

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Traffic Management and 'net neutrality'

To (Ofcom contact): Stephanie Peat

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Representing (self or organisation/s): Voice on the Net Coalition (VON) Europe

Address (if not received by email):

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Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

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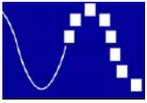
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Comments on Ofcom's Discussion Paper on Traffic management and "net neutrality"

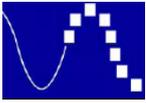
The Voice on the Net Coalition Europe ("VON") welcomes the opportunity to comment on Ofcom's **Discussion Paper on Traffic management and "net neutrality"** (hereafter "the Paper").

An open Internet is critical to citizen and consumer welfare, to the continued growth of the UK's economy, and especially its creative and high tech sectors, and to effective e-Government, at all levels. In addressing the issue of net neutrality, Ofcom should carefully balance 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 Ofcom 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. A starting point in Ofcom's approach to traffic management and net neutrality should be its desire and duty to preserve and promote the open Internet, a goal now mandated for NRAs under the revised Framework Directive (Article 8.4(g)).

In 2007 Ofcom rightfully 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 and application providers. There is evidence on the market that ISPs, especially when vertically integrated into the provision of 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 benefit. So the real issue of this debate is: where does the line fall between "legitimate" and "harmful" network management?

VON urges Ofcom 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, Ofcom 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, Ofcom should adopt a transparency standard requiring ISPs to provide all end-users (i.e., end 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, Ofcom should adopt a behavioral standard intended to prohibit ISP discrimination that is anticompetitive, creates barriers to innovation, or harms end-users and consumers, and Ofcom 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 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 Ofcom should state explicitly that discriminating against VoIP services and applications is not seen by Ofcom 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 (where they are technically and contractually unrestricted).
- Fourth, Ofcom should 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 Ofcom, including whether an ISP’s discrimination is anticompetitive, creates barriers to innovation, or harms end-users.

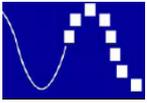
i) How enduring do you think congestion problems are likely to be on different networks and for different players?

VON considers that the enduring aspect of congestion could be avoided by Ofcom at several levels.

First, other European countries do not seem to encounter the backhaul bottleneck that is claimed to exist in the UK, and Ofcom should consider the best practices implemented in these countries, for instance in France or Sweden, 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).

Secondly, Ofcom and the UK government should also examine the possible incentives that can be put in place to encourage the deployment of faster, efficient and more robust broadband networks by operators.

Finally, 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 introduction, Ofcom has a role in making spectrum available more easily and hence alleviate wireless congestion.



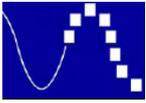
ii) What do you think are possible incentives for potentially unfair discrimination?

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.

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 behaviour even if they have no market power at the infrastructure layer, and even if they are not vertically integrated.

VON can identify different types of incentives for harmful discrimination that would be detrimental to application providers, content/service providers, and users in general (we think that is the best standard to measure it against rather than a concept of "unfairness"):

- First, discrimination by the 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 content/applications/services 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 afraid to lose revenue from their traditional voice services;
- Second, an ISP may use its bottleneck power towards VoIP or other service/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;
- 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.



iii) Can you provide any evidence of economic and or consumer value generated by traffic management?

In 2007 Ofcom rightfully 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 and application providers.

It is moreover important to distinguish between different types of traffic management. To quote the European Commissioner in charge of the Digital Agenda, Neelie 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," she said. "Discrimination against undesired competitors (for instance, those providing Voice over the Internet services) should not be allowed."¹

Traffic management for the purpose 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.

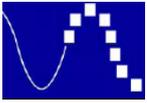
Traffic management for commercial motivations based on the exploitation of a bottleneck or discriminates between services/applications/content of similar nature does not seem to VON to create any value to end-users, as it removes the element of choice from the end-users' hands to put it in the hands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

iv) Conversely, do you think that unconstrained traffic management has the potential for (or is already causing) consumer/citizen harm? Please include any relevant evidence.

Recent developments confirm the need for the pro-active and forward-looking approach, as harm is evidenced widely in the UK and elsewhere in the EU. Indeed, in reality we see some worrying practices. 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, etc. 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" (see in France, SFR's website for details: <http://www.sfr.fr/mobile/ipad.jspe#>). 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.

VON considers it important that Ofcom ensure that end-users (citizens/consumers, government, and businesses as well as content/application/service providers) 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 Europe believes that a crucial challenge and imperative for Ofcom will be to continue to facilitate innovation by companies who are developing new applications and services, including VoIP, delivered via the Internet.

¹ Quoted at http://www.theregister.co.uk/2010/04/15/kroes_net_neutrality/



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 Ofcom 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.

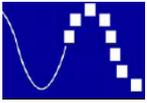
In terms of the two-sided nature of the Internet and Ofcom’s comments on it, VON would like to draw Ofcom’s attention to the following scenario: let’s imagine a start-up launching an innovative service or application from the far end of Africa or simply in a small town in Scotland or Wales. What should 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.

v) Can you provide any evidence that allowing traffic management has a negative impact on innovation?

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-competitive or harmful behaviour (e.g., to preserve the ISP’s own VoIP service or secure revenues of the 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. 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 the underlying technology, and that prevents it from being utilised to its full potential.

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 surcharge dispute with Vonage in Canada; blocking or surcharging of VoIP and P2P notably by European MNOs in their T&Cs, including in the UK; 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 impact



on innovation, which innovative application or service provider would be able to raise funds from investors into a new idea if there is no guarantee that this idea will be available to every end-user 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 and growth gains and social progress would disappear in a context where broadband Internet access providers would be allowed to turn into gatekeepers.

vi) Ofcom’s preliminary view is that there is currently insufficient evidence to justify *ex ante* regulation to prohibit certain forms of traffic management. Are you aware of evidence that supports or contradicts this view?

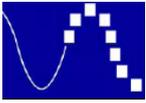
VON believes that Ofcom should state that discriminating against VoIP services and applications is not seen by Ofcom as legitimate, given that these services and applications do not consume substantial network resources and function today on fixed and mobile broadband access networks around the world (where they are technically and contractually unrestricted).

Moreover, Ofcom should adopt a behavioral 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, Ofcom 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 side – 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 new services by service/content/application providers on the Internet.

VON believes that adoption of a principle barring discrimination that is anti-competitive, creates barriers to innovation, or that harms end users and consumers would serve Ofcom’s goals of enabling end users to use ISPs’ Internet access services to access new innovative services and disseminate their own content, applications and services, but still provide ISPs with flexibility to serve a wide range of customers and business models. VON therefore recommends the adoption of broad guidelines that could be enforced on a case-by-case basis.

vii) Ofcom’s preliminary view is that more should be done to increase consumer transparency around traffic management. Do you think doing so would sufficiently address any potential concerns and why?

VON agrees with Ofcom but believes that Ofcom should require ISPs 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 Ofcom, 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.



Transparency is a key element, but it is only one part of the equation, given that markets which are seen by European regulators (including Ofcom) as being competitive (the mobile retail markets), in particular in the UK, 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 access operators mirror each other's behaviour, transparency does not lead to choice, and certainly not to unrestricted Internet access – which is the goal that motivated the introduction of transparency provisions on traffic management and access limitations in the revised EU Electronic Communications Framework.

viii) Are you aware of any evidence that sheds light on peoples' ability to understand and act upon information they are given regarding traffic management?

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,
- supplemented by very detailed, technical information.

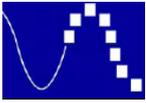
Obviously, if a minimum set of standards were set to guarantee access by end-users to the best efforts, global public Internet, whatever other managed services they may be buying from an operator, transparency requirements would be less necessary for the "Internet access" portion of the offering by the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

ix) How can information on traffic management be presented so that it is accessible and meaningful to consumers, both in understanding any restrictions on their existing offering, and in choosing between rival offerings? Can you give examples of useful approaches to informing consumers about complex issues, including from other sectors?

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 and traffic management can ensure that the service/content/application it offers is optimised to make the best and most efficient use of the network.

From a marketing point of view, the use of the word “Internet” 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 type of services or applications provided access to.

VON considers that the creation of a working group bringing together all stakeholders should be considered by Ofcom in this respect.

x) How can compliance with transparency obligations best be verified?

Regular measurements by Ofcom or another habilitated body will be required to verify if the announced performances by ISPs are met in practice. Ofcom could easily do this as part of its annual review of broadband speeds, where detailed analysis of traffic handling by ISPs is already being carried out, and publicised widely to consumers and the media.

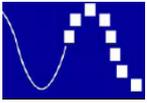
Moreover, appropriate complaint procedures will have to be put in place for both end-users and consumers and service/content/application providers that would feel wronged, triggering own-initiative investigations by Ofcom, and own-initiative enforcement by Ofcom -- e.g., on the basis of the new QoS provisions of the 2009 Telecoms Package. Ofcom should resolve such complaints on a case-by-case basis and be open to any and all end-users.

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 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.² The burden then shifts to the Access Provider to establish that “any such discrimination, preference or disadvantage meets the requirement of the framework.”³ CRTC also provided a mechanism by which Access Providers could

² Canadian Radio-television and Telecommunications Comm., File No. 8646-C12-200815400, Telecom Regulatory Policy CRTC 2009-657 at 48 (2009), at <http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>

³ Idem.



obtain prior approval for a given practice, and it reserved the right to initiate an enforcement investigation on its own motion. VON encourages Ofcom to study the CRTC approach.

xi) Under what circumstances do you think the imposition of a minimum quality of service would be appropriate and why?

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 Ofcom 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.

In setting such minimum quality of service requirements, Ofcom 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 Ofcom and creating a process for gathering input and data from outside experts. Ofcom should convene a technical advisory group – with industry participants (service/content/application providers and ISPs) operating across the EU -- 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 Ofcom 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.

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) 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.