



The Consumer Voice in Europe

EUROPEAN COMMISSION PUBLIC CONSULTATION ON SPECIFIC ASPECTS OF TRANSPARENCY, TRAFFIC MANAGEMENT AND SWITCHING IN AN OPEN INTERNET

BEUC response

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Summary

Net neutrality is continuously being violated across Europe. It is **crucial that the European Union urgently adopts a new, binding legislative instrument to restore and protect this fundamental principle** that underlies how the Internet has worked for decades. A new binding legislative instrument should establish clear, well-defined concepts such as 'public Internet' or 'best effort Internet', 'managed services' and 'legitimate traffic management measures'. The new instrument would ensure legal certainty for consumers and businesses alike.

Recommendations and guidance given by the European Commission or BEREC and NRAs may provide some partial solutions, but they also represent a risk that the necessary binding legislative solutions are further delayed. Leaving the situation to competition will not guarantee that net neutrality is protected.

The BEREC fact-finding mission carried out in the spring of 2012¹ provides overwhelming evidence that a **large number of network operators are using their power as regards the control of traffic** in order to block the transmission of data, prioritise their own services at the expense of their competitors', restrict the use of certain applications or charge online service providers a premium to guarantee fast delivery of their content; all of which could be categorised as traffic management done for commercial reasons and hence in violation of net neutrality principles.

For the last couple of years, network operators and ISPs are increasingly violating these fundamental rules of the Internet for purely commercial reasons. Any traffic management measure that imposes restrictions or illegitimately discriminates against specific technologies, applications, content or end-users interferes with the neutrality and openness of the Internet and should therefore not be allowed.

The Internet has for decades been an open platform that allowed innovation without permission, and granted consumers in Europe and around the world access to an ever-growing amount of content and knowledge, and has connected people like no technology has ever done before. This has only been possible due to the open and neutral character of the Internet, where no technology, service or content was discriminated against without a legitimate reason.

¹ "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe", BEREC BoR (12) 30, 29 May 2012.

3) **Please explain briefly which traffic management techniques are usually applied by network operators or ISPs and how they are technically implemented.**

Network operators and Internet Service Providers use many different traffic management measures for different purposes. Some traffic management measures, when done on legal requirements, for security reasons, or for unavoidable technical reasons such as temporary congestion management, are reasonable and part of managing their own infrastructure to have a sustainable business model. **Unfortunately, many measures are undertaken for commercial reasons and come at the detriment of the neutrality of the Internet and therefore of its end-users and consumers.**

ISPs should bear the burden of proof that there is conclusive evidence of congestion or that this is an imperative necessity for the functioning of the network. These claims should be carefully scrutinised by regulatory authorities, in line with the principles of transparency, proportionality and non-discrimination.

Moreover, reasonable network management should be distinguished from efforts to comply with legal obligations such as orders from courts, governmental agencies and law enforcement authorities, as well as efforts to curtail unlawful transfers of content. Measures taken under specific legal obligations will have specific policy rationales different from the technical reasons motivating network management. Voluntary efforts against unlawful transfers of content should not serve as a pretext for discrimination or to promote discriminatory effects.

Traffic management measures can take place as foreseen in contracts or directly as a technical measure, without the consumer having an easy possibility to be aware of it in all cases. The BEREC fact-finding mission carried out in the spring of 2012² clearly proves that a **large number of network operators are using their power as regards the control of traffic** in order to block the transmission of data, prioritise their own services at the expense of their competitors', restrict the use of certain applications or charge online service providers a premium to guarantee fast delivery of their content; all of which could be categorised as traffic management done for commercial reasons and hence in violation of net neutrality principles.

Network operators and ISPs often **block access to specific content, services or applications** transmitted over their networks. Different motives exist, including competition reasons whereby access to a competitive service or an application is blocked thus allowing the access provider to gain a monopoly over its clients. For instance, an ISP that also supplies telephony might degrade or block the services of a VoIP provider in order to ensure its revenue from traditional voice services.³

Another form of net neutrality interference through traffic management is evidenced by network operators considerably **slowing down the access speed** to content or applications to the point of preventing their use. Access degradation is particularly relevant for time-sensitive content, services and applications which require real-time delivery, such as VoIP, real-time video streaming, television services delivered over the Internet Protocol (IP) network, etc. This, in turn, has also a commercial objective in mind, as the bandwidth saved by forcibly slowing down the access speeds for some

² "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe", BEREC BoR (12) 30, 29 May 2012.

³ Another instance of blocked content occurs when consumers have adult content protection on their internet service. While this service is often useful to consumers, there are instances where consumers are unaware of this content blocking, especially on their mobile internet. In cases where adult material is blocked by default, consumers should be made aware of this and opting out should be clear and easy. Furthermore, websites should have the ability to check whether they are included on the list of blocked sites and there should be clear and easy steps to rectify any mistakes.

users allows the operator to assign more bandwidth to other premium users. While internet access should never be slowed down as a primary objective in and of itself, there may be circumstances where ISPs need to modify download speeds in order to meet different contractual obligations. BEREC's findings show that 49 fixed operators and 41 mobile unacceptably block or throttle the use of P2P technologies over their networks, and 2 fixed operators and 27 mobile operators do the same with VoIP.⁴

Degradation may be combined with prioritisation of specific content. An operator or ISP who also provides content generation and distribution services has incentives to dynamically allocate greater bandwidth to its own services at the expense of potentially competing internet services and applications. BEREC's findings show that 30 fixed operators and 13 mobile operators prioritise specific types of content.⁵

Access providers may also impose **unjustified restrictions** on the use of certain applications and/or equipment by its users. Such restrictions may be applied either by placing a cap on the maximum amount of application related data to be transferred over the network or through contractual terms.

Any or all of the above forms of traffic management can be undertaken by ISPs as a way of being able to allocate sufficient resources for their so-called managed services, those that exist beyond the best-effort Internet access services. The proliferation of bundled contracts, where managed services are bundled together with Internet access services, raise serious concerns for consumers, as ISPs often guarantee the quality of service of the managed services to the detriment of the Internet access service. This should not be allowed as we further explain below.

4) **Congestion management is one of the reasons for applying traffic management measures.**

a) **Please briefly describe how congestion management normally works**

Congestion management is understandably necessary to ensure the fluid functioning of the operators' networks, and happens when networks reach their maximum capacity for data traffic. In these circumstances, operators need to find workable ways to rapidly manage the congestion in a way that allows a fluid provision of their services, in compliance with all their contractual obligations towards all their clients.

It is therefore of utmost importance that operators constantly match a certain, previously-defined minimum Quality of Service (QoS), thanks to which consumers can be reassured they will always get the service they are paying for as it is described in their contract, despite any congestions that may happen.

Hence, congestion management should only occur for technical reasons, and never be used as a pretext to undertake traffic management measures for commercial purposes. It is thus very important that operators and ISPs continue investing in new and better infrastructure, and that policy makers put the right incentives in place so that these investments take place in the short term.

Furthermore, ISPs should bear the burden of proof that there is conclusive evidence of congestion or that this is an imperative necessity for the functioning of the

⁴ "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe", BEREC BoR (12) 30, 29 May 2012.

⁵ "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe", BEREC BoR (12) 30, 29 May 2012.

network. These claims should be carefully scrutinised by regulatory authorities, in line with the principles of transparency, proportionality and non-discrimination.

- b) If possible, please provide a definition and examples of genuine congestion management measures, i.e. measures which are necessary to avoid or tackle network congestion, as opposed to measures which may be called congestion management but actually pursue other purposes.**

Congestion management should only happen due to technical, legal or security requirements, and never for commercial reasons. Respecting the neutrality of the Internet while undertaking congestion management measures requires that these measures are always technologically neutral, application-agnostic and user-agnostic. The measures should never differentiate between different technologies or protocols, different users, or different applications or specific traffic classes. However, in order to comply with contractual obligations regarding the minimum service speeds offered in different broadband services, ISPs may use certain traffic management techniques to ensure that these obligations are met. It is important that all traffic management measures are always neutral, as described above.

It is important that National Regulatory Authorities have efficient, strong oversight powers so that when congestion management takes place, it can be verified that the purpose is always to deal with network congestion situations, and not for any commercial reasons like the ones described under question 3.

With regard to Internet subscription contracts which stipulate traffic management elements, it must be ensured that all contract terms are fair and transparent, and that they fully comply with applicable national legislation on unfair contract terms.

In particular, a contract must clearly disclose to consumers the impact that traffic management measures will have on speeds, data allowances and access to online content and services, which are the key criteria considered by consumers when making a purchasing decision. It is also very important that this information is part of the pre-contractual information disclosed to consumers.

- 5) Please provide your views on the following ways/situations where traffic management may be applied by ISPs.**

- a) Applied to deliver managed services (e.g. to ensure a guaranteed quality of service for a specific content/application)**

Necessary/~~Appropriate~~/~~Problematic~~

The commercialisation of so-called managed services is a legitimate business option for network operators and ISPs as long as the management of these services never undermines the services they provide to access the Internet.

These managed services may require specific quality of service for them to work properly, which in turn requires specific traffic management techniques. Therefore, National Regulatory Authorities should ensure that operators and ISPs run managed services in a way where there is no adverse impact on the delivery of the best effort Internet.

- b) Taking into account the sensitivity of the service to delay or packet loss**

Necessary/~~Appropriate~~/~~Problematic~~

Different services and applications require different qualities of service, so it is reasonable that ISPs adapt their traffic management to be able to ensure the

necessary QoS for the delivery of each service. It is nonetheless very important that this traffic management is done in line with the aforementioned criteria, and does not respond to any commercial purposes.

c) Used to implement or manage compliance with the explicit contractual restrictions (e.g. on P2P or VoIP) of the Internet access product accepted by the user

Necessary/~~Appropriate~~/Problematic

Restrictions on what users can do with their Internet connection, whether enforced technically or on the basis of a contractual obligation, should never be allowed in order to fully respect the neutrality of the Internet. Even more so when the restrictions are not technologically or application-agnostic and directly target a specific application or service such as P2P or VoIP.

There should also be a clear distinction between traffic management that is done without the user's consent or precisely because the end user wishes so⁶. Further, even when traffic management is done with consumers' consent, it is important to highlight that the rules on fair and transparent contract terms continue to apply, and that contracts must therefore not contain complex, confusing language.

d) Targeting types/classes of traffic contributing most to congestion

Necessary/~~Appropriate~~/Problematic

Traffic classes raise concerns because they create incentives to degrade the best effort Internet in an anti-competitive manner and represent an eventual departure from this model of the Internet. Operators seem to have had the possibility to offer them for over a decade and yet have not decided to do so before. There is no sufficient justification for this paradigm shift in the way networks are operated and therefore we see no reason why the best effort approach should be abandoned. As stated above, a best effort internet without illegitimate interference and discriminatory practices from ISPs results in a high quality of experience for consumers and has offered the right platform for great innovation over the past decades, and should therefore not be undermined by introducing traffic classes.

e) Targeting heavy users whose use is excessive to the extent that it impacts on other users

Necessary/~~Appropriate~~/Problematic

Provided that what is described as a *heavy user* means that subscribers to an Internet access service use their connection within the terms of their contracts, the ISP should never target the specific users because their use should not be considered *excessive* from a congestion management point of view. The ISP has the obligation to abide by the terms in the contract, and if congestion problems arise due to certain consumers using their broadband access service at its maximum, then it is in the ISPs' own interest to ensure that more infrastructure is available to deal with the congestion issue.

In this context, increased transparency around offers and data use is crucial. For example, Internet offers advertised as 'unlimited' should not have hidden 'fair usage policies' in its contract terms. Apart from the need for operators to invest in more infrastructure, it is sensible that offer differentiations with different broadband

⁶ The Norwegian guidelines foresee this – <http://www.npt.no/ikbViewer/Content/109604/Guidelines%20for%20network%20neutrality.pdf>

speeds and where necessary, data caps, are used in order to avoid light users from cross-subsidising the costs of heavy users. For further concerns on data caps, please refer to question 12.e.

f) Applied during busy times and places, when and where congestion occurs

~~Necessary/Appropriate/Problematic~~

As highlighted above, traffic management should only be used under a limited set of conditions and situations. Congestion management should only occur on temporary and extraordinary situations of unscheduled congestions. When it is done to solve exceptional and temporary situations of network congestion, it is reasonable that the techniques are applied locally, though never for specific users, and only when the congestion occurs. The traffic management measures should be immediately removed as soon as the congestion has been resolved.

In this context we urge the European Commission to look into the different markets and investigate the rationale behind the application of different traffic management practises, in order to understand why some broadband providers apply these techniques while others do not.

g) Affecting all applications/content providers in the same way (application-agnostic)

~~Necessary/Appropriate/Problematic~~

Traffic management always needs to be application-agnostic, in order to ensure a non-discriminatory treatment of different types of applications and content, thus protecting the neutrality of the Internet.

h) Affect (similar) application/content providers of the same category in the same way

~~Necessary/Appropriate/Problematic~~

The use of traffic management on similar application or content providers would represent the same problem as if the techniques were applied on specific providers. Measures need to always be application-agnostic unless it is done for legitimate reasons.

i) Used, without other grounds, against services competing with the ISP's own services

~~Necessary/Appropriate/Problematic~~

In a best effort Internet, traffic management should never be used for commercial purposes, including the most common example: against competing services. This not only entails the most severe interference with the neutrality of the Internet, it also affects competition in the market, diminishes consumer choice and seriously hampers innovation.

j) Implemented at the full discretion of the ISP

~~Necessary/Appropriate/Problematic~~

Traffic management should only be undertaken due to legal, security or technical requirements, and never at the discretion of the ISP. It is therefore important that the concept of *legitimate traffic management* and the circumstances under which it

can be applied be clearly defined in a binding European legislative instrument, applicable throughout the European Union.

k) Other differentiation criteria (please specify)

N/A

6) The use of managed services may affect the Internet access service in some cases, due to the sharing of access resources.

a) Please explain the impact of managed services on the standard Internet access service (“best effort”) in terms of available bandwidth and quality of service.

Very often, managed services come in bundled contracts with Internet access services and use the same equipment and bandwidth infrastructure at the end-user level. It is not clear for consumers whether the resources dedicated to the contracted managed services are affecting the Internet access service or not. It is of utmost importance that that is not the case and therefore the two always function in a way in which the expected QoS for the Internet access service can always be delivered.

In particular, the European Commission needs to ensure that the development of managed services will not have an adverse effect on the access to and delivery of online public services.

b) Please explain whether it is possible to offer separate capacity for managed services and the standard Internet access service. If yes, please provide information on the circumstances (costs, technologies) of separating them.

N/A

7)

a) Please give examples of “new business models” which could be developed on the basis of managed services by

- i. Network operators/ISPs**
- ii. Content providers (on the basis of agreements with ISPs)**

Managed services based on IP technology appear to offer a great deal of innovative possibilities for all sorts of businesses, including network operators/ISPs and content providers alike. For example, ISPs are already launching their own VoIP services⁷ over managed infrastructure, with premium quality of service, which represents a step away from traditional voice services. It seems like a logical step for big companies whose revenue heavily relies on analogue voice services to steadily move onto data services. Similarly, content providers valued by consumers have expanded into broadband markets and now provide broadband services for consumers.

Managed services have to fully respect the neutrality of the Internet access service that is subscribed, thus ensuring that all competing VoIP services (in the example above) are still accessible at the minimum QoS that has been established in the service contract.

⁷ Telefonica launched TU me in May 2012 - <http://www.tumeapp.com/en/>

It is important to highlight that many new and innovative services often begin their journey into the market with very scarce resources, both human and economic. In the online world, scale is often a make or break-factor for success, which emphasises the utmost importance of access to sufficient, necessary and neutral infrastructure for those new services to succeed. Further, the provisions contained in the telecoms package regarding functional separation should not be forgotten, and used as a tool to ensure the well functioning of the telecoms market.

b) How important are these innovative business models likely to become in the next three years? Please substantiate your view by means of available forecasts or studies.

These new business models have the potential to open new revenue sources for ISPs, network operators and content providers. Current global tendencies seem to show a consistent increase in these types of innovative business models. But they also come with great risk of parcelling the Internet ecosystem if a neutral, best effort Internet is not strongly protected.

In fact, the increasing number of similar innovative initiatives reinforces the urgency of adopting strong, binding legislative protection of net neutrality. This would allow all actors in the Internet ecosystem to have legal clarity and regulatory certainty of the kind of new business models they can develop both on the best effort Internet and on the managed services sphere.

c) What would be the expected benefits in terms of innovation and investment through new businesses (content or applications) benefitting from guaranteed levels of quality of delivery through managed services?

New innovative services that require enhanced quality of service have the potential to offer more consumer choice, open up new technological frontiers and generate economic growth. Yet it is important to once again stress that a neutral, best effort Internet must be ensured and protected.

8) What are likely positive and negative effects of certain traffic management practices on the Internet ecosystem, in particular on innovation and investment, by (i) network operators/ISPs and (ii) content providers? Please explain your view and, if appropriate, distinguish between different traffic management practices.

The Internet has for decades been an open platform that allowed *innovation without permission*, and granted consumers in Europe and around the world access to an ever-growing amount of content and knowledge, and has connected people like no technology has ever done before. This has only been possible due to the open and neutral character of the Internet, where no technology, service or content was discriminated without a legitimate reason.

For the last couple of years, network operators and ISPs are increasingly violating these fundamental rules of the Internet as we know it for purely commercial reasons, and BEREC's findings⁸ are a great testimony to this point. Any traffic management measure that imposes restrictions or illegitimately discriminates against specific technologies, applications, content or end-users interferes with the neutrality and openness of the Internet and should therefore not be allowed. These measures include all the ones mentioned in the response to Question 3 above.

⁸ "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe", BEREC BoR (12) 30, 29 May 2012.

In particular, if network operators and ISPs are allowed to increasingly come to commercial agreements with specific content providers, granting them preferential access, or even unique access to their infrastructure, this will completely modify the Internet ecosystem as it has functioned for the past decades. Prioritisation of specific content providers will only make innovation even harder and significantly reduce consumer choice. Worst of all, it will interfere with end-to-end connectivity, and therefore with consumers' right to access any content, at any time, from any location and any device, simply using their Internet access service.

- 9) **It appears that the implementation of traffic management measures requires ISPs to analyse certain information about individual data packets, for instance by Deep Packet Inspection (DPI) techniques. Please explain which type of information needs to be read by ISPs to implement the different traffic management measures. In which layer can this information normally be found?**

The argument put forward by operators that DPI technology is necessary to prevent network congestion and ensure equitable network distribution to all their customers fails to respond to net neutrality concerns⁹. Operators should only be allowed to look into network and transport layers, and gather the necessary information to efficiently manage the networks. Any deeper inspection should be forbidden unless specifically authorised due to legal or security requirements and should only occur exceptionally. It also overlooks the real problem which is the need for operators to invest in bandwidth and better networks rather than investing in the control of the data transferred through their pipes.

- 10) a) **Are there any privacy risks arising from the use of DPI for traffic management purposes, and, if so, what are the implications for transparency and consumer protection?**

In addition to net neutrality, the use of DPI techniques raises serious privacy concerns, because it can involve the inspection of information sent from one end user to another. DPI technology has the capability to look into the content of messages sent over the Internet, thus enabling third parties to draw inferences about users' personal lives, interests, purchasing habits and other activities. This gives ISPs and other organizations widespread access to vast amounts of personal information sent over the Internet. The European Data Protection Supervisor has also raised a number of concerns¹⁰.

- b) **Are there alternative techniques for traffic management that do not involve deep packet inspection? Please provide examples and explain your response. Please compare those alternative techniques with deep packet inspection, in particular in terms of their effectiveness, potential impact on privacy and costs for operators.**

Any traffic management measure, whether it's through DPI technique or not, has to first and foremost fully respect consumers' right to the confidentiality of their communications. The right to privacy and data protection should never come second to economic criteria such as the costs of using different alternative techniques.

⁹ [Big Brother on a budget: How Internet surveillance got so cheap](#)

¹⁰ "Opinion of the European Data Protection Supervisor on net neutrality, traffic management and the protection of privacy and personal data", October 2011

BEUC's member Consumer Focus has looked into different management techniques in the context of enforcement of Intellectual Property Rights, and produced a technical report that provides advice on standards and procedures.¹¹

11) Where the user's consent is required for traffic management measures, particularly where such measures might entail access to and analysis of certain personal data by ISPs, please explain how (e.g. in which format) this consent should be sought by the ISP, what prior information needs to be provided by the ISP to the user, and how the user consent should be given, in order to optimise user awareness and user convenience.

The requirements for consent to be valid are set by Articles 5 and 6 of the revised e-Privacy Directive and Article 2 (h) of the Data Protection Directive 95/46, which requires consent to be freely given, specific and informed as an indication of the data subject's wishes. Consent may be given by any appropriate method as clarified by the revised e-Privacy Directive¹².

Free: consumers' consent cannot be free if they have to consent to the monitoring of their communication data in order to get access to an Internet service. If the only alternative is not to subscribe to an Internet service at all, consent cannot be free.

Specific: consent cannot apply to an open-ended set of processing activities but should be sought for the specific purpose of monitoring of communication and traffic data.

Informed: simply providing consumers with all the information is not sufficient to claim consent, unless the information is understandable and the burden of proof that the consumer has read and understood the consequences of his/her consent is with the data controller.

Consent of the user and the subscriber: where the user and the subscriber are not the same person, individual consent should be sought by all the persons concerned.

Nevertheless, consent should not be used to overhaul the obligation to comply with the general principles of personal data processing and the obligations of the controller. To this end, even when valid consent has been obtained, the following principles have to be respected:

- **Data minimisation:** only the personal data that are necessary for the specific purpose should be collected and processed.
- **Proportionality:** personal data can only be processed insofar as they are adequate and suitable for the specific purpose.
- **Privacy by design:** operators and ISPs should implement measures to mitigate the privacy risks of traffic management techniques. To this end, the use of Privacy Enhancing Technologies, including encryption should be promoted.

12) In order to allow consumers to make informed choices, on the basis of clear, meaningful, and comparable information, which elements should be communicated to consumers?

¹¹ <http://www.consumerfocus.org.uk/files/2012/07/Online-traceability.pdf>

¹² Recital 17 of the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector

- Elements related to traffic management practices:

a) Contractual restrictions (blocking, throttling, other restrictions on application use)

Important/~~Less Important~~

These kinds of restrictions are contrary to the essence of net neutrality and should be banned as a matter of urgency. Whenever they exist, they should be clearly disclosed to the consumer in a transparent, understandable manner, in the context of individual use, and the offer that contains them should not be marketed as an Internet access service under any circumstance.

b) Traffic management policy applied to prioritise certain traffic in specific circumstances

Important/~~Less Important~~

c) Whether and to what extent managed services may affect the quality of the best effort Internet (e.g. the possibility of the Internet connection being affected when watching IP-TV or when using other managed services)

Important/~~Less important~~

Consumers should be able to understand how their bundled contracts work, and if one service is affecting the delivered quality of service of the other. As stated above, no bundled service (such as managed services) should interfere with the best effort Internet access service. These interferences should be prohibited. Should the interferences not be banned by legislation, it is important that they are clearly disclosed to consumers and explained in an understandable manner.

d) Other restrictions, please specify

N/A

e) Data allowances (caps), download limits

Important/~~less important~~

Data caps and download limits are of crucial importance for consumers to be aware of. In fixed Internet access services they should be avoided as they go intrinsically against the essence of the neutrality of the Internet. In fact, speed limits act as a natural cap on the amount of data allowed for transfer during a given period, and therefore no further cap should be imposed as a general rule. In mobile networks, bandwidth scarcity imposes harsher infrastructure constraints, and it is more reasonable that data caps are established. Yet, regardless of whether the connection is fixed or mobile, data caps and download limits should always be transparently disclosed and explained to consumers.

Data allowances and "fair use" policies should not be applied to what is marketed as "unlimited" or "unrestricted" offers and should not carry the word Internet, as they act as a limit on access to the Internet.

f) What these data allowances enable customers to do in practice (download x hours of video; upload y photos, etc)

Important/~~less important~~

Consumers understand technical concepts better when they are clearly related to the quality of experience they can expect from the service. Explaining data allowances through concrete examples of what they can do in practice (quality of experience) is therefore very important, as it helps them construct their own idea of what to expect from the service they are paying for.

- **Elements related to speed and quality**

a) Average speed, typical speed ranges and speed at peak times (upload and download)

Important/~~less important~~

Bandwidth speeds act as a natural barrier to Internet access services, and are therefore an essential part of any information disclosed to consumers in order for them to better understand the quality of experience they will get. Advertised speeds should include both download and upload maximum or average speeds. Consumers need to be told a) what headline speed means and why this is not necessarily their actual speed and b) in what cases they can expect what speed to be delivered. Full compliance with the Unfair Commercial Practices¹³ and the Consumer Rights Directives¹⁴ needs to be ensured.

Consumers need to receive all the necessary information to make an informed choice, including when and under what conditions their actual speed will be different from the advertised speed. They also need to have a clear idea of what actual speeds they can expect.¹⁵

b) Respect of guaranteed minimum speed (if applicable)

Important/~~less important~~

ISPs should always respect guaranteed minimum speeds, otherwise they would no longer qualify as *guaranteed*. That said, whenever this is not the case, consumers need to be informed, in order to get a clear picture of the reliability of the access service they are contracting. If consumers consistently fail to obtain the guaranteed minimum speeds stated in their contracts they should be entitled to cancel their contract without penalty. For more information on information disclosure at different stages, please refer to points a) and b) in question 14.

c) What these speeds allow customers to do in practice (video-streaming, audio-download, video-conferences, etc)

Important/~~less important~~

Similarly to what is explained above in point f) for traffic management, consumers get a better understanding when the information relates to their own experience.

¹³ Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

¹⁴ Directive 2011/83 on consumer rights

¹⁵ For example, the Norwegian Consumer Ombudsman states in their norm, developed in cooperation with ISPs, that "Marketed speeds reflect the representative net rate consumers actually expect to get in normal use period, from 07.00 until 01:00. The provider should also provide information on the factors that could affect speed, including the use of wireless networks, virus or other aspects of consumer equipment." - Net speed means the speed of technical line is set to (gross rate) minus the amount going away to traffic management (administratively), packet loss and "limitations" of equipment etc. When specifying the net speed the provider can not take into account any restrictions on the consumer side of the interface, for example within the consumers own equipment.

Therefore, it is useful to explain what kind of activities each speeds allows them to do over the broadband service.¹⁶

- d) Latency/network responsiveness (a measure of traffic delay) and which services would be affected thereby (e.g. certain applications such as IP-TV or videoconferencing would be seriously impacted by higher traffic delays in the network of the provider)**

Important/~~less important~~

Consumers need to be able to access more technical details when they so wish. In this example, it is important to explain to consumers what the possible impact of the latency/network responsiveness situation is, rather than simply disclosing this technical characteristic as such.

- e) Jitter (a measure of the variability over time of latency) and which services would be affected thereby (e.g. echoing in VoIP calls)**

Important/~~less important~~

Idem for d) above.

- f) Packet loss rate (share of packets lost in the network) and which services would be affected thereby (e.g. VoIP)**

Important/~~less important~~

Idem for d) and e) above.

- g) Reliability of the service (network accessibility and retain ability), i.e. measure for successful start and completion of data sessions**

Important/~~less important~~

Consumers need to be told about the reliability of their connection, easily explaining what types and frequencies of reduced or faulty connectivity they can expect. Also, what they should do when their connectivity is reduced or halted, as well as contact details for technical support, as well as the contact details of NRAs and consumer associations if they want to complain.

- h) Quality parameters for (mobile) voice telephony (call setup success rate, dropped calls, speech quality, other)**

Important/~~less important~~

- i) Others, please specify**

N/A

¹⁶ For example, Norwegian operator Get gives an overview of all its subscription packages with short descriptions of what qualities of experience consumers can expect, with more details available when clicking on one of the services.

- 13) Some ISPs currently apply 'fair use policies', which give them wide discretion to apply restrictions on traffic generated by users whose usage they consider excessive. Do you consider that, in case of contractual restrictions of data consumption, quantified data allowances (e.g. monthly caps of X MB or GB) are more transparent for consumers than discretionary fair use clauses?**

YES/~~NO~~

The so called 'fair use policies' raise serious concerns due to the fact that they create too much legal uncertainty and are not easily understandable by consumers. Data allowances, although they run contrary to net neutrality principles as explained in question 12.e) above, provide consumers with a more thorough understanding of what they can expect from the Internet access service and are a more justifiable approach to models where offers are differentiated in terms of usage.

Regardless of the considerations explained above, data caps should never be imposed on Internet access services that are marketed as "unlimited" or "unrestricted".

- 14) a) When should the elements of information referred to in question 12 be provided to the consumer by the ISP?**

Before signing the contract/~~Regularly updated during the contract period~~/~~during the contract period if changes occur~~/~~Other~~

This information needs to be provided before and during the contract, and it of course needs to be updated if changes occur and consumers need to be properly and timely informed about the changes. Consumers therefore need an easy and accessible way to receive that information from their ISP. If consumers are unhappy with the change in service they should be entitled to cancel their contract without penalty.

Following the recent investigation of BEREC we are particularly concerned that many ISPs put restrictions in consumer contracts even though the restrictions might not be technically implemented at present. Such contracts seriously undermine the transparency principle contained in the Telecoms Package as they remove telecom providers from the duty of alerting consumers when any of such technical limitations are implemented in practice. To the contrary, they put the burden onto the consumer to check terms and conditions regarding traffic management restrictions periodically on telecom provider's websites. They considerably weaken consumers as they open the door to abusive practices and changes in the way these practices are implemented without consumers being aware.

Therefore, we urge the European Commission to examine the issue of fairness of contractual limitations placed by broadband providers from the perspective of consumer detriment more closely, in particular whether contracts containing clauses that state 'terms and conditions may change from time to time' comply with the enhanced transparency obligation of the revised EU Electronic Frameworks Directive And in particular with horizontal consumer legislation, such as the Unfair Commercial Practices and Unfair Contract Terms Directives as implemented in the Member States.

- b) Which format (e.g. contract, general terms and conditions, separate and specific information, other (please specify)) do you consider appropriate to communicate this information to consumers?**

It is important to highlight the key principles that any transparency policy must respect in order to fully protect consumers:

- Accessibility
- Understandability
- Meaningfulness
- Comparability
- Accuracy
- Verification
- Sanctions and redress

The information disclosed to consumers needs to be included in the contract before it is concluded, so that they are well aware of at least the following:

- traffic management practices, the reasons and the circumstances that might justify their introduction, as well as the type of traffic to be affected and the impact on their Internet experience, including in terms of speed;
- the real connection speeds they can expect, regarding to both the download and upload streams;
- the capacity and quality of the Internet connection;
- the application of a minimum quality of service for applications and services;
- pricing information for conditions to the volumes of use, such as monthly bit caps limits and the costs for exceeding them;
- the reliability of their connection, easily explaining what types and frequencies of reduced or faulty connectivity they can expect;
- real-time information about their consumption and notification when close to exceeding the cap;
- any change in the operator's traffic management policies and the impact on consumers' experience;
- what they should do when their connectivity is reduced or halted; contact details for technical support;
- information regarding means of redress, including independent alternative dispute resolution (ADR) bodies as well as internal complaint handling schemes;
- contact details of the regulatory authorities.

Disclosure of this information and changes to the agreed conditions should be communicated to the consumer and should comply with the horizontal legislation on consumer protection, in particular the Unfair Commercial Practices, Consumer Rights and Unfair Contract Terms Directives as applicable via national law.

For those consumers who would like to have further technical details about these elements, it should be easy for them to access it by contacting the ISP, or through the ISP's website, for instance.

However, any information models communicated to consumers need to take into account consumers' limited understanding of technical terminology combined with a low consumer awareness of traffic management practices. For example a research on consumer understanding of information on traffic management carried out by Consumer Focus found that consumers neither were aware of the term traffic management, nor did they understand information provided by ISPs. In particular, consumers struggled to understand information on factors likely to be impacted by traffic management such as data caps, fair use policies, peer to peer and VOIP.¹⁷

¹⁷ The findings are based on a qualitative research carried out by Consumer Focus in November 2011 and an omnibus survey carried out on a sample of 2,048 people between 7 and 8 December 2011 by ICM Research. Please see research details in http://www.consumerfocus.org.uk/files/2009/06/Consumer-Focus-feedback-to-BSG-regarding-traffic-management-code_December2011.pdf

Communicating information to consumers through a multi-layered approach is considered to be the most efficient solution. We suggest BEREC produces specific guidance to national NRAs for operators and ISPs to use similar approaches. This guidance should be designed in cooperation with consumer groups.

- 15) What would be the (additional) costs for ISPs to (i) collect the various data mentioned in the table in question 12 (e.g. measuring of average speed, jitter, delay, etc) and (ii) communicate the information to their customers. Please provide an estimate of the above costs for your own company or an ISP of your choice explaining your assumptions and methodology, and details about the technical tools used to collect the various data. If possible, please provide a breakdown of the costs.**

Note: A high level of consumer protection is a fundamental right¹⁸ for all European citizens and cannot depend on the costs that companies incur in order to establish, in this case, consumer-friendly transparency policies.

- 16) a) In order to promote transparency and consumer choice, do you consider it necessary that comparable data on the internet access provided by ISPs is collected and published by NRAs or another independent organisation?**

YES/NO

Comparability of information is crucial to ensure that consumers are well-protected, to facilitate switching and foster consumer trust in the market. The role of NRAs, consumer associations and comparison websites is therefore of utmost importance in this case.

The information presented to consumers must be easily comparable with that of other access providers. In order to do so, NRAs should encourage access providers to use the same structure and categorization methodology when presenting the relevant information to consumers. The information provided by access providers should also be complete and easily intelligible, in non-technical language. This would ensure consumers receive accurate and relevant information so that they can make informed decisions when choosing between access providers. In parallel, NRAs shall still provide guidance in industry-driven initiatives.

- b) What are the advantages and corresponding costs of this data collection and publication being undertaken by NRAs or by another type of organisation (please specify which one). Please provide an estimate at EU-level or for an EU Member State of your choice.**

N/A

- 17) a) Do you consider it necessary to regulate the labelling as “internet Access” of subscriptions that restrict access to some Internet services, content or applications?**

YES/NO

¹⁸ Charter of Fundamental Rights of the European Union, 2000/C 364/01, Article 38

As stated above, subscriptions that include discriminatory restrictions on services, content or applications should not be labelled as “internet access”. Therefore, a European binding legal instrument regulating net neutrality should mandate that any subscription not respecting the end-to-end neutrality principle or imposing any illegitimate restriction should not be able to be marketed as a subscription to the Internet.

- b) If yes, which restrictions would be acceptable before a subscription could no longer be marketed, without qualification, as an “internet access” product?**

Only restrictions that are the outcome of legitimate traffic management measures, done due to legal or security requirements, or because of extraordinary situations of temporary network congestion, can be acceptable in an offer that is labelled as “Internet access”. Any other restrictions imposed on an access service should not be allowed to carry the “internet” denomination alongside it.

- c) What would be the consequences (including the cost) for ISPs if they were not allowed to market as “internet access” an offer with certain restrictions, or if such marketing was subject to mandatory qualification? Please provide quantification of your own company or an ISP of your choice explaining your assumptions and methodology.**

Note: Protecting consumers’ right to an open, neutral Internet should be at the forefront of any policy and regulatory decision. Furthermore, misleading advertising is banned under Unfair Commercial Practices legislation and therefore any offer that is marketed as an “Internet” access which is not an access service to the whole Internet should be barred for being illegal.

18)

- a) Please explain what barriers to switching ISPs still exist (if any) and how they can be overcome. Please mention in your reply all direct and indirect factors dissuading consumers from switching (e.g.: obstacles linked to the terminal equipment, burden of proof regarding a possible breach of contract, etc)**

Switching generally comes at a cost. These costs include contract cancellation fees, costs related to setup the new network and installation costs, as well as those related to informing third parties of the new contract information. In some cases, suppliers attempt to retain customers wanting to switch by offering them better deals. While this practice is beneficial to the consumer who wants to switch, it raises questions of whether existing customers are getting worse deals because they are not shopping around.

Furthermore, switching may not be possible for consumers who are confronted with a limited choice of operators available in a specific geographic area. They could also find themselves in a bundled contract while only wanting to switch operators for the Internet access service, but not having the possibility to do so.

Other common switching barriers include lack of difference in costs, consumers’ limited practical knowledge on how to switch providers, as well as procedural barriers to switching. For example, the system by which the provider that gives up the customer gets to lead the switching process gives few incentives to telecom operators to enable consumers to easily switch to a competitor. All these barriers and challenges need to be addressed if the European Commission policy goal is to increase switching levels in the telecom market.

The European Commission's 2011 Consumer Scoreboard¹⁹ shows that 80% of consumers have not switched Internet providers, proving yet again that switching by consumers in the telecoms market remains very low. Furthermore, of the remaining 20%, only 10% have switched to a different operator, with the remaining 10% switching services under the same operator. Switching will not solve the problem of discriminatory differentiation if all the ISPs' offers enact the same kind of practices. Last but not least, of the consumers who switched in 2011, only 50% found the process to be easy.

A Which? members survey in May 2012²⁰ revealed that switching is not perceived as easy. When asked why they have never switched their main internet provider, 24% of members were concerned something would go wrong if they switched, 20% thought it was too much effort to change and 9% said making a decision was complicated or confusing. If the mechanics around switching were more transparent, consumers might perceive the process to be easier and engage in switching more frequently, with the potential outcome of obtaining better deals.

In Norway, in a survey performed by the Norwegian Consumer Council earlier this year, it was found that approximately 50% of the population is acquiring more services than just TV-subscriptions from their TV-provider. End users are buying internet access, telephony, movies/tv-series and alarms, to name the most frequent additional services acquired. This has an obvious lock-in effect on switching, as user equipment is tuned to one provider and interfaces are different, to name but a few factors.

Among the 20% of those surveyed who had switched TV-provider within the last two years, 25% moved house and were obliged to, and approximately 10% had to switch due to the digital switch.

b) How should an ISP inform consumers of changes to their packages?

Communicating with consumers about changes in their packages that therefore entail changes in their contract is of utmost importance. Service providers need to make sure that the information is delivered at no cost for consumers, through an easily accessible channel, and in an understandable manner. Channels may include customer care telephone calls, the ISP's website, email, and so on, taking into account that no solution fits all and that consumer diversity must be respected.

c) What actions by an ISP would constitute a breach of contract or modifications to the contractual conditions which would enable a consumer to be released from a contract?

Any action that is not done in accordance with the contract terms or goes against contract law, in particular with the Unfair Contract Terms and Unfair Commercial Practices national legislation, would logically constitute a breach of the contract or could be illegal. It is important to highlight that any clauses that are ambiguous or abusive and that are not proportionate for consumers give them the right to cancel the contract at any time. Also, any modification that is done to the contract without the consent of the consumer gives him/her a similar right.

In the case of Internet access subscription services, the clauses that deal with quality of service, speed, and other main elements of the service are of key importance. If the contract is breached or modified on these most elemental aspects, consumers need to be entitled to cancel their contract at no costs.

¹⁹ Consumer Scoreboard 2011, European Commission

²⁰ Which? Home Communications Overall Broadband Survey, May 2012. Base: 935 responses.

d) Should customers be able to easily opt out from certain contractual restrictions (up to a completely unrestricted offer) by the same operator?

YES/NO

As mentioned above, ISPs and network operators should not be allowed to market Internet access services that come with illegitimate restrictions, whether contractual or technically enforced. As it is unfortunately happening very often, it must be ensured that consumers can easily opt out from such offers and always have the possibility to switch to an unrestricted offer.

Opting out from specific contractual restrictions would entail being under a different contract altogether and therefore the original contract would no longer apply.

e) Do you think that a customer should be allowed to switch to another operator within a reduced contract termination period in case his/her current operator does not at all offer an unrestricted Internet access product or does not allow switching to such unrestricted offer?

YES/NO

In relation with the answer provided in point d) above, precisely because consumers should always have the possibility to benefit from a fully unrestricted Internet access service, it is of crucial importance that when they find themselves being subscribers to a restricted one, they can very easily opt out and switch to another provider or another service. A good step in this direction is to reduce the contract termination periods.

As consumers are always on the weak end of a contractual relationship, the least that needs to happen is that termination and switching can occur as easily and swiftly as possible. Further, because transparency is being used as the preferred tool to reduce the number of net neutrality violations or at least to raise consumer awareness of them, it is imperative that consumers are able to easily move away from non-neutral contracts.

19) While there may be valid (technical) reasons why consumers do not always get the advertised service speed or quality, should there be a limit on the discrepancy between advertised and actual service parameters (e.g. speed)? How should this limit be defined?

YES/NO

A typical, or minimum, actual access speed should be required in terms of the advertised speed. This specific threshold of performance of the access connection would serve as a disincentive for misleading advertising and ensure compliance with Unfair Commercial Practices legislation.

Determining these thresholds of performance in terms of the advertised speeds should be a task carried out by NRAs and should be included in all NRAs QoS requirements. We welcome the work currently being undertaken by BEREC in this direction.²¹

²¹ "Draft Guidelines for Quality of Service in the scope of Net Neutrality", BEREC BoR (12) 32, 29 May, 2012.

- 20) Pursuant to Article 30 (6) of the Universal Service Directive conditions and procedures for contract termination shall not act as a disincentive against changing service providers. How could changing of operators be facilitated? Please provide examples and explain your response.**

Different elements make it harder for consumers to terminate contracts and switch providers. These include contract cancellation fees, costs related to set up the new network and installation costs. Further, bundled contracts for multiple services may be a barrier to easy switching if consumers cannot cancel one element of the bundle while retaining the others.

Further, when there are unfair terms contained in the contract that hinder consumers' ability to switch providers, they should be able to terminate the contract and all associated costs should be born by the provider.

- 21) How could the transparency of bundles (packages including telephony, Internet, TV) be improved for consumers and how could switching be facilitated in the presence of bundles?**

As stated above, consumers need to get accurate, updated, understandable and meaningful information about the services they are contracting. In the case of bundled packages, this should not only include the characteristics of each of the services, but also clear, understandable explanations of how each service will affect other services' performance. Together with NRAs, ISPs need to find ways to facilitate consumer switching for one or more of the bundled services in a package. This entails issues related to end-user equipment, and it should be dealt with by ISPs.

- 22) a) How important would be the benefits for end-users of improved transparency and facilitated switching?**

Very important / ~~important~~ / ~~slightly important~~ / ~~not important~~

Any market that doesn't provide users with transparency and switching possibilities must be considered as a non-functional market as a starting point. Without these properties, one cannot talk about a truly competitive market.

However, although transparency is crucial to a well-functioning market, the European Commission needs to recognise the limitations of this policy tool, given the information overload and the complexities in the telecom market which decrease consumers' ability to fully engage with the market and make the right decisions in accordance with their needs. Therefore, improved transparency and switching need to be combined with clear rules regarding non-discrimination and non-blocking which are easily understood by both the supply and the demand side of the market.

- b) What would be the expected benefits in terms of innovation by new businesses (content or applications) as a consequence of improved consumer choice and increased competition between ISPs?**

Consumers need more and better broadband, as well as rich content that is always accessible without discrimination. The challenge is to strike the right balance between the two. Therefore, increased competition between ISPs should trigger more investments in newer and better broadband infrastructure, and increased competition in content providers should provide consumers with enough quality choice.

To build an EU where broadband infrastructure is sufficiently well-developed to cope without problems with the traffic demand and offer services to new innovative ideas, where consumers can very easily switch operator if they are dissatisfied, where Internet users can innovate without permission and be able to reach the entire global Internet with their new services and products, requires that net neutrality is fully restored and respected, and infrastructure is sufficiently up to date to cope with growing demand. Where the commercial case for upgrading broadband infrastructure is not sufficient, there may be a role for governments to play to ensure that consumers are properly served. Consumers and end-users – and hence the economy as a whole – can only benefit from a wider choice in rich content.

23) Would the facilitation of switching for consumers trigger any (administrative) costs for ISPs?

In healthy competitive markets, switching is the most basic right of an empowered consumer, often defined as *voting with their feet*. It is the ultimate measure for them not only to show dissatisfaction but also to look after their own interests and look for a better deal by going elsewhere to get competing services.

The administrative costs that facilitated switching would impose on ISPs is therefore secondary, as it is more important to ensure consumer protection as a fundamental right and switching is a key pillar of sound consumer protection. For ISPs, these short term costs will in the medium term be compensated by a more vibrant telecom market.

24)

a) In your view, are there any problems regarding IP interconnection arrangements (between network operators, ISPs, transit providers and/or content providers) that could have an impact on the quality of the best effort Internet?

Consumers are entitled to an Internet connection which allows them to access any destination on the internet from any point of the network they choose to use, regardless of the application, service or protocol they are using. Therefore, interconnection agreements need to be carefully monitored to ensure that no architectural blockages are being created and that no matter which ISP a consumer opts for, they will be able to connect to all points on the Internet.

Until recently, best effort networks have adequately respected the neutrality of networks and hence ensured that consumers can enjoy fully neutral access services to the internet. Multiple techniques have been developed to tackle congestion problems without amounting to illegitimate differentiation of content, classification of traffic or blockage of bandwidth-demanding applications and services.

Furthermore, the separation of network and application layers that is characteristic of the best effort Internet has allowed for great freedom to create relationships between developers of content and applications and end-users without involving the network operator. This model has helped spur the level of competition and innovation in content, applications and services.

b) Are there any specific issues related to the vertical integration of ISPs and transit providers?

Modifying the way in which the Internet environment functions and significantly altering the value chain through vertical integration of ISPs and transit providers

could offer network operators additional revenue, but it entails enormous risks to net neutrality. As BEREC points out²², at the interconnection level, the core of traffic is dealt with via free peering, and where transit is still being used, prices are declining. Therefore, we do not agree with the network operator industry's claim that there is an economic necessity to impose compensation costs for those content providers whose content is distributed over their networks.

Furthermore, if network operators/ISPs are allowed to increasingly come to commercial agreements with specific content providers, granting them preferential access, or even unique access to their infrastructure, bypassing the interconnection layer, this will completely modify the Internet ecosystem as it has functioned for the past decades. Prioritisation of specific content providers risks making innovation even harder and may significantly reduce consumer choice. Worst of all, it may interfere with end-to-end connectivity, and therefore with consumers' right to access any content, at any time, from any location, using their Internet access service.

25) Direct peering, Content Delivery Networks (CDN) or Quality of Service Interconnection (between ISPs and content providers) are being developed to propose an enhanced quality of service for content providers and end users.

a) What role can they play in reducing the risk of network congestion?

In principle, Content Delivery Networks (CDNs) allow for a better Quality of Experience for consumers. They allow for the replication of content and reduce the total network distance which content must travel to reach the end-point. It is important to note though that caching comes with risks. It is very important that consumers always get up-to-date content when they are accessing mirror servers and therefore caching needs to be done in a way that all content is always updated downwards to the CDN's servers.

b) What opportunities and threats do they constitute for (i) ISPs, (ii) content providers, (iii) transit providers and (iv) end users?

CDNs also present challenges and risks from a consumer perspective. Where providers of CDNs integrate vertically into network providers and ISPs and also provide their own content and applications, they can actively discriminate among traffic by favouring and prioritising their own content, which is in violation of the principle of net neutrality. Therefore CDNs need to work in a content-agnostic manner, providing the content of their business partners in a non-discriminatory way.

Furthermore, CDNs may create competitive advantages for those content providers who can afford using their services to the detriment of smaller providers who cannot. Therefore, it is very important that this behaviour of CDNs is thoroughly monitored and analysed in order to ensure that all content providers, be they consumers or small and medium sized companies, have equal opportunities to offer their content and services online.

The advantage of using CDNs is based on physical proximity, and could be used as a by-pass of technical management. It is important that the placing of CDNs is carried out in a non-discriminatory way, but at the same time, costs related to this intermediary layer might not be economically feasible to all content providers, which may create distortions in competition.

²² "Assessment of IP-interconnection in the context of net neutrality", BEREC BoR (12) 33, 29 May 2012.

- c) **Are there any barriers of a regulatory, technical or business nature that prevents market players other than ISPs from playing a more important role in reducing the risk of network congestion?**

N/A

26)

- a) **Do you consider that intervention by public authorities is necessary at this stage?**

As BEREC's findings²³ show, net neutrality is being constantly violated throughout Europe, in fixed and mobile markets alike.

Recommendations and guidance given by the European Commission or BEREC and NRAs may provide some partial solutions, but they also represent a risk that the necessary binding legislative solutions are further delayed. Leaving the situation to competition will not guarantee that net neutrality is protected as a key principle of telecommunications legislation and will not provide a legal basis for courts to work on in case of related litigation. It is therefore of crucial importance that, on issues that have not been already covered by current legislation, the European Union adopts a new, binding legislative instrument to restore and protect net neutrality as a matter of urgency.

In order to ensure legal certainty, it is of utmost importance that certain key concepts are well defined. These definitions, together with a clear list of consumer rights related to net neutrality and a set of prohibited discriminatory activities for telecoms operators, should be the backbone of any legal instrument adopted to protect net neutrality. Establishing clear, well-defined concepts such as 'public Internet' or 'best effort Internet', 'managed services' and 'legitimate traffic management measures' are important to ensure all implementation measures at Member State level are coherent and there is clear legal certainty for consumers across the EU.

Regarding the implementation of existing transparency provisions in the telecoms package, encouraging industry to implement co-regulatory approaches after agreeing on standards may be a useful first step in some countries. A co-regulatory approach offers flexibility and speed to adapt to market and technological developments. Further, the diversity of the stakeholders involved may favour the development of practical solutions. However, it should be ensured that any such initiative is compulsory for all ISPs and mobile network operators, has independent oversight, monitoring and complaint handling mechanisms, redress and sanctions. It should also be made clear that where such initiatives are not fit for purpose or do not bring about any meaningful, positive change for consumers, policy makers will step in and introduce regulation.

Evidence gathered from self-regulatory initiatives, such as for example the Broadband Stakeholder Group's Code of Practice on the open internet and transparency of traffic management in the UK, shows the need for close collaboration and monitoring during development to ensure that self-regulation is fit for purpose. The UK code currently has numerous shortfalls such as the fact that it is non-enforceable across the whole industry or that it lacks independent oversight, monitoring, verification, sanctions and redress.²⁴ Another example is the Norwegian

²³ "A view of traffic management and other practices resulting in restrictions to the open Internet in Europe", BEREC BoR (12) 30, 29 May 2012.

²⁴ http://www.consumerfocus.org.uk/files/2009/06/Consumer-Focus-feedback-to-BSG-regarding-traffic-management-code_December2011.pdf

guidelines, which while there has not been any breach reported to date, the guidelines lack real enforcement mechanisms and are voluntary in nature. Further, no new operator has subscribed to them since 2009.

b) What would be the consequences of divergent interventions by public authorities in the EU Member States?

Given the divergence in implementation by Member States of the new Telecoms Package, it is imperative that the European Commission undertakes further legislative action to ensure net neutrality is enshrined into law and to guarantee the consistent implementation across all Member States.

Otherwise, the risk of divergent rules across Europe is very high. This is contrary to the objective of the Digital Single Market and the nature of the Internet as a borderless environment. In fact, divergent regulations of net neutrality related matters in different Member States would further fragment the Digital Single Market.

27)

a. Have you made use of the dispute resolution powers under the Framework Directive²⁵ in relation to a dispute about traffic management practices?

N/A

b. Have you also made use of these dispute resolution powers also in relation to disputes between an ISP and a content provider?

N/A

c. If you have made use, please explain under which circumstances. If you have not made use, please explain whether you consider that these dispute resolution powers would be an appropriate tool for such Internet traffic management disputes?

N/A

28) Do you consider that regulators should monitor interconnection agreements between providers?

YES/NO

It is important that National Regulatory Authorities (NRAs) closely monitor interconnections, and where serious risks to net neutrality are discovered, use the powers conferred on them in Article 5 of the Access Directive²⁶ in order to impose obligations on network operators and ISPs to interconnect their networks in an effort to ensure constant and healthy competition across all layers of the Internet.

²⁵ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

- 29) Under article 22(3) USD NRAs have the power to set minimum quality of service requirements on undertakings providing public communications networks. In a scenario where in a given Member State no unrestricted offer is available (for instance because all operators actually block VoIP), do you consider that the “minimum quality of service tool” should be applied by the NRA to require operators to provide certain unrestricted offers?**

YES/NO

As a matter of principle, and to respect the neutrality of the Internet described throughout this questionnaire, all offers that sell access to the Internet should be unrestricted. That said, when the case described above occurs, NRAs should be mandated to apply the minimum QoS tool to ensure that all operators offer at least one affordable, unrestricted access service to the Internet.

END