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Virgin Media
Communications House
Bartley Way
Bartley Way Business Park
Hook
United Kingdom
RG27 9UP

Policy Development Unit (B1), BU33 7/40
DG Information Society and Media
European Commission
B-1049 Brussels
Belgium

30th September 2010

Dear Sirs,

Virgin Media Response to the European Commission Questionnaire for the Public Consultation on the Open Internet and Net Neutrality in Europe

Virgin Media is pleased to respond to the above questionnaire. We have additionally contributed to, and support, the Cable Europe response – we do not therefore repeat the detailed points made in that response herein, however we set out below our key perspectives on the matter.

Given the increasing importance of the internet to the everyday lives of citizens, consumers and industry the subject of net neutrality is likely to be the subject of increasing focus. Moreover, this focus is likely to intensify as the deployment of next generation access networks progresses. As such, it is vital that the regulatory regime applying to the management and control of traffic over the internet is appropriate, proportionate and achieves a balance between the interests of the various stakeholders. It must establish an equilibrium between promoting competition and investment, ensuring that innovation is not stifled, avoiding unduly burdensome intervention and ensuring that the necessary safeguards for both citizen consumers and industry players are in place.

In this regard, we believe that a prescriptive, overly interventionist approach to the regulation of the flows of traffic over the internet will be counter productive. Rather, we are of the view that the existence of strong, sustainable infrastructure based competition that delivers choice and diversity to consumers, complemented by a sufficient level of consumer transparency and understanding, will allow a more 'hands off' regulatory approach to net neutrality thus permitting investment and

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innovation to prevail. We therefore welcome the comments made in this regard by Commissioner Kroes at the recent ETNO conference¹.

Across the EU, Cable networks are making an increasingly significant contribution to the competitive environment – particularly in relation to the deployment of next generation access services. In the UK in particular, Virgin Media is at the forefront of the deployment of such services. We have made substantial investments in our network, including an upgrade to DOCSIS 3 technology, which has resulted in the availability of 50Mb/s broadband services to approximately half of the UK population. Furthermore, we are continuing to pioneer and innovate in superfast broadband services. Investment in our network is ongoing, with the confirmed launch of a 100Mb/s broadband service during the course of 2010 and a broadening of the footprint of our 200Mb/s pilot. These developments have not only delivered choice and diversity to consumers, but have arguably stimulated investment by competing providers.

Fundamentally, Virgin Media does not believe that any material issues regarding net neutrality currently exist. As far as we are aware, while there may be distinct differences of opinion around the principles applying to net neutrality and traffic management in particular, those opposing views are not impediments to the continued functioning and operation of the internet. We consider that the existing degree of competition has served as a strong constraint on anti-competitive behaviour and that the types of practices, be they commercial or operational, that may alter the dynamics of the relevant markets and/or have consequences for consumers are very much nascent.

While this does not mean that problems related to net neutrality will not arise in the future, we believe that they are only likely to be an issue where firms have substantial market power and are using that power in an anti-competitive manner. In this regard, we believe that the level of competition that exists within many Member States will continue to act as a significant constraint against firms undertaking potentially harmful practices. Moreover where issues do arise, we believe the principles and provisions set out in the revised Telecoms Framework, together with existing competition tools and other ex post powers, will be sufficient to address them and will provide the basis for any intervention that might be required. We consider that undue or premature regulatory intervention should be avoided. In advance of developments in the treatment of the flow of traffic over the internet occurring, it is difficult to predict what issues might materialise. To intervene, therefore, with specific regulatory or legislative measures at this point in time would, in our view, serve only to disrupt the market and would very likely disincentivise investment and temper innovation.

As regards traffic management in particular, it is a statement of fact that it has always been an operational feature of the internet and will continue to be so in the future. Furthermore, we consider it to be a necessary means to an end in delivering a positive customer experience. In the context in which it has been employed to date, traffic management constitutes an essential tool in ensuring that customers continue to receive an acceptable level of service, providing the services that they expect and ensuring a fair allocation of resources. A truly neutral internet, or a situation in which

¹ *Address to Annual Conference of ETNO: 'Telecoms Markets – Working Together for Change', Commissioner Kroes, 23rd September 2003.*

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traffic flows were completely unchecked would not, in our view, deliver the customer experience that certain proponents of the concept envisage.

Moreover, traffic management is likely to constitute a key facilitator of innovation going forward and will become increasingly essential to sustainable network investment. It also plays a key role in maximising the efficient use of networks and thus maintaining the cost of consumer broadband access at an acceptable level.

We agree, however, that for competition to be able to sufficiently constrain anti-competitive behaviour, it must be complemented by a sufficient level of transparency of providers' traffic management policies and practices, such that consumers are able to make informed purchasing decisions and can discipline firms that do not provide the level or type of service that is required. In this regard, while we absolutely agree that greater transparency of traffic management is vital, we believe that a related and more fundamental issue exists in the form of a lack of overall consumer visibility, and thus cognisance and perception, of the capabilities and characteristics of their internet access products. Notwithstanding the wider concerns associated with this, we believe that this lack of comprehension also hampers understanding of traffic management.

We consider it vital for consumers to be able to assess the extent to which the overall attributes of their internet connection, including providers' traffic management policies, support their specific needs. For example, there are a number of reasons that could lead to the performance of a given service or connection failing to meet expectations or being regarded as unsatisfactory – and traffic management (or indeed 'net neutrality' issues more widely) is just one of those. This is well demonstrated, for example, in the case of services provided using dsl technology, where the physical characteristics of the line have a significant bearing on the level of performance and hence the end user experience. As a consequence, consumers more often than not receive a level of service significantly below that which may be inferred by the dsl provider's advertising – and this is clearly not a net neutrality or traffic management issue. Consumers must therefore be able to contextualise any concerns that they may have, make a judgement on the extent to which traffic management or other phenomena may be a factor in those and ultimately be able to make fully informed purchasing decisions including, if necessary, acting on this information to choose an alternative provider. Accordingly transparency, and thus consumer awareness and understanding of the overall attributes of internet access products - in particular the factors affecting the performance of them - is to our mind a key factor in the net neutrality and traffic management debate. Improving such should therefore be a principal objective. Furthermore, to ensure that any such improvements are sufficiently comprehensive, they should extend to the rules applying to the promotion & marketing of internet access products.

As regards transparency of traffic management specifically, the role played by it will be critical not only in tempering anti-competitive behaviour, but also in establishing and maintaining consumer trust and confidence. If transparency of traffic management is to have the desired effect, we consider it vital that policies and practices are disclosed on a proactive basis and that the precise application of any restrictions is fully set out. This should include, for example, specific declaration of any distinction made in the treatment of traffic relating to specific content providers or applications – information should not be presented at a generic level where such distinction is applied.

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Given the issues at stake, the broad concept of net neutrality is understandably an emotive subject, with strong and often conflicting opinions reflecting the different interests of stakeholders at the various points in the internet value chain. The debate has at times been, and has the potential to continue to be, clouded by emotion and subjectivity. We therefore believe it is critical that consideration of the regulatory approach to the matter is sufficiently objective.

Moreover, the debate about net neutrality has gained momentum around the world in recent times – not least in the United States. It is likely that discussion will only intensify, with an increasing polarisation of opinion among the various stakeholders. Against this backdrop of escalating focus and awareness, we would caution against the potential influence of international perspectives on the matter. While developments in overseas jurisdictions are undoubtedly important in the overall debate, their relevance to the EU needs to be viewed in the context of the specific national circumstances – and in particular the fact that market characteristics, and indeed the legislative and regulatory environment, may be very different to that prevailing at the European level. A situation in which the European policy debate is unduly influenced or prejudiced by developments in other territories must be avoided.

As regards the actions that an NRA may take in the event that issues around traffic management do arise, Virgin Media believes that the imposition of a minimum quality of service obligation would be confusing to customers and would be difficult to establish. We also consider that there would be a number of practical implementation and in life management issues. In our view, therefore, it should be employed as an absolute last resort, to be sanctioned only in the case of abject market failure or extreme unfair discrimination, where all other options for addressing the situation have been exhausted.

Overall, we believe that rather than implementing a regulatory approach that pre-empts situations that have not yet arisen, attention should be concentrated on encouraging and supporting infrastructure competition and enhancing consumer understanding of broadband services. We consider that to the extent that issues do arise in future, the revised Telecoms Framework, together with existing competition law provisions, will be sufficient to address them. Moreover, we are of the view that the levels of competition that exist, complemented by improvements to consumer transparency and understanding of internet access products in general, will act as a significant constraint on anti-competitive behaviour.

Virgin Media welcomes the opportunity to respond to this questionnaire, and we would of course be happy to discuss the matter further or expand on any of the points that we have made. Please do not hesitate to contact me should you wish to do so.

Yours faithfully,

Andrew Wileman.

For and on behalf of Virgin Media