

*Andrzej Nałęcz*

University of Warsaw, Poland

e-mail: [a.nalecz@uw.edu.pl](mailto:a.nalecz@uw.edu.pl)

ORCID: 0000-0003-0553-2084

**END USER RIGHTS, EQUAL TREATMENT OF  
TRAFFIC, AND COMPATIBILITY OF ZERO TARIFF  
OFFERS WITH THE OPEN INTERNET ACCESS  
REGULATION. CJEU TELENOR JUDGMENT IN CASES  
C-807/18 AND C-39/19 – A CASE COMMENT**

**Abstract**

This case comment concerns the judgment of the Court of Justice of the European Union in the *Telenor* case. The CJEU responded to a request for a preliminary ruling by the Budapest High Court, which related to the use of zero tariff offers in commercial practices and agreements on internet access services. Zero tariffs consist in the traffic generated by specific applications or services not counting towards deductions in an end user's data allowance in a given billing period. The CJEU came to the conclusion that such offers are incompatible with Article 3(3) of Regulation 2015/2120 on open internet access, if they involve traffic management measures blocking or slowing down all internet content other than the content subject to a zero tariff, once an end user's data allowance has been exhausted. Finding this incompatibility does not require an assessment of the scale of the practice, and its influence on end user rights. Such an assessment would be necessary to establish incompatibility with Article 3(2) of Regulation 2015/2120. However, finding incompatibility with Article 3(3) makes it possible for national regulatory authorities to refrain from analyzing incompatibility with Article 3(2).

## KEYWORDS

zero-rating, traffic management, internet access service, network neutrality

## SŁOWA KLUCZOWE

zero-rating, zarządzanie ruchem, usługa dostępu do internetu, neutralność sieciowa

## 1. INTRODUCTION

In the *Telenor* case,<sup>1</sup> the Court of Justice of the European Union (CJEU) addressed for the first time one of the many controversial issues under the 2015/2120 open internet regulation:<sup>2</sup> the compatibility of zero tariff offers with Article 3(2) and (3) of said regulation. This case comment provides a brief overview of Regulation 2015/2120 and the applicability of its provisions to the analysis of zero tariff offers as perceived before the CJEU judgment in the *Telenor* case. Then the case comment presents the CJEU judgment in the *Telenor* case and finally provides a discussion and conclusions on the judgment's merits.

## 2. REGULATION 2015/2120 AND ZERO TARIFFS WITHIN ITS FRAMEWORK

The Regulation 2015/2120 was prepared under the influence of the concept of network neutrality (also known as 'net neutrality' in the literature),<sup>3</sup> and it aims to safeguard open internet access. Network neutrality generally forbids provid-

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<sup>1</sup> Judgement of the EU Court of Justice of 15 September 2020, *Telenor Magyarország Zrt. v Nemzeti Média- és Hírközlési Hatóság Elnöke* (Joined Cases C-807/18 and C-39/19), ECLI:EU:C:2020:708.

<sup>2</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No 531/2012. ELI: <http://data.europa.eu/eli/reg/2015/2120/2020-12-21>. Henceforth: Regulation 2015/2120.

<sup>3</sup> C. T. Marsden, *Better Regulation of Net Neutrality: A Critical Analysis of Zero Rating Implementation in India, the United States and the European Union*, (in:) L. Belli (ed.), *Net Neutrality Reloaded: Zero Rating, Specialized Service, Ad Blocking and Traffic Management*, Rio de Janeiro 2016, pp. 70–71.

ers of internet access services from restricting what end users of those services do with their network connection.<sup>4</sup> In other words, network neutrality prescribes “that Internet users can freely choose online content, applications, services and devices without being influenced by discriminatory delivery of Internet traffic.”<sup>5</sup> In the spirit of network neutrality, Article 1(1) of Regulation 2015/2120 states that it “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 internet access service itself has been defined in Article 2 as “a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used.” Thus, any internet access service should effectively allow access to all internet content, and any content may be unavailable in the service only for reasons not conditional upon the actions of the provider of internet access services.<sup>6</sup> Article 3(1) establishes the rights of end users of internet access services: “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.” The cited provision does not differentiate between end users who consume or provide internet content or engage in both activities. Thus, all end users enjoy the same rights under Regulation 2015/2120, be they end users in households or businesses providing internet content for consumption by others.<sup>7</sup>

Under Article 3(2) of Regulation 2015/2120, “[a]greements 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.” The provision confirms the freedom to contract of both providers and end users of internet access services.<sup>8</sup> Unlike agreements, commercial practices are unilateral actions of the provider of internet access services, but similarly to agreements, they influence or may influence the conditions of the use of the

<sup>4</sup> T. Wu, *Network Neutrality, Broadband Discrimination*, “Journal of Telecommunications and High Technology Law” 2003, Vol. 2, pp. 167–168.

<sup>5</sup> L. Belli, P. De Filippi, *General Introduction: Towards a Multistakeholder Approach to Network Neutrality*, (in:) L. Belli, P. De Filippi (eds.), *Net Neutrality Compendium: Human Rights, Free Competition and the Future of the Internet*, Cham 2016, p. 2.

<sup>6</sup> S. Piątek, *Rozporządzenie UE Nr 2015/2120 w zakresie dostępu do otwartego internetu*, Warszawa 2017, p. 108.

<sup>7</sup> S. Piątek, *Rozporządzenie...*, pp. 129–133.

<sup>8</sup> T. Fetzer, *Net Neutrality in Europe after the Net Neutrality Regulation 2015/2120*, (in:) G. Knieps, V. Stocker (eds.), *The Future of the Internet: Innovation, Integration and Sustainability*, Baden-Baden 2019, p. 63.

service by end users.<sup>9</sup> Before the CJEU *Telenor* judgment, there were doubts about the strictly binding nature of the prohibition on limiting of end user rights under Article 3(2). Recital 7 of Regulation 2015/2120 states that competent authorities should intervene in cases where agreements or commercial practices “materially reduce” end user choice in internet content. A ‘material’ reduction is not any reduction, which explains the stance of some authors that some contractual limitations of end-user rights may, in fact, not be incompatible with Regulation 2015/2120. The scale of the reduction should be subject to assessment by regulatory authorities,<sup>10</sup> and only practices that undermine “the essence of end-users’ rights” (Recital 7) would justify intervention.<sup>11</sup>

The rights of end users enshrined in Article 3(1) correlate with the obligations of providers of internet access services under Article 3(3) first subparagraph. Providers “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.” However, at the same time, providers of internet access services have been allowed to implement “reasonable traffic management measures” under Article 3(3) second subparagraph. Generally speaking, internet traffic management is a term that encompasses all technical measures used by providers of internet access services in the networks that they maintain and which allow for efficient use of the network infrastructure under varying levels of internet traffic. The primary purpose of traffic management is to prevent and limit network congestion, which occurs when the volume of traffic in the provider’s network causes delays that may adversely influence the quality of the internet access service experienced by end users.<sup>12</sup> Under Article 3(3) second subparagraph, reasonable traffic management 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.” Providers of internet access services may implement measures that lead to a differentiation in the treatment of traffic, but only when it is objectively justified by technical considerations – that is, most of all, different latency or bandwidth requirements of specific categories of traffic. Different treatment of traffic generated by specific applications, rather than categories thereof, and especially for remuneration, is incompatible with Regulation 2015/2120.<sup>13</sup>

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<sup>9</sup> S. Piątek, *Rozporządzenie...*, p. 162.

<sup>10</sup> S. Piątek, *Rozporządzenie...*, p. 164.

<sup>11</sup> T. Fetzer, *Net Neutrality...*, p. 65.

<sup>12</sup> On traffic management in general see: S. Varma, *Internet Congestion Control*. Amsterdam 2015.

<sup>13</sup> S. Piątek, *Rozporządzenie...*, pp. 196–199.

Under Article 3(3) third subparagraph, the use of traffic management measures going beyond those addressed in Article 3(3) second subparagraph is not allowed, with only three exceptions exhaustively specified in the third subparagraph. The prohibited practices include blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between specific content, applications or services, or their specific categories (Article 3(3) third subparagraph). Providers of internet access services may only engage in such practices in order to: (a) comply with the law, be it EU or national legislation; (b) preserve the integrity and security of the network, services provided via that network, and of the end users' terminal equipment; and (c) prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion. Acting by the terms of a contract concluded between a provider of internet access services and an end user, or carrying on commercial practice, have not been listed among the exceptions on traffic management measures involving blocking or other actions mentioned in Article 3(3) third subparagraph.

Zero tariff offers are most often referred to in the literature as zero-rating practices.<sup>14</sup> They relate to internet access services that come with data transfer limits, commonly known as data caps. A data cap is allotted to the end user for the duration of the billing period, most often set at one month. Presently in the EU, internet access services in mobile (cellular) networks generally involve data caps, unlike in fixed networks.<sup>15</sup> The size of the data cap usually determines the price of the internet access service – the bigger the cap, the higher the price. If an internet access service comes with a data cap, the end user may access internet content if that cap has not been exhausted. Once that happens, internet access is either blocked or drastically slowed down, and to continue using the internet, the end user has to either wait for a new billing period or buy an additional data allowance from the provider of internet access services. Under a zero tariff offer, traffic generated by specific internet services, applications, or categories thereof does not count towards the data cap. Thus, the price of this traffic for the end user is zero. This characteristic of a zero tariff offer implies its categorization as a pricing mechanism.<sup>16</sup> It is up to the provider of internet access services to decide whether to introduce zero tariffs and which services, applications (or their categories) to include in its zero-rated offer to gain a competitive advantage in the market.<sup>17</sup>

Under Regulation 2015/2120, zero tariff offers are considered one of the commercial practices referred to in Article 3(2), and they can be subject to agreements

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<sup>14</sup> For use of the term 'zero-rating' in the literature consult the references throughout this case comment.

<sup>15</sup> *Mobile and Fixed Broadband Prices in Europe 2019*, European Commission 2020, <https://doi.org/10.2759/946134> (accessed: 30.05.2021).

<sup>16</sup> T. Fetzer, *Net Neutrality*..., p. 64.

<sup>17</sup> S. Piątek, *Rozporządzenie*..., p. 173.

concluded under that provision.<sup>18</sup> Neither zero tariffs nor zero rating have been mentioned in the text of either the recitals or provisions of the Regulation.<sup>19</sup> Thus far, the compatibility of zero tariffs with the Regulation has been a matter of some controversy.<sup>20</sup> In its 2016 *Guidelines*, the Body of European Regulators for Electronic Communications (BEREC) stated that “[t]here are different types of zero-rating practices which could have different effects on end-users and the open internet, and hence on the end-user rights protected under the Regulation.”<sup>21</sup> In BEREC’s opinion, zero tariff offers should be subject to an analysis of compatibility with Article 3(2) and Article 3(3) of Regulation 2015/2120. It is BEREC’s position that “[a] zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated application(s) would infringe Article 3(3) first (and third) subparagraph.”<sup>22</sup> It is safe to assume *a contrario* that BEREC does not consider other types of zero tariffs incompatible with said article. They should, however, be assessed under Article 3(2).<sup>23</sup> Analyzing those other types of zero tariffs, BEREC considers offers that apply to specific applications, rather than entire categories of applications, as potentially more likely to undermine the essence of the rights of end users, and reduce end users’ choice materially.<sup>24</sup> In BEREC’s opinion, as a kind of commercial practice, zero tariff offers should be assessed taking into account: the goals of the Regulation; the market positions of the ISPs and content providers involved; the effects on consumer and business end user rights; the effects on the rights of content providers as end users; and, finally, the scale of the practice and the presence of alternatives.<sup>25</sup> The assessment should be comprehensive and conducted on a case-by-case basis.<sup>26</sup> That is in line with the positions expressed in the literature, where it has been stated that “regulators should carefully account for the competitive environment and the existing tariff portfolio before deciding to intervene” in cases of zero tariffs.<sup>27</sup>

<sup>18</sup> S. Piątek, *Rozporządzenie...*, pp. 171–172.

<sup>19</sup> T. Fetzer, *Net Neutrality...*, p. 64.

<sup>20</sup> T. Fetzer, *Net Neutrality...*, p. 60.

<sup>21</sup> *BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules*, Body of European Regulators for Electronic Communications (BEREC), BoR (16) 127, August 2016, [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/regulatory\\_best\\_practices/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules](https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules) (accessed: 30.05.2021), para. 40.

<sup>22</sup> *BEREC Guidelines...*, para. 41.

<sup>23</sup> *BEREC Guidelines...*, para. 43.

<sup>24</sup> *BEREC Guidelines...*, para. 42.

<sup>25</sup> *BEREC Guidelines...*, para. 46.

<sup>26</sup> *BEREC Guidelines...*, paras. 47 and 48.

<sup>27</sup> J. Krämer, M. Peitz, *A fresh look at zero-rating*, “Telecommunications Policy” 2018, Vol. 42, No. 7, p. 501.

### 3. THE TELENOR JUDGMENT

The Budapest High Court in Hungary (Fővárosi Törvényszék) submitted requests for a preliminary ruling to the CJEU regarding two sets of proceedings before it, between Telenor (Telenor Magyarország Zrt.), a major Hungarian provider of public electronic communications services, including internet access services, and the Hungarian national regulatory authority for electronic communications – the President of the National Communications and Media Office (Nemzeti Média- és Hírközlési Hatóság Elnöke; henceforth – the President of the Office). The proceedings before the Budapest High Court concerned two decisions of the President of the Office, which ordered the termination of some of Telenor's practices (paras. 1 and 2 of the *Telenor* judgment).

Telenor offers to its end users many services and packages thereof. Two packages, named 'MyChat' and 'MyMusic', involve zero tariffs. The 'MyChat' package enables end users to purchase a data allowance of 1 gigabyte (GB) to be used freely on accessing all internet content until the data has been used up. What is more, six specific online communication applications – Facebook, Facebook Messenger, Instagram, Twitter, Viber, and WhatsApp – are covered by a zero tariff, meaning that the use of those applications does not cause deductions from the end user's data allowance. Finally, under the terms of the 'MyChat' package, once the 1 GB data cap has been exhausted, end users may still use the six specified applications without any restrictions, while data traffic generated by all other applications and services is slowed down via measures implemented in Telenor's network (para. 10). Under the terms of the 'MyMusic' offer, end users with a pre-existing internet access service can purchase a package allowing zero tariff access to four music streaming applications – Apple Music, Deezer, Spotify, and Tidal – and six online radio services. As with the 'MyChat' package, once the data allowance has been used up, end users may still access the selected applications and services while all other internet traffic is blocked or slowed down (para. 11).

The National Communications and Media Office investigated both packages, and by way of two decisions, ordered Telenor to terminate traffic management measures that did not comply with the obligation of equal and non-discriminatory treatment of traffic under Article 3(3) of Regulation 2015/2120 (para. 12). The decisions were upheld by the President of the Office, who determined that an assessment of the compatibility of a traffic management measure with Article 3(3) does not necessitate an analysis of the effect of those measures on the exercise of the rights of end users specified in Article 3(1) of Regulation 2015/2120 (para. 13).

Telenor requested a judicial review of the decisions of the President of the Office by the Budapest High Court. In Telenor's opinion, its packages form part of agreements concluded with its end users, and thus are covered exclusively by

Article 3(2) of Regulation 2015/2120, which requires the Office and its President to assess the packages' effects on the exercise of end user rights. According to Telenor, Article 3(3) applies only to traffic management measures implemented unilaterally by providers of internet access services (para. 15). The President of the Office admitted that while intervention under Article 3(2) would require market analysis, Article 3(3) prohibits the implementation of any unequal or discriminatory traffic management measures, and the formal nature of the internet access providers conduct, be it contractual or otherwise, has no bearing on the prohibition on such measures (para. 16).

The Budapest High Court noted that the wording of Regulation 2015/2120 does not make it clear whether the issue at hand – that is the compatibility of zero tariff packages that involve the slowing down or blocking of internet content not subject to the zero tariff once an end user's data allowance has been used up – falls within the scope of Article 3(2) or Article 3(3). Therefore, the Budapest High Court stayed its proceedings and referred four questions to the CJEU. First, the Budapest High Court wanted to know whether such a zero tariff package must be interpreted in the light of Article 3(2). Second, it asked if an analysis of the compatibility of such a package with Article 3(3) requires an impact- and market-based evaluation. Third, the Budapest High Court inquired whether the prohibition laid down in Article 3(3) is general and objective and independent of the fact that differentiated traffic treatment was introduced through an agreement, a commercial practice, or some other form of conduct. Finally, fourth, it asked if finding an infringement of Article 3(3) makes it unnecessary to evaluate infringement of Article 3(1) and (2) (paras. 17–20).

The CJEU reiterated the Budapest High Court's questions, the provisions of Article 3(2) and (3) of Regulation 2015/2120, and their aims (paras. 22–27). Then the CJEU commented on the need to evaluate the conduct of a provider of internet access services in light of Article 3(2) or Article 3(3) of Regulation 2015/2120. The CJEU remarked that national regulatory authorities are obligated to determine on a case-by-case basis whether the conduct of a given provider of internet access services falls within the scope of either Article 3(2) or Article 3(3) of Regulation 2015/2120, or both of those provisions. However, if a national regulatory authority finds that a provider's conduct is in its entirety incompatible with Article 3(3), an analysis of compatibility with Article 3(2) is not necessary (para. 28).

Commenting on Article 3(2) in general in paras 30–42 of its judgment, the CJEU remarked that an end user's internet access service might be shaped by both agreements conducted by this end user and the provider of the service (para. 32), and by the commercial practices of the latter, which – unlike agreements – do not reflect a concordance of wills (para. 34). There may be an interplay between commercial practices and agreements. Offering variants or packages of services to end users constitutes a commercial practice that may lead to concluding contracts with individual end users (para. 35). Agreements reflect every end user's

freedom to choose the services through which they intend to exercise their rights (para. 33). However, an internet access service may not entail any limitation of those rights (para. 30) and allowing such limitations to be introduced contractually would constitute a circumvention of the provisions of Regulation 2015/2120 (para. 33). Likewise, unilateral commercial practices also may not limit end user rights (para. 35).

The CJEU proceeded to set out the requirements for an assessment of incompatibility of the actions of a provider of internet access services with Article 3(2). The CJEU affirmed that the concept of ‘end user’ encompasses both consumers and professional entities, such as businesses and non-profit organizations and those who rely on internet access services to access or provide content (paras. 36–38). Thus, an assessment of the existence of limitations of end user rights must consider the rights of all of those entities, be they natural or legal persons, and consumers or providers of content (para. 39). Referring to the wording of Article 3(2) and Recital 7 of Regulation 2015/2120 (paras 40–41), the CJEU concluded that an assessment of the agreements and commercial practices of a provider of internet access services must concern the sum of all these agreements and practices, rather than any of them taken individually (para. 42).

With that, the CJEU proceeded to apply its interpretation of Article 3(2) of Regulation 2015/2120 specifically to agreements by which end users subscribe to packages such as were the subject of the Budapest High Court’s questions, that is, zero tariff offers involving the slowing down or blocking of non-zero-rated content once an end-user’s data allowance has been used up (paras. 43–46). The CJEU determined that such agreements are liable to limit the exercise of end user rights, but their compatibility with Article 3(2) must be assessed on a case-by-case basis (para. 43). The greater the number of agreements of this type, and the bigger the part of the market on which they are concluded, the more likely a significant reduction of the exercise of end user rights becomes, and the essence of the rights may be undermined (paras. 44–46).

Having discussed Article 3(2), the CJEU proceeded to analyze Article 3(3) of Regulation 2015/2120 in paras 47–53 of its judgment, firstly interpreting the provision in a general context, and secondly applying the resulting reasoning to zero tariff packages that involve the blocking or slowing down of non-zero-rated traffic.

The CJEU unambiguously stated that the providers of internet access services are obligated to treat all traffic equally, without discrimination, restriction or interference, and this obligation may not in any circumstances be derogated through commercial practices or agreements (para. 47). While providers of internet access services may implement reasonable traffic management measures, any measure that is not based on the objectively different technical quality of service requirements of specific traffic categories must be considered based on commercial considerations, which Article 3(3) forbids (para. 48). Measures that result in

specific applications or services being blocked slowed down, altered, restricted, interfered with, degraded or discriminated between, and which do not fall within any of the three exceptions exhaustively listed in Article 3(3) a–c, must be in themselves considered incompatible with Article 3(3) (para. 49). This incompatibility may be found without assessing the effect of those measures on the exercise of the rights of end users, since Article 3(3) does not lay down such a requirement (para. 50).

According to the CJEU, the practices at issue in the main proceedings involve blocking or slowing down some applications and services, and thus they are subject to assessment under Article 3(3). It is immaterial if the practices result from an agreement, a commercial practice, or unrelated to either of the two (para. 51). The implemented measures appear to be based on commercial considerations rather than the objectively different technical quality of service requirements of categories of internet traffic (para. 52), and there is no evidence that they fall within any of the exceptions listed in Article 3(3) third subparagraph (para. 53).

As a result of its considerations, the CJEU concluded in para. 54 of its judgment that zero tariff packages that allow for unrestricted use of specific applications and services once the end user's data allowance has been used up, and all other internet content is subject to blocking or slowing down, "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."

#### 4. DISCUSSION AND CONCLUSIONS

The judgment of the CJEU in the *Telenor* case is of importance to national regulatory authorities, providers of internet access services, and the end users of those services – consumers and providers of content alike. While the CJEU was mainly concerned with zero tariffs specifically, its conclusions will apply to agreements, commercial practices, and the use of traffic management measures which are not related to zero tariffs but are of general importance for internet access services. These general conclusions apply to limitations of end-user rights, the obligation of internet services providers to treat all traffic equally, and the interplay of Article 3(2) and (3).

As noted above in part 2, there was some confusion in the literature regarding the possibility and scope of limitations of the exercise of end user rights set out in Article 3(1) of Regulation 2015/2120. The CJEU is of an unambiguous opinion, rooted in Article 3(1) and (2), and Recital 7 that all such limitations are

incompatible with Regulation 2015/2120, and their introduction through an agreement concluded between a provider of internet access services and an end user, or by means of a unilateral commercial practice of said provider would constitute a circumvention of the provisions of Regulation 2015/2120. Even though end users can exercise their freedom to contract when negotiating contract terms on the price, data volumes or speed of internet access services, none of the terms agreed upon may infringe on the right to access and distribute any internet content and use any terminal equipment.

The CJEU stated that providers of internet access services are obligated to treat all traffic equally, and this obligation is not subject to limitation or derogation by way of agreements or commercial practices. Any differentiation in the treatment of traffic must be objectively justified by technical quality of service requirements, and traffic management measures that result in content being blocked, slowed down, or otherwise interfered with may only be implemented within the exceptions enumerated in Article 3(3) third subparagraph. Blocking or slowing down of content, but also any other differentiation in the treatment of traffic, may never be justified by any commercial considerations.

It is of particular importance to national regulatory authorities that, in the CJEU's opinion identifying incompatibility of traffic management measures with Article 3(3) does not require a painstaking, lengthy, and costly assessment of the effect of those measures on the exercise of the rights of end users, which is the norm under Article 3(2). Thus far, national regulatory authorities had to rely on BEREC's *Guidelines*, which were somewhat ambiguous in this respect. BEREC stated that "typically, infringements of Article 3(3) (e.g. technical practices, such as blocking access to applications or types of applications) will limit the exercise of the end-users' rights, and constitute an infringement of Articles 3(2) and 3(1)."<sup>28</sup> Thus, BEREC appeared to imply the need to assess infringement of Article 3(1) and (2) when an infringement of Article 3(3) was identified and made a connection between the analysis of the compatibility of traffic management measures with Article 3(3) and an evaluation of infringement of end user rights. The CJEU's *Telenor* judgment severs this connection, allowing a significant simplification of proceedings before national regulatory authorities in cases in which incompatibility with Article 3(3) was already established. It makes sense for national regulatory authorities to begin an evaluation of infringement of Article 3(2) and (3) with an analysis of compatibility with Article 3(3).

When it comes to zero tariffs specifically, the takeaways from the *Telenor* judgment are generally in line with positions expressed in the literature and the BEREC *Guidelines*. Firstly, agreements and commercial practices involving such tariffs are not *per se* incompatible with Regulation 2015/2120. Secondly, zero tariff offers that involve the blocking or slowing down of internet content other

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<sup>28</sup> BEREC *Guidelines*..., para. 37.

than the zero-rated applications or services once an end user's data allowance has been used up infringe Article 3(3) and must always be subject to intervention by national regulatory authorities. Thirdly, zero tariff offers that do not involve such discriminatory traffic treatment may infringe Article 3(2). To find incompatibility with this provision, a national regulatory authority needs to perform a comprehensive assessment of all of the agreements and commercial practices of a given provider of internet access services and their influence on exercising end user rights of both consumers and providers of content. This assessment must consider the scale of the relevant practices, which is determined, among other things, by the market position of the provider of internet access services, the market positions of the content providers concerned, and the number of agreements concluded.

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