CJEU: Judgment on the Open Internet Regulation and zero tariff options

IRIS 2021-9:1/27

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 2 September 2021, the Court of Justice of the European Union (CJEU) delivered its judgment in C-34/20, concerning the EU Regulation (2015/2120) on open internet access (Open Internet Regulation), and the compatibility with EU law of "zero tariff options", where an internet access provider applies a "zero tariff' to all or part of data traffic associated with an application or category of applications. Notably, the CJEU ruled that a zero tariff option operated by a German ISP was incompatible with the Open Internet Regulation.

The case involved Telekom Deutschland, an ISP that had been offering its end customers, for some of its packages, an additional option (also referred to as an "add-on option") in the form of a free "zero tariff" option called "StreamOn". Activation of that option allowed the data volume consumed by audio and video streamed by Telekom's content partners not to be counted towards the data volume included in the basic package; and once that data volume had been used up, that generally lead to a reduction in transmission speed. Further, by activating the "StreamOn" tariff option, the customer accepted bandwidth being limited to a maximum of 1.7 Mbit/s for video streaming, irrespective of whether the videos were streamed by content partners or other providers.

In a decision issued in December 2017, the German telecommunications regulator *Bundesnetzagentur* (Federal Network Agency) found that the tariff option operated by Telekom Deutschland did not comply with the obligations arising from Article 3(3) of Regulation 2015/2120, since it had been accompanied by a reduction in the data transmission speed for video streaming to a maximum of 1.7 Mbit/s. Crucially, Article 3(3) provided that 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". Following a referral to the CJEU by the domestic courts, the question before the Court was whether Article 3(3) of the Open Internet Regulation 2015 had to be interpreted as meaning that a limitation on bandwidth on account of the activation of a "zero tariff" option, applied to video streaming, irrespective of whether it was streamed by partner operators or other content providers, was incompatible with the obligations arising from Article 3(3).

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First, the CJEU noted that Article 3(3) sought to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end users' rights. Second, Article 3(3) precluded any measure which ran counter to the obligation of equal treatment of traffic where such a measure was based on commercial considerations. Crucially, the Court held that a "zero tariff" option, such as that at issue in the main proceedings, drew a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications. It followed, according to the CJEU, that such a commercial practice "[did] not satisfy the general obligation of equal treatment of traffic, without discrimination or interference", laid down in Article 3(3). As such, the Court concluded that Article 3 of the Open Internet Regulation had to be interpreted as meaning that a limitation on bandwidth, on account of the activation of a "zero tariff" option, applied to video streaming, irrespective of whether it had been streamed by partner operators or other content providers, was incompatible with the obligations arising from Article 3(3).

Finally, it should also be noted that the CJEU reached similar conclusions in Cases C-854/1 and C-5/20, also delivered on 2 September, on related "zero tariff" options operated by Vodafone GmbH, which were also found to be incompatible with Article 3(3) of the Open Internet Regulation.

Judgment of the Court of Justice of the European Union (Eighth Chamber), Case C-34/20, Telekom Deutschland GmbH v. Bundesrepublik Deutschland, 2 September 2021

https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0034

Judgment of the Court of Justice of the European Union (Eighth Chamber), Case C-5/20, Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. Vodafone GmbH, 2 September 2021

https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0005

Judgment of the Court of Justice of the European Union (Eighth Chamber), Case C-854/19, Vodafone GmbH v. Bundesrepublik Deutschland, 2 September 2021

https://curia.europa.eu/juris/document/document.jsf;jsessionid=2F167085AE13D2941A2C90D5C8D6B0AD?text=&docid=245531&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=519183

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