

Delivering super-fast broadband in the UK – Setting the right policy framework

Ofcom consultation

Response from Yahoo! UK & Ireland

December 2008

Introduction

Yahoo! UK & Ireland offers a range of consumer services including search, edited content and community services. We also operate an advertising network business, Yahoo! Network, which sells and brokers advertising on our owned and operated sites and those of third party partners both on the web and mobile. All these services rely on the performance of underlying platforms and on scale. Growth is driven by user engagement and levels of engagement rely on end-users having reliable and open access to the internet. Our comments on this consultation therefore focus on the impact policy decisions in this area could have on the wider digital economy and the expectations of end-users.

Summary

Ofcom has focused its analysis on removing regulatory barriers to investment in next generation access and giving providers clarity on how the framework will apply to the deployment and operation of new access infrastructure. We understand why this was the chosen starting point but it is a concern that the analysis has not progressed to an assessment of the wider impact of next generation access networks.

The interests of downstream businesses who will rely on future broadband infrastructure have an important bearing on how regulatory strategy and investment incentives are formulated by regulators and Government. There is a concern that, in its effort to support the investment case and give more certainty to network providers, Ofcom may endorse regulatory policies whose consequences would not be in the consumer interest. In some cases, they would also touch on established business models elsewhere in the media and communications sector.

There is also a concern that Ofcom's policy approach has the potential to reshape the future of the internet and users' experience of web-based services. For example, the consultation endorses the blocking of individual online services as long as users are informed that their service is limited in this way. This suggests that a provision designed to be an exception could easily become a norm were it not counterbalanced by a presumption that consumers will continue to enjoy end-to-end connectivity as they do today. It is also suggested that online services could legitimately be blocked where a network operator applies "carriage fees" to the site owner¹. The potential consequences

¹ See para 9.28

of such an approach would benefit from further analysis, particularly on consumers' online activity which will drive future growth in the web-based economy.

Consultation questions

Question 18: What actions, if any, should Ofcom undertake to support new revenue models from next generation access?

Section 9 notes that network providers are actively exploring new commercial models to underpin their investment in next generation access, in particular new opportunities to extract revenue from the value chain. Ofcom specifically asks how it could "support industry in these developments".

It is our understanding that Ofcom's objective is to remove regulatory barriers to investment and to give investors sufficient regulatory certainty to assess their business case. This objective must be balanced with Ofcom's other duties, including to further the interests of consumers and to promote innovation. It is therefore a concern that Ofcom expresses opinions about the desirability and acceptability of specific business models. Such matters are usually market-driven and, in some cases, the responsibility of other regulators and Government.

There is a risk that Ofcom may choose to adopt policies which appear to ease network providers' entry in to established and competitive markets and that this could be seen as exceeding Ofcom's remit. Providing such support could also act against the interests of other parties such as consumers and downstream businesses who rely on the underlying infrastructure. Since Ofcom will play a critical role in adjudicating on any complaint of unfair discrimination resulting from a novel business model, it could compromise its role as an independent regulator if it were to have previously endorsed the practice.

It is important that any activity Ofcom undertakes is within the scope of its statutory duties and, to that end, involves pro-active consultation with all relevant stakeholders, as well as access providers. We do not believe that Ofcom should take specific action to support new revenue models. Ofcom does, however, have a critical role in ensuring that such plans for revenue-generation are executed in a way which protects the interests of consumers and are not anti-competitive or unfairly discriminatory to other legitimate interests in the market. It would be helpful for Ofcom to give stakeholders clarity on how it can help ensure that new business models are effected in such a way and to give stakeholders an opportunity to discuss the relevant processes and remedies.

Question 20: Are these the right actions for Ofcom and other stakeholders to be undertaking at this time? What other actions need to be taken or co-ordinated by Ofcom?

We agree with Ofcom's conclusion that some demand uncertainty is unavoidable and that constructive engagement between players should be encouraged. As outlined above, however, there is risk that this activity could extend to facilitating the emergence of a specific business model or revenue-generating activity which benefits a particular stakeholder group and may be in direct competition with established models being pursued by others.

Figure 7 helpfully outlines Ofcom's planned activity following the consultation. The column on "consumer policy" is somewhat unbalanced in terms of protecting the interests of end-users. Some additional Ofcom activity would promote their interests more actively. Ofcom could also conduct a wider examination of the competitive environment and consider how investments in next generation access, if incentivised by certain policy decisions, might impact on the competitiveness of downstream markets. This additional activity would fall in to 3 main areas:

1.

Assessing the interests and needs of end-users in the next generation works: Many assumptions have been made about end-users but this has yet to be backed up with independent research. It is important to understand user's expectations of future broadband infrastructure, particularly with regard to choice, control and quality of service. This assessment also includes exploring the value of establishing a presumption of end-to-end connectivity in Ofcom's consideration of the regulatory framework. Ofcom is a strong advocate of information transparency for end-users so that they are aware of any service limitations from a particular broadband provider. However, such provisions risk legitimising network blocking and degradation by all access providers were there to be no presumption that users will continue to enjoy the choices that they have today. Downstream providers and consumers will have limited redress if, from the outset, such practices have been endorsed by the regulator. It is critical that limits to end-to-end connectivity are the exception not the rule. Ofcom has a role to play in establishing essential user rights.

2.

Requiring access providers to be open and transparent about current and planned network management policies: It is fast becoming a matter of fact in the policy discussion that network management activity will be necessary to manage demand for bandwidth in the next generation world. If this is the case, it has been accepted with little clarity about what access providers mean by "network management" and how it will be carried out in practice. Ofcom can direct access providers to explain how they propose to implement traffic management policies and demonstrate how they could be non-discriminatory, fair and pro-competitive. This exercise must also provide for consultation with stakeholders, including consumers and downstream service providers.

3.

Anticipating how complaints from users and downstream service providers should be handled: Many downstream businesses whose customers rely on their broadband connection to access their service have experience of site blocking or active traffic degradation. This experience shows that ISPs will often cite "network management" or "network security policy" as reasons for a site being unavailable and take no action on receipt of a complaint from a customer. The downstream service providers typically receive a similar response. More importantly, ISPs retain little historic data which shows that the activity actually occurred. It will be important for these stakeholders to be assured that Ofcom has in place the powers, expertise, resources, processes and access to evidence in order to investigate a complaint about unfair discrimination or activity whose effect is damaging to a third party. Timely and effective remedies that resolve matters quickly are also important and should be capable of acting as a deterrent to further discrimination. We would hope that Ofcom can show how it would respond to complaints of this kind.

Conclusions

A number of stakeholders raised concerns during Ofcom's first consultation on next generation access, which touched on matters critical to the future health of online businesses. These are not trivial. Myriad downstream businesses have been established on the assumption that the end-user will continue to purchase broadband access on the understanding that it offers fair and open access to the internet as they know it today. It is therefore important that Ofcom explore and anticipate these issues which affect a wider group of stakeholders, in addition to access providers.

The Caio Review reported its conclusions in September and recommended that Government register additional public policy issues arising from next generation access, identify options for solutions and drive forward action to address them. Digital Britain will also explore how investments in next generation access will influence the future growth of the digital and communications sector as a whole. Ofcom has much to contribute to both exercises. We urge Ofcom to give more weight to these issues as it progresses its assessment of regulatory options.

About Yahoo! UK & Ireland

Yahoo! UK & Ireland is a subsidiary of Yahoo! Inc., a leading global Internet brand and one of the most trafficked Internet destinations worldwide. Yahoo! is focused on powering its communities of users, advertisers, publishers, and developers by creating indispensable experiences built on trust. Yahoo! is headquartered in Sunnyvale, California.

Contact

Please address any questions regarding this response to:

Emma Ascroft
Head of Public & Social Policy
Yahoo! UK & Ireland
125 Shaftesbury Avenue
London WC2H 8AD
Tel: 020 7131 1088
Email: eascroft@yahoo-inc.com