Case C-807/18

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:

20 December 2018

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

11 September 2018

Applicant:

Telenor Magyarország Zrt.

Defendant:

Nemzeti Média- és Hírközlési Hatóság Elnöke (President of the National Media and Communications Office, Hungary)

Subject matter of the main proceedings

Action brought against the decision of the Hungarian regulatory authority (i) finding that the package of data traffic services offered by the telecommunications operator, which, in principle, allows limited use of certain applications but unlimited use without slowdown in the case of other applications (known as the MyChat reduced tariff), infringed Article 3(3) of Regulation 2015/2120 and (ii) ordering that operator to eliminate the differences between certain forms of internet traffic.

Subject matter and legal basis of the request for a preliminary ruling

Which provision of Article 3 of Regulation 2015/2120 is applicable to the MyChat reduced tariff? Is that reduced tariff capable of being compatible with Article 3(3) of Regulation 2015/2120 and, therefore, of satisfying the requirement of equal and non-discriminatory treatment? How detailed and extensive must the investigation

carried out by the national regulatory authority under Article 3 of Regulation 2015/2120 be?

Legal basis: Article 267 TFEU

Questions referred

1. Must a commercial agreement between a provider of internet access services and an end user under which the service provider charges the end user a zero-cost tariff for certain applications (that is to say, the traffic generated by a given application is not taken into account for the purposes of data usage and does not slow down once the contracted data volume has been used), and under which that provider engages in discrimination which is confined to the terms of the commercial agreement concluded with the end consumer and is directed only against the end user party to that agreement and not against any end user not a party to it, be interpreted in the light of Article 3(2) of 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 ('the Regulation')?

2. If the first question referred is answered in the negative, must Article 3(3) of the Regulation be interpreted as meaning that — having regard also to recital 7 of the Regulation — an assessment of whether there is an infringement requires an impact- and market-based evaluation which determines whether and to what extent the measures adopted by the internet access services provider do actually limit the rights which Article 3(1) of the Regulation confers on the end user?

3. Notwithstanding the first and second questions referred for a preliminary ruling, must Article 3(3) of the Regulation be interpreted as meaning that the prohibition laid down therein is a general and objective one, so that it prohibits any traffic management measure which distinguishes between certain forms of internet content, regardless of whether the internet access services provider draws those distinctions by means of an agreement, a commercial practice or some other form of conduct?

4. If the third question is answered in the affirmative, can an infringement of Article 3(3) of the Regulation also be found to exist solely on the basis that there is discrimination, without the further need for a market and impact evaluation, so that an evaluation under Article 3(1) and (2) of the Regulation is unnecessary in such circumstances?

Provisions of EU law relied on

Recital 7 and Articles 3 and 5 of 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)

Provisions of national law relied on

Az elektronikus hírközlésről szóló 2003. évi C. Törvény (Law 100 of 2003 on electronic communications)

Brief summary of the facts and the main proceedings

1 Telenor, one of Hungary's leading telecommunications service providers, offers, among other products, the MyChat service package. That package comes with a 1 GB data usage allowance and guarantees unlimited use within national territory of some of the main applications (Facebook, Facebook Messenger, WhatsApp, Instagram, Twitter and Viber). Use of the selected applications does not count towards the 1 GB data traffic limit and those applications are available to subscribers with access to full (unreduced) broadband even after they have used the 1 GB of data traffic, while other internet applications that are not included in the reduced tariff generate chargeable data traffic and access to them is limited – because slowed down – once the 1 GB of data traffic has been used.

2 The Nemzeti Média- és Hírközlési Hatóság Hivatala (National Media and Communications Office, Hungary), as first-tier authority, found that the MyChat reduced tariff could be regarded as a traffic management measure, in the form of a commercial practice, that is contrary to the requirements of equal and non-discriminatory treatment laid down in Article 3(3) of Regulation 2015/2120 and ordered the applicant to eliminate the unlawful differences between certain forms of internet traffic.

3 The second-tier authority and defendant – the Nemzeti Média- és Hírközlési Hatóság Elnöke (President of the National Media and Communications Office, Hungary) – upheld the decision of the first-tier authority. The second-tier authority found that any traffic management measure which draws a distinction between certain types of internet content is prohibited, on an objective basis and irrespective of the form that it takes. It also found that the MyChat package undoubtedly constitutes a traffic management measure, since it offers subscribers unlimited use of uniform quality of certain selected applications, while slowing down access to other internet content, reducing upload and download speeds to a maximum of 32 kbit/s once a certain data traffic volume has been exceeded, and

this in the absence of any of the grounds provided for in Article 3(3) of Regulation 2015/2120 that would allow the use of traffic management measures.

4 The applicant brought an action against the decision of the second-tier authority before the referring court.

Principal submissions of the parties to the main proceedings

5 According to the applicant, the defendant is wrong to interpret Regulation 2015/2120 restrictively. In its opinion, the regulatory authority should have carried out a two-stage investigation. Thus, it should first have analysed whether the conduct in question infringes the provisions of Article 3(1) and (2) or (3) of Regulation 2015/2120 and, if so, then carried out an evaluation of the impact of such a restriction or interference. The applicant states that, in the present case, the regulatory authority carried out only the first stage of that investigation, since it assessed the existence of discrimination under Article 3(3) but refrained entirely from analysing its impact. According to the applicant, the need for an impact evaluation can also be inferred from Article 5 of Regulation 2015/2120.

6 The applicant also complains that the regulatory authority applied only Article 3(3) of Regulation 2015/2120. That objection is founded principally on the proposition that Article 3(3), which concerns measures that the service provider decides upon unilaterally, should not have been applied and Article 3(1) and (2) should have been applied instead, since provision of the MyChat service must be regarded as a commercial practice derived from a bilateral agreement between the end user and the service provider.

7 In the alternative, that objection is founded on the proposition that Article 3(1) to (3) of Regulation 2015/2120 must be interpreted together, with the result that traffic management is considered to be unlawful where it restricts freedom of choice or the rights conferred on consumers in Article 3(1) and (2). According to the applicant, the MyChat package is lawful, since it extends the consumer's freedom of choice by allowing him a certain volume of general data traffic – that is to say, which can be used for any type of content – and a special and unlimited volume of data that can be used for chat services. As regards the fact that the MyChat package gives preference to certain chat applications over others, the applicant states that subscribers to the MyChat package can access any chat application within the framework of the 1 GB of data traffic. It nonetheless considers that it would not be feasible, because of the practical limitations involved, for the services package to include any chat application anywhere in the world.

8 The regulatory authority, as defendant, contends that an impact evaluation is necessary only in the case of the agreement between an end user and a service provider referred to in Article 3(2) of Regulation 2015/2120, or in the case where, although there is no support for a finding of infringement of Article 3(3) of that regulation, there is in fact a possibility that the agreement or commercial practice

infringes the rights conferred on end users in Article 3(1). Article 3(3) of Regulation 2015/2120, on the other hand, unequivocally provides that any traffic management measure which distinguishes between certain forms of internet content (irrespective of whether the internet access provider draws those distinctions by means of an agreement, a commercial practice or any other type of conduct) is objectively prohibited. The defendant considers that, in the present case, there is no need to carry out a two-stage investigation, since the analysis of Article 3(3) is necessary and also sufficient, and that there is also no longer any need to demonstrate whether the prohibited traffic management measure entails a significant restriction of end users' rights and freedom of choice.

9 The MyChat package must be regarded as a commercial practice which involves the application of a prohibited traffic management measure, and the arguments put forward by the applicant (to the effect, for example, that no content or application is blocked beforehand and subscribers can always conclude a data traffic contract with a general use allowance) do nothing to disprove this. The applicant cannot claim that the objective of bringing a service that infringes the provisions of Regulation 2015/2120 into line with the net neutrality requirements is not feasible, since it is not the net neutrality requirements that must be consistent with the applicant's product range but, on the contrary, the applicant who must offer products which comply with those requirements.

Succinct presentation of the reasons for the request for a preliminary ruling

10 The present order for reference concerns one of the first supervisory decisions to be adopted by the Hungarian regulatory authority under Regulation 2015/2120, which has prompted a serious difference of opinion as to interpretation in relation to two matters. The first, which relates to substantive law, is concerned with the uncertainty over whether the package of services offered by the internet access provider is capable of being compatible with the net neutrality requirements laid down in the aforementioned regulation and which of the latter's provisions is applicable to that package. The second matter is of a procedural nature and calls for clarification as to how detailed and extensive the investigation carried out by the national regulatory authority has to be. The outcome of this case will affect hundreds of thousands of consumers and the interpretation given here may also substantially determine the focus, purpose and level of detail of future investigations carried out by that authority.

11 The provisions of Regulation 2015/2120 are new. So far as the referring court is aware, there is still no uniform interpretation of those provisions either in EU law or in the legal systems of the Member States. Despite the fact that the guidelines issued by the Office of the Body of European Regulators for Electronic Communications on 30 August 2016 seek to offer guidance to enforcement authorities, there is a significant difference of opinion between the parties as to how they should be interpreted. In the light of all the foregoing, the referring court

is of the view that an interpretation by the Court of Justice is necessary to enable it to resolve the dispute in the main proceedings.

12 The questions referred for a preliminary ruling by the national court are concerned, in the first place, with the interpretation of Article 3(1) and (2) of Regulation 2015/2120 and Article 3(3) in conjunction with recital 7 thereof. There is some uncertainty as to the relationship between those provisions. According to the referring court, it is not inconceivable that the prohibition laid down in Article 3(3) is primarily intended to ensure that internet access service providers do not adopt unilateral measures. If the commercial practice under analysis in the present case nonetheless fell within the scope of Article 3(3), the question would then arise as to whether the prohibition in question is indeed an objective or general one which does not require the impact of the unlawful practice to be evaluated, or whether it is necessary to define a framework consistent with the content of recital 7 for the purposes of evaluating the significant restriction of the consumer's right to 'open internet access' and freedom of choice.

13 The applicant does not deny that the MyChat package gives rise to traffic management practices that differ depending on whether the traffic is generated by the selected applications or other internet content, but, while the regulatory authority's interpretation is that this is sufficient in itself to support the finding that there has been an infringement of EU law, the applicant considers it necessary to analyse other provisions of the Regulation. On a literal interpretation, the referring court would conclude that Article 3(3) of Regulation 2015/2120 contains an autonomous, unequivocal and unconditional legal obligation.

14 However, if the line of argument put forward by the applicant were accepted, the provision applicable to the dispute in the main proceedings would be Article 3(2) of Regulation 2015/2120, which would prompt the question as to whether the fact that there is a signed commercial agreement between the service provider and the end user – which the latter concludes in the exercise of his freedom of choice – puts paid to the argument that the infringement of the end user's rights can be established objectively and without the need to examine any other requirement. This is so because in this case the service provider and the end user arrived at the terms of the service by mutual agreement, as requested by the end user, which would imply that a finding as to the infringement of the end user's rights could be established only after an investigation based on the individual circumstances.

15 Similarly, notwithstanding the fact that it does not contain an explicit reference to the effect, Article 3(3) of Regulation 2015/2120 also seeks, through the general prohibition which it lays down, to protect the rights of other persons. The defendant makes the relevant point that, although, in the present case, the applicant does not actually discriminate between end users, it does discriminate between providers of applications or content. This raises serious doubts as to whether the applicant's claim based on the freedom to enter into a contract may be accepted, since that freedom could give rise to a commercial agreement between the service provider and the end user that infringes the rights of a third party, this

being a consequence precluded however by the provisions of EU law on net neutrality which define open internet access as a regulatory objective. Nevertheless, if that claim were accepted, this would raise the important question of whether, for the purposes of substantiating an infringement of the net neutrality rules, the mere existence of discrimination is sufficient or whether the impact of that discrimination must also be evaluated.