



2015 Annual Conference of P.R.I.M.E. Finance

Contribution by Gerben Everts, AFM: 'Why dispute resolution and the contribution of P.R.I.M.E. Finance Experts is important for the Netherlands'

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Ladies and gentlemen, esteemed colleagues, honoured guests,

It is a great pleasure to address – in this distinguished panel - my introductory notes to you today. I am impressed that you are able to organise your Annual Conference within the marvellous confines of the Peace Palace. However, it now crosses my mind that this is your natural habitat. A place historically linked with supranational justice, development and prosperity through discussion and scrutiny. In wartime and in peacetime, it is in the end all about trust and distrust, about risk taking, risk management and – if need be - dispute resolution. We therefore are in the right place today and tomorrow.

A warm welcome to the Kingdom of the Netherlands for all of you as well. I hope you had a good time already and had good travels. I have been informed that your Annual Conference is supported financially and in kind by our Dutch Government and the local community of The Hague. I am happy to provide you with my views on regulation and enforcement as a Commissioner of the Dutch Authority for the Financial Markets. To provide you with some more support in kind and in good spirit.

Our view as a regulator is that your work deserves large support. You are very important to us, to the Netherlands and its 17 million inhabitants, and to the global community. Dutch pension funds and other institutional investors have invested over 1 trillion euro in financial assets worldwide. To put it in perspective. The amount of real assets invested globally sprouting from the Netherlands equals the total of the Monetary Quantitative Easing

announced by the European Central Bank last Thursday – which is for the whole (!) of Europe. We're only a modest country. However, unfortunately as only one of the few exceptions within Europe, we are well-capitalized.

PRIME Finance is therefore very relevant to us. The future prosperity of our Dutch retirees and future retirees depend heavily on three factors. First, free access to global financial markets. Both to developed and – as important - developing markets. Second, clear, harmonised and effective rules which are applied worldwide in financial transactions. Third, top-class risk management, state-of-the-art legal systems and effective dispute resolution. Your ISDA's and dispute resolution regimes facilitate that the capital invested by our pension funds and other institutional investors can reach those that want to start their business, extend their business or provide for new innovations. Not only here in the Netherlands, but wherever in the world they have garage boxes, small or large plants and innovative ideas. Access to global markets, common rules and predictable enforcement is to the benefit of us all.

We have gathered this afternoon in this panel to embark on a fitting enterprise of high relevance, namely to discuss the possible role of PRIME Finance experts in the regulatory and enforcement framework. In short, I interpret this role to be one of complementary nature vis-à-vis our bread and butter as a regulator. In practice this means that PRIME Finance experts are involved in enhancing clarity on legal financial frameworks and in measuring emerging risks. I will come back to this later. However, let me first briefly expand on the operating model and objectives of the Netherlands Authority of the Financial Markets or AFM, to establish mutual familiarity.

Since 2002, the AFM has been made responsible for supervising conduct of business in the Dutch financial markets. Specifically, the AFM is tasked with the supervision of market conduct, which focuses on fair and equitable behaviour between market participants and vis-à-vis consumers and investors. Consumer and investor protection is at the very heart of our mission. Additionally, effort is focused on enhancing transparency and accuracy of

information on financial products and services. This includes supervising the market conduct of trading systems, investment firms, market intermediaries and many more such institutions.

In recent years, we have put considerable emphasis on themes such as improving the aspects of supervision related to product governance, banning inducements, and responsible credit provisioning. This is supported by a risk-based and problem oriented approach in supervision.

Three examples. First, some recent history. It turned out that a considerable amount of derivatives, mostly interest rate swaps, were sold by banks to small and medium sized entities in the Netherlands. Currently, we are investigating whether duty of care should have been applied and was applied by those that provided these products to often non-professionals. This is an intensive dialogue between us and the banks.

Secondly, in order to signal the importance. In the area of housing corporations, private kick-backs in inducements lead to enormous speculative derivative positions, for current and completely suggestive future credits. In one case, Vestia, the estimated negative market value lead to a settlement in 2012 of more than 2 billion euro. Where the treasurer speculated on increasing interest rates, you could imagine what the impact would have been were the settlement delayed...

A third examples on the way forward. We are now finalising the technical standards and implementing measures on the new Directive and Regulation on Markets in Financial Instruments, MiFID II. The implementation of MiFID and MiFIR will further improve the conduct of business aspects of financial instruments and derivatives and will strengthen our supervisory tools.

Of course, supervision alone is not enough to ensure stability, transparency and understanding within the financial industry. This requires many other skilful actors and institutions to achieve the desired effects. However, the matter of directly involving alternative dispute resolution in the regulatory process has pro's and con's.

First, in the Dutch legal system, we embrace the idea of proportional liability, and reject the idea of punitive sanctions. Hence the proof of a causal relationship between liability and the amount of damage is a key prerequisite before any payment is due. ADR's are still attractive, but the outcome of any legal procedure in the Netherlands is not as uncertain as is the case were punitive sanctions allowed.

Secondly, we have an Ombudsman in the Netherlands, like in many other jurisdictions. Consumers have access to this channel of dispute resolution already. Thirdly, we have a channel where consumers can file complaints vis-à-vis intermediaries, which is called KiFID.

In general, as stated in the examples provided to you, we see the benefits of alternative solutions other than lengthy court proceedings. However, ADR is also subject to some criticism. Mainly, this is due to the fact that supervisory organisations such as the AFM in the Netherlands, are required to remain objective and independent from market participants. More recently, lawyers and academics – not surprisingly – have warned for potential misuse of supervisory powers and are supportive towards more jurisprudence, where we and those supervised would generally prefer the route of less demanding and less expensive dispute resolution.

Within the AFM we are already including external experts in our capital markets and financial reporting and audit policy work. This has proven to be highly effective. We believe that expertise and current market experience with mediation and arbitration between financial institutions could serve as an important signalling agent or database for emerging risks such as class actions. In this respect, it is important that regulators and supervisory organisations recognize the potential benefits of involving alternative dispute resolution.

However, this requires further investigation into the mechanisms of ADR and the effects it has on all stakeholders involved.

Such an investigation was undertaken by the G20 OECD Task Force in the development of principles on financial consumer protection. This Task Force is chaired by one of my fellow-Commissioners. Within these principles, ADR was recognized as a source of information for emerging risks, as well as independent complaint handling and redress. A common understanding as to what is meant by “equitable and fair treatment” can be achieved through various channels. These include legislation, guidelines and recommendations issued by authorities. These include decisions by courts and alternative dispute resolution systems. These systems can be complemented by legal interpretation, industry practices and recommendations from representative consumer organisations.

Let me conclude by again wishing you an enlightening and insightful discussion today and tomorrow. I am confident there is plenty of potential to further explore the interaction between regulators, supervisors and PRIME Finance. For now, thank you for your attention! I now hand it back to the panel and will listen with great care to any suggestions for further engagement between the authorities and the private sector. Thank you.

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