EDRi response to the European Commission's "Exploratory Questionnaire" on network fees

May 2023

Question 40: Quantify [...] your direct investments in network infrastructure [...]

Infrastructure investment alone is only a narrow fraction of the digital economy. The demand for Content, Applications and Service Providers (CAPs) is what makes consumers buy high-quality internet access packages from their telecom operator. The question appears to be biased as it suggests that all parties in the value chain should naturally contribute to the privately-owned equipment of telecom operators, which does not make sense. Network infrastructure is no public service or utility, it is a private business in which all profits remain in private hands. The open internet relies on the principle that each consumer and CAP pays their own Internet Service Provider (ISP). VoD or Social Media Providers need to cover their own cost, just like producers of Telecom Equipment, CDNs etc. It is the ISP's responsibility to offer connectivity to virtually all endpoints (see Article 3(1) of Regulation (EU) 2015/2120) with the necessary interconnection agreements.

Question 43: Quantify the increase of traffic transmitted (inbound/outbound) through your networks over the last five years on a year-on-year basis. Please indicate the main sources of data and the share of traffic using CDNs. Please reply to this question by indicating the 10 largest contributors by name and provide the % of total traffic they generated in your network.

Traffic is not generated by CAPs, but by paying subscribers that request services (aka download data) from CAPs. The traffic exchanged between networks is also not directly attributable to individual CAPs. Networks that exchange data contain a multitude of individual endpoints like end-users, hosting companies, ad networks or CDNs. But even if that was the case, any traffic which is tunnelled via VPNs, Tor, iCloud Private Relay or other privacy-enhancing services can not be attributed correctly. So even where telecom operators see an increase in traffic through their networks, and even if that was attributed to a fixed group of CAPs, this merely demonstrate where end-users' preferences lie and for what kind of services they are willing to pay their ISP.

Question 45: In your view, what is the future outlook in terms of annual peak time traffic growth until 2030?

Internet traffic has been growing consistently over the past decades, while costs for providing connectivity have decreased in proportion. Modern network equipment can handle more data than ever, and the COVID-19 pandemic has shown the resilience of the internet to handle unprecedented traffic spikes. While such spikes are extremely rare, this success was not least due to the ability of the interconnection markets to adapt without much bureaucracy; a flexibility which would be put at risk with the regulation under question. Should a mandatory remuneration scheme be set up to funnel money from large tech companies to large telco companies, EDRi sees a real danger for the resilience of the internet and a threat to innovation and growth in the internet economy (level playing field, innovation without permission, etc).

Question 46: Please specify the fees paid to providers of ECNs within EU Member States cumulatively for the last 5 years and provide an outlook for the next 5 years.

The majority of interconnection agreements are done via handshake agreements without written contracts, often in a non-commercial and non-profit oriented nature. EDRi would welcome more transparency in the interconnection market. Sadly, this exploratory consultation is not tailored to provide representative results from the majority of the affected stakeholders, like internet exchanges, SMEs or public and private broadcasters. What is more, and as outlined by BEREC in their preliminary analysis of ETNO's so-called "fair share" proposal, there is no indication that a regulation of the interconnection market is even needed and the consequences could be a "significant harm to the internet ecosystem".

Question 48: Indicate your charging methods and the general pricing trend(s) on the IP market (increases/decreases/stable), particularly the proportion of paid peered traffic for the previous 5 years and provide outlook for the following 5 years.

Until the 2021 CJEU ruling that banned zero-rating practices in the EEA, internet traffic growth from major tech companies was actively and happily subsidised by ISPs in all but three EEA countries – by zero-rating offers. Those offers were economically viable for ISPs – they set it up voluntarily and they negotiated with CAPs for the latter to become part of ISPs "free" service classes. That's because the variable cost of this traffic was negligible compared to the assumed marketing benefit of bundling access service together with preferentially treated individual CAPs. Cross-subsidisation of these bundles via payments from CAPs would have been illegal according to the BEREC Net Neutrality Guidelines (para 42e).

Question 49: Specify the threshold above which you would consider a company to constitute a so-called large traffic generator ("LTG") based on the percentage level of traffic loaded on your network during peak time traffic (or any other classification that you may use). You should refer to this categorization method in all questions referring to LTGs.

The question is fundamentally flawed. LTGs are end-users who upload/download large amounts of data via the ISP infrastructure (which they pay to do exactly that). Internet traffic is not sent by CAPs but it is downloaded by end-users accessing it. Also, attribution of bandwidth to individual CAPs is almost impossible. The absence of porn websites as traffic "contributors" is proof of the biased data in the current debate. While Netflix is prominent in the ETNO report, Disney+ is missing, despite its EU success. That is because instead of operating its own network, Disney+ hosts its content on a CDN and cannot be singled out. As ETNO's traffic numbers for Google, Amazon and Microsoft include their cloud divisions, CDNs seem to be included in any payment obligation, trickling down to CDN customers, incl public broadcasters. Any price regulation for inter-connection – irrespective of the LTG definition – thus inherently raises costs for all sectors of society and hurts media plurality.

Question 51: What is today the share of your network investment incremental costs caused by the increases of data traffic coming from LTGs, you defined in Q49? What was this share 10 years ago and how is it expected to evolve in the next 10 years? Please provide a separate assessment for fixed and mobile networks.

Q.51 creates a false causal link between costs for telecom operators and traffic increases; a type of "free-riding" of CAPs which BEREC has disproven in their preliminary analysis in 2022 and in previous investigations in 2012 and 2017. The idea that large CAPs "cause" traffic increase is fundamentally flawed: When a CAP puts 1,000 terabyte of video on a server and makes it accessible to the internet, that creates zero traffic. Only end-users streaming those videos via their ISP network causes traffic. Of course, the more data end-users request, the more traffic they generate, and that is exactly what they pay their ISP for – if not what else? BEREC also found that interconnection markets are generally competitive and disputes were typically resolved without regulatory intervention, which research consultancy WIK confirmed in its 2022 study. If free riding by CAPs existed, the market wouldn't increasingly invest there and profits of incumbents wouldn't be as high as they are.

Question 52: Are there any obstacles preventing providers of ECNs from charging digital players for increased data traffic through their networks?

Answer "YES"

ISPs have an obligation under the Open Internet Regulation (EU) 2015/2120 to provide connectivity to virtually all end points (Article 3 para 1) and not to degrade service quality based on commercial considerations or make their prices dependent from the concrete CAP or class of CAP that is transmitted (Article 3 para 3). EDRi believes that the practice of several ISPs to exaggerate peering disputes already constitutes a breach of the EU's net neutrality framework. A regulation mandating such actions via price regulation would be at incompatible with existing net neutrality law and would lead to legal uncertainty likely escalating up to the CJEU. It simply cannot be done without infringing on net neutrality.

Question 53: What could be the effect on the environmental footprint of the services provided over electronic communications networks of a potential mechanism whereby the largest generators of traffic would contribute to network deployment, and/or would be subject to obligations regarding data delivery mode?

The net effect on the environment would be negative due to the most likely market reaction to such new regulation. Many CAPs will likely change their practices so that they exchange their data with EU networks offshore. A similar effect was observed in South Korea after the introduction of Sending Party Pays. Just as in South Korea, this has incidentally also increased the cost of telecom operators needing to connect with relevant CAPs further away and deteriorated service quality for consumers. As Ofcom declared that they would not follow the misguided European plans, any such "contribution" regulation could lead to a Brexit windfall dividend where LINX might overtake DeCIX as the current world leading internet exchange.

Question 54: The European Declaration on Digital Rights and Principles states that all digital players benefiting from the digital transformation should contribute in a fair and proportionate manner to the costs of public goods, services and infrastructures to the benefit of all people living in the EU. Some stakeholders have suggested a mandatory mechanism of direct payments from CAPs/LTGs to contribute to finance network deployment. Do you support such suggestion and if so why? If no, why not?

Answer "No"!!!!

Telecom networks are not public infrastructure, they are *privately* owned by some of the most wealthy corporations in the EU with billions of EUR annual net profits. Any additional financial contribution would foremost benefit their owners & shareholders, not the public. Studies of BEREC (BoR (16) 171) and RTR (29.10.2018) have shown: Money is not the bottleneck for infrastructure rollout. If the EU wants to ensure that large (tech) companies contribute more to *public* utilities, it should push for higher corporate tax. The so-called "fair share" idea as lobbied for by telcos only helps the private profits of companies that own physical networks and have political influence in key EU countries. In Germany, the network rollout by challengers far outperformed that of incumbents and the EU's past success in providing affordable connectivity stems from enforcing competition in the telecom market. A fair digital transformation cannot be achieved by re-introducing termination monopolies from the telephony era.

Question 58: Do you see any possible risks of a contribution to finance network deployment in the form of direct payments and if so, which? Please substantiate your answer, including with data.
Bring the items in this order:
1. Negative consequences for consumers
2. Sustainability within the internet ecosystem
3. Negative effects on the incentives for innovation
4. Other
5. Negative consequences on the competition between large and small providers of ECNs
6. Negative consequences on medium/small traffic generators
7. I do not know

Other
Negative consequence on media plurality, service quality and resilience of overall internet

1. Consumers will be hurt by poorer service quality and higher internet prices.
2. SMEs will face higher prices and a deteriorating service quality as network topology adapts to this artificial price regulation.
3. The cost of innovating in Europe will increase and the resilience of the overall internet would fall below required levels to overcome a potential next crisis. Smaller ISPs currently do more for network development than incumbents, yet they will be hit particularly hard in their ability to compete.
4. Ultimately, these negative effects will impede private and public broadcasters and thereby impair media plurality.

Question 59: What mitigating measures could be put in place to avoid the risks indicated in Q58?
Choose "Other"
Please specify "Other":

Don't mandate direct payments from CAPs to finance incumbent telecom operators' private businesses

Respond to "Please explain your answer":
The idea of a network fee is fundamentally incompatible with the diverse, decentralised nature of the open internet. It would either drastically change the nature of the internet and reduce many of its benefits, or it will make the EU follow the South Korean example and add layers upon layers of regulation to rectify the negative effects this model would inflict. In the absence of a real problem to solve in the interconnection market, any regulation will ultimately cause more damage than good.

Nevertheless, ideas worthy of consideration:
1) ISPs above a certain size should be obliged to prevent persisting/recurring congestions on transit links, to peer at point-of-presence, and to allow on-network caching servers,
2) transparency about all interconnection agreements incl price,
3) obligation to peer settlement-free towards all equal/smaller networks,
4) Final-offer arbitration based purely on cost of connectivity should be solely reserved for cases of prolonged interconnection disputes.

Question 60: The European Declaration on Digital Rights and Principles states that all digital players benefiting from the digital transformation should contribute in a fair and proportionate manner to the costs of public goods, services and infrastructures to the benefit of all people living in the EU. To achieve this, home stakeholders have suggested to introduce a mechanism consisting of a EU/national digital contribution or fund. Do you support such suggestion and if so why? If not, why not?

Answer "No"!!!!

Respond to "Please explain your answer":
The declaration is simply stating what is already current practice. All participants in the digital transformation are already contributing to the ecosystem at their level. By providing desirable content, CAPs create incentives for consumers to buy access services in the first place. Without that desire, none of the other businesses would even exist. The idea of "free riding" CAPs on ISPs network is nonsense and as such was rejected in the BEREC Preliminary Analysis. When taking the Declaration seriously, any truly "fair" funding instrument can only be based on revenue of CAPs and channel resources to the public, not other private corporations. Properly taxing wealthy companies can truly benefit the marginalised and unconnected parts of society and, if implemented well, would circumvent all the outlined dangers of any form of regulated interconnection market. (note: see the answers to question 54).