



Net neutrality and ‘traffic management’

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 Ofcom’s timely consideration of net neutrality and traffic management, and is pleased to have the opportunity to add to the discussion.

Ofcom has identified many important issues in its paper, particularly the need to carefully consider the way in which transparency obligations could be implemented, but we would also like to add some further areas for consideration. In particular:

- Ofcom’s interpretation of the debate, as set out in its consultation document, has been cast too narrowly. It focuses primarily on the potential benefits and risks to consumers in the short term, and the consumer remedies that could be 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, these issues could result in consumer and citizen detriment in the future.

While decisions on citizen issues may ultimately be a matter for Government, Ofcom’s principal statutory duty requires it to ‘further the interests of citizens in relation to communications matters’ as well as to ‘further the interests of consumers in relevant markets, where appropriate by promoting competition.’ The Panel considers it part of Ofcom’s duty to

more thoroughly assess the citizen impact of net neutrality and traffic management.

- We also note that the small businesses are likely to experience many of the same issues as consumers, and also encourage Ofcom to consider the potential impact on this group.
- 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. Transparency relies on consumers being able to understand and compare information about traffic management, weigh it up against other information relevant to their purchasing decision, and potentially switch their communications provider. If successful, transparency facilitates individual consumer choice. However, taken together individual choices, while appropriate for the people concerned, may not 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 Ofcom is planning to undertake some experimental research into the way consumers understand information about traffic management, and the Panel is pleased to offer any help or guidance that it can to this initiative. However, it is not possible to understand the impact of information about traffic management in isolation. It is important that Ofcom's research 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. The research should be constructed in a way to ensure that the different needs and behaviours of consumers and citizens are taken into account.
- In considering how best to present information to consumers Ofcom 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. The advertisement of 'up to' broadband speeds is an example of the latter approach that can cause confusion among consumers.
- Ofcom 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.

The Panel is therefore advising Ofcom to:

- Widen the scope of its work on net neutrality and traffic management to include a full consideration of the potential impact on citizens, on consumers' long-term as well as short term interests, and on small businesses;
- In thinking about consumers, Ofcom should consider the impact on small businesses, who may experience many of the same benefits and costs;
- Conduct 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;
- Consider the role of positive commitments about the kinds of content and services consumers will be able to access and when in the provision of information about traffic management;
- 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.

2. The citizen and consumer perspective

Ofcom's principal statutory duty requires it to:

'further the interests of citizens in relation to communications matters' and 'further the interests of consumers in relevant markets, where appropriate by promoting competition.'

The consultation document deals in detail with the consumer aspects of the debate. However, while it acknowledges wider political and public policy considerations it does not discuss them in detail, as it considers them to be matters for Government. The Panel recognises that it is not Ofcom's role to decide public policy; however, given Ofcom's statutory duty to further the interests of citizens the Panel believes that Ofcom should allow for consideration of the potential impact on citizens in the net neutrality debate. This is particularly important as there are potential conflicts between the interests of citizens and consumers, as illustrated below.

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. More detail on the extent to which Ofcom's recommendations on transparency will deliver this are set out in section 5 below.

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.

2.2 Citizen interests

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

The citizen perspective is less about meeting individual needs or wants and more about assessing the impact on broad societal goals. While it is clearly the role of Government to set these goals, Ofcom's statutory duty to further the interests of citizens means 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 the universal service commitment.

The government's UK Digital Champion is promoting the importance of placing key government services online³. 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 high contention rates 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 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 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 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 part of Ofcom's duty to more 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 Ofcom 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.

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 Ofcom to consider and monitor the impact of approaches to traffic management on small businesses.

3. Transparency and the need for further research

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.

Ofcom should conduct research to understand whether or not traffic management information is likely to cause sufficient change in consumer behaviour to motivate switching. More detail on this is provided in section 5 below.

4. The evidential issue

In many of the questions for discussion, Ofcom asks for evidence of value or harm created by traffic management practices. The Panel is concerned that there will be a presumption of no 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.

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.

5. Answers to the questions for discussion

The Panel has not responded to all the questions in Ofcom's discussion paper and has focused on those that fall within the Panel's expertise.

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.

The Panel assumes this question to be asking about 'unconstrained' traffic management in the sense of 'unregulated' traffic management, rather than traffic management that is not constrained by consumer choice and competition.

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.

As noted above, 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, 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 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.

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?

The Panel considers it more useful to speak of improving rather than increasing transparency because transparency should be about the quality of information given, not the volume. 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 and the Panel recognises Ofcom is addressing these in other ongoing work streams.

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 welcomes Ofcom's articulation of different approaches to tackling consumers' requirements for different levels of information, and 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.

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?

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.

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

The Panel understands that Ofcom favours a co-regulatory approach to transparency obligations. It is crucial that, if this approach is adopted, Ofcom

adheres to its own principles on co-regulation.⁴ In particular, it is vital that regulatory objectives and commercial incentives are aligned. If Ofcom decides to pursue a 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, Ofcom should not engage solely with industry and in the absence of a formal consultation process the Panel would be happy to provide input.

The Panel advises Ofcom to approach any voluntary transparency obligation on ISPs with caution, given the low levels of compliance with the broadband speeds voluntary code. 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.

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

Ofcom should consider the imposition of minimum quality of service as a way of supporting the provision of essential services over the internet in future, which we envisage would most likely be public services. This may take the form of some variation on 'must carry' obligations.

6. Summary of recommendations

In summary therefore, the Panel is advising Ofcom to:

- Widen the scope of its work on net neutrality and traffic management to include a full consideration of the potential impact on citizens and on consumers' long-term as well as short term interests;
- In thinking about consumers, Ofcom should consider the impact on small businesses, who may experience many of the same benefits and costs;
- Conduct 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;
- Consider the role of positive commitments about the kinds of content and services consumers will be able to access and when in the provision of information about traffic management;
- 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.

⁴ Ofcom (2008) *Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation*
<http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/statement.pdf>