

The Court of Justice issues its first decision on the principle of net neutrality

On 16 September 2020, the Court of Justice of the European Union (CJEU) issued a preliminary ruling in joined cases C-807/18 and C-39/19, ruling for the first time on the **principle of net neutrality**, enshrined in Regulation (EU) 2015/2120 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.

Both of the joined cases decided by the CJEU were referred by Fővárosi Törvényszék (Budapest High Court, Hungary), and concerned proceedings between Telenor Magyarország Zrt. ("Telenor") and the Nemzeti Média- és Hírközlési Hatóság Elnöke (President of the National Communications and Media Office, Hungary) ('the President of the Office'), about two decisions by which the latter ordered Telenor to terminate some of its internet access services including two packages known as "MyChat" and "MyMusic", as those included measures slowing down data traffic, applied to some of the applications and services included in the package offered by Telenor.

The two requests for a preliminary ruling concern the interpretation of Art. 3 of Regulation (EU) 2015/2120, establishing **the right for end users 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." (Art. 3, § 1). Art. 3, § 2 regulates **agreements between providers** of internet access services **and end users**, which **shall not limit the exercise of the rights of end users** under § 1. Pursuant to art. 3, § 3, **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. However, providers can implement traffic-management measures, as long as they are transparent, non-discriminatory and proportionate, and not based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic.

In short, the referring court enquired about the compatibility with Art. 3 of Reg. 2015/2120 of packages offered by a provider of internet access services through agreements concluded with end users, and (i) under which users agree to a tariff entitling them to use a specific data volume without restriction, without any deduction being made from that data volume for using certain specific applications and services and (ii) once that data volume has been used up, those users 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 available.

The Court stressed that the provisions of Reg. 2015/2120 seek to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users' rights.

The CJEU found that the agreement analysed in this case can entail a limitation of the exercise of the rights set out in Art. 3, § 1 of the Regulation.

The Court also considered the possible cumulative effect to which this type of agreements may lead, e.g. an increase in the use of certain applications and services - those which may be used without restriction – and, conversely, to a decrease in the use of other applications and services. Such a cumulative effect may lead to a significant limitation of the exercise of end users' rights. Thus, the conclusion of such agreements on a significant part of the market can limit the exercise of users' rights, pursuant to Art. 3 § 2 of the Regulation.

The Court also put an emphasis on the general obligation put on the providers of equal treatment, without discrimination, restriction or interference with traffic, from which derogation is not possible. Indeed, Art. 3, § 3, lists three specific exceptions – i.e. cases where traffic-management measures may be implemented by internet access services providers – but in the present case, no evidence shows that the measures implemented by Telenor fall within one of those exceptions.

In the light of the above, the CJEU concluded for the incompatibility with Art. 3 of the Regulation of packages made available by a provider of internet access services through agreements concluded with end users, and under which (i) the latter may purchase a tariff entitling them to use a specific volume of data without restriction, without any deduction from that data volume for using certain specific applications and services and (ii) once that data volume has been used up, those end users 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 available.

This ruling is likely to have a real impact on the relevant market all over the EU, as the kind of package described in the case at hand is not dissimilar to some commercial offers already seen in some Member states.

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