

# Financial Markets Newsletter

DE BRAUW  
BLACKSTONE  
WESTBROEK

## Financial markets Newsletter

April 2010

### The Netherlands – Law and regulations

- New Code of Conduct on Personal Data Processing by Financial Institutions

### The Netherlands - Other

- Bill implementing the Consumer Credit Directive submitted to parliament
- Update Act on Securities Giro Transfer Act
- Update on legislative changes arising from the advice of the Monitoring Commission Corporate Governance Code
- Consultation on revised UCITS Directive
- Consultation on adjustment and claw back of bonuses
- Consultation on Controlled Remuneration Policy Decree FMSA
- Second Chamber adopts list of controversial matters
- Funding of financial markets supervision
- Update on (international) financial reform
- Short-term measures for financial sector
- Liability of supervisors: report of a general discussion
- AFM publications
- DNB publications

### International – Regulation

#### International – Other

- Consultation regarding changes to Capital Requirements Directives
- EU Commission takes action against several countries, including the Netherlands, for late implementation of directives
- European Commission plans
- CESR - publications concerning MiFID
- CESR – publications concerning UCITS
- Other CESR publications
- Committee of European Banking Supervisors - publications
- IOSCO - publications
- Basel Committee on Banking Supervision - publications
- Report of plenary meeting Financial Action Task Force





right of claw back will, however, remain on the agenda (see [above](#)).

### **Funding of financial markets supervision**

The Minister of Finance wants supervisory legislation to contain clear rules on [funding of financial markets supervision](#). The Minister suggests a system whereby the government contribution per category of supervision is set out in advance, for example by way of a percentage of the supervision costs. A detailed proposal to amend the legislation on financial markets supervision on this point will be produced. This change in the funding system arises from recent case law of the Trade and Industry Appeals Tribunal. The Tribunal ruled that the costs made by the supervisory authorities as a result of its involvement in the (re)drafting of laws and regulations had been wrongly charged to the financial sector.

### **Update on (international) financial reform**

The Minister of Finance has given an [update](#) to the Second Chamber on national and international action taken to reform the financial sector. A large part of the reforms will take place at a European level. In addition, further improvements of financial markets regulation are being worked on at a national level. The Ministry of Finance aims to implement these improvements via regular amendments of existing legislation. However, the first proposed amendment of the FMSA – the Financial Markets Amendment Act 2010 – has been placed on the list of controversial matters (see [above](#)) and it is therefore unclear when this amendment will take effect. As things stand now, the second proposed amendment – the Financial Markets Amendment Act 2011 – will be submitted to parliament early next year.

A number of financial sector reforms have already been put in motion. These include:

- the Banking Code
- binding remuneration principles
- reinforcement of macro-prudential supervision
- supervision of credit rating agencies
- reinforcement of European supervision

In his update, the Minister also provides an outline of reforms that require involvement of the Second Chamber in the near future:

- more stringent capital requirements
- supervision of alternative investment funds
- reinforcement of financial reporting
- supervision of OTC derivatives trade

The Minister finally announced that he will work on strengthening the existing instruments for dealing with a financial crisis and reforming the deposit guarantee system.

### **Short-term measures for financial sector**

The Minister of Finance stated in a letter to the Second Chamber that the crisis has shown the need for a drastic reform of the financial sector. This would prevent that irresponsible conduct puts financial stability at risk. In addition to the current reforms, the Minister has proposed a number of shorter-term measures and a tightening or speeding up of existing or proposed regulation. The following measures are mentioned:

- statutory basis for powers of DNB and the AFM with regard to remuneration policy (see [above](#))
- conditions concerning executive pay when providing new assistance to financial enterprises
- *claw back* and reasonableness assessment, and assessment of supervisory directors' expertise (see above)
- firm contribution by the Netherlands to an international approach (amendment of Capital Requirements Directive, bank tax, and implementation of the *Principles for Sound Compensation Practices* of the [Financial Stability Board](#))
- approval by the supervisory board of a remuneration policy for senior management
- tackling severance payments exceeding one year's salary.

### **Liability of supervisors: report of a general discussion**

The Second Chamber's standing committee for finance held discussions with the Minister of Finance about liability of supervisors<sup>10</sup>. The majority in the Second Chamber turns out to be in favour of limiting this liability; supervisors would only be liable in the case of serious culpable errors. This would enable them to act more effectively and reduce the obstacles they experience in the execution of their tasks. The Second Chamber points out that a limitation of liability is also supported by the Basel Committee, which has stated that supervisors should be indemnified against liability for action taken in good faith. A limitation would also be in line with

---

<sup>10</sup> Parliamentary Papers 31 123, no. 5



*DNB publishes a chronicle of the financial crisis*  
In the [chronicle](#) DNB covers issues such as the structure of the financial sector, financial innovations, the scope of a supervisor's competence, and the Basel capital accords.

### *DNB publishes 2009 annual report*

In the introduction to DNB's [2009 annual report](#) DNB's president Wellink advocates the introduction of wider powers for the authorities to take over or relaunch institutions in distress. He also advocates the need for stricter supervision. This could be achieved by being more attentive to strategy and corporate culture, as well as to the macro environment in which financial enterprises operate.

## International | Other

### **Consultation on amendment of Capital Requirements Directives**

The European Commission has held a [consultation](#) on amendment of the Capital Requirements Directive<sup>11</sup>. The changes are designed to enhance the resilience of the banking sector and the financial system as a whole. The principal proposals are:

- strengthening the liquidity requirements
- improving the quality, consistency and transparency of the capital base
- a counter-cyclical capital framework
- introduction of a leverage ratio as a supplementary measure to the risk-based Basel II framework
- strengthening the capital requirements for counterparty credit risk exposures
- appropriate measures for the risks posed by systematically important financial institutions
- a single European rule book for the banking sector

The Commission wants to submit an amending directive to the European Parliament and the Council in the second half of this year.

The Capital Requirements Directive was also amended in December 2009<sup>12</sup>. That amendment was aimed at setting conditions for including hybrid capital instruments in the core capital. In addition, new rules for monitoring and controlling large positions of credit institutions were included in the directive and new provisions on cooperation

---

<sup>11</sup> 2006/48/EC and 2006/49/EG

<sup>12</sup> Directive 2009/111/EC (OJ 2009, L 302/97)

between supervisors in colleges were also introduced.

### **European Commission takes measures against several countries, including the Netherlands, for late implementation of directives**

The Commission has taken [measures](#) against a number of member states which are late in implementing European directives. The Netherlands has missed the deadline for implementation of the Directive on Holdings in the Financial Sector and the Directive on the Rights of Shareholders.

### *Prudential assessment of acquisition of holdings in the financial sector (Antonveneta Directive)*

The European Commission intends to start proceedings before the European Court of Justice against Greece, the Netherlands, Poland, and Portugal for missing the deadline for implementing the Directive on Holdings in the Financial Sector<sup>13</sup>. This directive tightens the procedures to be followed by the supervisory authorities of member states and sets the criteria to be applied when assessing proposed mergers and acquisitions or increases of capital holdings in the bank, insurance and securities sector. The directive was adopted following a request by the Netherlands to pay attention to the fact that cross-border takeovers in the financial sector seemed to be rare in Europe.

The deadline for implementation of the directive was 21 March 2009. In a [letter](#) (in Dutch) to the Second Chamber the Minister of Finance mentioned the financial crisis as one of the reasons for missing the deadline. The Second Chamber has meanwhile placed the [implementation bill](#) on the [list of controversial matters](#). The Minister has pointed out that sections of the Directive have had direct effect since 21 March 2009. Moreover, relevant sections of the FMSA should, where possible, be applied in accordance with the directive. The Minister has asked the Second Chamber to deal with this implementation bill with urgency.

### *Rights of shareholders*

The Directive on the Rights of Shareholders<sup>14</sup> should have been transposed to national law by 3 August 2009. The European Commission has

---

<sup>13</sup> Directive 2007/44/EC

<sup>14</sup> Directive 2007/36/EC

decided to issue reasoned opinions to Belgium, Cyprus, Greece, Spain, France, Luxembourg, the Netherlands, Portugal, and Sweden for non-implementation.

The Directive introduces minimum standards to ensure that shareholders whose shares are traded on a regulated market have timely access to relevant information ahead of the general meeting and simple means to vote at a distance.

The [implementation bill](#) is currently being considered by the First Chamber of parliament<sup>15</sup>.

### **European Commission Plans**

#### *Work programme 2010*

The European Commission has presented its [work programme 2010](#). This includes a list of legislative initiatives for 2010. The main proposals concerning the financial markets are:

- improvement of the transparency and stability of the derivatives market
- a proposal concerning short selling and credit default swaps;
- revision of the Directive on Deposit Guarantee Schemes;
- revision of the Market Abuse Directive;
- revision of the Capital Requirements Directive (see [above](#)).

The programme also includes a list of initiatives for the coming years, including a white paper on the relaunch of the internal market, direct supervision of credit rating agencies, and revision of the Financial Conglomerates Directive, the Investor Compensation Scheme Directive, and the MiFID. A short explanation of the various proposals and initiatives can be found on the [website](#) of the European Commission under “2010 Roadmaps”.

#### *European Commissioner Barnier explains measures taken in connection with the financial crisis*

In a [speech](#) to the European Parliament, Michel Barnier (European Commissioner for the Internal Market) outlined the measures taken by the Commission in response to the financial crisis. He also announced a number of new measures:

- in June, the Commission will put forward a proposal for regulation of derivatives;
- the Commission wants to extend and strengthen the sanctions in the financial sector, in particular for market abuse;

- in the autumn, the Commission will produce a proposal for rules on short selling and credit default swaps.

### **CESR – publications concerning the MiFID**

#### *Evaluation of the MiFID*

The Directive on Markets for Financial Instruments (MiFID)<sup>16</sup> came into force in 2007. This year, the European Commission will evaluate and where necessary revise a number of articles of the MiFID and the implementation directive. In line with this,, the Committee of European Securities Regulators (CESR) has published three [consultation papers](#) with changes on the following points:

#### *Transaction Reporting*

CESR suggests a number of changes concerning identification of clients in whose name the investment firm has executed a transaction.

#### *Equity Markets*

To increase post-trade transparency, CESR proposes, among other things, to improve the quality of information and shorten delays. The standards for publication of post-trade information should be embedded in MiFID.

#### *Investor Protection and Intermediaries*

- CESR advocates imposing an obligation on investment firms to record telephone conversations with clients in certain circumstances. A storage period of five years would have to apply.
  - In addition, CESR wants to encourage availability of data on the quality of execution of orders at the various execution venues.
  - CESR wants to obtain more clarity on which products can be regarded as non-complex.
  - CESR seeks to clarify that personal recommendations provided exclusively through distribution channels amount to investment advice (as defined in article 4(1)(4) of MiFID).
  - CESR wants to further harmonise the regime for tied agents and make this more transparent.
  - CESR wants to reduce the number of options and discretions that MiFID offers and thus promote the harmonisation on various points.
- The closing date for the consultations is 31 May 2010.

<sup>15</sup> Parliamentary Papers 31 746

<sup>16</sup> Directive 2004/39/EC



Commission, which will use it in its review of the Directive.

*Frequently asked questions about rating agencies* CESR has published a [FAQ-list](#) with regard to the Regulation on Credit Rating Agencies<sup>21</sup>. The regulation entered into force on 7 December 2009 and will apply from 7 June 2010.

### **Committee of European Banking Supervisors - publications**

#### *Draft implementation guidelines Banking Directive (large exposures)*

Article 106(2)(c) and (d) of the Banking Directive<sup>22</sup> provides for a number of exemptions from the rules on large exposures. The article also provides that the Committee of European Banking Supervisors (CEBS) should draw up guidelines to encourage convergence of supervisory practices in applying the exemptions set out in the article. CEBS has now published its draft guidelines and is holding a [consultation](#) on these until 6 May 2010.

#### *Revision guidelines for the recognition of external credit assessment institutions*

CEBS has held a [consultation](#) on revision of the guidelines for recognition of external credit assessment institutions. This should promote consistency between the Regulation on Credit Rating Agencies<sup>23</sup> and the Capital Requirements Directive<sup>24</sup>. By revising its guidelines, CEBS aims to make the recognition procedure more efficient and to prevent duplication.

#### *Other publications*

- CEBS has published [Draft guidelines on joint assessment and joint decision regarding the capital adequacy of cross border groups](#)

### **IOSCO<sup>25</sup> publications**

- *Principles for periodic disclosure by listed entities* ([report](#))
- *Systemic risk data requirements for hedge funds* ([template](#))
- *Disclosure Principles for Public Offerings and Listings of Asset Backed Securities* ([report](#))

<sup>21</sup> Regulation (EC) no. 1060/2009

<sup>22</sup> Directive 2006/48/EC

<sup>23</sup> Regulation (EC) no. 1060/2009

<sup>24</sup> Directive 2006/48/EC

<sup>25</sup> International Organisation of Securities Commissions

### **Basel Committee on Banking Supervision - publications**

#### *Report and recommendations of the Cross-border Bank Resolution Group*

When financial authorities believe that the structure of a financial institution is too complex, they should be able to impose additional capital requirements. It should be easier to break up financial institutions to enable supervisory authorities to act faster in an impending bankruptcy. This is argued in a report of the Basel Committee on Banking Supervision: Report and recommendations of the Cross-border Bank Resolution Group ([final paper](#)). The report contains ten recommendations:

- Effective national resolution powers
- Frameworks for a coordinated resolution of financial groups
- Convergence of national resolution measures
- Cross-border effects of national resolution measures
- Reduction of complexity and interconnectedness of group structures and operations
- Planning in advance for orderly resolution
- Cross-border cooperation and information sharing
- Strengthening risk mitigation mechanisms
- Transfer of contractual relationships
- Exit strategies and market discipline

The recommendations supplement the new capital requirements which are currently being drawn up by the Basel Committee.

#### *Principles for enhancing corporate governance*

The Basel Committee is holding a [consultation](#) on corporate governance for banks. Important issues include the role of the board, the composition and expertise of the board, and the importance of independent risk management.

### **Report of plenary meeting of Financial Action Task Force**

The Financial Action Task Force (FATF) is engaged in combating money laundering and financing of terrorism. During its most recent [plenary meeting](#) the FATF identified those countries which show strategic deficiencies in combating money laundering and financing of terrorism. This has led to two public documents. Angola, North Korea, Ecuador, Ethiopia, Pakistan, Turkmenistan, Sao Tome & Principe are on the

first list. They are countries (i) against which the FATF has previously taken action, (ii) which have not yet committed to drawing up an action plan with the FATF, or (iii) which have not yet taken measures to deal with identified deficiencies. The other document lists twenty countries with established deficiencies but which have drawn up an action plan with the FATF to address these deficiencies. These are Antigua and Barbuda, Azerbaijan, Bolivia, Greece, Indonesia, Yemen, Kenya, Morocco, Myanmar, Nepal, Nigeria, Ukraine, Paraguay, Qatar, Sri Lanka, Sudan, Syria, Thailand, Trinidad en Tobago en Turkey. The plenary meeting has also taken the decision in principle to add tax offences to the list of predicate offences for money laundering.

If you have any questions about this newsletter  
please contact:

Francine Schlingmann

T + 31 20 577 1564

E [francine.schlingmann@debrauw.com](mailto:francine.schlingmann@debrauw.com)

Joost Schutte

T +31 20 577 1688

E [joost.schutte@debrauw.com](mailto:joost.schutte@debrauw.com)

Marnix Somsen

T +31 20 577 1628

E [marnix.somsen@debrauw.com](mailto:marnix.somsen@debrauw.com)

**Amsterdam**

Claude Debussylaan 80

P.O. Box 75084

1070 AB Amsterdam

The Netherlands

T +31 20 577 1771

F +31 20 577 1775

**London**

5th Floor, East Wing

10 King William Street

London EC4N 7TW

United Kingdom

T +44 20 7337 3510

F +44 20 7337 3520

**New York**

650 Fifth Avenue, 4th floor

New York, NY 10019-6108

United States

T +1 212 259 4100

F +1 212 259 4111

**This publication is intended  
to highlight issues. It is not  
intended to be  
comprehensive nor to  
provide legal advice.**

If you no longer wish to  
receive our newsletter, please  
inform our Marketing  
Department in Amsterdam or  
send an e-mail to:  
[unsubscribe@debrauw.com](mailto:unsubscribe@debrauw.com)