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General: We welcome that the Commission is seeking views in this important area and is approaching it with an open mind.

Rather than give specific detailed answers to the questions posed we prefer to answer the main issues and trust that this doesn't inconvenience you:

Are the tools provided adequate?  
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We note that Framework Article 8(4)(g) obliges NRAs to promote the ability of end-users to access, run and distribute applications and services of their choice. This is not stated as a passive option for NRAs to consider; it is in fact mandatory. It is clear that the very many transparency measures included in the new framework - which are valuable and useful for other purposes - can not assist NRAs to promote users' ability to run or distribute applications or services. That would need powers to intervene more actively. The only such direct power is that provided by Universal Service Article 22(3), which has caveats that make it unlikely to be used unless/until BEREC and/or EC guidelines are available that provide some confidence that the Commission and/or other NRAs would not reject its use.

That means steps are needed urgently to provide such guidelines - even if some NRAs would prefer not to receive external guidance of that kind.

Is Traffic Management necessary for ISPs and/or Network Operators?  
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Traditional traffic management of the kind that helps traffic to flow in a non-discriminatory way is acceptable.

The control of excessive use by "bandwidth hogs" may also need controlling, for the benefit of all. This \*never\* necessitates the selective blocking or slowing of individual services, as a maximum cap (i.e. on total traffic of the excessive user) is always possible and that would not raise any network neutrality concerns. It is the desire by ISPs and network operators to intrude into the individual services and applications of users that causes most concerns and which raises temptations for the ISPs to use the data they derive from this for sometimes unacceptable purposes (even apart from the important privacy questions that arise).

Should Application/Service Providers be forced to make contributions to ISPs/Operators?  
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The spurious argument is sometimes made about a "free ride" by App Providers, ignoring the fact that the end-user has already paid in full for the access provided and may in some cases have also made a payment to the application provider. Likewise, where the application provider makes use of network resources it pays directly for those in the same manner as everyone else does (directly to any ISP it uses and via peering arrangements for any core network facilities).

The argument is also made that such additional contributions are needed to support network investment in these difficult times. It should be noted that the only motivation for new investment by

ISPs and operators is that of competition from their peers and, at a time when shareholders have seen their traditional large-scale profits decline, it would be a supreme optimist who would expect the bulk of any new source of revenue to find its way into network investment. Of course, if competition is strong, that investment would happen - but in that case it would have happened anyway, to avoid customer loss.

Finally, the ISP/Operator v Application/Content provider tensions run the risk of provoking contravention of the regulatory framework. Should any ISP decide to block access to its customers from some application provider (such as Google or Skype or ...), then they are simultaneously blocking access by their customers to the applications and services of their choice. In principle, it would then be incumbent on the NRA concerned to intervene to support the regulatory objective of Fwk Article 8(4)(g) and the many recitals that also express the rights of the end-user in that regard.

Transparency as a tool

There are many admirable references to and/or provisions for transparency in the new framework. However, it should be noted that these are meaningless where the end-user does not have a genuine choice, either because it lives in a non-metropolitan/rural area or because the service features it needs are not available from competing providers. As many or most end-users in the Community will fit into those categories, it is therefore dangerous to assume that transparency is in itself a generally sufficient tool.

Disputes

A possible tool to compensate for the weaknesses in the framework is the possibility for an entity other than a traditional operator to raise a dispute, asking for the intervention of the NRA to resolve the issue. There is an obligation on the NRA to make a decision (after a refusal to intervene if necessary, and with the passing of 4 months) and presumably the NRA would be expected to follow its obligations under Article 8(4)(g) if relevant, when arriving at its decision. Nevertheless, it can be expected that NRAs would be nervous when following such an unexplored pathway and it would be helpful for the Commission to provide guidance on tackling these kinds of disputes.

We hope these comments are helpful and contribute to the Commission's analysis,

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