

Joined Cases C-807/18 and C-39/19**Telenor Magyarország Zrt.****v.****Nemzeti Média- és Hírközlési Hatóság Elnöke**

(Requests for a preliminary ruling from the Fővárosi Törvényszék)

Judgment of the Court (Grand Chamber), 15 September 2020

(Reference for a preliminary ruling – Electronic communications – Regulation (EU) 2015/2120 – Article 3 – Open internet access – Article 3(1) – Rights of end users – Right to access applications and services and to use them – Right to provide applications and services – Article 3(2) – Prohibition of agreements and commercial practices limiting the exercise of end users’ rights – Concepts of ‘agreements’, ‘commercial practices’, ‘end users’ and ‘consumers’ – Assessment of whether the exercise of end users’ rights is limited – Detailed rules – Article 3(3) – Obligation of equal and non-discriminatory treatment of traffic – Possibility of implementing reasonable traffic-management measures – Prohibition of measures blocking and slowing down traffic – Exceptions – Commercial practices consisting in offering packages which provide (i) that customers subscribing to them purchase a tariff entitling them to use a given data volume without restriction, without any deduction being made from that volume for using certain specific applications and services covered by ‘a zero tariff’ and (ii) that once the data volume has been used up, those customers may continue to use those specific applications and services without restriction, while measures blocking or slowing down traffic are applied to the other applications and services)

1. *Approximation of laws – Telecommunications sector – Electronic communications networks and services – Measures concerning open internet access – Regulation 2015/2120 – Rights of end users – Prohibition of agreements and commercial practices limiting the exercise of those rights – Provider of internet access services offering packages with preferential access to certain specific applications and services – Application of a ‘zero tariff’ to those specific applications and services – Application, by the provider, of measures blocking or slowing down traffic linked to the use of the other applications and services available, once the data volume purchased has been used up – Not permissible*
(European Parliament and Council Regulation 2015/2120, Art. 3(1) and (2))

(see paragraphs 27-46, 54 and operative part)

2. *Approximation of laws – Telecommunications sector – Electronic communications networks and services – Measures concerning open internet access – Regulation 2015/2120 – Obligations of providers of internet access services – Equal and non-discriminatory treatment of traffic – Provider of internet access services offering packages with preferential access to certain specific applications and services – Application of a ‘zero tariff’ to those specific applications and services – Application, by the provider, of measures blocking or slowing down traffic linked to the use of the other applications and services available, once the data volume purchased has been used up – Not permissible*
(European Parliament and Council Regulation 2015/2120, Art. 3(3))

(see paragraphs 47-54 and operative part)

Résumé**The Court interprets, for the first time, the EU regulation enshrining ‘internet neutrality’**

The requirements to protect internet users' rights and to treat traffic in a non-discriminatory manner, laid down in Article 3 of that regulation, preclude an internet access provider from favouring certain applications and services by means of packages enabling those applications and services to benefit from a 'zero tariff' and making the use of the other applications and services subject to measures blocking or slowing down traffic

The Telenor company, which is established in Hungary, provides internet access services in particular. The services offered to its customers include two packages with preferential access (known as 'zero tariff'), and the specific feature of those packages is that the data traffic generated by certain specific applications and services does not count towards the consumption of the data volume purchased by customers. In addition, once that volume of data has been used up, those customers may continue to use those specific applications and services without restriction, while measures blocking or slowing down data traffic are applied to the other available applications and services.

After initiating two procedures to verify whether those two packages complied with Regulation 2015/2120 laying down measures concerning open internet access, (1) the Hungarian National Media and Communications Office adopted two decisions by which it found that those packages did not comply with the general obligation of equal and non-discriminatory treatment of traffic laid down in Article 3(3) of that regulation and that Telenor had to put an end to those measures.

The Fővárosi Törvényszék (Budapest High Court, Hungary), hearing two actions brought by Telenor, decided to refer the matter to the Court of Justice for a preliminary ruling, in order to ascertain how to interpret and apply Article 3(1) and (2) of Regulation 2015/2120, which safeguards a number of rights for end users of internet access services (2) and prohibits providers of such services from putting in place agreements or commercial practices limiting the exercise of those rights, and Article 3(3), which lays down a general obligation of equal and non-discriminatory treatment of traffic.

In its judgment of 15 September 2020, the Court, sitting as the Grand Chamber, interpreted for the first time Regulation 2015/2120, which enshrines the fundamental principle of an open internet (more colloquially known as 'net neutrality').

As regards, in the first place, the interpretation of Article 3(2) of Regulation 2015/2120, read in conjunction with Article 3(1) of that regulation, the Court observed that Article 3(1) provides that the rights which it safeguards for end users of internet access services are intended to be exercised 'via their internet access service', and that Article 3(2) requires that such a service does not entail any limitation of the exercise of those rights. In addition, it follows from Article 3(2) of Regulation 2015/2120 that the services of a given provider of internet access services must be assessed in the light of that requirement by the national regulatory authorities, (3) subject to review by the competent national courts, and taking into consideration both the agreements concluded by that provider with end users and the commercial practices in which it engages.

In that context, after providing a series of general clarifications of the meaning of the concepts of 'agreements', 'commercial practices' and 'end users' contained in Regulation 2015/2120, (4) the Court found that the conclusion of agreements, by which given customers subscribe to a package combining a 'zero tariff' and measures blocking or slowing down the traffic linked to the use of 'non-zero tariff' services and applications, is liable to limit the exercise of end users' rights, within the meaning of Article 3(2) of Regulation 2015/2120, on a significant part of the market. Such packages are liable to increase the use of the favoured applications and services and, accordingly, to reduce the use of the other applications and services available, having regard to the measures by which the provider of the internet access services makes that use technically more difficult, if not impossible. Furthermore, the greater the number of customers concluding such agreements, the more likely it is that, given its scale, the cumulative effect of those agreements will result in a significant limitation of the exercise of end users' rights, or even undermine the very essence of those rights.

In the second place, as regards the interpretation of Article 3(3) of Regulation 2015/2120, the Court found that, in order to make a finding of incompatibility with that provision, no assessment of the effect of measures blocking or slowing down traffic on the exercise of end users' rights is required. Article 3(3) does not lay down such a requirement in order to assess whether the general obligation of equal and non-discriminatory treatment of traffic in that provision has been complied with. In addition, the Court held that, where measures blocking or slowing down traffic are based not on objectively different technical quality of service requirements for specific categories of traffic, but on commercial considerations, those measures must in themselves be regarded as incompatible with Article 3(3).

Consequently, packages such as those the subject of review by the referring court are, generally, liable to infringe both paragraphs 2 and 3 of Article 3 of Regulation 2015/2120, it being specified that the competent national authorities and courts may examine those packages at the outset in the light of Article 3(3).

[1](#) Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ 2015 L 310, p. 1).

[2](#) Right for end users to access and use applications, content and services, but also the right to provide applications, content and services and to use terminals of their choice.

[3](#) On the basis of Article 5 of Regulation 2015/2120.

[4](#) The concept of 'end user' encompasses all legal entities or natural persons using or requesting a publicly available electronic communications service. It also includes both natural or legal persons who use or request internet access services in order to access content, applications and services, as well as those who rely on internet access to provide content, applications and services.