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COMMENT TO THE JUDGEMENT OF EU COURT OF JUSTICE IN JOINED CASES C-807/18 AND C-39/19 TELENOR MAGYARORSZÁG ZRT. V NEMZETI MÉDIA- ÉS HÍRKÖZLÉSI HATÓSÁG ELNÖKE

Abstract: The case comment concerns the Judgement of the EU Court of Justice of 15 September 2020 of Telenor Magyarország Zrt. v Nemzeti Média – és Hírközlési Hatóság Elnöke (Joined Cases C-807/18 and C-39/19). This first judgment of the EU Court of Justice under the Regulation 2015/2120 provided clarity on the interpretation and application of Article 3(2) and Article 3(3) of said Regulation, generally in line with BEREC's position known since 2016. In the opinion of the EU Court of Justice, commercial practices of providers of Internet access service, and agreements these providers conclude with end users are not prohibited per se if they involve 'zero tariffs'. However, traffic management measures that slow down or block Internet traffic not subject to the 'zero tariff' once an end user's data volume has been exhausted are incompatible with Article 3(3) of Regulation 2015/2120. To establish such incompatibility, no assessment of the influence of those traffic management measures on the exercise of end users' rights is required. However, such an assessment – involving an analysis of the markets for Internet access services, and for Internet content – would be necessary if a national regulatory authority wanted to establish incompatibility of the conduct of a provider of Internet access services with Article 3(2) of Regulation 2015/2120.

Keywords: Network neutrality, traffic management measures, zero tariffs

1. Introduction

In the judgement of 15 September 2020 Telenor Magyarország Zrt. v Nemzeti Média – és Hírközlési Hatóság Elnöke (Joined Cases C-807/18 and C-39/19) – henceforth: the *Telenor* judgement – the EU Court of Justice for the first time interpreted and commented on the application of the provisions of the Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open Internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No 531/2012 (henceforth: Regulation 2015/2120 or the Regulation). In that respect, the judgment constitutes a precedent.[1]

Regulation 2015/2120 introduced a network neutrality[2] regime into European electronic communications law, albeit under the different name of 'Open Internet'. The Regulation's ambiguous language, however, has caused controversies, and Internet access service providers, electronic communications regulatory authorities, end users – both households and enterprises – and scholars have all been waiting for the EU Court of Justice to provide at least some much needed clarity, especially on the compatibility of various traffic management measures with Regulation 2015/2120, and on 'zero tariffs', also known as 'zero rating' in the literature.[3] The *Telenor* judgement, based on Article 3 of Regulation 2015/2120, answers important questions about, firstly, commercial practices and agreements involving 'zero tariffs', and, secondly, traffic management measures that slow down or block Internet traffic. It also provides guidance on when it is necessary for national regulatory authorities to analyse the conduct of providers of Internet access services on a case-by-case basis, involving a thorough market analysis under Article 3(2) of Regulation 2015/2120, and when

[1] Szabados. 'Precedents' in EU law – The problem of overruling', 125-146.

[2] Belli, 'Net neutrality, zero rating and the Minitelisation of the internet', 96-122.

[3] Marsden, 'Zero Rating and Mobile Net Neutrality', 241-260. For a discussion of zero tariffs/zero rating under Regulation 2015/2120, see: Nałęcz, 'Zero-rating a usługa dostępu do Internetu i usługi specjalistyczne', 33-51.

some of the practices of those providers may be sanctioned without such an analysis, under Article 3(3) of said Regulation.

2. Overview of relevant provisions of Regulation 2015/2120

Under Article 3(1) of Regulation 2015/2120:

> End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their Internet access service.

This constitutes a quasi-definition of the Internet access service – it is a service that effectively allows all end users to access and distribute all Internet content, without any restrictions imposed by the Internet access service provider.

Under Article 3(2) of Regulation 2015/2120:

> Agreements between providers of Internet access services and end-users on commercial and technical conditions and the characteristics of Internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of Internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1.

Thus, providers of Internet access services may engage in commercial practices regarding those services, and they may enter into agreements with their end users on various characteristics of Internet access services, but those commercial practices or agreements may not adversely influence the rights of end users, specifically the right to access and distribute any Internet content.

The interpretation of Article 3(2) of Regulation 2015/2120 is influenced by Recital 7 of the Regulation, under which:

> National regulatory and other competent authorities should be empowered to intervene against agreements or commercial practices which, by reason of their scale, lead to situations where end users' choice is materially reduced in practice. To this end, the assessment of agreements and commercial practices should, inter alia, take into account the respective market positions of those providers of

> Internet access services, and of the providers of content, applications and services that are involved. Furthermore, national regulatory and other competent authorities should be required, as part of their monitoring and enforcement function, to intervene when agreements or commercial practices would result in the undermining of the essence of the end users' rights.

Thus, whether an agreement or commercial practice infringes on end users' rights under Regulation 2015/2120 may depend not only on the content of the agreement or the nature of the practice, but also on their scale, determined upon the market shares of the enterprises involved in or influenced thereby.

Under Article 3(3) first subparagraph:

> Providers of Internet access services shall treat all traffic equally, when providing Internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.

This provision specifies the basic obligations of Internet access service providers that directly relate to the rights of end users. The technical measures used by providers of Internet access services to relay traffic in their networks must generally treat all of this traffic equally.

Article 3(3) second subparagraph deals with reasonable traffic management measures. Under the provision:

> The first subparagraph shall not prevent providers of Internet access services from implementing reasonable traffic management measures. In order to be deemed to be reasonable, such measures shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations, but on objectively different technical quality of service requirements of specific categories of traffic. Such measures shall not monitor the specific content and shall not be maintained for longer than necessary.

Traffic management measures are technical solutions implemented by Internet access service providers in their networks that allow the networks to be used efficiently under different levels of traffic. In practice, the main goal of traffic management is to prevent and mitigate congestion in the network. Congestion in the network occurs when a high volume of traffic in the network causes delays that have to be dealt with – with as small

an adverse effect on Internet access service quality for retail customers as possible.[4]

Finally, Article 3(3) third subparagraph regulates the exceptions to the general requirements for traffic management measures set out in the previous subparagraph. Under Article 3(3) third subparagraph:

> Providers of Internet access services shall not engage in traffic management measures going beyond those set out in the second subparagraph, and, in particular, shall not block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories thereof, except as necessary, and only for as long as necessary, in order to:
> (a) comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of Internet access services is subject, or with measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers;
> (b) preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end-users;
> (c) prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally.

Thus, with respect to traffic management measures, Regulation 2015/2120 introduces a general ban – with enumerated exceptions – on blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, and their categories.[5] Such practices may never be justified by commercial considerations.

3. The *Telenor* judgement

In the *Telenor* judgement, the EU Court of Justice responded to requests for a preliminary ruling, submitted by the *Fővárosi Törvényszék* (Budapest

[4] Subir, *Internet Congestion Control*.

[5] Piątek, *Rozporządzenie UE Nr 2015/2120 w zakresie dostępu do otwartego Internetu. Komentarz*.

High Court, Hungary – henceforth: the High Court), and regarding two sets of proceedings between *Telenor Magyarország Zrt*. (henceforth – *Telenor*), a major provider of electronic communications services in Hungary, and the Nemzeti Média – és Hírközlési Hatóság Elnöke (President of the National Communications and Media Office, Hungary), the Hungarian regulatory authority for electronic communications (henceforth – the Office).

Among the many services and service packages offered by *Telenor* to its potential customers were two packages involving 'zero tariffs', 'MyChat', and 'MyMusic' (para. 9 of the *Telenor* judgment). In the 'MyChat' package, customers were offered an Internet access service with 1 GB of data to be used without any restrictions to access all available Internet content. However, six specific communication applications – Facebook, Facebook Messenger, Instagram, Twitter, Viber, and Whatsapp – were covered by a 'zero tariff' – that is, traffic generated by those applications did not count toward the 1 GB data limit. What is more, under the terms of the 'MyChat' package, once the 1 GB data limit was exhausted, customers were still allowed to use the six aforementioned applications without restriction, while traffic generated by any and all other Internet content was slowed down by traffic management measures (para. 10). Similarly, in the 'MyMusic' package, customers were offered 'zero tariff' access to selected music streaming applications – Apple Music, Deezer, Spotify, and Tidal – as well as six online radio services. Traffic generated by these applications and services was not deducted from the end user's general data limit. As with the 'MyChat' package, the 'MyMusic' package also involved unrestricted access to those selected few applications and services once the end user's data limit was exhausted, while all other traffic was slowed down (para. 11).

The Office initiated proceedings to investigate both packages, and issued two decisions – upheld under review by the President of the Office – requiring *Telenor* to put an end to the traffic management measures which did not comply with the obligation of equal and non-discriminatory treatment laid down in Article 3(3) of Regulation 2015/2120 (paras. 12-13).

Telenor demanded review of both decisions by the High Court. *Telenor* submitted that the contested packages were part of agreements with its customers that were concluded under Article 3(2) of Regulation 2015/2120, to the exclusion of Article 3(3) of that Regulation, which in Telenor's opinion only applies to traffic management measures introduced unilaterally by Internet access service providers. In turn, compatibility or incompatibility of agreements with Article 3(2) may not ascertained without an assessment of their effects on the exercise of end users' rights, and such as assessment had not been conducted by the Office (paras. 14-15).

The President of the Office countered that Article 3(3) of Regulation 2015/2120 prohibits all unequal or discriminatory traffic management measures, be they introduced under contractual terms or by unilateral practices of the Internet access service provider. Such measures are prohibited in themselves, and there is no need to assess their influence on the exercise of end users' rights (para. 16).

The High Court came to the conclusion that the wording of Regulation 2015/2120 makes it impossible to determine whether 'zero tariff' packages involving the slowing down or blocking of Internet content not covered by the 'zero tariff' once the allotted data volume has been used up, fall within the scope of Article 3(2), Article 3(3) or Article 3(2) and (3) of that Regulation. The High Court also concluded that it is not clear under Article 3(2) and (3) what methodology must be applied to determine whether an Internet access provider's conduct is compatible with Regulation 2015/2120 (paras. 17-19). The High Court referred four questions to the EU Court of Justice. First, the High Court asked whether commercial practices involving zero-cost tariffs and discriminatory treatment of traffic – the influence of which is limited to end users who entered into agreements with the provider of Internet access services – should be interpreted in the light of Article 3(2) of Regulation 2015/2120. Second, the High Court enquired whether Article 3(3) of Regulation 2015/2120 demands an impact – and market-based evaluation to determine whether and to what extent traffic management measures limit the rights of end users specified in Article 3(1) of Regulation 2015/2120. Third, the High Court wanted to know if the prohibition on the traffic management measures laid out in Article 3(3) is objective, or if it depends on the measures being introduced by means of an agreement, a commercial practice or another form of conduct of the provider of Internet access services. Fourth, and last, the High Court asked if there is no need to apply Article 3(1) and (2) if an infringement of Article 3(3) by way of discrimination has been identified (para. 20).

The EU Court of Justice rephrased the questions of the High Court, coming to the conclusion that the High Court in fact was asking whether zero-tariff packages involving the blocking or slowing down of Internet content not covered by the zero-tariff once an end user's data limit has been used up, are incompatible with Article 3(2) of Regulation 2015/2120, and – alternately or cumulatively – with article 3(3) of the Regulation (para. 22).

The EU Court of Justice reiterated the contents of Article 3(1) through (3) of Regulation 2015/2120 (paras. 23-25), and remarked that national regulatory authorities are obligated to determine on a case-by-case basis whether the conduct of a given provider of Internet access services

falls within the scope of either Article 3(2) or Article 3(3) of Regulation 2015/2120, or both of those provisions at the same time. If the national regulatory authority finds that the conduct analysed is incompatible in its entirety with Article 3(3) of Regulation 2015/2120, incompatibility of that conduct with Article 3(2) of that Regulation does not need to be determined (para. 28).

Having made that important point, the EU Court of Justice then presented its interpretation of Article 3(2). It commented on the difference between 'agreements' and 'commercial practices'. An agreement involves a concordance of wills of the parties, while a commercial practice of the provider of Internet access services is unilateral (para. 34). There may, however, be an interaction between the two. Specifically, offering variants of services or combinations thereof in order to meet the expectations and preferences of individual end users is a commercial practice, but one which is intended to result in those end users concluding agreements with the provider of Internet access services (para. 35). The EU Court of Justice recognized that agreements let end users determine the characteristics of their Internet access service in accordance with how those end users wish to make use of their rights under Article 3(1) of Regulation 2015/2120 (para. 33). These characteristics include the price, data volume and speed of the Internet access service (para. 32). However, at the same time, these agreements may not limit the exercise of end users' rights, as that would constitute a circumvention of the provisions of Regulation 2015/2120 safeguarding open Internet access (para. 33).

The EU Court of Justice brought to public awareness that the concept of 'end user' encompasses all legal entities using and requesting a publicly available electronic communications service, other than persons who themselves provide public communications networks or publicly available electronic communications services (para. 36). Thus, end users include both those who use or intend to use their Internet access service to access content, and those who rely on the service to provide such content (para. 37). The impact of agreements and commercial practices on the exercise of rights of end users must, therefore, take into account both those categories of end users.

Relying on Recital 7 of Regulation 2015/2120, the EU Court of Justice determined that in order to assess incompatibility with Article 3(2) of the Regulation, it is necessary to establish the scale of commercial practices and agreements, and whether they materially reduce end user choice. This necessitates, in particular, an analysis of the respective market positions of the providers of Internet access services, and of the providers of Internet

content (para. 41). An overall assessment of all commercial practices and agreements of a given provider of Internet access services is necessary (para. 42) – an assessment of individual commercial practices or agreements would not be sufficient.

Further remarks of the EU Court of Justice on the application of Article 3(2) of Regulation 2015/2120 did not concern any and all commercial practices and agreements, but were limited to such commercial practices and agreements as were the subject of the questions referred to it – that is those involving 'zero tariffs' and the blocking or slowing down of Internet content not subject to the 'zero tariff' once the end user's data limit has been used up. In the opinion of the EU Court of Justice such practices are liable to limit the exercise of end user rights (para. 43), as they are likely to increase the use of specific Internet content, and decrease the use of other content (para. 44). The more agreements involving 'zero tariffs' are concluded, the greater the likelihood of limitation of end users' rights (para. 45).

Having concluded its analysis of Article 3(2) of Regulation 2015/2120, the EU Court of Justice proceeded with an interpretation of Article 3(3) of the Regulation. The Court observed that providers of Internet access services have a general obligation to treat all traffic equally, and this obligation may never be derogated by commercial practices of providers of Internet access services, and agreements between them and end users (para. 47). Reasonable traffic management measures may be implemented, but only when they are based on objectively different technical quality of service requirements of specific categories of traffic, and never on commercial considerations (para. 48). The EU Court of Justice then stated that traffic management measures involving blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific Internet content – unless they satisfy the requirements laid out in Article 3(3) third subparagraph of Regulation 2015/2120 – are in themselves incompatible with that provision (para. 49). To determine this incompatibility, an assessment of such measures on the rights of end users need not be performed (para. 50).

The EU Court of Justice applied the above reasoning to the circumstances of the *Telenor* case. Telenor offered zero-tariff packages that involved the slowing down of Internet content not subject to the zero-tariff. These traffic management measures, which do not seem to fall within any of the exceptions laid out in Article 3(3) third subparagraph of Regulation 2015/2120, were introduced due to commercial considerations rather than

objectively different technical services requirements of categories of traffic (paras. 51-53).

Finally, the EU Court of Justice answered the High Court's questions, as rephrased by the EU Court of Justice, by stating that zero-tariff packages involving the blocking or slowing down Internet content not subject to the zero-tariff once the end user's data limit has been used up are incompatible with Article 3(2) or Regulation 2015/2120 if they limit the exercise of end users' rights, and are incompatible with Article 3(3) of the Regulation to the extent that traffic management measures blocking or slowing down traffic are based on commercial considerations (para. 54).

4. Conclusions

The *Telenor* judgement of the EU Court of Justice generally follows BEREC's interpretation of Regulation 2015/2120, laid out in its 2016 *Guidelines*,[6] even if neither BEREC nor its guidelines were referred to in the judgement. Thus, even though it is the Court's first judgement under Regulation 2015/2120, it may not be considered ground-breaking. However, some of its points will be of importance especially to national regulatory authorities.

In the opinion of the EU Court of Justice, commercial practices and agreements involving 'zero tariffs' are not prohibited per se. This is compatible with BEREC's position that different variants of zero tariff practices (which BEREC calls 'zero-rating' rather than 'zero-tariffs') may have different effects on end users' rights under Regulation 2015/2120, and some of these variants are relatively uncontroversial.[7] According to the EU Court of Justice, 'zero tariffs' may be incompatible with Article 3(2) of Regulation 2015/2120 if they involve slowing down or blocking Internet traffic, and the scale of their use materially limits end-user choice of Internet content. For such incompatibility to be determined, a market share analysis of the enterprises involved and a market impact analysis of their practices need to be performed. This was also BEREC's position.[8]

What is new and invaluable in the *Telenor* judgement is the EU Court's of Justice unambiguous stance on infringements of Article 3(3)

[6] BEREC, *BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules*.

[7] Ibid., paras. 40 and 42.

[8] *BEREC* ibid., paras. 41 and 45-46.

of Regulation 2015/2120. If traffic management measures implemented as a result of a commercial practice or an agreement are incompatible with Article 3(3) of Regulation 2015/2120, no assessment of their influence on the exercise of end users' rights is required. BEREC's position on the issue was much less clear. In BEREC's opinion, infringements of Article 3(3) of Regulation 2015/2120, such as blocking access to applications, will 'typically' 'limit the exercise of end users' rights, and constitute an infringement of Articles 3(2) and 3(1)'.[9] This somewhat confusingly implied that some practices incompatible with Article 3(3) of Regulation 2015/2120 might in fact not limit the exercise of the rights of end users. It was also not clear under BEREC's *Guidelines* if establishing an infringement of Article 3(3) made it immaterial for electronic communications authorities to establish an infringement of Article 3(2).

The disconnect between infringements of Article 3(3) of Regulation 2015/2120 and the need to determine a limitation of the exercise of end users' rights is the most important take-away from the *Telenor* judgement, especially for national regulatory authorities and their proceedings. When the authority finds it likely that a traffic management measure implemented by a provider of Internet access services is incompatible with Article 3(2) or with Article 3(3) of Regulation 2015/2120, or with both of these provisions, it makes most sense to first address incompatibility with Article 3(3), as this does not involve a complicated and costly assessment of the markets for Internet access services and for Internet content. If this compatibility has been established, it is no longer necessary to assess incompatibility with Article 3(2) of Regulation 2015/2120 in order to require of a provider of Internet access services to discontinue the relevant traffic management measure.

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