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Court	District Court of Rotterdam
Date of ruling	February 4, 2016
Date of publication	February 4, 2016
Case number	ROT 15/3019
Branch of law	Administrative law
Special features	First instance – panel of three judges

Summary of contents

The Netherlands Authority for Consumers and Markets (ACM) has imposed an administrative fine for violation of Section 7.4a(3) of the Dutch Telecommunications Act (Tw). According to the court's opinion, offering the app for free results in a link between the plan's tariff and the internet-based service (in this case, the app), because customers that use this app pay a zero tariff, whereas they have to pay for other internet-based services. To that extent, such a practice constitutes tariff differentiation (which is illegal).

It has not become apparent to the court that the principle of proportionality opposes the use of the instrument of fines, the more so since the plaintiff has committed the violation after ACM had warned the plaintiff that it had committed a previous similar offense. The court, in this case, considers a fine of EUR 200,000 appropriate and required. According to the court's opinion, a fine of this magnitude (which is the lower end of the range) does sufficient justice to the circumstance that ACM had never before imposed a fine under Section 7.4a(3) Tw, and that, at the time of the violation, no jurisprudence existed in which rulings had been handed down in similar cases.

Legal amendments	Dutch Telecommunications Act 7.4a, validity: 2013-01-01

Ruling

District of Rotterdam

Administrative Law Team 1

Case number: ROT 15/3019

Ruling of the three-judge panel on February 4, 2016 in the case between

Vodafone Libertel B.V., with registered office in Maastricht, plaintiff,

Legal representative: P.M. Waszink, LL.M.

and

The Netherlands Authority for Consumers and Markets (ACM), defendant,

Legal representative: A.E. Bergansius, LL.M.

Course of the proceedings

In its decision of December 18, 2014 (the disputed decision), the Netherlands Authority for Consumers and Markets (ACM) imposed an administrative fine of EUR 200,000 on the plaintiff for violation of Section 7.4a (3) of the Dutch Telecommunications Act (Tw).

The plaintiff has filed an objection against the disputed decision, and has asked ACM to agree to a direct appeal as laid down in Section 7:1a of the Dutch General Administrative Law Act (Awb). The defendant agreed to this request, and it forwarded the objections to the court to be processed as an appeal.

The hearing took place on November 12, 2015. Both parties were represented by their legal representatives. At the hearing, [name] and [name] were present, both employed with the plaintiff, as well as M. de Hek, LL.M., R. Partiman, LL.M., and R. Rodenrijs, LL.M., all of them employed with ACM.

Considerations

Legal framework

1.

On January 1, 2013, Section 7.4a of the Tw came into force as part of the amendment of the Tw in connection with the implementation of the revised telecommunications guidelines.

Section 7.4a of the Tw reads as follows, insofar relevant to this case:

"(…)
3. Providers of internet access services shall not make the level of tariffs for internet access services dependent on the services and applications that are offered or used via these services.
(…)"

In Section 15.4(3) of the Tw, it is laid down that ACM is authorized to impose administrative fines of up to EUR 450,000 in respect of a violation of the provisions under or pursuant to the rules within the meaning of Section 15.1(2) of the Tw. At the time, this power was laid down in Section 15.4(4) of the Tw.

Investigation and decision-making process of ACM

2.1.

The plaintiff is both a provider of a public electronic communications network over which internet access services can be offered, as well as a provider of internet access services. In the fall of 2013, the plaintiff offered the Vodafone Red plan in combination with a free HBO GO-app that subscribers could use for 90 days. This plan contained a bundle of mobile services

which included mobile broadband access, text, and voice. The HBO GO-app is a service of commercial pay-tv channel HBO with which subscribers are able to watch television series, films and documentaries on three devices. The advertised free use of the app meant that usage of the app would not count towards the data usage of the Vodafone Red plan, and that the content plan of the app was free. In order to be able to use the free HBO GO-app, subscribers had to activate a voucher using a code provided by Vodafone. Users did not have to pay anything for this activation.

2.2.
In an email of September 3, 2013, the plaintiff informed ACM about the introduction of the HBO GO-offer. In the period until September 20, 2013, discussions and correspondence between ACM and the plaintiff has taken place in order to gain clarity about the question of whether or not the offer was a separate service, and thus not fall under the prohibition laid down in Section 7.4a(3) of the Tw. On September 13, 2013, ACM indicated that, if the offer were not a separate service, the violation should be ended by the plaintiff as soon as possible. On September 20, 2013, ACM informed the plaintiff that the HBO GO-offer cannot be designated as a separate service. As a result thereof, a meeting took place on October 31, 2013, between ACM and the plaintiff, at the request of the plaintiff. In that meeting, ACM reiterated that the HBO GO-offer violated Section 7.4a (3) of the Tw. And, in connection therewith, it also indicated that the violation had to be ended as soon as possible. On November 5, 2013, the plaintiff stopped offering the HBO GO-offer. From that date, usage of the HBO GO-app would, once again, count towards the data usage of customers' plans, including customers who had activated their vouchers before November 5, 2013. With regard to these customers, no costs were charged for data usage outside of their data plans for the remainder of the special period.

2.3.
On August 4, 2014, ACM enforcement officials drew up an investigation report in which they concluded that the plaintiff had violated Section 7.4a(3) of the Tw by offering an internet access service between September 3, 2013 and November 5, 2013, in which the usage of the HBO GO-app would not count towards customers' data usage of their data plans. ACM subsequently imposed an administrative fine. In connection therewith, the following was considered (quote without the footnotes) in the disputed decision, among other considerations:

"32. By making the HBO GO application available "without data usage", a subscriber pays a different tariff per MB used when using this service than when he would, with the same subscription, not use this service, as, in addition to being able to use the entire data plan for the agreed costs, the consumer could additionally use data by means of the HBO GO application. A consumer making use of the HBO GO application, while paying the same price, is able to use more data in total than a consumer who does not use the HBO GO application. Thus, the average data rates for a consumer using the free HBO GO application are lower than

the average data rates for a consumer not using the HBO GO application. The use of the HBO GO application thus influences the rates for internet access.

33. ACM does not contest that it follows from the explanatory notes to Section 7.4a of the Tw that the prohibition of rate differentiation set out in that Section pertains principally to the prevention of obstructions such as applying separate rates, such as a WhatsApp levy or a Skype levy. Nevertheless, a proposition such as that of [the plaintiff] is in conflict with the strict net neutrality realized by Section 7.4a(3) of the Tw.

34. The positions of [the plaintiff] that it was unclear to [the plaintiff] what the line was between what is and what is not permitted with regard to net neutrality; that a policy rule of the Ministry of Economic Affairs is necessary in order to create more clarity with regard to Section 7.4a of the Tw; and the references to Section 6 ECHR and the lex certa principle, are not convincing. Already at the introduction of the similar Sizz application – see marginal 16-17 – [the plaintiff] was made aware of the fact that the service was not provided in accordance with Section 7.4a. Inter alia by letter dated 8 July 2013, ACM informed [the plaintiff] that the Sizz application was in conflict with Section 7.4a(3) of the Tw, because by making the Sizz application available "without data usage", the average price paid for the internet access service by a subscriber per MB used when using the Sizz application is different than when the subscriber does not use this service. Therefore, there could not have been any confusion on [the plaintiff]'s part about the fact that the similar HBO GO proposition was in conflict with Section 7.4a(3) of the Tw as well."

Assessment of the appeal

3.1.

The plaintiff argues that Section 7.4a(3) of the Tw has not been violated, which means there is no authority to impose an administrative fine. According to the plaintiff, the contested offer with HBO GO is not in violation of the provision. After all, by offering this service for free, the plaintiff did not make the level of the tariffs for internet access services dependent on the services and applications that are offered or used via these services. The explanatory notes to Section 7.4a(3) of the Tw are brief, and mostly go into the protection of consumers against obstruction of internet access. Obstruction is not the case here. According to the plaintiff, the scope of this prohibitory provision cannot be expanded by the draft policy rule that has been drawn up in this context. The discussion in parliamentary history about separate services does not take anything away from this, as it concerns an extralegal structure here. For example, the legislature considers services such as 'Skype-only' and 'WhatsApp-only' to be possible under current regulations if subscribers are not able to visit any other website or data service other than the 'separate service.' However, technically speaking, a separate service is not the case here. ACM's interpretation of Section 7.4a(3) of the Tw is therefore at odds with the lex certa principle.

3.2.

In the explanatory notes to an amendment of the bill that led to the amendment of the Tw as of 2013, the following can be found, among other things:

"Hopefully it is clear that the term 'internet access service' must be interpreted broadly in order to prevent circumvention of this provision. If access to websites, multiple services or applications such as apps is offered, it is, in any case, considered an internet access service. Under this Section, it is therefore, in any case, not permitted to offer a service, consisting of access to websites (specific ones or otherwise), services or applications, where the use of certain applications or services is blocked or is given a different tariff. This means that providers are able to offer separate services over the Internet, but not packages for access to a part of the Internet. Providers are obviously able to differentiate their plans for internet access in other ways such as available bandwidth and data limits.
(…)
The purpose of the third paragraph is to prevent providers of internet access services from charging tariffs that result in the obstruction, in practice, of access to specific services or applications on the Internet. This is unrelated to charging different tariffs for bandwidth differences. Under this paragraph, providers are for example prohibited to charge end-users higher tariffs for internet access using internet telephony than for internet access using other technologies. "

(Parliamentary Papers II 2010/11, 32 549, no. 29, pages. 2-4.)

3.3.
These considerations reveal that, with the prohibition of tariff differentiation, which has been laid down in Section 7.4a(3) of the Tw, the legislature also had the intention to prohibit a service, consisting of access to websites (specific ones or otherwise), services or applications where the use of certain applications or services is blocked or is given a different tariff. The prohibition laid down in Section 7.4a(3) of the Tw thus means that internet providers cannot link their internet tariffs to specific internet-based services that end-users can use. With such a link, end-users might be influenced when making their choices, which is in violation of net neutrality regulations. This prohibition does not make any distinction between positive and negative tariff differentiation. The circumstance that, in legislative history, only an example of negative tariff differentiation is given, does not alter that fact (if only because it is simply a single example).

3.4.
In the court's assessment, the free offering of the HBO GO-app results in a link between the plan's tariff and the HBO GO internet-based service, because subscribers that use this app pay a zero tariff rate, whereas they do have to pay for other internet-based services. To that extent, there is tariff differentiation (which is illegal). Since the app, as part of the offer, is not a separate service within the meaning of parliamentary history, a violation of Section 7.4a(3) of the Tw has thus been established.

3.5.
This means that Article 7 of the European Convention on Human Rights (ECHR) and Section 5:4(2) of the Awb have not been violated. A violation of the lex certa principle has not been established either, all the less so as ACM previously informed the plaintiff at the introduction of the Sizz-app, which is comparable to the HBO GO-app, that freely offering said app is in violation of 7.4a(3) of the Tw.

4.1.
The plaintiff argues that the prohibition of a free service such as the HBO GO-offer violates the free movement of services, as well as other principles of European Union law. In this context, the plaintiff points out that any ex ante measures in order to prevent obstructions to access can only be imposed after ACM has established, based on a market analysis, that there is general market power. It further points to Article 56 of the Treaty on the Functioning of the European Union (TFEU) and to jurisprudence, which say that a so-called must-carry obligation must serve a public interest, and cannot be disproportional. Furthermore, it follows from Articles 16 and 52(1) of the Charter of Fundamental Rights of the European Union that the freedom to conduct a business and the freedom of free speech cannot be disproportionally curtailed. At the hearing, the plaintiff further pointed to the draft version of Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, which will come into force on April 30, 2016. This new regulation does not provide for a categorical "zero rating prohibition", according to the plaintiff.

4.2.
In its written defense, ACM pointed to Article 22(3) of the Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), in which it is allegedly determined that the level of the tariffs for internet access services cannot depend on the services and applications that are offered or used over these services. The court has established that neither in said provision nor in any other provision in the Universal Service Directive such a norm can be found. However, ACM does rightly point out that the Universal Service Directive does not stand in the way of a national regulation as laid down in Section 7.4a(3) of the Tw. In addition, it correctly points out that the requirements for undertakings that enjoy significant market power within the meaning of chapter 6a of the Tw must be seen differently from the standard and objective laid down in Section 7.4a(3) of the Tw.

4.3.
Insofar ACM points out that the service in question is aimed at its recipients in the Netherlands, the court takes into consideration the following. The service in question can also

be used by citizens of other member states, and the regulation in question can be a barrier to entry into the market of all providers of internet access services, including those that wish to set up operations in the Netherlands in order to offer such a service, which means that this cannot be considered a matter of a purely internal nature (ECJ, October 1, 2015, cases C-340/14 and C-341/14, ECLI:EU:C:2015:641, in these cases R.L. Trijber and J. Harmsen). It should therefore be assessed whether it is a justified restriction of the free movement of services that is appropriate and proportional. According to the amendment's sponsors as referred to in 3.2., the objective of the regulation in question is to safeguard that end-users are able to determine themselves what contents they wish to send and receive, and what services, applications, hardware and software they wish to use for that. According to the sponsors, this restriction of the behavior of providers of internet access services is necessary for safeguarding the open and unrestricted access to the Internet for both service providers (online and otherwise) as well as citizens and undertakings. After all, it should be prevented that providers of internet access block or restrict access to or the provision of certain information or services (Parliamentary Papers II 2010/11, 32 549, no. 29, pages 2-3.). The court, together with ACM, adds that the legislation in question does not go beyond what is necessary, because providers are free to set the level of the tariffs and the tariff system the way as it sees fit, provided that they do not base the tariff of the internet access service on the usage of certain internet-based services over that internet access service. The invocation of Section 56 of the TFEU thus fails. Insofar entrepreneurial freedom is restricted by Section 7.4a(3) of the Tw, ACM correctly points out that tariff regulation is justified for the reasons mentioned above.

4.4.
The court has additionally established that, in the assessment of the case at hand, no attention can be given to a regulation (draft or final) that has not yet come into force.

5.1.
The plaintiff argues that, in fairness, ACM could not impose an administrative fine. It puts forward several arguments. According to the plaintiff, this matter is a bagatelle case, because the subscriber gets a temporary 'bonus,' which means no one has suffered any harm. Because of the lack of clarity regarding the prohibition provision, ACM should not have taken any enforcement action in the absence of any policy rule about the interpretation thereof. According to the plaintiff, ACM, in the preparatory phase, failed to make sufficiently clear why this should be considered a violation. Taking into consideration the period of time, the plaintiff could assume that no enforcement actions would be taken. The plaintiff additionally argues that the decision was taken outside of the term limit of 13 weeks after the date of the investigation report, as referred to in Section 5:51(1) of the Awb. According to the plaintiff, the principle of equality has been breached now that ACM has decided not to take any enforcement action against NS Reizigers in connection with a restriction within the meaning of Section 7.4a(1) of the Tw. The plaintiff also believes that it would have been reasonable if it had been assessed first whether a reparative sanction could have been sufficient before deciding to take punitive enforcement actions. In that context, a reparative sanction would not

have been necessary either, because the plaintiff had already suspended the service in question of its own accord.

5.2.
The court does not follow this line of reasoning. Based on the correspondence with ACM in connection with the Sizz-app, which is comparable to the HBO GO-app, it should have been clear to the plaintiff that its HBO GO-app, which had been subsequently launched, also violated Section 7.4a(3) of the Tw. With regard to the HBO GO-app (and as opposed to the Sizz-app), ACM did not do anything or did not fail to do anything that could have given the plaintiff the impression that no enforcement action would be taken. It should definitely not have relied on that assumption as it continued to offer the app, even after ACM had issued an opinion about its inadmissibility. The term limit that has been laid down in Section 5:51(1) of the Awb is an indicative period. The mere fact of exceeding this term limit, without any additional circumstances, which have not been established in this case, does not necessarily mean that there ought to be any consequences for ACM's power to impose administrative fines (see ABRvS[1] 19 October 2011, ECLI:NL:RVS:2011:BT8604). The violation (possible or actual) committed by NS Reizigers concerned a different provision, which was Section 7.4a(1) of the Tw, as put forward by ACM and also argued by the plaintiff. It can be deduced from ACM's letter of November 24, 2014 to NS Reizigers that specific websites with certain contents had been wrongfully blocked temporarily by the wireless internet access service on the trains. That case cannot be compared with the plaintiff's violation, and cannot be compared either with the circumstances in which the plaintiff committed the violation. With regard to the argument that the imposition of a reparative sanction should be considered before the imposition of an administrative fine, the court considers that, in case of a violation, ACM is free to make a choice between imposing a punitive or reparative sanction or to limit itself to issuing a warning, and that the court tests, with restraint, the choice made by the administrative authority against the principle of proportionality (see for example CBb[2] March 17, 2011, ECLI:NL:CBB:2011:BP8077, item 9.23). It has not become apparent to the court that the principle of proportionality opposes the use of the fining instrument, the more so since the plaintiff *has* committed the violation after ACM had warned the plaintiff that it had committed a similar violation before.

6.1.
According to the plaintiff, the level of the fine is too high, and it should be reduced considerably. In that context, it notes that it has suffered harm because of the publication of the disputed decision, because not all confidential business information has been redacted in the public version, including the number of customers that uses the HBO GO-app. ACM has indeed corrected this, but this information has already been published and discussed on other websites. Furthermore, the plaintiff has, in this context, put forward that it stopped the violation quite soon after ACM's position had become clear. Considering the lack of clarity

[1] Administrative Jurisdiction Division of the Council of State
[2] Dutch Trade and Industry Appeals Tribunal

regarding the prohibitive provision, it claims it can only be blamed to a limited extent. Finally, the plaintiff argues that the principle of equality has been violated as it has been imposed an almost identical fine as KPN has been, whereas KPN's conduct had been much more serious.

6.2.
In the assessment of the fine's proportionality, it is noted first and foremost that, in accordance with established jurisprudence, (see, among other cases, ABRvS February 6, 2013, ECLI:NL:RVS:2013:BZ0786; CRvB November 24, 2014, ECLI:NL:CRVB:2014:3754 and CBb April 4, 2012, ECLI:NL:CBB:2012:BW2271), the administrative body must, taking into consideration Section 5:46(2) of the Awb, set the level of the fine in proportion to the seriousness of the violation and to the extent to which the violation can be attributed to the violator, while taking into account, if necessary, the circumstances in which the violation was committed. The administrative body can, for the sake of unity of law and legal certainty, draw up and apply policy rules regarding the imposition of fines and the setting of the level thereof. When applying such policy rules, the administrative body must, in each case, assess whether or not such an application complies with the abovementioned requirements, and, if that is not the case, set the fine, in addition or contravention to those policy rules, at a level that is appropriate and required. The court assesses, without restraint, whether or not the administrative body's decision with regard to the fine meets those requirements, and thus results in a proportional fine.

6.3.
ACM has set the level of the fine using the 2014 ACM Fining Policy Rule, which came into force on August 1, 2014. Based on that, the basic fine has been set at between EUR 150,000 and EUR 450,000 (category IV). ACM has considered that the plaintiff can be fully blamed for the violation, because it had let the violation continue for two more months, after it had been warned. With regard to the seriousness of the violation, ACM has considered that attempting to direct end-users to a certain service or application (in this case through the HBO GO-offer) is in violation of the intention of the net neutrality provision. It can further be established that the voucher has been activated by several customers. According to ACM, the plaintiff has subsequently been able to benefit itself over its competitors, who *have* complied with Section 7.4a(3) of the Tw. ACM has set the timeframe of the violation at September 3, 2013 until November 5, 2013. Based on that timeframe, ACM has set the level of the fine at EUR 200,000.

6.4.
Since the violation took place between September 3, 2013 until November 5, 2013, ACM should have based the setting of the fine on the 2013 ACM Fining Policy Rule of April 19, 2013, unless the new policy would have been more beneficial for the plaintiff. This is not the case, as the 2013 fining policy rule uses the same range for the highest category (at the time 3). An additional consequence is that the plaintiff has not been disadvantaged by the application of the new policy rule, which means this inaccuracy can be passed over by applying Section 6:22 of the Awb.

6.5.
In this case, the court, too, considers a fine of EUR 200,000 appropriate and required since the plaintiff could have been aware of the scope of Section 7.4a(3) of the Tw because of the course of events in the previous Sizz-offer case, and since it did not immediately end the violation after ACM had pointed this out to the plaintiff, and since it was able to benefit itself over its competitors by making a more attractive offer to potential customers than it was allowed to. According to the court, a fine of this magnitude (which is the lower end of the range) does sufficient justice to the circumstance that ACM had not imposed a fine under Section 7.4a(3) of the Tw before, and that, at the time of the violation, there was no jurisprudence with rulings in similar cases (cf. CBb February 20, 2015, ECLI:NL:CBB:2015:49).

6.6.
It has not been apparent to the court that there were any other circumstances that should have led to a downward adjustment. ACM correctly points out that, like NS Reizigers, the KPN case concerned a violation of Section 7.4a(1) of the Tw. According to the ACM fining decision of December 18, 2014, it turns out that, in that case, there was no intentional act, but that certain services were erroneously blocked by KPN. Violation of the principle of equality in the setting of the fine, thereby putting the plaintiff at a disadvantage, is not the case here. Furthermore, including confidential business information by mistake does not necessarily lead to further reductions.

7. The appeal has been dismissed.

8. There is no reason to impose an order for costs.

Ruling

The court dismisses the appeal.

This decision was given by judges J.H. de Wildt, LL.M., chairman, and J. Bergen, LL.M., and N. Saanen-Siebenga, LL.M., members, assisted by R. Stijnen, LL.M., registrar, and was pronounced in open court on February 4, 2016.

Registrar chairman

Copies sent to parties on: