

## Comments on the European Commission's Public Consultation on the Open Internet and Net neutrality in Europe

### Preliminary remarks

The Voice on the Net Coalition Europe ("VON") welcomes the opportunity to comment on the European Commission's public consultation on the open internet and net neutrality in Europe (hereafter "the Consultation").

An open Internet is critical to citizen and consumer welfare, to the continued growth of the EU's economy, and especially its creative and high tech sectors, and to effective e-Government, at all levels.

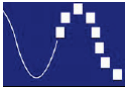
We welcome that the Commission's starting point in the discussion on the open Internet should be its desire and duty to preserve "the open and neutral character of the Internet", a goal now mandated for NRAs under the revised Framework Directive (Article 8.4(g)) and rightly recognised in the Commission's Consultation document.

Moreover, in addressing the issue of an open Internet and net neutrality, the Commission should strike a careful balance between:

- the need of ISPs to manage their networks;
- the ability of service and application providers to develop and innovate, including the proverbial "2 guys in a garage";
- the position of content providers, regardless of whether they are a citizen, an administration, or a media conglomerate; and,
- the role of NRAs to address the risk inherent in an ISP's ability to discriminate in the treatment of traffic based upon the ISP's control over a bottleneck and its resulting economic or other fundamental interests.

VON urges the Commission to take a path that balances these competing interests in a way that serves the interests of end-users, consumers, ISPs, and service/content/application providers including the media and cultural industries and Government at all levels, by taking the following steps:

- First, the Commission should explicitly confirm the widely-accepted principles that end-users and consumers have the right to send and receive the content of their choice, and access and use the content, applications, and services of their choosing, and to connect hardware and use software of their choice that do not harm the network.
- Second, the Commission should encourage NRAs to adopt a transparency standard requiring ISPs to provide all end-users (i.e. individual users including consumers, but also service/content/application providers including the media and cultural industries and Government at all levels) 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.

- Third, the Commission should set a behavioural standard intended to prohibit ISP discrimination that is anticompetitive, creates barriers to innovation, or harms end-users and consumers, and it should bar ISP conduct that violates the other core, open Internet principles of user choice (see our first bullet point). ISPs may face some technical challenges to manage network congestion and support various online applications. VON agrees that any regulation should not limit efforts by ISPs to fairly use network management to overcome technical challenges and maintain a high quality Internet service for their customers. However, this freedom to manage the network should not be a license for ISPs to behave in anti-competitive and other harmful ways, such as blocking legitimate content and applications or unreasonably degrading services that users have paid to access. Neither should ISPs unreasonably discriminate against any content or services on the Internet. VON believes that the Commission should state explicitly that discriminating against VoIP services and applications is not seen by the Commission as legitimate given that these services and applications do not consume substantial network resources and function today on fixed and mobile broadband access networks around the world (in the areas where they are technically and contractually unrestricted).
- Fourth, the Commission should ensure that Member states adopt an enforcement mechanism that would handle complaints from all end users (i.e. individual users including consumers, but also service/content/application providers including the media and cultural industries and Government at all levels) on a timely “case-by-case” basis to determine whether an ISP has violated the principles adopted by the regulator, including whether an ISP’s discrimination is anticompetitive, creates barriers to innovation, or harms end-users.

**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?**

### Problems

Some observers state that even without specific regulation, ISPs would be unlikely to block applications or virtually foreclose content from their platforms as indirect network effects ensure that the platform’s value to end users increases along with the applications and content available on it.

VON Europe believes that this is only one side of the story, and far from the reality.

Recent developments confirm the need for a pro-active and forward-looking approach, as harm is evidenced widely in the EU. Indeed, in reality we see some worrying practices. . Many mobile network operators, including all GSM/UMTS operators in several EU Member States, have decided to adopt technical and/or contractual conditions preventing users from using VoIP and P2P applications, and certain other forms of utilisation are otherwise impeded or subject to unjustified additional retail tariffs. Mobile operators are continuing the discriminatory pattern initiated notably



when the iPhone was launched, with its “big brother” the iPad, namely to prohibit end users from using VoIP, P2P, and other applications. In France, the mobile operator SFR, for example, has introduced “Internet access” packages for the Apple iPad which specifically prohibit VoIP and P2P use, and yet still call it “unlimited.” In fact, a number of operators are already packaging their offers as “something else than Internet”, namely in this case “3G”<sup>1</sup>. In the UK, 3G access to the Internet for the iPad is offered by all mobile operators except T-Mobile, seemingly with the same usage restrictions as for their other “mobile broadband” plans -- i.e. VoIP is prohibited or subject to a surcharge -- except for “Three” and O2 / Telefonica.

In other words, ISPs do have incentives to discriminate between players operating at the application and content layers of the OSI model, i.e. application and content providers, in particular when ISPs are vertically integrated into the application and/or content layers and if ISPs face limited competition at the infrastructure layer. In these obvious cases, ISPs can act as monopolists by shaping traffic in a way that departs from the application providers’, content/service providers’, or users’ interests. But ISPs also have an incentive to engage in anti-competitive and other harmful behaviour even if they have not been declared as having significant market power at the infrastructure layer, and even if they are not vertically integrated.

### **Bottlenecks & Competition**

Broadband providers’ control over the physical last-mile infrastructure necessary to access the Internet allows them to effectively determine whether end users reach the Internet at all. The problem is therefore centred on the Internet access bottleneck, and is particularly relevant in mobile markets, where only a limited number of providers exist.

But the bottlenecks are also present at the backhaul level in some Member States, e.g. the UK, whereas the best practices implemented in other countries, for instance in France or Sweden, have allowed to comprehensively solve backhaul issues (e.g. ensure that there is access to dark fibre to create uncontended backhaul can be a major factor in allaying congestion).

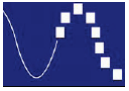
VON believes that it is important to understand that the net neutrality issue is first and foremost an issue of bottlenecks, rather than one relating to the degree of competition in the retail and/or wholesale Internet access market(s).

VON can identify different types of incentives for harmful discrimination that would be detrimental to service/content/application providers, and users in general, and are likely to occur regardless of the degree of competition in the market:

- First, there could be discrimination by an ISP that aims at favouring its own services, those of a subsidiary (vertically-integrated provider) or those of a preferred partner, or aims simply at blocking or degrading service/content/applications considered as potentially competing with its own services. This type of discriminatory conduct is confirmed by evidence in the Madison River case in the United States, the Shaw Cable dispute with Vonage in Canada, and the European wireless operators that decided to block or surcharge VoIP applications being afraid to lose revenue from their traditional voice services;

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<sup>1</sup> See in France, SFR’s website for details: <http://www.sfr.fr/mobile/ipad.jspe#>



- Second, an ISP may use its bottleneck power towards VoIP or other service/content/application providers to place them at competitive disadvantage or harm them in any way. This may result in undesirable outcomes such as price or quality discrimination (intentional degradation of the QoS to encourage end users to switch to the ISP's service). An illustration of such harmful conduct would consist in reserving part of the bandwidth only for the ISP's own VoIP or traditional voice service, thus securing a competitive advantage over perceived rivals; or by asking competing VoIP services to pay for QoS if they wish to compete with the ISP's VoIP with the same QoS level (this arose in the Shaw Cable dispute with Vonage in Canada, where Shaw allegedly charged customers an extra QoS fee to use non-Shaw VoIP services)<sup>2</sup>;
- Third, discrimination motivated by the focus by some telecoms operators - as evidenced in their press statements - to point at specific companies as "those that make all the money" from them offering infrastructure, obviously forgetting that infrastructure is a means to access content, services and applications, but not a means to an end. As a result, this leads to a situation where network operators can extort excessive rents out of their controlling position over a bottleneck.

The reported cases and public statements in the US and Europe -- i.e. the Madison River and Comcast cases in the US; Shaw Cable VoIP QoS fee dispute with Vonage in Canada; blocking or surcharging of VoIP and P2P notably by European MNOs in their T&Cs; removal by some UK mobile operators of VoIP functionality from Nokia N95 handsets in 2007; statements by various telecoms CEOs in the press etc. -- show that the threat is not hypothetical. In terms of the impact on innovation, the question should be asked which innovative content, application or service provider would be able to raise funds from investors for a new idea if there is no guarantee that this idea will ever be available to all end-users wishing to access it? Internet innovation was built around the principle that you could "innovate without having to ask permission" and this principle which has underpinned twenty years of global, wide-ranging productivity, growth gains and social progress would disappear in a context where broadband Internet access providers would be allowed to turn into gatekeepers.

It is also important to realise that part of the discussion behind the net neutrality debate is not only one driven by economic and financial considerations, but also by the issue of control combined with the fear of some access providers to see infrastructure treated as a commodity by service/content/application providers and end-users. When taking these two factors into consideration, one can see that the potential and the incentives for abuse by access providers are not necessarily covered by a traditional SMP analysis under telecoms rules, or as the OECD stated in its 2007 report: *"Anti-competitive behaviour can appear in all types of markets, even those judged to be competitive (...) Therefore, regulators cannot simply count the number of data providers in a given region and assume that the market is sufficiently competitive. Regulators may need to undertake a careful market analysis to determine whether households have effective choices for substitutable*

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<sup>2</sup> See CBC article: <http://www.cbc.ca/money/story/2006/03/08/shaw-060308.html>



*broadband Internet access. Which Internet access technologies constitute substitutable broadband will be a key issue in determining market competition.”<sup>3</sup>*

The traditional ex post competition approach is indeed ill-suited to redress the widespread harm to innovation, citizens and consumers already witnessed around the EU: access operators without significant market power are as likely as those with SMP to engage in harmful discrimination; mobile retail markets are excluded from market reviews in Member States and hence escape close scrutiny by NRAs; and competition cases are also long affairs, often taking up to 10 years, which are also very costly and therefore simply impossible to carry out for most European innovative companies (more than 95% of EU ICT firms are SMEs).

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

Abuses such as the arbitrary blocking and degradation of traffic already take place in the current market environment. It would be important to acknowledge the potential for future market structures to incentivise discriminatory behaviour, particularly the abuse of bottleneck control over users’ Internet access.

Indeed, the fast-moving vertical and horizontal integrations and commercial dynamics within the converged Internet / ICT ecosystem (from hardware, to networks, to content, etc.), exemplified by such phenomena as ‘bundling’, could accelerate the trend towards serious harmful and other undesirable discriminatory practices that would have negative consequences for innovation, consumer choice, trade, etc. For instance, issues could arise in terms of the devices that are allowed or not to connect to the Internet. In the Netherlands, a recent newspaper article<sup>4</sup> reports statements by two mobile operators about the fact that users use their mobile phone data subscription to surf the internet with their PC (by connecting their mobile phone to their PC, also referred to as “tethering”), whilst the Internet unlimited package is 30 Euro per month for PCs and 7 to 10 Euro for mobile phone. This has led the said operators to change their T&Cs to now explicitly prohibit linking mobile phones to PCs to surf the web.

Conversely, VON considers it would be unnecessary to extend the Internet openness rules to content and applications providers. While broadband Internet access providers now have a clear incentive to push the Commission and NRAs to extend the scope of their scrutiny into the Internet itself, these pleas appear to be driven solely by a cynical and self-interested attempt to unnecessarily add layers of complexity or, to use a French expression, “*de noyer le poisson*”.

There is no sound reason to impose communication laws or regulations on the robust marketplace of Internet services, content and applications, where competition and innovation are inherent and thrive, and the user is central to the ecosystem – unlike at the broadband Internet access layer where severe bottlenecks exist which almost inherently give rise to problems that NRAs in charge of electronic communications networks and services must address in accordance with their mandate.

<sup>3</sup> OECD Paper on « Internet Traffic Prioritisation : An Overview », April 2007, DSTI/ICCP/TISP(2006)4/FINAL, p. 28.

<sup>4</sup> <http://www.nu.nl/internet/2333012/misbruik-mobiel-internet-zorgt-duurdere-bundels.html>



Parties that urge expanding openness rules in this way provide no sound legal, technical, economic, or policy reasons to do so.

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

The overarching principles to preserve and enhance openness of the Internet are present in the regulatory framework but require additional clarifications and guidance to be issued by the European Commission to ensure a harmonised approach is taken by policy-makers and regulators at national level, and “grey” areas are clarified to the benefits of all users and innovation.

This is especially true as discrimination in broadband access practices can be difficult to spot as it can take multiple forms (blocking packets, lowering their priority, delaying them hence creating jitter, etc.), have legitimate or illegitimate reasons, and occur at different places in the network.

The EU Regulatory framework comprises different tools that can be used to preserve the principles we set out in this paper, namely:

- The *ex ante* tools relating to SMP operators, found to have dominance in a relevant market. The difficulty however in using this tool is that the market that would be concerned in case of a net neutrality “breach” would most likely be the retail broadband market, which is not part of the markets listed in the Relevant Markets Recommendation.
- The mechanism put in place by Article 5 of the Access Directive, which does not require an SMP finding for NRAs to impose obligations on operators to provide access on fair, reasonable and non-discriminatory terms, notably to preserve end-to-end connectivity. However, as is the case with the SMP regime, Article 5 applies to “access and interconnection” issues, which would not cover many issues faced by content, service or applications providers faced with discriminatory or abusive behaviour by an ISP.
- The consumer protection principles put in place by the Universal Service Directive which covers such principles as transparency and the possibility for NRAs to set minimum quality of service requirements (see our responses to questions 5 and 11).
- The open Internet principle of end-user choice now enshrined in Article 8.4(g) of the revised Framework Directive.
- The RTTE Directive, which prohibits under Article 7 that operators impose unjustified restrictions of electronic communications terminal equipment to connect to their network.

Competition law can also play a role, but has its own limitations. If blocking content, applications or services could fall under the competition law provisions relating to “refusals to supply or deal”, such refusal is only deemed against competition law in the context of a dominant operator owning an essential facility. More importantly, if an access provider degrades a service, competition law can be applied if the said operator is dominant and behaves in a discriminatory manner. But it is uncertain that, should there be two separate offerings by access operators, one of Internet access and one of managed services, that these would not be deemed to be in different markets. Should this be the case, an operator could degrade the quality of service for all content, services, and applications providers on Internet access by creating a dirt road effect, which might not be covered by



competition law rules, but should trigger an NRA intervention under Article 22 of the Universal Service Directive.

Ultimately, the Commission could do a lot to help by enabling a dialogue between all stakeholders and giving additional guidance to member states regarding the need for access operators' behaviour to be transparent and non-discriminatory, and what this could mean in practice to NRAs and the new powers they have under the revised Framework to prevent abuse, and to end-users (consumers and businesses alike). The Norwegian approach is in that sense quite interesting as it resulted in a set of "Guidelines for Internet neutrality"<sup>5</sup> which are the result of a constructive dialogue between all stakeholders with the NRA acting as a facilitator. Moreover, the principles included are flexible enough to adapt to technological change, whilst they provide sufficient guidance to allow an intervention in case of violation.

**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?**

In 2007, the UK regulator Ofcom observed that traffic shaping already exists at the core of the network, and that ISPs can increase social welfare by engaging in network management to a certain degree, to better match the demand of end users with the demand of service/content/application providers. As indicated in our response to question 1, there is evidence in the market that ISPs across the EU, especially when vertically integrated into the provision of content, services and applications, unduly manage traffic conveyed over their network by blocking applications and virtually foreclosing access to and use of content provided by third party providers from their platforms in order to secure (higher) revenues or other commercial benefits. So the real issue of this debate is: where does the line fall between "legitimate" and "harmful" network management?

It is therefore important to distinguish between different types of traffic management. To quote Commissioner Kroes, "Any commercial or traffic management practice that does not follow objective and even-handed criteria, applicable to all comparable services, is potentially discriminatory in character," as she said that "Discrimination against undesired competitors (for instance, those providing Voice over the Internet services) should not be allowed."<sup>6</sup>

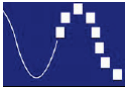
Traffic management for the purposes of combating spam, security attacks or punctual exceptional measures to alleviate congestion are useful and have never been contested as such, as long as they remained proportional and not harmful.

Traffic management for commercial motivations based on the exploitation of a bottleneck or that discriminates between services/applications/content of similar nature does not seem to VON to create any value to end-users, as it removes the element of choice from the end-users' hands to put it in the hands of the ISPs.

Whilst some forms of traffic management are legitimate, some other forms of traffic management are not. In addition, the abuse of traffic management with the intention to engage in anti-

<sup>5</sup> See <http://www.npt.no/ikbViewer/Content/109604/Guidelines%20for%20network%20neutrality.pdf> (last visited July 2010).

<sup>6</sup> Quoted at [http://www.theregister.co.uk/2010/04/15/kroes\\_net\\_neutrality/](http://www.theregister.co.uk/2010/04/15/kroes_net_neutrality/)



competitive or harmful behaviour (e.g. to preserve the ISP's own VoIP service or secure revenues of their own products) should be prohibited.

VON considers that policymakers and regulators should ensure that end-users and consumers can continue to use the Internet applications, services and devices of their choice and access the content of their choice. Regulators and policymakers should resist any attempts, whether regulatory, commercial or competitive, to block or hinder unfettered access to VoIP (or similar technologies) and more generally to all legal Internet content, applications and services, including their underlying technology, and that prevents it from being utilised to its full potential.

**Question 5: To what extent will net neutrality concerns be allayed by the provision on 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?**

Transparency is a key element, but it is only one part of the equation, given that markets which are seen by European regulators as being competitive (the mobile retail markets) do not in fact exhibit dynamics leading to unrestricted access to the Internet. Transparency informs you of the deal you get as a user, but if that deal is the only one on the market as all or most access operators mirror each other's behaviour, transparency does not lead to choice, and certainly not to unrestricted Internet access – which is the end-goal that motivated the introduction of transparency provisions on traffic management and access limitations in the revised EU Electronic Communications Framework.

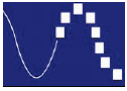
**In other words, transparency on its own is just not enough.**

As regards the scope of such transparency, VON believes ISPs should be required to provide **all end-users** (i.e. both service/content/application providers which include businesses and public administrations, and consumers) with clear, precise and relevant information on the services and applications that can be accessed and distributed through their ISP, the traffic management practices employed on the networks and any quality of service limitations. Disclosure of such information is critical if regulators, service/content/application providers, and end users and consumers are to have sufficient information available to determine if anticompetitive or harmful discrimination by ISPs is occurring. See our response to question 14 for more details.

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

As regards net neutrality, the potential of accessing the Internet on mobile devices and the increased demand by users implies that **the principles as such should be the same**, even if in practice, their implementation leads to different results due to the different capabilities and constraints of fixed and mobile networks. Non-discrimination should be the cornerstone upon which the system is built, be it on mobile or fixed networks.

Moreover, though it is a fact that wireless networks have unique capacity constraints likely to warrant different treatments when applying the standards we discuss in our preliminary remarks,



the Commission and NRAs have a role in making spectrum available more easily and hence alleviate wireless congestion.

**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?**

VON supposes this question refers to the practice of content and application providers investing in infrastructure, notably through Content Delivery Networks (CDNs).

VON is aware that some broadband providers have asserted that CDNs are “non-neutral” but we consider this argument to be incorrect. The function of a CDN is to enhance users’ overall Internet experience by hosting and serving content from a location closer to end users, thus avoiding points of possible congestion and reducing latency. By definition, they do not and cannot involve themselves or interfere with other traffic flows to end users. Only last-mile broadband access providers and in some cases those who own backhaul networks have such control.

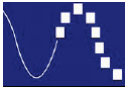
Furthermore, unlike network prioritizing which is usually zero-sum (so that speeding some packets inherently means slowing others), there is no limit to the number of users that can enjoy the enhanced quality and speed that come from CDNs and similar content serving facilities. Moreover, service/content/application providers invest in data centre infrastructure available to third parties: anyone, including broadband operators, is welcome to take advantage of this to develop their own services for users.

VON therefore considers that broadband providers’ bottlenecks are still the *only* gateway users have to access the Internet and that is where harm to innovation and end-users can most likely occur and does take place at present. This is therefore the layer of the value chain which the Commission and regulators should focus their current efforts on, and not be distracted by over-broadening the scope of their efforts far beyond the core issues around the open Internet.

**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?**

VON considers that the differentiation proposed by the French regulator ARCEP between “Internet access” and “managed services” offers an interesting possibility, as long as managed services are allowed to be offered by ISPs together / beside the best efforts Internet, and provided that they do not discriminate in a way that is anticompetitive, creates barriers to innovation, or harms end users and consumers using ISPs’ non-managed Internet access services. If such discrimination occurs, enforcement should occur by regulators on a case-by-case basis.

It should also be made clear that operators should continue to invest in improving the infrastructure underlying the best efforts Internet, and not just the infrastructure underlying their managed



services, so that the Internet does not become a “dirt road,” a clear risk to diminish the social and economic value of the Internet.

**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?**

VON considers it important that the Commission and regulators ensure that all end-users (individual users including consumers, but also service/content/application providers including the media and cultural industries and Government at all levels) can continue to use the Internet to access or provide lawful (VoIP) applications and services and devices, as that is essential to promote choice, innovation and competition. VON believes that a crucial challenge and imperative will be to continue to facilitate innovation by companies who are developing new service/content/applications, including VoIP, delivered via the Internet.

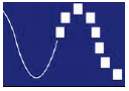
VON believes this requires that the Commission clearly states in new, formal guidance (as suggested in response to Q. 3) that discriminating against VoIP services and applications is not seen as legitimate, given that these services and applications do not consume substantial network resources and function today on fixed and mobile broadband access networks around the world (in the areas where they are technically and contractually unrestricted).

Moreover, the Commission and regulators should adopt a behavioural standard applicable to ISP discrimination that balances the competing interests of ISPs vs. all end-users (i.e. individual users including consumers, but also service/content/application providers including the media and cultural industries and Government at all levels). Specifically, the Commission should embrace a standard that would prohibit ISP discrimination that is anticompetitive, creates barriers to innovation, or harms end users and consumers, while allowing other legitimate traffic management for an ISP’s own managed services. Such an approach provides an alternative to extremes on either sides – a blanket ban on all discrimination by ISPs vs. a wholly “hands off” approach – and would enable deployment of innovative new managed services by ISPs as well as new services by service/content/application providers on the Internet.

From a marketing point of view, the use of the word ‘Internet’ (or paraphrases such as ‘the web’) in marketing materials should be forbidden if what is offered is less than the entire, global public Internet (in terms of access and dissemination).

As for “sub-sets” of the Internet, which cannot be called “Internet” in any case, they could possibly be described using white or black lists of types of services or applications provided access to.

VON therefore recommends the adoption of broad guidelines highlighting principles supporting the protection of the open Internet, including what constitutes reasonable network management and functional / minimum quality of service access to the Internet that could be enforced on a case-by-case basis. We also consider that the creation of a working group bringing together all stakeholders should be considered by the Commission and NRAs in this respect.



From a practical point of view, it is also important for NRAs to put in place appropriate complaints procedures for both end-users and service/content/application providers that would feel wronged, triggering own-initiative investigations by the regulator, and own-initiative enforcement by the regulator, e.g. on the basis of the new QoS provisions of the 2009 Telecoms Package.

Decisions should be reached within a reasonable timeframe — for example 90 days from when a complaint is filed — and without unnecessary burden on the parties, including end-users and consumers. Reasonably speedy evidence gathering and decision-making will provide clarity to industry at the same time that it protects end users and consumers from ongoing abuses. Lengthy delays, in contrast, could prove harmful to the development of the Internet ecosystem by delaying the development and market entry of nascent services and thus depriving end-users and consumers of innovative new services and applications.

The experience of the Canadian Radiotelevision and Telecommunications Commission (“CRTC”) may be instructive. In its October 2009 framework for evaluating the lawfulness of network management practices, the CRTC established a process whereby a party that believes that a network management practice is unlawful may file a complaint “establishing that a [network management practice] discriminates or results in a preference or disadvantage” and describing the rationale and evidence for concluding that the preference or disadvantage is unlawful.<sup>7</sup> The burden then shifts to the Access Provider to establish that “any such discrimination, preference or disadvantage meets the requirement of the framework.”<sup>8</sup> CRTC also provided a mechanism by which Access Providers could obtain prior approval for a given practice, and it reserved the right to initiate an enforcement investigation on its own motion. VON encourages the Commission to study the CRTC approach.

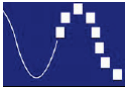
**Question 10: Are the commercial arrangements that currently govern the provision of access to the internet adequate, in order to ensure that the internet remains open and that infrastructure investment is maintained? If not, how should they change?**

The current arrangements that govern the Internet have worked very well so far, built upon the basic principle of non-discrimination, allowing innovative content, products, applications and services and information of all kinds to appear and be disseminated on the Internet without the need to seek prior permission from anyone.

This underpinned the unprecedented wave of innovation without permission (without many barriers), worldwide interactions and competition across a number of sectors and societies, which also contributed over 40% in increased productivity over the last decade in the European Union. This virtuous cycle of online innovation in turn generated renewed end-user demand for Internet access, itself providing return for investment in networks.

<sup>7</sup> CRTC Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers*, October 21, 2009, <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm> and <http://www.crtc.gc.ca/eng/archive/2010/2010-445.htm>

<sup>8</sup> Ibid.



Disturbing the fundamental ‘rule of the game’ behind the Internet economy’s success that is the open and neutral character of the Internet could have serious and negative consequences far beyond the ICT value chain, and for operators themselves.

Safeguarding the open Internet is the best way to ensure continued benefits for all in the value chain, starting with consumers, and including (return on) investments in infrastructure.

However, for VON, if carriers enter into specific traffic management or QoS agreements with service/content/application providers, the terms of such agreements should meet the principle of non-discrimination as set out above and be made publicly available under the transparency principle. For example, the ISP could post those terms on their website. Otherwise, there will be no ability to ensure that discriminatory and anti-competitive behaviour is occurring and for the Commission or NRAs to monitor for bad actors.

VON would also like to make a few remarks on the two-sided nature of the Internet. We would like to draw the Commission’s attention to the following scenario: let’s imagine a start-up launching an innovative service or application from the far end of Africa or simply in a small town in Scotland or Wales. What should that service/content/application provider then do to ensure its customers can successfully use the service? Negotiate with every ISP to benefit from a managed service package and hence hire lawyers across the globe assisted by engineers that will need to scrutinize SLAs in 120 countries and a plethora of languages? Will they have to auto-limit their offering to only the few countries (if any) they have the resources to negotiate with and deprive the rest of the world of their innovation? Managed services may be an attractive option when thinking of purely national services such as television, but do not truly fit the global model and nature of the networks of networks constituting the Internet where service/content/application providers, ISPs, and end users and consumers commonly are in different countries.

Moreover, when looking at the example of an existing two-sided market in the voice telecoms world, namely “the Premium Rate service” model (using non-geographic numbers), practice shows that both premium rate service providers and end-users are at the mercy of the bottleneck intermediary, which has so far led to all sorts of abuses across Europe, for lack of regulatory tools to intervene. A recent illustration of such an abuse occurred on the UK market where mobile operators hiked up the prices of calls to directory service providers (directories being part of the Universal service Directive scope) for end-users between 50 and 150%, jeopardising the survival of an entire sector and harming end-users.

**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?**

VON considers that there is a need to safeguard the quality of Internet access in order to avoid a “dirt road” effect, in parallel to the possibility for ISPs to offer managed services.

Art 22 par 3 of the Revised Universal Service Directive stipulates 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.”* The use of “prevent” does seem to suggest that any action undertaken by the Commission or 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 already been introduced. It is important to note again in this perspective, that blocking, degradation and other hindrances to services and content that consumers want to access are already widespread as set out in our response to Q.1. Where there is such evidence of harm, intervention would therefore be warranted, in the form of the imposition of minimum quality of service, whereby an end-user should always be able to access the best efforts, global public Internet, whichever other services they may also be subscribing to.

In setting such minimum quality of service requirements, the Commission or regulators 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 regulators and creating a process for gathering input and data from outside experts. The Commission and NRAs should convene a technical advisory group – with industry participants (service/content/application providers and ISPs) operating across the EU, and other relevant stakeholders -- as a means of receiving expert input to help inform reasoned decision-making about what forms of discrimination may be anticompetitive or harm end users and consumers, create barriers to innovation (including providers of services/applications/content and consumers), and what “best practices” should be put forward. Industry experts can provide the Commission and regulators with valuable information on network management practices and developments in network infrastructure and technology, and what constitutes minimum quality of service and/or a ‘functional Internet access’, as recommended in EU legislation.

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

**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?**

Regular measurements by NRAs or another habilitated body will be required to verify if the announced performances by ISPs are met in practice. Most regulators could easily do this as part of their recurring reviews of broadband speeds.

From a practical point of view, we believe that the following elements are critical in determining and monitoring quality of service requirements:

- The support of a body of technical experts, as set out in our answer to question 11;
- Regular testing of Internet speeds and quality of service for each access provider (fixed or mobile), both in terms of the speeds available for Internet access and for the various managed services, if any, are available, and for each main application type such as streaming, VoIP, P2P, websites, etc. For the latter, SLAs offered could also prove a useful source of information; and,



- The requirement for ISPs to report on a regular basis to NRAs about the quality of services effectively achieved in the different layers of their network, both in the last mile and at hand-over points.

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

Traffic management covers some quite technical realities that can be difficult or simply scary for mainstream end-users to understand. On the other hand, over-simplifying the information could be misleading, as the devil often lies in the details.

It seems appropriate that the information given regarding traffic management be accessible in at least **two formats**:

- a set of clear, key facts (like an executive summary) that any consumer could understand; and,
- supplemented by very detailed, technical information.

Obviously, if a minimum set of standards were set to guarantee access by end-users to the best efforts, global public Internet, whatever other managed services they may be buying from an operator, transparency requirements would be less necessary for the “Internet access” portion of the offering by the provider.

Information given regarding traffic management should moreover comply with a certain number of conditions, namely:

- traffic management policies should be easily accessible by the public in various formats (e.g. posted on the ISP’s website, available in paper format, etc.);
- these policies should be communicated to end-users prior to their subscription, any changes being then notified immediately, with the possibility for the end-user to then switch at no cost if such changes violate principle 1 above -- i.e. they have the right to send and receive the content of their choice, and access and use the content, applications, and services of their choosing, and to connect hardware and use software of their choice that do not harm the network; and,
- a comparable format should be adopted by all ISPs, preferably set jointly by all relevant stakeholders, to allow end-users to make an informed and user-friendly comparison between the available offerings.

Consumers are not the only ones that should receive accessible and meaningful information: it should be the case for all end-users. From the point of view of a service/content/application provider, having access to detailed information on traffic management can ensure that the service/content/application it offers is optimised to make the best and most efficient use of the network.



**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?**

Media pluralism and cultural diversity, the amazing global wealth, dissemination and exchange of knowledge available through the Internet, are at risk in a world of several possible clustered 'internets' (subsets of the Internet).

Since the millions of end users and consumers who access Internet via their ISPs create much of the content that results in this cultural diversity and media pluralism, it is critical the EU adopts a principle protecting individuals' rights to access content, applications, services and devices. So, as noted above, the Commission should explicitly confirm the widely-accepted principles that end-users and consumers have the right to send and receive the content of their choice, and access and use the content, applications, and services of their choosing, and to connect hardware and use software of their choice that do not harm the network.

It is indeed very clear that restricting arbitrarily certain uses of the Internet has dire consequences for citizens' enjoyment of fundamental freedoms.

There is an even bigger threat in condoning restrictions to the Internet generally: the EU has long been a champion of freedom of expression and the free flow of information online. Allowing private actors to arbitrarily restrict certain uses of the Internet in the EU would validate repressive practices abroad that regularly stifle freedom of expression and the free flow of information.

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We thank you in advance for taking consideration of these views. Feel free to contact Caroline De Cock, Executive Director VON Europe, by phone (+ 32 (0)474 840515) or email ([cdc@voneurope.eu](mailto:cdc@voneurope.eu)) should you need further information.

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#### **ABOUT the VON Coalition Europe**

The Voice on the Net (VON) Coalition Europe was launched in December 2007 by leading Internet communications and technology companies, on the cutting edge – iBasis, Google, Microsoft, Skype and Voxbone – to create an authoritative voice for the Internet-enabled communications industry.

The VON Coalition Europe notably focuses on educating and informing policymakers in the European Union in order to promote responsible government policies that enable innovation and the many benefits that Internet voice innovations can deliver.