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Subjecting executives in the financial sector to reliability scrutiny

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1. Introduction

Under Dutch law, anyone who wants to be in charge of a bank, an insurance company, a pension fund, a holding company, or any one of a number of other financial undertakings, needs to be reliable. And everyone will readily agree that this is a good idea: we like to have fine, trustworthy men and women in charge of our money, pensions and insurances. And it is not only us; EC law requires them to be reliable as well. After all, international trade would be severely hampered if one could not trust foreign banks and companies.

There are problems with the reliability test, though, for who should determine whether someone is such a fine, trustworthy man or woman, fit to take care of our money? And more importantly, how should they so decide? It turns out that it is quite difficult to encapsulate such notions in black-letter law. Inevitably, supervisors are left with room for discretion, and courts see themselves confronted with cases that turn out to be all but black and white. Mistakes are bound to be made.

The problem is aggravated by the serious consequences which a negative reliability judgment has, both for the executive himself and for the company that employs him. There is tension here between the interest of the individual – the company as well as the executive – and that of society as a whole, which can only thrive with a healthy, dependable financial sector.

All in all, the reliability test as it is executed in the Netherlands has received a fair amount of criticism. But the solutions that have been proposed are as problematic as the issue itself, contradicting both EC law and each other. It turns out to be difficult to find a solution to the problems posed by reliability scrutiny and its consequences based on an analysis of Dutch law alone. Looking beyond the borders of Dutch financial law might provide new insights. To find an alternative approach I will turn to Germany. In addition, I will look at reliability testing outside the financial sector in the Netherlands.

This article will then attempt to answer two questions. First: How is reliability tested in the Netherlands, and what problems does this evoke? And second: What solutions are possible, while staying within the framework set by EC law?

Below, Section 2 sets out to sketch the relevant EC law, so the framework in which both Dutch and German law have to operate is clear. After that, I will expound the law pertaining to

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the Dutch reliability test in the Financial Supervision Act (*Wet op het Financieel Toezicht, Wft*), its application by the courts and the criticism it has received.

After that, I will turn to German law for an example of an alternative way to shape the EC requirements pertaining to reliability scrutiny in the financial sector into national law, after which the Dutch reliability scrutiny outside of the financial sector will be discussed.

Finally, I will compare the different systems, and attempt to draw some conclusions as to the best solutions to the problems that are perceived to plague the Dutch system.

2. Reliability scrutiny in EC law

The reliability requirement for financial executives as is found in the Wft is largely based on EC law, which requires managers of credit institutions, insurance companies and the like to be of good repute. This requirement is found in a considerable number of directives,[1] the most prevalent of which is the Markets in Financial Instruments Directive (MiFid), which concerns investment firms and regulated markets. Although the directives differ in their scope, the provisions that relate to the good repute requirement are largely identical, and will be discussed as they appear in MiFid with regard to investment firms.

The central requirement is found in article 9(1) MiFid: 'Member States shall require the persons who effectively direct the business of an investment firm to be of sufficiently good repute (…)'. Article 10(1) contains a similar provision for shareholders and members with qualified holdings: the authorities have to be convinced as to their suitability, taking into account the need to ensure sound and prudent management. It is up to the applicant to provide the information necessary to judge whether he meets the requirements laid down in the directive (Article 7(2)).

This requirement plays an important role in the authorisation of firms, which is required for nearly all regulated financial undertakings: when it is clear from the start that the management is not of good repute, the investment firm will not receive authorisation (Article 9(3)). Likewise, authorisation must be refused if shareholders do not meet the suitability requirement (Article 10(1)). If the executives lose their good reputation at a later date, this is a ground for withdrawing the authorisation, since Article 8 sub c MiFid holds that when the requirements under which authorisation was granted are no longer met, the authorisation may be withdrawn. Although such a withdrawal is not obligatory, Member States have to ensure that authorized firms comply with the MiFid provisions at all times (Article 16(1) MiFid), so even when the authorisation is not withdrawn, some form of action is required.

To ensure compliance with the MiFid, the Member States must designate the authorities which are to carry out the duties provided for in the directive (Article 48(1)). To execute their tasks, the competent authorities must at least have the powers listed in Article 50(2). These include powers pertaining to access to relevant information, the power to require the cessation of any practice that is contrary to the provisions adopted in the implementation of the directive (Article 50(2)(e)), and the power to adopt any type of measure to ensure that investment firms and regulated markets continue to comply with legal requirements (Article 50(2)(i)), which in

1 Directive 2002/87/EC of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate, *OJ* L 35, 11.2.2003, p. 1; Directive 2004/39/EC of 21 April 2004 on markets in financial instruments (MiFid), *OJ* L 241, 2.9.2006, p. 1; Directive 2007/64/EC of 13 November 2007 on payment services in the internal market, *OJ* L 319, 5.12.2007, p. 1; Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, *OJ* L 126, 26.5.2000, p. 1; Directive 98/78/EC of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group, *OJ* L 330, 5.12.1998, p.1; Directive 2006/48/EC of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, *OJ* L 177, 30.6.2006, p. 1.

the case of disreputable managers can mean the authorities need to have the power to require the removal or replacement of the management. These powers should be exercised within the limits of the national legal framework (Article 50(1)), and any decisions based on the provisions adopted in accordance with the directive have to be open to appeal (Article 51(1)), although the directive does not state for whom.

Despite the importance of the requirement, the criteria one must meet to be deemed of sufficiently good repute are lacking in most of these directives. Where they can be found, they require no previous bankruptcy and a clean criminal record with regard to relevant offences.[2]

The Committee of European Securities Regulators (CESR), in its previous FESCO incarnation, clarified the good repute requirement found in the Investment Services Directive (ISD)[3] in its *European standards on fitness and propriety to provide investment services*.[4] One of the goals of the standards was to provide an agreed minimum standard for the assessment of the fitness and propriety of investment firms and relevant individuals to provide investment services.[5]

The fit and proper criterion used by the CESR is comprised of both the good repute requirement and the competence requirement found in *e.g.* Article 9(1) MiFid, and requires persons 'to meet high standards of personal integrity in all respects and to be competent and capable of performing the functions or role currently performed or which it is proposed they should perform in the firm'.[6]

To evaluate whether this requirement is met, the CESR proposed a minimum standard of what information should be considered, including personal details, education and qualifications and a complete work history. Of particular relevance for the assessment of reliability are someone's criminal record and information about any previous civil cases, including disqualification as a company director or bankruptcy. The competent authorities can opt to exclude certain types of offences – for example, motoring offences.[7] For the evaluation of someone's personal financial integrity, the authorities can check current and past personal solvency. A bankruptcy, either of the prospective executive or of a company under his management, can be considered, but would not in itself be sufficient to make someone unfit for any function in an investment firm.[8] This is remarkable, since the directives that do give criteria for meeting the good repute requirement demand that there has been no prior bankruptcy.[9]

Providing inaccurate or misleading information can be a reason to fail the fit and proper test,[10] but apart from that the standards give no guidance as to when the authorities should conclude, based on the relevant information, that an individual does not meet the ISD standards.

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2 One of the exceptions can be found in Directive 2002/92/EC of 9 December 2002 on insurance mediation, *OJ* L 9, 15.1.2003, p. 3, which does define good repute. Art. 4(2) of this directive lays down the good repute requirement for insurance and reinsurance intermediaries. To meet this requirement, they must have a clean criminal record or the national equivalent thereof in relation to serious criminal offences linked to crimes against property or other crimes related to financial activities, and they should not have been previously declared bankrupt. Another, less relevant, exception is Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings, *OJ* L 143, 27.6.1995, p. 70, which sets a number of minimum conditions which should be fulfilled to meet the requirement of good repute. Art. 6 of this directive clarifies that persons in charge of the management of a railway undertaking may not have been convicted of serious criminal offences, including offences of a commercial nature, of serious offences against specific legislation applicable to transport, or of a serious or repeated failure to fulfil social or labour law obligations, and may not previously have been declared bankrupt.

3 Directive 93/22/EC of 10 May 1993, *OJ* L 145, 30.4.2004, p. 1, which has been repealed by the MiFid.

4 *European standards on fitness and propriety to provide investment services*, (99-FESCO-A / February 1999).

5 *Ibid.*, p. 2.

6 *Ibid*., p. 7.

7 *Ibid*., pp. 7-8.

8 *Ibid*., p. 8.

9 See *supra* note 2.

10 *European standards*, *supra* note 4, p. 8.

2.1. Conclusions about EC law

Anyone who has significant influence on the management of a financial undertaking must be of good repute, but it is still unclear what that means. We do know what information must be considered, and hence, what factors can influence whether someone is reliable or not.

However, the consequences of a failure to meet the good repute requirement are clear enough. Member States have to ensure that firms comply with the provisions of EC law, and those provisions determine that those effectively directing the business of financial undertakings have to be of good repute. If this is no longer the case, the withdrawal of the authorization becomes an option. Less far-reaching measures are possible as well, as long as they ensure that the firm will live up to its obligations: unreliable managers cannot stay.

3. Reliability scrutiny in the Netherlands

Since the start of 2007, the financial market in the Netherlands has been regulated through the Wft. Its main purpose was to make the existing law more accessible and coherent, and to lower the administrative burden for the businesses concerned.[11] The changes with regard to reliability scrutiny have been marginal, so that old case law remains relevant. Previously, the rules for scrutinising reliability were contained in the Policy rules on assessments of the reliability of persons (including candidates) who determine or co-determine the policy of schemes that are subject to supervision or of the reliability of holders of qualified shareholdings in the said schemes.[12] Today, they are contained in the Decree on prudential regulation under the Wft (*Besluit prudentiële regels Wft*) and the Decree on the supervision of the conduct of financial undertakings under the Wft (*Besluit gedragstoezicht financiële ondernemingen Wft*). With regard to the content, the changes have been minimal. Under the Policy rule, reliability was measured by a number of character traits, like openness, trustworthiness and discretion which, in turn, were determined by the acts and antecedents of the person scrutinized; a much criticized approach.[13] In the two decrees reliability is directly determined based on the acts and antecedents themselves.

The reliability requirement can be found in several places in the Wft. Article 3:9 requires that the policies of clearing institutions, credit institutions and insurers are (co-)determined by persons whose fit and proper qualities are beyond doubt. The same holds true for mixed financial holding companies, financial holding companies and insurance companies,[14] as well as for management companies, investment companies, investment firms, depositaries and financial service providers.[15] Additionally, one must meet the requirement to obtain a declaration of no-objection for a qualified holding that allows one to determine or co-determine the policies of an undertaking.[16] Whether someone meets this criterion is determined by the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, *AFM*) or the Dutch Central Bank

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11 *The most important amendments to the supervision of conduct following the introduction of the Act on Financial Supervision (Wft)*, AFM brochure, http://www.afm.nl/corporate/default.ashx?DocumentId=8884, p 4; G. Roth *et al.*, 'De Wet op het financieel toezicht: Megaoperatie in het kader van de regulering van de financiële markten; patiënt overleden?', 2007 *Nederlands Juristenblad,* no. 19, pp. 1164-1169, doubt whether these goals have been accomplished.

12 *Beleidsregel inzake de betrouwbaarheidstoetsing van (kandidaat)(mede) beleidsbepalers en houders van gekwalificeerde deelnemingen in onder toezicht staande instellingen.*

13 P. Klemann, 'Beleidsregel inzake de betrouwbaarheidstoetsing van (kandidaat)(mede)beleidsbepalers en houders van gekwalificeerde deelnemingen in onder toezicht staande instellingen', 2000 *Vennootschap & Onderneming,* no. 6, pp. 102-104, argues that extensive psychological personality analysis would be required to settle the question whether someone has these characteristics, not to mention the fact that they conflict with one another.

14 Art. 3:272 Wft.

15 Art. 4:10 Wft.

16 Art. 3:99 Wft.

(*De Nederlandse Bank, DNB*). The legal criteria that are used are the same for both institutions, and are recorded in the Decree on the supervision of the conduct of financial undertakings under the Wft (for the AFM) and in the Decree on prudential regulation under the Wft (for the DNB). With regard to the reliability test, these decrees are identical. In the remainder of this article, the sections mentioned will refer to the first decree.

It is determined in the decrees that the reliability of an administrator of a financial undertaking has to be beyond doubt, based on his intentions, acts and antecedents.[17] A number of antecedents which must be considered are included in an appendix to the decree.[18] The first and most important category contains a number of serious financial crimes. Anybody convicted of those crimes will fail the reliability test for at least eight years after the conviction has become final.[19] After that period, it is up to the judgment of the supervisor how these antecedents will affect its reliability judgment.

The second category contains convictions for less serious crimes, or those who have no direct relation to the financial market, as well as the aiding and abetting of the crimes from the first category, or attempts to commit those crimes. Additionally, cases where there was no conviction fall within this category, regardless of the outcome.[20] Even an acquittal can be considered to be a relevant antecedent. One might see a problem here: Somsen argues that when the criminal court acquits it is not very convincing that the supervisor nevertheless imposes a sanction, which the administrative court subsequently upholds.[21] To justify the discrepancy, the courts have pointed to the purpose of the reliability criterion:[22] the trust in the financial market has to be guaranteed, therefore the reliability of those concerned has to be beyond doubt. This is a stricter criterion than that used by the criminal court, where the lack of reliability needs to be proven. I would agree that different rulings might be confusing, but they are not necessarily inconsistent. The three subsequent categories contain financial antecedents, the former experiences of the supervising authorities and antecedents related to tax law. These categories are open-ended: any act that gives the authorities reason to doubt the subject's reliability can be considered. The last category contains a number of antecedents that fall outside the above categories. If the subject's registration at the Dutch Securities Institute has been ended, or if disciplinary sanctions or sanctions based on labour law have been imposed on him, these are relevant antecedents as well.

Although a number of antecedents are mentioned explicitly, the financial authorities retain a great margin of appreciation in deciding what facts to consider, as the categories in the appendix are mostly open-ended. They retain even greater freedom in deciding whether a relevant antecedent should lead to a negative reliability judgment. The consequences are clear if there is a category 1 antecedent and the conviction has become final less than eight years previously. If so, the authorities are bound to reach a negative decision. This is not without problems. In a case before the District Court (*Rechtbank*) the appellant argued that since no further balancing of interests could take place, Section 15 of the Decree violates the principle of proportionality as well as Article 6(1) of the ECHR, which demands that the courts have full jurisdiction.[23] In the preliminary relief procedure the court emphasized that the reliability

17 Section 12 Decree on the supervision of the conduct of financial undertakings under the Wft.
18 Appendix C to the Decree on the supervision of the conduct of financial undertakings under the Wft.
19 Section 15 Decree on the supervision of the conduct of financial undertakings under the Wft.
20 *E.g.* CBb 6 June 2002, *JOR* 2002/64, m.nt. CMGvdK (*Maka*); CBb 18 April 2002, *JOR* 2002/117, m.nt. CMGvdK (*preliminary relief VPV*).
21 M. Somsen, comment on CBb 12 September 2006, *JOR* 2007/14, Para. 4.
22 CBb 18 April 2002, *AB* 2002/199, m.nt. IcvdV; *JOR* 2002/117, m.nt. CMGvdK.
23 Rechtbank Rotterdam 4 July 2007, *LJN* BA9472 (*VLA*) (not yet reported). The case concerned a request for preliminary relief, so the questions raised have not yet been answered.

requirement – including the necessity that an executive has a clean criminal record with regard to relevant crimes – is based on EC law.[24] To determine the acceptability of Section 15, it would have to be decided whether the relevant directive was a violation of the ECHR. Indeed, once the reliability requirement is no longer met, anything less than removing the executives in question from their position would be a violation of EC law. After all, Member States must ensure that firms comply with Article 9(1) MiFid, which provides that persons who effectively direct the business of an investment firm must be of good repute. The court did not further decide whether Section 15 is a violation of Article 6 ECHR in the preliminary relief procedure, but even if this is the case, it is open to debate whether this provision is a necessary consequence of EC law. I will discuss this point below.

For all other antecedents, the consequences are determined in accordance with Section 16. This article determines that not only the behaviour that led to the antecedent itself must be considered, but also other relevant circumstances, the interests that the Wft aims to protect and the interest of the undertaking and the individuals concerned. How this is done is up to the supervisors.

A number of authors have claimed that the wide margin of appreciation awarded to the AFM and DNB breaches the requirements of legal certainty.[25] The consequences of an antecedent are unpredictable, and the duration of these consequences even more so. The only way in which someone who has been confronted with a negative decision as to his reliability can find out whether his 'term' has finished, is to ask for a new decision.[26] In response it has been argued that there should be a maximum duration during which antecedents are to be considered relevant.[27] Somsen goes beyond that, proposing a system with limitative antecedents and little, if any, room for discretion.[28]

The consequences of a negative decision on the reliability of a firm's executives are severe. A new undertaking will fail to get an authorization, without which most activities on the financial markets are prohibited.[29] An undertaking already in existence may lose its authorization to operate,[30] or the supervisor may oblige it to dismiss its unreliable policy makers to once again meet the Wft requirements.[31] A violation of the Wft regulations may result in an order for periodic penalty payments[32] or an administrative fine.[33] For an individual, a negative reliability decision results in the end of his career, at least in the financial sector.

In practice, a negative judgment has severe non-legal consequences, even before it has become final.[34] The case of VPV forms an excellent illustration: when after years of court hearings, decisions, appeals and new decisions the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven, CBb*) finally decided that the AFM's decision on the reliability of two executives of VPV was faulty, the company had just been declared bankrupt by the District Court of Zwolle. This problem is aggravated by the publication options of AFM and

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24 The relevant provision was in Directive 2002/92/EC, *supra* note 2, which sets the reliability requirement for insurance mediators. In most other directives, however, such a provision cannot be found.
25 D. Doorenbos, comment on CBb 12 September 2006, *JOR* 2007/14, Para. 11.
26 *Ibid*., Para. 11.
27 M. Somsen, comment on CBb 27 September 2005, *JOR* 2006/11; Doorenbos, *supra* noot 25, Para. 5; Klemann *supra* note 13, p. 103.
28 M. Somsen, 'Beleidsregel Betrouwbaarheidstoetsing betrouwbaar?' 2005 *Tijdschrift voor Financieel Recht*, no. 3, pp. 67-69.
29 Arts 2:4, 2:11, 2:27, 2:48, 2:55, 2:65, 2:75, 2:80, 2:86, 2:92 and 2:95 Wft.
30 Art. 1:104 Wft.
31 Art. 1:75 Wft.
32 Art. 1:79 Wft.
33 Art. 1:80 Wft.
34 Roth *et al.*, *supra* note 11, p. 1169, stress the importance of reputation in the financial sector and expect serious consequences of the increased power which the AFM and DNB have to harm this reputation. For the consequences of sanctions before any judicial procedure has been followed, see also D. Doorenbos, 'Schandpaal en onschuldpresumptie', 2003 *Nederlands Juristenblad,* no. 42, pp. 2190-2196.

DNB. When the Wft is violated, the supervisors have the option to issue a public warning, which will harm the image of the firm concerned.[35] A judicial review after the damage is done cannot alleviate this problem, so it is up to the supervisors to prevent faulty decisions as much as they can.

Some have argued that the consequences of a negative reliability judgment should be changed, holding that a *de facto* prohibition on practising for the executive concerned is a violation of the principle of proportionality.[36] In criminal law, such a prohibition would be a last resort, reserved for very serious cases. Unfortunately, once the decision has been made, EC law requires an unreliable executive to be dismissed. Tempering the consequences is not possible.

One would expect that with the supervising authorities having a wide margin of discretion, and their decisions far-reaching consequences, ample procedural safeguards are in place, but that is hardly the case. The Decree itself contains only one provision on the procedure that should be followed: The sources from which the AFM and DNB can obtain their information are listed in the Decree. However, if the information they acquire in this way gives them reason to use other sources as well, they are allowed to do that, if they notify the subject of their investigation in advance.

In addition, the provisions of the General Administrative Law Act (*Algemene wet bestuursrecht, GALA*) are applicable. There, the requirements of due care (Article 3:2) and proportionality (Article 3:4) have been codified, as well as the prohibition on détournement de pouvoir (Article 3:3) and the duty to give reasons (Article 3:46).

Against the decisions of the AFM and DNB judicial protection has been provided in two instances. When the undertaking or the individual concerned disagrees with the decision of the AFM or DNB, after lodging an objection at the institutions themselves, he can appeal to the District Court of Rotterdam.[37] There is a possibility of a further appeal to the Trade and Industries Appeal Tribunal.

Note that the reliability decision in itself is not open to appeal, as it is not a legal act in itself.[38] The question whether the decision is legitimate can only be answered in procedures pertaining to decisions based on the reliability decision.

The courts have traditionally preached deference to the decisions of the AFM and DNB. The reliability of the executives has to be beyond doubt, and it is the supervisors which have an independent responsibility in judging whether this is the case.[39] The court can only review whether they base their decision on correct assumptions and whether they have not exceeded the limits of their discretionary power.[40]

In practice, however, the review is quite strict. First, the courts practice no restraint in the review of the facts themselves.[41] The supervisor must show that it evaluated the available evidence for itself. It may not rely on the judgment of the prosecutor or the criminal court.[42] When the facts are contested, the court itself will review them.[43]

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35 The general competence to issue warnings to the public is given in section 1:94 Wft. With regard to administrative fines, section 1:97 Wft even obliges the authorities to publish.
36 Doorenbos, *supra* note 25, Paras. 6-11.
37 Art. 1:10 Wft.
38 CBb 20 April 2006, *JOR* 2006/157.
39 Rechtbank Rotterdam 25 October 2004, *JOR* 2004/330.
40 Rechtbank Rotterdam 16 May 2003, *JOR* 2003/175.
41 CBb 12 September 2006, *JOR* 2007/114 (*VPV*).
42 CBb 27 September 2005, *JOR* 2006/11, m.nt. M. Somsen; Rechtbank Rotterdam 28 September 2007, *JOR* 2007/303 (*Geldwijzer*).
43 CBb 16 November 2006, *JOR* 2007/747 (*Terpstra & Van der Hoop*); CBb 10 March 2005, *JOR* 2005/100.

Second, the facts have to be sufficient to uphold the decision.[44] With regard to the question as to whether an antecedent is sufficiently serious to justify a negative ruling on someone's reliability, the courts have set a number of criteria: the nature of the transgression, the number of transgressions, the period since the transgression and the interests of third parties.[45] When there is an antecedent related to the company rather than to the executive himself, it must be shown whether it can be held against the individual executive, as it is possible that not all executives bear responsibility for such a transgression.[46]

Third, the reasoning behind the decision has to meet strict criteria. The supervisor has to show that all relevant interests have been taken into account and it has to justify the weight that it has assigned to these interests.[47] If the appellant can show that not all relevant circumstances have been taken into account, the court will overrule the decision of the supervisor.[48]

A number of cases clearly show that the court goes beyond the marginal review it says it performs. In its ruling of 19 June 2001, the CBb held that although the executives involved bore some blame for their behaviour, this was not in itself enough to justify a negative reliability judgment. They had failed to stop, and subsequently to report, the misbehaviour of a third party. Their behaviour was not in the list of antecedents in the appendix, and in addition to that, they were not primarily responsible for the misbehaviour. It should not, therefore, have led to them being declared unreliable.[49] In a case brought before the District Court, it was similarly held that the facts were insufficient to support a negative reliability judgment.[50] The appellant had settled a case with the DA, which he claimed he thought concerned a minor traffic transgression. In fact the settlement was offered with regard to a laser shield he had installed in his car. He had not notified the AFM about the settlement, because for settlements concerning traffic violations this is not required. The AFM had not shown that the omission was anything more than an innocent mistake and the court ruled that it could not deem the subject to be unreliable based on this fact.

The severity of the consequences of a negative reliability judgment has led some authors to argue that this is a criminal charge in the sense of Article 6 ECHR.[51] Therefore, the safeguards provided in Article 6(2) and (3) should be respected. The CBb and the District Court are consistent in their rejection of this view. The purpose of the decision is not to cause grief to those concerned, but to protect the trust in the financial market. There is no punitive element.[52] Somsen points out that the purpose which the sanction serves is not the only factor to be taken into account, though: the severity of the sanction must be considered as well.[53] In a similar vein, Overkleeft-Verburg argues that even if the primary aim of a sanction is prevention, that does not exclude the possibility that it also contains a punitive element.[54] Although their aim of better procedural safeguards is laudable, it is unlikely that a negative reliability decision can be qualified as a criminal charge. The point of view of the national legislator is not decisive in

44 CBb 12 April 2007, *JOR* 2007/148 (*Quinta II*); *Terpstra & Van der Hoop, supra* note 43.
45 Rechtbank Rotterdam 4 September 2001, *JOR* 2002/264, m.nt. CMGvdK, see also *supra* note 20.
46 CBb 28 April 2006, *JOR* 2006/240 (*Quinta I*).
47 *Quinta II*, see *supra* note 44.
48 *Ibid.*
49 CBb 19 June 2001, *JOR* 2001/191, m.nt. CMGvdK.
50 *Geldwijzer*, *supra* note 42.
51 Somsen, *supra* note 21, Para. 9; G. Overkleeft-Verburg, comment on CBb 28 April 2006, *JB* 2006/202, Para. 4.
52 *Maka*, *supra* note 20: In this case, the plaintiff argued that he was being punished twice for the same act: once by the prosecutor (the case was settled), and once by the negative reliability decision. The CBb brushed this objection aside, simply stating that the negative reliability decision was not a punitive sanction. In CBb 16 November 2006, *JOR* 2007/747 (*Terpstra & Van der Hoop*) the court stated that although it may be experienced as a punitive sanction, it is in fact not so. Instead, it merely serves to protect the interests of investors.
53 Somsen, *supra* note 21, Para. 9.
54 G. Overkleeft-Verburg, comment on CBb 28 April 2006, *JB* 2006/202, Para. 4; also J.F. de Groot, comment on CBb 12 April 2006, *JOR* 2007/148.

deciding whether a measure is a criminal charge, but in this case the measure goes no further than is necessary for restoring the legitimate situation.[55] Companies are required to have reliable executives, and as it is impossible to somehow turn an unreliable executive into a reliable one, there is no other option but to require them to leave. Although the severity of the consequences should be taken into account, in itself this is seldom enough to qualify a measure as a punitive charge.[56]

However, Article 6(1) ECHR is applicable regardless of whether there is a criminal charge. The requirement of full jurisdiction has been based on this provision and although the court has hitherto ruled that the requirements of this provision are stricter for criminal charges,[57] it could easily be reinterpreted to mean that full jurisdiction is required when the consequences of a measure are severe. Many Dutch authors endorse this view,[58] and it has been pointed out that the courts do indeed seem to intensify their review if a measure has far-reaching consequences.[59] As we have seen, the reliability test is not an exception to this.

3.1. Conclusion

The Dutch reliability test clearly shows the influence of the EC law on which it is based. The information and antecedents which must be considered are regulated, although the system is open-ended. For a limited category of antecedents, the legislator has determined in advance that these should lead to a negative reliability judgment. For all others, it is up to the supervisors to make the decision. This has led to the criticism that in determining the consequences of the antecedents the AFM and DNB have too much freedom in the latter case and too little in the former – resulting in a possible violation of the requirement of full jurisdiction in Article 6(1) ECHR. The consequences once someone is deemed unreliable are clear and are sometimes thought to be too harsh. They are also prescribed by EC law, and thus it is not easy to change them. Although the wide margin of appreciation awarded to the AFM and DNB has led the courts to practice a stricter review over time, it is still argued that judicial protection is not effective in protecting the affected parties from the consequences of a faulty reliability judgment.

Understandably, the analyses result in a number of conflicting proposals to resolve these problems, some holding that the room for discretion given to the AFM and DNB should be limited, others that it should be expanded. Others propose a system with a full judicial review, a solution that fits in with the often heard call for closer judicial scrutiny of decisions with severe consequences for those involved. Although such a system might in general increase compatibility with the ECHR, in this case it is not entirely clear what problem it would solve. The review carried out by the courts has already become fairly strict, and the main problem in relation to the ECHR seems to be Section 15 of the decree. As an analysis of Dutch law alone does not provide us with a solution, we must turn to other systems for scrutinising reliability.

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55 A criterion proposed by C. Albers '"Etikettenschwindel" in het administrative sanctierecht?' 2001 *Nederlands Juristenblad*, no. 25, pp. 1157-1162, pp.1158-1159, which has been generally well received: See Somsen, *supra* note 21, Para. 9; A. van den Berg *et al.*, 'Wet Bibob en wetsvoorstel Bestuurlijke maatregelen nationale veiligheid: te kort door de Straatburgse bocht?' 2007 *De Gemeentestem*, pp. 611-621, p. 616.

56 F. Houdijker, 'Rechtsbescherming bij bestuurlijke punitieve sancties: een bron van spanning? in: *Bestuurlijke punitieve sancties*, Preadviezen Jonge VAR 2005, pp. 9-53, p. 42, and the cases cited there.

57 Albers, *supra* note 55 , p. 1158.

58 Houdijker, *supra* note 56, p. 42; Somsen, *supra* note 21, Para. 9; T. Barkhuysen *et al.*, comment on *Jussila,* ECHR 23 November 2006, *AB* 2007/51, Para. 9.

59 Overkleeft-Verburg, *supra* note 51, Para. 4; Van den Berg *et al.*, *supra* note 55, p. 621.

4. Scrutinising reliability in Germany

In Germany, the supervision of the financial markets has been in the hands of the *Bundesanstalt für Finanzdienstleistungsaufsicht* (*BaFin*), since in 2002 the three former supervisors merged into one.[60] The legislation did not share in the process of integration though, so the powers of the BaFin are still based on a number of different acts. The supervision of credit institutions, financial services institutions, financial holding companies and financial enterprises is regulated in the German Banking Act (*Kreditwesengesetz, KWG*), insurance companies are covered by the Act on the Supervision of Insurance Undertakings (*Versicherungsaufsichtsgesetz, VAG*) and the trade in securities is supervised based on the Securities Trading Act (*Wertpapierhandelsgesetz, Wphg*). For the reliability test, the KWG and the VAG are the most important, as the Wphg only sets a reliability requirement for executives of foreign undertakings.[61]

The provisions of the KWG and the VAG reflect the system prescribed by EC law, and hence they differ little from those found in Dutch law. Where they do differ, though, the differences are important. And as we shall see below, the interpretation and application of the rules differ as well.

The reliability requirement itself is laid down in Section 33(1)(1) no. 2 KWG and Section 7a(1) VAG: the German executives and the applicant need to be *zuverlässig*: reliable. This reliability criterion is a general requirement in German trade law. Anyone who practices a trade in the sense of the Industrial Code (*Gewerbeordnung, GewO*) needs to be sufficiently reliable to execute that trade. If any kind of authorisation is required to practice the trade, this can be refused when reliability is lacking[62] and such a lack of reliability can be reason for a *Berufsverbot*, based on Section 35 GewO. The definition of the reliability of executives in the financial sector is in keeping with the general definition which has been developed by the Bundesverwaltungsgericht based on the GewO.[63] Reliability is defined in a negative way: it is lacking when '*der Betreffende nach seiner gesamten Persönlichkeit nicht die Gewähr dafür bietet, dass er seine Tätigkeit ordnungsgemäß betreiben wird*'.[64] (When the subject, based on his personality, does not offer the guarantee that he will practice his trade according to the rules.) In practice, someone's reliability is judged based on whether there are facts which shed doubt about this, since it is these facts that seem to indicate an unfit personality.[65] As a minimum, one should comply with the prescriptions of one's trade.[66] The sensitivity of the branch and the specific demands of leading a financial undertaking influence the strictness of the reliability scrutiny, since in Germany there is no unreliability per se. Instead the judgement is connected to a specific position.[67] Therefore, any facts that show unreliability can only be taken into account when they show unfitness for this particular position, and reliability must be judged in the context of the application for authorisation that gave rise to the test.[68] When determining the reliability of an individual, the authorities must at least take into account the size and nature of the undertaking and the position the person

60 M. Schüler, *Integrated Financial Supervision in Germany*, 2004, Discussion paper no. 04-35 of the Zentrum für Europäische Wirtschaftsforschung GmbH, ftp://ftp.zew.de/pub/zew-docs/dp/dp0435.pdf, p. 2.
61 Section 37i Wphg sets a licence requirement for foreign undertakings, which can be refused when the reliability requirement is not met based on Section 37j.
62 H. Laubinger: 'Die gewerbliche Unzuverlässigkeit und ihre Folgen', 1998 *Verwaltungs Archiv*, no. 1, pp. 145-189, p. 147.
63 R. Fischer, Zulassung zum Geschäftsbetrieb', in: K. Boos *et al.*, *Kreditwesengesetz, Kommentar*, Auflage 2, 2004, p. 1024; Also Laubinger, *supra* note 62, p. 147.
64 *Ibid*., p. 1024. See also *e.g.* BVerwG 2 February 1982, *BVerwGE* 65, 1 ff., 1f.
65 *Ibid*., p. 1025.
66 Laubinger, *supra* note 62, p. 148.
67 Fischer, *supra* note 63 p. 1024.
68 *Ibid*., p.1024.

concerned will take.[69] In addition, the principles of *Sachgerechtigkeit* and *Verhältnismäßigkeit* – proportionality – are of key importance. An isolated mishap, or one committed under exceptional circumstances, will usually be insufficient to warrant a negative reliability judgement.[70]

Although German law lacks hard and fast rules that determine under what circumstances someone is unreliable to an even greater extent than Dutch law, there are a number of things that may well be an indication of a prospective executive's unreliability. Prior convictions, especially for crimes against property, fraud and forgery may lead the BaFin to judge him to be unreliable.[71] The same holds true for tax transgressions. Financial crime will weigh heavier on someone's record than other crimes, and may lead to the judgment that someone is unreliable even after a significant period has elapsed. The closer the crime is connected to the executive's position, the heavier it weighs on his reliability. The same is true for the wrongfulness of the deed and the culpability of the executive,[72] but the final judgment will always depend on the specific circumstances of the case.[73] A concrete example addressed by the *Bundestag* concerned tax evasion coupled with gifts to political parties. This would not necessarily lead to the conclusion that someone is unreliable: rather, this will be determined in conjunction with the scale of the affair and with whether there was a goal of personal gain.[74]

When a crime is prosecuted, the presumption of innocence applies. This is even the case when a fixed penalty is paid in order to be discharged from any conviction. However, procedures that do not result in a conviction can still bring up facts that can be a point of departure for the judgement of the BaFin.[75] Any judgement must be based on concrete facts. An overall impression or mere suspicions are insufficient.[76]

Other factors that may lead to unreliability are a failure to meet legal obligations, especially those based on the KWG or similar laws, unreliability in professional life, or personal weaknesses and flaws.[77] Personal weaknesses and flaws can only be considered if they have an effect on the functioning of the individual in his capacity as an executive. Finally, the application itself can be a reason to deem someone unreliable, *e.g.* if it attempts to conceal relevant antecedents.

Other facts that have not been mentioned might also lead to a negative decision as long as they show unfitness for the particular position the subject has or will have.[78] Like in the Netherlands, the list of antecedents that can be considered is open-ended.

Unlike in Dutch law, there is no provision which prescribes a negative decision on someone's reliability, without allowing mitigating circumstances to be taken into account.

The consequences of a negative reliability judgment are similar to those in Dutch law, as these are based on EC directives. If the reliability requirement is not met, the licence required by Section 32(1) KWG and Section 5 VAG will be refused. For existing firms the licence can be revoked based on Section 35 KWG or Section 87(1)(1) VAG. A once reliable executive can only become unreliable if new facts emerge. It is not important when they took place, only when they became known. A re-evaluation of the facts that were already known is not allowed, except in exceptional circumstances, like corruption at the licensing authority.[79]

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69 BverW vom 27 juni 1961, *NJW* 1961m 1834; L. Schork, *Gesetz über das Kreditwesen*, 2001, § 33 Rdnr. 22.
70 Fischer, *supra* note 63, p. 1024.
71 *Ibid*., 1025.
72 Laubinger, *supra* note 62, p. 150.
73 Fischer, *supra* note 63, p. 1025.
74 F. Reischauer *et al.*, *Kreditwesengesetz*, 2008, § 33 KWG, Rdnr. 10.
75 Fischer, *supra* note 63, p. 1025.
76 *Ibid*., p. 1025, Laubinger, *supra* note 62, p. 150.
77 Fischer, *supra* note 63, p. 1025.
78 Laubinger, *supra* note 62, p. 155.
79 Fischer, *supra* note 63 p. 1062.

Less intrusive sanctions are available: the executives concerned can be dismissed based on Section 36(1) KWG or Section 87(6)(1) VAG when the requirements for authorization are no longer met. The BaFin can also prohibit them from practising their profession with an undertaking that has legal personality, an option that is not open to the Dutch supervisors. However, since in the Netherlands the reliability judgment is not attached to a specific function, as it is in Germany, any unreliability judgment is also a *Berufsverbot*.

When deciding on the consequences it should attach to executives' unreliability, the BaFin has to consider the principle of proportionality. The least restrictive measure must be taken, which means that it is more likely that a board member will be dismissed than that the licence is revoked. However, if an undertaking will not comply with the demand to have two reliable executives for an extended period, the licence will be revoked.

Section 36(2) KWG offers the BaFin the possibility to dismiss malfunctioning executives when they do not comply with the provisions of the KWG, either intentionally or because of negligence, after issuing an official warning. The same provision also offers the BaFin the possibility to prohibit them from practising. The provision allows the BaFin to solve the problem of a malfunctioning executive without necessarily deeming him unreliable. The use of this power is again guided by the principle of proportionality, so the least restrictive means must be used. This may even mean that instead of issuing an official warning, the BaFin must sometimes make do with a *Misbilligung*.[80]

What information the BaFin has to consider in its reliability examination has been regulated in some detail. First, there is the information supplied by the applicant himself. Section 32(1)(2) No. 3 KWG and Section 5(5)(5) VAG oblige the applicant to supply the information which is necessary so that his reliability can be adjudged as well as that of the proposed executives. A failure to supply this information may result in a refusal to authorise.

The information that has to be supplied is an elaboration of the requirements set in the CESR standard, and consists of the personal details of the managers, a statement by each applicant and manager as to whether criminal proceedings are pending or have been instituted against them on account of a crime or other offence, whether they or an enterprise managed by them has been or is involved as a debtor in insolvency proceedings, or in proceedings for making a statutory declaration, or in any comparable proceedings.[81] In addition, a complete, signed *curriculum vitae* is required, containing a detailed work history and a description of the applicant's or manager's professional training. Dishonesty in supplying this information can lead to a negative reliability judgment.

In addition, the BaFin consults the Federal Central Register (*Bundeszentralregister*) for criminal offences and the Central Commercial Register (*Gewerbezentralregister*) for business offences.[82] BaFin's prior experiences with the persons concerned and breaches of regulations can be considered as well.[83] The latter have to be very serious, and will mostly concern provision contained in the KWG itself.[84]

A firm can appeal to the Administrative Court (*Verwaltungsgericht, VG*) against the decisions of BaFin, after it has launched an objection with BaFin. The appeal in itself doesn't suspend BaFin's decision. To accomplish that, the procedure of Section 80(5) of the Code of Administrative Procedure (*Verwaltungsgerichtordnung, VwGO*) has to be followed. Such a

80 BverwG, 6 November 2006, *NJW-RR* 2007, 492 6.
81 Section 23(4) and (5) *Anzeigenverordnung*.
82 Fischer, *supra* note 63, p. 1025.
83 *Ibid*., p. 1025.
84 *Ibid*., p. 1025.

procedure will seldom be successful, as the general interest puts more weight into the scales.[85] Against decisions to send the executives of a firm home, the executives concerned are considered to be an interested party in addition to the firm itself. The decision has *Drittwirkung*, the interest of the individual is affected to such a degree that he is a 'Betroffener' as meant in Section 41(1)(1) of the Law on Administrative Procedures (*Verwaltungsverfahrengesetz, VwVfG*).[86]

However, when an executive is dismissed, the courts hold that this doesn't mean he is the subject of a *Berufsverbot*, as the decision isn't addressed to him.[87] Whether such a *Berufsverbot* would be a punitive sanction isn't addressed.

The court will fully review the decision that someone is unreliable.[88] The interpretation of the applicable provisions and their application will be reviewed, as well as the question of whether the facts that have been established are a sufficient ground for concluding that the person concerned is unreliable.

4.1. Conclusions

Although the German reliability test is based on the same EC directives, there are some distinct differences between Dutch and German law. Firstly, there are no hard and fast rules in Germany on what it means to be reliable. There is always room to consider other factors and ameliorating circumstances, unlike in the Netherlands, where certain crimes ensure that someone is no longer reliable for a period of at least eight years. Thus, German law avoids the problems with Article 6(1) ECHR that are caused by Section 15 of the decree in Dutch law. In addition, one is unreliable in a specific context in Germany, which means that not being fit for one position does not necessarily exclude one from all others. In both countries, the courts fully review the decision. However, in Germany this is a long-standing tradition, while in the Netherlands the courts used to restrain themselves, accepting the margin of appreciation awarded to the supervising authorities, and have only relatively recently started to review their decisions in full.

The decision whether someone is reliable is governed by the principle of proportionality: it might be disproportionate to declare someone unreliable. Once the decision that someone is unreliable is reached, however, the consequences are the same as in the Netherlands. This approach is in accordance with EC law: when someone is unreliable, they have to go. However, there is much more room for discretion for the Member States in determining when someone is unreliable than in determining what consequences this should have. German law uses this room to a greater extent than Dutch law, which determines a whole category of persons unreliable, without room for further consideration.

In addition it is remarkable that the German reliability test is basically the same one that is used outside financial law. In the Netherlands, this is quite different.

5. Back to the Netherlands: reliability outside the financial realm

There are many functions outside the financial realm for which there is a reliability criterion, and more often than not this criterion is based on EC law.[89] Usually, to meet this criterion, one has

85 *Ibid*., p. 1070.
86 *Ibid*., p. 1092.
87 Verwaltungsgericht Frankfurt am Main, 17 March 2005, 1 E 686/04.
88 Laubinger, *supra* note 62, p. 159. OVG Berlin 2 October 2001, *EW.R* 2002, S.533.
89 *E.g.* Passenger Transport Act (*Wet op personenvervoer*) 2000, Art. 8 in conjunction with Art. 12; Counsel Act (*Advocatenwet*) Art. 2(2); Primary Education Act (*Wet op het primair onderwijs*) Art. 32(9); Private Security Organizations and Detective Agencies Act (*Wet particuliere beveiligingsorganisaties en recherchebureaus*); Investigating Officers Decree (*Besluit buitengewoon opsporingsambtenaar*).

to be able to show a Certificate of Good Conduct (*Verklaring omtrent het gedrag, VOG*). To acquire such a certificate one has to send an application to the mayor of the town where one lives.[90] He will send the request to the Minister.[91] It is the mayor's responsibility to check whether the information the applicant has supplied is correct, and he can advise the Minister on any special circumstances in his municipality that might affect the decision.[92]

The Minister will decide on the request, taking into consideration the risk for society in relation to the purpose for which the VOG has been requested and the interest of the applicant.[93] He has to refuse the request when there is a criminal antecedent in the criminal records, which, considering the risk posed to society, if repeated, will harm the proper execution of the task for which the certificate was requested.[94]

If the criminal records do not contain any data on the applicant for the past four years, the VOG will be issued, unless the applicant has been found guilty of a sexual offence, in which case there is no time-limit, or has been imprisoned at anytime in the past four years.[95] The decision can be based on the qualification of the facts by the criminal court. There is no need to consider the facts anew to see whether they justify an unreliability judgment.[96]

The law itself leaves it to the Minister to decide which crimes will harm the proper execution of which tasks. However, there are a number of policy rules concerned with certain tasks in which it is determined which antecedents form grounds to refuse a request related to that particular task.[97] Additionally, the possible risks to society are made concrete in the policy rules.[98] If a specific function is not covered by one of the screening profiles in the policy rules, it must be justified why a particular antecedent will pose a risk, if repeated, in the execution of that function.[99]

Whether there is an actual risk of repetition is not conclusive. It has to be considered whether the act, if repeated, will pose a risk to society, without regard being had to the person of the applicant.[100] Only under exceptional circumstances can the Minister deviate from this rule. However, if there is no apparent risk of recidivism, this cannot be entirely left out of the consideration.[101]

Additionally, the sources on which the Minister can base his decision are limited.[102] Information acquired in other ways cannot affect the outcome of the decision. For information from police records it depends on the measure and how it affects the decision in a particular case. The policy rules state that in the case of repeated transgressions which have been settled, these transgressions can be considered. The role of these data is clearly subsidiary and such antecedents do not affect the decision on whether to issue the VOG as seriously as those found in the criminal

90 Art. 30(1) Judicial Data and Criminal Records Act (*Wet justitiële en strafvorderlijke gegevens, Wjsg*).
91 Art. 30(4) Wjsg.
92 Art. 30(2) Wjsg.
93 Art. 28 Wjsg.
94 Art. 35 Wjsg.
95 Policy Rules VOG (*Beleidsregels VOG*) NP-RP 2004, Para. 3.1.
96 Rechtbank Haarlem 5 July 2006, *LJN* AY3383 (not yet reported), Para. 2.6. In this case this led to there being no obligation to take into consideration the circumstances of the case which the applicant had put forward.
97 Appendix A to the Policy Rules VOG NP-RP 2004, *e.g.*: '*een taxi/buschauffeur is belast met de zorg voor het welzijn en de veiligheid van mensen. In deze functie komt het voor dat er een één op één relatie is, waarbij er sprake is van een (tijdelijke) afhankelijkheid. Daarnaast gaan taxi-buschauffeurs om met contante en girale waarden. Bij de uitoefening van de functie kan er derhalve een risico bestaan voor de veiligheid van personen en goederen. Daarnaast bestaat ook het gevaar van machtsmisbruik, afpersing, diefstal, verduistering, vervalsing van waardepapieren en/of geld en het wiswassen van gelden*'.
98 Policy Rules VOG NP-RP 2004, Para. 3.2.2.
99 Rechtbank Roermond 17 January 2007, *LJN* AZ6687 (not yet reported).
100 Policy Rules VOG NP-RP 2004, Para. 3.2.2.
101 Rechtbank Utrecht 15 January 2007, *LJN* AZ9761 (not yet reported).
102 Art. 36 Wjsg.

records, since they have not been confirmed by a judge.[103] In practice, refusals to issue a VOG will be based on on the criminal records. The policy rules state that a VOG will be issued if someone has not appeared in the criminal records for the past four years, unless he is guilty of a sexual offence, or has been imprisoned during the past four years.[104]

The case law on the VOG shows that even when a Certificate is required for a function, when someone commits a crime that would lead to the refusal of a request for a VOG, this is in itself not enough reason to dismiss him.[105] In such a case the interest of the subject in retaining his job will weigh heavier than at the time he was hired. So, though the lack of a Certificate can be a reason to refuse someone a job, the same behaviour that will give rise to the lack of the Certificate is not in itself a sufficient reason to dismiss him.

When compared with the system of the Wft, a number of aspects stand out. The law itself leaves a much smaller margin of discretion to the Minister. It is clear which antecedents will be considered and on what information the Minister will base his decision. After a set number of years, the antecedents will no longer be considered. However, if there are relevant antecedents, the request must be refused. Additionally, there are policy rules which make clear which antecedents will bar one from performing which functions. In short, there is more certainty, but less room to tailor the decision to the individual case.

6. Comparison, conclusion, recommendations

As the reliability test in financial law is based on EC directives, it is not surprising that Dutch and German law have much in common, although there are some remarkable differences as well. The procedure that is followed to determine a subject's reliability is the same. The information that has to be considered is somewhat regulated, based on the CESR standard. However, there is no legislation that prescribes to which conclusion these facts should lead, although in the Netherlands the law offers more handholds than in Germany.

In the Netherlands, after a conviction for certain crimes, one is automatically unreliable for eight years thereafter. This provision has met with opposition, as it leaves no room to consider the specific circumstances of the case. Additionally, it has been argued that the consequences of an unreliability judgment based on Section 15 are disproportionate, as the article leaves no room for differentiation. German law does not recognise a category of crimes which render someone unreliable without further consideration, although these same crimes greatly impact on the decision there as well. Indeed, EC law offers no convincing ground for a provision like Section 15 of the Decree: reliability is not defined and the CESR standards do not offer any ground for such a strict criterion either. As EC law fails to define reliability the German system is acceptable. Indeed, as Article 50(1) MiFid requires the national supervisors to exercise their powers in accordance with national law, it could be considered strange if a certain category of cases were excluded from the application of a general principle of law such as the principle of proportionality, especially in a jurisdiction that leans as heavily on these principles as Germany does.

It would then be wrong to claim that EC law is disproportionate, as it leaves the option to apply the principle of proportionality to the reliability judgment itself. When deeming someone unreliable is disproportionate, other options to uphold the law are, and must be, available, as

103 Policy Rules VOG NP-RP 2004, Para. 3.2.2, see also Rechtbank Roermond 17 January 2007, *supra* note 99.
104 Policy Rules VOG NP-RP 2004, Para. 3.1.
105 CBb 13 June 2005, *LJN* AT9317 (not yet reported); CBb 3 February 1994, *JB* 1999/52; Rechtbank Amsterdam 27 November 1992, no. AW 89/509 (not yet reported).

Member States remain obliged to ensure compliance with the provisions adopted to implement the directives. For instance, when in Germany executives fail to comply with the provisions of the KWG this might be a reason to deem them unreliable, or it might even be a reason for a *Berufsverbot*. However, this is not a necessary consequence. What conclusion is attached to the behaviour of an executive is governed by the principle of proportionality. It is Dutch law that excludes this option for the cases covered by Section 15. What remains the same are the consequences attached to a negative reliability judgment: once an executive is unreliable, he has to go. The plea for differentiation in the consequences of a negative reliability judgment in Dutch law which is heard in the doctrine is moot. EC law does not leave that option open.

There is another aspect in which the German supervisor can make finer distinctions: In the Netherlands, one is either reliable, in the sense of the Wft, or on is not. In Germany, one is unreliable in connection with a specific position. There is no *unzuverlässigkeit an sich*. Defining reliability in this way allows the German supervisors to discriminate somewhat in the consequences attached to a negative reliability judgment, as it leaves them the option of declaring the same executive reliable enough to hold some other position. It is not clear whether it would have much consequence in practice were this practice to be adopted in Dutch law, but it would certainly require a significant change in how the notion of reliability is understood.

On the other hand, it has been argued that Article 16 of the Decree leaves altogether too much room for the supervisors. German law does not offer much in the way of a solution here. If anything, the BaFin has more room for discretion than the AFM and DNB. The use it can make of this room for discretion is limited by little else than the general principles of law, mostly proportionality, though in Germany these principles are part of the Constitution. Unlike in the Netherlands, this hardly leads to any criticism in Germany. An explanation for this may be found in the long tradition of delivering these judgments. The KWG and the VAG use the same standard of reliability that has been used for decades in the GewO. The courts have a long tradition of reviewing these decisions and it is quite clear what is expected of the supervising authorities with regard to providing the necessary grounds for their decisions.

In the Netherlands, tailoring the reliability test to the already existing VOG was not an option. The information used to base the decision on whether to issue a VOG is too limited for basing the reliability judgment in financial law. Doing so would violate CESR procedures and the EC law provisions that hold that the applicant must supply all information necessary so that his reliability and that of the proposed executives can be adjudged. In addition, the VOG only regulates entry into a profession. It does not provide a basis for dismissing, at a later date, executives who have become unreliable, whilst such a basis is required by EC law.

So rather than adapting an existing system, the Dutch legislator adopted the CESR guidelines, which included a margin of appreciation given to the supervising authorities that was more or less alien to Dutch law regarding reliability testing. Apparently this takes some getting used to. However, the Dutch courts have steadily intensified the level of the review they carry out and now, rather than a marginal review, they perform a full review of the decisions of the supervisors, their grounds and the facts upon which the decision is based. The AFM and DNB can do little more than be careful in their decisions. As before, they should allow themselves to be guided by proportionality. Careful, transparent reasoning is essential. Some mistakes cannot be avoided, but their number will probably lessen in time, as the case law of the courts clarifies what demands are put upon the decisions of the supervisors. Thus, one might say that the Dutch system is moving towards the German one, compensating a wide margin of appreciation with a full review by the courts and stringent demands on the grounds for the supervisors' decisions.

This development makes it clear that, in time, Section 15 of the Decree can be abolished. Since it is not necessary to have such a provision based on EC law, there is little reason to retain it. It is self-evident, and it should be enough, that the crimes mentioned in this article have a heavy impact on the judgment of the supervisor. The duty to provide reasoned decisions should ensure that even when Section 15 has been abolished, only in the rarest of cases will the supervisors decide that someone is reliable even though he has recently committed financial or property crimes.

The proposed solution will help to make the Dutch reliability test ECHR-proof. The repeal of Section 15 will result in the possibility of a full judicial review of *all* reliability decisions. A desirable development: even when the negative reliability decision is not a criminal charge – and it probably is not – it still has to meet the requirements of Article 6(1) ECHR. Considering the serious consequences of a negative decision, it is advisable to apply the requirement of full jurisdiction. Although for most decisions that is already what the courts are doing, they cannot fully put it into practice until Section 15 is repealed.