LIABILITY OF REGULATORS NEW DUTCH STYLE

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SUMMARY

Once upon a time in the world of money and greed, financial regulators saw a major crisis unfolding under their watch. But the regulators did not fear because they were immune to liability. Because one day, they had got together and issued a statement that all financial regulators be made immune. The statement also said that this immunity would only apply to financial regulators because all regulators are equal but financial regulators are more equal than others.

The Dutch financial regulator, for friends also known as DNB, envied the other regulators for their immunity. In fact, DNB was also immune but it could not quite believe this because it could not find its immunity in the Dutch statute book. For years, DNB lobbied and lobbied the Dutch Minister of Finance to have its immunity laid down in the statute book – but in vain.

Until, one day, a new Finance Minister was appointed. Just like DNB, he was the kind of person that put more trust in statutes than in the courts and he promised DNB to write its immunity in the Dutch statute book.

The question with which this article is concerned is: will DNB live happily ever after?

1. THE FINANCIAL CRISIS AND THE REGULATORS[1]

It started with a mortgage broker in California who sold loans to people to buy a house. The people were poor and did not have enough money to pay off their

1 The term 'regulator' is used here, as this is the usual English concept. The terminology is not ideal as 'regulators' supervise and enforce rather than regulate. However, the term 'supervisor' would not sufficiently cover the matter either.

debts but the broker did not care. And the bank could not care less. It shredded the claims, wrapped the confetti in nice small boxes, called them derivatives and sold them to other banks. Other banks did the same and the tricky derivatives spread into the global banking system. Not much later, many of the derivates appeared to be worthless because the poor borrowers had stopped paying their debts. Banks stopped lending money to each other out of fear that other banks' assets had also devaluated. Banks collapsed or almost collapsed and the financial system came on the brink of a breakdown. The governments had no choice but to interfere and bail out banks with billions of taxpayers' money. However, when the governments wanted to issue stricter rules for financial regulation, the bankers warned them that this would lead to a second financial crisis. In the meantime the bankers went on with binge-banking and pocketing their bonuses according to the principles of the children's party: there is a bonus for everyone, also for the losers.

The primary responsibility for the financial crisis lies with the banks that took big risks, traded in very complex financial products of which hardly anybody understood the risks, failed in proper risk management, delegated due diligence to credit rating agencies and, backed by short sighted shareholders, were only interested in short term results. "Money … has often been a cause of the delusion of multitudes… Men, it has been well said, think in herds; it will be seen that they go mad in herds, while they only recover their senses slowly, and one by one."[2]

The financial regulators' responsibility cannot in any way diminish the bankers' responsibility. But the reverse is also true: the bankers' responsibility cannot in any way diminish that of the regulators. Indeed, in the *De Larosière Report*[3] the regulators were strongly criticised for the way they handled the run up to the financial crisis:

– There was too much attention for individual players and too little for the playing field and the systemic risks. The crisis made clear that the system is not simply the addition of the individual financial companies. Probably the approach was also too legal: everything goes according to the rules, so all goes well. But what if the rules are wrong?
– The Basel-Framework[4] appeared to be completely insufficient as a basis for international regulation. The rules provided too much freedom for banks and considerably contributed to the crisis' development and extent.

2 Ch. Mackay, *Extraordinary Popular Delusions and the Madness of Crowds* (London 1841).
3 *Report of the High Level Group on Financial Supervision in the EU, chaired by Jacques De Larosière* (European Commission, 2009).
4 The banking supervision Accords, in fact 'Basel I' and 'Basel II', drafted by the Basel Committee on Banking Supervision. The latter consists of the governors of the Central Banks of 27 mainly western countries.

- Many crucial activities on the financial markets were beyond the regulators' watch. Investment banks' activities interfered with those of the regulated banks causing high risks. And the non-regulated credit rating agencies almost always estimated the risks too low.
- The regulators failed to judge and limit the risks of complex financial products. They were too dependent on information from market participants like the banks, auditors and credit rating agencies.
- Financial markets are international markets whereas supervision is mainly organised on a national basis. Regulators in countries with an important financial industry do not always have an interest in exchanging information with other regulators.
- It is questionable whether regulators are sufficiently resistant against *capture* and more generally whether they and legislators are strong enough to resist the relentless and shameless lobby of the banking industry.

In the early years of the 21st century, financial regulators must have fathomed that the global financial system was running higher and higher risks and was on its way to a severe crisis. One may argue that nobody could have expected the imbalances to cause a financial crisis of such an intensity and duration.[5] However, it is beyond doubt that regulators knew that the imbalances would end in a severe economic crisis of some sort. It can be considered a serious shortcoming that regulators' warnings for such a crisis remained too weak.

An explanation, not a justification, is that the crisis had multiple causes and that regulators' responsibilities at an international level are diffused. This makes it very difficult to point a finger to failures of individual regulators regarding the causes of the crisis. Moreover, the problem was that the economy was booming and it is always difficult to start talking about winter when it is still summer. Even if the regulators would have raised the alarm it is unlikely that politicians would have listened. In the end, the watchdogs only started barking when the financial cholera was already spreading over the globe.

For this reason, it will be difficult to hold financial regulators individually liable for their conduct in the run up to the crisis. Another important reason is that financial regulators usually enjoy quasi liability immunity. An argument for this quasi immunity is to enable financial regulators to act more vigorously. This argument has not held true, as regulators across the world acted similarly ineffectively during the crisis regardless of their liability status. Probably, there is no clear relationship between limited liability and robust supervision.

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5 De Nederlandsche Bank, *In het spoor van de crisis. Achtergronden bij de financiële crisis* (2009), p. 9.

2. QUASI IMMUNITIES OF FINANCIAL REGULATORS: A BIRD'S EYE VIEW

What are the requirements for the liability of financial regulators in the countries around the Netherlands? A brief overview.[6]

2.1. FRANCE

In France, public bodies are subject to the normal rules of fault (negligence) liability. However, when the public body carries out complex tasks and has a margin of discretion a *faute lourde* (grave fault) is required for liability.[7] This special regime applies to public bodies like the police, the tax authorities and the financial regulator.[8]

The case law has not provided a definition of a *faute lourde*. In the legal literature it is argued that a normal fault is a fault that would not have been committed by a reasonably careful regulator in the same circumstances, whereas a grave fault refers to situations where the fault is so flagrant that also a non-professional would not have committed it.[9] However, the case law seems to present a more blurred picture. For example, the use of confidential documents by the public body against a regulated financial company was considered not to be a *faute lourde* but an act by the financial regulator beyond its statutory power was. And an act that violated a statutory provision was in one case a *faute lourde* and in another case not.[10]

The *faute lourde* particularly serves its function when it comes to judging acts that are within the discretion of the regulator. In this respect, the French rules for regulator's liability seem to follow the general rules for public body liability.

6 See the country overviews in C. van Dam, *Aansprakelijkheid van toezichthouders – Achtergrondstudies* (London, 2006) (www.wodc.nl). See also (in Dutch) E. De Kezel e.a., *Financieel toezicht en aansprakelijkheid in internationaal verband* (2009), p. 153ff and M. Tison, "Do not attack the watchdog! Banking supervisor's liability after Peter Paul", *CMLR* 42 (2005) 639ff.

7 Conseil d'État 24 January 1964, Leb. 1964. 43; Conseil d'État 29 December 1978, Dalloz 1979. 278 (*Darmont*), comm. Vasseur.

8 Conseil d'État 20 October 1972, *Actualité Juridique de Droit Administratif* 1972. 597 (police); Conseil d'État 27 July 1990, *Actualité Juridique de Droit Administratif* 1991. 53 (tax authorities), comm. Richer. In this case it was also decided that a *faute simple* is sufficient in case of routine acts.

9 J.-J. Menuret, note under Conseil d'État 30 November 2001, Kechichian, *La Semaine Juridique* 2002. II. 10042, p. 502.

10 C. van Dam, *Aansprakelijkheid van toezichthouders – Achtergrondstudies* (London, 2006), Report France (Frison-Roche), p. 259.

2.2. BELGIUM

Until 2002, liability of the Belgian financial regulator was subject to the normal rules for governmental liability. This implied that a 'normal' fault was sufficient for liability and that the regulator's discretion was taken into account when establishing a fault. The only published case in which liability was established on this basis dated from 1975.[11] This was not exactly a record that begged for interference but in 2002 the Belgian legislator granted the regulator (de Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)) quasi liability immunity. As a justification for this step it referred to the legislation in 'countries like Germany' and to the Core Principles of the Basel Committee (see below). Article 68 WFTS (Act regarding supervision of the financial sector and the financial services) holds: "The CBFA performs its duties in the general interest only. The CBFA, the members of its organs and its members of staff are not liable for damages for their decisions, acts or conduct when carrying out the CBFA's statutory tasks, except in case of deceit or grave fault."

The Belgian standard is virtually the same as in France. However, there is no case law yet that sheds more light on the statutory concepts. In a case regarding the bankruptcy of an investment company, it was asserted that the CBFA had wrongly maintained the appearance of the company's solvency. The District Court in Brussels dismissed the claim because it held that there was no causation between the asserted negligence and the investor's damage. Hence, the Court could refrain from expressing its view on the character and content of the grave fault.[12]

2.3. UNITED KINGDOM

In the United Kingdom, the tort of negligence cannot serve as a basis for liability of the financial regulator for inadequate supervision. In 1988, the Privy Council held that a financial regulator does not owe the clients of a bank a duty of care for lack of sufficient proximity between the client and the regulator.[13] The case concerned facts that occurred before the Banking Act 1987 entered into force that precluded negligence claims against the financial regulator.

The collapse of the Bank of Credit and Commerce International (also known as the Bank of Crooks and Crime International) causing losses to over 6,000 depositors led to the well-known *Three Rivers*-cases. Here, the basis for the claim

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11 Cass. 9 October 1975, *Revue critique de jurisprudence belge* 1976, 165. Claims against the regulator were dismissed by Rb. Brussel 28 June 1955, *Journal des tribunaux* 1956, 71 and Rb. Brussel 24 October 1994, *Bank- en Financiewezen* 1995, 232.

12 Rb. Brussel 11 May 2007, *Tijdschrift voor Belgisch Handelsrecht* 2009, 73.

13 *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175. See also *Davis v Radcliffe* [1990] BCLC 647.

was the tort of *misfeasance in a public office*.[14] The tort requires an unauthorised act by a person holding public office and acting in bad faith. Bad faith means that the person either had the purpose of causing harm to the claimant or was aware that his act would probably cause damage of the type in fact suffered by the claimant or that he was consciously indifferent to that risk.[15] In *Three Rivers II* the majority of the House of Lords held that the case could go to trial[16] but in 2005 the claimants withdrew their claims after a senior judge at the High Court had ruled that "… it was no longer in the best interests of the creditors for the litigation to continue."[17]

After *Three Rivers*, the threshold for liability in *common law* is virtually the same as in *statute*.[18] The Financial Markets and Services Act 2000 limits liability of the Financial Services Authority and its staff to *acts in bad faith* and conduct that is incompatible with the Human Rights Act 1998.[19] Bad faith means that the *public officer* acted with the intention to cause damage to the claimant, or acted with the knowledge (a) that he acted beyond his powers and (b) the claimant could suffer damage because of this act.

The fact that the FSA has come under severe criticism for its lack of supervision in the run op to the financial crisis and particularly its handling of the Northern Rock collapse has fuelled the debate on the FSA's quasi-immunity which no longer seems to be taken for granted.[20] On 9 March 2011, the chairman of the Treasury Select Committee of the House of Commons, Andrew Tyrie (Conservative) questioned whether it might be time to look at making the FSA legally liable for 'reckless behaviour' in order to deter employees from doing 'stupid' things. He said: "The fact that you may be subject to actions in the courts will alter your behaviour."

2.4. GERMANY

In Germany, liability of public bodies is based on §839 BGB. This is a fault liability in which the public body's discretion is taken into account. It is also required that the violated norm aims to protect the infringed individual interests. Initially, the courts held that statutory rules in financial regulation were written

14 This tort goes back to *Turner v Sterling* (1671) 2 Vent. 24 and was kissed awake by the Privy Council in *Dunlop v Woollahra Municipal Council* [1982] AC 158 (PC).

15 *Three Rivers District Council v Governor and Company of the Bank of England (Three Rivers I)* [2000] 2 WLR 1220; Winfield and Jolowicz (2006), par. 7.18.

16 *Three Rivers District Council v Governor and Company of the Bank of England (Three Rivers II)* [2001] UKHL 16.

17 *The Times*, 3 November 2005.

18 A *statutory immunity* does not necessarily exclude liability in *common law*; see also Ch. Proctor, "BCCI: Suing the Supervisor", *The Financial Regulator* 2001, p. 37.

19 S. 102 Financial Services and Markets Act 2000.

20 Www.epolitix.com/latestnews/article-detail/newsarticle/fsa-immune-from-legal-liability.

in the general interest so that individuals did not have a claim. In 1979, however, the BGH made a U-turn, holding that also individual account holders (but not shareholders or other banks) could sue the financial regulator for inadequate supervision.[21] However, the case law remained very reluctant to accept liability, allowing the regulator a wide margin of discretion.

Despite this reluctance and without any evidence of any past or future problems, the legislator interfered by adopting the rule that the financial regulator performs its duties in the general interest only.[22] This means that liability is excluded, even if the regulator acted grave negligently, in bad faith or intentionally. This immunity has been strongly criticised. It is argued that it infringes Article 6 ECHR and Article 34 German Constitution.[23] However, no case has been brought to the *Bundesverfassungsgericht*, which means that the constitutionality question remains unanswered.

2.5. EUROPE

Nowadays, financial regulation is mainly driven by the European Union. At the same time, the regulators are national bodies and national law determines their liability. An effort to create European minimum harmonisation on the basis of the *Francovich* case law failed in the Peter Paul case.

Peter Paul and others had lost money when the German BVH Bank went bust. Their deposits were higher than what the German Deposit Guarantee Scheme compensated[24] and they sued the German State for inadequate supervision. The German court asked the European Court of Justice whether the German regulator's immunity was compatible with community law.[25] The European Court considered that the First Banking Directive and other European Directives did not confer rights to individual account holders in case of a bank's bankruptcy as a consequence of inadequate supervision by the regulator. It held that a rule according to which a regulator performs its duties in the general

21 BGH 15 February 1979, *BGHZ* 74, 144 = *NJW* 1979, 1354 (Wetterstein); BGH 12 July 1979, *BGHZ* 75, 120 = *NJW* 1979, 1879 (Herstatt-Bank).

22 Formerly § 6(4) *Gesetz über das Kreditwesen,* now § 4(4) Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht (FinDAG): "Die Bundesanstalt nimmt ihre Aufgaben und Befugnisse nur im öffentlichen Interesse wahr". See also BGH 20 January 2005, *NJW* 2005, 742.

23 See particularly *Münchener Kommentar zum BGB*, 4th edn. 2004, § 839 N 255 (Papier); Th. Maunz and G. Dürig, *Kommentar zum Grundgesetz* (Köln, 2008), Article 34 N 190; M. Gratias, *Staatshaftung für fehlerhafte Banken- und Versicherungsaufsicht im Europäischen Binnenmarkt* (Baden-Baden, 1999), with further references.

24 At that moment Germany should have had implemented the Deposit Guarantee Scheme Directive 94/19. This was a breach of community law and LG Bonn 16 April 1999, *NJW* 2000, 815 granted each claimant the equivalent of € 20.000 (the minimum guarantee amount).

25 BGH 16 May 2002, *NJW* 2002, 2464.

interest only does not violate European law.[26] It is likely that the Court considered the topic too sensitive to interfere in the national interests.[27]

The Articles 6 and 13, and Article 1 First Protocol ECHR can also be relevant for regulator's liability. Article 6 protects access to justice and Article 13 guarantees an effective remedy if a Convention right is infringed. Article 1 First Protocol holds that every natural or legal person is entitled to the peaceful enjoyment of his possessions, which does not only include goods but also rights. There is no case law yet about the relevance of these provisions for the financial regulator's (limited) liability but it is strongly arguable that a liability immunity amounts to a violation of Article 6 and 13 ECHR,[28] whilst a limitation of liability with retrospective effect almost certainly violates Article 1 First Protocol.[29]

2.6. BASEL COMMITTEE

In 1997, the Basel Committee on Banking Supervision (in which financial regulators cooperate) published a blueprint for an effective supervisory system: the *Core Principles for Effective Banking Supervision*.[30] The first principle mentioned the need to legally protect financial regulators. It concerns "… protection (normally in law) from personal and institutional liability for supervisory actions taken in good faith in the course of performing supervisory duties".[31]

Hence, the Basel Committee recommended protecting regulators against liability if they acted *in good faith* when performing their duties. According to Ross Delston, a World Bank consultant, limiting liability of regulators is necessary because of "… the chilling effect that even the threat of litigation can have on the performance of a banking supervisor's work."[32] Delston does not furnish any empirical evidence for his assertion. Also in my 2006 research (see below) I did not find indications for this chilling effect.[33] It shows that the lobby for limiting

26 ECJ 12 October 2004, C-222/02 (Peter Paul/Germany), para. 40–47.

27 See also M. Tison, "Do not attack the watchdog! Banking supervisor's liability after Peter Paul", *CMLR* 42 (2005) 639ff.

28 See for example ECtHR 28 October 1998, Case 87/1997 (*Osman v United Kingdom*), § 150–151; ECtHR 3 April 2001, Case 27229/95 (Keenan/United Kingdom); ECtHR 18 July 2006, Case 54810/00 (Keegan/United Kingdom).

29 See for example ECtHR 20 November 1995 (Pressos Compania Naviera/Belgium), Case 17849/91; ECtHR 23 October 1997 (National and Provincial Building Society a.o./United Kingdom), Cases 21319/93 and 21675/93); ECtHR 6 October 2005 (Maurice/France), Case 810/03.

30 Www.bis.org/publ/bcbs30a.pdf. The International Association of Insurance Supervisors (IAIS) and the International Organization of Securities Commissions (IOSCO) issued similar recommendations.

31 Www.bis.org/publ/bcbs30a.pdf, p. 14.

32 R.S. Delston, *Statutory Protection for Banking Supervisors*, www1.worldbank.org/finance/html/statutory_protection.htm#delston.

33 C. van Dam, *Aansprakelijkheid van toezichthouders – Algemeen rapport*, London, 2006, p. 64ff.

the financial regulators' liability is not empirically but politically driven. The same goes for the legislative interferences in Belgium and Germany (see above).

The Core Principles do not give an indication as to the meaning of *good faith*. This makes it difficult to compare with the concepts of *grave fault* (France and Belgium) and *bad faith* (United Kingdom). The recommendation suggests a rule in which the burden of proof of good faith is on the regulator. In this respect, the mentioned national rules go further by putting the burden of proof of bad faith or grave fault on the claimant.

3. DNB'S LIABILITY IN THE DUTCH COURTS

In the Netherlands, DNB's liability is determined by the general liability provision of Article 6:162 Burgerlijk Wetboek (Civil Code), which embodies a negligence liability regime. When applying this rule, the courts take into consideration that public bodies like DNB have a margin of discretion. The current state of affairs can be found in the Hoge Raad's *Vie d'Or* decision of 2006.[34] The case was about the supervision of life insurance company Vie d'Or that went bankrupt in 1993, causing substantial damage to policyholders. In its decision, the Hoge Raad held, first, that a regulator must act adequately and carefully. This must be assessed by taking all circumstances into account. Second, the Hoge Raad provided guidance by mentioning a (non limitative) number of relevant elements regarding both the regulator's discretion and the interests of potential victims:

– starting point is the financial institution's responsibility;
– the regulator has a considerable discretion and this implies that the court must be reluctant when judging the regulator's conduct;
– it is not relevant whether from hindsight a different decision would have been better but whether the regulator could reasonably have taken the decision it took;
– in his considerations, the regulator must take the interests of potential victims into account;
– if the regulator faces a dilemma, it is relevant whether he contributed to the occurrence of this dilemma by leaving developments to take their course;
– the regulator must act in such a way that the risk of insolvency stays as small as possible and not only take measures if an immediate risk occurs;
– the regulator must observe carefully whether its measures are effective and, if not, take more effective measures.

34 HR 13 October 2006, NJ 2008, 527, ann. C.C. van Dam (De Nederlandsche Bank/Stichting Vie d'Or). In May 2008, a settlement was reached between all parties involved and a fund for the 11,000 policyholders was created. The Dutch Central Bank did not contribute to this fund but paid the legal costs of the claimants. The settlement was declared to be in principle binding for all policyholders; see Hof Amsterdam 29 April 2009, *NJ* 2009, 448.

The Vie d'Or decision reflects the reluctant way in which the Dutch courts decide about the financial regulator's liability. They do not set high standards for the quality of supervision and take the regulator's broad discretion into account.[35]

How reluctant this approach works out in practice can be illustrated by the fact that over the past decades, DNB is only held liable twice for inadequate supervision. The first time was by the The Hague Court of Appeal in Vie d'Or but this decision was quashed by the Hoge Raad. The second case was a recent decision of the Amsterdam Court of Appeal[36] but this decision is appealed and is pending before the Hoge Raad. It is therefore still likely that DNB will keep a clean liability sheet. This begs the question why DNB so much wants a limitation of its liability.

4. A SHORT HISTORY OF A SUCCESSFUL POLITICAL LOBBY

In 2005, the Dutch Minister of Justice commissioned a survey on the liability risks for regulators. The reason for this research was a number of major incidents in The Netherlands and the role of the regulator had come under scrutiny. One of these incidents was the collapse of life insurance company Vie d'Or. The survey did not only focus on the liability of financial regulators but had a general focus and also looked, for example at liability risks of supervisory bodies in the area of health and safety. The survey was carried out under the auspices of the British Institute of International and Comparative Law and was supervised by the author of this contribution.[37]

The conclusion of the survey was that the Dutch liability system functioned satisfactorily, that the system served as a healthy incentive for regulators and that there was no reason for concern regarding uncontainable risks. From discussions with supervisors, it appeared that this conclusion was broadly shared, also by DNB. The Dutch Cabinet agreed with the conclusions. However, on the initiative of the Ministry of Finance, lobbied by DNB, a follow up research project was commissioned into the question whether the conclusions from the 2006 report

[35] See the Vie d'Or cases, as well as HR 23 February 2007, *NJ* 2007, 503 (X/DNB) and Hof Den Haag 21 July 2009, *JOR* 2009, 264, ann. Roth (claim against DNB dismissed). The same goes for the liability of the Autoriteit Financiële Markten (AFM): see Hof Amsterdam 13 September 2007, *NJ* 2007, 606 (Accent Aigu/AFM), in which the Court of Appeal applied the Vie d'Or arrest of the Hoge Raad and dismissed the claim against AFM. Another claim against AFM was dismissed by Hof Amsterdam 23 December 2008, LJN: BG9422 (Befra/AFM), quashing Rb. Amsterdam 14 September 2005, *NJ* 2005, 535 (BeFra/AFM).

[36] Hof Amsterdam 15 juni 2010, case number 200.034.466/01 (Voute and Van Wulfften Palthe/DNB).

[37] C. van Dam, *Aansprakelijkheid van toezichthouders* (London 2006).

also applied to risks for financial regulators when they were working in an international context.

This second survey was published in 2009. In a letter to Parliament, the Dutch Minister of Finance wrote, also on behalf of the Minister of Justice, that he agreed with its conclusions.[38] The main conclusion was that, despite the fact that Dutch legislation does not limit the financial regulator's liability by statute, its potential additional international liability risks are very limited because the Dutch courts are very reluctant to accept liability. It was also concluded that the deviating Dutch statutory framework would not attract foreign liability claims.

The Minister of Finance emphasised the importance of the compensation and deterrence functions of liability law with respect to financial regulators and he pointed at the risk of precedents for other public and private bodies if liability of financial regulators would be limited. The Minister did not exclude that the running surveys into the financial crisis would change his view but weighing all relevant aspects he found "… that a limitation of the liability of Dutch financial regulators is not necessary". Three months later, the Minister of Finance resigned for reasons unrelated to the quoted letter.

In May 2010, a Committee of Dutch Parliament reported on its inquiry into the financial system.[39] One of its recommendations regarded the liability of financial regulators: "Fear for an incorrect legal interpretation or for damages claims should not influence a policy choice by the Dutch financial regulator in a wrong way. Therefore, the Committee recommended to restrict the liability of the Dutch financial regulators and to bring it in line with what is common at a European level".

The Dutch Cabinet considered this recommendation[40] and in March 2011 the Minister of Finance announced, unsurprisingly, that he intended to propose a Bill to limit the liability of financial regulators.[41] He mentioned a few reasons for his proposal, one being his aim to encourage a more openly critical supervision by the financial regulator. This is not a very convincing argument. DNB is primarily responsible for prudential supervision and its main concern is the solvency of financial companies. The real obstacles for openly criticising financial companies and for more transparency are the regulator's confidentiality obligations and the risk of a bankrun. A bankrun is never in the public interest and a regulator will aim to prevent this from happening regardless of the liability

38 Letter Minister of Finance to the Tweede Kamer der Staten-Generaal, *Beleidsvisie over aansprakelijkheid financiële toezichthouders bezien vanuit de internationale dimensie*, 13 November 2009.

39 *Verloren krediet*, Parlementaire onderzoekscommissie financieel stelsel (Den Haag 2010); *Credit lost*, Report of the Parliamentary Committee Inquiry Financial System (The Hague 2010).

40 Kamerstukken II 2010/11 31980, nr 16.

41 Letter Minister of Finance to the Tweede Kamer der Staten-Generaal, *Beperking van de aansprakelijkheid van de financiële toezichthouders,* 11 March 2011.

risk it runs. Moreover, experiences in countries with a limited liability regime show that regulators are not more openly critical or more transparent in their supervisory tasks.[42]

The Finance Minister looked at various ways to limit the financial regulators' liability, and in the end opted for a liability limitation to cases of intentional and gross negligent (*grove schuld*) conduct. Such a regime is similar to those in the neighbouring countries and in the Minister's view this will limit the Dutch regulators' exposure to foreign liability claims. Unfortunately, he did not provide reasons for negating the findings of the 2009 Report (see above), where it was concluded that the deviating Dutch liability regime would not attract foreign claims.

The Minister rejected the option of capping the regulators' liability. This is remarkable, as DNB's President had often quoted the case of a damages claim of 10 billion euro to argue that DNB's liability should be limited. To tackle such high claims a cap on DNB's liability would make sense whereas limiting liability to cases of intention and gross negligence would still keep DNB to *zittern und zagen*.

Overall, the Minister's proposal is extremely thinly motivated. In fact, the only reason for the statutory limitation is to have a tool that looks the same as those of foreign regulators. This is not necessarily a good reason. Most of the foreign statutory limitations are politically driven rather than evidence based.[43] Following others because they are in the majority is not convincing. And although a level playing field in Europe with regards to regulators' liability can make sense, the focus of the Finance Minister and DNB is very much on the outer features of a statutory rule and neglects the very reluctant way the Dutch courts apply the general rule of Article 6:162 BW. Formally, the Dutch rule is a negligence liability but the courts arguably apply a similar standard as in Belgium and France, which amounts to a standard of gross negligence. This way, the Dutch judiciary carefully preserves the balance between protecting the interests of companies and individuals on one hand and those of the financial regulators on the other.

The new rule creates the risk of shifting the balance too much to the disadvantage of the legitimate interests of companies and individuals. There is also a risk that the new rule will work as a boomerang and attract more rather than fewer claims against the financial regulators. This is because claimants will probably like to find out how the new rule will work out in practice. And it will remain difficult to predict the outcome of cases, as the courts will still need to

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42 More transparency is easier when the financial company has collapsed; in other situations confidentiality remains key. Compare the Dutch Rapport of the *Commissie van Onderzoek DSB Bank* into the collapsed DSB Bank on one hand, and the problems regarding publication of FSA's findings into the RBS collapse on the other: www.bbc.co.uk/news/business-12001243.

43 See also my inaugural lecture, *Politieke infiltratie in het privaatrecht* (Deventer 1994).

take all circumstances of the case into account. In other words: there remain serious doubts as to the question whether DNB will live happily ever after.

Finally, there is a more fundamental point to mention, which regards all countries that have statutorily limited their financial regulator's liability. These limitations ignore the fact that the judiciary is not a hostile *Fremdkörper* of the State but part of the same polity that the financial regulator and other regulators and public bodies aim to serve. Protecting financial regulators more strongly than other regulators and public bodies not only shows a lack of constitutional balance but it can also damage the trust individuals and companies have in financial regulators and the State.

CONSIDERATION

It is both a pleasure and an honour to contribute to this *liber amicorum* for Herman Cousy, a man of many trades and master of all. One of those trades is financial regulation, the aims of which he serves as a member of the CFBA's supervisory board. And while I am not in favour of liability immunity of regulators, I do favour the immunity of the members of its organs and its staff when they carry out regulatory tasks. However, this assumes they act inadequately and I hasten to say that in Herman's case this is, of course, quite beyond imagination.

Herman Cousy's interests and expertises go way beyond the legal area. I remember sitting opposite him at a conference dinner somewhere in Great Britain where the food was delicious but in a rather British kind of way. At some point during this culinary depression, someone said 'Munich'. Immediately, a bright smile appeared on Herman's face and he said: 'Dallmayr'. Indeed, the delicatessen shop 'Dallmayr' at the Dienerstrasse, where one is greeted by the most delicious aroma of coffee, truffles and chocolate, and where the appetisingly presented salads and specialities tempt the palate. It is the kind of place where you will have a fair chance to bump into the laureate.

Delicatessen is a proper English word that comes from the German 'Delicatessen' (now 'Delikatessen'). Unsurprisingly, it entered German from the French *délicatesse* and ultimately originates from the Latin *delicatus*. The word is virtually the same in most European languages and is an excellent example of spontaneous European harmonisation. It is a word that suits a European citizen like Herman Cousy who is, in legal and non-legal delicatessen, a most reliable connoisseur. Or should I say 'Feinschmecker'?