



## II-2.6 : The ARCEP publishes 10 recommendations and propositions for Network and Internet Neutrality

Friday 8 October 2010, by [Alex Raiffe, Junior Editor](#)

### MAIN INFORMATION

*The Autorité de régulation des communications électroniques et des postes (ARCEP — French Telecommunications and Postal Regulatory Authority) published a document on September 30, 2010—the fruit of one years work—in which it outlines ten recommendations and suggestions for network and Internet neutrality.*

**LIEN :** <http://www.arcep.fr/>

### CONTEXT AND SUMMARY

The publication of the ARCEP's 10 recommendations for Network and Internet Neutrality on September 30, 2010 (64 pages) marks the one-year anniversary of this Authority's reflections upon Network and Internet Neutrality, including a colloquium organized on the subject (*cf. The Journal of Regulation, III-3.6*) in April 2010, and about fifty public consultations.

The document outlines three goals:

1. How can all users be guaranteed a free, transparent, and non-discriminatory access to all content and applications on networks and on the Internet?
2. How can the Internet, which over the last twenty years has become a structurally and systemically important tool for the future of all societies, continue to function faced with the exponential growth in demand for bandwidth?
3. How can the massive investments required in networks and in content be made, while preserving the fundamental principles of the Internet?

The ARCEP has made ten propositions and recommendations for the achievement of these goals:

1. The freedom and quality of Internet access:
  - a. The ARCEP recommends that all Internet Service Providers (ISPs) be required to provide end-users with:
    - i. The possibility of sending and receiving all content of their choice;
    - ii. The possibility of using services and applications of their choice;
    - iii. The possibility of using all equipment and programs of their choice, as long as they do not harm the network;
    - iv. Sufficient and transparent service quality.
2. Non-discrimination of information flows in Internet access:

- a. The ARCEP recommends that the general rule be that ISPs not discriminate between various types of information transmitted over their network.
3. A framework for bandwidth-management systems
  - a. An exception to points 1 and 2 can be made, within limits. Indeed, ISPs that implement bandwidth managements systems must do so in a pertinent, proportional, efficient, non-discriminatory, and transparent fashion.
4. Managed services
  - a. Any ISP must be allowed to offer its own services, as long as such services do not harm the quality of the Internet service provided, and respect Competition Law and Regulatory Law principles.
5. Greater transparency towards end-users
  - a. ISPs must provide subscribers with clear and understandable information as to services and applications available within their subscription; quality of service information; possible limitations on use; and bandwidth management practices that they might be subject to.
  - b. Particularly, the ARCEP recommends that :
    - i. Any restriction on data transmission be explicitly indicated in commercial documents and in the subscription contract, in a clear and understandable manner;
    - ii. The term "Internet" cannot be used to describe services that do not correspond to recommendation n°3.
    - iii. The term "unlimited" cannot be used to describe services that include terms such as "reasonable usage" which can lead to service cut-offs, extra charges, or bandwidth restrictions if the user is not "reasonable".
  - c. The ARCEP asks ISPs to consult with consumer associations and to make a proposition as to the implementation of this recommendation before the first trimester of 2011. The ARCEP reserves the right to modify the propositions made.
6. Supervision of bandwidth management practices
  - a. The ARCEP will request ISPs, content providers, and consumer associations to work on a common definition of bandwidth management practices, as well as the limitations on the terms "unlimited use" and "reasonable use"
7. Supervision of Internet service quality
  - a. The ARCEP will publish its criteria for quality internet service provision, and appropriate benchmarking tools;
  - b. The ARCEP will request ISPs to publish their quality of service results.
8. Supervision of the data-interconnection market
  - a. The ARCEP recommends that ISPs comply with any end-user's request to access services or applications; and that ISPs comply with any content provider's request to make its content available to users.
  - b. The ARCEP will collect data relative to this market, which it will use to decide whether this market must be regulated.
9. Taking content providers' role in network neutrality into account
  - a. Content providers must respect

- i. The principle of non-discrimination between ISPs giving access to their content;
- ii. The principles of objectivity and transparency in their rules concerning third-party content, especially as concerns search engines.

#### 10. Improving terminal neutrality

- a. European directive 1995/5/CE concerning radio equipment and telecommunications terminal equipment will soon be revised. Therefore, the ARCEP requests that the question of the neutrality of the terminal market be revised in order to take into account the ever-greater interaction between terminals, software, and content providers.

The ARCEP has made these non-binding recommendations, and will reevaluate its action after the first trimester of 2011 to see how its recommendations have been accepted.

These recommendations will be, if needed, modified or made mandatory, in order to implement the aforementioned goals.

## **BRIEF COMMENTARY**

This situation allows us to clearly observe the dialectic conception of Regulatory Law. Indeed, this situation functions as a constellation: while on the national level, the ARCEP published its recommendation, a working group is working on this issue on the European level, and a legal battle is taking place in the United States.

Is this regrettable? No. Since Regulation is a self-supervised system, each actor adjusts his positions based on those of his counterparts, not necessarily to align his positions on theirs, but at the very least, to coordinate the calendar for action.

For example, the ARCEP is anticipating that its recommendation will be followed, and has said that it will reevaluate its recommendations during the first trimester of 2011, exactly at the time when the European Commission's working group will publish its conclusions.

This allows the ARCEP to cooperate with the European Commission, while simultaneously influencing it. This rhetorical game between different bodies, which abolishes hierarchy between them, since one never has definite control over another, and shows that the sector's thought and decision-making process is self-supervised and extremely specialized.

Secondly, this is a very shrewd and political document. Usually, regulators are not political bodies, because they lack sufficient legitimacy to make political decisions. But, what is the nature of a recommendation such as the one that the ARCEP just published on Net Neutrality, if not political? For, Net Neutrality is an extremely political notion.

Furthermore, the recommendation states that the first of its three goals is to define consumers' guarantees for free and non-discriminatory access to content and networks. But, this means that the ARCEP takes for given the existence of such a right of access,

whose conditions must still be technically defined, and that the existence of this right has not yet been politically established, whereas the regulator presumes their existence.

We observe, therefore, that regulators permanently seek not only to anticipate the technical progress of their sector, but also, the political positions that will be taken within the sector, and that will shape it.