

UNCERTAINTY FOR THE OPEN AND FREE INTERNET

First positioning of the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – vzbv) on the possible introduction of the sending-party-pays system

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I. SUMMARY

A few weeks ago, the European Commission (Commission) announced its intention to introduce the “sending-party-network-pays system” (or sending-party-pays, SPNP) in the framework of the legislative proposal of the “Connectivity Infrastructure Act” (CIA) this autumn. From a consumer’s point of view, the Federation of German Consumer Organisations (vzbv) suggests the following aspects to be taken into account:

- ❖ vzbv rejects the introduction of the sending-party-pays system. The negative consequences for competition, the internet economy and consumer interests outweigh the profit motives of the telecommunications industry.
- ❖ The introduction of the SPNP system could have disruptive effects on the entire structure of the internet. For this reason, the current functioning of the internet of global and voluntary interconnection of networks as well as the "best-effort principle" must be maintained.
- ❖ Internet service providers (ISPs) are already compensated for building and providing broadband infrastructure. It would be important to improve the regulatory framework on different ends such as efficient funding, increasing roll-out capacities and using new installation techniques.
- ❖ The SPNP system would undermine net neutrality and could thus jeopardise the open and free access to the internet for consumers.
- ❖ Before publishing a legislative proposal, the European Commission should wait for the final report from the Body of European Regulators for Electronic Communications (BEREC) on the subject.
- ❖ vzbv criticises the non-transparent process for the possible introduction of the SPNP system. The Commission has bound itself to a public and transparent participatory process ahead of introducing a legislative proposal. vzbv therefore calls for a public consultation. This would create appropriate opportunities for participation by the groups concerned such as civil society, industry representatives, consumer associations and individual citizens.

II. INTRODUCTION

With the CIA announced for fall 2022, the European Commission could realise its plans and impose a fee on content providers (also called content application providers, or CAP, or over-the-top services, or OTT) for the use of the internet infrastructure for the benefit of the telecommunications industry.¹² This sudden regulatory motion was motivated by statements from the telecommunications industry complaining that CAPs consume large amounts of data without paying for the costs of providing the capacities. According to the European Commission, telecommunications providers no longer receive the appropriate return on their investments in telecommunications networks, which is why the remuneration ought to be regulated.³

The renewal of this old demand was initiated by ETNO (European Telecommunications Network Operators' Association). In a study, they argue that the imbalance between CAPs (in particular large providers such as Google, Netflix, Amazon, etc.) and the telecoms industry affects their ability to invest in the maintenance and innovation of the telecoms infrastructure and in particular in the roll-out of 5G networks.⁴

Ten years ago, there was already a quite similar debate where telecommunications providers already proposed the "sending-party-pays" system. At that time, the European Commission and BEREC, among others, spoke out against this proposal on the grounds that there would be more need for regulation, the danger of monopolies would be increased and there would generally be no benefit.⁵

There has already been a lot of criticism from civil society⁶, some EU Member States⁷ and members of the European Parliament⁸ for the legislative proposal and the non-existent participatory process.

From the consumer's point of view, the initiative towards pushing the SPNP-system of the European Commission and the telecommunications industry must be criticised. The non-transparent approach of the European Commission makes it difficult to participate in the political and legislative process.⁹

¹ Euronews: Should Google, Meta and Netflix help pay for telecoms networks? Why not, says EU's Vestager, 2022, <https://www.euronews.com/next/2022/05/02/should-google-meta-and-netflix-help-pay-for-telecoms-networks-why-not-says-eu-s-vestager>, 18.07.2022.

² Bertuzzi, Luca: Commission to make online platforms contribute to digital infrastructure, 2022, <https://www.euractiv.com/section/digital/news/commission-to-make-online-platforms-contribute-to-digital-infrastructure/>, 18.07.2022.

³ Ibid.

⁴ AXON: Europe's internet ecosystem: socioeconomic benefits of a fairer balance between tech giants and telecom operators, 2022, <https://etno.eu/library/reports/105-eu-internet-ecosystem.html>, 10.07.2022.

⁵ BEREC: https://berec.europa.eu/eng/document_register/subject_matter/berec/others/1076-berecs-comments-on-the-etno-proposal-for-ituwcit-or-similar-initiatives-along-these-lines, 14.06.2022.

⁶ <https://epicenter.works/content/eu-kommission-droht-mit-aushoehlung-der-grundwerte-des-freien-und-offenen-internets>, 10.07.2022.

⁷ Bloomberg: estager's Idea for Tech to Pay Telecom Costs Gets More Pushback, 2022, <https://www.bloomberg.com/news/articles/2022-07-19/seven-countries-voice-concern-over-eu-s-streaming-fee-idea>, 19.07.2022.

⁸ Joint letter: regarding the Sending-Party-Pays-Model; 2022, https://www.patrick-breyer.de/wp-content/uploads/2022/07/20220712_COM_Access-Fees-MEP-Letter_final3.pdf, 19.07.2022.

⁹ According to as yet unconfirmed reports, the European Commission is now planning a public consultation on IP-interconnection, Politico: Commission plans consultation on Big Tech's telecoms contribution, 2022, <https://pro.politico.eu/news/152534>, 26.07.2022.

The negative consequences of this proposal can hardly be assessed. There is a risk that competition will be distorted, which could have a negative impact on the price/performance ratio and the diversity of telecommunication products and tariffs, as well as on the diversity of offers, thus increasing barriers to access to the market. Furthermore, there is a risk that net neutrality, as the cornerstone of open and free access to the internet, will be undermined.

III. POSITIONS IN DETAIL

1. SENDING-PARTY-PAYS SYSTEM

The sending-party-pays system (or sending-party-network-pays, SPNP) is a billing system for internet traffic in which CAPs pay ISPs traffic-dependent network charges. The telecommunications industry justifies its renewed push for the introduction of this system by arguing that CAPs should contribute to network costs in order to co-finance further network investments.¹⁰

At a technical level, the discussion revolves around data traffic that is passed through from the content provider (CAP) via the internet service provider (ISP) to end consumers who request the data. The transmission of data between CAP and ISP is called IP interconnection. According to art. 2 (28) of the European Electronic Communications Code (EECC) *“‘interconnection’ means a specific type of access implemented between public network operators by means of the physical and logical linking of public electronic communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking where such services are provided by the parties involved or other parties who have access to the network”*.¹¹

IP interconnection between ISPs and CAPs is based on transit and peering agreements. At the wholesale level, ISPs do not receive payments for terminating traffic. The costs are covered by the end users, who pay for the use of the internet and bandwidth with their telecommunications subscriptions. The billing system is therefore based on the party requesting the data traffic.¹²

As mentioned above, the call for termination fees for CAPs is not a new one. ETNO had already tried to push a similar proposal in 2012.¹³ BEREC dealt with the proposal at length at the time and rejected it on the grounds that the change to the existing structure of the internet could have a detrimental effect on further developments of the internet by putting out of balance the bargaining power of market participants, opening the way for market abuse by the telecommunication industry.¹⁴ Furthermore, there would be a risk increasing the need for regulatory oversight. For consumers, access to content could be disrupted, which in turn could affect the diversity of offerings. CAPs would also be affected by the adverse effects. In summary, BEREC said that the current charging system has enabled a high level of innovation, as well as the development of a wide range of content and applications.¹⁵ The current payment system benefits all market

¹⁰ ETNO: Joint CEO Statement: Europe needs to translate its digital ambitions into concrete actions, 2022, <https://etno.eu/news/all-news/717-ceo-statement-2021.html>, 15.07.2022.

¹¹ Art. 2 (28) 28 EECC.

¹² WIK-Consult: Wettbewerbsverhältnisse auf den Transit- und Peeringmärkten, Auswirkungen für die digitale Souveränität Europas, 2022, p. 33.

¹³ ETNO: ITRs Proposal to Address New Internet Ecosystem". 2012, <https://etno.eu/datas/itu-matters/etno-ip-interconnection.pdf>, 14.07.2022.

¹⁴ BEREC: BEREC's comments on the ETNO proposal for ITU/WCIT or similar initiatives along these lines, 2012, https://berec.europa.eu/eng/document_register/subject_matter/berec/others/1076-berecs-comments-on-the-etno-proposal-for-ituwcit-or-similar-initiatives-along-these-lines, 19.07.2022.

¹⁵ Ibid.

participants. BEREC also plans to comment on the current push by the telecommunications industry. A first report is announced for October 2022, the final report is scheduled for the end of 2023.¹⁶

At the time back in 2014, the European Commission also agreed with BEREC's assessment and pointed out that CAPs with their diverse offerings are the ones that maintain demand and play a crucial role in the internet ecosystem.¹⁷

1.1 South Korea as a negative example

Unlike in the discussion ten years ago, South Korea now serves as an example for the introduction of the sending-party-pays system and its negative impact for the market and consumers.

South Korea is the only country in the world where IP interconnection has been regulated since 2016 when the sending-party-pays system was introduced. First, ISPs were obliged to pay a fee when exchanging data traffic with each other.¹⁸ Since 2020, selected CAPs are also obliged to pay fees to ISPs for terminating traffic.¹⁹ Some CAPs reduced the quality of their streaming services in order to save on network fees. It can also be observed that some CAPs, especially regional ones, are withdrawing from the South Korean market to avoid paying network fees.²⁰ The variety of offers for consumers is therefore decreasing. A decline in investment in infrastructure and a slowdown in the digital transformation are expected.²¹ There is also a risk of market concentration and dominance of a few ISPs.²²

1.2 Investment costs for deployment and maintenance of the internet infrastructure

The European telecommunications industry justifies the demand for the introduction of the SPNP system with a perceived imbalance between ISPs and CAPs (in particular large providers such as Google, Netflix, Amazon etc.). ISPs see their ability impaired to invest in the maintenance and innovation of telecommunications infrastructure and in particular in the roll-out of fibre and 5G networks.²³

¹⁶ BEREC: New work item assessing the IP interconnection ecosystem and impact of the sending-party-pays principle ("OTT fair share") on this ecosystem and on end-users, 2022, https://www.berec.europa.eu/sites/default/files/files/document_register_store/2022/6/Presentation%20-%20BEREC%20public%20debriefing%20June%202022.pdf, 19.07.2022.

¹⁷ Kroes, Nellie: Adapt or die: What I would do if I ran a telecom company, 2014, https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_14_647, 15.07.2022.

¹⁸ WIK-Consult: Wettbewerbsverhältnisse auf den Transit- und Peeringmärkten, Auswirkungen für die digitale Souveränität Europas, 2022, p. 35.

¹⁹ Ibid.

²⁰ Ibid., p. 39.

²¹ Ibid.

²² Internet Society: Internet Impact Brief South Korea's Interconnection Rules, 2022, <https://www.internetsociety.org/wp-content/uploads/2022/05/IIB-South-Korea-Interconnection-Rules-2022.pdf>, 14.07.2022.

²³ AXON: Europe's internet ecosystem: socioeconomic benefits of a fairer balance between tech giants and telecom operators, 2022, <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>, 10.06.2022.

At least for the German market, it can be argued that it is not the lack of investment capital that is dragging out the progress of broadband deployment. The telecommunications industry in this country has pledged 50 billion in investments in fibre optic deployment.²⁴ According to the German telecommunications industry, money is not the problem but rather the right framework conditions which are lacking, such as sufficient construction capacities, a reformed funding landscape and the use of new installation techniques.^{25,26} At one point, the industry criticized that they are “suffocating in subsidies”.²⁷

Consumers pay their ISP for access to the internet (they also pay the CAP for the use of the content itself). The transport of data is therefore already paid for by the consumer. For this service, the ISPs now want additional fees from content providers. CAPs, on the other hand, already pay for their content, applications and services to be transported through the internet and for consumers to access them.²⁸ Large CAPs invest heavily in content delivery networks and the infrastructure required for them.²⁹ It is unclear whether CAPs would pass on the increased costs to end users.

Furthermore, consumers in Germany do not only pay for the use of the broadband infrastructure via their individual telecommunications subscription. In many cases, landlords can pass on the costs for the expansion of the fibre-optic infrastructure to their tenants via the new fibre-optic provision fee (Glasfaserbereitstellungsentgelt) introduced into the German Telecommunications Act (TKG).³⁰ The tenants must then, of course, still pay for an individual telecommunications contract.

It is also difficult to understand why network costs are a problem, especially with the advancing expansion of fibre optics. The networks are more stable than ever before and fibre optics can transmit much larger volumes of data with greater stability than copper for example.³¹

According to John Stephens, CFO of AT&T, in 2016, it was already possible to build “2.5 times more capacity at 75 percent of the capital costs compared to just a few years ago” due to increasing network virtualisation.³²

²⁴ VATM: VATM-Jahrbuch 2022, Wettbewerb - Der Treiber für die Gigabit-Gesellschaft, 2022, p. 8.

²⁵ Ibid.

²⁶ Delhaes, Daniel: Wissing macht Tempo beim Breitbandausbau – lässt die Finanzierung aber offen, 2022, <https://www.handelsblatt.com/politik/deutschland/gigabitstrategie-wissing-macht-tempo-beim-breitbandausbau-laesst-die-finanzierung-aber-offen/28172854.html>, 19.07.2022.

²⁷ Sawall, Achim: Weitere 10 Milliarden Euro “ersticken Glasfaserausbau”, 2021, <https://www.golem.de/news/vatm-weitere-10-milliarden-euro-ersticken-glasfaserausbau-2111-161341.html>, 19.07.2022.

²⁸ Open letter: EU-Kommission droht mit der Aushöhlung der Grundwerte des freien und offenen Internet, 2022, <https://epicenter.works/content/eu-kommission-droht-mit-aushoehlung-der-grundwerte-des-freien-und-offenen-internets>, 10.07.2022.

²⁹ Ibid.

³⁰ § 72 TKG.

³¹ Telekom: Glasfasertechnik: Mit Lichtwellen rasend schnell Daten übertragen, <https://www.telekom.com/de/konzern/details/glasfasertechnik-schnell-stabil-und-zukunftssicher-635930>, 19.07.2022.

³² Gibbs, Colin: T-Mobile, AT&T and Verizon maintain capex spending despite incentive auction, 2016, <https://www.fiercewireless.com/wireless/t-mobile-at-t-and-verizon-maintain-capex-spending-despite-incentive-auction>, 14.07.2022.

1.3 Zero Rating as a driver for data traffic

The European Court of Justice has just ruled in 2021 that zero-rating tariffs are incompatible with the European net neutrality rules.³³ With respect to the numerous zero rating products flooding the European market before the ECJ ruling, the telecommunications industry's demand for charging data-intensive use of the networks is even more incomprehensible.

With zero-rating tariffs such as StreamOn or VodafonePass, consumers are not charged for the inclusive data volume used when using selected services (such as Spotify, Netflix, WhatsApp, TikTok, YouTube, etc.). Zero rating tariffs become more interesting for end users the more limited their inclusive data volume is and the higher the prices for additional data are.

With its own tariff structures, the telecommunications industry has thus created incentives to consume unlimited data of certain services and CAPs. StreamOn alone had 4.6 million customers in Germany in 2021.³⁴ Such products also drive up data traffic. Well noted, without network problems in Germany even during the COVID-19 pandemic.³⁵³⁶

VZBV POSITION

vzbv rejects the introduction of the sending-party-pays system. The negative consequences for competition, the internet economy and consumer interests outweigh the profit motives of the telecommunications industry.

Internet service providers (ISPs) are already compensated for building and providing broadband infrastructure. It would be important to improve the regulatory framework on different ends such as efficient funding, increasing roll-out capacities and using new installation techniques.

Before publishing a legislative proposal, the European Commission should wait for the final report of the Body of European Regulators for Electronic Communications (BEREC) on the subject.

³³ Cases C-854/19, C-5/20, C-34/20.

³⁴ Telekom: Geschäftsbericht 2021, 2022, p. 72.

³⁵ Bundesnetzagentur: Tätigkeitsbericht Telekommunikation 2020/2021, 2021, p. 96.

³⁶ Telekom: Das Netz ist stabil, 2020, <https://www.telekom.com/de/konzern/details/das-netz-ist-stabil-596708>, 15.07.2022.

2. IMPACT OF THE SPNP-SYSTEM ON THE STRUCTURE OF THE INTERNET

The internet at its core are interconnected networks. Each network joins the internet voluntarily and decides independently with which other networks it will interconnect and how it will route traffic. This is based on the individual network's own needs and requirements. So if a network wants to be connected globally to the internet, it only has to interconnect with other networks that are already part of the internet. The new network then negotiates the interconnection individually. There is no central internet administration or coordination for this system that dictates how and where connections are made. All networks work together freely and decide individually which networks are to be interconnected.³⁷ This is how the internet emerged and grows globally, without borders.

Furthermore, the internet functions as a general-purpose network. It is not optimised for a specific language, usage pattern or particular traffic characteristics. It works according to the "best-effort principle" and routes data packets independently, as quickly as possible and within the limits of the available resources.³⁸ The design of the internet makes it possible to reach everyone and therefore gives every company the freedom to attract and serve customers all over the world.

If there now would be requirements for certain business agreements between ISPs and CAPs, one would restrict the previous autonomy of the entire internet and its flexibility and voluntary character would be taken away.³⁹

CAPs from all over the world cannot reach customers in South Korea as easily and freely as before. Consumers from South Korea no longer have free access to any content but only to that content provided by CAPs who have specific contracts with their ISPs. The example of South Korea gives a good idea of the negative impact the SPNP system could have in the EU and on the existing structure of the internet, its capacity for innovation, freedom and diversity of applications.

2.1 Endangering net neutrality as a direct consequence of the SPNP system

The telecommunications industry argues that net neutrality is not affected by the SPNP system because it affects the relationship between end users and ISPs and not IP interconnection, i.e. the interconnection of networks, or the relationship between ISPs and CAPs at the wholesale level.

However, the section above, about the structure of the internet, already suggests why this statement is not in line with the realities of the market.

Since 2015, the Regulation (EU) 2015/2021 has guaranteed net neutrality and ensured equal treatment of data and discrimination-free access when using data networks. Telecommunication providers are obliged to treat all traffic equally. Users have the possibility to use the bandwidth they have booked as they wish and access the content they want. In this respect, the Regulation has a strong impact on business relations in the area of IP interconnection. What would happen if a content provider refused to pay fees to the ISPs? Would the content then no longer reach end users because the ISP would

³⁷ Internet Society: Internet Impact Brief South Korea's Interconnection Rules, 2022, p. 5.

³⁸ Ibid.

³⁹ Ibid.

block access? According to the principle of net neutrality the ISP has no right to do this since it must treat all data equally.

BEREC sees no threat to net neutrality as long as the “best-effort principle” is followed and all data is treated equally. According to BEREC, the best-effort principle is reflected in the current interconnection agreements between IP networks in the form of transit and peering agreements.⁴⁰ However, changes to this approach at the wholesale level could have a negative impact on net neutrality and end users if they no longer have access to all content.⁴¹

In California, network charges for IP interconnection were explicitly banned in 2018 with the introduction of strong net neutrality rules to ensure a better standard of protection for open and free access to the internet.⁴²

A broad alliance of civil society organisations also warns against the undermining of net neutrality. The organisations see the danger that broadband providers and ISPs will abuse their monopoly on accessing end users and exploit it in granting paid access to CAPs.⁴³

VZBV POSITION

The introduction of the SPNP system could have disruptive effects on the entire structure of the internet. For this reason, the current functioning of the internet of global and voluntary interconnection of networks as well as the “best-effort principle” must be maintained.

The SPNP system would undermine net neutrality and could thus jeopardise the open and free access to the internet for consumers.

⁴⁰ BEREC: An assessment of IP interconnection in the context of Net Neutrality, 2012, p. 5.

⁴¹ Ibid.

⁴² Kelly, Heather: California just passed its net neutrality law. The DOJ is already suing, 2018, <https://edition.cnn.com/2018/10/01/tech/california-net-neutrality-law/index.html#:~:text=The%20California%20law%20would%20be%20the%20strictest%20net,or%20companies%20fees%20for%20faster%20access%20to%20customers.,> 21.07.2022.

⁴³ Open letter: EU-Kommission droht mit der Aushöhlung der Grundwerte des freien und offenen Internet, 2022, <https://epicenter.works/content/eu-kommission-droht-mit-aushoehlung-der-grundwerte-des-freien-und-offenen-internets>, 10.07.2022.

3. NON-TRANSPARENT PREPARATORY PHASE OF THE LEGISLATIVE PROCESS

So far, there are basically no official announcements of the European Commission to introduce the SPNP system. Apart from a few interviews by Commissioner Vestager⁴⁴ and Commissioner Breton⁴⁵, the process for the possible introduction of termination fees for CAPs is intransparent. Civil society⁴⁶, a number of Members of the European Parliament⁴⁷ and EU Member States⁴⁸ criticise this.

The approach of the European Commission is even more surprising as such a project was not announced in the Commission's current digital strategy.⁴⁹ The demand of the telecommunications industry for termination fees for CAPs does not seem to figure in the upcoming action plan "Road to the Digital Decade" either will not be included.⁵⁰

For a proper participatory process, all stakeholders must have the opportunity to comment on the issue in a public consultation before a proposal is published. According to media reports⁵¹, however, the SPNP regulation is to be published in autumn 2022 with the "Connectivity Infrastructure Act".

VZBV POSITION

vzbv criticises the intransparent process for the possible introduction of the SPNP system. The participatory process must be public and transparent before a legislative proposal is published. vzbv therefore calls for a public consultation. This would create appropriate opportunities for participation by all groups concerned such as civil society, industry representatives, consumer associations and individual citizens.

⁴⁴ Rudl, Tomas: Neuer Angriff auf die Netzneutralität, 2022, <https://netzpolitik.org/2022/eu-digitalkommissarin-vestager-neuer-angriff-auf-die-netzneutralitaet/>, 15.07.2022.

⁴⁵ Bertuzzi, Luca: Commission to make online platforms contribute to digital infrastructure, 2022, <https://www.euractiv.com/section/digital/news/commission-to-make-online-platforms-contribute-to-digital-infrastructure/>, 18.07.2022.

⁴⁶ Rudl, Tomas: EU-Abgeordnete warnen vor Abschaffung der Netzneutralität, 2022, <https://netzpolitik.org/2022/kritik-an-vestager-eu-abgeordnete-warnen-vor-abschaffung-der-netzneutralitaet/>, 15.07.2022.

⁴⁷ Joint letter: regarding the Sending-Party-Pays-Model; 2022, https://www.patrick-breyer.de/wp-content/uploads/2022/07/20220712_COM_Access-Fees-MEP-Letter_final3.pdf, 19.07.2022.

⁴⁸ European Member States Denmark, Estonia, Finland, Germany, Ireland, The Netherlands and Sweden: Call for a careful process in light of the current debate on OTTs, 2022, <https://www.permanentrepresentations.nl/documents/publications/2022/07/19/call-for-a-careful-process-in-light-of-the-current-debate-on-otts>, 30.07.2022.

⁴⁹ EU-Kommission: Ein Europa für das digitale Zeitalter, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_de, 19.07.2022.

⁵⁰ Krempf, Stefan: Netze: Schlappe für Telcos im Streit über Kostenbeteiligung von Big Tech, 2022, <https://www.heise.de/news/Netze-Schlappe-fuer-Telcos-im-Streit-ueber-Kostenbeteiligung-von-Big-Tech-7181315.html>, 19.07.2022.

⁵¹ Stolton, Samuel: EU executive eyes Big Tech's money to save 5G, 2022, <https://www.politico.eu/article/commission-present-connectivity-infrastructure-act-eu/>, 19.07.2022.