

LEGAL UPDATE

Polymakers, beware!

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On 6 March 2018, the Netherlands Authority for the Financial Markets (AFM) published two penalty decisions on its website with regard to daily polymakers. The suitability and integrity of all daily polymakers to be appointed at financial services providers must be assessed by the AFM prior to their appointment. The penalty decisions in question give a good insight into how the AFM deals with the group of persons to be screened. In addition, these penalty decisions show that the AFM does not shy away from taking action against persons effectively holding a managerial position ("feitelijk leidinggevenden") and co-perpetrators.

This issue essentially boils down to the following. The financial services provider in question had a formal director (under its articles of association) and a very influential major shareholder. The major shareholder owned 29.04% of the shares in the financial services provider by means of a holding company. This percentage was insufficient, however, to "automatically" require the assessment of his integrity as a co-polymaker of a financial services provider by the AFM. The formal director effectively had little to no influence on the business decisions at the financial services provider; the formal director was merely the company's figurehead towards the AFM. The managerial duties were performed by the major shareholder.

The AFM investigated the financial services provider, as well as the person(s) who made the daily policy decisions at the financial services provider. First of all, it should be noted that by definition, a formal director is always regarded as a *daily polymaker* by the AFM, regardless of the specific duties they have been allocated and regardless of whether they exercise the authorities that belong to the position of a formal director. In addition, the AFM applies a *look-through* approach. This means the AFM (also) considers those who *effectively* make *policy* decisions to be daily polymakers. Whether this is the case, can follow from the company's articles of association, internal rules, shareholder meetings and all other facts and circumstances.

Ultimately, it was determined that the major shareholder qualified as a *person effectively holding a policy-making position*. The AFM arrived at this conclusion based on the consideration that in practice the major shareholder acted as a director of the company instead of the formal director. In addition, the AFM considered that the major shareholder effectively made the daily policy decisions at the financial services provider and decided its strategy, and therefore managed the company. According to the AFM, this is not altered by the consideration that the major shareholder was entitled to a role within the company based on his capacity as a major shareholder and the authorisation granted to him. Because the major shareholder, as "a person effectively holding a managerial position", effectively managed this behaviour (and therefore the violation of the Financial Supervision Act (Wft)), the AFM imposed a penalty on the major shareholder in person. Therefore, (major) shareholders: if the duties you perform extend beyond the duties appropriate to your role as shareholder of the company, beware of the fact that you may qualify as a *person effectively holding a policy-making position*!

Another striking aspect of the case in question is that the penalty has been imposed on the formal director. The formal director has been penalised as a "co-perpetrator" (*medepleger*) with regard to the violation committed by the major shareholder. The administrative law standard set out in the General Administrative Law Act (*Algemene wet bestuursrecht*) is applied on the basis of concept under criminal law concept of "co-perpetrating".

A person qualifies as a co-perpetrator if they closely and deliberately collaborated with another person in perpetrating an offence. This qualification is justified only if the intellectual and/or material contribution to the offence by the person in question is of sufficient significance. The formal director was found to have closely and deliberately collaborated in perpetrating the offence because she (co)created the situation whereby on paper he was designated as the daily policymaker, whereas the major shareholder should have been designated as such, because he was effectively the daily policymaker. Therefore, the formal director directly (co)created the situation whereby the company was managed by a policymaker who had not been approved by the AFM. So the AFM has apparently considered the qualification as co-perpetrator justified, as the person in question performed a crucial role as a formal director. This is because the AFM holds that without the collaboration of the formal director of the financial services provider, the offence could not have been committed.

The matters outlined above should be a gentle reminder for financial institutions to keep a close eye on *who* makes the company's daily policy decisions. By doing so, a lot of misery can be avoided for policymakers. The AFM clearly does not shy away from taking action against “persons effectively holding a managerial position” (*feitelijk leidinggevend*) and “co-perpetrators” (*medeplegers*). In addition, it is important for formal directors of financial institutions to ensure that they (or their fellow directors) perform the duties that may only be performed by a formal director. If they fail to do so, and allow these duties to be performed by someone who has not been screened by the AFM as a policymaker, they may have to pay dearly.

This is a Legal Update from the Banking & Finance team.

For more information, please contact:

Frank Richel
+31 30 25 95 652
frankrichel@vbk.nl