

**AMETIC COMMENTS ON DRAFT BEREC GUIDELINES ON IMPLEMENTATION BY NATIONAL
REGULATORS OF EUROPEAN NET NEUTRALITY RULES**

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I. INTRODUCTION

AMETIC is the Spanish association that defends the interests of the electronic, information technology, telecommunications and digital content sectors in Spain. Due to the multisector composition of its members, AMETIC is an example of associative integration of the TIC hyper sector in Europe.

One of our main goals is the promotion of the development of the sectors that we represent, since we believe they are a key tool to foster growth and to change the current production model.

AMETIC welcomes the opportunity to comment on the draft BEREC Guidelines on Net Neutrality. Taking into account that telecommunications operator, digital content providers, search engines services providers, social networks and consultancy services providers are members of the Association, we consider that AMETIC represent legitimate interests that will be affected by the next regulatory framework on the issues under consultation.

Due to the diverse sensitiveness of the companies that are members of AMETIC, instead of answering the whole public consultation this document expresses a general position on those items where it has been possible to reach a common position. Nevertheless, due to the different interests hold by our members, we believe that the consensus obtained within AMETIC offers several criteria that deserve to be taken into account as they express the common position of the different Spanish agents affected by the subject matter of the public consultation.

II. GENERAL COMMENTS

Once again AMETIC welcomes the opportunity to comment the draft BEREC Guidelines on Net Neutrality, giving the relevance of the new regulatory framework to be imposed in such a critical issue for the development of Internet in Europe.

In fact, the Regulation 2015/2120, laying down measures concerning open internet access, for the first time, sets out rules on net neutrality at European level which are quite complex, and go far beyond previous requirements.

Before the TSM-Regulation was adopted, EU law (Framework Directive and Universal Service Directive), treated net neutrality only in a rather abstract way. Therefore, in many European member states, there was no legal provision on net neutrality with practical relevance and others, had made their own rules that will have to be removed to make place for the Regulation.

The EU regulation on the contrary containing specific rights and obligations regarding net neutrality, it obligates providers of internet access services and empowers both consumers and national regulatory authorities.

It is well known that unlike directives, a EU regulation does not have to be transposed in national law, so when it becomes effective, the Regulation will be directly applicable. The regulation is an equivalent to a national legislative act and directly binds authorities, courts and citizens.

However, some parts of the Regulation may have different criteria on the implementation of the obligations. Therefore, the Regulation itself includes an instruction laid down in Art. 5 (3) of TSM Regulation (EU 2015/2120):

...” 3. By 30 August 2016, in order to contribute to the consistent application of this Regulation, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines for the implementation of the obligations of national regulatory authorities under this Article”...

So BEREC’s understanding on the Regulation becomes crucial as it will give light to the NRAs on the implementation harmonisation. Therefore, seen from the perspective of the companies AMETIC represents, the Guidelines are as important as the original Regulation. As a result, it is extremely important to safeguard the principles of the Regulation, to reach the objective of providing guidance to NRAs where needed and after consulting stakeholders, while not going too far invading their competences. It is also important that both the original Regulation and Guidelines strike a balanced regulatory approach so as to safeguard end-users’ rights but at the same time not stymieing the ability of companies to provide innovative services and offers to end-users.

III. SCOPE

A Regulation is binding for all the UE state members since it is published and it does not admit any interpretation by the NRAs on the definitions and concepts addressed under itself. However, BEREC has the challenging job of providing comments on the implementation of a complex Regulation. AMETIC wishes to thank BEREC in first term for the effort, resources and sensitiveness dedicated to this issue.

AMETIC understands these Guidelines should contribute to a better understanding of the Regulation in order to give guidance to NRAs on the national implementation. Thus obliges to be cautious in such activity in order to avoid going unnecessarily further on the interpretation of BEREC’s mission.

Nevertheless, acknowledging the difficulty of the mission, AMETIC believes that the final document exceeds the mandate included in the Regulation. Therefore, we consider the Guidelines include an excessive detail following an overly prescriptive approach to the implementation of open Internet rules particularly in the absence of any evidence of material detriment to end-users’ rights to access the internet. This could hamper growth, innovation, and service quality well beyond the industry

Such is the case of sub-internet services; BEREC Guidelines consider sub-internet-services to be within the scope of the Regulation and an infringement of the rules. As a result, BEREC introduces an outright ban on ISPs offering walled garden / limited set of internet services (this ban seems to apply regardless as to whether or not the ISP also offers 'full' internet). The current wording is also vague and misleading and there is a risk that it could be applied beyond internet access services to non-IAS. This is clearly incorrect. In summary, AMETIC's position is that there is no legislative basis for this outright ban in the Regulation and so for, we consider this statement has to be withdrawn.

In general terms, AMETIC considers the Guidelines in some aspects go too far invading National competences of NRAs.

This is probably due to the fact that the elaboration process of this Guidelines did not followed the necessary audience of the interested agents, resting transparency to the procedure. For that said, it becomes crucial to attend the comments that are being presented to BEREC in this phase.

Besides, in the case of countries like Spain with different Regulatory Authorities, it is not clear which one is called to assume the new responsibilities stated in the Regulation. Regarding our country, we believe the NRA referred in the Regulation to monitor, ensure compliance (specially regarding specialised services and commercial practices) and promote continued availability of internet access must be SETSI (General Secretariat for Telecommunications and Information Society, of Ministry of Industry, Energy and Tourism). References to competition law of course have to be attended by the CNMC (Competition Authority).

Finally, AMETIC considers that the main principles inspiring Net Neutrality Regulation aim to ensure and foster Internet in Europe by promoting innovation, and the development of new services and applications. Therefore, BEREC Guidelines should be oriented in such way avoiding restrictions or limits that could harm this objective.

Regarding core questions covered by the guidelines;

1. Zero-rating and commercial practices

BEREC's guidelines recommend that zero-rating practices where the zero-rated applications receive preferential treatment after the data cap is reached should be prohibited. Below cap zero-rated offers are to be treated in line with the lawmakers' balanced attitude to zero-rating and other commercial practices, so that the guidelines propose a set of criteria which regulators can use to assess such practices in general. These criteria encompass market positions of the providers involved, the scale of the practice, effects on end-user, including effects on content and application providers, and whether the general aims of the Regulation are circumvented.

AMETIC considers the presumption that all zero-rating practices should be considered prohibited should be totally abandoned and instead follow a case by case ex-post study done by the ANR guaranteeing innovation is not damaged by the ex post assessment result. Accordingly, references to specific practices (both over and below cap zero rating offers) that shall be prohibited or new definitions given, should be deleted of the Guidelines (ie. Paragraphs 11, 17, 38, 39, 52, 111,..). Even the current criteria set by BEREC are vague and could lead to a fragmented approach across

Member States and risk stymieing innovation to the detriment of end-users. For example, it is unclear how concepts such as ‘strong market position’ will be interpreted/applied by National Regulatory Authorities and there is considerable risk that this could result in severely restricting the ability of ISPs and other providers to develop and provide innovative offers even in the absence of clear evidence of material detriment to end-users.

2. Traffic management

The Regulation establishes common rules “to safeguard equal and non-discriminatory treatment of traffic”. But this does not prevent ISPs from applying reasonable traffic management for Internet traffic. An important criterion for such measures is that they are based on objective technical quality of service requirements. Furthermore, such measures shall not monitor the specific content of the traffic.

But the guidelines exclude commercial reasons from the consideration of reasonable traffic management that, in the case of internet access services provided to companies is an impossible. It must be taken into account, that there are specific regulated wholesale services for companies (in the scope of the market analysis) that impose special quality parameters necessary for the provision of these services (Gold quality instead of best effort).

One can’t avoid mentioning the special European net neutrality feature “categories of traffic” in this regard. BEREC’s guidelines shed some light on how such traffic categories can be used to differentiate traffic management. In case traffic categories are implemented by ISPs, BEREC explains that traffic categories may be identified by reference to application layer protocol or generic application type in so far as applications with equivalent requirements are handled agnostically in the same category, among other criteria. These criteria clearly exceed Regulation mandates and will hamper 5G development, which is based on traffic management.

Regarding the exceptional traffic management, the differentiation of Internet traffic allowed under reasonable traffic management must be distinguished from traffic management going beyond reasonable traffic management. For the latter purpose, the Regulation specifies these exceptions: Other legislative measures; network integrity and security; and congestion management. Only under these three exceptions, measures like throttling or blocking of applications are allowed.

AMETIC considers important to point out the existence nowadays of several services that allow the end-user to request blocking and introduce filters by ordering its Internet Service Provider to do so. The Regulation is due to protect end users, hence their choice must be guaranteed without exception. As a result, we believe these services should be maintained and BEREC should delete references as the one in paragraph 75. This is distinct from automatic blocking at the network level which should be prohibited unless one of the three exceptions referenced in the original Regulation is met. In addition, end-users have the choice to request ISPs to block websites, applications and services on the framework of parental control, in our view this must be respected and guaranteed.

Congestion management is a particularly complex traffic management measure to assess, and guidance is therefore important in this area. As BEREC's guidelines describe, congestion management may also be done on a general basis, independent of applications. In light of the principle of proportionality, regulators should consider whether such types of congestion management would be sufficient and equally effective to manage congestion, when assessing ISP's practices.

3. Specialised services

These services are other services than Internet access services that may be offered by providers under certain conditions. The first main condition is that the service is offered to meet requirements for a specific level of quality which can't be achieved over the Internet access service, and the second main condition is that the network capacity is sufficient to provide the service in addition to any Internet access service provided.

In order to assess whether the ISPs fulfil these conditions, the guidelines recommend regulators to request ISPs for information about their specialised services. ISPs should then demonstrate how the specific level of quality cannot be assured over the Internet access service, and explain how sufficient network capacity is ensured. Regulators can then conduct their assessment based on the information provided, as well as measurements of the performance of the Internet access service

AMETIC considers crucial for Internet development in Europe to avoid making close lists of specialised services. On the contrary, the evolution to new services profiting innovation must be granted. Hence, these services shall only be analysed where there is a clear risk for competition on the market and it should be taken in due account that is under the ISPs responsibility and its clients to define which services need an optimization. In fact, we consider it should be enough requiring NRAs to demonstrate how e.g., sufficient network capacity does not exist rather than requiring ISPs to have to prove too much up front, as otherwise there is a risk that new innovative services will never be developed and end-users will be deprived the ability to benefit from such services which surely cannot be the intention under the original Regulation or Guidelines.

4. Transparency

AMETIC understands the Regulation first and now BEREC Guidelines, pursuit to establish harmonised measures among EU Members States regarding the information ISPs must provide on the performance of their Internet service. Some Member States have already regulated this issue. That is the case of Spain, with de Ministerial Order IET/1090/2014 that includes even further measures than those of the Regulation, so additional regulation would be redundant.

Concerning the information ISP are required to provide in the customers' contracts, AMETIC considers a reasonable period of implementation should be granted.

In addition, measures are clearly defined. Therefore, paragraphs 141, 143,145, 148, 151 y 154 should be deleted as they exceed the definitions under Regulation.

Finally, the Regulation is clear on the implementation of the new transparency criteria to the new contracts. Consequently, the retrospective application under paragraphs 130 and 186 should be deleted.