

Netflix – BEREC report on harmonised definitions for OTT services indicators

Introduction

We would like to thank BEREC for the opportunity to provide feedback on its draft report on harmonised definitions for indicators regarding over-the-top (OTT) services, relevant to electronic communications markets (Report).

Netflix is an entertainment company offering subscription video-on-demand services in all 27 EU Member States. Netflix members rely on having access to a high speed, reliable, and open internet so that they can access the Netflix service. Netflix has partnered with many national regulatory authorities (NRAs) to provide information when necessary to meet these objectives, including to ensure the stability of internet networks during the COVID-19 pandemic. However, Netflix is not a telecommunications provider.

The European Electronic Communications Code (EECC)¹ regulates providers of electronic communication networks (ECNs) or providers of electronic communication services (ECSs). Providers of services other than electronic communication networks or services (non-ECN/S) are not regulated by the EECC. Providers of video streaming services like Netflix are already regulated by regulations as set out in the Audiovisual Media Services Directive (AVMSD)².

The European legislator has provided NRAs with a single strictly limited competence to request information from “other relevant undertakings”, such as providers of video streaming services, provided that these requests are a) necessary to carry out a regulatory task under EU law; b) preceded by information collection from ECN/S providers; c) proportionate and not impose an undue burden on undertakings; d) adequately reasoned and e) used only by way of exception.³

Netflix is concerned that the fundamental goal of Report – harmonising information gathering by NRAs – prejudices the outcome of what should be a highly specific, individual and exceptional analysis.

Purpose and Proportionality of Indicators

The Report explains that “in all cases, requests need to be adequately reasoned, motivated and proportionate, not creating an undue burden on providers,”⁴ and necessary in the

¹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast).

² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, as modified by Directive 2018/1808/EU.

³ Article 20 EECC and recital 57 EECC.

⁴ Report, p. 15.

framework of the regulatory tasks of the NRA⁵. The importance of this starting point cannot be overstated, and should permeate the entire process of requesting data from non-ECN/S providers.

In order to observe these principles in practice, Netflix 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.

Confidentiality

BEREC concludes that in general, all reporting of video-streaming data should be considered confidential.⁶ Netflix appreciates that BEREC understands and confirms the importance of safeguarding confidential information. Netflix trusts this recommendation will be adopted by Member States into their respective national information sharing policies.

BEREC also states that information requests "cannot be denied due to confidentiality concerns as BEREC, NRAs and other competent authorities (CAs) shall ensure its confidentiality" based on article 20(3) EECC.⁷ 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.

'Indirect Requests'

The overview of the legal background in the Report states that BEREC may issue "indirect requests" to non-ECN/S providers.⁸ Article 40 of the BEREC Regulation in fact only allows information requests in case the information is necessary for the tasks BEREC is carrying out.⁹ All BEREC's regulatory tasks relate to the electronic communications sector only.¹⁰

Conclusion

Providers of audiovisual media services are principally regulated by the AVMSD. The fact that video streaming service providers are already subject to sector-specific regulation with a strict country of origin principle points to a need for caution, proportionality, purpose limitation and data minimisation when it comes to the application of information requests on the basis of the EECC.

Netflix is looking forward to working with BEREC and NRAs, albeit in a subsidiary role given the nature of its business, to aim for ensuring the provision of good quality, affordable,

⁵ Report, p. 2,3, 9, 11, 15, 16, 18.

⁶ Report, p. 10.

⁷ Report, p. 17.

⁸ Report, p. 15.

⁹ Article 40(1) BEREC Regulation.

¹⁰ Article 4 BEREC Regulation.

publicly available services through effective competition and consumer choice, as envisioned by the EECC.