

# Rechtsbescherming bij bestuurlijke boeten : balanceren op een magische lijn?

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## Summary

The principal theme of this dissertation is administrative fines. They entail an unconditional obligation to pay a sum of money, intended to punish the offender. Administrative fines are imposed by an administrative organ without prior court intervention. They are governed by the General Administrative Law Act (*Algemene wet bestuursrecht* [Awb]).

This dissertation deals in particular with the question as to whether administrative law offers sufficient legal protection to (alleged) violators of administrative rules. With the introduction of the administrative fine, a traditionally criminal sanction has entered into administrative law. The author therefore also examines the question as to whether rules and principles of criminal law (ought to) apply with regard to legal protection in the case of imposition of administrative fines by administrative organs and judicial review of administrative fines. In view of the above, attention is paid to national criminal (procedural) law and conventional guarantees in the area of criminal (procedural) law. A comparison with the United States is also made.

The book comprises three parts. Part One, which consists of three chapters, deals with the imposition of administrative fines as has developed in the Netherlands. The rules governing fines proposed in the Fourth Phase Awb Draft Bill play a central role in this Part. Part Two, which is subdivided into four chapters, discusses the US rules governing administrative 'penalties'. This external comparison is followed by Part Three, which examines the question as to whether the rules proposed in the Fourth-Phase Awb Draft Bill (potentially) offer sufficient legal protection where punitive sanctions are imposed. Where such legal protection is defective, the author offers suggestions to the (Awb) legislator for improving the alleged offender's legal protection status.

### *Part I*

In Chapter 2 of Part One, a general theoretical and legal-historical framework is outlined, the core of which is formed by the nature and emergence of administrative fines. In addition to this, imposition of administrative fines is compared with both criminal sanctioning and imposition of other administrative sanctions. Attention is also paid to the type of norm violation that lends itself particularly to sanctioning by way of administrative fine.

The case law of the European Court of Human Rights (ECHR) (Chapter 3), in particular case law on the concept of 'criminal charge', is relevant in examining the question as to the substantive legal area under which imposition of administrative fines can be classified. In the Netherlands, much weight is attached to ECHR case law on legal protection in the area of administrative "fining". Since, on the basis of relevant ECHR case law, it may be assumed that the imposition of administrative fines must be seen as a 'criminal charge' within the meaning of Article 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the procedural guarantees ensuing from the article must be duly observed. Article 7 ECHR must be taken into account as well and national fining practice must also meet the requirements en-

coming from Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR). The author examines the way in which the ECHR gives meaning to the term 'criminal charge'. The Court's construction of a number of specific guarantees of criminal procedure is also discussed in this Chapter. The presumption of innocence, the *nemo-tenetur* principle (together with the right to remain silent), the *nullum crimen sine lege* principle, the *nulla poena sine lege* principle, the *lex certa* requirement and the principle that the offender must be given the benefit of a change in the law after the fact, if it involves the imposition of a lesser punishment, are discussed individually. Chapter 4, the final chapter of Part One, deals with past and future development of Dutch procedure relating to the imposition of administrative fines. Legal normalisation of procedures for the imposition of administrative fines and the legal protection of the (alleged) offender are the central themes here. The fine regulation as proposed by the Scheltema Commission in the Fourth-Phase Awb Draft Bill has been taken as a point of reference, because it may be seen as a general regulation in which most, if not all, aspects of existing Dutch regulations governing administrative fines have been laid down. Upon the coming into force of the Fourth Phase, the general provisions on the imposition of administrative fines laid down in the special statutes will disappear as a rule. In the same chapter, the proposed fine regulation is discussed and examined in the light of such fundamental procedural guarantees of (criminal) procedure as ensue from, for instance, Articles 6 and 7 ECHR and Articles 14 and 15 ICCPR. First, the author discusses whether the Scheltema Commission has given sufficient consideration to conventional guarantees, in particular those analysed in Chapter 3. Special attention is paid to those conventional guarantees that seem to have been insufficiently developed by the Commission. In addition to this, the author examines the question of whether, in view of the alleged offender's legal protection, administrative law offers a good basis for the imposition of punitive administrative sanctions, in particular administrative fines.

### Part II

The theme of Part II is enforcement of administrative fines in the United States. It consists of four chapters. In Chapter 5, general federal administrative law is discussed. The way in which these administrative fines are imposed is the subject of Chapter 6, whereby the safeguards to be observed under the fine regulation are also discussed. The question as to the degree to which constitutional (criminal [procedural]) guarantees must be respected is dealt with in Chapter 7. Chapter 8, finally, serves to take stock. Put briefly, in the United States administrative fines are not seen as a punitive sanction. This entails that (most of) the fundamental guarantees under US criminal law do not apply to the imposition of administrative fines. The conclusion that may be drawn from this is that the procedure for imposing administrative fines fails to provide for a number of fundamental guarantees existing in criminal law, which should be taken into account when imposing punitive administrative sanctions.

### Part III

In this Part, the author indicates whether, in her opinion, the legal protection provided under the regulation proposed in the Fourth-Phase Draft Bill is sufficient with regard to

imposing administrative fines (and other punitive administrative sanctions) in the Netherlands. Where the legal protection offered shows deficiencies, the author makes suggestions to the (Awb) legislator for improving the alleged offender's legal protection in relation to imposing administrative fines and other punitive administrative sanctions.

### *Conclusion*

The following may be inferred from Parts One, Two and Three: the enforcement deficit under the criminal law is an important motive, perhaps the most important, for lifting disposition of lesser breaches of the law out of the criminal law and placing it under the regime of the administrative law. Administrative fines were created as a result of the envisaged increase in administrative disposition of lesser breaches of the law. Administrative organs have the authority to impose punitive sanctions under special administrative statutes. In large part, this authority has been stripped of the impractical and time-consuming snags that plague criminal procedure. Efficiency and effectiveness of enforcement have been given priority, since administrative procedure does not include the (time-consuming) guarantees provided under the law of criminal procedure. There is no actual barrier in the Draft Bill against transferring the disposition of norm violations from criminal to administrative law. A criterion with sufficient distinguishing potential, making it possible to determine whether the sanctioning of norm violations can be taken out of the criminal law, is missing and therefore 'the violation's minor normative charge' criterion has been preserved. Only offences that are morally reprehensible cannot be taken out of the criminal law domain, since punishment for these offences must have a stigmatising effect. This effect will only ensue from (public) criminal proceedings.

According to the European Court of Human Rights (ECHR), administrative fines must be considered a 'criminal charge' within the meaning of Article 6 ECHR. This entails that the minimum guarantees ensuing from the Article, and the closely related Articles 7 ECHR and 14 and 15 ICCPR, must be taken into account when imposing administrative sanctions. This is acknowledged in the Draft Bill. In this dissertation, however, the question is posed whether the essential procedural guarantees provided under the criminal law apply regardless of conventional law. In this context, the author deals with the question of characterisation of administrative sanctions on the basis of substantive criteria.

From a procedural perspective, administrative fining is governed by administrative law. Nevertheless, it becomes immediately clear that imposing administrative fines differs fundamentally from administrative juridical acts usually performed by administrative organs; administrative fines show remarkable similarity to criminal sanctions. Essential feature of administrative sanctions is that they are aimed at punishing the lawbreaker. Other than reparatory sanctions traditionally featuring in administrative law, which are intended to restore lawfulness, inflicting suffering is a major objective of administrative sanctions of a punitive nature. The author contends that, because of its injurious nature, the administrative fine is part of administrative criminal law or of criminal law *per se*. This entails that, also divorced from conventional law, certain (fundamental)

principles<sup>1</sup> of criminal (procedural) law must be observed in imposing administrative fines.

Departing from this premise, the author examines the fine regulation as proposed in the Draft Bill. She concludes that in the proposed fine regulation the alleged offender's legal protection leaves to be desired in a number of (important) areas. This seems to relate to the fact that in the Draft Bill the Scheltema Commission takes the conventional minimum guarantees as its point of departure, whereas, in part for reasons of efficiency and effectiveness of enforcement, it defines these guarantees too restrictively in certain circumstances. The Draft Bill does not provide for unlimited application of criminal (procedural) law and its principles as laid down in Dutch national rules and regulations and in case law. Additionally, the Scheltema Commission places the fine regulation within general administrative law. In so doing, it fails to appreciate that the law of administrative procedure, the essence of which is lawfulness of administrative action rather than the criminal liability of the offender, cannot be applied without restriction in imposing such, originally criminal, punitive sanctions as the administrative fine. If the current rules of administrative procedure were applied, insufficient attention would be paid to important principles of criminal (procedural) law. For instance, the presumption of innocence, the prohibition against double jeopardy and evidentiary doctrines would have little impact. Furthermore, the administrative judge's conception of his current role is too restricted: as a result of his passivity, his too narrow view of how to compensate for the parties' inequality of arms, and his less intensive search for the concrete truth, the administrative judge cannot serve as a *punishing* judge under current administrative procedure.

It is to be preferred, therefore, that the possibility of imposing administrative fines be regulated in a separate statute. Such a statute must contain those rules of administrative (procedural) law on the basis of which the degree of legal protection relating to the imposition of administrative fines is at least equal to the (minimum) guarantees ensuing from the ECHR. In such a statute, both provisions of administrative (procedural) law and of criminal (procedural) law can be made applicable. In addition to this, certain aspects need to be expressly regulated. Attention should be paid, in any case, to aspects that under the current regulation have resulted in insufficient legal protection. On the basis of this new statute, administrative judges are to be afforded the same powers as criminal judges.

If newly regulated, fining procedure will be more complex. In order not to hamper efficient and effective enforcement, it is suggested that a possibility be created to offer administrative transactions to alleged offenders, so that readily establishable violations can be thus disposed of. If the alleged offender does not accept the offer, fine proceedings provided under for the proposed statute will be instituted. With the introduction of the transaction arrangement governed by administrative law, care must be taken, however, that the alleged offender's legal protection is sufficiently guaranteed. In particular, acceptance of such a transaction offer must not be based on apparent consent. The regulation proposed by the author is to be preferred over large-scale introduction of fines imposed by the Department of Public Prosecution.

1 As, for example, the *nulla poena* principle, rules governing concurrence, the prohibition against double jeopardy, the principle of legality, the *lex certa* requirement and the right to remain silent.