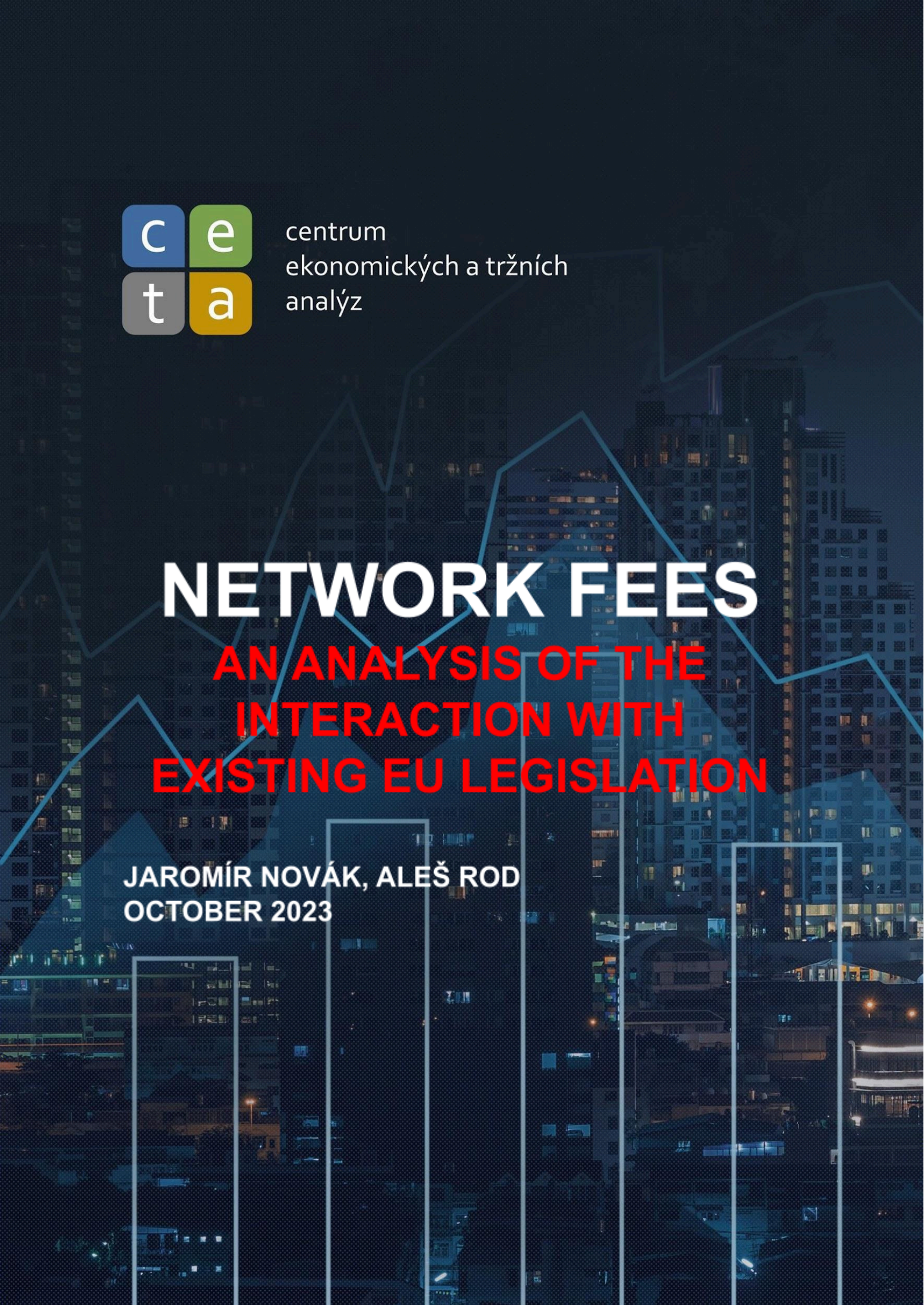

centrum
ekonomických a tržních
analýz

NETWORK FEES

AN ANALYSIS OF THE INTERACTION WITH EXISTING EU LEGISLATION

JAROMÍR NOVÁK, ALEŠ ROD

OCTOBER 2023

EXECUTIVE SUMMARY

- The ongoing dialogue around the notion of the so-called "network fees" — the proposal that companies providing online content should contribute financially to Internet service providers to offset the growing costs of network development — has resurfaced with renewed intensity over the past year. This is not a new concept; similar debates have arisen several times in the past. At present, the European Commission seems inclined to take the idea seriously, having prominently featured it in a consultation on the future of electronic communications and its infrastructure, which ran from February to May of this year. While we commend the active exchange of views, we argue that an essential element is missing from this debate: the perspective of existing and future regulatory oversight.
- The telecommunications landscape in the EU has largely been a triumph, offering competitive prices and widespread Internet access to European citizens and businesses alike. It would be misguided to criticize the EU for an alleged "lack of investment in high-speed Internet" as the overall narrative contradicts this notion. Both large and small telecoms companies are generally profitable and the competitive climate has brought significant benefits to consumers. For regions where private broadband investment is not viable, national and EU funding initiatives are in place to bridge the digital divide.
- We believe that European regulators and policymakers should first use the regulatory tools already at their disposal and follow established processes for reviewing and revising existing laws and directives before considering new regulation. In addition, any regulatory changes primarily advocated by the major telecoms operators — members of the European Telecommunications Networks Operators Association and the GSMA — would require significant changes to existing regulatory frameworks, including the Open Internet Regulation (OIR), the European Electronic Communications Code, and potentially the Digital Markets Act.
- It is important to appreciate the complexity and intricacy of the Internet's architecture, which operates across multiple layers — from the physical layer, which includes the actual hardware and network cables, through the data link, network and transport layers, to the application layers. Each layer has its own unique functionalities, and the cumulative effect of changes in one layer can affect others. Thus, any regulatory intervention aimed at a particular layer — for example, the application layer where content providers operate — could inadvertently affect the underlying layers, affecting the quality, reliability, and economics of Internet services as a whole.
- The risk of unintended consequences underlines the need for a holistic, in-depth analysis that takes into account the multi-layered nature of the Internet and the interdependencies between these layers. Regulatory action should not be taken in a vacuum or on the basis of a superficial understanding of the issues at stake. Instead, they must be the result of robust analytical frameworks that assess not only the immediate impact, but also the downstream effects on each layer of the Internet architecture.
- In addition, the authorities involved — whether NRAs, BEREC, or the European Commission — should actively engage with industry stakeholders, academic experts, and the public to gain a full understanding of the potential impact of any proposed changes. They should also make full use of existing regulatory instruments to model the outcomes of any new proposals

and integrate theminto a broader strategy consistent with the EU's long-term goals for the digital economy.

- We urge all policymakers to exercise the utmost caution, as even minor errors in regulatory changes could trigger a chain reaction of failures or inefficiencies. These effects could spread farbeyond the initial area of impact, threatening the structural soundness and operational effectiveness of the entire Internet infrastructure.

The study was developed with a financial contribution from Google Ireland Limited. The contributor of the study has not affected neither the methodology nor the conclusions of the study.

About CETA:

The Center for Economic and Market Analyses (Centrum ekonomických a tržních analýz – CETA) is a non-governmental, non-partisan research institution that provides applied research at various areas, while using approaches from economics, economic policy, economics of regulation, econometrics or statistics. CETA's interest is directed towards the Czech economy as well as to other European economies

Authors:

***Jaromír Novák**, CETA non-resident fellow researcher, is a former head of the Czech Telecommunication Office (2013-2020), now working as a partner in CZ.NIC association, operator of the CZ top-level domain. Jaromir also lectures at the Faculty of Law of Charles University in Prague, Czech Republic.*

***Aleš Rod,** CETA executive director, leads the analytical team of CETA. In 2022, he has been appointed to the National Economic Council, an advisory body to the government of the Czech Republic. Aleš is a member of Board of Trustees at the Anglo-American University in Prague, Czech Republic.*

TABLE OF CONTENT

1 INTRODUCTION

The debate about the “network fees” - the idea that content providers should pay a certain amount of money to Internet service providers to share the allegedly rising costs of building networks - has resurfaces with a vengeance over the past year. The idea is not new - similar arguments have been made many times in the past. At present, the European Commission seems at least willing to consider the idea, featuringit prominently in its consultation on "The future of the electronic communications sector and its infrastructure", which ran from February to May this year.[1] We very much respect a lively exchange of views. However, we feel that the debate is missing an important aspect – looking at the whole issue through the lens of the regulator.

In the EU, telecoms and digital regulations and directivesare enforced either by national independent regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC), or the European Commission itself (as in the case of very large online platforms and very large search engines, which are designated as such for the purposes of obligations under the Digital Services Act). It is highly unlikely that a new procedure would change the involvement of the NRAs and BEREC.

The telecoms sector has been heavily regulated since the liberalization of the market and the end of state monopolies in the 1990s. We often hear telcos complain that they areunder more government control than other players in the "digital ecosystem". And they are partly right. However, as a utility and network industry, telecoms tend to be a highly oligopolistic (and in some cases monopolistic) market. That is quite enough to justify a certain level of regulation.

The EU telecoms ecosystem has been a great success so far. It has brought competition and access to the internet at reasonable prices to European citizens and businesses. We believe that the EU as a whole should not be derided for “under-investing in high-speed internet”, because for the most part this has not been true. Telcos, large andsmall, are on the whole profitable businesses and the competitive environment has generated a large consumer surplus. In the case of rural and remote areas, where private investment broadband networks is not viable, national and EU support schemes are helping to reduce the digital divide in the EU.

In this paper, we examine the existing rules and the suitability of current tools for analyzing markets for the purpose of the potential failure envisaged in the "network fees" debate. We argue that European regulators and policymakers should first use the tools they already have in existing regulation and stick to the process of evaluating and revising existingregulations and directives before proposing new rules. In addition, the regulatory intervention proposed mainly by the large telecom operators (members of the European Telecommunications Networks Operators Association and the GSMA) would require significant changes to other legal instruments, namely the Open Internet Regulation[2] (OIR), the European Electronic Communications Code and possibly the Digital Markets Act.

---

[1] https://digital-strategy.ec.europa.eu/en/consultations/future-electronic-communications-sector-and-its-infrastructure

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015R2120-20201221

2 What is the Proposed Mechanism?

First of all, it is necessary to define what the proposal that we want to examine from a regulatory point of view actually says. There is no regulatory proposal yet. We believe that the best definition lies in the response from the European Telecommunications Networks Operators Association (ETNO), which, together with the GSMA[3] has been lobbying for a mechanism to be introduced by the regulator (presumably the European Commission, based on the regulation adopted by the European Parliament and the Council), that would *"re-establish fairness in the relationship between Large Traffic Generators and telecom operators"* in the form of a *"contribution mechanism [that] should be based on commercial negotiations enshrined in a framework that obliges the parties to negotiate, in good faith and based on common EU principles, a fair and reasonable contribution for traffic delivery. The scope of the mechanism should only affect "large traffic generators", i.e. only be those companies that account for more than 5% of an operators yearly average busy hour traffic measured at the individual network level."* Beneficiaries should be *"all telecom companies who invest in infrastructure for connectivity – no matter big, small, traditional or challengers."*

From this description, we understand that the telecom associations believe that the operators will be direct beneficiaries of the mechanism, without any intermediary and with little or no regulatory oversight. ETNO only proposes a transparency mechanism *"to ensure that the resources are effectively invested in network deployment as well as improved capacity and efficiency of networks."* We also understand that the contribution mechanism would only affect entities whose services and content are in high demand by the users[4] and, in this respect, contribute to a significant amount of traffic in the telecom operators' networks. This is based on the perceived market failure by the ETNO which states that *"[A small number of large digital platforms] generate enormous revenues for themselves through digital access to European citizens, whilst creating significant costs for telecom operators. Yet, most of the investment burden needed to meet the requirement of these large digital players falls on the shoulders of European operators. Due to significant differences in bargaining power, operators are currently not in a position to reach fair commercial agreements with those creating the greatest cost burden."*

As a complement, it is also worth mentioning how the idea of network fees is reflected in the language of the European Commission. In January 2022, the European Commission published a non-legislative policy document, the Draft EU Declaration on Digital Rights and Principles for the Digital Decade, which explicitly mentions the future activities of the European Commission to develop *"... appropriate frameworks for all market participants who benefit from the digital transformation to assume their social responsibility and contribute fairly and proportionately to the cost of public goods, services and infrastructure for all Europeans"*. The final text of this political declaration was negotiated under the Czech Presidency.[5]

---

[3] https://etno.eu/downloads/positionpapers/summary%20of%20the%20joint%20telecom%20industry%20response.pdf

[4] We believe that the term "large traffic generators" is misleading. Traffic is generated by user demand; digital content companies do not "broadcast" it.

[5] https://digital-strategy.ec.europa.eu/cs/library/european-declaration-digital-rights-and-principles

With this understanding, we will assess whether there is a way in the current regulation to determine whether there is a market failure, and in a second step (if there is one) to address that perceived market failure, and how the institutions should proceed in investigating telcos'claims according to the current legislation.

3 CURRENT REGULATION

At present, the EU is arguably very well equipped to regulate both telecoms companies and digital giants. Providers of electronic communications services are subject to the requirements of the European Electronic Communications Code (EECC) and the Open Internet Regulation, among others. Digital companies have to comply with the rules of Digital Services Act and the Digital Markets Act, and content providers in particular are also regulated by the Audiovisual Media Services Directive, the Copyright Directive and various others. In addition, both sectors are affected by other regulations such as the revised Network and Information Security Directive (NIS2), the old ePrivacy Directive or the Cybersecurity Act. In addition, the European Commission is empowered by these regulatory instrumentsto publish recommendations and guidelines for various reasons (e.g. to define which markets are subject to ex ante regulation).

3.1 ELECTRONIC COMMUNICATIONS CODE

The EECC was born out of the need to adapt to the rapid technological changes and market developments in the digital ecosystem. Prior to the EECC, the regulatory framework consisted of four directives (Framework, Authorisation, Access, and Universal Service Directives), collectively known as the Telecoms Package. The EECC merged and modernized these directives into a single, coherent instrument.

The EECC has several objectives: It aims to promote the connection of high-capacity network infrastructure, including 5G and fiber networks, stimulate competition, and strengthen end-user rights. It also recognizes the role of the so-called over-the-top (OTT) players, such as WhatsApp or Skype, which provide equivalent interpersonal communication services but with a lighter regulatory touch than traditional telecom operators. It promotes better spectrum management for 5G, codifies what constitutes a universal service that should be available to all Europeans, and encourages investment in new network infrastructure.

The EECC follows the spirit of the previous Directive in terms of regulation. The aim of any ex ante regulatory intervention should be to ensure benefits to end-users in terms of price, quality and choice. The regulatory intervention itself should be designed to achieve effective and sustainable competition in retail markets. It should be temporary and be based on market analysis, stakeholder consultation, the possible imposition of remedies, including price controls in the most serious cases of market failure, and regular reassessment of the regulated market. The markets susceptible to regulation are listed in the Recommendation on Relevant Markets, which is published by the Commission and reviewed periodically. The number of relevant markets has been reduced from eighteen to two throughout the existence of the regulatory framework and the process of telecoms liberalization.

The regulatory framework places very high demands on the NRAs to carry out rigorous analysis to demonstrate market failure.

With regard to the debate on “network fees”, we believe that the EECCis an appropriate and fully sufficient regulatory framework to address any market failures that may be discussed in this context

in the future (but importantly, none have been identified so far under the EECC). The recitals call on national regulators and Member States to act in the event of market failure, e.g. in the recital 144:

> *In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a regulatory framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they can ensure end-to-end connectivity by imposing proportionate obligations on undertakings that are subject to the general authorization and that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile), or the ability to change or withdraw the national number or numbers needed to access an end-user's network termination point. This would be the case for example if network operators were to restrict unreasonably end-user choice for access to internet portals and services.*

It is also clear that the EECC is flexible and it is well equipped for analysis not only at the national level but on also at the cross-border level. The Directive contains provisions on cross-border markets, their identification and possible regulation in the Article 65:

> *Procedure for the identification of transnational markets*
>
> *1. If the Commission or at least two national regulatory authorities concerned submit a reasoned request, including supporting evidence, BEREC shall conduct an analysis of a potential transnational market. After consulting stakeholders and taking utmost account of the analysis carried out by BEREC, the Commission may adopt decisions identifying transnational markets in accordance with the principles of competition law and taking utmost account of the Recommendation and SMP guidelines adopted in accordance with Article 64.*
>
> *2. In the case of transnational markets identified in accordance with paragraph 1 of this Article, the national regulatory authorities concerned shall jointly conduct the market analysis taking the utmost account of the SMP guidelines and, in a concerted fashion, shall decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations referred to in Article 67(4). The national regulatory authorities concerned shall jointly notify to the Commission their draft measures regarding the market analysis and any regulatory obligations pursuant to Articles 32 and 33.*

Two or more national regulatory authorities may also jointly notify their draft measures regarding market analysis and possible regulatory obligations in the absence of transnational markets if they consider that market conditions in their respective jurisdictions are sufficiently homogeneous.

As the EECC covers interconnection agreements between different entities and can be used to resolve potential disputes, Article 65 is an instrument that can be used where there is a market failure with cross-border relevance. In this case, the correct approach would be to follow the reasoning of the Directive - ISPs and/or network operators should provide evidence of market failure in the interconnection market to the Commission or the national regulatory authority or authorities in their respective countries.NRAs and the Commission can then make a reasoned request and BEREC will carry out an analysis of a potential transnational market.

The competence to carry out this analysis lies with BEREC, which can draw on the extensive collective experience of national regulators in defining markets at national level. The analysis of transnational markets must of course take into account national circumstances of the countries concerned. Where transnational markets are identified and require regulatory intervention, the relevant regulators need to work together to determine the appropriate regulatory measures, including during the notification process to the European Commission.

It should be noted that in its preliminary statement[6] and its subsequent contribution to the public consultation[7] organised by the European Commission, BEREC "has found no evidence that such mechanism is justified give the current state of the market". At the same time, BEREC considers that the ETNO members' proposal could pose various risks to the internet ecosystem.

If the European Commission now proposes further sector-specific legislation to regulate relations in the telecommunications market beyond the EECC, it will be implicitly stating that the application of the EECC is not achieving its stated objectives, in particular to stimulateinvestment in new network infrastructure.

3.2 Open Internet Regulation

The Open Internet principle is enshrined in Regulation (EU) 2015/21201, which has been applicable in all Member States since 30 April 2016. The Regulation gives end-users a directly applicable right to access and distribute lawful content and services of their choice through an internet access service. It enshrines the principle of net neutrality: internet traffic must be treated without discrimination, blocking, throttling or favoritism. Contracts between end-users and their ISPs cannot contain provisions that would restrict these rights, and ISPs can only manage traffic within the strict limits set out in the OIR. The principle of an open internet was included in the European Declaration on Digital Rights and Principles in 2022, demonstrating its continued relevance in the EU. In short, the rules set out in the OIR serve as a foundation for the internet ecosystem in Europe.

---

6 *https://www.berec.europa.eu/en/document-categories/berec/opinions/berec-preliminary-assessment-of-the-underlying-assumptions-of-payments-from-large-caps-to-isps*

7 https://www.berec.europa.eu/en/document-categories/berec/others/berec-input-to-the-ecs-exploratory-consultation-on-the-future-of-the-electronics-communications-sector-and-its-infrastructure

There have been a number of significant developments since the Regulation enteres into force.Legal, judicial and regulatory developments include the entry into force of the European Electronic Communications Code, which among things extends the consumer protection aspects of Directive 2002/22/EC to which the Regulation refers, two revisions of the original BEREC Guidelines (2020 and 2022) and, most importantly,four judgments of the ECJ on the Regulation, one in September 2020[8], and three in September 2021[9].

All of the ECJ's judgments on the Open Internet Regulations have been in cases involving 'zero tariff' options.

The 'zero tariff' option is a commercial practice whereby an Internet access provider applies a 'zero tariff' or a reduced tariff to all or part of the traffic associated with an application or category of specific applications offered by partners of that access provider. Such data is therefore not included in volume of data purchased by end-users as part of their basic package.

In 2019, the European Court of Justice (ECJ) examined packages from an online service provider that allowed users to access certain applications and services at a 'zero tariff'. This meant that the data used by these applications and services wasn't deducted from the user's main data package. However, there were specific conditions attached to these offers. In its decision, the ECJ emphasised that the basicrule of equal treatment of traffic must be respected for applications and services under the 'zero tariff' option. Until2021, the ECJ ruled that 'zero tariff' options violate the Regulation. Restrictions such as bandwidth limits, tethering, or roaming resulting from these options are also contrary to EU rules.

Following the ECJ rulings, BEREC noted in its 2022 Guidelines that commercial practices could include 'differentiated pricing', where the price for a given amount of data is not the same for all traffic of a giveninternet access service, but that these practices should be 'application agnostic'. In other words, ISPs may include in their commercial practices a different price for a given amount of data (including a 'zero tariff' option or a reduced tariff), as long as that traffic is used independently of the application.

Based on these findings, we believe that any proposal on network fees would be inconsistent with the Open Internet Regulation. Any contribution mechanism that would require content providers to pay for the traffic they deliver to ISPs would - under the current regulations - have to be considered in breach of Article 3(3) of the OIR. Singling out content providers that "account for more than 5% of an operators yearly average busy hour traffic measured at the individual network level" as proposed by ETNO and GSMA, clearly violates the language of the OIR. The regulation allows ISPs to take "reasonable traffic management measures", but explicitly states that these measures "shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic.

[8] Judgment of the Court (Grand Chamber) of 15 September 2020 in Joined Cases C-807/18 and C-39/19 - Telenor Magyarország

[9] Judgments of the Court (Eighth Chamber) of 2 September 2021 in Case C-854/19 - Vodafone, Case C- 5/20 - Vodafone, and Case C-34/20 – Telekom Deutschland

The guidelines set out in the OIR form the basis of the European Internet ecosystem. The basics, which have been supplemented over time by BEREC guidelines and ECJ case law.

4 OPINION OF BEREC

In the arguments put forward by BEREC in its public response to the European Commission's public consultation[10], we find a clear rejection of the introduction of a direct additional payment. As the group of European regulators rightly points out, all players already contribute to the Internet ecosystem in different ways: some provide access networks, others provide digital infrastructure or IP transmission services, others content, applications and services, others digital skills, or a combination of these.

There is only a limited correlation between data growth and the level of investment needed to achieve a gigabit society and to cover allegedly rising network costs, which does not justify the introduction of network fees surcharge. This is what the operators state in their management reports.[11]

Private investment is key to the deployment of networks and ensures the value of market-based solutions. In addition, where appropriate, public funding at local, national or European level is used to support or complement private investment.

BEREC notes that it is by no means certain that operators would use the proceeds of the network fees contribution to target deployment in underserved areas.

Important (if not the most important in many Member States) barriers to the deployment of high-capacity networks are administrative procedures (e.g. for construction permits, road construction permits and subsidies), availability of information (e.g. for municipalities, investors and operators), lack of consumer demand (e.g. where existing infrastructure is sufficient to meet consumer needs), lack of construction capacity and lack of necessary real estate.

BEREC considers that mandatory payments by content service providers to operators are likely to put small operators and small content service providers at a competitive disadvantage. The mere introduction of a network fees contribution is likely to increase the bargaining power of ISPs given their monopoly position in the traffic termination market. This also brings with it the possibility for operators to discriminate and favour their own services (e.g. streaming or cloud-related).

In our view, the strengthened ISP termination monopoly should justify regulatory intervention. Termination has been heavily regulated since the beginning of telecoms liberalization (with specific price regulation), and since the EECC came into force it has been elevated from the specific national markets, following Commission recommendations and guidelines, directly to the EU level. Currently, mobile and fixed voice termination is covered by the Commission's delegated regulation. If the justification for “network fees” were a “cost burden” and the Commission were to take a similar approach as in the case of voice termination, it would have to create a similar cost model to be able to determine what the real costs are. Needless to say, this would be extremely difficult and expensive for both the Commission and the national regulators who would have to provide the data for the model (thus creating an unnecessary regulatory burden for ISPs in the EU).

---

10 https://www.berec.europa.eu/en/document-categories/berec/others/berec-input-to-the-ecs-exploratory-consultation-on-the-future-of-the-electronics-communications-sector-and-its-infrastructure

11 https://accesspartnership.com/why-the-concern-about-telecom-operator-finances/

In its May 2023 opinion on the Commission's consultation, BEREC states that net neutrality principles promote innovation because any end-user can use content and applications without having to ask for permission. The emergence of a termination monopoly could therefore lead to a decline in innovation and consumer welfare, as operators would have the choice of content instead of end-users. The introduction of mandatory network fees contributions could thusly lead to a breach of net neutrality rules, in particular Article 3(1) and (3) of the Net Neutrality Regulation. Unequal charges and the imposition of charges only on certain large content providers could also result insuch a limitation of the range of services and applications available and would be unlikely to comply with the general obligation to treat traffic equally without discrimination or interference under the first subparagraph of Article 3(3) of the Net Neutrality Regulation.

Another significant unintended negative impact would be the disruption of direct peering, where the contribution to network fees could lead to a reduction in direct peering. The current peering market has an exceptionally low cost base and a very high proportion of peering relationships are concluded completely “settlement free”. This has lead to the emergence of a wide variety of Internet Exchange Points (IXPs) serving local markets, thereby increasing the efficiency efficiencies and quality of delivery of traffic. If the network fees regulation were to replace the current market-based model for interconnection, interconnection decisions would be driven by administrative rules and regulatory policy rather than technical or security needs. Reducing the propensity of networks to interconnect could result in fewer interconnection points between access and content networks. This may weaken the stability of Internet connectivity, making it more vulnerable to local equipment failures, and could lead to Internet traffic being redirected away from local interconnection points, thereby reducing the performance and resilience of the interconnection ecosystem to cyber-attacks.

5 Evaluating Regulations

In the EU, the Better Regulation Principles require all regulations and directives to be regularly assessed to determine whether they are fit for purpose. Indeed, as the Better Regulation Principles state, this is a basis for keeping regulation in the form necessary for its continued functioning. Evaluation also tells us whether the Commission (which is responsible for proposing new legislation or amendments and revisions to the existing legislation) considers that changes are needed. Indeed, as the Better Regulation Principles state:

> *Evaluations are most instructive when they generate a robust evidence base on successes and shortcomings, while also identifying areas for improvement with respect to emerging trends and challenges. Importantly, they should say more about why pieces of legislation have or have not delivered as expected.*[12]

> *Evaluation is one of the key pillars of better regulation. It allows us to check whether European legislation and funding programmes deliver as intended and remain relevant and fit for purpose. It identifies problems and their causes that then feed into impact assessments and eventually proposals that can deliver better results. It also provides the evidence we need to simplify and tackle unnecessary costs without undermining policy objectives*[13]

In recent EU regulations and directives, evaluation is mandatory and is included directly in the articles. For example, in the Open Internet Regulation, Article 9 clearly states:

> *By 30 April 2019, and every four years thereafter, the Commission shall review Articles 3, 4, 5 and 6 and shall submit a report to the European Parliament and to the Council thereon, accompanied, if necessary, by appropriate proposals with a view to amending this Regulation.*

The first report on the implementation of the Regulation was published in April 2019. It concluded that the Regulation is adequate and effective in protecting end-users' rights and promoting the internet as a driver of innovation, and that there is no need to amend it. Since then, the Commission, BEREC and NRAs have continued to monitor market developments and the implementation of the Open Internet rules.

The recently published second review for the OIR provides new insights into the Commission's thinking on possible future changes to the Internet ecosystem.[14]

---

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0219

[13] https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1582903615393&uri=CELEX:52019DC0178

[14] https://digital-strategy.ec.europa.eu/en/library/second-report-implementation-regulation-open-internet-access

It notes that since 2019, there have been significant technological, market, and geopolitical changes that weren't anticipated when the regulation was first drafted. The continued relevance of the OIR through these changes shows that its principles-based approach successfully balances the protection ofend-user rights with the promotion of a competitive EU digital market. Based on this assessment, the Commission finds that the ideals of an open internet, taking into account end-users, content creators, application providers, and internet service providers, are as relevant today as they were in 2019 when the first report was published.

In the European Electronic Communications Code, the periodic review is enshrined in the Article 122:

> *By 21 December 2025 and every five years thereafter, the Commission shall review the functioning of this Directive and report to the European Parliament and to the Council.*

In reviewing the functioning of this Directive, the Commission should assess whether, in the light of market developments and with regard to competition and consumer protection, the provisions on specific ex ante regulation are still necessary or whether these provisions need to be amended or repealed. As the EECC introduces new approaches to the regulation of the electronic communications sector, such as the possibility of extending the application of symmetric obligations beyond the first point of concentration or distribution and the regulation of joint investments, particular attention should be paid to assessing the functioning of these approaches.

Despite the existence of review mechanisms and interim reports, the European Commission has not used these tools to transparently signal the existence of the problems that are supposed to exist in the European telecommunications market as a result of increasing data consumption.

6 Digital Markets Act

To address potential market abuse by the major digital platforms - "gatekeepers" - the EU adopted the Digital Markets Act ("DMA"). The DMA targets the largest "gatekeepers", i.e. providers that have a significant impact on the internal market, operate one or more important gateways to customers and have, or are expected to have, an established and lasting position in their business.

The DMA is designed to address a problem where platforms, which are "multi-sided markets", have accumulated such market power. Electronic communications providers are explicitly excluded from the DMA in Article 1 of the Regulation. However, some telecoms operators - such as Telefónica - argue that they shouldbe allowed to develop into a two-sided or multi-sided market. Their argument is that they are hampered in their search for new revenues and business opportunities by sector-specific regulation (mainly OIR):

> *The fact is that the EU telco industry is heavily regulated and its market is far from unhampered. The telco industry must comply with the Open Internet Regulation so that the right to internet access of end users is fully protected. This together with asymmetrical access regulation based on Significant Market Power, obligations of interoperability, and an antitrust policy focused on granting a minimum number of competitors in the market at any price, makes all but impossible, not only to negotiate with OTTs, to even bring them to the negotiation table.*[15]

However, if they have succeeded in becoming a multi-sided market, and if they have been able to negotiate "network fees" with content providers, the question arises as to whether they should not also be subject to the regulation intended for platforms and gatekeepers, namely the DMA. The large telecoms groups would most probably fall within the DMA criteria (7.5 billion euros turnover and 45 million monthly active end-users in the Union over the last three years). We have already shown that the operators would gain a de facto termination monopoly, which (in a different but similar market for voice termination) is heavily regulated.

Obviously, the gatekeeper prohibitionsin Article 5 of the DMA are currently designed for large digital platforms, but if the "network fees" proposal is adopted and large operators become potential gatekeepers and operate as multi-sided markets, it may be necessary to amend the DMA to reflect this new development.

[15] https://www.telefonica.com/en/communication-room/blog/who-chooses-the-number-of-sides-of-a-market/

7 Conclusion

On the basis of the evidence we have presented, we believe that there sufficient legal and regulatory instruments in the current regulations and directives to analyze the markets and to consider whether there is a market failure and therefore a need for regulation of interconnection between ISPs and those providers whose content is in high demand by end-users. Article 65 of the EECC should be used to determine whether there is a need for regulatory intervention in a properly defined transnational market.

The "network fees" proposal would require a radical revision of the Open Internet Regulation absolutely necessary, as differential treatment of certain traffic is incompatible with the current rules. However, in its recent evaluation of the OIR, the Commission did not find any market failure or need for revision. Substantial changes would be contrary to the better regulation principles that should guide the regulatory process in the EU. Before the Commission launched the questionnaire on the "Future of the Electronic Communications Sector and its Infrastructure" in February this year, which included several questions on "fair contribution", we did not find any official review report or assessment document that even suggested there was a market failure that needed to be addressed.

In our view, before making such a proposal, the Commission should analyze the regulatory tools and instruments it already has at its disposal and use them, or clearly explain why they are not appropriate for the issues that need to be addressed. Electronic communications are not a new phenomenon like AI that would justify a new greenfield regulation. Stability is also a value in itself, when the regulatory framework has been in place for a long time and people and companies voluntarily cooperate and coexist according to the established rules.

8 References

BEREC. (2022). BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs.

BEREC. (2022). BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs.

BEREC. (2023). BEREC input to the EC's exploratory consultation on the future of the electronics communications sector and its infrastructure.

Court of Justice of the European Union . (2020). PRESS RELEASE No 106/20 "The Court interprets, for the first time, the EU regulation enshrining ‘internet ".

ETNO, GSMA. (2023). Summary of the Joint Telecom Industry Response to the EU consultation on “The future of the electronic communications sector and its infrastructure”.

EUR - Lex. (2015). REGULATION (EU) 2015/2120 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL.

EUR - Lex. (2023). European Declaration on Digital Rights and Principles for the Digital Decade 2023/C 23/01.

European Commission. (2019). COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Better regulation: taking stock and sustaining our commitment.

European Commission. (2021). COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS EMPTY "Better regulation: Joining forces to make better laws".

European Commission. (2022). European Declaration on Digital Rights and Principles.

European Commission. (2023). Second report on the implementation of the Regulation on Open internet access.

European Commission. (2023). The future of the electronic communications sector and its infrastructure.

González, F. H. (2023). Who chooses the number of sides of a market?

Luca, S. D. (2023). Network cost contribution debate.

Publication Office of the European Union. (2021). Judgments of the Court (Eighth Chamber) of 2 September 2021 in Case C-854/19 - Vodafone, Case C- 5/20 - Vodafone, and Case C-34/20 – Telekom Deutschland.

Webb, W. (2023). Why the concern about telecom operator finances?

CETA-Centrum ekonomických a tržních analýz, z. ú.

Jungmannova 26/15
110 00 Praha 1
(+420) 272 048 488
info@eceta.cz
www.eceta.cz