

FINNIUS

Warnings as supervision-relevant antecedents

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The Dutch supervisors, the Netherlands Authority for the Financial Markets (“AFM”) and the Dutch Central Bank (“DNB”), can issue warnings to financial undertakings in response to violations they have detected. These are informal measures against which no appeal (nor to the supervisor itself nor in court) can be made. This is because these measures do not qualify as a decision within the meaning of the General Administrative Law Act (“Awb”). However, they do qualify as ‘supervision-relevant antecedents’ for all board members and supervisory directors of the undertaking that received the warning. In practice we see that the AFM, when issuing a warning, emphasizes that it qualifies as supervision-relevant antecedent. These informal measures have an important side effect for the board members and supervisory directors involved.

These persons are assessed by the AFM and DNB on their trustworthiness and suitability. During this assessment, the supervisors look at (among other things) the collection of antecedents of the board member or supervisory director concerned. If the trustworthiness of the person assessed is not beyond doubt or the suitability is insufficient, the supervisors will decide negatively and the person concerned may not be appointed. For active board members and supervisory directors, a changed or new antecedent can even lead to a reassessment. It would not come to that with a warning alone, but with several antecedents the result could be otherwise. The fact that warnings are considered in the assessment while no discussion over the warning itself is possible, in practice leads to frustration and incomprehension of board members and supervisory directors. The warning sticks to them as supervision-relevant antecedent during their whole further career within the financial sector.

The Administrative Jurisdiction Division of the Council of State recently asked the State councillor to write an opinion on when must the administrative warning be considered an appealable decision. State councillor Advocate General Widdershoven states in his opinion that a warning that isn’t based on a statutory provision cannot be a decision within the meaning of the Awb. Additionally, he briefly discusses the warning in the context of an antecedents review. He believes that the lawfulness of a warning can be brought to court in the proceedings against the decision from which the consequences of the assessment surface, and does not consider this route to be disproportionately onerous. Legally speaking, that is correct. Unfortunately, it does not remove the understandable frustration of board members and supervisory directors.

The question remains whether the administrative judge will review the lawfulness of the warning on its merits during such a procedure, taking into account the role of the in principle marginally assessing judge. This requires that the respective person has to make a formal, negative judgment, while practice shows that one tries to avoid this at all costs. Furthermore, it can be difficult for the respective board member or the supervisory director to demonstrate that there was no violation with an unlawful warning as a result, or to demonstrate that he or she was not personally involved in the violation. The facts can be years old by then and it may also be that the board member or the supervisory director is no longer employed at the respective undertaking and therefore has no access to information or evidence.

The Advocate General has considered in its opinion that it must be possible to dispute informal warnings if (among other things) the term during which the warning may have negative effects is such that an interested party, having regard to the violation being under discussion, can no longer effectively dispute the lawfulness of the warning in the legal proceedings against the administrative sanction to be imposed from the point of view of evidence. To prevent lack of evidence and for reasons of legal certainty, according to the Advocate General a maximum term of (as a rule) two years must apply for these warnings. This might meet the said practical objections to some extent. Applied to the warning as supervision-relevant antecedent, this could mean that a warning does not qualify anymore as such after said term (and therefore should also be removed from the Directors monitor of the AFM and DNB). The opinion is addressed to the Administrative Jurisdiction Division, but is not binding. The ruling of the Administrative Jurisdiction Division is expected this spring.

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