



30 September 2010

THE EBU RESPONSE

TO THE QUESTIONNAIRE FOR THE PUBLIC CONSULTATION ON THE OPEN INTERNET AND NET NEUTRALITY IN EUROPE

The European Broadcasting Union¹ (EBU) welcomes the opportunity to respond to the Questionnaire for the public consultation on the open Internet and net neutrality in Europe.

In fulfilling their public service mission the EBU Members seek to serve all users equally and without discrimination, irrespective of the means that users employ to access the public media services. This also includes those users who chose to access PSB services via the Internet.

A pluralistic Internet is of high social, democratic and cultural value, and public service broadcasters very much contribute to it. It is therefore essential that the public Internet remains open, neutral and transparent. The EBU view on the net neutrality is summarised in the following main points:

- Concerns over net neutrality arise where the network infrastructure has insufficient capacity to support the Internet traffic. Traffic management cannot substitute significant investments in additional network capacity and advanced technical solutions.
- Traffic management on the public Internet is only acceptable in some specific cases, such as alleviating congestions on the network, blocking unlawful content and dealing with cyber-crime (e.g. hacking attacks). Anti-competitive traffic management shall be prohibited.
- No discrimination of traffic with regard to its origin, destination, type of content, services or application should be permitted on the public Internet. It is particularly important that media services of general interest (e.g. those provided by PSBs) are accessible on the public Internet with sufficient quality of service (QoS).
- Traffic management may have implications for freedom of expression. Traffic management shall under no circumstances impose on Internet users any restrictions in terms of sending or receiving lawful content, using services or running applications of their choice.
- Exclusive agreements between content providers and network operators should not be permitted as this could harm smaller players and public service providers, leading ultimately to the detriment of the consumer.

¹ The EBU is the world's largest professional association of national broadcasters, whose Active Members are public service broadcasters in 56 countries corresponding to the ITU European Broadcasting Area, which includes all European countries, Central Asia, North Africa and the Middle East. Associate Members include broadcasters from Canada, the USA, Japan, Mexico, Brazil, India and Hong Kong, as well as many others.

The EBU's purpose is to serve and support the interests of its Members, promote cooperation between broadcasters and facilitate the exchange of audiovisual content. The EBU works to ensure that the crucial role of public service broadcasting, which is central to Members' activities, is recognised and taken into consideration by decision-makers.

The organization provides services to the broadcasting community at large, along with expertise specifically to Members on legal, technical and programming issues. It also conducts economic and market analyses and offers targeted training programmes. For more information about the EBU: www.ebu.ch

- Managed services could be offered above and beyond the public Internet. However, as they are provided on the same networks there is a risk that allocation of network capacity and investments will be diverted from the public Internet towards managed services that are more profitable for the network operators. Consequently, operators of such managed services must be required to make their services available on fair, reasonable and non-discriminatory (FRAND) terms and ensure they do not degrade the quality of other content being delivered via the public, 'best efforts' Internet. Regulatory intervention may be needed to ensure that managed services are not offered to the detriment of services on the public Internet and do not prevent access to media services of general interest with sufficient QoS.
- Regulatory efforts should focus on the implementation of the relevant provisions of the revised telecom package in order to safeguard public interest and ensure the highest possible level of net neutrality. Proper monitoring of the actual traffic management practices is required. Additional guidelines or co-regulatory mechanisms may be needed to affirm net neutrality principles for the public Internet at both European and national levels. If these measures do not lead to the desired outcome (i.e. open, neutral and transparent public Internet) additional regulatory measures should be considered. We welcome further clarity from the Commission about a range of issues (for example minimum quality of service) and welcome guidelines about the parameters of what the Commission considers to be acceptable traffic management.

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?

EBU response:

Concerns over net neutrality and the need for traffic prioritisation arise because of capacity constraints on the ISPs' access and backhaul networks.

In a number of cases services provided by the EBU members and other media organizations have been degraded because of network congestions and traffic management practices applied by the network operators. This is particularly significant in case of live programmes, e.g. coverage of popular sport events. This has resulted in consumer confusion and frustration, further complicated by insufficient transparency about these practices. The problem is more relevant for TV than radio services since the former require significantly higher bitrates than the latter.

EBU has concerns about the rise in potential incentives for discriminatory behaviour by network operators, which risks undermining the Internet's open and neutral character, and ultimately resulting in consumer harm and citizen detriment. While competition in the market should theoretically address any anti-competitive behaviour, we think there is currently insufficient competition in a number of markets across Member States. Until all fixed and mobile broadband markets are sufficiently competitive, there is a strong case for regulatory intervention to protect the principles of net neutrality.

One particular case is IPTV which is a managed TV service that normally offers better quality than streaming TV services on the public Internet, provided on the same network by the same ISP. In cases where these offers are not open to all interested content providers this could lead to distortion of competition.

Question 2:

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

EBU response:

The current capacity constraints on the networks can only be alleviated by investing in additional capacity and advanced technical solutions. In making investment decisions network operators need to dimension their networks on the basis of the anticipated future traffic volume for the whole investment cycle. As the Internet data traffic is expected to continue to grow, the network infrastructure will need to be continuously upgraded.

This is particularly relevant for the mobile networks, which have more severe capacity constraints and currently experience faster data growth compared to fixed networks. The costs of delivery over mobile networks are relatively high.

As the quality of service on the public Internet largely depend on the overall performance of the whole delivery chain, investments are required in access networks, backhauled as well as in the Internet core.

Three separate aspects have been identified which may lead to discrimination against certain type of content or content from certain providers:

- services that undermine the existing business models of the network operators
- services that generate large amounts of data, thus putting additional strain on the networks.
- cases where network operators have an economic incentive to prioritize certain services

The risk is particularly pertinent for public service broadcasters because they make content available free of charge and thus create editorial competition for other providers.

If a network provider offers managed services, it would be necessary to ensure sufficient quality of service for services on the public Internet. As both the managed services and the services on the public Internet are provided on the same networks there is a risk that investments would be diverted from the public Internet towards managed services, especially since the latter are likely to be more profitable for the network operators. This could in turn lead to a degradation of services on the public Internet.

Vertically integrated operators have incentives to restrict those types of traffic that compete with their own services. They may also discriminate in order to create sufficient capacity for their own services, even if they do not directly compete. Additionally, there are incentives for non-vertically integrated network operators to behave anti-competitively and distort competition, for example with preferential or exclusive arrangements with certain content providers.

Another potential issue is the neutrality in terms of terminal equipment, including mobile Internet terminals and connected TVs.

It is essential that every consumer can access the full range of content and services he or she wishes as this creates an important public value. Regulatory intervention may be needed to ensure that managed services are not offered to the detriment of services on the public Internet, in particular to prevent degradation of content which has a public value.

Question 3:

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

EBU response:

The current regulatory framework for electronic communications (Directive 2009/140/EC and Directive 2009/136/EC) contains key net neutrality principles (unrestricted end-user access to Internet content, services and applications; non-discrimination; transparency of traffic management; minimum quality of service requirements) including provisions to prevent degradation of services on the public Internet. It also empowers the national regulators to implement necessary measures to keep the public Internet open, neutral and transparent, including imposing minimum quality of service requirements.

It should be noted that these are fairly new regulations and have not yet been transposed by all Member States which makes it difficult to assess whether the current regulatory framework is sufficient or not. As a major principle it is important to ensure transparency, to enable the National Regulatory Authority (NRA) to assess the ISP's traffic management and determine whether it complies with the net neutrality principles.

The regulators should use the full extent of tools at their disposal. As a minimum, the net neutrality principles shall be affirmed in the national legislation. Monitoring of ISPs' traffic management practices and market developments is important as it enables the national regulator to apply necessary and appropriate measures. Furthermore national regulators and the Commission should be prepared to intervene rapidly and effectively where there is an evidence of anti-competitive behaviour or risk of consumer harm. Stakeholders throughout the value chain should be encouraged to alert the authorities to such behaviour.

The EBU welcomes additional clarity from the Commission about the extent and scope of competition tools available to NRAs to intervene. For example, whether it is necessary for SMP to be proven before anti-competitive traffic management can be considered. It is critical that regulatory authorities give proper consideration to the range of exclusionary behaviour that could emerge and be prepared to intervene swiftly and robustly if it becomes apparent. Further clarity would also be welcome from the Commission about the minimum level of consumer information that must be made available, and the form it should take.

Another important issue is the regulation of audiovisual media services that respects the principles of media pluralism and cultural diversity as recognized in the European law. The new audiovisual media services Directive (2007/65/EC as codified 2010/13/EU) covers both linear and non linear audiovisual media services irrespective of the networks used. However, the same principles are not applied to audiovisual services on the Internet originating from countries outside the EU/EEA.

With the rapid development of hybrid broadband broadcast technology (sometimes called 'connected TV') the non-regulated services coming over the Internet coexist side by side on the same TV screen with the regulated services delivered over broadcasting networks. This issue may need to be addressed by the media content regulatory authorities.

Finally, the European law recognizes the possibility to impose must-carry obligations in favour of specified radio and television broadcast channels and complementary services, and in particular public service offers, on networks used by a significant number of users for the reception of broadcasting services. Public media services on the public Internet must be offered at least under fair, reasonable and non-discriminatory conditions on all ISP networks.

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?

EBU response:

Given that this question is destined for “operators”, EBU will not address this.

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?

EBU response:

The transparent provision of traffic-related information to the consumer is necessary but, in our view, is currently insufficient in relation to traffic management. Significant further effort from across the industry is required to improve consumer transparency. Any information provided to the consumer should make clear what traffic management practices are in place and what it means for the users. In order for information to be meaningful for the users, it needs to be comparable and up-to-date so that it can be factored into purchasing and switching decisions. It is essential that subscribers – particularly of mobile networks – are empowered to differentiate between different broadband packages and any restrictions placed on accessing content, services or applications.

Traffic-related information should not be used as a means of advertising the managed services, which may be on offer from the same network operator over the same physical network.

EBU wishes to stress that network congestion which gives rise to network neutrality concerns would itself be allayed if sufficient capacity were available on networks. The associated network neutrality concerns would be allayed if the openness of the public Internet were protected.

Question 6:

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

EBU response:

Yes.

Whilst capacity constraints on the mobile network are larger than those on the fixed networks the same net neutrality principles shall be applied. This is particularly important since mobile broadband access should play an important role in achieving the objectives declared in the Digital Agenda for Europe.

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?

EBU response:

Public service broadcasters (PSBs) serve all users without discrimination. This principle is evident in the manner which broadcast networks are used to service PSB customers. Customers accessing PSB services via the public Internet should benefit from the same principle.

There are a number of forms of “prioritisation” which take place over Internet networks. Some of them are based on the type of application (e.g. Voice-over-IP (VoIP) getting priority over browsing). Such prioritisation could be used as a tool to favour a service offered by the ISP over similar services offered over the same network by other entities. EBU is against the use of prioritisation as a means of gaining competitive advantage.

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?

EBU response:

The main distinction between the public Internet access and the managed services is in the type of subscription and, possibly, the type of services provided. The public Internet access implies provision of user connection to the public Internet irrespective of service being used. Services are delivered on a ‘best efforts’ basis and QoS is not service specific.

A ‘managed service’ implies provision of a particular pre-defined service (or a set of services) offered by the provider. Managed services are provided only if they are subscribed to by the user. Conditions for provision of managed services should be stipulated in the subscription contract. QoS may be one of the differentiating factors and may be service specific.

Managed services could be offered above and beyond Internet access by a given network provider. Examples of this arrangement are the “triple play” packages offered by cable companies and ISPs including telephony, Internet access and ‘cable-like’ TV services. Importantly, these managed services are offered over the same physical network as public Internet access.

If managed services are more profitable for operators than the provision of public Internet access, the concern is that investments and allocation of network capacity would be diverted from the maintenance and expansion of the latter in favour of the former. This could lead to degradation, or at least stagnation, of the services offered over the public Internet. In the long term this may undermine the business models based on the public Internet and harm the public service value of the Internet.

If a network operator were allowed to agree an exclusive contract with certain content or application providers, this might lead to the situation where only content providers with sufficient resources are able to negotiate a deal, thereby distorting competition, hindering innovation, and resulting in reduced consumer choice. It is therefore crucial that managed services are available on FRAND terms to prevent this risk.

Regulatory intervention may be needed to ensure that managed services are not offered to the detriment of services on the public Internet and do not prevent access to media services of general interest with sufficient QoS.

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?

EBU response:

The concept of fair, reasonable and non-discriminatory (FRAND) access should also be applied to arrangements between content providers and ISPs with regard to the provision of managed services. It is important that 'managed services' are transparent and as clear as possible to end users, and do not degrade the quality of services offered on the public ('best efforts') Internet. NRAs should monitor arrangements by all operators, particularly vertically integrated operators, to ensure that:

- exclusive arrangements do not occur which distort competition. It is also important to ensure that network operators do not leverage their positions to favour their own content or services.
- 'managed services' do not degrade the performance of content being delivered via the public Internet. If necessary, NRAs should introduce a minimum quality of service to ensure that network operators and ISPs designate a certain proportion of network capacity to 'best efforts' public Internet access.

It would be helpful for the Commission to clarify what investigatory powers exist for NRAs, in order to ensure that a threat of regulatory intervention is genuine and credible.

We think there is an important role for industry to convene regularly to discuss developments and best practice, but also alerting NRAs to concerns or new challenges which can be addressed through dialogue and industry collaboration in the first instance. NRAs may wish to establish – in consultation with industry – a code of practice defining reasonable traffic management practices and the operation of managed services alongside 'best efforts open Internet access'. NRAs should retain an oversight function, monitoring and reporting on the practices and behaviour of network operators to identify the potential for consumer and citizen harm.

Such rules should be without prejudice to any measures taken by Member States within the framework of their cultural and audiovisual policies.

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?

EBU response:

EBU recognises that substantial investment will be required to safeguard a viable public Internet infrastructure in the future. There is a need for incentives for investment in next generation networks and services.

In an environment where operators seek to maximise the return on any investment in infrastructure, the main focus points of network neutrality will need to be re-enforced - perhaps with appropriate regulation. In particular, protection of the consumer and the safeguard of his/her right to access public service media needs to be ensured.

The arrangements between ISPs for the provision of services - particularly peering arrangements - require greater scrutiny in order to ensure that these arrangements are transparent and non-discriminatory.

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?

EBU response:

National regulatory authorities should monitor the ISPs traffic management practices and intervene in any case of sustained violation of the net neutrality principles.

Minimum QoS requirements should be introduced if managed services become the norm, in order to protect services on the public Internet. In this case, neutrality must be the presumption. NRAs should set (and monitor delivery against) the minimum quality of service requirements for the public Internet access, in consultation with ISPs, content providers and consumer groups. Any definition must be dynamic and should reflect the evolving expectations of end users to be able to run services and applications of their choice for a given subscribed connection speed.

Question 12:

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

EBU response:

A set of technical requirements should be identified that will ensure minimum end-to-end QoS on the public Internet and enable the delivery of audio-visual services (e.g. down-stream and up-stream bandwidth, throughput, maximum packet loss, latency, jitter, connection interruptions and other incidents). These minimum requirements should be specified in the subscription contracts and carefully monitored.

There are software tools that enable users to measure and monitor the actual parameters of their connection. These tools should be made freely available to all subscribers. In addition, appropriate mechanisms should be put in place for the users and service providers to report incidents and problems to relevant authorities.

Consumer associations should be pro-active in protecting interest of the users.

A minimum QoS requirements must be set at a level which allows all providers to compete on an equal footing, while giving new entrants scope to innovate.

We recognise that implementation of a minimum QoS would be complex and practically challenging. Minimum QoS could be made meaningful to consumers by describing it in terms of functionality and available services (e.g. long-form audio-visual content). Critically, any definition would need to be an evolving and dynamic concept, regularly reviewed and improved in order to reflect changing consumer expectations. Interpretation of QoS should be an industry-wide collaborative effort, overseen by the regulator, and with the consumer experience at its heart. We welcome further clarity from the Commission about ways to interpret QoS and approaches that NRAs should consider.

ISPs should be required to monitor QoS on their connections and publish relevant information.

Independent monitoring and market surveillance activities should be encouraged and, where appropriate, commissioned by the national authorities.

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?

EBU response:

Minimum quality of service requirements should be quantifiable and measurable. A set of technical requirements should be identified that will ensure minimum QoS on the public Internet, e.g. minimum down-stream and up-stream bandwidth and throughput, maximum packet loss and latency, jitter, connection interruptions and other incidents).

Co-operation between NRAs is important for exchange of information and best practices and in order to co-ordinate their approaches where necessary. In countries with similar level of broadband infrastructure (either fixed, mobile or both) the minimum QoS requirements would facilitate free flow of Internet traffic through the networks within and between these countries.

Question 14:

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

EBU response:

Transparency for consumers is very important.

As a minimum, the following information should be provided to all users:

- all relevant details of subscription contracts, including declared QoS parameters and any limitations
- information concerning any traffic management practices and the reasons for their application
- availability of monitoring tools and user guidance
- parameters of actually delivered services (e.g. bandwidth, throughput, packet loss, latency, jitter, incidents). This information could also be a more realistic basis for billing (i.e. instead of the subscribed maximum speed which is normally used at present).

In a competitive broadband market with full transparency of information, consumers could easily switch broadband providers if ISPs carried out unwanted traffic management practices. However, evidence suggests lack of effective competition in many Member States, whereas bundling of services and often onerous terms of contract provisions mean consumers do not switch ISPs. (see Ofcom Consumer Experience Study of 2009).

The EBU believes that the underlying reasons for the low levels of consumer switching between broadband providers in the EU needs to be more fully understood. It would be helpful if the EC and NRAs would consider establishing practical initiatives to significantly ease switching by consumers. This initiative should also consider when it would be appropriate for consumers to switch ISP providers if their access to lawful content has been blocked or degraded by their ISP, regardless of the market power of the ISP.

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?

EBU response:

The Internet is increasingly central to the lives of citizens, consumers and industry. It has transformed the way we work, communicate, access media, and contribute to society, offering unprecedented scope for freedom of expression, plurality of information, and economic growth. The Internet's unparalleled value as a tool for political and creative expression deserves the strongest protection against unwarranted barriers. Particularly for public service broadcasters, the Internet is now an essential platform for delivering services to consumers and interacting with audiences in unprecedented ways. Indeed, the popularity of high quality content from PSBs online has been a major driver of broadband take-up across Europe.

Overall the Internet is a critical platform for delivering plurality of voice, freedom of expression, empowering consumers, and developing international dialogue and interactivity. Broadly speaking the open and transparent nature of the Internet has facilitated these benefits and the minimum intervention by authorities has enabled such growth. Going forward, we think there are potentially some areas that the Commission may wish to consider:

- Internet governance: we think the current system of multi-stakeholder oversight of governance issues should be protected to ensure that governments or institutions cannot disrupt the Internet and the free flow of information and content;
- investment in local and national content: due to increased competition from global actors online, the importance of local and national content that reflects values of particular member states is increasingly important, particularly content from PSBs that is domestically-originated. We think the Commission should consider ways to ensure that high quality domestic content, in particular content deemed important for the democratic, cultural and social needs of European societies, is findable, has sufficient prominence, and is easily accessible by all consumers.

Whether in the broader context of Internet governance or in the more specific context of Internet traffic management, it is of the utmost importance to pay attention to the possible implications for the freedom of expression, as well as pluralism and cultural diversity.

As stated by the European Commission in its Communication on the future of European regulatory audiovisual policy of 15 December 2003, certain general interest objectives, "such as cultural diversity, the right to information, the protection of minors and consumer protection are not called into question by technological or market developments. What is questioned are the means by which these objectives can be achieved in a changed environment".

Today, networks operators and ISPs, sometimes vertically integrated, have the tools and technical ability to manage the Internet traffic flow in case of network congestion, but at the same time these tools allow them to act as gatekeepers with respect not only to content providers such as broadcasters, by blocking and degrading their access to the Internet network, but also to consumers/end-users by blocking and degrading their access to certain content and applications.

This situation entails major risks in terms of pluralism of information and cultural diversity on the Internet; for example if users do not have access to a wide variety of (quality) content of their choice. Moreover, there is a risk that users may not be aware of the services due to bad referencing in programme guides, navigators and other discovery tools such as search engines.

As mentioned in Recital 5 of Directive 2009/140/EC of the Telecom Package, "the separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection".

In that respect, public service broadcasters have a fundamental role to play in the new online environment in offering all European citizens varied content of high quality and in guaranteeing and promoting fundamental European policy objectives such as social cohesion, media pluralism and cultural diversity. At the European level (including the Council of Europe) this aspect has been recognized by several texts (for example, the Amsterdam Protocol and the European Parliament Resolution of 25 September 2008 on concentration and pluralism in the media, and especially point AP²).

As more and more public service broadcasters use the Internet network to distribute their content and services, net neutrality principles are a fundamental instrument (as are must-carry rules on broadcasting networks) for enabling them to carry out their public service remit, and especially for ensuring that such legitimate general interest objectives as media pluralism and cultural diversity are fulfilled. Public service broadcasters can play an important role and help bring about a better balance to the online world, as they have done in traditional media.

It is thus crucial to ensure that Internet broadband networks serve the communications needs of each society and facilitate the creation, exchange and dissemination of content, including the content of public service broadcasters. This is of key importance for cultural diversity in Europe as European broadcasters (both public and commercial) finance more than 80% of Europe's original audiovisual programme production.

Moreover, at the international level the UNESCO Convention on cultural diversity encourages States to adopt appropriate measures to protect and promote the diversity of cultural expression "whatever the means and technologies used". This means that, in line with the principle of technological neutrality, these measures should also be applied to the Internet and broadband environment.

The "European audiovisual model", which implies the co-existence of commercial and public service media and places much emphasis on cultural diversity, needs to have an equivalent on the Internet too. In terms of pluralism and cultural diversity, both commercial and public space is needed on the Internet.

It is also important to mention the Council of Europe's Recommendation Rec(2007)16 on measures to promote the public service value of the Internet, which defines the latter as "people's significant reliance on the Internet as an essential tool for their everyday activities (communication, information, knowledge, commercial transactions) and the resulting legitimate expectation that Internet services be accessible and affordable, secure, reliable and ongoing".

² "AP. whereas universal public access to high-quality, diverse content is becoming even more crucial in this context of technological changes and increased concentration and in an ever more competitive and globalised environment; whereas public audiovisual services are essential for democratic opinion-forming, to enable people to familiarise themselves with cultural diversity and to guarantee pluralism; and whereas these services must be able to use the new broadcasting platforms to carry out the task they are given, to reach out to all the groups that make up society, whatever means of access are used."