

a culture of good corporate governance transparency and accountability in Malaysia. Debates may nevertheless continue on the appropriateness or efficacy of some of its recommendations.

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The Netherlands Boekel De Nerée

Dutch financial regulator focuses on flash loans

Since the beginning of 2012 there have been several court cases involving the Authority for the Financial Markets (AFM), one of the Dutch financial markets supervisors, and offerors of so-called flash loans. These are short-term loans to consumers for small amounts of money, whereby the money is

transferred to the consumers on the same day that the request for the loan is made, or within just a few days. The reason behind the greater focus of the AFM on offerors of flash loans is that the Act on Financial Supervision (AFS) was amended due

to the implementation of the Consumer Credit Directive (2008/48/EC) in May 2011. The most important amendment is that before the implementation of the Consumer Credit Directive, all credit which was repayable within three months fell outside the scope of the AFS. After the implementation of the Directive, only credit which has to be repaid by a consumer within three months and whereby the costs payable by the consumer are insignificant fall outside the scope of the AFS. Due to this amendment,



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many offerors of credit to consumers who previously were not regulated are now obliged to obtain a licence from the AFM.

Recent case law shows that offerors of flash loans and the AFM often disagree on whether the activities concerned qualify as the offering of credit, or which costs should be considered to be part of the costs of the credit. In the Consumer Credit Directive 'total cost of the credit to the consumer' means, in short, all costs and fees which the consumer is required to pay in connection with the credit agreement, except for notarial costs. Furthermore, costs in respect of ancillary services relating to the credit agreement are also included if, in addition, the conclusion of a service contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed.

In one of the recent court cases, the consumer could choose between having the credit at his disposal on the same day as the application (speed transfer) or having the money at his disposal within five business days. If the consumer opted for the speed transfer, he had to pay a certain amount of money. The AFM was of the opinion that the costs of the speed transfer were part of the total cost of credit as defined in the Consumer Credit Directive. The offeror concerned disagreed and argued that the speed transfer was only an ancillary service which was not compulsory to obtain the credit. In another case the offeror bought part of future claims of consumers, for example parts of future wages, at a discount. This way the consumers could have an amount of money at their immediate disposal, while the offeror collected the claims when they became due and payable. The AFM argued that the firm was offering (flash) credit to consumers, while the firm argued that his activities did not qualify as the offering of credit at all. The court agreed with the AFM in both cases. It will take some time, however, before the highest court in the field of the AFS (*College van Beroep voor het bedrijfsleven*) will get the opportunity to determine whether the view of the AFM is correct. For the time being, it may be concluded that offerors who structure their product in a manner tantamount to circumvention in order to avoid regulation under the AFS do not stand a very good chance in court.

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Nigeria

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Award of interest

Claims relating to interests constantly feature in suits filed before courts in Nigeria and have been the subject of several appeals over the years. While the courts have established precedents with regard to post-judgment interests owing mostly to the various rules of courts permitting such awards subject to court discretions, the practice relating to award of prejudgment interests remains uncertain.

Save for a few isolated cases (*Nigeria General Superintendence Co. Ltd v Nigerian Ports Authority* (1990) 1 NWLR (Pt. 129) 741 and *Adeyemi v Lan & Baker (Nig) Ltd* (2000) 7 NWLR (Pt. 663) 33), Nigerian courts have relied mostly on the common law holding in *London Chatham & Dover Railway v S.E. Railway Co.* [1893] AC 429 to hold that interest may be claimed only as of right where it is contemplated by agreement between parties, under mercantile custom, statute, or under a principle of equity such as breach of fiduciary relationship (see *Ekunwufe v Wayne (West Africa) Ltd* (1989) 5 NWLR (Pt. 122) 422).

Recently in *A. G. Ferrero & Co. Ltd v Henkel Chemicals (Nigeria) Ltd* (2011) All FWLR (Pt 587) P.647, the Supreme Court was again faced with the challenge of deciding whether a party was entitled to an award of prejudgment interest on money paid later than the due date, even when such interest was not specifically made a part of the parties' agreement. It held



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