

# Legal Alert

## A new financial penalty regime for companies and management

August 2009

### Introduction

Recently two bills have been adopted in Dutch Parliament, introducing a substantial increase in administrative fines under Dutch financial supervision laws that can be imposed by the Dutch financial regulators (AFM and DNB), and personal liability of management under these laws. Both bills have far-reaching consequences for financial institutions and listed companies in the Netherlands, as well as for their management. They provide *inter alia* for administrative fines up to EUR 4 million, facilitate additional increases and allow for enforcement action against individual members of management. This legal alert provides an overview of the most important changes and main elements of this new penalty regime.

### Amendment of the penalty regime

#### Introduction

On 7 July 2009, the amendment of the financial penalty regime (*Wet wijziging boetestelsel financiële wetgeving (Boetewet)*, “**Penalty Act**”) was adopted by Dutch Parliament. In addition to the Penalty Act a new penalty decree (*Besluit bestuurlijke boetes financiële sector (Boetebesluit)*, “**Penalty Decree**”) has been prepared including guidelines for the imposition of administrative fines. To illustrate the differences between the former and new penalty regime, both penalty

regimes will be described briefly below. Subsequently, the main changes and issues related to the new regime will be discussed.

#### Former penalty regime

The former penalty regime consists of fixed administrative fines. There are five categories of fines amounting to EUR 600, EUR 1,000, EUR 6,000, EUR 24,000 and EUR 96,000, respectively. In general, the applicable amount can be multiplied by a factor varying from 1 to 5, depending on the financial means of the offender. Therefore, in practice, a maximum fine of only EUR 480,000 can be imposed.

#### New penalty regime

The Penalty Act provides for a new system of fixed and flexible administrative fines, consisting of three categories of violations: light, medium and grave. Similar to the current regime, all violations are specified and categorised in the applicable laws.

#### Light violations - fixed

Light violations will remain governed by a system of fixed amounts. Subject to the possibility of mitigation as described below, in principle, a maximum fine of EUR 10,000 can be imposed for each violation. This category concerns relatively light and frequently occurring violations, such as non-compliance with a simple notification obligation or breach of a time limit.

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### *Medium and grave violations - flexible*

Fines for medium and grave violations are flexible. The amount of a flexible fine can be adjusted in view of the circumstances of the case. Starting point for Dutch financial regulators are the so-called base amounts: EUR 500,000 for a medium violation and EUR 2 million for a grave violation.

The maximum fine for medium violations, such as infringements of regulations governing consumer protection or non-compliance with integrity rules, amounts to EUR 1 million.

Grave violations can lead to fines up to a maximum amount of EUR 4 million. In general, violations in this category, e.g. market manipulation, insider trading and rendering banking activities without a license, are also subject to the imposition of criminal sanctions such as fines or imprisonment pursuant to the Economic Offences Act (*Wet op de economische delicten*).

### *Reducing and increasing fines*

According to the guidelines for the imposition of fines as set out in the Penalty Decree, financial regulators can reduce or increase the base amounts for medium and grave violations with a maximum of 50 percent by taking into account the gravity and/or duration of the violation and/or the degree of culpability of the offender. Although cumulation is possible, the overall maximum fine is, in principle, limited to EUR 4 million.

In cases of recidivism, the fine will be doubled. Thus, in those instances the applicable maximum amounts per category can be exceeded, potentially leading to fines up to EUR 8 million for grave violations. A situation of recidivism exists if an infraction is committed within five years after a fine for an identical infraction has been imposed.

To determine the amount of a fine the financial means of the offender have to be considered. For all three categories (light, medium and grave) mitigation based on the financial means is possible up to 100 percent.

### *Illegally obtained proceeds*

Financial regulators can also levy a fine if an offender obtained illegal proceeds of EUR 2 million or more. In those instances a maximum fine of twice the amount of the illegal proceeds can be imposed. The statutory maximum of EUR 4 million can thus be exceeded.

### *Publication*

The rules regarding the publication of a decision of the regulator to impose a fine remains unchanged. In principle, all decisions to impose fines for grave violations, as well as for certain other violations, must be published by the regulator. This duty to publish is irrespective of whether an appeal has been instituted against such decision before the administrative courts. However, publication may be suspended if a preliminary court injunction against publication is obtained.

### *Effective date and transitional provisions*

The Penalty Act has entered into force on 1 August 2009.

The Penalty Act contains a transitional provision determining that violations that occurred or started before the date of commencement of the Penalty Act will remain subject to the financial penalty regime existing at that time.

## **The “fourth tranche” and the Financial Markets Supervision Act (“FMSA”)**

### *Introduction*

The “fourth tranche” of the General Administrative Law Act (*Algemene wet bestuursrecht*) focuses *inter alia* on revision of regulatory enforcement of all administrative laws, such as the FMSA, and more specifically on administrative fines.

### *Punishment of individuals*

The most significant change is the introduction of the possibility to take enforcement action, including the imposition of fines, against individuals who were involved in the perpetration of an infraction by a legal entity. This possibility is derived from existing criminal law concepts, which make that individuals who have either given instructions to commit a crime (*opdrachtgevers*) or who in fact presided over the commission of a crime by the legal entity (*feitelijk leidinggevend*) can be held criminally liable.

Several criteria must be met for an individual to be deemed to have presided over a crime by the legal entity. Firstly, the individual must have the authority to take such measures as to prevent the crime from being committed. Secondly, the individual should reasonably have taken such measures, but has in fact omitted to do so. Thirdly, the individual consciously accepted the possibility that the crime would be committed. As these

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criteria show, actual knowledge of the crime being committed or intent on the part of the individual may not be necessary for such individual to be criminally liable for actions attributed to a legal entity. Furthermore, the criteria in principle allow for criminal prosecution of individuals at every level of management involved, not just the ultimately responsible individual.

Applied to the obligations and prohibitions arising under Dutch financial supervision laws and regulatory enforcement, there may be a broad group of individuals within listed companies or financial institutions that could possibly be subject to administrative fines if those obligations or prohibitions are violated. Besides members of the (supervisory) board, *inter alia* managers of a particular department within the firm could be deemed to meet the relevant criteria in a particular situation.

### *Joint perpetration*

In addition to the punishment of individuals, the criminal law concept of the co-perpetrator (*medepleger*) is also introduced as a new category of offenders in administrative law. This means that, if an infraction is committed jointly by two or more persons, each of the persons involved can be punished separately. Conscious cooperation and joint commission of the infraction are in that case required.

Other categories of offenders as known in Dutch criminal law, e.g. associates (*medepligtigen*) or instigators (*uitlokkers*), have not been introduced in Dutch administrative law.

### *Defences*

No administrative enforcement measures can be imposed if a justification defence (*rechtvaardigingsgrond*) can be invoked by the party concerned. If a justification defence applies, the relevant conduct does not constitute a violation. As a result, the persons involved are not punishable. Obvious examples of such defences are *force majeure* (*overmacht*) and fulfilment of an administrative order or legal duty.

Justification defences are to be distinguished from so-called grounds for exculpation defences (*schulduitsluitingsgronden*). An offender cannot be sanctioned for an infraction if such a defence is allowed by the court. Exculpation defences include

the concept of the absence of all culpability (*afwezigheid van alle schuld*).

### *Statute of limitation*

The statutory time limit for imposing a fine under the FMSA is extended from three to five years after the date on which the infraction was committed.<sup>1</sup>

### *Effective date and transitional provisions*

On 1 July 2009, the "fourth tranche" entered into force.

The "fourth tranche" holds that an administrative sanction imposed due to violations which occurred before its entry into force will remain subject to the regime existing before such time.

### *Practical implications*

The new penalty regime and the possibility of regulatory enforcement against individuals signal the move towards a significantly harsher penalty environment in the Netherlands. It provides the financial regulators with far-reaching powers to impose substantial fines for infractions of Dutch financial supervision laws on issuers, financial institutions and individuals. It remains to be seen how the financial regulators will use those powers in practice.

This publication describes the legal situation as at 4 August 2009.

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<sup>1</sup> Article 5:54 FMSA (new).

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### Contact information

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