



B I P T

**BELGIAN INSTITUTE FOR POSTAL SERVICES
AND TELECOMMUNICATIONS**

**ADVICE OF THE BIPT COUNCIL
OF 25 APRIL 2018
REGARDING
THE EVALUATION OF
THE MY APPS SPACE PILOT PROJECT BY PROXIMUS
IN THE LIGHT OF
REGULATION (EU) 2015/2120 REGARDING NET NEUTRALITY**

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Chapter 1 Background and facts

1.1. Cause

This opinion is, by virtue of Article 14, § 1, 1^o, of the Act of 17 January 2003 on the status of the regulator of the Belgian postal and telecommunications sectors, issued to the Minister in charge of telecommunications matters and to the Chamber of Representatives.

This opinion has been requested by the Chairman of the Commission for Infrastructure, Traffic and Public Enterprises, in a letter of 15 March 2018 to the Vice-premier and Minister of the Digital Agenda, Telecom and Postal Services.

This letter of 15 March 2018 was delivered to BIPT on 22 March 2018.

The letter of 15 March 2018 results from a series of facts and discussions that are repeated below, before we enter into detail as regards the actual request for an opinion and how BIPT can act upon it.

1.2. Facts

On 24 March 2017 Proximus launched a “pilot project” regarding sponsored mobile data.

A number of selected Proximus customers whose smartphones function by means of an Android operating system¹ received a text message by Proximus inviting them to install a Proximus app, the “My Apps Space”.

That app allows the Proximus user to activate apps from participating companies that (initially) are not charged to their allowance for mobile data use, as the participating company pays the data use on its app “instead of the user”.

According to Proximus’s press release of 27 March 2017² this would guarantee the advertiser’s brand more installations of his app as well as an increased use and it would allow the user to discover new apps and recommend them without having a higher invoice. As regards the sponsor, the press release also mentions that the My Apps Space allows the sponsors to attract new users through a channel that is complementary to the existing advertising channels.

The “My Apps Space” app, as launched on 24 March 2017, was only available for Android³. The app was not available on iOS and the Windows Phone. According to Proximus’s press release the version for iOS would follow within six months.

¹ Proximus indicated in its answers to BIPT’s question that the types and exact numbers of customers are confidential.

² Press release “Proximus launches pilot project on sponsored mobile data” of 27 March 2017.

³ Proximus customers who did not receive a promotional SMS to download the app, can still download it and can check under the app’s “Offers” tab whether apps by partners are mentioned. If that was not the case, they were not able to use the sponsored mobile data, but according to the FAQs on Proximus’s website, they could use the app’s other advantages, such as monitoring their data use and block apps on the mobile network.

According to Proximus's answer of 19 May 2017 to the request for information by BIPT, there were six participating 'sponsors' on 30 April 2017⁴:

- BNP Paribas Fortis,
- ING,
- Delhaize,
- StepStone,
- Luminus and
- Takeaway.com, a platform for home-delivered meals.

According to Proximus's declarations the My Apps Space Platform was open to all interested 'sponsors'.

The data use paid by the 'sponsor' instead of the user depended on the agreement between the 'sponsor' and Proximus. Proximus also indicated to BIPT a typical (confidential) price asked for the sponsoring.

According to the FAQs on Proximus's website the user could find the limits for data use and/or the duration for each app, in the My Apps Space.

In its answer of 19 May 2017 Proximus also provided BIPT with confidential data on among other things:

- the number of Proximus customers that were invited to activate the My Apps Space (with a code provided along with the promotional SMS),
- the number of customers who accepted the invitation,
- which of the participating apps that had been activated by the last category of users.

From the information provided it appeared that the customers could have multiple (or all) of the participating apps sponsored.

If the volume of free data was exceeded, the user received a message⁵, warning him about the end of the sponsored offer. According to Proximus's declarations to BIPT the user was given the choice between closing the app or continuing to use the app, in which case the further use was charged to the mobile data bundle.

According to the FAQs on Proximus's website the sponsoring of the partner apps was not valid abroad.

Neither could the user use the sponsoring of the partner apps if he no longer had credit on his prepaid card.

Proximus confirmed to BIPT that the "pilot project" was stopped on 21 November 2017⁶ based on a (spontaneous) decision by Proximus.

⁴ This was the closing date of the period BIPT reported on in its first annual report on the monitoring of net neutrality in Belgium (see below, under 1.3).

⁵ A pop-up according to Proximus's declarations with respect to BIPT.

⁶ At the moment this opinion was elaborated, there was nothing more to be found on the Proximus website and the app that had to be downloaded from Google Play, was no longer to be found either. The roll-out for iOS was, according to BIPT's information, discontinued.

1.3. Parliamentary deliberations

BIPT mentioned that it had been monitoring this specific project in its [annual report on the monitoring of net neutrality in Belgium](#) (period of 30 April 2016 - 30 April 2017), published on BIPT's website on 29 June 2017⁷.

BIPT's monitoring of this project was also brought up during the hearing "annual overview of the postal and telecommunications sectors" in the Chamber of Representatives of 17 January 2018, during which the BIPT Council reported on its activities and presented its 2018 work plan to the Representatives.

Finally, during the Commission for Infrastructure's hearing of 6 March 2018, the Minister of Telecommunications and Digital Agenda, De Croo, answered the oral Parliamentary Question no. 22.352 by Representative Karine Lalieux on "the net neutrality and Proximus's pilot project My Apps Space".

In his answer the Minister more specifically put forward that BIPT had examined the pilot project "My Apps Space", had further treated the case internally following receipt of the factual and data material by Proximus, and finally did not finish its evaluation, considering the discontinuation of the project on 21 November 2017, based on a (spontaneous) decision by Proximus.

It is that reply that triggered the Chairman of the Commission for Infrastructure in her letter of 15 March 2018 to ask the Minister to order BIPT to "continue and finish the evaluation [BIPT] started".

⁷ <http://bipt.be/en/operators/telecommunication/protection-of-consumers/annual-report-on-the-monitoring-of-net-neutrality-in-belgium>

Chapter 2 Analysis

2.1. Legal framework and BEREC guidelines

2.1.1. Regulation (EU) 2015/2120

The sponsoring of data is not prohibited or regulated as such in the text of [Regulation 2015/2120](#)⁸ (hereinafter sometimes called “the Regulation” in short).

According to Article 1 (1) of the Regulation, the topic and scope of the Regulation in the field of “open Internet access”⁹ are: “*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*”.

From this stipulation one can derive that broadly speaking the Regulation contains two major sets of rules: (1) those regarding the rights of end-users on an open Internet access and (2) those regarding the manner in which providers of Internet access services (ISPs) may or may not intervene on the Internet traffic.

These sets of rules are discussed below and, where necessary, put in perspective by means of the quotes from the Regulation’s recitals.

a. End-users’ rights on an open Internet access

The end-users’ rights on an open Internet access are, in the first place¹⁰, laid down in Article 3 (1) of the Regulation, which states:

“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.”

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*”.

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*

⁸ 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.

⁹ The official name the European legislator has given to “net neutrality”.

¹⁰ In this opinion BIPT restricts itself to the end-user rights related to the case as presented. Article 4 of the Regulation also formulates end-user rights regarding transparency and non-conformity between the contract and the service actually provided, but these are not important for the assessment of the justified nature of the sponsoring of mobile data.

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."

b. Rules regarding the treatment of the Internet traffic by the ISPs

In Article 3 (3) of the Regulation the rules are laid down to guarantee the equal and non-discriminatory treatment of traffic when providing Internet access services.

Article 3 (3), first subparagraph, of the Regulation contains the following principle on the treatment of the Internet traffic:

"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."

In order to contribute to the efficient use of network means and an optimisation of the general transmission quality¹¹ ISPs are allowed however to adopt traffic management rules.

Article 3 (3), second subparagraph, of the Regulation determines the conditions thereto:

"The first subparagraph shall not prevent providers of internet access services from implementing reasonable traffic management measures. In order to be deemed to be reasonable, such 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. Such measures shall not monitor the specific content and shall not be maintained for longer than necessary."

Finally, Article 3 (3), third subparagraph, starts by quoting which traffic management measures are not allowed and continues to formulate three ad hoc exceptions (and conditions for application).

This third subparagraph reads as follows:

"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, except as necessary, and only for as long as necessary, in order to:

(a) comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of internet access services is subject, or with measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers;

(b) preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end-users;

¹¹ Confer Recital 9 of the Regulation.

(c) prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally.”.

2.1.2. The BEREC Guidelines of 30 August 2016

a. Role of the BEREC Guidelines

The [BEREC Guidelines](#)¹² draw their legal grounds from Article 5 (3) of Regulation 2015/2120.

They are guidelines for implementing the obligations of national regulatory authorities (“NRA(s)”), 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 Guidelines¹³.

b. Sponsoring of data in the Guidelines and in the EU

The BEREC Guidelines do not contain specific recommendations on how to analyse the sponsoring of data in the light of the net neutrality principle.

An inquiry within BEREC, the umbrella organisation for EU telecoms regulators, also taught us that at the moment there is no knowledge of similar data sponsoring programmes either in other European countries.

Consequently there are no public analyses or rulings by other NRAs on the sponsoring of data under the application of Regulation 2015/2120.

¹² BEREC Guidelines on the implementation by National Regulators of European Net Neutrality Rules, BoR (16) 127. Location: http://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

¹³ Confer Article 3, paragraph 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.

Box 1: the analysis of data sponsoring in the United States - similarities and differences compared to the EU

There exists a paper however, "[Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services](#)"¹⁴ by the American Wireless Telecommunications Bureau of 2016 on sponsored data.

That Bureau's mission is to issue advice and recommendations to the actual Federal Communications Commission (in short "FCC") in the US.

The analysis published was conducted under the General Conduct Rule of the Open Internet Order of 2015, which has been withdrawn today. The Rule bears similarities to Art. 3 (2) of the Regulation obliging NRAs in the EU to evaluate zero-rating/sponsored data, but there is a difference, for the Regulation asks the NRAs to assess whether the zero-rating/sponsored data restrict the end-user rights, while in the US a "no unreasonable interference or unreasonable disadvantage" standard is maintained (in the context of which the FCC Guidelines have put forward seven factors to be analysed; cf. footnote 44 of the paper quoted).

This paper analyses four US data sponsoring programmes in particular. In general, the paper points out the advantages of data sponsoring for the user and at the same time puts forward a number of concerns regarding such sponsoring.

These concerns mainly regard the data sponsoring by AT&T and are especially related to a possible unjustified favouritism of the affiliates of this ISP in the programme concerned¹⁵.

Data sponsoring results in the application of a price of zero for the sponsored data, which also occurs with zero-rating.

Zero-rating is indeed generally defined as a practice where an ISP applies a price of zero to data traffic for a specific application or category of applications (and the data is not included in a data cap set on the Internet access service)¹⁶.

¹⁴ https://apps.fcc.gov/edocs_public/attachmatch/DOC-342987A1.pdf

¹⁵ See in particular:

- p. 14: "Our concerns about the potentially anticompetitive impact of AT&T's conduct are based in part, but not entirely, on the fact that unaffiliated mobile video service providers must pay a significant, clearly identifiable amount of money for the sponsored data needed to offer streaming video programming to AT&T Mobility's subscribers on a zero-rated basis – by comparison to AT&T, which need not incur a comparable out-of-pocket expenditure to offer DIRECTV Now on a zero-rated basis. Rather, any imputed "charges" that DIRECTV "pays" AT&T Mobility for sponsored data, even if formally recorded on the corporate books as internal transfer payments, would result in no net expenditure at the holding company level." and
- p. 16: "Unlike T-Mobile, however, which charges all edge providers the same zero rate for participating in Binge On, AT&T imposes hefty per-gigabyte charges on unaffiliated third parties for use of Sponsored Data. All indications are that AT&T's charges far exceed the costs AT&T incurs in providing the sponsored data service. Thus, it would appear that AT&T's practices inflict significant unreasonable disadvantages on edge providers and unreasonably interfere with their ability to compete against AT&T's affiliate, in violation of the General Conduct Rule."

An inherent characteristic of data sponsoring is that a company (typically the provider whose app or content has a price of zero) pays the ISP for applying the price of zero. That is not always the case with zero-rating as there are also other forms of zero-rating letting the ISP decide for himself which apps or types of apps he zero-rates in his Internet access products.

All in all, considering the similarity of the outcome with data sponsoring and so-called pure zero-rating without sponsoring, BIPT believes that *at the moment, by analogy*, the BEREC recommendations regarding zero-rating in the BEREC Guidelines can and should be applied.

c. Recommendations regarding zero-rating in the Guidelines

Zero-rating is discussed at two occasions in the BEREC Guidelines: (1) with the recommendations regarding the application of the end-users' rights on an open Internet access and (2) upon the discussion of the obligations of ISPs regarding the treatment of the traffic when providing Internet access services.

Firstly, the practice of zero-rating is discussed in the marginal numbers 40 to 48 included of the BEREC Guidelines as a commercial practice or as agreed upon commercial or technical conditions of an Internet access service.

In general, in the relevant excerpts from the Guidelines a **multi-factor analysis** (of five factors) is elaborated, recommended to the NRAs in order to assess the impact of zero-rating on the rights of end-users of an open Internet access.

According to the Guidelines, regulators should verify in practice:

- whether zero-rating complies with the general aims of the Regulation and/or does not circumvent them
- what is the market position of the players involved in the zero-rating
- what is the impact of the zero-rating practices on the consumers' rights to consult information and content, to share these and to use applications and services of their choice
- what is the impact of the zero-rating practices on the rights of providers of content and information through the Internet to share information and content and to offer applications and services
- what is the extent of the practice and which alternatives exist (with competitors as well).

This list of five factors to assess can be seen as a test recommended to determine whether the NRA, as mentioned in Recital 7 of the Regulation (see above), is *“required to intervene when agreements or commercial practices would result in the undermining of the essence of the end-users' rights”*, to consult information and content freely, to share these and to use and provide the applications or services of their choice.

¹⁶ 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).”*

Secondly, zero-rating is also discussed in the part of the BEREC Guidelines relating to the (second series of) rules from the Regulation, dealing with the treatment of the traffic when providing Internet access services.

In marginal number 55 the BEREC Guidelines do indeed state: *“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.”*

Such a violation of the ban on technical discrimination is, according to the BEREC Guidelines, not subject to a multifactor analysis¹⁷.

2.2. The sponsoring of data did not violate the discrimination ban of Article 3 (3) of the Regulation

Based on the answers Proximus provided to BIPT’s questions, it appeared that Proximus did not treat the “sponsored” bits in its network differently from the comparable “non-sponsored” bits in the sense of Article 3 (3) of the Regulation.

In other words, Proximus did not take a traffic management measure specifically as regards the sponsored data.

Article 3(3), second subparagraph, of the Regulation (EU) 2015/2120, containing the criterion stating that *“measures”* by the ISP should not be based upon *“commercial considerations but only on the basis of objectively different technical quality of service requirements of the specific categories of traffic”*, **therefore does not apply here** and was not violated either.

Furthermore, Proximus’s answers to BIPT revealed that Proximus did not treat the sponsored apps differently from the non-sponsored apps or traffic upon depletion of the volume of mobile data included in the allowance: if the Internet access was no longer possible because the allowance had been exhausted, the zero-rating apps were no longer available either.

Proximus consequently was not guilty of discrimination that is prohibited by virtue of Article 3(3), first (and third) paragraph of the Regulation.

2.3. Elements BIPT could have used to intervene or not, based on Article 3(2) of the Regulation

¹⁷ BEREC Guidelines, no. 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.”*

2.3.1. General reservations relating to the analysis BIPT makes in this section

Regarding the sponsoring (or zero-rating) of certain apps there are, as mentioned above, no explicit prescriptions in the Regulation, but there is a list of five factors in the BEREC Guidelines that regulators have to assess in their decision-making process as to whether or not to intervene.

That analysis of five factors mainly comes down to assessing whether the zero-rating, because of its “scope”, leads to a “factual restriction” of the “essence” of the end-user rights, also including the providers of content and information through the Internet (the so-called “CAPs” - Content and Application Providers), to consult information and content freely, to share them and to use and provide applications and services of their choice.

Such a **multifactor analysis is an analysis ex-post** in which facts and actual figures play a major part.

BIPT confirms that it has only continued its first analysis, following the receipt of Proximus’s first figures in May 2017, internally.

Next, and before BIPT was able to ask an update of the figures and facts from Proximus and allow the latter to comment possible new findings by BIPT, the project had been discontinued by Proximus itself.

The following is therefore a hypothetical assessment of a number of the factors of the BEREC Guidelines, **from which no rights can be drawn** and which do not constitute complementary national guidelines regarding data sponsoring either as the facts and figures that would underlie these complementary national guidelines, are missing.

2.3.2. Analysis

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

The Regulation’s main goal is to protect end-users’ rights and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation.”¹⁸

In answer to a question of BIPT Proximus declared in essence that it launched the pilot project to allow sponsors to increase their apps visibility with the Proximus customers.

In its press release of 27 March 2017 Proximus also puts forward that it aims to boost the use of participating apps without the customer having to look at his data costs.

Increasing the visibility of apps and stimulating mobile data use are activities that BIPT (as such) cannot qualify as contrary to the Regulation’s goals and the end-user rights included therein.

It is of course true that sponsoring of data implies that payments are requested from participating CAPs. In that regard BIPT does not see a direct ban in the Regulation, but **possible risks of circumventing the innovation stimulating goal of the Regulation**.

¹⁸ Confer Recital 1 of the Regulation.

If Proximus for instance were to set a sponsoring price that was too high, a situation might arise in which Proximus would attract only the vested powers with sufficient access to funds among the CAPs for its My Apps Space. The innovative force ensuing from the apps provided by smaller (in principle) less substantial companies, could consequently be affected.

In view of the discontinuation of the project, BIPT did however not have the opportunity to look deeper into the pricing and its effects (see also under d)).

BIPT can however confirm that during the period of the pilot project **no complaints of end-users/CAPs** have been lodged ad hoc¹⁹.

b) 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?

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. According to marginal number 46 of the BEREC Guidelines those market positions would have to be analysed in line with competition law principles.

Considering the (confidential) target public Proximus has focused the first phases of the pilot project on, it was, in view of the degree of competition in that market segment, with the reservation of a different decision by the Belgian competition authority or by the European Commission, not obvious to consider that Proximus held a dominant position there.

Afterwards, in view of the discontinuation by Proximus, there has been no more opportunity to map out the exact type(s) of end-customers and consequently the market segment(s) (still in a "pilot phase" of the project) that Proximus had addressed and activated by registration for the My Apps Space platform.

If the target public were to include the business users as well, the chance that BIPT would have concluded there was dominance, would have been bigger than in the opposite case.

An element that BIPT still wished to investigate was whether the sponsor platform could be easily duplicated. If that were to have been the case, Proximus's competitors could have easily started up their own sponsoring programmes and it would not be so obvious to decide that there are high barriers to access or expansion on the market.

BIPT feels that switching costs are lower on the consumer market, especially as business end-users cannot (or not always; see the criterion of the subscriber with a maximum of five calling numbers) use Article 111/3 of the Act of 13 June 2005 on electronic communications, which restricts or cancels the termination fees if the contract is more than 6 months old.

As for the six CAPs who participated in the pilot project, BIPT, again with the reservation of a different decision by the Belgian competition authority (or the European Commission), assumes that they do not occupy a dominant position on the distinguished (for they are diverse) markets on which they perform their main economic activity.

¹⁹ Actually, BIPT did not receive a single complaint relating to the pilot project.

Another factor playing a role here (for the protection of the open nature of the Internet; *editorial note*) is that the sponsors of the apps mainly develop their activities in parts of the economy that do not exclusively or mainly relate to offering online products and services (see also the press release of Proximus on My Apps Space as a complementary advertising channel).

Furthermore none of the six CAPs involved controls essential parts of the network that end-users have to use to get access to the apps.

c) What are the effects of the zero-rating offers on the end-users' rights of consumers and business customers?

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-rated²⁰.

Now that the exact details of the activated types of customers are not known and, considering the discontinuation of the pilot project, **no figures** (over a long(er) period of observation) have been gathered regarding **the proportion of the data volume that did or did not remain in the data bundle each month, no final decision can be made here.**

In general it can be said however that the volumes of mobile data included in the offers by Proximus are generally large. This means that, again in general, it was very unlikely that BIPT would have come to the conclusion that the included volume provided would not have been sufficiently comprehensive in order to let end-users exercise their right to consult or share content and information through “non-sponsored apps”²¹.

In that assessment it was also very relevant that the six participating apps were **not apps that require a large data volume to be used.** Indeed, banking, retail purchases, searching and managing job openings, ... generally require only little data volume. The effect on the consumer end-user rights and, if need be, business users would have been greater if the sponsored apps would have targeted the streaming of music or videos for instance.

BIPT considers the effects of the sponsoring on the end-user rights also to be very variable as end-clients did not have to activate all apps in the My Apps Space but still had a choice and could for instance activate depending on the fact whether or not they were an end-customer with the sponsor in the “off-line world”.

Finally, in this case the Proximus customers, who had the possibility to download sponsored apps, were also **free to use the apps with or without sponsoring.** Proximus customers who - for whichever reason - did not want to partake in the zero-rating of apps, were indeed free to do so, without this seemingly having an impact on the usability of those apps; the only difference was that when the app in question was not activated in the My Apps Space, the data volume used was deducted from the data allowance subscribed to.

The fact **that the data volume used for the sponsored app was not deducted from the bundle** however, **contributed to more available data volume for other apps.**

d) What are the effects of the zero-rating offers on the CAPs end-users?

²⁰ BEREC Guidelines, No 48.

²¹ And this, according to their data needs, considered to be reflected in their choice of tariff plan.

The considerations in the previous section also apply *mutatis mutandis* to the effects of the zero-rating offers on the rights of the CAPs' end-users.

Furthermore, insofar as can already be observed within the **short span** since the launch of the pilot sponsoring programme until the discontinuation thereof, there does **not appear to be a decrease in the range and diversity of content and applications offered** by CAPs under the influence of the data sponsoring programme of Proximus²².

Were the pilot sponsoring programme to have lasted longer and/or were it to have been rolled out commercially, BIPT would have had the possibility to look deeper into possible negative effects of the pricing of the data sponsoring on the innovation stimulating goal of the Regulation (see higher) or on possible exclusion effects related to the financial or other terms for access to the programme.

The level of the sponsor rates could for instance be a concern in terms of impact on the end-user rights of Article 3 (2) of the Regulation, as the choice of whose app would be zero-rated in the My Apps Space, contrary to what is the case for the Favourite App in the Tuttimus, Mobilus and Bizz offers, indeed does not only depend on the customer's preferences but also on the (financial) capacity of the app provider to sponsor his app. This could for instance be too high of a barrier to small and medium-sized enterprises for them to compete on a level playing field with larger companies and to make their app offer known. Compare for instance a small web shop and a large web shop that sells shoes. The traffic to both does not differ much as the traffic is mostly defined by the pictures of shoes. But the financial capacity is not the same resulting in the smaller shoe shop not having the capacity to buy traffic towards its web page and to consequently be put at a disadvantage.

Another concern could be the **variations in the pricing**, that could not be justified by objective differences. Such variations might in certain circumstances boil down to a *de facto* restriction of the end-users' rights at the expense of those of the (category of) CAPs upon whom a higher price would be applied.

However, BIPT repeats that, in view of the discontinuation of the project, it was not able to go deeper into this and that, during the period of the pilot project, **no complaints by CAPs** have been lodged with BIPT.

As regards exclusion in other fields **there did not seem to be much cause for concern at first glance**, as Proximus declared in its answers of May 2017 to BIPT that **the offer was open to any interested sponsor**, except for websites and apps destined for adults, containing racist content,.... In any case, the fact that in the My Apps Space two apps from banks were activated, gave the impression that there was no exclusivity.

In line with the analysis Wireless Telecommunication Bureau, mentioned above in section 2.1.2., and with the conclusions of a study [Zero rating Practices in Broadband Markets](#) carried out by the European Commission²³, BIPT might have problems with the fact that all providers of apps or content had to sponsor in order to be zero-rated, while that would not be the case for **zero-**

²² Such can also be associated with the other considerations of BIPT regarding the scope of the zero-rating and the respective market positions of the parties concerned.

²³ See <http://ec.europa.eu/competition/publications/reports/kd0217687enn.pdf>, in particular, p. 138: "[C]ompetition concerns may exist where ISPs zero-rate access to their own content. However, in this case the content in question should be sufficiently attractive compared with potential alternatives for zero-rating to have a material impact on choice of content (and not to discourage customers from choosing the ISPs in question). Such concerns may become more prevalent as a result of mergers between ISPs and CAPs."

rating apps or content of Proximus itself or its subsidiaries or that apps or content of Proximus or its subsidiaries only had to make an accounting expenditure in order to receive zero-rating while other (competing) apps had to make a cash expenditure. Such a matter however **did not seem to be present** in this case.

e) What alternative offers are there and what was the scale of the zero-rating with Proximus?

Apart from the Proximus offers, there are in general, in Belgium, **enough alternative offers for the moment, which have (at least) an equal amount of mobile data volume included, in the large majority of cases without zero-rating.** Data sponsoring as a practice is, as such, not offered publicly to interested “sponsors” by any other ISP.

As regards the scope of zero-rating by means of sponsoring, BIPT repeats in the first place that it only continued its first analysis internally, after it had received the first figures from Proximus in May 2017, and that Proximus then, before BIPT was able to ask for updated figures from Proximus, discontinued the project of its own accord.

Furthermore, it seemed that, based on the first declarations by Proximus to BIPT, Proximus intended to develop certain (at the moment confidential) **terms and conditions in the sponsoring programme restricting the effects of zero-rating.**

In other words, it was, based on the figures and facts at BIPT’s disposal during the first months following the launch of the pilot project, not possible to say that the figures were of such a level (compared to the total number of mobile broadband subscribers within the scope of the My Apps Space) that it can be said that the impact of zero-rating has such a scale that it would result in a material reduction of end-users’ choice.

2.4. The restriction of the sponsoring to traffic within Belgium constituted a violation *prima facie* of Regulation (EU) no. 513/2012 regarding roaming within the EU

Regulation (EU) 2015/2120 did not only introduce the rules regarding open Internet access (directly in the EU Member States’ rules of law); it also resulted in the abolition of the retail roaming surcharges in the EU as of 15 June 2017.

As regards the latter rules, BIPT noted that the sponsoring, according to the FAQs on Proximus’s website, would not be valid abroad.

At first glance this condition, **as regards data use within the EU, seemed to be contrary to Article 6bis of Regulation (EU) no. 513/2012 regarding roaming on public mobile telecommunications networks within the Union, introducing the principle of roam like at home.**

Article 6bis does indeed state: *“With effect from 15 June 2017, [...], roaming providers shall not levy any surcharge in addition to the domestic retail price on roaming customers in any Member State [...] for any regulated data roaming services used, [...], subject to Articles 6b and 6c.”*

As Proximus did not notify a fair use policy (see Article 6b) regarding the sponsoring to BIPT, nor requested the application of the mechanism of sustainability of the abolition of the retail

surcharges (Article 6c) but did not continue to apply the zero-rating within the EU, it seemed to BIPT that Proximus applied a different tariff mechanism²⁴ to the traffic towards the sponsored apps in the EU than to the traffic to that same app in Belgium: no deduction took place of the data volume included in the allowance following the latter data use, while that did take place in case of the regulated data roaming services.

That is why Proximus de facto applied a surcharge on the data roaming traffic within the EU towards the sponsored apps and Proximus violated Article 6bis of Regulation (EU) no. 531/2012 at first glance.

Also in view of the considerations above relating to the scale of the zero-rating and BIPT's priority management as regards roaming ²⁵, this finding has not been notified before the spontaneous discontinuation of the offer by Proximus in a formal notice or infringement proceedings to Proximus so that the latter was, in light of its rights of defence, not able to respond.

Following the discontinuation of the offer this *prima facie* finding has become null and void.

²⁴ BIPT does not base itself on a nominal retail price in this case, but rather on the applied tariff mechanism (of zero-rating), that is also supposed to be comprised in the concept of the domestic retail price, according to Regulation (EU) no. 531/2012. Article 2, § 2, r) of Regulation no. 531/2012 does indeed define the retail price as follows: *"domestic retail price' means a roaming provider's domestic retail per-unit charge applicable to calls made and SMS messages sent (both originating and terminating on different public communications networks within the same Member State), and to data consumed by a customer; in the event that there is no specific domestic retail per-unit charge, the domestic retail price shall be deemed to be the same charging mechanism as that applied to the customer for calls made and SMS messages sent (both originating and terminating on different public communications networks within the same Member State), and data consumed in that customer's Member State;"* (BIPT underlines)

²⁵ See among other things [fine imposed upon Lycamobile](#) and the BIPT decisions on the requests for the application of the sustainability mechanism by [Nethys](#) and [Mundio Mobile](#).

Chapter 3 Conclusion

In this opinion BIPT answered a question by the Chairman of the Commission for Infrastructure, Traffic and Public Enterprises of the Chamber of Representatives to the Vice-premier and Minister of the Digital Agenda, Telecom and Postal Services to continue and finish the evaluation of data sponsoring in the pilot project My Apps Space of Proximus, started by BIPT.

That question can be met to a certain degree as regards the respect of the prohibition of “technical discrimination”, comprised in Article 3 (3) of Regulation 2015/2120 regarding “net neutrality”: Proximus turned out to comply with this prohibition.

Regarding the sponsoring (or zero-rating) of certain apps there are no further explicit prescriptions in the Regulation, but there is a list of five factors in the BEREC Guidelines that regulators have to assess in their decision-making process as to whether or not to intervene on the grounds of Article 3 (2) of Regulation 2015/2120 due to a restriction of the end-user rights on an open Internet access.

That analysis of five factors mainly comes down to assessing whether the zero-rating, because of its “scope”, leads to a “factual restriction” of the “essence” of the end-user rights, also including the providers of content and information through the Internet, to consult information and content freely, to share them and to use and provide applications and services of their choice.

Such a multifactor analysis is an analysis ex-post in which facts and actual figures play a major part.

In view of the discontinuation of the project at Proximus’s own initiative, BIPT can only offer a **hypothetical assessment** of a number of the factors of the BEREC Guidelines as regards the multifactor analysis, based on the first figures and facts at BIPT’s disposal during the first months following the launch of the pilot project.

Based on those figures and facts it was not possible to say that the sponsoring was of such a level that it could be stated that it had such an impact that it would result in a material reduction of choice for the end-users.

Next, and before BIPT was able to ask an update of the figures and facts from Proximus and allow the latter to comment possible new findings by BIPT, the project had been discontinued by Proximus himself.

BIPT did note that a restriction of the sponsoring to the use within Belgium was at first glance not in line with the roam like at home principle that came into force as of 15 June 2017, but this aspect of the sponsoring programme has, considering the first findings regarding net neutrality, the priority management for roaming and next the spontaneous discontinuation by Proximus itself, not been notified to Proximus in a formal notice or infringement proceedings, so that the latter was not able to respond to it, in accordance with its rights of defence.

For the reasons mentioned above, **no rights nor final conclusions can be drawn** from this opinion.

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Jack Hamande
Council Member

Luc Vanfleteren
Council Member

Michel Van Bellinghen
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