

The Netherlands

A Storm in a Teacup or Dark Clouds on the Horizon?

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I. Buzz in the Netherlands: changes in fines in the Dutch Commodities Act

The Dutch Commodities Act (DCA) is currently subject to major changes. The maximum administrative fine for violating the DCA is currently €4.500 per separate violation. Most recently, the Senate adopted a legislative proposal¹ which raises the maximum administrative fine to €810.000 per separate violation, more than 180 times the prior amount (!). This article focuses on the who, what, when, where and why of the changes in the DCA.

II. The intended purpose of this change: insight into the legislative procedure

Initially, the original proposal intended to raise the administrative fines from €4.500 to € 78.000 per violation. The most important reason for this proposal was the recent changes in the amount of the fines imposed based on the Social Affairs and Employment Act.² The Social Affairs and Employment Act is closely related to some subjects in the DCA. Therefore, it would seem logical to make the amount of the fines uniform. However, the original proposal declared the new fine applicable to nearly all violations

of the DCA. During the legislative procedure, the focus changed to food and product safety as a justification for the overall increase of the fines. The documents in the legislative procedure refer to the recent Dutch food scandals, such as the fish³ and horse meat issue⁴. The initial reason for the changes of the DCA seemed to slip into the background, while the protection of food safety became more and more prominent.

III. A sudden (and dramatic) increase in fines...

Due to the aforementioned developments during the legislative procedure, the amount of the proposed administrative fine also increased. The House of Representatives agreed that the maximum fine of €81.000⁵ would still not have a precautionary effect on large companies. Consequently, another amendment was adopted in order to raise the maximum from the fifth category⁶ (€81.000) to the sixth category (€810.000), which is a significant change. This change will be incorporated into article 32a, paragraph 2 DCA, and the Senate accepted the new proposal on 19 May 2015. When the changes will take effect, will be decided by Royal Decree.⁷

IV. ...and a justification for these changes

The Parliamentary Papers clarify that the highest administrative fines are only aimed at cases of *severe fraud* or *deception* and require an element of *intent* or *gross negligence* of the offender. From this information it follows that the fines that belong to 'lighter' violations of the DCA may remain unchanged.

According to the new article 32b, paragraph 1 DCA, the next step is that an annex to the DCA should be established by order in council. This annex should list all articles of the DCA that constitute a prohibi-

* Hoogenraad & Haak advocaten, www.hoogenhaak.nl.

1 Kamerstukken // 2014/15, 33775, 17. http://www.eerstekamer.nl/behandeling/20150414/gewijzigd_amendement_van_het_lid_2/document3/f/vjt5ikyh5wyx.pdf (only available in Dutch).

2 Kamerstukken // 2014/15, 33775, 3.

3 <https://www.nvwa.nl/actueel/waarschuwing/waarschuwing/2026521/waarschuwing-voor-producten-met-salmonella-besmette-zalm> (Only available in Dutch).

4 http://ec.europa.eu/food/food/horsemeat/timeline_en.htm

5 In the procedure, the proposed fine of EUR 78.000 was increased to EUR 81.000, (Kamerstukken // 2014/15, 33775, 7).

6 The maximum fines in the proposal correspond with the fine categories as laid down in the Dutch Criminal Code.

7 The Royal Decree has not yet been issued.

tion, and a corresponding (maximum) administrative fine. Most certainly, the maximum fine per violation will not exceed the maximum of €810.000. In the current version of the DCA, a similar annex exists. New in the prospective DCA is that the amount of the fines can be partly based on i) the number of employees, ii) the degree of culpability, and iii) the (partial) turnover of the company. In summary the amount of the maximum fines are increased by a factor of 180, but the exact fine that will be imposed will be calculated according to the specific situation. Generally, a governmental decree can be implemented autonomously, but the newly adopted article 32b, paragraph 2 DCA requires the previous consultation of the Parliament, the so-called soft, preliminary scrutiny procedure.⁸ This addition was proposed (and adopted) due to the fact that some elements of the new higher fines – such as the percentage of the turnover that will be used to calculate the fine – are still uncertain. It is therefore desirable that the governmental decree is laid before the full Parliament.

V. Reference to Economic Offences Act: criminal fines

Another change in the DCA is the reference to criminal fines, based on the Economic Offences Act, which can be applied in case of severe violations of the DCA. In some situations, a criminal sanction is more appropriate than an administrative fine. Crimi-

nal fines can be applied i) in case of wilful or reckless acting that constitutes a danger to human health or safety, or ii) when the height of the administrative fine is exceeded by the benefits of violating the DCA.

VI. Conclusion: huge change, but only a real threat to 'true bad boys'

There is no doubt that the maximum fine of violating the provisions mentioned in article 32a paragraph 1 DCA, will be increased to €810.000. The exact fine that can be applied in specific cases should be determined based on the order in council, which still⁹ needs to be formulated. We anticipate that the changes in the law (although accepted by the Senate) will not take effect before the order in council is composed. The most important reason is that only the order in council decides in which situations the highest fines are to be imposed. We assume that, due to the preliminary scrutiny procedure and the uncertainty of the calculation of exact fines, this may take some time. Based on the information of the Parliamentary Papers, the honest local grocery probably shouldn't fear the worst, unlike (large) companies with questionable intentions.

⁸ Kamerstukken // 2014/15, 33775, 18.

⁹ Note of the authors: at the time of writing the order of council still needs to be formulated.