

Arts & Labs
Ofcom Net Neutrality Consultation Submission

Question 1: How enduring do you think congestion problems are likely to be on different networks and for different players?

As a coalition of content, application, and service providers, Arts & Labs is in an ideal position to represent a broad perspective from across the Internet ecosystem. There is no doubt that growing demand for bandwidth, especially given the expansion in video-based applications and services, is raising the risks of online congestion that can degrade the Internet experience for all users. In order to serve consumers by enabling them to enjoy good performance by the legal applications of their choice, network operators require the flexibility to manage their networks in ways that maximize efficiency and keep traffic moving even in times of high demand.

Such management is essential for meeting consumer expectations and also to facilitate continued innovation by content and applications providers. Indeed, we encourage active collaboration among operators, content creators, application providers and other Internet participants to ensure a good fit between network capabilities and new content and applications. In order to innovate, content and application providers need some assurance that networks can be managed in ways that ensure quality performance for innovate new content, applications and services. Collaboration between network operators and others in the Internet ecosystem also supports the development of high-level content by enabling content creators to provide consumers with safe and easily accessible alternatives to illegal copies of music, video and other copyrighted materials that are offered online by digital thieves.

The debate in the US has evolved from two black and white perspectives on the issue, to a more nuanced and focused discussion that allows for effective network management and a range of managed services so long as they do not harm users or competition. It has become increasingly clear that active participants in the Internet ecosystem share a commitment to an Open Internet, while also accepting the necessity of effective network management to address issues like congestion and to encourage innovation.

Question 2: What do you think are possible incentives for potentially unfair discrimination?

It is certainly possible to construct scenarios in which network providers might seek inappropriately to advantage their own content and applications. But all of the immense activity on the Internet to date, however, demonstrates that providers have a strong incentive to expand subscribership by making sure that consumers can access the legal websites and services of their choice without interference by operators. Any operator that selectively blocked or degraded lawful services would face almost certain public exposure and criticism that would alienate users and cause them to cancel subscriptions and sign up with competitive providers.

In addition, Arts+Labs believes that strong “transparency” - which might usefully apply to all players in the Internet ecosystem, and could will provide an important check against potential misconduct by ensuring that users understand what services they are paying for, any limitations

on access or bandwidth, and the provider's network management practices. Strong transparency practices might be the product of industry standard setting, rather than a product of regulation. Such transparency standards could very usefully apply to all players in the Internet ecosystem, so that a consumer could know, for instance, if a particular app was a bandwidth hog and would be likely to cause the consumer to use up more bandwidth.

Question 3: Can you provide any evidence of economic and or consumer value generated by traffic management?

From traffic lights to landing rights, management is an essential component of safe, efficient, and effective networks. In the case of the Internet, the ability to manage networks is critical for good performance, especially in periods when high demand can create congestion that undermines the performance of applications such as VoIP and streaming video that are extremely sensitive to delays. Network management can also protect users from illegal and dangerous conduct.

The proof is in the pudding: traffic management has been a mainstay of the Internet as it has developed and as we know it today; the economic and consumer value generated by today's "traffic managed" Internet is undeniable. There is no cogent reason to risk the continued strength of the Internet with ex ante regulation.

Effective network and traffic management encourages content creators and applications providers to continue to invest in innovative new content and services by providing assurance that the networks will provide the level of service needed to support new offerings. Undue restrictions on such management, on the other hand, will discourage such innovation because creators will lack the certainty that their products will operate effectively enough to satisfy consumers.

Question 4: Conversely, do you think that unconstrained traffic management has the potential for (or is already causing) consumer/citizen harm? Please include any relevant evidence.

While we can construct hypothetical scenarios where a provider might inappropriately take advantage of traffic management, there is absolutely no evidence that this has occurred, or is occurring. Longstanding precedent suggests that discrimination that harms consumers or interferes with competition may well run afoul of existing competition law. Additional regulation to address this highly theoretical concern thus seems unnecessary and may even create confusion because of possible legal conflicts.

Question 5: Can you provide any evidence that allowing traffic management has a negative impact on innovation?

No. In fact, limiting the ability of providers to implement traffic management technologies might very well stifle innovation. Indeed, the US Department of Justice, weighing in on the issue before

the Federal Communications Commission, found that “much of the conduct that some proponents of “net neutrality” regulation are concerned about can be procompetitive”, while “A blanket prohibition on such conduct would likely result in significant marketplace distortion. Even assuming that a potential danger exists, the ambiguity of what conduct needs to be prohibited raises a real possibility that regulation would prohibit some conduct that is beneficial, while failing to stop other conduct that may be harmful.”

Question 6: 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?

We are not aware of information supporting the claims that traffic management poses a competitive risk to the industry. Indeed, all evidence supports Ofcom’s preliminary view that no ex ante regulation is justified. For example, the U.S. Department of Justice, in comments to the U.S. Federal Communications Commission said that many forms of network management would be pro-competitive and beneficial to consumers.

Question 7: 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. We support the broad adoption of a strong transparency rules across the Internet ecosystem. These rules – which should be formulated cooperatively with operators and developers – would provide consumers with information about network management practices and application characteristics, and ensure that content and application providers receive the quality of service they expect from operators. Transparency rules also support competition by enabling operators to differentiate themselves by seeking to appeal to consumers by developing effective and relatively non-intrusive traffic management techniques.

In general, Arts+Labs believes that strong “transparency” will provide an important check against potential misconduct by ensuring that users understand what services they are paying for, any limitations on access or bandwidth, and the provider’s network management practices.

Question 8: Are you aware of any evidence that sheds light on peoples’ ability to understand and act upon information they are given regarding traffic management?

It is hard to predict given that this practice has not been implemented to date. We know from experience in other industries that plain language disclosure is preferable to highly legalized forms. We believe is likely that disclosure will evolve over time based on feedback from consumers.

Question 9: 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

Question 10: How can compliance with transparency obligations best be verified?

Arts & Labs encourage regulators and industry players to come together to discuss the best ways of ensuring accurate assessments of networks. This should be a dialogue that continues indefinitely, and allows all players to bring grievances, concerns, or ideas to the table so as to improve both technology and practices.

Question 11: Under what circumstances do you think the imposition of a minimum quality of service would be appropriate and why?

Arts+Labs believe that all users must have the ability to access the legal services and content of their choice and we are comfortable with legal recognition of that broad principle. However, we are concerned that attempts to define specific minimum quality of service standards may interfere with the successful evolution of the Internet by locking networks into systems and technologies that will quickly become outdated or will not be flexible enough to support future content or applications. Given the pace of technological change, it is highly likely that such rules will be based on assumptions that are soon overtaken.