



B I P T

**BELGIAN INSTITUTE FOR POSTAL SERVICES
AND TELECOMMUNICATIONS**

**ANNUAL REPORT
REGARDING
NET NEUTRALITY MONITORING
IN BELGIUM**

(period from 1 May 2017 - 30 April 2018)

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Chapter 1. General

1.1. Preliminary provision

1. This report is adopted by BIPT.
2. On 7 June 2018, BIPT sent its draft annual report regarding net neutrality monitoring in Belgium (period from 1 May 2017 - 30 April 2018) to the CSA, the VRM and the Medienrat. As net neutrality also concerns content-related issues, BIPT fulfils its monitoring task in cooperation with the audiovisual media regulators.
3. The CSA, the VRM and the Medienrat were more specifically invited to amend the draft and/or complete it, in view of its publication and submission to the European Commission and BEREC. This report takes account of that input.

1.2. Context of this report

4. Article 5.1, second paragraph of Regulation (EU) 2015/2120 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 Union¹ (hereinafter also referred to as "Regulation 2015/2120" or simply "the Regulation") requires for the national regulatory authorities (hereinafter also referred to as "NRAs") to publish an annual report on their monitoring compliance with this Regulation and about their findings. The NRAs send those reports to the Commission and to BEREC.
5. This report is the report referred to in Article 5.1, second paragraph of Regulation 2015/2120.
6. In accordance with the [BEREC Guidelines on the implementation by National Regulators of European Net Neutrality Rules](#)² (hereinafter also referred to as "the BEREC Guidelines" or simply "the Guidelines") this report will cover the period from 1 May 2017 up to and including 30 April 2018 and be delivered by 30 June 2018.
7. Under Article 5.1, first paragraph, of the Regulation the NRAs shall:
 - closely monitor and ensure compliance with Articles 3 and 4 of Regulation 2015/2120 and

¹ *Official Journal*, No L 310/1, 26 November 2015.

² See No 182 of those Guidelines, published at http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practice/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules

- promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology.

1.3. The provisions of the Regulation

8. The core provisions of Regulation 2015/2120 reported on are Articles 3 and 4.
9. These Articles provide:

“Article 3
Safeguarding of open internet access

1. 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.

This paragraph is without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications or services.

2. Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users laid down in paragraph 1.

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.

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.

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;

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

4. Any traffic management measure may entail processing of personal data only if such processing is necessary and proportionate to achieve the objectives set out in paragraph 3. Such processing shall be carried out in accordance with Directive 95/46/EC of the European Parliament and of the Council. Traffic management measures shall also comply with Directive 2002/58/EC of the European Parliament and of the Council.

5. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality.

Providers of electronic communications to the public, including providers of internet access services, may offer or facilitate such services only if the network capacity is sufficient to provide them in addition to any internet access services provided. Such services shall not be usable or offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for end-users.

Article 4

Transparency measures for ensuring open internet access

1. Providers of internet access services shall ensure that any contract which includes internet access services specifies at least the following:

(a) information on how traffic management measures applied by that provider could impact on the quality of the internet access services, on the privacy of end-users and on the protection of their personal data;

(b) a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services;

(c) a clear and comprehensible explanation of how any services referred to in Article 3(5) to which the end-user subscribes might in practice have an impact on the internet access services provided to that end-user;

(d) a clear and comprehensible explanation of the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users' rights laid down in Article 3(1);

(e) a clear and comprehensible explanation of the remedies available to the consumer in accordance with national law in the event of any continuous or regularly recurring discrepancy between the actual performance of the internet access service regarding speed

or other quality of service parameters and the performance indicated in accordance with points (a) to (d).

Providers of internet access services shall publish the information referred to in the first subparagraph.

2. Providers of internet access services shall put in place transparent, simple and efficient procedures to address complaints of end-users relating to the rights and obligations laid down in Article 3 and paragraph 1 of this Article. The requirements laid down in paragraphs 1 and 2 are in addition to those provided for in Directive 2002/22/EC and shall not prevent Member States from maintaining or introducing additional monitoring, information and transparency requirements, including those concerning the content, form and manner of the information to be published. Those requirements shall comply with this Regulation and the relevant provisions of Directives 2002/21/EC and 2002/22/EC.

4. Any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated by the provider of internet access services in accordance with points (a) to (d) of paragraph 1 shall, where the relevant facts are established by a monitoring mechanism certified by the national regulatory authority, be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law.

This paragraph shall apply only to contracts concluded or renewed from 29 November 2015.”

10. For the purposes of the reporting also Article 5.1, first paragraph, second sentence of the Regulation is relevant. Under this provision, with a view to carrying out the tasks referred to in the first sentence of Article 5.1, first paragraph, the NRAs “*may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services*”.

1.4. The BEREC Guidelines

11. Based on Article 5.3 of Regulation 2015/2120 BEREC, the European umbrella organisation of NRAs, has adopted guidelines to implement the NRAs’ obligations in order to contribute to the consistent application of the Regulation. Those guidelines are those cited above, called “BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules”.

12. In its [work programme 2018](#)³ BEREC announced that at the end of 2018 it will provide an opinion for the European Commission, in which it will evaluate the experiences with Regulation 2015/2120 and with the BEREC Guidelines. For this deliverable, BEREC will also address upcoming new technologies (such as 5G) and services (specialised services, IoT/machine-to-machine (M2M) services, etc.) and their relationship to the Net Neutrality Regulation. The European Commission itself will in accordance with Article 9 of the Regulation evaluate Articles 3, 4, 5 and 6 of the Regulation by 30 April 2019 at the latest and report on this to the European Parliament and the Council (if needed, along with appropriate proposals to amend the Regulation itself).
13. BIPT was and is actively involved in this project. In this context, among other things, it took note of the points of view of various stakeholders regarding the implementation of the Regulation, submitted during a [public consultation](#)⁴ held on the BEREC website, the deadline of which was 25 April 2018. One of the contributions to this public consultation came for an association of Belgian operators active in Belgium and investing in electronic communications networks.
14. As regards the annual reporting by the NRAs, the Guidelines recommend the following:

“Annual reporting of NRAs

182. The reports must be published on an annual basis, and NRAs should publish their annual reports by 30th June for the periods starting from 1st May to 30th April. The first report is to be provided by 30th June 2017, covering the period from 30th April 2016 to 30th April 2017 (the first 12 months following application of the provisions).

183. As well as being published, the reports should be provided to the Commission and to BEREC. To enable the Commission and BEREC to more easily compare the reports, BEREC recommends that NRAs include at least the following sections in their annual reports:

- *overall description of the national situation regarding compliance with the Regulation;*
- *description of the monitoring activities carried out by the NRA;*
- *the number and types of complaints and infringements related to the Regulation;*
- *main results of surveys conducted in relation to supervising and enforcing the Regulation;*
- *main results and values retrieved from technical measurements and evaluations conducted in relation to supervising and enforcing the Regulation;*
- *an assessment of the continued availability of non-discriminatory IAS at levels of quality that reflect advances in technology;*
- *measures adopted/applied by NRAs pursuant to Article 5(1).”*

³ https://berec.europa.eu/files/document_register_store/2018/1/BEREC%20WP%202018.pdf especially p. 18.

⁴ <https://consultations.berec.europa.eu/en/info-page/consultation-paper-evaluation-application-regulation-eu-20152120-and-berec-net-neutrality>

Chapter 2 The implementation of the legal framework by BIPT

15. In the period covered by this report BIPT took the following implementing decisions or initiatives to promote the continued availability of Internet access services at levels of quality that reflect advances in technology.

2.1. Adoption of the Decision of the BIPT Council of 2 May 2017 regarding the communication of the speed of a fixed or mobile broadband connection

16. Even before Regulation 2015/2120 was adopted, a BIPT decision stipulated how certain operators had to inform their (potential) subscribers about the speed of the Internet connection. This was more specifically laid down in the [BIPT Council Decision of 4 December 2012](#) concerning communication of the speed of fixed broadband connection⁵.

17. As discussed in the previous BIPT annual report that decision had to be amended; in order for that decision to correspond with the European Regulation BIPT organised a public consultation about a [draft new decision](#) and subsequently had additional discussions with operators and stakeholders to arrive at an appropriate final decision.

18. That process led to a [final decision](#) of 2 May 2017 regarding the communication of the speed of a fixed or mobile broadband connection⁶.

19. This new decision of 2 May 2017 replaced the decision of 4 December 2012 in order to:

- extend the scope of the decision to mobile Internet;
- have the parameters for speed performance correspond with the European Regulation;
- remove the distinction made between peak and off-peak hours for speed performance;
- take utmost account of the BEREC Guidelines.

20. For fixed Internet products the ISPs should provide the following parameters:

- the minimum upload and download speed;
- the upload and download speed normally available;
- the maximum upload and download speed;
- the advertised upload and download speed;
- the download volume subscribed to.

⁵ <http://www.bipt.be/en/operators/telecommunication/protection-of-consumers/bipt-council-decision-of-4-december-2012-concerning-communication-of-the-speed-of-fixed-broadband-connection>

⁶ <http://www.bipt.be/en/operators/telecommunication/protection-of-consumers/decision-of-the-bipt-council-of-2-may-2017-regarding-the-communication-of-the-speed-of-a-fixed-or-mobile-broadband-connection>

21. For mobile Internet products the mobile operators should provide the following parameters:
- the estimated upload and download speed;
 - the advertised upload and download speed;
 - the download volume subscribed to.

2.2. Territorial Internet access coverage (Atlas)

22. As the coordinator of initiatives regarding network quality BIPT has published a map of the [fixed](#)⁷ and [mobile](#)⁸ coverage. The purpose is to monitor how the roll-out of networks in Belgium is evolving.
23. By means of the fixed maps BIPT can identify the so-called “white spots”, where some households still have no access to a 30 Mbps Internet connection.
24. The mobile coverage maps show the coverage predicted by the operators on the Belgian territory. BIPT checks their reliability by way of ad hoc measurements in the field.

2.3. Quality of Experience

25. In order to complete the mobile coverage BIPT intends to measure the quality of experience by way of drive tests. Those measurements should make it possible to compare the quality experienced by the user, especially regarding the quality of the calls and the time it takes to download a file.
26. In addition, BIPT intends to launch an application that allows to measure the quality of experience in the field by way of the users (crowdsourcing).
27. In the period after 30 April 2018 BIPT will continue to elaborate the practicalities of these planned initiatives.

⁷ <http://www.bipt.be/en/consumers/telephone/quality-of-service/coverage-maps-for-fixed-broadband-access>

⁸ <http://www.bipt.be/en/consumers/telephone/quality-of-service/coverage-maps-mobile-networks>

Chapter 3 Monitoring of the Regulation by BIPT

3.1. Monitoring the traffic management practices

3.1.1. Use of DPI

28. One of the actions planned in the field of Internet traffic management was to examine the use of DPI for traffic management further within the context of monitoring and to carry out a more profound examination in accordance with the above-mentioned criteria of Article 3(3) of the Regulation.
29. DPI means “Deep Packet Inspection”. This is a system where electronic data traffic is analysed at various layers. The goal is definitely not to identify the content of the packet, but the use of the packet. Explained by way of a practical example: DPI does not want to determine whether the packet contains a pixel of the last “Game of Thrones” episode, but whether it is a video packet that is transmitted based on the P2P or RTP⁹ protocol. Identification of the content is a violation of the privacy legislation and therefore a legal offence. This practice is only allowed based on exceptions provided for by law.
30. Based on that identification the operator can decide to apply traffic management on certain packets such as: refuse or transmit with another priority, ... This identification can be done in a variety of ways, whereby those ways can be used simultaneously to achieve an identification as accurate as possible:
- Verification of all information in the payload of the transport layer protocol;
 - Identification based on the URL (Unified Resource Locator) and SNI (Server Name Indication);
 - DNS snooping¹⁰;
 - source IP address;
 - port number;
 - Type of Service (ToS)/QoS information in the IPv4 or IPv6 header;
 - Analysis of the traffic patterns.
31. The result of that identification can also be used not to charge the traffic of certain packets to the end-customer, as is done for example in case of zero-rating or sponsored data. For the moment there is no consensus about whether the use of DPI for such purposes counts as a traffic management measure. Therefore, BIPT will not analyse the use of DPI in this context.

⁹ Real-time Transport Protocol, abbreviated to RTP, is a protocol that defines a standardised packet format to send audio and video over the Internet.

¹⁰ DNS snooping is a method where a DNS server is queried to find out whether the DNS server has a specific DNS record cached in order to deduce if the DNS server’s owner (or its users) has (have) recently visited a specific site. This method can be used to collect statistical information about the users of the DNS server.

32. On 9 April 2018, BIPT sent a questionnaire to the main ISPs¹¹ about the traffic management measures they use in their networks. The questions were centred around their use of DPI. BIPT was aiming to know more about the following elements, in case they use a DPI system:
- the traffic charge conditions under which the system is triggered;
 - what actions the system undertakes next;
 - the effect this has on the end-user’s services;
 - the ultimate impact of all those measures on his network.
33. The answers to these questions facilitate BIPT's analysis whether those measures can be catalogued as measures admissible under Article 3 (3) c) of the Regulation to *“prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally.”*
34. Based on the answers to the questionnaire involved BIPT can sketch the situation as follows.
35. For four network exploitations the operators stress the fact that they are currently not using any form of DPI for traffic management measures, not even in case of congestion. However, DPI can for instance still be used for analysing an incident, in case of a customer’s complaint, the latter having given his explicit approval, or a request from a legal body.
36. The use of DPI in case of an incident or a user’s complaint is still the subject of further factual and legal analysis at the time of drafting this report.
37. In case of a request from a legal body Article 3 (3) a) of the Regulation applies, i.e. in order to: *“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;”*

¹¹ The questionnaire was more specifically addressed to Telenet, Brutélé/Nethys (VOO), Proximus and Orange, and related to the use of traffic management in both the fixed and the mobile network. Therefore the questionnaire was addressed primarily to those network operators in Belgium who together reach the large majority of end-users, so that the questionnaire achieved a wide scope, without making other priorities of BIPT suffer. This selection of operators does by no means imply a recognition by BIPT that (especially) other Internet Service Providers are exempted from observing Articles 3 and 4 of Regulation 2015/2120/EU.

38. Telenet and Brutélé/Nethys (under the VOO brand name) give a very extensive explanation on their public websites about their traffic management measures, and particularly about the way P2P traffic is handled: <https://www2.telenet.be/nl/klantenservice/telenet-netwerkbeheer/> and <http://www.voo.be/en/netzwerkmanagement/>. The answers to the detailed questions of BIPT confirm that those measures indeed fall under the scope of Article 3 (3) c) of the Regulation: the system does not intervene permanently in the traffic, but only locally, in case of significant congestion and only in upstream traffic. The end-customer's normal download use is not impacted by those measures in any way, not even in locations where there would be a congestion in upstream traffic.

3.1.2. Enquiry among a number of ISPs on the security exception in the net neutrality legislation

39. Since 2010 ENISA (the European Network and Information Security Agency), the European Commission and the NRAs have been holding meetings to support a harmonised implementation of the provisions regarding 'security and integrity of networks and services' in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive").
40. In the period covered by this report, at the request of the NRAs, ENISA held an EU wide enquiry among telecom providers and ISPs about security exceptions in the net neutrality legislation.
41. Among the exceptions to the ban on blocking, slowing down and discrimination of Internet traffic in Article 3 (3) of the Regulation item b) indeed mentions the possibility for ISPs to intervene in Internet traffic in order to "*preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end-users*".
42. Concretely, BIPT mailed a consultation document on 9 April 2018 to a number of Belgian large telecom providers and ISPs, with a request to fill it out by 30 April 2018 at the latest.
43. The information gathered by means of this enquiry will be used by ENISA to compose a document that gives a general aggregated survey of how those exceptions are applied, what the good practices are in this field, the challenges, etc.

3.2. Zero-rating monitoring

44. In the case of zero-rating the Internet Service Provider does not consider the data traffic of a specific application or category of applications for the data limit. This results in free data for this specific application or category of applications.
45. Regarding this practice, considered to be linked to open Internet access (although it is not explicitly treated in Regulation 2015/2120) BIPT has mainly developed the following activities.

3.2.1. Monitoring of the Tuttimus, Mobilus, Minimus and Bizz offers of Proximus

46. As mentioned in BIPT's previous annual report Proximus launched a new range of products on 17 October 2016, incorporating a form of zero-rating. There were four new offers:
 - 2 for residential customers (Tuttimus, a 4-Play offer, and Mobilus, a residential postpaid offer for mobile communications) and
 - 2 for (small) business customers (Bizz All-In, a bundle of telephony services, Internet access services and related services¹², with the possibility to choose a version that includes Proximus TV against payment of a supplement, and Bizz-Mobile, a stand-alone offer for mobile communications).
47. In the current period, the range of products for residential customers has been completed with a 3-Play offer. Indeed, in November 2017, Proximus launched the so-called Minimus offer, in which Internet, TV and one mobile phone subscription (or more if requested) are bundled.
48. As part of Minimus too, customers got zero-rating for one favourite app they could pick from a list of 6 possible applications: Facebook, WhatsApp, Snapchat, Instagram, Twitter or Pokémon Go. When no choice was made, this time WhatsApp was the standard app to be zero-rated in Mobilus. From July 2017 onwards this was also the standard app for new customers in the other offers launched earlier, in which zero-rating was incorporated.
49. The mobile data volume included in the allowance was extended in all offers from August 2017 onwards. The extensions in the standard offers¹³ were as follows:

¹² Storage in the cloud, e-mail addresses on name of the company and a .be domain name.

¹³ At the time of the tariff increase BIPT counted 63 possible tariff plans on the detailed page of the Proximus website, but for easy reference in this report the values in the standard offers are taken into consideration; by and large this means the offers without any optional services (such as full control, Netflix included, call connect, etc...), services that one can unsubscribe to (such as Proximus TV, in a Tuttimus without TV bundle) and without any formulas incorporating payment by instalment of an included smartphone.

Stand-alone and Minimus		Tuttimus Packs		
	Up to and including 31/07/2017	From 01/08/2017	Up to and including 31/07/2017	From 01/08/2017
Mobilus S	1 GB	1.5 GB	2 GB	3 GB
Mobilus M	3 GB	5 GB	5 GB	10 GB
Mobilus L	8 GB	10 GB	10 GB	20 GB

Table 1: extensions of the mobile data volume included in the standard residential offers of Proximus, in which zero-rating is incorporated (source: answer from Proximus to the BIPT questionnaire of 1 March 2018)

Stand alone & Packs¹⁴		
	Up to and including 31/07/2017	From 01/08/2017
Bizz Mobile S	1 GB	1.5 GB
Bizz Mobile M	3 GB	5 GB
Bizz Mobile L	8 GB	10 GB
Bizz Mobile XL	12 GB	20 GB

Table 2: extensions of the mobile data volume included in the standard business offers of Proximus, in which zero-rating is incorporated (source: answer from Proximus to the BIPT questionnaire of 1 March 2018, completed by BIPT as regards Bizz Mobile S)

50. In the large majority of cases those extensions of included volume were accompanied by a tariff increase, which was as follows for the (standard) offers mentioned above:

¹⁴ Except Bizz Mobile S, which is not offered in the form of a Pack.

Stand-alone and Minimus		Tuttimus Packs		
	Up to and including 31/07/2017	From 01/08/2017	Up to and including 31/07/2017	From 01/08/2017
Mobilus S	€ 15	€ 15.99	€ 81	€ 82.99
Mobilus M	€ 25	€ 26.99	€ 92	€ 93.99
Mobilus L	€ 40	€ 42.99	€ 103	€ 107.99

Table 3: comparison of prices, including VAT, in the standard residential offers of Proximus, in which zero-rating is incorporated (source: Proximus website)

Stand alone & Packs¹⁵		
	Up to and including 31/07/2017	From 01/08/2017
Bizz Mobile S	€ 12	€ 13
Bizz Mobile M	€ 21	€ 23
Bizz Mobile L	€ 36	€ 39
Bizz Mobile XL	€ 56	€ 56

Table 4: comparison of prices, including VAT, in the standard business offers of Proximus, in which zero-rating is incorporated (source: Proximus website)

51. For the Minimus offers, launched on 1 August 2017, the values concerned were as follows:

Variant	Price (including VAT)
Minimus 1.5 GB	€ 82.94
Minimus 5 GB	€ 93.49

¹⁵ Except Bizz Mobile S, which is not offered in the form of a Pack.

Minimus 10 GB	€ 107.94
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Table 5: Prices, including VAT, and included volume in the standard Minimus offers of Proximus (source: Proximus website)

52. As stated in the report on the Tuttimus, Mobilus and Bizz offers, [published on 30 January 2017](#)¹⁶, BIPT has continued to monitor the figures regarding the Proximus offers and the use of apps, with a view to intervening if it would appear necessary.
53. In June 2017, BIPT obtained a first update of the figures, which had been requested from Proximus before.
54. About one year after having launched its Tuttimus and Mobilus offers Proximus presented in the press¹⁷ a survey of certain aspects of zero-rating in those offers¹⁸. Proximus revealed the following information among other things:
- Facebook is by far the favourite app most chosen;
 - Facebook is followed by WhatsApp, Snapchat, Instagram, Pokemon and Twitter;
 - At the end of June 2017, Tuttimus or a business Bizz All-in was used by 255,000 customers.
55. In March 2018, BIPT sent a new request to Proximus to update the figures and facts (considering the Minimus offer that had been launched in the meantime), as well as a number of new questions, such as the monthly percentage of the total mobile data traffic that was zero-rated since October 2016 and the monthly percentage of the mobile data traffic of customers of offers in which zero-rating was applied, that was zero-rated.
56. Proximus answered those questions in a confidential letter of 20 April 2018.
57. Based on the trends shown by the figures and facts obtained (including percentages regarding the share of the included mobile data volume that remained unused on average in the offers concerned, the number of cases that the volume included in the allowance was exceeded, and the relative share of zero-rated traffic in the total mobile traffic on the Proximus network) BIPT's finding was that its earlier conclusion could be maintained, particularly the fact that the impact of zero-rating is not so great as to lead to a factual restriction of the end-users' choice.

¹⁶ See <http://www.bipt.be/en/operators/telecommunication/protection-of-consumers/bipt-analysis-of-zero-rating-of-apps-in-the-proximus-offers>

¹⁷ See the specialist journal Data News for instance: "Facebook veruit het populairst voor gratis data bij Proximus."

¹⁸ BIPT took this to mean the trends up to the end of June 2017.

3.2.2. Opinion on the “My Apps Space pilot project” of Proximus

58. As described in the previous report of BIPT on net neutrality Proximus announced on 27 March 2017 that it would launch a pilot project regarding sponsored mobile data.
59. The sponsoring was organised as follows: after downloading a Proximus app (the “My Apps Space” app) certain Proximus users¹⁹ could activate apps from 6 participating companies, without the mobile data use being deducted (initially) from their allowance, because the participating company paid the data use on its app instead of the user. There were 6 participating ‘sponsors’: 2 banks (BNP Paribas Fortis and ING), supermarket chain Delhaize, recruiting agency StepStone, gas and electricity provider Luminus and Takeaway.com, a platform for home delivery of meals.
60. In May 2017, BIPT received data from Proximus (e.g. number of invited customers, number of customers who effectively had accepted the invitation, which of the participating apps had been activated by the latter category of users, what the standard price of a standard “sponsoring agreement” was, ...). Afterwards BIPT continued to study the case in-house.
61. Next, and before BIPT was able to ask an update of the figures and facts from Proximus and allow the latter to comment on any new findings by BIPT, the project was discontinued on the initiative of Proximus on 21 November 2017.
62. On the occasion of the answer given by the Minister of Telecommunications and Digital Agenda De Croo on 6 March 2018 to an oral parliamentary question of Mrs Karine Lalieux, member of the Belgian Chamber of Representatives, BIPT expressed its [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](#)²⁰ on 25 April 2018 based on Article 14, § 1, 1°, of the Act of 17 January 2003 on the status of the regulator of the Belgian postal and telecommunications sectors. This in answer to the question from the President of the Parliamentary Commission Infrastructure of the Belgian Chamber of Representatives, Mrs Lalieux, to continue and finish the evaluation started by BIPT.
63. Expressing proper reservations about the rights of defence and the collection of facts and figures, which could not be continued because of the discontinuation on the initiative of Proximus, the opinion advanced by and large three findings:
- Proximus appeared to observe the ban on “technical discrimination” referred to in Article 3 (3) of Regulation 2015/2120: when Internet access was no longer possible because the allowance was used up, the sponsored apps were inaccessible too.

¹⁹ The “My Apps Space” app, as launched on 24 March 2017, was only available for Android.

²⁰ <http://www.bipt.be/en/operators/telecommunication/protection-of-consumers/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>

- Furthermore (for traffic below the data cap) a theoretical multifactor analysis was developed, as recommended by BEREC, whereby:
 - On the one hand, emphasis was put on the need for a concrete, sufficiently profound impact on the rights referred to in Article 3 (1) of the Regulation which is inherent in the BEREC Guidelines. In doing so BIPT considered the fact that based on the figures and facts at BIPT’s disposal during the first months following the launch of the pilot project, it was not possible to say that the figures were of such a level (compared to the total number of mobile broadband subscribers within the perimeter of the My Apps Space) that the impact of zero-rating can be said to have such a scope that it would result in a factual restriction of the end-users’ options. Next and before BIPT could ask Proximus for an update of the figures, the project was discontinued on the initiative of Proximus.
 - On the other hand, a number of concerns were factored in, such as possible risks of circumventing the innovation stimulating goal of the Regulation²¹ and considering the studies for the European Commission and for the FCC²², discrimination in price setting and sponsoring of one’s proper apps.
- The restriction of the sponsoring to use within Belgium seemed at first glance not to be 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 roaming²³ and next the spontaneous discontinuation by Proximus itself, not been notified to Proximus in a formal notice or infringement proceedings, so that considering its rights of defence the latter was not able to respond to it.

64. Consequently BIPT concluded its opinion with the observation that for the reasons above **no rights, nor any final conclusions could be drawn from its opinion.**

3.2.3. Discussions and point of view about the zero-rating (to be developed) of a customer service app, which also contained a customer loyalty programme

65. Over the period covered by this report BIPT was approached a number of times by ISPs enquiring about the conformity of their projects with the principles of the Regulation and the BEREC Guidelines.

²¹ 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.

²² See box 1, p. 9 of the opinion.

²³ 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.

66. BIPT appreciates such a proactive approach. Though Regulation (EU) 2015/2120 and the BEREC Guidelines do not require ex-ante screening and/or approval by the NRA, BIPT would like to stress that it is in favour of a proactive contact between the regulator and every operator prior to the launch of new offers or commercial practices, especially when the launch involves major issues that are high on the regulatory and political agenda, such as zero-rating. This enables both parties to prepare possible questions linked to the launch thus preventing a possible establishment of a breach, which may lead to additional measures, such as adapting or repealing an offer or even a fine.

67. Thus, one ISP asked BIPT a question that essentially was about the relationship between

- on the one hand, section 34 and especially section 35 of the BEREC Guidelines²⁴, which essentially states that the possibility for an end-user having reached his data cap, to access the ISP's customer service, to order an extra data bundle, is unlikely to limit the end-user's rights to open Internet access, referred to in Article 3 (1); and
- on the other, a bullet of section 55 of the BEREC Guidelines, which mentions the fact of letting zero-rated traffic pass after having used up the allowance, whereas the other traffic is blocked²⁵ as an example of obvious violation of the ban on discrimination of Internet traffic in Article 3 (3), first paragraph of the Regulation.

68. In this particular case the ISP wanted to fully zero-rate his customer service app, which indeed contained a reload function, as referred to in section 35 of the BEREC Guidelines.

69. However, during the discussion BIPT remarked that yet other functions were available on the planned customer service app, such as a function with which loyalty points could be exchanged with the ISP itself (among other things to buy smartphones in the ISP's shop) or with the ISP's external partners, who sold retail products.

²⁴ "34. With regard to characteristics of IAS, agreeing on tariffs for specific data volumes and speeds of the IAS would not represent a limitation of the exercise of the end-users' rights (ref. Recital 7). Moreover, BEREC considers that end-users' rights are likely to be unaffected, at least in the case that data volume and speed characteristics are applied in an application-agnostic way (applying equally to all applications).

35. Examples of commercial practices which are likely to be acceptable would include:

- [...]
- the ability for an end-user to access the ISP's customer services when their data cap is reached in order to purchase access to additional data."

²⁵ "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."

70. In that context BIPT was of the opinion that (the intention of) letting traffic pass to this function after the allowance is used up, while blocking similar traffic to sites where other online reductions can be activated, constituted a unequal treatment of traffic of the same nature and therefore a discrimination of Internet traffic based on the applications or services offered, which is prohibited under Article 3 (3), first paragraph of the Regulation.

71. Indeed, according to BIPT, the fact that reload is allowed in section 35 of the BEREC Guidelines after having reached the data cap does not mean that BEREC has abandoned the application of the principle of equal treatment of Internet traffic in Regulation (EU) 2015/2120 after having reached the data cap, but quite the opposite. For a reload only the ISP can provide the customer with the reload asked, so that this service or function does not compete with other services offered over the Internet. However, as far as loyalty programmes are concerned, which are also (sometimes only) offered online²⁶, such competition does exist, and in that case the technical discrimination of Internet traffic, as explained in section 55 fully applies when no objective grounds are presented to justify a difference²⁷ in treatment by the ISP.

72. BIPT has urged the ISP concerned several times to:

- Provide a motivation for each of the app's functions (apart from the "reload" function already covered in the above-mentioned section 35 of the BEREC Guidelines) to justify an exception to the principle of equal treatment of Internet traffic; and
- To explore the idea of creating for app functions for which no justification was given (or would be accepted by BIPT), a separate URL where traffic is blocked after the allowance is used up.

73. The ISP concerned did not submit any relevant motivation to BIPT (neither did he mention the suggested IT development), following which BIPT confirmed that it could not agree with that ISP's intention to zero-rate the Customer Service App involved for the full 100%.

²⁶ So no longer combined with a physical loyalty card.

²⁷ See the combination of sections 49 and 51 of the BEREC Guidelines:

"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. [...]"

51. In assessing whether an ISP complies with this principle, NRAs should apply a two-step assessment:

- *In a first step, they should assess whether all traffic is treated equally.*
- *In a second step, they should assess whether situations are comparable or different and whether there are objective grounds which could justify a different treatment of different situations (under Article 3(3) second subparagraph – see paragraphs 57-75 below). »*

3.2.4. Discussion and point of view regarding zero-rating in case of roaming in countries where the Roam Like at Home principle applies

74. In the period leading up to the introduction of the Roam Like at Home principle on 15 June 2017 BIPT answered a question from an ISP on how zero-rating should be implemented in case of a roaming customer who can benefit from such an offer in a country where that principle applies.

75. In the answer to that question BIPT particularly advanced the following:

- It was allowed to regard the offers involved as an “open bundle” based on the information then available to BIPT. This means that a fair use policy in the form of a volume restriction could be applied.
- Since from 15/06/2017 the domestic tariff will be applied, the use of those roaming offers in the EU will have to be treated as domestic use. The same goes for zero-rating, where specific reference was made to the following part of the definition of domestic retail price in Article 2, § 2, r) of the Roaming Regulation: *“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 [...] data consumed in that customer’s Member State;”*

3.3. Complaints about the observance of Regulation 2015/2120

76. BIPT itself received two complaints, or at least utterances of dissatisfaction, relating to the observance of Regulation 2015/2120²⁸.
77. BIPT has also given its input within the context of one complaint forwarded by the Office of the Ombudsman for Telecommunications asking for an opinion.

3.3.1. Complaints about zero-rating at Proximus

a) Input in a complaint against zero-rating the favourite app in the Tuttimus offers of Proximus

78. At the end of December 2017, following a question from the Office of the Ombudsman for Telecommunications, BIPT gave its input regarding a citizen's complaint about zero-rating the favourite app in the Tuttimus offer of Proximus described above. The question or complaint of the person involved was whether Proximus was not obliged to treat all apps and all data equally based on the net neutrality rules.
79. In its answer to the Office of the Ombudsman BIPT explained how it had arrived at its findings in its report (mentioned earlier) about the analysis of zero-rating apps in Proximus offers.
80. The input mentioned that BIPT's monitoring had shown that Proximus was not treating the favourite app in a discriminatory way, in that this app could not be used if the data volume included in the allowance was used up. BIPT also mentioned that there were no indications either that Proximus was treating the traffic towards that app at a higher speed or quality compared to other Internet traffic.
81. Regarding the tariff treatment of the "favourite app" BIPT advanced that in the report it had carried out an analysis, which was recommended in the BEREC Guidelines and that at the end of that analysis it had arrived at the conclusion that there were no elements at the time indicating that the zero-rating of apps by Proximus would endanger the Internet users' rights to consult information and content freely, to share it and to use and provide the applications and services of their choice, which was the touchstone of the Regulation.

b) Complaint by a chat app developer against the zero-rating of WhatsApp in the Tuttimus, Minimus and Mobilus offers

82. In a direct complaint sent to BIPT a chat app developer asked for the BIPT report mentioned above to be reviewed.

²⁸ BIPT is not a body that treats individual complaints. It does receive reports, on the basis of which (among other things) it decides to intervene in order to structurally solve shortcomings on the market with regard to the law and the interests BIPT must defend.

83. The complainant had developed a chat app of his own, but complained about the fact that it is a lot cheaper to use WhatsApp, because Proximus offers subscriptions in which WhatsApp can use a lot more mobile data and can therefore offer more over a mobile network. For this content and application provider it was not a problem to pay more, because he, like WhatsApp or Messenger, would provide more or less traffic for the ISP, but the person involved thought it unfair and annoying that an ISP such as Proximus treated chat apps differently. Furthermore, the complainant sounded out BIPT about the kind of cooperation between Proximus and WhatsApp, so that WhatsApp could be selected as the favourite App and decided that it was impossible for him to compete (mainly) with WhatsApp in the current situation.
84. In its answer BIPT first remarked that the favourite app chosen by a Tuttimus or Mobilus customer is not necessarily a chat app. Next BIPT pointed out that in Proximus offers where zero-rating is applied, a sufficient data volume is given to use and offer apps that are not zero-rated and that BIPT, despite verifying the situation at regular times, had not yet encountered any elements leading to a review of the conclusions made in the report of early 2017.
85. Answering the question about the cooperation between Proximus and WhatsApp BIPT pointed out that Proximus had answered BIPT that the selection of the favourite apps is based on research of customer preferences, not on the wishes of (one or more) app provider(s).

3.3.2. Complaint about the lack of freedom to choose the modem

86. BIPT has received a complaint from a customer about the mandatory use of the Flybox modem as part of Orange's Easy Internet@Home offer. BIPT asked Orange to provide more information regarding those limitations and is currently handling the case.

Chapter 4 Conclusion

87. In this second annual report regarding net neutrality monitoring BIPT has primarily described the evolutions in Belgium with respect to the measures taken in the broad scope of open Internet access.
88. As for the transparency of broadband Internet speeds BIPT finalised the process on 2 May 2017 that led to a new BIPT decision regarding the communication of the speed of a fixed or mobile broadband connection, which made an earlier BIPT decision about Internet speeds conform with the requirements of the Regulation.
89. Zero-rating was monitored in the period from 1 May 2017 to 30 April 2018, without there appearing to be a reason for intervention.
90. At the end of the period covered by this report BIPT collected more detailed information about the use of DPI (“Deep Packet Inspection”) from the major network operators in Belgium. The analysis of that information will be continued where necessary, this time also taking into account the entry into force of the GDPR.
91. BIPT registered only a few complaints about net neutrality and answered them in accordance with the legal framework and the BEREC Guidelines.
92. All in all BIPT is of the opinion that there are no major reasons for concern in Belgium as to open Internet access: no cases of blocking services or applications in the network have been found and as for end-users’ choice the mobile data volumes included in the ISPs’ offers are growing increasingly in order to meet the evolution of the expanding mobile data traffic.

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