

# Bestuurlijke boetes en de Verklaring Omtrent het Gedrag

*Een onderzoek naar de realiseerbaarheid en wenselijkheid van het betrekken van bestuurlijke boetes bij de VOG-screening aan de hand van een casestudy naar handhaving en integriteit in de financiële sector*

Dr. mr. E.G. van 't Zand  
Prof. mr. dr. J.H. Crijns  
Prof. mr. dr. P.M. Schuyt  
Prof. mr. dr. M.M. Boone  
Mr. dr. M.L. van Emmerik

Met medewerking van:  
Mr. I. van der Steen  
L. Verlinde





# Summary

## MOTIVATION AND RESEARCH QUESTION

The Dutch Certificate of Conduct, known as the *Verklaring Omtrent het Gedrag* (VOG), is a form of background screening that is aimed at preventing breaches of the integrity of vulnerable persons, businesses, organisations or sectors. Since 2004, when the processing of applications for the certificate of conduct was assigned to the central screening authority Justis, this preventive instrument has become widely integrated in Dutch society. Over the past fifteen years, the number of applications each year has risen sharply, from over one hundred thousand to over one million. In response to certain incidents, the screening process for certificates has been tightened a number of times, for sex offenders for instance, or extended, to include continuous screening for childcare employees and taxi drivers. The request to expand screening to include additional sources of information, such as police data and administrative fines, has also been on the political agenda on several occasions. Up to now, however, the screening process for the certificate of conduct has entailed the investigation of an applicant's conduct based on judicial documentation, i.e. having a criminal record or not. A certificate can only be refused because of a criminal offence, which, in view of the risk to society, would stand in the way of the purpose of the application.

The use of both the certificate of conduct and the administrative fine (*bestuurlijke boete*), a sanction introduced in the 1990s, have soared since their implementation. In recent years, this has led to a debate on the extent to which differences between enforcement of legislation under criminal law and enforcement under punitive administrative law – more in particular the administrative fine – are justified. In 2015, the Advisory Division of the Council of State in the Netherlands stated in an unsolicited, critical opinion: 'What is currently most evident – in contrast to what was originally the intention of the administrative fine – is the fact that serious, complex offences are threatened with heavy administrative fines, and that heavy fines are imposed on relatively minor offences.'<sup>1</sup> Thus, it can be questioned to what extent it is desirable to maintain the current policy where administrative fines, *however heavy*, are never included in the screening for the certificate of

---

1 See Advisory Division of the Council of State, Opinion of 13 July 2015, W03.15.0138/II, *Stcr.* 2015, 30280, p. 1.

conduct, but criminal-law sanctions, *however minor*, can in principle always be taken into account. This study focusses on providing an answer to the following central research question.

**Central research question.** To what extent is it feasible and desirable to include administrative fines in the screening process for a certificate of conduct?

## RESEARCH METHODS

The main research question has been divided into five sub-questions. To answer these separate questions, a combination of legal and empirical research was chosen, with an emphasis on consultations with organisations and authorities active in the field. Using qualitative research methods (a focus group and interviews) to collect information on experiences and perceptions acquired in practice, an attempt has been made to formulate important criteria, points of view and the parameters that are of significance to the research question. Considering the great diversity in administrative fines (see section 4), a case study was selected to focus the empirical research. A sector was sought where enforcement by means of administrative fines, besides criminal-law sanctions, was expected to be prevalent. The *financial sector* was chosen for two reasons. First, a large number of offences that occur in the financial and economic sphere can be dealt with under both administrative law and criminal law, and the number of offences concerning regulatory legislation that are being criminalised continues to rise.<sup>2</sup> Second, in the financial sector in particular, serious breaches of standards can occur that have a substantial normative dimension, in response to which very heavy administrative fines can be imposed.

The financial sector turned out to be a good choice for the case study. We could involve a large number of relevant authorities in the research, and were thus able to establish a broad and in-depth picture of a specific sector. In total, we spoke to 28 people from 16 different organisations and departments. These organisations were: 1) screening authority Justis and the departments COVOG, LBB and TRACK within Justis; 2) regulatory and enforcement organisations (ACM, AFM, Tax authorities, BFT, DNB); 3) professional and trade associations (Adfiz, DSI, NBA, NOB, Foundation for Banking Ethics Enforcement (*Stichting Tuchtrecth Banken*)); 4) other relevant organisations (FEC, iCOV, Ministry of Finance).

---

2 See Advisory Division of the Council of State, Opinion of 13 July 2015, W03.15.0138/II, *Stcrf.* 2015, 30280, p. 3.

The authorities participating in the research were asked how they enforce administrative fines and how they assess integrity in practice; and more in particular which objectives, case-related considerations and practical aspects play a role in this respect. Their responses provided highly relevant information, not only on the practice in imposing administrative fines, but also on the possibilities all authorities have to review the integrity of financial professionals or companies, and how they act when unethical behaviour is identified. The interviews with experts from these organisations not only provided rich insights and examples from practice on the way in which the various authorities conduct their tasks, but also about how these authorities work together. Cooperation occurs on a large scale based on covenants and collaborative arrangements that aim to promote and safeguard the integrity of professionals and companies in the financial markets. Although the case study on the financial sector did not provide information that can simply be generalised to apply to other sectors where administrative fines are used to discipline breaches of standards, the information acquired from the thick description of the financial sector can certainly provide angles that could be applied in the same way to these other sectors and other types of fines. In view of the considerable differences found in the financial sector in enforcement of legislation through the imposition of fines and the review of integrity, it can also be expected that if information, perspectives and conditions from other sectors are also included in the analysis, this answer will become even broader.

## CERTIFICATE OF CONDUCT

**Research question 1.** What are the underlying objectives of the screening process for a certificate of conduct?

Legislation aimed to achieve two objectives with the current certificate of conduct: on the one hand, *crime prevention* and on the other hand, *protection of privacy* (of persons registered in the Criminal Records System). These objectives translate into policy and practice as the prevention of risks to society while offering people with a criminal record the opportunity to reintegrate in society. When it comes to crime prevention, since 2004 a more important role has been assigned to the certificate of conduct through two important changes in the law. First, by always processing applications that involve an employment relationship, whether paid or unpaid. Second, by including in the assessment not only final convictions, but also other judicial data, such as pending cases, decisions not to prosecute and out-of-court settlements (*transacties*). In the past fifteen years, these amendments have contributed visibly to this type of background screening occupying an important position in society. Research on the certificate of conduct, however, has not kept up with these developments and it is largely unclear to what extent this instrument is actually effective in limiting risks to society. Up to now, only

one evaluation study focused on the impact and it established that refusing to issue certificates of conduct only has a limited effect on recidivism.

Opportunities for ex-convicts to re-integrate in society appear in theory to be mostly safeguarded through the protection of privacy, since third parties – for example, employers, business relations, volunteer organisations, firms offering internships or rental companies – in principle are not given access to a person's criminal past. In practice, however, resocialisation opportunities appear to be limited to a certain degree. The need to provide a certificate of conduct for an increasing amount of jobs has led to processes of self-exclusion that should not be underestimated. People with a criminal record avoid applying for a certificate of conduct because they fear they will be rejected. One aspect that contributes to this is that it is not clear which criminal records (including type of offence and manner of disposal) risk rejection for certain jobs. Certificate of conduct policy has been broadly formulated and offers such a wide scope for assessment in individual cases, that a grey area exists that causes uncertainty about which persons, in which circumstances, have the chance of securing a specific job.

#### ADMINISTRATIVE FINE

**Research question 2.** What types of administrative fines can be imposed, by which administrative authorities, and what is the level of these fines?

It is clear that the use of the administrative fine – a punitive sanction requiring payment of a certain amount of money – has soared in recent decades, to the extent that it has become an indispensable enforcement instrument for many administrative authorities. An overview of types of fines has provided this study with part of the answer about the types of fines that exist, for what offences and on whom they are imposed, the authority competent to impose them and the maximum fine possible. We have seen that a wide variety exists in administrative fines, both in relation to the offences, the administrative authorities involved and the maximum level of fines. Providing a full and up-to-date overview of authorities allowed to impose fines, and the offences for which they can be imposed, has proven to be a nigh on impossible task. The authorities that can impose fines and the offences for which they can be imposed are laid down in numerous special administrative acts. It is not always easy to find out who is competent to impose the fines, since at the level of the official legislation it is often the responsible minister designated to be the official competent authority. To discover which administrative authority exercises this competence in practice requires a more extensive study of the secondary legislation. What the overview of fines does tell us, though, is that all kinds of administrative authorities are involved.

In relation to the level of these fines, the statutory maximum as such does not indicate much about the sums imposed for administrative fines in practice. The level of the fine depends in specific cases on the seriousness of the offence, the extent of culpability and the circumstances under which the offence was committed. At the same time, the offender's ability to pay the fine must be taken into account. It is clear that this enormous variety in practice concerning these administrative fines makes it difficult to refer to *the* administrative fine in general terms. It is also not easy to provide an answer to the question of whether and to what extent it is feasible and desirable to include administrative fines in the screening process for the certificate of conduct.

#### INTEGRITY AND ENFORCEMENT IN THE FINANCIAL SECTOR

**Research question 3.** How is enforcement implemented through fines and integrity assessed in practice, and what objectives, case-related considerations and practical aspects play a role?

##### *Imposition of fines in practice*

The empirical findings of the study have established that there are three important aspects regarding the imposition of administrative fines by regulatory authorities, which could be considered relevant for other sectors besides the financial sector. First of all, the position of the administrative fine within the broader set of regulatory instruments. Within the overall enforcement process, various official and unofficial measures can be imposed that precede or substitute the imposition of a fine, so that merely including administrative fines in the screening for the certificate of conduct will certainly not ensure that all relevant information about a person's conduct is covered in the assessment. Second, many different substantive as well as pragmatic considerations play a role in the process of deciding to impose a fine. So by no means all offences that could potentially be considered for an administrative fine are actually settled as such. Moreover, in some cases the choice is made to impose a fine on a business, which means that it cannot easily be traced back to an individual, or at least not without extensively examining all past records. Third, the seriousness of the offence and extent of culpability on which the various types of fines are based can vary greatly. Thus, the value of an administrative fine can only be assessed properly if the circumstances and conduct upon which it is based are also considered. These observations lead to the conclusion that when considering enforcement under administrative law, many types of authorities are involved which implies that *the* administrative fine, as a general term, is no simple or clear-cut exercise.

### *Assessment of integrity in practice*

Subsequently, an overview is provided of the integrity requirements already in place and the mechanisms for both regulatory and professional organisations in the financial sector to safeguard these. It appears that these organisations can consult various information sources to assess integrity. Regulatory authorities share data on a structural and frequent basis, including alliances such as consultations between market regulators Infobox Criminal and Inexplicable Assets (iCOV) and the Financial Expertise Centre (FEC). The professional bodies and disciplinary tribunals that operate under civil law are very much dependent on notifications they receive from members or people who have been screened, and whether or not they are provided with a certificate of conduct. Even though there is no direct exchange of information between regulatory authorities and professional associations, the can report on regulatory offences base on cooperation agreements as well as by submitting disciplinary complaints. However, in practice this latter option is not frequently used, at least according to the respondents who participated in this research. It can therefore be concluded that although various channels do exist to raise violations concerning integrity – in this case of financial professionals – in practice, these channels are by no means fully utilised.

### FEASIBILITY AND DESIRABILITY

**Research question 4.** To what extent can including information about administrative fines in the screening for the certificate of conduct be considered feasible?

**Research question 5.** To what extent can including information about administrative fines in the screening for the certificate of conduct be considered desirable?

- a. To what extent can this contribute to the objectives of the screening?
- b. To what extent do normative considerations play a role in this respect?

### *Feasibility*

The research question about the feasibility of involving administrative fines in the screening for the certificate of conduct, points of view has been looked at from both empirical and practical perspectives. The practical feasibility would appear to depend on a number of matters: numbers (the more fines, the more difficult it becomes to exchange data); whether fines are published or not; the willingness to share, centralise and/or hand over ownership of data; and, not to be underestimated, the possibilities that ICT systems can offer. Since it has been established that possibilities already exist for extensive data exchange between authorities included in this research, it would appear that information could be shared in a similar way with the Central Agency for the Certificate of Conduct (COVOG), a department within the

screening authority Justis. For this purpose, it is essential that a legal basis is created for the competent administrative authorities to share data with COVOG, as well as for COVOG assessment of the data, a process that requires observance of privacy safeguards.

One important practical obstacle, however, is that at present there is often no clear central or decentral registration system for administrative fines. In practice, data exchange occurs in three different ways: fully automated, structured and incidentally. Fully automated access to registration systems – the current practice in the certificate assessments by consulting the central Criminal Records System (JDS) – is not yet feasible, since no central systems exist in which the wide range of administrative fines can be directly consulted. On the other hand, regulatory authorities indicate that if administrative fines are published on their websites, and can be specifically traced back to a person or legal entity, in principle there are no obstacles to COVOG having access to this information. It can be concluded that although many obstacles still exist, these can be levelled – insofar this is considered desirable.

### *Desirability*

According to the empirical study, the desirability to expand the screening process for certificates of conduct to include administrative fines can be divided into arguments that are related on the one hand to the efficiency and effectiveness of such an expansion, and on the other hand, to normative considerations that are relevant for this purpose. In relation to efficiency, the aspects surrounding the imposition of fines discussed above have certain implications. We have observed, for example, that the seriousness of the violation and the culpability of the offender can only to a limited extent be derived from the level of the fine imposed. In addition, a number of policy and pragmatic considerations play a role in the selection process that might lead to the imposition of an administrative fine. Since the monitoring process and enforcement practice of the different authorities varies so much, no clear significance can be attached to the administrative fine if this were to be included in the assessment for the certificate of conduct and considering administrative fines in this process will be a complicated exercise. In order to create the desired clarity and transparency for certificate assessors, but also for interested third parties such as employers, business relations or commissioning authorities who must be able to trust the assessment, background knowledge of the monitoring process and enforcement practice for each different type of fine is necessary.

Subsequently, when considering effectiveness, it should be established to what extent the empirical study has revealed incidents, which – as a result of expanding the screening for the certificate of conduct to include administrative fines – could possibly have been prevented. From the empirical study, only very few cases came forward with regard to people, professions or sec-

tors of which it could be suggested that problems related to integrity could have been addressed if administrative fines had been taken into account in the screening process for the certificate of conduct. As such, examples could only be provided in hypothetical terms, it should be concluded that there are very few concrete situations where specific incidents could have been prevented by expanding the screening for the certificate of conduct.

Nevertheless, the empirical study did reveal that for four overarching groups of positions, the certificate of conduct could be a valuable addition to the existing range of instruments, which could be expanded beyond the financial sector alone. These are: 1) management positions, up to just below the top tier in an organisation; 2) positions at government institutions, including regulatory authorities; 3) positions where the interests of clients are paramount and at risk of being damaged because clients are misled or customer information is misused; 4) self-employed people, who would not be concerned with obligations related to the certificate of conduct due to the nature of their position.

Turning to the question of to what extent the expansion of the screening for the certificate of conduct to include administrative fines could be a valuable addition to the existing range of instruments in relation to the assessment of integrity, it can be concluded that in principle this could provide useful information to acquire a good picture of the integrity of persons or businesses. However, no clear answer can be given to the question whether, and to what extent, including all administrative fines or certain fines in the screening for certificates could be a useful or potentially effective addition to the existing range of instruments for promoting integrity, in this case within the financial sector. Since there are no clear signs that this would indeed be the case, for the time being it must be concluded that this is not so.

Finally, normative considerations also have a part to play in answering the question concerning desirability, in particular in relation to privacy, proportionality and the legal position and protection of people imposed with a fine. Taking the approach 'the more information, the better', opens up the discussion about the protection of privacy and the proportionality of an imposed fine. It should be considered to what extent the refusal of a certificate of conduct based on an administrative fine could lead to additional 'punishment'. From the perspective of the legal position and legal protection, punitive administrative law requires that citizens should be sufficiently aware of the consequences a fine could have. Partly in view of the above, one important condition for refusing to issue a certificate of conduct because of an administrative fine, is considered to be that the administrative fine in question is irrevocable.

## ANALYSIS AND DISCUSSION

### *Alignment with the system for the certificate of conduct*

The above findings in relation to feasibility and desirability are subsequently considered in the light of the current system for the certificate of conduct. This helps in determining whether, and to what extent, the criteria and parameters arising from the empirical study for including administrative fines in the certificate screening are in line with the current policy and practice in assessments. Proceeding based on the primary objective of the certificate of conduct, which is prevention of risks, including administrative fines could in theory be in line with this. The criterion to process an application for a certificate – limiting risk to society – is not clearly specified in the policy rules on the certificate and can thus be broadly interpreted. However, at present no legal basis exists to include administrative fines in the assessment process, whether or not as a separate ground for refusal. Accordingly, this basis would first have to be established before administrative fines could be included in the screening process for a certificate of conduct.

The way in which information on fines could then be shared with COVOG, is however not in line with current procedures, since there is no directly accessible, central registration system, which can be consulted. A request to recover relevant information in each individual case would not only prolong the processing time for a certificate assessment considerably, but it would also not provide the same reliable basis as the Criminal Records System, which an assessor can at all times consult without depending on other authorities for the prompt provision of the necessary information.

In addition, the parameters drawn up in practice on the possibility to consider administrative fines in the screening process, in particular considering the seriousness of the offence from background facts and conduct, appear not to be in line with the current assessment system. Not only can almost all criminal records at present be viewed as constituting a risk to society, in principle, no further investigation is performed about the offence or extent of culpability. The seriousness of the risk is mainly assessed in line with what is expressed about the offence in the severity of the sentence imposed. In principle, the certificate assessor only refers to the sentence imposed by the criminal court or the Public Prosecutor and so the background facts and circumstances to a case are not normally included in the assessment. If the intention now is to suddenly pull out all the stops, as it were, by including administrative fines in the screening process for the certificate of conduct, this will inevitably lead to substantial differences with the way in which criminal records are considered at present.

Finally, the results of the empirical study show that many possibilities already exist for the exchange of information, for example additional measures that were imposed on an offender via disciplinary proceedings, but this option is little used in practice. Consequently, not only potential effectiveness, but also efficiency by possibly including administrative fines in the scope of the certificate screening, will be limited. However, it cannot be ruled out that once the screening process has been expanded to include administrative fines, this form of background screening will take off as the certificate of conduct itself did over the past fifteen years.

### *Conclusion*

The results of the legislative research and the empirical study in the financial sector provide a balanced answer to the central research question on the feasibility and desirability of including administrative fines in the scope of the screening for the certificate of conduct. On the surface, the answer appears fairly simple: the more information included in the screening process, the more complete the picture that can be gained about a person's conduct. This would therefore seem to point in favour of including administrative fines in the screening process. A second argument in favour of this lies in developments in recent decades where a certain overlap has arisen between punitive administrative law and criminal law, so that it is difficult to justify drawing a clear line to separate these areas of law in the certificate of conduct policy. After all, though not originally intended, administrative fines are now also imposed for serious, complex offences and – compared to sanctions under criminal law – can be very severe indeed.

On the other hand, this research has also established that there are clear arguments to consider the a priori desirability of including administrative fines in the screening for the certificate of conduct in a different light, and that including these fines will also encounter a number of practical issues. Respondents who participated in the research pointed out many aspects related to imposing fines in practice, stressing that it is not at all evident that including administrative fines in the screening process would lead to a more reliable basis to assess an applicant's integrity. One practical obstacle, for example, is the fact that there are currently no clear central or decentral registration systems for administrative fines. In addition to this, from the perspective of effectiveness it is desirable that administrative fines are included in the screening from the moment they are imposed. From the perspective of legal protection of the applicant, however, it is more obvious to include them only when they have become final. This latter option, however, could clearly undermine effectiveness. Finally, the question remains how officials at COVOG can view the substance behind administrative fines in practice, so that they only consider the fines that are indeed a reliable indicator of the risk of a repeat offence.

This leads to the observation that many of the abovementioned points that question including administrative fines in the screening process, in essence also apply *mutatis mutandis* to the current system for the certificate of conduct. Many of our respondents fear that in practical terms, there will be a lack of nuance in the manner in which administrative fines are included in an assessment. Moreover, some, less serious, administrative fines add very little to the information about the integrity of the offender and their soundness for working in specific sectors in the future. Such reservations could also be made concerning the current system for the certificate of conduct, since in principle, all criminal-law sanctions – however minor – are included in an assessment, and it is left to the discretion of the certificate assessor to decide whether, and to what extent, they decide to dig deeper when estimating a risk.

In a sense, our findings hold up a mirror to the current system for the certificate of conduct and the assessment practice based on it: why, in the case of administrative fines, carefully decide which fines may be included in the screening, while criminal-law sanctions in principle are always included in a screening? The outcomes of the research also reflect on the use of administrative fines: it appears that this sanction has developed at such a rapid pace in recent decades that a case could be made for including certain administrative fines in the screening for the certificate of conduct. That said, as a result of this proliferation of administrative fines and the resulting wide range of fines, this does not appear to be a feasible option.

This leads us to the final conclusion that including administrative fines, or at least some administrative fines, in the screening process for the certificate of conduct could, in some cases, be considered desirable. However, at the moment too many objections still remain to provide tangible substance to this *a priori* desirability in a clear and workable arrangement. At present, there is also little clarity about the effectiveness of the current system for the certificate of conduct, let alone about the possible effectiveness that could be achieved by expanding the screening process to include administrative fines, or at least certain fines. Viewed from this perspective, it would seem to be a better option to, once again, first take a good, critical look at the current system for the certificate of conduct, and only then to answer the question whether and to what extent including administrative fines in the screening process would provide a useful addition and, if so, how this could be implemented.

