ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

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**COMMENTS OF ITIF**

Before the

European Commission

Brussels

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| In the Matter of:<br><br>How to master Europe's digital infrastructure needs? | ) | White Paper - COM(2024)81 |

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## INTRODUCTION AND SUMMARY

The Information Technology and Innovation Foundation (ITIF; Transparency Register #: 923915716105-08) appreciates this opportunity to comment on the European Commission's whitepaper regarding how to master Europe's digital infrastructure needs. Europe can enhance its position in the world and the connectivity of its citizens by ensuring a level playing field for the broadband infrastructure market and crafting a harmonized Europe-wide spectrum policy.

## THE COMMISSION SHOULD NOT FAVOR EITHER SIDE OF THE BROADBAND INFRASTRUCTURE MARKET

The whitepaper correctly recognizes that there has been broad opposition to proposals to enact a kind of "sending party pays" regime between content application providers and broadband providers.[1] While this proposal is sometimes masked by the slogan "fair share," it would really involve regulators unfairly putting their thumb on the scale for one side of a market transaction.[2]

The Whitepaper is further correct that European broadband is becoming more competitive and that this reality warrants a step back from ex ante regulation.[3] But the Whitepaper confuses cause and effect. Ex ante regulation has hampered competition and entrenched monopoly actors. A shift away from ex ante regulation, therefore, is as much a cause of increased competitiveness as its effect. A more permissive regulatory regime is better able to facilitate market entry and provide European consumers with high-quality service at competitive prices.

So-called "fair share" proposals would be a reversal of this process. High-quality broadband networks funded by market-price fees for service should become the norm. The European Commission should seek to foster a level playing field for negotiations between ISPs and end users as well as between Internet service providers (ISPs) and content and application providers (CAPs). When each side of the market is free to get the best deal it can, there is little argument for regulation to upend the bargained-for solution. It is the bargaining process reconciles the costs of broadband infrastructure and the benefits to CAPs and end users of using that infrastructure. Regulators will be unable plan a solution that better accounts for each party's value. The bargaining process also signals to the market where resources can be employed more efficiently: if an ISP cannot afford to build and operate a broadband network at market rates, that is itself a profit opportunity for someone else who can employ those resources differently. Rather than seeking to protect competitors from competition, Europe should insist market participants stand or fall on their own.

Indeed, the real costs of a sending-party-pays proposal would inevitably fall on consumers as well as CAPs; regulators cannot evade the laws of economics by fiat. Imposing higher prices on CAPs via regulation is akin

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[1] European Commission, "White Paper: How to Master Europe's Digital Infrastructure Needs," Digital Strategy, February 21, 2024, 26, https://digital-strategy.ec.europa.eu/en/library/white-paper-how-master-europes-digital-infrastructure-needs.

[2] Joe Kane and Jessica Dine, "Consumers Are the Ones Who End Up Paying for Sending-Party-Pays Mandates" (ITIF, November 2022), https://itif.org/publications/2022/11/07/consumers-are-the-ones-who-end-up-paying-for-sending-party-pays-mandates/.

[3] "Whitepaper" at 32-33.

to a tax on those services. But, as with any tax, the formal assignment of liability does not affect who bears the burden of the cost. Instead, a tax on data or other online content, will raise the price of that content by the amount of the tax. Some consumers, therefore, will pay higher prices for online content while others, unable to afford higher prices, will drop out of the market and consume less. In either case, it is European citizens, not just CAPs who foot the bill. This dynamic exists even for content for which users do not currently pay. An ad-supported or "freemium" service will find itself less profitable after accounting for regulatorily-mandated fees and will, therefore, shift away from those business models for marginal users. In short, there is no long-term free lunch to be had by treating CAPs as a piggy bank for broadband infrastructure upgrades. Instead, CAPs and ISPs should bargain for a price, and regulators should limit themselves to ensuring they do not favor either side in that negotiation.

A similar policy in South Korea exemplifies the harmful effects of a "fair share" policy. There, as WIK-Consult documents, "Market observers report a decline in diversity of online content and expect rising prices for end users for content, as well as lower network infrastructure investments. Quality for end users is declining."[4] South Korea must also divert considerable resources to the enforcement of its price regulations.[5] Disagreements about the volume of traffic flows and the prices owed for them are now matters for bureaucratic proceedings rather than private negotiations.

Rather than incurring greater administrative costs to sustain a regime that, in turn, increases consumer prices and reduces the quality of online content, the European Commission should direct its efforts to leveling the playing field, including by loosening ex ante regulation and overzealous net neutrality rules, so that businesses bear the cost of finding customers and providing services that consumers want rather than running to regulators for special treatment.

## SPECTRUM MANAGEMENT SHOULD MAXIMIZE PRODUCTIVITY OF EUROPEAN AIRWAVES

The fragmentation of the European wireless ecosystem has hampered its ability to realize the benefits of European airwaves. Radio waves do not recognize national boundaries, so the large, nationally diverse landmass of Europe would benefit from a spectrum policy that was harmonized across the Union, rather than compromising productivity at national boundaries.[6]

To be clear, there is still a role for member countries to participate in spectrum policy and collect revenue from spectrum auctions. Europe-wide harmonization only means that the Commission can develop the most valuable possible allocation and technical rules and limit the influence of parochial regulatory capture.[7] This new regime would likely result in some consolidation in the European wireless market. A smaller number of larger wireless providers would be better able to leverage economies of scale to lower consumer prices and

[4] Neumann et al., "Competitive conditions on transit and peering markets," Bundesnetzagentur, https://www.bundesnetzagentur.de/EN/Areas/Telecommunications/Companies/Digitisation/Peering/download.htm.

[5] *See e.g.*, Joyce Lee, "S. Korea broadband firm sues Netflix after traffic surge from 'Squid Game,'" Reuters, October 13, 2021, https://www.reuters.com/business/media-telecom/skorea-broadband-firm-sues-netflix-after-traffic-surge-squid-game-2021-10-01/.

[6] Doug Brake, "Spectrum Policy and the EU Digital Single Market: Lessons from the United States" (ITIF, December 7, 2015), https://itif.org/publications/2015/12/07/spectrum-policy-and-eu-digital-single-market-lessons-united-states/.

[7] *Ibid.*

offer higher quality service, including seamless connectivity across national borders. They will also be in a better position to invest in the spectrum and physical infrastructure necessary to support 5G and future generations of wireless technology. The Commission must note that this consolidation does not entail a decline in competition. Indeed, a few highly capable competitors are all that is needed to exert the competitive pressure that benefits consumers. Europe will better enable spectrum productivity rather than micromanaging the wireless marketplace in a way that serves ideological ends rather than consumer benefits.

## CONCLUSION

Europe has the potential to dramatically improve the productivity of it communications infrastructure and allow the market to better serve citizens' needs. By adopting the policies outlined in these comments, Europe can realize the full potential of broadband connectivity and productive spectrum policy.

Thank you for your consideration.

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