Creativity Works! submission to the consultation "White Paper – 'How to master Europe's digital infrastructure needs?'

Creativity Works!, Europe's leading alliance of the creative and cultural sectors since 2013, wishes to express its concerns following repeated calls for the application of a network fees regime, either through the introduction of a "dispute resolution mechanism" as suggested in the White Paper, or through direct payments to telecom companies or contributions to a fund from "large traffic generators", including over-the-top media services (OTTs) and creative content providers, to support the cost of telecom infrastructure investment. Such proposals pose **a threat to the sustainability of the European creative sectors and their ability to provide diverse content and services to European consumers**. We therefore welcome the opportunity to contribute to the consultation launched by the European Commission on the White Paper "How to master Europe's digital infrastructure needs?"

Creativity Works! members create, produce, publish, distribute and exhibit a wide range of creative and cultural content in the European Union. We understand and value the paramount importance of a strong telecoms industry infrastructure and the commercial availability of high-speed internet access, which allows for the high-quality distribution of creative content to a wide and diverse audience.

Creative content providers invest in content to the benefit of consumers, but also to ISPs – the popularity of creative content services are the primary revenue drivers and enable selling and upselling of their services. The introduction of direct contributions or a mechanism consisting of an EU/national digital contribution or fund would entail a *de facto* double payment by our industries and have unintended consequences on the significant investments made by the sector in a wide range of diverse creative and cultural content.

The assertion that creative content providers, such as online streaming providers, disproportionately enjoy the benefits of the internet ecosystem without contribution is incorrect. The content industries significantly contribute to the internet ecosystem and creative content providers in the internet ecosystem, via measures such as content delivery networks (CDNs), compression technology, caching, anti-piracy, production quality innovation and other measures that improve the efficiency and sustainability of network infrastructure, all of which serve to reduce traffic-related costs for ISPs.

As a result, we urge policymakers to consider the negative effects of such unnecessary concepts on the whole digital ecosystem - including content creators and producers, and as a result, on European consumers. All of these require careful and thorough assessment.

Our contribution highlights that:

- The creative sectors reject the introduction of a dispute resolution mechanism as risking the introduction of a network fees regime through the back door while threatening net neutrality;
- The creative sectors already invest in content, which in turns contributes to drive sustained and sustainable demand and major revenue for telecoms services, thereby benefiting the internet ecosystem;
- Creative content services already invest in the internet ecosystem, eventually reducing traffic;
- There is no market failure preventing investment in performant, sustainable digital infrastructure: investments are flowing in connectivity and the interconnection market is working well;
- Pirates and commercial scale infringers 'free ride' on and harm digital marketplaces and generate congestion;
- Introducing constrictions akin to network fees would mean that less content would be produced and distributed in Europe - reducing consumer choice and European competitiveness in the creative sector.

CW! stands ready to assist policymakers and share the perspective of the creative & cultural sectors in Europe. We look forward to continuing to engage on the issue.

1. The creative sectors reject the introduction of a dispute resolution mechanism as risking the introduction of a network fees regime through the backdoor while threatening net neutrality

The creative sectors employ 17 million people in Europe - directly and indirectly - and our sectors accounted for 6.9% of EU GDP (EUIPO, 2022). The economic contribution of CCIs exceeds that of the telecommunications, high technology, pharmaceuticals and automotive industries ("Rebuilding Europe" EY report, January 2021), while SMEs comprise the overwhelming majority of businesses (90%) and employment in our sectors.

A network fees regime – whether through the "backdoor" with the introduction of a dispute resolution mechanism (Section 3.2.2 of the White Paper) or through the introduction of direct contributions or a mechanism consisting of an EU/national digital contribution or fund, would fundamentally change the way the internet operates. This threatens the rights of consumers and of content providers to receive and send data freely.

As traffic originates from the requests of the Internet Services Providers' (ISPs) own customer, a network fee would be a toll on consumer behaviour and choice. Consumers would pay twice for the same internet service quality as the additional cost would likely have to be passed down to the subscribers of those in scope. Such an approach would undermine the spirit of net neutrality in Europe and also likely impair competition, entrench incumbent providers of Electronic Communication Networks' (ECN) market power and distort market incentives.

The introduction of a dispute resolution mechanism for a potential negotiation for the payment of a contribution to the network infrastructure will also jeopardise the existing net neutrality regime in Europe. The services who can't or won't pay may (for different reasons) end up being removed from the networks or face unequal treatment. Under the EU's net neutrality rules (Open Internet Regulation), ISPs are prohibited from blocking or slowing down internet traffic. Instead, it would be important to solidify the current regime, with separation of services and networks, that enables ECN providers and content and application providers to invest in their networks, services, content and technologies.

While the Open Internet Regulation does not apply to interconnection but rather to the "last mile" part of the networks, BEREC has stated that National Regulation Authorities (NRAs) may take into account the interconnection policies and practices of ISPs in so far as they have the effect of limiting the exercise end-user rights under Article 3(1) of the EU Regulation 2015/2120 (Net Neutrality Regulation). Furthermore, BEREC recently reconfirmed its view that according to Article 2(2) of the Open Internet Regulation, an ISP provides internet access, ensuring connectivity to all endpoints. This means ISPs must interconnect to guarantee unrestricted access to any internet endpoint. Thus, ISP behaviour within the IP Interconnection ecosystem falls under the Open Internet Regulation.

Reducing interconnection capacities to "encourage" content providers to pay could be considered a termination fee regime through the back-door: the way for ISPs to encourage a content provider to pay network charges would be to "congest" all alternative routes (by transit ISPs) into the ISP's network, thereby introducing these net neutrality concerns.

2. The creative sectors already invest in content, which in turns contributes to drive sustained and sustainable demand and major revenue for telecoms services, thereby benefiting the internet ecosystem;

The creative and cultural sectors support ISPs by allowing Europeans to derive value from the premium broadband connections they purchase to watch, read, stream, play or listen to our content. The content and creative works brought to EU audiences by creative content providers, in particular high-quality video-on-demand (VOD), music-on-demand (MOD) services, live sports content, as well as video game services, is one of the reasons why end customers ask for faster bandwidth speeds, driving additional revenues for ISPs (via the sale of higher bandwidth tariffs). ISPs also often partner with creative content providers, distributing content (i.e., by resale or bundles) which benefits all parties (Netopia, 2023). Rather than benefiting without paying, content providers both invest heavily in networks and content itself and increase the demand for ISPs' services.

As technology evolves, new and innovative services are developed that lead to a further increase in demand for connectivity. This organic relationship between services and connectivity is dynamic and responsive to market demands, driving investment and innovation. Technological advancements and consumer preferences continually shape and redefine the landscape of the digital economy. BEREC appears to acknowledge this symbiotic relationship as it *"considers that there is a mutual interdependence between C*ontent and Application Providers (CAPs) *and ISPs. The demand from ISP' customers for content drives demand for broadband access and the availability of broadband access drives demand for content."*

3. Creative content services already invest in the internet ecosystem, eventually reducing traffic

The content industries and content providers already invest significantly to support, enhance and improve European network infrastructure or contribute to the internet ecosystem by minimising the impact of the delivery of their content on the bandwidth by financing or using content delivery networks (CDNs), compression technology, caching, peering and other measures to improve the efficiency and sustainability of networks' backbone infrastructure. These actions and investments are made to maximise consumers' experience by ensuring that content is delivered to them smoothly, in the best quality for their use, and without delays. Caching content closer to ISPs' end users (known as on-net caching) has had substantial benefits in terms of efficiency and quality improvements, from which ISPs themselves have also largely benefitted. BEREC also recognises that "*Network usage has increased, but due to continuous technological developments as well as competitive pressure, marginal network costs are observed to have declined to the point that they outweigh any increased costs associated with increased network use*."

Traffic-related costs have not grown over the last years and are not expected to grow over time; in fact, **they are often falling**, also due to the large investments made by creative content services (WIK-Consult, 2022). The decrease in traffic-related costs is driven by a combination of technological progress (which has helped reduce the amount of data required to deliver the same content) and increased cooperation between ISPs and content providers in areas such as caching, Content Delivery Networks (CDNs), peering and transit. These significant cost reductions balance out any traffic increases, resulting in a net neutral effect. As a result, the majority of ISPs' costs are fixed rather than traffic-related, and there is no concrete evidence of any 'investment gaps' in internet networks.

The argument that traffic is "caused" by CAPs has been refuted by BEREC since 2012, which stated that the data flow request usually comes from the retail Internet access provider's own customer, who asks for content provided by the CAPs, and from whom the ISP is already deriving revenues. In addition, there is no evidence to question the conclusion from the 2017 IP-IC report that "*BEREC considers that the Internet ecosystem's ability to cope with increasing traffic volumes is still given*".

Finally, the increase in traffic volumes is not directly correlated to (higher) content providers' revenue, and it is therefore misleading to claim that creative content providers are the main beneficiaries of network investments. Some of the internet services with the highest revenues generate low traffic and vice-versa.

4. There is no market failure preventing investment in performant, sustainable digital infrastructure: investments are flowing in connectivity and the interconnection market is working well

As acknowledged in the White Paper, there is no observed failure on the interconnection market, which functions well. Consequently, the introduction of a mechanism for dispute resolution (Section 3.2.2. of the White Paper) risks leading to the creation of a network fees regime. On the contrary, policymakers along with stakeholders should work to strengthen the current regime, separating services and networks in order to enable ECN providers as well as content and application providers to invest in their networks, services, content and technologies.

Oxera concludes that from an economic perspective, introducing a network fee will not promote investment in the network: "*Promoting investment by network operators is not an economically sound reason for instituting a levy—there are more effective ways of achieving such a goal*." Critically, Oxera also states that transaction and regulatory costs of a network fees proposal would be significant, and that there might also be additional costs in terms of a degradation of internet quality (as has been seen in South Korea), reduced investment incentives for CAPs, and competitive distortions between CAPs affected by the charges and those that are not. Consumer welfare is likely to be negatively impacted.

As demonstrated by the performance of countries leading in high Fibre to the Home (FTTH) deployment, **there is sufficient private investment capital today, and many financial institutions are eager to finance FTTH projects which are profitable**. The real bottlenecks to fibre deployment include organisational slack, time lags and time requirements to get necessary building permits and authorisations, and limited construction capacities – all of which would not be addressed by introducing a network fee.

Lastly, the interconnection market does not need regulation on infrastructure costs to ensure its functioning. The OECD found that *"the internet has developed an efficient market for connectivity based on voluntary contractual agreements. Operating in a highly competitive environment, largely without regulation or central organisation, the Internet model of traffic exchange has produced low prices, promoted efficiency and innovation, and attracted the investment necessary to keep pace with demand."* BEREC came to similar conclusions. In addition, the 2022 WIK report for Germany's Federal Network Agency (*Bundesnetzagentur*) stresses that the market is competitive and functioning well while the German Monopoly Commission also *"does not consider a regulatory intervention to be justified that forces OTTs to pay telecommunication providers."*

5. Pirates and commercial scale infringers 'free ride' on and harm digital marketplaces and generate congestion

Infringing access to or transmission of our sectors' **copyright protected content** in the digital environment continues to drain the creative and cultural sectors' growth, jobs and investments. On average, illegal access to or transmission of copyright protected content represented 82% of total piracy (be it sports events, films or music) in the EU in 2020 (EUIPO, 2021 - Online copyright infringement in the European Union). According to a recent VAUNET study, "*5.9m people in Germany watched illegal live TV signals in 2022. This resulted in losses of €1.8bn, and foregone taxes and social security contributions of €390m*." According to an ICMP study, there were more than 3 billion copyright infringing digital apps downloaded from e-Commerce marketplaces in 2023 and of which more than 90% provide illegal access to Music-on-Demand and/or Video-On-Demand streamed services. According to a study by Bournemouth University for the Audiovisual Anti-Piracy Alliance AAPA, infringing services made €3.21 billion in 2021 with illicit IPTV piracy services, which are used by 17 million Europeans.

The Film and TV Piracy Report 2022, measured 215 billion global visits to piracy websites in 2022, an 18% year-over-year increase compared to 2021. Also relevant for the discussion on network fees, 95% of the pirated content was delivered by streaming, and only 5% by download. Furthermore, illegal downloading of copyrighted materials takes up 24% of the global bandwidth according to DataProt.

Copyright infringing activities amount to a huge part of total internet and e-commerce marketplace traffic and many networks are saturated by pirated content and commercial scale infringement, in particular at peak hours: infringers do not invest in compression technology, free ride on the internet ecosystem and cost our sectors significantly. Pirated content and infringing activities legally and commercially harm us, remain rampant on telecoms networks and often negatively affects network quality. Pirated content undermines content creators, leads to losses of European jobs and revenue, do not contribute to the economy and harm all parts of the creative ecosystem.

However, traffic to pirated content is completely omitted from the statistics used in the public debate when discussing the potential introduction of network fees. Large ISPs have not been transparent about which content providers generate what amount of traffic and how this affects their network. As a result, we would like to encourage ISPs to continue working hand-in-hand with the creative and cultural sectors to tackle piracy, as free-riders (e.g. pirates) drive traffic congestion.

6. Introducing constrictions akin to network fees would mean that less content would be produced and distributed in Europe - reducing consumer choice and European competitiveness in the creative sectors

The creative and cultural industries have proven their importance in the everyday lives of European citizens. Europeans enjoy access to almost 170 million music tracks, on more than 800 licensed digital streaming and download services; thousands of catch up TV services; over +3,000 On-Demand Audiovisual Services (VOD); more than 3 million e-book and audiobook titles; and countless images. Video games deliver experiences that enrich the daily lives of more than 54% of all Europeans. Together, we help make the online world a vibrant and engaging place for all while driving technological business developments.

Creative content providers, such as Video-On-Demand, Music-On-Demand and video games, operate in a highly competitive and dynamic market resulting in significant investments in content and diversity of services. Requiring providers of such services to pay network fees would automatically impair their capacity to make investments in the production and distribution of a wide range of diverse creative and cultural content and in improving their distribution networks. Overall, more money paid in network fees would mean less money to invest in creative works and varied distribution, access and price options, which in turn would translate into less content being produced and made available. In addition, the concept of "network fees" would damage the creative and cultural sectors, the vast majority of which are SMEs, as it would unjustifiably divert funds from their creative process.

If consumers have to pay higher prices to access the Internet, internet connections subscriptions will likely fall, which may result in less availability of content and content services or reductions in content quality (OXERA, 2023) and perhaps the disappearance of some services on the market due to the drop in consumers' access (ITIF, 2022).

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