Autoriteit
Consument & Markt

# Decision

*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.*



**Our reference:** ACM/DJZ/2014/207376
**Case number:** 14.0875.31
**Date:** 18 December 2014

**Decision of the Netherlands Authority for Consumers and Markets to impose a fine for a violation of Section 7.4a, paragraph 1 of the Dutch Telecommunications Act with regard to net neutrality.**

**Summary**

On 4 August 2014, regulatory officials of the Netherlands Authority for Consumers and Markets drew up a statement of objections against KPN. B.V. for a violation of the Dutch Telecommunications Act because of a breach of the obligation of net neutrality. On the basis of this statement, the Netherlands Authority for Consumers and Markets imposes on KPN a fine of EUR 250,000.

KPN has provided internet access via Wi-Fi hotspots in several locations in the Netherlands. Consumers making use of these hotspots did not have access to certain services and applications, as these had been blocked by KPN. The aim of net neutrality is to maximize internet users' freedom of choice and expression. The conduct of KPN is not compatible with this aim.

## I. Introduction

1. With this decision, the Netherlands Authority for Consumers and Markets (hereinafter referred to as ACM) establishes, pursuant to Section 15.4, paragraph 3 of the Dutch Telecommunications Act (hereinafter referred to as DTA), a violation for which it imposes a fine of EUR 250,000. This fine is imposed on KPN B.V. (hereinafter referred to as KPN). This fine is imposed for violation of Section 7.4a, paragraph 1 DTA.

2. The reason for the decision at hand is the statement of objections as drawn up on 4 August 2014 (hereinafter: the investigation report) by regulatory officials of ACM.

3. In this decision, ACM will first describe the background of the provision on net neutrality (part II), the procedure (part III), the investigation report (part IV), the facts (part V) and the view of KPN (part VI). In the subsequent parts, ACM will assess whether a violation of the provision

on net neutrality has been committed and who may be identified as offender (part VII), and the determining of the level of the fine (part VIII). Lastly, there is the dictum (part IX).

**II.**

**III. Net neutrality**

4. In implementing the Universal Service Directive[1], the Netherlands deliberately opted for strict net neutrality. As part thereof, Section 7.4a DTA entered into force on 1 January 2013. The aim of this provision is to ensure net neutrality, by means of which the legislature aims to realize a freely accessible internet offering anybody the possibility to visit any website and use any service that requires the use of the internet[2]. Furthermore, this creates the opportunity for anybody to provide innovative services and websites. In other words, the provision aims to maximize the freedom of choice and expression of internet end users, without being steered by the internet access provider[3].

5. Internet providers have the ability to restrict access to websites or services provided via the internet[4]. They can do this by hindering or slowing down internet traffic on their own initiative or pressured by third parties. This “power” of internet providers, however, is at odds with the freedom of choice and expression of end users. For this reason, Section 7.4a DTA prohibits in principle all hindering or slowing down of services or applications on the internet by providers of public electronic communications networks through which internet access services are supplied, and by providers of internet access services.

**IV. Procedure[5]**

6. Prior to the investigation report of the regulatory officials, the Netherlands Independent Post and Telecommunications Authority (hereinafter referred to as OPTA, now ACM) carried out an investigation into the conduct of KPN. The reason for this was a complaint received by OPTA from VoIP provider [confidential]. (hereinafter: [confidential], provider of service [confidential]).

7. Following the problems reported by [confidential] at the Wi-Fi hotspots of KPN at the locations of Schiphol Airport and Hotel Van der Valk, regulatory officials from the Telecommunications, Transport and Postal Services Department of ACM have addressed questions to KPN.[6]



[1] Directive 2002/22/EG, OJ L 108, 24.4.2002, as last amended on 25 November 2009 by Directive 2009/136/EC

[2] Parliamentary Papers II 2010/11, 32549, no. 29.

[3] Parliamentary Papers II 2010/11, 35549, no. 29, p. 2.

[4] Parliamentary Papers II 2010/11, 32549, no. 29, p. 2.

[5] For a detailed account of the state of affairs from prior to the investigation until the investigation report, see part 2 of the investigation report.

[6] Reference 2013301713 – source 2.

8. In that context, KPN conducted further investigation into the Wi-Fi hotspots and as a result of its findings, KPN reported on 9 July 2013 to ACM "issue 227" in the form of a question of interpretation, in short whether its Wi-Fi hotspots meet the provisions with regard to net neutrality.[7] KPN subsequently modified this reporting and categorized it as a potential violation with regard to the net neutrality of its Wi-Fi hotspots.[8]

9. Subsequently, from 26 August 2013 through 26 March 2014, there has been correspondence between KPN and regulatory officials following requests for information by the Telecommunications, Transport and Postal Services Department of ACM. [9] In this period, the Telecommunications, Transport and Postal Services Department notified KPN in a letter dated 13 March 2014 of the start of an enforcement procedure.[10]

10. On 4 August 2014, the Telecommunications, Transport and Postal Services Department of ACM sent the investigation report to KPN.[11] In its letter dated 8 August 2014, ACM invited KPN to present its views of the investigation report, both in writing and orally.[12] KPN only submitted opinions of the investigation report in writing. KPN submitted its written opinion in its letter dated 25 August 2014.[13] No hearing took place.



## V. The investigation report

11. The reason for the decision in question was the conduct as established in the investigation report. In this investigation report, the regulatory officials found that KPN committed a violation of Section 7.4a, paragraph 1 DTA, by providing from 1 January 2013 to 4 July 2013 the internet access service "Free Basic Internet" (hereinafter referred to as Free Basic Internet), which is part of the service "KPN Hybrid Hotspots" besides the paid service "Premium Internet", within which certain services and applications on the internet were wrongfully blocked.

## VI. Facts

12. KPN is a limited liability company under Dutch law.[14] It is provider of a public electronic

---

[7] Reference 2013302351 – source 3.

[8] Reference 2013302352 – source 4.

[9] Reference 2013101944 – source 5, reference 20131204478 – source 6, reference 2013102641 – source 7, reference 201305812 – source 8, reference 2013103065 – source 9, reference 2014101140 – source 11, reference 2014402376 – source 12 – reference 201410679 – source 13.

[10] Reference 2014201485 – source 10.

[11] Letter with reference: ACM/DTVP/2014/204338.

[12] Letter with reference: ACM/DJZ/2014/204619.

[13] Letter with reference: L/14/U/039.

[14] Extract Dutch Chamber of Commerce KPN. B.V.

communication network through which internet access services are provided as well as provider of internet access services.

13. [confidential] is provider of service [confidential], a telephone service provided through the internet. This application enables calls (local as well as international) with a smartphone through a mobile or Wi-Fi internet connection by means of voice over IP (hereinafter referred to as VoIP).

14. On 23 April 2013, [confidential] reports to KPN that its application is being blocked at several Wi-Fi hotspots of KPN, such as at Schiphol Airport and Hotel Van Der Valk.[15] KPN subsequently reports to [confidential] on 14 May 2013 that its application is available again at these hotspots,[16] which [confidential] confirms on 23 May 2013.[17]

15. Following the problems at these Wi-Fi hotspot locations, ACM addressed questions to KPN in its letter dated 24 June 2013.[18] KPN subsequently conducted further investigations into the Wi-Fi hotspots.

16. On 4 July 2013, KPN finds that the problems were not limited to the service of [confidential] and/or to the locations of Schiphol Airport and Hotel Van der Valk.[19] On all 176 KPN Hybrid Hotspots[20], within the Free Basic Internet service, certain data flows are generally blocked. This results from a configuration setting at KPN. For the Free Basic Internet service, a so-called “Access List” was drawn up on which it was stated that data traffic through gateways 80 and 443 must be available. All applications not provided through these gateways are therefore blocked.[21] Examples of this are Bittorrent, FTP (File Transfer Protocol), SSH, Telnet and VoIP.[22] In the event that end users wish to get access to these applications, they are forced on these Wi-Fi hotspots to choose the paid Premium Internet variant of KPN.[23]

17. On 4 July 2013, KPN deletes the Access List, with the consequence that all traffic is admitted, including the services and applications blocked until then. The blockade has thus been ended.[24]



---

[15] Reference 2013301713 – source 2.

[16] Reference 2013301713 – source 2.

[17] Reference 2013301713 – source 2.

[18] Reference 2013301713 – source 2.

[19] Reference 2013102641 – source 7.

[20] Reference 2013302351 – source 3, reference 2013302353 – source 4, reference 2013101944 – source 5.

[21] Reference 2013102641 – source 7, reference 2013103065 – source 9.

[22] Reference 2013103065 – source 9.

[23] Reference 2013302351 – source 3, reference 2013302532 – source 4, reference 2013101944 – source 5.

[24] Reference 2013102641 – source 7.

18. Subsequently, on 11 July 2013, KPN reports to ACM that there has been a potential violation with regard to the net neutrality of its Wi-Fi hotspots:

*"Following the request by ACM with regard to the complaint from* [confidential] *within the context of net neutrality, KPN wants to report a potential violation with regard to net neutrality for Hotspots. This concerns the so-called "Hybrid" form of internet provision, which KPN provides at 176 hotspot locations in the Netherlands. In places where this form is provided, the end user has a choice between either free "Basic Internet" or paid "Premium Internet" use of the hotspot.*
*With free "Basic Internet", a customer may surf the net and use email (within a limited time); using this variant, other services, such as VPN and email client services, could not be used. In the case of the paid variant "Premium Internet, the user is not bound by a time limit and enjoys access to other services such as VPN and email client services.*
*KPN ended the violation (potential or otherwise) on 4 July last by adjusting the proposition. The other services may now be used within the free internet variant as well.*
*The difference from the paid variant is internet speed and the limited duration of usage."*[25]



19. The conduct lasted from 1 January 2013 through 4 July 2013. Within this period, a total of [confidential] license agreements were concluded.[26] The number of license agreements concluded by unique end users (a unique end user is a person who sought access to the Free Basic Internet service at least once within this period) is [confidential].[27]

20. Besides the complaint from [confidential], ACM has not received any other complaints with regard to the Free Basic Internet service about blocking and/or slowing down of services and applications on the internet.

## VII. Opinion

21. Concisely summarized, KPN presents the following in its opinion.

22. First and foremost, KPN identifies with the description of the facts as laid down in the investigation report. It does not oppose the establishment in the investigation report that there has been a violation of Section 7.4a, paragraph 1 DTA. However, KPN does not share the conclusion in the investigation report that there has been a very serious violation (see marginal 57 of the investigation report). Within that context, KPN argues as follows.

23. Firstly, KPN holds the opinion that the norm of Section 7.4a, paragraph 1 DTA is indeed

[25] Reference 2013302352 – source 4.

[26] Reference 2014101140 – source 11.

[27] Reference 2014101140 – source 11.

addressed to all “providers of internet access”, but that, at the time of the introduction of the provision, the precise definition was not yet clear. In this context, KPN remarks that it was unclear how this norm would be applied to forms of service provision (free or paid) based on Wi-Fi technology existing before 1 January 2013. According to KPN, the parliamentary discussion focused on the internet service provision of providers of public fixed and mobile networks.

24. In addition, KPN opposes the aspect of harm to end users included in the investigation report. KPN argues that it is plausible that most of the end users of [confidential] who have connected to the Free Basic Internet service have not been hindered in their internet options. In that context, KPN argues as follows: (1) Besides the Free Basic Internet service, end users at the locations concerned could also choose the paid variant without the hindering or slowing down of the services or applications on the internet, the Premium Internet Service; (2) nearly all customers of KPN and its brands have free access to the Premium Internet service; and (3) among the [confidential] end users, there were [confidential] visitors of Schiphol Airport coming largely from abroad; since an advanced provision on net neutrality such as Section 7.4a DTA is in force only in the Netherlands, end users from abroad *“will not have felt restricted in their freedom of choice and expression*”; they are used to the services concerned being blocked and will not have tried to use these services. To illustrate the foregoing, KPN argues that since the end of the blockades within the Free Basic Internet Service on 4 July 2013, it has not seen a substantial change in the ratio between the number of users of the free service and that of the paid variant; in addition, KPN emphasizes the fact that both KPN and ACM have not received any complaints of the [confidential] end users.

25. With regard to the aspect of harm to service providers included in the investigation report, KPN holds the opinion that these providers have suffered little or no harm. KPN bases this on its statement that the end users have not been effectively restricted in their freedom of choice and expression, as described in marginal 24.

26. With regard to the duration of the violation, KPN presents the following. KPN admits that at the time of the introduction of Section 7.4a DTA, it was insufficiently aware of the need to modify the Free Basic Internet service. In the discussions with [confidential], KPN came to the conclusion that it was not permitted to provide, in addition to a complete service, Premium Internet, another “extra service” with fewer facilities. After KPN became aware of this fact, it has acted fast.

## VIII. Assessment

27. Section 7.4a, paragraph 1 DTA reads as follows:
*“Providers of public electronic communications networks via which Internet access services are delivered and providers of Internet access services shall not hinder or slow down applications or services on the Internet, unless and to the extent that the measure in*

*question with which applications or services are being hindered or slowed down is necessary:*

*a. to minimize the effects of congestion, while equal types of traffic must be treated equally;*
*b. to preserve the integrity and security of the network and service of the provider in question or the end-user's terminal;*
*c. to restrict the transmission to an end-user of unsolicited communication within the meaning of Section 11.7(1), provided that the end-user has given its prior consent for this to be done, or*
*d. to implement a legislative provision or court order."*

28. Pursuant to Section 7.4a, paragraph 1 DTA (net neutrality), in principle *any* hindrance or slowing down of services or applications on the internet is prohibited for providers of public electronic communications networks through which internet access services are supplied, and for providers of internet access services.

29. The concept of "provider of an internet access service" has not been defined in the Dutch Telecommunications Act. Nevertheless, the concept should be interpreted in the broadest sense of the word, in order to prevent the provision with regard to net neutrality from being circumvented.[28]

30. In short, an internet access service is a service with which access to the internet is provided. "Internet" refers to *"the world wide, public network of end-points with the IP-addresses assigned by the Internet Assigned Numbers Authority (IANA)"*.[29] This definition of the internet is to be interpreted broadly. When a service is provided with which access to websites and other services or applications on the internet are provided, such as email or VoIP, this is considered provision of an internet access service.[30]

31. Irrespective of KPN's statement (stated briefly in marginal 23) that there was ambiguity with regard to the precise definition of the concept of "providers of internet access services" at the time of the introduction of the regulation, it is, in any case, certain that, from the start of the introduction of the regulation, KPN falls within this concept given the considerations in marginal 29 and 30. Moreover, it follows from KPN's opinion that it was clear to KPN from the start to whom the norm is addressed: *"The norm addresses all "providers of internet access""* and *"A literal interpretation of the text includes in this any form of internet access*



[28] Parliamentary Papers I 2011/12, 32549, no. G, p. 8.

[29] Parliamentary Papers II 2010/11, 32549, no. 29, p. 2.

[30] Parliamentary Papers II 2010/11, 32549, no. 29, p. 2.

*provided as a "service"".*[31] Its statement that a parliamentary discussion would focus on the provision of internet services provided by providers of public fixed and mobile networks is therefore irrelevant, even regardless of the fact that parliamentary history proves the opposite.[32]

32. KPN is both provider of a public electronic communications network through which internet access services are provided and provider of internet access services. ACM establishes that, in the decision in question, the capacity of KPN as provider of an internet access service, that of provider of the Free Basic Internet service, is relevant. With the Free Basic Internet service, KPN provides access to websites and other services and/or applications on the internet to end users and therefore the service qualifies as an internet access service.

33. Until 4 July 2013, KPN provided the Free Basic Internet service via its Wi-Fi hotspots at 176 different locations in the Netherlands. From the end of 2009, KPN had blocked, with regard to the Free Basic Internet service, all services not provided through gateways 80 and 443, such as VPN (Virtual Private Network)[33] and email client services (such as Outlook's email application)[34].

34. Section 7.4a DTA prohibits any hindering or slowing down of services or applications on the internet, *including* a blockade such as applied by KPN in its Free Basic Internet Service. KPN provided the Free Basic Internet Service already before the entry into force of the provision with regard to net neutrality as set out above, see marginal 16 and 33. Pursuant to Section 7.4a, paragraph 1 DTA, KPN was required to have modified its service by 1 January 2013 in such a way that there was no longer any hindering or slowing down of services or applications on the internet. ACM establishes that KPN has failed to do this by maintaining the blockade of services which were not provided through gateways 80 and 443.

35. According to KPN, it discovered on 4 July 2013 that, within the Free Basic Internet service, particular data flows were generally blocked in violation of Section 7.4a, paragraph 1 DTA. KPN corrected this on that same day. This does not, however, change the fact that KPN, as a provider of internet access services, has hindered services on the internet in violation of Section 7.4a, paragraph 1 DTA.



---

[31] Letter with your reference: L/14/U/039, marginal 1 and 2, p. 2. (ACM/DJZ/2014/102535).

[32] Parliamentary Papers II 2010/11, 32549, no. 29, p. 2, Parliamentary Papers I 2011/12, 32549, no. G, p. 8 and Appendix of Reports II, 2011/12/ 1888, p. 2.

[33] VPN is used in order to enable working outside the office. A connection is established with the company network through an external computer, which enables working from the external computer on the company network. VPN is therefore mainly relevant for professional end users.

[34] Reference 2013102641 – source 7.

36. As follows from its opinion, KPN does not oppose the establishment in the investigation report that there has been a violation of Section 7.4a, paragraph 1 DTA. In the light of the above, ACM establishes that KPN has violated Section 7.4a, paragraph 1 DTA from 1 January 2013 up to and including 4 July 2013.

## IX. Fine

37. Section 15.1, paragraph 2 DTA, in so far as it is relevant, reads as follows:
*"The Authority for Consumers and Markets is charged with the enforcement of compliance with the rules under or pursuant to the provisions of this act other than within the meaning of paragraph 1 and with the enforcement of the roaming regulation."*

38. Section 15.4, paragraph 3 DTA reads as follows:
*"The Authority for Consumers and Markets may impose an administrative fine on an undertaking amounting to a maximum of EUR 450,000 in respect of a violation of the provisions under or pursuant to the rules within the meaning of Section 15.1, paragraph 2.*



39. Pursuant to Section 15.1, paragraph 2 DTA, ACM is charged with the enforcement of the compliance with Section 7.4a DTA. Pursuant to Section 15.4, paragraph 3 DTA, ACM has the power to impose a fine of at most EUR 450,000 per violation in the event of a violation of the rules within the meaning of Section 15.1, such as the obligation set out in Section 7.4a, paragraph 1 DTA. Pursuant to Sections 5:41 and 5:46 of the Dutch General Administrative Law Act, the culpability of the offender, the seriousness of the violation and the circumstances under which the violation was committed must be taken into account when determining the level of the fine to be imposed.

40. On August 1, 2013, the ACM Fining Policy Rule 2014 (hereinafter referred to as: Fining Policy Rule) entered into force.[35] The Fining Policy Rule contains detailed rules for the manner in which ACM is to interpret its power to impose administrative fines. The general aim for the determination of the level of the fine is that the fine should be proportional with regard to the committed violation. Furthermore, ACM employs the principle that the fine to be imposed should be sufficiently dissuasive (deterrent) to other offenders or potential offenders.

41. Pursuant to Section 15.4, paragraph 3 DTA in conjunction with Article 2.7, paragraphs 1 and 2 of the Fining Policy Rule, ACM sets a basic fine within the range of the fining category in which the violated norm has been categorized. In the case of the violation in hand, ACM

[35] Policy Rule of the Minister of Foreign Affairs of 4 July 2014, no. WJZ/14112617, with regard to the imposition of administrative fines by the Authority for Consumers and Markets (2014 ACM Fining Policy Rule), Government Gazette (15 July) 2014, 19776.

sets the basic fine within the range of EUR 150,000 and EUR 450,000, as the violation set out in Section 7.4a, paragraph 1 DTA has been categorized in fining category IV, for which this fining range has been determined (see Annex 2, relating to Article 2.7, paragraph 2 of the Fining Policy Rule).

42. Article 2.2 of the Fining Policy Rule provides three different factors, which are: the seriousness of the violation, the conditions under which the violation was committed and the duration of the violation. ACM sets the basic fine within the range taking at least these factors into account.

43. After the basic fine has been set, ACM assesses whether there are any aggravating or mitigating circumstances pursuant to Article 2.8, paragraph 1 of the Fining Policy Rule. Articles 2.9 and 2.10 of the Fining Policy Rule list circumstances that shall in any case be considered aggravating or mitigating circumstances.

44. Finally, ACM may, pursuant to Section 5:46, paragraph 2 of the Dutch General Administrative Law Act – in which it is provided that an administrative body must, if so required, take the circumstances under which the violation was committed into account –, take the financial strength of the company into account when determining the fine.

*VIII. 1 Culpability of the violation*

45. The norm set out in Section 7.4a, paragraph 1 DTA is addressed to *all* providers of internet access services. It is certain that in the situation in hand, KPN is to be considered a provider of an internet access service in respect of its Free Basic Internet Service and this should have been clear to KPN from the introduction of the norm. On the basis of this norm, KPN was required to modify the Free Basic Internet service from the entry into force of Section 7.4a, paragraph 1 DTA. As ACM has established, KPN has neglected to do so.

46. The adjustment of its internet access services to suit the law amendment, which is the introduction of the net neutrality provision, is entirely KPN's responsibility. In its opinion, KPN admits that, at the time of the introduction of Section 7.4a DTA, KPN was insufficiently aware of the need to modify the Free Basic Internet Service. Therefore, ACM concludes that the violation, consisting of the failure to comply with a statutory obligation resulting from Section 7.4a, paragraph 1 DTA, is fully imputable to KPN.

*VIII. 2 Determination of the basic fine*

47. Section 7.4a, paragraph 2 DTA aims to ensure net neutrality to protect a freely accessible internet offering anybody the possibility to visit any website and use any service available on the internet, without the interference of the provider of internet access services. The legislature deems the open character of the internet a great asset which needs to be protected. The provisions, in other words, aim to maximize the freedom of choice and

expression of end users on the internet. The end user needs to be able to choose for himself which information or services he wishes to receive through the internet; the provider of internet access services may not play an interfering role in this. Section 7.4a DTA prevents end users from being limited in their freedom of choice and expression on the internet due to providers of public electronic communications networks through which internet access services are provided, and providers of internet access services making use of their power to hinder or slow down access to websites or services provided through the internet. Violation of Section 7.4a, paragraph 1 DTA may result in a fine of up to EUR 450,000.

48. In respect of the violation of Section 7.4a, paragraph 1 DTA at issue here, ACM takes into account that this violation arises from a deliberately "chosen business model" (as KPN refers to it in marginal 14, p. 5 of its letter dated 25 August 2014) with which it realized that, inter alia, VPN and email client services were blocked. In order to use these applications nevertheless, end users were forced to use the paid Premium Internet or the mobile network. It is likely that end users may have experienced a hindrance because they were unable to use certain services and applications.

49. ACM establishes that this disadvantage, moreover, stretches beyond the above. Certain providers of services and applications for which internet access is necessary had been blocked by KPN's action, such as the VoIP service [confidential], but also frequently used services such as FileZilla,[36] Viber (one of the most downloaded applications of 2013 and similar to Skype and WhatsApp)[37] and VoipBuster. Net neutrality enables such providers to provide services and websites (for example new, innovative ones) also to the benefit of end users. This way, inter alia, net neutrality contributes to the maximization of end users' freedom of choice and expression. Due to the blockade, however, these services and applications were not available to end users. The internet was thus not freely accessible and offering anybody the possibility to visit *any* website and use *any* service that requires the use of the internet, enabling end users to decide for themselves what information or which services they receive through the internet. End users have therefore been harmed because their freedom of choice and expression was restricted.

50. Moreover, this "temporary" restriction of end users' freedom of choice and expression may have harmful effects on end users' freedom of choice and expression in the long term. By blocking service providers such as [confidential], the incentive for similar providers to invest in the development of new and innovative services is removed, for the accessibility of these services and websites can make or break these services and websites.



[36] Reference 2013103065 – source 9.

[37] Source: http://www.nutechn.nl/apps/3641070/viber-heeft-330-miljoen-gebruikers.html (in Dutch).

51. The violation commenced on 1 January 2013 and was ended by KPN on 4 July 2013. ACM sets the duration of the violation at more than six months. Within this period, [confidential] end users have used the Free Basic Internet service. This means that about [confidential] end users were not free to use any internet service. KPN claims that foreign end users at Schiphol Airport have not been harmed by its violation (see marginal 24). KPN bases this claim on the argument that such blockades are prohibited only in the Netherlands. ACM points out that the prohibition to hinder services on the Internet aims to maximize the freedom of choice and expression of all end users in the Netherlands. Foreign end users who do not enjoy protection of their freedom of choice and expression with the same scope, do enjoy this protection in the Netherlands under Dutch law. ACM therefore does not share this view of ACM and does not take it into account.

52. Finally, ACM takes into account the fact that the violated provision entered into force on 1 January 2013 and was relatively new at the time of the violation in question. KPN was aware of the entry into force of the provision concerned and modified its internet access services. In this process, the internet access service Free Basic Internet was overlooked, so KPN argues. ACM takes into account that KPN did not do so deliberately. Nevertheless, KPN is responsible for compliance with the law on this issue. This is all the more so because KPN could hinder or slow down internet access to its own advantage.



*VIII. 3 Basic fine*

53. In light of what ACM considered in marginal 47 up to and including 52, ACM concludes that a basic fine of EUR 250,000 is reasonable.

*VIII. 4 Aggravating or mitigating circumstances*

54. KPN argues that it came to the conclusion in the discussions with [confidential] that the Free Basic Internet service was not in accordance with Section 7.4, paragraph 1 DTA. After that, KPN acted fast. KPN ended the violation immediately and on its own initiative and reported the violation to the Telecommunications, Transport and Postal Services Department of ACM. In so far as KPN thus argues that ACM should consider these mitigating circumstances, ACM considers the following.

55. On 23 April 2013, [confidential] reported to KPN that its application was completely blocked via KPN's Wi-Fi Hotspots at Schiphol Airport and Hotel van der Valk. Subsequently, KPN indeed reported on 14 May 2013 that the service of [confidential] was working again at these two locations, but this does not change the fact that KPN did not discover until 4 July 2013 – after detailed investigations carried out by KPN following questions of regulatory officials – that certain services were blocked on all 176 of KPN's Wi-Fi Hotspots and lift these blockades. ACM is of the opinion that the time it took KPN to end the violation was not so short as to justify a fine reduction.

## Decision

56. With regard to the reporting of the violation to the Telecommunications, Transport and Postal Services Department, ACM notes the following. In so far as an offender lends extensive cooperation to the investigation and ends the violation on its own initiative and without intervention from ACM, ACM may take this into account as mitigating circumstances. In the case in question, ACM also considers that KPN had concluded the “Compliance Charter KPN and Opta” with OPTA on 24 April 2008, in which KPN provides a concrete interpretation of its own responsibility to comply with the DTA. On the basis thereof, it is up to KPN to report violations to ACM on its own initiative and to end violations within the shortest possible time after discovery. Therefore, in this specific case, ACM establishes – also in light of that which ACM has established with regard to the duration of the violation – that KPN’s cooperation was not so extensive as to justify a reduction of the basic fine. No other mitigating circumstances have been found.

57. Neither have any aggravating circumstances been found.

*VIII. 5 Conclusion with regard to the determination of the level of the fine*

58. Taking into account the seriousness of the violation as well as the circumstances under which the violation was committed and the duration of the violation, and the absence of any aggravating or mitigating circumstances, ACM imposes on KPN a fine of EUR 250,000 for violation of Section 7.4a, paragraph1 DTA.

59. In ACM’s view, the level of the fines, considering together all circumstances mentioned above, is proportional. Therefore, ACM sees no reason to further adjust the fines.

Autoriteit
Consument & Markt

## Decision

**IX. Dictum**

60. The Netherlands Authority for Consumers and Markets:

- Imposes on KPN B.V. a fine of EUR 250,000 for violation of Section 7.4a, paragraph 1 of the Dutch Telecommunications Act during the period from 1 January 2013 up to and including 4 July 2013.

The Hague,

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

J.G. Vegter, LL.M.
Member of the Board

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: 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.