



## **Policy guideline definition Internet access service in the meaning of Article 7.4a Telecommunications Act**

### **Introduction**

1. On May 2, 2014 the Dutch Ministry of Economic Affairs started an Internet consultation, offering interested parties the possibility to provide their input on the policy guideline (hereinafter "Policy Guideline") regarding the term "Internet access service" (*"internettoegangsdienst"*) in Article 7.4a of the Dutch Telecommunications Act (hereinafter "DTA"), the net neutrality provision.
2. Netflix, Inc. (hereinafter: "Netflix") welcomes and supports the initiative of the Ministry of Economic Affairs to clarify the rules regarding net neutrality and therewith strengthen the protection of Internet users. As a provider of Internet services, Netflix is happy to provide its input on the proposed Policy Guideline. We are thanking you for the opportunity to submit our vision in English.

### **About Netflix**

3. Netflix is an Internet television network with more than 33 million members in over 40 countries enjoying more than one billion hours of TV shows and movies per month, including original series. For one low monthly price, members can watch as much as they want, anytime, anywhere, on nearly any Internet-connected screen. Netflix launched as an Internet television network in the United States in 2007.
4. In the EU, Netflix currently offers its services in the United Kingdom, Ireland, Norway, Denmark, Sweden, Finland and the Netherlands. We are to launch our service in Germany, Austria, Switzerland, France, Belgium and Luxembourg in late 2014. The Netherlands is an important market for Netflix. Netflix launched its service in the Netherlands in September 2013. Netflix has the intention to transfer its headquarters to the Netherlands for the next phase of its European expansion, with a provisional timetable for early 2015.

### **The importance of net neutrality**

5. An open and free Internet is vital for unhindered communication and innovation. An open and free Internet can only function properly without discrimination of services. Therefore, it is of great importance that the principle of net neutrality has been laid down in Article 7.4a DTA.

6. Article 7.4a DTA prohibits the hindrance and/or slowing down of services and applications on the Internet. Negative or positive price discrimination is also prohibited. Such measures are necessary to protect the consumers' right to use services of their own choice, without limitations, and to have access to and distribute the content they wish.
7. Net neutrality thus services the freedom of expression and information. Not only of consumers, but of online service providers as well. As a result of the net neutrality principle, innovation is stimulated. It is clear that as soon as providers are able to give certain services a preferential treatment over others (such as their own), this will frustrate the ability of other, innovative services to enter the market or to survive on the market.

### **The proposal for a Policy Guideline**

8. According to the Explanatory Memorandum to article 7.4a DTA, the term "Internet access services" should be understood broadly.<sup>1</sup> As soon as a provider offers access to websites, multiple services and/or applications, the provider qualifies as an Internet access provider and the net neutrality provision applies.
9. The Explanatory Memorandum, however, emphasizes that article 7.4a does not preclude providers from offering *separate* services ("*losse diensten*") via the Internet – such as VoIP, chat-only, email, and/or music- or video streaming services – in which case (all) other Internet traffic may be blocked.
10. In order for the net neutrality provisions to have the desired effect, the above-mentioned prohibitions must be interpreted broadly, as the Policy Guideline correctly states. Circumvention of the prohibitions by offering a separate service which is in fact a service of an Internet access provider must be prevented. The definition of the term "separate service" in the Policy Guideline is laudable in this respect and Netflix appreciates the opportunity provide input on the further clarification of certain terminology.

#### Separate service

11. The Policy Guideline states that a separate service means a service or application which is delivered via the Internet, but by which only that service or application can be used. The rest of the Internet is not made accessible for the subscriber. According to the Explanatory Memorandum, the reason the net neutrality provision does not apply to separate services is for the benefit of consumers who do not need Internet access of a certain Internet provider, but do need a specific service offered by that provider.
12. This means that in order to be a separate service, the service or application should be available for everyone, without the need to subscribe to the provider's general Internet access service. If the service is only available in conjunction with one or more subscriptions, a service cannot be deemed "separate". Although it may be understood from the purpose of the Policy Guideline

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<sup>1</sup> *Kamerstukken II*, 32 549, nr. 29, p. 2-3.

that this is the meaning of a separate service, Netflix finds that this should be emphasized in the explanatory memorandum with the Policy Guideline and proposes to include the following text to the Policy Guideline:

*Section 7.4a of the Dutch Telecommunications Act applies to the provision of an Internet access service. The explanation sets out the fact that the term "Internet access service" must be interpreted broadly to prevent circumvention of the net neutrality provision. Only the provision of a single, separate service via the Internet (hereinafter: "Internet service"), **accessible independently of an Internet access service**, is excluded from section 7.4a. As soon as more than one single, separate service is offered to an end user, this qualifies as offering an Internet access service. This includes the provision of a separate Internet service in combination with an Internet access service to an end user.*

*Artikel 7.4a van de Telecommunicatiewet is van toepassing op het aanbieden van een internettoegangsdienst. In de toelichting is uitgelegd dat het begrip internettoegangsdienst ruim moet worden uitgelegd om omzeiling van de netneutraliteitsbepaling te voorkomen. Alleen het leveren van een enkele losse dienst via internet (hierna: internetdienst), **toegankelijk onafhankelijk van een internettoegangsdienst**, is van artikel 7.4a uitgesloten. Zodra aan een eindgebruiker meer dan één losse internetdienst wordt geleverd is sprake van het aanbieden van een internettoegangsdienst. Hieronder wordt mede verstaan het aan een eindgebruiker leveren van een losse internetdienst in combinatie met een internettoegangsdienst.*

#### Single separate service

13. Pursuant to the Policy Guideline, merely delivering a single separate service is excluded from Article 7.4a DTA. As soon as more than one separate service is delivered, it is considered an Internet access service. The Policy Guideline, however, does not specify how it will be determined if a certain service is a *single* service.
  
14. The explanatory note only states that it is not allowed to offer *packages* of separate services. As soon as more than one separate service is offered *at the same time*, it is considered an Internet access service. However, this does not prevent service providers from offering a single service which in fact contains multiple services. As a result, it could be possible to combine multiple services in one separate service and offer access to a part of the Internet while blocking the rest on the Internet. For instance, is a service that offers access to music as well as Internet television a single service or is such a service considered to be two separate services? And a service for e-mail and a calendar? Or for a search engine and maps? Given the above, it is important to define how one separate service will be distinguished from another separate service by emphasizing that the separate service shall be clearly demarcated.

15. Also, it should be defined how a separate service will be distinguished from an Internet access service. Netflix proposes to add the following text to the Policy Guideline, the specification of which should be explained in the explanatory note or developed by the supervisory authority.

*Section 7.4a of the Dutch Telecommunications Act applies to the provision of an Internet access service. The explanation sets out the fact that the term "Internet access service" must be interpreted broadly to prevent circumvention of the net neutrality provision. Only the provision of a single, **clearly demarcated**, separate service via the Internet (hereinafter: "Internet service") is excluded from section 7.4a. As soon as more than one single, separate service is offered to an end user, this qualifies as offering an Internet access service. This includes the provision of a separate Internet service in combination with an Internet access service to an end user.*

*Artikel 7.4a van de Telecommunicatiewet is van toepassing op het aanbieden van een internettoegangsdienst. In de toelichting is uitgelegd dat het begrip internettoegangsdienst ruim moet worden uitgelegd om omzeiling van de netneutraliteitsbepaling te voorkomen. Alleen het leveren van een enkele, **duidelijk afgebakende**, losse dienst via internet (hierna: internetdienst) is van artikel 7.4a uitgesloten. Zodra aan een eindgebruiker meer dan één losse internetdienst wordt geleverd is sprake van het aanbieden van een internettoegangsdienst. Hieronder wordt mede verstaan het aan een eindgebruiker leveren van een losse internetdienst in combinatie met een internettoegangsdienst.*

#### Combination with Internet access service

16. The Policy Guideline states that delivering a separate service in combination with an Internet access service qualifies as delivering more than one service and is thus considered an Internet access service. Combining a separate service with an Internet access service can, however, also occur in other situations. Netflix therefore recommends to amend the Policy Guideline as follows:

*Section 7.4a of the Dutch Telecommunications Act applies to the provision of an Internet access service. The explanation sets out the fact that the term "Internet access service" must be interpreted broadly to prevent circumvention of the net neutrality provision. Only the provision of a single, separate service via the Internet (hereinafter: "Internet service") is excluded from section 7.4a. As soon as more than one single, separate service is offered to an end user, this qualifies as offering an Internet access service. **Providing** ~~This includes the provision of a separate Internet service in combination with an Internet access service to an end user~~ **is not regarded as a separate service.***

*Artikel 7.4a van de Telecommunicatiewet is van toepassing op het aanbieden van een internettoegangsdienst. In de toelichting is uitgelegd dat het begrip internettoegangsdienst ruim moet worden uitgelegd om omzeiling van de netneutraliteitsbepaling te voorkomen. Alleen het leveren van een enkele losse dienst*

*via internet (hierna: internetdienst) is van artikel 7.4a uitgesloten. Zodra aan een eindgebruiker meer dan één losse internetdienst wordt geleverd is sprake van het aanbieden van een internettoegangsdienst. ~~Hieronder wordt mede verstaan~~ Het aan een eindgebruiker leveren van een losse internetdienst in combinatie met een internettoegangsdienst **wordt niet beschouwd als losse dienst.***

17. Furthermore, as discussed above, the service or application should be available for everyone, without the need to subscribe to the provider's general Internet access service. The explanatory note should clarify what is meant by a combination with an Internet access service. That is of course clearly the case when the separate service is offered as a special offer and/or with discount as part of the general Internet access service. However, a service offered as a separate service that must be purchased by customers in addition to the general Internet access service should be regarded as an Internet access service as well.

#### Price discrimination

18. The explanatory note states that Article 7.4a prohibits negative and positive price discrimination. Internet access providers may not influence the choice of end users by making certain services or applications less appealing to end users than alternative services, for instance by making them more expensive, or by making them more appealing, by providing them for a better price. The explanatory note stipulates that this prohibition may not be circumvented, for instance by offering an Internet access service in combination with a separate service which can be used for a better price than other services, for example by keeping the data use of that service outside of the data limit of the user or by not charging for the use of that service.
19. End users benefit when their choices are not influenced by decisions made by Internet access providers, such as whether certain services are exempt from a user's data limit. When Internet access providers can make such decisions, application providers such as Netflix must either negotiate with the Internet access provider or risk being put at a competitive disadvantage. Therefore, consistent with the explanatory note, Netflix is of the opinion that the Policy Guideline should prohibit a separate service having any influence on an Internet access service:

*Section 7.4a of the Dutch Telecommunications Act applies to the provision of an Internet access service. The explanation sets out the fact that the term "Internet access service" must be interpreted broadly to prevent circumvention of the net neutrality provision. Only the provision of a single, separate service via the Internet (hereinafter: "Internet service") is excluded from section 7.4a. As soon as more than one single, separate service is offered to an end user, this qualifies as offering an Internet access service. This includes the provision of a separate Internet service in combination with an Internet access service to an end user. **It is not permitted to allow the receipt of a separate service to have any effect at all on the quality or price of an internet access service.***

*Artikel 7.4a van de Telecommunicatiewet is van toepassing op het aanbieden van een internettoegangsdienst. In de toelichting is uitgelegd dat het begrip internettoegangsdienst ruim moet worden uitgelegd om omzeiling van de netneutraliteitsbepaling te voorkomen. Alleen het leveren van een enkele losse dienst via internet (hierna: internetdienst) is van artikel 7.4a uitgesloten. Zodra aan een eindgebruiker meer dan één losse internetdienst wordt geleverd is sprake van het aanbieden van een internettoegangsdienst. Hieronder wordt mede verstaan het aan een eindgebruiker leveren van een losse internetdienst in combinatie met een internettoegangsdienst. **Het is niet toegestaan het afnemen van een losse dienst op enigerlei wijze van invloed te laten zijn op de kwaliteit of prijs van een internettoegangsdienst.***

20. In the opinion of Netflix, the explanatory note should stipulate that price discrimination may not only take the form of a financial benefit/disadvantage (a service is available for a different rate), but can also relate to the quality (the service is available in different resolution) or availability of the service (e.g. the service remains available after the data cap has been reached) or by promoting a separate service with an Internet access service in any other manner.

### Recommendations

21. Below, we will highlight the recommended changes discussed above. Netflix advises to amend the wording of the proposed guideline as follows. In addition, Netflix recommends to amend the explanatory remarks to clarify the requirements set out above.

*Section 7.4a of the Dutch Telecommunications Act applies to the provision of an Internet access service. The explanation sets out the fact that the term "Internet access service" must be interpreted broadly to prevent circumvention of the net neutrality provision. Only the provision of a single, **clearly demarcated**, separate service via the Internet (hereinafter: "Internet service"), **and which is accessible independently of an Internet access service**, is excluded from section 7.4a. As soon as more than one single, separate service is offered to an end user, this qualifies as offering an Internet access service. **Providing**~~This includes the provision of a~~ separate Internet service in combination with an Internet access service to an end user **is not regarded as a separate service. It is not permitted to allow the receipt of a separate service to have any effect at all on the quality or price of an internet access service.***

*Artikel 7.4a van de Telecommunicatiewet is van toepassing op het aanbieden van een internettoegangsdienst. In de toelichting is uitgelegd dat het begrip internettoegangsdienst ruim moet worden uitgelegd om omzeiling van de netneutraliteitsbepaling te voorkomen. Alleen het leveren van een enkele, **duidelijk afgebakende**, losse dienst via internet (hierna: internetdienst), **toegankelijk onafhankelijk van een internettoegangsdienst**, is van artikel 7.4a uitgesloten. Zodra aan een eindgebruiker meer dan één losse internetdienst wordt geleverd is sprake van het aanbieden van een internettoegangsdienst. ~~Hieronder~~*

~~wordt mede verstaan~~ Het aan een eindgebruiker leveren van een losse internetdienst in combinatie met een internettoegangsdienst **wordt niet beschouwd als losse dienst. Het is niet toegestaan het afnemen van een losse dienst op enigerlei wijze van invloed te laten zijn op de kwaliteit of prijs van een internettoegangsdienst.**