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BEREC

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BEREC Report on the outcome of the public consultation of the BEREC Draft Report on harmonised definitions for indicators regarding OTT services, relevant to electronic communications markets

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1 Executive Summary

The objective of the BEREC Report on harmonised definitions for indicators regarding OTT services, relevant to electronic communications markets, is to identify and define harmonised metrics regarding OTT services, which are of interest to National Regulatory Authorities (NRAs) in the scope of fulfilling their regulatory tasks. The data is considered important for many NRAs and BEREC to ensure conformity with the provisions of, or decisions or opinions adopted under Directive (EU) 2018/1972 ("European Electronic Communications Code", hereafter EECC) and Regulation (EU) 2018/1971 (“BEREC Regulation”).

Article 2(5) of the EECC provides the definition of "interpersonal communications services" which, coupled with Article 20 of the EECC, gives NRAs the legal powers to collect data regarding "number-independent interpersonal communications services" (hereafter NI-ICS). Moreover, Article 20 also provides the legal basis to request data from undertakings which are not active in the electronic communication services or networks but are still operating in closely related sectors, insofar these requests are substantiated and proportionate.

The metrics for which harmonized definitions are provided are limited to a set of important indicators. The report also provides the necessary guidance for their collection, elaborating on particular challenges in relation to the collection of certain metrics (for instance, relating to the caveats with some indicators), while proposing potential means to overcome reporting difficulties. The indicators included herein have been identified by NRAs as key for adequately fulfilling their regulatory mandate.

BEREC proposes the following metrics as relevant with respect to two main categories of services: (i) NI-ICS, namely the number of active and registered users, for two relevant categories of users, namely business users and non-business users, and metrics on usage (number and minutes of calls, numbers of messages) and (ii) video-streaming services, focusing on subscriber metrics, registered and active users, the number of simultaneous streams and content pieces sold, and revenue. However, these metrics may not cover all the NRAs' informational needs, as national specificities may imply the need for additional data.

Since 2019, BEREC has engaged in an ongoing dialogue with stakeholders to identify and define relevant indicators that would assist NRAs in their regulatory tasks and that would be feasible to provide and proportionate to request. In particular, from the 16th of March 2021 to the 21st of April 2021, stakeholders were invited to submit their inputs on the Draft BEREC Report on harmonised definitions for indicators regarding OTT services, relevant to electronic communications markets. This was a last call for feedback before the approval of the final report and its publication later this year.

Nine responses were received, from NI-ICS and video-streaming service providers, operators and operators' associations. One contributor requested to keep its identity confidential and another one has provided a confidential and a non-confidential version of the response. All the public contributions are published on the BEREC website.

All the respondents welcomed the opportunity to participate in this consultation and supported BEREC's efforts to define a list of harmonised indicators which may assist NRAs in the fulfilment of their regulatory tasks.

BEREC has considered all the responses in delivering this report and amended the Draft Report in the light of the responses, where it has been considered necessary, as presented in what follows.

2 Introduction

In this document, the comments are grouped according to the Report's section they refer to, containing, at the same time, a general comments section.

During the period from the 16th of March 2021 to the 21st of April 2021, BEREC received 9 contributions, including one which has been indicated as confidential, from the following stakeholders:

1. Deutsche Telecom AG (“DT”)
2. Digital Europe
3. European Competitive Telecommunications Association ("ECTA")
4. European Telecommunications Network Operators' Association ("ETNO")
5. Facebook
6. Netflix
7. Telefónica
8. Vodafone
9. Confidential contributor ("the CC")

Some of these contributions also included confidential comments, BEREC refers to those in the report as "confidential contributions".

BEREC is grateful to have received the submissions and has carefully considered all of them. Accordingly, BEREC sets out its summary of assessments and responses in this report.

3 General Comments & Comments on Section 1 - Introduction of the BEREC Report

All the stakeholders welcomed the opportunity to comment on the Draft BEREC Report and strongly support BEREC's efforts to define a list of harmonised indicators to assist NRAs in the fulfilment of their regulatory tasks, and, in this way, contribute to ease the preparation and handling of data which can be requested by NRAs in different Member States.

Digital Europe considers having a harmonised set of indicators for NI-ICS as positive, but, given the cross-border nature of NI-ICS and the reliance on the country of destination principle, as well the potential national jurisdictions which could be applicable, it suggests to introduce

a more centralised and streamlined process for NI-ICS providers to engage and disclose information to NRAs, in order to not expose NI-ICS providers to potentially 27 different regulatory regimes.

ETNO and *DT* also welcome BEREC's initiative suggesting a set of harmonized metrics in relation to OTT services that shall help NRAs to assess the competitive landscape and the economic importance of individual NI-ICS providers. To that end, they note that some of the proposed metrics would be relevant in the context of the Digital Markets Act (hereafter DMA) proposal, which uses quantitative criteria (e.g. number of active users) to designate gatekeepers which fall within the scope of the proposal. Hence, the NRAs should closely cooperate and exchange relevant information and experiences with the EC on those metrics.

According to the *CC*, the metrics identified by BEREC for NI-ICS services and video-streaming services are consistent and effective for NRAs' tasks. However, it points out to the importance of regularly updating the list of indicators on the basis of the evolution of the markets and on the knowledge building with respect to the business models applied by OTT providers.

Supporting BEREC's intentions for a harmonised approach when seeking information from OTT providers, *Facebook* strongly urges NRAs to adhere wherever possible to the guidance provided by BEREC, in order to best support the realisation of a Digital Single Market.

Also, in favour of BEREC's initiative, *Telefónica* emphasises that BEREC and NRAs should apply and gain experience with the metrics and make those a steady feature of their reporting practices. Moreover, it suggests that these practices should find a dedicated forum for exchange, for example involving BEREC, to which also other competent authorities can participate. Additionally, *Telefónica* thinks that BEREC should commit to a timeline for reviewing the metrics that NRAs and other competent authorities choose to apply.

BEREC Response 1

Given the new provisions brought to the NRAs by the EECC, BEREC initiated a preliminary workflow in 2019 that eventually led to this public consultation. The next step is to work on revenue indicators, as well as to gather NRAs experiences in collecting this kind of data in order to consider the best scheme for harmonization and establishing comparability of data for the regulatory purposes under NRAs remit.

BEREC considers that the workstream initiated with respect to harmonized OTT indicators could be the basis for establishing a European framework on data collection regarding this topic. For the particular case of NI-ICS, the harmonized set of indicators to be collected will be also relevant for the DMA, as it will allow further monitoring of digital platforms and their core platform services. The measurement and associated assessment of competitive dynamics of the digital services is a challenge for all authorities, and this is why BEREC will keep on working on this topic and collaborating with all the public and private parties involved.

It is noteworthy that both BEREC and the NRAs are on a learning curve with respect to the most appropriate and relevant metrics to be used for the characterization of the underlying services and are trying to gain as much experience as possible. The BEREC Report represents an initial and early attempt to identify and define the most relevant indicators and

BEREC's work in this field does not preclude any future work on these topics. Moreover, as already mentioned in the Report, some NRAs might have a more extensive need for information, depending on their activities.

The current stage of the work that BEREC has already done, i.e. determining common definitions and periods of data collection for a minimal set of indicators, could be considered as a first step towards a potential centralization of the data collection process, without prejudice, however, to any independent initiatives that NRAs may wish to undertake. Since the majority of the services have a pan-European scope, it may after all be appropriate to consider conducting data collection activities at BEREC level.

In relation to NI-ICS, BEREC understands the benefits of a more centralised and streamlined process, which would involve engaging in its own data collection and disclosing information to NRAs. However, the current BEREC Regulation does not provide for such a centralised data collection process, as explained in section 5 of the Report.

Digital Europe expresses that the only thing that NI-ICS have in common is that the NI-ICS provider does not own or exercise control over the delivery infrastructure. Because of this, the reporting of indicators should be flexible enough in order to permit the providers "to utilise the particular data/indicators they maintain in the ordinary course of business". In this sense, *Digital Europe* appreciated that BEREC has not included in the Report data which providers would not normally collect, solely for reporting/information disclosure.

Moreover, *Digital Europe* points out that data collected by NRAs will involve highly sensitive commercial information and that providers of NI-ICS should not be required to disclose other information that is not directly related to the communications feature. In any event, confidentiality safeguards need to be applied and, should this not be possible, the data should not be collected.

DT stresses that any data provision shall be proportionate and strike the right balance between regulatory necessities and burden upon providers.

ECTA calls on BEREC to strictly apply the principle that any information must be proportionate to the performance and the task targeted and must be reasoned to minimize any extra burden for ECN and ECS providers, as the EECC results already in a significant increase in the administrative burden for the providers.

Facebook highlights that proposing a common set of harmonized indicators up front is expected to ensure that data requests are proportionate, reasoned and limited to what is necessary for NRAs to perform their duties under the EECC.

Finally, *Telefónica* explains that one task for BEREC it to provide more clarity and certitude to NRAs and other competent authorities about the legitimacy of information requests that are purposeful and proportionate in the sense of the Code: the becoming applicable of the Code marks the right moment for defining a baseline of shared metrics and putting these to use.

BEREC Response 2

The idea of achieving in so far as possible a proportionate data collection has been the main driving force behind BEREC's workstream on this topic. It has been BEREC's intention to engage in a preliminary analysis of data which would be readily available in the ordinary course of business to collect by providers and to set common elements that would make the provision of data across Member States easier for the different companies. Moreover, the relevance of the data for NRAs activities and their relative importance need to be safeguarded.

The EECC states in Article 20 that "Member States shall ensure that undertakings providing electronic communications networks and services, associated facilities, or associated services, provide all the information, including financial information, necessary for national regulatory authorities, other competent authorities and BEREC to ensure conformity with the provisions of, or decisions or opinions adopted in accordance with, this Directive and Regulation".

Thus, NRAs are the Authorities that need to decide on the indicators to be collected in order to fulfil this task, carefully assessing the proportionality of any data requests.

4 Comments on Section 2 – Number-independent interpersonal communications services

4.1 Number-independent interpersonal communications services definition (Section 2.1 of the Draft Report).

According to *Telefónica*, BEREC misses an opportunity to elaborate on the criteria that NRAs should use as a common starting point for applying the definition of NI-ICS. BEREC should, at least, provide examples of cases in which there might be doubts on whether a number serves as an identifier only, enabling communications with numbers, but not connecting with them.

BEREC Response 3

BEREC considers the definition of NI-ICS as being clear enough with regard to the usage of numbers, as Article 2(7) of the EECC states that: "'*number-independent interpersonal communications service' means an interpersonal communications service which* ***does not connect with publicly assigned numbering resources****, namely, a number or numbers in national or international numbering plans, or which* ***does not enable communication with a number*** *or numbers in national or international numbering plans*".

This definition makes it very clear that, by contrast to the number-based interpersonal communication services (NB-ICS, thereafter) where the use of a number must be the purpose of connection or communication with that number (i.e. via the communication service this number is assigned), the mere use of a number as a tool for identifying users of

a different communication service (which uses other addressing schemes than publicly assigned numbering resources) does not lead to the classification as NB-ICS. This fact is also supported by Recital 18 of the EECC.

4.2 Number-independent interpersonal communications services metric definitions (Section 2.2 of the Draft Report)

Digital Europe underlines that NI-ICS are different to traditional telecommunication services, on the one hand, and to one another, on the other hand. The metrics that NRAs traditionally collect would be misplaced and unreliable to inform on policy decisions or to understand market presence. For instance, the indicators based on location might be distorted, while proxies based on payment details, IP addresses or registration details, are not always retrievable.

ETNO and *DT* support all the metrics proposed in the draft. Eventually, *ETNO* and *DT* suggest to contrast the metrics proposed for NI-ICS to those used for NB-ICS in order to assess the competitive constraint of NI-ICS on NB-ICS.

BEREC Response 4

BEREC acknowledges the differences between NI-ICS and "traditional" telecommunication services, such as NB-ICS. These differences were taken into account in the drafting of this Report, as they have a bearing on the type of information that can be relevant for these services. BEREC has also considered that the obligations set with respect to NI-ICS in the EECC differ when compared to the ones applicable to NB-ICS.

Thus, the indicators regarding NI-ICS services cannot be exactly the same as those sought regarding NB-ICS services, but still need to be useful to assess competition dynamics between service types (NI-ICS and NB-ICS) and among providers within the NI-ICS type, and, more generally, valid to procure sufficient data to oversee the application of the EECC.

BEREC considers that the list of indicators included in the report provides for a minimal set of data that will enable the analysis of competition dynamics.

As a general remark on the inclusion of NI-ICS metrics in the report, *Telefónica* states that BEREC endorses the arguments of NI-ICS providers without critical questioning. According to this operator, the arguments of NI-ICS providers with respect to call duration are not consistent with NI-ICS providers' quality of service evaluation practice, nor compelling for regulatory purposes. In its view, NI-ICS providers should be able to provide this information which has not been included by BEREC in the Draft Report (see also section 4.2.1).

Moreover, *Telefónica* expresses its concern on BEREC's dismissal of metrics as inappropriate or not feasible. According to *Telefónica*, the report should state that metrics meeting purposiveness and proportionality standards constitute legitimate points of enquiry. Also,

BEREC should state explicitly that the mere non-availability of a specific metric is not sufficient to bar competent authorities from requesting it. In any event, it is inherent from the EECC's provisions that data shall be reported from entities not previously under the scrutiny of NRAs.

BEREC Response 5

The information requests with respect to traditional electronic communications services have evolved over time and, depending on the regulatory needs and enhanced tasks to be fulfilled by the NRAs, have been made more sophisticated and comprehensive. This resulted in, among others, improved operators' capabilities in collecting and reporting data.

At the initial stage of these developments, BEREC has considered it appropriate to carefully take into account the specificities of NI-ICS (as described by their providers) when compiling the set of indicators. The indicators proposed in the report are a first step in the NRA's data collection exercises and represent a minimum list that BEREC considers useful for the NRAs to efficiently fulfil their regulatory tasks.

BEREC considers its proposal to be sufficient as a common ground for all Member States for the time being. As NRAs gain experience on the topic, they can further assess the feasibility to obtain additional data and the completeness of the indicators' list. In view of this, in the future, BEREC will review the list taking into account the experience with NI-ICS gained by NRAs and seeking for the opportunity to improve NRAs' information to fulfil their mandates.

It is worth mentioning that BEREC selected the indicators being mindful of the balance between their relevance to most NRAs, on the one hand, and the difficulties/feasibility that the providers expressed to provide the data, on the other hand. Not all service providers offer the same services, with the same functionalities and embedded intelligence, and the range of services falling under the NI-ICS qualification is significantly wider and more heterogeneous than those under the NB-ICS category. The diversity in services offered implies that BEREC and NRAs have to be especially mindful on how data requests may impact all the providers of different NI-ICS, regardless of their penetration or popularity.

Finally, it is relevant to highlight that, for some NRAs, the metrics presented by BEREC may be insufficient and hence they may decide that it is necessary and justified to request additional data.

4.2.1 Comments on indicators regarding NI-ICS services not included in the Draft Report

Call duration

Telefónica explains that the call duration with respect to NI-ICS services can be a relevant indicator. According to *Telefónica*, given that end-user satisfaction surveys are common practice immediately after the call is finished, from this information the relevant duration of could be determined/estimated. Moreover, according to *Telefónica's* views, it appears evident that providers will conduct evaluations going beyond end-user satisfaction surveys to develop

competitive services, facilitate technical planning decisions and evaluate the impact on user satisfaction.

BEREC Response 6

BEREC notes that Telefónica's comments refer to the "call duration" metric, this is to statistics that would refer to the average duration of calls, mean duration of calls and other relevant moments of the distribution of the length of calls.

However, it is noteworthy that NRAs do not seek statistical information on the distribution of the duration of calls regarding NB-ICS and that, in most cases for those services, information about call duration is proxied by taking the quotient of total number of minutes over total number of calls yielding a minutes per call metric[1]. The report also provides for the collection of number of calls and number of minutes in the case of NI-ICS, therefore allowing the calculation of their quotient, so that the same logic of the metric for call duration is ensured for both NB-ICS and NI-ICS.

Revenue indicators

Telefónica disagrees with BEREC abstaining from defining a harmonised metric for NI-ICS revenues, pointing out that more ambition in that respect is expected. According to the provider, BEREC's qualification that a harmonised collection of such data is not 'easily' achieved means leaving these market developments unsupervised and allows the NI-ICS providers to extract themselves from regulatory oversight, perpetuating an imbalanced treatment in the market.

Moreover, BEREC should respond to legislative expectations that the necessary adjustments with respect to data collections are made in the light of the EECC's new provisions, precisely because of the identified gap between NRAs' data needs on NI-ICS and their lack of availability thereof. *Telefónica* sees this as particularly relevant in the context of the upcoming adoption of the DMA, providing ground for regulatory oversight of NRAs in the digital services universe. In its view, NRAs have particularly relevant cost modelling insights (from the NB-ICS), which could be used to evolve views concerning the revenue flows of NI-ICS.

Facebook highlights that gathering harmonized data in relation to revenues for NI-ICS services raises unique issues and should not be included in the final set of harmonized indicators.

DT and *ETNO* share the opinion of BEREC on the fact that a collection of harmonized revenue metrics is complicated at this stage (because of zero-priced services and the various monetization strategies implied), and suggest that BEREC pursues future involvement in work streams on this topic, given its importance for the assessment of economic and competitive scenery in the telecommunications field.

[1] Generally, this metric would differ from the average duration of calls.

BEREC Response 7

BEREC agrees with *Telefónica*, *DT* and ETNO that revenues are an important indicator in the assessment of competition among NI-ICSs services and between NI-ICS services and NB-ICS services. Because of this, BEREC plans to set up a workstream in order to develop on indicators regarding revenues related to NI-ICS. This workstream, will among others, build on the experience and exchange with stakeholders in the context of the BEREC Draft Report on the Internet Ecosystem, which will be open for public consultation in 2022.

BEREC highlights that the currently proposed indicators are an initial set of indicators for data collection and will revise and develop this set of indicators further in order to assist NRAs in fulfilling their tasks. However, as rightfully pointed out by some stakeholders, the reporting on revenue-related metrics is complex and needs further investigation.

Preinstallation indicators

Telefónica makes an argument for the preinstallation indicator. In its view, pre-installations affect end-user behavior and are "likely to shape the nature of competition among different NI-ICS providers". As for the particular metrics, *Telefónica* considers of interest the number and type of pre-installations, disagreeing with BEREC who does not propose any harmonized metric of that dimension.

Telefónica goes on to explain that a key question to be addressed concerns the bundling of pre-installed communications services with other applications or device functionalities, to be examined both from the perspective of the device manufacturer and the application provider.

According to *Telefónica,* preinstallation indicators would contribute to assess the share of devices that are multihomed by default and scope the number of potentially registrable users, and in this sense means of cross-validating registered users' numbers.

Finally, *Telefónica* encourages BEREC to recognize the possibility of ICS facilities (specific applications) being pushed to end users' devices after these have been purchased by the operating system provider. Such practices deserve attention due to the potentially unfair competitive advantage they confer to the provider.

Time spent on messaging platforms indicators

ETNO and DT support all the metrics proposed, but wonder why the time spent on messaging platforms is not used as an additional metric to complement the number of instant messages. This metric is considered highly relevant, especially when it comes to NI-ICS providers relevance in the market, as well as for assessing the competitive interaction with NB-ICS, and would be useful to assess multi-homing between NI-ICS.

BEREC Response 8

BEREC agrees with *Telefónica* that preinstallations may affect competition between NI-ICS providers and could be seen as relevant for its assessment. Nevertheless, only some NRAs

attribute relative importance to this indicator. Moreover, and in order to retrieve this information, NRAs might need to not only address NI-ICS providers but also equipment and operating system manufacturers. Given this, the information has not been considered for inclusion in the report.

BEREC also agrees with *ETNO* and *DT* that the time spent on messaging platforms may be a relevant indicator in order to assess the relative popularity of different online platforms/NI-ICS. However, there are important practical difficulties in the retrieval of these data that could make the indicators non-informative or very difficult to interpret. For example, end users may be having the app or service open/running in the background, "spending" time on the app or service without even being aware this.

BEREC therefore does not include indicators on preinstallation and the time spent on the messaging platforms proposed list of indicators.

BEREC highlights that the currently proposed indicators are an initial set of indicators for data collection and will revise and develop the set of indicators further in order to assist NRAs in fulfilling their tasks, depending on the experience and knowledge built.

4.2.2 Comments to indicators included in Section 2.2.1 of the Draft Report

Number of Monthly Active Users (MAU) (Section 2.2.1.1 of the Draft Report)

Digital Europe questions the utility of such an indicator, stating that the figures are exposed to seasonality and large fluctuations (during the time of certain events - for instance, festivals, international sport events etc.) and that considering the "by country" metric is even more misleading when people travel (from) abroad.

Similarly, *Facebook* notes that the assumptions on the country of residence and fluctuations of usage will likely lead to material distortions in the proposed metrics. Furthermore, even if it should be possible to provide MAUs broken down by different Member States based on various proxies and/or assumptions, the data obtained will be inherently less accurate than for traditional telecoms services. Thus, caution needs to be exercised with respect to the conclusions drawn.

Finally, *Telefónica* considers that the list of caveats exposed by BEREC appears to be unduly restrictive, despite the Report stating that those should not impede the provision of data. *Telefónica* suggests BEREC to focus on the concrete ways of obtaining the data, outlining mitigation strategies for the caveats. BEREC understands that this comment refers to the breakdown of MAU by Member State.

BEREC Response 9

BEREC considers that the number of monthly active users (MAU) is a very relevant indicator, and its utility as well as its analytical value are necessary to ensure conformity with the provisions under Directive (EU) 2018/1972.

BEREC therefore does not agree with the opinions of certain stakeholders, who have questioned the utility of this indicator in the Report.

For further assessment of the MAU indicator, seasonality will be taken into account. With the practices of NRAs in mind, as well as in the light of the importance of getting a view on seasonality effects considered by operators, BEREC proposes to collect four data points per year.

By gaining experience in the definition of indicators and data collection over time, BEREC and NRAs will learn and continue to develop their insights. With a stable reporting period, gathered data will be more robust and reliable and in the future allow BEREC and NRAs to learn more about NI-ICS and its providers competing in the electronic communications services' markets and at a further stage, consider improvements in the data requested, should these be deemed necessary.

Changes to the Report:

To assess the seasonality in the usage of services, BEREC proposes changing the recommended number of data points per year (by service and by country) from two (half-yearly) to four (quarterly), independently of the frequency of the data collection, on which NRAs may decide.

With respect to the specific business-related metric proposed by BEREC, *a confidential contribution* states that while NI-ICS providers offer variants of their apps focused on the needs of businesses, it is unlikely to accurately identify all business users/businesses that use a particular NI-ICS, since a lot of (smaller) businesses are making use of the standard version of the applications, which are also used by consumers. For these users, providers have no means, in their ordinary course of business today, to accurately identify a business user from a consumer user of the same app variant.

Telefónica asks BEREC to clarify that the inclusion of the metric on business users does not imply that every electronic communications provider is considered an online intermediation provider as such, in the sense of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services[2].

BEREC Response 10

Having considered the comments received, BEREC proposes the following definition of a business user to be included in the report: **a business user is any natural or legal person acting in a commercial or professional capacity, making use of an enhanced NI-ICS service, offered by the NI-ICS provider for professional/business use**.

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN

For practical purposes in data collection, bearing in mind the limitations mentioned by the stakeholders, BEREC suggests collecting data on two types of business users per NI-ICS service, namely those using:

1. an enhanced version of the standard service, against payment[3]; and/or
2. an enhanced service/service with enhanced functionalities, e.g. a dedicated software application or application programming interface (API), which targets particularly businesses, either or not against payment.

Moreover, BEREC suggests setting up a continuous dialogue with NI-ICS providers to elaborate on the notion of "enhanced" and refine the definition of a business user in the context of data collection practices. For instance, an enterprise that is considered a business user may be counted as one single business user or, alternatively, the number of accounts/clients used by such enterprises may be taken into account. Yet, to ensure comparability between services, the same metric(s) should be collected for all services.

With respect to *Telefónica's* concern, as expressed above, BEREC considers that, by no means, does the text of the Report imply that every electronic communications provider is considered an online intermediation provider *per se* and, therefore, such a conclusion cannot and should not be drawn.

Changes to the Report:

BEREC will add the definition of business users of type 1 and 2 and indicators to the Report and include the necessary clarifications.

Regarding the active user metrics, *Telefónica* suggests that BEREC should clarify that the two are mutually exclusive: the number of monthly active users referring solely to the end-users, in contrast to the number of monthly active business users which is targeting only business users.

Telefónica requests that BEREC clarifies that the 30 day-period referred to in the proposed metrics is to be established relative to the registration moment. Therefore, it proposes that the metrics on the number of registered users are to come first, before the number of active users.

Finally, *Telefónica* requests BEREC to clarify that indicators on active users and active business users concern specific NI-ICS services and should always be obtained from the provider of the service, not the internet service providers (ISPs).

BEREC Response 11

The MAU indicator will only pertain to users that cannot be qualified as business users as defined under response 10 above. BEREC is aware that professional individuals and

[3] An example for an enhanced service is the dedicated application "Whatsapp Business" targeting businesses, see https://www.whatsapp.com/business/?lang=en.

enterprises who are using the consumer or standard version of the NI-ICS applications may be included in the monthly active users' statistics.

BEREC reiterates that the notion of active users refers to users who have been active at least once in the considered (calendar) month.

At the same time, BEREC clarifies that the information on the proposed NI-ICS indicators will only be collected from NI-ICS providers and not from internet service providers (ISPs).

Changes to the Report:

A clarification will be included in the Report, explaining which active users are to be reported under the considered metrics categories, as well as the fact that the information on active users of any NI-ICS will only be requested from NI-ICS providers offering the concerned NI-ICSs and not from the ISPs. Additionally, "month" will be clarified to refer to a calendar month.

Number of Registered Users (Section 2.2.1.2 of the Draft Report)

According to *Facebook*, this metric is unlikely to convey accurately information on the adoption or effective usage of NI-ICS services. Therefore, *Facebook* recommends that NRAs do not seek information about registered users but instead focus on MAU, which it believes to present a more accurate and meaningful picture on user engagement.

A *confidential contribution* notes that the registered users metric is unprecise because of incomplete confirmation processes[4] or inauthentic account creation activity. Moreover, the internal reporting on registered accounts lacks a standard accepted methodology and is subject to significant interpretation and reliability issues.

Telefónica asks BEREC to clarify that the proposed metric refers only to end-users.

BEREC Response 12

BEREC is aware of the potential inconsistencies and shortcomings of this indicator, but considers that it should be included in the current list of indicators. The ratio of the number of MAUs to the number of registered users could help to get an insight on the effective usage and hence the success of an application.

Furthermore, BEREC and NRAs will learn from their experiences gained in the collection process and will refine the definition and its application in data collection in the future.
Concerning the confidential contribution's standpoint, BEREC proposes that all registered accounts should be reported regardless of whether they are deemed inauthentic or not. Furthermore, the NI-ICS provider could provide additional information on significant data

[4] Most registered accounts do not complete the registration process, required to render the application useful.

cleaning operations, to be taken into account by the NRAs. In this way, sudden drops in the number of registered users could be explained

In analogy with the MAU indicator, BEREC will also make a distinction between registered regular users and registered business users and, therefore, add specific, dedicated metrics for business users to the list. Business users should not be included in the "Number of Registered Users" indicator but will instead be included in the other indicator "Number of Registered Business Users".

Changes to the Report:

The business users related metric will be added to the list of indicators, while the distinction between business users of type 1 and 2 will be clarified. In principle, the same clarifications as the ones following BEREC Response 11 will be included in the Report.

Usage: Number and minutes of voice calls and video-calls and number of instant messages (Section 2.2.1.3 of the Draft Report)

Concerning the periodicity of data collection, *Telefónica* suggests that all the proposed metrics on usage should be collected at least on a monthly basis to ensure coherence with the remaining indicators and promote internal comparability within NI-ICS, as well as external comparability relative to NB-ICS.

BEREC Response 13

From BEREC's point of view, there is no justifiable reason to include the collection of those metrics on a monthly basis in the report. For example, a monthly collection is not a general practice among European NRAs as far as NB-ICS are concerned.

Thus, it is BEREC's view that such an approach would raise an unreasonable burden on providers of NI-ICS, NB-ICS (in case this practice would also be also applied to these), as well as NRAs.

However, in some cases, NRAs may request companies to provide data regarding these indicators for particular dates, for instance in one particular month or a few specific months, for national specificities or in order to be able to compare and cross-check indicators that pertain to the same period of time (e.g. the number of voice calls and the number of monthly active users in a given month).

Split of voice-calls, video-calls and instant messaging per country of destination

Telefónica requests that BEREC considers the split of NI-ICS services by country of destination (in-country, inbound and outbound traffic). In its view, it is only in this way that the data will enable appreciation of service usage and the competitive dynamics would be depicted accurately, allowing for a proper substitutability assessment.

However, *Facebook* highlights that gathering harmonized data in relation to country of destination for NI-ICS services raises unique issues and should not be included in the final set of harmonized indicators.

BEREC Response 14

BEREC recognizes the informative value of an even more granular view on the (category of) destination of any call.

However, certain NI-ICS providers have brought up plausible technical limitations in determining the country of destination for connections over the internet. Determining the country of origination, which is considered as an indicator that is feasible to collect, already poses certain challenges.

Hence, since the information on the country of destination does not seem to be collected by NI-ICS providers in their normal course of activity, and no arguments related to the feasibility have been provided by *Telefónica*, this indicator is not incorporated in the current list of indicators.

5 Comments on Section 3 – Video-streaming services

Netflix points out that the EECC does not regulate video streaming service providers, which are regulated by the Audiovisual Media Service Directive. It invokes the country-of-origin principle as a factor that suggests caution in information requests under the EECC, given that the principle is intended to avoid an overlap of jurisdictions.

According to *Netflix*, the information collection powers from "other relevant undertakings" that are not telecommunications providers (like video streaming providers) prescribed in the EECC is strictly limited to specific cases and needs to: (i) be necessary for regulatory tasks under EU law; (ii) follow a similar information request from the telecom operators; (iii) be proportionate and not pose an undue burden; (iv) be adequately motivated; and (v) be used by means of exceptions. Thus, *Netflix* is concerned the BEREC Report incentivizes NRAs to request data beyond specific, individual and exceptional analysis requirements.

Netflix appreciates that the Draft Report outlines the criteria NRAs should meet to request data (reasonableness, motivation, proportionality, conditionality requirement) but recommends BEREC to require requests from NRAs be bound to a specific purpose (a 'purpose limitation') which will be communicated to the provider involved and state why such information is only available from non-ECN/S providers.

Similarly, *Vodafone* urges NRAs to be cautious and prudent in requesting data about video streaming services, being clear with regards to the purpose of use and to scope the information requests on the policy intent. Whilst, *Vodafone* agrees with BEREC seeing no legal hurdles in respect of the VOD reporting measures that BEREC has already identified as technically feasible to be reported on, it believes that reporting measures would be costly to develop where they do not exist. Therefore, *Vodafone* urges BEREC to take into account the

economic cost pressures that European VOD services are already under, when compared to non-EU OTT rivals.

BEREC Response 15

NRAs do not collect data if there is no purpose in accordance with the motivations set in Article 20 of the EECC.

Regarding the data that the Authorities could collect with respect to video-streaming services, BEREC has already identified that, according to the NRAs' views, this information could be needed by some NRAs in order to fulfil their tasks (c*f.* BoR (19) 244, BEREC Preliminary report on the harmonised collection of data from both Authorised Undertakings and OTT operators, 2019). While data collection may incur a cost of treatment for the undertaking from which data are collected, it is subject to the judgement of the NRAs, after their sound assessment and consideration of the providers' arguments, which will ultimately determine whether such a data collection is proportionate.

In any case, when requesting data from video-streaming providers (or any other providers) NRAs will have to comply with the conditions and objectives set in Article 20 of the EECC as it is recalled in the Report.

5.1 Video-streaming service definition (Section 3.1 of the Draft Report)

A confidential contribution suggests that providers of video sharing platforms and IPTV services should be included in the scope of the report as they generate significant amount of data traffic.

BEREC Response 16

For IPTV services, most of the indicators included in the Report (for example, subscription and revenue data) are already provided by operators to NRAs for a long time in order to allow NRAs to perform their tasks under the regulatory framework for electronic communications.

In general, defining harmonized indicators for video-streaming services is useful for NRAs to assess the competitive context, especially in the fixed broadband markets, as content providers operate in very closely related markets to the electronic communications ones. For example, in some countries, the internet access service (hereafter IAS) is extensively sold bundled with audio-visual contents which competes with video-streaming offerings. Also, in some cases, these bundles even include the services supplied by video-streaming providers.

This means essentially that NRAs have good reasons (such as the economic assessment and understanding of the impact of video-streaming offers on the competition in the internet access markets) that suggest defining indicators for video-streaming services. In particular,

metrics on revenues and subscribers can be considered key indicators for those type of economic analyses.

About data traffic generated in the networks by online services, monitoring any network congestion issue that might arise is of the main interest for NRAs. In this respect, BEREC recognises that many types of services have an impact on this aspect, going beyond video-streaming services (see also BEREC Response 19 below).

5.2 Video-streaming metric definitions (Section 3.2 of the Draft Report)

DT and *ETNO* welcome the metrics proposed by BEREC in this respect.

5.2.1 Subscriber metrics for subscription video on demand (SVOD) services (Section 3.2.1.1 of the Draft Report)

A confidential contribution suggests deleting the "number of simultaneous streams that are marketed with subscription services", as this does not provide indications on how the actual use of services could technically impact on the networks. Thus, the metric is not suitable to assess data traffic.

BEREC Response 17

The indicator "**number of simultaneous streams that are marketed with subscription services"** aims to describe situations in which multiple users, through a single subscription (account), can access various video contents on multiple screens at the same time. This is a common commercial practice among video streaming platforms that offer subscription plans at different prices depending on the number of screens/devices on which it is possible to simultaneously watch/video contents.

Therefore, this indicator does not intend to measure data traffic, but is rather useful to understand the penetration of video-streaming services by proxying the number of potential users.

Changes to the Report:

BEREC will clarify the meaning of "simultaneous streams" in the Report, describing the underlying business practice of offering one subscription (account) with simultaneous multiple-use possibilities.

5.2.2 Active User Metrics for subscription video on demand (SVOD) services (Section 3.2.1.3 of the Draft Report)

A confidential contribution suggests limiting this to video streaming services that are part of a bundle encompassing other non-entertainment services. According to this comment, for unbundled offers, all paying subscribers are considered as active.

BEREC Response 18

BEREC takes this occasion to clarify that the active user metrics have been included exclusively for video-streaming services sold in bundles with other services. To that end, bundles with IAS are excluded.

BEREC considers this metric necessary to evaluate to which extent the registered user metric is a good metric to assess video-streaming services' effective users, in cases where the number of subscribers may overestimate the real penetration of such services. This may occur, for instance, when users purchase a video-streaming service bundled with other non-entertainment services which may be seen by users as the core services of the bundle (e.g. Amazon Prime). In those cases, there may be many accounts that are not really used.

Changes to the Report:

BEREC will change the name of the active user metrics, as presented in section 3.2.1.3, to **"Active User Metrics for SVOD bundled with other non-entertainment services (other than IAS)"**. A corresponding addition specifying that bundles with IAS are excluded will be included in the text.

5.2.3 Data Traffic Metrics (Section 3.2.1.5 in the Draft Report)

Questions on data traffic indicators

(iii) Do video-streaming providers use CDNs exclusively so that CDNs only serve one video-streaming service and all the traffic directed to those can be attributed to that video-streaming service?

Vodafone notes that CDN refers to a geographically distributed group of servers which work together to provide fast delivery of Internet content, and points out two categories of CDNs: (a) Interconnectivity providers (ICPs) which have commercial CDN businesses and re-sell capacity to content owners; (b) Hyperscalers (some of whom are video-streaming providers), which are not ICPs because although they have CDN capabilities they are not willing to sell transit services to third parties.

Typically, video-streaming providers will use commercial CDNs, that are shared across many different providers at one time. However, some video-streaming providers do have own CDN capabilities that are not for resale to third parties.

DT and *ETNO* clarify that, typically, CDNs provide services to a series of small to medium sized content owners and service providers and, therefore, no exclusivity should be assumed/exclusivity is rare[5]. At the same time, in the case of large content providers/owners, the market trend shows that they tend to avoid using independent CDNs, but to move towards integration, incorporating the necessary delivery infrastructure.

Telefónica notes that there seems to be no generalized answer to the question, but that video-streaming services providers are better positioned to answer this question.

(ii) Could a CDN identify data traffic from/to a certain internet access provider or a provider of an internet exchange point (in the same or another member state) at an aggregate level and provide this information to an NRA?

According to *ETNO* and *DT*, most likely yes, but this should be answered by providers of CDN services. In the same line, *Vodafone* mentions that they are not aware of any technical limitation on why this would not be feasible.

(iv) What are the legal matters for internet access provider, providers of an internet exchange point and CDNs and video-streaming providers in getting access to this information and providing it to an NRA?

According to *DT* and *ETNO*, ISPs are not able to analyse the traffic because it is often (and increasingly) encrypted and it would require the consent of all end users, to comply with EU data protection legislation. Indeed, according to *DT* and *ETNO*, ISPs would have to implement *Deep Packet Inspection technologies* to provide the required data. Similarly, *Telefónica* argues that the analysis of the traffic flows requires particularly invasive analytics, generally at odds with the applicable data protection rules.

Vodafone draws attention to the prohibition of general monitoring of information as prescribed by Article 15 of the E-Commerce Directive (2000/31/EC)[6], which prohibits the monitoring of traffic at the individual consumer's data packet level, to analyse content delivery. Recital 47 of the said Directive clarifies that the general prohibition principle leaves room for some exceptions in "specific cases", with Recital 48 giving Member States the flexibility to interpret this against a "duty of care" in order to detect and prevent illegal activities. However, it is not clear, in *Vodafone's* view, that the policy intent of such reporting obligations meets the criteria.

[5] Some hyperscalers (see Vodafone's division of CDNs) have acquired and integrated in their business formerly independent CDNs which could be seen as exclusive, but they can be no longer addressed as standalone actors.
[6] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN

(i) Could an internet access provider or a provider of an internet exchange point identify data traffic from/to a certain Content Delivery Network (CDN) (in the same or another member state) at an aggregate level and provide this information to an NRA?

DT and *ETNO* consider that any service provider involved in the end-to-end connection may provide the relevant information on traffic, on a "per source level" and, therefore, the video-streaming provider is as good positioned as the ISP to report the data. However, if the data is required at a "per service" level, only the video-streaming provider would be in an appropriate position to report it.

Telefónica notes that ISPs and/or IAPs/IXPs would not be in the position to report data traffic per service. ISPs are limited by data protection issues and traffic encryption (see question iv), while the exchange points providers may have only a partial view because the video-streaming providers may use different CDNs for the delivery of their services, and those may change with time depending on the market conditions.

According to *Vodafone,* telecom network operators might be in a position to attribute the traffic it detects coming from a certain ICP/commercial CDN to a certain video-streaming service (or more generally any content provider). *Vodafone* explains that telecom providers could report on the aggregate CDN traffic at the Member States level if they do have a direct interconnection with the CDNs, while, if not, the identification and reporting of traffic to NRAs is hardly possible.

Vodafone urges BEREC to be cognizant of the need of the data given the possible investment required to monitor such information.

The *CC* explains that operators or internet access providers are unable to identify data traffic from/to a certain CDN at an aggregate level. If a video-streaming provider or more generally any content provider is using its own CDN to deliver its contents, the data can be directly provided by this entity considering that such information is made available by its CDN through the website with all the related report on traffic content data. If the content provider is using a global CDN in order to provide its services, the internet access provider is unable to quantify and identify the traffic content of a specific content provider from the aggregated traffic received by the global CDN.

A confidential comment notes that the ISPs can identify the data traffic generated by video-streaming services, providing the example of the proprietary single-content delivery network.

<u>Comments on data traffic indicators</u>

Concerning the reporting obligations with respect to the data traffic metrics, *a confidential contribution* states that such data requests should be primarily addressed to the telecom operators (i.e. internet access providers). Only if such information is deemed unavailable or insufficient, the requests should target the video-streaming services providers, being up to the NRAs to decide on the reasonability of ECN/ECS providers motivation of not reporting the requested data.

By contrast, most of the respondents (*ETNO*, *ECTA, Telefónica* and the *CC*) stress that electronic communications providers should not be considered the "competent parties to provide analytics" on the traffic flows of video-streaming services. In turn, such data requests should be targeted at the content providers/video-streaming services providers (i.e. source of the generated traffic) for the following main reasons:

- Data protection and end-to-end encryption;
- Lack of reasoning and proportionality;
- Even if monitoring traffic by destination was possible, it would be extremely costly and resource-intensive for ISPs.

Moreover, *Telefónica* asks BEREC to include an explicit statement on the obligation of traffic data to be reported by the video-streaming services providers in the final Report.

Additionally, BEREC received a series of comments concerning the level of disaggregation of the traffic metrics for video-streaming services.

For instance, *ECTA* stresses that if the purpose of the collection of such data is network dimensioning and congestion avoiding, only the aggregate traffic data would suffice (no need to collect data on a per service level). According to ECTA's response, there is no possibility for ECS and ECN as IAP providers for distinguishing the traffic content of a specific content provider from the aggregated traffic received by the CDN. The *CC* also supports the idea of collecting data at an aggregate level due to confidentiality constraints.

Vodafone strongly agrees that 'aggregate' data regarding internet traffic at the level of the overall ISP network is sufficient and urges BEREC to consider a definition of 'aggregate' which consolidates to EU-level data rather than at Member State level.

BEREC Response 19

BEREC has thoroughly analysed all the responses to the questions on data traffic summarised above and reflected on them.

Improving the quality of internet access services for end-users has been an important driver of BEREC's activity during years. Clearly, network congestion, and in particular congestion in the access networks, may undermine the provision of internet access services. This makes it necessary for public authorities to ordinarily gain information on data traffic carried over access networks and, more generally, over electronic communications networks in order to see whether targeted policies are necessary to address any mismatches between the demand for network connectivity and the actual network capabilities. In recent times, the unprecedented demand triggered by the COVID-19 pandemic has made the need for this kind of information very clear.

Therefore, unsurprisingly, data traffic information at an aggregate level is an important metric to all relevant public authorities and BEREC considers that this aggregate information

(where no distinction is made on what/who generates the traffic) should be retrieved from the providers of internet access networks / ISPs[7].

Traffic information detailed by service offered over the internet

Moreover, in some instances, public authorities may find it valuable to identify the traffic that is generated by the use of particular services and/or "service types" that run over the internet, such as video-streaming services, for several reasons, as explained below.

First, such information is useful to predict data traffic over networks in order to anticipate potential problems in the delivery of internet access services.

Second, NRAs also have obligations to monitor and ensure compliance with the rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users rights, as laid down in Articles 3 and 4 of the Open Internet Regulation[8], Regulation (EU) 2015/2120 (hereafter OIR). A basic principle of this Regulation is that ISPs should treat all traffic equally when providing internet access services and, therefore, instances when intervention is needed are described and treated as exceptions.

Moreover, the OIR also qualifies that the providers of internet access services may implement reasonable traffic management measures (Art. 3 (3) OIR second subparagraph), which must be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic. The measures shall not monitor the specific content and shall not be maintained for longer than necessary.

Despite the explicit prohibition of certain traffic management practices[9] included in the OIR, it exceptionally allows ISPs (Art. 3 (3) OIR third subparagraph) to engage in such traffic management practices in certain circumstances, for example in order to prevent or mitigate the effects of network congestion, as long as equivalent categories of traffic are treated equally.

Because of these reasons, some NRAs may exceptionally need to find out about the traffic generated by the use of specific services or types of services running over the internet, in order to assess the reasonability and the need for exceptional traffic management practices so as to establish whether they constitute an infringement of Art 3(3) OIR.

However, the mentioned reasons to collect information on the traffic generated by the demand of a specific service which runs over the internet do not apply exclusively to video-streaming services, but could potentially motivate data requests with respect to other

[7] For examples of monitoring activities of NRAs related to congestion see the Draft BEREC Report on COVID-19 crisis - lessons learned regarding communications networks and services for a resilient society, BoR (21) 88.

[8] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) no 531/2012.

[9] Blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between Internet content, applications or services, or specific categories.

services, as well. In particular, data requests are more likely for those services generating most of the traffic, generally those based on streaming of audio-visual content, for example video-sharing platforms, social networks or video-conferencing services.

Who should provide traffic data information detailed by service?

Regarding the assessment on who should be providing the traffic data per generating service to NRAs, in BEREC's view, except in very limited cases, the information about the data generated by a specific service, app or content should be reported to NRAs by the provider of such service, app or content deliverer, since ISPs cannot retrieve or have access to this data[10]. There are several reasons for this as follows.

The first and main reason is that ISPs cannot trace users' data traffic without inspecting traffic and, thus, without infringing the provisions of Directive 2002/58/EC[11], as amended by Directive 2009/136/EC[12], unless they obtain the consent of the specific end-users to do this. Moreover, traffic data constitutes personal data if associated to a natural person and therefore, in such cases, Regulation (EU) 2016/679[13] would also apply.

Second, as pointed out by one response, in some specific but infrequent cases, it may be that a particular service is provided exclusively via one CDN, where this CDN does not spare any capacity for other services. However, in these cases, the aggregate traffic information generated by such CDN (which would be wholly attributable to that one service) would only be retrievable by an ISP if this ISP had a direct interconnection with such a CDN. Therefore, in most circumstances, ISPs would be in no position to deliver on this metric.

Thus, the unique case in which ISPs could deliver on a traffic metric per originating service would be the situation where the service is provided by one CDN that accepts no other traffic apart from the one service running over the internet and the corresponding ISP has a direct interconnection with this CDN.

In conclusion, when NRAs are interested in traffic by generating service/type of service, in most situations, the providers of such services should be addressed to report on traffic data, since this information is not available to ISPs. Even in the cases where a CDN is under exclusive use of one service, NRAs would need to address service providers first to find out

[10] Note that Article 20(1), subparagraph 2 of the EECC specifies that data collection from undertakings other that electronics communications and service providers, active in the electronic communications or closely related sectors, can only be collected when the information collected from the latter is insufficient for national regulatory authorities *to carry out their regulatory tasks under Union law.*

[11] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

[12] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

[13] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

about this and, in any event, the information about this service could not be provided by ISPs in all cases, as explained above.

Regarding *Telefónica*'s comment that the BEREC Report should explicitly state that video-streaming providers should be reporting on traffic, BEREC ponders that this is not possible on a *per se* basis as in some exceptional cases ISPs/network operators could report on this data. The reporting obligation for providers other than ECS and ECN providers stems from Article 20 EECC, as discussed in the Draft Report.

Changes to the Report:

Considering the explanations provided above, BEREC proposes not to circumscribe the data traffic metric exclusively to video-streaming services but rather to treat it as a separate metric applicable to all categories of traffic generators. To that end, the data traffic metrics would constitute an independent section of the Report, numbered 4.

6 Comments on Section 4 – Legal considerations

With respect to confidentiality-related issues, *Netflix* is appreciative of BEREC recommending that data with respect to video streaming services are considered confidential, but suggests that Member States should qualify "video-streaming data" as confidential in their national information sharing policies.

A *confidential contribution* expresses that BEREC's statement that information requests "cannot be denied due to confidentiality concerns as BEREC, NRAs and CAs shall ensure its confidentiality" results from misinterpreting the EECC, as Article 20(3) stipulates that the qualification of information as confidential should not prevent its sharing and that the sharing NRA remains obliged to ensure that the receiving NRA has warranted the protection of confidential information. In short, one cannot assume that BEREC, NRAs or CAs will safeguard confidential information based on their legal duty to do so in article 20(3) EECC.

BEREC Response 20

As correctly pointed out in the submission, BEREC clearly states that it recommends that the "provisioning/reporting of video-streaming data should be considered confidential" (section 3 in the Report). However, BEREC notes that the decision to label the data as confidential needs to be granted in accordance with the applicable national law and that BEREC cannot mandate that certain type of data is labelled as confidential *per se*.

As for the reading of the provisions of Article 20(3) of the EECC, BEREC believes that, in any event, confidentiality grounds are no basis for denial of requests to access information raised by the EC, BEREC and any Competent Authority (CA). Yet, at the same time, the Article requires that confidentiality is ensured by such receiving party, being in its remit to act in due diligence and preserve the confidential status.

Netflix raises the issue of indirect data requests, pointing out that Article 40 of the BEREC Regulation allows for data requests only in case that the information is necessary for the tasks that BEREC is carrying out. Since all BEREC's regulatory tasks relate to the electronic communications sector only, some clarity in this respect would be welcomed.

BEREC Response 21

As stated in the BEREC Regulation (EU) 2018/1971, more precisely in Article 4, BEREC has to fulfil a wide array of regulatory tasks consisting of providing assistance and advice to NRAs, the European Parliament, the Council and the Commission on various matters relating to the electronic communications sector in general.

Since looking into the activity of other undertakings active in sectors that are closely related to the electronic communications services sector, which can have and do have an impact on the regulatory conduct in the framework for electronic communications, may be necessary and is approached in the EECC, BEREC does not consider that its involvement in this is excluded *per se*. However, as pointed out by BEREC in several places in the Report, any such involvement needs to be thoroughly reasoned and justified, including through the legal provisions applicable in the case.