EXECUTIVE SUMMARY

1. The panoply of issues associated with and attributed to the internet is vast, and many of these issues are inter-linked. Care must be taken to ensure that each is considered within the appropriate forum and by the appropriate body able legitimately to effect change.

2. Sky supports the rights of citizens to access their choice of legal information, to run their choice of legal application and connect their choice of legal devices (that do not put the network at harm) on the internet.

3. The existing greater degree of regulatory oversight and competitiveness of the internet access market in the UK and Europe (as detailed later in this response), ensure that many of the observed behaviours and prospective concerns held in the USA, and which have given rise to this debate, are neither existent nor expected here. Competition can and should be relied upon to provide the necessary consumer safeguards.

4. In the competitive retail internet access market that Sky and other UK ISPs operate in, there is every incentive to compete for customers through delivering a valued service that meets and exceeds the user’s expectations. Sky supports the empowerment of consumers in making informed purchasing decisions. To that end, Sky supports providing meaningful information on its traffic management practices to consumers.

5. Any imposition of ex-ante regulation on the retail internet access market in the UK would be disproportionate and highly damaging, for the following reasons:
   i) There is every evidence of a vibrant competitive market delivering significant consumer benefits;
   ii) The market is not one identified by the European Commission as a market susceptible to regulation and would fail the “3 criteria test”; and
   iii) The market is competitive and exhibits a high level of innovation which would be likely to be stifled through the imposition of regulation.

6. The imposition of ex-ante regulation is normally justified when there is demonstrated sustained market failure. In particular, Sky considers that the retail internet access market in the UK does not exhibit clear sustained market failure. The leading market players are vigorously competing with each other, leading to an expanding market and changing market shares. Internationally bench marked prices and penetration put the
UK amongst the top countries. Innovative propositions (such as Sky’s recent launch of its two maximum speed broadband and talk bundles, one for free including up to 20Mb usage per month) are being offered and taken up by consumers, many of whom are choosing to switch from their current supplier.

7. Finally, Sky considers that there is no justification for the imposition of a minimum quality of service (QoS), for the following reasons:

i) There is no evidence that any circumstance will arise that such a regulation is intended to address;

ii) Such a measure is unavoidably complex and massively disproportionate with a consequent scope for unintended consequences; and

iii) One such perverse outcome would be a denial of supply to some users or service providers.
LIST OF CONTENTS

SECTION 1. The context ................................................................. 3
SECTION 2. Principles of net neutrality ................................................ 3
SECTION 3. Traffic management and transparency ................................ 5
SECTION 4. Ex-ante regulation anticipating anti-competitive discrimination .......... 6
SECTION 5. Mandating minimum quality of service ................................... 8
SECTION 6. Ofcom Questions for discussion .......................................... 9

SECTION 1. THE CONTEXT

1.1 The panoply of issues associated with and attributed to the internet is vast, and many of these issues are inter-linked. Care must be taken to ensure that each is considered within the appropriate forum and by the appropriate body able legitimately to effect change.

1.2 Ofcom is correct to limit its focus, in its consideration of matters often associated with “net neutrality”, to those issues that might result in anticompetitive effects or defined consumer harms, recognising that while there are other interesting questions on the fundamental rights of citizens, these are properly the purview of governments and legislators.

SECTION 2. PRINCIPLES OF NET NEUTRALITY

2.1 It is pertinent to look to the USA, where the net neutrality debate began, and where much of the debate has been focused. There the Federal Communications Commission (FCC) has established six principles that can be grouped into two broad categories: consumer entitlements and access provider obligations. These are as follows

Consumers are entitled to:

1. access the lawful Internet content of their choice;
2. run applications and use services of their choice, subject to the needs of law enforcement;
3. connect their choice of legal devices that do not harm the network; and
4. benefit from competition among network providers, application and service providers, and content providers.

A provider of broadband Internet access service must:

5. treat lawful content, applications, and services in a non-discriminatory manner (non-discrimination); and

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1 Ofcom, Traffic management and net neutrality: A discussion document, 24 June 2010, paragraph 1.5
3 The FCC added a further 2 principles and codification of the previous principles, as reported on 22 October 2009, http://www.wired.com/images_blogs/epicenter/2009/10/fcc-09-93a1.pdf
6. 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 rulemaking (transparency).

2.2 In Europe the European Commission issued its Declaration on Net Neutrality in 2009. There is reference to the promotion of the end-users’ ability to access and distribute information (comparable to the first four FCC “principles” on consumer entitlements) which is the subject of Article 8 (4)(g) of the revised Framework Directive. The Declaration also references the additional need for transparency and the potential for a minimum quality of service (QoS), as detailed in Articles 20 and 21 and explained in recitals 29 and 34 of the revised Universal Service Directive.

2.3 Sky supports the rights of citizens to access their choice of legal information, to run their choice of legal application and connect their choice of legal devices (that do not put the network at harm) on the internet.

2.4 We note, as do many other commentators, that the circumstances, in both the regulatory and competitive environment, in the USA are significantly different from those in Europe.

“Competition for broadband Internet access is richer in European markets in ways that are highly relevant to Network Neutrality – the average European has a far wider range of meaningful choice. As a result, problematic deviations from Network Neutrality are far less likely in Europe than in the U.S.”

“This [how controversial net neutrality is] is a reflection of the relative lack of competition in America’s broadband market.”

2.5 The existing greater degree of regulatory oversight and competitiveness of the internet access market in the UK and Europe (as detailed later in this response), ensure that many of the observed behaviours and prospective concerns held in the USA, and which have given rise to this debate, are neither existent nor expected here. Competition can and should be relied upon to provide the necessary consumer safeguards.

2.6 Notwithstanding the lack of any basis for concern from a competition point of view, in an increasingly complex market with sophisticated product offerings it is understandable that there may be unmet needs of citizens to be fully informed consumers. To give comfort to consumers and to bring greater clarity to industry best practice, Sky, together with other key industry participants, is working actively to draft a set of principles for use as a guide in formulating our commercial practices. It is

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8 The Economist, “Briefing: The future of the internet. A virtual counter-revolution.”, 4 September 2010
expected that a significant set of industry participants will have signed up to the principles prior to the next round of consultations, such that consideration of any next steps can be taken in the context of established industry principle.

SECTION 3. TRAFFIC MANAGEMENT AND TRANSPARENCY

3.1 The information, services, and applications delivered via the internet today and those of the foreseeable future, particularly those with video content, are placing a rapidly growing demand on networks for more and more capacity. Many networks experience network congestion and are deploying traffic management in order to ensure network integrity and provide assured quality of service to congestion sensitive applications – such as voice and streaming video. Due to the significant investments Sky has made in its core and backhaul network, in anticipation of the trends now playing out, we do not exercise any restrictive traffic management that would affect our on-net internet access customer.

3.2 Ofcom correctly acknowledges the potential for consumer benefit through traffic management in a capacity constrained world. At its most fundamental, traffic management is about improving the efficient use of the network. Absent traffic management, either users would be denied access to the internet itself or networks would have to be dimensioned to cater for peak usage dictated by a few, which would raise access costs for all. Higher access costs would similarly deny the internet for some, due to access becoming unaffordable.

3.3 In the competitive retail internet access market that Sky and other UK ISPs operate in, there is every incentive to compete for customers through delivering a valued service that meets and exceeds the user’s expectations. Sky supports the empowerment of consumers in making informed purchasing decisions. To that end, Sky supports providing meaningful information on its traffic management practices to consumers.

3.4 Just what information is meaningful, and how best to communicate it in a readily understandable manner, will be a challenge for the industry to determine and deliver. This is a challenge that Sky has already engaged with, along with other access providers, and through the Broadband Stakeholders Group (BSG) we will contribute to the development of an industry framework around transparency on traffic management. It does not therefore follow that the appropriate answer to this issue is prescriptive regulation.

3.5 In considering how best to improve the informing of consumers, it is useful to keep in mind a couple of key factors. The first, is that consumers are engaged in multiple “conversations”, not just those with a prospective supplier. They are likely to be the recipients of information provided by competitors and, at their choice, may seek out third party sources of information. The web is a rich source of competitively provided comparative information. Second, consumers are individuals and have their own information needs and wants. Not all consumers wish to be subject to the same messaging or avail themselves of the same information detail as all other consumers.

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9 Ofcom, discussion document, paragraph 1.3
3.6 To improve the quality and accuracy of information available from third party sources, such as price comparison websites, and to facilitate the comparison of information provided by different suppliers, it would be helpful if the industry could agree to a set of standardised information.

3.7 To accommodate the differing information needs of individual consumers, suppliers like Sky need the flexibility to structure the delivery of information in a tiered fashion. The approach should be to facilitate the ready web access to detail for those who want this, while not overburdening all with intrusive, time wasting, and expensive (to communicate) unwanted verbiage in advertising or on sales calls.

SECTION 4. EX-ANTE REGULATION ANTICIPATING ANTI-COMPETITIVE DISCRIMINATION

4.1 The internet has been characterised by continuous innovation in an environment of minimal regulation. It is important that this climate of innovation, which delivers enormous benefits, be maintained and the imposition of any intrusive regulation resisted.

4.2 Any imposition of ex-ante regulation on the retail internet access market in the UK would be disproportionate and highly damaging, for the following reasons:

i) There is every evidence of a vibrant competitive market delivering significant consumer benefits;

ii) The market is not one identified by the European Commission as a market susceptible to regulation and would fail the “3 criteria test”; and

iii) The market is competitive and exhibits a high level of innovation which would likely be stifled through the imposition of regulation.

4.3 We expand on each of these below.

4.4 The imposition of ex-ante regulation is normally justified when there is demonstrated sustained market failure. Sky considers that the retail internet access market in the UK does not exhibit clear sustained market failure. The leading market players are vigorously competing with each other leading to an expanding market and changing market shares. Internationally bench marked prices and penetration put the UK amongst the top countries10. Innovative propositions (such as Sky’s recent launch of its two maximum speed broadband and talk bundles, one for free including up to 20Mb usage per month) are being offered and taken up by consumers, many of whom are choosing to switch from their current supplier.

4.5 The retail internet access market is not a market identified by the European Commission as a market susceptible to the imposition of ex-ante regulation11.

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10 ECTA Broadband Scorecard, Q3 2009

recital 5
European Commission Explanatory Note on Relevant Markets(C(2007) 5406),
Additionally, under the EU Regulatory Framework for electronic communications, national regulators are required to follow the “three criteria test” when considering whether to impose ex-ante regulation. That is:

1. The market shows high and non-transitory barriers to entry, and
2. market structures do not tend towards effective competition in a relevant time horizon, and
3. application of competition law alone does not adequately address the market failure.

None of the tests would be met objectively in the UK retail internet access market for the imposition of regulation for a preferred form of traffic management, as discussed below.

4.6 There are few or no insurmountable barriers to entry. Of the four main broadband internet access competitors, two – Talktalk Group and Sky – were not even in the market five years ago. Besides the major ISPs, there are dozens of other smaller ISPs\(^{12}\). With the provision of regulated wholesale broadband and LLU, and innovative wireless solutions, an ISP can enter the market and start serving customers almost overnight. Investment continues apace, as evidenced by Sky’s own continued expansion of its access network.

4.7 As noted throughout this submission, the retail internet access market in the UK is highly competitive. The market structure supports a high degree of rivalry between competitors as evidenced by the changing market shares of participants and strong growth of the recent mobile broadband entrants. This and continued internet take up, is noted in the recent Ofcom Communications Report\(^{13}\).

4.8 Given there are no market structure problems (the failure of the first two tests), the adequacy of competition law (the third test) is not relevant.

4.9 In the absence of any demonstrated sustained market failure competition will be the driver for both access and content/application providers to innovate with different delivery and charging models. Ex-ante regulation risks stifling such innovation. Regulatory certainty and Ofcom’s explicit obligation under the revised European Regulatory Framework\(^{14}\) to support investment in improving broadband access would be compromised through the unnecessary imposition of ex-ante regulation.

4.10 Escalating demand, constrained capacity, the varying technical demands of different applications, and new communications technology have already been the catalyst for innovative responses. These have included the up scaling of raw throughput (eg early ADSL with a maximum throughput of up to 8Mb, to ADSL2+ with a maximum throughput of 20+Mb and more recently vDSL delivering up to 40+Mb) and the

\(^{12}\) ISPA UK (Internet Service Provider Association) membership list, http://www.ispa.org.uk/cgi-bin/member_list.cgi

\(^{13}\) Ofcom, Communications Market Report, 19 August 2010, table 4.1 page 235 http://www.ofcom.org.uk/cmr

introduction of smart compression encoding and line conditioning (eg BT’s 1.6Mb dedicated QoS session for streaming of BT Vision15).

4.11 Incentives to continue to invest in this differentiating innovation including the opportunity to commercialise and monetise where either suppliers or consumers are prepared to pay for increased value, must be maintained. Besides the example of BT’s approach to delivering its video on demand service, one is also referred to the significant investments being made in deploying content delivery networks (CDNs), the purpose of which is to enhance the user’s on-line experience. These investments are made with the justification of some expected future revenue stream. Whether those revenues are best achieved through innovative advertising regimes, as part of the price of wider bundles, or by fees paid by content providers or consumers – or some combination of all of the above – is still to be determined. Eliminating one or more opportunities for commercialisation by regulatory fiat at this time, in a competitive market, would undermine the incentives to innovate. Additionally, failing the opportunity to match specific investment costs with willingness to pay via perceived value, threatens an increase in access cost for all consumers.

SECTION 5. MANDATING MINIMUM QUALITY OF SERVICE

5.1 Sky considers that there is no justification for the imposition of a minimum quality of service (QoS), for the following reasons:

- i) There is no evidence that any circumstance will arise that such a regulation is intended to address;
- ii) Such a measure is unavoidably complex and massively disproportionate with a consequent scope for unintended consequences; and
- iii) One such perverse outcome would be a denial of supply to some users or service providers.

5.2 We expand on each of these points below.

5.3 Sky is not aware of any instances of internet traffic management or provision of internet access where the overall user experience would have been enhanced through the setting of a minimum QoS. Within the technology constraints of the access network, and backhaul and core networks, both access and content providers seek to deliver the most appropriate user experience to their customers. This may be a limited quality service for an affordable price, or it may be a premium service with associated higher price. Differentiated services, including different levels of service, are a feature of an effectively competitive market. Absent market power, a supplier that does not position their offering to deliver value, will likely expose themselves to losing customers and ultimately exiting the market.

5.4 Quality standards are only relevant in the context of a desired outcome. Consumers use their internet access to fulfil a diverse set of requirements. To set a minimum in relation say, to gaming, for someone who has no interest in gaming, may unnecessarily impose a quality and cost constraint on the user, which, in the extreme, may force the

15 BT Vision customer help http://bt.custhelp.com/app/answers/detail/a_id/9557/c/348,1154
user to abandon use of the internet access altogether. It is far better in the competitive retail internet access market of the UK, for providers to be left to innovate and offer real choice to consumers from which they may select to meet their own specific needs.

5.5 Leaving aside just how a quality measure would be defined, implemented or monitored, there is the potential for perverse outcomes as a consequence of such an imposition, in that some users might have to be denied access altogether if, due to inherent technology limitations, access providers could not guarantee the mandated minimum. Sky supports Ofcom’s expressed view\(^{16}\) of not considering such an imposition until there is clear evidence of a need and other less prescriptive measures had been exhausted, and in any case notes that the European Commission has committed to monitor and regularly report on the development of the market and traffic management practices\(^{17}\).

SECTION 6. OFCOM QUESTIONS FOR DISCUSSION

6.1 Ofcom has posed a number of questions to which it has requested responses. We address those questions here.

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

There are likely to be continued instances of congestion to a varying degree across both fixed and mobile networks, being a natural consequence of growing demand providing the positive signal for additional investment in capacity or other capacity alleviating innovation. Experience to date is that increase in demand on the network is rather continuous in the aggregate, whereas capacity can only be increased in discrete expensive steps. There will tend to be periods of congestion when demand has accelerated faster than has been anticipated or when new capacity does not come on stream quickly enough.

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

As noted above, within the competitive retail internet access market operating in the UK, an operator without market power, exercising a potentially unfair discrimination would likely suffer negative financial and market consequences through the responses of its competitors, as long as consumers are informed.

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

The main economic benefits to consumers from traffic management are:

- the provision of access where, in the absence of traffic management, there would be insufficient capacity to accommodate the user on the network, and

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\(^{16}\) Ofcom discussion document, paragraphs 1.12, 4.50, 4.57, 6.6

\(^{17}\) Commission declaration on net neutrality (2009/c 308/02)
• in lower prices paid by the user for access due to lower costs to the access provider through delaying the purchase/provision of additional capacity.

It needs to be remembered that traffic management is usually applied only during periods of high traffic usage. Provisioning network capacity to accommodate the spikes of peak-hour usage, places an inefficient cost burden on all users all of the time.

6.5 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.

Theoretically there is the possibility for harm through the unnecessary degradation of service. However, in a competitive market like that operating in the UK, consumers would react negatively to such unnecessary degradation, including by switching suppliers – thus providing a stimulus to invest in more capacity, and it would not be commercially sustainable for the operator to maintain such degradation. Today, we see a willingness to publicise the perceived inferior differences of competitors through comparative advertising. With improved transparency, we could expect even greater competitive exposure.

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

No, under today’s market driven traffic management practices, new services and applications have been created and delivered. Access has continued to attract new investment and expanded, and innovative consumer choices have been offered.

6.7 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?

There is little evidence to suggest that consumers are concerned or being misled in their expectations as to how their internet access is being managed. Ofcom’s view that ex-ante regulation is not required, is supported by recorded ASA (Advertising Standards Authority) adjudications. A search of adjudications on the ASA’s website show only two consumer led complaints on this subject since 2005 (see adjudications against Virgin Media dated April 2009 and November 2007) and indicate that consumers are not being harmed by current products and sales processes.

6.8 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?

Yes. Greater transparency will help to better set consumers’ appropriate expectations of their internet access service.

18 Advertising Standards Authority adjudications (search conducted August 2010)
6.9 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?

No.

6.10 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?

This is a challenging task and one that Sky has already embarked upon with other internet access providers.

Ofcom has offered several approaches to improve informing consumers. As noted above, individual consumers will have varying requirements and capacity for information, and as such, some form of “tiered” presentation of details will be required; offering flexibility of when and how it is accessed. Whether, and to what degree, the provision of the other suggestion of “one stop shop”, “real time”, and/or “comparative services” need to be explicitly supported by industry will need to be considered with a mind to fashioning a proportionate approach that meets defined needs while minimizing administrative burden and cost.

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

This depends on the final measures to be used. However given the lack of demonstrated harm or expressed consumer concern, any intrusive or burdensome practices should be avoided. At this time an exceptions based, dispute or complaints initiated, investigative service would appear to be more appropriate.

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

Sky can conceive of no circumstances where the imposition of a minimum quality of service would be appropriate or beneficial to consumers.

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19 Ofcom discussion document, paragraphs 5.33 – 5.40