Policy Development Unit (B1), BU33 7/40
DG Information Society and Media
European Commission
B-1049 Brussels, Belgium

Email: INFSO-NETNEUTRALITY@ec.europa.eu

Vienna, September 10, 2010

ISPA CONTRIBUTION REGARDING THE QUESTIONNAIRE FOR THE PUBLIC CONSULTATION ON THE OPEN INTERNET AND NET NEUTRALITY IN EUROPE

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?

1. ISPA is pleased that the Commission has initiated a debate about the open internet and whether net neutrality regulation is required in Europe. In the discussion to date, there has been no clear definition of what net neutrality means and no definition of the problem that needs to be addressed. ISPA believes net neutrality is part of a wider debate about how Europe would like to see internet services develop and the policy tools needed to support that development.
2. Referring to the situation in Austria we currently do not observe problems with net neutrality and the openness of the internet.
3. However, technical and economic circumstances are regularly rapidly changing. Therefore, permanent and close monitoring of market changes which are able to affect the openness of the internet is highly important in order to safeguard the innovative capacity of the internet as a global source of creativity and innovation.
4. Competition and transparency are the key points to identify and also to avoid future problems of net neutrality and the openness of the internet. Special emphasis therefore must be laid on players with significant market power (like ISPs, Access Providers, Content Providers and Device Manufactures) who could use their position to distort competition and compromise the openness of the internet.

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

1. Possible triggers could be new services or new players claiming a lot of bandwidth as well as a slowing down of infrastructure investments, decrease of competition, technical developments or exclusive agreements – especially regarding content services – on a national, European or global scale.
2. Of course the backbone is most susceptible to prioritisation problems. The problems regarding net neutrality and the openness of internet are primarily problems of competition, foreclosure and transparency. Therefore, other segments of the internet value chain should not be left aside. For example it is highly important to safeguard

competition between the different ISPs and make sure that e.g. smaller providers can interconnect with bigger ones under fair conditions.

3. The direct influence between competition and net neutrality issues is bidirectional. Decrease of competition eg based on re-monopolisation tendencies in the access market could lead to a discrimination of services.
4. Nevertheless, the relative market power of ISPs and content or application providers varies. An ISP negotiating with a small, little known application provider in a sector where there are many competing applications may well have the stronger negotiating position. However, this is not true of the same ISP negotiating with a global “must have” application. The Commission implies that the ISP may be able to act as a “bottleneck” and consequently have considerable bargaining power. Equally, the application provider can threaten to block access to its application from users having an IP address associated with the ISP. In practice, therefore, the relative market power of both ISP and application or content provider depends on their strength in the market. We do not see a difference to many other markets and therefore no requirement for special regulation.
5. Fundamentally, competition between ISPs will be the best guarantor that customers have access to the applications, content and service they want. As long as customers have the information they need to make well informed choices (transparency), there is no need for regulatory intervention. The provisions of the recently revised Universal Service and Users’ Rights Directive would seem to be sufficient to provide the required transparency. They are not yet in force, so it is too early to conclude they are inadequate to address the perceived problem. Regulation now would, in effect, be to conclude that the revised regulatory framework is not adequate even before it comes into force and even without identifying an actual (rather than theoretical) problem.

Question 3: Is the regulatory framework capable of dealing with the issues identified, including in relation to monitoring/assessment and subsequent enforcement?

1. The current framework seems adequate to solve possible problems. NRAs are enabled to safeguard competition and to make sure that consumers are adequately informed about their products (see Articles 20, 21 Universal Services Directive).
2. In our opinion the effects of the yet to be transposed “telecom package” should be evaluated prior to suggesting further regulation.
3. NRA’s possibilities to act (eg the setting of minimum quality of service requirements on undertakings providing public communications networks, see Art 22 para 3 Universal Service Directive) only in case of market failure are already in place and should be measures of last resort.

Question 4: To what extent is traffic management necessary from an operators' point of view? How is it carried out in practice? What technologies are used to carry out such traffic management?

1. Traffic management is one of the most important issues for the operator. The holder of the network infrastructure is responsible for the traffic and has to balance net integrity, control of the net and his legitimate business strategies. The key is to ensure customers are given sufficient information to be able to make informed choices about the different offerings available (transparency).

address: 1090 wien, währingerstraße 3/18 • austria • europe
phone: +43-1-4095576 • fax: +43-1-409557621 • mail: office@ispa.at • web: http://www.ispa.at • zvr:551223675
UID-Nr.: ATU 543 97 807 • IBAN=AT59 1200 0006 6049 1705 • BIC=BKAUATWW • blz:12000 • bank austria:00660491705 • dvr:0931977

A specifically important reason for implementing traffic management measure is network security. Otherwise serious threats such as distributed denial of service (DDOS) attacks could not be effectively fought.

2. In general, traffic management allows operators to improve the functioning of the internet and customers' overall experience. It may mean prioritising voice calls, including VoIP, over software updates or certain peer-to-peer applications. Of course, different operators may take a different view of which services they should (de-) prioritise to improve their customers' experience, but that is part of the competitive process and provides customers with choice.
3. Therefore, the use of traffic management to address congestion or to prioritise certain services should not be seen as a market failure that needs to be regulated. It is a way of enhancing the functioning of the internet and the overall customer experience and should be welcomed.

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?

1. The terms "managed services" versus "public internet on a 'best efforts' basis" are not fully specified and it is therefore difficult to give a detailed answer to this question.
2. Generally, ensuring transparency for consumers and fair competition between operators is the best way to deal with the issue of net neutrality. Ultimately, it is the customers who decide about the product that fits their needs. Therefore they need correct and complete information and the possibility to choose between comparable offers.
3. Operators may want to offer what the Commission describes in its consultation as "managed services". To some extent this competitive differentiation already exists. This should be seen as a positive development, offering customers choice over the services available and encouraging experimentation and innovation. It allows operators to package services to match their customers' preferences.
4. As with traffic management to deal with congestion, transparency of managed services will be essential to a well functioning market. Consumers must have the information to make informed choices.

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

1. Yes, the same basic principles should apply to both markets. However, different access infrastructure might need different specific treatments to achieve similar network management goals.

Question 7: What other forms of prioritisation are taking place? Do content and application providers also try to prioritise their services? If so, how – and how does this prioritisation affect other players in the value chain?

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1. Prioritisation and selection takes place on every level of the internet value chain. It also occurs within content and application services and should not be seen as a problem per se if transparency and competition is safeguarded.
2. Prioritisation takes places in several forms; eg the auction platform Ebay.com prefers its billing service “paypal” to other billing services by embedding it into its website, providing “purchase protection” and special offers for customers using paypal. In this example the prioritisation of paypal has no sustainable effect on other billing systems due to the fact that other billing systems are not blocked and the market provides several alternatives.
3. Content and application providers steadily affect access providers business by further expanding into the internet value chain (eg revenue sharing between hardware operators and service providers). Since revenue for providing access is decreasing compared to the content market, any regulation of net neutrality should not support the current tendency towards an economic and competitive imbalance between the access and the content and application sectors.

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?

1. Exclusive agreements always have the negative touch of constricting competition and assist market foreclosure. Of course in principle such exclusive agreements could affect net neutrality in case network operators - especially those with significant market power - supply their exclusive partners with faster or more stable connectivity than competing companies.

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?

1. Self-regulation is a basic internet principle. Therefore regulatory measures should only be imposed after voluntary measures have failed under the requirements of proportionality and necessity.
2. Even if there are currently no obvious problems with anti-competitive discrimination resulting from traffic management or other prioritising techniques it is highly important to be aware of possible future developments causing problems in this field and to set actions helping to avoid or recognise such problems timely.
3. Transparency is an important issue. If problems on net neutrality arise and transparency is not warranted, voluntary measures as a further step like an industry code of conduct agreeing on certain minimum levels could help customers to achieve the needed information to choose the desired product and safeguard competition.

Question 10: Are the commercial arrangements that currently govern the provision of access to the internet adequate, in order to ensure that the internet remains open and that infrastructure investment is maintained? If not, how should they change?

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1. We do not see a threat to the openness of the internet and infrastructure investment by current commercial arrangements. However, since revenue for providing access is decreasing compared to the content market, any regulation of net neutrality should not support the current tendency towards an economic and competitive imbalance between these two sectors. In contrast to access services, content services are not only growing in absolute terms but also further expanding into the internet value chain (eg revenue sharing between hardware operators and service providers).

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?

1. In general, the market or voluntary measures have to ensure that customers' needs are reflected. Should, over time, offers to consumers be limited to an extent to where no effective consumer choice is possible (transparency is not given), intervention by the NRA might be considered since this is a clear sign of market failure. However, this should be a measure of last resort.
2. Setting minimum quality of service requirements should respect the technical principals of the particular operators. E.g. mobile network operators do not have full control over service speeds due to the nature of the spectrum as atmospheric conditions can make a difference to propagation characteristics.

Question 12: How should quality of service requirements be determined, and how could they be monitored?

1. Only the market can determine the necessary quality of service; thus NRAs have to make sure that consumers have the possibility to select the product of their choice and give their input to the market development. It is therefore highly important to monitor competition and efficiently intervene in cases of abuse of market power or generic market failure.

Question 13: In the case where NRAs find it necessary to intervene to impose minimum quality of service requirements, what form should they take, and to what extent should there be co-operation between NRAs to arrive at a common approach?

1. In a truly European telecommunication market, co-operation between NRAs can strongly contribute to the single market. However, especially the setting of minimum quality of service requirements will depend strongly on national developments and circumstances. It should be the subject of discussion between national operators, consumer protection bodies and the NRA in an effort to find a solution on a voluntary basis.

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

1. Transparency is – as argued above – a highly important measure to avoid negative developments on net neutrality stemming from traffic management or other potential

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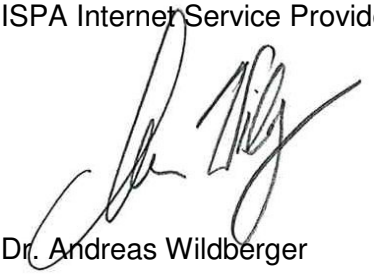
limitations. In our opinion the effects of the yet to be transposed “telecom package” should be evaluated prior to suggesting further regulation.

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?

1. It is possible that for example “walled gardens”, i.e., the provision of tailored services in a closed network environment could potentially harm the above mentioned freedom of expression, media pluralism and cultural diversity.
2. Anyway, today we do not see any concern that any other issues are affecting in a negative way freedom of expression, media pluralism and cultural diversity on the internet. If such developments would be observed in the future, NRAs would have to investigate if any regulatory actions are needed.
3. In summary we appreciate the commission’s impulse to start a debate on the open internet and whether there is a need for net neutrality regulation in the EU. There has been much said about possible market failures but there is little evidence to show actual market failures. In fact, a proper examination of Europe’s telecom markets mostly shows healthy competition to provide customers with better, faster services and to offer new innovative services. It is vital that operators have the commercial freedom to experiment and innovate with managed services in terms of business models, price and quality. The ability to manage congestion is also essential to providing customers with a good service.
4. The counterbalance to that commercial freedom is the need to be transparent with consumers about the traffic management policies deployed, and the nature of the managed services. Similarly, ISPA recognises the importance of the internet to modern society, and a legitimate requirement for operators to provide unrestricted internet access, possibly alongside any managed services they may also wish to offer.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Andreas Wildberger
Secretary General

About ISPA: ISPA is the Austrian association of Internet Service Providers, representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework supporting optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.

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