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## **ACM Policy rule on the provision of information concerning internet speeds**

The Netherlands Authority for Consumers and Markets

Considering Sections 15.1, paragraph 3, 15.2 and 15.4 of the Dutch Telecommunications Act, Articles 4, paragraph 1, under d, and 5 of the Regulation of the European Parliament and of the Council established under Article 114 of the Treaty on the Functioning of the European Union concerning open internet access and Section 4:81 of the Dutch General Administrative Law Act,

decides:

### **First section – Definitions**

#### **Article 1. - Definitions**

In this policy rule, the following definitions apply:

- a. *ACM*: the Netherlands Authority for Consumers and Markets, as referred to in Section 2, paragraph 1 of the Establishment Act of the Netherlands Authority for Consumers and Markets;
- b. *Download speed and upload speed*: the download speed and upload speed within the meaning of the net neutrality regulation;
- c. *Provider of internet access service*: a provider of an internet access service within the meaning of the net neutrality regulation;
- d. *Net neutrality regulation*: the Regulation of the European Parliament and of the Council established under Article 114 of the Treaty on the Functioning of the European Union concerning open internet access.

### **Second section – Internet speeds on fixed networks**

#### **Article 2. – Minimum download speed and upload speed on fixed networks**

1. To ACM, minimum speed is understood to mean the following: the speed that an internet access service must be able to reach at all times.
2. In ACM's judgment, the measured speed can never be below the minimum speed, except if a situation occurs as described in Section 7.1a of the Dutch Telecommunications Act.

#### **Article 3. – Normally available download speed and upload speed on fixed networks**

1. To ACM, normally available speed is understood to mean the following: the speed that an internet access service reaches at any given time.



2. In ACM's judgment, the normally available speed must be reached in at least eight out of ten measurements of an internet access service that an end-user conducts in a single week. In this context, ACM states that these measurements should be spread out evenly across at least three days in said week, and that it must be possible to conduct the measurements at any given time during the day, but that no more than one measurement per hour can be counted.

#### **Article 4. – Maximum download speed and upload speed on fixed networks**

1. To ACM, maximum speed is understood to mean the following: the highest possible speed that an internet access service is actually able to deliver as part of the subscription that has been taken out.
2. In ACM's judgment, at least 90% of the maximum speed is reached in one of the ten measurements that an end-user conducts in a single week. In this context, ACM states that these measurements should be spread out evenly across at least three days in said week, and that it must be possible to conduct the measurements at any given time during the day, but that no more than one measurement per hour can be counted.

#### **Third section – Internet speeds on mobile networks**

##### **Article 5. – Estimated maximum download speed and upload speed on mobile networks**

In ACM's opinion, the estimated maximum speed is the highest reachable speed that an internet access service is able to deliver as part of the subscription that has been taken out.

#### **Fourth section – Fixed and mobile networks**

##### **Article 6. – Advertised download speed and upload speed on fixed and mobile networks**

- 1 To ACM, advertised speed is understood to mean the following: the speed that providers of internet access services use in their commercial communications.
- 2 In ACM's judgment, the advertised speed on fixed networks is not higher than the maximum speed that can be normally offered on the network in question.
- 3 In ACM's judgment, the advertised speed on mobile networks is not higher than the estimated maximum speed as referred to in Article 5.
- 4 In ACM's judgment, providers of internet access services must indicate in their communications referring to the advertised download speed and upload speed that the actual available speed may deviate from the advertised speed.

##### **Article 7. – Units to be used for speeds**

In ACM's opinion, the speeds referred to in Article 4 of the net neutrality regulation must be expressed in either one of the following units: Mbit/s or Gbit/s.

##### **Article 8. – Information about measurements**

In ACM's opinion, providers of internet access services must provide, on their websites, clear and comprehensible information about the way the measurements as referred to in this policy rule are to be conducted.



**Fifth section – Final remarks**

**Article 9. – How to cite this policy rule**

This decision shall be referred to as: ACM Policy rule on the provision of information concerning internet speeds.

**Article 10. – Entry into force**

- 1 This decision shall be published, with its explanatory notes, in the Dutch Government Gazette.
- 2 This decision shall enter into force on January 1, 2018, with regard to contracts that are concluded after the day this policy rule has been published between end-users and providers of internet access services.
- 3 This decision shall enter into force on March 1, 2018, with regard to contracts that are concluded on or before the day this policy rule has been published between end-users and providers of internet access services.

The Hague, 23 November 2017

The Netherlands Authority for Consumers and Markets,

C.A. Fonteijn

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## **Explanatory notes to the ACM Policy rule on the provision of information concerning internet speeds**

### **General**

#### **Background**

On April 30, 2016, the net neutrality regulation came into force.<sup>1</sup> Article 4 of this regulation contains transparency measures for ensuring open internet access. Article 4, paragraph 1, under d, stipulates that providers of internet access services must ensure that any contract that includes internet access services specifies at least the following:

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

Op August 30, 2016, BEREC<sup>2</sup> set its Guidelines.<sup>3</sup> These Guidelines have been established with an eye to the consistent application of the net neutrality regulation, and provide guidance on the implementation of the obligations laid down in the regulation. With this policy rule, which is an interpretation of said regulation, the Netherlands Authority for Consumers and Markets (ACM) clarifies in greater detail the different internet speeds that are referred to in Article 4, paragraph 1, under d, of the net neutrality regulation.

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#### **Objective of the policy rule, and its relationship vis-à-vis the net neutrality regulation**

The net neutrality regulation has direct application. This means that, since the regulation came into force, providers of internet access services have been bound by the provisions in it. The objective of this policy rule is to provide clarity about the different internet speeds that are mentioned in the net neutrality regulation. As a result, providers of internet access services and end-users will know how ACM interprets these various concepts.

#### **Oversight and enforcement**

In accordance with Section 18.2a of the Dutch Telecommunications Act (hereafter: Tw), ACM is the national regulatory authority (NRA) within the meaning of the net neutrality regulation. Article 5 of the regulation stipulates that the NRAs will closely monitor and ensure compliance with Article 4 of the regulation. Under Section 15.1, paragraph 3 of the Tw, ACM is charged with enforcement of the compliance with the provisions under or pursuant to the net neutrality regulation.

#### **Implementation aspects for providers of internet access services**

Under the net neutrality regulation, providers of internet access on fixed networks must provide a clear and comprehensible explanation of the following (1) the minimum, (2) the normally available, (3) the maximum and (4) the advertised download speed and upload speed of the internet access

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<sup>1</sup> Regulation 2015/2120 of the European Parliament and of the Council.

<sup>2</sup> Body of European Regulators of Electronic Communications.

<sup>3</sup> BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules (BoR (16) 127).



services. With regard to mobile networks, providers of internet access services must provide a clear and comprehensible explanation of (1) the estimated maximum and (2) advertised download speed and upload speed of internet access services. With this policy rule, ACM offers its interpretation of these various concepts. As a consequence, providers of internet access services may have to bring their commercial communications in line with this policy rule. Under Article 4 of the regulation, providers of internet access services must provide in their contracts a clear and comprehensible explanation of the above aspects. The speeds that are mentioned in Article 4, paragraph 1, under d, belong at least to the key features of the service within the meaning of Section 6:230m, paragraph 1, under a of the Dutch Civil Code, and, in the case of distance selling such as over the internet, this information should therefore be provided in a clear and comprehensible manner before consumers are bound by an agreement.<sup>4</sup>

### **Measurements**

In addition to the aforementioned rules regarding any non-conformity of performance, Article 4, paragraph 4 of the net neutrality regulation stipulates, in a nutshell, that any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed and the performance indicated by the provider of internet access services will be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law.

In this context, the net neutrality regulation requires that the relevant facts be established using a monitoring mechanism certified by the NRA. At the time of establishment of this policy rule, such a certified monitoring mechanism is not yet in place. ACM believes it to be desirable that end-users are able to measure their internet connections properly. The fact that no certified monitoring mechanism currently exists, does not mean that end-users are not able to conduct measurements of their internet speeds. Even without any certified monitoring mechanism, end-users are able to conduct such measurements. When conducting such measurements, ACM finds the following aspects to be of importance:

When measuring their fixed internet access, end-users must conduct the measurements from their own devices with a wired connection. In the case of measuring mobile connections, any Wi-Fi connection must be switched off first before conducting the measurement. When end-users have their internet speed measured, the measurement may be affected by the following:

- a. Having internet traffic that uses the same connection at the same time (cross traffic);  
and
- b. Outdated hardware and software.

It is undesirable that the measurement is affected by the above circumstances. End-users should therefore make sure that the above circumstances do not occur.

With regard to legal protection of end-users, the provisions in the Tw are of importance. For example, the Tw includes a provision stipulating that the provider of an internet access service must compensate subscribers when certain failures occur on its network (Section 7.1a Tw).

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<sup>4</sup> In this context, the obligations on internet providers under the Consumer Rights Directive, the Unfair Commercial Practices Directive, the e-Commerce Directive and the BEREC Guidelines on Transparency in the scope of Net Neutrality, BOR (11) 67 are also of importance.



## **Consultation**

ACM has made the draft version of this policy rule available for consultation. The draft policy rule was published on ACM's website.

During the consultation of the draft policy rule, ACM received responses from CAIW, KPN, the providers represented by NLConnect, Tele2, T-Mobile, VodafoneZiggo, and M7group SA. The policy rule and the explanatory notes have taken into account these parties' opinions where possible. Also, ACM has clarified certain parts of the explanatory notes, or it has made certain provisions in the policy rule clearer. Comments and clarifications in general following the responses and their incorporation into the policy rule are found below.

### *Net neutrality regulation*

Insofar the responses, in terms of substance, resulted in any deviations from the net neutrality regulation, also in terms of substance, ACM notes the following. By publishing this policy rule, ACM provides a detailed interpretation of the various internet speeds that are mentioned in Article 4, paragraph 1, under d, of the net neutrality regulation. This means that, in this context, the substance of the net neutrality regulation is leading.

### *Concepts*

In the definition of the concept of "provider of an internet access provider," the reference to the BEREC Guidelines has been removed, because the Guidelines do not further explain this concept.

### *Failures*

With regard to Article 2, paragraph 2, of the policy rule, providers indicate that the reference to Section 7.1a of the Tw ignores the possibility that a network failure does not necessarily always lead to a complete interruption of service, but could also manifest itself in a situation where the service is temporarily operational. In practice, providers say that this could lead, for example, to a slowing down of the internet access service, but not to a complete interruption of service. For that reason, providers suggest removing the reference to Section 7.1a of the Tw. Providers further suggest to use as the starting point the network failures that have been communicated by the provider of an internet access service. ACM does not see any reason for adjusting the policy rule on this point. ACM believes it is important to use as the starting point the failures within the meaning of Section 7.1a of the Tw. In a nutshell, that section explains in what situations end-users are compensated. By following that interpretation, it is ensured that the standard remains the same.

### *Spreading out measurements evenly*

With regard to Article 3, paragraph 2, and Article 4, paragraph 2 of the policy rule, providers indicate that the potential consequence of the phrasing is that end-users conduct most of the measurements on one specific day, whereas the aim is to have the measurements be spread out somehow. ACM shares this position, and has rephrased Article 3, paragraph 2, and Article 4, paragraph 2. As a result, it is clear that the measurements must be spread out evenly across at least three days. ACM does not see any reason to limit this to three days.

With regard to Articles 3 and 4, it is also noted that the interests of end-users could be better served if arrangements were made about any deviations from the indicated speed regarding the speed that can only be determined objectively after delivery, according to the respondent in question. In connection therewith, ACM notes that this is not in accordance with the net neutrality regulation. Providers must provide in their contracts a clear and comprehensible explanation of the various



internet speeds, and also inform end-users about this information before agreements are signed and end-users are bound by them. This follows from footnote 30 with recital 131 of the BEREC Guidelines. It says: “NRAs should note that ISPs are under obligation to provide information to consumers before being bound by the contract under other EU instruments: the Consumer Rights Directive [...]”

#### *Minimum speed*

With regard to Article 2, it is noted that, with this definition, providers may decide to communicate a very low minimum speed. To that point, ACM notes that providers are free to decide what minimum speed they wish to communicate. However, it is important that this minimum speed is correct and is communicated to end-users in a clear and comprehensible manner.

#### *Advertised speed*

In Article 6, paragraph 2, it is clarified that the advertised speed cannot be higher than the maximum speed that can normally be offered on a network.

#### *Applicable to all contracts*

Based on the responses from the consultation, it appears that it is unclear to what contracts the policy rule applies. In connection therewith, ACM notes that the applicability of the net neutrality regulation has been followed, as well as anything that has been said about this in the Guidelines. In recital 134 of the Guidelines, the following is mentioned about this subject:

*“Articles 4(1), 4(2) and 4(3) apply to all contracts regardless of the date the contract is concluded or renewed.”*

As a consequence, the policy rule applies to all contracts, regardless of the date a contract is concluded or renewed.

#### *Implementation period*

Providers have expressed they would like to have an implementation period. ACM finds this reasonable, too. In Article 10, paragraph 2 of the policy rule, ACM therefore determined that the policy rule will come into force at a later point in time. In that context, a distinction is made between (1) contracts that, after the day of this policy rule’s publication, have not yet been concluded between providers of internet access services and end-users, and (2) such contracts that, on or before the day of this policy rule’s publication, have been concluded. With regard to the first category, the policy rule comes into force on January 1, 2018. With regard to the second category, the policy rule comes into force on March 1, 2018. For providers, adjusting the contracts from the first category will cost less time than those from the second category. For that reason, providers are offered more time for adjusting the contracts from the second category.

#### *Measurements*

Some of the responses concern any implications of a measurement mechanism, including a remark that providers themselves should also be able to conduct control measurements in order to be able to verify an end-user’s measurement. At this point, ACM does not see any reason for adjusting the policy rule on such points. In ACM’s opinion, it is premature to include in this policy rule any potential implications of a measurement mechanism, since no such certified mechanism exists yet.



## Notes to each article

### **Article 2**

In Article 2, it is explained what ACM considers to be the minimum download speed and upload speed on fixed networks. In ACM's opinion, the minimum speed is the lower limit: the measured speed cannot be lower than the minimum speed, except in situations as described in Section 7.1a of the Tw.

### **Article 3**

In the first paragraph of Article 3, it is explained what ACM considers to be the normally available download speed and upload speed on fixed networks. In the second paragraph of Article 3, it is described in what situations at least this speed should be reached according to ACM. In practice, the measured internet speed usually varies. As a consequence, ACM does not expect providers of internet access services to be able to offer the speed they indicate in their offers at all times. However, ACM does expect providers to reach this speed in at least eight of out ten measurements that an end-user conducts within a week. In this context, ACM states that these measurements should be evenly spread out over at least three days in that week, and that it should be possible to conduct these measurements at any point during the day, but that no more than one measurement per hour is counted. With the provision that only a single measurement per hour can be counted, it is prevented that the provider is blamed too harshly for an incidental failure. It is thus safeguarded that the measurements that the end-user conducts is a true reflection of the speed that is offered.

### **Article 4**

The first paragraph of Article 4 explains what ACM considers to be the maximum download speed and upload speed on fixed networks. According to ACM, providers of internet access services are not required to reduce the offered speed to the maximum speed.

The second paragraph of Article 4 explains under what circumstances this speed must be reached, according to ACM. At least 90% of the maximum speed must, according to ACM, be reached in at least one of the ten measurements that an end-user conducts in a single week. In this context, the threshold of 90% of the maximum speed was chosen because the speed usually varies, and it can be reasonably expected from providers of internet access services that they are fully able to reach the maximum speed in at least one of the ten measurements in a single week. According to ACM, the measurements should be evenly spread out across at least three days in a single week. The measurements can be conducted at any point during the day, and no more than one measurement per hour is counted.

### **Article 6**

Article 6 explains what ACM considers to be the advertised download speed and upload speed on fixed and mobile networks. Providers of internet access services are free to determine what speeds they advertise with, but the advertised speed cannot, in ACM's opinion, be higher than the maximum speed that can normally be offered on a network. Providers of internet access services use the advertised speed in their commercial communications and contracts. By commercial communications, ACM means at least the communications on the providers' websites, and the providers' advertisements.

ACM is of the opinion that providers of internet access services must indicate with the advertised download speed and upload speed for mobile networks that the actually available speed may deviate





from the advertised speed. Such deviations may occur, because, for example, the speed is dependent on whether the mobile network is overloaded, and on the physical location of the end-user.

#### **Article 8**

In order to safeguard the accuracy of the measurements, ACM believes that providers of internet access services should give end-users clear information about how the measurements as referred to in this policy rule can be conducted. This should prevent end-users from improperly influencing the measurements in certain ways. In this context, ACM finds at least the following information relevant for end-users:

1. That end-users, when measuring their own internet connections, must conduct the measurement from their own devices with a wired connection;
2. That end-users, when measuring mobile connections, must switch off the Wi-Fi connection first before starting the measurement.
3. That measurements can be influenced by:
  - a. Having internet traffic that uses the same connection at the same time (cross traffic); and
  - b. Outdated hardware and software.
4. How end-users are able to reduce the influences mentioned under the previous number.

In ACM's opinion, it is undesirable that the measurement is affected by the above circumstances. ACM therefore believes that end-users should make sure that the above circumstances do not occur.