

Public Consultation by the  
European Commission

Questionnaire on the open Internet and net  
neutrality in Europe

Response of  
Orange France Telecom Group

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Public Version

## **Executive Summary**

Orange France Telecom Group (OFTG) welcomes the European Commission (EC) consultation on the open Internet and net neutrality in Europe and shares its belief that it is crucial to preserve the open and neutral character of the Internet. Internet has become central to people's lives and a powerful motor for creating more growth and jobs. Net neutrality stems from the principle that all end users (i.e. customers, local authorities, undertakings and institutions) shall be free to access all services and contents available on the Internet.

In order to function properly, the Internet requires the intervention *inter alia* of service and content providers, web hosting companies, terminal manufacturers, capacity services, international transit operators, network operators. All of these activities take place around the world and use a network of interlinked networks. Internet has thus developed on a best effort basis, with no one player being responsible for the entire chain but each actor taking responsibility upon its specific segment in the chain. This means that net neutrality of the Internet can be a reality only if all levels of the value chain are in compliance.

Internet is today characterised by huge traffic explosion, mainly due to the increased use of online video content. Such trend constitutes a great challenge for network operators wishing to ensure the correct functioning and quality of Internet in order to deliver to their end users the best service possible, may they be high or low data users. In that context, the questions raised by the EC regarding the traffic management practices are an opportunity for OFTG to better explain its understanding of the current net neutrality debate.

Traffic management is essential in order to ensure that networks function correctly, which benefits both service providers and end users, and makes innovative offers and services possible at the retail level. In discussions of traffic management, it is essential to distinguish between managed services and public Internet. Managed services are services under the technical control of a network operator and enjoy a guaranteed level of quality which meets their specific requirements. For instance, IPTV can be offered on a large scale only because network operators manage multicast routing in their network. Network operators are also able to meet business customers' specific needs, including security, quality and reliability, by using traffic management.

Both history and observation show that managed services have a positive impact on Internet access quality. Internet has always used a shared infrastructure for its technological, pricing and sociological benefits, initially within the military, then among universities and now among network operators' managed services. Network operators' main motivation in developing new network technologies is improving the quality of their managed services, but Internet access also benefits from the resulting higher capacity and more widespread access. Without network operators' managed services, which have made Internet attractive in terms of both services and prices, Internet access would never have been available to the general public. Managed services and public Internet must therefore be combined and resources shared out among them for everyone's benefit.

Traffic management on public Internet's stake depends on whether or not there is enough Internet traffic capacity. When there is enough capacity, traffic management is a technical way to optimize the service provided on the basis of the corresponding technical requirements and all users are served. When capacity is insufficient, some traffic will not be served and traffic management will only aim to define the best possible allocation of

the available capacity in the benefits of all users. The case of sufficient capacity is obviously ideal; it requires the implementation of an appropriate Internet traffic economics system which would provide an efficient way to match network capacity and traffic demand.

In order to ensure net neutrality across the Internet value chain, OFTG holds that:

- **The current electronic communications framework**, including the 2009 new provisions which remain to be implemented at national level, **is efficient and sufficient to guarantee the neutrality of network operators, in particular with regard to traffic management**;
- **Ongoing network investments must be supported** in order to cope with the rise in Internet traffic and to guarantee that public Internet has a satisfactory level of quality for end users and service providers;
- **A change in the Internet ecosystem in order to encourage more efficient use of network capacity for the benefit of all must be considered**. Increasing network capacity alone will not be enough to deal with the explosion of traffic and congestion at the local access level; the explosion of online video content combined with the characteristic of Internet protocol indeed imply that any extra capacity is automatically occupied. An appropriate policy option is thus to favor an efficient use of the networks by supporting the introduction of a reasonable price signal at the wholesale access level. Such contribution, limited to the incremental costs generated by the level of traffic, would improve network functionality and allow a better match between demand and capacity, resulting in a better level of quality for the benefit of end users and service providers. This would also enhance investments and favour innovation, by encouraging in particular the use of content delivery network;
- **End users must be provided with relevant and sufficient transparency**. While OFTG does not believe that the definition of minimum quality of service requirements would be appropriate for the Internet, OFTG strongly supports the need for end users to be provided with all of the relevant information they deserve to make their choices, particularly in terms of traffic management. The new European provisions adopted in 2009 aiming to improve transparency remain to be implemented into national law. OFTG therefore welcomes recent actions launched by national regulators such as ARCEP or OFCOM and will contribute to the discussions, particularly those on **definition of a common terminology or the implementation of relevant KPIs at Internet access level**;
- **Consumers must enjoy the same level of protection no matter what services they use**. In particular, Internet services directly competing with electronic communications services have to be subject to the same regulations in terms of transparency, competition, protection of personal data or privacy;
- **Neutrality has to be ensured throughout the value chain, including content, applications (e.g. search engines or social networks) and devices**. No specific tool available on the public Internet shall be privileged nor exempted from providing transparency guarantees, in particular;
- **The international nature of the Internet and European competitiveness must be considered** when assessing the potential need for additional measures at the European level.

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## *Overview of OFTG's position in the debate*

OFTG welcomes the current EC consultation on open Internet and net neutrality in Europe. It is crucial to preserve the open and neutral character of the Internet, which has become central to people's lives and a powerful motor for creating more growth and jobs.

### **A. Presentation of the Orange France Telecom Group**

OFTG provides consumer services and support for companies in Europe on a large scale. It has acquired a thorough knowledge of net neutrality issues through its involvement in activities throughout the Internet value chain: fixed and mobile broadband Internet services, transit network, content provider, portals and new activities such as healthcare solutions for professionals and consumers. The principle of open public Internet is thus a cornerstone to which OFTG is not only deeply attached, but also a major contributor:

- the neutrality of its Internet access service allows clients to access the contents and services of their choice, while maintaining the secrecy of their correspondence and protecting their personal data;
- the roll-out of infrastructures as well as the continuous financing of capacity growth in order to handle the rise in traffic and provides an ever-increasing number of citizens with Internet access;
- the development of managed services, like IPTV which is offered on the highly competitive "triple-play services" market, requires demanding innovation and permanent technical adjustments to the network, which eventually benefits Internet access services and thus all of the other players in the chain;
- the protection of consumers' interests, and to a large extent Internet users' interests (consumers, undertakings, local authorities, institutions), is ensured by compliance with the information and transparency rules as laid out in various legal texts.

As a player on different levels of the Internet chain, OFTG has a deep understanding of the various different issues raised in the open Internet and net neutrality debate, especially on the European internal market. This experience is the basis of this response to the EC consultation.

### **B. Definition of the Internet and scope of the discussion**

It seems necessary to define the concepts of public Internet and Internet access in order to have a common understanding of the issues at stake.

The "**public Internet**" corresponds to IP addresses which have been made public by their owners and "**Internet access**" refers to the service providing the ability to transmit or receive data from the public Internet, which comprises all the public Internet addresses<sup>1</sup>.

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<sup>1</sup> We refer to ATT's definition in its answer to FCC NPRM draft in early 2010

Regarding the definition of the public Internet, “IP addresses that have been made public by their owners”, it is worth noting that not all addresses which belong to the public numbering plan are accessible on the public Internet. The owners of a public address may choose to exclude their addresses from the public Internet<sup>2</sup>, since they have the right, but not the obligation, to integrate their addresses into the public Internet.

In order to understand the overall dimensions of the public Internet and to clarify the debate, it is also important to establish the distinction between public Internet and managed services. OFTG welcomes the definition proposed by the French regulator, Arcep, in its “*Initial policy directions on open Internet and network management*”<sup>3</sup>, which states that **managed services** are “*services providing access to content/services/applications through electronic means, marketed by the network operator which guarantees certain specific features thanks to the process it uses on the network it owns and operates. Some of the classic features include reliability rate, minimal latency, jitter (variation in time between packets), guaranteed bandwidth, security level, etc. According to the above definition, providing end users with access to the Internet does therefore not constitute a managed service. Some managed services can be governed by a contract with an ISV [Information society service vendor, see below], and may also result from an offer made available to the end user, whether as a standalone offer or in the form of an option bundled with Internet access.*”

These services managed by network operators are distinct and separate from the public Internet and therefore should not be directly discussed in the debate on net neutrality. When assessing the openness and neutrality of Internet, we therefore invite the European Commission to ensure that the scope of the exercise is correct, *i.e.* it cannot be limited to a small part of the Internet but must deal with the entire public Internet.

### C. Internet value chain

The Internet’s complexity lies in the fact that a large number of players are active at different levels of the value chain<sup>4</sup>:

**Operators** (ISP and telecommunications carriers):

- **Internet Service Provider (ISP):** a provider of electronic communications services, whose area of business is providing the public with access to the Internet (Arcep’s definition);
- **Telecommunications carriers:** operators which direct the traffic between ISP (generally local operators) (OFTG definition).

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<sup>2</sup> 2 main reasons:

- Common practices of operators: operators have always used technical public numbers to route certain types of traffic (voice mail, company services) within their network rendering them not accessible to other operators;
- Generalisation of the IPv6 addresses: IP addresses are to rise from the current number of 4 billion available in the IPv4 environment to a number of 340 undecillion thanks to the switch to IPv6 environment. The greater number of IP addresses will enable any machine or everyday object to have a public address. Some holders of public IPv6 addresses will need to use them for private applications outside the public Internet. In that context, certain servers (sensitive sites, company servers, even end users) may be kept “invisible” from the Internet.

<sup>3</sup> See : [http://www.arcep.fr/uploads/tx\\_gspublication/consult-net-neutralite-200510-ENG.pdf](http://www.arcep.fr/uploads/tx_gspublication/consult-net-neutralite-200510-ENG.pdf)

<sup>4</sup> That description of the Internet value chain is based on the definitions proposed by Arcep in its aforementioned public consultation as completed by OFTG.

Information society service vendor (ISV) and terminals' manufacturers:

- **Information society service vendor (ISV):** any legal entity or natural person who provides an information society service, i.e. any service provided by means of electronic equipment and at the individual request of a service recipient, regardless of the business model employed. In practice, this category of economic player includes providers (publishers, distributors) of services/content/applications to the public by electronic channels – especially but not only via the Internet (e.g. TV channels delivered over ADSL). A consumer (see definition below) who makes information available on the Internet is one example of an ISV.

We here refer to the Arcep's definition which is proposed in the consultation mentioned above. It does not correspond to any existing legal category because it is an enlarged definition of the provisions laid out in the e-commerce Directive<sup>5</sup>. With no further references to the remuneration criterion, the definition covers players whose business model is based on a two-sided market approach and whose service does not wholly or mainly consist in the transmitting of signals on electronic communications networks.

The definition is an accurate reflection of the state of Internet economics and is pertinent to a broad understanding of how the Internet value chain works. With regard to current terms mentioned in the debate, ISV covers what are known as "over the top players" (OTTP) or players involved in the "upstream layer".

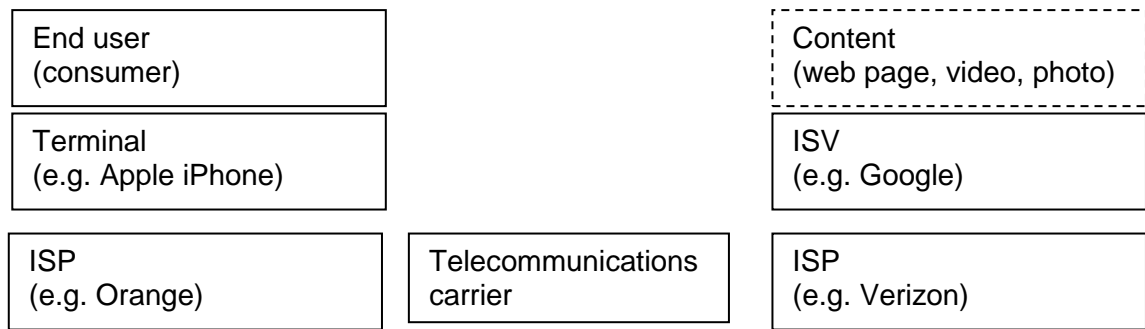
- **Terminal manufacturers:** manufacturers who sell equipment which allows increasingly voluminous content to be used in an increasingly ergonomic fashion. They also occasionally provide the customer and applications developers with kiosks to facilitate the content downloading (sometimes for a fee).
- **End user** (including consumers), access content, services and applications:
    - End user: a legal entity or natural person who uses or requests an Internet access service, but does not provide the service. In most instances, the end user is an ISP subscriber. An end user may also make different types of content or applications available online. The term "consumer" refers to a natural person who uses or requests an Internet access service for non-business purposes;
    - Content: a generic term for describing the content, services or applications that the end user accesses or uses.

The following diagram clearly shows:

- The interfaces between ISPs and telecommunications carriers; it is essential that they function correctly in order to guarantee the Internet's sustainability;
- That ISPs are not the only players in a position to contribute to the implementation of a principle of Internet neutrality: the principle must also be applied to terminal manufacturers and ISVs.

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<sup>5</sup> This directive refers to "Information Society Service", that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.



Internet value chain diagram as defined by OFTG

It should be noted that the single legal or physical entity may play several distinct roles in the above diagram. An end user might also be a content supplier, there are a number of operators which are both ISPs and telecommunications carriers, and most ISPs are also ISVs (e.g., because their portal is accessible to all Internet users and provides easy access to different online services).

#### D. Traffic management is essential

The EC questionnaire is mainly focused on the behaviour of network operators/ISPs, particularly traffic management practices. It states that some have raised concerns that the openness of the Internet may be undermined if network operators seek to treat traffic differently. Such a situation could require further public policy responses.

In the sections below, OFTG will further discuss the reasons which justify traffic management practices, whose necessity was also acknowledged during the recent discussions on the telecoms reform package<sup>6</sup>.

OFTG believes that the current regulatory framework is sufficient to deal with any issues that traffic management practices may raise. First competition law is an efficient tool to prevent any potential anti competitive practices. Second, the EU revised eCommunications framework has resulted in provisions that give NRAs additional tools to avoid any risks of blocking sites or applications and slowing down service provision. Those new tools still need to be transposed into national law and implemented by NRAs before their efficiency can be properly assessed. This means that there is no need for further legislation in the field of traffic management practices. Any further interventions on traffic management at European level could only be based on concrete issues that could not be solved by implementing current *ex-ante* and *ex-post* rules.

We therefore welcome the pragmatic approach advocated by Vice President Neelie Kroes<sup>7</sup>. We are also pleased with the cautious conclusion which the British regulator Ofcom adopted for its consultation<sup>8</sup>, indicating that any new intervention on traffic management issues would be premature. We also wish to highlight the risk in terms of innovation and investments that a rigid definition of what constitutes a « reasonable

<sup>6</sup> “In order to meet quality of service requirements, operators may use procedures to measure and shape traffic on a network link so as to avoid filling the link to capacity or overfilling the link, which would result in network congestion and poor performance” (Recital 34 of Citizens’ rights directive)

<sup>7</sup> « My first general principle is not to make assumptions. I do not make the assumption that one side or another should prevail in this debate, or even that further Commission intervention is required” NK’s statements during Arcep’s NN debates (Speech/10/153)

<sup>8</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/net-neutrality/summary/netneutrality.pdf>

traffic management», as proposed in §4 p 7 of the EC consultation, would create in such a rapidly evolving market.

## **E. Net neutrality topics which may require further examination**

OFTG concurs with the aforementioned Arcep and Ofcom analyses which state that the issue of neutrality should not be limited to the electronic communications market, but must be assessed throughout the value chain of the public Internet. It is thus up to the EC to go beyond the question of the neutrality of Internet access and the limited scope of traffic management.

### **E.1 The need for appropriate Internet access traffic economics**

In order to promote the quality of the public Internet, the main priority should be to favour a sound economy in terms of balance between Internet traffic demand and Internet capacity supply.

A sound economy should support ongoing network investments in order to handle the rise in Internet traffic and to provide end users and service providers with satisfactory public Internet quality, while avoiding the extra capacity being pre-empted by some players.

As explained below, OFTG believes that Internet traffic economics which would guarantee the provision of open Internet access imply that service providers would contribute to the network cost generated by their traffic. Such a reasonable contribution, equivalent to the level of the variable cost of the service and proportional to the level of traffic generated, is essential because consumers often do not have much control over the traffic they receive. This contribution would promote a more commensurate and efficient use of network capacity for the benefit of all users. It would create a level playing field for the different players of the value chain, ensure that market players have a common interest in providing good average quality on the public Internet, and ensure better use of bandwidth and networks, all for end users' benefit.

However, current commercial arrangements fail to ensure this type of sustainable ecosystem, especially for the local access segment. If this situation does not change and appropriate Internet traffic economics are not implemented, traffic management will become even more critical in providing fair Internet quality to all customers.

### **E.2 End users must enjoy sufficient transparency and the same level of protection, no matter what service they use**

Transparency is key for end users, and OFTG is already working together with the relevant public authorities and stakeholders to improve the current situation, where necessary. This could relate to transparency in terms of traffic management, the terminology used or the definition of relevant KPI at the Internet access level.

It is also important that all players apply the principle of neutrality (ISPs, ISVs and the manufacturers of terminals) if they offer equivalent services.

The wide availability of Internet broadband access makes it possible to provide services which were previously only offered by electronic communications operators via external platforms linked to the network. Certain services from ISVs and terminal manufacturers, referred to as “over the top services”, can thus be a substitute to the network

operators' services. This is the case of VoIP or e-mail, for example. These services are in direct competition with the services provided by electronic communications providers, and must comply with the regulation on electronic communications, the protection it provides for consumers and the obligations which it imposes with regard to public authorities. In as much as certain services from ISVs are substitute to electronic communications services, they should be subject to the same requirements and monitored in the same way, whatever the underlying technology and whatever the type of provider.

The consumers should be assured that all of the services which are in direct competition meet the same level of requirements. In practice, the definition of electronic communication services in the framework could be modified to include all services which are substitutes for electronic communications services, whatever the technical means used by the provider, in compliance with the principle of technological neutrality laid out in European regulation.

Consistency in the scope of regulation is a necessity as much in order to protect citizens and end users' rights as in order to promote fair and merit-based competition between the players in the market place.

### **E.3 The net neutrality debate should be assessed globally**

As Arcep and Ofcom have also noted, over the past few years some major players have developed and conducted their business directly over the Internet or by using hardware that constitutes a means of accessing the Internet.

This is particularly the case of search tools such as **search engines and their associated advertising offers**. They have become the main entry points to Internet which influence consumers who make choices on the basis of what is deemed available by these applications. This means that the majority of web site publishers and ISVs derive their online visibility from these applications. These search applications, whether they are paid or free services, serve as reference points which guide users in their choice of content or services. Neutrality in the way such applications are defined and operate is thus of the utmost importance in the Internet ecosystem. Public authorities should have relevant tools which allow them to ensure that "access" to services and content on the public Internet *via* search engines in particular is also neutral, does not discriminate among services and is transparent.

It is also related to the devices or terminals sector. The range of traditional terminals represented by computers is now joined by **mobile devices (smartphones) and so-called "Internet connectable" terminals** (televisions or games consoles). Through their technical configuration and the providers' commercial offers, these terminals can also be very structuring in their choice of content and ways of accessing information for users, as well as for services and content suppliers who use IP technology as their medium. Here again, neutrality should be guaranteed.

Some of them have very strong market position and most are not European. As ARCEP has noted, dealing with the **international nature of the value chain** is also one of the challenges in the debate on Internet neutrality. This international element also entails accounting for the impact of regulation on European competitiveness.

## Question 1 - Current problems: bottlenecks, competition

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

### 1.1 There is currently no neutrality issue at the Internet access level

Since the early days of the launch of the Internet and especially when broadband took off, there have been very few cases denouncing alleged breaches of neutrality consisting in the degradation of public Internet access by operators. When compared to the intensity of the Internet market and the high number of accesses provided, the accusations clearly remain exceptional.

Moreover, the few operators denounced for breach of neutrality always reacted within a few days, or even a few hours, to put an end to the offending practices. Any operator's strategy based on the abuse of traffic management practices remains a theoretical threat. Suspicions of network operators are thus exaggerated since any implementation of such strategy would automatically and quickly be sanctioned by consumers (and possibly further litigations), who are free to churn to any other operators thanks to fierce competition at the retail level in Europe. This explains why opponents of traffic management practices always refer to the same limited range of controversial affairs (Madison, Comcast on the US market or Neuf/Daily Motion in Europe).

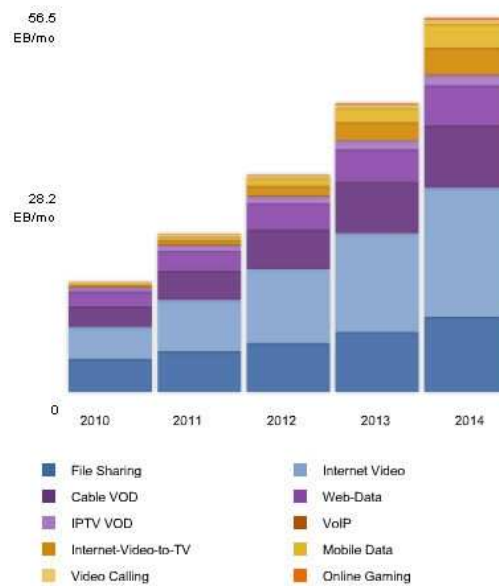
In short, in the EU, broadband retail markets are competitive, characteristic that prevents access operators from implementing measures which would shut off or limit access to the Internet. Such situation has been favored by unbundled access to the local loop and the technical flexibility it gives to alternative operators, that have managed to launch competitive Internet access services. The best guarantee for net neutrality at Internet access level is thus to keep those markets competitive by promoting infrastructure based competition. OFTG considers that the current *ex-ante* framework and competition laws are sufficient to address any net neutrality issues at the access level.

However, there are real issues due to network congestion which comes from dysfunctionality on the wholesale interconnections market. In OFTG's opinion, the interconnection data market is the cornerstone for preserving an open Internet and net neutrality. In order to provide a better understanding of that field, we will hereafter focus our answer on that market.

### 1.2 However, IP traffic flows at the level of interconnection with the OFTG network are becoming highly problematic due to unilateral and imbalanced increases in traffic

#### The explosion of traffic increases

It is widely acknowledged that there is currently an explosion of data traffic, which should continue in the coming years, as shown in the graph below:



\*Cisco VNI June 2010

This increase in traffic leads to quality of service problems due to congestion, financial problems related to network sizing, problems with the allocation of resources shared between users of Internet access and users of the Internet as a carrier, and difficulties in establishing appropriate price structures, especially for mobile data offers. OFTG also faces the abnormal behaviour of certain powerful players on the global Internet market attempting to create inequitable conditions for access to the OFTG network.

This leads to an **increase in unilateral traffic** transmitted by players higher up in the Internet value chain. This massive transmission of data which saturates the networks penalises emerging services being developed by other actors of the Internet as well as a vast majority of end users. OFTG is confronted with a major risk of **its network being saturated** by the massive transmission of data over the Internet. The traffic generators have no incentive to use the capacity efficiently since they currently pay for use of the network at prices that do not cover the costs, or even the marginal cost, of adapting the network's capacity to their traffic.

### The congestion phenomenon

There are three main network segments where congestion may occur. Network congestion must be evaluated end-to-end: there is congestion as soon as one segment is congested, and the congestion of one segment mechanically generates an absence of congestion on the other segments, which does not prove that their dimensioning is adequate for the real demand.

In 2009, the situation was as follows:

2009 situation	Access congestion	Backbone and backhaul congestion	Interconnection congestion	Global Congestion
Fixed Broadband network	depend on copper pair BB eligibility	none in 2009	yes	yes
Mobile network	Yes for some usages: 1/ intensive use by multiple customers in the same radio cell 2/ above reasonable usage	none in 2009	yes, because fixed and mobile IP networks use the same interconnection points	yes

### Peering agreements

Excessive unilateral transmissions mostly take place in the technical peering agreements channel. France Telecom exchanges traffic with peer operators without payment on the basis of the fact that certain rules are respected, especially on the minimum volume of traffic exchanged and the way that the traffic is balanced. These agreements are almost never subject to formal contracts, yet the vast majority of Internet traffic flows through the points that they cover.

Peering agreements do not include any guarantees of quality (the connection is made on a 'best effort' basis). Orange's peering policy is publicly available; it allows for a maximum imbalance in the traffic of 2.5 (between incoming and outgoing traffic) for each player, and has resulted on average in an overall balance in the traffic exchanges between peers.

For the past few years, OFTG has noticed a continuous erosion of the Incoming / Outgoing ratio for traffic exchanges under its peering agreements. The following graph illustrates the continuous erosion of the ratio with an acceleration in 2008.

### **[Privileged information]**



[End of privileged information]

## ***Question 2 - Problems in the future: other parts of the Internet value chain***

**Question 2:** How might problems arise in future? Could these emerge in other parts of the Internet value chain? What would the causes be?

We have observed two kinds of problems that may arise in the future, both at the network level and in other part of the Internet value chain.

### **2.1 Networks congestion will increase**

At the access network level, the phenomenon of congestion, which is already a reality, will increase due to new and hungry-bandwidth usage by more powerful devices (smartphones, tablets, connected TV,...) and the development of cloud solutions. Forecasts of video consumption also show that HD TV usage will dramatically grow in the short term.

Despite investments by network operators, and without implementation of a correct economic signal, the increase in unilateral and inefficient traffic transmitted by players higher up in the Internet value chain will continue (See section 1.2).

### **2.2 Internet neutrality issues will develop in other parts of the value chain**

As stated above, we believe that the issue of net neutrality should be assessed globally, throughout the entire value chain.

For a few years, new players have established themselves as market leaders at many levels of the Internet value chain. They have gained market power in various activities that are not covered by eCommunications regulation. This is the case of activities at the public Internet level, such as search engines, social networks and online advertising (sponsored links, displays) as well as terminals or devices. Because those areas fall outside the scope of the eCommunications framework, they are not subject to the approach of *ex-ante* regulated markets, which can create an unfair competitive advantage for them. Those market powers may also raise *per se* questions about the neutrality of the Internet.

Competition law might be useful in dealing with some of the difficulties. For example, competition authorities are currently examining the search engine market characterised by the presence of a very strong market player, thus raising potential issues in terms of entry barriers, externalities and leverage effects on adjacent markets. Competition law in and of itself will not, however, be sufficient to solve the imbalanced situation; it does indeed not cover certain dimensions which are crucial for those leaders' success (personal data, data breach notification obligations...), which is another explanation of these players' unfair advantage. We will further discuss certain issues in the last chapter "Other issues".

### *Question 3 - Regulatory framework*

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

The applicable legal framework including both sector-specific regulation, that still need to be implemented into national laws, and competition law can adequately deal with any issues described in our answer to Question 1.

With regard to traffic management and potential breaches of net neutrality by network operators, in particular, the new powers, related to transparency, traffic management and dispute resolution, granted to NRAs will be sufficient to guarantee that Internet access remains fully open and neutral.

In terms of congestion issue and the need for an appropriate economic signal to be implemented at wholesale access level, OFTG considers that the regulatory framework should contribute to an efficient use of the capacity for the benefit of all and thus not be supportive of any free-riding use of capacity.

Finally, some means of action needed to properly address the neutrality concerns identified at other levels of the value chain, as indicated in Question 2.2, may be missing.

## Question 4 - Traffic management

**Question 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?

The first thing which must be understood in order to grasp the reasons why operators need to implement traffic management practices is the distinction between managed services and public Internet access service. In Question 5, we will explain why this distinction is crucial and how managed services contribute to the sustainability of successful Internet access.

The following discussion will focus on the traffic management practices implemented for traffic conveyed over the public Internet and will not cover the traffic management practices used for other types of services.

### 4.1. Traffic management is essential in order to improve the consumer experience and ensure that networks function correctly

The fact that operators may legitimately use traffic processing techniques is widely acknowledged in both the American and European debates. As noted on page 5 of the EC consultation, the revised European framework recognises this need and Commissioner Neelie Kroes has underlined the importance of and the need for traffic management in ensuring network quality<sup>9</sup>. It is worth noting that while traffic management has always been implemented by network operators, it has only very recently been raised as an alleged issue by certain players. As explained above, this is only due to the very large increase in traffic and current inefficient network use by certain major players. It is thus the latter issue which must be resolved and not traffic management as such.

The basic role of traffic management is improving the consumer experience. Traffic management gives end users better access to content and information by preventing the risks for network operations created by congestion. It also helps to improve, rather than negatively affect, the smooth traffic routing. The various methods of traffic management (traffic shaping<sup>10</sup>, throttling<sup>11</sup>, caching...) aim to provide the best possible response to varying consumer expectations in terms of quality of service, by distinguishing among the types of service (e.g. voice calls, e-mail, video,...) carried by the network.

Traffic management mechanisms may also be needed for specific purposes, such as:

- Minimising the transfer time for services with limits on their crossing time (which represents a significant gain for these services) by increasing the delay for

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<sup>9</sup> Speech by Vice-President Neelie Kroes made at ARCEP on 13 April 2010

<sup>10</sup> Traffic shaping is a practice which consists in analysing the different types of usage to ensure that those which are sensitive to delays, such as voice, have priority over other less sensitive ones, like e-mail. A delay of a few seconds does not affect the consumer experience for the latter. Traffic management is the technical optimisation of the efficiency of the network with the available resources.

<sup>11</sup> Throttling is the practice consisting in slowing down data streams in order to limit network congestion and avoid routers and servers' breakdowns. Such measures usually allow the flow of traffic to be served while bringing the affected network's resources back to normal, i.e. in their uncongested state.

services for which crossing time is not important (thus without any significant loss of quality for the latter). It should be noted, however, that such mechanisms are not standardised and thus may suffer when crossing interconnection interfaces between two networks;

- Avoiding useless content duplication; temporary storage mechanisms (Web caches) for portions of very popular content, videos, pictures and music can be directly distributed using special functions in the access network rather than being transported thousands of times across the whole Internet. This mechanism, which is based on CDN technology, helps to greatly reduce the saturation of core networks upstream from access networks.

Finally, it is very important for the players (operators, ISV's, terminal manufacturers) to be able to segment their retail offers and to offer:

- Basic offers, whether 'packaged' or not, with certain protective or restrictive measures, at an attractive price; for instance OFTG automatically provides an anti-spam filter in its 'Net' offer for e-mail service along with a device for blocking pings and a temporary (but not fixed) IP address;
- Options (or other offers) which enable better informed users to deactivate certain protective or restrictive measures, which are offered, which may be offered at a higher price.

The traffic management practices linked to retail market segmentation correspond to consumer needs (security, protection...) or to technical and financial constraints (IPv4 addresses are rare) and are provided as options – either paid or free of charge – enabling more expert users to access more services if they wish.

For example, within OFTG, Orange France offers its mobile customers the possibility of activating a VoIP option with financial arrangements that vary depending on their main mobile subscription. In Poland, Telekomunikacja Polska, TP, also allows mobile Internet consumers to use VoIP services. The compatibility of the absence of options for certain specific services is a matter to be addressed by competition law.

In some cases (e.g. Internet access by satellite), there may be technical reasons why certain services cannot be provided, like games that require a very short response time. Finally, as an ISP, it is impossible to provide access to inaccessible site, because the choice is actually made by the owner of the corresponding IP address.

In order to ensure optimal flow of all types of usage without necessarily affecting the quality perceived by the customer, operators have to implement traffic management measures; they go hand in hand with investments in capacity increases. Traffic management measures can thus in no way be considered exceptional.

If they are clearly explained to end users, specific access limitations do not create any particular problems (especially if there are optional mechanisms which allow the well-informed end users to deactivate the restrictions). A ban on all means of segmenting offers could result either in a massive price increase or a growth in usage so large that the available capacity would be swamped and all parties would be penalised, which is highly undesirable.

Finally, in a rapidly changing sector it would seem equally inappropriate if not impossible to define "reasonable traffic management" *ex-ante*, as the consultation seems to suggest at one point. A cautious approach as championed by Vice President Kroes and

proposed by Ofcom, among others, in its own consultation is preferable: “In a period of considerable change, there are substantial dangers from premature regulatory intervention to support one part of the sector over another”<sup>12</sup>.

The two approaches (traffic management and investments) are not in contradiction with each other, but can and should be combined. **It is fundamental to remember that network operators have a legitimate right to regularly manage traffic** in order to allow innovative offers at the retail level and to keep the network running smoothly for the benefit of all.

#### **4.2. An appropriate economic signal for access which would incentivise efficient capacity use should be considered in order to keep Internet open and neutral**

While OFTG shares the overall aim of preventing chronic congestion problems, which make use of traffic control mechanisms necessary, the idea that banning such technical solutions would solve the question in any way is an illusion.

To use a metaphor from the world of road traffic: banning traffic jams on motorway networks or local roads is not enough to prevent them.

The most effective public policies for reducing congestion on the road network consist in constantly sending out behavioural and financial messages to infrastructure users: fuel taxes, information on traffic (especially at rush hour), developing relatively cheap public transport, reducing the speed limit when traffic is congested to optimise the average speed, introducing more restrictive rules for professional road users (bans on lorries at weekends), setting up tolls, making contributions to the climate, energy, etc.

Similarly, there is no reason to wait for congestion to occur before implementing crawler lanes for slower vehicles as an exceptional measure.

Depending on the types of congestion encountered on the Internet, the same type of policy should be adopted by network operators in order to ensure efficient capacity use and the long term sustainability of the Internet; see below in Question 10.

In order to avoid network congestion, it is preferable to send out the right economic signal to players who are able to exploit them effectively:

- In very concrete terms, an appropriate policy option would be applying a financial contribution to all incoming traffic on local access networks, which would be equal to the long term incremental cost of the downstream traffic; it would aim to reach an efficient balance between demand and capacity at a point where the marginal utility of traffic equals the marginal cost of network capacity
- On the other hand, ineffective or ill-defined technical and financial rules can encourage operators to keep potential saturation outside their network by sizing their network’s incoming capacity. This situation would require additional traffic management measures.

Sending this kind of economic message would also encourage all players to look for optimal technical solutions, which would enable a better use of resources for the benefit of all.

<sup>12</sup> Ofcom, ‘Net Neutrality and traffic management, a discussion documents’, 24 June 2010, pt 3.28

## **Question 5 - Managed services and public Internet: transparency**

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

Before providing a detailed response on the issue of transparency, it seems necessary to highlight the fact that contrary to the conclusions which might be drawn from a superficial analysis, the managed services offered by operators contribute to the success of Internet access. First of all, they meet consumers' need for services with guaranteed quality. Second, they are a major factor in improving the Internet at both the technical and business levels.

### **5.1. The ability to offer “managed services” makes it possible to provide high quality services which could not technically be provided over the public Internet**

The ability to offer managed services makes it possible to develop the ergonomics and quality of service which correspond to a proven consumer need. In several European countries including France, the development of broadband, and thus that of the Internet and services, is largely based on the success of the triple play packages offered by the principal ISPs. It is also important to emphasise that for certain services, such as television programmes broadcast, their very nature dictates that same situation and equal treatment cannot apply between managed services and services provided over the public Internet.

For example, if a programme as popular as the eight o'clock news on a major channel were only available on the service platform of an ISV connected to the Internet, millions of television viewers all attempting to access the programme at the same time via the public Internet would create traffic congestion that would be impossible to manage and would penalise all Internet users, while this kind of simultaneous access by millions of people is perfectly feasible as a managed service integrated into a triple play access. It is impossible to qualify this difference in services supplied to the customer as discriminatory; it is quite simply the result of two distinct technical channels (public Internet and managed services).

In any event, the management of certain types of services must obviously comply with competition law and other applicable regulations.

### **5.2. The development of managed services has and will continue to greatly benefit Internet access service**

Historically, all progress made on networks in order to improve managed services has also been beneficial for Internet access:

- For fixed line services, the public Internet can optimise use of its dedicated resources as well as the managed services' capacity when it is unused (e.g. when the TV is not being used with multi-play access, the capacity initially reserved for it can be allocated to public Internet service);
- For mobile services, data services could not be provided at the current competitive rates if traditional managed voice services did not already cover a large proportion of network coverage costs.

Thanks to the high level of investment in managed services over the past few years, the public Internet has greatly benefited from their enhanced capacities. The concern expressed by some players according to which managed services might undermine the average quality of best effort Internet is thus questionable. Quite the contrary, shared resources between managed services and public Internet are allocated efficiently in the sense that shared resources can be temporally allocated to public Internet when they are unused for managed services, which benefits to the public Internet quality. On the other hand, if managed services did not have priority for these shared resources, when they need them, they would not function correctly. This means that managed services and public Internet should not be put in opposition to each other but should be combined.

### 5.3 Transparency is a key element for consumers

**OFTG strongly supports the need for transparency.** We believe that competition and transparency are the two essential pillars of market efficiency. In other words, **competition fuels the transparency as much as transparency fuels the efficiency of competition.**

While we do feel that there is no need for further legislation in this area, since the directives adopted at the European level in 2009 remain to be implemented at national level, **OFTG is already working together with the relevant public authorities and stakeholders to improve current practices in order to ensure that consumers are given all relevant information.** Implementation of those new provisions at the national level will guarantee that consumers know what they buy, what they will be able to access and the best way to adapt their use to their chosen Internet access. That is why OFTG welcomes Arcep and OFCOM's willingness to gather information on this subject and will contribute to the discussions which both regulators have undertaken.

In order to be efficient, any action which aims to improve and ensure transparency should be implemented on a broad scale so that it involves a wide range of stakeholders, notably consumers and users associations as well as business and industrial federations representing the different parts of the value chain.

While we believe that it would be irrelevant to define minimum quality of service standard, as explained below, we do feel that the sector could work on defining average standards for Internet access or relevant KPIs. Works could also be undertaken on transparency about any potential traffic prioritisation or on terminology, to assess and define for example how and when the term "unlimited" could be used. On that last topic, some positive results improving consumers protection have already been delivered. For example in France the members of the telecommunication federation have committed<sup>13</sup> under the patronage of the Secretary of State in charge of consumers to improve readability and understanding regarding the term "unlimited". Parties are also working together on hypothesis where such word cannot be used.

Achieving transparency for end users also means providing useful and relevant information; increased transparency shall not be tantamount to the provision of a flood of details which the majority of end users cannot understand, which make it necessary to strike the right balance (see answers to Questions 11 & 14).

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<sup>13</sup>[http://www.minefe.gouv.fr/discours-presse/discours-communiqués\\_finances.php?type=communiqué&id=4604&rub=1](http://www.minefe.gouv.fr/discours-presse/discours-communiqués_finances.php?type=communiqué&id=4604&rub=1)

OFTG is strongly committed to continue working on transparency together with public authorities and relevant stakeholders, notably consumers associations, in order to ensure that end users receive relevant and sufficient information so that they can make the right choice.

OFTG also believes that managed services and Internet access should not be opposed to each other; the development of managed services improves the quality of the Internet:

- By driving technological advances and increasing the network capacity;
- By spreading out the costs of shared infrastructure,
- By contributing to the increase in the numbers of Internet users thanks to the commercial success of multi-play offers,
- By allowing the public Internet to use the resources dedicated to managed services when the latter are not in use.

## Question 6 - Traffic management for fixed and mobile networks

**Question 6:** Should the principles governing traffic management be the same for fixed and mobile networks?

Fixed and mobile access networks have specific characteristics, whether intrinsic or due to their stage of development, which require for a moderate approach to the priorities to be retained for neutrality. Fixed and mobile services are to be distinguished using the following elements:

### 6.1 The early and rapid development of mobile Internet

Mobile Internet is developing at a quick pace, and political priorities should focus on the financial, technological and commercial sectors' ability to sustain that growth, further enable genuine innovations for usages, and provide consumers with the choices and prices which are to be expected on a competitive market.

In terms of development, it has, for example, been observed that the mobile data resources initially intended for use by new creative and innovative services are also used to offer more traditional services such as voice.

### 6.2 The question of investments in the fixed local loop

In the coming years, major investments in the fixed local loop will be needed to increase the access rates in order to engage the roll-out of fibre networks. The orientations laid out by the public authorities in the net neutrality debate will necessarily impact the trends of investments in the fixed local loop. This impact shall be accounted for in choosing the main criteria for analysing the political options for net neutrality.

### 6.3 Structural differences in the architecture of public Internet access

In a mobile network architecture, the outgoing traffic towards the Internet goes through fewer than 10 proxies<sup>14</sup>: some virtual IP addresses are derived from real existing ones,<sup>15</sup> which implies that it is difficult to identify each mobile Internet user. A fixed IP address will correspond to one thousand mobile users, in contrast with the very few users on a fixed network. This means that the issues of identification and security raise questions on a completely different quantitative level.

### 6.4 Different orders of magnitude in terms of capacity and volumes conveyed

The limits in terms of spectrum allocated to mobile electronic communications, the lower quality of the propagation environment (air as compared to copper wires or fibre) and access capacity sharing between mobile subscribers all contribute to the fact that the mobile loop's data transport capacities are one to two orders of magnitude lower than those available for wired local loops.

This makes it crucial to use mobile Internet capacities efficiently, especially given that mobility increases the potential of applications and services. It would be highly

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<sup>14</sup> Basically, a proxy is a computer server which is an intermediary between a customer and a server on Internet.

<sup>15</sup> IP addresses are NAT (Network Address Translation)

detrimental if the lack of an economically relevant signal or of efficient traffic flow management were to lead to the pre-emption of bandwidth by a few bandwidth-hungry applications, thus impeding the innovations which could emerge.

On the other hand, the relatively low data volumes conveyed on mobile networks as compared to fixed networks and the architecture of mobile public Internet access mean that some routing applications which are more sophisticated than those used for fixed networks can be implemented in the core network.

### **6.5 Technical management of the risk of congestion at the radio access level**

For mobile network architecture, sharing out access loop capacities among subscribers imposes technical traffic management in order to lower the risks of congestion at the access level. The radio part of the mobile networks provides transport capacities which are far more variable than the fixed local loops because of the real use of a single cell by several users at any given moment.

In conclusion, while traffic management is needed for both mobile and fixed networks, it is currently even more necessary on the mobile networks.

## ***Question 7 - Other forms of prioritisation: content and application providers' strategies***

**Question 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?

Content and application providers have developed various strategies to prioritize their services. These strategies may be linked to the technical architecture rolled-out to convey their traffic, while others aim to prioritise the service after it is made available on the public Internet. The latter kind raises concerns about neutrality outside the scope of Internet access and may negatively affect the other players in the value chain.

### **7.1. Content and service providers develop strategies to prioritise the conveyance of their traffic**

At first, the most powerful content and application providers were able to place their own servers and IT capacities at the best entry points of the networks, thus giving them the most favourable locations. It was one way to optimise costs and improve quality.

With the increase in some ISVs' financial power, new strategies have been developed. They still aim to optimise traffic conveyance but they are located even deeper in the network entry point and provide the ISV with an increasing number of advantages, since the deepest entry point is the closest to end users. Some strong players have the capacity to deploy their own private network and/or implement CDN solutions.

#### **7.1.1. Private network roll-out**

Some leading content and application providers have the financial resources to roll out private networks for their exclusive usage. These networks are not open to other operators and are dedicated to the sole use of the ISV; ISV are completely free to implement whatever they want on these private networks and can prioritise their services. They may be rolled out on a worldwide scale.

#### **7.1.2. Implementation of Web caches or CDN solutions**

Technical solutions like Web caches and CDNs can significantly reduce traffic in core networks by avoiding certain redundancies and improving the quality perceived by end users. They can be used by players which can not afford to roll out their own private networks.

CDNs are currently implemented close to international and national interconnection points and provide a sort of “fast lane” for distributing some information at the long distance networks level. CDNs do not make any difference to the domestic routing of traffic in the backhaul and access networks.

### **7.2. Devices and search engines can constitute other means to prioritise access to content**

Certain players' strategies aim to ensure their presence at the entry point to content on the public Internet.

### 7.2.1 Devices and natively embarked applications

Because some devices and some applications now have a critical influence on Internet usage, it seems important to guarantee neutrality, openness and non discrimination on such tools to preserve the market and consumers from any risk of abuse. This point is further developed in the chapter “Other issues”.

### 7.2.2 Search engines

Searches have become a prominent way to surf on Internet, find information and make transactions. The search engine market is, however, currently characterised by a very strong market player in Europe, whose technical, commercial and strategic choices can have massive impacts on the Internet ecosystem as a whole.

Transparency and non discrimination must be guaranteed to avoid any distortion of competition; a topic which falls under the scrutiny of competition authorities at both European and national levels<sup>16</sup>.

In conclusion, other forms of prioritisation do exist within the Internet value chain, which may raise some openness issues. This further confirms the need for the EC to avoid exclusively focusing its analysis on the network operators’ side.

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<sup>16</sup> [http://www.autoritedelaconurrence.fr/user/standard.php?id\\_rub=378&id\\_article=1448](http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=378&id_article=1448)

## Question 8 - Non-discrimination in managed services

**Question 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?

With regard to exclusivities, with the exception of access to channels (see below), **OFTG believes that exclusivities are already effectively regulated and controlled by competition authorities.** In general, exclusivities **merit examination on a case by case basis and cannot be subject to general provisions** which might create competitive advantages or disadvantages in the market place. In terms of acquiring content rights, it should be noted that the principle of the exclusivity of certain rights has always been recognised and acknowledged with respect to the rules for evaluating the value of an investment.

**Access to audiovisual content has become essential for telecommunications operators.**

In fact, the massive investments needed to build and maintain networks can only be financially justified by the revenues which they can be expected to generate. Against a stable background, or even one in which revenues from access decline, the revenues drawn from services, including audiovisual services, are essential in order to balance the investments made in current (3G, ADSL) and future (4G, fibre...) networks. The difficulty of distributing certain types of exclusive contents, namely the majority of the most attractive television channels, has led OFTG to develop new television services. The creation of new channels has in turn led to new investments in the content production in an economic context that was difficult for the audiovisual sector.

Content strategy also depends on **open partnerships** concluded with third party producers and publishers which, apart from the distribution of traditional television channels, have also led Orange subscribers to access innovative services: catch-up TV, enhanced TV channel portals. The exclusive distribution and carrying which OFTG practices for some of its channels have been examined on a number of occasions by the relevant authorities. All of these investigations have highlighted the absence of any anti-competitive consequences due to the exclusive carrying of content owned by OFTG in the corresponding markets.

However, there might be some issues in the specific concentrated **Pay TV market.** In France, for example, the adverse effects of the principal distribution exclusivities being concentrated and locked in by the dominant player in the Pay TV market are well established. It raises problems notably in terms of network funding (the Pay TV exclusivities held by the player in ADSL network tend to systematically spread to the FTTx network) and discrimination (the main audiovisual player having potential access to all the most attractive thematic channels on an unbundled basis, including on FTTx networks).

- OFTG believes that exclusivities are currently effectively regulated and controlled by the competition authorities
- They merit examination on a case by case basis and therefore cannot be subject to general provisions which might run the risk of creating competitive advantages or disadvantages in the market place
- The situation remains worrying, however, on the specific Pay TV market

## *Question 9 - Non-discrimination within managed services*

**Question 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?

The revised European Framework will enlarge the NRAs' power to settle disputes between network operators and players seeking for interconnection to their infrastructure. NRAs will act on the basis of the sector-based eCommunications rules. In addition, competition authorities are also empowered to efficiently tackle any potential abuse related to exclusivity agreements.

There is consequently **no need or justification for any additional measures on managed services within the eCommunications framework.**

Finally, it is also worth noting that the industry is currently working on normalisation to define standardised next generation access (NGA) managed services. Such standardisation will lead to new NGA managed services with open interfaces, which should favor interoperability and cooperation between operators and service providers.

## Question 10 - Sustainability of the economics of the Internet ecosystem

**Question 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?

The main question deals with the wholesale interconnection agreements which are at the basis of Internet access service offers. As we explained in answer to Question 2, the current situation is unsatisfactory.

The Internet traffic economics which would guarantee the provision of open Internet access imply that service providers contribute financially to the avoidable network cost generated by their traffic, but the current commercial arrangements fail to ensure such a sustainable ecosystem. If appropriate Internet traffic economics cannot be implemented, traffic management's role in providing fair Internet quality to all customers will become even more critical.

### **10.1 Internet traffic economics which would guarantee the provision of open Internet access imply that service providers contribute to the avoidable network cost generated by their traffic**

The structural solution which guarantees that the Internet remains open and that infrastructure investment is maintained is an Internet traffic economics system which leads to an efficient match between network capacity and traffic demand.

Internet traffic management has different stakes depending on whether or not there is enough capacity for the Internet traffic. When the available capacity is sufficient, traffic management is a technical way of optimizing the service received by each traffic depending on its requirement and everyone is served. On the other hand, when there is not enough capacity available, some traffics will not be served, regardless of any traffic management efforts; traffic management practices will only aim to define the best allocation of the available capacity. The first situation, which is obviously the most satisfactory, should be aimed at through proper Internet traffic economic system.

If the traffic generated on Internet access is *de facto* priced at zero, whereas its incremental cost is above zero, the Internet sustainability cannot be ensured. In that case, the demand will exceed capacity and cause capacity shortages. Increasing network capacity is not a viable solution because of the exploding online video traffic and because the Internet protocol is designed to occupy all of the available capacity. This means that without a price signal for Internet use which covers network capacity costs, any increase in capacity will lead to an equivalent increase in traffic demand, for the exclusive benefit of users (providers or end users) who are particularly likely to occupy bandwidth.

**Hence, in order to achieve the priority aim of an efficient match between traffic and capacity, the only structural option is to set a price for use of Internet access resources at a level which covers incremental costs.**

The next question is whether this price for traffic on Internet access should be paid by the retail customer market or by the wholesale service providers' market.

**It should be paid by the party best placed to understand the price signal and to control the volume of traffic generated** by its activity on Internet access on the basis of the price signal. Most of the retail customers are powerless to control the traffic they receive from service providers and to technically influence the efficiency with which the network is used to deliver the service: from pop-ups to automatic updates and upgrades, including the format and routing of video streaming, the expertise and the decisions which influence the volumes of downstream traffic are on the service providers' side. This means that the price signal concerning downstream traffic received by retail customers should be sent to the party generating the traffic, *i.e.* service providers.

## **10.2 Current commercial arrangements do not lead to appropriate Internet traffic economics**

In order to analyse current Internet economics, we must distinguish between commercial arrangements on the basis of “termination” or “transit” markets such as what is defined for the voice interconnection market:

- Termination markets: from the latest open technical interface to the end customer;
- Transit markets: whatever is above the termination, nationally and internationally

**Transit and peering commercial arrangements** exist in transit markets which are generally seen as competitive in the European Union. Some concerns have, however, arisen in these markets due to the unlimited growth of traffic asymmetry between some peering partners, particularly due to video streaming. The partners which receive much more traffic than they generate (“eyeball networks”) are often unable to properly monetise the asymmetry of costs they are submitted to with their partners (see Q 1.2). This situation might lead to litigation, which eventually could be settled by NRAs since they have been granted new powers under the revised framework. In such cases, NRAs should make decisions which contribute to the appropriate Internet economics system described above, and they should be particularly careful not to encourage free-riding use of Internet capacity.

In the case of the **current commercial situation in the termination markets**, as defined above, all of the fixed and variable network costs are born by retail customers. As explained in the previous paragraph, this situation is not efficient and jeopardises the quality and sustainability of Internet access. The options for ISPs within this kind of situation are not fully satisfactory:

- If retail prices are based on volume, including downstream volumes, it is very difficult, even impossible, to provide the majority of customers with relevant tools and transparent information which would enable them to understand and control downstream volumes;
- On the other hand, with flat-rates retail prices, there are fewer possibilities to offer “cheap prices” for low usage. It also leads to inefficient outcomes:
  - No incentive for efficient use of network resources and a waste of network capacities;

- This leads to a random relationship between traffic volumes and the utility of Internet traffic (see ATKearney study for Vodafone on the Internet value chain<sup>17</sup>);
- In turn, this leads to high opportunity costs for Internet users, generating high traffic because they may block very useful services generating low traffic.

Pricing downstream traffic at the level of long term variable costs to the party which generates the traffic and not the one which receives would solve this dilemma. It would provide a relevant incentive for efficient and proportionate use of network resources. It would not only solve the issue of Internet capacity allocation but would also prevent access and transport capacity congestion. **It would allow transparent and manageable retail prices which would meet Internet users' different expectations, and it would finally support innovation in Internet service because the "best effort" Internet access quality would be safeguarded.**

### **10.3 If appropriate Internet traffic economics cannot be implemented, traffic management's role in providing fair Internet quality to all customers will become even more critical**

Introducing a traffic contribution would represent a significant departure from current commercial arrangements between Internet traffic carriers and would thus require time and care and would come with a risk of fierce opposition.

It is, however, the most efficient economic option. If the current situation remains unchanged, however, the lack of a relevant price signal for Internet access use addressed to service providers generating traffic will result in a shortage of Internet access capacity.

This means that capacity shortage will have to be managed by the network operators. The role of traffic management techniques in making the most efficient use of available capacity in order to serve the demand and to ensure a fair, reasonable and transparent allocation of capacities between traffics will then become even more critical. Otherwise, capacity allocation will *de facto* occur for the benefit of the users who tend to occupy the most bandwidth, while all of the users who need Internet in their daily lives and are not experts in Internet technology would not be served as they should be.

OFTG believes that in order to guarantee open Internet access:

- An appropriate economic signal has to be implemented; service providers should contribute financially to the network incremental cost generated by their traffic;
- The current commercial arrangements fail to ensure such a sustainable ecosystem;
- If appropriate Internet traffic economics cannot be implemented, traffic management's role in providing fair Internet quality to all customers will become even more critical

The regulatory framework should contribute to the implementation of an appropriate Internet ecosystem, that would ensure consumers a satisfactory level of quality of service, by avoiding any free-riding use of Internet capacity.

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<sup>17</sup>[http://www.vodafone.com/etc/medialib/public\\_policy\\_series.Par.21246.File.dat/public\\_policy\\_series\\_11.pdf](http://www.vodafone.com/etc/medialib/public_policy_series.Par.21246.File.dat/public_policy_series_11.pdf)

## ***Question 11 - Instances in which NRAs would set minimum quality of service requirements***

**Question 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?

This question assumes that some operators may be willing to develop strategies based on deliberately spoiling public Internet access quality, which would then result in the artificial allocation of resources between managed services and public Internet. In that context, some would see setting minimum quality of service requirements as the solution which would avoid that kind of risk. OFTG does not believe such risk to be realistic because of the following characteristics of the Internet context.

First, the **current state of competition** within the Internet access market does not allow any strategy based on degrading the quality of public Internet access to be successful. The Internet access market attracts consumers who place a high value on the quality of service, and for whom it is as important as having their choice and freedom respected by the provider who offers the service. Because the Internet access markets are highly competitive throughout Europe, end users are accurately informed and able to switch operators on a sound basis if they are unsatisfied with the service provided. Competition thus fuels transparency as much as transparency fuels the efficiency of competition.

The **“best effort” nature of the public Internet access service** must also be taken into account. Because the Internet is open, no individual player can guarantee the quality of this kind of system, which is not controlled by any one player. On the other hand, best effort quality would be better guaranteed by sending out relevant economic signals to players (see Q10).

Finally, **the new provisions of the revised eCommunications framework** will reinforce the existing transparency guarantees. As indicated in Questions 5 and 14, transparency is key and OFTG is willing to ensure that end users receive relevant information. Before considering the adoption of additional new rules, we thus invite the public authorities to wait for concrete implementation of those new measures at national level.

This is why **OFTG supports the pragmatic approach proposed by Arcep and Ofcom**. OFCOM has in particular indicated that minimum QoS standards are a rather prescriptive policy option and that it would be advisable to explore existing competition tools and consumer transparency options before considering minimum QoS requirements<sup>18</sup>. Any NRA intervention should be limited to monitoring parameters allowing to properly assess the quality of the services provided by the operators depending on their limited liability for the public Internet. This approach has already proven to be efficient for the coverage of mobile networks, see also Question 12.

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<sup>18</sup> Ofcom, idem, pt 1.12, 1.19

## *Question 12 – Determining and monitoring quality of service requirements*

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

As explained in Question 11, any intervention on that domain involves risks and would not necessarily be efficient. The setting of minimum quality of service requirements for public Internet would indeed be complex and partial because of the basic nature of public Internet, as a network of networks for which no specific player is globally liable. As also indicated by Arcep and Ofcom, a more pragmatic approach based on transparency should be supported.

We consider that instead of imposing specific minimum quality of services requirements, efficient use of the networks in the benefits of all users and transparency for the end users could be improved. To improve customer experience, one might consider **monitoring statistical data**. Some statistical observations on the quality of service for public Internet access could then be successfully led by NRAs. A useful parallel can be drawn with statistical monitoring of network coverage. The publication of the data collected by NRAs has been a strong driver in providing an incentive for network operators to further deploy their networks, especially for mobile network coverage.

Finally, service content providers have also to take upon their own responsibilities when using networks to distribute their services to end users; the consumer experience is indeed sensitive to their technical choice or possible discrimination in the way they address different ISP.

### *Question 13 - Form of minimum quality of service requirements*

**Question 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?

See answers to previous questions.

NRA wishing to collect statistical observation of public Internet quality of service should obviously do so in a coordinated manner to ensure consistency throughout all Member States. In such scenario, OFTG would welcome the EC to invite NRAs to define some harmonised processes for statistical quality monitoring. Any inconsistency would indeed have a detrimental effect on the Internal market.

## Question 14 - Increasing efficient transparency for consumers

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

The rationale behind transparency for consumers in eCommunications follows three complementary directions:

- End users must be given clear, relevant and meaningful information before signing the contract and during its implementation: what they are entitled to expect from the offer, the elements they need to understand what the tariff covers, how the access technical performance is managed, conditions for ending the contract, etc.
- End users may have the possibility to obtain statistical performance measurements: NRA may publish some statistical data defined in a pragmatic and gradual approach if it is relevant in assessing the end user experience. This form of transparency may however be challenging because of the difficulty of giving customers a simple explanation of certain complex technical parameters.
- NRAs are empowered to analyse, monitor and intervene on traffic management practices if necessary, by imposing on operators obligations to inform end users.

As indicated above in Question 5, **OFTG believes that transparency is a key element for open Internet.** Current standards for consumer transparency have already been improved during the review of the eCommunication framework. **A set of provisions has been adopted to better provide consumers with enhanced information.** Some NRA, such as Arcep and OFCOM, have already launched initiatives to implement them; there is therefore no need for further legislative European intervention, at least not before the new provisions are implemented at national level and deemed insufficient after concrete assessment. Those works could relate on improving transparency **for example in terms of general conditions, publication of KPI, common terminology standard, etc.**

**OFTG is already working further together with public authorities and other stakeholders** (professional, users and consumers associations...) **on those topics.** For instance, as explained above, improvements have already been made in France where the operators federation, working together with the consumers associations and under the patronage of the Secretary of State in charge of consumers, agree to improve readability and understanding regarding the term “unlimited”. Parties are also working altogether on hypothesis where such word cannot be used. One might also consider the possibility to establish codes of conduct implying a wide range of stakeholders representing the Internet ecosystem to favor the cooperation and improve trust between players and with the consumers. Only a shared and global approach to transparency can lead to concrete improvements which benefit end users.

Moreover, as OFCOM also highlighted in its consultation, when applying the new rules a balance will have to struck between technical detail, e.g. the parameters for traffic management, and the need to provide consumers with meaningful information<sup>19</sup>.

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<sup>19</sup> Idem, section 5

Finally, it is also worth noting that any increased measures of transparency for Internet users which aim to enhance neutrality for the public Internet should go hand in hand with an obligation of transparency for other Internet players, namely those who directly supply end users with services which consume large amounts of bandwidth. As this type of measure and the players it would address do currently not fall under the jurisdiction of NRAs, the Commission would have to consider inserting relevant provisions in the cross-sector consumer regulation and have it monitored by the relevant consumer protection authorities.

## ***Question 15 - Issues related to freedom of expression, media pluralism and cultural diversity***

**Question 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?

### **15.1 Internet is a space where freedom of expression, media pluralism and cultural diversity exist**

These principles are already guaranteed by the current framework and are respected by network operators. In particular, the legal framework established by the eCommerce directive is the key regulation granting freedom of speech and the respect of criminal law in a long and complex value chain which involves multiple players with various levels of control and rights to the distributed content. According to that directive, network operators are “mere conduits” and are thus forbidden to inspect the content conveyed over their networks. The eCommerce Directive acknowledges the potential for misuse of online services (e.g. the publication and distribution of child pornography or criminal content which incites hatred) and establishes a process for intermediaries to respond to notice of illegal activities. Network operators can thus be requested to intervene against illegal content, which is also a way to safeguard freedom of speech. On that topic, cost coverage aspect of such filtering action should be taken into account by public authorities.

Finally, according to eCommunications rules, network operators are required to respect the secrecy of correspondence. Moreover, the eCommunications regulation recognises the high social value of Internet access; any restrictions on Internet access should respect fundamental rights and freedoms of natural persons<sup>20</sup>.

### **15.2 Managed services contribute to safeguard those principles**

The existence of managed services in electronic Communications brings a strong social benefit. While minimal provisions which aim to protect basic principles do apply to all services, at least in France, managed services contribute to public policies in a stronger proportion because service editors and network operators are under the strict scrutiny of dedicated national authorities.

Moreover, many managed services fall under the scope of the AVMS directive<sup>21</sup>, in which article 13 states that Member States are to ensure that audiovisual media services under their jurisdiction promote the production of and access to European works. Such promotion could relate, inter alia, to the financial contribution made by such services to the production and acquisition of rights to European works or to the share and/or prominence of European works in the catalogue of programmes offered by the service.

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<sup>20</sup> Recital 4 of Amending Directive 2009/140/EC; Article 1(3) of the amended Directives 2002/22/EC and Article 1(3a) 2002/21/EC

<sup>21</sup> Directive 2010/13/EU of the European parliament and of the Council.

OFTG thus contributes to cultural diversity through various managed services in countries where it is present. For example, in France, OFTG is present:

- as a distributor: TV by Orange, thematic channels, music offer, 24/24 actu, etc.
- and as an editor (in 2008, premium TV package Orange).

In order to offer these services, OFTG must comply with particularly strong obligations: payment of “creation support” taxes or obligations on the production and display of audiovisual and film creations. OFTG is also committed to publishing innovative services like “Orange *cinéma séries*”, with the signature of landmark agreements with the audiovisual and film industries<sup>22</sup>.

### **15. 3 Issues may arise because of the International nature of the Internet**

The audiovisual industry is compliant with stringent requirements (youth protection, cultural diversity, arts funding...) at different levels of the value chain. In contrast, there are no national borders in the Internet economy and some global players can escape regulatory constraints.

Over the past few years, major players have developed by conducting their business directly over the Internet or by using hardware that constitutes a means of accessing the Internet. Direct competition between the managed services of EU-based operators and unregulated content services which are not part of the arts funding system, including foreclosed ecosystems (smartphones, launch of connected terminals – TV but also games consoles) may jeopardise the very objectives of regulation and lead to the distortion of competition between players. It is therefore important that all players involved in the same area of activity, whatever it may be, are subject to, if not identical rules, at least rules of a type that do not unjustly distort competition.

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<sup>22</sup> December 2008 : agreement with the audiovisual producers and authors ; November 2009 : agreement with the representatives of French movies industry

## 16. Other issues

### 16.1 The need for a fair and balanced framework

16.1.1 Consumers must benefit of the same level of protection no matter what services they use

European consumers should be assured that all the services which are in direct competition satisfy the same level of requirements. In other words, Internet services competing with eCommunications services should be subject to similar rules. In practice, **the definition of electronic communication services in the framework could be modified, to include all services which are functionally substitute for electronic communication services whatever the technical means used by the provider**, in compliance with the principle of technological neutrality laid out in the European regulation.

We also feel that national authorities which are acting beyond the current scope of the electronic communications should be provided with efficient tools. For instance, economically-based mechanisms like what exists in the electronic communications field could be introduced to tackle issues related to market power.

#### 16.1.2 The need for a level playing field in terms of data protection

OFTG believes that equivalent treatment is important when it comes to obligations for gathering and processing personal data. **OFTG believes that EU laws should ensure the same level playing field for all EU and non EU based firms which handle with EU citizens personal data.** To be more precise, article 4 of the European Data Protection Directive 95/46/EC does not cover the case of non-EU companies processing EU-resident personal data on non-EU based servers.

The unsatisfactory current situation was recently highlighted by the common public letter dated 19 April 2010 addressed by certain authorities<sup>23</sup>, in charge of personal data protection, to Google and other Internet players calling them to respect the laws related on data protection when they launch new products and services. On April 20<sup>th</sup>, the French authority has sent a similar letter to Google<sup>24</sup>.

In order to resolve this issue and given that the field of electronic communications has already been properly reviewed, the priority is now introducing similar mechanisms in the other relevant fields.

**OFTG thus welcomes the ongoing broad debate on the revision of the Data Protection Directive which provides an opportunity to guarantee end users with consistent processing of their personal data by all of the players in the value chain.** OFTG hopes that this regulatory effort will clarify and simplify current Internet privacy challenges

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<sup>23</sup> Common public letter dated April 19th, 2010 on the initiative of several authorities in charge of the personal data protection (France, Canada, New Zealand, Germany, Israel, Ireland, Italy, Spain, Netherland, United Kingdom)

<sup>24</sup> Letter by the French authority (CNIL) addressed to Google on April 20th, 2010 (ref. <http://www.cnil.fr/la-cnil/actu-cnil/article/article/12/les-gardiens-de-la-vie-privee-exhortent-google-a-respecter-les-lois/>)

including minors' personal data, the simplification of international transfers of data and prior consent.

More precisely, minors' personal data is a topic extremely complex and sensitive. We would favour the launch of a consultation between all relevant stakeholders (EC, regulatory and data protection authorities in other jurisdictions) to ensure a consistent approach. With regard to international data transfer, the current EU rules would need some improvements. In complex situations with multiple data controllers and jurisdictions involved (e.g. cloud computing), the current provisions of the Directive may impede the free flow of personal data and, thus, the development of economic activities outside the EU by EU-based companies. We also believe that international data transfers within a single "group of companies" need to be simplified. With regard to consent, OFTG favours a user-centric approach delivering meaningful changes to individuals' privacy experience. Rather than rigid and quickly outdated specific provisions, we favour a legal framework based on transparency: individuals must be made capable of making informed decisions on their privacy choices and preferences. On the other hand, requiring explicit consent for all processing would in the end undermine privacy. Regulation should stress the need for clear and simple messages so that end users can make informed decisions, instead of requiring mechanical prior consent.

We also feel that even within the boundaries of the European Union, it would be right to extend the principle of mutual recognition to the protection of personal data in such a way as to simplify the implementation of new European wide data processing, thus making it more effective.

Finally, OFTG is in favour of the "Madrid Resolution", an approach that deserves to be applauded and encouraged. Adopted on the 5<sup>th</sup> November 2009 by nearly 80 bodies involved in the privacy protection, the Madrid Resolution constitutes the first step towards an international convention, which would define a series of principles and rights that guarantee the effective protection of privacy at an international level and ease the international flow of personal data. In our view, this kind of international convention is essential in a globalized world.

### 16.1.3 The international nature of the Internet & its impact on the EU's competitiveness

European players have to fulfil European obligations resulting in higher fixed costs for European players than for non-European players when opening pan European digital services, which may raise issues in terms of Europe's attractiveness. There is a clear need for a legal framework that would provide a level playing field for European and non European providers of European digital services.

A global and pragmatic approach to the net neutrality debate is thus needed in order to ensure that, **before adopting any new regulation and potentially increasing regulatory pressure on European operators, its impact on EU competitiveness is assessed.**

## 16.2. Devices neutrality in general

Device neutrality has started to raise some concerns which deserve further consideration.

First of all, the range of traditional terminals represented by computers is now joined by **mobile devices (smartphones) and so-called "Internet connectable" terminals**

(televisions or games consoles). Through their technical configuration and their providers' commercial offers, these terminals can also be very structuring in their choice of content and ways of accessing information for users, as well as for service and content suppliers who use IP technology as their medium. This means that consumers' freedom may also be at stake, because some ISVs may not guarantee a satisfactory level of freedom due to their bargaining power.

The availability of some highly valued applications or services offered by ISVs has become a **competitive factor** that cannot be ignored by the other players on the value chain. We wonder whether it would not be useful to further investigate the market power that may have risen within the terminals segment and corresponding applications to adopt relevant regulatory remedies, if needed.

Secondly, it is worth noting that obligations related to the publication of technical interface specifications and the pre-configuration of terminals affect operators, but no equivalent provisions exist for the terminals manufacturers.

The **directive of 9 March 1999 on terminals equipment**, which was instrumental in avoiding issues with compatibility and interfaces between networks, does not work both ways as it is only a source of obligations for operators and not for manufacturers. OFTG considers that obligations which are comparable to those of operators should be established for the manufacturers in light of the way the terminals market has changed. This could be considered within the ongoing review of that directive launched by the EC.

Furthermore, mobile operators are very often subject to additional specific rules. For example, in France, the French regulator has imposed on operators some rules relating to the terminals' configuration like for the take-up of mobile Internet. These are in particular obligations of information, of non-discrimination and configuration specifically aimed at service providers.

These rules (publication of the technical specifications for the interfaces between networks and terminals, rules on pre-configuration - SIM locking – for certain service providers the configuration of terminals) do not exist for terminal manufacturers, who are today nevertheless taking on an increasingly significant share of the configurations needed for the services they carry or make accessible.

Such rules would be tantamount to asking terminal manufacturers to publish and document native API's<sup>25</sup> (a measurement which the EC imposed on Microsoft for Windows following investigations into infringement of competition law), in order to ensure the "neutrality" and the openness of the kiosks natively associated with certain terminals, and to enabling users to more easily modify the parameters for the terminal configuration as predefined by the manufacturers.

The existence of a fragmented terminal market thus translates into increased potential for manufacturers to innovate but also into restrictions on consumer choice when they want to download applications, modify the initial configuration of their terminal, or when they want to change terminals.

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<sup>25</sup> Application Programming Interface: software interface between external applications and the PC or terminal operating system.

The application of rules designed to guarantee the “neutrality” of terminals, which is also promoted by the Wholesale Applications Community (WAC), would therefore seem desirable in order to allow for the development of mobile multi-media and to avoid dubious practices that could be dealt with by commercial law, but with an effect very distinct from that of *ex-ante* regulation, and finally also to ensure symmetry of obligations.

Without symmetrical obligations, the grounds for maintaining the obligations imposed exclusively on operators (publication of the technical specifications for interfaces between networks and terminals, rules on pre-configuration for certain service providers) become questionable in light of the current configuration practices of some terminal manufacturers.

### **16. 3. Connected televisions in particular**

16. 3.1 A multitude of terminals and innovative technical solutions will help to enrich the interactive audiovisual experience

There is a new change on today’s horizon related to the use of the television set or, more accurately, the television screen: all compatible televisions will be capable of accessing interactive services.

These new services will reach television audiences through different channels and technologies:

- Numerous Internet access providers have already developed and installed interactive applications that function with a Set Top Box (STB) installed by the distributor and which is directly plugged into the television set using a scart (analogical) or HDMI (digital) cable.
- Using a television connected via an ISP.  
“Connected television” usually refers to this category of television sets. It requires a “client” device within the television set that interfaces with the traditional Internet network, displays a portal on the screen, buttons, thumbnails and widgets and generates the selections made by the television viewer using the remote control.  
In practice, television manufacturers tend to develop proprietary solutions, but nevertheless use standard bricks. The HbbTV standard could well be implemented in this context.
- Apart from television sets, other mass market hardware, such as the latest generation of game consoles, is also connected to the Internet. With the exception of computers, the leading mass market electronic terminal connected to the Internet in the home remains the game console. Approximately 70 % of such consoles are connected to the Internet by their owners, meaning more than 100 million machines around the world today and 225 million by 2013. They offer a range of services including video games, VoD and Internet browsing (source: IDATE survey, January 2010).

- Provision of interactive services on radio spectrum resources not allocated to electronic communications operators.<sup>26</sup>

OFTG takes part in these technological changes through its ADSL television packages offered as part of its triple play packages and, more recently also through a partnership with the manufacturer LG Electronics that was signed on 7<sup>th</sup> January 2010 for connected televisions sold by LG in France. Concerning connected TV, OFTG believes that it is a technological change which makes it possible to bring the Internet to a mass market screen with simplified and intuitive access to web type content and services, thus enabling more varied usages.

16.3.2 Connected TV could be subject to exclusivities, limited in duration and scope in compliance with competition law

The development of these new television sets thus represents technological progress which encourages investments by the various players that could, in compliance with competition law, justify exclusivities which are limited in duration and scope taking into account those investments. These technological developments are of a nature that favours new types of usage and, in OFTG's opinion, complete the way in which traditional TV is used.

However, the development of these usages for terminals must take place within a legal and regulatory framework ensuring equivalent treatment for players proposing identical or similar services whatever the medium or technique chosen to bring them to the public.

16.3.3 Players which offer audiovisual services should be subject to the same legal framework

Players which offer audiovisual media services should be subject to the same regulatory framework, including arts funding, whatever the means of access or the technique proposed or even the country from which the services are provided if they reach the same local population.

In particular, the Audiovisual Media Services directive recommends a lighter regulation for on-demand services than for traditional television services. Overly strict regulatory measures would prevent the emerging VoD market from continuing its rapid growth. OFTG considers that implementation of these provisions within national laws should refrain from transposing the Directive in a way which would treat online and offline services too similarly. An overly strict regulatory framework for innovative services (video on demand, catch-up television etc) would be likely to have adverse consequences on the viability and the development of these services in Europe.

At the same time, for VoD, even more so than for television services, restrictions on investments, catalogues and scheduling could easily be circumvented by sites or platforms located in certain countries which do not have the same level of financial

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<sup>26</sup> For example, under the terms of the law governing audiovisual, the radio-electrical spectrum managed by the French broadcast regulator, CSA, allows the provision of interactive services. For the past few months, the CSA has been experimenting push VoD services on the radio-electrical frequencies that it manages, access to which is not subject to payment of a tax or licence – thus illustrating the absence of “neutrality” in the ability of profit companies to access the spectrum

contributions to production. Given the current state of the regulation applicable in some countries, including France, these same sites would contribute only a little or nothing at all to financing production.

OFTG restates the fact that the development of VoD contributes to reducing piracy, and recommends:

- A flexible regulation of SMAD's when applying the directive;
- A balance in the regulation in order to avoid any circumvention, especially by connected terminals. This relates in particular to the issue of audiovisual services offshoring. For example, French secondary legislation on this topic which is currently under preparation raises some issues in terms of effectiveness, both with regard to the criteria selected for its establishment and in terms of its scope of application, which is limited to European Union Member States.

Apart from the regulatory and legal framework and its application to different types of players offering comparable services, the question of the use of access network resources will also arise as the traffic increases. In fact, hardwares which enable content viewing which uses large amounts of bandwidth capacity should, like all the other large consumers of resources discussed above, contribute to a fair remuneration for the network resources that they use (cf Q10.).

OFTG restates the fact that the development of VoD contributes to reducing piracy, and recommends:

- a regulation of on-demand audiovisual media services at national levels in line with the Audiovisual Media Services directive;
- a fair balance in the regulation to avoid any circumvention, particularly by connected terminals, for VoD, even more so than for television services, restrictions on investments, catalogues and scheduling could easily be circumvented by sites or platforms located in countries having lower financial requirements
- hardwares which enable content viewing which uses large amounts of bandwidth capacity should contribute to a fair remuneration of the network resources that they use.

#### 16. 4. Search neutrality

As mentioned above, end users see search tools like search engines and the associated advertising offers as omnipresent keys to accessing Internet, which enable them to see what content is available and thus to exercise choice by using these tools. The flip side of this is that for the majority of web site publishers, these applications constitute references which grant them visibility on the web. These indexes, either paid or free of charge, serve as reference points which guide users in their choice of content or services.

This medium of access to web services is therefore very important for consumers, which means that it is essential to ensure non discrimination and transparency in its functioning rules in order to avoid any distortion of competition.