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open, competitive choice for IT users

European Commission Communication on Future Networks & the Internet

Response of “Open & Collaborative Internet” Special Interest Group, OpenForum Europe

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Introduction

The **Open & Collaborative Internet Special Interest Group of the OpenForum Europe** was established in July 2008 to support a shared vision of the future of the Internet as an open, accessible and collaborative eco-system to the benefit of users, citizens and businesses.

Internet has brought substantial benefits to users of all kinds, whether professional or domestic, young or old, rural or urban. Benefits include greater access to knowledge, services, recreational resources and the ability to connect with multiple communities of like-minded users. It has lowered the barrier to market entry and service innovation for countless SMEs, and massively extended their markets across borders. By helping equalise traditional asymmetries of information or resources, Internet has empowered digital natives and digital immigrants¹ alike and made it easier for people to participate in, and comment on, the world around us. A new computing trend towards a web-based computing environment -“cloud computing”- opens a range of new opportunities for innovation, efficiencies and collaboration, provided that the challenges for openness and standardisation of this new, emerging Internet platform are met.

These developments have been possible because of the open, interoperable and collaborative way in which the Internet has grown. Today's open Internet is based on open standards, notably TCP/ IP and http. These standards give any and all users both Internet access and the ability to create innovative content and offer innovative services on the Internet. Maintaining and further extending the benefits of the Internet to all of us will depend on whether the Internet continues to be built around principles of interoperability, and the widespread use of open standards, which are free from all restraints on implementation, including royalties.

Furthermore, a fair, non-discriminatory, transparent and competitive playing field that ensures consumer choice must be maintained so that end-users can reach the Internet applications, content, and services they desire, without anti-competitive discrimination or restrictions. Only then can the Internet keep innovating and drive the economy, giving consumers and enterprises greater choice at an affordable cost, and delivering maximum benefit to the European and global economy.

This challenge is one that we should not avoid. As the web continues to increase in economic and social importance, so the incentives for some economic operators to deviate from the open and collaborative model are accentuated. The risk that predatory platforms, based on closed and vendor-specific specifications, might be abused to enclose sections of the Internet, segment its users for narrow short term revenue gain, and counter the overall economic good, is a real one that should not be underestimated. There is also a risk that some broadband access providers start to discriminate among applications and content of users' choice, for instance by providing faster access to their own services or applications over competing ones in ways that do not represent fair use of

¹A digital native is a person who has grown up with digital technology, whereas a digital immigrant is an individual who grew up without digital technology and adopted it later.

added value investment. Such risks are particularly great with respect to, but not limited to, dominant market players.

Our broad membership, drawn from software and Internet companies, as well as not-for-profit partners, reflects the wide understanding that the development and improvement of the Internet in an open, collaborative and competitive environment has ceased to be merely a question of technology: it is now also a key strategic public policy objective.

It is in this context that OFE very much welcomes the discussion launched by the European Commission on future networks and the Internet. We look forward to an ongoing dialogue with the European institutions and governments as well as other stakeholders on the ideas raised in the Commission's Communication, and developed in this paper.

Specific comments

The Special Interest Group on "Open and Collaborative Internet" congratulates the European Commission on their willingness to address the complicated commercial and technical issues which face the Internet of the future. Technological convergence requires an open discussion about the future of the Internet, and we welcome the broad view adopted by the Commission that identifies challenges not just in the traditional realm of Electronic Communications Networks and Services policy but beyond into other areas such as standards and copyright policy.

On this basis, we wish to make the following comments about specific aspects of the Communication.

Open standards

We welcome the Commission's recognition that "the win-win of open interfaces and open standards is that the market can grow for all." It correctly acknowledges the risk that "dominant players may try to use proprietary standards to lock consumers into their products or to extract very high royalties from market players".

The European Commission's review of ICT Standardisation policy in the EU recognises the need for European policies to be based on widely accepted global open standards, and the important role that non-formal standards bodies can play in the delivery of European policies. We welcome the opportunity to continue to contribute to that discussion, in view of a planned White Paper on ICT standardisation. We would like to underline that the time has come to fully recognize global fora/consortia and their open standards in European legislation. Safeguards, such as criteria for which fora/consortia should be recognised, are relatively easy to put in place and correspond with the stakeholder intention to limit the potential for commercial interests to distort international standard setting procedures. The result would be more dynamic, up-to-date, robust standards to support a legislative framework that reflects the evolution of the software industry.

The importance of open standards and specifications for the Internet cannot be overstated. Today's open Internet is based on open standards and specifications such as TCP/ IP, and http, to name just a few, and the Internet of the future will require the elaboration of new open standards. Open standards ensure that neither prior permission nor royalties are required to implement them and that companies can freely create products which interoperate with others across the Internet. It will be crucial for realising the productivity and value gains inherent in the emerging use of Internet-based applications that such applications be interoperable and use open standards. At a minimum, fully and completely disclosed, and effectively implementable Application Program Interfaces (APIs) are an essential element for interoperability and collaborative working within business and private communities. While the Internet moves very quickly, traditional standards organisations do not move at this pace, so there may be a time lag before all of the key specifications, emerge from an open, collaborative process. However, maximum openness is always the goal for standardisation, since software interoperability builds on open standards and specifications.²

Looking forward, the area of software interoperability, which is best served by open standards, is a topic to be considered for potential framework legislation, due to its ripple effects across the European governance value chain. Currently, it is scattered in dozens of directives, which may not necessarily be contributing to better regulation, nor towards enhancing the R&D and policy agendas. European policy for Information Society and Media now has the opportunity to set the tone, redefining open standards-based interoperability as a key asset of

² See the recent article on "The Momentum of Open Standards - a Pragmatic Approach to Software Interoperability", European Journal of ePractice, No 5, 2008. [<http://www.epracticejournal.eu/document/5156>].

the Internal Market, keeping in mind the global nature of the Internet. The major thrust of such a directive should be a mandate to use and procure open standards and a roadmap for migration to open standards in the European institutions and in the Member States. In the meantime there are significant powers to impose standards or interoperability both in single market, member state procurement legislation and under market access rules under the Electronic Communications Services. We believe the Commission and the suggested enhanced European Regulatory Group should look to ensure these powers are harmonised and used to defend the Internet as a platform for innovation and competition.

With desktop-run applications potentially loosening its grip on end-users when a significant cloud computing environment emerges, policy-makers should be vigilant of attempts to leverage closed standards built on proprietary technologies, protocols, formats and programming technologies, to the Internet. The very same commercial lock-in strategies known from the PC environment are likely to be reproduced in the new environment. In addition, the convergence between telecommunications and IT concerns and technologies is also fragile. It is important that the Internet logic and software players' industry-wide demands for openness survives the pressure from both PC and telecommunications players which may traditionally operate with different business models that are challenged when they have to suddenly co-exist and interoperate with other technology domains. Furthermore, the Internet industry has developed a range of dynamic standards-setting processes, and it is important that (1) these processes remain open and transparent, and (2) all players effectively implement web standards and do not "fork" agreed standards, for instance by adding proprietary extensions that create *de facto*, *closed* standards.

Because of the increasingly networked government, industry, and society, we note, on a general basis, that interoperability, standardisation, and open standards in particular, have become exponentially more important from the days of e-Europe, and even now, as we begin to look beyond the i2010 strategy. We strongly feel this shift should be reflected in the upcoming strategy for DG Information Society and Media, and could be accompanied by legislative efforts on open standards supported by improved use of existing powers, policy and R&D actions. We believe this would be forward looking, and will contribute to the global effort needed to salvage the Internet from a multitude of large players seeking short term financial gain at the expense of the sustainability of the overall system. Without a push for open standards, the Internet will continue to be fragile as we move into the next decade.

For more specific advice on open standards, we refer to OFE's Special Interest Group on Standards.³ This group recently produced a one-page brief on the topic, attached for your convenience.⁴ We would be pleased to respond to any specific knowledge and information requests by the Commission, as we are currently ramping up our think tank capability in the area.

A fair, non-discriminatory, transparent and competitive playing field ensuring consumer choice

A key component of the Commission's Communication relates to the discussion surrounding a fair, non-discriminatory, transparent and competitive playing field (the Commission communication uses the term "net neutrality"), the principle that end-users can reach the Internet applications, content, and services they desire on a level playing field, without anti-competitive discrimination on commercial grounds, or restrictions. The Communication rightly states that "traffic management could be used for anti-competitive practices such as unfairly prioritising some traffic or slowing it down and, in extreme cases, blocking it." The conclusion of the Council of Ministers on the Commission's communication recognises "that open and non discriminatory access to the Internet should be promoted in order to ensure effective competition and an innovation-friendly environment." We agree that while Internet traffic can be duly managed to guarantee quality of service at busy times, there is no place for anti-competitive discrimination that prioritises some content over other as a function of commercial ownership, agreements, or interests. There should be a principle requiring non-discrimination between comparable services on the same underlying infrastructure (i.e. within the same class of use from the perspective of the end-user; for instance, IPTV services will certainly compete with video-streaming platforms so they should be considered to be comparable services). This does not prejudice the right to undertake reasonable network management if and when necessary to address congestion at peak times (for instance by prioritising latency-sensitive applications to ensure quality of service), or improve specific services with investments in networks and infrastructure enhancements.

Commissioner Reding has herself elaborated on these themes in recent speeches⁵, where she spoke of the need to "prevent powerful interests putting at risk the openness of the Internet as a public space and weakening innovation on networks". We welcome the intention to elevate the debate from the technical to the political

³ See OFE's Special Interest Group on Standards: <http://www.openforumeurope.org/initiatives/sigs-1/standards-sig/>

⁴ See <http://www.openforumeurope.org/library/onepage-briefs/ofe-open-standards-onepage-2008.pdf>

⁵ OECD Ministerial conference Seoul, June 2008 <http://www.oecd.org/dataoecd/37/40/40972025.pdf>

imperative level, and the recognition by senior European politicians that “a truly open digital economy based on interoperable networks and inclusive access to the Internet is of crucial importance”⁶.

These pronouncements are welcome to put into context the comments by some that forms of traffic intervention discriminating among competitors is justified to ensure adequate return on investments into next generation networks.

Providing such clarifications is essential. Firstly because new services and applications are the main driver creating the demand for better broadband, and thereby potentially create the commercial environment in which network providers may make a return on their own services. Secondly, because a purely retrospective application of competition law could jeopardise the innovative culture of the Internet, and inhibit open competition on the Internet.

Competition must always be on the services and products around the platform, not on the platform itself. The issue is complex and the territory ever changing, so national regulators should be encouraged both to monitor and to address these new issues.

The reason that the Internet has been a tremendous success story is that it has provided an open innovation space with minimal barriers, akin to the single market in the EU. For instance, Internet start-ups would find it difficult to strike commercial agreements ensuring prioritisation of their services that would be necessary for them to achieve the same quality of service as competing established services.

We welcome Commissioner Reding's proposals put forward within the Electronic Communication Networks and the Electronic Communications Services package debate to strive for competitive broadband access markets and to oblige Internet Service Providers to provide transparent information to users. However, we believe that an approach solely based on the market may place unjustified trust in the effectiveness of retail competition at ISP-level and the ability and preparedness of users to easily switch providers in response to adequate information about discriminatory practices. The measures outlined in the review proposal are certainly necessary, but may not be sufficient to prevent unwelcome anti-competitive practices. In a period of considerable ISP consolidation across the EU, the range of competing offers could be significantly less than hoped for, reducing both the opportunity and the incentive of customers to change providers. Moreover, while the Commission is right to emphasise remedies available under EC competition law as far as dominant network operators and co-ordinated anticompetitive conduct is concerned, competition law is not necessarily designed to quickly and/or effectively address discriminatory conduct of a non-dominant operator or prevent abusive behaviour by dominant players before it occurs. Therefore, national regulatory authorities – where they are distinct from competition authorities - have also a role to play at the wholesale level in addressing potential anti-competitive conduct through network management practices.

For these reasons, **non-discrimination and a fair competitive playing field should be enshrined as the guiding principle** governing Internet transmissions in the EC telecommunications framework. As outlined above, we recognise that if necessary, prioritisation of certain packets (e.g. that call for low latency such as VOIP) is legitimate if they do not discriminate between service providers within the same usage category. Second, information society service providers should have access to a complaints procedure, with NRAs being able to request from operators the necessary information to decide if there has been discrimination. We welcome the amendments adopted by the European Parliament that go into these directions. We believe that there is scope for clarification of these issues within the current review of the legislative framework which will *de facto* lay the foundations for the regulation of next generation networks.

The consequences of failing to address the question of openness are already implicit in the Commission's Communication: Section 2 rightly points to the potential benefits from emerging social networks and the Internet of services. Information technology, among other developments, is turning into a global “cloud” accessible over the Internet from anywhere, which has the potential of delivering cheaper and better IT to individuals and companies, contributing to huge productivity gains and value creation across society. Therefore, there is greater need than ever to ensure non-discriminatory access to critical web-based applications, as such services are likely to be at the heart of next-generation commercial applications (“Enterprise 2.0”).

Conclusion

We strongly believe that for the Internet to continue to flourish as an open, innovative and collaborative infrastructure, and to deliver on the promise of huge productivity gains through Internet-based applications, constant vigilance for anti-competitive practices and an ongoing debate regarding the technical standards that

6 Conference 'Network Neutrality - Implications for Innovation and Business Online' Copenhagen, 30 September 2008

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/473&format=HTML&aged=0&language=EN&guiLanguage=nl>

underlie the Internet are needed. While information obligations on ISPs towards consumers are welcomed as a first step towards ensuring transparency in the marketplace, more is needed to ensure that consumers benefit, and that markets continue to operate openly. We are encouraged by the Commission's restatement of its commitment to keep design principles "including end-to-end connectivity, openness, neutrality and transparency" at the heart of EU research efforts, and believe that these principles provide an essential context and vision to the current discussion.

About the Open & Collaborative Internet SIG:

The Open and Collaborative Internet Special Interest Group within OpenForum Europe provides a forum for like-minded stakeholders to articulate and defend a shared vision of the future of the Internet as an open and accessible eco-system to the benefit of users, citizens and businesses. While the internet's achievements for innovation and economic efficiency, growth, consumer welfare and user experience are clear, as it evolves and grows in popularity, it is susceptible to anti-competitive pressures in timescales unsuited to retrospective application of pure competition law. The SIG aims to preserve the best of the internet: ensuring that the Internet can keep innovating and drive the economy, thus giving consumers greater choice at the lowest possible cost. The SIG seeks to foster understanding and generate new innovative thinking for the development and improvement of the Internet in an open environment.

About OFE:

OpenForum Europe supports open, competitive choice for IT users. It is a strong supporter of Open Standards, and recognition of new business opportunities offered by the OSS/Free Software model. Not-for-profit and independent, it draws its membership from both the user and supply communities including such market leading companies such as Adobe, Google, IBM, Oracle, SUN Microsystems etc, and holds partnerships with many national and other leading organisations across Europe, and increasingly globally. In 2007 the Commission and Portuguese presidency invited OFE to represent the European open community in responding to the ministerial declaration at the eGovernment conference in Lisbon. Some 25 other organisations from across Europe aligned themselves to the statement made by OFE.

OpenForum Europe acknowledges all the input received from its members and partners in the compilation of this document. However, OpenForum Europe does not seek to represent any specific community nor present its opinions as being unanimously supported by its full membership. References given are fully attributed and every effort made to ensure they have been taken in true context.

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