

Comments on the Consultation

« Éléments de réflexion et premières orientations sur la neutralité de l'internet et des réseaux »

by 118 218 – June 2010

Introduction

118 218 welcomes the opportunity to comment on the ARCEP consultation on net neutrality (hereafter "the Consultation").

We thank you in advance for taking consideration of these views. Feel free to contact Nik Hole, Executive Director, Government and Business Affairs – Europe for The Number, by phone (+44 7973 748952) or email (nik.hole@118118.com) or Béatrice Bihr, Directeur Juridique - Le Numero, by phone (+33 (1) 70 36 01 15) or email (Beatrice.BIHR@118218.fr) should you need further information.

Executive Summary

118218 broadly agrees with the approach set out in this document but, as always, the devil will be in the detail.

118218 believes that several clarifications could be helpful to ensure that the principles identified by ARCEP in this consultation are interpreted in a manner which enhances consumer satisfaction, competition and innovation:

- As a leading principle, ARCEP must continue its technologically neutral approach, notably as regards voice.
- ARCEP must issue additional guidance to avoid that access operators bypass principles applying to internet access through marketing rebranding and undue qualifications as "managed services".
- ARCEP's approach in terms of user choice must be the cornerstone upon which all other principles rest.
- ARCEP must put in place robust complaint handling procedures to ensure its 2nd Direction is meaningful to end-users.
- ARCEP must ensure that the balance between internet access and managed services does not create a "dirt road" effect for the internet.
- ARCEP should assess barriers to switching from a practical point of view.
- ARCEP must ensure that managed services are offered on a non-discriminatory basis and under fair and reasonable terms.

We refer you to our detailed remarks below.

Detailed Remarks

1. **ARCEP MUST CONTINUE ITS TECHNOLOGICALLY NEUTRAL APPROACH NOTABLY AS REGARDS VOICE:** ARCEP has always very consistently considered that access to third party services by end-users should be done according to the same set of rules and principles for voice over TDM and voice over broadband¹. This consultation and its ensuing next steps should in no way jeopardize this approach and principle.
2. **ARCEP MUST ISSUE ADDITIONAL GUIDANCE TO AVOID THAT ACCESS OPERATORS BYPASS PRINCIPLES APPLYING TO INTERNET ACCESS THROUGH MARKETING REBRANDING:** ARCEP proposes to allow access operators to differentiate between “Internet access”² and “managed services”³. There obviously is a risk that access providers could be tempted to call all their products on broadband “something else than the Internet” (3G, high quality services, etc), hence falling under the “managed services” label and escaping the obligation of openness and choice delivery.

From 118 218’s perspective, the “managed services” label has been used against its sister company in the UK (118 118) by the incumbent BT to unduly favour BT’s own directory services over all its competitors. Indeed, when offering its customers a “managed voice over broadband” service, BT has cut off access to all directory services numbers, except for its own. Protest by 118 118 to BT and the UK regulator Ofcom have led to (1) a commercial “offer” by BT that effectively confirm the move to block access to all competitors as it is extremely onerous and grossly out of proportion to other agreements in the UK Directory Enquiries industry or to the current terms offered for origination of 118 calls via BT’s PSTN⁴ and (2) difficulties under the present implementation of the regulatory framework under UK law for Ofcom to address these issues, a situation which they are currently attempting to remedy. This means the competition law route is the only option available currently, and one that is known to be both lengthy and costly, time playing in favour of BT’s move to foreclose the market. Such a scenario should not be allowed by ARCEP in France, and the document at principle level seems to indicate that it could not be replicated.

¹ Voice over broadband should be understood as a voice service offered by the access operator over its own broadband network.

² Defined as “a service that consists of providing the public with access to online communication services. This service provides the public with the ability to send and receive data by using the IP communication protocol, from all or virtually all points, designated by a public Internet address, from all of the interconnected public and private networks around the world that make up the Internet” (pg 7).

³ Defined as « services providing access to content/services/applications through electronic means, marketed by the network operator which guarantees certain specific features thanks to the process it uses on the network it owns and operates. Some of the classic features include reliability rate, minimal latency, jitter (variation in time between packets), guaranteed bandwidth, security level, etc.” (pg 8).

⁴ These financial terms would create a margin squeeze on calls from BT Broadband Talk to 118118, or would force an increase in 118118 prices, making it less competitive when competing with BT’s own 118500 service. BT has refused to supply any data that could help substantiate a legitimate business case for paying this high price.

3. **118 218 FULLY SUPPORTS ARCEP'S APPROACH RELATING TO USER CHOICE:** 118218 agrees with ARCEP that policymakers and regulators should ensure that consumers and businesses 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 all legal Internet content, applications and services, including the underlying technology, and that prevents it from being utilised to its full potential.

In practice, it must be noted however that “consumer choice” implies that the consumer be aware of all the offerings that are available on the Internet, so that he/she would be aware that access to a given website, service and/or application is blocked or hindered. If users are pushed into walled gardens, they will spot initially the fact that major applications or sites are not accessible (or only accessible at low quality), such as YouTube or Skype, but they will not know “what they are missing” for a raft of smaller applications and services that are maybe “less” visible or known currently. The Number therefore strongly opposes any blocking or degradation of any legal content, service or application providers over the Internet.

4. **118 218 FULLY SUPPORTS THE 2ND DIRECTION FROM ARCEP BUT CONSIDERS APPROPRIATE COMPLAINT HANDLING PROCEDURES ARE REQUIRED:** ARCEP states that “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.” The required procedures to handle any complaints regarding the breach of these principles should be set in place to ensure that both businesses and consumers that would consider the principle to be violated can get a quick and affordable resolution of their complaint. In other words, 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 consumers.
5. **ARCEP MUST ENSURE THAT THE BALANCE BETWEEN INTERNET ACCESS AND MANAGED SERVICES DOES NOT CREATE A “DIRT ROAD” EFFECT FOR THE INTERNET (4th DIRECTION):** For example, what percentage of the broadband pipe can be allocated to managed services versus what is kept for Internet access? This is not a case for a fixed mathematical equation as, for example, proposing a 40%-60% split between managed services and Internet access can have very different meanings depending on the total capacity of the pipe⁵. In other words, if a mobile operators offers a user a 1 Mbit/s data connection on his/her smartphone with a bundle of mobile TV, email and Internet access, but in practice allocates 90% of that bandwidth to mobile TV and only 10% to Internet access, his/her experience of the Internet on that network will be extremely limited, with probably slow download of websites and the impossibility to use a certain number of applications and services. The mobile network operators will have complied with transparency requirements by telling the user his/her bundle included a bundle of

⁵ In other words, 60% of 1 Mbit/s or of 1 Gbit/s are extremely different realities in terms of the applications and services that can be accessed.

managed services and limited Internet, but his/her consumer experience, although transparent, will be disappointing. This issue is likely to require detailed and evolving (due to technological evolutions) guidance on a case-by-case (as not all networks are equal) basis by ARCEP, including in terms of the setting of minimum quality of service requirements for Internet access, as is now allowed under the Revised Universal Service Directive.

6. **PRACTICAL BARRIERS TO SWITCHING MUST NOT BE IGNORED:** The theory is that an unsatisfied broadband user can just move to another provider to get a better offer. This however ignores various practical impediments, namely (1) in the mobile industry and to a lesser extent in the fixed, operators tend to align their offers as demonstrated by the VoIP blocking by all MNOs in France under their “fair use” policies, due to the oligopolistic nature of the market (2) barriers to switching go beyond cost and administrative burden, to also cover such things as the lack of “email address” portability for end-users that rely on the email address that was given to them by their ISP and which they can’t take with them when switching to another ISP (or even ask for it to be forwarded to their new email for a limited time period).
7. **ARCEP MUST ENSURE THAT MANAGED SERVICES ARE OFFERED ON A NON-DISCRIMINATORY BASIS AND UNDER FAIR AND REASONABLE TERMS:** Broadband providers should not be permitted to leverage their control over broadband networks to extract “prioritization” fees from third party applications and content providers without proper scrutiny. There is a serious risk of creating a “Premium rate services” model on the Internet, where experience in the copper voice world show the many abuses that have occurred in the Value-Added Services sector over traditional voice, hence requiring regulatory intervention to ensure access to third party services and reasonableness of costs charged by operators. Similar services should be offered equivalent conditions, and ARCEP should ensure that even when offering a managed service under non-discriminatory terms, an integrated access provider does not offer unfair and/or unreasonable terms, knowing that its own affiliate might be paying those terms as a left pocket / right pocket operation, whilst all competitors suffer from it.