

## **Questionnaire for public consultation on the Open Internet and Network neutrality in Europe**

The Initiative for a Competitive Online Marketplace (“ICOMP”) welcomes this opportunity to comment on the Commission’s consultation on the Open Internet and Network neutrality in Europe.

*1) Is there currently a problem of network 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?*

ICOMP agrees that there is a need for flexibility in order to foster innovation and investment while preserving the fundamentally open nature of the Internet. The National Regulatory Authorities (“NRAs”) have power under the revised Framework Directive (Article 8.4(g)) to ensure that this is achieved. However, in addition to the powers under the revised Framework Directive ICOMP believes further steps should be taken to ensure “search neutrality”. Today’s Internet features a nearly endless supply of content, and most consumers as well as business users use search engines to help identify the content that is most important to them, such as news, videos and other information. The fact that search engines select and rank results in response to perceived relevance is, in general, of tremendous benefit to consumers.

However, when most users apply just a single search engine they make themselves dependent upon the choices made by a company whose search criteria they often fail to fully understand. Moreover, if effective competition does not exist – that is, if a single search engine serves as the dominant gateway between consumers and content – there is a greater risk that economic forces will not exert sufficient discipline to prevent the dominant search engine from altering search results to favour its own interests or viewpoint. For Internet-based services, the existence of a dominant search provider raises the risk that consumers will be exposed disproportionately to the content selected by the dominant provider or its preferred partners.

In the online advertising environment, this concern is also acute. As with a dominant search provider, a dominant ad network operator can increase or decrease the revenues of particular publishers that it favours or disfavors. Such a provider also could promote certain sites more broadly than others, bringing more users to its own or favoured sites and further depriving those who are disfavoured, particularly sites that the provider perceives as a competitive threat to primary or ancillary services that it might offer.

Where there exists a dominant ad provider and a lack of competition, an online publisher’s choice to use a non-dominant ad network will mean little if the publisher cannot make enough

money through the non-dominant network to maintain its operations. In particular, a dominant ad network has the ability to unilaterally assure – or undermine– an online publisher’s financial viability.<sup>1</sup>

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

ICOMP believes that the use of mobile broadband accessed through a new generation of high-quality smartphones and other devices is a burgeoning avenue for online activity. One possible problem with the development of the mobile broadband could be emergence of bottlenecks in bandwidth capacity preventing content providers and retailers from effectively offering their goods and services to end-users. Another area of concern is the emergence of mobile advertising services, whether this is taking place within a competitive market structure and what the consequences of monopolization of these activities might be.

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

In terms of pure network neutrality issues, ICOMP broadly believes that the regulatory framework of the revised EU Electronic Communications Network is capable of dealing with the issues identified, provided vigilant enforcement efforts by the NRAs are made. In terms of other issues, such as search neutrality and monopolisation of search advertising markets, the primary tool is the application of the relevant competition law principles. However, it almost goes without saying that other policy initiatives need to bear in mind the current monopolistic structure of the markets concerned and the effects that structure is having on competition.

*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?*

At the outset, it is important to distinguish between different types of traffic management. Traffic management for the purpose of combating spam, security attacks or specific exceptional measures to alleviate congestion are useful and have never been contested as such, as long as they remain proportional and are not harmful.

*5) To what extent will network 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 on a ‘best efforts’ basis, on the other?*

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<sup>1</sup> For further discussion on the issue of search neutrality and for examples of abuse of market power in search and online advertising, see ICOMP White Paper, *Openness and the Internet*, available here: <http://www.i-comp.org/~icompps/email/OpennessInternet.pdf>.

There are clearly benefits to transparency standards whereby ISPs provide end-users with clear, precise, and relevant information on the services and applications that can be accessed through their ISP, the traffic management practices employed on the networks, and any quality of service limitations. Whether or not these should be required or whether their provision should be left to market forces is less clear.

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

It is possible that in order to prevent network congestion, adjustments may need to be made to traffic management rules that apply to mobile networks.

*7) What other forms of prioritization are taking place? Do content and application providers also try to prioritize their services? If so, how-and how does this prioritization affect other players in the value chain?*

Another prominent form of prioritisation is search neutrality, as referred to in the answer to question 1 above.

*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?*

ICOMP believes that a crucial challenge and imperative for the NRAs will be to continue to facilitate innovation by companies who are developing new applications and services delivered via the Internet.

*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?*

ICOMP considers that a healthy and competitive environment for online commerce relies on the ability of businesses to respond swiftly to consumers' needs. It also relies on the development of best practices and cross-industry support for high standards in Internet behaviour. The best way to achieve high standards and best practices is by finding the right balance between self-regulation on the one hand and public regulation on the other. With this in mind, ICOMP considers that it is usually the case that voluntary solutions need to be given a chance before regulatory solutions are imposed. Clearly, this approach does not preclude the application of the competition rules in appropriate circumstances.

*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?*

ICOMP has some sympathy for the view that the current arrangements governing the provision of the mobile broadband access may not be fully adequate to ensure that the necessary infrastructure investment is maintained over the long term. The provisions of all available sources of income, including that from mobile advertising, need to be fully reflected in this debate.

*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?*

Article 22 (3) of the revised Universal Service Directive states that “*In order to prevent the degradation of service and the hindering or slowing down of traffic over networks, Member States shall ensure that national regulatory authorities are able to set minimum quality of service requirements on an undertaking or undertakings providing public communications networks.*” (emphasis added).

The use of “prevent” suggests that any action undertaken by the NRAs should occur *ex-ante* rather than *ex-post*, as measuring what a network is capable of offering may be rendered more difficult once unreasonable traffic management practices have been introduced.

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

In setting minimum quality of service requirements, the NRAs will have to take into account the fact that the online ecosystem is complex and multi-dimensional. Enforcement of open Internet policies and regulations will therefore require leveraging the deep technical expertise within the NRAs and creating a process for gathering input and data from outside experts. Industry experts can arguably provide the NRAs with valuable information on network management practices and developments in network infrastructure and technology, and what constitutes minimum quality of service.

*13) In 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-operations between NRAs to arrive at a common approach?*

The NRAs should adopt an enforcement mechanism that would handle complaints from all end-users on a timely “case-by-case” basis to determine whether an ISP has violated the principles adopted by the NRAs, including whether an ISP’s discrimination is anticompetitive, creates barriers to innovation, or harms end-users. These complaints should be resolved within a

reasonable timeline of 180 days. Taking account of the EU-wide impact of any Quality of Service regulation, the NRAs should coordinate their approach to the fullest extent possible.

*14) What should transparency for consumer consist of? Should the standard currently applied be further improved?*

Transparency is a key element, but it is only one part of the equation.

*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?*

ICOMP strongly believes that search is the key gateway to content on the Internet and that search practices need to comply fully with EU competition rules, including those relating to abuse of a dominant position. The power of search, coupled with existing monopolies in search advertising markets, is having a fundamental impact on access to content in all its forms. Its impact on freedom of expression, media pluralism and cultural diversity is immense and needs to be kept under constant review. The primary tools at the Commission's disposal are the competition rules, but the analysis needs to be reflected in every aspect of the Commission's policy making.