



**EUROISPA CONTRIBUTION TO THE CONSULTATION ON THE OPEN
INTERNET AND NET NEUTRALITY IN EUROPE
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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?

EuroISPA witnesses that in recent discussions on net neutrality a particular attention has been devoted to the solution of a problem that does not exist in the EU and, first and foremost, relates to a concept, “net neutrality”, which so far has not been clearly defined. Therefore, considering net neutrality as a problematic issue when it is not would risk generating legal uncertainty for European businesses. EuroISPA believes that net neutrality is part of a wider debate about how Europe would like to see Internet services develop. As a general consideration, EuroISPA does not observe any risk to the neutrality and openness of the Internet but suggests instead keeping monitoring market changes which may compromise the innovative capacity of the internet in the future.

EuroISPA believes, however, that as far as competition rules apply and transparency principles are respected, future problems of net neutrality and openness of the Internet will be easily identified and avoided.

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

The problems relating to net neutrality and the openness of the Internet are primarily problems of competition, foreclosure and transparency. That said, other segments of the Internet value chain should not be disregarded. For example, it is extremely important to safeguard competition between different ISPs and make sure that small providers can interconnect with bigger ones under fair conditions. Indeed, the direct influence between competition and net neutrality issues is two-fold: a decrease of competition based on access market monopolisation could lead to a discrimination of services, particularly to the detriment of small application providers with no buying power; this circumstance would change completely when the ISP market power faces big content or application providers with a stronger negotiating position.

EuroISPA considers that this is a rather common competition situation that market forces and competition rules are able to properly address. Competition between ISPs will be the best guarantee that customers have access to the applications, content and services they want. As long as the access market is truly competitive and customers have the information they need to make well informed choices (transparency), there is no need for regulatory intervention.

The recently revised Universal Service and Users’ Rights Directive has not been fully implemented at national level yet, so it is too early to consider alternative scenarios of potential market failure. Additional regulation would be an admission that the revised regulatory framework is not adequate and this even before its full implementation is assessed.



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

The current framework seems adequate to solve problems that may arise in the future. National authorities are supposed to safeguard competition, make sure consumers are adequately informed about their products (Articles 20, 21 of the Universal Services Directive) and have sufficient power to address hypothetical situations of market failure. The setting of minimum quality of service requirements on undertakings providing public communications networks, under Article 22 (3) of the Universal Service Directive, should be a measure of last resort. EuroISPA is of the opinion that the effects of the yet to be transposed “telecom package” should be assessed prior to suggesting further regulation.

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 Internet's most defining characteristic is its diversity. Consumers have different needs, means, preferences and priorities, which the Internet can meet. Applications also have diverse requirements for bandwidth, latency, quality of service, etc. Traffic management is one of the most important issues for the Internet provider: whilst improving the functioning of the Internet, it enhances customers' overall online experience. Without traffic management measures, network security would be put at risk and serious threats such as distributed denial of service (DDOS) attacks could not be effectively prevented and combated. Rigid network management rules would restrict the Internet's efficiency, reliability, and resiliency. Internet networks need the management flexibility to efficiently respond to unforeseen developments, problems and threats. The holder of the network infrastructure is responsible for the traffic and has to balance net integrity, control of the net and his legitimate business strategies. The key is to ensure customers are given sufficient, transparent information to be able to make informed choices about the different offerings available.

On the other hand, network management may mean prioritising voice calls, including VoIP, over software updates or certain peer-to-peer applications. Of course, different operators may take a different view of which services they should prioritise to improve their customers' experience, but that is part of the competitive process. Such strategies provide customers with choice, as long as there are low barriers to switching operators and full transparency on the process. Therefore prioritizing and scheduling multiple tasks, or managing scarce resources can not be considered discrimination *per se* and the use of traffic management to address congestion or to prioritise certain services should not be seen as a market failure which needs to be regulated. Instead, it should be welcomed as a way of enhancing the functioning of the Internet and the customer's overall experience.

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?

The terms “managed services” versus “public Internet on a ‘best efforts’ basis” are not fully specified and it is, therefore, difficult to give a detailed answer to this question.



Generally, ensuring transparency for consumers and fair competition between operators is the best way to deal with the issue of net neutrality. Ultimately, it is the customers who decide about the product that fits their needs. Therefore, consumers need correct and complete information and the possibility to switch easily between comparable offers. Operators may want to offer what the Commission describes in its consultation as “managed services”. To some extent, this competitive differentiation already exists. This should be seen as a positive development, offering customers a choice over the services available and encouraging experimentation and innovation. It allows operators to package services to match their customers’ preferences. In the same way, traffic management deals with congestion, transparency of managed services is essential to the sound functioning of the market.

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

The same basic principles should apply to both markets. However, different access infrastructures may need specific treatments to achieve similar network management goals.

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?

Prioritisation and selection takes place at every level of the Internet value chain. It also occurs within content and application services and should not be seen as a problem as long as transparency and competition are safeguarded. The dividing line between the content and application provider business and the access provider business has become blurred in recent years (namely because of revenue sharing between hardware operators and access providers). However, any regulation of net neutrality should not create an economic and competitive imbalance between these sectors.

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?

In principle the risk exists that exclusive agreements could affect net neutrality in the case where network operators - especially those with significant market power - supply their exclusive partners with faster or more stable connectivity than competing companies. Should this situation be present, however, competition authorities would be best placed to deal with this practice. In general, a right balance should be struck on a case-by-case basis to avoid chilling the development of premium products and offers.

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?

Regulatory measures should only be considered after voluntary measures have failed under the requirements of proportionality and necessity. Even if there are currently no obvious problems with



anti-competitive discrimination resulting from traffic management or other prioritising techniques, it is very important to be aware of possible future developments in this field and to set pre-emptive actions for potential problems. Transparency is an important issue. If a net neutrality issue arises and transparency is not warranted, voluntary measures, such as an industry code of conduct on certain agreed minimum levels, could help customers achieve the needed information to choose the desired product and safeguard competition.

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?

We do not see a threat to the openness of the Internet and infrastructure investment by current commercial arrangements. However, any regulation of net neutrality should ensure sound competition between access and content industries is preserved.

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?

In a context where transparency is non-existent and no effective consumer choice is possible, intervention by the NRA should be considered. In this case, the NRA should ensure minimum quality of service requirements respect the technical principles of the particular operators. However, this should be a measure of last resort because the market forces, or voluntary measures, should normally ensure customers' needs are reflected.

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

Only the market can determine the necessary quality of service. It is, therefore, up to NRAs to make sure consumers have the possibility to select the product of their choice and contribute to the market development. It is, therefore, highly important to monitor competition and efficiently intervene in cases of abuse of market power or generic market failure.

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?

In a Single European telecommunication market, co-operation between NRAs can strongly contribute to the Single market. However, the setting of minimum quality of service requirements will strongly depend on national developments. It should constitute a subject of discussion between national operators, consumer protection bodies and the national NRA.



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

Transparency is – as argued above – a highly important measure to avoid negative developments on net neutrality stemming from traffic management or other possible restrictions. In our opinion, the effects of the yet to be transposed “telecom package” should be evaluated prior to considering further regulation.

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?

It is possible that “walled gardens”, i.e. the provision of tailored services in a closed network environment, could harm the above mentioned freedom of expression, media pluralism and cultural diversity. If such developments were to be observed in the future, NRAs would have to determine whether any regulatory action is needed.

To conclude, in the context of net neutrality discussions in the EU much has been said about possible market failures but there is little evidence to substantiate this. In fact, a thorough examination of Europe’s telecommunication markets indicates healthy competition that provides customers with better, faster services whilst offering new innovative ones. It is vital to the industry that operators have the commercial freedom to experiment and innovate with managed services in terms of business models, price and quality. The ability to manage congestion is also essential to providing customers with a good service. Commercial freedom is counterbalanced by transparency with consumers about the traffic management policies deployed and the nature of the managed services.

EuroISPA stresses the utmost importance of the Internet in modernising society and underlines the need for operators to make legitimate requirements to provide unrestricted Internet access as well as offering the managed services they may want to offer.

***EuroISPA** is the world’s largest association of Internet Services Providers (ISPs) representing the interests of more than 1800 ISPs across the EU and the EFTA countries. EuroISPA is a major voice of the Internet industry on information society subjects such as cybercrime, data protection, e-commerce regulation, EU telecommunications law and safe use of the Internet (www.euroispa.org). Contact: Andrea D’Incecco, Head of Policy (+32 2 503.22.65/ andrea@euroispa.org).*