Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

15 September 2020 (*)

(Reference for a preliminary ruling – Electronic communications – Regulation (EU) 2015/2120 – Article 3 – Open internet access – Article 3(1) – Rights of end users – Right to access applications and services and to use them – Right to provide applications and services – Article 3(2) – Prohibition of agreements and commercial practices limiting the exercise of end users' rights – Concepts of 'agreements', 'commercial practices', 'end users' and 'consumers' – Assessment of whether the exercise of end users' rights is limited – Detailed rules – Article 3(3) – Obligation of equal and non-discriminatory treatment of traffic – Possibility of implementing reasonable traffic-management measures – Prohibition of measures blocking and slowing down traffic – Exceptions – Commercial practices consisting in offering packages which provide (i) that customers subscribing to them purchase a tariff entitling them to use a given data volume without restriction, without any deduction being made from that volume for using certain specific applications and services covered by 'a zero tariff' and (ii) that once the data volume has been used up, those customers 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)

In Joined Cases C-807/18 and C-39/19,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decisions of 11 September 2018, received at the Court on 20 December 2018 and 23 January 2019, respectively, in the proceedings

Telenor Magyarország Zrt.

v

Nemzeti Média- és Hírközlési Hatóság Elnöke,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, M. Vilaras, E. Regan, S. Rodin and I. Jarukaitis, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský (Rapporteur), L. Bay Larsen, F. Biltgen, A. Kumin, N. Jääskinen and N. Wahl, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 17 December 2019,

after considering the observations submitted on behalf of:

– Telenor Magyarország Zrt., by A. Losonci, P. Galambos and M. Orbán, ügyvéd,

– the Nemzeti Média- és Hírközlési Hatóság Elnöke, by I. Kun, acting as Agent,

– the Hungarian Government, initially by M.Z. Fehér and Zs. Wagner, and subsequently by M.Z. Fehér, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil and A. Brabcová, acting as Agents,

– the German Government, by J. Möller and D. Klebs, acting as Agents,

– the Netherlands Government, by M.K. Bulterman and M.J. Langer, acting as Agents,

– the Austrian Government, initially by G. Hesse and J. Schmoll, and subsequently by J. Schmoll, acting as Agents,

– the Romanian Government, initially by C.-R. Canţăr, E. Gane, R.I. Haţieganu and A. Wellman, and subsequently by E. Gane, R.I. Haţieganu and A. Wellman, acting as Agents,

– the Slovenian Government, by N. Pintar Gosenca and A. Dežman Mušič, acting as Agents,

– the Finnish Government, by M. Pere, acting as Agent,

– the European Commission, by G. Braun, L. Havas and L. Nicolae, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 March 2020,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 3 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).

2 The requests have been made in two sets of 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') concerning two decisions by which the latter ordered Telenor to terminate some of its internet access services.

Legal context

Regulation 2015/2120

3 Recitals 1, 3, 6 to 9 and 11 of Regulation 2015/2120 are worded as follows:

'(1) This Regulation aims to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users' rights. It aims to protect end users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation. …

…

(3) The internet has developed over the past decades as an open platform for innovation with low access barriers for end users, providers of content, applications and services and providers of internet access services. The existing regulatory framework aims to promote the ability of end users to access and distribute information or run applications and services of their choice. However, a significant number of end users are affected by traffic-management practices

which block or slow down specific applications or services. Those tendencies require common rules at the Union level to ensure the openness of the internet and to avoid fragmentation of the internal market resulting from measures adopted by individual Member States.

…

(6) End users should have the right to access and distribute information and content, and to use and provide applications and services without discrimination, via their internet access service. …

(7) In order to exercise their rights to access and distribute information and content and to use and provide applications and services of their choice, end users should be free to agree with providers of internet access services on tariffs for specific data volumes and speeds of the internet access service. Such agreements, as well as any commercial practices of providers of internet access services, should not limit the exercise of those rights and thus circumvent provisions of this Regulation safeguarding open internet access. 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. 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.

(8) 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. …

(9) 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. Reasonable traffic-management measures applied by providers of internet access services should be transparent, non-discriminatory and proportionate, and should not be based on commercial considerations. …

…

(11) Any traffic management practices which go beyond such reasonable traffic-management measures, by blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, or specific categories of content, applications or services, should be prohibited, subject to the justified and defined exceptions laid down in this Regulation. Those exceptions should be subject to strict interpretation and to 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. …'

4 Article 1 of Regulation 2015/2120, entitled 'Subject matter and scope', provides in paragraph 1 thereof:

'This Regulation establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users' rights.'

5 In accordance with Article 2 of Regulation 2015/2120, the definitions set out in Article 2 of

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33) apply for the purposes of that regulation.

6 Article 3 of Regulation 2015/2120, entitled ‘Safeguarding of open internet access’, states in paragraphs 1 to 3 thereof:

‘ 1. 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.

…

2. 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.

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.

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.

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.’

7 Article 5 of Regulation 2015/2120, entitled ‘Supervision and enforcement’, provides in the first subparagraph of paragraph 1 thereof:

‘National regulatory authorities shall closely monitor and ensure compliance with Articles 3 and 4, and shall promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. For those purposes, national regulatory authorities may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services.’

Directive 2002/21

8 Article 2 of Directive 2002/21 includes, inter alia, the following definitions:

‘(h) “user” means a legal entity or natural person using or requesting a publicly available electronic communications service;

(i) “consumer” means any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession

…

(n) “end user” means a user not providing public communications networks or publicly available electronic communications services;

…’

The disputes in the main proceedings and the questions referred for a preliminary ruling

9 Telenor, which is established in Hungary, is a major player in the information and communication technology sector. It provides internet access services in particular. The services offered to its potential customers include two packages known as ‘MyChat’ and ‘MyMusic’, respectively.

10 ‘My Chat’ is a package which enables subscribing customers, first, to purchase 1 GB of data and use it without restriction until that data has been used up, accessing freely the available applications and services. Moreover, the use of six specific online communication applications, namely Facebook, Facebook Messenger, Instagram, Twitter, Viber and Whatsapp, which are covered by a ‘zero tariff’, is not deducted from that 1 GB data limit. Secondly, the ‘My Chat’ package provides that once the 1 GB of data has been used up, subscribers may continue to use those six specific applications without restriction, whereas measures slowing down data traffic are applied to the other available applications and services.

11 ‘MyMusic’ is a package available in three different formats, ‘MyMusic Start’, ‘MyMusic Nonstop’ and ‘MyMusic Deezer’, respectively, which are accessible to customers with a pre-existing internet-access services package. Those formats enable subscribers, first, to listen to music online using four music streaming applications in particular – Apple Music, Deezer, Spotify and Tidal – and six radio services, and the use of those ‘zero tariff’ applications and services is not deducted from the data volume included in the format purchased. Secondly, the ‘MyMusic’ package provides that once that data volume has been used up, subscribers may continue to use those specific applications and services without restriction, whereas measures blocking or slowing down data traffic are applied to the other available applications and services.

12 After initiating two procedures to ascertain whether ‘MyChat’ and ‘MyMusic’, respectively, complied with Article 3 of Regulation 2015/2120, the Nemzeti Média- és Hírközlési Hatóság (National Media and Communications Office, Hungary; ‘the Office’) adopted two decisions in which it found that those packages introduced traffic-management measures which did not comply with the obligation of equal and non-discriminatory treatment laid down in Article 3(3) of that regulation and that Telenor had to put an end to those measures.

13 Those two decisions were subsequently upheld by two decisions of the President of the Office, who found, in particular, that in order to examine whether the traffic-management measures were compatible with Article 3(3) of Regulation 2015/2120 it was not necessary to assess the effect of those measures on the exercise of end users’ rights set out in Article 3(1) of that regulation.

14 Telenor brought proceedings against both those decisions of the President of the Office before the

Fővárosi Törvényszék (Budapest High Court, Hungary).

15 In that context, Telenor submits, in essence, that the 'MyChat' and 'MyMusic' packages form part of agreements concluded with its customers and may, as such, be covered only by Article 3(2) of Regulation 2015/2120, to the exclusion of Article 3(3) of that regulation which is directed solely at traffic-management measures implemented unilaterally by providers of internet access services. Furthermore, in any event, in order to ascertain whether those packages are compatible with Article 3(3) of Regulation 2015/2120, Telenor argues that it is necessary, as when examining whether they are compatible with Article 3(2) of that regulation, to assess their effects on the exercise of end users' rights. Consequently, the packages cannot be considered to be incompatible with Article 3(3) of Regulation 2015/2120 solely because they establish traffic-management measures which do not comply with the obligation of equal and non-discriminatory treatment, laid down in that provision, as the President of the Office found.

16 The President of the Office counters, in particular, that the question which is the provision of Article 3 of Regulation 2015/2120 in the light of which a given form of conduct must be examined depends not on the formal nature of that conduct, but on its content. In addition, the President contends that, unlike Article 3(2) of that regulation which requires an assessment to be made of the effects, on the exercise of end users' rights, of the agreements and commercial practices put in place by providers of internet access services, Article 3(3) prohibits all unequal or discriminatory traffic-management measures, and it is irrelevant to distinguish between such measures introduced through an agreement between an end user and a provider and those based on a provider's commercial practice. Furthermore, all such unequal or discriminatory measures are prohibited in themselves, and there is, therefore, no need to assess their effects on the exercise of end users' rights.

17 Having noted that Regulation 2015/2120 is intended to ensure internet neutrality and is of considerable importance in that respect, the referring court considers, in essence, that the disputes pending before it raise two sets of novel legal issues relating to a central provision of that regulation.

18 In that regard, it notes, first, that while Article 3(1) and (2) of Regulation 2015/2120 safeguards a number of rights for end users of internet access services and prohibits providers of such services from putting in place agreements or commercial practices limiting the exercise of those rights, Article 3(3) lays down a general obligation of equal and non-discriminatory treatment of traffic. However, it cannot be determined from the wording of that regulation whether packages made available by a provider of internet access services through agreements concluded with its customers and which provide (i) that those customers may benefit from a 'zero tariff' enabling them to use certain specific applications and services without restriction, without that use being deducted from the data volume purchased, and (ii) that once that data volume has been used up, measures blocking or slowing traffic are to be applied to the other applications and services available, fall within the scope of Article 3(2), Article 3(3) or Article 3(2) and (3) of that regulation.

19 Secondly, the referring court notes that it cannot also be ascertained from the wording of Article 3(2) and (3), once it has been determined which of those paragraphs 2 and 3 are applicable to such conduct, what methodology must be applied in order to determine whether that conduct is compatible with Regulation 2015/2120.

20 In those circumstances the Fővárosi Törvényszék (Budapest High Court, Hungary) decided to stay the proceedings and to refer the following questions, which are worded identically in Cases C-807/18 and C-39/19, to the Court of Justice for a preliminary ruling:

'(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 2015/2120]?

(2) If the first question referred is answered in the negative, must Article 3(3) of [Regulation 2015/2120] be interpreted as meaning that – having regard also to recital 7 of that 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 that regulation confers on the end user?

(3) Notwithstanding the first and second questions referred for a preliminary ruling, must Article 3(3) of [Regulation 2015/2120] 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 provider of internet access services 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 [Regulation 2015/2120] also be found to exist solely on the basis that there is discrimination, without the further need for a market and impact evaluation, with the result that an evaluation under Article 3(1) and (2) of the regulation is unnecessary in such circumstances?'

21 By decision of the President of the Court of 8 March 2019, Cases C-807/18 and C-39/19 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

22 By its four questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 3 of Regulation 2015/2120 must be interpreted as meaning that packages made available by a provider of internet access services through agreements concluded with end users, and (i) under which end users may purchase 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 covered by 'a zero tariff' 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, are incompatible with Article 3(2) of Regulation 2015/2120, read in conjunction with Article 3(1) of that regulation, and, alternatively or cumulatively, with Article 3(3) thereof.

23 In accordance with Article 3(2) of Regulation 2015/2120, first, agreements concluded between providers of internet access services and end users and, secondly, commercial practices conducted by those providers, must not limit the exercise of end users' rights as laid down in Article 3(1) of that regulation. Those rights include, as is apparent from Article 3(1), clarified by recital 6 of Regulation 2015/2120, the right to use content, applications and services via an internet access service and the right to provide such content, applications and services via that same service.

24 For its part, the first subparagraph of Article 3(3) of Regulation 2015/2120 provides, first of all, that providers of internet access services must treat all traffic equally without discrimination, restriction or interference, irrespective, inter alia, of the applications or services used.

25 The second subparagraph of Article 3(3) goes on to state that the first subparagraph of Article 3(3) must not prevent providers of internet access services from implementing reasonable traffic-management measures, and clarifies that, in order to be deemed to be reasonable, such measures, must, first, be transparent, non-discriminatory and proportionate, secondly, must not be based on

commercial considerations but on objectively different technical requirements of specific categories of traffic and, thirdly, must not monitor content or be maintained for longer than necessary.

26 Lastly, the third subparagraph of Article 3(3) states that providers of internet access services must not engage in traffic-management measures going beyond those set out in the second subparagraph of Article 3(3), and must not in particular block, slow down, alter, restrict, interfere with, degrade or discriminate between specific applications or services, or specific categories thereof, except as necessary, for a fixed period, in order to (i) comply with Union legislative acts, national legislation that complies with Union law or measures giving effect to such Union legislative acts or national legislation, (ii) preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end users or (iii) prevent network congestion and mitigate the effects thereof.

27 As is apparent from Article 1 of Regulation 2015/2120, and as the Advocate General observed in points 27 to 29 of his Opinion, those various provisions of that regulation seek to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users' rights.

28 Since compliance with those provisions and thus with the objectives pursued by Regulation 2015/2120 is ensured, according to Article 5 of that regulation, by the national regulatory authorities, it is for those authorities – subject to review by the national courts and in the light of the clarifications provided by the Court of Justice – to determine on a case-by-case basis whether the conduct of a given provider of internet access services, having regard to its characteristics, falls within the scope of Article 3(2) or Article 3(3) of that regulation, or both provisions cumulatively, and in the latter case the authorities commence their examination with one or other of those provisions. Where a national regulatory authority considers that a particular form of conduct on the part of a given provider of internet access services is incompatible in its entirety with Article 3(3) of Regulation 2015/2120, it may refrain from determining whether that conduct is also incompatible with Article 3(2) of that regulation.

29 In the present case, it is apparent from the information before the Court that the packages at issue in the main proceedings have four characteristics, as may be seen from the wording of the questions referred for a preliminary ruling and from the statements in the two orders for reference summarised in paragraphs 9 to 11 and 18 above. First, the provider of internet access services which designed the packages offers them for sale to its potential customers in Hungary, before implementing them by means of bilateral contracts concluded with interested customers. Secondly, those packages give each customer subscribing to them the right to use without restriction, up to the data limit included in the tariff which he or she purchased from the provider, all the applications and services available, and the use of certain specific applications and services covered by a 'zero tariff' is not deducted from that limit. Thirdly, the packages provide that once the data volume purchased has been used up, any customer who has subscribed to them may continue to use those specific applications and services without restriction. Fourthly, once the data volume included in the package subject to those conditions has been used up, the provider of internet access services applies to each customer concerned measures blocking or slowing down the traffic arising from the use of any non-zero tariff application or service.

30 As regards, in the first place, Article 3(2) of Regulation 2015/2120, read in conjunction with Article 3(1) of that regulation, it must be observed at the outset that Article 3(1) provides that the rights which it safeguards for end users of internet access services are intended to be exercised 'via their internet access service', and that Article 3(2) requires that such a service does not entail any limitation of the exercise of those rights.

31 In addition, it follows from Article 3(2) of Regulation 2015/2120, read in the light of recital 7 of that regulation, that the services of a given provider of internet access services must be assessed in the light of that requirement by the national regulatory authorities acting on the basis of Article 5 of

that regulation, subject to review by the competent national courts, and taking into consideration both the agreements concluded by that provider with end users and the commercial practices in which it engages.

32 In that regard, it must be pointed out, first, that Article 3(2) of Regulation 2015/2120 refers to 'agreements' by which a provider of internet access services, on the one hand, and an end user, on the other, agree on the commercial and technical conditions and the characteristics of the internet access services to be provided by the service provider to the end user, such as the price and corresponding data volume and speed.

33 As is apparent from recital 7 of Regulation 2015/2120, those agreements give concrete expression to the freedom of every end user to choose the services through which he or she intends to exercise the rights safeguarded by that regulation, according to their characteristics. That same recital adds, however, that such agreements must not limit the exercise of end users' rights and thereby circumvent the provisions of that regulation safeguarding open internet access.

34 As regards the 'commercial practices' referred to in Article 3(2) of Regulation 2015/2120, that provision states that they are to be 'conducted' by providers of internet access services. They are not, therefore, supposed to reflect a concordance of wills between such a provider and an end user, unlike the 'agreements' to which that provision also refers.

35 Such commercial practices may include, in particular, the conduct of a provider of internet access services which consists in offering specific variants or combinations of those services to its potential customers, in order to meet the expectations and preferences of each customer, and, if necessary, conclude an individual agreement with them. This may mean that a greater or lesser number of agreements of the same or similar content are put in place, depending on those expectations and preferences. Like the agreements referred to in Article 3(2) of Regulation 2015/2120, those commercial practices must not, however, limit the exercise of end users' rights and thereby circumvent the provisions of that regulation safeguarding open internet access.

36 Secondly, it follows from Article 2 of Regulation 2015/2120 and from the provisions of Directive 2002/21 to which that article refers – in particular from Article 2(h), (i) and (n) of that directive – that the concept of 'end user' encompasses all legal entities or natural persons using or requesting a publicly available electronic communications service, other than those persons providing public communications networks or publicly available electronic communications services. Accordingly, the concept of 'end user' refers to both consumers and professional entities such as undertakings or non-profit organisations.

37 Furthermore, the concept of 'end user' includes both natural and legal persons who use or request internet access services in order to access content, applications and services, as well as those who rely on internet access to provide content, applications and services.

38 Article 3(1) of Regulation 2015/2120 and recital 6 of that regulation also refer specifically to both those categories of end user, whose rights they assert in particular to access information and content and use applications and services, but also to distribute information and content and provide applications and services.

39 It follows that the possible existence of a prohibited limitation of the exercise of end users' rights, as set out in paragraph 30 above, must be assessed by taking into account the effects of the agreements or commercial practices of a given provider of internet access services on the rights not only of professionals and consumers who use or request internet access services in order to access content, applications and services, but also of professionals who rely on such internet access services in order to provide such content, applications and services. In that regard, it is apparent from recital 7 of Regulation 2015/2120 that, when assessing the agreements and commercial practices of the provider in question, it is indeed necessary to take into account, inter alia, the market positions of that category of professional.

40 Thirdly, in a good many language versions, Article 3(2) of Regulation 2015/2120 uses the plural when referring, in the context described in the preceding paragraph, to the ‘agreements’ and ‘commercial practices’ of a given provider of internet access services.

41 Furthermore, recital 7 of Regulation 2015/2120 makes clear that the assessment of whether the exercise of end users’ rights is limited involves determining whether the agreements and commercial practices of such a provider lead, by reason of their ‘scale’, to situations where end users’ choice is materially reduced, taking into account, in particular, the respective market positions of the providers of internet access services and of the providers of content, applications and services that are involved.

42 It follows that the intention of the EU legislature was not to limit the assessment of the agreements and commercial practices of a given provider of internet access services to a particular agreement or commercial practice, taken individually, but to provide for an overall assessment also to be carried out of that provider’s agreements and commercial practices.

43 In the light of those various factors, it must be found, first of all, that an agreement by which a given customer subscribes to a package whereby once the data volume included in the tariff purchased has been used up, that customer has unrestricted access only to certain applications and services covered by a ‘zero tariff’, is liable to entail a limitation of the exercise of the rights set out in Article 3(1) of Regulation 2015/2120. Whether such an agreement is compatible with Article 3(2) of that regulation must be assessed on a case-by-case basis, in the light of the parameters set out in recital 7 of that regulation.

44 Next, such packages, which fall within the scope of a commercial practice within the meaning of Article 3(2) of Regulation 2015/2120, are, in the light of the cumulative effect of the agreements to which they may lead, liable to increase the use of certain specific applications and services, namely those which may be used without restriction on a ‘zero tariff’ once the data volume included in the tariff purchased by customers has been used up, and are, accordingly, liable to reduce the use of the other applications and services available, having regard to the measures by which the provider of the internet access services makes that use technically more difficult, if not impossible.

45 Lastly, the greater the number of customers concluding subscription agreements to such packages, the more likely it is that, given its scale, the cumulative effect of those agreements will result in a significant limitation of the exercise of end users’ rights, or even undermine the very essence of end users’ rights, a situation expressly referred to in recital 7 of Regulation 2015/2120.

46 It follows that the conclusion of such agreements on a significant part of the market is liable to limit the exercise of end users’ rights, within the meaning of Article 3(2) of Regulation 2015/2120.

47 In the second place, as regards Article 3(3) of Regulation 2015/2120, it should be noted, first of all, that, as is apparent from paragraph 24 above, the first subparagraph of that provision, read in the light of recital 8 of that regulation, imposes on providers of internet access services a general obligation of equal treatment, without discrimination, restriction or interference with traffic, from which derogation is not possible in any circumstances by means of commercial practices conducted by those providers or by agreements concluded by them with end users.

48 Next, it is apparent from the second subparagraph of Article 3(3) of Regulation 2015/2120, and from recital 9 of that regulation in the light of which it must be read, that, while being required to comply with that general obligation, providers of internet access services are still able to adopt reasonable traffic-management measures. However, that possibility is subject to the condition, inter alia, that such measures are based on ‘objectively different technical quality of service requirements of specific categories of traffic’, and not on ‘commercial considerations’. In particular, any measure of a provider of internet access services in respect of an end user as defined in paragraphs 36 and 37 above, which, without being based on such objective differences, results in the content, applications or services offered by the various content, applications or services providers not being treated

equally and without discrimination, must be regarded as being based on such 'commercial considerations'.

49 Lastly, it follows from the third subparagraph of Article 3(3) of Regulation 2015/2120 that, unless they have been adopted for a fixed period and are necessary to enable a provider of internet access services (i) to comply with a legal obligation, (ii) to preserve the integrity and security of the network or (iii) to prevent or remedy network congestion, all measures consisting in blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific applications or services cannot be considered reasonable within the meaning of the second subparagraph of Article 3(3) and must, therefore, in themselves be regarded as incompatible with Article 3(3).

50 Accordingly, in order to make that finding of incompatibility, no assessment of the effect of those measures on the exercise of end users' rights is required, since Article 3(3) of Regulation 2015/2120 does not lay down such a requirement for the purpose of assessing whether the general obligation which it prescribes has been complied with.

51 In the present case, first, the conduct at issue in the main proceedings includes measures blocking or slowing down traffic related to the use of certain applications and services, which fall within the scope of Article 3(3) of Regulation 2015/2120, irrespective of whether those measures stem from an agreement concluded with the provider of internet access services, from that provider's commercial practice or from a technical measure of that provider unrelated either to an agreement or a commercial practice. Those measures blocking or slowing down traffic are applied in addition to the 'zero tariff' enjoyed by the end users concerned, and make it technically more difficult, if not impossible, for end users to use applications and services not covered by that tariff.

52 Consequently, those measures appear to be based not on objectively different technical quality of service requirements for specific categories of traffic but on commercial considerations.

53 Secondly, there is no evidence in the file before the Court that those measures fall within one of the three exceptions exhaustively listed in the third subparagraph of Article 3(3) of Regulation 2015/2120.

54 In the light of all the foregoing considerations, the answer to the questions referred is that Article 3 of Regulation 2015/2120 must be interpreted as meaning that packages made available by a provider of internet access services through agreements concluded with end users, and under which (i) end users may purchase a tariff entitling them to use a specific volume of data without restriction, without any deduction being made from that data volume for using certain specific applications and services covered by 'a zero tariff' 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:

– are incompatible with Article 3(2) of Regulation 2015/2120, read in conjunction with Article 3(1) of that regulation, where those packages, agreements, and measures blocking or slowing down traffic limit the exercise of end users' rights, and

– are incompatible with Article 3(3) of that regulation where those measures blocking or slowing down traffic are based on commercial considerations.

Costs

55 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 3 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 must be interpreted as meaning that packages made available by a provider of internet access services through agreements concluded with end users, and under which (i) end users may purchase a tariff entitling them to use a specific volume of data without restriction, without any deduction being made from that data volume for using certain specific applications and services covered by 'a zero tariff' 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:

– **are incompatible with Article 3(2) of Regulation 2015/2120, read in conjunction with Article 3(1) of that regulation, where those packages, agreements, and measures blocking or slowing down traffic limit the exercise of end users' rights, and**

– **are incompatible with Article 3(3) of that regulation where those measures blocking or slowing down traffic are based on commercial considerations.**

[Signatures]

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* Language of the case: Hungarian.