



European Commission: the open internet and net neutrality in Europe

Communications Consumer Panel Consultation Response

1. Introduction

The Communications Consumer Panel (the Panel) was established under the Communications Act 2003 as an independent advisory body. Its role is to influence Ofcom, Government, the EU, and service and equipment providers so that the communications interests of consumers and citizens are protected and promoted.

The Panel pays particular attention to the needs of older people and people with disabilities, to the needs of people in rural areas and people on low incomes, and to the needs of small businesses, which face many of the same problems as individual consumers.

The Panel welcomes the Commission's timely consideration of net neutrality and traffic management, and is pleased to have the opportunity to add to the discussion.

The Commission has identified many important issues in its paper but we would also like to add some further areas for consideration. In particular:

- The difference between the consumer impact in the short- and long-term, and the difference between the consumer and citizen impact. At the moment, the debate focuses primarily on the potential benefits and risks to consumers in the short term, and the consumer remedies put in place to mitigate those risks.

However, there are also potential risks to consumers' long term interests, as well as important citizen issues to consider. Depending on how the market develops, failing to identify these issues and concentrating only on short-

term consumer interest might result in consumer and citizen detriment in the future.

The Panel considers it essential for the Commission to thoroughly assess the citizen impact of net neutrality and traffic management.

- The focus on the consumer element of the net neutrality debate results in an over-reliance on the role of transparency. There are a number of limitations to transparency for both consumers and citizens. For instance:
 - The success of transparency relies on consumers being able to understand and compare information about traffic management, and weigh it up against other information relevant to their purchasing and switching decisions. This information is complicated and is only one of a range of factors that consumers must understand, so achieving the objective of transparency will be difficult.
 - Transparency can only be effective if consumers are able to switch their communications provider if they are not happy with the service they receive. This relies on the availability of joined-up, easy to use switching processes for broadband and for bundled products including broadband.

If successful, transparency would facilitate individual consumer choice. However, taken together individual choices, while appropriate for the people concerned, may not necessarily result in outcomes that are beneficial for society as a whole.

- There is very little research available from the UK, or elsewhere, that looks into the way consumers and citizens make decisions about broadband services and the extent to which they understand the information provided to them about such services. The Panel understands that UK regulator Ofcom is planning to undertake some experimental research into the way consumers understand information about traffic management. However, it is not possible to understand the impact of information about traffic management in isolation.
- It is important that research is undertaken that takes into account the way consumers make decisions and use information about broadband generally, to ensure that any remedies are useful to people in the round. This is because factors other than traffic management policies, such as price, speed or customer service, may affect a consumer's decision to purchase a broadband package. Consumers may also be influenced by the details of other products that may be bundled with a broadband service, such as number of TV channels or prices for phone calls. The research should be constructed to understand the way that consumers prioritise and act on these factors. The research also should be constructed in a way to ensure that the different needs and behaviours of consumers and citizens are taken into account.

- We note that small businesses are likely to experience many of the same issues as consumers, and so encourage the Commission also to consider the potential impact on this group.

There are two further key points that we would like to reiterate that are also covered in our response to the questions in the consultation document:

- The Commission should recognise that existing evidence of consumer harm or value due to traffic management practices might not be forthcoming, and that lack of evidence does not necessarily mean lack of harm. Traffic management is an emerging phenomenon. While we could wait for harm to emerge so it can be evidenced, there are clear indicators of some harms that could emerge as the market develops. It would therefore be better to start to frame policy with an understanding of what some of these future harms might be, so that we do not unintentionally promote or encourage them and hopefully make them less likely to occur.
- In considering how best to present information to consumers the Commission should bear in mind that consumers may find it useful to have positive commitments about the content and services they will definitely be able to access and when, rather than information about services they may or may not be able to use. Promises about the type and quality of services that consumers can access, that are described in language the consumer can relate to their experience, is much more empowering than technical information. This is because consumers know what to expect and will be able to tell when they are not receiving the service they are promised. The advertisement of 'up to' broadband speeds is an example of how information can cause confusion among consumers.

2. Consumer, citizen and small business interests

Although an individual may be at the same time a consumer, a citizen and a small business, it should not be assumed that the consumer, citizen and small business impacts of net neutrality will be complementary. The Panel believes that the Commission should look closely at the potential impact of any reduction in net neutrality to see whether there are any conflicts of interest between and amongst the needs of consumers, citizens and small businesses.

2.1 Consumer interests

Consumer benefit is likely to be generated if consumers are able to access the applications and services that they need and value in a consistently reliable way. While the evidence on what consumers need and value is limited, there are some indicators:

- The panel's research for the Digital Britain report¹ shows that there is no standard 'basic' set of services that all people value equally - different groups tend to value different types of online services and applications;
- The Panel's digital participation research² shows that there is a strong desire for filters and guides to help people navigate through content. People use friends, family and trusted brands to help them sift through large amounts of information and identify goods and services they are likely to want;
- The evidence of, among others, the Apple App store, shows that, at least in certain circumstances, consumers are not adverse to walled gardens.

In the short term therefore, consumers' interests are likely to be met through a solution that delivers a range of different services with different approaches to traffic management, and potentially including prioritised services or applications paid for by the content provider, the consumer, or both.

However, for this approach to be effective consumers will need to have access to information about the different services and approaches taken by different providers, be able to compare this information, be able to switch package or provider easily, and a sufficient number will actually have to switch in order to exert competitive pressure on providers.

This approach would not necessarily bring benefits to consumers who do not have much control over the speeds that they receive, including rural consumers who are restricted by the technology available or consumers on low incomes who cannot afford to pay for better quality of service. These consumers would not have the same choice of services, and could find that the quality of services they receive is negatively affected by prioritisation in favour of consumers who are able to pay.

It is also important to note that in the longer term this approach may create barriers to entry for providers that wish to develop and deliver new content and services. This could potentially reduce future consumer choice. It will therefore be crucial to monitor the impact on innovation of developments in this market.

There are therefore potential conflicts between the interests of different groups of consumers. Even if the most actively engaged consumers make decisions about their broadband package or provider using information on traffic management provided as a result of enhanced transparency, the outcomes could disadvantage other groups of consumers, for instance those who are less able to pay and those who are less actively engaged. These decisions could also have a negative impact on all consumers in the future if the impact of those decisions is to reduce innovation and the development of new services and applications.

¹ See *Consumers' views on the digital future*, and *Not online not included: consumers say broadband essential for all*, available at www.communicationsconsumerpanel.org.uk

² See *The journey to digital participation: a consumer research report*, available at www.communicationsconsumerpanel.org.uk

2.2 Citizen interests

The citizen perspective is less about meeting individual needs or wants and more about assessing the impact on broad societal goals. The potential impact is wide-ranging, touching on areas including privacy, freedom of speech, access to essential services and the delivery of universal broadband. To illustrate the potential issues, we focus on the last of those two areas: essential services and universal broadband.

The UK government's UK Digital Champion is promoting the importance of placing key government services online and this is likely to be the case for governments across Europe.³ There are two ways in which online public services could be negatively affected by traffic management:

- If the market develops to include large numbers of content and service providers who are prepared to pay to deliver prioritised quality of service to their users, public services could suffer from being in the shadows of more appealing commercial services that are able to offer a significantly better user experience. Thus public services become less attractive and may even suffer in comparison to prioritised private sector competitors, for instance NHS eHealth versus private eHealth.
- If Internet Service Providers (ISPs) routinely throttle or degrade certain types of traffic public services could be actively discriminated against, particularly if those services are high bandwidth, like iPlayer or future eHealth services. This could be a particular issue in areas with slow or unreliable connections where some users have paid for prioritised quality of service. In these circumstances the degradation of traffic for those consumers who are unable or unwilling to pay a premium for prioritised quality of service could result in them being unable to access key online public services during peak times.

The UK Government has committed to delivering universal broadband at 2mbs by 2015. The rationale behind this is that broadband is increasingly becoming an essential service, like gas, electricity or water. Depending on how the market develops, approaches to traffic management could have a detrimental impact on this universal broadband commitment and other such commitments across the EU. In particular, if ISPs choose to throttle or degrade traffic in order to ensure a higher quality of service for those consumers who have paid a premium, those consumers who are unable or unwilling to pay could receive speeds lower than 2mbs, particularly at peak times. These examples show that there are a number of ways in which approaches to traffic management could have a detrimental effect on citizen interests. The Panel considers it necessary to thoroughly assess the citizen impact of net neutrality and traffic management.

³ See, for example, the *Manifesto for a Networked Nation*, available at www.raceonline2012.org

Given the potential detriment to both consumers and citizens, we also encourage National Regulatory Authorities to actively monitor the development of this market to identify any emerging consumer or citizen issues and take early action to mitigate them. This could include adopting some kind of minimum quality of service or universal ‘must-carry’ obligation if developments in the market threaten important citizen goals, such as access to online public services or the delivery of public service content online.

2.3 Small businesses

Many of the benefits and costs set out above also apply to small businesses. Small businesses could benefit from the increased choice of packages and services made available through different approaches to traffic management. However, rural small businesses are affected by the same issues as rural consumers. Small businesses are also users of public services, including for instance online tax and VAT returns and grant applications, and could suffer from any approach to traffic management that throttled or degraded these kinds of services. We encourage the Commission to consider the impact of approaches to traffic management on small businesses.

The Panel is therefore advising the Commission to:

- Include in the scope of its work on net neutrality and traffic management a full consideration of the potential impact on citizens, on consumers’ long-term as well as short term interests, and on small businesses;
- Seek out further research to understand how consumers make decisions in broadband markets, and the role of information about traffic management as one of a range of factors consumers may take into consideration during the purchasing or switching process;
- In the provision of information about traffic management, consider the role of positive commitments about the kinds of content and services consumers will be able to access and when, as well as the role of basic information about policies;
- Require NRAs to actively monitor the development of this market to identify any emerging consumer or citizen issues and take early action to mitigate these issues; and
- Consider adopting some kind of minimum quality of service or universal ‘must-carry’ obligation if developments in the market threaten important citizen goals, such as access to online public services or delivery of public service content.

3. Answers to questions for discussion

The Panel has not responded to all the questions in the Commission’s consultation document and has focused on those that fall within the Panel’s expertise.

Question 1: Is there currently a problem of net neutrality and the openness of the internet in Europe? If so, illustrate with concrete examples. Where are the bottlenecks, if any? Is the problem such that it cannot be solved by the existing degree of competition in fixed and mobile access markets?

The Panel is concerned that, in asking for concrete examples of a problem with net neutrality and the open internet in Europe, there may be a presumption of no existing harm if no evidence is found.

Consumer evidence on the harms or benefits of traffic management would rely to a large extent on measuring switching behaviour and consumers self-reporting their views. This asks a lot of consumers. It requires that consumers can recognise traffic management when it happens, understand how it affects their experience of the internet, and - most importantly - can imagine what the internet would be like otherwise. Without a reasonably coherent vision of what they are missing out on (or gaining) from traffic management, consumers will find it very difficult to give an accurate picture of any harm (or value) they have experienced, or to switch broadband provider as a result of traffic management practices.

Question 2: How might problems arise in future? Could these emerge in other parts of the internet value chain? What would the causes be?

It is also important to note that we are dealing with an emerging market. While we could wait for harm to emerge so it can be evidenced, there are clear indicators of some harms that could emerge as the market develops. It would therefore be better to start to frame policy with an understanding of what some of these future harms might be, so that we do not unintentionally promote or encourage them and hopefully make them less likely to occur.

Further research into how well customers understand traffic management and the degree to which it affects their purchasing decisions will be very important in gauging the likelihood of harm. Another problem, however, is that traffic management is just one of various factors that affect users' experiences of broadband, many outside the ISPs' control.

As no-one yet knows how the internet will develop, it is important that there is a holistic policy framework in place to allow policy makers and regulators to respond quickly if any issues arise in future.

Question 5: To what extent will net neutrality concerns be allayed by the provision of transparent information to end users, which distinguishes between managed services on the one hand and services offering access to the public internet on a 'best efforts' basis, on the other?

The Panel agrees that transparency is important but believes that it is unlikely to be the only solution to ensuring that consumers and citizens interests are protected. This is because there are so many other factors that influence consumers' switching behaviour that traffic management practices might not carry sufficient weight when consumers are making purchasing decisions.

The Commission should therefore obtain research to understand whether or not traffic management information is likely to cause sufficient change in consumer behaviour to motivate switching.

The Panel believes that there are two basic considerations when thinking about transparency as a solution: how to convey information in a way that is meaningful, and how useful information is as a remedy.

The Panel calls for more research into how consumers understand and use information about traffic management in the context of other information about broadband services.

There needs to be an understanding of how to make information meaningful to consumers, in order that it can be actionable. This requires a solid knowledge base about the factors that influence consumers' decisions about which broadband packages to buy and when to switch.

For transparency to work as an aid to competition, a significant percentage of consumers need to be able - and willing - to switch broadband packages. To be able to switch external barriers, including complex processes, need to be addressed.

To be willing to switch, consumers need to be able to weigh up a broad range of factors about their current broadband package in comparison to those from other providers. These factors include price, speed and customer service levels but also the value of bundled services that come with the broadband connection, such as telephone or TV. There is also a related third aspect to consumers' willingness to switch, which is consumers ability to switch to a better package than the one they currently have. Research in behavioural economics indicates that consumers can find information misleading and can focus on the wrong areas when making a decision.

The Panel supports the drive for comparable information and the development of industry-standard metrics to help consumers weigh up the relative merits of different broadband packages. However, the detail of delivering transparency is important only so long as transparency on traffic management will work as a solution. There should therefore be more research conducted to find out whether consumers understand what traffic management is and what it does, and whether they would be sufficiently motivated by its effects to switch provider.

A particular difficulty with transparency as a solution is the trade-off between the demands of different consumers for different levels of information. The Panel thinks that it is likely that a combination of approaches will be necessary to meet the transparency needs of the full spectrum of consumers. It is important, however, that this information about traffic management is built into a holistic treatment of broadband information in general. Clear and standardised information about traffic management practices in isolation would only inform part of the broadband purchasing or switching decision, and so may not have the optimum impact.

Question 6: Should the principles governing traffic management be the same for fixed and mobile networks?

The transparency principle should not differentiate between mobile and fixed networks. Each type of network should present information on traffic management that is meaningful and comparable. Networks should also tell consumers what they will experience as a result of traffic management policies, rather than just saying what the traffic management policies are. Such promises about the types of services or applications that consumers will be able to use will be much more empowering than technical information about traffic management.

Question 8: In the case of managed services, should the same quality of service conditions and parameters be available to all content/application/online service providers which are in the same situation? May exclusive agreements between network operators and content/application/online service providers create problems for achieving that objective?

The Panel is not against managed services in principle but would be concerned about the emergence of internet packages that discriminate against essential services for consumers and citizens. This is of particular concern for disadvantaged groups.

There is a danger of a commercially-driven ‘two-tier’ internet where content providers that can afford it can deliver their content using high quality of service and others are left to rely on low quality of service or ‘best efforts’. These others may then become less attractive to consumers and fall out of the market, thus lessening competition and innovation.

This kind of two-tier service could also have an effect on consumers who do not have much control over the speeds that they receive, including rural consumers who are restricted by the technology available or consumers on low incomes who cannot afford to pay for better quality of service. For instance, in the UK, BT Vision requires broadband of at least 1.6mbps to play good-quality TV on-demand. If a consumer only has the minimum universal service connection of 2mbps, BT Vision leaves only 400kbps for internet access whilst TV on-demand is watched. Thus these customers would need to make a choice between TV on-demand and adequate-quality internet access that consumers with access to faster broadband connections would not. Furthermore, this example assumes that consumers actually get the headline speed, which Ofcom’s research on broadband speeds in the UK shows does not happen in practice.

This is not so much of a concern for entertainment services, for which price differentiation is just part of commercial reality, but is more an issue when thinking about public services. Public services could suffer from being in the shadows of more appealing commercial services that take advantage of prioritised quality of service. Thus public services may become less attractive, and thus less viable.

There is also the potential that public services could be actively discriminated against, particularly if those services are high bandwidth, such as iPlayer or future eHealth services. There may be room, therefore, to consider some degree of ‘must carry’ obligation on ISPs or even to discriminate positively in favour of essential public services.

Exclusive agreements would allow discrimination between different content/application/service providers by the network operators. This is, again in principle, not inherently problematic for consumer as long as such agreements do not distort competition.

An important consideration when assessing whether competition would be distorted is the ease with which consumers can switch between broadband providers, including whether there is a joined-up process for switching bundles of services.

Question 9: If the objective referred to in Question 8 is retained, are additional measures needed to achieve it? If so, should such measures have a voluntary nature (such as, for example, an industry code of conduct) or a regulatory one?

It is vital that regulatory objectives and commercial incentives are aligned. If the Commission decides to pursue a regulatory or co-regulatory approach, it should ensure that the interests of consumers and citizens are taken into account in developing a code of practice. For this reason, the Commission should not engage solely with industry and the Panel would be happy to provide input.

The Panel advises the Commission to approach any voluntary transparency obligation on ISPs with caution, given the low levels of compliance with the UK’s broadband speeds voluntary code.⁴ The Panel believes that there should be particular emphasis on ISPs to provide practical support to consumers throughout their contract to aid with switching to more appropriate broadband packages within the same ISP or between ISPs.

Ofcom published in 2008 a set of principles to help guide decision-making on the best regulatory approach to use.⁵ These might be a useful source of reference.

Question 11: What instances could trigger intervention by national regulatory authorities in setting minimum quality of service requirements on an undertaking or undertakings providing public communications services?

The Commission should consider the imposition of minimum quality of service as a way of supporting the provision of essential services over the internet in future. This may take the form of some variation on ‘must carry’ obligations.

⁴ Ofcom (2010) *UK broadband speeds, May 2010*
<http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/bbspeeds2010/bbspeeds2010.pdf> pg.6

⁵ Ofcom (2008) *Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation*
<http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/statement.pdf>

Question 14: What should transparency for consumers consist of? Should the standards currently applied be further improved?

The Panel believes that there are two basic considerations when thinking about transparency as a solution: how to convey information in a way that is meaningful, and how useful information is as a remedy.

The Panel calls for more research into how consumers understand and use information about traffic management in the context of other information about broadband services.

There needs to be an understanding of how to make information meaningful to consumers, in order that it can be actionable. This requires a solid knowledge base about the factors that influence consumers' decisions about which broadband packages to buy and when to switch.

For transparency to work as an aid to competition, a significant percentage of consumers need to be able - and willing - to switch broadband packages. To be able to switch external barriers, including complex processes, need to be addressed.

To be willing to switch, consumers need to be able to weigh up a broad range of factors about their current broadband package in comparison to those from other providers. These factors include price, speed and customer service levels but also the value of bundled services that come with the broadband connection, such as telephone or TV. There is also a related third aspect to consumers' willingness to switch, which is consumers ability to switch to a better package than the one they currently have. Research in behavioural economics indicates that consumers can find information misleading and can focus on the wrong areas when making a decision.

The Panel supports the drive for comparable information and the development of industry-standard metrics to help consumers weigh up the relative merits of different broadband packages. However, the detail of delivering transparency is important only so long as transparency on traffic management will work as a solution. There should therefore be more research conducted to find out whether consumers understand what traffic management is and what it does, and whether they would be sufficiently motivated by its effects to switch provider.

A particular difficulty with transparency as a solution is the trade-off between the demands of different consumers for different levels of information. The Panel thinks that it is likely that a combination of approaches will be necessary to meet the transparency needs of the full spectrum of consumers. It is important, however, that this information about traffic management is built into a holistic treatment of broadband information in general. Clear and standardised information about traffic management practices in isolation would only inform part of the broadband purchasing or switching decision, and so may not have the optimum impact.

The Panel proposes that information on traffic management, and broadband services in general, should be based on the goal of giving consumers and citizens access to the applications and services that they need and value in a consistently reliable way. In order to be able to do this, there first needs to be an understanding of what consumers need and value. As we have noted above, research in this area is limited; however, there are indicators:

- There is no standard ‘basic’ set of services that all people value equally - different groups tend to value different types of online services and applications, and some groups want to create content and are therefore producers in their own right;
- There is a strong desire for filters and guides to help people navigate through content.
- At least in certain circumstances, consumers are not adverse to walled gardens.

There also needs to be an understanding of what consumers understand to be consistently reliable. This does not necessarily mean that consumers want everything to be available at all times. It is more likely to mean that consumers want to know when they will be able to access the applications and services that are important to them.

The implications of this are that information should be presented in terms of the different types of content and services that consumers will be able to access. It should also be presented in terms of positive commitments about what consumers will be able to access and when, rather than follow the kind of ‘up to’ models we have seen in the advertisement of broadband speeds.

Question 15: Besides the traffic management issues discussed above, are there any other concerns affecting freedom of expression, media pluralism and cultural diversity on the internet? If so, what further measures would be needed to safeguard those values?

The citizen perspective is less about meeting individual needs or wants and more about assessing the impact on broad societal goals. It is clearly the role of the Commission to set these goals, so it is appropriate for it to assess the impact of traffic management on these goals. The potential impact is wide-ranging, touching on areas including privacy, freedom of speech, access to essential services and the universal service commitment. To illustrate the potential issues, we focus on the last of those two areas: essential services and universal broadband.

The UK government’s Digital Champion is promoting the importance of placing key government services online and this is likely to happen across the EU. There are two ways in which online public services could be negatively affected by traffic management:

If the market develops to include large numbers of content and service providers who are prepared to pay to deliver prioritised quality of service to their users, public services could suffer from being in the shadows of more appealing commercial services that are able to offer a significantly better user experience. Thus public services become less attractive and may even suffer in comparison to prioritised private sector competitors, for instance NHS eHealth versus private eHealth.

If Internet Service Providers (ISPs) routinely throttle or degrade certain types of traffic public services could be actively discriminated against, particularly if those services are high bandwidth, like iPlayer or future eHealth services. This could be a particular issue in areas with slow or unreliable connections where some users have paid for prioritised quality of service. In these circumstances the degradation of traffic for those consumers who are unable or unwilling to pay a premium for prioritised quality of service could result in them being unable to access key online public services during peak times.

The UK Government has committed to delivering universal broadband at 2mbps by 2015. The rationale behind this is that broadband is increasingly becoming an essential service, like gas, electricity or water. Depending on how the market develops, approaches to traffic management could have a detrimental impact on the universal broadband commitment. In particular, if ISPs choose to throttle or degrade traffic in order to ensure a higher quality of service for those consumers who have paid a premium, those consumers who are unable or unwilling to pay could receive speeds lower than 2mbps, particularly at peak times. These examples show that there are a number of ways in which approaches to traffic management could have a detrimental effect on citizen interests.