

## Response to ARCEP Net Neutrality public consultation by Prutech Innovations Services Ltd. (Ireland)

### General Comments:

We consider this consultation document to be of a very high standard, addressing all the key issues very thoroughly and in a very balanced manner. It could be seen as a model for other NRAs to follow.

Our responses are as follows:

**Question 1 - Definitions:** The definitions are very clear and perfectly usable. We would have no disagreement with any of them. Perhaps the definition of “*Managed Services*” could be enhanced by acknowledging that the service provider may (by contract) have control over additional network segments so as to extend coverage of its quality guarantee i.e. “... *thanks to the process it uses on the network it owns and operates and, in some cases, the extended networks over which it has negotiated quality standards*”.

**Question 2 - Presentation:** The presentation of the background and issues surrounding Internet and network neutrality is excellent, appropriate and fair. One comment follows:

On page 12 it is stated: “*The transposition process will provide an opportunity to add details on implementing the most notable provisions in this area at the national level, namely ... [in bullet 3]:*

*expansion of NRAs’ powers to settle disputes (Art. 20 of the Framework Directive). A content provider may appeal to an NRA to obtain reasonable terms of network access from an ISP. As it stands there are not, however, any provisions in place that would allow an ISP to make a comparable appeal to a regulatory authority to obtain reasonable terms for accessing the services provided by ISVs.*”

Although we understand the reason for this remark, we think that there is no specific need for an appeals mechanism for this. The **end-user** is clearly the ISV's customer, receiving the ISV's services under the terms set down by the ISV and accepted by the end-user – if it is sufficiently interested. The ISP – which (by definition, and also in practice) is nothing more than the end-user's bit-pipe (paid for in full by the end-user) - could always receive the ISV services as a new end-user customer under exactly the same terms, if it wished. If however, the ISP wishes to sell-on the ISV's services (i.e. as an intermediary or franchiser), then whether or not the ISV wishes to gain extra sales power in this way is a straightforward commercial decision for the ISV and there seems to be no role for a telecommunications regulator to intervene in this. A directly comparable example would be where a customer orders a book or DVD from a distant publisher, in which case nobody could reasonably expect that the transportation company (i.e. post office or courier) should be entitled to appeal for a share of the publisher's profits simply because it carries the goods.

**Question 3:** *The Authority invites the players to comment on its general approach to the terms and conditions governing Internet access.*

The broad approach being taken seems to be exactly on the right tracks. The description points towards a system that would – in principle – provide ARCEP with a regulatory approach that could be a model for Europe. However, this also depends (inevitably

perhaps) to some degree on the precise interpretation of the various texts and wording that ARCEP takes when it comes to following up at the implementation stage.

The greatest risks to net neutrality within the described approach are:

- a) the extent to which ARCEP really enforces, and continues into the future to enforce, the principle that managed services are not provided at the expense of Internet services. ISPs offering both will have strong incentives to increase the former and it could not be sufficient for instance to add extra capacity over time to managed services without adding the **same proportion** of extra capacity to the unmanaged services. Simply leaving the Internet capacity as it is or only adding limited amounts, while steadily increasing the managed segment, should not be permitted.
- b) discriminatory or selective traffic management practices. The description of what ISPs may do to manage congestion seems in general to be correct, though it leaves certain doubts about the precise intent. It should not ever (unless exceptional circumstances can be shown), be open to ISPs or operators to discriminate between a user's Internet traffic streams (i.e. use differential treatment between the services and applications that the user chooses to interact with<sup>1</sup>). In virtually every circumstance (if indeed not all!), a simple overall capacity restriction (i.e. a cap!) placed on users will be sufficient to tackle network congestion or other capacity issues<sup>2</sup> and the reasons behind any resort to other practices should be questioned very carefully. A capacity cap is a fair approach as it means the paying end-user can decide to upgrade to a faster-speed access or to accept less quality of delivery – or to not use multiple heavy services simultaneously. It is under the end-user's control!

The principles that ARCEP considers must be taken into account for permissible traffic management are broadly appropriate and the concept itself is excellent. However, some comments are appropriate:

- **Proportionality:** *“the measure must seek to have the least possible impact on the network’s operation”*. I would suggest that *“the network’s operation”* is not the appropriate measure; it should be *“the least possible impact on network users, especially those which are not responsible for the problems being tackled”*. I would also suggest that in addition to proposing that additional investment in capacity should be provided (which might be difficult to persuade an operator to carry out), ARCEP perhaps should consider a bar on future managed capacity expansion until the problems are resolved. That would have the dual effect of preventing Internet access users being targeted while also incentivising the operator to actually make the desired investment.
- **Effectiveness:** The description of this section, perhaps unintentionally, appears to favour managed services over Internet services. One excerpt (but not the only example) is the phrase *“lead to a real improvement in access to certain services, without significantly degrading the rest of the services that can be accessed via the Internet”*. It is clear that an operator already has sufficient incentives not to allow damage to its managed services (i.e. increased payment), without encouragement by ARCEP. Therefore the motivation for the effectiveness rule must instead revolve

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1 A possible exception might be made on the basis of certain normal Internet priority treatments based on traffic management rather than service management, currently used for very time-insensitive services like email

2 While this comment is specifically targeted at Internet access, I believe it is also valid for the network core. The validity of the following statement on Page 17 is therefore rather doubtful to me (assuming “equal degree” means equal for all those that have purchased the same access bandwidth and proportionately more or less for those who have paid more or paid less for their access speeds): *“For instance, the fact of limiting the bandwidth available to all users to an equal degree does not really resolve a congestion problem in the network’s core.”*

around avoiding ANY degrading of the Internet services.

- **Transparency:** Although this may simply be a matter of slightly inaccurate translation (???), the phrase “*most opportune time and means*” is rather unfortunate. If it means “*opportune time for the ISP*” then that could mean never. Likewise “*opportune means*” for the operator could equate to very ‘*inopportune means*’ for the end-user. In fact, what is needed is an obligation to provide timely, simple and easily understood and assimilated information for the end-user (i.e. the transfer of easily found and rapidly understood **knowledge**, not just multiple pages of highly technical ‘web-page 23’ information).
- **Non-discrimination:** The current text is perfect, insofar as it stands. However, a critical goal to add to that described is to prevent an ISP from penalising an application or service provided by an ISV who isn't co-operative in respect of making payments that the ISP would like to receive but is not legally able to demand (i.e. indirect operational blackmail).

**b3: QoS for Internet Access:** The expression “*it seems necessary to encourage the service to be of satisfactory quality*” seems to be surprisingly weak. At a minimum it is important for this to be tied to the principle described earlier that the Internet QoS must not suffer because of special treatment for managed services.

In the rest of this section, heavy reference is made to QoS and QoS parameter measurement. Consideration should be given to whether QoE (i.e. en-user experience) might not be more appropriate and if so how this could be realistically and simply approached. In particular, when communicating with user organisations (as discussed in the document) QoE might be seen as more relevant and more understandable.

**Sections c and d1 (Managed v Internet services):** These sections are appropriate, as they stand. However, it seems necessary that a caution must be added about the risk of erosion over time of the relative relationships of managed and Internet services by unfair means. While sudden discrimination would be spotted and tackled, a deliberate neglect of Internet service in favour of heavier support for managed services, at a time when the demand for Internet services remains high, would not serve the cause of innovation or the welfare of end-users very well. Thought therefore needs to be given to ensuring the balance is not changed in an unjustified fashion.

**Section d2 (Data Interconnection):** This section, dealing with a difficult topic, is well thought out and ARCEP is right to tread cautiously, regardless of the pressure it may be under from operators.

It is understandable that operators and ISPs would want to find a new revenue source but the ARCEP needs to be cautious about accepting arguments based on the rather spurious “free ride” concept under which it is proposed (by operators) that ISVs should share the revenue received for their content. The reality is that the ISVs as a generality - even if there might be exceptions - have no commercial relationships with the operators/ISPs who merely carry their content on behalf of the end-user. It is without question that the end-users are the real clients requesting that content and if anyone should pay then it is those end-users (i.e. the ISPs' own customers). This means that the operators/ISPs have a weak (or non-existent?) legal basis for demanding payment from ISVs, who would simply refuse. ARCEP should therefore avoid falling into the trap of placing itself in the quicksands into which the operators are inviting it. As described above, it is generally accepted that other carriers (such as couriers or the mail system), have no entitlement to a share of royalties or revenue in respect of books/DVDs or other value that they transport and one would expect a judge to equally question the rights of an ISP (bit-pipe) in an analagous situation.

ARCEP will also be aware that under the incoming new EU regulatory framework, end-users are (without limitation) entitled to access and use applications or services of their choice and therefore any action by the ISPs/operators to block/impede access to those services in order to pressurise the ISVs would be likely to result in a public outcry for action by ARCEP (e.g. by user associations, politicians, media) to enforce those rights. In that context it is difficult to see why the ISV should accede to a request for payment from some third-party bitpipe entity placed between it and its real customer, especially when that customer has already paid for the carriage – which is clearly all that the ISP/operator is providing.

ARCEP's intention to monitor and seek information on the IP information market is both appropriate and entirely sensible.

**Question 4:** *The Authority invites the players to comment on the six proposed directions.*

**1<sup>st</sup> Direction:** The Direction perfectly interprets the intentions of the 2009 EU framework and ARCEP has expressed it very clearly. ARCEP is also to be congratulated on clearly expressing the that operators/ISPs should not be held liable for policing the content transmitted by their users (*“For its part, an ISP is not required to take the initiative to verify the legality of the uses being made of the Internet.”*). This is a rather obvious conclusion if Internet is to remain the vibrant mechanism that it currently is, but one about which other regimes still remain silent, thereby causing uncertainty and inviting diverse responses in the face of media industry pressures.

**2<sup>nd</sup> Direction:** Apart from the use of the word *“recommends”*, this Direction is also absolutely appropriate and justified. We feel however that the Authority must go beyond the implication of allowing a choice in respect of such a critical topic, by requiring adherence to this rule. We have already commented above regarding the choice of traffic management methods, when such are necessary (i.e. there should never be a need to selectively restrict traffic flows of an individual end-user; a flat cap type of restriction will always suffice and would be fairest).

**3<sup>rd</sup> Direction:** This Direction is very clear and very appropriate.

**4<sup>th</sup> Direction:** This Direction is very clear and very appropriate. It also appears to be the case that ARCEP is well aware of the dangers that in practice the managed services could be used as a Trojan Horse to steadily cripple any parallel Internet access that is provided in parallel. Guarding against this should be an ongoing task.

**5<sup>th</sup> Direction:** This Direction is a good step, in view of the need for NRAs to build a much better understanding of the reality of the IP interconnection markets within their territories. There is no doubt that this is an opaque area at the moment, even though it appears to be working well without regulation.

**6<sup>th</sup> Direction; First element:** ARCEP may need to spell out more clearly the difference between *“information”* and *“understanding”*. It is too easy, and indeed already too common, for *“information”* to be provided that is readable (if it can be located!) but not understandable by the average busy and non-expert person.

It would also be a huge help towards understanding and towards comparison if ARCEP itself presented the information (on its website?) in a common template format, using input (which could perhaps be automated) from the operators. That way, the contents of the template would be under ARCEP's control, as would the quality of presentation and the accessibility. These are vital matters in view of the new focus on network neutrality transparency.

**6<sup>th</sup> Direction; Second element:** This element is very clear and very appropriate.

**6<sup>th</sup> Direction; Third element:** We are not in a position to comment on this element.

**Question 5:** It is understandable that operators are concerned at being excluded from discussions between terminal equipment item providers (such as TV providers) and content providers, but that is not a matter for an NRA or indeed for the government to be concerned about. If the operators are only contracted to provide carriage – which is mostly the case – then it is not the function of the State to ensure they benefit from the activities of those at the ends of the transmission chain. The issue of finding new sources of income for investment in networks is a quite unrelated<sup>3</sup> one and should not be brought into this discussion.

The issue of privacy is a critical one and the European safeguards need to be ensured for European Internet users. This is best achieved by combined national efforts at the European level. Likewise, while French concerns about “English language” governance and influence on the Internet is understandable, it is probably misplaced as the growth of other languages and economic powers in the coming years – and notably Spanish (S. American), Chinese, Japanese and Indian – will reduce this effect considerably. The American foothold may last for some time but it must be understood that this remains almost as negative a political and cultural factor for European English speakers as it does for French speakers – so again, combined European efforts to weaken the US grip would be the best response.

We hope these comments are helpful.

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3 Apart from the fact that there is no relevant linkage between the carrier and the end parties, there is no reason whatsoever to assume that operators would spend any extra revenue they receive on network upgrades, at a time when their shareholders are screaming for them to increase dividends to the rich levels of earlier years. In any event, if a public policy decision were made about enhancing operator revenues so as to fund network investment, then that must be done transparently (e.g. by means of a levy or specifically mandated increase in charges) and the revenues received for this must then be ring-fenced, so they can only be used for that purpose.