Dear sirs

I am grateful for the opportunity to respond to Ofcom's informal consultation on traffic management and note our previous conversations on this matter.

This response notes your outstanding concerns that a regulatory agency, even one as august as Ofcom, is limited in its field of inquiry and is not suited to conducting an inquiry into the wider implications of network neutrality. Unfortunately "questions of fundamental rights and industrial and public service policies are beyond the scope of this discussion document as they are matters for Government." [pp7-8]. It begs the question as to why BIS has not yet consulted directly on this issue. Indeed, given the broad policy questions about innovation policy that this inquiry suggests, it is frankly missing the point (though elegantly and competently done) for Ofcom to conduct its walk-through of discrimination and two-sided market analysis. There is real value in your proposals for consumer transparency in Chapter 5, and it is here that I focus.

I attempt to answer the eleven questions posed, but also attach a working article on the wider issues that will be considered more fully by the European Commission and hopefully by the government departments concerned. As you are aware, I authored a monograph on these issues in January 2010 which has now been downloaded more than 100,000 times and has been submitted as evidence to the FCC NPRM in March. It is also in wide circulation in BEREC, the CRTC, PTS Norway and the European Commission.

i) How enduring do you think congestion problems are likely to be on different networks and for different players?
On mobile, there is likely to be a more or less permanent attempt by the oligopolistic networks to block rival applications, especially streamed video, voice and peer-to-peer file-sharing.
On fixed networks, the cable network should be able to provide backhaul at reasonable levels with adequate backhaul investments. Its current policies intend to throttle for 10 hours in the 10am-9pm period which is not promising.
British Telecom should also be able to supply its own backhaul and that to its competitors at regulated levels, but this depends on the regulator showing the ability to recognise that exponential increases in backhaul capacity need to be matched by exponential decreases in wholesale costs to its competitors and retail arm. Neither I, nor other independent analysts (notably Burstein and Odlyzko) are hopeful of BT and other incumbents' incentives to achieve this, nor regulators' competence and vigour in pressing for such a solution.

ii) What do you think are possible incentives for potentially unfair discrimination?
See the 200-page report I co-authored for BIS, DCMS and Ofcom in 2006: http://www.ofcom.org.uk/research/tv/reports/videoregulation/
We discuss at great length the potential investment-chilling effects of such regulation in the work Ofcom commissioned from RAND on the Audio Visual Media Services Directive in 2006.
I hold to those conclusions.

iii) Can you provide any evidence of economic and or consumer value
generated by traffic management?
Note that it is a useful threat to block business cases for independent
video or voice over IP offers, as we discuss at great length in the
work Ofcom, BIS and DCMS commissioned on the Audio Visual Media
Services Directive in 2006 - in this case, Ofcom substitutes the
chilling effects of European regulation with the equally chilling
effects of private ISP regulation. I suggest that Ofcom and BIS should
see the parallel, in the case of countenancing private regulation by
ISPs of the exact same industries, especially with regard to
interactive gaming.

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.
Ofcom itself is well aware that ISPs - especially non-dominant ISPs -
have been engaged in traffic discrimination for at least five years
that has led to huge user frustration and complaints to ISPs - who
relayed these complaints to Ofcom in 2006. See
http://chrismarsden.blogspot.com/2008/10/charlie-dunstones-gotcha-
moment-2006.html
See our 200-page report for BIS, DCMS and Ofcom in 2006, detailing the
effects of regulation on innovation (especially Appendix 1 on
investment-shifting games):
http://www.ofcom.org.uk/research/tv/reports/videoregulation/

v) Can you provide any evidence that allowing traffic management has a
negative impact on innovation?
Can anyone prove a negative?
The questions that should be asked are:
Can a developer rely on an open Internet in future?
Has an open Internet led to innovation in the past?
Did guaranteed Quality of Service on the telecoms and ATM networks lead
to less or more innovation than that in the Internet in the thirty
years since 1980?
As Ofcom rightly points out, based on conventional economic analysis,
there is no evidence that fundamentally changing the nature of the
Internet will slow down the pace of innovation:
"4.50 It is possible to postulate a future scenario in which the
introduction of traffic management and the kind of charging models
described in this chapter lead to a different kind of internet economy,
in which the space available for the 'best efforts' internet - and the
low barriers to market entry and innovation that it guarantees - is
reduced. If this outcome starts to emerge, it is likely that this would
lead to pressure to regulate to avert this. One possibility would be to
use the powers to impose minimum quality of service to define a 'best
efforts' internet to which all network operators and ISPs would have to
designate a certain proportion of network capacity. However, we re-
emphasise that there is as yet no evidence that this problem is
arising, and good reasons to doubt that it will arise, given the
current competitive market structure and the incentives on network
operators and ISPs existing within that market structure."
While Europeans have enjoyed consumer welfare increases based on telco
value destruction by BitTorrent and Skype (with tremendous benefits in
international calling rate reduction), is there not at least room to
consider that there have been simply vast 'prosumer' (EU jargon)

benefits from the freedom to tinker that a neutral Internet gave us? That is not strictly within the bounds of the economic analysis performed according to Ofcom. That is not Ofcom's fault necessarily, but a statement of why the government should be having direct citizen consultation on net neutrality rather than delegating it to a regulatory agency that necessarily has to limit its investigation. We were promised by the Conservatives when in Opposition that there would be more policy making by government rather than Ofcom after they were elected? It would at least consider options in view of the announced review of the E-Commerce Directive, for instance.

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?
Ofcom itself is well aware that ISPs - especially non-dominant ISPs - have been engaged in traffic discrimination for at least five years that has led to huge user frustration and complaints to ISPs - who relayed these complaints to Ofcom in 2006. See http://chrismarsden.blogspot.com/2008/10/charlie-dunstones-gotcha-moment-2006.html
Given that all ISPs have such incentives due to the incentives between layers in the Internet value mesh, the claim that there is insufficient evidence is a condemnation of Ofcom's evidence gathering and ISPs' failure to report complaints, not of ISP users.

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?
It may, but as your Chapter 4 analysis fails to comprehend the underlying reasons for discrimination (incentives between layers, rather than vertical integration by incumbents with market power), there appears inadequate understanding of the competitive dynamics between layers.

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?
As you are aware from my work with Jonathan Cave and others on video, interactive gaming and mobile video http://www.ofcom.org.uk/research/tv/reports/videoregulation/, there is a pressing need to examine these individual sectors and their prosumers' response to traffic management. It is now urgent that Ofcom - or more properly BIS - carries out this work, especially in the field of interactive gaming, in which the UK formerly led the world in innovation and development, based on an educated user base. The reasons for our relative decline in that field deserve immediate inquiry.

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?
See my proposed co-regulatory solution outlined in the book: Net Neutrality: Towards a Co-Regulatory Solution (2010) Bloomsbury Academic, London.

x) How can compliance with transparency obligations best be verified?
The 'voluntary' ISP Code of Conduct features in your Chapter 5 net neutrality discussion:
"Ofcom has already introduced information requirements through our Code of Practice on Broadband Speeds...Within Ofcom's Code of Practice on broadband speeds, there is also a requirement to provide information on policies on fair usage, traffic management and traffic shaping...We are planning to publish the new code after the summer." [pp37-38, Chapter 5] Elsewhere, Ofcom suggests several alternatives for actually getting ISPs to admit their traffic management policies and publicize them:
"5.48 We recognise that the use of traffic management techniques is, by its nature, difficult for consumers to detect and understand. It is therefore, critical that consumers are fully informed of any traffic prioritisation, degradation or blocking policies being applied by their network operator or ISP and that they are able to factor these in when making purchasing or switching decisions. This is important not just from the point of view of consumers' rights, but also relevant to the question of whether stricter rules may be required on discrimination."
I suggest Ofcom should allow consumers to measure their speed of access (I can do this currently with my 3 mobile connection), and think they MUST offer their own website detailing traffic management based on quarterly ISP metrics. The only verifiable solutions, as Ofcom itself has made clear, is an independent website to offer QoS information on a quarterly if not monthly basis, accompanied by Ofcom and SamKnows (or another partner's) mystery shopper tests. Currently, many ISPs are engaged more in garrotting than throttling of bandwidth for their paying customers. The size of print, in marketing materials for new customers, that 'explains' this is miniscule and brief to the point of invisibility.

xi) Under what circumstances do you think the imposition of a minimum quality of service would be appropriate and why?
It is essential for both prosumers and developers that a minimum level of Internet access be provided. ISPs should not be allowed to advertise themselves as providers of public broadband communications if they intend to remove the majority of that bandwidth for large periods of the day from their customers. They appear to have forgotten that they are common carriers, and Ofcom needs to reassert its regulatory authority and remind them. The Code of Practice from 2008 - to be revised during this consultation period in response to obvious ISP failure to comply as revealed by Ofcom's mystery shopping as well as thousands of complaints made by customers through ISP fora online - is hopefully the beginning of that process.

I am always available to amplify these points. I congratulate Ofcom for provoking this debate and hope the new government will show some kind of leadership on the wider issues, not least freedom of expression and privacy, neglected on this issue, not least in the Digital Britain report and the BIS response on net neutrality to the latest EC Implementation report questionnaire.

Sincerely
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