

Case C-34/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

24 January 2020

Referring court:

Verwaltungsgericht Köln (Germany)

Date of the decision to refer:

20 January 2020

Applicant:

Telekom Deutschland GmbH

Defendant:

Bundesrepublik Deutschland

Subject matter of the main proceedings

Telecommunications, mobile communications tariffs, video-streaming, slowing down of one category of service

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred

1.(a) In the case where a mobile communications tariff including a monthly data allowance and providing for reduced transmission speed once that data volume has been used can be extended by a free option which allows certain services provided by content partners of the telecommunications company to be used without offsetting the data volume used for those services against the monthly data allowance included in the mobile communications tariff, and the end-user agrees to limitation of the bandwidth to a maximum of 1.7 Mbit/s for video-

streaming, irrespective of whether the video-streaming service is provided by content partners or other providers, is Article 3(2) of Regulation (EU) 2015/2120 to be understood as meaning that agreements on the characteristics of internet access services within the meaning of Article 3(2) of that regulation must fulfil the requirements of Article 3(3) thereof?

(b) If the answer to Question 1.(a) is in the affirmative: Is Article 3(3), third subparagraph, of Regulation (EU) 2015/2120 to be understood as meaning that, in a situation such as that at issue in the present case, bandwidth limitation qualifies as the slowing down of one category of service?

(c) If the answer to Question 1.(b) is in the affirmative: Is the term ‘impending network congestion’ within the meaning of Article 3(3), third subparagraph, point c), of Regulation (EU) 2015/2120 to be understood as meaning that it covers only (impending) exceptional or temporary network congestion?

(d) If the answer to Question 1.(b) is in the affirmative: Is Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120 to be understood as meaning that, in a situation such as that at issue in these proceedings, the need for equal treatment of equivalent categories of traffic precludes bandwidth limitation that applies in the case of one optional add-on only, but not in the case of other mobile communication tariffs, and applies, moreover, to video-streaming alone?
[Or. 3]

(e) If the answer to Question 1.(b) is in the affirmative: Is Article 3(3), third subparagraph, of Regulation (EU) 2015/2120 to be understood as meaning that, in a situation such as that at issue in these proceedings, bandwidth limitation that depends on the addition of the optional add-on and that the end-user can, moreover, deactivate at any time for up to 24 hours fulfils the requirement that one category of service may be slowed down only for as long as is necessary to achieve the objectives of Article 3(3), third subparagraph, points (a) to (c), of Regulation (EU) 2015/2120?

2.(a) If the answer to Question 1.(b) is in the negative: Is Article 3(3), second subparagraph, second sentence, of Regulation (EU) 2015/2120 to be understood as meaning that, in a situation such as that at issue in these proceedings, bandwidth limitation for video-streaming alone is based on objectively different technical quality of service requirements of specific categories of traffic?

(b) If the answer to Question 2.(a) is in the affirmative: Is Article 3(3), second subparagraph, third sentence, of Regulation (EU) 2015/2120 to be understood as meaning that identification of the traffic generated from video-streaming from IP addresses, protocols, URLs and SNIs and using pattern matching, during which certain header information is compared with typical video-streaming values, constitutes monitoring of the specific content of the traffic?

3. If the answer to Question 1.(a) is in the negative: Is Article 3(1) of Regulation (EU) 2015/2120 to be understood as meaning that, in a situation such

as that at issue in these proceedings, bandwidth limitation for video-streaming alone restricts end-users' rights within the meaning of Article 3(1) of Regulation (EU) 2015/2120?

Relevant provisions of EU law

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), especially Article 3

Relevant provisions of national law

Telekommunikationsgesetz (Telecommunications Law) of 22 June 2004 (BGBl. [Federal Law Gazette] I p. 1190), especially Paragraph 126

Brief summary of the facts and procedure

- 1 The applicant is a subsidiary of a telecommunications company whose services to customers include mobile communications services provided at varying tariffs. Since 19 April 2017, customers on its 'MagentaMobil' mobile communications plan have been able to add the free 'StreamOn' option (originally available in 'StreamOn Music', 'StreamOn Music&Video', 'MagentaEINS StreamOn Music' and 'MagentaEINS StreamOn Music&Video' variations). If 'StreamOn' is added, the data volume generated from audio- and video-streaming of the applicant's content partners' services is not offset against the data allowance included in the mobile communications tariff agreed in the contract for use of the internet connection provided via mobile communications ('zero rating') but, once it has been used up, the transmission speed in general is reduced. In order to qualify for zero rating, the content partner must essentially fulfil individual technical requirements prescribed by the applicant and enter into a contract; the applicant does not demand remuneration from content partners.
- 2 In the case of 'StreamOn Music&Video', the end-user also agrees to limitation of the bandwidth to a maximum of 1.7 Mbit/s for video-streaming, irrespective of whether the video-streaming service is provided by content partners or by other providers.
- 3 In order to distinguish between traffic generated from content partners' services and other traffic, the applicant agrees distinguishing criteria with its partners, such as IP addresses, protocols, URLs and SNIs. It also identifies traffic generated from video-streaming using pattern matching, during which certain header information is compared with typical video-streaming values.

- 4 End-users can deactivate and reactivate optional add-ons and thus bandwidth limitation at any time, that is to say, they can restore maximum transmission quality, including for video-streaming, by using the data volume included in their data allowance. If they are not reactivated within 24 hours, the applicant automatically restores the default settings (that is to say, no offsetting against data allowance and bandwidth limitation). With ‘MagentaEINS StreamOn Music&Video’, on the other hand, the bandwidth is not limited. ‘MagentaEINS StreamOn Music&Video’ differs from ‘StreamOn Music&Video’ in that this optional add-on can be added to a mobile communications tariff only if the mobile communications tariff is combined with a fixed network tariff, including an associated internet access service.
- 5 All optional add-ons can be cancelled at any time with immediate effect.
- 6 On 15 December 2017, the Bundesnetzagentur (German Federal Network Agency) adopted the contested decision. By that decision, it found that the reduction in the video-streaming data transmission speed to a maximum of 1.7 Mbit/s under the ‘StreamOn’ optional add-on infringed Article 3(3) of Regulation (EU) 2015/2120 and that the requirements for traffic management measures laid down in Article 3(3), second subparagraph, or third subparagraph, point (a), were not fulfilled. Furthermore, it prohibited the applicant from reducing the data transmission speed to a maximum of 1.7 Mbit/s under the ‘StreamOn’ optional add-on and ordered it to cease applying the corresponding tariff clauses.
- 7 The opposition filed by the applicant against that decision was rejected on 8 June 2018.

Principal arguments of the parties in the main proceedings

- 8 The applicant is fundamentally of the opinion that Article 3(2) of Regulation (EU) 2015/2120 is the only criterion by which bandwidth limitation under the optional add-on should be measured; that end-users’ rights within the meaning of Article 3(1) of Regulation (EU) 2015/2120 have not been infringed and therefore the bandwidth limitation is permissible; that the same applies if Article 3(3) of Regulation (EU) 2015/2120 is also used as a criterion, which the applicant considers would be wrong; that Article 3(3), first subparagraph, of Regulation (EU) 2015/2120 does not of itself enact a principle of comprehensive equal treatment; that, in any event, bandwidth limitation is permissible as a traffic management measure within the meaning of Article 3(3), second subparagraph, first sentence, of Regulation (EU) 2015/2120; that there has been no infringement of the ban on discrimination or of the [Or. 7] principle of proportionality within the meaning of Article 3(3), second subparagraph, second sentence, of Regulation (EU) 2015/2120; that, as required by Article 3(3), second subparagraph, third sentence, of Regulation (EU) 2015/2120, the content of traffic is not monitored and the measure is not maintained for longer than necessary; and that, aside from

the foregoing, bandwidth limitation is permissible data compression within the meaning of recital 11 of Regulation (EU) 2015/2120.

9 The defendant takes issue with the applicant's arguments.

Brief summary of the basis for the request

10 The case is to be determined by the legal situation at the time of the last official decision, that is to say, on 8 June 2018.

11 In the opinion of the referring court, there are substantial grounds for believing that the applicant has infringed its obligations under Regulation (EU) 2015/2120, but that the legal situation is not sufficiently clear-cut to dispense with an order for reference.

Question 1.(a)

12 It follows from the case-law of the Oberverwaltungsgericht (Higher Administrative Court) of the *Land* of North Rhine-Westphalia that:

- Agreements within the meaning of Article 3(2) of Regulation (EU) 2015/2120 must be measured against the requirements of Article 3(3) of that regulation. The applicant's argument that the bandwidth limitation at issue is agreed by contract between it and its end-users and thus comes solely under Article 3(2) of Regulation (EU) 2015/2120 is unconvincing, as the scope of Article 3(2) and the scope of Article 3(3) thereof are not mutually exclusive, in the sense that Article 3(2) of Regulation (EU) 2015/2120 regulates all contractual agreements permitted between providers of internet access services and their end-users, whereas Article 3(3) of that regulation concerns only any remaining unilateral measures by providers of internet access services not agreed by contract.
- The terms 'discrimination', 'restriction' or 'interference' should be understood as defining in greater detail the equal treatment requirement within the meaning of Article 3(3), first subparagraph, first sentence, of Regulation (EU) 2015/2120. At the same time, the terms 'sender', 'receiver', 'content', 'applications', 'services' or 'terminal equipment' are used to indicate that unequal treatment is expressly prohibited. Therefore, an agreement permitting bandwidth limitation to a maximum of 1.7 Mbit/s for video-streaming constitutes unequal treatment, inasmuch as bandwidth limitation for video-streaming but not for other services and applications is an arbitrary technical distinction based on the type of application or service used or provided.
- This is confuted neither by recital 9 of the Regulation, which merely serves to explain the requirements regulated in Article 3(3), second subparagraph, of Regulation (EU) 2015/2120 for reasonable traffic management measures,

which should still be permissible despite any unequal treatment of traffic as a systematic exemption from Article 3(3), first subparagraph, of Regulation (EU) 2015/2120, nor by recital 11 of the Regulation concerning data compression to reduce the data volume but not the data transmission speed.

13 However, a view that conflicts with the case-law of the Higher Administrative Court of the *Land* of North Rhine-Westphalia can also be argued as follows:

- Article 3(2) and Article 3(3) of Regulation (EU) 2015/2120 have different scopes, meaning that traffic-shaping under contractual agreements must be measured solely against Article 3(2) thereof. The wording of Article 3(2) of Regulation (EU) 2015/2120 refers only to Article 3(1), not to Article 3(3) thereof. The term ‘treat’ in Article 3(3), first subparagraph, of Regulation (EU) 2015/2120 does not appear to bear any terminological similarity with the term ‘agreements’ within the meaning of Article 3(2) of the Regulation.
- In terms of the overall scheme of the Regulation, Article 3(1) of Regulation (EU) 2015/2120 regulates fundamental end-user rights, Article 3(2) thereof essentially regulates the private autonomy to enter into agreements, and Article 3(3) thereof regulates unilateral rights and obligations of providers of internet access services that do not need to be agreed with the end-user. Applying the requirements of Article 3(3) of Regulation (EU) 2015/2120 for the purpose of assessing the legality of agreements within the meaning of Article 3(2) thereof would run counter to that. Article 3(2) of Regulation (EU) 2015/2120 also expressly allows agreements on the commercial and technical conditions of internet access services. However, Article 3(3), second subparagraph, of Regulation (EU) 2015/2120 prohibits all traffic management measures ‘based on commercial considerations’. Having to measure agreements within the meaning of Article 3(2) of Regulation (EU) 2015/2120 against the requirements of Article 3(3) of Regulation (EU) 2015/2120 as well would have the following absurd result: although end-users and providers of internet access services would be able to enter into a contract on commercial conditions, Article 3(3), second subparagraph, of Regulation (EU) 2015/2120 would prevent the contractual agreement from being implemented by applying a corresponding traffic management measure. That result is prevented if Article 3(2) of Regulation (EU) 2015/2120 is understood to be the only criterion by which the legality of contractual agreements is measured and Article 3(3) of Regulation (EU) 2015/2120 is understood to be the criterion by which the legality of unilateral measures taken by providers of internet access services is measured. That interpretation is also in keeping with the sense and purpose of Regulation (EU) 2015/2120, which focuses on protecting end-users and their rights.

14 Given the differing views on the scope of Article 3(2) in relation to the scope of Article 3(3) of Regulation (EU) 2015/2120, the referring court is of the opinion that clarification is needed as to whether agreements within the meaning of

Article 3(2) of Regulation (EU) 2015/2120 should be measured against the requirements of Article 3(3) of Regulation (EU) 2015/2120.

Question 1(b)

- 15 Assuming that agreements within the meaning of Article 3(2) of Regulation (EU) 2015/2120 must also be measured against the requirements of Article 3(3) of that regulation, the referring court initially holds that bandwidth limitation to a maximum of 1.7 Mbit/s for video-streaming manifestly qualifies as unequal treatment within the meaning of Article 3(3), first subparagraph, of Regulation (EU) 2015/2120. That is because clearly not all traffic is treated equally within the meaning of the first subparagraph of Article 3(3) of Regulation (EU) 2015/2120 in the provision of internet access services.
- 16 Furthermore, the referring court is of the opinion that there can reasonably be no doubt that unequal treatment within the meaning of the first subparagraph of Article 3(3) of Regulation (EU) 2015/2120 can be justified solely in accordance with the second and third subparagraphs of Article 3(3) thereof. According to recital 8 of Regulation (EU) 2015/2120, when providing internet access services, providers of those services should treat all traffic equally, without discrimination, restriction or interference, independently of its sender or receiver, content, application or service, or terminal equipment. According to general principles of EU law and settled case-law, comparable situations should not be treated differently and different situations should not be treated in the same way unless such treatment is objectively justified.
- 17 Clearly, any such justification is subject to the requirements of the second and third subparagraphs of Article 3(3) of Regulation (EU) 2015/2120.
- 18 Although recital 8 of Regulation (EU) 2015/2120 refers, in connection with the prohibition of unequal treatment within the meaning of Article 3(3), first subparagraph, of Regulation (EU) 2015/2120, to general principles of EU law and to settled case-law, the referring court assumes that objective justification within the meaning of recital 8 is only possible subject to the requirements laid down in the second and third subparagraphs of Article 3(3) of Regulation (EU) 2015/2120. This is because a different interpretation of Article 3(3), first subparagraph, of Regulation (EU) 2015/2120 would run counter to the obvious regulatory scheme of Article 3(3) thereof.
- 19 In light of this, the referring court holds that there is also no doubt that the criterion in the third subparagraph of Article 3(3) of Regulation (EU) 2015/2120 must take precedence over the criterion in the second subparagraph of that Article 3(3).
- 20 This is because, as its wording illustrates, that provision enacts a fundamental ban on traffic management measures that go beyond reasonable traffic management practices within the meaning of Article 3(3), second subparagraph, of Regulation

(EU) 2015/2120 and expressly refers to the slowing down of categories of services as a measure that providers of internet access services are prohibited from applying unless the requirements of Article 3(3), third subparagraph, points (a) to (c), of Regulation (EU) 2015/2120 are fulfilled.

- 21 In the light of these basic assumptions, the referring court is of the opinion that, in the present case, it does not follow with sufficient clarity from Regulation (EU) 2015/2120 whether, in a situation such as that at issue in these proceedings, bandwidth limitation qualifies as the slowing down of one category of service within the meaning of Article 3(3), third subparagraph, thereof.
- 22 The referring court cannot assume reasonably without doubt that bandwidth limitation that applies to video-streaming alone concerns one category of service within the meaning of Article 3(3), third subparagraph, of Regulation (EU) 2015/2120 ('specific content, applications or services, or specific categories thereof', 'des contenus, des applications ou des services spécifiques ou des catégories spécifiques de contenus, d'applications ou de services'). The term 'category of service' is not defined in Article 2 of Regulation (EU) 2015/2120. Moreover, Article 3(3), second subparagraph, second sentence, of Regulation (EU) 2015/2120 and Article 3(3), third subparagraph, point (c), thereof contain further terms, namely 'specific categories of traffic', on the one hand, and 'equivalent categories of traffic', on the other, which in turn are not defined in Article 2 of Regulation (EU) 2015/2120 and do not elucidate the term 'category of service', as the binding language versions of the Regulation sometimes use terms that overlap with the term 'category of service' ('specific categories of traffic', 'certaines catégories spécifiques de trafic', 'équivalent categories of traffic', 'les catégories équivalentes de trafic').
- 23 Even if, in the opinion of the referring court, there is overwhelming cause to believe that, as 'specific content, applications or services' and 'specific categories thereof' are named in Article 3(3), third subparagraph, of Regulation (EU) 2015/2120, bandwidth limitation for video-streaming comes within the scope of that provision alone, it does not follow from Article 3(3), third subparagraph, of Regulation (EU) 2015/2120, read in the light of recital 11 of Regulation (EU) 2015/2120, that non-discriminatory data compression techniques that reduce the size of a file without changing its content are prohibited. Although, in the opinion of the referring court, there is overwhelming cause to believe that, in a situation such as that at issue in these proceedings, bandwidth limitation is not a non-discriminatory data compression technique in that sense as, according to recital 11 of Regulation (EU) 2015/2120, any such data compression is supposed to make possible a more efficient use of scarce resources and to serve the end-users' interests by reducing data volumes, increasing speed and enhancing the experience of using the content, applications or services concerned, in the opinion of the referring court, these requirements are not fulfilled in a situation such as that at issue in this case in the event of bandwidth limitation.

- 24 Nonetheless, recital 11 of Regulation (EU) 2015/2120 clarifies that Article 3(3), third subparagraph, thereof does not preclude all measures by providers of internet access services intended to make possible a more efficient use of scarce resources. In light of that fact, the referring court cannot assume, at least not reasonably without doubt, that, in a situation such as that at issue in these proceedings, bandwidth limitation qualifies as the slowing down of one category of service within the meaning of Article 3(3), third subparagraph, of Regulation (EU) 2015/2120. Therefore, in the opinion of the referring court, clarification is needed as to whether bandwidth limitation qualifies as the slowing down of one category of service within the meaning of Article 3(3), third subparagraph, of Regulation (EU) 2015/2120.

Question 1.(c)

- 25 According to recital 11 of Regulation (EU) 2015/2120, Article 3(3), third subparagraph, points (a) to (c), thereof are subject to strict interpretation and to strict proportionality requirements. Specific content, applications and services, as well as specific categories thereof, should be protected because of the negative impact on end-user choice and innovation of blocking, or of other restrictive measures not falling within the justified exceptions. In light of that, the referring court is of the opinion that there is overwhelming cause to believe that, in a situation such as that at issue in this case, bandwidth limitation does not fulfil the requirements of Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120. According to recital 15 of that regulation, Article 3(3), third subparagraph, point (c), thereof allows necessary measures to prevent impending network congestion, that is to say, situations in which congestion is about to materialise, and to mitigate the effects of network congestion, where such congestion occurs only temporarily or in exceptional circumstances. It states that temporary congestion should be understood as referring to specific situations of short duration, where a sudden increase in the number of users in addition to the regular users, or a sudden increase in demand for specific content, applications or services, may overflow the transmission capacity of some elements of the network and make the rest of the network less reactive. According to recital 15 of Regulation (EU) 2015/2120, exceptional congestion should also [Or. 24] be understood as referring to unpredictable and unavoidable situations of congestion. It states that possible causes of those situations include a technical failure such as a service outage due to broken cables or other infrastructure elements, unexpected changes in routing of traffic or large increases in network traffic due to emergency or other situations beyond the control of providers of internet access services.
- 26 The referring court is of the opinion that the bandwidth limitation applied here in the case of optional add-ons for video-streaming does not fulfil these requirements simply because it is not applied in temporary or exceptional circumstances only. On the contrary, it follows from the information provided by the applicant that the bandwidth is limited because the network capacity available should allow permanent, unlimited use of video-streaming only up to a maximum bandwidth of 1.7 Mbit/s. Irrespective of whether impending network congestion can be assumed

from any such blanket submission, no temporary or exceptional circumstances within the meaning of recital 15 of Regulation (EU) 2015/2120 are apparent in that regard.

- 27 However, the referring court cannot assume reasonably without doubt that the term ‘impending network congestion’ within the meaning of Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120 concerns only temporary or exceptional impending network congestion.
- 28 That is because the wording of Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120 refers to impending network congestion, on the one hand, and to the effects of exceptional or temporary network congestion, on the other. The referring court is of the opinion that clarification is therefore needed as to whether the adjectives ‘exceptional’ and ‘temporary’ also refer to the term ‘impending network congestion’.
- 29 In the opinion of the referring court, the fact that recital 15 of Regulation (EU) 2015/2120 considers, in summarising, that traffic management measures going beyond reasonable traffic management measures are permissible ‘to prevent or mitigate the effects of temporary or exceptional network congestion’ suggests that they do. Clearly, this means that impending network congestion comes within the scope of Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120 only if it is exceptional or temporary. By contrast, the statement in recital 15 of that regulation that recurrent and more long-lasting network congestion which is neither exceptional nor temporary should not benefit from the exception in Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120, but should rather be tackled through expansion of network capacity, proves to be inconclusive. It is the understanding of the referring court that the reference to expansion of network capacity is included simply by way of contrast to exceptional and temporary congestion and is therefore less important than the question of whether the term ‘impending network congestion’ concerns exceptional and temporary situations only.
- 30 Notwithstanding the pointers provided by recital 15 of Regulation (EU) 2015/2120 for the interpretation of the provision, the referring court considers that the wording of Article 3(3), third subparagraph, point (c), thereof is ambiguous. The referring court therefore considers that, without a preliminary ruling by the Court of Justice, it will be unable to make an interpretation to the effect that the provision covers only (impending) exceptional or temporary network congestion.

Question 1.(d)

- 31 In the opinion of the referring court, there is overwhelming cause to believe that the application of bandwidth limitation in a situation such as that at issue in these proceedings involves unequal treatment of equivalent categories of traffic only in the case of the ‘StreamOn Music& Video’ optional add-on and not in the case of the other add-ons, especially not the ‘MagentaEINS StreamOn Music&Video’

optional add-on. That is because bandwidth limitation for video-streaming does not apply to all end-users; therefore, both equivalent and, more importantly, identical categories of traffic are treated unequally. This is compounded by the fact that, in the opinion of the referring court, relevant unequal treatment of equivalent categories of traffic within the scope of Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120 also exists in a situation such as that at issue in these proceedings, where bandwidth limitation applies to video-streaming only.

- 32 However, as stated previously, the term ‘equivalent categories of traffic’ (‘gleichwertige Verkehrsarten’; ‘les catégories équivalentes de trafic’) is (also) not defined in Article 2 of Regulation (EU) 2015/2120. Moreover, the term does not coincide with the term ‘specific categories of traffic’ within the meaning of Article 3(3), second subparagraph, second sentence, of Regulation (EU) 2015/2120, even though the binding language versions thereof sometimes use overlapping terms (‘specific categories of traffic’, ‘certaines catégories spécifiques de trafic’, ‘équivalent categories of traffic’, ‘les catégories équivalentes de trafic’). Finally, this term is terminologically different from the term ‘category of service’ within the meaning of Article 3(3), third subparagraph, of Regulation (EU) 2015/2120.
- 33 That notwithstanding, it is not permissible under Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120 to slow down one category of service ‘except as necessary’ to prevent impending network congestion or to mitigate the effects of exceptional or temporary network congestion. Furthermore, recital 15 of Regulation (EU) 2015/2120 refers to the principle of proportionality and considers it necessary in this regard that traffic management measures based on Article 3(3), third paragraph, point (c), of Regulation (EU) 2015/2120 treat equivalent categories of traffic equally. This makes it impossible for the referring court to decide reasonably without doubt **[Or. 27]** whether, in cases such as the present, the application of bandwidth limitation infringes Article 3(3), third subparagraph, point (c), thereof in the case of one optional add-on only. Although, in the opinion of the referring court, there is little to suggest that, the reference to the principle of proportionality might in fact imply that, where one category of service is slowed down, equivalent (and also identical) categories of traffic need not be treated equally, provided that partial slowing down of one category of service may prevent impending network congestion.
- 34 Clarification is therefore required as to whether Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120 allows such an understanding. Only if partial slowing down in the above sense proves to be permissible would the question even arise as to whether the application of bandwidth limitation to the ‘StreamOn Music&Video’ optional add-on only and not to the ‘MagentaEINS StreamOn Music&Video’ optional add-on can permissibly be based, as argued by the applicant, on the fact that, in the case of the ‘MagentaEINS StreamOn Music&Video’ optional add-on, it is possible to predict from the fixed network connection in place that not all video-streaming will be via the mobile network.

Question 1.(e)

- 35 In the opinion of the referring court, there is overwhelming cause to believe that the time requirement in Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120 is not safeguarded if, in a situation such as that at issue in these proceedings, the bandwidth limitation applies in principle permanently, but the optional add-on must be added, on the one hand, and can be deactivated and reactivated by the end-user, on the other.
- 36 That is because it is the referring court's understanding that permanent bandwidth limitation clearly disregards the regulatory purpose of Article 3(3), third subparagraph, of Regulation (EU) 2015/2120 which, according to recital 15 thereof, should not give providers of internet access services the possibility to circumvent the general prohibition on blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, or specific categories thereof.
- 37 However, the recitals of Regulation (EU) 2015/2120 do not further specify the requirement that measures within the meaning of Article 3(3), third subparagraph, thereof are permissible only 'for as long as is necessary' to achieve one of the objectives listed in Article 3(3), third subparagraph, points (a) to (c), of that regulation. Even if, in the opinion of the referring court, there are no convincing grounds that suggest as much, it cannot be assumed, at least not reasonably without doubt, that, in a situation such as that at issue in these proceedings, the requirement of Article 3(3), third subparagraph, of Regulation (EU) 2015/2120 is safeguarded by the fact that bandwidth limitation applies only once an optional add-on has been added, which can, moreover, be deactivated and reactivated at any time by the end-user.
- 38 In light of this, the referring court considers that the meaning of the time requirement in Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120 also requires clarification.

Question 2

- 39 If, in a situation such as that at issue in the present proceedings, bandwidth limitation does not infringe Article 3(3), third subparagraph, of Regulation (EU) 2015/2120, it is necessary to clarify, in addition to Questions 1.(b) to 1.(e), whether it is a permissible traffic management measure within the meaning of Article 3(3), second subparagraph, of Regulation (EU) 2015/2120.

Question 2.(a)

- 40 According to recital 9 of Regulation (EU) 2015/2120, providers of internet access services may implement, in order to optimise the overall transmission quality, traffic management measures which differentiate between objectively different categories of traffic. It states that any such differentiation should, in order to

optimise overall quality and user experience, be permitted only on the basis of objectively different technical quality of service requirements (for example, in terms of latency, jitter, packet loss, and bandwidth) of the specific categories of traffic, and not on the basis of commercial considerations. The stated objective of reasonable traffic management is to contribute to an efficient use of network resources and to an optimisation of overall transmission quality responding to the objectively different technical quality of service requirements of specific categories of traffic, and thus of the content, applications and services transmitted.

- 41 In light of that, the referring court is of the opinion that there is overwhelming cause to believe that, in a situation such as that at issue in this case, bandwidth limitation is not based on objectively different technical quality of service requirements of specific categories of traffic within the meaning of Article 3(3), second subparagraph, of Regulation (EU) 2015/2120. That is because the requirements for video-streaming in terms of latency, jitter, packet loss, and bandwidth do not differ in fact from data transmission for the use of other applications or services. Video-streaming differs from data transmission for the use of other applications or services only inasmuch as adaptive bitrate technology is regularly applied.
- 42 However, in the opinion of the referring court, that is not an objectively different technical quality of service requirement of specific categories of traffic within the meaning of Article 3(3), second subparagraph, second sentence, of Regulation (EU) 2015/2120. The same applies to the fact, argued by the applicant, that video-streaming is a potentially bandwidth-intensive application. In the opinion of the referring court, that does not of itself satisfy the criterion that all traffic management measures must be based on objectively different technical quality of service requirements of specific categories of traffic.
- 43 The fact that bandwidth limitation for video-streaming is not based on objectively different technical quality of service requirements of specific categories of traffic within the meaning of Article 3(3), second subparagraph, second sentence, of Regulation (EU) 2015/2120 is also illustrated, in the opinion of the referring court, by the fact that bandwidth limitation only applies in the case of one optional add-on and nowhere else and that optional add-on can, moreover, be deactivated and reactivated at any time by the end-user.
- 44 Nonetheless, the referring court cannot definitively rule thus reasonably without any doubt. This follows, first, from the fact, as stated previously, that the term ‘specific categories of traffic’ (‘bestimmte Verkehrskategorien’; ‘certaines catégories spécifiques de trafic’) is (also) not defined in Article 2 of Regulation (EU) 2015/2120. Moreover, that term does not coincide with the term ‘equivalent categories of traffic’ within the meaning of Article 3(3), third subparagraph, point (c), of Regulation (EU) 2015/2120, even though the binding language versions of that regulation sometimes use terms that overlap (‘specific categories of traffic’, ‘certaines catégories spécifiques de trafic’, ‘équivalent categories of traffic’, ‘les catégories équivalentes de trafic’). Moreover, that term differs terminologically

from the term ‘category of service’ within the meaning of Article 3(3), third subparagraph, of Regulation (EU) 2015/2120.

- 45 This is compounded by the fact that recital 9 of Regulation (EU) 2015/2120 simply paraphrases, by way of example, the criterion in Article 3(3), second subparagraph, second sentence, thereof that traffic management measures must be based on objectively different technical quality of service requirements. In light of that fact, the referring court cannot rule definitively that, in a situation such as that at issue in these proceedings, bandwidth limitation is not based on objectively different technical quality of service requirements of specific categories of traffic within the meaning of Article 3(3), second subparagraph, of Regulation (EU) 2015/2120.
- 46 The meaning of the term ‘objectively different technical requirements’ cannot be seen as adequately clarified as, according to recital 9 of Regulation (EU) 2015/2120, providers of internet access services may implement traffic management measures in order to optimise the overall transmission quality; recital 9 of Regulation (EU) 2015/2120 likewise states that traffic management measures should optimise the overall quality and user experience. In the opinion of the referring court, this does not of itself explain the meaning of the requirement of Article 3(3), second subparagraph, second sentence, of Regulation (EU) 2015/2120 that traffic management measures must be based on objectively different technical quality of service requirements of specific categories of traffic. Recital 9 of Regulation (EU) 2015/2120 itself simply establishes a reference to the requirement that the objective of reasonable traffic management is ‘to contribute to an efficient use of network resources and to an optimisation of overall transmission quality responding to the objectively different technical quality of service requirements of specific categories of traffic, and thus of the content, applications and services transmitted’. Even having recourse to recital 9 of Regulation (EU) 2015/2120, the meaning of the term ‘objectively different technical requirements’ cannot be established with sufficient clarity.
- 47 Thus, it is necessary to clarify whether, in a situation such as that at issue in these proceedings, bandwidth limitation fulfils the requirement of Article 3(3), second subparagraph, second sentence, of Regulation (EU) 2015/2120 that traffic management measures must be based on objectively different technical quality of service requirements of specific categories of traffic.

Question 2.(b)

- 48 Article 2 of Regulation (EU) 2015/2120 does not define the term ‘monitor the specific content’ within the meaning of Article 3(3), second subparagraph, third sentence, of the Regulation. Recital 10 of the Regulation simply states that reasonable traffic management does not require techniques which monitor the specific content of data traffic transmitted via the internet access service.

- 49 This does not provide the referring court with sufficient pointers to specify the regulatory content of Article 3(3), second subparagraph, third sentence, of Regulation (EU) 2015/2120. Therefore, the referring court cannot decide reasonably without doubt whether, in a situation such as that at issue in these proceedings, bandwidth limitation involves prohibited monitoring of the actual traffic, inasmuch as technical data from IP addresses and/or protocols and/or URLs and/or SNIs (for https) and/or, where applicable, the public keys used to encrypt https and/or technical data used by providers or their service providers are used to identify video-streaming traffic.

Question 3

- 50 If, in a situation such as that at issue in these proceedings, bandwidth limitation should be measured solely against Article 3(2) of Regulation (EU) 2015/2120 and not against the requirements of Article 3(3) thereof, the referring court is of the opinion that clarification is needed as to whether bandwidth limitation infringes end-users' rights under Article 3(1) of Regulation (EU) 2015/2120. Under that provision end-users are to 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.
- 51 The referring court is of the opinion that the question as to whether, in a situation such as that at issue in these proceedings, bandwidth limitation qualifies as a restriction on end-users' rights within the meaning of Article 3(1) of Regulation (EU) 2015/2120 has not initially been adequately clarified on the basis of the BEREC Guidelines. Although they indicate that certain technical situations infringe Article 3(1) of Regulation (EC) 2015/2120, that does not, in the opinion of the referring court, suggest, at least not with absolute certainty, that bandwidth limitation infringes Article 3(1) of that regulation.
- 52 The same applies to the assumption in the BEREC guidelines, which are not, moreover, expressly applied in the provisions of Regulation (EU) 2015/2120, that infringement of Article 3(3) thereof may simultaneously mean infringement of Article 3(1) of that regulation.
- 53 Individual optional add-ons have of themselves already been criticised for forcing end-users to use the services of content partners. However, according to the BEREC guidelines in particular, so-called zero-rated plans are not of themselves incompatible with Article 3(1) of Regulation (EU) 2015/2120. Provided that non-discriminatory access to zero rating is guaranteed for content providers and no separate fee is charged for zero rating, such plans are considered generally permissible even outwith the BEREC guidelines.
- 54 Finally, it has not been clarified, at least not definitively, whether, in a situation such as that at issue in these proceedings, bandwidth limitation should be seen as a

restriction of end-users' rights within the meaning of Article 3(1) of Regulation (EU) 2015/2120. The discussion to date on these matters can be summarised as follows: The specific configuration of traffic shaping is relevant. Provided, as in this case, that end-users can deactivate and reactivate traffic shaping (combined with zero rating), bandwidth limitation is not seen as an infringement of Article 3(1) of Regulation (EU) 2015/2120 as, according to the grounds argued, end-users have the private autonomy to decide how to use their internet access; if customers are given an additional option and are in sole control of that decision, that suggests that their options have been increased, not that their freedom of choice has been restricted.

- 55 The wording of the provision and the recitals of Regulation (EU) 2015/2120 provide no clues whatsoever as to whether infringement of end-users' rights is precluded because their options in a situation such as that at issue in these proceedings are extended by the optional add-ons. The same applies to the question of whether content providers' rights are infringed because they are no longer able to distribute their content in the maximum possible technical quality to all end-users. Nor does the fact that Article 3(1) of Regulation (EU) 2015/2120 makes ('their') reference to the internet access service of end-users provide a definitive answer to the question referred, as nothing can be inferred from that in terms of the legal position of content providers. Moreover, it would appear that the discussion to date on traffic shaping has disregarded the fact that, in the situation at issue here, providers of video-streaming services and other content providers are treated unequally.
- 56 In light of this, the referring court is of the opinion that the European Court of Justice needs to clarify whether, in a situation such as that at issue in these proceedings, bandwidth limitation qualifies as a restriction of end-users' rights within the meaning of Article 3(1) of Regulation (EU) 2015/2120.