

Net Neutrality: UK, France and US developments in May/June 2010

July 2010

In the UK, Ofcom has released a discussion paper on net neutrality which comprehensively overviews the market and regulatory issues. We focus on this discussion paper, as it covers many of the complex issues for Telcos, content providers and ISPs. We touch on US and French developments in May and June.

Ofcom's net neutrality discussion paper has been heralded by 24 June's *The Register* as a departure from the US regulator's approach:

Peanut butter and jelly sandwiches. Baseball. McCarthyism. Net neutrality. Not all US cultural exports succeed abroad, and the latter has landed with a dull thud in Europe. Ofcom today opened a consultation on net neutrality but its preferred stance is likely to disappoint the Tin Foil Hat brigade of web activists who created and fomented the issue in the USA.

But while there can be differences of view, it may be the issues in the States are different from those in the UK. Therefore each country must look at its own circumstances, guided by principle. As Ofcom's Chief Executive noted:

As we think about this set of problems, it is worth noting that the facts on the ground are different here in Europe compared with the US.

In the US, limited competition, both at the network and at the ISP level, means that the potential for consumer detriment through traffic management is greater.

2009 and 2010 has seen an upsurge in the focus on net neutrality. For background see our articles: [Mobile Services and Net Neutrality](#), [Net Neutrality: The Plot Thickens Internationally](#) and [Net Neutrality and Online Content](#).

May and June sees major developments in the US, France, and UK debate. In the US, the FCC is grappling with its Court set back, with the "Third Way" proposal from the FCC Chairman, opposed by the minority Republican members.¹ The Court of Appeals limited FCC's jurisdiction in relation to cable operators: as the Court said, the FCC does not have the authority to "regulate an Internet service provider's network management practices".

ARCEP, the French regulator, has produced a report dealing with, among other things, guaranteeing internet access and quality of service, and transparency and non-discrimination.²

United Kingdom

In light of market developments, and forthcoming obligations and rights under the revised European Framework for Electronic Communications Regulation, Ofcom has kicked off the debate with a discussion paper,

¹ For a useful overview, see *The Register's* summary at: http://www.theregister.co.uk/2010/05/07/genachowskis_third_way/.

² http://www.arcep.fr/uploads/tx_gspublication/consult-net-neutralite-200510-ENG.pdf.

called *Traffic Management and 'net neutrality'* – A discussion document (24 June 2010).³ It seeks comments on preliminary views.

In summary those preliminary views are:

- Given the “all or nothing” connotations of “net neutrality” and the different views as to what it means, Ofcom talks more of “traffic management” instead of “net neutrality”.
- Traffic management has two main positive functions: preventing congestion, and differentiation of services (probably at differential pricing: which is often pro-competitive). But there are potential negatives. To be remembered is that discrimination in an economic sense can be pro-competitive.
- Discriminatory traffic management (which often will be pro-competitive as it enables competition, choice and innovation) will generally only be a potential issue where firms have substantial market power (SMP).⁴ Where those with SMP can discriminate to favour their own services, they will come under “*very close scrutiny to ensure that there are no anti-competitive effects*”.⁵ In the UK, the broadband markets are considered to be competitive, and therefore SMP issues may not arise. However, the paper does address competitive bottleneck issues such as local access. But bottleneck issues may crop up elsewhere too, such as in relation to the supply of valued content by a content provider. This highlights the complexity of the so called net neutrality debate. It has many facets, as we have noted in earlier articles. Regulators must consider the wider set of changes in the value chain, and not assume, contrary to the position of some, a fixed relationship between ISPs and content providers. That relationship is not fixed, says Ofcom. Ofcom considers that “*there are substantial dangers from premature regulatory intervention to*

³ <http://www.ofcom.org.uk/consult/condocs/net-neutrality/netneutrality.pdf>.

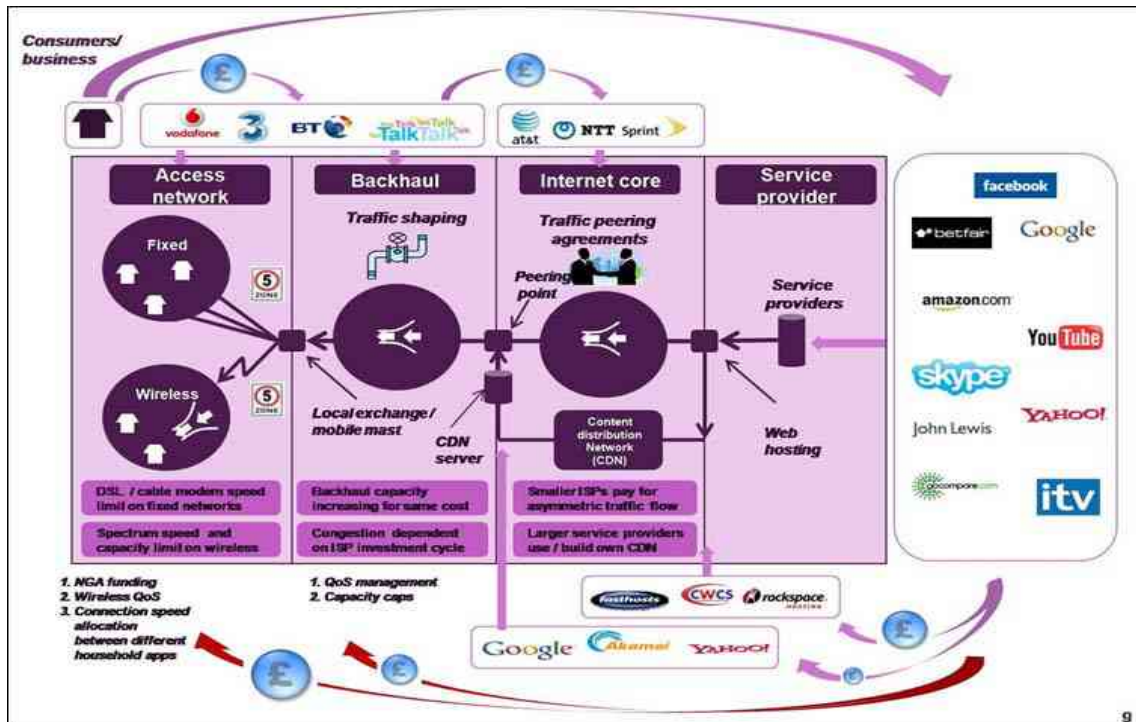
⁴ Ofcom at this stage of the debate uses the SMP concept as a broad conceptual principle: ultimately SMP needs to be considered at a granular level, with reference, as Ofcom notes, to relevant product and geographic markets, etc.

⁵ *Traffic Management and 'net neutrality'*, above n 3, p2.

support one part of the sector over another”.⁶

- Ofcom consider there is insufficient evidence at present to regulate traffic management requirements (in effect, to regulate, including under the reviewed European Framework, *ex ante* net neutrality/traffic management requirements). To the contrary, there is a danger in doing so given the complexity and evolutionary state of the markets.
- In this respect Ofcom explores the various market segments, particularly the telecommunications sector, the content industries, and the online sector (that is the more traditional “best efforts” internet sector). The inter-relationships are summarised in the following Ofcom diagram.
- As the telecommunications, content and online sectors change, points of friction will inevitably arise as to who controls customer relationships, and the rate of innovation. Firms in all sectors are competing for a share of advertising and customer-based revenue at a time when there is concern about the sustainability of many existing business models. (That’s not just traditional business such as newspapers: it includes online and telecommunication companies too).
- One key message from Ofcom is that the simple idea that content injectors should not be charged by Telcos when providing content (zero rating) could in itself be distortionary, given the complexity of the two sided markets (a topic addressed by Ofcom and also in our earlier articles). Regard must be had to the markets and revenues from various sources such as advertising, etc. To regulate just one facet (zero rating content injection or regulating traffic management) may be to distort the overall markets, says Ofcom.
- With the rapid rise of content distribution networks, and other market developments, there is real danger in regulation that could distort the market, including investment incentives. In a two

⁶ *Traffic Management and 'net neutrality'*, above n 3, p17.



sided market, “ensuring that these demand linkages are properly taken into account is critical to achieve the desired “efficient” market outcome”, says Ofcom when concluding that regulation is risky at this point. Ofcom continues:⁷

4.28 Prohibiting charging on one side of the market – i.e. to content and application providers – would be appropriate only if there was evidence that consumers place value on additional services, applications and content significantly more than the service providers value access to consumers.

4.29 On the basis of our preliminary analysis, it is not clear that such a prohibition would be proportionate. Indeed the introduction of wholesale charging could be consistent with an efficient market outcome.

- Instead of ex ante regulation, Ofcom will explore existing competition tools (e.g. ex post anti-trust and regulatory tools) and consumer transparency.
- Fundamental to Ofcom’s conclusion is the need for genuinely useful and understandable consumer information and transparency about the provider’s traffic management rules for a particular service. That enables (a) comparison between providers and (b) transparency around the impact of any change to traffic management upon the customer’s internet experience.
- In parallel, Ofcom is investigating ways in which customers can more readily and quickly switch suppliers.
- Ofcom concludes that the information provided to consumers must be carefully crafted, taking into account the developing area of behavioural economics. How can consumer information best be collated and presented so that consumers will consider it and switch suppliers, or make other decisions, based on that information? Ofcom suggest a number of possible models: a repeating theme in the discussion paper is the importance of getting right the content and presentation of customer information about traffic management.

⁷ Traffic Management and ‘net neutrality’, above n 3, p28.

- Broader social and political objectives inform Ofcom's discussion, but those matters are issues more directly for the EU as part of its review.

In addition to submissions on the appropriate approach, Ofcom is asking for evidence of problems, or otherwise, with traffic management, etc.

Assuming Ofcom maintains its preliminary views, it appears to be leaving things to the market to sort out, including the level of required consumer transparency. But there is

a warning, especially to those with SMP, that, if the position is not satisfactorily sorted, ex ante regulation (and/or ex post action) can be expected.

In short, a regulatory backstop will encourage resolution by the market. So will, as Ofcom constantly repeats in its paper, a well informed consumer base.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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