



eBay is a registered organization in the European Commission Register of Interest Representatives.

Name and address: eBay EU liaison office: Avenue des Arts 44, 1040 Brussels, Belgium.

Registration number: 40386322300-77.

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eBay Response to the European Commission Public Consultation on the Open Internet and Net Neutrality in Europe

About eBay

Founded in 1995, eBay Inc. connects hundreds of millions of people around the world every day, empowering them to explore new opportunities and innovate together. eBay Inc. does this by providing the Internet platforms of choice for global commerce and payments. Since its inception, eBay Inc. has expanded to include some of the strongest brands in the world, including eBay, PayPal, Marktplaats, StubHub, Shopping.com, and others. eBay Inc. is headquartered in San Jose, California.

Our contribution to this consultation focuses on our EU e-commerce platforms. eBay aims to create, maintain and expand the functionality, safety, ease-of-use and reliability of its online commerce platforms while, at the same time, supporting the growth and success of its community of users.

Introduction

eBay welcomes this European Commission consultation on the open Internet and net neutrality. The global open Internet has been a revolutionary force for good, empowering innovative businesses, large and small, to compete and succeed. It brings significant benefits to consumers, it creates jobs across Europe and globally, and boosts the economy as a whole.

eBay believes that openness, end-to-end connectivity and non-discrimination are central to the Internet's success as an innovation engine. Creating a "fast lane" on the Internet will dramatically change the Internet as we know it for the worse. Consumers will gravitate to the "fast lane" and the biggest, richest content companies, and those affiliated with network operators, will dominate.

Replacing the open Internet with two-tiered networks will stifle competition, allow broadband Internet operators to advantage content they own themselves, or which is controlled by business partners, and potentially lead to national "preferences" in many countries.



Responses to the Consultation Questions

The open internet and the end-to-end principle

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?*

eBay is aware of issues in some EU Member States concerning throttling of certain services, such as P2P applications. In the area of mobile communications, some Voice over IP (VoIP) service providers have suffered either blocking of their services or their customers have been forced to pay additional fees for their use. In most cases, the concern arising from these efforts was that they were clearly designed to dissuade consumers from using certain third-party services, in favour of the mobile operators' own services.

The current bottleneck of concern in relation to net neutrality issues appears to be at the point of Internet access provision. eBay is sceptical as to whether we can rely on competition between service providers to solve current or future potential problems of net neutrality and openness. For example, in relation to some of the problems experienced by service providers in Member States, certain VoIP services have been effectively blocked in the past by all mobile operators. This could have disastrous consequences for an online service provider in the future and act as another unjustified barrier to market entry.

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

eBay has heard some telecommunications operators raise issues concerning service providers in other parts of the Internet value chain. Strengthening the principle of net neutrality in the interpretation and application of EU legislation and regulation, alongside competition law to assess issues of dominance, would seem to be the best way to safeguard against issues relating to other service providers. We believe the principle of net neutrality is key for consumer choice and the ability for service providers to compete in, and enter the marketplace.

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

eBay notes that recent revisions to the EU regulatory framework for electronic communications are designed to promote transparency and non-discrimination for consumers in competitive telecoms and Internet access markets.¹ However, the framework itself leaves substantial room for interpretation on key points such as appropriate traffic management.

¹ Revised Directive 2002/22/EC: Article 20 (Contracts), 21 (Transparency and publication of information) and 22 (Quality of service); Directive 2002/19/EC: Article 9.1; Directive 2002/21/EC: Article 8.



Indeed, current discussions in Member States indicate that national regulatory authorities are likely to take different approaches to this question. For this reason, eBay believes further guidance and regular monitoring from the European Commission on questions concerning traffic management, pursuant to the protection of the principle of net neutrality, is important.

Traffic management/discrimination

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?*

eBay agrees with the notion that "Traffic management *per se* is neither good nor bad." For example, it may make sense for network operators to prioritise certain types of traffic with low latency – for example, video or voice. Similarly, measures to counter spam would clearly be an acceptable form of traffic management. However, it would be a violation of net neutrality principles if network operators were allowed to give preferential treatment to their own, affiliated content over the service provided to non-affiliated content.

Moreover, we would caution against a blanket assumption that it is always acceptable to throttle or degrade certain types of traffic such as video or P2P. It should never be reasonable for any network operator, whether fixed or wireless, to block, throttle or degrade particular applications without regard to the network capacity such applications are actually consuming. Not all video applications, or peer-to-peer or VoIP applications, consume the same amount of bandwidth or place the same demands on network capacity. Moreover, some VoIP applications may also include video communications capabilities but consume relatively little bandwidth. We believe National Regulatory Authorities (NRAs) should therefore be careful about sanctioning traffic management practices based on broad application descriptions. We note that the revised EU Framework for Electronic Communications already clarifies that traffic management services are neither mandated nor prohibited: any such measures must respect national and community law, be appropriate, proportionate and necessary, and be transparent. The work already done by the Canadian regulator, CRTC, provided a very useful starting point for defining acceptable traffic management practices, equally for fixed and wireless providers. We also note the recommendation of the French regulator ARCEP that "...*the traffic management practices that ISPs employ to ensure Internet access remain exceptional and comply with the general principles of relevance, proportionality, efficiency, transparency and non discrimination.*"

Similarly, we do not object to consumers/subscribers being allowed to pay more for higher speed broadband or greater broadband usage. This is the most economically efficient means of managing concerns about bandwidth. Charging content providers over and above what they pay to secure their own broadband access will simply lead to less transparent pricing. By way of analogy, urban cities seek to manage congestion on their road network by charging drivers for their journeys into a congestion zone. They do not charge retailers directly for creating the demand for travel in the first place.

Online service and content providers already pay for broadband access and have invested heavily in content distribution networks and measures to ease congestion on the backhaul and local loop. If these providers are forced to pay extra on top of their existing access charges for better access to broadband networks, they will simply pass on these costs to end consumers, but the cost of bandwidth will be hidden in these charges.



While major content and application service providers may be able to exert a degree of bargaining power over network operators, this ignores the broader detrimental impact which charging may have over innovation by smaller, emerging players.

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?*

In today's world of converged business models, the incentives for access providers to favour affiliated content have undoubtedly increased. Moreover, the capacity of network operators to engage in discrimination against particular content, applications or services has undoubtedly increased with the development of Deep Packet Inspection technologies. We would acknowledge that there is a greater degree of competition amongst broadband access providers in the UK and Europe, than the US for example. However, we would still question the assumption that competition and transparency will be sufficient to prevent discrimination.

It is assumed, for example, that consumers can easily switch broadband providers if they are concerned that their favourite content or applications are being blocked or degraded. But not only does switching broadband providers entail significant cost and disruption for users (compared to the relative ease of switching applications), it also presupposes that consumers will have the capacity to make an informed judgment as to whether they need to switch in the first place.

For example, suppose a user makes a call via Skype and is concerned about the quality of a particular call. How will they be able to tell easily whether the fault lay with the application, or whether their ISP was actively blocking or degrading, or de-prioritising their VOIP packets, or even whether the network operator was simply using best efforts during a period of congestion? Unless consumers are able to answer these questions easily, how will they even know whether they need to switch broadband providers?

We would therefore urge the Commission to devote further study as to how ex-post facto regulation would work in enforcement terms. We agree that further work is required to assess consumers' requirements in terms of transparency and to establish how the Commission and NRAs will be able to judge the merits of a particular claim that a network operator is abusing their privilege as an access provider.

We would favour a combination of the various options outlined in relation to consumer information and transparency. Tiered approaches to traffic management policies could provide users with a helpful summary as to individual ISPs' traffic management policies, provided consumers are updated regularly to take account of changes to traffic management practices. However, we expect that these are unlikely to be sufficient to determine whether or not an ISP is discriminating as to the source or ownership of content (as opposed to types of content).

NRAs will need to be able to access information on traffic shaping ex post facto in order to assess any claims of discrimination, whilst minimizing the information gathering burden for ISPs. It may also be worth considering 'spot checks' or light touch independent audits of ISPs traffic management practices to establish that stated traffic management practices are being followed and non-discrimination principles are being observed.



The provision of real time information for consumers on broadband speeds and download times may allow for detection through crowd sourcing – for example, if a number of end users identified a problem with a particular website or application. It would also enable greater comparison across ISPs. While consumers may initially struggle to make use of such information, we would expect that innovative third party comparison models will develop organically through the market to assist consumers. The provision of real time information would also enable consumers to measure their own broadband usage in relation to declared traffic management practices and any terms of service.

Finally, we would also urge the Commission and NRAs to develop further proposals to make it easier for consumers to switch broadband providers.

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

eBay believes the key principles should be the same for fixed and mobile networks. In line with the concept of better regulation, technology neutrality would be the most appropriate principle to follow, consistent with other EU legislation and regulation.

Furthermore, eBay notes that mobile Internet services will develop apace, especially with new devices designed to facilitate service consumption on the move. Consumers will increasingly use e-commerce services via their mobile devices. Given that there is such a highly competitive e-commerce industry and so many small- and medium-sized enterprises rely on e-commerce revenues to sustain their multi-channel retail businesses, it is imperative that consumers can access the services of their choice in a non-discriminatory fashion via fixed and wireless Internet access services.

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?*

eBay maintains that the greatest risk of harm in prioritisation of services lies with the access providers and/or other network operators. This is where the bottleneck of greatest current concern persists. As stated above, users' ability to switch Internet access provider are limited, whereas switching between providers of particular online services is likely to prove easier (and discussions concerning certain issues in this regard, such as portability of personal data, are ongoing in the appropriate policy debates). Furthermore, the strong net neutrality principles we support would ensure non-discrimination among the online services a consumer can access via an Internet access service, and in turn are an important ingredient in fostering a competitive online marketplace for different 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?*

and

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?*

eBay believes that these questions illustrate the need to define “managed services” and how these might be different from the “Internet”. This must bear in mind the consideration that certain types of services could comprise parts that use both a managed access service and a general Internet service (for example, in e-government or e-health services). We therefore urge great caution before proceeding with a distinction.

Market structure

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?*

eBay believes that commercial arrangements concerning the provision of access, underpinned by necessary regulation and based on the principle of non-discrimination, have worked extremely well to date. The open nature of the Internet has facilitated and encouraged innovation in online services. It is important to maintain this structure and thereby safeguard against allowing the erection of another unnecessary barrier to a digital single market - barriers that the Commission is committed to removing.

In relation to infrastructure investment, some have argued that charging content and applications service providers for preferential broadband access is an essential condition for investment in next generation broadband. However, this ignores both the considerable investment that has been made since the advent of the Internet in upgrading networks and also the crucial link between content and network investment. The creation of new, higher quality content drives demand for faster broadband, thereby cementing the business case for faster broadband. Similarly, greater network capacity prompts innovation in the content and applications layer, thereby generating a virtuous cycle of investment.

We are concerned that the creation of a two-tier Internet will fundamentally change the way the open Internet functions as an engine for innovation and openness. Closed network models limit opportunities for innovation and tilt the competitive playing field clearly in the direction of established businesses that develop relationships with network providers.

If the open Internet is replaced with a two-tiered network based on business deals between established content companies and broadband access providers, the network operator preference for closed network models will eventually lead to a withering of capacity in the old open Internet as the business focus of network providers shifts toward improving service offerings for giant content partners. In this two-tier network model, congestion on the open Internet actually provides an incentive to sell the network providers preferential service offering to content companies with the wherewithal to pay.



In that new world, it pays for the broadband access providers to see the open portion of the Internet gradually become more congested due to a growth in Internet subscribers and services. As congestion increases, the ability to sell preferential services to a few giant content providers increases. The incentive to pay fees to be able to have access to higher quality broadband to provide consumers a better end-user experience for their suite of online services will go up as congestion chokes the open network. Of course, new businesses will not have the avenues open, thereby stifling innovation – one of the major driving forces of the Internet. At a time when the Commission and Member States are seeking to encourage more widespread use of the Internet and greater job-creating innovation, we therefore risk erecting new barriers to consumers being able to enjoy the content of their choice.

Just as network providers need a predictable climate for investment, so do content providers. Online businesses depend on being searchable and useable on a level playing field by *any* internet user. Crucially, this enables them to determine addressable audience and to plan investment and growth. Losing control over audience size would damage business models (particularly those that rely on network effects, audience measurement etc)

Consumers – quality of service

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?*

eBay welcomes the Commission's question on the application of the important provisions in Directive 2009/136/EC, the "Citizen's Rights Directive" on quality of service imposition. Our view is that it would be prudent for the Commission and NRAs to provide for ex ante measures to impose quality of service requirements to safeguard against cases where an end-user is prevented by their Internet access provider from using – due to blocking, degradation or other barriers – their chosen services via the public Internet. This is especially important given the nature of many fixed and mobile Internet service contracts for consumers, which often result in consumers being effectively "locked in" to a service provider for an extensive period of time or where the Internet access service is bundled with other content or communications services. The consumer may therefore be unable to easily switch providers in cases of service blocking or degradation (assuming – as outlined above – that they are even aware of their service provider's actions).

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

and

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?*

eBay recommends that the Commission and NRAs should prioritise efforts to define minimum quality of service requirements to ensure any European Internet user has "functional Internet access".



Such quality of service requirements must ensure that in the event of a distinction being made between the best efforts Internet and “managed services” (see our answer to questions 8 and 9 above), network operators continue to invest in the former, to ensure the maintenance and further development of a vibrant, open Internet economy.

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

We refer to our answer to question 5 above.

In addition, a crucial element is that consumers must be aware of the service limitations they are agreeing with when engaging in (an often long-term) contract for an “Internet access service”. eBay recommends that the Commission and NRAs continue to develop tests for transparency, to ensure consumers are treated fairly.

The political, cultural and social dimension

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?*

Net neutrality means that broadband Internet carriers – both fixed line and wireless – should not be able to discriminate between data going over their Internet network based on the source or ownership of the data. For example, blocking, throttling or degrading non-affiliated content should be clearly prohibited. Just as threatening to the long-term ability of the Internet to foster innovation and free expression is the prospect that broadband Internet carriers will implement a new network model that consolidates network capacity based on business arrangements with Internet content giants, replicating past communications networks where media giants have excessive power as cultural and political gatekeepers. The power of the Internet user to choose any content source they want is fundamental to how the Internet operates as an open platform for communication and creative expression.

Any other Issues/Conclusions

While we understand the European Commission’s desire to avoid overly prescriptive ex ante regulation, we do not agree that it is sufficient to rely solely on ex post regulation. Moreover, if ex post regulation is to work effectively, there need to be clearly understood ‘rules of the road’. We would therefore urge the Commission to adopt formally the FCC’s six Net Neutrality rules, namely:

1. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user’s choice over the Internet.
2. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from running the lawful applications or using the lawful services of the user’s choice.



3. Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from connecting to and using on its network the user's choice of lawful devices that do not harm the network.
4. Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and content providers.
5. Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a non-discriminatory manner.
6. Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.

We would agree with the FCC's definition of 'reasonable network management' as consisting of: (a) reasonable practices employed by a provider of broadband Internet access service to (i) reduce or mitigate the effects of congestion on its network or to address quality-of-service concerns (if done in a non-discriminatory manner); (ii) address traffic that is unwanted by users or harmful; (iii) prevent the transfer of unlawful content; or (iv) prevent the unlawful transfer of content; and (b) other reasonable network management practices.

These rules and principles should apply to both fixed broadband services and wireless services. Mobile Internet access is increasing and will continue to do so. Consumers want to be able to access the Internet from anywhere and from the device of their choice. Net neutrality principles should exist regardless of platform or network, which becomes even more important as cloud computing gains prevalence.

For further information or any clarification of the remarks outlined above, please contact:

- Stefan Krawczyk, Senior Director & Counsel Government Relations Europe:
 - o +32 (0)2 788 97 57; skrawczyk@ebay.com
- Claire Vasile, Manager Government Relations EU:
 - o +32 (0)2 788 97 16; cvasile@ebay.com