

**Case C-39/19**

**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:**

23 January 2019

**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)

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**Subject matter of the main proceedings**

Action brought against the decision of the Hungarian regulatory authority (i) finding that the complementary service offered by the telecommunications operator, available for mobile telephony subscriptions and which allows limited and unlimited data traffic for certain music streaming platforms (known as the MyMusic 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 MyMusic 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 an unconditional, 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 monthly pre-paid complementary services package 'MyMusic'. The MyMusic package is available in three forms (Start, Nonstop and Deezer) and, depending on the amount of the monthly subscription, offers 500 MB data usage or unlimited data usage with access to four specific music streaming platforms (Deezer, Apple Music, Tidal and Spotify) as well as certain online radio stations (Kossuth Rádió, Petőfi Rádió, Bartók Rádió, Dankó Rádió, Rádió 1, Music FM, and Sláger FM) (together referred to as 'the applications'). The data traffic generated in the context of those packages does not count towards the data volume available to subscribers and those applications continue to be available to them on an unlimited basis (that is, with no restrictions or blocking of broadband) even after subscribers have used the volume of data traffic contracted (in the case of the MyMusic Start package up to a volume of 500 MB). By contrast, other internet content not included in the applications generates chargeable data traffic and access to such content is limited. The tariff for the MyMusic packages is considerably lower than that for the 500 MB or unlimited data packages available with the same subscriptions.
- 2 The Nemzeti Média- és Hírközlési Hatóság Hivatala (National Media and Communications Office, Hungary), as first-tier authority, found that the MyMusic 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 added that the MyMusic reduced tariff undoubtedly constitutes a traffic management measure which, as such, may be considered contrary to the provisions of Article 3(3) of Regulation 2015/2120, without the need to carry out an impact- and market-based evaluation.

- 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 the MyMusic reduced tariff must be regarded as a commercial practice derived from a bilateral agreement between the end user and the service provider. In the case of commercial practices, whether an end user's freedom of choice is restricted must be ascertained in relation to all the services offered by the service provider, not in relation to a single package of services (MyMusic Start, for example), that freedom not being restricted when it is possible to access any content. On the other hand, in the case of unilateral measures, what is crucial is that service providers do not treat certain content unfavourably and only apply permitted and reasonable traffic management measures.
- 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 MyMusic reduced tariff is lawful, since it actually extends the consumer's freedom of choice, because the applicant's subscriptions offer data packages that may be used for general content, that is to say any type of content, and also data packages allowing access to certain special content. In addition to a limited data volume (Start) or unlimited data volume (Nonstop, Deezer), the

MyMusic packages offer access to specific music services and consumers have the possibility of increasing their volume of data traffic. There is a large demand for music applications, so that the MyMusic reduced tariff increases consumers' freedom of choice and well-being.

- 8 As regards the fact that the MyMusic reduced tariff gives preference to certain music applications over others, the applicant argues that through the MyMusic package subscribers may access the music services they generally use and that it is an open system which any other music services provider is free to join. However, it considers that it would not be feasible, because of the practical limitations involved, for the services package to include any music application anywhere in the world.
- 9 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.
- 10 The MyMusic reduced tariff 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. All internet access services must comply with the net neutrality requirement since, otherwise, internet access service providers could avoid compliance with that requirement by ensuring that only one package from their commercial offer to subscribers complied with that obligation.
- 11 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**

- 12 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.
- 13 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.
- 14 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.
- 15 The applicant does not deny that the MyMusic reduced tariff 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.

- 16 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.
- 17 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.