

Criminal & Regulatory Enforcement Newsletter

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A new financial penalty regime for companies and management

On 23 June 2009, the “fourth tranche” of the General Administrative Law Act (*Algemene wet bestuursrecht*) was adopted by the Dutch Parliament. This new law entered into force on 1 July 2009 and allows for enforcement action against individual members of various levels of management. As a result administrative measures, in particular administrative fines, can be imposed

on both legal and natural persons. Also, various criminal terms are being introduced such as “factual leadership” (*feitelijk leidinggeven*) and “joint perpetration” (*medeplegen*). The introduction of a legal basis for individual liability of board members and supervisory directors is a significant change in administrative law.

In addition, an amendment of the financial penalty regime (*Boetewet*) will be adopted on 7 July 2009. The new regime *inter alia* provides for the possibility to impose higher and more flexible administrative fines by the Dutch financial regulators. Currently, a maximum fine of EUR 900,000 can be imposed, which in practice is limited to EUR 480,000. Not only should such an increase in fines have a deterrent effect, it should also lead to more similarity in (the level of) fines compared to surrounding European countries.

A combination of fixed and flexible fines is now proposed, consisting of three categories of offences (light, medium and grave). The maximum fine per category will be: EUR 10,000 (light), EUR 1 million (medium) and EUR 4 million (grave), with an overall maximum of EUR 4 million. The initial fine can be doubled in case of repeat offences within five years and the total amount of the fine can be increased up to twice the amount of the illegal gains (*wederrechtelijk verkregen voordeel*), if the benefit obtained from the offence is more

than EUR 2 million.¹ In contrast to fines for light offences, fines for medium and grave offences are flexible. According to the “penalty guidelines” (*Boetericht snoeren*), Dutch financial regulators can reduce or increase fines by taking into account the gravity and duration of the offence and the culpability of the offender. Together with the possibility for full mitigation, these changes allow for more proportionality with respect to financial fines.

The combination of both bills will lead to substantial changes in the Dutch financial penalty regime. It was the intention that the amendment of the financial penalty regime would enter into force subsequent to or jointly with the “fourth tranche” of the General Administrative Law Act. The adoption of the amendment is currently scheduled for 7 July 2009 and is expected to enter into force shortly after.

A legal alert on this topic will follow soon.

Amendment of the Economic Offences Act

Based on Dutch law, certain violations of – *inter alia* – securities and corporate law rules qualify as criminal offences. Administrative or criminal law sanctions can be levied on the perpetrators of these offences. During the preparation of the bill for amendment of the Dutch financial penalty regime, the articles of the Financial Market Supervision Act included in the Economic Offences Act were reviewed. This review resulted in a significant amendment of the Economic Offences Act, which will take effect if the new financial penalty regime is adopted and enters into force. The result will be a major decrease in the number of infractions of securities regulations that may be subject to sanctions through criminal prosecution.

Guideline on Investigation and Prosecution of Bankruptcy Fraud

On 1 March 2009, the Guideline on Investigation and Prosecution of Bankruptcy Fraud (*Aanwijzing opsporing en vervolging faillissementsfraude*; the “**Guideline**”) entered into force.

¹ As a result the overall maximum of EUR 4 million seemingly can be exceeded.

The Guideline contains rules for the Public Prosecution Office (*Openbaar Ministerie*) to increase the prosecution of bankruptcy fraud. The Guideline indicates that criminal law will be complementary to the civil law instruments that a receiver (*curator*) has in bankruptcy proceedings. The Guideline further provides for cooperation between the Public Prosecution Office and receivers.

The Guideline distinguishes between simple fraud cases and serious and complex/sensitive bankruptcy fraud cases. This distinction should result in better allocation of tasks between investigation authorities and more efficient settlement of cases. Simple cases will be investigated by the regional police, whereas complex cases, which require specialised financial knowledge, will be investigated by the Fiscal Intelligence and Investigation Service and Economic Investigation Service (*FIOD-ECD*) and/or the supra-regional detective force (*Bovenregionale Recherche*).

Receivers can report bankruptcy fraud cases to the bankruptcy reporting centre (*Fraudemeldpunt*). In addition, simple fraud cases can also be reported to the regional police and the district Public Prosecutor Office. Complex fraud cases can also be reported to the FIOD-ECD and the public prosecutor.

Investigative authorities and receivers each have their own specific powers on the basis of criminal and civil law, which can be combined, on the basis of the Guideline, in combating bankruptcy fraud. For instance, the Public Prosecution Office has more powers to trace missing property forming part of the estate, whereas the receiver, once missing property has been found, is able to seize this property.

Guideline on the Confiscation of Proceeds from Crime

On 1 March 2009, the new Dutch Guideline on the Confiscation of Proceeds from Crime (the “**Guideline**”) entered into force, replacing the former 2005 Guideline. The Guideline provides the Public Prosecution Service with rules and procedures in order to enable execution of (international) confiscation. The term “illegal gains from crime” (*wederrechtelijk verkregen voordeel*) is

defined as any economic advantage or profit the suspect involved has gained from criminal activities. Criminal proceeds can be calculated per offence or per time period.²

Aspects covered by this extensive Guideline include:

- investigation and prosecution;
- determination of the amount of illegal gains;
- confiscation proceedings;
- international pre-judgment attachments;
- international confiscation; and
- applicable multilateral and bilateral conventions.

A bill is currently being prepared to expand the possibilities of confiscation. Should new legislation enter into force, the Guideline will be amended accordingly.

National plan to combat real estate fraud

An increasing number of real estate fraud cases came to light in 2008. In response, the Dutch government established a national steering group in March 2009 in order to improve the prevention of real estate fraud. The steering group is chaired by the Ministry of Defence and the Ministry of Finance and is composed of representatives of *inter alia* the public prosecutor, the police, the Netherlands Authority for Financial Markets (*Autoriteit Financiële Markten*) and the Financial Supervision Office (*Bureau voor Financieel Toezicht*).

The steering group has four main objectives: (i) improvement of the integrity policy of financial and legal service providers; (ii) enhancing transparency in the real estate sector; (iii) increasing of the supervision of the real estate sector; and (iv) increase in the cooperation among the administrative, fiscal and criminal law authorities that deal with the real estate sector. In order to achieve these objectives the steering group will prepare an action plan. It also has the authority to

² The Prosecution Office Criminal Assets Deprivation Bureau (*Bureau Ontnemingswetgeving Openbaar Ministerie*; BOOM) fulfils an important role in assisting the Public Prosecution Office with the investigation of confiscation.

submit bills to the Second Chamber of the Dutch Parliament, if necessary.

New bill: Experts in criminal cases

The bill entitled "Experts in criminal cases" (*Wet deskundigen in strafzaken*, adopted on 3 February 2009) sets requirements for reliability and competence of court-appointed experts. The bill also improves the position of the suspect. Suspects have now been granted the explicit right to demand a counter-inquiry. Furthermore, the examining judge has been granted powers outside the scope of the preliminary inquiry, as a result of which the position of the supervisory judge has been strengthened.

A special task force is currently working on the creation of an independent public register for court-appointed experts. This task force prepared a draft decree, which describes how this register should be created. This draft decree contains the requirements experts will have to meet in order to be considered for registration. Part of the draft decree is a Code of Ethics, which provides rules with respect to independence, impartiality, requirements of due care and integrity. Court-appointed experts will only be admitted to the register if they sign the Code of Ethics. The register is expected to become operational in the course of 2009.

Protection of press informants

On 29 October 2008, the Dutch Minister of Justice presented a bill on the protection of informants of journalists in criminal proceedings (*Wet bronbescherming in strafzaken*).

The direct cause for the bill was the decision of the European Court of Human Rights (the "ECHR") on 22 November 2007 (*Voskuil v. the Netherlands*). In that decision, the ECHR ruled that the Netherlands had violated article 10 of the European Convention on Human Rights (freedom of speech) by incarcerating a journalist for 17 days who refused to reveal the identity of his informant.

Pursuant to the bill, witnesses to whom information has been confided as part of (information gathering in view of) professional news coverage, or news coverage as part the public debate, have

the right to claim exemption from giving a statement or answering questions about the source of such information.

A court, however, will be able to deny the journalist such privilege if the court finds that there is "an overriding requirement in the public interest which public interest would be heavily damaged if the source were not to be revealed". If the journalist were to still refuse to reveal his sources after such denial, he can be detained for a maximum of 16 days. However, such overriding requirement should not be readily assumed.

An interesting feature of the bill is that the Minister of Justice has deliberately chosen not to define the term "journalist". Therefore, new media, such as "bloggers" on the internet, are in principle included in the definition. However, the Minister notes that, for the privilege to be applicable, it is decisive whether the publication intends to play a role in the public debate and whether it intends to communicate to a wide public. Furthermore, the term "professional" also refers to certain ethical standards, such as verification of sources and hearing both sides, that must be taken into account in order for the privilege to be applicable.

The right to counsel during police interrogation: ongoing debate

On 27 November and 11 December 2008, the ECHR rendered two decisions which concern a sensitive issue in the Netherlands: a suspect's right to be represented by counsel during police interrogation. At present, Dutch law does not, in principle, recognise such right. The ECHR decisions, *Salduz v. Turkey*³ and *Panovits v. Cyprus*⁴ (the "ECHR Decisions"), have led to intensified debates in both the legal journals and case law on their respective scope and implications for Dutch criminal procedure. The debates centre around the question whether it can be concluded from the ECHR Decisions that a suspect is entitled to counsel's (physical) presence *while being questioned*. The answer depends on the meaning of the term "access to a lawyer" and "assistance of a lawyer" as used in the ECHR

³ ECHR (Grand Chamber) 27 November 2008, appl.no. 36391/02, published in The Netherlands in *NbSr* 2009, 1.

⁴ ECHR 11 December 2008, appl. no. 4268/04, published in The Netherlands in *NbSr* 2009, 2.

Decisions. If the ECHR Decisions indeed recognise a right to counsel's presence during interrogation, this would have major consequences for the Dutch criminal justice system, as it is at present not structured to accommodate this right.

Several developments have taken place within the Dutch criminal justice system since the publication of the ECHR Decisions. The Public Prosecution Service has sent a non-binding advice to all Public Prosecution Services on how to act. The advice in essence denies that a suspect's counsel should have physical access to the suspect during interrogation. In several instances, judges have had to rule on a defendant's reliance on the ECHR Decisions, which has led to differing decisions, varying from a denial that *Salduz v. Turkey* involves a right to counsel's presence during an interrogation⁵ to a more balanced approach, in which it was held that *Salduz v. Turkey* does not automatically include such right, but that further review is needed in this respect.⁶

The Netherlands Supreme Court has not yet ruled on the implications of the ECHR Decisions under Dutch law. Three cases are, however, now pending and judgments are not expected before 30 June 2009.⁷

It appears that there is more consensus on the conclusion that under Dutch law, the ECHR Decisions do call for further (legislative) elaboration of a suspect's lawyer's position in the first phase of interrogation. In a letter to the Second Chamber of Parliament of 15 April 2009, the Dutch Minister of Justice confirmed that he shares this conclusion and announces that he is considering implementing various elements in this respect. With regard to the actual (physical) presence of counsel during interrogation, the Minister announced that he will await the outcome of an experiment currently being conducted in Amsterdam and Rotterdam, where the presence of counsel during interrogation is being tried out. The experiment will not be completed until 2010.

⁵ District Court of Rotterdam, 19 December 2008, *NbSr* 2009, 40.

⁶ District Court of Amsterdam, 18 December 2008, *NbSr* 2009, 30.

⁷ The opinion of Advocate-General Knigge in these matters was issued on 17 February 2009.

Market abuse case law: the VHS matter

On 3 April 2009, the Amsterdam District Court delivered its decision in the VHS case.⁸ The VHS case centres around the CEO of VHS Onroerend Goed Maatschappij N.V., a company then listed on Euronext Amsterdam. The CEO held a majority stake in the company (80%). The District Court established that the CEO had effected several transactions in VHS shares through third-party accounts during a four-year period, both on and off the exchange, for the purpose of stabilising the price of VHS shares.

The CEO effected the transactions between 2000 and 2004. The public prosecutor could not charge the CEO with market manipulation due to the rather restricted legal regime regarding market manipulation in effect at that time: article 344 CC which did not apply to manipulative transactions but only to spreading false information. This regime was amended in October 2005 and now also covers manipulative transactions. Because of this restricted regime, the CEO was (only) charged with (i) breaching the duty to report his transactions in VHS shares to the Netherlands Authority for Financial Markets; and (ii) violating the prohibition on insider trading by trading in VHS shares while having superior knowledge of the manipulation scheme.

The District Court found the CEO guilty of the first charge and acquitted the CEO of the second charge based on the reasoning in earlier jurisprudence of the Dutch Supreme Court.⁹ According to this jurisprudence, if a manipulator has knowledge of self-produced facts, such knowledge does not qualify as inside information. A manipulator, even though he has certain specific non-public information, will therefore not automatically violate the prohibition on insider trading.

Both the public prosecutor and the defence have lodged notices of appeal with the Amsterdam Court of Appeal.

The public prosecutor also investigated the role of Staalbankiers N.V. and concluded that it had

⁸ District Court of Amsterdam 3 April 2009, LJN BI0007 (VHS)

⁹ Supreme Court 6 February 2007, NJ 2008/467 m.nt. Kristen, JOR 2007/73 m.nt. Corthals and Italianer.

insufficiently intervened in the transactions in VHS shares. Staalbankiers reached an out-of-court settlement of EUR 400,000 with the public prosecutor upon taking additional compliance measures, such as stricter training programmes and more stringent internal policies, and dismissing some of the employees involved in the transactions in VHS shares.

Safeguarding attorney-client privilege: tapping conversations between clients and their lawyers

In September 2008, at the annual convention of the Netherlands Bar Association (*Nederlandse Orde van Advocaten*), the chairman of the Board of Procurators General discussed the relationship between the Public Prosecution Service and the Bar in relation to the tapping of telephone conversations between lawyers and their clients.

Tapping telecommunications is a special investigative power enshrined in the Special Investigative Powers Act (*Wet bijzondere opsporingsbevoegdheden*). The present procedure prescribes that when authorised, investigating officers may listen to the recorded telephone conversations in criminal investigations. If they suspect that a conversation has been held with a professional entitled to privilege (*i.e.* a lawyer), they must inform the public prosecutor in such a way that the public prosecutor can assess whether or not the conversation may be disclosed. If this is not the case, the public prosecutor must issue an order to promptly destroy the recordings of the conversation. This duty is applicable to all types of storage. If a conversation does not qualify as a conversation that is subject to the privilege of non-disclosure, the recording can be added to the documents of the case.

The current issue of concern is that the existing procedure fails to safeguard the attorney-client privilege in practice. In a number of cases conversations held with a lawyer became public. The low point was the *Hells Angels* case, where the District Court of Amsterdam decided to block the prosecution, since the Public Prosecution Service had severely and repeatedly infringed the rules on safeguarding the attorney-client privilege.

This decision of the District Court of Amsterdam led to a critical examination by the Public

Prosecution Service. The examination focused on the question of whether the existing system of destroying recorded conversations offers sufficient safeguards. After consulting the Netherlands Bar Association and the Dutch Association of Defence Counsel (*Nederlandse Vereniging van Strafrechtadvocaten*), the Board of Procurators General delivered their opinion to the Minister of Justice. They concluded that a system of number recognition should be introduced for the Bar. The Minister of Justice presented the recommendations to the Dutch Parliament.

In short, the proposed system of number recognition for the Bar entails that all lawyers may submit a maximum of five telephone numbers, which will in principle not be tapped by judicial authorities and the police. The idea is that the system for interception of telephone conversations will automatically recognise and filter out the telephone numbers submitted. The recordings of these intercepted conversations will be stored in a separate digital depot for 30 days, after which these recordings will automatically be deleted. The reason for storing the conversations is to prove possible abuse of the system by a client or lawyer.

The majority of Parliament agrees with the proposed new system by the Minister of Justice, but not without expressing some concerns. The Minister of Justice will discuss these concerns with the Public Prosecution Service and the Netherlands Bar Association and has requested the Board of Procurators General to further investigate other forms of communication with lawyers in relation to the attorney-client privilege. The new system is expected to enter into force next year.

Contact information

The Criminal & Regulatory Enforcement practice group of De Brauw Blackstone Westbroek represents corporations and financial institutions in a wide range of criminal and regulatory matters. This practice group also conducts internal investigations for our clients and advises them on preventative measures and compliance programmes.

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