

## **NMa policy rules on administrative fines under transport legislation**

The Board of the Netherlands Competition Authority;

Having regard to Sections 75 and 76, paragraph 2, preamble and under a, of the Dutch Railway Act, Sections 8.25h, paragraph 7, and 11.21 of the Dutch Aviation Act, Sections 45f, paragraph 1, preamble and under a, 45g, paragraph 1, and 45h, paragraph 1, of the Dutch Pilotage Act, and Sections 4:81, 5:1, 5:5, 5:8, 5:41 and 5:46, paragraph 2, of the General Administrative Law Act,

Decides:

### **Article 1 Definitions**

The following definitions apply to these policy rules:

- a. Board: the Board of the Netherlands Competition Authority, as mentioned in Section 1, under c, of the Dutch Competition Act;
- b. annual turnover: the net turnover, which is the revenue from the sale of goods and services, deducted by discounts and the like, and deducted by turnover taxes;
- c. starting point of the fine [*boetegrondslag*]: if the offender is an undertaking, the starting point of the fine is an amount based on the annual turnover, or, if the offender is a natural person, it is an amount that is based on the seriousness of the violation and on the income and assets of the offender, which acts as the basis for determining the level of the administrative fine;
- d. basic fine [*basisboete*]: the amount determined by the Board resulting from application of the starting point of the fine.

### **Article 2 General assumption**

The Board sets an administrative fine at such a level that, as part of specific prevention, it acts as a deterrent for an offender against committing another violation, as well as that, as part of general prevention, it acts as a deterrent for other, potential offenders against committing the same, or any other violation.

### **Article 3 Procedure**

1. The Board sets the level of an administrative fine, based on the starting point of the fine, which will be determined on a case-by-case basis.
2. After the starting point of the fine has been determined, the Board will set the basic fine.
3. The Board will then look into any aggravating or mitigating circumstances, and it will determine whether these could reasonably lead to either an increase or a decrease of the basic fine.
4. Contrary to the previous paragraphs, the Board can impose a symbolic administrative fine, should special circumstances call for such a fine.

### **Article 4 Calculating the fine**

1. The Board determines the starting point of the fine using the offender's annual turnover of the financial year preceding the year in which the offender has received the decision imposing the administrative fine on the offender.

*Please note that the following translation is given for convenience only.  
The original decision in Dutch is the authentic version.*

2. The Board uses the annual turnover earned in the Netherlands, unless this, in its opinion, would not result in an appropriate fine.
3. In cases where the Dutch Pilotage Act is violated, the Board, in determining the starting point of the fine, may use the joint annual turnover of the undertakings, as designated under Section 15a, paragraphs 2, and Section 15b, paragraph 1 of the Dutch Shipping Traffic Act.
4. When geographically apportioning the annual turnover, the Board conforms to the European Commission's Notice of July 10th, 2008, titled 'Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the Merger 'Regulation')' (OC C95 of 16.04.2008, pages 1 - 8).
5. If the Board is unable to establish the offender's annual turnover based on information provided by the offender, the Board may instead use an estimate thereof.
6. The Board uses a certain permillage of the annual turnover as starting point of the fine. The level of this permillage depends on the categorization of the violation in question. The Annex to this decision lists which category a certain violation will fall under. Each category has a minimum fine level in order to avoid that the corresponding permillage will result in too low a starting point of the fine based on too low an annual turnover.

category I	0.25 ‰ (permillage) of annual turnover	minimum fine: €2,500
category II	0.75 ‰ (permillage) of annual turnover	minimum fine: €5,000
category III	1.5 ‰ (permillage) of annual turnover	minimum fine: €10,000
category IV	2.5 ‰ (permillage) of annual turnover	minimum fine: €15,000
category V	7.5 ‰ (permillage) of annual turnover	minimum fine: €25,000
category VI	15.0 ‰ (permillage) of annual turnover	minimum fine: €50,000

7. If the Board is not satisfied with the category the violation in question has fallen into as a result of the categorization, it may instead use the category above or below the original category.
8. For calculation purposes, if the annual turnover in question exceeds €500,000,000, the Board will add to the initial €500,000,000, ten per cent of any turnover from €500,000,000 up to €1,000,000,000, and one per cent of any turnover in excess of €1,000,000,000.
9. The Board determines the basic fine by multiplying the starting point of the fine by a factor (S) for the seriousness of the violation. This factor (S) reflects the degree to which the violation has harmed the interests that the violated provision in question aimed to protect. Factor (S) has three degrees: very serious, serious, and somewhat serious. Depending on the seriousness of the violation, the Board will assign this factor (S) a value of up to 5.

#### *Article 5*            **Calculating the fine in the case of natural persons**

1. The Board determines the starting point of the fine, based on the violation's seriousness as well as on the offender's income and assets. The starting point of the fine is also the basic fine.
2. If the Board is unable to establish the offender's correct income and assets based on information provided by the offender, the Board may instead use an estimate thereof.
3. The starting point of the fine lies within the following ranges:
  - a. €10,000 - €200,000:
    - 1°. A violation of Section 5:20 of the General Administrative Law Act;
    - 2°. Giving instructions or exercising de facto leadership resulting in a violation of Section 8.25h, paragraph 3, of the Dutch Aviation Act;

*Please note that the following translation is given for convenience only.  
The original decision in Dutch is the authentic version.*

3°. Giving instructions or exercising de facto leadership resulting in a violation of Section 45h, paragraph 1, of the Dutch Pilotage Act.

b. €50,000 - €400,000:

1°. Giving instructions or exercising de facto leadership resulting in a violation of (the provisions laid down by or under) Sections 17, paragraph 1, preamble and under d, 27, paragraph 1, 57 through 62, 63, paragraph 1, and 67 of the Dutch Railway Act;

2°. Giving instructions or exercising de facto leadership resulting in a violation of (the provisions laid down by or under) Sections 8.25d, 8.25e, 8.25f, paragraphs 3, 5, 6 and 7, 8.25g, paragraphs 1 – 5, 8.25ga, and 8.25h, paragraphs 1 and 3, of the Dutch Aviation Act;

3°. Giving instructions or exercising de facto leadership resulting in a violation of (the provisions laid down by or under) Sections 27c, 27i, 27j, 27k, 27l, paragraph 1, 45c, paragraph 2, of the Dutch Pilotage Act.

#### *Article 6*            **Mitigating or aggravating circumstances in connection with the fine**

1. An aggravating circumstance is, in any case, a circumstance in which:

a. the Board or another authorized body, including a judicial body, has already earlier and irrevocably established the same or a similar violation committed by the offender;

b. the offender has obstructed the Board's investigation.

2. In case of recidivism, as referred to in the previous paragraph, under a, the Board will increase the basic fine by 100 per cent, unless such an increase would be considered manifestly unreasonable.

3. A mitigating circumstance is, in any case, a circumstance in which:

a. the offender has offered the Board more cooperation than he/she was legally required to;

b. the offender has suspended the violation of his/her own accord – more importance is attached to the situation where the offender has suspended the violation of his/her own accord before the Board has launched an investigation rather than the situation where the offender has suspended the violation after an investigation had been launched;

c. the offender has compensated of his/her own accord those that have been harmed because of the violation.

4. When applying Article 5, paragraph 3, preamble, under a, sub 2 or 3, or under b, the Board, when considering mitigating or aggravating circumstances, may also take into account the degree of involvement on the part of the natural person in the violation, as well as his/her position within the organization/company he/she is or has been employed with.

#### *Article 7*            **Determining the level of the administrative fine**

1. The Board determines the level of the administrative fine, taking into account the following:

a. the statutory maximum fine;

b. these policy rules;

c. the general principles of sound administration.

2. the Board can deviate from these policy rules if the full application thereof led to clear inequities.

3. If the Board establishes that an offender has committed several violations, it can impose an administrative fine for all violations combined instead of fining for each violation separately.

4. The Board rounds down the level of the administrative fine to the nearest €1,000.

#### *Article 8*            **Rescission of earlier decision**

The decision 'NMa Fining Code 2007' is hereby rescinded.

*Please note that the following translation is given for convenience only.  
The original decision in Dutch is the authentic version.*

*Article 9*            **Transitional rules**

If an administrative fine is imposed for a violation that had occurred before this decision became effective, the 'NMa Fining Code 2007' continues to apply thereto.

*Article 10*           **How to cite this decision**

This decision shall be cited as: 'NMa Policy rules on administrative fines under transport legislation'.

*Article 11*           **Entry into force**

This decision becomes effective on October 1st, 2009.

This decision and its explanatory notes will be published in the Dutch Government Gazette.

The Hague, the Netherlands, September 21st, 2009

The Board of the Netherlands Competition Authority,

Pieter Kalbfleisch

René Jansen

Gert Zijl

*Please note that the following translation is given for convenience only.  
The original decision in Dutch is the authentic version.*

## Annex to the NMa policy rules on administrative fines under transport legislation

### I. Background

Article 4, paragraph 6 of these policy rules states that the Board will use a permillage of an offender's annual turnover when imposing administrative fines that the Board is authorized to impose under Sections 75 and 76, paragraph 2, preamble and under a, of the Dutch Railway Act, Sections 8.25h, paragraph 7, and 11.21 of the Dutch Aviation Act and Sections 45f, paragraph 1, preamble and under a, 45g, paragraph 1, and 45h, paragraph 1, of the Dutch Pilotage Act, except for violations that have been committed by natural persons. The permillage is determined using six ascending categories. This annex explains which category the aforementioned violations fall into. This annex is an integral part of the NMa Policy rules on administrative fines under transport legislation.

### II. Categorization

#### 1. Dutch Railway Act

a. The violations, as referred to in Section 76, paragraph 2, preamble and under a, of the Dutch Railway Act, for which, under Section 76, paragraph 3, of the Dutch Railway Act and Section 57, paragraph 1, of the Dutch Competition Act, administrative fines can be imposed of up to €450,000 or 10 per cent of annual turnover, should that be more, are categorized as follows:

Category II	<ul style="list-style-type: none"> <li>a. Section 58, paragraph 3;</li> <li>b. Section 58, paragraph 4;</li> <li>c. Section 59, paragraph 3.</li> </ul>
Category III	<ul style="list-style-type: none"> <li>a. Section 57.</li> </ul>
Category IV	<ul style="list-style-type: none"> <li>a. Section 60, paragraph 3;</li> <li>b. Section 61 (supplementary provisions).</li> </ul>
Category V	<ul style="list-style-type: none"> <li>a. Section 17, paragraph 1, under d (supplementary provisions);</li> <li>b. Section 58, paragraph 1 (determining the network statement);</li> <li>c. Section 58, paragraph 1 (consultation with users);</li> <li>d. Section 58, paragraph 2;</li> <li>e. Section 59, paragraph 1;</li> <li>f. Section 59, paragraph 2;</li> <li>g. Section 60, paragraph 1 (supplementary provisions);</li> <li>h. Section 60, paragraph 2;</li> <li>i. Section 61 (core provisions);</li> <li>j. Section 62, paragraph 7 (supplementary provisions);</li> <li>k. Section 63, paragraph 1.</li> </ul>
Category VI	<ul style="list-style-type: none"> <li>a. Section 17, paragraph 1, under d (core provisions);</li> <li>b. Section 27, paragraph 1;</li> <li>c. Section 60, paragraph 1 (core provisions);</li> <li>d. Section 62, paragraph 1;</li> <li>e. Section 62, paragraph 7 (core provisions);</li> <li>f. Section 62, paragraph 8;</li> <li>g. Section 67, paragraph 1;</li> <li>h. Section 67, paragraph 2;</li> <li>i. Section 67, paragraph 3.</li> </ul>

*Please note that the following translation is given for convenience only.  
The original decision in Dutch is the authentic version.*

## 2. Dutch Aviation Act

a. The violations, as referred to in Section 8.25h, paragraph 7, of the Dutch Aviation Act, for which, under Section 69, paragraph 1, of the Competition Act administrative fines can be imposed of up to €450,000 or 1 per cent of annual turnover, should that be more, are categorized as follows:

Category IV	a. Section 8.25h, paragraph 3.
-------------	--------------------------------

b. The violations, as referred to in Section 11.21 of the Dutch Aviation Act, for which, under that Section and Section 57, paragraph 1, of the Competition Act, administrative fines can be imposed of up to €450,000 or 10 per cent of annual turnover, should that be more, are categorized as follows:

Category I	a. Section 8.25h, paragraph 1.
Category III	a. Section 8.25d, paragraph 2, second sentence; b. Section 8.25g, paragraph 4; c. Section 8.25ga.
Category IV	a. Section 8.25d, paragraph 12 (supplementary provisions); b. Section 8.25e, paragraph 4; c. Section 8.25f, paragraph 7.
Category V	a. Section 8.25d, paragraph 3; b. Section 8.25d, paragraph 4; c. Section 8.25d, paragraph 5; d. Section 8.25d, paragraph 6; e. Section 8.25d, paragraph 8; f. Section 8.25d, paragraph 9; g. Section 8.25d, paragraph 10; h. Section 8.25d, paragraph 11; i. Section 8.25d, paragraph 12 (core provisions); j. Section 8.25e, paragraph 1; k. Section 8.25e, paragraph 2; l. Section 8.25e, paragraph 3; m. Section 8.25g, paragraph 2; n. Section 8.25g, paragraph 3; o. Section 8.25g, paragraph 5; p. Section 11.21 in conjunction with Section 56, paragraph 5, Competition Act in conjunction with 56, paragraph 1, under c, Competition Act.
Category VI	a. Section 8.25d, paragraph 1, first sentence; b. Section 8.25d, paragraph 2; c. Section 8.25f, paragraph 3; d. Section 8.25f, paragraph 5; e. Section 8.25f, paragraph 6; f. Section 8.25g, paragraph 1.

## 3. Dutch Pilotage Act

a. The violations, as referred to in Section 45h, paragraph 1, of the Dutch Pilotage Act, for which, under that Section, administrative fines can be imposed of up to €450,000 or 1 per cent, should that be more, of the

*Please note that the following translation is given for convenience only.  
The original decision in Dutch is the authentic version.*

combined turnover of the organizations, as designated by Sections 15a, paragraph 2, and 15b, paragraph 1 of the Dutch Shipping Traffic Act, are categorized as follows:

Category IV	a. Section 45h, paragraph 1, in conjunction with Section 54 Competition Act.
-------------	--

b. The violations, as referred to in Section 45f, paragraph 1, preamble and under a, of the Dutch Pilotage Act, for which, under Section 45f, paragraph 2 of the Dutch Pilotage act, administrative fines can be imposed of up to €450,000 or 10 per cent, should that be more, of the combined turnover of the organizations, as designated by Sections 15a, paragraph 2, and 15b, paragraph 1 of the Dutch Shipping Traffic Act, are categorized as follows:

Category IV	<ul style="list-style-type: none"> <li>a. Section 27c, paragraph 2;</li> <li>b. Section 27c, paragraph 3;</li> <li>c. Section 27c, paragraph 4;</li> <li>d. Section 27c, paragraph 5;</li> <li>e. Section 27c, paragraph 6;</li> <li>f. Section 27c, paragraph 7;</li> <li>g. Section 27j, paragraph 2 (except for first sentence);</li> <li>h. Section 27j, paragraph 3;</li> <li>i. Section 27k, paragraph 2;</li> <li>j. Section 27k, paragraph 3;</li> <li>k. Section 27k, paragraph 4;</li> <li>l. Section 45c, paragraph 2.</li> </ul>
Category V	<ul style="list-style-type: none"> <li>a. Section 27c, paragraph 1;</li> <li>b. Section 27i, paragraph 2;</li> <li>c. Section 27j, paragraph 1;</li> <li>d. Section 27j, paragraph 2, first sentence;</li> <li>e. Section 27k, paragraph 1;</li> <li>f. Section 27l, paragraph 1.</li> </ul>
Category VI	<ul style="list-style-type: none"> <li>a. Section 27i, paragraph 1.</li> </ul>

**4. Dutch General Administrative Law Act**

The violations of the Dutch General Administrative Law Act, as referred to in Section 75 of the Dutch Railway Act and Section 45g, paragraph 1, of the Dutch Pilotage Act, for which, under the first mentioned Section and under Section 45g, paragraph 3 of the Dutch Pilotage act, administrative fines can be imposed of up to €450,000 or, should that be more, 1 per cent of the annual turnover or of the combined turnover of the organizations, as designated by Sections 15a, paragraph 2, and 15b, paragraph 1 of the Dutch Shipping Traffic Act, are categorized as follows:

Category IV	<ul style="list-style-type: none"> <li>a. Section 5:20 in conjunction with 5:15;</li> <li>b. Section 5:20 in conjunction with 5:16;</li> <li>c. Section 5:20 in conjunction with 5:17;</li> <li>d. Section 5:20 in conjunction with 5:18;</li> <li>e. Section 5:20 in conjunction with 5:19.</li> </ul>
-------------	---

*Please note that the following translation is given for convenience only.  
The original decision in Dutch is the authentic version.*

Category V	a. Section 5:20 in conjunction with Sections 5:15 and 5:17
------------	--

## **Explanatory notes**

### **General**

On October 1st, 2009, the Policy rules of the Dutch Minister of Economic Affairs of September 11th, 2009, takes effect, containing the guidelines on the imposition of administrative fines under legislation for which the supervision of compliance has been entrusted to the Board of the NMa (Policy rules of the Minister of Economic Affairs for the imposition of administrative fines by the NMa 2009). These Policy rules, in which the high-trust policy objective of the current Dutch administration has been incorporated by the Minister of Economic Affairs, have led the Board of the Netherlands Competition Authority (hereafter: the Board) to rescind the NMa Fining Code 2007. Furthermore, as the Policy rules of the Minister of Economic Affairs solely relate to the imposition of administrative fines under the Dutch Competition Act, the Dutch Electricity Act 1998, the Dutch Gas Act, the Dutch Independent Grid Management Act<sup>1</sup> and the Interim Media Concentrations Act, these Policy rules have also led the Board to draw up new policy rules for the imposition of administrative fines under the Dutch Railway Act, the Dutch Aviation Act, and the Dutch Pilotage Act. In order to have clarity, legal certainty and consistency in the fining policy, the Board believes it to be desirable to have these new policy rules conform to the Policy rules of the Minister of Economic Affairs as much as possible.

Current transport legislation, of which the Board has been entrusted enforcement of compliance therewith, contains a fine maximum for violations of different provisions for which it can impose an administrative fine. The fine maximum is either a fixed amount or a percentage of the offender's annual turnover in the financial year preceding the fining decision, regardless of where the turnover has been earned. It has been left up to the Board to further specify what factors it could take into consideration when determining the administrative fine. The Dutch General Administrative Law Act stipulates that the level thereof needs to be proportional to the seriousness of the violation and to the degree to which the violation can be imputed to the offender. These circumstances have been discounted in the fining system. The Board may decide to have the seriousness of the violation be reflected in the starting point of the fine, as well as in the so-called factor (S) with which it can multiply the starting point of the fine (because of the violation's seriousness). The Board may decide to have the degree of imputability, if it sees reason to do so, be reflected in the level of the administrative fine through, for example, the mitigating and aggravating circumstances. If the Board sees reason to do so, it can take other circumstances into account as well, for example, the duration of the violation.

### **Notes per article**

#### *Article 1*

The description of the term 'annual turnover' under b follows the definition of 'net turnover', as referred to in Section 2:377, paragraph 6, of the Dutch Civil Code.

#### *Article 2*

The objective of the administrative fines that the Board imposes is the enforcement of the Competition Act by penalizing violations thereof. It is not their objective to take away any of the offender's advantages. The

---

<sup>1</sup> Act of November 23rd, 2006 amending the Dutch Electricity Act 1998 and the Dutch Gas Act in connection with specific regulations concerning independent grid management, Dutch Government Gazette. 2006, 614.

*Please note that the following translation is given for convenience only.  
The original decision in Dutch is the authentic version.*

Board will set the fine at such a level that it will prevent the offender from committing another violation (specific prevention), and that it acts as a deterrent for potential offenders against committing similar violations (generic prevention). Administrative fines need to have a deterrent effect in order to achieve the desired preventive effect. This applies, in any case, to the interests the relevant legal standards aim to protect.

#### *Article 3*

When assigning a fine, the Board will determine the starting point of the fine on a case-by-case basis. In general, when transport laws are violated, the interests that the relevant legal standards aim to protect cannot be easily related to a certain turnover. In these kinds of situations, the Board will therefore have to use annual turnover as the basis for the starting point of the fine. That figure gives an indication of the offender's power in economic terms, and can also be used to give an indication of a violation's potential effects on the economy, should certain legal standards be violated. Another benefit using annual turnover is that the administrative fine will be proportional to the offender's size and will thus have a deterrent effect. If natural persons have committed violations, the Board will determine the starting point of the fine taking into consideration the seriousness of the violation, as well as the offender's income and assets in order to be able to set an administrative fine that has a sufficiently deterrent effect from both a general-prevention point of view as a specific-prevention point of view.

The process of fine assignment is as follows: the Board determines the starting point of the fine, using annual turnover or, should the offender be a natural person, the violation's seriousness as well as the offender's income and assets. The violation's seriousness is reflected in the categorization of the fine in one of six fining categories, or, should the offender be a natural person, in one of two ranges. The Board thus determines the basic fine, by incorporating the violation's seriousness into the starting point of the fine. Factor (S) is used to adjust the category-determined fine, if the circumstances in question so dictate. The Board sets factor (S) at 1 if it believes that the violation's seriousness is sufficiently reflected in the categorization of the violation, given the violation's circumstances. By using a factor (S) ranging from 0 to 5, the circumstances of each case can thus have both an aggravating and a mitigating effect on the category-based fine. When assigning a fine for violations committed by natural persons, the Board already takes into account the violation's seriousness in determining the starting point of the fine. In the case of natural persons, the basic fine therefore corresponds with the starting point of the fine.

#### *Article 4*

For the starting point of the fine, the Board uses a permillage of annual turnover, which ranges from 0.25 ‰ in the first category to 15.0 ‰ in the sixth category. In categorizing each violation, the Board follows the Minister of Economic Affairs' approach, meaning it will look at the specific interest that the relevant legal provision aims to protect in relationship to the entire law it is part of. The more important the Board believes this specific interest to be, the higher an administrative fine is justified in case of a violation of the relevant legal provision. In the context of determining the starting point of the fine, this means that the Board has used a higher permillage as starting point in order to determine the final level of the administrative fine. The intervals between the permillages of the categories have been chosen in such a way that the difference in seriousness between the interests that are protected by the relevant legal provisions is sufficiently reflected therein. The categorization system is listed in the Annex.

*Please note that the following translation is given for convenience only.  
The original decision in Dutch is the authentic version.*

*Article 5*

This article relates to violations, committed by natural persons, of Section 5:20 of the Dutch General Administrative Law Act and to giving instructions and exercising de facto leadership resulting in violations of provisions in the Dutch Railway Act, the Dutch Aviation Act, or the Dutch Pilotage Act. This article does not relate to violations of provisions in the aforementioned acts committed by self-employed individuals, such as registered pilots. In such cases, the Board will follow the system as mentioned in Article 4.

*Article 6*

The first paragraph, under b, states that the Board can increase the basic fine in the event it is hindered in its investigation by the offender. The Board can increase the fine as long as this will not harm the rights of defense that an offender is entitled to.

*Article 7*

When applying the second paragraph, the offender's financial situation is usually not taken into account in determining the level of the administrative fine – that is insofar the fine will not increase the likelihood that the offender will have to file for bankruptcy. As a side note, the offender has the option of requesting a payment plan from the Board.