

Indemnity against administrative fines – Is it effective?

It is possible to effectively indemnify for administratively imposed fines because of breaches of law. This follows from a recent prejudicial decision of the Supreme Court of the Netherlands in an action for recovery of an administrative fine between a contractor and subcontractor. Including indemnification clauses in agreements may therefore be a worthwhile protection against consequences of enforcement measures. Here are some considerations and conditions.

Often, agreements contain indemnification provisions for costs of administrative fines. For example, many companies hold their managing and supervisory directors and other policy makers harmless for any personal fines imposed for conduct in the course of their duties. The reason for this is that in the event a company breaches the law, enforcement action can be directed not only at the relevant legal entity committing the offence but also at the person instructing the prohibited conduct (*opdrachtgever*) or the person having actual control of the prohibited conduct (*feitelijk leidinggever*).

Recourse for fines under debate

There is no general rule in the Netherlands prohibiting indemnity against administrative fines. Still, contractual indemnification relating to fines has been criticised. The possibility for regulators to fine individual executives is intended to be an extra incentive to comply with relevant laws and regulations. Knowing that the company will ultimately get the bill in a case where

an individual is confronted with enforcement action, might wipe out this preventative effect. As a result, there have been examples where this was considered an unacceptable impairment of the fine system and where the competent authority increased the administrative fines for employees who were indemnified by their employer.

Lower courts in the Netherlands have the possibility to ask a prejudicial question to the Supreme Court in situations where there is limited case law on a legal matter and the answer to be provided has direct relevance for a variety of disputes based on the same or similar facts. That is also what happened in the case at hand. A subcontractor had contractually agreed to indemnify the contractor against any fine imposed for non-compliance with legal obligations. The court questioned whether under these circumstances an action for recourse would be possible given its undermining effect. It therefore asked the Supreme Court if a contractual arrangement stipulating that an administrative fine is to be paid by a third party is contrary to the law or public order.

More clarity on indemnity clauses

In its prejudicial decision of 11 December 2015

([ECLI:NL:HR:2015:3568](#)),

the Supreme Court has now provided some clarity on indemnity provisions relating to administrative fines. The Supreme Court held that indemnification clauses in which one party agrees to pay imposed fines on behalf of another party are not contrary to the fundamental principles of the legal system. According to the Supreme Court, these indemnification provisions do not as such impair the object and purport of the law or the possibility of enforcement by way of imposing administrative fines. Therefore, they are not considered void.

Nevertheless, distinguishing characteristics of the legislation concerned, the indemnification clause in question and specific facts of the case remain relevant. The Supreme Court found that under special circumstances an indemnification provision may not be effective. For instance, if serious blame could be

attributed to the party seeking recourse, and the contractual clause would provide for indemnity against fines for non-compliance with intent or gross negligence, or if parties would have agreed to indemnification with a view to frustrate the collection of the fine by the regulator.

After all, regulators are continuously stepping up their enforcement action and increasingly focussing on holding individuals responsible, not just formal directors but also other managers and executives.

Indemnification is worth it

Although the decision relates to a fine for violation of the Dutch Foreign Nationals (Employment) Act (*Wet arbeid vreemdelingen*), given the importance of such prejudicial decisions of the Supreme Court it is expected to impact other legal areas and regulated sectors as well. For that reason, it may be worthwhile to include indemnification clauses in agreements as they can effectively protect against consequences of enforcement measures.

Contacts



Simone Peek
+31 20 711 9182
simone.peek
@cliffordchance.com



Bauke de Vries
+31 20 711 9394
bauke.devries
@cliffordchance.com

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Clifford Chance, Droogbak 1A, 1013 GE Amsterdam, PO Box 251, 1000 AG Amsterdam

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