

**Telefónica's response
to BEREC's public consultation on the**

**Draft Report on harmonised definitions for
indicators regarding OTT services, relevant to
electronic communications markets**

BoR (21) 33

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INTRODUCTION

Telefónica welcomes the initiative that BEREC has taken with this draft report and previous work to make one of the most important innovations of the European Electronic Communications Code (EECC, or Code), the extended definition of what constitute electronic communications services, relevant to regulatory practice and, to that end, operational.

The transformation that OTT services in a broad sense as well as the subcategory that has now been explicitly brought into scope of EU electronic communications law as 'number-independent interpersonal communications services' have occasioned, has started well before the work on this report and, indeed, the preparations to revise the regulatory framework at European level.

In view of their overall growing economic importance and the important questions that these developments raise both for the traditional electronic communications sector as well as for the wider socio-economic fabric of the European Union, Telefónica considers this as but a first step in the application of the new legislative rules. What is particularly needed at this point are active steps towards effective monitoring and analysis of the changing composition and structure of the electronic communications sector and their competitive ramifications.

That notably number-independent interpersonal communications services (NIICS) play an important role in this respect is well illustrated by the surge in popularity that they have experienced during the ongoing COVID pandemic. It is also reflected in the proposal for the Digital Markets Act that the European Commission set forth in December 2020, which rightly places NIICS on its list of 'core platform services'.

Telefónica considers that BEREC and its members should swiftly take steps to apply and gain experience with the proposed metrics and make reporting on associated market developments a steady feature of their reporting practices, as some NRAs have started doing. Telefónica would also suggest that these practices find a dedicated forum for exchange, for example involving BEREC's MEA and SAI Working Groups, to which also other competent authorities can participate.

In the following sections, we comment constructively on the draft report to enhance its clarity and usefulness for all parties concerned, and to ensure its alignment with the Code. As a globally active provider of electronic communications, Telefónica wishes to underline that effective action to make use of the unique framework that the Code provides, including productive application and development of the ideas and metrics in the draft report, should be at the core of BEREC's and its members' strategic priorities and sectoral engagement. Only by doing so can they respond to the new responsibilities and challenges that OTTs entail and that the Code has now recognised. Ensuring this will also help to further develop a blueprint for how global connectivity and communications markets can move further towards promoting welfare and competition under appropriate oversight.

2 Number-independent interpersonal communications services

2.1 Number-independent interpersonal communications services definition

Telefónica considers that BEREC here misses an opportunity to elaborate on the criteria that NRAs should use as a common starting point for applying the definition of NIICS. The only guidance provided derives from the wording of recital 18 of the Code.

The Guidelines could here have provided examples of cases in which there might be doubts about whether a number serves as an identifier only. This would seem to be the case notably where a service enables communication with numbers, but does not connect with them. In such situations, it would be relevant to know how conceptually and technically the line between the two scenarios is to be drawn. This is of particular relevance in the context of a report designed to enable measurement of NIICS on the basis of clear operational understandings of the differences between them and NBICS.

2.2 Number-independent interpersonal communications services metric definitions

General remarks

Telefónica notes that BEREC's draft report appears to endorse the answers presented by NIICS providers at the workshop without further analysis or critical questioning. Some of these answers seem, however, neither consistent with end-user experience, nor compelling for regulatory purposes. NIICS services frequently include user satisfaction queries that are administered subsequent to service use. This being so indicates that providers, at a minimum, can infer from the time of origination relative to the time of questionnaire launch how long the connection lasted. Indeed, the administration taking place after the call indirectly also confirms that the communication was indeed terminated.

It thus appears somewhat inexact to hold that NIICS providers would not be in a position to infer the information. Moreover, it is to be expected that hardware optimization will build on traffic analysis to allow for appropriate dimensioning choices to protect services as far as possible against fallout. Thus, even if NIICS providers are not obliged to deliver these services to a specific quality standard, it appears evident that they will conduct evaluations at a level going beyond user satisfaction surveys to keep the development of their services competitive, to facilitate technical planning decisions and evaluate their implementation and impact on user satisfaction.

Telefónica considers more generally that the appropriateness of particular metrics needs to be seen relative to the purpose they serve. It therefore appears contradictory to the very purpose of the extension of information gathering powers that art. 20 EECC provides for, i.e. especially to allow competent authorities to discharge their oversight functions, to dismiss metrics out of hand as inappropriate and/or non-feasible. Telefónica notes in this regard that the report does not provide for a clear dividing line between NIICS providers' arguments and the appreciation of those arguments by BEREC. As the requirements of purposiveness and proportionality provide adequate standards of justification for authorities' information requests, the report should clearly state that metrics meeting those standards constitute legitimate points of enquiry.

Although this necessarily follows by implication, Telefónica also believes that the report should state explicitly that the mere non-availability of a specific metric is not sufficient to bar competent authorities from requesting it. This is not only evident from the fact that hitherto regulated providers of electronic communications have repeatedly been, and continue to be, subject of such requests. Indeed, if this were the case, parties potentially subject to such requests could escape oversight by claiming non-availability or by engineering their systems in a manner that would make it impossible to serve them. It is, however, an inevitable feature of the new legislative framework for electronic communications in the EU that information will be required from parties that were not previously regulated. If this were not the case, the Code's aims as set out in art. 1(2) EECC might not be attained, and the draft report should therefore acknowledge this point.

Revenues

Considering BEREC's extensive (and welcome) involvement in discussions around the Commission's proposal for a Digital Markets Act (DMA), it is also surprising to see that BEREC abstains from defining a harmonised metric for NIICS revenues after correctly having referred to recital 16 EECC to explain that revenues consist of relevant consideration given, whether directly or indirectly, rather than necessarily a price charged for the use of an NIICS.

After more than a decade of discussion on whether these services would qualify as ECS, more ambition on this point would have been welcome and required. Indeed, the claims set forth by certain NIICS providers at the recent BEREC Stakeholder Forum that electronic communications markets would not have changed since the enactment of the Code would precisely suggest that NRAs should critically probe such assertions to remain on top of market developments and to gauge the competitive rebalancing that occurs in the current economic environment. BEREC's qualification that harmonised collection of such data is not 'easily' achieved instead amounts to leaving these market developments unsupervised and allowing providers of those services to extract themselves by simple assertion from regulatory oversight.

Also, failing to address the question of revenues in a harmonised manner at this stage would seem to perpetuate imbalances in the treatment of these services at a time when BEREC members need to adjust their regulatory analysis and practices to the new legislative framework. This appears particularly pressing both to respond to clear legislative expectations that such adjustment would take place and to reaffirm BEREC's and its members' evolving competences in that context against the previously identified gap between needs and practice,¹ since these also constitute an important basis for their involvement in the ongoing discussions on the DMA.

Considering the abovementioned long-standing engagement by some NRAs with these questions and the work carried out by BEREC on various occasions since at least 2015, we believe that now is the right moment for BEREC to draw on its competences and use these to justify its and its members' role in the EU digital services universe. Absent such work, oversight will suffer and competent lead authorities will likely proceed to make the necessary determinations without the involvement of electronic communications regulators. This would

¹ BoR (19) 244, at 12 (highlighting that 27 NRAs confirmed the need for EU benchmarks on unmanaged OTT services, while most did not gather any statistical information on these).

be particularly regrettable as, indeed, NRAs possess relevant cost modelling insights at unit level for number-dependent electronic communications and should be able to use these to evolve views on the revenue flows involved in the provisioning of NIICS. This should also, at an aggregate level, allow for a clearer appreciation of how the ICS space in the EU is evolving now that the Code has become applicable.

Pre-installation

Telefónica agrees that pre-installations constitute a critical structuring element for end-user behaviour. They are thus especially likely to shape the nature of competition among different providers of NIICS. Despite this, BEREC proposes no specific pre-installation metrics, yet appears to go even further by suggesting collection of information regarding device specificities. In order to provide a useful contribution to the analysis of ICS behaviour, we believe that the dimension of pre-installations will benefit from further refinement and should be complemented by additional consideration of other installations not triggered by end-users.

Telefónica would suggest that greater emphasis be placed on the number and type of pre-installations. This also allows scoping the number of potentially registrable users and, in this sense, provide a basis for cross-validation of the number of registered users. A key question to be addressed in this context concerns the bundling of pre-installed communications services with other applications or device functionalities. This should be examined both from the perspective of the device manufacturer as well as from the perspective of the application provider.

These metrics, which are clearly not available from electronic communications providers, should constitute a new baseline metric for ICS in order to go beyond the analysis of device manufacturers' market shares at the equipment level. In particular, this should contribute to an assessment to what extent devices today are multi-homed by default. At the same time, BEREC members may want to examine the commercial relations between vendors and service providers, and Telefónica suggests that BEREC include a recommendation to that effect in the final report.

Finally, we would also encourage BEREC to recognise the possibility of interpersonal communications service facilities being pushed to end users' devices after these have been acquired. Possible ways of loading these onto the device include notably installations pushed by the operating system provider, as part of a distinct installation process requested by the user or triggered by a third party. Considering the novelty aspect of such installations and the possibly positive effect on adoption, these practices should attract particular attention due to the potentially unfair competitive advantage that they confer upon the provider.

2.2.1 Indicators

Telefónica generally appreciates the care that BEREC has taken in elaborating the indicators it has retained for public consultation.

At the same time, we would underline that the purpose of the report is not to exhaustively list the objectives for which indicators may be utilised. Indeed, the report specifies only a baseline of indicators that NRAs may expand according to their own needs and

circumstances. The report therefore should not give the impression that any one particular use must be pursued – the essential criterion is to assist competent authorities in discharging their functions and to remain proportionate and supply appropriate justification for any request.

Similarly, the listing of caveats that may be associated with the utilisation of these indicators appears unduly restrictive, even if BEREC repeatedly states that these caveats ‘should not impede obtaining the information’². Telefónica suggests for the final report instead to focus on ways of obtaining the information, outline possible mitigation strategies for caveats identified and underline the purpose of all information to support NRAs and other competent authorities in discharging their roles³.

On the individual indicators proposed, we would observe the following:

- **Need for clarity on user categories:** To avoid confusion between the parties to whom individual indicators refer, we suggest clarifying that registered and active user metrics (NIICS#3 and NIICS#1), as originally discussed, refer to *end-users* of NIICS, as opposed to the newly introduced indicator on business users (NIICS#2). The report should equally clarify that the respective categories are mutually exclusive.
- **No presumption for electronic communications providers to constitute platform operators:** The latter indicator on business users, derived from a different statutory context, should not be taken to suggest that every provider of electronic communications would by default constitute an ‘online intermediation service provider’ in the sense of Regulation (EU) No. 2019/1150. The applicability of this qualification needs to be established for each provider with regard to a specific service, while taking into account what has been stated above on the notion of remuneration.
- **Uniformity of NIICS referencing and clarification of data provisioning responsibilities:** To enhance usability and intelligibility of the proposed indicators, it should be clarified that the usage statistics to be collected with indicators NIICS#1 and NIICS#2 concern specific NIICS services. Correspondingly, it should be clarified that the relevant data should always be obtained from the provider of the service (cf. our previous comments on certain characteristics above). In particular, the wording should not imply that providers of Internet access services would be obliged to provide the information sought.
- **Uniformity of data collection reference periods:** For purposes of ensuring comparability, the report should recommend that data on the number and/or minutes of voice calls, video calls and instant messages (NIICS#4 to NIICS#6) *at least* be collected on a monthly basis. This will ensure coherence with the remaining indicators and promote internal comparability within NIICS as well as external comparability relative to NBICS. It should further be specified that the 30 day-period referred to in NIICS#1 is to be established relative to the point in time at which NIICS#3 is established; following from this, it should be considered to make the number of registered users the first of the NIICS indicators.

² BoR (21) 33, at 4, 6, 8 and 9.

³ Cf. our general remarks on section 2.1, at

- **Disaggregation of service use by country of destination:** In order to enhance market transparency and enable authorities, including NRAs, to understand the impact of OTT services and apply measures in pursuit of the objectives of applicable law in a targeted and effective manner, the indicators on voice calls, video calls and instant messages (NIICS#4 to NIICS#6) should be extended to allow for analysis of traffic flows by jurisdiction. Practically, this can be done by adding to all three indicators the further specification 'per country of destination and traffic type (in-country, inbound, outbound)'. It is only in this manner that the collection of data will enable more precise appreciation of service usage and the competitive dynamics among NIICS providers and between them and NBICS providers and thereby also allow for a refined substitutability assessment to be conducted.⁴

3 Video-streaming services

In view of the continuously increasing importance of bundled service offerings in electronic communications markets, Telefónica welcomes the attention that BEREC pays to video-streaming services as a possible matter for NRA attention. We generally welcome the proposed metrics, but would nevertheless encourage their streamlining to generally commence from the registered user base (cf. also the comments above on NIICS).

As regards the approach to be taken by NRAs when collecting this information, we are of the view that inaccuracies must be avoided, and the data collection process should be rationalised as far as possible. Therefore, we encourage BEREC to construe the notion of insufficiency as a basis for data requests to parties other than electronic communications providers purposely and in a proportionate manner. This implies that information should not only be requested from video-streaming service providers when it is unobtainable from providers of electronic communications, but also that the latter must not be held to engage in attempts at inferring information by means that are liable to be subject to error or, indeed, insufficiently representative of market realities. The case of traffic metrics provides a particularly striking illustration of this problem (in addition to the fundamental rights concerns addressed below).

Secondly, while agreeing that these services do not fall within the scope of the EECC, we consider that neither this consideration, nor that of the perceived urgency of a request, should have any impact on the confidentiality of information pertaining to such services. In determining their confidentiality, national authorities should apply the rules set out in art. 20(3) EECC. With the finalised report setting out a series of useful indications in this respect, potential addressees will already be aware of minimum levels of detail required. They should, in any case, provide the information promptly, as required by the Code, without transgressing applicable timescales. Considering the overall limited participation of video-streaming service providers in the discussion process leading up to this draft report, BEREC may indeed want to further engage with them, and other high traffic service providers, in order to ensure awareness and understanding of these procedural requirements.

⁴ From a qualitative perspective, cf. Futuresight, *Declining Calls and Changing Behaviour* (London, 2020).

3.2.1.5 Data traffic metrics

Undoubtedly, traffic volumes generated by streaming services, including video platforms and live streams as well as radio, podcasts, audio distribution platforms and other high quality audio and visual content, have been one of the major traffic drivers in recent years.

To appreciate and monitor the respective traffic flows, NRAs and other competent authorities should not fall in the trap of considering that because electronic communications providers enable users to access these services, they would automatically also be the competent parties to provide analytics on these services.

However, this ignores that where they provide Internet access, electronic communications providers do so in a content-agnostic manner. This reflects the general obligation to facilitate access to the Internet without interfering with or influencing the choices that end-users may wish to engage in. Moreover, given the potentially unlimited range of services that users may choose to request, and that they may be served with directly or incidentally as the result of such a request, monitoring traffic flows by destination would be costly and excessively resource-intensive. Thirdly, with the general shift to encrypted Internet traffic, analysis of the traffic flows generated requires particularly invasive analytics, which are generally at odds with applicable data protection rules.

Therefore, Telefónica overall believes that where video-streaming services require investigation by competent authorities for purpose of discharging their functions, these authorities should address their requests to the providers of these services. We observe that those providers, in line with the service definition set out in section 3.1 of the draft report, might—but certainly are not required to—be CDN operators. From this overall vantage point, we consider that questions phrased purely in terms of potential technical capacity would not seem to promote regulation that appropriately reflects responsibilities for different types of service provisioning.

We therefore encourage BEREC to make a clear recommendation for traffic data to be collected from video-streaming service providers, where it appears that such is required for the purposes of competent authorities fulfilling their tasks.

- 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?***

As stated above, such identification will tend to be impractical for several reasons, most important among which are traffic encryption and data protection concerns. Since video-streaming service providers may use different CDNs in different jurisdictions, and such usage may vary dynamically in time, there is also no stable foundation for IAPs/IXPs to engage in such aggregation.

- 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?***

To be answered by CDN operators.

- 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?**

To be answered by providers of video-streaming services. It is our impression that there is no readily generalizable answer to this question.

- 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?**

See the introductory considerations to this section as well as the response to question (i) above.

CONCLUSION

Telefónica supports the work undertaken by BEREC with its draft report as an important foundation stone for aligning regulatory analysis and practice with the new legislative framework of the Code by making full and appropriate use of the new information gathering powers that art. 20(1) EECC establishes in relation to providers of NIICS and other OTT services.

In finalising its report, one of the key tasks for BEREC is 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. Given notably NRAs' previously expressed need for information about OTT service providers and the detrimental consequences that absence thereof had on the comprehensiveness and robustness of market analysis, the becoming applicable of the Code marks the right moment for defining a baseline of shared metrics and putting these to use.

Beyond implementing the suggestions outlined in the preceding sections, we believe that BEREC should also establish and commit to a timeline for reviewing the metrics that NRAs and other competent authorities choose to apply and their harmonising effect. Doing so will be essential to ensure that the newly established information gathering powers effectively contribute to attaining the objectives of the European Electronic Communications Code by creating a cohesive and balanced oversight approach to electronic communications in the digital ecosystem.