

# **PUNITIVE MEASURES POLICY 2011**

## **CHAPTER 1. Introduction**

### **1.1 General**

This policy shall replace the punitive measures policy of 2007 which is not up to date anymore due to the entry into force on 1 January 2009 of the Dutch Media Act 2008 (Stb. 2008, 583) (last amended by the law of 10 December 2009, Stb. 2009, 552), and the entry into force on 1 July 2009 of Chapter 5 of the Dutch General Administrative Law Act. The Dutch Media Act 2008, in particular in Articles 7.12 and 7.14, grants the Dutch Media Authority powers to impose sanctions, and the Dutch Media Authority is –considering the interests involved – competent to respond to a breach of a standard by or pursuant to the Dutch Media Act 2008, either through a punitive sanction with the intention to add harm to the offender or by means of a remedial sanction (such as an order for periodic penalty payments as referred to in Article 7.12, third paragraph) in order to prevent or to undo the breach.

This policy provides insights into the criteria which will be applied when imposing administrative penalties for the infringement of a standards by or pursuant to the Dutch Media Act, and therewith addresses the intention of the principle of legal certainty and the principle of equal treatment.

This policy does not cover measures which the Dutch Media Authority is obliged to take and of which the Dutch Media Authority has no freedom to balance the interests (see e.g. Articles 2.47, first paragraph, sub a, 2.67, first paragraph, sub a, or 3.4, first paragraph: of the Dutch Media Act 2008: Mandatory withdrawal of a designation being issued or of a consent).

In punitive sanctions, besides the objective to strike the interests of the offender, purposes of special and general prevention will be pursued.

The terminology used in this policy document has the same meaning as was assigned by or pursuant to the Dutch Media Act 2008 and the General Administrative Law Act, unless explicitly stated otherwise.

## 1.2 Relevant provisions

In relation to the powers of the Dutch Media Authority to impose administrative sanctions, the following general rules of competences laid down in the Dutch Media Act 2008 are particularly important:

### Title 7.2 Oversight and enforcement

#### Article 7.11

1. The Dutch Media Authority is charged with the administrative enforcement of the provisions of this Act, with the exception of:
  - a. Articles 2.2 to 2.22, 2.24 to 2.33, 2.34a to 2.34i, 2.36 to 2.41, 2.53 to 2.57, 2.59, 2.60, 2.73 to 2.87, 2.125 to 2.131, 2.143 to 2.145, 2.149, 2.150, first paragraph, 2.151, first paragraph, 2.158, 2.163, 2.164, first and second paragraphs, 2.166 to 2.168, 2.180 to 2.187, 4.2 to 4.5 and 6.26; and
  - b. Chapter 8.
2. The members of the Dutch Media Authority and the employees of the Dutch Media Authority assigned by a decision of the Dutch media authority, are charged with overseeing compliance.
3. A decision as referred to in paragraph 2, shall be notified by means of publication in the Staatscourant.

#### Article 7.12

1. In the event of an infringement of a provision by or pursuant to this Act – with the exception of Articles 2.34, first paragraph, 2.58, subsections a to c and e and 2.170 or Article 5: 20 of the General Administrative Law Act – the Dutch Media Authority may impose an administrative fine of up to EUR 225.000 per infringement.
2. The administrative fine to infringements of the provisions in Article 2.34, first paragraph, shall be 10 % of the total amount of monies that on average in the calendar years prior to the offence during the current period of approval to the broadcasting association has been made available for the delivery of media supply for the national public media service.
3. In case of infringement of the provisions laid down in or pursuant to Articles 2.132 to 2.134, 6.10 to 6.14 and 6.20 the Dutch Media Authority may impose an order for periodic penalty payments to the offender.

#### Article 7.14

1. In case of infringement of the provisions laid down in or pursuant to this Act or Article 5:20 of the General Administrative Law Act, the Dutch Media Authority may, in addition to the imposition of an administrative penalty and an order for periodic penalty payments:
  - a. withdraw hours referred to in Article 2.51, of the institution concerned for a period of no more than twelve weeks;

b. reduce or withdraw hours referred to in Articles 2.49, first paragraph, 6.1 and 6.5, of the institution concerned; and

c. withdraw or reduce the hours that the STER<sup>1</sup> has available pursuant to Article 2.95 on the programme channels of the national public media service.

2. The Dutch Media Authority also has the powers referred to in the first paragraph if the Management Board has requested the Dutch Media Authority to reduce or withdraw the hours of the institution concerned because:

a. the institution that provides media supply for the national public broadcasting service was sanctioned for two consecutive years as referred to in Article 2.154; or

b. the broadcasting association or the educational media institution in the view of the Management Board does not adequately implement the willingness to cooperate for the benefit of the national public media service.

In addition, the Media Act 2008 has a number of specific provisions in which powers of the Dutch Media Authority to impose administrative sanctions are included.

To the oversight and enforcement by the Dutch Media Authority of the Dutch Media Act 2008 also the provisions set out in Chapter 5 (enforcement) of the General Administrative Law Act apply.

## **CHAPTER 2. SANCTIONS**

2.1 In the event of an infringement with respect to the provisions by or pursuant to the Dutch Media Act, one or more of the following administrative sanctions may be imposed:

a. administrative fine;

b. order for periodic penalty payment;

c. reduction of hours;

d. withdrawal of hours;

e. (partial) withdrawal of an authorisation, designation or exemption;

f. (request for) reduction or termination of advance payments.

2.2 In assessing whether - and, if so - what punitive measure should be imposed, the Dutch Media Authority takes into account the severity of the offence and the extent to which the party concerned is culpable for the offence. The Dutch Media Authority shall, when the assessment is made, take into account any relevant circumstances in which the offence has been committed.

---

<sup>1</sup> Stichting Etherreclame, Radio and Television Advertising Foundation, responsible for broadcasting commercials and/or advertisements on public radio, television and/or digital media.

2.3 A sanction that comprises a reduction or withdrawal of hours in accordance with Article 3.4, second paragraph, sub b, of the Dutch Media Act 2008 of the consent of a commercial media institution shall, except in special cases, be imposed only if there is a repeated or prolonged non-compliance with the provisions applicable to the offender by or pursuant to the Dutch Media Act 2008, or, in the case of an infringement where there is gross negligence or (conditional) intent.

2.4 To establish the level of an administrative fine, the Dutch Media Authority uses, in accordance with the fine maximum laid down in Article 7.12 of the Dutch Media Act 2008, the following calculation methodology.

For the determination of the severity of an offense, the enforceable standards are first of all divided into three categories (A, B and C) reflecting different ranges.

In this context, then, with regard to the impact of an offence, a distinction is made between media institutions with a national, regional or local audience range or dissemination level. The positioning of the offence committed within the ranges set out in the fine categories depends on the nature, severity and where relevant the duration of the offence.

On the basis of mitigating or aggravating circumstances an assessment is made as to whether, and if so to what extent, the offence is culpable, and the level of the fine shall be determined.

The adoption of the fine category is without prejudice to the possibility that by applying Article 2.13 and/or by the presence of aggravating and mitigating factors to go beyond the calculation methodology and/or the range of the relevant fine category.

#### Fine category A

Violation of the provisions laid down under or pursuant to the Articles:

2.1, 2.34, 2.50, 2.52, 2.58, 2.88, 2.88a, 2.89, 2.90, 2.91, 2.94, 2.95, 2.96, 2.97, 2.106, 2.107, 2.108, 2.109, 2.110, 2.111, 2.112, 2.113, 2.114, 2.132, 2.133, 2.134, 2.135, 2.136, 2.137, 2.138, 2.138a, 2.139, 2.141, 2.142, 2.151, second paragraph, 2.164, third paragraph, 3.1, 3.2, 3.5, 3.5a, 3.7, 3.8, 3.9, 3.10, 3.11, 3.13, 3.15, 3.16, 3.17, 3.18, 3.19, 3.19a, 3.19b, 4.1, 4.6, 5.1, 5.2, 5.3, 5.4, 6.13, 6.14, 6.15, 6.20, 6.21, 7.18 of the Dutch Media Act 2008 and 5:20 General Administrative Law Act.

#### Fine category B

Violation of the provisions laid down under or pursuant to the Articles:

2.35, 2.49, 2.70, 2.71, 2.72, 2.92, 2.93, 2.99, 2.115, 2.116, 2.117, 2.118, 2.119, 2.124, 2.171, 2.172, 3.6, 3.20 to 3.26, 3.29, 3.29b, 3.29c, 3.29d, 6.4, 6.6, 6.9, 6.10, 6.23, 6.24 and 6.27 of the Dutch Media Act 2008.

#### Fine category C

Violation of any other provision by or pursuant to the Dutch Media Act 2008 of which the Dutch Media Authority is responsible for administrative enforcement.

If the offender is a public national media institution or a commercial media institution with an

audience range above 500.000 households, the following ranges apply.

*Fine category national*

		Category A	Category B	Category C
I	Very serious violation	EUR 135.000 — EUR 225.000	EUR 80.000 — EUR 135.000	EUR 20.000— EUR 35.000
II	Serious violation	EUR 35.000 — EUR 135.000	EUR 20.000 — EUR 80.000	EUR 6.000— EUR 20.000
III	Minor violation	0 – EUR 35.000	0 – EUR 20.000	0 – EUR 6.000

In the case of an infringement committed by a commercial on-demand audiovisual media service, via the open internet, the above-mentioned ranges are applied.

Where appropriate, in the case of media services listed in the previous sentence it may be possible to derogate from these ranges.

For commercial on-demand media services which are not offered via the open internet, the technical scope applies, in line with the explained system in Articles 2.4, 2.5 and 2.6 for other commercial media institutions.

- 2.5 If the offender is a public regional media institution or a commercial media institution with an audience range of between 25.000 and 500.000 households, the following ranges apply.

*Fine category regional*

		Category A	Category B	Category C
I	Very serious violation	EUR 27.000 — EUR 45.000	EUR 16.000 — EUR 27.000	EUR 4.000— EUR 7.000
II	Serious violation	EUR 7.000 — EUR 27.000	EUR 4.000 — EUR 16.000	EUR 1.200— EUR 4.000
III	Minor violation	0 – EUR 7.000	0 – EUR 4.000	0 – EUR 1.200

- 2.6 If the offender is a public local media institution or a commercial media institution with an audience range of less than 25.000 households, the following ranges apply.

*Fine category local*

		Category A	Category B	Category C
I	Very serious violation	EUR 6.750 — EUR 11.250	EUR 4.000 — EUR 6.750	EUR 1.000— EUR 1.750
II	Serious violation	EUR 1.750 — EUR 6.750	EUR 1.000 — EUR 4.000	EUR 300— EUR 1.000
III	Minor violation	0 – EUR 1.750	0 – EUR 1.000	0 – EUR 300

- 2.7 A very serious violation is a violation involving one or more of the following circumstances:
- A public media institution has significantly violated the principle of non-commerciality, e.g. the prohibition of being servant to commercial interests of third parties, and independence;
  - A public media institution has significantly violated the principle of lawful spending of resources or the principle of transparency in the financial accountability;
  - A commandment that can be converted into percentages is only achieved for 1/2 or less;
  - A prohibition that can be converted into percentages is exceeded with more than 2/10;
  - The violation has a structural nature;
  - A programme that consists fully or partly of news, current affairs or political information, is sponsored;
  - The violation covers more than 10% of the duration of the programme;
  - Surreptitious advertising with a very large emphasis;
  - Other circumstances that make the violation very serious according to the Dutch Media Authority, including i.a. violations in relation to vulnerable groups in society;
  - Very serious non-compliance with the cooperation obligation and information obligation;
  - Repeat sanction of a (very) serious violation.
- 2.8 A serious violation is a violation involving one or more of the following circumstances:
- A public media institution has in more than a limited extent violated the principle of non-commerciality, e.g. the prohibition of being servant to commercial interests of third parties, and independence;
  - A public media institution has in more than a limited extent violated the principle of lawful spending of resources or the principle of transparency in the financial accountability;
  - A commandment that can be converted into percentages is achieved for more than 1/2 but less than 4/5;
  - A prohibition that can be converted into percentages is exceeded between 1/20 and 2/10;
  - A violation that involves access to the cable;
  - Surreptitious advertising with a large emphasis;
  - Other circumstances that make the violation serious according to the Dutch Media Authority;
  - Serious non-compliance with the cooperation obligation and information obligation;
  - Repeat sanction of a minor violation
- 2.9 A minor violation is a violation involving one or more of the following circumstances:
- A public media institution has to a limited extent violated the principle of non-commerciality, e.g. the prohibition of being servant to commercial interests of third

parties, and independence;

- A public media institution has to a limited extent violated the principle of lawful spending of resources or the principle of transparency in the financial accountability;
- A commandment that can be converted into percentages is not fully achieved, but for more than 4/5;
- A prohibition that can be converted into percentages is exceeded, but with less than 1/20;
- Surreptitious advertising with low emphasis,
- To a limited extent non-compliance with the cooperation obligation and information obligation.

2.10 The Dutch Media Authority determines the range of the relevant fine category, in the light of the circumstances referred to in 2.7, 2.8 and 2.9. In determining the amount of the fine within the corresponding range, the starting point is the middle of the range.

2.11 With the exception of the offences that concern access to the cable, in case a violation concerns a radio programme, the nearest lower range in the fine category is chosen. In the case there is already a minor offence, the level of the fine, subject to possible aggravating circumstances, is determined in the lower part of the range.

2.12 In determining the level of the fine, the Dutch Media Authority takes into consideration aggravating and mitigating circumstances.

Aggravating conditions include:

- The fact that there is a repeat violation of the same nature;
- The fact that the offender was adequately informed in the of the application of regulation;
- The fact that there is gross negligence or (conditional) intent;
- The fact that the violation has resulted in an unlawfully financial advantage or an advantage which can be valued in money;
- A broad geographic coverage of the provider of a broadcasting network;
- The fact that there is a repeat sanction for a continuous violation.

Mitigating circumstances include:

- The interpretation of the violated standard rule has not been considered in the regulatory policy of the Dutch Media Authority before;
- The fact that the violation has occurred while the offender had taken precautionary measures;
- In the meantime the offender has taken efficient measures to prevent repeat of the violation;
- a limited geographical coverage of the provider of a broadcasting network.

2.13 The calculation methodology laid down in Articles 2.4 to 2.12 for the determination of the level of fines serves as a guideline and it is not a compulsory requirement. The

methodology can be derogated from in case of in the opinion of the Dutch Media Authority qualifying circumstances.

- 2.14 The Dutch Media Authority can impose another administrative fine to the offender in case the violation continues after a previous administrative fine. Before such a repeat fine is imposed, the Dutch Media Authority notifies the offender by written notification of the possibility to end the violation within a reasonable deadline. Such a written notification may be omitted if it is or should be clear to the offender that even after the previous administrative fine it is still expected to cease the violation, and considering the passage of time since the previous fine he has been reasonably able to comply with the violated standard.
- 2.15 For a violation of Article 5:20, first paragraph, of the General Administrative Law Act no fine shall be imposed, only after the offender has been given the possibility by written notification to comply with the obligation to cooperate within a reasonable term (rectification of default).  
If after imposition of a fine the obligation to cooperate is still not complied with, a new claim will be done. In the case that this claim is still not complied with, the offender will not be offered a term again to rectify this default.
- 2.16 The Dutch Media Authority is competent to impose an order for periodic penalty payments for violation of the provisions laid down in or pursuant to Articles 2.132 to 2.134 and 6.10 to 6.14 and 6.20. Title 5.1 and Section 5.3.2 of the General Administrative Law Act apply.

### **CHAPTER 3. PROCEDURE IN THE EVENT OF PUNITIVE SANCTIONS**

- 3.1 The Dutch Media Authority may, ex officio or at the request of a stakeholder, carry out an investigation regarding administrative enforcement by means of punitive sanctions of the provisions in or pursuant to the Dutch Media Act 2008 or Article 5:20 of the General Administrative Law Act. Subsequently, the titles 5.1, 5.2 and 5.4 of the General Administrative Law Act apply.
- 3.2 If necessary, the Dutch Media Authority shall seek information on the suspected violation from the party or parties concerned. An information request has to be fulfilled as indicated by the Dutch Media Authority.  
If the Dutch Media Authority determines that a violation has been committed, the Dutch Media Authority draws up a report as referred to in Article 5:48 of the General Administrative Law Act.
- 3.3 The Dutch Media Authority shall inform the concerned party or parties by registered letter of its intention to impose the sanction and the grounds on which this intention is based. The report mentioned in Article 3.2 shall be sent with this letter to the party or parties concerned.
- 3.4 The Dutch Media Authority shall inform the party or parties concerned in the notification referred to in Article 3.3, of the opportunity to submit its view to the intention to impose a sanction measure at a hearing within four weeks. If the party concerned intends to outline its view only in writing, the Dutch Media Authority grants the opportunity to do so for a period of four weeks after the notification referred to in Article 3.3. The Dutch Media Authority may, if there are justified grounds, extend this term with two weeks upon the request of the concerned party or parties.
- 3.5 When notifying the hearing, the concerned party shall be informed that he/she is not obliged to answer questions.
- 3.6 If the intention relates to an alleged violation equal to an alleged violation which the Dutch Media Authority is already pursuing, the Dutch Media Authority may stay the proceedings at the request of the concerned party until a decision is taken in the previous procedure.
- 3.7 Written documents may be submitted not later than ten days before the date of the hearing.
- 3.8 A report will be made of the occurrences at the hearing. This report shall be sent to the concerned party, if possible with the decision of the Dutch Media Authority regarding the intended sanction.
- 3.9 The Authority shall decide on the imposition of a sanction within the period of time laid down in Article 5:51, first paragraph, of the General Administrative Law Act.

- 3.10 The Authority shall provide its decision without delay by registered letter to the party or parties concerned.
- 3.11 Similar suspected violations committed by the same party may be treated accompanied and for each violation a separate sanction may be imposed.
- 3.12 The Dutch Media Authority may impose one sanction where appropriate for individual not similar violations committed by the same offender. If this is the case, the highest fine will be imposed, of the fines that can be imposed separately, for the sum of violations.
- 3.13 On a decision on administrative appeal that is directed against a sanction decision of the Dutch Media Authority in relation to a violation of Articles 2.88a, 2.89, 2.90, 2.91, 2.94, 2.95, 2.96, 2.97, 2.106, 2.107, 2.108, 2.109, 3.5a, 3.7, 3.8, 3.9, 3.11, 3.15, 3.16, 3.17, 3.19, 3.19a and 3.19b, of the Dutch Media Act 2008, the Dutch Media Authority asks the opinion of the Advisory Committee on Appeals. The Dutch Media Authority may ask the Advisory Committee on Appeals for an opinion on appeals directed to other sanction decisions.
- 3.14 In the event of an opinion being requested, the Dutch Media Authority shall send the appeal immediately following receipt to the Advisory Committee on Appeals. The party or parties concerned will be informed of the transmission in writing.
- 3.15 On the advice by the Advisory Committee on Appeals the Regulation Advisory Commission on Appeals determined by the Dutch Media Authority shall apply.

#### **CHAPTER 4. FINAL PROVISIONS**

- 4.1 This Policy shall enter into force two days following notification in the Government Gazette, with the proviso that Chapter 2 of the Policy shall enter into force only two months of its notification in the Government Gazette.
- 4.2 The Punitive Measures Policy 2007 and the regulation applicability policy under the Media Act 2008 where applicable to the mentioned Policy will expire from the date of entry into force of this Policy.
- 4.3 This policy may be cited as the Punitive Measures Policy 2011.
- 4.4 This policy will be published by notification in the Government Gazette and on the website of the Dutch Media Authority ([www.cvdm.nl](http://www.cvdm.nl)).

COMMISSARIAAT VOOR DE MEDIA,

Prof. Tineke Bahlmann  
President

Prof. Madeleine De Cock Buning  
Commissioner

## **CHAPTER 5. EXPLANATION**

With the entry into force of the Dutch Media Act 2008 on 1 January 2009, important changes were implemented regarding the administrative enforcement by the Dutch Media Authority.

Where it concerns the power of the Dutch Media Authority to impose a punitive sanction (administrative fine), the legislator decided not to make a distinction between categories of violations with separate maximum fines, as used to be the case. Based on the legislation currently in place, the same maximum fine of EUR 225.000 applies for each violation.

When carrying out the enforcement regime the Dutch Media Authority has to take note of the entry into force of Chapter 5 (Enforcement) of the General Administrative Law Act on 1 July 2009. In particular the Dutch Media Authority has to take note of the principle that the level of the administrative fine should be aligned with the severity of the violation and the extent to which the offender is culpable, in accordance with the circumstances of the case. Moreover, the Dutch Media Act 2008 assigns the power to the Dutch Media Authority to impose in certain cases a repair sanction (order for periodic penalty payments).

This amending legislation is the rationale to establish a new Punitive Measures Policy, to replace the Punitive Measures Policy of 2007, to provide insight in how the Dutch Media Authority will shape the amended legislation in practice. In particular where it concerns its policy to impose administrative fines, of which the level of the fine will be based on a modified classification of fine categories (compared to the old policy).

Specific transitional provisions on the date of entry into force of this policy shall not be deemed necessary. The new Policy applies to what exists on the date of entry into force, such as the existing legal status and their interrelationships (immediate effect).

However, this shall not affect the provisions in Article 9.5 of the Dutch Media Act 2008 and/or in Article 5:46, fourth paragraph, of the General Administrative Law Act, which still apply.

It is clear from that provision that the Punitive Measures Policy 2007 will still apply to violations that were committed before the entry into force of this Policy, if the incrimination of the Policy 2007 is more favourable to the offender.

## **Explanation of individual articles**

### Article 1.1

For the purposes of this Policy a violation is conduct contrary to a provision by or pursuant to the Dutch Media Act 2008 (or with Article 5:20 of the General Administrative Law Act), in accordance with the provisions of Article 5:1 of the General Administrative Law Act. In the light of the provisions of Article 5:4, second paragraph, of the General Administrative Law Act it should also be pointed out here that, where appropriate, a violation of a provision or condition under which a favourable decision was taken by or pursuant to the Dutch Media Act, such as a designation, authorisation or an exemption, may lead to the imposition of an administrative fine. As by violating the laid down condition the offender must be deemed to have acted without the relevant designation, authorisation or exemption.

### Article 2.2

From this provision it follows, inter alia, that, in certain circumstances, the Dutch Media Authority will refrain from imposing a sanction, even though a violation was committed. This is clearly the case if the violation cannot be imputed to the offender. As guilt within the meaning of culpability often is not a component of the standards that the Dutch Media Authority enforces, the Dutch Media Authority does not have to prove the culpability. The Dutch Media Authority may in principle assume culpability if the perpetrator is known. It is for the offender to make an appeal for absence of any debt, and to make this absence plausible (Parliamentary Papers 29 702, No 3, p. 134). The principle of proportionality may also in certain circumstances lead to the imposition of a less severe sanction.

### Article 2.3

If the circumstances occur as listed in this Article, considering special and general prevention, a sanction may be imposed either for public media institutions to reduce or revoke broadcasting hours or for commercial media institutions to (partially) withdraw the authorisation referred to in Article 3.1 of the Dutch Media Act 2008. These punitive measures may be imposed in principle for violation of each provision by or pursuant to the Dutch Media Act 2008, whether or not combined with an administrative fine. To determine the severity of the violation, a connection can be made with Article 2.7 to 2.9 of this Policy.

There is at any rate repeated or prolonged non-compliance with the Dutch Media Act if the violation has a structural character. In the case of partial withdrawal of the authorisation, as referred to in Article 3.4, second paragraph, point B, of the Dutch Media Act 2008, one should think of a prohibition to provide media offering for a certain period of time.

Articles 2.4 to 2.9 (calculation methodology fine level)

To determine the level of the fine, the Dutch Media Authority will apply the three fine categories and associated range, as referred to in Article 2.4.

On the basis of the circumstances mentioned in Articles 2.7, 2.8 and 2.9, the Dutch Media Authority determines the severity of the violation. To that end the following shall apply. When determining the fine category, the Dutch Media Authority first assess whether one or more of the circumstances as mentioned in Article 2.7 (a very serious violation) has occurred. If this is the case the violation will be classified as a very serious violation. If this is not the case, the Dutch Media Authority shall then assess whether the violation can be classified as a serious violation. This is the case if one or more of the circumstances as mentioned in Article 2.8 have occurred. If the offence cannot be classified as a serious violation as well, the Dutch Media Authority assesses whether the violation involves circumstances as referred to in Article 2.9. If that is the case, the violation will be classified as minor.

If a violation involves neither of the circumstances as mentioned in Article 2.7, 2.8 and 2.9, the violation will be classified as serious.

The following example illustrates a commandment or prohibition that can be converted into percentages. A media service that spends 40% of its broadcasting time on ICE-programme-supply (supply of an informative, cultural and educational nature), as meant in Article 2.70, sub a, of the Dutch Media Act 2008, commits a minor violation now that the prescribed percentage of 50% has been obtained for at least 4/5.

The Dutch Media Authority, when determining the degree of emphasis of surreptitious advertising, shall take into account at least the following conditions:

- The duration of the advertising message or avoidable expression other than advertising;
- The manner in which the advertisement or avoidable expression other than advertising is transmitted, in view or sound, or in a combination of both;
- The location, size and impact of the advertisement or avoidable expression other than advertising compared to the whole of the programme, or
- The location, size and impact of a range of advertising messages and/or avoidable expressions other than advertising compared to the element of the programme, and any
- The multiplier effect of advertising messages or avoidable expressions other than advertising outside of the programme;
- The number of times that the advertising message or avoidable expression other than advertising occurs in the programme.

The provisions of Article 2.13 which lays down that the calculation methodology set out in the Policy acts as a guideline and not as a compulsory requirement, shall be noted.

If Article 7.12, second paragraph, of the Dutch Media Act 2008 – which sets out the level of the administrative fine in case of violation of the provision of Article 2.34, first paragraph, as fixed by the legislator – is applied, the Dutch Media Authority will still impose a lower administrative fine – in accordance with Article 5: 46, third paragraph, of the General Administrative Law Act – if the offender demonstrates that the fine is too high, due to special circumstances.

Following the methodology for linear commercial media services, where the technical range of the media service is the starting point for the imposition of an administrative fine, also for commercial on-demand audiovisual media services the technical range is chosen as starting point for the qualification of the fine.

The great majority of those services may be used on-demand through the publicly accessible internet. These services could therefore have a nationwide coverage. This means that these commercial on-demand media services via the Internet fall in principle in the highest category.

The Dutch Media Authority however, could imagine that it may not be justifiable in all circumstances to impose a fine to these media services within the range of the highest category. The Dutch Media Authority may take into account the extent of the media service, when determining the level of the fine. Commercial on-demand media services that have a lower technical coverage, like services that can only be offered through a limited part of the fibre network, fall into a lower fine category, depending on the size of the technical coverage.

Articles 2.4 to 2.6 (subdivision in terms of audience range)

In the Policy, a distinction is made between public service and commercial media institutions on national, regional and local level. This subdivision is obvious when looking at differences in (territorial) range or levels of distribution in practice of the media institutions, with the related impact or severity of the violation. The boundaries between the three distinct levels of commercial media institutions are determined by the number of households that are covered by these institutions.

The determination of the number of households that is covered by a commercial media institution, shall be done on the basis of the figure that the Dutch Media Authority has used for the calculation of the liable regulatory costs in the year in which the violation has been committed, based on the declaration ex Article 3.31 of the Dutch Media Act 2008.

If Articles 2.5 and 2.6 do not apply, the normal range applies as set out in Article 2.4. It follows that the normal range is valid, for example, for national public media institutions, the provider of a broadcasting network, RNW (Radio Netherlands Worldwide) and (commercial) media institutions with a range of more than 500.000 households.

Article 2.11

This Article reflects the principle that a violation of the Dutch Media Act 2008 by means of a

radio programme generally has a less social and economic impact than an infringement committed by means of a television broadcast. With the nearest lower range it is meant that a very serious infringement will be classified as a serious violation and a serious violation as a minor violation. If the violation already is a minor violation, the fine will be determined in principle on a quarter of the upper limit of the range. This article is without prejudice to the possibility to determine a higher or lower fine on the basis of Article 2.12 or 2.13.

#### Article 2.12

When determining the final fine level, the Dutch Media Authority can consider aggravating and mitigating circumstances with regard to the culpability. The fact whether the fine is increased or reduced, and, if so, the extent to which this happens, will depend on the circumstances of the case.

Regarding the aggravating condition that there is a repeat violation of the same nature, it is not necessary, though possible, that a (irrevocable) fine has been imposed for violations in the past that serve as the basis for the assumption of the repeat violation. To assume repeat violation it is sufficient that the previous offence can be made plausible to a reasonable extent.

The same applies to the aggravating condition that the offender does not meet the requirements by or pursuant to the Dutch Media Act repeatedly or prolonged. Also in this case it is sufficient to establish to a reasonable extent that such violations have taken place. The fact that no fine was imposed for violations committed in the past, shall not affect the possibility to increase of the fine.

The Dutch Media Authority shall not proceed with the imposition of a separate fine for the same violation that was already used as an aggravating condition to determine an earlier fine.

If the violation has resulted in an unlawfully financial advantage or an advantage which can be valued in money, the Dutch Media Authority can take that fact into consideration as an aggravating condition. The fine may then be increased to the maximum set in Article 7.12 of the Dutch Media Act 2008 for that violation to clear the unlawfully gained financial advantage. Furthermore, if the Dutch Media Authority finds that the fine level based on the normal calculation methodology is not an appropriate response in view of special or general prevention, the Dutch Media Authority may deviate from the calculation methodology.

The mitigating circumstance that the violation has occurred despite the precautionary measures taken by the offender, has to be demonstrated by the offender. To this end it must be made plausible that the precautionary measures are reasonably to be considered as such. This also applies to the circumstance that the offender has taken efficient

measures to prevent repeat of violation after the violation. A single commitment regarding repeat of violation from the offender is insufficient.

#### Article 2.14

When imposing a repeat fine, the fine level is determined in the nearest higher range of the same category. The reason for this is that the severity of the violation has increased due to the continuance. In case of a very serious violation it is not possible to switch to a higher range. Therefore the fine level in that case will be determined in the same range. To emphasise the severity of such a violation, aggravating conditions will be applied to the fine level.

Article 5:43 of the General Administrative Law Act (in which the codification of the *ne bis in idem*- principle that a defender is not to be prosecuted for the same violation twice) does in principle not preclude a repeat fine. However, it has to be established that there is a case that in criminal law is meant by the doctrine of “the continuous offence”: the act to cause existence or continuance of a prohibited situation. In such a case it is a condition that it was clear to the offender, that even after the previous fine he was still expected to put an end to the prohibited situation. In addition, the different periods that the fines correspond to, have to be distinguishable from another. Following the imposition of the first fine, the offender must also have had sufficient time to reasonably ensure full compliance with the violated norm.

If these conditions are not met, the Dutch Media Authority will have to inform the offender again of his (continuous) violation, which involves a new deadline to comply with the legal obligation after all, prior to the imposition of a repeat fine.

#### Article 3.1

For enforcement decisions at the request of any interested party, this refers to the provisions of the General Administrative Law Act, in particular Chapter 4 (Special provisions on decisions). If the request at the outset is not considered to be clearly inadmissible or unfounded, the Dutch Media Authority will consequently follow the procedure as described, except that documents related to the case will be sent in copy to the applicant.

The procedure described in this chapter of the Policy does not preclude the procedure as described in another policy concerning the deviation by a provider of a broadcasting network of an advise of a programme council.

#### Article 3.5

Due to Article 5.10a, second paragraph, of the General Administrative Law Act, the Dutch Media Authority shall communicate to the offender with the intended sanction, that he or

she is not obliged to answer questions during a hearing. This article does not preclude the obligations of an interested party pursuant to Article 5:20 of the General Administrative Law Act, in particular with regard to information which is independent of the will of the person concerned.

#### Article 3.13

Only if the administrative sanction relates to a violation of the regime for advertising, sponsorship and product placement, as specified in this article, the Advisory Commission Appeals will be asked for advice following an administrative appeal. In any other case it is up to the discretion of the Dutch Media Authority to decide whether or not an opinion from the Advisory Commission Appeals is requested.