A NETWORK USAGE FEE WILL HINDER - NOT ADVANCE - EUROPE'S DIGITAL DECADE GOALS

Key Takeaways from EU Network Usage Fee Consultation

At the behest of a handful of incumbent European telecommunications companies (telcos), the European Commission (EC) launched an Exploratory Consultation on "The future of the electronic communications sector and its infrastructure." The EC consultation revived an old and repeatedly rejected argument that large U.S. content and application providers (CAPs), should be required to pay direct payments or to a central fund for subsidizing telcos' network infrastructure costs through the imposition of a network usage fees (NUF).

Many EU countries oppose Network Usage Fees including Austria, Belgium, Czechia, Denmark, Finland, Germany, Ireland, Lithuania, Malta, and the Netherlands. Additionally, BEREC, consumer groups, smaller and competitive telcos, the United States government, and other interested stakeholders have faulted the proposal.

Below is a summary of the key arguments against mandating subsidies to telcos, that have been made by the wide range of stakeholders who are critical of the EC's proposals.

NUFs would violate net neutrality and upend the structure of the open internet.

- "It is difficult to understand how a system of mandatory payments imposed on only a subset of content providers could be enforced without undermining net neutrality." "ISPs' demands for "fair share" payments are inherently about treating data traffic differently and strengthening their control over users' access to the internet." Reaping the benefits of the "many indispensable and interdependent building blocks" of the internet "depends on promoting an internet that is open, free, global, interoperable, reliable and secure." "The concern that ISPs use their position over access to customers in order to extract network fees," instead of working together with CAPs "to provide the best quality of service under a more cooperative approach is at the heart of EU's network neutrality rules." Moreover, BEREC, the body responsible for applying net neutrality rules in Europe, opined that "[i]f a mandatory payment was limited only to certain players (such as "LTGs"), it would go against the principle of net neutrality as set out in recital 1 of the OIR. This is because it involves treating traffic unequally, contradicting the principles of equal treatment and non-discrimination enshrined in Article 3(3) of the OIR." (See, e.g., responses of United States NTIA, CCIA, DigitalEurope, European VOD Coalition, Google, BEREC (Annex to Section 4)).

There is no established market failure that justifies regulatory intervention.

- "[T]here is no evidence that there is a problem of Internet connectivity or significant challenge in meeting the ambitious Digital Decade targets that existing market and public sector solutions cannot solve." Moreover, "[t]he consultation also provides no clear description or evidence-based rationale for why regulatory interventions should be considered. This is highly problematic" and "a bad practice that could have global ripple effects." "The questionnaire seeks answers to questions on direct network contributions and alternative funding mechanisms but BEREC would assume that the introduction of any such intervention would be preceded by a finding that the market is failing to generate an efficient outcome (i.e. charging excessive prices, generating excessive profits to the detriment of end-users, lack of investments) and that there is a lack of competition"; "BEREC holds that any regulatory intervention requires a proper justification"; and "A mandatory payment from CAPs to ISPs is likely to increase the bargaining power of ISPs due to their market position regarding termination monopoly of traffic." (See, e.g., responses of Google, Coalition for Creativity, Internet Society, ITIF, BEREC).

Consumers drive growth in data traffic, and should not have to pay twice for services.

- "This argument for a 'fair share' policy proposal is based on a significant mischaracterization of the existing Internet ecosystem", as "Internet traffic is a result of end-users requesting this traffic from online services, in line with the data allowance of their Internet access subscription." "It is not CAPs who generate data, but ISPs' own customers" and "ISPs are already paid by their customers for internet access." "ISPs are seeking to have the European Commission turn the internet into a system where ISPs get paid twice for the same service." (See, e.g., responses of ITIF, Internet Society, CCIA, Google, Professor Barbara van Schewick).

There is no evidence that existing networks and investment cannot support new consumer services.

- "There is no evidence that there is a problem of Internet connectivity or significant challenge in meeting the ambitious Digital Decade targets that existing market and public sector solutions cannot solve." "Looking forward, there is currently no evidence that new consumer services such as augmented reality (AR) or virtual reality (VR) applications cannot work under the existing 'best efforts' Internet and would overload networks." (See, e.g., response of Google).

Content providers already contribute significantly to the internet ecosystem and infrastructure by investing in content, applications, services, and infrastructure.

- "All participants in the digital transformation are already contributing fairly on their level" in the complex internet ecosystem. "[A]ctors contribute in different ways to the internet ecosystem: some for example provide access networks, others digital infrastructures or IP transit services, others content, applications and services, and others again provide digital skills, or a combination thereof." For their part, on top of their investments in content, "[o]ver the last decade (2011-2021) CAPs' investment in European network infrastructure amounted to €183 billion, including hosting (e.g. data centres), transport (e.g. submarine and terrestrial cables), and content delivery networks (e.g. peering and caching)." CAPs also spent "on average €22 billion per year on EU digital infrastructure" over the last five years and saved ISPs "nearly €1 billion per year in network and transit fees in the EU." Thus, "[c]ontrary to ETNO's complaints, content providers clearly "contribute[...] in a fair and proportionate manner" to making the internet work." (See, e.g., responses of epicenter.works for digital rights, BEREC, CCIA, Professor Barbara van Schewick).

Consumers will likely face higher prices and a lower quality of experience.

- "[T]he overall result of the obligation for online service providers to pay network fees to ISPs was a decline in quality and diversity of online content," "rising prices" and "lower network infrastructure investments." Significantly, ISP customers "will receive poor performance on any content or service not directly connected to the ISP, despite paying for access to the entire internet." (See, e.g., responses of BEUC, European VOD Coalition & European VOD Coalition Position Paper).

The Flawed "Sending Party Network Pays" Regime in South Korea Should Inform Policymakers.

- Interference in the overwhelming voluntarily negotiated settlement free interconnection regime has resulted in negative effects to both network economics and performance. Studies suggest that similar policies in Korea have created "unnecessary costs and bottlenecks in South Korea's digital ecosystem" which led to increased costs for telcos who needed to connect with relevant CAPs further away and "lower quality of service." Fundamentally, "[y]ou either drastically change the nature of the internet and thereby abandon all of its benefits, or the EU will follow the South Korean example and add layers upon layers of regulation to rectify and curtail the negative effects this model would inflict." (See, e.g., responses of United States NTIA, epicenter.works for digital rights, Internet Society. See also responses of CCIA, European VOD Coalition).

NUFs would risk fragmentation of the global internet, leading to an internet that is less free, interoperability, reliable, and secure.

- "Introducing direct payments will drastically change the model of how the Internet works globally, and will lead to an inefficient infrastructure, higher costs, lower quality of service and risks a fragmentation of the Internet." This new mechanism would force "any and all online actors ... to negotiate with and pay each and every telecom operator in the world for their content to be accessible by users, which would be overly costly for most voices active online, and thus limit their ability to reach a global market and audience" with "long term repercussions for the viability and vitality of the Internet, digital trade, freedom of expression, and access to information, with users likely unable to access the content of their choice depending on where they're based in the world." (See, e.g., responses of Internet Society, Google).

NUF will likely lead to less innovation in content applications, as well as the quality and diversity of content and applications.

- "We see a real danger for the resilience of the internet with this proposal, while also undermining the drivers for innovation and growth in the internet economy." Net neutrality "fosters innovation, since any end-user can implement content and applications without asking the ISP for permission." Further, "the exploitation of the termination monopoly could lead to a decrease of innovation since ISPs are steering the selection of content instead of end-users." (See, e.g., responses of epicenter.works for digital rights, BEREC (Annex to Section 4), ITIF. See also responses of BEREC (Response Overview), BEUC, DigitalEurope, European VOD Coalition, Google, IT Media).

The European Commission must take steps to improve its consultation process to ensure it is inclusive and comprehensive of all stakeholders.

- "Many of the consultation's questions are based on a factually-flawed premise and perpetuate a misrepresentation of Internet traffic as caused by online services." "We urge caution should the EU consider any new funding mechanisms that could disrupt the current Internet ecosystem, which has successfully adapted to evolving technological and market conditions over time. Internet traffic is global, raising questions regarding one country's ability to collect revenues from foreign content providers; if many countries take this path it would likely be unsustainable." "Any move towards a legislative proposal" must be preceded by "an inclusive and comprehensive public consultation and impact assessment following the Better Regulation principles, with a clear focus on the potential impact on consumers' protection, experience, choice, and price implications. It is fundamental that the views from all relevant stakeholders are taken into account." (See, e.g., responses of Internet Society, United States NTIA, BEUC).