

Publication: recent court decisions suggest more critical attitude towards regulators

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A preliminary relief judge reversed three recent decisions on the publication of measures taken by the Dutch Central Bank (DNB) and the financial markets regulator AFM. In the first case, DNB was found to have overstepped the mark by publishing the names of the managers and the company that had received fines. In a second ruling, the judge instructed DNB not to publish a multimillion fine imposed on Delta Lloyd. And in the third case, the preliminary relief judge ruled that the AFM was not entitled to publicly warn consumers about certain practices. According to the preliminary relief judge, the Financial Markets Supervision Act is not designed to allow this type of general warning without specifying the statutory provisions that have supposedly been infringed. Regulators must weigh the interests involved before deciding to fully disclose details of the parties involved. These rulings may suggest a more critical attitude of the courts and a shift in the approach about what regulators can make public.

DNB

The Dutch Central Bank (DNB) levied administrative fines on 11 September 2014 on a company and its management for violating financial supervision laws. Allegedly, the company had raised money through a subsidiary to finance real estate projects in Asia, but without holding the necessary banking licence. In making these fines public, DNB included the personal details of the managers and the name of the company. The managers and the company filed successful preliminary relief proceedings against the publication. According to the preliminary relief judge, DNB had failed to explain convincingly why it needed to publish the information.

The court decision coincided with recent changes in the statutory rules relating to publication of fines. These changes arose from the implementation on 1 August 2014 of the Capital Requirements Directive and Regulation. Since no transitory law applies to the new provisions, the preliminary relief judge immediately applied the new provisions.

Under the old law, the regulator was only precluded from publishing a fine if disclosure was contrary to the due exercise of supervision by the regulator.

Under the new provisions, a fine decision must be published anonymously, having weighed up the interests concerned, if full disclosure would:

- be disproportionate to an individual recipient of a fine
- cause disproportionate damage to the parties involved
- undermine an ongoing criminal investigation
- jeopardise the stability of the financial system.

Following the court ruling, DNB anonymised the fines on its website.

In another case on 30 January 2015, a preliminary relief judge instructed DNB not to publish a multimillion fine imposed on Delta Lloyd. DNB's position was that it could publish the fine. But the preliminary relief judge ruled that the old and stricter legal regime applied in this case. Delta Lloyd insisted on non-publication to avoid disclosure of information about the employees involved and the company. The facts of the fine will therefore remain unknown to the public for now. We will continue to report on this case in In context.

AFM

On 18 December 2014, the Financial Markets Authority (AFM) announced on its website that it was investigating a company on the basis of a significant number of reports about how this party approached customers with insurance policies bearing excessive charges. The AFM's statements are to be regarded as a public warning. The AFM declared it wanted to warn consumers in general about certain practices, rather than for breach of a specific statutory prohibition.

In its decision of 23 December 2014, a preliminary relief judge ruled that the AFM was not authorised to give public warnings in this manner about the company's practices and that all statements about the company on the AFM's website and all alerts regarding these statements were unlawful. According to the judge, the Financial Markets Supervision Act does not allow the AFM to give such a general warning, without specifying which provisions of the Act are infringed. The AFM was instructed to immediately rectify the statements on its website. The preliminary judge also prohibited any further statements that would amount to a repetition of the public warning.

These preliminary relief rulings on what regulators can make public are a significant development, as they suggest a more critical attitude of the courts and a shift in their approach.