GSMA Position on Open Internet
Telecoms Single Market Proposal
13 April 2015

Preserving an open Internet, in the sense of everybody being entitled to distribute and access the content, services and apps of their choice, is clearly fundamental. Indeed, this relates not only to the ‘network’ side, but also to the Internet value chain in its entirety.

Before entering into the details of any possible new EU rules on open Internet, we feel it is important to revisit first principles in relation to net neutrality:

1. **All traffic has never been treated identically in the Internet**: Traffic management has long been an important tool in meeting the needs of users of Internet services. In addition, optimisation, caching, intelligent traffic management and providers of Content Delivery Networks have a business model based on obtaining revenues by improving quality of experience for end-users. Traffic management will become more important with the growth in video services and the development of new technologies such as LTE, as even voice is delivered over the data networks.

2. **EU rules should focus on desired outcomes**: In the fast moving environment of digital technologies, adopting new EU rules on Internet openness should avoid two main risks: (i) that they might quickly become obsolete, and (ii) that they might get drawn into picking winners or second-guessing innovation. We believe that any new European initiative should be proportionate, technology-neutral and future-proof. This is why it is essential to ensure that the provisions on the open Internet remain as a set of high-level principles that are simple and clear. This would be both so that operators can implement them, and regulators monitor them. Any legislative text should focus on the outcomes or objectives for policy, rather than specify detailed technical inputs.

**Within Internet access services, all traffic is not treated identically, and EU rules should recognise the centrality of this concept in order to allow effective functioning of the network**

IP networks route packets according to their respective characteristics. First of all their destination must be considered, and this must further take into account the constantly changing availability of routes. Thus routing is simply not identical for each packet. Technical optimisation of packet routing must also recognise that while email packets can be slightly delayed (a matter of milliseconds) with no impact on customer experience, the same is not the case for real-time services such as voice or video. These latter two must happen in real time. Internet access providers need to be able to operate their network efficiently, and therefore regulation should only seek to cover undesired outcomes.

The latest EU proposals provide that operators can “prevent imminent network congestion and mitigate the effects of exceptional network congestion, provided that equivalent types of traffic are treated equally”. Traffic management has always been employed by operators so that the Internet can function effectively, efficiently and successfully, as it does today. Efficient network management does not, of course, mean that the Internet is distorted or that customers are not able to enjoy content, services and
applications of their choice. It simply means that services work better and networks run more efficiently. This is particularly important in the area of mobile networks whereby the ‘last mile’ is currently more capacity-constrained, as well as being affected by unpredictable working conditions.

Traffic management can be used to optimise video, reducing the size and therefore the cost to the end user. It may also be used to manage quality based on distance from cell sites and interference from surroundings, amongst other things. Traffic management is a discipline in a constant state of innovation. Innovations are regularly/frequently being made to maximise network capacity and ensure quality for the end user. In this way, the investment in network capacity is complemented by active network management. We would hope that policymakers recognise the dual objectives of maximising network capacity and ensuring end user quality, and the importance of enabling innovation in network management towards those objectives.

It is therefore essential that any rules on traffic management first of all acknowledge that traffic management is beneficial to overall consumer welfare.

Secondly, therefore, we would hope that those rules avoid seeking to fix in any rigid way the methods to be employed for networks to function. In that sense, prescribing a limited list of cases where traffic management is deemed reasonable is not future-proof. Indeed, we believe it risks having unintended negative consequences.

Thirdly, it is important here to underline that operators must remain able to fight efficiently against spam, optimise traffic and prevent congestion. To ensure efficient network utilisation and optimal end-user experience, congestion management cannot be limited to situations of “imminent” congestion, nor of “exceptional” or “temporary” effects of congestion. Congestion happens frequently as part of normal network operation, especially on mobile networks. CISCO recently published an illustrative video which explains the functioning of the Internet, highlighting the importance of traffic management. Similarly, spam filtering takes place deep within the network to address known spam issues, and also should not be restricted to customers who have actively consented to this filtering.

**EU rules should focus on Internet access services offered to consumers and avoid being prescriptive on innovative services**

Within a single network, many types of service can co-exist, including Internet access services that are delivered on a best effort basis, and other services where operators need to guarantee a certain level of quality. These services are characterised by specific requirements in terms of efficiency, interoperability and reliability.

Operators are already providing such services as managed VoIP, IPTV, and VPN for enterprises. The possibility of offering quality-controlled services will foster the development of a whole range of innovative services to businesses (e.g. e-health applications, telepresence, M2M, cloud services), as well as to consumers (e.g. gaming), while enabling more efficient utilisation of networks and thus ensuring more capacity is available for Internet access services.

We believe those policies that seek to prescribe the detailed and technical aspects of such services have been seen to be very limiting over recent months, as well as problematic to implement; the problem is that it is virtually impossible to imagine a single definition that covers all those existing services, never mind those that are still to be invented. The FCC Decision also refrains from defining those services, for that very reason, as set out below.
This can be seen in relation to the fact that previous definitions proposed have notably included a requirement to ensure that those services are provided on “logically distinct capacity”. The provision of Internet access and other services over the same physical network infrastructure is the most efficient use of network resources. Flexibility in operating the networks and dynamically assigning network resources is important for the efficient management of multiple traffic flows over the network, while ensuring that operators can innovate to provide the optimal user experience in a fiercely competitive marketplace. On the other hand, the delivery of specific services incentivises operators’ investing in their network infrastructure for the benefit of Internet access services thanks to efficient allocation of resources. This is why any legal definition of the relationship between the two types of service must both preserve Internet openness and remain technically-founded.

This was recognized by the Specialised Services Committee set up by the FCC, who acknowledged that treating specialised services as entirely separate from the Internet access service would have a counter-productive effect on operators’ incentives to expand network capacity allocated to broadband Internet, which they would do in order to allow more space for specialised services. The Committee stated specifically that “Regulation should not create a perverse incentive for operators to move away from a converged IP infrastructure”.

In addition, the same Committee also acknowledged that technologies will evolve to address the problem in general, and there will be a general trend towards more application/service optimisation controlled by the provider. This is the thrust of proposals for “Software Defined Networking”, “Information Centric Networking”, and general cloud infrastructure. Consequently, our recommendation would be not to define services provided in parallel to Internet access services, and to exclude enterprise services from the scope of the net neutrality rules.

**EU rules should not ban or prejudge specific commercial practices.**

We would hope that EU rules could recognise the level of competition that has been achieved in Europe in the Internet Access Services market, and thus avoid regulating commercial offers i.e. on the basis of presumed future harm to consumers. Commercial flexibility is indispensable to addressing the needs of different types of customers. This includes the debate recently raised on “zero rating” and sponsored data. Those offers are fully consistent with the principles of the open Internet. In these cases, we believe that general competition law is sufficient to prevent harmful or anticompetitive discrimination. The FCC, in its above-mentioned Decision, has also refrained from prohibiting such practices.

In this regard, a general prohibition of sponsored data or zero-rated services would have a negative impact on consumer choice, consumer usage and innovation. This is before we even assess all the benefits it may bring to the competitive marketplace, which include increasing penetration, enhancing usage and boosting innovative start-up services.

**The FCC rules**

There has been much debate about the FCC rules on net neutrality. Overall, these rules are in many instances more benign for operators than what is either already regulatory practice or proposed in the European context. The FCC rules currently allow much more flexibility on reasonable traffic management, and exclude “enterprise services” from the scope of net neutrality. In addition, whilst the FCC rules introduce a “bright line” ban on paid prioritisation, they also have a number of exceptions and waivers, including specialised services – which are described as non-broadband Internet access services. These include connectivity bundled with e-readers, heart monitors, or energy consumption sensors, limited-purpose devices such as automobile telematics, and services that provide schools with
curriculum-approved applications and content, and existing facilities-based VoIP and Internet Protocol-video offerings.

The FCC has also decided against defining “specialised services” on the grounds that this may limit innovation and, ultimately, consumer welfare, stating that “(w)e disagree with commenters who argue that the Commission should adopt a more detailed definition for non-BIAS data services to safeguard against any such circumvention of the rules. Several commenters provided definitions of what they believe should constitute non-BIAS data services. Others, however, expressed concerns that a formal definition of non-BIAS data services risks potentially limiting future innovation and investment, ultimately negatively impacting consumer welfare. We share these concerns and thus decline to further define what constitutes “non-BIAS data services” or adopt additional policies specific to such services at this time”.

The FCC has defined reasonable network management, but in a way that is technology-neutral and future-proof: “A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service”.

Our recommendations

In summary, our recommendations are as follows:

1. The open Internet should be protected and customers should have the right to access and distribute legal content and information on the Internet.
2. Reasonable traffic management is essential for operators to both manage a limited resource efficiency and provide the best service possible to end users. Consequently, the definition of reasonable traffic management should be technology-neutral and future-proof.
3. Services provided in parallel to Internet-access services should not be narrowly defined in a regulation, as this may stifle innovation in the future, but the impact of these services should nevertheless be carefully measured and monitored.
4. “Enterprise services” should be excluded from the scope of net neutrality.
5. Commercial flexibility and choice is indispensable to addressing the needs of different types of customer, and these areas should not fall within the remit of net neutrality rules.