Bijlage 6

English summary

Violations of regulatory law can be enforced through criminal or administrative law. Large differences exist between both systems when it comes to the maximum legal fine and the way a fine is being determined in a specific case. These differences do not solely occur between criminal and administrative law, but can also be seen within administrative law itself: currently, there are over 80 administrative fine systems, all with their own distinctive features.

Regarding the growing differences within the legal system, the Dutch government announced, in its Cabinet Note concerning the choice for an enforcement system (*Kamerstukken II* 2008/09, 31 700 VI, nr. 69, p. 12, *Kamerstukken I* 2008/09, 31 700 VI, D, p. 12), that a general framework concerning criminal and administrative fines in the different areas of regulatory law can be useful to "be able to argue, during the process of legislation, what the severity of a fine should be, so that it is coherent with the severity of fines in other areas of law". In addition, the *Enforcement Program 2011-2014 (Handhavingsprogramma 2011-2014, p. 31)* from the ministry of Social Affairs and Employment also emphasized that there should be more equality in the level of fines and the methods used to determine them.

In consideration of the above, the ministry of Security and Justice (more precise, the Research and Documentation Center of this ministry, *het WODC*) has asked the University of Groningen to find an answer to the following research question:

> *How are fines being determined in administrative and criminal law and how can more equality be ensured in the different fining systems?*

Firstly, by studying various statutes (for example the Penal Code and statutes containing systems of administrative fining), policy documents (for example directives of administrative bodies) and associated and secondary documents, a reconstruction could be made of the elements which determine the severity of fines and the design of the specific fining system. Subsequently, the outcomes of this study for administrative and criminal law were compared with each other.

The first conclusion that can be drawn after observing the results of the study is that the elements which determine the severity of fines in the two concerning areas of law correspond with each other. These elements are:

1. The nature of the offense, or the concerning legal interest.
2. The nature of the offender.
3. Realized profits, repair of effects and coherence with other penalty options.
4. Reoffending.

The second conclusion is that the operationalization of these elements by the distinguished legislators differs and that the choices made by these legislators are often not (sufficiently) motivated.

Furthermore, the following observations can be drawn:

Ad 1) The same types of interests (or legal rights) are protected by criminal regulatory law and administrative law. They mainly concern the collective interests of public security and integrity. In both fields of law these interests are of great importance for the system of determining fines.

Ad 2) When it comes to determining the severity of fine, in criminal as well as in administrative law, legal entities and individuals are treated differently. Especially in administrative law, fines imposed on legal entities can be significantly higher than fines imposed on individuals.

Ad 3) Both fields of law have a different approach on the effect that realized profits, repair of effects and the wish for coherence with other penalty options have on the severity of the fine. The differences within administrative law on this point are striking as well.

Ad 4) Prevention of repeat offending is in both legal areas a fine increasing element, but the way this is regulated in both systems varies. The consequence of (frequent) repeat offending for the choice between administrative or criminal enforcement differs.

Besides studying the four elements discussed previously, the research also focused on examining the design of fining systems. In administrative law there are, for example, systems with legally fixed fines, systems with policy fixed fines, open systems (without any regulation), and mixed systems. Just like the choice for the severity of a fine, the choice for a particular fining system is often not motivated by legislators and/or policymakers. The research shows that choosing a finding system mostly depends on the number of fines, the ministry that is responsible for developing the fining system and the clarity of the offence and the offender.

The general perception of the punitive enforcement of regulatory law on the subject of determining fines and fining designs is one of great diversity, even arbitrariness. This study eventually resulted in designing a framework, more specifically a checklist (for legislators) which pays attention to the four

elements that determine the severity of a fine and the different types of designs for fining systems. The checklist includes directives and examples illustrating general concepts, such as the effect that the nature of the offender has on the legal maximum of the fine (legal entity or individual as offender, the size of a legal entity, financial capacity) and the way the severity of a fine is influenced by discouraging repeat offending. These directives and examples can help the legislators determine the maximum legal fine and help them make a choice for a specific fining system (fixation of fines, developing an equation with different variables which lead to a fine, or setting a range in which a fine can be determined depending on a range of variables). This checklist in Dutch is included in one of the annexes of the report.

Besides the checklist other, more general recommendations are suggested:

a. Adjusting Article 23 of the Penal Code; introducing more flexibility in the various categories of fines.
b. Adapting administrative law to include the (adjusted) categories of fining defined in Article 23, paragraph 4, Penal Code and also adopting the system of indexation contained in Article 23, paragraph 9, Penal Code.
c. Introducing, as far as possible, equal rules of fining that aim to discourage reoffending in administrative as well as in criminal law, matching the current rules from the public prosecutor's office laid down in directives (these rules should involve the fine-increasing-percentage in the case of repeat offending, the period that is taken in account for repetition, et cetera).

Specifically, in administrative law rules can be made concerning the transition from enforcement through administrative law to enforcement through criminal law in the case of repeated reoffending.

When 'high-trust policy' (diminishing the intensity of supervision in exchange for the commitment of abiding the rules and increased fines when this trust is betrayed) is introduced in a fining system, it is wise to regulate this in directives of the administrative body.

Adjusting Article 23 of the Penal Code is recommended because the introduction of more flexibility in the fining categories makes it possible to impose higher fines, so that the criminal fines are (more) comparable with administrative fines.

Further research on the subject to introduce a basis in the Dutch Economic Offences Act for further standardization of fines in subordinate legislation is recommended. If this will be introduced, some of the sub-elements of determining fines which are currently regulated in directives of the public prosecutor's office can be laid down in statutory based rules. This matches the preference in administrative law for further standardization in administrative legislation, according to the principle of: 'fixating fines where this is possible'.

If the regulation of fines is consistently laid down in statutes or statutory based rules, this probably also leads to diminishing differences between administrative fining systems (where the administrative judge reviews the decree

of the administrative body and has to respect the discretion of the administrative body as well as the directives from the administrative body which deals with the given discretion) and the fine imposed by the public prosecutor's office (where the criminal judge, as a sole decider, can shun such considerations). The points of interest and the recommended direction for solutions that this study has produced can therefore also be useful in the further reconciliation between administrative fining systems and fines imposed by the public prosecutor's office *(strafbeschikking)*.

Finally, an important point to be kept in mind is that no matter which maximum legal fine and fining system is chosen, the result should always be a *proportionate* fine.