



Zero-Rating and EU Net Neutrality Rules

**Review of the European Court of
Justice's Ruling in Cases C-807/18 and
C-39/19 (Telenor Hungary)**

21 September 2020

The Development

- On 15 September 2020, the European Court of Justice (ECJ) delivered a preliminary reference ruling which confirms that EU regulation on net neutrality precludes an internet access provider from:
 - Favouring certain applications/services by means of subscription packages enabling those applications/services to benefit from a zero tariff (so called “zero-rating”)
 - Making the use of the other applications/services subject to measures blocking or slowing down traffic
- This is the first time that the ECJ has been called upon to interpret EU Regulation 2015/2120 (the Net Neutrality Regulation) since its adoption in 2015.
 - Zero-rating, which is not specifically addressed in the Net Neutrality Regulation, is a practice in which electronic communication network operators offer certain apps and services that do not count towards a consumer’s monthly data allowance.
- The ECJ bases its findings on the principle of equal treatment and confirms that national regulatory authorities do not need to assess the effects of practices on end users’ rights to establish an infringement of the Net Neutrality Regulation.
- All zero-rating practices require careful review following this judgment.

Telenor’s Zero-Rated Subscriptions

- Telenor offered two types of zero-rated subscriptions to its potential customers in Hungary.
 - “My Chat”: 1 GB of data that could be used freely for all available applications and services. The use of six specific online communication applications did not count towards the data limit. Once the 1 GB limit of data was used up, subscribers could continue to use those six specific applications without restriction, whereas measures slowing down data traffic were applied to the other available applications and services.
 - “MyMusic”: A package allowing customers to listen to music online subject to a data limit. The use of certain music streaming applications and radio services were not deducted from the data limits, and, once the data volume had been used up, subscribers could continue to use those specific applications and services without restriction, whereas measures blocking or slowing down data traffic were applied to the other available applications and services.



The Preliminary Ruling Request

- The Hungarian National Media and Communications Office (the Office) adopted two decisions that held both subscriptions introduced traffic-management measures which infringed the general obligation of equal and non-discriminatory treatment of traffic laid down in the Net Neutrality Regulation, and that Telenor had to discontinue the subscriptions.
- The President of the Office upheld these decisions, finding that, in order to examine whether the traffic-management measures were compatible with the Net Neutrality Regulation, it was not necessary to assess the effect of those measures on the exercise of end users' rights.
- Telenor challenged the President of the Office's decisions before the Budapest High Court. The Court decided to stay proceedings and refer a number of questions to the ECJ for a preliminary ruling.

The Net Neutrality Regulation

- The Net Neutrality Regulation entered into force on 29 November 2015 and has been applicable since 30 April 2016. The Net Neutrality 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. The Net Neutrality Regulation aims to protect end users and simultaneously guarantee the continued functioning of the internet ecosystem as an engine of innovation.
- Article 3(1) provides for the basic right to open internet access for end users.
- Article 3(2) prohibits agreements and commercial practices that limit the right to open internet access for end users.
 - According to the Recitals to the Net Neutrality Regulation, regulators should be empowered to intervene if agreements or practices “by reason of their scale, lead to situations where end-users choice is materially reduced in practice, thereby circumventing the objectives of the Net Neutrality Regulation” and should be required to intervene when such agreements or practices would result in “the undermining of the essence of end user rights.”
- Article 3(3) provides rules related to traffic management and describes when traffic management measures are considered reasonable, as well as any justifications for limitations or differentiation going beyond such measures pursuant to national legislation or court orders, integrity/security of the network and congestion.

The Ruling

The ECJ ruled as follows.

Article 3 (2) – Agreements limiting end users' rights

- The conclusion of agreements on a significant part of the market 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 limit the exercise of end users' rights within the meaning of Article 3 (2).
 - In the light of the potential cumulative effect of the agreements, such packages are likely to increase the use of certain specified applications/services (those on a zero tariff once the data volume has been used up), and are liable to reduce the use of other applications/services available (since access to these services may be more technically difficult, if not impossible).
 - The greater the number of customers concluding subscription agreements to such packages, the more likely 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.

Article 3 (3) – Traffic management

- Article 3 (3) imposes on internet access service providers 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.
- While being required to comply with that general obligation, internet access service providers are still able to adopt reasonable traffic-management measures.
 - However, that possibility is subject to the condition that such measures are based on “objectively different technical quality of service requirements of specific categories of traffic”, and not on “commercial considerations”.
 - Any internet access service providers' measure in respect of an end user, which, without being based on such objective differences, results in the content, applications, or services offered by the various content, applications, or service providers not being treated equally and without discrimination, must be regarded as being based on such commercial considerations.
- Unless measures 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 and will, therefore, be regarded as incompatible with Article 3 (3).
- In order to determine a finding of incompatibility, no assessment of the effect of those measures on the exercise of end users' rights is required.



Source

A copy of [the judgment](#) is available online.

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