

# NET NEUTRALITY - THE UK DEBATE

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by *Katie Samadi*



## **Katie Samadi**

Global Sourcing  
+44.20.7847.9584  
katie.samadi@pillsburylaw.com

Ms. Samadi is an associate in Pillsbury's London office in the Global Sourcing practice and a member of the Information Technology, Data Privacy and Communications teams. She represents clients in outsourcing, IT, telecom and procurement arrangements, including providing related intellectual property and data protection advice. Ms. Samadi has represented European, U.S. and multinational organizations on outsourcing arrangements in the energy and financial services sectors.

Ofcom announced in October 2010 that, following its review of responses to a Discussion Document entitled "Traffic Management and Net Neutrality,"<sup>1</sup> it did not intend to impose regulation preventing or limiting the ability of internet service providers to 'manage' the flow of data at peak times by throttling or blocking certain applications or content. Ofcom says that it "will not regulate ahead of a problem and impose a market structure on the industry."

Key to the regulator's decision is that evidence of harmful traffic management policies (such as service providers favouring content provided by content providers that have signed a lucrative contract with the service provider) is "simply not there yet." It is argued by many (including the BBC) that, without ex ante regulatory intervention, anti-competitive practices could emerge, but as yet, there is little evidence of these practices being put into effect. Indeed, heavy regulation of traffic management could have a detrimental impact on consumers, because significant infrastructure investment will need to be made for services to operate unimpeded at peak times, thus raising access costs for all users. It has been argued that traffic management should be allowed as

a temporary measure only while investment in architecture allows the technology to catch up with demand.

Due in some part to interventions such as wholesale access regulation and LLU, to date in the UK there is no evidence of anti-competitive content management leading to consumer detriment (although it is questionable whether consumers are able to recognise the effects of traffic management on their internet service as they have never experienced a truly 'neutral' network). Fixed broadband competition is healthier in the UK (and across Europe) than in the US, where consumers have a far more limited number of broadband providers to choose from. Sky's response to Ofcom's discussion document noted that "the existing greater degree of regulatory oversight and competitiveness of the internet access market in the UK and Europe ensure that many of the observed behaviours and prospective concerns held in the USA, and which have given rise to this debate, are neither existent nor expected here. Competition can and should be relied upon to provide the necessary consumer safeguards."<sup>2</sup>

Ofcom's opinion that, for the time being, competition in the internet access market is sufficient to prevent

undue content or service blocking comes despite the fact that the ability of a consumer to switch service provider in the UK is constrained by product bundling, contractual tie-ins and the lack of transparency around other service issues (such as true speed). In a truly competitive market, a consumer will be empowered to switch services quickly and easily based on the range of information available to him, which should include transparency as to traffic management policies.

The European Telecoms Reform Package<sup>3</sup> will, when implemented into UK law, require operators to provide greater transparency around what traffic management measures they are operating, and in March the Broadband Stakeholder Group announced that most of the leading ISPs had signed up to a voluntary code of practice on transparency around traffic management practices. The debate between the regulator and industry continues as to what form traffic management information should take. It is clear that the primary aim of providing greater transparency is to allow consumers to choose to switch service provider if a certain traffic management policy is not suitable, but it is not clear how best to present the information so that it is easily interpreted by consumers. BT has suggested that certain terms are given standardised meanings, so that “Peak,” “Unlimited” and “Restriction” have a consistent definition,<sup>4</sup> and the voluntary transparency code (which will be launched in a pilot phase this year) encourages providers to present key facts in a common format. It has also been

noted that transparency of network management policies might also see an end to vague “fair usage” policies which impose unclear restrictions on what is otherwise sold as “unlimited” access.

The Communications Consumer Panel has suggested that consumers may find it useful to have positive commitments about the content and services they will definitely be able to access and when, rather than information about services they may or may not be able to use.<sup>5</sup> If given contractual force, this is akin to a guarantee of minimum service quality, which the Telecoms Reform Package also empowers national regulators to impose.

To date, Ofcom has stated that it would explore the use of its existing regulatory tools before considering imposing minimum service obligations, and it may be that a requirement for service providers to provide information about the quality of service that will be available at certain times will lead to a kind of market-led voluntary minimum standard, and at the least, service quality guarantees will become a point of competition between providers. Indeed, a truly consumer-friendly UK broadband access market requires service providers to offer a service that meets the needs and expectations of all of their users, and these needs and expectations are not equal. Any kind of universal minimum quality (which usually means ‘speed’) requirement would increase access costs for all users, and close the market for lower cost, lower quality services that meet the needs of some consumers.

The debate in the UK has centered not just around whether regulation should be introduced to ensure transparency in traffic management, but how to ensure that the policies introduced are fair and non discriminatory. The internet is now seen as an essential tool for living as a citizen in the UK and accessing public and private services: “the internet has become a utility akin to electricity or water.”<sup>6</sup> Assuming that some level of content or user discrimination is permitted, there are different models that service providers can employ: payment-related service optimisation (which may be time-bound, such as a three hour guaranteed service slot to download a movie, or may be content/user defined), or content-related optimisation, such as discriminating in favour of types of traffic that are likely to suffer packet loss such as video and video game streaming, or to blocking certain types of content (e.g. illegal or immoral content) or types of use (e.g. P2P). Many respondents to Ofcom’s June 2010 discussion document raised the citizen issues that might arise from the implementation of either of these philosophies, including the possibility that “universal” services such as iplayer and public eHealth services would not be accessible by certain individuals at peak times. Allowing some sort of traffic management might also conflict with the UK government’s commitment to delivery of universal broadband speeds of 2mbs by 2015.

What is clear is that, regardless of the place of the internet in our society and the importance of a viable standard of service to consumers,

Ofcom will not look to prevent or regulate traffic management by service providers until it is proven to be problematic. What may materialise is a market in which some services are prioritised on the basis of a commercial arrangement with the content provider/application owner, and in which consumer choice dictates that there will nevertheless be a kind of market-imposed minimum standard of service to protect access to essential public services and popular applications such as iplayer. O2 announced in early March that they would use their anticipated super-fast 4G broadband service (currently in the development stage) as “an equivalent of the M6 toll road,” allowing content providers to choose to use that channel, rather than 3G services, for certain content or services. This might be seen as the first highly publicised big step towards a two-tiered service offering, in which optimized services are available to those (on either side of the market) who are prepared to pay for enhanced content delivery.

### Endnotes

- <sup>1</sup> Traffic Management and ‘net neutrality,’ A Discussion Document, Ofcom, 24 June 2010
- <sup>2</sup> Response by British Sky Broadcasting Group PLC to Ofcom’s Discussion Document ‘Traffic Management and Net Neutrality,’ 9 September 2010
- <sup>3</sup> Consisting of Directive 2009/140/EC (the ‘Better Regulation Directive’) and Directive 2009/136/EC (the ‘Citizens’ Rights Directive’)
- <sup>4</sup> BT Response to Ofcom Consultation on Traffic Management, 9th September 2010
- <sup>5</sup> Net neutrality and ‘traffic management’ Communications consumer Panel Consultation Response
- <sup>6</sup> BBC response to Ofcom’s discussion document on traffic management and ‘net neutrality’