

"Sending party network pays" - a model that endangers media pluralism

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A. Preliminary remarks

For some months now, well-known telecommunications providers have been making their demand for the introduction of the "sending party network pays" principle (SPNP) heard again¹.² According to this model, service providers whose services produce data traffic on a large scale (such as VoD and streaming providers, for example) should make payments to telecommunications infrastructure operators. In this way, they should contribute a "fair share" to the financing of the infrastructure. Demands of this kind were already rejected by BEREC in 2012 with good arguments.³

In October 2022, BEREC renewed its assessment with a first preliminary assessment of the current demands⁴. Despite changes in the internet ecosystem, it maintains its 2012 findings.

The current discussion focuses mainly on large tech platforms as potential addressees of regulation. Due to feared differentiation difficulties, massive effects could also threaten the classical media sector.

From VAUNET's point of view, the SPNP principle endangers media pluralism and the existing high quality of media offerings in Europe, creates disadvantages for consumers and is thus contrary to the goals pursued by the European Commission and the co-legislators, for example in the European Democracy Action Plan or also the European Media Freedom Act. VAUNET therefore calls on decision-makers at European and national level to refrain from introducing so-called "network fees".

¹ Thus already in 2012, cf. ETNO, "ITRs Proposal to Address New Internet Ecosystem", 2012, available at: <https://etno.eu/datas/itu-matters/etno-ip-interconnection.pdf>

² ETNO, "Europe's internet ecosystem: socio-economic benefits of a fairer balance between tech giants and telecom operators", 2022, available at: <https://etno.eu/downloads/reports/europes%20internet%20ecosystem.%20socio-economic%20benefits%20of%20a%20fairer%20balance%20between%20tech%20giants%20and%20telecom%20operators%20by%20axon%20for%20etno.pdf>

³ BEREC's comments on the ETNO proposal for ITU/WCIT or similar initiatives along these lines, available at: https://www.berec.europa.eu/sites/default/files/document_register_store/2012/11/BoR%2812%29120rev.1_BEREC_Statement_on_ITR_2012.11.14.pdf

⁴ BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs, available at: https://www.berec.europa.eu/system/files/2022-10/BEREC%20BoR%20%2822%29%20137%20BEREC_preliminary-assessment-payments-CAPs-to-ISPs_0.pdf

B. Key points

- If the SPNP principle is introduced, media or broadcasting companies could also be obliged to make payments. A further increase in distribution costs would have a direct negative impact on investments in innovative contributions to the opinion forming process and media pluralism. In addition, there would be a not inconsiderable calculatory uncertainty since the data traffic is initiated by the users and not the content providers.
- Media companies can also be indirectly affected: In some cases, large tech platforms and social networks are used to distribute content in addition to their own online services. Here, a "pass-through" of costs would have to be expected.
- Therefore, there is a threat of a restriction of media pluralism and the quality of streaming offers to the detriment of consumers. In South Korea, SPNP was introduced at the TC network operator level in 2016 and extended to large content providers in 2020. As a result, there were reduced streaming qualities to avoid traffic and also market exits.
- The demand for a "fair share" of infrastructure costs underestimates the fact that telecommunications providers profit from high-quality content. In order to be able to use this content comfortably, users are opting for internet connections with a higher broadband and corresponding access contracts. Thus, content providers already contribute significantly to the economic operation of the infrastructure.
- A re-investment of revenues from "network fees" in broadband expansion can hardly be secured by law. And there is no need for this: what is needed to drive the expansion forward is a reduction in bureaucracy and extended regulations on the shared use of existing infrastructure.
- SPNP creates a two-sided market. Users already pay internet service providers for connections and the traffic generated by their internet usage - either a flat rate or according to volume. Thus, today the ones who pay are primarily those who actually decide how the infrastructure is used. If another source of revenue is developed on the side that provides content for retrieval, there is a risk of overcompensation of the infrastructure operators.
- The assertion that offers with large data volumes are cost drivers in the operation of the infrastructure contradicts the active marketing (until the prohibition) of contract offers with "zero rating" options, which exempted particularly data-intensive services from the agreed data volume.
- BEREC's preliminary assessment clearly shows: the costs for infrastructure operators increased by increasing data traffic are negligible compared to the total costs of the network. According to BEREC, the introduction of SPNP could cause significant damage to the internet ecosystem.

C. In detail

1. A payment obligation jeopardises media companies' investments in content and innovation

Additional payment obligations, such as those once again envisaged by the telecommunications companies as feed-in fees for infrastructures, would have a direct impact on possible investments in content and in innovative contributions to opinion-forming and media pluralism. Therefore, it must be ensured in any case that media companies will neither be directly nor indirectly affected by any payment obligation.

The current request primarily refers to very large tech platforms; in some cases, the still outstanding gatekeeper qualification according to the Digital Markets Act is proposed. If the reference for a corresponding regulation were to be directly linked to traffic volumes, be it as peak volume or total volume, there is a danger that the expected positive development in the streaming and VoD market would also include traditional media companies.

It must be considered that media companies are subject to strict regulation anyway. In addition to national regulations, there is more and more directly applicable European law; most recently, for example, the Digital Services Act and, in the near future, the regulation on transparency and targeting of political advertising and the European Media Freedom Act. Many of the regulations provided in there entail additional burdens in the form of bureaucratic effort or require the holding and administration of information.

2. Media companies can also be indirectly affected

The introduction of traffic-based payment obligations could also indirectly affect media companies. In addition to the traditional distribution-channels and the successful expansion to the online sector, professional media services also use large tech platforms and social networks to distribute their services to also provide citizens who primarily use these digital platforms with relevant information and other services. Here, in the case of the introduction of the "SPNP" principle a significant increase in distribution costs must be expected, virtually with a levy on the traditional audiovisual service providers, with the consequences outlined above.

The "polluter pays" approach that is applied so far, according to which the originators of the data volume to be transferred - the receiving users - pay exclusively for the reception service, also brings with it a higher calculation security for the providers of digital services, which is not guaranteed in

the SPNP model due to fluctuating and uncontrollable call-off figures. These providers are also already making major contributions to cost savings and business models in the broadband market. On the one hand, this is done through data optimization and their own content delivery networks; on the other hand, attractive content services significantly increase the demand for broadband internet connections.

3. Consequences: Less media pluralism and restrictions of services for consumers

The consequences of creating two-sided infrastructure markets at the expense of the media sector can already be observed in practice. In South Korea, the "SPNP" principle was introduced at ISP level in 2016 and extended to large content providers in 2020. As a result, content providers have, for example, reduced the streaming quality of audiovisual content available to their end-users in order to keep the costs, which are difficult to calculate, reasonable⁵. There have also been market exits, which have also had a negative impact on the telecommunications market.⁶

4. Network fees do not automatically contribute to broadband expansion

It is occasionally argued that the existing problems in broadband expansion - whether in the area of 5G or in the expansion of the fiber-optic network - could be countered by a "fair share" of content providers in the costs of telecommunications infrastructure operators. This assumption wrongly assumes that the expansion suffers from a lack of investment capacity on the part of the telecommunications companies. However, the decisive factors for the slow progress are rather a high bureaucratic effort, a deficit between investment expenditure and demand that reduces the economic attractiveness, as well as insufficient regulations on the shared use of existing infrastructure,⁷ which is reflected on the cost side.

Moreover, it cannot be ensured from a regulatory point of view that additional revenues from telecommunications companies are actually invested in broadband expansion.⁸

⁵WIK "Competitive conditions on transit and peering markets", 37 m.w.N., 2022, available at: https://www.bundesnetzagentur.de/EN/Areas/Telecommunications/Companies/Digitisation/Peering/download.pdf?__blob=publicationFile&v=1

⁶ For effects, also on the telecommunications market, see Park/Nelson "Afterword: Korea's Challenge to the Standard Internet Interconnection Model", in: The Korean Way With Data, available at: <https://carnegieendowment.org/2021/08/17/afterword-korea-s-challenge-to-standard-internet-interconnection-model-pub-85166>

⁷ WIK, "Potentials for accelerating broadband expansion", 2021, available at: https://www.wik.org/fileadmin/Studien/2022/WIK_Beschleunigung_Breitbandausbau_final.pdf

⁸ Williamson "An internet traffic tax would harm Europe's digital transformation", 2022, available at: <https://lisboncouncil.net/wp-content/uploads/2022/07/COMMUNICATIONS-CHAMBERS-Internet-Traffic-Tax-2.pdf>

A reduction of the access fee for end users is also not to be expected.⁹ According to current economic studies, paying twice for the same service leads to an overcompensation of large infrastructure providers, who already show enormous profitability¹⁰ – with negative consequences for consumers and media pluralism. In addition, there is a threat of the termination monopoly being exploited by restrictive interconnection policies to enforce network fees, with the consequence of distortions of competition.¹¹

5. SPNP can endanger net neutrality

Depending on the design, SPNP could also call into question the principle of network neutrality if the negotiation of the amount of corresponding payments leads to preferential treatment of offers. In addition, a tough enforcement of network charges by market-dominant telecommunications companies for content providers and large platforms could end in the refusal of the transmission of corresponding signals. End-users would then no longer be able to use such services. This would contradict the principle of treating all data equally.

About VAUNET

VAUNET is the umbrella organization for commercial audiovisual media in Germany and the largest representative body of commercial broadcasting interests in Europe. Its 160 members enrich Germany's media landscape through diversity, creativity and innovation.

⁹ Abecassis/Kende "IP interconnection in the internet: a white paper", 2020, available at:

<https://www.analysismason.com/consulting-redirect/reports/online-service-providers-internet-infrastructure-dec2018>

¹⁰ cf. comparison of dividends of telecommunications providers with the EURONEXT average at:

<https://www.ft.com/content/cb8d8dfa-5e8c-4dd7-b9c7-7535a52be5a0>

¹¹ WIK, fn. 4, p. 35; references to the practice cases at: Lyons "An Antitrust-Informed Approach to Regulating Internet Connection", Boston University Journal of Science and Technology Law, Vol. 24, No. 2, 2018, p. 240, available at:

<https://ssrn.com/abstract=3258747>