

B I P T

**BELGIAN INSTITUTE FOR POSTAL SERVICES
AND TELECOMMUNICATIONS**

**REPORT
REGARDING
THE ANALYSIS OF
ZERO-RATING OF APPS
IN THE PROXIMUS OFFERS**

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1. INTRODUCTION

1. In this report BIPT sets out its findings regarding the research into and the analysis of the Proximus offers in which zero-rating is applied.
2. Those tariff plans were launched on 17 October 2016.
3. This analysis is also aimed at answering the questions of the Minister of Digital Agenda, Telecom and Post, asked by mail by his private office on 18 October 2016. In that mail the Minister's fear for possible market disruption resulting from zero-rating of certain apps was expressed. The fact is that in our country a brisk app sector is developing, a situation in which it is important not to disrupt the market.
4. Zero-rating can take various forms but it is generally defined as a practice where an ISP¹ applies a price of zero to data traffic for a specific application or category of applications (and the data does not count towards any data cap in place on the on the Internet access service)².
5. As this report also aims to answer the Minister's question, it does not contain any confidential information. However, that confidential information was communicated to the Community regulators in charge of electronic communications, to which a draft version of this report has been sent.

2. DESCRIPTION OF THE PROXIMUS OFFERS IN WHICH ZERO-RATING IS APPLIED

2.1. General

6. On 17 October 2016 Proximus launched a new range of products it had developed in collaboration with its customers and respondents, based on their expectations. Abundance, offers that can be personalised and a better price/quality ratio are the elements that were put forward. The online survey held in collaboration with the independent consultancy iVox among 1,000 persons has produced the following results (among others):
 - Seven out of ten persons surveyed do not want to worry about mobile data consumption when they use their equipment on the move. Half of the parents do not want to worry about their children's data consumption;

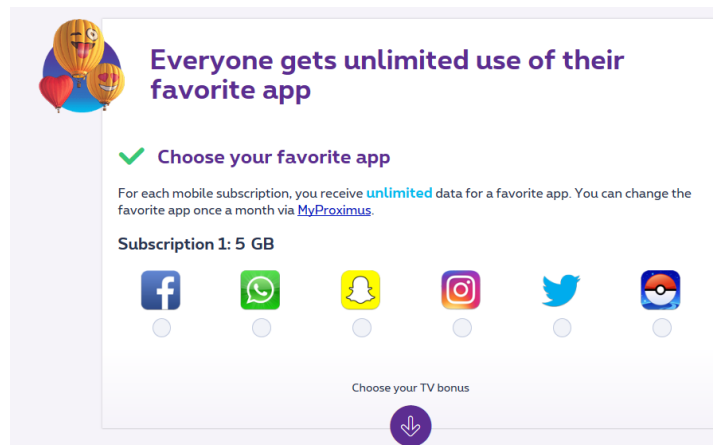
¹ ISP stands for "Internet Service Provider", a provider of an internet access service (in the Regulation the latter term is defined as "*a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used.*") (see Article 2 (2)).

² [BEREC Guidelines on the implementation by National Regulators of European Net Neutrality Rules](#), BoR (16) 127 (hereinafter referred to as the BEREC Guidelines), No 40: "*There is a specific commercial practice called zero-rating. This is where an ISP applies a price of zero to the data traffic associated with a particular application or category of applications (and the data does not count towards any data cap in place on the IAS).*"

- Four out of ten persons surveyed confess that they do not want to do without their favourite app and add they are prepared to give up something else in exchange. 32% states that Facebook is the app they really could not do without any more.³

2.2. Tuttimus

7. For residential customers Proximus launches Tuttimus⁴, the all-in where every family member enjoys mobile Internet and unlimited Internet at home to the full, and everyone uses his favourite application without any limitation. Customers can choose between 6 popular apps: Facebook, Instagram, Twitter, Pokémon GO, Snapchat and WhatsApp, as shown in the following screen shot:



8. In the explanation at the bottom of the page it reads: *“the Mobilus subscription in a Tuttimus or Familus Pack entitles you to unlimited data in Belgium for an application of your choice from a defined list. The customer can choose only one app and can change it once a month in MyProximus. Limits may apply for certain apps. For more info, see www.proximus.be/support. The general terms and conditions of the applications shall remain applicable. The protection measure against bill shocks shall apply for the favorite app. Proximus has made a selection of the most popular applications around. Proximus reserves the right to modify the offer with two months' notice.”* :

• **Favorite app:** the Mobilus subscription in a Tuttimus or Familus Pack entitles you to unlimited data in Belgium for an application of your choice from a defined list. The customer can choose only one app and can change it once a month in MyProximus. Limits may apply for certain apps. For more info, see www.proximus.be/support. The general terms and conditions of the applications shall remain applicable. The protection measure against bill shocks shall apply for the favorite app. Proximus has made a selection of the most popular applications around. Proximus reserves the right to modify the offer with two months' notice.

9. From an answer from Proximus to BIPT's request for information (so not from the excerpts quoted above from the Proximus website) we learn that the favourite app is set to Facebook by default. Consequently, if the customer does not make an adjustment Facebook remains activated as the favourite app.
10. From another answer by Proximus to the request for information it is found that Tuttimus customers are granted a specific extra mobile capacity of 1 GB, which they can only use to watch “TV Overall” on mobile equipment. When that specific data volume of 1

³ See [Proximus press release of 17 October 2016](#).

⁴

http://www.proximus.be/en/id_cr_packcomposer_tuttimus/personal/products/tuttimus.html

GB is completely used up the data consumption for “TV Overall” is counted towards the normal mobile data traffic. Customers are informed about this by means of a text message.

2.3. Mobilus

11. The same principles apply to the Mobilus offer⁵.
12. Thanks to Mobilus, the mobile subscription for people on the move, customers get a maximum amount of data and call minutes on the 4G network. In addition, the data usage for the favourite application is included:

The screenshot displays three mobile subscription plans labeled S, M, and L. Each plan includes unlimited SMSes and unlimited data for a chosen app from a list of popular apps like Facebook, WhatsApp, Snapchat, Instagram, Twitter, and Pokémon GO. The prices are €15/month for S, €25/month for M, and €40/month for L. Below the plans, there are links for detailed information and rates outside the bundle. At the bottom, there is a section for 'Unlimited data for your app' with icons for Facebook, Twitter, WhatsApp, Snapchat, and Instagram, and a note that Facebook is activated by default on all mobile subscriptions.

13. The general conditions in the footnote say: “All Mobilus subscriptions include unlimited data in Belgium for an app chosen from a defined list. The customer can choose only one app and can change it once per month in MyProximus. Limits may apply for certain apps. More info on [Change your Favorite App](#). The general terms and conditions of the apps remain/are applicable. If you reach the mobile Internet data limit included in your subscription, your surfing speed will be reduced to 128 Kbps, including for your favorite app, until your next billing cycle. Proximus has made a selection of the most popular applications around. Proximus reserves the right to modify the offer with two months' notice.”

⁵ See http://www.proximus.be/en/id_catr_m/personal/products/mobilus.html

⊕ Footnotes

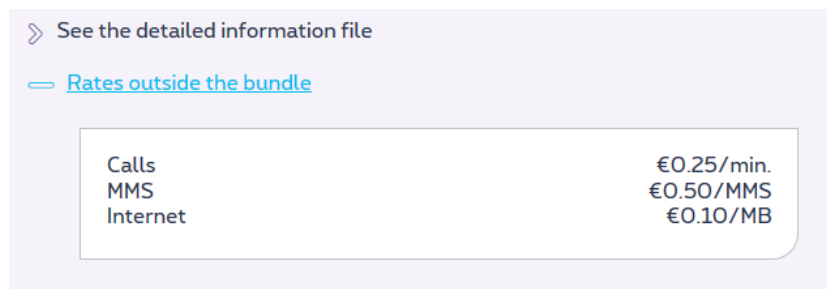
⇒ [General conditions](#)

Prices include VAT.

- Calls and texts to all fixed and mobile networks in Belgium, except to premium numbers (voting lines, 0900 numbers, etc.). Calls are billed by the second after the 60th second.
- Unlimited usage only for personal use, in accordance with the General Terms and Conditions
- The surfing data included is valid only in Belgium. Bundle and out-of-bundle usage is billed per 1 KB.
- All Mobilus subscriptions include unlimited data in Belgium for an app chosen from a defined list. The customer can choose only one app and can change it once per month in MyProximus. Limits may apply for certain apps. More info on [Change your Favorite App](#). The general terms and conditions of the apps remain/are applicable. If you reach the mobile Internet data limit included in your subscription, your surfing speed will be reduced to 128 Kbps, including for your favorite app, until your next billing cycle.
- When the subscription credit has been used up, calls and MB are billed in accordance with the applicable rate plan. Unused minutes and MB cannot be carried over to the next month.
- Proximus has made a selection of the most popular applications around. Proximus reserves the right to modify the offer with two months' notice.
- To use the Proximus 4G network, you need a compatible device

14. Under the product presentation of Mobilus the following information is given: “Access to Messenger is not included in the Facebook app”.

15. As a reminder, the rates outside a bundle are:



See the detailed information file

⇒ [Rates outside the bundle](#)

Calls	€0.25/min.
MMS	€0.50/MMS
Internet	€0.10/MB

2.4. Bizz tariff plans

16. For small businesses Proximus has launched the Bizz tariff plans. Two of those tariff plans include zero-rating components: Bizz All-In and Bizz Mobile.

17. Bizz All-In⁶ is a bundle of telephony services, Internet access services and related services⁷, with the possibility to choose a version that includes Proximus TV against payment of a supplement. As for Internet access unlimited surfing is offered from a fixed location. The mobile component of the bundle again includes the choice of one favourite app, as shown in the screenshot below⁸:




⁶ See http://www.proximus.be/en/id_cb_bizz_allin/self-employed-and-small-companies/products/bizz-all-in-the-all-in-one-pack.html

⁷ Storage in the cloud, e-mail addresses on name of the company and a .be domain name.

⁸ This screenshot was taken in December 2016. At the time of the launch on 17 October 2016 customers had a choice of 6 different apps, including Pokemon Go. By December 2016 the Pokemon Go option had disappeared from the Bizz tariff plans.

Mobile data and international calls

✓ Choose your mobile data volume in your mobile subscription, included in your Bizz All-in

 3 GB Unlimited calls and SMS	 8 GB Unlimited calls and SMS	 12 GB Unlimited calls and SMS 600 min to the EU + 600 min and 600 MB in the EU Unlimited calls from fix to all fixed lines in the EU
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✓ Unlimited usage of your favourite app



Facebook (Messenger data volume not included) will be activated by default as your favourite app. After activation of your subscription(s) you can easily adapt your favourite app via MyProximus. Your colleagues can also choose their favourite app.

24/7 support



18. The footnotes of Bizz All-in stipulate the following about the favourite app: “Favorite app: every Bizz Mobile subscription in a Bizz All-in Pack entitles the customer to an unlimited volume of data in Belgium for using an app of his choice from a defined list. The customer can only choose one app and can only change it once a month via MyProximus. Limits may apply for some applications. More information is available on www.proximus.be/support.”

Favorite app: every Bizz Mobile subscription in a Bizz All-in Pack entitles the customer to an unlimited volume of data in Belgium for using an app of his choice from a defined list. The customer can only choose one app and can only change it once a month via MyProximus. Limits may apply for some applications. More information is available on www.proximus.be/support.

19. Bizz Mobile as a stand-alone product also offers the choice of a favourite app, as can be seen in the following screenshot⁹:

Unlimited calls to fixed lines and between colleagues

	M	L	XL
	3 GB 250 min. Unlimited SMSes	8 GB Unlimited calls Unlimited SMSes Call cheaper abroad (Proximus Calls to All Countries)	12 GB Unlimited calls Unlimited SMSes Call cheaper abroad (Proximus Calls to All Countries) 600 in and to EU + 600 MB in EU
Unlimited data for your app	Unlimited data for your app	Unlimited data for your app	Unlimited data for your app
	€21 /month	€36 /month	€56 /month
	Add to cart	Add to cart	Add to cart More advantages in EU!

As from 2 mobiles (and up to 10), benefit from 20% of reduction. More info? [Make an appointment with a Bizz Expert](#) or [we call you back within the 2 hours](#)

Unlimited data for your app

Facebook (without Messenger) is activated by default on all mobile subscriptions. Select your favorite app after activating your subscription via MyProximus. The workers choose also their favourite App.

20. The footnotes stipulate:

“

- *The surfing data included is valid only in Belgium. Bundle and out-of-bundle usage is billed per 1 KB.*
- *Favorite app: All Bizz Mobile subscriptions include unlimited data in Belgium for an app chosen from a defined list. The customer can choose only one app and can change it once per month in MyProximus. Limits may apply for certain apps. The general terms and conditions of the apps are applicable. If you reach the mobile Internet data limit included in your subscription, your surfing speed will be reduced to 128 Kbps, including for your favorite app, until your next billing cycle. (sic) (Based on the Dutch version it should be:) “Proximus has made a selection of the most popular applications around. Proximus reserves the right to modify the offer with two months' notice.*
- *If you reach the mobile Internet data limit included in your subscription, your surfing speed will be reduced to 128 Kbps, including for your favorite app, until your next billing cycle. More info on www.proximus.be/support.*
- *[...]*
- *When the subscription credit has been used up, calls and MB are billed in accordance with the applicable rate plan. Unused minutes and MB cannot be carried over to the next month. Rates outside the bundle for calling to GSM in Belgium with Bizz Mobile S or M: €0,14/min. Rates outside the bundle for Mobile Internet in Belgium: € 0,0248/MB.”*

3. LEGAL CONTEXT AND BEREC GUIDELINES

3.1. Regulation (EU) 2015/2120

21. **Zero-rating in itself is not regulated** in the text of Regulation 2015/2120¹⁰ (hereinafter sometimes called “the Regulation” in short).
22. The purpose of the Regulation is “*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.*”¹¹
23. The starting point of the Regulation regarding end-user rights to open Internet access is Article 3 (1) of the Regulation, which lays down:

“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.”
24. Under Article 3 (2) of the Regulation agreements between ISPs and end-users can be concluded “*on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed*” and “*any commercial practices*” can be conducted provided that the ISPs do “*not limit the exercise of the rights of end-users laid down in [Article 3] paragraph 1*”.
25. Recital 7 of the Regulation puts Article 3 (2) in perspective as follows: “*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.*”.
26. (Some practices of) zero-rating (are) is said to **potentially infringe on principles governing traffic management**, laid down in Article 3, paragraph 3, first (and third) subparagraph of the Regulation¹² and furthermore it is said that practicing zero-rating

¹⁰ In full: 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, *Official Journal*, No L 310/1, 26 November 2015.

¹¹ Recital 1 of the Regulation.

¹² Deduced from the BEREC Guidelines, No 41 and No 55, third bullet point: “*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.*”

could have an impact on the exercise of the end-users' rights laid down in the above-mentioned Article 3, paragraph 1, of the Regulation¹³.

27. Article 3 (3), first subparagraph of the Regulation lays down:

“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.”

28. The first sentence of Article 3 (3), third subparagraph, is:

“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,

followed by (under letters a) up to and including c)), three exceptions, none of which relates to zero-rating.

3.2. The BEREC Guidelines of 30 August 2016

29. The BEREC Guidelines already quoted above in footnotes, are legally founded on Article 5 (3) of Regulation 2015/2120. They are guidelines for implementing the obligations of national regulatory authorities, established by BEREC, with a view to consistent implementation of the Regulation. The BEREC Guidelines constitute recommendations to NRAs and NRAs should take utmost account of the Guidelines¹⁴.

30. Marginal numbers 40 up to and including 48 of the BEREC Guidelines discuss the practice of zero-rating as a commercial practice or as commercial or technical conditions agreed upon of an Internet access service.

31. According to the BEREC Guidelines “Content and Application Providers” (abbreviated “CAP(s)”) are also included in the notion of end-users of an Internet access service¹⁵.

¹³ See also, BEREC Guidelines,

- No 37: *“When assessing agreements or commercial practices, NRAs should also take Article 3(3) into account given 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). Details about this assessment can be found in paragraphs 49-93.”* and
- No 49: *“A basic principle of the Regulation relates to traffic management and is the obligation on ISPs to treat all traffic equally when providing IAS. Typically, infringements of this principle which are not justified according to Article 3(3) would also constitute an infringement of the end-user rights set out in Article 3(1).”*

¹⁴ As laid down in Article 3 (3) of [Regulation \(EC\) No 1211/2009](#) establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office and recital 19 of Regulation (EU) 2015/2120.

¹⁵ See BEREC Guidelines, No 4. A CAP is defined by BEREC as follows: *“CAPs make content (e.g. web pages, blogs, video) and/or applications (e.g. search engines, VoIP applications) and/or services available on the Internet. CAPs may also make content, services and applications available via specialised services.”* (BEREC Guidelines, No 2).

32. In general in the relevant excerpts from the Guidelines a **multi-factor analysis** is elaborated, recommended to the NRAs in order to assess the impact of zero-rating on the rights of end-users.
33. There is only one case in which the BEREC Guidelines say such an extensive assessment is not necessary. It is the case of an offer where all applications are blocked (or slowed down), once the data cap is reached except for the zero-rated application(s), as it would infringe Article 3(3) first (and third) subparagraph¹⁶.

4. STEPS IN THE ANALYSIS

34. In order to apply the multifactor analysis mentioned above, BIPT sent a letter on 31 October 2016, containing a list of 21 questions to Proximus.
35. Proximus replied confidentially to BIPT's request for information on 29 November 2016.
36. With a letter of 2 December 2016 BIPT asked Proximus for a non-confidential version of its answer, as well as for the update of the figures Proximus had not been able to provide on 29 November 2016.
37. Proximus sent a non-confidential version of its answer by letter on 6 December 2016.
38. After that Proximus provided updated figures by mail on 9, 15 and 22 December 2016, as well as some clarifications, as requested by BIPT.
39. A draft report was communicated on 24 January 2017 to the other regulators who are a member of the Conference of Regulators of the electronic communications sector.

¹⁶ BEREC Guidelines, Nos 55-56: "55. *In case of agreements or practices involving technical discrimination, this would constitute unequal treatment which would not be compatible with Article 3(3). This holds in particular for the following examples:*

[...]

- *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), as it would infringe Article 3(3) first (and third) subparagraph.*

56. *NRAs should apply a comprehensive assessment of compatibility with the Regulation for all those IAS offers which are not as clear as the examples mentioned in paragraph 55."*

5. BIPT ANALYSIS

5.1. Zero-rating beyond the data cap?

40. The answers from Proximus to the request for information show that after the data cap agreed upon or “fair use limit” has been reached, Proximus does not discriminate between the data traffic to which zero-rating applies and the other data traffic. The zero-rating content is treated equally as any other data, in that the customer, for either type of traffic:
- either pays the outside the bundle rate
 - or (as part of Mobilus Full Control (which is also available in Tuttimus)) can no longer surf, until he takes action by either recharging, or by agreeing to continue surfing at the outside the bundle rate.

5.2. Multifactor analysis of the zero-rating offers of Proximus

41. In line with marginal numbers 46 and 48 of the BEREC Guidelines BIPT considers the following factors for the other aspects of the Proximus offers, in the context of which zero-rating is applied (hereinafter referred to as “zero-rating offers”).

5.2.1. Do the zero-rating offers comply with the general aims of the Regulation and/or are those aims circumvented?

42. In its answer to BIPT’s request for information Proximus explained that its new offers were launched after an online survey performed in collaboration with iVox, to clearly map the customer’s wishes in these new digital times, but that in that survey customers were not asked specifically which apps they preferred to be zero-rated.
43. According to Proximus the selection of 6 favourite apps belongs to a strategy of advancing the interests of customers, and of ensuring their needs are met (also see in that regard the results of the study mentioned in section 2.1).
44. To get an insight into the customers’ needs Proximus also analysed in 2014 in cooperation with the ‘Ipsos Research Agency’ the behaviour of Belgian smartphone users. This analysis resulted in a number of categories of typical smartphone use. One of them is the use of apps and according to its answer, Proximus has focused on apps within a few of the categories of typical smartphone use, in order to select the 6 favourite apps.
45. Facebook and Whatsapp turned out to be the apps most used. Proximus points out that the number of Facebook users in Belgium was estimated at about 6 million at the end of 2015¹⁷. Therefore Facebook is the most popular app by far. That is why Proximus has chosen that app as the default app (offering the customer to adapt that setting; see below).
46. In addition, Proximus explains why it has opted for Snapchat and Instagram.

17

See: <http://www.internetworldstats.com/stats4.htm>;
<https://www.statista.com/statistics/568747/forecast-of-facebook-user-numbers-in-belgium/>
Source: <https://www.statista.com/statistics/568747/forecast-of-facebook-user-numbers-in-belgium/>

47. Finally, Proximus has also added Pokemon GO to the list, considering the lasting popularity of that app.
48. This answer, further completed by a confidential explanation about the strategy of Proximus and confidential figures and other findings from the iVox and Ipsos studies, proves that when selecting the 6 favourite apps Proximus has chosen the most popular communications and social media apps that enjoy a great popularity among youngsters and profit from a great brand awareness.
49. BIPT deems these choices founded and coherent with the vision of Proximus concerning customer interests. BIPT has not discovered any elements that would have been inspired by the intention to circumvent the aims of the Regulation.
50. In answer to another question from BIPT Proximus said actually it had not selected the favourite apps based on the wishes of the app providers, which is coherent with what is written above.

5.2.2. Are the respective market positions of the ISPs and CAPs involved such that the zero-rating offers undermine the essence of the end-users' rights?

51. Recital 7 of the Regulation stipulates that when considering intervention against agreements and commercial practices of ISPs and their assessment "*inter alia [...] the respective market positions of those providers of internet access services, and of the providers of content, applications and services, that are involved*" should be taken into account.
52. Considering the current level of competition on the (mobile) Internet market and unless a different decision by the Belgian competition authority or by the European Commission is taken¹⁸ it is not evident to assume that Proximus (by itself¹⁹) currently has market power for the provision of mobile Internet access services.
53. As to the CAPs who offer the 6 apps involved, BIPT assumes, again unless the Belgian competition authority or the European Commission take another decision, that Facebook has market power on the market of social network services.
54. Regarding WhatsApp (taken over by Facebook) some caution is already necessary as the European Commission considered in its decision of 3 October 2014 on the acquisition of WhatsApp by Facebook²⁰ among other things that in the field of consumer communications apps, which constitutes a recent and fast growing sector, the context is very dynamic, in which any large market shares can be ephemeral and do not necessarily form an indication of a market power and of lasting damage to competition²¹.

¹⁸ In the context of the BEREC meetings BIPT was informed that the European Commission's DG Competition had started an investigation (for monitoring and/or enforcement purposes) into zero-rating practices in broadband markets.

¹⁹ So, without considering a possible market power jointly held by several mobile operators in Belgium.

²⁰ Zie http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7217

²¹ See for instance, cited Facebook/WhatsApp decision, No 99: "99. [...] *the Commission notes that the consumer communications sector is a recent and fast-growing sector which is characterised by frequent market entry and short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, the Commission takes the view that in*

55. In that decision the European Commission also draws attention to the (1) low switching costs for users and (2) the faint to non-existent possibility for Facebook and WhatsApp to put up barriers to entry and expansion in the market of consumer communications apps²².
56. In the section on the low switching costs the Commission also refers to the phenomenon of multi-homing. Multi-homing means that end-users install and use, on the same handset (such as a smartphone) several communications apps at the same time, so that end-users who try a new app generally do not stop using apps they were using before²³. In this case, based on that effect, it can be argued that zero-rating of a single favourite communications app (no matter whether the Proximus customer already had the app on his smartphone or not) does not mean that the Proximus customer will stop using apps that are not zero-rated.
57. As to the entry and expansion barriers the Commission remarks that Facebook and WhatsApp do not control any essential parts of the network, which end-users need to use to get access to the communications services app²⁴.
58. However, the latter is the case for a mobile network operator like Proximus.
59. Also the effect of multi-homing could be diminished (or annulled), if the mobile data volume included in the allowance is too low to continue to use other apps that are not zero-rated. This effect currently appears to be inexistant. See the discussion in section 5.2.3.
60. The same goes *mutatis mutandis* for the zero-rating up to 1 GB of monthly use of the “TV Overal” app for Tuttimus customers, whereby mainly the apps from broadcasting companies targeting the Dutch-speaking, French-speaking and German-speaking public (e.g. the apps from VTM, RTL à l’infini,...) have to be considered as the competing apps.
61. BIPT examines those aspects in the next two sections, including for Pokemon Go, which compared to the other 5 favourite apps, does not seem to have a direct link to consumer communications or social network services and/or, as far as BIPT knows, has not been examined in a context of competition law.

5.2.3. What are the effects of the zero-rating offers on the end-users’ rights of consumers and business customers?

62. One of the dimensions the BEREC Guidelines recommend to investigate for this factor is the extent to which the volume included in the allowance offers sufficient room in practice to make (normal) use of apps that are not zero-rated²⁵.
63. When questioned about this Proximus presented the following figure:

this market high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition.”

²² Cited decision, No 132

²³ Cited decision, Nos 105 and 110.

²⁴ Cited decision, No 134.

²⁵ BEREC Guidelines, No 48.

Mobilus	Before	Smart+15 €15 120 min 1 GB	Smart+25 €25 300 min 2 GB	Smart +45 €45 Ult'd min 4GB
	After	Mobilus S €15 120 min 1 GB	Mobilus M €25 300 min 3 GB	Mobilus L €40 Ult'd min 8 GB
Tuttimus	Before	Smart+15 €12 120 min 1 GB	Smart+25 €20 300 min 2 GB	Smart +45 €35 Ult'd min 4GB
	After	Mobilus S €14 120 min 2GB	Mobilus M €25 Ult'd min 5 GB	Mobilus L €36 Ult'd min 10 GB

64. This figure shows that each new tariff plan offers **more included mobile data volume** than before²⁶ (except for Mobilus S, where the included volume remains the same, leaving the volume of the favourite app out of consideration). On a confidential basis Proximus also mentions the share of the included volume a Smart+15, Smart +25 and Smart+45 subscriber used on average per month. **The majority of customers do not turn out to be at the limits of their included mobile data volume.** This could evidently change in the future. For the moment, however, that included volume seems to be largely sufficient in a forward looking perspective. Nevertheless, BIPT does not have a sufficiently clear vision of the evolution of future services, their consumption or their success, to make a final pronouncement.
65. Moreover, according to Proximus, the fact can be pointed out **that the consumed data volume of the favourite app is not counted towards the bundle, thus contributing to more available data volume for other apps.**
66. Neither does Proximus expect that zero-rating will lead to an uncontrollable peak in traffic because the possible apps, on which zero-rating can be activated, already count among the most popular ones. Proximus does not expect the average data usage by customers who have opted for the new plans to deviate strongly from the average data usage by other customers²⁷.
67. This is also confirmed by the answer of Proximus to the question of BIPT whether Proximus had registered in the first month following the launch of the new offers more or less cases where the included Internet volume was exceeded compared to the 6 months preceding the launch: no substantial difference can be noticed of the (confidential) “out of bundle” data volume of Proximus mobile customers in the months of October and November 2016 as opposed to the previous 6 months, which suggests that more than sufficient volume is granted to those customers.

²⁶ At, depending on the case, a lower, higher or an equal price.

²⁷ Proximus will monitor the actual usage by its customers and can, if necessary, consider whether measures have to be taken.

68. Based on the information provided, BIPT therefore thinks that the included volume made available is currently sufficiently large to enable end-users to exercise their right to consult or share content and information through “non-favourite” apps and to use non-zero-rated applications in accordance with their needs (reflected in their choice of a tariff plan).
69. Insofar as can be observed within the short span since the launch of the new offers and in view of the other considerations about scale and respective market positions, **neither has any decrease been observed of the range and diversity of content and applications** consumers-end-users can use under the influence of the zero-rating offers of Proximus.
70. In that regard it is also relevant to consider that not every activated Mobilus, Tuttimus or Bizz tariff plan has the same effect, as the customer can apply zero-rating to only one of the six (in case of Bizz: five) possible favourite apps and because zero-rating of TV Overall up to a monthly consumption of 1 GB is limited to Tuttimus and Bizz customers, just as it could be relevant that Facebook is the app that is zero-rated when no other choice has been made.

5.2.4. What are the effects of the zero-rating offers on the end-users’ rights of CAPs?

71. The considerations in the previous section also apply *mutatis mutandis* to the effects of the zero-rating offers on the end-users’ rights of the CAPs.
72. The new offers have a **lot of included data volume (even more than before)**, so that CAPs do not experience any limitations or hindrance in that field because of the zero-rating applied by Proximus.
73. The Proximus figures **do not show that the majority of customers are at the limits of their included mobile data volume.**
74. It should also be repeated that, insofar as can be observed within the short span since the launch of the new offers, there does not appear to be **any decrease of the range and diversity of content and applications** offered by CAPs under the influence of the zero-rating offers of Proximus. **Multi-homing also** plays a role in this, as far as certain types of apps is concerned.
75. **None of the apps gets a preferential treatment beyond the data cap.**
76. However, it should be noted that in the case of Proximus the price differentiation is between individual applications (and not between *classes* of applications).
77. As stated above, it is still too early to make a final pronouncement about this. It is a fact though, that Proximus’ future policy and its reactions to requests from competing providers of zero-rated apps to obtain zero-rating too, will play a role in this matter²⁸, apart from customer interests and operational feasibility of the requests.

²⁸ A (confidential) answer from Proximus to a question from BIPT about this produced few concrete elements.

5.2.5. What alternative offers are available?

78. In Belgium there are enough alternative offers for the moment, which have (at least) an equal included mobile data volume, in the majority of cases without zero-rating.
79. Indeed, on the Belgian market relatively few zero-rating offers have been launched up to now.
80. In the summer of 2016 Base and Proximus applied zero-rating to a number of tariff plans for Pokemon Go (in case of Base this was accompanied by zero-rating for Youtube, Spotify and Deezer), but those were commercial practices that only applied for a limited time, which has passed in the meantime.
81. Since April 2012 (so for a large part before Regulation 2015/2120 came into force) Mobistar (now Orange Belgium) has applied zero-rating for Facebook and Twitter in some of their tariff plans marketed at the time²⁹. From 3 October 2016 onwards new mobile tariff plans have been marketed and those have no zero-rating.

5.2.6. What is the scale of the zero-rating at Proximus?

82. BIPT notes that the Regulation also has the objective of having the NRAs intervene *“against agreements or commercial practices which, by reason of their scale, lead to situations where end-users’ choice is materially reduced in practice.”* (recital 7 of the Regulation; BIPT underlines).
83. In answer to the request for information from BIPT Proximus provided by letter of 29 November 2016 and by e-mail of 9 December 2016 figures (up to and including November 2016) about which app customers activated as their “favourite app” (meaning zero-rated app).
84. Those (confidential) figures have not been observed over a sufficiently long period to draw any conclusions. Will the activations continue to rise in the months to come? Or will there be a slow-down, and if so, when?
85. In other words, it is yet impossible to say that the figures are of such an order (compared to the total number of mobile broadband subscribers Proximus has) that the impact of zero-rating can be said to have such a scale that it leads to a material reduction in practice of the end-users’ choice.
86. The fact that intervention does not have to be considered for the moment, does not mean that further monitoring is not called for.

5.3 The first official assessment of zero-rating by other NRAs

87. The Hungarian and Dutch NRAs have very recently taken a decision against zero-rated products.

²⁹ Those engagements are still being honoured.

88. The Hungarian decision was based on Article 3 (3) first and third subparagraph of the Regulation, finding a discriminatory treatment of the traffic beyond the data cap: the zero-rated services were still available, whereas the other services were blocked. Also the Swedish NRA has published a draft decision in that sense.
89. BIPT has also examined this issue as regards Proximus, but, as explained in section 5.1, it has found no discriminatory treatment.
90. The Dutch decision is based on a national Act that prohibits price differentiation in any form.
91. It was also related to an application of that Act to music streaming services, which fall outside the scope of this case.
92. In this analysis BIPT is the first regulator to carry out the multifactor analysis under Art. 3 (2) of the Regulation.

6. CONCLUSIONS

93. The answers from Proximus to the request for information show that after the data cap agreed upon or “fair use limit” have been reached, Proximus does not discriminate between the data traffic to which zero-rating applies and the other data traffic (which is different from the cases in Hungary and Sweden, where discrimination was involved).
94. The Belgian assessment of zero-rating is based on the European Regulation (which is different from the Dutch case).
95. BIPT has not discovered any elements that would have been inspired by the intention to circumvent the aims of the Regulation.
96. Subject to the investigation made by the competition authorities (especially regarding Facebook), the respective market positions of the ISPs and CAPs involved do not seem to be such that the zero-rating offers undermine the essence of the end-users’ rights.
97. The new offers have a lot of included data volume (even more than before), so that consumers, business users and CAPs do not experience any limitations or hindrance in that field because of the zero-rating applied by Proximus.
98. The Proximus figures do not show that the majority of customers are at the limits of their included mobile data volume.
99. Insofar as can already be observed within the short span since the launch of the new offers, there does not appear to be any decrease of the range and diversity of content and applications offered by CAPs under the influence of the zero-rating offers of Proximus. Multi-homing also plays a role in this, as far as certain types of apps are concerned.
100. In Belgium there are enough alternative offers for the moment, which have (at least) an equal included mobile data volume, in the majority of cases without zero-rating.
101. It is yet impossible to say that the subscription to the new offers is of such an order (compared to the total number of mobile broadband subscribers Proximus has) that the impact of zero-rating can be said to have such a scale that it leads to a material reduction in practice of the end-users’ choice.
102. The fact that intervention does not have to be considered for the moment, does not mean that further monitoring is not called for.