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EC Questionnaire for the public consultation on the open internet and net neutrality in Europe

Comments from the Initiative of European Network Operators (IEN)

IEN highly appreciates EC's public consultation on the open internet and net neutrality in Europe as an important step towards an elaborate and differentiated regulatory approach on this issue.

In the following, IEN would like to give some comments from the view of a Germany based association of pan-European network operators whose business models mainly focus on "high-end" business customers.

I. General remarks

IEN members are dominantly focused on the provision of services for business customers who demand national or multinational service packages. Their demands can be considered as to what ERG described in its report on the regulation of access products necessary to deliver business connectivity services as the "high-end" businesses. Customers in this segment increasingly outsource their communications requirements to operators who can meet their requirements across a range of countries. They do not only request end-to-end connectivity but offers which include a vast, often complex variety of services or applications that run over

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customer specific networks and thus, private IP networks. It is not uncommon that business customers outsource their entire telecommunication needs and ask for network management, maintenance and service. Customers often purchase by tendering the services they require to the market. Although this customer group might not be very large, it is however, very important in pointing the way towards future use of ICT.

When analyzing net neutrality issues, IEN considers it to be essential that the European Commission, NRAs and governments of the member states are aware of the way that businesses currently presently do and will in the future use ICT and moreover, the way the telecoms industry would seek to provide the underlying services. A clear distinction between different groups of customers is essential when considering and evaluating potential regulatory remedies. Business customers could be broadly viewed as users of communications services with individually negotiated terms of their telecommunications contracts. This differentiated terminology should be used to exempt business customer services from network neutrality measures.

IEN generally supports EC's current regulatory approach that was described by Commissioner Kroes in April 2010¹ and refers to obligations and possible remedies of the current EU framework but would also like to point out that the specific target group of each principle that was mentioned should be carefully considered. The debate on net neutrality is still at an early stage in Europe and therefore, over-hasty regulatory intervention should be avoided.

II. Remarks in detail

1. Open internet and end-to-end-principle

In view of IEN, the new framework contains a variety of regulatory measures to promote net neutrality. Hence, IEN urges the EC to carefully monitor whether those instruments will be effective and moreover, are necessary for all end customers and services.

Especially the potential impact of additional transparency requirements should be carefully considered with regard to the specific needs and requirements of the group of business customers as described above. These issues must be very carefully assessed before the EC could give any possible regulatory response.

With focus on transparency rules, IEN entirely agrees that such obligations may lead to benefits for consumers. As Commissioner Kroes stated in her

¹ See speech of Commissioner Kroes on April 13th 2010 at ARCEP Conference:
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/153>

speech, the transparency measures should ensure consumers “to understand and get what they pay for”. However, this statement clearly underlines the lack of necessity of such obligations for providers of business customer services. They demand for individually tailored products and services and their contractual agreements are negotiated in extensive detail. The contracts do cover all service topics and technical issues and furthermore consist of detailed service level agreements (SLAs). The highest conceivable level of transparency is therefore symptomatic for the service relationship. Any non-compliance with those SLAs is typically sanctioned by contractual penalties. Therefore, asymmetry of information issues, as they are discussed in the context of consumer services, do not arise in this market segment.

IEN generally agrees with the Commission that the new regulatory framework already provides a great variety of options to deal with any potential net neutrality issues. As such, any further regulatory intervention should be duly justified by the need to tackle specific problems which could possibly emerge. IEN furthermore supports the Commissions approach to strike the right balance between the parties concerned. In view of IEN it is essential that this also includes the differentiation between different consumer groups acting in different networks (public IP networks and private IP networks) and demanding different services.

IEN takes the view that in the European environment competition at the network level as set forth in the regulatory framework will ensure the functioning of net neutrality. Therefore, IEN would like to underline the Commissioners statement as recently declared:

“Strong competition in broadband markets may allow a more relaxed regulatory approach to net neutrality issues.”²

The most important objective of all NRAs and governments should be the granting of effective competition in all telecommunications markets. This allows network operators and other market participants to explore and develop innovative business models, an efficient use of the networks and will lead to better services and applications for all end users, including business customers and consumers alike in Europe.

2. Traffic management/discrimination

In view of IEN, effective competition under the new European framework will be the most effective instrument to prevent bottlenecks that might lead to issues that are discussed under the net neutrality banner. IEN calls on the governments and NRAs of the member states to implement and set

²See speech of Commissioner Kroes on September, 23 at ETNO :
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/472&format=HTML&aged=0&language=EN>

forth the revised framework for electronic communications to best promote competition.

IEN would like to stress that network management is essential for business customers that require stable and individually tailored telecommunication solutions. It should be pointed out that such services are often provided on private IP networks that are managed by specific network operators. Those services should be excluded from any obligations that are promoted under the net neutrality concept.

Traffic management is a necessary tool to:

- a.** comply with SLAs agreed upon in contracts with customers, which is the today's practice for business customer services
- b.** manage networks effectively in periods of transition to network upgrades
- c.** ensure efficient use of capacity restricted networks. Capacity in access networks is a scarce resource and needs to be priced effectively. Given that demand for traffic conveyance is heterogeneous (as different applications have different needs in terms of throughputs and bandwidth, and as different users have different sensitivities on the service provided) traffic management is inherently necessary for an efficient use of the given networks.

In addition, the Commission should generally take into account that network management is always needed to avoid network congestion and to improve the quality of services offered or to filter identified spam and malware. A differentiated treatment of network traffic is not necessarily indicative of anti-competitive behavior. Moreover, differentiation is not per se discrimination. Discrimination should be delineated from differentiation of services among customers. As customer requirements vary, differentiation of services does not automatically imply discrimination, rather differentiation is an effective means of maximizing consumer value. Unfair discrimination therefore implies some level of power over the market activities. IEN believes that unfair discrimination can prevail in circumstances of market power, i.e. being derived from ownership of bottleneck resources. Incentives to unfairly discriminate evolve in circumstances where discrimination is successful in delivering extra profit. In vertically integrated market proposals, the incentive to discriminate competing services at the downstream market can be substantiated by a locked-in situation of the customer on the downstream level or by competitors inability to get access to the upstream bottleneck on equal terms.

Incentives for potentially unfair discrimination arise in the vertically integrated environment as described above, when it is more profitable to influence downstream competitor's services (or block it). As set out above, the incentive might exist for market players who inhibit some sort of market

dominance. However, it is not obvious for the moment where such dominance would prevail which is not tackled by ex-ante regulation.

The required services of business customers involve proprietary networks and a high degree of traffic management at the customer's direction. These services should be taken into account when considering the need for a "managed services" exception envisaged in the revised Universal Service Directive's Recital 34, and particularly, the application of Article 22(3) powers to set minimum quality levels for network transmission services which are critical to large business customers.

As set out earlier in its comments, IEN believes that competitive markets and the enforcement of the current regulatory framework is sufficient to avoid any potential anti-competitive, discriminatory behavior related to net neutrality issues as regards traffic management.

3. Quality of service

IEN believes the EC should take a careful view on quality of service considerations in the context of imposing minimum QoS requirements. Firstly, and in general, minimum QoS obligations risk to leave aside the whole variety of consumer preferences at the lower end (creating inefficient market outcome). They furthermore risk to limit competition on the variety of service schedules, and it is likely to impose additional costs on the market outcome on operators and for supervision (verification). Secondly, in the context of business customer services, measures that direct at imposing certain quality standards and that do restrict the use of traffic management tools are likely to be inappropriate and harmful in the business communications markets.

IEN again points out that business customers as described above, do define those minimum standards themselves and demand for contractual penalties if these standards are not met by their telecoms providers of choice.

III. Preliminary conclusions from the questionnaire

IEN shares the opinion that the Commission should monitor the ongoing debate on net neutrality and the translation of the corresponding EU framework requirements into national law.

However, it should be stressed that the debate on network neutrality covers a broad variety of aspects that demand for require a differentiated consideration in individual contexts. The debate could also be considered as helpful to foster the discussion on broadband as a social and political goal and to review the consumers' position in regards to the public Internet

services that are on offer. As such, IEN takes the view that network neutrality is primarily a consumer-focused concept.

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As explained in detail, with regard to the use of IP networks, the needs of consumers are very different from the needs of business customers. For wholesale markets and for business communications services, a wide array of Quality of Services parameters that are individually agreed with the customer, periodical service reports, all of which are being backed by contractual penalty clauses, are constitutional to the contractual relationship between the telecoms service provider and the business customer. Business customers are ensuring the highest level of possible information to be gained from the operators in the market. When it comes to the provision of the IP based services, network management concepts are not only helpful but inherently necessary to comply with the service levels agreed upon with the customer.

In conclusion, lacks of transparency as they are discussed in the context of the consumer market, do not apply to the business customers markets. Thus, measures that aim at imposing specific concepts able to achieve a higher degree of transparency, non-discrimination of QoS on the consumer side turn out to be inappropriate, if not harmful, in business customer markets. An effective network management requires traffic shaping tools to comply with contractual obligations towards (business) customers.

IEN would therefore like to recommend the EC to acknowledge the existing differences in the group of customers and to embed this in the concept of network neutrality and any related potential remedies. Furthermore, IEN believes that effective competition on the markets would be the most successful way to grant net neutrality and as such, EC should monitor the effectiveness of the current regulatory framework rather than encouraging any over-hasty implementation of remedies.
