

Please note that, although every effort has been made to ensure this translation is accurate and consistent, it is for informational purposes only. In case of any dispute or inconsistencies, the Dutch version is authentic.

Decision Public

Our reference: ACM/DTVP/2017/205487_OV
Case number: 17.0475.53
Date: 26 September 2017

This is a decision of the Netherlands Authority for Consumers and Markets (ACM) turning down the request for enforcement filed by Bits of Freedom. Bits of Freedom requested ACM to take enforcement action against the so-called 'Data-free Music' service (in Dutch: Datavrije Muziek) of T-Mobile Netherlands B.V. for violation of Article 3, paragraphs 1, 2 and 3 of the net neutrality regulation (illegal limitation of the exercise of the rights of end-users, and the principle of non-discrimination).

Summary

1. The Data-free Music service of T-Mobile Netherlands B.V. (hereafter: T-Mobile) has been available on the Dutch market since 10 October 2016. This service is available to customers of T-Mobile who have data plans of 6 GB or more, or who have a Go Up plan of 10 GB. With the Data-free Music service, music from affiliated music-streaming services can be streamed for free. Any data that is used for the Data-free Music service does not count against a customer's data plan. Data used for other internet-based services¹ does count towards data plans. This form of tariff differentiation is called "zero-rating".
2. Dutch digital-rights organization Bits of Freedom filed a request for enforcement with the Netherlands Authority for Consumers and Markets (hereafter: ACM) against the Data-free Music service. In a nutshell, Bits of Freedom requests ACM to take enforcement action against the Data-free Music service of T-Mobile for violation of Article 3, paragraphs 1, 2 and 3 of the net neutrality regulation.
3. In this decision, ACM rules that the Data-free Music service is compatible with Article 3, paragraphs 1, 2 and 3 of the net neutrality regulation. The request for enforcement filed by Bits of Freedom is therefore turned down.

¹ Internet-based services are services that are offered over the Internet such as chat services, email services, search engines, music services, online games, newsgroups, streaming media etc.

1 Introduction

4. T-Mobile launched the Data-free Music service on 10 October 2016.² With the Data-free Music service, music from affiliated music-streaming services can be streamed within the Netherlands for free. The Data-free Music service comes included in the following plans for existing and new customers of T-Mobile:
 1. Go Up plans of 10 GB;
 2. Stel Samen & Stel Bij (literally “Assemble and Adjust”) plans with 6 GB data or more;
 3. Stel Samen & Stel Bij Tablet plans with 6 GB data or more; and
 4. Stel Samen & Stel Bij Zakelijk (literally “Assemble and Adjust - Business”) plans with 6 GB data or more.³
5. Any data that is used for the Data-free Music service does not count against a customer’s data plan. Data used for other internet-based services does count towards data plans. If a customer has used all the data in their data plan, the download speed of all their traffic (including that of the Data-free Music service) will be reduced.
6. On December 9, 2016, ACM ruled⁴ that the service violated Article 3, paragraphs 2 and 3 of the net neutrality regulation, and Section 7.4a, paragraph 3 of the Dutch Telecom Communications Act (hereafter: Tw). In its decision, ACM ordered T-Mobile to stop offering and providing the Data-free Music service under penalty of a penalty payment.
7. T-Mobile filed a direct appeal against ACM’s decision with the District Court of Rotterdam. On 20 April 2017, the District Court of Rotterdam ruled that zero-rating is indeed categorically prohibited by the Tw, but that this Dutch prohibition does not apply because the Netherlands was not authorized to regulate this because of the European net neutrality regulation. In addition, the net neutrality regulation, according to the District Court of Rotterdam, did not seem to prohibit zero-rating just like that.⁵ To that point, the court considered the following:

“The legislative history of the net neutrality regulation clearly shows that the Union legislature did not intend to include in the regulation a categorical prohibition of zero-rating, despite attempts thereto by the Netherlands. Therefore, such a prohibition has not been included in the text of Article 3 of the net neutrality regulation.”⁶

² See an email of T-Mobile dated 1 November 2016 with reference ACM/DTVP/2016/309186.

³ Screen shot of 15 August 2017 (see annex 1).

⁴ Reference: ACM/DTVP/2017300516.

⁵ <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Rotterdam/Nieuws/Paginas/Nederlands-verbod-op-zero-rating-in-strijd-met-Europese-netneutraliteitsverordening.aspx>

⁶ Legal consideration 6.5 of the court’s ruling .

Decision Public

The District Court of Rotterdam ruled the grounds put forward by T-Mobile to be valid, and reversed the order subject to periodic penalty payments, imposed by ACM.

8. Following the ruling of the District Court of Rotterdam, Bits of Freedom filed a request for enforcement with ACM regarding T-Mobile's Data-free Music service. In its request, it formally requests ACM to prohibit T-Mobile's Data-free Music service on the ground of the net neutrality regulation. That is why ACM, in this decision, tests the Data-free Music service against Article 3, paragraphs 1, 2, and 3 of the net neutrality regulation in conjunction with the BEREC Guidelines.⁷

2 Course of the procedure

9. On 10 October 2016, T-Mobile launched the Data-free Music service.
10. On 11 May 2017, Bits of Freedom filed a request for enforcement with ACM.⁸ This request for enforcement was forwarded to T-Mobile on 16 May 2017.⁹
11. On 9 June 2017, ACM asked T-Mobile for an opinion on the request for enforcement. In addition, ACM asked T-Mobile additional questions about the Data-free Music service.¹⁰ On 3 July 2017, T-Mobile submitted its opinion to ACM, and gave answers to the questions.¹¹ On 18 July 2017, ACM forwarded the public version thereof to Bits of Freedom.¹²
12. On 5 July 2017, ACM gave Bits of Freedom the opportunity to provide a further, verbal explanation of the request for enforcement.¹³ On 7 July 2017, ACM forwarded the minutes of this discussion to T-Mobile.¹⁴
13. On 10 July 2017, T-Mobile, at the offices of ACM, gave a further explanation of its opinion and of its answers to the questions of 3 July, 2017.¹⁵ On 27 July 2017, ACM forwarded the public

⁷ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules (BoR (16) 127; 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).

⁸ Reference: ACM/DTVP/2017303678.

⁹ Reference: ACM/DTVP/2017403158.

¹⁰ Reference: ACM/DTVP/2017203468.

¹¹ Reference: ACM/DTVP/2017305048.

¹² Reference: ACM/DTVP/2017404870.

¹³ Reference: ACM/DTVP/2017305159.

¹⁴ Reference: ACM/DTVP/2017404594.

¹⁵ Reference: ACM/DTVP/2017405736.

version thereof to Bits of Freedom.¹⁶

3 Legal framework

14. On 25 November 2015, the net neutrality regulation was adopted. This regulation took effect on 30 April 2016.¹⁷

15. Article 3, paragraph 1 of the net neutrality regulation reads as follows:

“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.”

16. Article 3, paragraph 2 of the net neutrality regulation reads as follows:

“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.”

17. Article 3, paragraph 3 of the net neutrality regulation, insofar relevant to this decision, reads as follows:

“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.”

18. Article 5, paragraph 1 of the net neutrality regulation, insofar relevant to this decision, reads as follows:

“National regulatory authorities shall closely monitor and ensure compliance with Articles 3 and 4, and shall promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. For those purposes, national regulatory authorities may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on

¹⁶ Reference: ACM/DTVP/2017405073.

¹⁷ Article 10, paragraph 2 of the net neutrality regulation.

Decision Public

one or more providers of electronic communications to the public, including providers of internet access services.”

19. On 30 August 2016, BEREC adopted the earlier mentioned Guidelines.¹⁸
20. Section 15.1, paragraph 3 of the Dutch Telecommunications Act, insofar relevant to this decision, reads as follows:

“The Netherlands Authority for Consumers and Markets is charged with enforcement of compliance with the provisions under or pursuant to provisions laid down in this act other than those referred to in the first and second paragraphs, and with the provisions under or pursuant to the roaming regulation and the net neutrality regulation.”

5/40

4 Request for enforcement filed by Bits of Freedom

21. Bits of Freedom requested ACM to take enforcement action against the Data-free Music service on the ground of violation of Article 3, paragraphs 1, 2 and 3 of the net neutrality regulation.
22. According to Bits of Freedom, the Data-free Music service limits the rights of end-users. In offering select zero-rated music services, , Bits of Freedom argues that T-Mobile does not always treat the internet traffic of its customers equally. Bits of Freedom argues that customers are consequently stimulated to use certain internet-based services sooner than other ones. T-Mobile thus influences the choice of end-users, and therefore limits their freedom. Furthermore, Bits of Freedom argues that the manner in which T-Mobile markets its offerings, as well as the conditions that apply to them result, in practice, in unequal treatment of music-streaming services at an individual level. Bits of Freedom says that T-Mobile’s conditions are far-reaching and not transparent. One of the arguments put forward by Bits of Freedom is that not every provider of a similar online service will be able to apply for the Data-free Music service. Some providers of such services may not be aware of T-Mobile’s offerings, while other providers are not fluent in Dutch or cannot accept the conditions set by T-Mobile.

5 T-Mobile’s opinion

23. T-Mobile is of the opinion that, by offering the Data-free Music service, none of the net neutrality rules are violated. An outline of its arguments is as follows.
24. The net neutrality regulation does not contain (either implicitly or explicitly) an absolute

¹⁸ BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules (BoR (16) 127).

prohibition on tariff differentiation. Article 3, paragraph 3, first section of the net neutrality regulation should be read in conjunction with the subsequent sections of paragraph 3 as well as in conjunction with Article 3, paragraph 2 of the net neutrality regulation. Article 3, paragraph 3 of the net neutrality regulation concerns internet traffic management, and, as a general rule, prohibits providers of internet access services from treating different types of internet traffic technically differently. According to T-Mobile, this article does not impose any rules with regard to the commercial treatment of internet traffic. Any arrangements regarding the commercial treatment of internet traffic should be assessed using the standards that have been laid down in Article 3, paragraph 2 of the net neutrality regulation. Article 3, paragraph 2 of the net neutrality regulation advocates a case-by-case approach. The BEREC Guidelines dovetail with such an approach.

25. Furthermore, T-Mobile is also of the opinion that Article 3, paragraph 2 of the net neutrality regulation has not been violated either. As the net neutrality regulation does not contain an absolute prohibition on tariff differentiation, it cannot be argued that every form of tariff differentiation necessarily entails an illegal restriction of end-user rights safeguarded in the net neutrality regulation.

6 Background

6.1 Introduction

26. In this chapter, ACM will first explain the background of net neutrality. ACM will subsequently address the question of why the BEREC Guidelines apply to the assessment of the Data-free Music service against the net neutrality regulation. In chapter 7, ACM assesses whether the Data-free Music service is compatible with the net neutrality regulation seen in conjunction with the BEREC Guidelines.

6.2 Background of net neutrality

27. The internet has evolved over the past decades as an open platform for innovation with low access barriers for end-users, providers of content, applications and services, and providers of internet access services ¹⁹ The internet is designed as a network in accordance with the so-called “end-to-end”-principle. This means that internet traffic between two end points (for example a consumer who uses the internet, and a provider of a music-streaming service) is passed on by the provider of an internet access service without this traffic being impacted or altered in the meantime. As a result of the “end-to-end”-principle, new services and

¹⁹ Regulation 2015/2120, consideration 3.

Decision Public

applications have come immediately within reach for end-users. The open nature of the internet stimulates the development of innovative services.

28. The net neutrality regulation aims 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. This regulation aims to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation.²⁰

6.3 Implementation of the BEREC Guidelines

29. As mentioned, ACM assesses in this decision whether the Data-free Music service complies with the net neutrality regulation seen in conjunction with the BEREC Guidelines. The BEREC Guidelines say the following with regard to the implementation thereof:

“These BEREC Guidelines drafted in accordance with Article 5(3) of the Regulation are designed to provide guidance on the implementation of the obligations of NRAs.”

30. This shows that the BEREC Guidelines should provide *guidance* when testing against the net neutrality regulation. Therefore, ACM will only take into consideration the recitals from the BEREC Guidelines that are relevant for the assessment of the Data-free Music service.

31. With regard to the BEREC Guidelines, the court on April 20, 2017, ruled as follows:

“These Guidelines do not contain a prohibition on “zero-rating”, but provide an assessment framework based on which it can be assessed whether or not such commercial practices may or may not be at odds with the aims of the net neutrality regulation. (...).”²¹

7 Assessment of the Data-free Music service

32. In this chapter, ACM assessed whether or not the Data-free Service, as currently offered by T-Mobile, meets the requirements laid down in the net neutrality regulation seen in conjunction with the BEREC Guidelines.²²

²⁰ Regulation 2015/2120, consideration 1.

²¹ Ruling of the District Court of Rotterdam, 20 April 2017, ECLI:NL:RBOT:2017:2940, consideration 6.6.

²² In its opinion regarding the request for enforcement filed by Bits of Freedom, T-Mobile in this context refers to an email of ACM dated 28 September 2016. In this email, T-Mobile argues that ACM ruled that the Data-free Music service is consistent with Article 3, paragraph 2 of the net neutrality regulation and the thereto-related sections in the BEREC Guidelines. ACM notes that it only gave a provisional assessment in said email, while also making reservations. In this decision, ACM issues a final ruling as to whether or not the Data-free Music service is compatible with the net neutrality regulation and the BEREC Guidelines.

Decision Public

8/40

Zero-rating

33. T-Mobile's Data-free Music service is an example of a commercial service within the meaning of Article 3, paragraph 2 of the net neutrality regulation. The second paragraph reads as follows:

"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" (emphasis by ACM)

34. In recital 40 of the BEREC Guidelines, zero-rating is named as a specific commercial practice within the meaning of Article 3, paragraph 2 of the net neutrality regulation. In recital 40 of the BEREC Guidelines, zero-rating is described as follows:

"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). There are different types of zero-rating practices which could have different effects on end-users and the open internet, and hence on the end-user rights protected under the Regulation." (emphasis by ACM).

35. In recital 41 of the BEREC Guidelines, it is stated that zero-rating is in violation with, at least, Article 3, paragraph 3, and subparagraph 3 of the net neutrality regulation with regard to the following:

"A zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated application(s) would infringe Article 3(3) first (and third) subparagraph (see paragraph 55)."

36. The foregoing does not apply to T-Mobile's Data-free Music service, because T-Mobile treats the Data-free Music service in the same manner as it does other services and applications as soon as the monthly data cap has been reached. The following can be found on T-Mobile's website (reference date: 15 August 2017 and originally in Dutch):

*"Why is my speed reduced if my data plan has been exhausted?
All providers must relay all internet traffic with the same speed. This is because of net neutrality legislation. So if your data plan has been exhausted, we will reduce your download speed, including the speed of Data-free Music."*

Aim of the regulation

37. For the assessment of the Data-free Music service, the BEREC Guidelines stipulate that it

Decision Public

should be assessed whether the Data-free Music service is compatible with the aim of the net neutrality regulation. This is shown by recital 43 of the BEREC Guidelines. It says the following:

“When assessing such agreements or commercial practices like zero-rating in relation to Article 3(2), the assessment should take into account the aim of the Regulation to “safeguard equal and non-discriminatory treatment of traffic” (Article 1) and to “guarantee the continued functioning of the internet ecosystem as an engine of innovation” (Recital 1) as well as Recital 7, which directs intervention against agreements or commercial practices which, “by reason of their scale, lead to situations where end-users’ choice is materially reduced in practice”, or which would result in “the undermining of the essence of the end-users’ rights.”

9/40

38. It appears from the above that the aim of the net neutrality regulation consists of two aspects, which are the principle of non-discrimination and the effect on end-users’ rights. ACM will assess these effects below.

7.1 Principle of non-discrimination

39. In this section, ACM will explain T-Mobile’s Data-free Music service. The following aspects will be discussed:
- I. The subscribers of the Data-free Music service;
 - II. The definition that T-Mobile uses for streaming music;
 - III. The application process for music-streaming services;
 - IV. The admission requirements for music-streaming services; and
 - V. The music-streaming services that are, are not or are not yet affiliated with the service.

7.1.1 Explanation of Data-free Music service

Subscribers of the Data-free Music service

40. The Data-free Music service comes included with the following plans for both existing and new customers of T-Mobile:
- Go Up plan of 10 GB;
 - Stel Samen & Stel Bij (literally “Assemble and Adjust”) plans with 6 GB data or more;
 - Stel Samen & Stel Bij Tablet plans with 6 GB data or more; and
 - Stel Samen & Stel Bij Zakelijk (literally “Assemble and Adjust - Business”) plans with 6 GB data or more.
41. Both consumers and business customers are able to take out a subscripton to the Data-free

Music service.²³ It is an additional service to the plan for mobile internet access.

Streaming of music

42. The basic principle of the Data-free Music service is that zero-rating is applied to an entire category of applications, which are music-streaming services. According to T-Mobile's website, subscribers are able to 'stream music from participating music-streaming services'. T-Mobile decides which category is zero-rated. T-Mobile notes that, by 'streaming music,' they mean 'listening to music/radio'.²⁴ This means that the MBs that are used for this purpose do not count against the data plan of the end-user that is subscribed to the service. However, several exceptions apply, which are:
- a. Searching for artists or songs,
 - b. Album covers that are loaded while listening to or searching for music,
 - c. Uploading your own music using the mobile network,
 - d. Using a music-streaming service that is not yet affiliated with the Data-free Music service,
 - e. Listening to commercials when streaming music,
 - f. Watching YouTube movies or in-app pages (for example the in-app pages of Dutch radio station QMusic).²⁵
 - g. Downloading music from participating music-streaming services.²⁶

Application process

43. Music-streaming services can apply with T-Mobile of their own accord or can be suggested by T-Mobile subscribers. The latter option means that a T-Mobile subscriber informs T-Mobile that they wish to see a specific music-streaming service be affiliated with the Data-free Music service. T-Mobile indicates that the entire application process is expected to take four to six weeks. The lead time of this process depends on several factors such as the speed with which T-Mobile and the music-streaming service in question communicate with each other. That means that the total lead time can be longer than those four to six weeks. Music-streaming services do not pay to be admitted to the service. For a more detailed explanation of the application process, see annex 2.²⁷
44. If T-Mobile and a music-streaming service have reached an agreement over admission to the Data-free Music service, these parties sign an agreement. T-Mobile uses an agreement that,

²³ Business customers are able to take out the Data-free Music service with a Go Up plan or a Stel Samen & Stel Bij Business plan with a data plan of 6 GB or more, according to T-Mobile's website, print screen of 15 August 2017 (see annex 1).

²⁴ Reference: ACM/DTVP/2017305048.

²⁵ Print screen of 15 August 2017 (see annex 1) and reference: ACM/DTVP/2017305048.

²⁶ Reference: ACM/DTVP/2017405736.

²⁷ Reference: ACM/DTVP/2017305048.

Decision Public

11/40

in terms of substance, is the same for all affiliated services.²⁸ This agreement is also available in English.²⁹ With this agreement, T-Mobile seeks to safeguard that the music-streaming service keeps T-Mobile informed about any technical changes, and to ensure that T-Mobile is authorized to use the music-streaming service's logo so that the music-streaming service is recognizable for subscribers to the Data-free Music service.³⁰

Admission criteria for music-streaming services

45. One of the criteria to be admitted to the service is that the music-streaming service should be publicly accessible. This means that a private music-streaming service cannot be admitted to the Data-free Music service. An example of a private music-streaming service is a media server with which a private individual can stream their own music from one device to another. If a private streaming service is converted into a publicly accessible music-streaming service, it may be admitted to the Data-free Music service. To illustrate this point, T-Mobile provided correspondence between it and a private individual who ran a private streaming service, and who wished to participate in the Data-free Music service.³¹
46. Another criterion is that T-Mobile must be technically able to recognize the participating music-streaming services.³² T-Mobile uses the IP addresses for recognition. In practice, this means that T-Mobile, on the basis of the IP address, is able to recognize whether or not a user is streaming music or uses another service or application over the internet. In this way, T-Mobile is able to see if the service needs to be zero-rated or if it counts against the end-user's data plan.

Music-streaming services

47. On the reference date of 15 August 2017, 25 music-streaming services participate in the Data-free Music service.³³

²⁸ See the annex to T-Mobile's letter (reference: ACM/DTVP/2017305048).

²⁹ Reference: ACM/DTVP/2017404755.

³⁰ Reference: ACM/DTVP/2017305048.

³¹ This concerned an email exchange between the private individual in question and T-Mobile staff. T-Mobile sent this email exchange to ACM on 20 July 2017. Reference ACM//DTVP/2017/305591.

³² This means that end-users who wish to use the Data-free Music service using a VPN connection are unable to do so. This is because T-Mobile cannot recognize end-users using a VPN connection. One of the consequences is that T-Mobile cannot see if the user in question is a T-Mobile subscriber at all. Affiliated music-streaming services cannot use VPN connections either because T-Mobile will not be able to determine the IP address of the music-streaming service in question. As a result, music-streaming services using VPN connections cannot be zero-rated. To ACM's knowledge, this kind of situation does not occur at the moment.

³³ Print screen of 15 August 2017 (see annex 1).

Decision Public

Bandcamp new!	Olympia Radio new!
BesteHits.nl	Onlineradio.nl
Deezer	Puur NL
Digitally Imported new!	Qmusic
Fantasy Radio new!	Radio 8FM
Grand Prix Radio	Radio Esperando
HappyHardcore new!	Radioguide.fm new!
HitsNL	Radio Neerlandika
Hitz24	Spotify
Intense Radio	SoulRadio
MonsterHitMusic	Tidal
Napster	Universe Radio
Nederland.FM	

12/40

48. On its website, T-Mobile indicates which providers cannot or do not want to be participate in the Data-free Music service. On the reference date of 15 August 2017, these were the following providers:
- 22Tracks – does not want to participate
 - Aha Radio – not a music-streaming service according to T-Mobile’s definition, but organize content
 - Fun-x - does not want to participate
 - Groove Music (Microsoft) - does not want to participate
 - Mimi Music - not a music-streaming service according to T-Mobile’s definition, but organize content
 - Mixcloud - does not want to be participate
 - Mixerbox – also offers video
 - Plex – Private-streaming solution
 - SomaFM - does not want to participate

7.1.2 ACM’s assessment of Data-free Music against the principle of non-discrimination

49. Considering the manner in which T-Mobile offers the Data-free Music service, ACM is of the opinion that this service does not violate the principle of non-discrimination as defined in the aim of the net neutrality regulation. ACM comes to this conclusion because, with regard to this service, providers of content and applications are treated equally within the category of music-streaming services. After all, any publicly accessible music-streaming service is able to apply for affiliation with the service. In addition, ACM is of the opinion that music-streaming services do not encounter any substantial barriers to entry in order to become affiliated with the Data-free Music service. This conclusion will be discussed below for each aspect of the service.

Strict interpretation of ‘music-streaming service’

50. As the previous section shows, T-Mobile only zero-rates internet traffic for streaming music/radio through affiliated music-streaming services, except for situations listed under recital 42. Data traffic for these exceptions do count against the end-user’s data plan. These exceptions do not fall under the category of ‘streaming music’. As such, T-Mobile applies a strict interpretation of the category of music-streaming services that are zero-rated. With zero-rating, a distinction is made between data traffic that does and does not count against one’s data plan. The fact that, in this context, T-Mobile uses a strict interpretation of the category that is zero-rated is, in ACM’s opinion, not unreasonable.
- On T-Mobile’s website, it is clearly indicated what exceptions apply.¹ With regard to the exceptions (recital 42), ACM notes the following. It is important that end-users are clearly informed about these exceptions. ACM finds it important that T-Mobile continues to communicate this clearly in the future.

Public music-streaming service

51. Another criterion that T-Mobile uses, and that music-streaming services need to meet, is that the music-streaming service must be publicly accessible. ACM believes that this is not an unreasonable criterion, because, otherwise, the music-streaming service cannot be used by other end-users at all. If the music-streaming service is not offered publicly, only the end-user who owns the private streaming service has access to this music service.

Technical criterion

52. A technical criterion that T-Mobile uses, and which music-streaming services need to meet, in order to be affiliated with the Data-free Music service is that internet traffic must be recognizable using the IP address. This criterion enables T-Mobile to distinguish between internet traffic that must be zero-rated and internet traffic that should not be zero-rated. According to ACM, this is a reasonable criterion, because, in that way, T-Mobile knows what traffic must be zero-rated and what traffic should not be zero-rated. To ACM’s knowledge, this criterion does not produce any material restriction.

Agreement

53. The agreements that T-Mobile signs with affiliated music-streaming services do not differ from each other. There are no additional requirements for any specific music-streaming service. And the arrangement is also available in English. According to ACM, this shows that this is not a substantial barrier to entry for music-streaming services, and that they are all treated equally.

Participating music-streaming services

Decision Public

14/40

54. ACM establishes that many different music-streaming services are affiliated with the Data-free Music service. Providers that do not wish to be affiliated, had the ability to do so. This is also demonstrated by the information that T-Mobile sent to ACM.³⁴ The list of affiliated music-streaming services illustrates that a variety of publicly accessible music-streaming services is already affiliated with the Data-free Music service. According to ACM, T-Mobile thus does not act as gatekeeper in that it, for example, only allows certain music-streaming services be affiliated with the service.

7.2 Impact on end-users' rights

55. In this section, ACM assesses whether the Data-free Music service undermines the rights of end-users as referred to in the net neutrality regulation. In this assessment, ACM distinguishes between the end-users' rights of consumers and of T-Mobile's business customers (7.2.1) and the end-users' rights of providers of content and applications³⁵ (7.2.3).

7.2.1 Impact on end-users' rights: consumers and business customers

56. When assessing the impact on end-users' rights of consumers and business customers of the Data-free Music services, recitals 42, 45 and 46 of the BEREC Guidelines must be taken into consideration.

57. Recital 42 of the BEREC Guidelines reads as follows:

“The ISP could either apply or offer zero-rating to an entire category of applications (e.g. all video or all music streaming applications) or only to certain applications thereof (e.g. its own services, one specific social media application, the most popular video or music applications). In the latter case, an end-user is not prevented from using other music applications. However, the zero price applied to the data traffic of the zero-rated music application (and the fact that the data traffic of the zero-rated music application does not count towards any data cap in place on the IAS) creates an economic incentive to use that music application instead of competing ones. The effects of such a practice applied to a specific application are more likely to “undermine the essence of the end-users’ rights” or lead to circumstances where “end-users’ choice is materially reduced in practice” (Recital 7) than when it is applied to an entire category of applications.”

58. Recital 45 of the BEREC Guidelines reads as follows:

“When assessing whether an ISP limits the exercise of rights of end-users, NRAs should consider to what extent end-users’ choice is restricted by the agreed commercial and

³⁴ Reference: ACM/DTVP/2017305048.

³⁵ In this case, providers of content and applications are the providers of music-streaming services.

Decision Public

15/40

technical conditions or the commercial practices of the ISP. It is not the case that every factor affecting end-users' choices should necessarily be considered to limit the exercise of end-users' rights under Article 3(1). [...]"

59. Recital 46 of the BEREC Guidelines reads as follows:

"In light of the aforementioned considerations, BEREC considers that a comprehensive assessment of such commercial and technical conditions may be required, taking into account in particular:

[...]

the effects on consumer and business customer end-user rights, which encompasses an assessment of inter alia:

- o whether there is an effect on the range and diversity of content and applications which consumer end-users may use³⁶ and, if so, whether the range and diversity of applications which end-users can choose from is reduced in practice;*
- o whether the end-user is incentivized to use, for example, certain applications;*
- o whether the IAS subscription contains characteristics which materially reduce end-user choice (see in more detail in paragraph 48).*

[...]"

60. When assessing the Data-free Music service, the BEREC Guidelines say that the impact of the market positions of the internet access services involved on end-users' rights should also be taken into account. This is expressed in recital 44 of the BEREC Guidelines. The following is said in that recital:

"Recital 7 also indicates that the assessment should 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".

61. With regard to that, the following is mentioned in recital 46 of the BEREC Guidelines:

"In light of the aforementioned considerations, BEREC considers that a comprehensive assessment of such commercial and technical conditions may be required, taking into account in particular:

[...]

the market positions of the ISPs and CAPs involved - a limitation of the exercise of end-user rights is more likely to arise where an ISP or a CAP has a 'strong' market position (all else being equal) compared to a situation where the ISP or CAP has a 'weak' market position. The market positions should be analyzed in line with competition law principles".

[...]

the scale of the practice and the presence of alternatives - a practice is more likely to limit the

³⁶ "This may also concern the effect on freedom of expression and information, including media pluralism."

Decision Public

exercise of end-user rights in a situation where, for example, many end-users are concerned and/or there are few alternative offers and/or competing ISPs for the end-users to choose from.”

7.2.2 ACM’s assessment of end-users’ rights: consumers and business customers

62. ACM is of the opinion that the Data-free Music service does not limit the exercise of end-users’ rights of consumers and of T-Mobile’s business customers as laid down in the aim of the net neutrality regulation. When assessing the impact on end-users’ rights of consumers and business customers, it is important to examine what category of services is zero-rated. In section 7.1.1., it is indicated what category T-Mobile zero-rates in the Data-free Music service, what the application process for music-streaming services is, what criteria are used, and which music-streaming services are and are not affiliated. In section 7.1.2 , ACM ruled that the Data-free Music service does not violate the principle of non-discrimination: music-streaming services are, in fact, treated equally in the Data-free Music service.
63. As a result of the foregoing, the choice of end-users is not limited. In fact, end-users can choose from a large range of music-streaming services that are zero-rated through the Data-free Music service. This is because the service is open to all public music-streaming services. In this context, it is also important to note that T-Mobile subscribers can inform T-Mobile of what specific music-streaming services they wish to see be affiliated with the Data-free Music service. If such is the case, and it is a music-streaming service that is not affiliated, T-Mobile will contact this provider, which is then invited to apply for the Data-free Music service.³⁷ T-Mobile does not act as gatekeeper by, for example, only allowing certain music-streaming services to apply. As a result of the foregoing, the impact on the options of end-users is limited. The fact that the service is only available to end-users with a data plan of 6 GB or more further limits this impact. This group of end-users has, considering the size of the data plans, the choice to take out other services next to the Data-free Music service.
64. Finally, end-users also have the opportunity to inform T-Mobile that they no longer wish to take out a subscription to the Data-free Music service. End-users can do so via the website or in the My T-Mobile app.

7.2.3 Impact on end-users’ rights of providers of content and applications

65. Regarding the assessment of the impact of the Data-free Music service on end-users’ rights of providers of content and applications, the following is laid down in recital 46 of the BEREC

³⁷ Reference: ACM/DTVP/2017305048.

Guidelines:

“In light of the aforementioned considerations, BEREC considers that a comprehensive assessment of such commercial and technical conditions may be required, taking into account in particular:

[...]

the effects on CAP end-user rights, which encompass an assessment of, inter alia:

- whether there is an effect on the range and diversity of content and applications which CAPs provide³⁸ and to what extent the range and diversity of applications may not be effectively accessed;*
- whether CAPs are materially discouraged from entering the market or forced to leave the market, or whether there are other material harms to competition in the market concerned (see in more detail in the fourth bullet of paragraph 48 with regard to offers);*
- whether the continued functioning of the internet ecosystem as an engine of innovation is impacted, for example, whether it is the ISP that picks winners and losers, and on the administrative and/or technical barriers for CAPs to enter into agreements with ISPs.*

[...]”

66. In section 7.1.2, ACM has come to the conclusion that the Data-free Music service does not violate the principle of non-discrimination as laid down in the aim of the net neutrality regulation. The diversity in music-streaming services that are affiliated with the Data-free Music service is an indication that this does not limit the range of providers of content and applications for end-users. Furthermore, end-users themselves are able to nominate music-streaming services for the Data-free Music service.
67. Recital 48 of the BEREC Guidelines shows that the smaller the data plan to which zero-rating is applied, the greater the impact of zero-rating on the choice of end-users is. This recital reads as follows:

“[...]

End-users of an IAS whose conditions include a lower (or zero) price for the data associated with a specific application or class of applications will be incentivized to use the zero-rated application or category of applications and not others.

Furthermore, the lower the data cap, the stronger such influence is likely to be.

[...]”

³⁸“This may also concern the effect on freedom and pluralism of media.”

7.2.4 ACM's assessment of end-users' rights: providers of content and applications

68. ACM is of the opinion that the Data-free Music service does not limit the exercise of end-users' rights of providers of content and applications as laid down in the aim of the net neutrality regulation. As already described in section 7.1, T-Mobile makes its Data-free Music service available to all music-streaming services regardless of their market positions, as long as they meet the criteria that T-Mobile has set. According to ACM, the list of the 25 music-streaming services that are affiliated with the Data-free Music service in recital 47 demonstrates this. The range of music-streaming services on this list varies between music-streaming services that are only active in the Netherlands and music-streaming services that are active internationally. As already concluded in section 7.1.2, the admission criteria for the Data-free Music service do not, ACM believes, pose a barrier to participate for smaller music-streaming services, and T-Mobile does not act as gatekeeper by, for example, only admitting certain music-streaming services.
69. The BEREC Guidelines shows that the smaller the data plan to which zero-rating is applied, the greater the impact of zero-rating on the choice of end-users is. With a smaller data plan, end-users are stimulated to use the music-streaming services that are affiliated with the Data-free Music service. According to the list in recital 47, the Data-free Music service is only available to T-Mobile customers with data plans of 6 GB or more. Such plans are quite large, considering that the average Dutch consumer uses 32 MB per day.³⁹ The incentive for this group of end-users only to use music-streaming services that are zero-rated is not great, since their data plans are large enough to use other services that are not zero-rated, too. Taking that into account, the end-users' rights of providers of content and applications are, in the opinion of ACM, not limited.

7.3 Conclusion

70. Bits of Freedom requested ACM to take enforcement action against T-Mobile's Data-free Music service. ACM turns down this request for enforcement. ACM has tested the Data-free Music service against Article 3, paragraphs 1, 2 and 3 of the net neutrality regulation. ACM rules that the service is compatible with it.

No violation of the principle of non-discrimination

71. ACM is of the opinion that the Data-free Music service does not violate the principle of non-discrimination. With respect to this service, providers of internet access services are treated equally. Music-streaming services face two barriers to entry for becoming affiliated with the

³⁹ <https://www.nederlandict.nl/news/staat-van-telecom-2017/>.

Decision Public

Data-free Music service, which are: it must be a publicly accessible music-streaming service, and internet traffic is recognizable through an IP address. According to ACM, these criteria do not pose any substantial barriers to entry. The first requirement is, ACM believes, not an unreasonable requirement, because, otherwise, other end-users are simply unable to take out the music-streaming service. The technical requirement with regard to the IP address is, ACM believes, not an unreasonable requirement either, because it enables T-Mobile to distinguish between internet traffic that must be zero-rated, and internet traffic that should not be zero-rated. This requirement does not, ACM believes, post any material restriction.

72. Based on information from T-Mobile, it turns out that many different music-streaming services participate in the Data-free Music service. In the opinion of ACM, this large diversity in the music-streaming services that are affiliated shows that all publicly accessible music-streaming services are able to become affiliated with the Data-free Music service. T-Mobile thus does not act as gatekeeper by, for example, only admitting certain genres of music or the larger music-streaming services to the Data-free Music service.
73. In addition, if the monthly data cap has been reached, the Data-free Music service is treated like any other service of application. In this respect, no distinction is made between any of the various services that end-users can take out with T-Mobile.

No limitation of end-users' rights

74. The Data-free Music service also does not limit the exercise of end-users' rights. The rights of consumers and business customers are not limited. This is the case because there is a large diversity in music-streaming services that are zero-rated, as a result of which consumers and business customers of T-Mobile have many options. Furthermore, consumers and business customers themselves have influence over the music-streaming services that are affiliated, since they are able to make suggestions to T-Mobile regarding any other music-streaming service they wish to see affiliated with the Data-free Music service. In this way, end-users are able to exert influence over the music-streaming services affiliated with the Data-free Music service. End-users are also able to inform T-Mobile that they no longer wish to take out the Data-free Music service.
75. In addition, the Data-free Music service does not limit the exercise of end-users' rights of providers of content and applications. The diversity in music-streaming services that are affiliated with the Data-free Music service, as well as the fact that end-users themselves are able to suggest music-streaming services for zero-rating support this conclusion. Furthermore, the fact that the Data-free Music service is only available to T-Mobile customers with data plans of 6 GB or more is another indication that end-users' rights are not limited. As a result, end-users are able to use relatively a lot of data in this plan, giving them the opportunity to use

Decision Public

other services and applications next to the Data-free Music service.

76. ACM is of the opinion that the market positions of T-Mobile and of the providers of content and applications do not give cause for coming to any other conclusion than that the Data-free Music service does not undermine the end-users' rights as laid down in the aim of the net neutrality regulation. The Data-free Music service is open to all music-streaming services regardless of their market positions, as long as they meet the criteria set by T-Mobile regarding accessibility and recognizability using an IP address. The diversity in music-streaming services that so far have been affiliated with the Data-free Music service support this conclusion, according to ACM.

7.4 Decision

ACM turns down the request filed by Bits of Freedom to take enforcement action against T-Mobile's Data-free Music service. A violation of Article 3, paragraphs 1, 2, and 3 of the net neutrality regulation has not been established.

The Netherlands Authority for Consumers and Markets,
on its behalf,

Signed

Christina de Jong-Kwestro
Team Manager
Telecommunications, Transport and Postal Services Department

20/40

**Decision
Public**

Objection

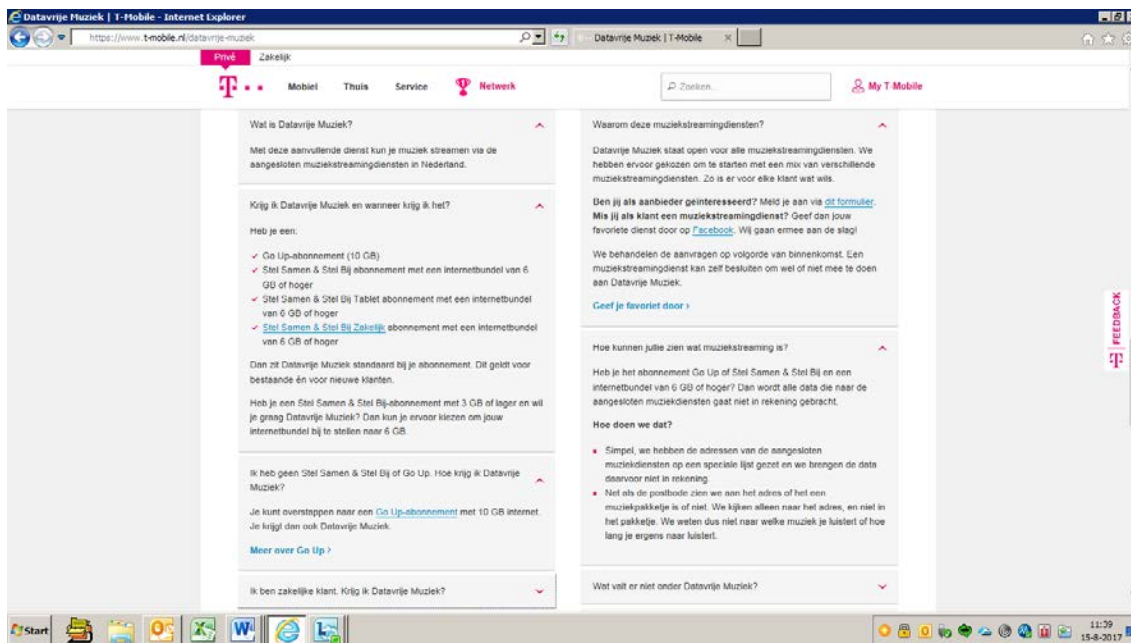
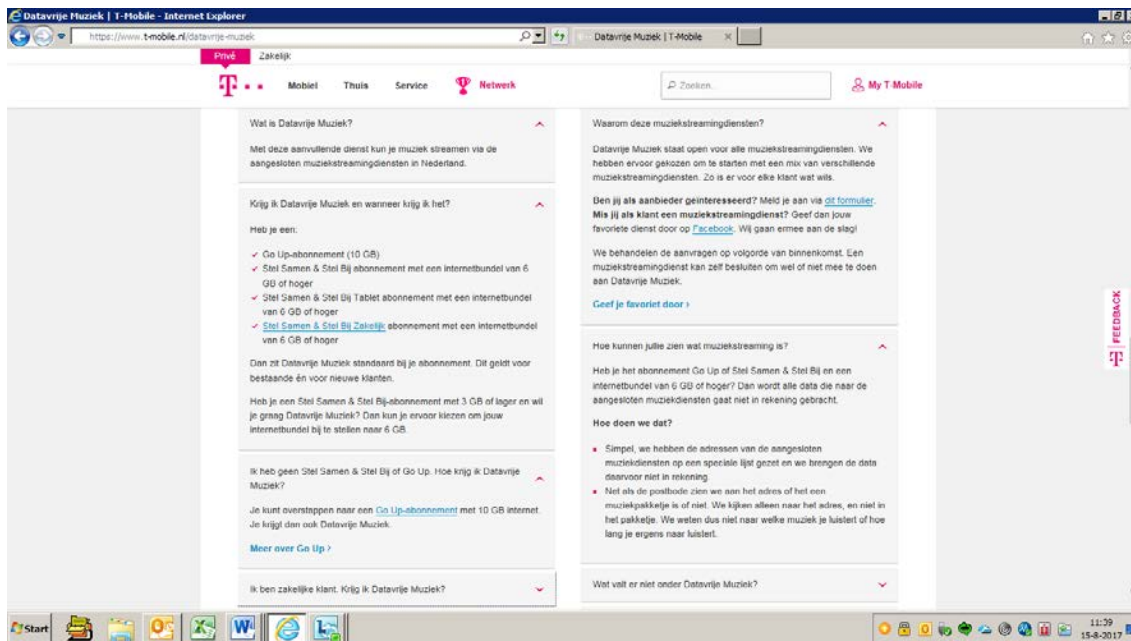
Anyone whose interest is directly affected by this decision can file an objection against this decision with the Netherlands Authority for Consumers and Markets within six weeks after the publication date of this decision. The objection must be sent to the following address: The Netherlands Authority for Consumers and Markets, Telecommunications, Transport and Postal Services Department, P.O. Box 16326, 2500 BH, The Hague, the Netherlands. Under Section 7:1a, paragraph 1 of the Dutch General Administrative Law Act, an interested party may request the Netherlands Authority for Consumers and Markets in its objection to agree to filing an appeal with the Dutch Trade and Industry Appeals Tribunal directly.

21/40

Decision Public

Annex 1

Print screens of the website of T-Mobile on 15 August 2017



22/40

Decision Public

23/40

Ik heb geen Stel Samen & Stel Bij of Go Up. Hoe krijg ik Datavrije Muziek?

Ik ben zakelijke klant. Krijg ik Datavrije Muziek?

Heb jij Go Up of een Stel Samen & Stel Bij Zakelijk abonnement met een internetbundel van 6 GB of hoger? Dan zit Datavrije Muziek standaard in je abonnement. Meer informatie lees je op de [zakelijke pagina](#).

Is Datavrije Muziek ook geldig in het buitenland?

Ja, je kunt elke maand 6 GB in de EU gebruiken voor Datavrije Muziek. Je kunt je verbruik bijhouden via [My T-Mobile](#). We sturen je een sms als je 6 GB's voor Datavrije Muziek in de EU (Bijna) op zijn. Daarna gaat het verbruik voor muziek streamen uit je gewone abonnement.

Kan ik Datavrije Muziek uitzetten?

Wil je Datavrije Muziek niet gebruiken? Deze keuze is natuurlijk aan jou. Je kunt Datavrije Muziek uitzetten door in [My T-Mobile](#) de blokkade aan te vinken.

Kan ik in hoge kwaliteit muziek blijven streamen als mijn internetbundel op is?

Wat valt er niet onder Datavrije Muziek?

- Als je naar artikelen of nummers zoekt
- Albumhoesjes die worden geladen bij het bekijken of bij het opzoeken van muziek
- Als je je eigen muziek uploadt via het mobiele netwerk
- Als je een muziekstreamingdienst gebruikt die nog niet aangesloten is bij Datavrije Muziek
- Als je reclame luistert tijdens het streamen van muziek
- Als je YouTube filmpjes of in-app pagina's bekijkt (bijvoorbeeld bij Omroep)

De MB's die je hiervoor gebruikt, gaan uit je gewone internetbundel. Houd je verbruik in de gaten via [My T-Mobile](#). Je kunt ook de gratis MB's bekijken die je verbruikt aan Datavrije Muziek.

Zorg ervoor dat je altijd de laatste apps en software updates op je toestel hebt staan.

Kan ik zien hoeveel gratis Datavrije Muziek ik heb gebruikt?

Heb je gratis MB's verbruikt tijdens het luisteren naar Datavrije Muziek? Dan zie je deze terug in je verbruikstatus in [My T-Mobile](#). Let op dat je de laatste versie van de My T-Mobile app gebruikt.

Is mijn abonnement voor de muziekstreamingdienst nu gratis?

Nee, de abonnementsdiensten van bijvoorbeeld Deezer en Spotify of andere diensten zijn niet inbegrepen bij Datavrije Muziek. Je betaalt gewoon voor je abonnement bij de dienst zoals je dat altijd al deed.

Heb je een abonnement op Spotify via een andere provider, maar Go Up of Stel Samen & Stel Bij met internetbundel van 6 GB of hoger bij T-Mobile? Dan stream je de muziek met Spotify datavrij.

Kan ik in hoge kwaliteit muziek blijven streamen als mijn internetbundel op is?

Ja, in Nederland kan dat. Is je internetbundel op? Dan verlagen wij de download snelheid voor Go Up, en de 6 GB en 20 GB (de L- en XL-bundels) naar 384 Kbps. Dat is ruim voldoende om in hoge kwaliteit muziek te streamen.

Ben je in de EU? Dan stopt je internet als je bundel op is. Je kunt daarom pas weer Datavrije Muziek luisteren als je een MB-aanvuller hebt gekocht.

Waarom wordt mijn snelheid vertraagd als mijn internetbundel op is?

Alle providers moeten al het internetverkeer met dezelfde snelheid doorgeven. Dit heeft te maken met de wetgeving rondom netneutraliteit. Dus als je internetbundel op is, dan verlagen wij de internetsnelheid en ook de snelheid van Datavrije Muziek.

Is mijn abonnement voor de muziekstreamingdienst nu gratis?

Kan ik nu ook gratis videostreamen?

Nee. Kijk je filmpjes op YouTube, Facebook of via andere videostreamingdiensten? Dan gebruik je MB's en gaat het gewoon uit je internetbundel.

Werk Datavrije Muziek via tethering of een MB-verdelers?

Ja, Datavrije Muziek werkt ook via een MB-verdelers of tethering. Je kunt je muziek dus delen met meerdere apparaten, zoals je laptop of tablet.

Werk Datavrije Muziek in combinatie met VPN?

Nee, met een VPN-verbinding werkt Datavrije Muziek niet.

[Aanvullende voorwaarden Datavrije Muziek \(pdf\)](#)

Praat mee over Datavrije Muziek

[UPDATE] Toevoegen diensten Datavrije Muziek

Hey allemaal, Een kleine update in de vorm van een infographic. Dit is mede mogelijk gemaakt door jullie suggesties, dus blijf ze doorgaveven! a19445c2-b315-4ae9-9304-0020f950497e.jpg [Lees verder](#)

Decision Public

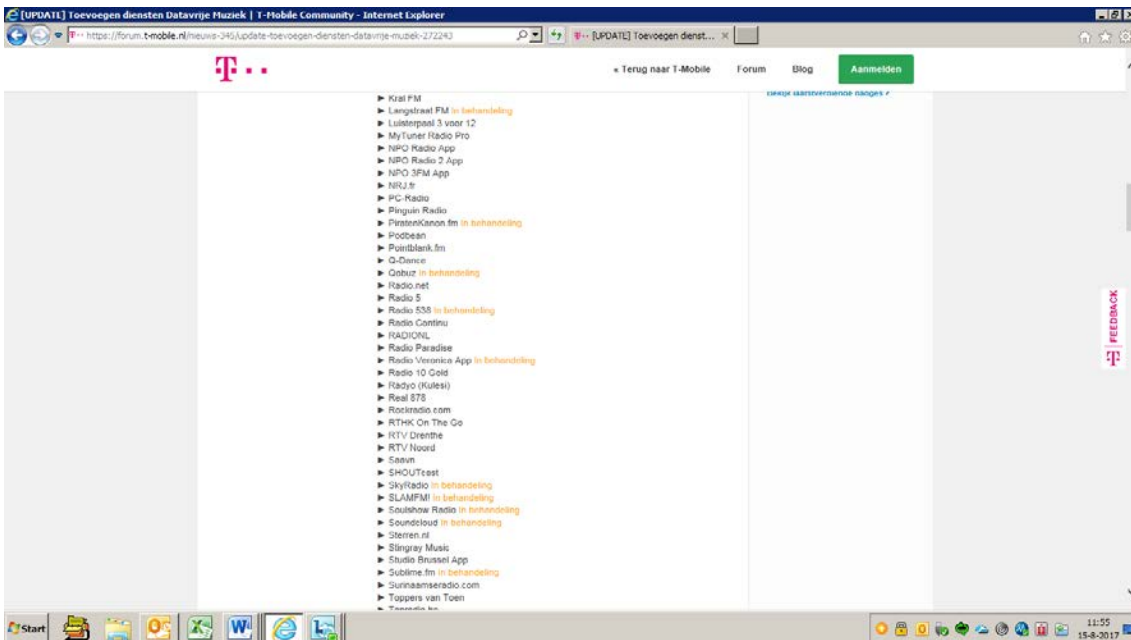
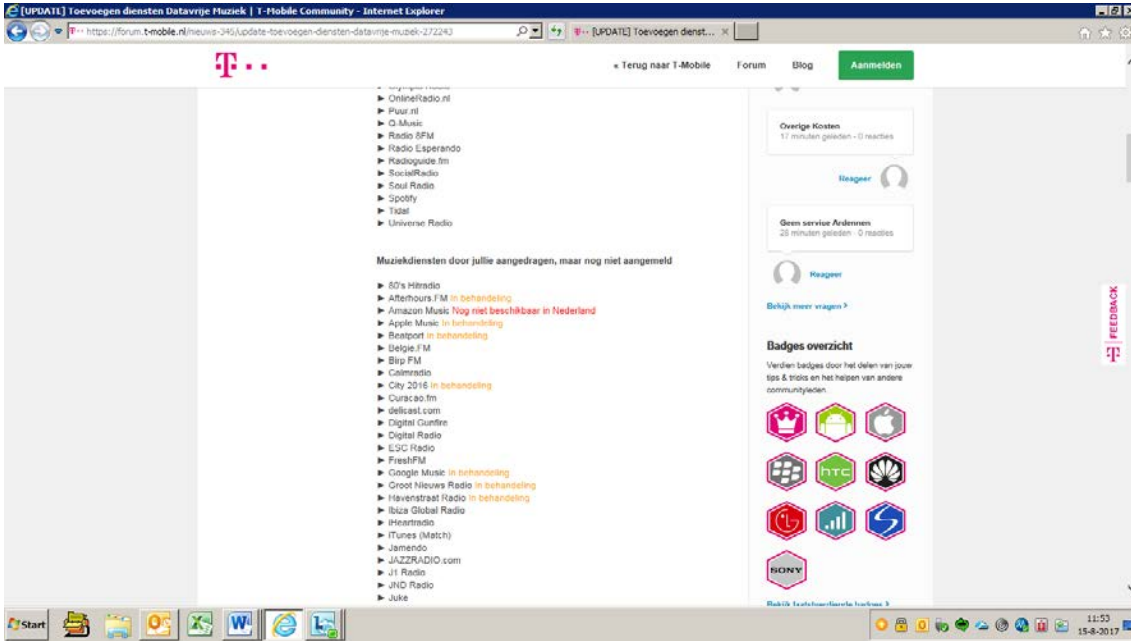
24/40

The screenshot shows the 'Datavrije Muziek' page on the T-Mobile website. The main heading is 'Welke muziekstreamingdiensten doen mee?'. Below this, there is an image of a hand holding a smartphone with a red coiled cable plugged into it. To the right of the image is a list of streaming services, each with a checkmark and a 'nieuw!' (new!) label. The list includes: Bandcamp, Beats1.nl, Deezer, Daily.fm, Fantasy Radio, Grand Prix Radio, Happy hardcore, Hit24, Intense Radio, MonsterHitMusic, Napster, Nederland FM, Olympia Radio, OnlineRadio.nl, Pure.nl, Quidis, Radio 8FM, Radio Escoradio, Redogude.fm, Radio IJverlandse, Spotti, SoulRadio, Tidal, and Unlivese Radio. A 'STREAM 24/7 DATAVRIJ' badge is visible in the top right of the image area. The page also features a search bar, navigation links (Privé, Zakelijk, Mobiel, Thuis, Service, Netwerk), and a 'My T-Mobile' profile icon.

The screenshot shows a forum post on the T-Mobile Community website. The post is titled '[UPDATE] Toevoegen diensten Datavrije Muziek' and is posted by David, a Moderator. The post content includes: '10 maanden geleden - Topic startte', 'Sinds de introductie van Datavrije Muziek en onze oproep om jouw favoriete muziekstreamingdienst aan te melden zijn we overspoeld met suggesties via Facebook, Twitter en het forum. Omwille gaaf natuurlijk!', 'We gaan nu aan de slag om deze diensten toe te voegen. Hierin maakt het voor ons totaal niet uit of het een kleine of grote dienst betreft, iedereen is hierin gelijk.', 'Hieronder vind je de lijst van gegeven suggesties (op alfabetische volgorde). We zullen hier ook eventuele updates over de voorrang plaatsen. Als er nog niets bij de dienst staat dan zijn we nog niet gestart met het benoemen, maar dat gebeurt dan zo spoedig mogelijk! Pas wanneer de dienst onder het kopje 'Diensten die al aangemeld zijn bij Datavrije Muziek' kan je deze datavrij streamen.', and a list of services: 40UP Radio, Bandcamp, Beets1.nl, Deezer, DJ.FM, Fantasy Radio, Grandprix Radio, Happyhardcore.com, Hit24, Intense Radio, MonsterHit Music, Napster, Nederland FM, Nederlandse FM, Olympia Radio, and OnlineRadio.nl. The forum interface includes a sidebar with social media links (Facebook, Twitter, Google+, LinkedIn), a 'Tags' section, and a right-hand sidebar with a 'NIEUW! Unlimited dagbundels voor internet met PrefCard!' advertisement, 'Statistieken' (108k Topics, 582k Reacties, 259k Leden), and a 'Het T-Mobile Community team stelt zich voor' section. The page also features a search bar, navigation links, and a 'Feedback' button.

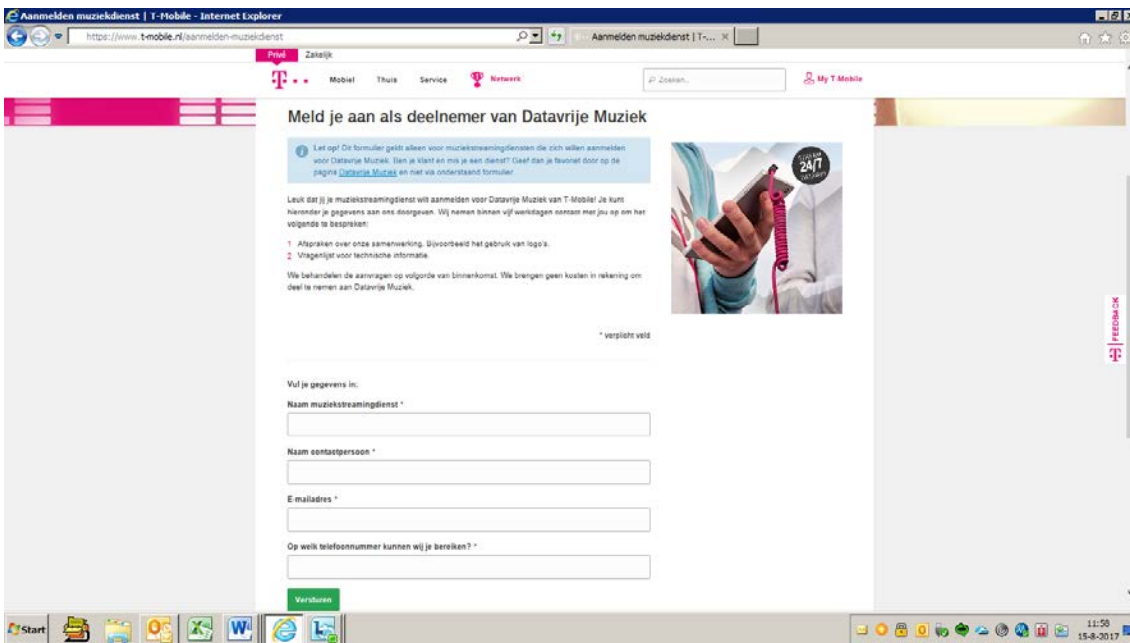
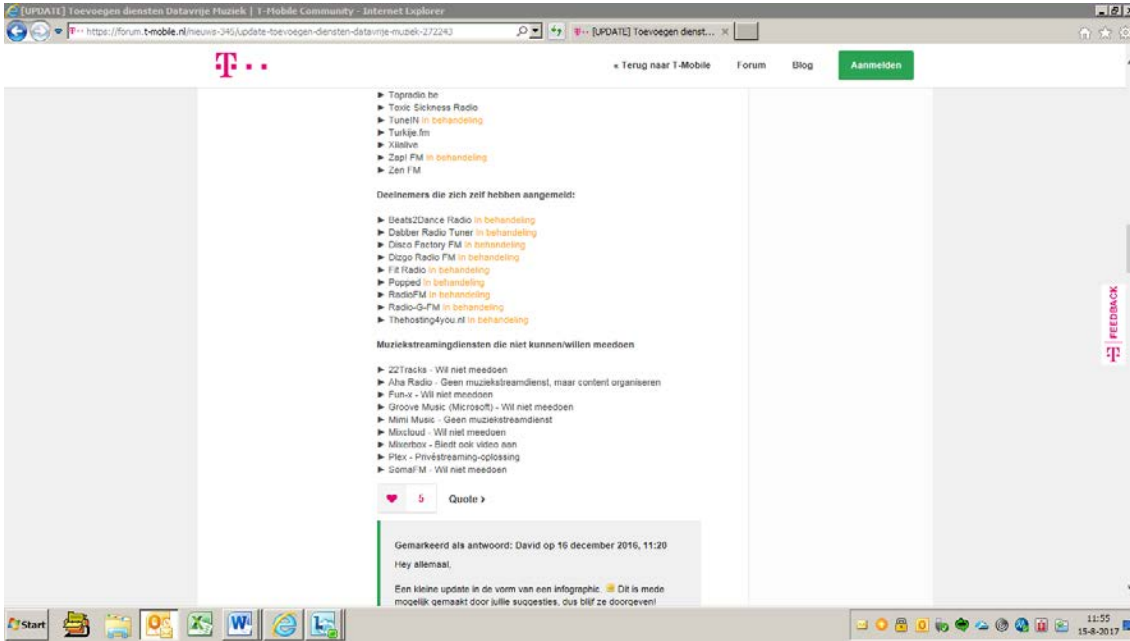
Decision Public

25/40

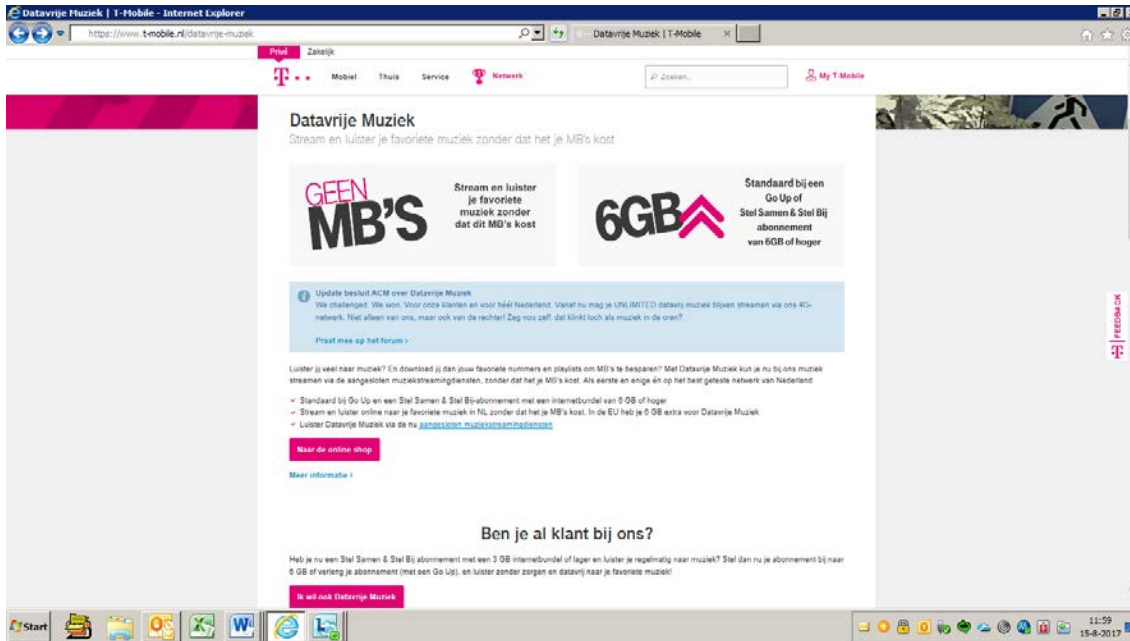


Decision Public

26/40



Decision Public



27/40

Annex 2

CONFIDENTIAL!

AUGUST 2016

DATAFREE MUSIC PARTNER AGREEMENT

28/40

between

T-Mobile Netherlands B.V., a company incorporated under the laws of The Netherlands, with its registered office at Waldorpstraat 60, 2521 CC The Hague ("**T-Mobile Netherlands**"), duly represented by its director T-Mobile Netherlands Holding B.V., represented in this matter by its directors [name] [function] and [name] [function] ;

(Hereinafter referred to as: "**T-Mobile Netherlands**")

- and -

[Supplier], a company incorporated under the laws of, with its registered office at ("**Content Partner**"), duly represented by its directors [name] [function] and [name] [function];

(Hereinafter to be jointly referred to as "**Parties**" or individually as "**Party**")

Decision Public

PREAMBLE

T-Mobile Netherlands is operating as a telecom provider a mobile telecommunications network in The Netherlands.

Content Partner offers services in the field of audio (music and other) streaming.

T-Mobile Netherlands intends to offer end users the possibility of zero rated access to certain audio streaming services of qualifying audio streaming providers as part of certain T-Mobile Netherland rateplans (which rateplans may be an add-on or part of a bundle);

Content Partner intends to participate with the audio streaming content of his audio streaming service in the aforementioned zero rated access offer of T-Mobile Netherlands.

T-Mobile Netherlands intends to encourage as many audio streaming providers as possible to participate in its' zero rated access offer and is willing to conclude agreements on the zero rating of audio streaming content with a large number of qualifying audio streaming providers (provided they meet the requirements as set out hereinafter) to be able to zero rate further audio streaming content of other qualifying audio streaming providers within the zero rated access offer.

The Parties therefore enter into this Agreement (as defined below).

NOW, THEREFORE, the Parties agree as follows:

1. **DEFINITIONS** In addition to terms defined elsewhere in the Agreement, the following terms shall have the meaning set out below:
 - 1.1 **"Agreement"**: means this Agreement and its Annexes.
 - 1.2 **"Affiliate/s"**: refers to all companies affiliated to T-Mobile Netherlands and/or affiliated to its parent company Deutsche Telekom AG (DTAG) as defined by Sec. 15 of the German Stock Corporation Akt [Aktiengesetz, AktG] worldwide as well as all companies worldwide in which T-Mobile Netherlands or DTAG, directly or indirectly has ownership of at least 25% of the shares and/or has management control (e.g. local branches in territories other than Germany such as T-Mobile Polska S.A.).
 - 1.3 **"Audio Content"** refers to pure audio content only, i.e. "Audio Content" does not comprise films, music videos, games, software and other content even if such content is combined with and/or contains audio elements.
 - 1.4 **"Confidential Information"** refers to all documents, information and data which the disclosing Party orally or in writing marks or designates as or presumes to be "confidential" and which are made available to the Parties or of which they gain

29/40

**Decision
Public**

knowledge on the basis of the co-operation and all information which is by nature confidential or a reasonable person would believe to be confidential.

- 1.5 **“Content”** refers to all (i.e. 100 %, in other words: the full catalogue of) Audio Content and related metadata made available by the Content Partner to its customers by way of the Usage Types through the Streaming Service. Only lawful Content and Content which is properly licensed by the Content Partner from the respective rightsholders is eligible for the Data Free Audio Offer.
- 1.6 **“Data Free Audio Offer”** refers to the offering by T-Mobile Netherlands of Zero Rated mobile data to End Users within a rateplan (which rateplan may be an add-on or part of a bundle) regarding their use of audio streaming services of the participating Content Partner and the participating Qualifying Audio Streaming Providers through T-Mobile Netherlands’ mobile telecommunications network. For the avoidance of doubts: It is in the sole discretion of T-Mobile Netherlands into which qualifying rateplans it integrates the Data Free Audio Offer. Only lawful content and content which is properly licensed by the Qualifying Audio Streaming Providers from the respective rightsholders is eligible for the Data Free Audio Offer.
- 1.7 **“End Users”** refers to all customers of T-Mobile Netherlands who have booked a Data Free Audio Offer.
- 1.8 **“Marketing-Material”** refers to the marketing material as set out in Clause 7.
- 1.9 **“Qualifying Audio Streaming Providers”** refers to any legal audio streaming provider which operates an audio streaming service (e.g. music-streaming-on-demand service, audio broadcast service [live radio] or audio podcast service) in the Territory and meets the technical criteria - as defined by T-Mobile Netherlands in its sole discretion - necessary to participate in the Data Free Audio Offer.
- 1.10 **“Streaming Service”** refers to the audio streaming service offered by Content Partner.
- 1.11 **“Territory”** shall be The Netherlands (which may be expanded to further territories in T-Mobile Netherlands’ sole discretion solely to the extent necessary to accommodate End Users who are roaming outside of the Territory).
- 1.12 **“Usage Types”** refers to the streaming (streaming on-demand, broadcasting by way of streaming) and to the tethered downloading of content for offline usage. For the avoidance of doubts: “Usage Types” does not refer to the downloading of content for the creation of permanent copies (download to own/permanent downloads).
- 1.13 **“Zero Rated”** means that the data consumed by the End User in the course of accessing the Content of the Content Partner and the content of the Qualifying Audio Streaming Providers over T-Mobile Netherlands’ mobile telecommunication

**Decision
Public**

network does not count towards the end user's data allowance imposed by T-Mobile Netherlands within the applicable rateplan.

2. SUBJECT MATTER OF THE AGREEMENT

The subject matter of this Agreement is the participation of Content Partner in the Data Free Audio Offer of T-Mobile Netherlands.

Any Qualifying Audio Streaming Provider can work with T-Mobile Netherlands for inclusion in the Data Free Audio Offer, which is designed to benefit all End Users.

Content Partner is a Qualifying Audio Streaming Provider and makes Content available to the users of its Streaming Service. Purpose of this Agreement is the inclusion of the Streaming Service into the Data Free Audio Offer to enable End Users to use the Streaming Service Zero Rated.

For using the Streaming Service or any other Qualifying Audio Streaming Service End Users need to conduct (if necessary under the terms and conditions of the Streaming Service/the other Qualifying Audio Streaming Provider) a customer relationship with the Content Partner respectively the other Qualifying Audio Streaming Provider. In the sense of this Agreement a) the Content Partner shall be solely responsible for all matters related to the Streaming Service itself (including but not limited to operation, maintenance and availability of the Streaming Service, the Content included in the Streaming Service including legality of Content and clearance of rights for exploitation of the Content, invoicing of customers and recovery of any payments) and b) T-Mobile Netherlands shall only be responsible for its mobile telecommunications network.

For the avoidance of doubt, the setup and details of the Data Free Audio Offer as well as potential adjustments to it (including but not limited to the choice if and what Audio Content and/or metadata and/or Usage Types to be Zero Rated) shall be in T-Mobile Netherlands' sole discretion. T-Mobile Netherlands shall use commercially reasonable efforts to inform Content Partner about relevant changes via e-mail.

The Data Free Audio Offer may be discontinued at any time in the sole discretion of T-Mobile Netherlands.

The Data Free Audio Offer is applicable in the Territory only, i.e. usage of the Streaming Service by End Users from outside of the Territory is not Zero Rated.

For the avoidance of doubts the Parties agree that T-Mobile Netherlands will not act as a reseller of the Streaming Service.

3. MARKING OF CONTENT BY CONTENT PARTNER

Content Partner shall deliver detection signatures to make the Content distinguishable for T-Mobile Netherlands from other (i.e. not Zero Rated) content. The Content can only be Zero Rated if Content Partner provides T-Mobile Netherlands with accurate and complete technical information and complies with the requirements as set out in ANNEX 1. Technical information and requirements consist of IP addresses used to provide the Content to the customers of the Content Partner, protocols, List of URLs and/or SNI (for HTTPS) used to provide the Content to the customers of the Content Partner (which includes a specific string or keywords in the HTTP header) and server and host names associated with the Content or information about any other mechanism to detect Content .

The Content Partner warrants and represents that the URL/IP addresses, protocols, server and hostnames it provides to T-Mobile Netherlands in accordance with ANNEX 1 only correspond with the Content and do not lead to any other content.

The Usage Type that is eligible for Zero Rating under the Data Free Audio Offer will be provided by the Content Partner to the customer of the Content Partner in such a way that is distinguishable from other usage types that are not qualified to be Zero Rated under the Data Free Audio Offer.

Any changes to the provision of Content by the Content Partner to users of the Streaming Service including but not limited to Usage Types, by Content Partner or hired third parties that could impact T-Mobile Netherlands' ability to identify the Content and include Content in the Data Free Audio Offer must be communicated to T-Mobile Netherlands three (3) month in advance in writing (e-mail is sufficient). If T-Mobile Netherlands is not aware of changes then it can't ensure correct detection of Content for being Zero Rated. T-Mobile Netherlands reserves the right to suspend the Content Partner's participation in the Data Free Audio Offer upon prior written notice (e-mail is sufficient) if such changes cannot be resolved in a timely manner and End User expectations cannot be met. Further claims are reserved.

4. ZERO RATING CONTENT BY T-MOBILE NETHERLANDS

T-Mobile Netherlands and Content Partner will work together to ensure that T-Mobile Netherlands is enabled to properly identify Content and Usage Types. The use of technology protocols which make detection of Content difficult such as https and UDP require additional collaboration with T-Mobile Netherlands to enable the Content detection.

T-Mobile Netherlands will use commercially reasonable efforts to provide the Data Free Audio Offer to End Users.

T-Mobile Netherlands is entitled to make changes regarding the request of technical information and regarding the requirements set out in Annex 1. In case of any changes T-Mobile Netherlands will notify the Content Partner in advance as specified in Annex 1.

5. CONTACTS

For the execution of this Agreement, each Party shall designate a technical and a commercial contact person whose names and addresses are specified in Annex 2. The contact persons of the Content Partner shall be available for T-Mobile Netherlands by telephone during customary business hours for all technical and/or commercial questions and comments regarding the provision of Content and/or Usage Type and/or Streaming Service.

6. LEGALITY OF THE STREAMING SERVICE, CONTENT AND THE MARKETING-MATERIALS

- 6.1 The Content Partner represents and warrants that the Content Partner complies with all legal provisions with respect to the legality of the Streaming Service, the Content and the Marketing-Materials.

7. MARKETING-MATERIAL

The Content Partner shall provide any existing trademarks, trade names, logos and/or other brand features of the Streaming Service (“the **Marketing-Material**”).

T-Mobile Netherlands has the worldwide, royalty free and non-exclusive right to use the Marketing Material in T-Mobile Netherlands marketing communication for the purpose of the promotion of the Data Free Audio Offer in all media (eg: website / POS / email). It is at T-Mobile Netherlands sole discretion whether and to what extent it promotes the Data Free Audio Offer.

Decision Public

The Content Partner represents and warrants that the Content Partner holds all rights in the Marketing-Material which are required to grant T-Mobile Netherlands the rights given to T-Mobile Netherlands under this Agreement.

Content Partner has the non-exclusive and royalty free right to use the T-Mobile Netherlands logo and/or branding on its´ website, but only after written approval (e-mail is sufficient) of T-Mobile Netherlands.

8. NO REMUNERATION

The Parties shall not owe each other any consideration, in particular remuneration for the performances under this Agreement.

Each Party will bear its own costs, including the costs incurred on its behalf in relation to the realization of this Agreement.

Content Partner will in particular bear any costs for his Streaming Service, the marking of the Content and any other performance of Content Partner under this Agreement.

T-Mobile Netherlands will in particular bear any costs for the offering of the Data Free Audio Offer to the End Users and any other performance of T-Mobile Netherlands under this Agreement.

9. LIMITATION ON LIABILITY

- 9.1 Subject to the provisions of this article, each Party shall be liable for any and all damages suffered by the Other Party as a result of:
- (a) a Party not meeting its obligations under the Agreement and/or governmental obligations;
 - (b) acts or omissions of a Party, its employees, its (sub)contractors and/or their employees.
- 9.2 Parties' liability shall be limited to direct damages only and to an amount of EUR 25.000 per event or EUR 50.000 per year.
- 9.3 No liability shall exist for both Parties for indirect damages, such as but not limited to, consequential damage caused by defect, loss of profit or loss of customers.

10. CONFIDENTIALITY

- 10.1 The Parties undertake to keep confidential all Confidential Information during the term of this Agreement and for two years thereafter; notably the disclosure of Confidential Information to third parties requires the other Party's prior written consent. This requirement of prior consent shall not apply to persons involved by one Party in connection with the conclusion and/or performance of this Agreement, including but not limited to Affiliates, consultants and/or technical service providers; however, the relevant Party shall impose written confidentiality obligations upon those persons which are not less protective than the confidentiality obligation under this Agreement. The foregoing shall also apply to the present Agreement. This restriction of the confidentiality obligation as to time shall not apply to the extent that personal data is concerned.
- 10.2 The Parties shall also impose the obligation to maintain the level of confidentiality they have entered into under this Agreement on all persons or companies entrusted with Confidential Information or performance under this Agreement by the Parties.
- 10.3 The foregoing obligations shall not apply (without granting of a right or license) insofar as one Party that has received Confidential Information can show that this information, in a legal manner:
- (a) was available to the public at the time of disclosure or became publicly available thereafter; or
 - (b) was disclosed to the receiving Party by another party; or
 - (c) was in the possession of the receiving Party or was known to it before receipt of the information; or
 - (d) was developed by the receiving Party independently of the Confidential Information; or
 - (e) is to be disclosed by T-Mobile Netherlands to a state media authority and/or to other organisations for the supervision of media and/or the protection of minors and/or the bodies of such organisations, provided that T-Mobile Netherlands informs the Content Partner of such disclosure without delay (e-mail will suffice), or
 - (f) is required to be disclosed by statutory or administrative-law provisions or due to an unappealable court decision if the disclosing Party is notified of this requirement without undue delay and the scope of the disclosure is limited as far as this is possible.
- 10.4 Notwithstanding the above, T-Mobile Netherlands is entitled to disclose Confidential Information to Affiliates.

11. TERM AND TERMINATION

- 11.1 The Agreement starts on (“Start Date”) and is concluded for an indefinite period of time. It can be terminated by either Party in writing with a notice period of three (3) months with effect to the end of a calendar month.
- 11.2 The right to terminate this Agreement without observing any notice period for good cause shall not be affected thereby.
- 11.3 Such good cause exists in particular if:
- (a) a Party becomes insolvent, a non-abusive application to initiate insolvency proceedings against the other Party has been filed, any such application against the other Party has been rejected for lack of assets, any executions against a Party have been fruitless or any execution measures have been initiated against a Party which have not been cancelled within one month (e.g. cancellation of seizure/attachment); or
 - (b) a Party has breached a material provision of this Agreement; material provisions are notably those provisions as set forth in Clause 3 (Marking of the Content by Content Partner), Clause 6 (Legality of the Content and the Marketing Material) and Clause 10 (Confidentiality); or
 - (c) a Party has otherwise breached an obligation under this Agreement, but only after expiry of a period of 3 (three) weeks set for the remedy of such breach or after warning, except where such period or warning can be dispensed with, notably after taking into account the severity of the breach or other special circumstances;
- 11.4 T-Mobile Netherlands furthermore has an extraordinary right to terminate the Agreement if the Data Free Audio Offer is terminated or, in any other manner, is no longer offered to End Users. The decision on such termination or other cessation of such offer to the general public is in T-Mobile Netherlands's sole discretion. The notice period for a termination under this clause shall be four (4) weeks.
- 11.5 Any notice of termination of this Agreement must be given in writing.

12. REQUIREMENTS FOR NOTICES TO THE OTHER CONTRACTING PARTY

- 12.1 To the extent that notices must be made according to this Agreement to the other Party, these shall be directed to one of the commercial contact persons stated in **ANNEX 2**.
- 12.2 Any Party can change its contact details by means of a written notice made to the other Party. Any such change shall become effective two weeks after receipt of the notice of change.

Decision Public

12.3 To the extent that notices pursuant to this Agreement have to be made in writing, they may only be delivered in person or sent by mail, courier or fax. In particular, transmission by e-mail shall only be sufficient where explicitly named in this Agreement.

13. MISCELLANEOUS

13.1 In the event of any dispute under this Agreement the Parties shall endeavour to handle any dispute on an intimate and amicable basis. If Parties do not reach a settlement all disputes arising in connection with this Agreement between the Parties will be submitted to the jurisdiction of the court district of The Hague.

13.2 The Agreement is governed by and will be construed in accordance with the laws of the Netherlands, to the exclusion of the international law of conflicts and the UN Vienna Sales Convention (“Weens koopverdrag”).

13.3 The assignment of rights and transfer of obligations under this Agreement and/or the transfer of this Agreement in its entirety shall be permissible only with the prior written consent of the other Party, unless such transfer takes place to an Affiliate. The Parties agree that such consent shall not be unreasonably withheld. This shall not affect the provisions of Sec. 354 a of the German Commercial Code [*Handelsgesetzbuch – HGB*].

13.4 This Agreement represents the entire provisions relating to the subject matter of this Agreement and replaces all previous provisions agreed between the Parties in respect of the subject matter of this Agreement. No oral side agreements have been made. The following annexes form an integral part of this Agreement:

ANNEX 1: Technical Information and Requirements for provision and identification of the Content

ANNEX 2: Contacts

13.5 The general terms and conditions of the Content Partner shall not apply, even if T-Mobile Netherlands does not expressly object to them.

13.6 Changes, amendments to, or termination of this Agreement require written form. This also applies to any agreements by which the written form requirement is modified or cancelled.

13.7 Should any of the provisions in this Agreement be invalid or unenforceable in whole or in part, this shall not affect the remaining provisions. The Parties shall replace any invalid provision without delay by a valid provision which comes as close as possible to the economic purpose of the invalid provision. The same shall apply for any omissions in the Agreement.

**Decision
Public**

IN WITNESS WHEREOF, AGREED AND SIGNED IN TWO COUNTERPARTS:

T-Mobile Netherlands B.V.,
represented by its managing director T-Mobile
Netherlands Holding B.V.

Name:

Position:

Place:

Date:

[Content Partner]

Name:

Position:

Place:

Date:

T-Mobile Netherlands B.V.,
represented by its managing director T-Mobile
Netherlands Holding B.V.

Name:

Position:

Place:

Date:

[Content Partner]

Name:

Position:

Place:

Date:

38/40

TECHNICAL INFORMATION AND REQUIREMENTS FOR PROVISION AND IDENTIFICATION OF THE CONTENT

The Parties agree, that this Annex – in deviation from Clause 13.6 - may be updated by T-Mobile Netherlands via E-Mail to reflect any changes to the Data Free Audio Offer or the technical requirements.

1. Methods of Traffic identification (subject to potential changes)

Unencrypted traffic:

- Signature based identification.
- Sub-domain detection.
- Enriched http header
- Fixed IP address ranges and ports.
- URL based

Encrypted traffic:

- TLS handshake detection (Server Name Indication) with sub-domain detection for different services.
- Certificate based detection.
- Enriched TLS handshakes header

SPECIFIC INFORMATION NEEDED

THE CONTENT PARTNER SHALL PROVIDE ANSWERS ON THE FOLLOWING:

Do you offer more than one streaming service?
Is an app available? If Yes on which OS (ios/android/other)
Is the content also delivered via web browser?
What protocol is used to deliver the content? – HTTP / - HTTPS / - other, please specify
Do you host your streaming service on your own server or to other webhosting provider?
Do you use CDN to deliver the content? If yes, please specify who is your CDN provider ?
Do you use fixed IP address to deliver the content? If yes, please also provide the list of IP address (or subnet)
If you used fixed IP address, is the IP address exclusively used by you or is it also used by other streaming services?
If you used fixed IP address, and you have more than one streaming service, do you share the IP address with more than one streaming service you provide?
If you use HTTP protocol to deliver your content, please provide list of URLs. If you have more than one streaming service, would it be possible to group the URL based on content or content type
If you use HTTPS protocol, do you include SNI (Server-Name-Indication) in the "Server Hello" during the TLS handshake? If yes, please specify the SNI string
If you use HTTPS protocol, and you offer more than one streaming service, do you use same SNI or different SNI per streaming services?
Is there commercial/ads in your content?
If you have commercial, do you deliver the commercial as part of your content? Or only referral to external link ?
Please specify the bitrates of your content and or content type. Also specify if you support adaptive-bitrate

CONTACTS

1. COMMERCIAL BUSINESS CONTACT

T-Mobile Netherlands

Contact: [CONFIDENTIAL]

Tel.: [CONFIDENTIAL]

E-mail: [CONFIDENTIAL]

Content Partner:

Contact: _____

Tel.: _____/_____

E-mail: _____@_____

2. TECHNICAL CONTACT

T-Mobile Netherlands

Contact: [CONFIDENTIAL]

Tel.: [CONFIDENTIAL]

E-mail: [CONFIDENTIAL]

Content Partner

Contact: _____

Tel.: _____/_____

E-Mail: _____@_____