financial supervisory authorities and financial services

COME TOGETHER

International conference GCEFCL
Towards Sustainable Financial Services in the EU: Making Sense of the Trend
Amsterdam, September 30th, 2016

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Topic

• Ensuring compliance with EU and Dutch principles based-regulation:
  – The role of financial supervisory authorities

• The key problem
  – Distance / conflict between authorities and services

• How to bridge / solve?
  – Communication and soft law
Conflict
Confidence Problem

- Trust: easy to lose, hard to regain
  - Decade? Generation?
- Necessity of severe supervision
  - Permanently
- Tackle illegal and legal but harmful conduct
  - Malcolm Sparrow
Principles-based

• Open norms
• Duty of care for the addressees
• Compliance
  – Primary responsibility for the addressees
• Enforcement
  – Reactive position authorities
• Lack of legal certainty for the addressees?
• Risk for arbitrariness?
• Risk for function creep?
Structure of powers
legal enforcement

When a person breaches the norm (X),
the administration can (Y1) impose a sanction (Y2).

Is the norm violated? X
If so: Should a sanction be imposed? Y1
If so: Which one? Y2
## Discretion (Y1, Y2)?

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<tr>
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<th>Y1</th>
<th>Y2</th>
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<tbody>
<tr>
<td>Remedial</td>
<td>duty to enforce</td>
<td>deference</td>
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<td>sanction</td>
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<td>Punitive</td>
<td>deference</td>
<td>full jurisdiction</td>
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<td>sanction</td>
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The X-thing

When a person breaks a norm, (X)

• In case of open norms
• Deference or Full Jurisdiction?

When a bank does not comply to demands of integrity, ...
When its prospectus does not comply to demands of transparancy, ...
The organization takes care of the compliance of its accountants...
The X-thing
Traditional Approach

• Traditional doctrine
  – Nulla poena sine lege certa (Bestimmtheitsgebot)
  – No deference

• Discretion: yes-no, static phenomenon
The X-thing
Modern Approach

- Foreseeability (increases gradually)
- Duty to
  - Inquire (addressees)
  - Inform (authorities)
  - Order; declaration (Feststellungsklage)
- Relevance of to whom the norm is addressed to
- Discretion: gliding scale, dynamic phenomenon
Conflict and Distance
Street Cats
Private and Public Soft Law

• Open norm

• Primary responsibility addressees
  – Self-regulation

• Reactive position authorities
  – Comply or
  – Explain and establish policy rules

• No self-regulation, and specific norms are required
  – Establish policy rules
Individual norm-making

- Soft law: general information and communication

- Individual *binding* designation
  - 4:24a Wft
  - Exclusive basis for a sanction

- Individual *non-binding* information
  - Quasi-declaration:
  - No basis for a judicial remedy
Consequences

• Duty for financial supervisory authorities
  – To give its opinion about self-regulation of (organizations of) financial services
  – To publish administrative rules, guidelines, etc, in case of rejection or absence of this self-regulation
  – To give specific information when demanded

• Regarding
  – The X-thing
  – Y1 (Y2)
COME TOGETHER

bridging the distance between financial supervisory authorities and financial services

Co-operation Communication Transparency
financial supervisory authorities and financial services

A Hug?!