

The Consumer Voice in Europe

CONNECTIVITY INFRASTRUCTURE AND THE OPEN INTERNET

BEUC preliminary position on possible introduction of network
infrastructure fees



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Why it matters to consumers

Quality connectivity ensuring access to an open and free Internet is essential for consumers to access digital products and services and to be able to live and work in our society. The Open Internet, which guarantees access and distribution of internet content and services without discrimination, is today a pre-condition for a healthy and fair economy and society. Investment in network infrastructure, especially the rollout of 5G networks, stands out as a unique opportunity to improve accessibility, affordability and quality of service for EU consumers.

Summary

BEUC would like to highlight its preliminary concerns from a consumer perspective, based on the information currently available, regarding the announced intention by the European Commission to present a legislative initiative on connectivity infrastructure, following calls from European telecommunications network operators for big content providers to pay a fee to support the costs of network infrastructure deployment.

BEUC in principle supports the objective of bridging the digital divide by investing in development of network infrastructure, underlining the need for available, accessible and affordable quality bandwidth Internet connection. However, pursuing such goals via the introduction of a potential network fee payment scheme, which could amount to a "sending-party-network-pays" system (SPNP), brings a set of risks and challenges which must be carefully analysed and addressed to avoid counterproductive consequences, in particular for the integrity of the principle of net neutrality and fair competition in the EU Single Market for telecommunications.

For consumers in particular, the risks or potential disadvantages of establishing measures such a SPNP system would range from a potential distortion of competition on the telecom market, negatively impacting the diversity of products, prices and performance, to the potential impacts on net neutrality, which could undermine the open and free access to Internet as consumers know it today.

Moreover, according to the European Commission's Better Regulation principles, any EU regulatory action must be based on a transparent, inclusive process and rely on solid evidence, providing thorough justification and analysis to substantiate any changes in the previous policy approach taken on network infrastructure.

Therefore, BEUC issues the following preliminary recommendations:

- First of all, an inclusive and comprehensive impact assessment and public consultation must be carried out, with a clear focus on the potential impact for consumers.*
- A comprehensive revision of the Broadband Cost Reduction Directive (BCRD) to achieve the 2030 Digital Compass Targets should be primarily focused on removing barriers to infrastructure deployments.*

- *Network fees or other types of 'direct contributions' by online players to telecom operators that could amount to a "sending-party-pays" system should in principle be avoided.*
- *Measures to increase investment in deployment of high-quality broadband connectivity infrastructure should preserve a level-playing field for competition in the EU telecoms market and ensure net neutrality.*

1. Background

Following ongoing calls from European telecommunications network operators for big content providers to pay a fee to support the costs of network infrastructure, the European Commission has publicly stated its intention to present a legislative proposal this autumn on connectivity infrastructure that would introduce measures in this regard, presenting it as instrumental to ensuring that the EU meets its digital connectivity targets for 2030.

BEUC would like to highlight its preliminary concerns regarding this initiative from a consumer perspective, based on the information currently available.

BEUC in principle supports the objective of bridging the digital divide by investing in development of network infrastructure, underlining the need for available, accessible and affordable quality bandwidth Internet connection. Following the COVID-19 pandemic, it is becoming increasingly important for consumers to have access to high quality internet connectivity, digital services and content, regardless of their location.

However, pursuing such goals via the introduction of a potential network fee payment scheme, which could amount to a "Sending-party-network-pays" system (SPNP) based on 'taxing' internet traffic, brings a set of risks and challenges which must be carefully analysed and addressed to avoid counterproductive consequences, in particular to the integrity of the principle of net neutrality and fair competition in the EU Single Market for telecommunications.

2. State of play: a little bit of history repeating itself

In May 2022, public statements by both Commissioners Vestager¹ and Breton² signalled that the European Commission was assessing whether online platforms should contribute to network infrastructural costs, with Commissioner Breton going a step further, effectively announcing that the European Commission would present a legislative proposal to this effect before the end of 2022.

This announcement followed the publication of a report³ commissioned by the European Telecommunications Network Operators' Association (ETNO), representative of European telecom operators, which claims that online platforms consume most of Internet network

¹ <https://www.euronews.com/next/2022/05/02/should-google-meta-and-netflix-help-pay-for-telecoms-networks-why-not-says-eu-s-vestager>

² <https://www.lesechos.fr/tech-medias/hightech/bruxelles-veut-taxer-les-gafam-pour-financer-les-reseaux-telecoms-1404614>

³ <https://etno.eu/downloads/reports/europes%20internet%20ecosystem.%20socio-economic%20benefits%20of%20a%20fairer%20balance%20between%20tech%20giants%20and%20telecom%20operators%20by%20axon%20for%20etno.pdf>

traffic capacity without contributing their “fair share” for the costs of that capacity. ETNO argues that the imbalance between tech giants and economic operators compromises their ability to invest in the maintenance and innovation of the telecom infrastructure and, especially, compromises the roll-out of 5G networks.⁴

The report commissioned by ETNO is the latest episode in a debate that started in 2011, when large European telecommunications operators lobbied for the introduction of a SPNP system. These proposals were then rejected by regulators, the Body of European Regulators for Electronic Communications (BEREC)⁵ and by the European Commission.⁶

If the forthcoming proposal does indeed suggest the introduction of network fees for content providers, it would therefore depart from previous policy choices and signal a policy shift from the Commission on this topic. However, the evidence or facts to justify such a legislative intervention at this stage are not clear. In fact, an open letter by 34 civil society organisations argues that “nothing has changed that would merit a different response this time”.⁷

Although no specific details of the forthcoming proposal have been announced yet, we understand that the Commission considers that this initiative is instrumental to ensure that the EU meets its digital connectivity targets for 2030.

A reference to the need to develop a framework to ensure all market actors “make a fair and proportionate contribution to the costs of public goods”, services and infrastructure was discussed during the trilogue negotiations between the Commission, the European Parliament and the Council of the European Union on the Decision on the 2030 policy programme “Path to the Digital Decade”. However, EU legislators ultimately decided to water down this provision in the final agreement, in the light of strong opposition from the European Parliament.⁸ This position followed a public letter signed by more than 50 Members of the European Parliament (MEPs)⁹ from across the political spectrum, which criticised the Commission’s plan for introducing “access fees” which would “pose serious risks to the internet as we know it and are unlikely to solve the broadband deployment problem”.

So far, the main proposals of the European Parliament to meet the EU connectivity targets for 2030 have focused on the need to review the Broadband Cost Reduction Directive (BCRD) with the aim of removing barriers to infrastructure deployments and of lowering costs - not to create direct contributions from online platforms to telecom operators.

⁴ <https://etno.eu/news/all-news/717-ceo-statement-2021.html>

⁵ <https://www.berec.europa.eu/en/document-categories/berec/others/berecs-comments-on-the-etno-proposal-for-ituwcit-or-similar-initiatives-along-these-lines>

⁶ https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_14_647

⁷ https://epicenter.works/sites/default/files/2022_06-nn-open_letter_cso_0.pdf

⁸ <https://www.euractiv.com/section/digital/news/eu-institutions-agree-on-governance-framework-for-the-digital-transition/>

⁹ https://www.patrick-breyer.de/wp-content/uploads/2022/07/20220712_COM_Access-Fees-MEP-Letter_final3.pdf

3. Main issues from a consumer perspective

3.1. Net neutrality

Concerns regarding net neutrality were recently raised by EU Member States¹⁰, MEPs as well as civil society organisations¹¹, who criticised the Commission's plans to introduce a so-called "fair share" contribution scheme.

Following the lead of the report released by ETNO, telecom operators have argued for direct payment solutions by online platforms to those telecom operators responsible for deployment of the network infrastructure. Moreover, the ETNO report calls for a targeted approach of limiting such network fee payments to those online platforms which are responsible for the largest volume shares of Internet traffic.¹²

The introduction of a differentiated regime which applies only to the major online platforms, defined on the basis of the volume of their Internet data traffic, would raise concerns of potential incompatibility with the principle of net neutrality.

The principle of net neutrality is established by the Open Internet Regulation (OIR)¹³, in Article 3(3): "providers of internet access services should treat all traffic equally, without discrimination, restriction, or interference, independently of its sender or receiver, content, application or service, or terminal equipment". Article 3(3) establishes a clear prohibition of "general, unconditional and objective nature", in so far as it "proscribes any traffic management measure which is not reasonable (within the meaning of paragraph 3) and does not contribute towards the fair and non-discriminatory treatment of that traffic".¹⁴

In addition, the BEREC Guidelines on the Implementation of the OIR¹⁵ also provide orientation on the application of the Regulation. The main argument of telecom operators at the moment¹⁶ is that EU rules on net neutrality are not at risk, given that the BEREC Guidelines state that IP interconnection (the market where telecom operators and online platforms engage) is excluded from the scope of this Regulation.¹⁷ However, the BEREC Guidelines also indicate that a breach of net neutrality may arise as regards the interconnection policies and practices of Internet service providers, in so far as they have the effect of limiting the exercise of end-user rights under Article 3(1)" of the Regulation.¹⁸

From a consumer perspective, it therefore seems plausible, and indeed probable, that the introduction and enforcement of a system of contributions based on a model of direct payments from online platforms to telecom operators, such as advocated by ETNO, could

¹⁰ <https://www.euractiv.com/section/digital/news/tech-brief-back-to-school-edition/>

¹¹ https://epicenter.works/sites/default/files/2022_06-nn-open_letter_cso_0.pdf

¹² Page 43. <https://etno.eu/downloads/reports/europes%20internet%20ecosystem.%20socio-economic%20benefits%20of%20a%20fairer%20balance%20between%20tech%20giants%20and%20telecom%20operators%20by%20axon%20for%20etno.pdf>

¹³ Regulation (EU) 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ 2015 L 310, p. 1. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2120>).

¹⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CC0807>

¹⁵ BEREC Guidelines on the Implementation of the Open Internet Regulation, available at: https://www.berec.europa.eu/sites/default/files/files/document_register_store/2022/3/BoR%20%2822%29%2030%20Draft%20Update%20to%20the%20BEREC%20Guidelines%20on%20the%20Implementation%20of%20the%20OIR_final.pdf

¹⁶ Pages 42-43. <https://etno.eu/downloads/reports/europes%20internet%20ecosystem.%20socio-economic%20benefits%20of%20a%20fairer%20balance%20between%20tech%20giants%20and%20telecom%20operators%20by%20axon%20for%20etno.pdf>

¹⁷ BEREC Guidelines, paragraph 50.

¹⁸ BEREC Guidelines, paragraph 6.

entail such indirect consequences, and so stand to compromise the principle of net neutrality.

For instance, a network fee payment system could potentially translate into measures that effectively discriminate between different types of traffic and infringe the rights of end-users (e.g. what would happen when a platform does not pay the fee, would the telecom provider block all traffic coming from the platform?). For instance, MEPs have raised the example of German universities during the Covid pandemic¹⁹, with the allegation that Deutsche Telekom refused to handle the increase in online learning traffic without compensation from universities, “making the German Research Network effectively unusable”²⁰.

Moreover, a study²¹ commissioned by the German Federal Network Agency (*Bundesnetzagentur* or *BNetzA*) has pointed out the example of South Korea, which is “the only country so far that has responded to the concerns of telcos and introduced the Sending Party Network Pays (SPNP) billing principle on a legal basis”, where online and content and application providers are obliged to pay network charges to Internet service providers. The report concludes that the overall result of this regulation was “a decline in quality and diversity of online content and expect rising prices for end users for content, as well as lower network infrastructure investments”.

The principle of net neutrality should also be interpreted in light of the recent EU Court of Justice (CJEU) rulings on ‘zero-rating’²², which clarified that ‘zero-rating’ offers are a violation of the Open Internet Regulation. We would point out that the CJEU rulings only prohibited ‘zero-rating’ practices after years of campaigns by telecom companies actively incentivising data consumption and the increase of data traffic by offering their customers access to more (and even unlimited) data consumption from selective platforms and applications, by not counting the data traffic these platforms and services generated in their subscribers’ overall data consumption.²³

All this is taking place in a context of rapid deployment of fibre optic infrastructure across the EU, which is capable of ensuring the transmission of much larger volumes of data while providing for a more stable network than ever before.²⁴ Therefore, the network congestion argument used by telecom operators to support the introduction of a network fee scheme seems to be at odds with their so far staunch defence of practising ‘zero-rating’ offers.²⁵

3.2. Competition

In addition, the potential network fee scheme raises serious competition concerns in potentially multiple markets. For instance:

- In the EU audio-visual market: the European Association of Commercial Television and VoD Services (ACT)²⁶ fears that network fees or other types of direct contributions based on taxing volumes of dataflow would disproportionately target

¹⁹ https://www.patrick-breyer.de/wp-content/uploads/2022/07/20220712_COM_Access-Fees-MEP-Letter_final3.pdf

²⁰ <https://www.heise.de/hintergrund/Missing-Link-Regulierer-vs-Monopolisten-Streit-im-Markt-der-Peering-Anbieter-4886694.html?seite=all>.

²¹ https://www.bundesnetzagentur.de/EN/Areas/Telecommunications/Companies/Digitisation/Peering/download.pdf?jsessionid=6CA2C5499A8AFADB9D71CBC4601B663E?__blob=publicationFile&v=1

²² Judgements C-854/19 Vodafone (roaming), C-5/20 Vodafone (tethering) and C-34/20 Telekom Deutschland (throttling) of 2 September 2021. <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-09/cp210145en.pdf>

²³ <https://en.epicenter.works/document/1522>

²⁴ https://www.vzbv.de/sites/default/files/2022-08/22-08-01_vzbv_position_sending-party-pays-system.pdf

²⁵ https://epicenter.works/sites/default/files/2022_06-nn-open_letter_cso_0.pdf

²⁶ <https://www.acte.be/publication/tv-vod-statement-on-network-fees/>

high bandwidth service providers from the audio-visual sector, with unintended consequences of higher prices for consumers and/or less investment in quantity and quality of content production.

- In the EU telecoms Single Market: mobile virtual network operators (MVNOs), who currently pay high fees to telecom operators for the use of their network infrastructure, fear the introduction of additional fees for OTT service providers would stand to increase the profitability gap that exists between traditional telecom operators and MVNOs, making it harder for MVNOs to innovate and compete.²⁷ This would risk stifling competition in already concentrated telecoms markets.
- If telecom operators can directly make money from dominant “big tech” content companies in this way via a ‘traffic tax’, this would probably disincentivise the telecom operators from innovating and challenging these dominant/monopolistic companies, weakening the structure of already often uncompetitive markets even further by dissuading entry by potential challengers.²⁸
- If telecom operators receive payments from “big tech” but not from other content providers, are net neutrality rules sufficient to prevent telecom operators from favouring “big tech” over other content providers (for example, in the case of capacity or quality constraints)? If not, this would risk weakening the ability of other providers to compete effectively for consumers’ business. Moreover, this would further strengthen big tech’s existing hold over content markets, with potential spill-over effects into other markets by enhancing big tech’s ability to leverage market power from one market to another to expand “big tech” ecosystems.

The network fee scheme could turn markets designed to serve end users (consumers) from a single sided market into two-sided markets. Telecom operators would no longer have the incentive to focus on end user customers only but would have to balance end users’ interests with the interests of their “paying customers” on the content provision side. Consumers can only lose out from such a dilution.

Moreover, the imposition of a network fees scheme could potentially lead to increased profitability for telecom operators (simply switching monopoly/oligopoly rents from one sector to another) without any guaranteed benefit pass-through to consumers by way of lower prices or improved infrastructure. Regardless of the kind of measures proposed, there must be, at the very least, a clear obligation for telecom operators to reinvest any possible financial gains into actual deployment of network infrastructure. However, recent statements²⁹ by telecom operators’ representatives reveal that these companies may be either unable or unwilling to commit to directly allocating such financial gains to infrastructure investment.

First and foremost, before even considering the introduction of a network fee scheme, telecom operators would need to provide the necessary binding assurances that the introduction of such scheme would effectively lead to increased connectivity investment and better services for consumers.

In conclusion, the potential risks for competition would directly reflect in substantially negative consequences for the interest of consumers, with a direct impact on consumer choice and pricing, as well as negative reflexions on the diversity and quality of products and performance.

²⁷ <http://mvnoeurope.eu/mvno-europe-position-paper-on-network-investment-contributions/>

²⁸ Ibid.

²⁹ <https://www.pubaffairsbruxelles.eu/event/should-large-digital-content-platforms-pay-for-the-usage-of-networks/?highlights> ; <https://www.etno.eu/events/upcoming-events/156:eu-internet-ecosystem.html> ; https://vimeo.com/710412455?embedded=true&source=video_title&owner=13775208

4. BEUC preliminary recommendations

4.1. First of all: an inclusive and comprehensive impact assessment and public consultation must be carried out

First and foremost, according to the European Commission's Better Regulation principles, any EU regulatory action must be based on a transparent, inclusive process and rely on solid evidence, providing thorough justification and analysis to substantiate any changes to the previous policy approach taken on this topic.

In the same manner as the Broadband Cost Reduction Directive, subject to public consultation from December 2020 to March 2021, a new legislative proposal on connectivity infrastructure investments, be it a new stand-alone proposal or its integration into an already planned initiative, should be preceded by an inclusive public consultation and comprehensive impact assessment. It is fundamental that the views from all relevant stakeholders are considered, in particular telecom regulators and representatives of the civil society, including consumer representatives. The consumer perspective should be a key aspect of the impact assessment, detailing the potential impact of such a regulatory move on the consumer experience, especially its impact on consumer choice and prices charged.

BEREC, as the competent regulator, should be actively engaged in this process. BEREC has previously examined the issue of the internet ecosystem and IP-interconnection markets, most recently in 2017³⁰, when it concluded then that the internet ecosystem was still able to cope with increasing traffic volumes. In the event of a policy shift, BEREC should be allowed sufficient time to produce fresh analysis reporting on this issue, which is due this late autumn³¹, in order for its views to be taken into the utmost consideration.

EU Member States and MEPs have already issued similar calls for a thorough analysis and consultation. In July 2022, seven EU member states - Denmark, Estonia, Finland, Germany, Ireland, the Netherlands and Sweden - wrote to the Commission calling for this proposal to be preceded by a public debate³². More recently, in August 2022, a joint paper signed by France, Italy and Spain called on the Commission to hold an open debate while reiterating that any future proposal should preserve the principle of net neutrality.³³

From the European Parliament, MEPs from across the political spectrum have signed a public letter demanding the consultation of "the public, technology experts, academics, civil society, expert regulatory agencies".³⁴

4.2. Further considerations on the substance of any foreseen measures

- A comprehensive revision of the Broadband Cost Reduction Directive to achieve the 2030 Digital Compass Targets should be primarily focused on removing barriers to infrastructure deployments.

³⁰ <https://www.berec.europa.eu/en/document-categories/berec/reports/berec-report-on-ip-interconnection-practices-in-the-context-of-net-neutrality>

³¹ https://www.berec.europa.eu/sites/default/files/files/document_register_store/2022/6/Presentation%20-%20BEREC%20public%20debriefing%20June%202022.pdf

³² <https://www.euractiv.com/section/digital/news/seven-eu-countries-warn-the-commission-against-hasty-decisions-on-fair-share/>

³³ <https://www.euractiv.com/section/digital/news/tech-brief-back-to-school-edition/>

³⁴ https://www.patrick-breyer.de/wp-content/uploads/2022/07/20220712_COM_Access-Fees-MEP-Letter_final3.pdf

- Network fees or other types of 'direct contributions' by online players to telecom operators, which would amount to a "sending-party-network-pays" (SPNP) system should in principle be avoided.
- Measures to increase investment in deployment of high-quality broadband connectivity infrastructure should preserve a level-playing field for competition in the EU telecoms market and ensure net neutrality.

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