the ECHR.

Section 3 to 18 of the DEA establish duties on internet service providers to undertake traffic management for the purpose of preventing civil copyright infringement online. Specifically Section 3 to 16 allow for a “technical obligation” to be placed on ISPs, forcing them to impose “technical measures” on subscribers.³³ A technical measure is defined as a measure that “limits the speed or other capacity of the service provided to a subscriber”, “prevents a subscriber from using the service to gain access to particular material, or limits such use”, “suspends the service provided to a subscriber” or “limits the service provided to a subscriber in another way”³⁴. Section 17 to 18 allow blocking injunctions to be issued against ISPs, forcing them to prevent their service from being used to gain access to “locations on the internet”³⁵ which are “(a) a location from which a substantial amount of material has been, is being or is likely to be obtained in infringement of copyright”, “(b) a location at which a substantial amount of material has been, is being or is likely to be made available in infringement of copyright”, or “a location which has been, is being or is likely to be used to facilitate access to a location within paragraph (a) or (b)”.³⁶

We are concerned that these provisions do not comply with the mere conduit principles as enshrined in the E-Commerce Directive, and violate UK citizen’s right to due process (Article 6 of the ECHR), the right to freedom of expression (Article 10 of the ECHR) and the right to privacy (Article 8 of the ECHR). We are also concerned that the implementation of Section 3 to 16 of the DEA will lead to violations of the Data Protection Directive and the Data Retention Directive. We have outlined our concerns in detail in our recent consultation response to the UK telecoms regulator Ofcom, which is to implement Section 3 to 16 of the DEA through secondary legislation.³⁷

We therefore recommend that the European Commission restates the need for member states to only establish and implement laws on traffic management in compliance with the principles of the E-Commerce Directive (**Directive 2000/31/EC**), the Data Protection Directive (Directive 95/46/EC), the Data Retention Directive (Directive 2006/25/EC) and the rights guaranteed to citizens under the ECHR.

³² **Telecoms Package**, Universal Service Directive, new article 1(3)

³³ **Digital Economy Act 2010**, Section 9/124G, Subsection 2

³⁴ **Digital Economy Act 2010**, Section 9/124G, Subsection 3

³⁵ **Digital Economy Act 2010**, Section 17, Subsection 2

³⁶ **Digital Economy Act 2010**, Section 17, Subsection 4

³⁷ **Consumer Focus response to Ofcom consultation on Digital Economy Act 2010 Draft Initial Obligations Code**, July 2010



Consumer Focus response to the European Commission's consultation on the Open Internet and Net neutrality

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