

Draft BEREC Guidelines on implementation by National Regulators of European net neutrality rules - response on behalf of Shine Technologies

1. INTRODUCTION AND SUMMARY OF PROPOSAL

- 1.1 This response is submitted by the law firm Clifford Chance LLP on behalf of Shine Technologies ("**Shine**") in response to BEREC's public consultation of 6 June 2016 on draft BEREC guidelines on implementation by National Regulators of European net neutrality rules (BEREC document number BoR (16) 94).
- 1.2 Shine is a developer and distributor of software solutions, including ad blocking solutions – see www.getshine.com. Shine is not itself an ISP, subject to the requirements of Regulation (EU) 2015/2120 (the "**Regulation**"), but produces ad blocking solutions for public telecommunications operators, acting as ISPs, to offer to their customers. Shine therefore has an interest in the application of the net neutrality rules in the Regulation to ad blocking solutions offered by ISP's within the European Union to their customers.
- 1.3 Shine welcomes the implementation of the Regulation and, in most respects, understands and supports the proposed draft guidelines. Shine is concerned, however, that the Regulation should not be incorrectly interpreted as interfering with end-users' rights to select between content on an open Internet.
- 1.4 In particular, Shine proposes that the draft guidelines should be amended to make clear that the Regulation does not prohibit the implementation by an ISP of an ad (or other content) blocking solution *at the request of the end-user or subscriber*. Where an end-user or subscriber specifically requests the blocking of content in a particular category, the ISP is not engaging in a discriminatory practice (nor, more generally, prejudicing net neutrality principles) if it takes technical steps to implement his or her request. Those steps are functionally equivalent to a blocking solution implemented on the subscriber's terminal equipment or private network, which, as the draft guidelines acknowledge, would fall outside the scope of the Regulation.
- 1.5 Specifically, Shine is concerned that **paragraph 75** of the draft guidelines could be interpreted as implying an absolute prohibition on ad blocking solutions (unless the conditions in article 3(3)(a), (b) or (c) are met), even when implemented at the request of the end-user or subscriber. Shine proposes that **paragraph 75** should be amended to make clear that this is not BEREC's intention and does not reflect the requirements of the Regulation.

2. ANALYSIS

- 2.1 Article 3(3) of the Regulation prohibits ISPs from discriminating between content available through their services, including through blocking, except in the limited "traffic management" circumstances identified in articles 3(3)(a) to (c).
- 2.2 The purpose of the Regulation, as set out in article 1(1), is to "safeguard equal and non-discriminatory treatment of traffic in the provision of Internet access services and related end-users' rights". The purpose of article 3(3), in particular, is to prohibit discrimination between and blocking of traffic in a manner which prejudices end-users' rights. Discrimination and blocking by or on behalf of an end-user is not a net neutrality issue but mere exercise of end-user choice in the use of the open Internet.
- 2.3 Article 3(3) does not refer specifically to a situation where an ISP takes steps *at the request of an end-user or subscriber* to treat different content differently or block particular content or content in particular categories. It is inherent in the nature of an IAS, however, that in response to end-user / subscriber requests an IAS will treat different content differently (for example, serving up content which is specifically requested but not other content). This may amount to discrimination on the part of the end-user or subscriber, outside the scope of the Regulation, but it does not amount to discrimination on the part of the ISP.
- 2.4 Article 3(3) therefore regulates steps taken unilaterally by an ISP, not steps taken by an ISP at the request of its end-user or subscriber. If a request by an end-user or subscriber is made in the context of an agreement between an ISP and its subscriber or a commercial practice of an ISP, that agreement or practice will need to meet the requirements of article 3(2).
- 2.5 This principle applies not only to ad blocking but also to other forms of distinction between content in different categories. Unilateral implementation of a "parental controls" function, blocking access to certain categories of sensitive content, would similarly be likely to breach article 3(3) (unless it fell within article 3(3)(a)). This does not however prevent an ISP from (as is common practice) implementing a parental controls function at the request of the end-user or subscriber. In that case, again, it would be the end-user or subscriber, not the ISP, that would be discriminating between different categories of content.
- 2.6 **Paragraph 75** of the draft guidelines gives ad blocking (and comparable steps in relation to advertising content) as an example of a practice that will breach article 3(3) unless it falls within the scope of articles 3(3)(a) to (c). It contrasts ad blocking in the provision of an IAS with terminal-based restrictions put in place by the end-user, outside the scope of the Regulation.

- 2.7 Shine agrees with the thrust of **paragraph 75**: it is appropriate to distinguish between restrictions put in place by or on behalf of an end-user or subscriber, which are not affected by article 3(3), and unilateral restrictions put in place by an ISP, which are (with exceptions) prohibited. However **paragraph 75** as it stands does not distinguish between network-internal blocking put in place unilaterally, on the one hand, and network-internal blocking put in place at the request of the end-user or subscriber, on the other. The draft guidelines therefore risk an incorrect interpretation of the Regulation, effectively prohibiting legitimate practices which do not prejudice net neutrality.
- 2.8 Shine therefore proposes that **paragraph 75** should be amended (see drafting proposal in paragraph 4 below).

3. **SUPPORTING POINTS**

Shine would make two further points:

- 3.1 ***Protection of citizens' rights***: As they stand, the draft guidelines risk weakening citizens' rights by interfering with their ability to select between the content that they wish and do not wish to access over the Internet:

- 3.1.1 End-users need the freedom to protect their privacy and other interests by blocking advertising, not merely through solutions implemented within their terminal equipment / private networks but also through network-internal solutions. There is no policy reason to limit this freedom to the terminal / private network level.

Companies with a vested interest in delivery of advertising content, irrespective of the wishes of the end-user, may also have a significant share of the market for terminal equipment, particularly in relation to mobile devices, the Internet of things and related app stores and similar. They may use this position of influence to weaken citizens' right to choose, for example by using app store terms to reject the distribution of terminal-based ad blocking applications (see, for example, <https://techcrunch.com/2016/02/03/google-boots-ad-blockers-from-google-play/>).

- 3.1.2 Advertising content is an increasingly common threat to the **security** of end-users and their terminal equipment, through the distribution of malware in advertising scripts served to websites. Shine understands there to have been many incidents of "malvertising", with serious implications for end-users and subscribers (see, for example, <http://arstechnica.com/security/2016/04/more-big-name-sites-hit-by-rash-of-malicious-ads-that-attack-end-users/>).

Unilateral blocking of all advertising content in order to address this security issue would be unlikely to meet the requirements of article 3(3)(b), but article 3(3)(b) does recognise the legitimate interest in protection of terminal as well as network equipment. Where *an end-user or subscriber* wishes to block advertising content because of a concern for the security of his or her equipment, he or she should be free to do so.

- 3.2 *Unfair discrimination between service providers*: Paragraph 75 risks unfairly discriminating between providers of functionally equivalent ad blocking (or other content management) products. There is no net neutrality or other policy reason why an ISP should be prevented from offering ad blocking solutions in competition with companies offering terminal / private network solutions. Availability of competing solutions from a wide range of sources encourages innovation and drives down cost. In particular, solutions at the network level allow subscribers to manage their preferences on a "family" basis, should they so choose, rather than addressing content control issues terminal-by-terminal.

4. **SPECIFIC PROPOSAL FOR AMENDMENT TO THE DRAFT GUIDELINES**

Shine's specific proposal is that paragraph 75 should be amended to read as follows (Shine's proposed additions are shown underlined):

"By way of example, ISPs should not block, slow down, alter, restrict, interfere with, degrade or discriminate advertising when providing an IAS, unless the conditions of the exceptions a), b) or c) are met in a specific case. In contrast to network-internal blocking put in place unilaterally by the ISP, terminal equipment-based restrictions put in place by the end-user are not targeted by the Regulation. Similarly, network-internal blocking or other restrictions put in place by the ISP *at the request of the end-user or subscriber* do not amount to unequal treatment or discrimination on the part of the ISP and are not prohibited by article 3(3). Any related agreement between the ISP and end-user, or commercial practice of the ISP, would, however, be subject to assessment under article 3(2)."

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