

Regulatory Myopia and the Fair Share of Network Costs: Learning from Net Neutrality's Mistakes

Giuseppe Colangelo

European Commission Exploratory Consultation, 'The Future of
the Electronic Communications Sector and Its Infrastructure'

Comments of the International Center for Law & Economics, 18
May 2023

Regulatory Myopia and the Fair Share of Network Costs: Learning from Net Neutrality's Mistakes

*Giuseppe Colangelo**

Abstract

Seeking to boost funding for the next generation of telecommunications infrastructure, European Union (EU) policymakers have proposed mandating that some large online platforms pay a special usage fee to network operators. Framed as a way to ensure that the largest users of internet infrastructure contribute their “fair share” to telecommunications networks, the proposal would be another unnecessary and harmful regulatory intervention. These comments paper seek to demonstrate that the fair-share debate itself is, in fact, the byproduct of an earlier intrusive government initiative: net-neutrality regulation. Like net neutrality’s anti-discrimination rules, a “fair share” tax would represent a solution that doesn’t work to a problem that doesn’t exist. Moreover, the debate reflects the EU’s fundamentally misguided inclination toward an industrial-policy approach to the digital transformation, built on the unsound belief that innovation can be delivered via regulation and by subsidizing legacy domestic firms with rents transferred from successful global players. Rather than continuing to interfere in market dynamics and private negotiations without any solid evidence of market failure, the EU should instead learn from its past mistakes and acknowledge the limited scope for regulation in these dynamic markets.

* Giuseppe Colangelo is the Jean Monnet Professor of EU Innovation Policy and an associate professor of law and economics at the University of Basilicata, and academic affiliate of the International Center for Law & Economics (ICLE). He is also Transatlantic Technology Law Forum (TTLF) Fellow at Stanford Law School and the University of Vienna.

I. Introduction

“[W]e have a vision, and we have a goal,”¹ European Commissioner Thierry Breton said in a February 2023 speech in Helsinki announcing the launch of a public consultation on the future of connectivity and infrastructure in the European Union (EU).² The consultation’s stated goal is to keep pace with transformative technological developments and to make Europe a digital leader by boosting deployment of forward-looking telecommunications infrastructure. Toward this end, the European Commission argues, it is essential that the regulatory framework is fit for purpose, with adequate funding to support the required investments.³

Given that ambitious goal, these comments investigate the likelihood that this vision can become a reality.

As part of the 2030 Digital Decade policy program,⁴ European policymakers are seeking a means to equip Europe with the next generation of connectivity infrastructure. The primary solution offered—one that has the backing of incumbent European telecom operators (telcos)—is to make some large online platforms (so-called “Big Tech”) contribute to the cost of telecom networks. The proposal has been justified on grounds that Big Tech firms use a large share of bandwidth, while the telcos have seen a decline in their returns on investment.⁵

Essentially, the proposal would constitute a direct welfare transfer from online content and application providers (CAPs) or over-the-top service providers (OTTs) to benefit telcos and other internet service providers (ISPs). This would be accomplished by setting a data-transmission threshold and charging CAPs a fee when they transmit data exceeding that threshold. Indeed, the questionnaire the Commission released as part of the public

¹ Thierry Breton, *Getting Europe Ready for the Next Generation of Connectivity Infrastructure*, EUROPEAN COMMISSION (Feb. 6, 2023), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_23_623.

² See Press release, *Commission Presents New Initiatives, Laying the Ground for the Transformation of the Connectivity Sector in the EU*, EUROPEAN COMMISSION (Feb. 23, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_985.

³ *Exploratory Consultation - The Future of the Electronic Communications Sector and Its Infrastructure*, EUROPEAN COMMISSION (Feb. 23, 2023), <https://digital-strategy.ec.europa.eu/en/consultations/future-electronic-communications-sector-and-its-infrastructure> (paras. 2.1 and 2.3, quantifying investment needs until 2030 of about 174 billion euros).

⁴ *Decision (EU) 2022/2481 of the European Parliament and of the Council Establishing the Digital Decade Policy Programme 2030* (Dec. 14, 2022), OJ L 323/4; see also, *2030 Digital Compass: The European Way for the Digital Decade*, EUROPEAN COMMISSION (Jan. 26, 2023), COM/2021/118 final.

⁵ Breton, *supra* note 1; see European Commission, *supra* note 3, para 2.3, reporting that “some European providers of electronic communication networks and services, especially incumbents, claim that they suffer from a decreasing market valuation and lower return on investment, especially when compared to companies in the US.” The European Commission also mentioned that telcos’ claims regarding declining margins and rising costs are stem from current uncertainties (including high inflation, rising interest rates, and geopolitical tensions) that have led capital markets to focus on assets with better short-term returns and profitability and to prefer solutions that protect them from demand risk.

consultation does not ask whether such a levy is needed, but merely seeks input on how it should be structured.⁶

Unsurprisingly, telcos have described the fair-share tax as “a once in a lifetime opportunity to recover digital leadership in Europe.”⁷ Telco operators argue that a few Big Tech firms generate a significant portion of all internet traffic, but do not adequately contribute to the development of such networks.⁸ These concerns find support in the recent European Declaration on Digital Rights and Principles for the Digital Decade, which calls for a framework through which “all market actors benefiting from the digital transformation assume their social responsibilities and make a fair and proportionate contribution to the costs of public goods, services and infrastructures, for the benefit of all Europeans.”⁹

EU policymakers have also explored the need to encourage consolidation in the telecom industry in order to sustain investments that will stanch “Europe’s progressive technological decline.”¹⁰ Under this vision, the path to promote investment and spur innovation in Europe’s digital future would be forged not only through rent transfers from CAPs to telcos, but also by defeating “excessive competition” in the telecom section.¹¹

We argue here that the current debate stems, instead, from earlier invasive and unnecessary regulatory initiatives. Notably, the “fair share” proposal is the poison fruit of net-neutrality regulation, which has prevented telcos from monetizing their networks. In an alternative framework, the telecom sector could have instead been permitted to manage the transmission of content and services according to their value for end users, anticipated bandwidth use, or a host of other quality requirements upon which various CAPs depend.

⁶ This was also the opinion expressed by the German secretary at the Ministry for Digital Affairs and Transport (BMDV); see Christian Zentner, *Kritik an Geplanter „Zwangsabgabe“ für Netflix und Co*, BUNDESTAG (March 2, 2023), <https://www.bundestag.de/presse/hib/kurzmeldungen-936322> (finding the questionnaire to be “slightly tendentious”).

⁷ Carlos Rodríguez Cocina, *You Have Not Seen This Movie Before: Fair Share Is Not a Remake*, TELEFÓNICA (March 10, 2023), <https://www.telefonica.com/en/communication-room/blog/you-have-not-seen-this-movie-before-fair-share-is-not-a-remake>.

⁸ *Europe’s Internet Ecosystem: Socio-Economic Benefits of a Fairer Balance Between Tech Giants and Telecom Operators*, AXON PARTNERS GROUP CONSULTING (May 11, 2022), <https://axonpartnersgroup.com/europes-internet-ecosystem-socio-economic-benefits-of-a-fairer-balance-between-tech-giants-and-telecom-operators> (report prepared for the European Telecommunications Network Operators’ Association); *Estimating OTT Traffic-Related Costs on European Telecommunications Networks*, FRONTIER ECONOMICS (April 7, 2022), available at <https://www.telekom.com/resource/blob/1003588/384180d6e69de08dd368cb0a9febf646/dl-frontier-g4-ott-report-stc-data.pdf> (report for Deutsche Telekom, Orange, Telefonica, and Vodafone); see also, European Commission, *supra* note 3, Section 4 (describing the phenomenon as a “paradox” between increasing volumes of data on the infrastructures and alleged decreasing returns and appetite to invest in network infrastructure).

⁹ *European Declaration on Digital Rights and Principles for the Digital Decade*, EUROPEAN COMMISSION (2022), 28 final, 3.

¹⁰ Alan Burkitt-Gray, *Vestager Calls for EU to Centralise and Consolidate Telecoms*, CAPACITY (Jan. 31, 2023) <https://www.capacitymedia.com/article/2b7xs7payiktkefkh1hj4/news/vestager-calls-for-eu-to-centralise-and-consolidate-telecoms>; see also, Breton, *supra* note 1.

¹¹ *Id.*

Rather than acknowledging the limits of regulation, the fair-share proposal reflects the Commission's persistent distrust of market forces and private-ordering mechanisms. Further, the debate represents just the latest instance of a more generalized EU industrial-policy approach to the digital transformation. This approach rests on the unsound belief that innovation can be delivered through regulation and by subsidizing legacy domestic EU firms through the transfer of rents from successful global players.

Having in this section provided an overview of the conflict between telecom operators and CAPs, Section II frames the "fair share" debate within the broader EU industrial-policy approach to the digital transformation, noting similarities with earlier efforts to support the EU's audiovisual and publishing industries. Section III investigates the controversial relationship between "fair share" duties and net-neutrality rules. Section IV points out the limited role for regulation and the principles that should guide government intervention in fast-moving industries. Section V concludes.

II. A Solution in Search of a Problem

The 2030 Digital Decade policy program highlights the need to foster investment in high-speed telecommunications networks if the EU is to meet the connectivity targets established in the path to the digital transformation.¹²

Data traffic represents the critical determinant of telecom networks' size and capacity. EU telcos claim, however, that exponential growth of internet traffic has left them unable to earn viable returns on network investments.¹³ According to the telcos, traffic growth is disproportionately driven by a small number of OTTs, who provide relatively little direct economic contribution to network rollout.

According to a report for the European Telecommunications Network Operators Association (ETNO), just six firms generated roughly 56% of all network traffic, with Google accounting for 21%; Meta accounting for 15.4%; Netflix accounting for 9.4%; Apple accounting for 4.2%; Amazon accounting for 3.7%; and Microsoft accounting for 3.3%.¹⁴ Further, a study conducted by Frontier Economics on behalf of Deutsche Telekom, Orange, Telefónica, and Vodafone estimated that traffic driven by OTTs could generate annual costs for EU telcos of €36 to 40 billion.¹⁵ Such findings are often cited by telcos to

¹² *Supra* note 4.

¹³ See, *CEO Statement on the Role of Connectivity in Addressing Current EU Challenges* (Sep. 26, 2022), available at https://etno.eu//downloads/news/ceo%20statement_sept.2022_26.9.pdf; see also, *United Appeal of the Four Major European Telecommunications Companies* (Feb. 14, 2022), <https://www.telekom.com/en/company/details/unity-appeal-of-the-four-major-european-telecommunications-companies-646166>.

¹⁴ Axon, *supra* note 8; see also, *2023 Global Internet Phenomena Report*, SANDVINE (Jan. 2023) <https://www.sandvine.com/global-internet-phenomena-report-2023-download?submissionGuid=7b66978f-d664-4f10-b50b-28a48700788f>.

¹⁵ Frontier Economics, *supra* note 8.

make the case that OTTs are free riding on their network investments and need to be made to more equitably share the burden:

Digital platforms are profiting from hyper scaling business models at little cost while network operators shoulder the required investments in connectivity. At the same time our retail markets are in perpetual decline in terms of profitability.¹⁶

To address the concern of free riding, telcos have proposed a sending-party-network-pays system, which would mandate that the largest online platforms pay usage fees to compensate network operators.¹⁷ In singling out the largest platforms for exceptional treatment, the proposal resembles how EU institutions already approach the regulation of “gatekeepers” under the Digital Markets Act (DMA) and “very large online platforms” under the Digital Services Act (DSA).¹⁸ The proposal would establish a direct compensation mechanism, rather than private negotiations among the relevant parties, because it assumes that network operators are not positioned to negotiate fair terms with leading OTTs due to the latter’s alleged strong market positions, asymmetric bargaining power, and a lack of a level regulatory playing field.

The telcos point to the revenue and market capitalization enjoyed by the largest OTTs as demonstrating that the services Big Tech provides are essential for consumers.¹⁹ But while the growth in traffic volume for the OTTs’ services creates additional costs for network operators, the telcos contend that they cannot respond to that growth in demand with higher retail prices, both because of strong competition in the retail telecommunications market and due to regulatory interventions at the wholesale level.²⁰ These factors, they contend, have created an uneven regulatory playing field between OTTs and telcos. Moreover, they argue that this uneven playing field has contributed to declining profit margins for telcos’ traditional retail revenue streams and that, consequently, telcos’ costs of capital are now higher than their returns on capital.

For their part, OTTs argue that they contribute to the internet ecosystem with investments in content-delivery networks and infrastructure—such as data centers, undersea cables, and satellites—and by creating content that is attractive to consumers, who in turn buy access from the ISPs to consume that content.²¹ Therefore, they argue, it is the end users who

¹⁶ United Appeal, *supra* note 13.

¹⁷ Axon, *supra* note 8.

¹⁸ Regulation (EU) 2022/1925 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), (2022) OJ L 265/1; Regulation (EU) 2022/2065 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), (2022) OJ L 277/1.

¹⁹ Axon, *supra* note 8, 18.

²⁰ *Id.*

²¹ See, e.g., *Doing Our Part: How Google’s Network Helps Internet Content Reach Users*, GOOGLE (Apr. 20, 2022) <https://cloud.google.com/blog/products/infrastructure/google-network-infrastructure-investments>; *Network Fee Proposals Are Based on a False Premise*, META (Mar. 23, 2023), <https://about.fb.com/news/2023/03/network-fee-proposals-are-based-on-a-false-premise>.

generate traffic by consuming content, and they already pay ISPs through their subscriptions.

This debate over how network costs should be allocated is not new, and nor is the idea of a sending-party-network-pays system. The Body of European Regulators for Electronic Communications (BEREC) rejected a similar proposal 10 years ago, arguing that requests for dataflows stem not from content providers, but from retail ISPs' own customers. BEREC further contended that increased demand for broadband access can be attributed to the success of content providers.²²

Indeed, broadband networks are two-sided markets that bring together CAPs and end users. ISPs derive revenue from end users, who in turn pay for internet service to gain access to OTTs' content. Since both sides of the market (content providers and end users) contribute to the cost of internet connectivity, BEREC found that "[t]here is no evidence that operators' network costs are already not fully covered and paid for in the Internet value chain."²³

Further, BEREC acknowledged that the current "model has enabled a high level of innovation, growth in Internet connectivity, and the development of a vast array of content and applications, to the ultimate benefit of the end user."²⁴ Therefore, "the nature of services to be delivered across the network, and the charging mechanisms applied to them, should continue to be left to commercial negotiations among stakeholders."²⁵

While prevailing internet traffic volumes are notably higher today than those observed a decade ago, it does not appear that BEREC regards the recent changes in traffic patterns as sufficient to modify its underlying assumptions regarding the sending-party-network-pays regime.²⁶ Indeed, in a recent preliminary assessment of a proposed direct compensation mechanism to benefit telcos, BEREC confirmed that it feels "the 2012 conclusions are still

²² BEREC's *Comments on the ETNO Proposal For ITU/WCIT Or Similar Initiatives Along These Lines*, BoR(12) 120, BODY OF EUROPEAN REGULATORS FOR ELECTRONIC COMMUNICATIONS (2012), 3; *Report on IP-Interconnection Practices in the Context of Net Neutrality*, BoR (17) 184, BODY OF EUROPEAN REGULATORS FOR ELECTRONIC COMMUNICATIONS (2017), (finding the internet-protocol-interconnection market to be competitive); Neelie Kroes, *Adapt or Die: What I Would Do If I Ran a Telecom Company* (Oct. 1, 2014), https://ec.europa.eu/commission/presscorner/detail/de/SPEECH_14_647 (arguing that OTTs are driving digital demand: "[EU homes] are demanding greater and greater bandwidth, faster and faster speeds, and are prepared to pay for it. But how many of them would do that if there were no over the top services? If there were no Facebook, no YouTube, no Netflix, no Spotify?"); see also, *Proposals for a Levy on Online Content Application Providers to Fund Network Operators. An Economic Assessment Prepared for the Dutch Ministry of Economic Affairs and Climate*, OXERA (Feb. 27, 2023), 19, available at <https://open.overheid.nl/documenten/ronl-8a56ac18a98a337315377fe38ac0041eb0dbe906/pdf>, (noting that the cause of the traffic is the consumer's initial request rather than the CAP's fulfilment of that request).

²³ BEREC 2012, *supra* note 22, 4; see also, Oxera, *supra* note 22, 14 (arguing that there is no clear evidence that the absence of charging CAPs means that telcos are unable to raise revenues and cover their costs).

²⁴ BEREC 2012, *supra* note 22, 4.

²⁵ *Id.*, 1.

²⁶ BEREC *Preliminary Assessment of the Underlying Assumptions of Payments from Large CAPs to ISPs*, BoR (22) 137, BODY OF EUROPEAN REGULATORS FOR ELECTRONIC COMMUNICATIONS (2022), 4.

valid” and that the sending-party-network-pays model would provide ISPs “the ability to exploit the termination monopoly” and could be of “significant harm to the internet ecosystem.”²⁷

BEREC also questioned the assumption that an increase in traffic directly translates into higher costs, noting that the costs of network upgrades necessary to handle increased traffic volumes are small relative to total network costs, and that upgrades come with significant increases in capacity.²⁸ In other words, BEREC found that rising traffic volumes do not directly lead to significant incremental costs relative to total network costs.²⁹

Finally, BEREC once again found no evidence of free riding along the value chain,³⁰ finding that the IP-interconnection ecosystem remains largely competitive and that costs for internet connectivity are typically covered by ISPs’ customers.

It would be reasonable to assume that if there had been such a significant free-riding, this would have been reflected in ISPs financial statements and also in loss warnings.³¹

BEREC’s preliminary findings and continued skepticism of replacing freely negotiated internet interconnections with mandated network-usage fees are supported by studies that similarly find a lack of evidence of free riding;³² report significant investments by CAPs to

²⁷ *Id.*, 4-5.

²⁸ *Id.*, 7-8 (“BEREC considers in this regard the incremental costs necessary for the upgrade in capacity on a given network to handle more incoming traffic. These costs can incorporate to some extent technological upgrades as far as they are relevant for solving capacity issues. These costs have to be differentiated from the total network costs, which are mostly coverage costs.”).

²⁹ *Id.*, 9

³⁰ *Id.*, 11-14.

³¹ *Id.*, 13; see also, *Plans for Charging Internet Toll by Large Telecom Companies Feared to Have Major Impact on European Consumers and Businesses*, GOVERNMENT OF THE NETHERLANDS (Feb. 27, 2023), <https://www.rijksoverheid.nl/documenten/publicaties/2023/02/27/plans-for-charging-internet-toll-by-large-telecom-companies-feared-to-have-major-impact-on-european-consumers-and-businesses> (arguing that “the large telecom operators seem to forget that consumers already pay for their Internet traffic, through their Internet subscription. The plea for an Internet toll actually implies that large telecom operators want to get paid twice.”).

³² David Abecassis, Michael Kende, & Guniz Kama, *IP Interconnection on the Internet: A European Perspective for 2022*, ANALYSYS MASON (Sep. 26, 2022), <https://www.analysismason.com/consulting-redirect/reports/ip-interconnection-european-perspective-2022>; Volker Stocker & William Lehr, *Regulatory Policy for Broadband: A Response to the “ETNO Report’s” Proposal for Intervention in Europe’s Internet Ecosystem*, SSRN (Oct. 16, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4263096; Brian Williamson, *An Internet Traffic Tax Would Harm Europe’s Digital Transformation*, COMMUNICATIONS CHAMBERS (Jul. 2022), available at <https://lisboncouncil.net/wp-content/uploads/2022/07/COMMUNICATIONS-CHAMBERS-Internet-Traffic-Tax-2.pdf>.

support network infrastructure;³³ and raise concerns about the potential side effects of a sending-party-network-pays model on the proper functioning of internet connectivity.³⁴

A study conducted by WIK-Consult for the Federal Network Agency Germany (Bundesnetzagentur) confirmed that the IP-interconnection ecosystem is largely competitive and warned against the kinds of potential unintended consequences already seen in South Korea, the only country thus far that has mandated sending-party-network-pays billing.³⁵ South Korea provides a cautionary tale about the adverse effects that stem from interference in voluntary negotiations. Indeed, there is evidence that the competitive distortions between CAPs and ISPs generated by the Korean initiative had negative effects for consumers in terms of costs and the degradation of quality.³⁶

Some EU member states have also been skeptical of telcos' pleas and of the idea more generally that charging a toll on the internet is an appropriate strategy to promote network investments.³⁷ According to these members, the proposed "fair share" toll would pose considerable risks to the internet ecosystem and is likely to cause considerable harm to businesses and consumers. Indeed, as the envisaged data-transmission tax will affect the most popular services and content, a huge percentage of consumers are expected to bear the relative cost, as targeted OTTs eventually pass the new fees paid to ISPs downstream.³⁸ These concerns were expressed in a letter from Austria, Estonia, Finland, Germany, Ireland, and the Netherlands that urged the Commission to publish the Broadband Cost

³³ David Abecassis, Michael Kende, & Shahan Osman, *The Impact of Tech Companies' Network Investment on the Economics of Broadband ISPs*, ANALYSYS MASON (Oct. 12, 2022), <https://www.analysismason.com/consulting-redirect/reports/internet-content-application-providers-infrastructure-investment-2022>.

³⁴ See, e.g., *Connectivity Infrastructure and the Open Internet*, BEUC: THE EUROPEAN CONSUMER ORGANISATION (Sep. 16, 2022), available at https://www.beuc.eu/sites/default/files/2022-09/BEUC-X-2022-096_Connectivity_Infrastructure-and-the_open_internet.pdf; Bijal Sanghani, *Fair Share Debate and Potential Impact of SPNP on European IXPs and Internet Ecosystem*, EUROPEAN INTERNET EXCHANGE ASSOCIATION (Jan. 3, 2023), available at https://www.euro-ix.net/media/filer_public/1a/e4/1ae40d86-95ea-460a-920d-3b335c2439d4/spnp_impact_on_ixps_-_final.pdf.

³⁵ Karl-Heinz Neumann, et al., *Competitive Conditions on Transit and Peering Markets*, WIK-CONSULT (Feb. 28, 2022), available at https://www.bundesnetzagentur.de/EN/Areas/Telecommunications/Companies/Digitisation/Peering/download.pdf?__blob=publicationFile&v=1.

³⁶ *Id.*, 36-38; see also Oxera, *supra* note 22, 28–33 (arguing that implementation of such a scheme would entail significant transaction and regulatory costs, as the regulator would be required to fulfil such recurring tasks as traffic analysis and verification, dispute settlement, and coordination with companies and other authorities).

³⁷ Government of the Netherlands, *supra* note 31; see also, Zentner, *supra* note 6 (stating that the telecommunications companies' argument that such a levy would provide them with more money for network expansion does not hold water).

³⁸ Government of the Netherlands, *supra* note 31; Oxera, *supra* note 22 (predicting that only a limited portion of the additional revenue stream to telecom operators would be passed on to the internet subscribers in the form of slightly lower subscription fees, and that this would be offset by price increases from online services for subscriptions to, e.g., Spotify or Netflix more expensive).

Reduction Directive (BCRD) review without discussion of the “fair share” debate.³⁹ In their view, while the revised BCRD should aim to accelerate the deployment of very high-capacity networks, the fair-share proposal is a distinct topic that requires a proper evidence-based assessment of its own merits.

A. Blaming and Taxing Digital Platforms

From a broader perspective, the “fair share” debate reflects the EU’s recent industrial-policy approach to the digital transformation.

The internet has deeply transformed traditional industries by favoring the emergence of new business models and creating opportunities for new players to enter those markets. Because of these challenges, some legacy incumbents struggle to keep pace with innovation and new forms of competition, disrupting entire industries. It is no secret that Europe has lagged behind in the digital economy and that established European companies have suffered most from the emergence of digital markets, as they have thus far been unable to develop competitive platform-based ecosystems.

Against this backdrop, European institutions have looked to subsidies as the solution to rescue some legacy players. Such interventions have been justified by policymakers on grounds of alleged market failures or the importance of public interests at stake. Such claims are not new, and public deliberation would ordinarily turn to evaluating whether the claimed market failures are real and whether the measures identified to promote future competition and innovation are effective. But EU policymakers have managed to evade such questions by insisting that the rescues they obviously seek not rely directly on subsidies from the European public.⁴⁰ Instead, the proposed subsidies would come from private, largely U.S.-based firms.

In sum, the manifesto for the new protectionist EU industrial policy is to “blame and tax Big Tech.” This narrative holds that the success of a few large online platforms is the cause of the purported market failures, and that it is therefore fair to tax their success and force them to share their profits.⁴¹ The approach is shortsighted but, from the perspective of EU policymakers, certainly convenient.

³⁹ *Call for Release of BCRD Revision – Refusal of Merge with Fair Share Debate*, AUSTRIA, ESTONIA, FINLAND, GERMANY, IRELAND, AND THE NETHERLANDS (May 12, 2022), available at https://www.permanentrepresentations.nl/binaries/nlatio/documenten/publications/2022/12/05/call-for-release-of-bcrd-revision--refusal-of-merge-with-fair-share-debate/Call+for+release+of+BCRD+revision+-+Refusal+of+merge+with+fair+share+debate_def.pdf.

⁴⁰ See Breton, *supra* note 1 (arguing that the burden of financing connectivity infrastructure should not rest solely on the shoulders of member states or the EU budget).

⁴¹ See Tobias Kretschmer, *In Pursuit of Fairness? Infrastructure Investment in Digital Markets*, SSRN (Sep. 20, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4230863 (arguing that a transfer from large OTTs to telcos would be equivalent to a tax on success and that this would appear to arbitrarily target a group of largely U.S.-based firms while letting at least partly European newcomers and/or smaller firms enjoy the same externalities at no cost).

The internet's impact on business models is seen as particularly threatening to the media industry. In light of new technologies to transmit audiovisual-media services, European institutions argued for a regulatory framework that would ensure "optimal conditions of competitiveness" for European media and safeguard certain "public interests, such as cultural diversity."⁴²

The policy solutions identified by the revised Audiovisual Media Services (AVMS) Directive are twofold.⁴³ First, European works are required to represent at least 30% of on-demand audiovisual-media services' catalogs, and the services are required to ensure the prominence of those works.⁴⁴ Second, to ensure adequate levels of investment in European works, EU member states are permitted to impose financial obligations (including requiring direct investments in content and mandated contributions to the national fund) on media-service providers established within their territory, or on the basis of revenues the providers generate from services that are provided in and targeted toward the member state's territory.⁴⁵

In other words, to counter U.S. platforms' dominance in the European video-on-demand (VOD) market,⁴⁶ the new AVMS Directive targets large foreign companies by imposing content quotas and financial obligations under a regime that has been termed the "Netflix tax."⁴⁷ While this protectionist intervention to rescue the European audiovisual market is ostensibly made in the name of the public interest, both of the envisaged measures more accurately reflect resentment of the global players' success than they do concern for Europe's noble cultural diversity.⁴⁸

⁴² Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L 95/1, Recitals 4 and 12.

⁴³ Directive (EU) 2018/1808 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, [2018] OJ L 303/69.

⁴⁴ *Id.*, Recital 35 and Article 13(1).

⁴⁵ *Id.*, Recital 36 and Article 13 (2).

⁴⁶ For analysis of the EU market, see David Graham, *et al.*, *Study on the Promotion of European Works in Audiovisual Media Services*, ATTENTIONAL, KEA EUROPEAN AFFAIRS, AND VALDANI VICARI & ASSOCIATI (Aug. 28, 2020), <https://digital-strategy.ec.europa.eu/en/library/study-promotion-european-works>.

⁴⁷ See Sally Broughton Micova, *The Audiovisual Media Services Directive: Balancing Liberalisation and Protection*, E. BROGI & P.L. PARCU (eds.), RESEARCH HANDBOOK ON EU MEDIA LAW AND POLICY, Edward Elgar Publishing (2020), 264 (arguing that the AVMS Directive is a unique blend of the liberal-market approach typical of the EU's single market and classic protectionism, stemming from a history of concern that American content and media services would dominate European screens, threatening its cultures and industries).

⁴⁸ *Id.*; see also Joëlle Farchy, Grégoire Bideau, & Steven Tallec, *Content Quotas and Prominence on VOD Services: New Challenges for European Audiovisual Regulators*, 28 INT. J. CULT. POLICY 419 (2022), (noting that the objective of cultural diversity contains a great ambiguity and that "[b]eyond the incantatory discourse on the expected benefits of cultural diversity, the notion is in fact complex, and refers to multiple, sometimes contradictory aspects.").

Shortly after the AVMS Directive's enactment, taxing Big Tech also became the preferred solution to rescue the European publishing industry.⁴⁹ Seeking to address a purported gap in value between digital platforms and news publishers, the Directive on Copyright in the Digital Single Market granted the latter a right to control and receive compensation for the reproduction and availability of online summaries of their news articles.⁵⁰ Indeed, publishers claim that the sustainability of their entire industry has been jeopardized by the emergence of digital gatekeepers, which capture most of the advertising revenue without bearing the cost of the investments needed to produce news content. It is alleged that this unfair split of revenues is the result of asymmetric bargaining power, which makes it difficult for press publishers to negotiate with Big Tech on an equal footing.⁵¹

In sum, the news publishers' case that free riding and asymmetry of bargaining power justify their request for revenue sharing are the same arguments used by telcos to support their own "fair share" proposal. The publishing industry's struggles, however, started well before the emergence of digital platforms. Newspapers' business models were first hit by the advent of the internet, which changed consumption habits and enabled the growth of new forms of journalism.⁵² Moreover, digital platforms arguably play a complementary role to news sites, as legacy publishers benefit from inbound links that drive audience traffic. Indeed, empirical evidence does not support the free-riding narrative.⁵³ It may be sound policy to support publishers in their digital transformation but, as argued some years ago, "[t]axing new digital players will not save press publishing industry and legacy business models."⁵⁴

Such findings also apply to the telcos. Indeed, as is evident from this brief analysis, there are strong similarities between the audiovisual market and the publishing industry when it comes to the fair share of network costs. All of these policy initiatives stem from European industries' inability to keep the pace with the digital transformation that has been enhanced by the spread of high-speed internet. While the internet revolution has enabled the

⁴⁹ On the dispute between news publishers and digital platforms, see Giuseppe Colangelo, *Enforcing Copyright Through Antitrust? The Strange Case of News Publishers Against Digital Platforms*, 10 J. ANTITRUST ENFORC. 133 (May 10, 2021); Giuseppe Colangelo & Valerio Torti, *Copyright, Online News Publishing and Aggregators: A Law and Economics Analysis of the EU Reform*, 27 INT. J. LAW INF. TECHNOL. 75 (Jan. 11, 2019).

⁵⁰ Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, [2019] OJ L 130/92, Article 15.

⁵¹ *Id.*, Recitals 54 and 55.

⁵² See, e.g., *The Evolution of News and the Internet*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (Jun. 11, 2010), available at <https://www.oecd.org/sti/ieconomy/45559596.pdf>; *Potential Policy Recommendations to Support the Reinvention of Journalism*, U.S. FEDERAL TRADE COMMISSION (Jun. 2010), available at https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf; Bertin Martens, et al., *The Digital Transformation of News Media and the Rise of Disinformation and Fake News - An Economic Perspective*, JOINT RESEARCH CENTER (Apr. 25, 2018), available at <https://joint-research-centre.ec.europa.eu/system/files/2018-04/jrc111529.pdf>; Martin Senftleben, et al., *New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era*, 48 IIC 538 (2017).

⁵³ Colangelo-Torti, *supra* note 49.

⁵⁴ *Id.*, 90.

emergence of new global players, legacy European companies are struggling to adapt their business models and strategies in order to compete.

In this context, policymakers frequently invoke the need to protect public interests as justification for regulatory interventions they claim would correct purported market failures, but that instead merely alter the prevailing market dynamics. Indeed, protectionist interventions that impose financial obligations on successful players will not address the problems in question, and will therefore be ineffective at achieving the goal of closing the competition gap between European firms and the global players. Moreover, as discussed in the next section, taxing online providers in the telecommunications sector, specifically, would appear to be clearly at odds with the rationale that underlies European efforts to enforce the net-neutrality regulation.⁵⁵

III. The Net-Neutrality Problem

The European Commission's "fair share" proposal is of dubious compatibility with net neutrality, which was the flagship initiative delivered by the Commission in the previous political term. Indeed, the Commission has appeared anxious to reassure the public that there is no going back on net neutrality and that it remains "strongly committed" to protecting a neutral and open internet.⁵⁶ But there are manifest concerns that direct compensation from large OTTs to ISPs would endanger the principle of net neutrality.⁵⁷ Indeed, the fair-share proposal appears at odds with both the legal obligations of net neutrality and its underlying economic rationale.

Net neutrality has always been a particularly contentious topic, as confirmed by the transatlantic divergence on the topic. While the EU regulation remains in force, the U.S. Federal Communications Commission's (FCC) 2015 Open Internet Order was repealed in 2018 by the superseding Restoring Internet Freedom Order.⁵⁸ The FCC reverted to its pre-2015 position, concluding that the benefits of a market-based, light-touch regime for internet governance outweigh those of utility-style, common-carrier regulation. Quoting then-FCC Chairman Ajit Pai, "there was no problem to solve. The Internet was not broken in 2015. We were not living in a digital dystopia."⁵⁹

Given the assumption that broadband providers enjoy endemic market power, a common feature of net-neutrality regulations is the imposition of non-discrimination rules that

⁵⁵ Regulation (EU) 2015/2120 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, (2015) OJ L 310/1.

⁵⁶ European Commission, *supra* note 2.

⁵⁷ Government of the Netherlands, *supra* note 31; BEREC, *supra* note 26, 5.

⁵⁸ Restoring Internet Freedom Order, FEDERAL COMMUNICATIONS COMMISSION (2018) 33 FCC Rcd 311.

⁵⁹ Ajit Pai, FCC Releases Restoring Internet Freedom Order, FEDERAL COMMUNICATIONS COMMISSION (Jan. 4, 2018) 1, <https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order/pai-statement>.

ensure all internet traffic is treated equally. As terminating-access monopolists, ISPs are deemed gatekeepers for edge providers that seek to reach their end-user subscribers—hence, they may discriminate against the former and impose restrictions on the latter. Toward this end, the 2015 Open Internet Order imposed three *ex ante* bright-line rules preventing U.S. ISPs from blocking content, throttling traffic, or discriminating against specific content for a fee (so-called “paid prioritization”).⁶⁰ These rules were predicated on the belief that there was a need to protect and promote openness, since “the Internet’s openness promotes innovation, investment, competition, free expression, and other national broadband goals.”⁶¹

In a similar vein, by establishing common rules to safeguard equal and non-discriminatory treatment of internet traffic, the EU Regulation pointed to the need to protect end-users and guarantee the continued functioning of the internet ecosystem as an engine of innovation:⁶²

The internet has developed over the past decades as an open platform for innovation with low access barriers for end-users, providers of content, applications and services and providers of internet access services. ... However, a significant number of end-users are affected by traffic management practices which block or slow down specific applications or services.⁶³

Indeed, proponents of net neutrality typically claim that allowing ISPs to treat different CAPs differently through, *e.g.*, paid prioritization would stifle innovation by hindering the entrance of new content providers. This, in turn, would negatively affect the welfare of end-users through rising subscription fees, less variety of content, and reduced quality of connections.⁶⁴ Opponents, on the other hand, question the very economic logic of net-neutrality regulation, maintaining that it would increase regulatory costs, dampen ISPs’ incentives to invest in broadband capacity, and harm both consumers and content providers.⁶⁵

⁶⁰ *Open Internet Order*, FEDERAL COMMUNICATIONS COMMISSION (2015), 30 FCC Rcd 5601.

⁶¹ *Id.*, 5625-26.

⁶² Regulation (EU) 2015/2120, *supra* note 55, Recital 1.

⁶³ *Id.*, Recital 3.

⁶⁴ See, *e.g.*, Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 JTHTL 329, (2006)

⁶⁵ See, *e.g.*, Michael L. Katz, *Wither U.S. Net Neutrality Regulation?*, 50 REV. IND. ORGAN. 441 (2017), (finding substantial tension between the regulation and the objective of promoting consumer choice and sovereignty, and noting that the internet has never been, and is not designed to be, neutral); Christopher S. Yoo, *Beyond Network Neutrality*, 19 JOLT 1 (2005), (considering network neutrality a misnomer that may reinforce sources of market failure in the last mile and dampen incentives to invest in alternative network capacity) Wolfgang Briglauer, *et al.*, *Net neutrality and High-Speed Broadband Networks: Evidence from OECD Countries*, EUR. J. LAW ECON. (forthcoming), (finding empirical evidence that net-neutrality regulations exert a significant and strong negative impact on fiber investments); Marc Bourreau, Frago Kourandi, & Tommaso Valletti, *Net Neutrality with Competing Internet Platforms*, 63 J IND ECON 30 (2015), (noting that, in a model with competing ISPs—rather than a monopolistic market structure—a switch from the net-neutrality regime to the alternative discriminatory regime would be beneficial in terms of investments, innovation, and total welfare).

Moreover, these types of regulations explicitly prevent ISPs from bargaining with CAPs in ways that would allow ISPs to seek payment for excessive network usage. Thus, some substantial portion of the “problem” that “fair share” seeks to correct directly arises from telcos being constrained from arm’s-length negotiations with CAPs.

Net-neutrality opponents also contest the claim that ISPs have and use market power in ways that lead to market foreclosure, arguing that this is not supported by empirical evidence.⁶⁶ A related concern is that vertically integrated ISPs with market power could potentially self-preference their own content.⁶⁷ But even if a vertically integrated ISP had market power, it is not obvious that compromising the quality of content requested by end users would be profit maximizing.⁶⁸ That is, even in this extreme hypothetical, the threat of user defection because of degraded quality mutes or answers the concern.

More generally, the economic literature has stressed that the consequences of net-neutrality regulation depend on precise policy choices, how they are implemented, and how long-run economic trade-offs play out.⁶⁹ Strict net neutrality may lead to socially inefficient allocations of traffic, as well as traffic inflation. It would thereby harm efficiency by distorting both ISPs and content providers’ investments and service-quality choices.⁷⁰

Given the ambiguous effects of net neutrality’s anti-discrimination rules, the most controversial issue concerns whether any value is added value by enforcing a net-neutrality regime through an *ex ante* regulatory ban, rather than traditional *ex post* case-by-case antitrust enforcement.⁷¹ Indeed, net neutrality introduces a blanket ban of practices that

⁶⁶ See, e.g., Katz, *supra* note 65, 450;

Thomas W. Hazlett & Joshua D. Wright, *The Effect of Regulation on Broadband Markets: Evaluating the Empirical Evidence in the FCC’s 2015 “Open Internet” Order*, 50 REV. IND. ORGAN. 487 (2017); Maureen K. Ohlhausen, *Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLORADO TECHNOLOGY LAW JOURNAL 119 (2016); Timothy J. Tardiff, *Net Neutrality: Economic Evaluation of Market Developments*, 11 J. COMPETITION LAW ECON. 701 (2015); Gerald R. Faulhaber, *The Economics of Network Neutrality*, REGULATION 18 (2011-12).

⁶⁷ Pietro Crocioni, *Net Neutrality in Europe: Desperately Seeking a Market Failure*, 35 TELECOMM POLICY 1, (2011) 6-7; see also, *Zero-Rating Practices in Broadband Markets*, DOTECON, AETHA CONSULTING, AND OSWELL AND VAHIDA, (Feb. 2017), available at <https://ec.europa.eu/competition/publications/reports/kd0217687enn.pdf>.

⁶⁸ See Crocioni, *supra* note 67 (arguing that even a monopolist ISP may benefit from valuable complements and be better off charging a higher price for internet access, instead of trying to force customers onto its own services); see also Ohlhausen, *supra* note 66; Faulhaber, *supra* note 66.

⁶⁹ Shane Greenstein, Martin Peitz, & Tommaso Valletti, *Net Neutrality: A Fast Lane to Understanding the Trade-offs*, 30 JEP 127 (2016); see also Sébastien Broos & Axel Gautier, *The Exclusion of Competing One-Way Essential Complements: Implications for Net Neutrality*, 52 INT. J. IND. ORGAN. 358 (2017), (showing that, even in monopoly and duopoly, imposing net neutrality does not always improve welfare).

⁷⁰ Joshua Gans & Michael L. Katz, *Weak Versus Strong Net Neutrality: Corrections and Extensions*, 50 J. REGUL. ECON. 99 (2016); Martin Peitz & F. Schuett, *Net Neutrality and Inflation of Traffic*, 46 INT. J. IND. ORGAN. 16 (2016).

⁷¹ See, e.g., A. Douglas Melamed & Andrew W. Chang, *What Thinking About Antitrust Law Can Tell Us About Net Neutrality*, 15 COLORADO TECHNOLOGY LAW JOURNAL 93 (2016); Ohlhausen, *supra* note 66.

would not be *per se* antitrust violations.⁷² Notably, net neutrality *de facto* prevents broadband providers from introducing vertical contractual restraints, which have typically proven to be welfare enhancing more often than anticompetitive.⁷³ Therefore, there is a risk that, in the name of leveling the playing field, net neutrality focuses on competitor welfare rather than consumer welfare.⁷⁴ In sum, given the ambiguous welfare effects of discrimination, it is impossible to establish in advance whether the purported exclusionary effects outweigh their potential procompetitive benefits. Hence, there is no economic support for an *ex ante* absolute prohibition.

The “fair share” solution of taxing Big Tech to fund broadband-network improvements also appears to violate both the economic rationale for and legal obligation of equal treatment under net neutrality. By only imposing fees on OTTs that transmit data exceeding a certain threshold, the “fair share” proposal clearly discriminates against some online services and content—that is, the largest ones. With regard to the economic rationale, net neutrality has been justified on the grounds that broadband providers enjoy endemic market power as terminating-access monopolies. It would therefore be strange to impose an intervention to restore “fairness” in the relationship between network operators and content providers on the premise that the former suffers from an asymmetry of bargaining power. Indeed, under EU net-neutrality rules, ISPs are assumed to have insurmountable bargaining power, even though the “fair share” proposal presumes them to be powerless before Big Tech.

Indeed, as noted above, net neutrality is a primary driver of the current “fair share” debate. Allowing paid prioritization between ISPs and CAPs likely would have prevented the emergence of these claims. Indeed, it could be argued that, on the one hand, net neutrality has tilted the balance in favor of large OTTs⁷⁵ and, on the other hand, paid prioritization would be the efficient market answer to different content offerings.

⁷² A good example is provided by the treatment of zero-rating offers. For an analysis, see Giuseppe Colangelo & Valerio Torti, *Offering Zero-Rated Content in the Shadow of Net Neutrality*, 5 MARKET AND COMPETITION LAW REVIEW 141 (2021); see also Pablo Ibáñez Colomo, *Future-Proof Regulation Against the Test of Time: The Evolution of European Telecommunications Regulation*, 42 OXF. J. LEG. STUD. 1170 (2022), 1187-188 (noting that the very practices that are problematic from a net-neutrality perspective are healthy expressions of competitive markets; hence, absent a finding of significant market power, there is no support for a preemptive ban of vertical integration, exclusivity agreements, and other practices that have an equivalent object and/or effect: these practices are routinely examined by competition authorities and careful case-by-case evaluation has long been deemed appropriate for them).

⁷³ See, e.g., Katz, *supra* note 65; Ohlhausen, *supra* note 66; Joshua D. Wright, *Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?*, U.S. HOUSE JUDICIARY SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW (Jun. 20, 2014), <https://www.ftc.gov/legal-library/browse/prepared-statement-commissioner-joshua-d-wright-net-neutrality-antitrust-law-more-effective>; Christopher S. Yoo, *What Can Antitrust Contribute to the Network Neutrality Debate?*, 1 INT. J. COMMUN. 493 (2007).

⁷⁴ Katz, *supra* note 65, 454.

⁷⁵ Irene Comeig, Klaudio Klaser, & Lucia D. Pinar, *The Paradox of (Inter)net Neutrality: An Experiment on Ex-Ante Antitrust Regulation*, 175 TECHNOL FORECAST SOC CHANGE 121405. (2022).

Notably, conventional economic principles justify vertical restraints and discriminatory practice, as online content varies in terms of value for consumers, bandwidth use, and quality requirements.⁷⁶ Indeed, as was raised years ago during the U.S. net-neutrality debate, a ban on paid prioritization is inconsistent with a well-developed body of literature showing that it is impossible to determine *ex ante* whether any specific instance of paid prioritization will have positive or negative effects for consumers.⁷⁷ Moreover, restraints on prioritization are likely to thwart a range of welfare-increasing business models on the internet and to chill further pricing innovations.⁷⁸

Therefore, the fair-share proposal struggles to address the same fundamental question already raised in the case of net neutrality: whether a regulatory intervention is justified in the first place.

IV. Regulatory Humility and Lessons Unlearned

According to the economic literature, regulatory intervention is only justified under limited circumstances. The case for regulation is best substantiated where it can correct market failures, such as when free and unrestricted competition is unable to allocate resources efficiently.⁷⁹ Even under the romantic assumption that regulation serves consumers' interests and policymakers have sufficient information and enforcement powers to both promote the public interest and maximize social welfare, the primary focus of regulation will still be to tackle market failures.⁸⁰

Outside those examples of market failure, effective competition is commonly accepted to be the best regulator, as it has been empirically demonstrated to lead to lower prices, better quality, and greater innovation.⁸¹ Without a proper justification, regulation negatively interferes in market dynamics by generating inefficiencies, introducing artificial barriers to entry, and deterring technological innovation.

Calibrating regulation is extremely difficult. Although regulation is expected to be forward-looking, it may lack flexibility, and the imposition of rigid sets of rules can risk enshrining a static view of the market at the expense of its dynamic evolution. Moreover, consistent

⁷⁶ Ohlhausen, *supra* note 66, 137.

⁷⁷ See Justin (Gus) Hurwitz, *et al.*, *Amicus Curiae Brief in U.S. Telecom Association et al. v. FTC*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (Aug. 6, 2015), available at http://laweconcenter.org/images/articles/icle_oio_amicus_filed.pdf.

⁷⁸ Geoffrey Manne, *et al.*, *Policy Comments in the Matter of Protecting and Promoting the Open Internet*, INTERNATIONAL CENTER FOR LAW & ECONOMICS AND TECHFREEDOM (Jul. 17, 2014), available at https://laweconcenter.org/wp-content/uploads/2017/08/icle-tf_nn_policy_comments.pdf.

⁷⁹ RICHARD BALDWIN, MARTIN CAVE, & MARTIN LODGE, *UNDERSTANDING REGULATION*, Oxford University Press (2012).

⁸⁰ WILLIAM J. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE*, Harvard University Press (1952).

⁸¹ *Regulation and Competition. A Review of the Evidence*, UK COMPETITION AND MARKETS AUTHORITY (2020), <https://www.gov.uk/government/publications/regulation-and-competition-a-review-of-the-evidence>, paras. 1.3 and 2.4.

with both private-interest and public-choice theory, government intervention is often prone to capture by special interests, rather than promoting general social welfare.

Although these are limits of regulation generally, they are particularly critical in fast-moving industries, where it is challenging to design a future-proof framework.⁸² Therefore, especially when dealing with digital transformations, it is appropriate to embrace regulatory humility, acknowledge the inherent limits of regulation, and refrain either from picking winners and losers in the marketplace or from preemptively intervening in the absence of solid evidence of market failure and consumer harm.⁸³ Notably, the market-failure approach assumes that government activity should be limited to the minimal amount of intervention sufficient to correct for specific failures.⁸⁴

Further, interventions to correct market failures should neither require nor assume a particular technology. This would ensure much-needed flexibility to adapt the rules to rapidly changing realities, thus avoiding early obsolescence. It would also avoid the weaponization of regulation to protect incumbents' market position by freezing investments and hindering the development of new technologies. In sum, the principles of minimal and technologically neutral intervention reflect a light-touch approach of regulatory self-restraint, with awareness that the market is generally better suited to promote innovation and that regulation scores poorly on dealing with the unexpected.

The EU's net-neutrality rules departed from the principles of self-restraint and technological neutrality.⁸⁵ Despite the fact that there was no discernible evidence of a market failure, EU policymakers chose to interfere with the management of internet traffic. Moreover, they did so by imposing an outright ban on common marketplace practices whose effects are at least ambiguous, and hence deserving of case-by-case assessment. As a result, net neutrality picked winners (OTTs) and losers (ISPs). At the time, academics and other experts warned against the adoption of rigid regulation, which by definition cannot aspire to be future-proof and is apt to capture the dynamics of industries characterized by rapid innovation.⁸⁶

Indeed, net neutrality did not anticipate the rise of OTT services. A fascinating slogan has apparently proven to be more influential than economic principles and reality. And now, "fair share" advocates want the EU to step into the breach created by net-neutrality

⁸² Colomo, *supra* note 72.

⁸³ See Ajit Pai, *Remarks at the 18th Global Symposium for Regulators*, FEDERAL COMMUNICATIONS COMMISSION (Jul. 10, 2018), <https://www.fcc.gov/document/chairman-pai-remarks-global-symposium-regulators-geneva>; Maureen K. Ohlhausen, *Regulatory Humility in Practice*, FEDERAL TRADE COMMISSION (Apr. 1, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/635811/150401aeihumilitypractice.pdf.

⁸⁴ Baldwin, Cave, & Lodge, *supra* note 79.

⁸⁵ See also Colomo, *supra* note 72.

⁸⁶ See, e.g., Melamed & Chang, *supra* note 71; Ohlhausen, *supra* note 66; Bruce M. Owen, *Net Neutrality: Is Antitrust Law More Effective than Regulation in Protecting Consumers and Innovation?*, U.S. HOUSE JUDICIARY SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW (Jul. 8, 2014), <https://ssrn.com/abstract=2463823>.

regulation and impose further (likely inefficient) levies on Big Tech. The more rational course would be to reconsider the nature of net neutrality's non-discrimination principles in the first place. Alas, the "fair share" proposal in fact shares several features with net-neutrality regulation, demonstrating that, rather than learn from previous mistakes, European institutions are ready to repeat them. In particular, the proposal at issue does not square with economics.

Indeed, the economic justification for the regulatory intervention is missing, as there is no evidence of a market failure to address. Quite the opposite, according to BEREC.⁸⁷ The current model has fostered innovation, growth in internet connectivity, and the development of a vast array of content and applications. In other words, it has generated significant benefits for end users. The increase in traffic volume has not altered this fundamental reality and the IP-interconnection ecosystem largely remains highly competitive. At the same time, there is no evidence of free riding by CAPs along the value chain. As a result, the adoption of a sending-party-network-pays model would represent an unwarranted threat to the internet ecosystem that would generate costs with little or no countervailing benefits.

It is even questionable whether increases in internet traffic have resulted in higher costs for the telcos, who also benefit from the demand for broadband access that has been driven by the success of OTTs' content and services.⁸⁸ More generally, it is not clear how punishing the success of some OTTs would promote investment and innovation in the broadband market.

Further, rather than abiding by the principle of minimal intervention, the proposal would interfere with market dynamics by substituting a direct-compensation mechanism for private negotiations. The justification advanced for such an invasive intervention is the alleged asymmetry of the telcos' bargaining position vis-à-vis large OTTs. The assertion is that OTTs enjoy this disproportionate bargaining position because of their market power and an uneven regulatory playing field. Leaving aside the inherent knowledge problem in a central regulator deciding how dynamic data flows should be valued, this explanation is at odds with the primary assumption of net neutrality—that the telcos play a gatekeeper role because of their control of access to the internet. In reality, both Big Tech and the ISPs are sufficiently competent parties that they should be able to negotiate mutually beneficial business terms among themselves.

If telcos face an uneven regulatory playing field, it is precisely because of net neutrality, which limits their ability to monetize their networks by discriminating among content and applications. Rather than acknowledge that interfering with market forces was the original mistake and that it is therefore time to restore private parties' ability to freely negotiate the terms for content delivery, EU policymakers once again choose to blame the market.

⁸⁷ BEREC, *supra* note 26.

⁸⁸ *Id.*

If we acknowledge that internet traffic is generated by consumers (rather than by OTTs), payments into a fund managed by the European Commission would have the same welfare implications as direct payments.⁸⁹ Given that everyone benefits from the internet, if there is a policy issue regarding financing the next generation of telecommunications infrastructure, it makes more sense for that to be financed out of a fund born through general taxation.

The proposed tax on Big Tech has been framed as ensuring that they pay their “fair share” of network costs. But fairness is in the eye of the beholder. The term is so vague that it inherently grants policymakers greater discretion and room for intervention, all in the name of a purportedly noble cause.⁹⁰ Unfortunately, regulations that aren’t supported by market-failure framework are doomed to be captured by private interests. From this perspective, the “fair share” proposal is, indeed, consistent with public-choice theories of regulation that regard it as a rent-seeking device to benefit a small group of incumbents at the expense of rivals and consumers.

V. Conclusion

According to an old saying, history tends to repeat itself. This result is avoidable only if we learn from our mistakes.⁹¹ Looking at the “fair share” debate, European institutions appear condemned to repeat the past.

When it comes to technology and innovation, Europe systematically lags behind the United States and China. In the best-case scenario, it is catching up, but there is a significant gap to close. This picture is captured by various proxies of technological progress, such as the number of patents, the amount of R&D expenditure, the amount of private investment in artificial intelligence, the location of so-called “unicorn” firms, and the number of leading research institutions in high-tech fields.⁹²

There is another digital-economy scoreboard, however, on which Europe is the clear frontrunner. Namely, Europe celebrates its position as the leading regulator of digital

⁸⁹ See also Oxera, *supra* note 22, 34 (arguing that the fund would still lead to a transfer of money from one group to another and would not lead to substantially lower transaction costs).

⁹⁰ Giuseppe Colangelo, *In Fairness We (Should Not) Trust. The Duplicity of the EU Competition Policy Mantra in Digital Markets*, THE ANTITRUST BULLETIN (forthcoming).

⁹¹ Paul Crampton, *Striking the Right Balance Between Competition and Regulation: The Key Is Learning from Our Mistakes*, APEC-OECD CO-OPERATIVE INITIATIVE ON REGULATORY REFORM (Oct. 2002), available at <https://www.oecd.org/regreform/2503205.pdf>.

⁹² For useful information about several key innovation indicators, such as the value of venture-capital deals, the number of science and technology clusters, and government budget allocations for research and development, see, *Global Innovation Index 2022*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, https://www.wipo.int/global_innovation_index/en/2022; see also Riccardo Righi, et al., *AI Watch Index 2021*, JOINT RESEARCH CENTRE (Mar. 20, 2022), <https://publications.jrc.ec.europa.eu/repository/handle/JRC128744>.

markets.⁹³ Indeed, in less than a decade, Europe has delivered the GDPR, the DMA, the DSA, and countless data-sharing initiatives. Indeed, it would appear that regulation is at least a partial cause of the EU's poor results in the digital economy. After all, EU policymakers' primary concern should be to ensure that the regulatory framework is fit for purpose. But over the past decade, when the expected results didn't arise or when there were unintended consequences, rather than question the treatment, EU policymakers routinely have suggested increasing the dosage.

Against this background, the idea of introducing a tax on CAPs to boost investments in the next generation of telecommunications infrastructure could be just considered another piece of the jigsaw.

However, it is worth remembering that the diminished bargaining position that telcos have vis-à-vis online platforms is the result of another EU regulation. Indeed, without the net-neutrality ban on paid prioritization, telcos would have been free to negotiate differentiated terms for the delivery of OTTs' content and services. OTTs could have been charged according to bandwidth usage, through side payments for setting up optimized network nodes, or through any number of other mutually beneficial business arrangements.

Further, the proposal contradicts the central premise of net neutrality, which was that broadband providers' position as internet gatekeepers threatens OTTs and end users. But rather than acknowledge the mistakes of that earlier unnecessary and myopic intervention, the EU is supporting another shortsighted initiative that would be at odds with the economic rationale and the legal provisions of current internet regulation.

Again, as BEREC stated in 2012, the internet "has developed well without regulatory intervention, through stakeholders' coordination in the free market. Its ability to evolve over time and self-adapt has been key to its growth and success."⁹⁴ More recently, this message has been reiterated, emphasizing that "[t]he internet's ability to self-adapt has been and still is essential for its success and its innovative capability."⁹⁵

There was no evidence of market failure to justify net neutrality, and there isn't a market failure to justify imposing a "fair share" tax for network costs. Therefore, like net-neutrality anti-discrimination rules, mandating some large online platforms to compensate network operators with a usage fee would be a solution that wouldn't work to a problem that doesn't exist.⁹⁶

⁹³ See Margrethe Vestager, *Tearing Down Big Tech's Walls*, PROJECT SYNDICATE (Mar. 9, 2023), <https://www.project-syndicate.org/commentary/eu-big-tech-legislation-digital-services-markets-by-margrethe-vestager-2023-03> ("We are proud that Europe has become the cradle of tech regulation globally.").

⁹⁴ BEREC, *supra* note 22, 1.

⁹⁵ BEREC, *supra* note 26, 3.

⁹⁶ Ajit Pai, *The FCC and Internet Regulation: A First-year Report Card*, FEDERAL COMMUNICATIONS COMMISSION (Feb. 26, 2016) <https://www.fcc.gov/document/commissioner-pai-remarks-internet-regulation-first-year-report-card>.

The “fair share” proposal also reflects another pattern of recent EU industrial policy already seen in the audiovisual and publishing industries. As the digital revolution challenges existing business models, thus requiring a radical transformation of entire economic sectors, some incumbents suffer in adapting to the new environment, which requires facing new rivals but also taking advantages of new opportunities. This is part of the natural evolution of the market, where the disruptive force of innovation is generally welcome.

The EU is, instead, apparently concerned about the welfare of some legacy incumbents, especially if they are EU-born companies. As a result, market dynamics are once again threatened by regulatory interventions that impose financial obligations on successful online (and largely foreign) players. Such protectionist initiatives are at odds with the fundamental principle of competitive neutrality, according to which governments actions should ensure that all enterprises face a level playing field, irrespective of factors such as their ownership, location, or legal form.⁹⁷ Moreover, they have already proven to be an ineffective means to help companies in reinventing themselves and filling their competitive gap.

In sum, the EU not only assumes that it could lead and deliver innovation through regulation, but also that an industry’s digital transformation could be achieved by subsidizing legacy homegrown companies with welfare transfers from successful foreign players.

Such a vision does not live up to the ambitious goals of the 2030 Digital Decade. Insofar as Europe will be a place where innovation is regulated, rather than invented, there will be no chance to reverse its technological decline and recover digital leadership. Taxing Big Tech will not make Europe great again.

⁹⁷ See, *Recommendation of the Council on Competitive Neutrality*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (May 30, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.