THE LIMITS OF THE FAIR SHARE DEBATE

Embracing Interoperability for an Open Internet.

OPEN FUTURE POLICY BRIEF #4

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THE ISSUE IN BRIEF

This policy brief contributes to the discussion about the importance of maintaining an open internet, where information, ideas, and culture can flow freely. It was prompted by the European Commission's currently ongoing, exploratory consultation on the future of the connectivity sector, launched in the midst of the renewed debate over introducing a "network fee," i.e., a proposed mechanism of direct payments from content providers and other tech companies to network providers (the so-called "fair share proposal").

In this brief, we examine the part of the consultation questionnaire devoted to the "Fair contribution by all digital players." We outline the main arguments raised in support and opposition to the idea of network fees, including the argument that it would challenge the principle of net neutrality. We point to the limits of the current criticism. We also show why the commitment to ensuring fair and proportionate contributions to the costs of public goods, services, and infrastructures made by the EU in the European Declaration on Digital Rights and Principles for the Digital Decade should not be read as providing a basis for introducing network fees. We argue that targets for digital transformation should be tackled through taxation and subsequent public support for investment into sustainable infrastructure that fosters interoperability rather than mandatory direct transfers of money between powerful private actors.

The brief posits that the struggle to maintain an unfettered exchange of information online is taking place not just at the network level but also within the domain of internet platforms and in the space occupied by content and application providers. To that end, we put forward the concept of Digital Public Space – as a framework to conceptualize ecosystems existing outside the control of commercial entities and provide fora for public and private exchanges, information access, and civic organization tools and interoperability – as one of its design principles.

BACKGROUND

The European Commission is conducting exploratory consultation[1] on "the vision for the future of the connectivity sector and of the connectivity infrastructure." One of the contentious and widely debated aspects of the vision is the so-called fair share proposal or the "direct compensation mechanism."

In February 2022, an open letter[2] signed by four major European telecommunication companies revived the debate from ten years ago about the concept of "sending-party-network pays" (i.e., obliging content and application providers to pay fees to network providers). In the letter, the telecoms urged the Commission to propose legislation requiring companies that provide online content (for example, video streaming, games, and social media) to cover a portion of the costs of digital infrastructure. This "fair share" proposal sparked a strong response. A group of civil society organizations warned[3] the Commission against sacrificing the "free and open internet to the short-sighted and self-interested demands of the telecom industry." In a letter[4] signed by 54 MEPs, parliamentarians argued that access fees pose severe risks to the internet "as we know it."

THE CONSULTATION

The consultation aims to gather information on various aspects of the digital ecosystem, including costs, investments, and potential risks and benefits of the "fair share proposal." It is running until 19th May 2023. The online questionnaire consists of 62 questions. It has been criticized as biased, worded in an overtly leading manner, and designed in a way that makes it difficult to provide a meaningful response.[5]

The consultation questionnaire (PDF version) is structured into four sections. Each section includes a short introductory explanation of its background and rationale. Section 4 is dedicated to the "Fair contribution by all digital players." The introduction to the section points to an apparent paradox "between increasing volumes of data on the infrastructures and alleged decreasing returns and appetite to invest in network infrastructure." It is followed by a list of questions regarding direct investments in network infrastructure and digital infrastructure optimization.

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1 European Commission. 'Exploratory Consultation: The Future of the Electronic Communications Sector and Its Infrastructure'. Accessed 4 April 2023. https://ec.europa.eu/eusurvey/runner/Future_of_Connectivity.

2 Deutsche Telekom. 'United Appeal of the Four Major European Telecommunications Companies', 14 February 2022. https://www.telekom.com/en/company/details/united-appeal-of-the-four-major-european-telecommunications-companies-646166.

3 epicenter.works - Plattform Grundrechtspolitik. 'Global Open Letter to defend Net Neutrality against attacks from EU Commissioners Vestager & Breton', 8 June 2022. https://en.epicenter.works/sites/default/files/2022_06-nn-open_letter_cso_0.pdf

4 Patrick Breyer. 'EU Lawmakers Criticise Commission's Plans to Eliminate Net Neutrality', 12 July 2022. https://www.patrick-breyer.de/en/eu-lawmakers-criticise-commissions-plans-to-eliminate-net-neutrality/.

5 Konstantinos Komaitis and Paul Hofheinz, "Thierry Breton's Retro Vision: Taking Europe 'Back to the Future,'" The Lisbon Council, February 27, 2023, https://lisboncouncil.net/thierry-bretons-retro-vision-taking-europe-back-to-the-future/.

The questionnaire aims to gather information on various aspects of the digital ecosystem and targets a wide spectrum of stakeholders – individuals, companies, and organizations. The Commission wants to collect data on costs and investments made by electronic communication networks (ECNs) and by content and application providers (CAPs), including the "Large Traffic Generators" (LTGs). It seeks to understand the increase in traffic over the past five years and its sources, fees paid to providers of ECNs, and the identification of LTGs based on the percentage of traffic load on the network. Additionally, stakeholders are asked about the impact of LTGs' investments on the costs of network deployment investments and the obstacles preventing providers from charging digital players for increased data traffic.

The questionnaire delves into the proposed mandatory contribution mechanism from CAPs/LTGs to finance network deployment, soliciting stakeholder feedback on feasibility and the structure required to ensure effective network deployment contribution. The questionnaire also explores the potential risks of such a mechanism, such as negative effects on innovation, sustainability, consumers, and competition. Finally, stakeholders are asked about their views on the creation of an EU or national digital fund, the funding sources, and the potential uses of the fund. These potential uses include funding future network deployments, protecting vulnerable consumers, and covering increased traffic costs.[6]

THE CONTROVERSY

What are the issues addressed by the fair share proposal? According to the text of the consultation, with the growing significance of connectivity, substantial investments in network infrastructure are required to accommodate and integrate new technologies and achieve Europe's Digital Decade targets.[7] Providers of ECNs (the telecoms), especially incumbents, claim that while the need for network investments increases, market valuation and return on investment for ECNs' decline.

The consultation was launched in the middle of an ongoing controversy. The Commission refers to two primary sets of opposing arguments. On the one side of the discussion, there are telecoms who claim that digital players who are the primary source of internet traffic should be required to pay for the construction of electronic communications networks.[8] According to the telcos, such a contribution would be "fair" because content and application providers profit from the high-quality networks without having to pay for their deployment. To put it simply: since content and application providers are a source of an increase in traffic, which generates costs, they should contribute to covering them. Otherwise, they are "free-riding."

[6] The concept of a fund mentioned in the consultation text, although it sounds similar to the idea of a European Public Digital Infrastructure, they are not the same. We return to the idea of an EPDI in the last section of the brief.

[7] We have previously criticized the fact that the European Commission's policy program in the Digital Decade framework primarily consists of a set of quantitative targets. While some of the targets address real challenges, others appear to be motivated primarily by the belief that technological progress will provide solutions to Europe's societal challenges. See: Open Future. 'Europe's Digital Decade – A Compass without a Map?', 8 April 2021. https://openfuture.eu/blog/a-compass-without-a-map.

[8] See for example: Hernández, Jaime Galán. 'You Have Not Seen This Movie before: Fair Share Is Not a Remake'. *Telefónica*, 2 February 2023. https://www.telefonica.com/en/communication-room/blog/you-have-not-seen-this-movie-before-fair-share-is-not-a-remake/.

On the other side of the controversy, there are CAPs who argue that payments for the traffic transmitted would be both unjustified, as the traffic is requested by end-users and the network costs are not traffic dependent, as well as dangerous as the mechanism would also endanger the way the internet works and breach net neutrality rules.[9]

The arguments of telecom companies are also being challenged by civil society actors, including the European Consumer Organisation, as well as the Body of European Regulators for Electronic Communications.

In June 2022, 34 civil society organizations pointed out in an open letter that the costs related to establishing and upkeeping network infrastructure have considerably diminished due to advancements in networking technology. This has enabled network providers to set up and maintain the broadband infrastructure that is both faster and more extensive, all at a significantly reduced cost. Civil society organizations have also underscored that the "fair share proposal" is based on a wrong assumption of how the internet works. Users already pay network providers for accessing content from companies such as Alphabet, Apple, Amazon, or Netflix (the "CAPs"). If the "fair share proposal" was put into effect, it would mean that network providers would receive double compensation for the same service.

In their preliminary position,[10] published in September 2022, the European Consumer Organisation (BEUC) noted that the imposition of a network fee system might merely transfer monopoly/oligopoly rents from one sector to another, potentially leading to an increase in the profitability of telecom operators without any corresponding reduction in prices or improvement in infrastructure for customers. They emphasized that any proposed measures must include a clear obligation for telecom operators to reinvest any financial gains in the deployment of network infrastructure.

In reaction to the controversy, the Body of European Regulators for Electronic Communications (BEREC) published a preliminary assessment[11] where it investigates the underlying assumptions for such a proposal and similar approaches, taking into account recent market developments and investments made by various stakeholders.

BEREC evaluated whether the assumptions underlying the claims made by the large European telecoms were substantiated and concluded that they were not. BEREC's assessment recalls a similar debate that took place in 2012 at the World Conference on International Telecommunications 2012 when the European Telecommunications Network Operators' Association (ETNO) proposed the mechanism of sending party fees. BEREC concluded at the time that departing from existing principles could cause significant harm to the internet ecosystem, as internet service providers could exploit their termination monopoly in a manner similar to the

[9] See for example: Meta. 'Network Fee Proposals Are Based on a False Premise', 23 March 2023. https://about.fb.com/news/2023/03/network-fee-proposals-are-based-on-a-false-premise/.

[10] BEUC, "Connectivity Infrastructure and the Open Internet', 19 September 2022. https://www.beuc.eu/position-papers/connectivity-infrastructure-and-open-internet

[11] BEREC, "BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs", 07 October 2022. https://www.berec.europa.eu/en/document-categories/berec/opinions/berec-preliminary-assessment-of-the-underlying-assumptions-of-payments-from-large-caps-to-isps

traditional telephony termination monopoly. It pointed out that “there is no evidence that operators’ network costs are already not fully covered and paid for in the Internet value chain (from CAPs at one end, to the end users, at the other).” BEREC shows that although the traffic patterns changed, the 2012 conclusions remain valid.

Following the launch of the consultation, the Lisbon Council think tank published in February 2023 a critical commentary. The authors of the piece — Konstantinos Komaitis and Paul Hofheinz — highlight that requiring companies that transmit data above a certain threshold to pay a fee directly to the telecom provider would result in a two-sided market where both consumers and providers pay. Komaitis and Hofheinz warn that this would create an incredibly powerful middleman who could switch off internet access to service providers who did not pay. They also note that the costs would be ultimately borne by consumers. Similar to the other critical voices, they argue that the proposal is based on false assumptions.

According to the authors of Lisbon’s council critical commentary, the real purpose of the proposal seems to be to “slow down, regulate, and tax successful American Internet companies.” Instead of putting in place a thriving European ecosystem, the measure is punitive in nature and looks to harm US companies. They criticize the EU Commissioner for the Internal Market, Thierry Breton for looking “to defend and shore up incumbents” by “putting in place policies to sustain the unsustainable and soften the pressure felt from market failure and failure to please customers.”

LIMITS OF THE CURRENT CRITICISM

Some of the most ardent critics of the fair share proposal point out that the fees will harm the internet “as we know it.”[12] As signaled above, there is a concern that a direct compensation mechanism would endanger the principle of net neutrality.

As a legal requirement in the EU, net neutrality is laid down in Article 3, paragraph 3 of the Open Internet Regulation,[13] which says that:

> *“providers of internet access services shall treat all traffic equally, when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.”*

Experts have identified net neutrality as a fundamental tenet for promoting fair and unrestricted competition in the digital sector, and it has been aptly dubbed the "basis for free and open

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12 See for example: Patrick Breyer, ‘EU Lawmakers Criticise Commission’s Plans to Eliminate Net Neutrality’, 12 July 2022. https://www.patrick-breyer.de/en/eu-lawmakers-criticise-commissions-plans-to-eliminate-net-neutrality/.

13 Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 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 (Text with EEA relevance), 310 OJ L § (2015). http://data.europa.eu/eli/reg/2015/2120/oj/eng.

competition for consumer attention across the sector."[14] Net neutrality benefits consumers by allowing them to access their preferred content and services and promotes innovation by allowing new players to compete with established companies.

Maintaining net neutrality ensures that all online content and applications receive equal treatment at the network level. However, some of the most significant challenges to openness and the free flow of information occur at the application layer occupied by digital platforms,[15] who have served as gatekeepers and gateways to a wide range of goods and services. They have been able to limit users' access to specific content, applications, or services on the internet's upper layers.

The growth of internet platforms as gatekeepers has affected the competition dynamics and internet experience for users. Some of the new challenges to the openness of the digital ecosystem have been addressed, e.g., by the recently adopted interoperability requirements for communications services (Digital Markets Act, Article 7)[16] and researcher access rules (Digital Services Act, Article 40, par. 8).[17] However, there is still a need for broader interoperability requirements, in particular, aimed at dominant platforms.

The direct compensation mechanism foreseen by the European Commission has been criticized partly due to the assertion that the internet should remain "free and open" and does not require intervention. However, this assumption – that the current regulation secures the internet's open character – is gradually losing credibility. We have previously pointed out[18] that as a value, net neutrality stems from the belief that the internet should be a free and open exchange of information. This perception has already been severely harmed by platformization, that is, the rise of platform ecosystems that has upended the popular ideal of a universal and neutral internet that connects the world.[19]

Tim Wu, a Columbia Law School professor widely credited with coining the term "net neutrality," stated in a 2003 paper where he unpacked the concept of net neutrality that one of the arguments in favor of this concept was that:

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14 Konstantinos Komaitis, Paul Hofheinz. 'Thierry Breton's Retro Vision: Taking Europe "Back to the Future"'. *The Lisbon Council*, 27 February 2023. https://lisboncouncil.net/thierry-bretons-retro-vision-taking-europe-back-to-the-future/.

15 See: BEREC. "BEREC Opinion on the European Commission's proposal for a Digital Markets Act", 16 March 2021, p. 3. https://www.berec.europa.eu/sites/default/files/files/document_register_store/2021/3/BoR%20(21)%2035%20BEREC%20Opinion%20on%20the%20DMA%20-%20final.pdf

16 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance), 265 OJ L § (2022). http://data.europa.eu/eli/reg/2022/1925/oj/eng.

17 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), 277 OJ L § (2022). http://data.europa.eu/eli/reg/2022/2065/oj/eng.

18 Open Future. 'Net Neutrality: Defending the Internet "as We Know It" Is Not Enough', 21 September, 2022. https://openfuture.eu/blog/net-neutrality-defending-the-internet-as-we-know-it-is-not-enough.

19 See: Van Dijck, José. 'Seeing the Forest for the Trees: Visualizing Platformization and Its Governance'. *New Media & Society*23, no. 9 (September 2021): 2801–19. doi:10.1177/1461444820940293, p. 2802.

> *"email, the web, and streaming applications are in a battle for the attention and interest of end-users. It is therefore important that the platform be neutral to ensure the competition remains meritocratic."*[20]

When Tim Wu wrote the paper, network providers were the major gatekeepers of the free and open internet. This has changed with the more recent rise of commercial platforms.

As previously stated, the battle for attention and access now takes place on a different level of the internet stack. As a result, measures to ensure a free and open flow of information and competition must also address the level of online platforms.

ASPECTS OF INTERNET INFRASTRUCTURE	**PRINCIPLES**
CONNECTIVITY LAYER	**NET NEUTRALITY** (GUARANTEED IN ART. 3 OF THE OPEN INTERNET REGULATION) **INTEROPERABILITY** (ACCEPTED TECHNICAL PROPERTY, INHERENT IN THE LAYER'S DESIGN)
APPLICATION LAYER	**INTEROPERABILITY** (NOT AN EMERGENT PROPERTY OF THE INFASTRUCTURE, REQUIRES LEGAL SAFEGUARDS) THE RIGHT TO PARTICIPATE IN THE DIGITAL PUBLIC SPACE ⇨ Fulfillment of this right would be supported by the development of the European Public Digital Infrastructure Fund.

Table 1:Design principles enhancing openness of internet infrastructure

FAIR SHARE AND THE EUROPEAN DECLARATION OF RIGHTS AND PRINCIPLES

The questionnaire refers to provisions of Chapter II of the European Declaration on Digital Rights and Principles, in which the EC commits to:

> *"developing adequate frameworks so that all market actors benefiting from the digital transformation assume their social responsibilities and make a fair and proportionate contribution to the costs of public goods, services and infrastructures, for the benefit of all people living in the EU."*

[20] Wu, Tim. 'Network Neutrality, Broadband Discrimination'. *J. on Telecomm. & High Tech. L.* 2 (1 January 2003): 141. https://scholarship.law.columbia.edu/faculty_scholarship/1281

The reference to the Declaration appears to be based, at least in part, on the assumption that the implementation of a direct compensation mechanism might constitute such a framework and that the Declaration would serve as a foundation for such a proposal. This assumption, however, is incorrect.

The Declaration proposes a contribution to the costs of "public goods, services, and infrastructures for the benefit of all EU citizens." The Declaration makes no mention of the need for these goods, services, or infrastructure to be digital. It does, however, classify them as "public." Implementing a mechanism for direct money transfers from content and applications providers to telcos would be a very opaque way of meeting this commitment, if at all. A mechanism like this would result in the redistribution of some wealth from the big tech to the big telcos, however, with no oversight or control over how the funds are spent.

In the Declaration, the EU institutions made a political commitment to ensure that all market participants who benefit from the digital transformation take on their social responsibilities and contribute equitably and proportionally to the cost of public goods, services, and infrastructure. To achieve this goal and ensure that big tech adequately contributes to the costs of public goods and services, adequate taxation (potentially a dedicated tax on digital advertising revenues) should be implemented instead of direct compensation for telecoms.

THE WAY FORWARD

The implementation of a direct compensation mechanism will not resolve any of the complex challenges confronting open digital ecosystems but rather create new ones by undermining the principle of net neutrality. While the need for network improvement is real, there is no evidence that network operators cannot accomplish this through private investment and, in the case of networks in areas where their deployment may not be economically feasible, potentially with state assistance.

The targets for digital transformation should be tackled through taxation and subsequent public support for investment into sustainable infrastructure that fosters interoperability. Rather than supporting a "transfer of monopoly/oligopoly rents,"[21] the European Commission should invest in policies that steer Europe toward a more sustainable, society-centered, and value-based digital future. Achieving this will require balancing concerns related to technological advancement and increased internet traffic against the need to curb the digital sector's environmental footprint and improve resource management.

By adopting the European Declaration on Digital Rights and Principles for the Digital Decade, the EU committed to fostering participation in the Digital Public Space. In order to achieve this objective, a genuine European Digital Public Space must be established. We have defined Digital Public Spaces as digital ecosystems that exist outside the control of commercial entities that extract value from users of these platforms. They provide fora for public and private exchanges,

[21] BEUC, "Connectivity Infrastructure and the Open Internet', 19 Septemebt 2022. https://www.beuc.eu/position-papers/connectivity-infrastructure-and-open-internet

information access, and civic organization tools. Digital Public Spaces are based on democratic values and Public Digital Infrastructure and ensure the existence of a rights-based, society-centered alternative to the services provided by commercial platforms.

Digital Public Spaces require an alternative model for developing the infrastructure needed to run them. In a recent white paper, we propose the creation of a European Public Digital Infrastructure Fund[22] to address this need. Beyond funding, one of the key design principles for a more diverse and inclusive digital ecosystem is a strong interoperability framework. As we have argued above, interoperability at the service level requires legal safeguards that should aim to support generative interoperability rather than simply ensuring market competition. In this context, support for interoperable digital public spaces that operate alongside existing platforms and services would be an effective regulatory intervention that can limit the power of commercial platforms and contribute to upholding net neutrality as a broader value. In order to protect the underlying values of net neutrality, it is not enough to protect "the Internet as we know it" but to ensure that the values embodied in net neutrality are also addressed at the service layer.

Adequate taxation, the development of digital infrastructure that prioritizes societal values over financial gain and fosters Digital Public Spaces, and the promotion of policies that support generative interoperability will help the EU fulfill its commitment to a more sustainable and equitable digital future for all. The fair share proposal functioning as a direct compensation mechanism will not.

[22] Keller, Paul. 'European Public Digital Infrastructure Fund White Paper'. *Open Future*, 16 December 2022. https://openfuture.pubpub.org/pub/public-digital-infra-fund-whitepaper/

ABOUT OPEN FUTURE

Open Future is a European think tank that develops new approaches to an open internet that maximize societal benefits of shared data, knowledge and culture.

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