The Court of Justice of the European Union on Net Neutrality: Interpretation of Article 3 of Regulation 2015/2120 as regards a Discriminatory Traffic Management Measures Decision

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The Court of Justice of the European Union ("***CJEU***"), in its recent decision with regard to the two joint cases (C-807/18 and C-39/19) brought before it for preliminary ruling, addressed how incompatibility with net neutrality shall be assessed under the relevant legislation regarding open internet access. In order to analyse this decision, we will first explain what net neutrality is and briefly discuss its possible links with the competition law. We will then move on to the relevant legislation surrounding the net neutrality. Lastly, we will discuss the aforementioned preliminary ruling of the CJEU and conclude.

What is Net Neutrality?

Currently, there is no universal consent on the definition of net neutrality.[1] Different approaches relating to different cases reveal more than one aspect of the term. In this context, using it as an umbrella term that covers different regulatory obligations could be helpful for the purpose of definition. Net neutrality is a term that encompasses the varying levels of unequal treatment to online traffic, from excessive and unreasonable, to the more moderate forms of discrimination, under the traffic management practices of internet service providers ("***ISPs***").[2] Within the framework, net neutrality can be defined as a public policy principle for the ISPs to uphold: the equal treatment to all online content and applications.[3] In brief, net neutrality is a dynamic concept and is shaped by the developments and needs of the technology sector.

[1] Gürkaynak G., Özgün İ., Bakanoğulları U., *Competing Bits: Net Neutrality, Zero Rating and Competition Law*, The Academic Gift Book of ELIG, Attorneys-at-Law in Honor of the 20th Anniversary of Competition Law Practice in Turkey, Legal Yayıncılık A.Ş., 2018, p. 31

[2] Dr. Maniadaki K., *Net Neutrality Regulation in the EU*, Journal of European Competition Law & Practice, 2019, p. 1

[3] Legorreta S., Spears N., Boyajian V., Daubert T., Bennett J., Pioli C.L., Elshof M., Bingham C., *Net Neutrality And Zero Rating – Where Is The Mexican Regulation Of Network, Isps And Otts Heading?*, Mondaq, 2020

Net Neutrality in Scope of Competition Law

A good starting point to assess net neutrality's relationship with competition law would be the fundamental principles set forth under Articles 101 and 102 of Treaty on the Functioning of the EU ("***TFEU***"). Article 101 prohibits all agreements and concerted practices between undertakings which may result in the distortion of trade between the Member States and competition within the relevant market.[4] Therefore, this is the relevant provision to be applied, for example, when an agreement or concerted practice between the ISPs and other content providers (*i.e.*, the applications, services, etc.) is assessed. Alternatively, if the assessment is focused on a dominant ISP favouring its vertically integrated application service providers ("***ASPs***"), the provision to visit is Article 102 of the TFEU on the abuse of dominant position, which prohibits exclusionary and discriminatory unilateral conducts by dominant undertakings in their relevant markets.[5]

That said, it should be noted that competition law is not a suitable medium to address all traffic management practices that may be deemed as contrary to a net neutrality policy. That is to say, a given practice of an ISP could be contrary to a net neutrality policy, whereas it may actually be permissible under the competition law rules. For example, agreements between ISPs and independent ASPs, which would require ISPs to favour the traffic generated by these ASPs would probably not fall within the scope of Article 101 of the TFEU, unless such agreements envisage some form of exclusivity. Similarly, the ISPs` preferential treatment to their own traffic may only be evaluated under Article 102 of the TFEU, in case the said ISPs hold a dominant position in the relevant upstream markets. In the same vein, the ISPs unilateral decisions to offer certain packages that favour the traffic generated by independent ASPs to which their subscribers attach greater value, may only lead to a secondary line discrimination and it is well known that such unilateral conduct would rarely be deemed as anti-competitive, especially if it is designed in accordance with the preferences of end-users and are merely presented as options, without strict impositions.

Moreover, since those practices that have a positive overall impact on efficiency and increase consumer welfare would not infringe articles 101 or 102 of the TFEU, many traffic

[4] See for full text: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E101
[5] See for full text: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E102

management practices would still be compatible with competition law, even if they require unequal treatment of certain online traffic. Hence, it would not be unreasonable to argue that the relation between competition law and net neutrality would be reserved to fringe cases where the unequal treatment of online traffic constitutes a manifestation of market power and leads to exclusion of equally efficient competitors. This is why the issue of net neutrality is addressed by specific regulations that do not necessarily take into consideration the efficiency dimension of traffic management practices, and focus primarily on the openness of the internet.

Relevant Regulation

The relevant legislation, on which the Budapest High Court requested interpretation from the CJEU, is Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 ("***Regulation***") laying down measures concerning open internet access. Paragraph 1 of the Regulation`s preamble explains its two main objectives as "… *to protect end users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation.*" Article 3(1) entitled "Safeguarding of Open Internet Access" is about end users'[6] rights to access and distribute content, enjoy applications and services of their own choice, without being subject to certain conditions imposed by ISPs. Article 3(2) prohibits agreements between ISPs, and unilateral commercial practices of the ISPs that would result in the restriction of end users' rights laid down in Article 3(1). Article 3(3) sets out a general rule regarding net neutrality, stating that ISPs shall treat all traffic equally when providing internet access.

Article 3(3) also allows ISPs to implement reasonable traffic-management measures. Reasonable measures, in this context, mean transparent, proportionate and non-discriminatory measures which are based on objective quality requirements. Such measures shall not be based on commercial considerations, monitor the specific content or be maintained for longer than necessary.

[6] Article 2 of the Regulation refers to and incorporates the definitions under Directive 2002/21/EC, wherein the term "end user" is defined as a user not providing public communications networks or publicly available electronic communications services.

A Summary of the Case

Telenor Magyarország Zrt. ("***Telenor***"), a major mobile operator in Hungary, offers its customers 1 GB of unrestricted data, with free access to the available applications and services ("***Packages***"). In addition, the required data for using ten pre-determined online communication applications and six radio services (together "***Free Applications and Services***") is not deducted from that 1 GB. If the 1 GB of data runs out, subscribers may continue to use the Free Applications and Services without restriction, whereas other applications and services would be subject to measures that slow down the data traffic.

After initiating two procedures to ascertain whether the Packages comply with Article 3 of the Regulation, National Media and Communications Office of Hungary ("***Office***") adopted two decisions, which were subsequently upheld by the President of the Office. As such, the President of the Office found that the Packages do not comply with the obligation of equal and non-discriminatory treatment laid down in Article 3(3) of the Regulation, and that Telenor has to put an end to those measures. The decision further stated that an effect-based evaluation is not necessary to find out that the concerned measures are incompatible with Article 3 of the Regulation.

Telenor brought proceedings against both decisions of the President of the Office before the Budapest High Court, submitting that the Packages are part of the agreements concluded with its customers and may, as such, be covered only by Article 3(2) of Regulation, to the exclusion of Article 3(3) which is directed solely at traffic-management measures implemented unilaterally by ISPs. Furthermore, in any event, in order to ascertain whether the Packages are compatible with Article 3(3), Telenor argued that it is necessary to assess their effects on the exercise of end users' rights. Telenor therefore argued that the Packages cannot be considered to be incompatible with Article 3(3) 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.

Budapest High Court stayed the proceedings and referred several questions to the CJEU for a preliminary ruling. The referring court asked, in essence, whether Article 3 must be interpreted as meaning that packages made available by an ISP through agreements concluded

with end users are incompatible with Article 3(2), read in conjunction with Article 3(1) of the Regulation, and, alternatively or cumulatively, with Article 3(3) thereof.

What did the CJEU decide?

As stated in Article 5 of the Regulation, it is for the national regulatory authorities – subject to judicial review– to determine on a case-by-case basis whether the conduct of an ISP, having regard to its characteristics, falls within the scope of Article 3(2) or Article 3(3), or both provisions cumulatively, and in the latter case the authorities commence their examination with either of those provisions. Where a national regulatory authority considers that a particular form of conduct on the part of an ISP is incompatible in its entirety with Article 3(3), it may refrain from determining whether that conduct is also incompatible with Article 3(2).

Whether there is a prohibited limitation of the exercise of end users' rights, as laid down in Article 3(1), must be assessed by taking into account the effects of the agreements (*i.e.*, any material reduction regarding end users' choice) or commercial practices of a given ISP. When assessing the agreements and commercial practices of an ISP, it is essential to take into account, among others, the market positions of the ISP and of the providers of content.

In order to make a finding of incompatibility under Article 3(3), no assessment of the effect of those measures on the exercise of end users' rights is required, since Article 3(3) does not lay down such a requirement for the purpose of assessing whether the general obligation it prescribes has been complied with. In the present case, first, the conduct at issue in the main proceedings includes measures blocking or slowing down traffic for the use of certain applications and services, which fall within the scope of Article 3(3), irrespective of whether those measures stem from an agreement concluded with the ISP, or from the ISP's commercial practice, or from a technical measure of that provider, unrelated either to an agreement or a commercial practice.

The answer of the CJEU to the questions referred is that, as per Article 3 of the Regulation, packages made available by an ISP through agreements concluded with end users are incompatible with Article 3(2) and it must be read in conjunction with Article 3(1), where those packages, agreements, and measures amount to blocking or slowing down of traffic,

thereby limiting the exercise of end users' rights. It is further laid down that where such measures that amount to blocking or slowing down of traffic are based on commercial considerations, these practices are also incompatible with Article 3(3).

Conclusion

The issues surrounding net neutrality in the case at hand were assessed under the Regulation, which, at least on its face, contains provisions aiming, *inter alia*, to safeguard the openness of the internet and create a level playing field among the ASPs. It is important to note that there is a critical difference between the aims pursued by the Regulation and those pursued by articles 101 and 102 of the TFEU. The former focuses exclusively on the freedom to compete, disregarding whether certain practices that might reduce this freedom would actually create a more efficient marketplace, and is against any practices that may render the internet less accessible. The latter, on the other hand, seeks to analyse the effects of the relevant conducts on equally efficient competitors, and is ultimately concerned with the preservation of effective competition that would yield best outcomes for consumers, even if that may mean a reduction in the openness of the internet. That said, whether a given practice's possible effects on fundamental freedoms should be taken into consideration by the competition authorities in assessing such practice's outcome for consumers, would be another discussion. The more the competition authorities take into consideration the fundamental freedoms in that regard, the more converged the aims of the Regulation and of Articles 101 and 102 become.

In this regard, the effects of the measures in question imposed by Telenor on the customers were not taken into consideration by the President of the Office, and this approach was approved by the CJEU. Indeed, if the aims of the Regulation were completely aligned with those of competition law, the concerned authority would have analysed the effects of the measures in question on consumer welfare thoroughly, before ruling as to whether such measures should be prohibited. As such, the case at hand demonstrates that a practice of a mobile operator that touches the issue of net neutrality, may be prohibited by sector-specific regulations concerning the net neutrality, although it might be perfectly compatible with Articles 101 and 102 of the TFEU.

By providing the aforesaid answers regarding a rather novel concept, the CJEU shed light on how compliance with net neutrality shall be assessed, under the Regulation.

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