

LEGAL UPDATE

Dutch Authority for the Financial Markets goes after persons with actual control

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Last month the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*) (“**AFM**”) once again published a [fining decision](#) that it imposed on the person who had actual control of the violations of a financial services provider. In our previous [Legal Update](#) we already wrote about the imposition of measures on the ‘actual policymaker’ and the person who qualifies as ‘co-perpetrator’ of the violation. Both in the fining decisions that we discussed in our previous Legal Update and in last month's fining decision the *person with actual control* qualification was required to go after the above-mentioned persons. This Legal Update briefly explains when there is a situation of actual control of a violation of a legal person and, consequently, when the AFM can go after natural persons.

Pursuant to settled case law there may be a situation of actual control of prohibited acts under circumstances if the officer (such as the daily or actual policymaker) fails to take measures to prevent such acts – even though he is authorised and reasonably obliged to do so – and deliberately accepts the significant chance of prohibited acts taking place. Incidentally, it is not required that the officer knew that the acts would constitute a violation by the legal person.

Qualification as a person with actual control requires more than ‘merely’ being an executive director of a legal person that committed a violation. The [Trade and Industry Appeals Tribunal](#) (*College van Beroep voor het Bedrijfsleven*) (“**CBB**”) does, however, state that if one or more of the actual main activities of the legal person consists of the prohibited act and an executive director has sole or independent authority to take decisions, the criterion that applies to actual control is met. According to the CBB an executive director is deemed to be aware of the main activities of the legal person managed by him and is reasonably obliged to take measures to prevent the main activities from being contrary to the law. If the executive director does not do so he accepts the chance that prohibited acts take place.

What is striking is the fact that in this case the daily policymaker raised a defence against the AFM's going after the daily policymaker by arguing that he is already financially prejudiced, since he is a shareholder of the legal person. The CBB's opinion in that respect is that the person with actual control and the legal person have rights and obligations independent from each other, so that a violation of the *ne bis in idem* principle does not apply, for instance. Nevertheless, it is possible that the person with actual control is financially prejudiced twice, because he is a shareholder of the legal person (which has also been fined by the AFM) and is punished twice in that sense. That is why the CBB is of the opinion that the assessment of the proportionality of the fine must take into account this (possible) ‘double’ punishment.

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