

## Comments on ARCEP's Consultation on its Discussion points and initial policy directions on Internet and network neutrality

The Voice on the Net Coalition Europe ("VON") welcomes the opportunity to comment on ARCEP's Consultation on its **Discussion points and initial policy directions on Internet and network neutrality** (hereafter "the Consultation").

VON broadly agrees with the approach set out in this document but, as always, the devil will be in the detail.

### *Questions*

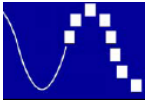
*No. 1) The Authority invites players to comment on its proposed definitions.*

*No. 2) The Authority invites players to comment on its presentation of the background and issues surrounding Internet and network neutrality.*

An open Internet is critical to consumer welfare and the continued growth of France's high-tech economy. In addressing the issue of net neutrality, ARCEP should carefully balance the tension between the need of ISPs to manage their networks; the ability of ISVs (content/application providers) to develop, including the proverbial '2 guys in a garage'; and the role of ARCEP to address the risk inherent in an ISP's ability to discriminate in the treatment of traffic based upon the ISP's economic or other fundamental interests.

VON would urge ARCEP to take a path that balances these competing interests in a way that serves the interests of end-users, consumers, ISPs, and ISVs by taking the following steps:

- First, as ARCEP proposes in the 1<sup>st</sup> direction, adopt the widely-accepted principles that end-users and consumers have the right to send and receive the content of their choice, and access and use the content, applications, services and hardware of their choosing. VON strongly supports this principle, which must be the cornerstone of all other proposed directions.
- Second, ARCEP should adopt the transparency requirement of the 3<sup>rd</sup> direction and 6<sup>th</sup> direction (1<sup>st</sup> element) requiring ISPs to provide ISVs and end users and consumers with clear, precise, and relevant information on the services and applications that can be accessed through their ISP, the traffic management practices employed on the networks, and any quality of service limitations.
- Third, consistent with the 2<sup>nd</sup> direction ARCEP should adopt a behavioral standard intended to prohibit ISP discrimination that is anticompetitive, creates barriers to innovation, or harms end-users and consumers, and ARCEP should bar ISP conduct that violates the other core, open Internet principles, such as the 1<sup>st</sup> direction.
- Fourth, consistent with the 6<sup>th</sup> direction (2<sup>nd</sup> element) adopt an enforcement mechanism that would handle complaints from end users, consumers and ISVs on a "case-by-case" basis to determine whether an ISP has violated the directions adopted by ARCEP, including



whether an ISP's discrimination is anticompetitive, creates barriers to innovation, or harms consumers.

- Finally, VON considers it unnecessary to extend the Internet openness rules to content and applications providers given the robust marketplace for such services available to consumers.

Recent developments confirm the need for the pro-active and forward-looking approach by ARCEP suggested above. Indeed, in reality we see some worrying practices. Mobile operators are continuing the discriminatory pattern initiated notably when the iPhone was launched, with its "big brother" the iPad, namely to prohibit end users from using VoIP, P2P, etc. applications. SFR for example has introduced Internet access packages for the Apple iPad computer tablet which specifically prohibit VoIP and P2P use, and yet do not call it 'Internet access' but rather '3G' and still call it 'unlimited'. In fact, a number of operators are already packaging their offers as "something else than Internet", namely in this case "3G" (see SFR's website for details: <http://www.sfr.fr/mobile/ipad.jspe#>).

#### *Questions*

*No. 3) The Authority invites the players to comment on its general approach to the terms and conditions governing Internet access.*

*No. 4) The Authority invites the players to comment on the six proposed directions.*

As stated in our introduction, VON broadly agrees with the approach set out in this document but, as always, the devil will be in the detail.

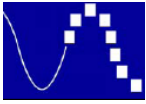
#### **1st direction**

*The Authority recommends that, to provide "Internet access," an ISP must be obligated, in accordance with the legal provisions in effect, to furnish end users with the ability to:*

- *send and receive the content of their choice;*
- *use the services and run the applications of their choice;*
- *connect the hardware and use the programmes of their choice, provided they do not harm the network.*

First, ARCEP should adopt the 1<sup>st</sup> direction and ensure that end-users (citizens, government, and businesses) and consumers can continue to use the Internet to access lawful VoIP applications and services and devices, as that is essential to promote choice, innovation and competition. VON Europe believes that a crucial challenge for ARCEP will be to continue to facilitate innovation by companies who are developing new applications and services, including VoIP, delivered via the Internet.

VON agrees with ARCEP that policymakers and regulators should ensure that end users and consumers can continue to use the Internet applications, services and devices of their choice. Regulators and policymakers should resist any attempts, whether regulatory, commercial or competitive, to block or hinder unfettered access to VoIP (or similar technologies) and more generally to all legal Internet content, applications and services, including the underlying technology, and that prevents it from being utilised to its full potential.



**3rd direction**

*A connection to the Internet must be provided with a sufficient and transparent quality of service.*

*To guarantee this, the Authority is launching sector-specific efforts to qualify the minimum quality of service parameters for Internet access, and is working to implement specific indicators.*

**6th direction (1st element)**

*ISPs must provide end users with clear, precise and relevant information on the services and applications that can be accessed through their data services, of the traffic management practices employed on their networks, the quality of service of these offers and their possible limitations. As a result, the terms “Internet” and “unlimited”, for instance, must only be used if they satisfy the terms defined in section II.a and ff. Moreover, the Authority is committed to a system whereby ISPs will periodically publish quality of service indicators that are specific to their retail market data services.*

Second, ARCEP should adopt the transparency requirement of the 3<sup>rd</sup> direction and the 6<sup>th</sup> direction (1<sup>st</sup> element) and require ISPs to provide ISVs and end-users and consumers with clear, precise and relevant information on the services and applications that can be accessed through their ISP, the traffic management practices employed on the networks and any quality of service limitations. Disclosure of such information is critical if ARCEP, ISVs, and end users and consumers are to have sufficient information available to determine if anticompetitive or harmful discrimination by ISPs is occurring in the marketplace for Internet access services.

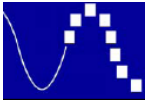
**2nd direction**

*The Authority recommends that the traffic management practices that ISPs employ to ensure Internet access remain exceptional and comply with the general principles of relevance, proportionality, efficiency, transparency and non discrimination.*

Third, consistent with the 2<sup>nd</sup> direction, ARCEP should adopt a behavioral standard applicable to ISP discrimination that balances the competing interests of ISPs **vs.** ISVs, end-users and consumers of Internet access services. Specifically, ARCEP should embrace a standard that would prohibit ISP discrimination that is anticompetitive, creates barriers to innovation, or harms end users and consumers while allowing other legitimate traffic management for an ISP's own managed services. Such an approach provides an alternative to extremes on either side – a blanket ban on all discrimination by ISPs **vs.** a wholly “hands off” approach – and would enable deployment of innovative new managed services by ISPs as well new services by ISVs.

VON believes that adoption of a standard barring discrimination that is anticompetitive, creates barriers to innovation, or that harms end users and consumers would serve ARCEP's goals of enabling end users to use ISPs' Internet access services to access new innovative services but still provide ISPs with flexibility to serve a wide range of customers and business models.

Moreover, transparency is a key element, but it is only one part of the equation, given that markets which are seen by European regulators (including ARCEP) as being competitive (the mobile retail markets), in particular in France, do not in fact exhibit dynamics leading to unrestricted access to the Internet. Transparency informs you of the deal you get as a user, but if that deal is the only one on



the market as all access operators mirror each other's behaviour, transparency does not lead to choice, and certainly not to unrestricted Internet access.

**4th direction**

*To maintain all of the players' capacity to innovate, all operators must be able to market "managed services" both to end users and information society service providers (ISV), in accordance with competition laws and sector specific regulation, and provided that the managed service does not degrade the quality of Internet access.*

VON agrees with the various elements in this direction, especially as regards the need to safeguard the quality of Internet access in order to avoid a "dirt road" effect.

Moreover, VON believes that managed services can be offered by ISPs provided that they do not discriminate in a way that is anticompetitive, creates barriers to innovation, or harms end users and consumers using ISPs' non-managed Internet access services. If such discrimination occurs, enforcement should occur by ARCEP on a case-by-case basis.

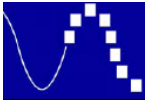
A final comment regarding the managed services vs. Internet access approach is one that relates to the global nature of the Internet. Let's imagine a start-up launching an innovative ISV service or application from the far end of Africa or simply in a small town Ardèche or Corsica. Due to the bandwidth requirements of the service or application, the quality of service guarantees offered by managed services are the only option to ensure consumers get the full benefit of this new offer. What should that ISV then do to ensure its customers can successfully use the service? Negotiate with every ISP to benefit from a managed service package and hence hire lawyers across the globe assisted by engineers that will need to scrutinize SLAs in 120 countries and a plethora of languages? Will they have to auto-limit their offering to only the few countries (if any) they have the resources to negotiate with and deprive the rest of the world of their innovation? Managed services may be an attractive option when thinking of purely national services such as television, but do not truly fit the global model and nature of the networks of networks constituting the Internet where ISVs, ISPs, and end users and consumers commonly are in different countries.

**5th direction**

*To eradicate the opacity that currently exists in data interconnection markets, and to obtain information that will be useful to exercising its powers, the Authority will soon be adopting a decision on the periodical collection of information on these markets.*

*Based in part on this information, the Authority will later assess whether it is necessary to implement regulation in these markets.*

VON has no special comment relating to this direction, although we note that ARCEP's proposal suggests that there is some kind of inequity that may need to be corrected, without reference to French end-users' preference and behaviour. French end-users' preference and behaviour definitely should be a parameter in any discussion, given that it drives take-up of access network connections in France.

**6th direction (2nd element)**

*The Authority therefore recommends that:*

- In the case of offers of partial access to the services available on the Internet, due to the blocking (outside the scope of regulatory obligations) of certain services, websites or protocols, which is generally the case on mobile networks today, operators cannot qualify these offers as “Internet access” so as not to mislead end users. Only an offer that has all the characteristics of “Internet access” (see above) may employ this terminology;*
- the term “unlimited” cannot be used to describe service offerings that include “fair use” type limitations that restrict consumption over time.*

VON believes that ARCEP should more clearly emphasise its view under the 6<sup>th</sup> Direction, 2<sup>nd</sup> element, that discriminating against VoIP services and applications is not seen by ARCEP as legitimate, given that these services and applications do not consume substantial network resources and function today on fixed and mobile broadband access networks around the world (where they are technically and contractually unrestricted). We also wish explicitly to warn against the risk that ARCEP may actually find itself providing legitimization for restrictive practices for which there is no legitimate basis based on ARCEP’s own proposed criteria of relevance, proportionality, efficiency, transparency and non-discrimination.

Therefore, it is important for ARCEP to put in place appropriate complaint procedures for both end-users and consumers, application, and service providers (ISVs) that would feel wronged, triggering own-initiative investigations by ARCEP, and own-initiative enforcement by ARCEP, e.g. on the basis of the new QoS provisions of the 2009 Telecoms Package. ARCEP should resolve such complaints on a case-by-case basis and be open to ISVs’ or ISPs’ customers.

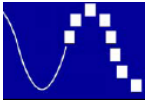
Decisions should be reached within a reasonable timeframe — for example 90 days from when a complaint is filed — and without unnecessary burden on the parties, including end-users and consumers. Reasonably speedy evidence gathering and decision-making will provide clarity to industry at the same time that it protects end users and consumers from ongoing abuses. Lengthy delays, in contrast, could prove harmful to the development of the Internet ecosystem by delaying the development and market entry of nascent services and depriving end-users and consumers of innovative new services and applications.

The experience of the Canadian Radiotelevision and Telecommunications Commission (“CRTC”) may be instructive. In its October 2009 framework for evaluating the lawfulness of network management practices, the CRTC established a process whereby a party that believes that a network management practice is unlawful may file a complaint “establishing that a [network management practice] discriminates or results in a preference or disadvantage” and describing the rationale and evidence for concluding that the preference or disadvantage is unlawful.<sup>1</sup> The burden then shifts to the Access Provider to establish that “any such discrimination, preference or disadvantage meets the requirement of the framework.”<sup>2</sup> CRTC also provided a mechanism by which Access Providers could obtain prior approval for a given practice, and it reserved the right to initiate an enforcement investigation on its own motion. VON encourages ARCEP to study the CRTC approach.

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<sup>1</sup> Add cite to CRTC decision.

<sup>2</sup> Add cite.

**6th direction (3rd element)**

*The Authority will complete its work, in tandem with the DGCCRF and consumer associations:*

- *to define, with the leading ISPs and the associations that represent them, common best practices for “fair use” policies for situations when they are relevant;*
- *to have quality of service indicators that are specific to retail market data services published periodically, notably for “Internet access”, both fixed and mobile.*

The online ecosystem is complex and multi-dimensional. Enforcement of new open Internet policies and regulations will therefore require leveraging the deep technical expertise within ARCEP and creating a process for gathering input and data from outside experts. ARCEP should convene a technical advisory group – with industry participants (ISVs and ISPs) operating across the EU -- as a means of receiving expert input to help inform reasoned decision-making about what forms of discrimination may be anticompetitive or harm end users and consumers, create barriers to innovation, and what “best practices” should be put forward. Industry experts can provide ARCEP with valuable information on network management practices and developments in network infrastructure and technology.

**Question:**

*No. 5) The Authority invites the players to comment on its analysis of the other dimensions of neutrality.*

Finally, VON considers it would be unnecessary to extend the Internet openness rules to content and applications providers. While broadband Internet access providers now have a clear incentive to push ARCEP to extend the scope of its scrutiny into the Internet itself, these pleas appear to be driven solely by a cynical and self-interested attempt to unnecessarily add layers of complexity or, to use a French expression, “*de noyer le poisson*”.

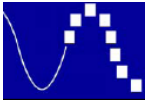
There is no sound reason to impose communications laws or regulations on the robust marketplace of Internet content and applications, where competition and innovation are inherent and thrive, and the user is central to the ecosystem – unlike at the broadband Internet access layer where severe bottlenecks (“*goulets d’étranglement*”) exist which almost inherently give rise to problems that national regulatory authorities in charge of electronic communications networks and services must address in accordance with their mandate. Parties that urge expanding ARCEP’s rules in this way provide no sound legal, technical, economic, or policy reason to do so.

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We thank you in advance for taking consideration of these views. Feel free to contact Caroline De Cock, Executive Director VON Europe, by phone (+ 32 (0)474 840515) or email (cdc@voneurope.eu) should you need further information.

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**ABOUT the VON Coalition Europe**

The Voice on the Net (VON) Coalition Europe was launched in December 2007 by leading Internet communications and technology companies, on the cutting edge – iBasis, Google, Microsoft, Skype and Voxbone – to create an authoritative voice for the Internet-enabled communications industry.

The VON Coalition Europe notably focuses on educating and informing policymakers in the European Union in order to promote responsible government policies that enable innovation and the many benefits that Internet voice innovations can deliver.