

Financial Markets Newsletter

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The Netherlands | Law and regulations

Act enters into force implementing Directive on shareholders rights

The implementing legislation concerning the exercise of certain rights by shareholders in listed companies entered into force on 1 July 2010.

De Brauw has published a legal alert on the new provisions. Please let your De Brauw contact person know if you would like a copy of this legal alert. You can also download it from our website.

www.debrauw.com.

Changes to FMSA Exemption Regulation (qualified investors)

A regulation amending articles 2, 4 and 53 of the FMSA Exemption Regulation has been published by the Ministry of Finance. Where offers of securities are directed solely at qualified investors, offerors will be exempted from the mandatory exemptions ("wild west sign"). They can refrain from mentioning during the offer and in advertising material or other documents that they are not subject to licence requirements and they are not supervised by the Netherlands Authority for the Financial Markets ("AFM"). The amending regulation will come into force when the Financial Markets Amendment Act 2010 takes effect, currently expected to be in 2011.

The amending legislation also amends the Money Transactions Offices Exemption Regulation. Hotels will no longer need to be entered in a register in order to be allowed to exchange coins or banknotes for their guests, provided hotels comply with certain rules. These changes came into force on 1 July 2010.

Rules on supervision costs published

The Minister of Finance has set out the amounts, criteria, scope and apportionment formulas for ongoing supervision on the basis of:

- The Trust Offices Supervision Act
- The Accounting Firms Supervision Act
- The Money Transactions Offices Act
- Financial Reporting Supervision Act

The rules entered into force on 14 July.

Bank's annual report to explain compliance with Banking Code

Under certain rules issued by the Ministry of Finance and the Ministry of Justice, banks will have to include information in their annual reports on their compliance with the Banking Code, which took effect on 1 January 2010 and sets out principles on governance, risk management, auditing and remuneration policy. If principles have not been complied with, a bank's annual report will need to explain the reason for this departure. The new rules will apply to annual reports for financial years starting on or after 1 January 2010.

The Netherlands | Other

Cabinet approves creation of statutory powers to claw back or revise bonuses

The Cabinet has approved the introduction of statutory powers to claw back or revise bonuses of company executives if these have been paid or awarded on the basis of incorrect information or for which, in view of exceptional circumstances, there is no reasonable justification. The bill sets out basic provisions for all public companies, banks and insurance companies, as well as a supplementary rules for all companies in the financial sector. The text of the bill and the advice of the Council of State will be made public when the bill is introduced in the Second Chamber. A consultation was held earlier this year on a draft of the bill.

Evaluation of Trust Offices Supervision Act

The Ministry of Finance has conducted an evaluation of the effectiveness of the Trust Offices Supervision Act (*Wet toezicht trustkantoren*) in achieving its aim, i.e. to promote the integrity of the financial system through regulation of the trust sector. The conclusion is that the Act has proven to be effective insofar as it is applicable. The fact that many parties do not fall under the Act is perceived by the Ministry to put the integrity of the Dutch markets at risk. The Act's scope of application should therefore be widened. In

addition, the Act should be modernised and some provisions should be added to better regulate the sector and enable effective enforcement by the supervisor. The Ministry also concluded that this Act and the Prevention of Money Laundering and Terrorist Financing Act should be better coordinated.

Consultation on Financial Markets Amendment Decree 2011

The Ministry of Finance is holding a consultation on the Decree until 12 July. The Decree is to amend three financial market regulations:

Decree on Conduct of Business Supervision of Financial Undertakings FMSA

- A new provision is introduced with regard to the assessment of policy makers of financial enterprises who have a final conviction for an offence as listed in an annex to the Decree. The new provision enables the supervisor to weigh all relevant circumstances or interests when assessing the integrity of such a person. Even though such a conviction would in general suggest unsuitability for the position, the supervisor may reach a different view if there are important grounds for this.
- The Decree sets out the information to be provided by a financial service provider before it enters into an agreement with a consumer. Under the amendments, this information duty is to be extended by a requirement to provide information to the consumer on the capacity in which the service provider is acting. The Netherlands had been given notice by the European Commission that it had failed to implement the Directive on distance marketing on this point.

Decree on Prudential Rules FMSA

The 2009 Directive concerning the insurance and reinsurance business does not have the usual transitional provisions and will therefore have direct effect from 1 January 2013. By that date the new solvency requirements will have to be met. In order to avoid practical implementation problems, provisions are to be added to the Decree on Prudential Rules requiring insurance companies to

provide the main information as specified in the Directive.

Consultation on revision of public offer rules

The Ministry of Finance has launched a consultation on revision of the public offer rules. The following proposed changes are mentioned:

- clarification of the put up or shut up rule
- clarification of the obligation to make information generally available relating to a proposed, announced or launched public offer
- removal of the requirement that the offer price may be raised only once; in principle, the number of increases in the offer price would be unlimited.

The consultation period ends on 26 July 2010. See [the June issue](#) of De Brauw's Corporate Newsletter for further information.

Response of Minister of Finance to report by the DSB Bank Commission

The Minister of Finance has submitted this report to the Second Chamber of the Dutch Parliament and has announced a number of measures to strengthen confidence in financial supervision in the Netherlands.

- The Minister wants to clarify the confidentiality regime of the FMSA. This concerns in particular a possibility for the Minister to inform parliament about bankrupt financial enterprises. To that end, the Minister is preparing a bill which will amend the FMSA on this point. The Minister also intends to raise the confidentiality issue at European level.
- The Dutch Central Bank will draw up a plan to effect a culture change. In addition, the Minister wants to investigate how internal supervision within the central bank itself could be improved. One option being considered is to extend the tasks of the supervisory board. The Minister will draw up legislative proposals on this point.
- The Minister will send the Second Chamber a vision of "supervising supervision" in November. This is expected to be take form in legislation during 2011. The Minister also advocates a system of visitation by colleague supervisors within the European Union.

- The Minister has asked the supervisory bodies to report annually to him on sticking points in the supervisory regulations. He will submit these reports to the Second Chamber in September of each year.
- The Minister is discussing with the Minister of Justice whether it would be desirable to introduce criminal sanctions in respect of making a call for a bank run.

AFM supervisor of rating agencies

The Regulation on credit rating agencies provides that each member state should designate a competent authority for the application of the Regulation. In the Netherlands, the AFM has been appointed as supervisor.

Rating agencies have until 7 September to apply to the Committee of European Securities Regulators (CESR) for registration. Applications for registration from credit rating agencies active in several member states will for the time being be dealt with by colleges of supervisors. Per 1 January 2011, at the earliest, the majority of supervisory tasks will be transferred to the newly created European Securities and Markets Authority.

AFM publishes brochure on market manipulation

The AFM has published a [brochure](#) (in Dutch) in which it provides further explanation on market manipulation rules. The brochure contains a summary of the current provisions, a number of examples of market manipulation, and an explanation of the term 'common market practice', and a list of signals that could cause the AFM to start an investigation.

Amsterdam Court of Appeal orders Dutch Central Bank (DNB) and AFM to pay damages

The Amsterdam Court of Appeal has ordered DNB and the AFM to compensate two managing directors of Veer Palthe Voûte for the damage caused by a premature intervention of the two supervisors.

On 14 April 2003, the AFM and DNB ordered Veer Palthe Voûte to dismiss two managing directors for suspected insider trading. Even though the two

directors were eventually convicted, the Court of Appeal ruled that the supervisors should not have ordered their dismissal while they were still only under suspicion. The AFM and DNB will therefore have to compensate the two directors for 40% of the damage they suffered as a result of the intervention.

International | Other

European Commission approves new rules for UCITS

The European Commission has approved the [Revision of the UCITS Directive](#)¹. The revisions include a large number of rules – in respect of two directives and two regulations – which investment funds will need to comply with. The new rules concern:

- the form and content of the key investor information document; this is the document that will replace the simplified prospectus. The CESR has in the meantime published guidelines on the use of the key investor information document;
- code of conduct and organisational requirements for management companies; these are aligned with the rules in MiFID for financial services providers;
- rules for mergers of UCITS and master-feeder constructions²; the implementing directive provides, among others, rules for the information exchange between the feeder UCIT and the master UCIT;
- standard documents and procedures for the notification procedure and cooperation between supervisors.

Member states have until 1 July 2011 to implement the directives.

¹ 2009/65/EC

² A feeder UCIT is a UCIT or an investment subdivision thereof which, in derogation from article 1, para. 2(a), article 50, articles 52, 55 and 56 para. 2(c), is authorised to invest at least 85% of its assets in participation rights in another UCIT or investment subdivision thereof (the "master UCIT") (art. 58(1) Directive 2009/65/EU).

European Parliament adopts bill to amend the Prospectus Directive

The European Parliament has adopted a [bill to amend the Prospectus Directive](#). The Parliament added a number of changes to the original bill proposed by the Commission. These include, in addition to the exemptions which the Prospectus Directive addresses:

- The exemption from the obligation to issue a prospectus applies from now to offerings with a value of at least EUR 100,000 per investor or a nominal value per unit of at least EUR 100,000; the present threshold amount is EUR 50,000. The threshold for dispensation from the requirements based on the art. 8(b) Transparency Directive will be raised to EUR 100,000.
- The prohibition on offering does not apply if the offering is directed towards fewer than 150 persons per member state, none of whom is a qualified investor. At this time, this applies to 100 persons.
- It has been clarified that the exemption for offerings with a total value of less than EUR 100,000 concerns the total value in the EU.
- The exemption for securities that are offered upon a merger has been expanded to include legal divisions.
- Securities that form part of an offering in which the total value is less than EUR 5 million from now on will fall outside the scope of the Prospectus Directive. At this time a threshold of EUR 2.5 million applies.
- The exception to the obligation to issue a prospectus for offerings to employees will be expanded to (1) securities of issuing institutions with a head office or statutory seat in the EU, and (2) securities that are admitted to trading on an "equivalent" market in a third country. As expected, registration with the SEC and a listing on a large exchange in the US (including NYSE and NASDAQ) will be considered as "equivalent".
- The European Parliament has proposed in the definition of qualified investor to include a reference to the list of professional clients in annex II of MiFID. This will ensure that

investment institutions in a private placement may rely on the division of their clients on the basis of MiFID.

- The requirement of an issuing institution to annually publish an information document will lapse.

The Council of the European Union has not yet adopted the amended bill. The amended directive is expected to be published in September or October. The member states will then have 18 months to implement the new rules.

European Parliament adopts stronger rules for bankers' bonuses and capital requirements

The European Parliament has approved the amendments of the [Directive on capital requirements for financial institutions](#)³. The rules applicable to bankers' bonuses will become stricter under this amended Directive. Limits will be introduced for bonuses paid out in cash in advance and at least half of a bonus will need to be paid in contingent capital and shares.

New rules will also be introduced for banks saved by government support. These will include stricter capital requirements for banks' trading activities and higher norms for re-securitisations.

The Council of the European Union has yet to formally agree to these rules. The rules concerning bonuses are expected to enter into force in January 2011. The new capital requirements will likely enter into force in December 2011.

Commission introduces bill to amend the rules applicable to credit rating agencies

The European Commission has proposed amendments to the [Regulation on credit rating agencies](#)⁴. The most important amendment is that instead of national supervisors, the European Securities and Markets Authority (ESMA) will be charged with registration and supervision. Institutions that issue structured financing instruments, such as credit institutions, banks and investment firms, will need to offer access to all other interested credit rating agencies to information which they provide to their own credit

³ 2006/48/EC and 2006/49/EC

⁴ Regulation (EC) no. 1060/2009

rating agency in order to enable them to issue unrequested ratings.

Amendment of guarantee and compensation systems

The European Commission has proposed a revision of the [deposit guarantee system](#) and the [investors compensation system](#). Important elements of the proposals are quicker repayment, higher coverage, and better information for investors and bank account holders. The financing of the systems will also be revised. The Commission's view is that most amendments will enter into effect in 2012 and 2012.

The Commission has also published a [White Paper on insurance guarantee systems](#). The White Paper includes the Commission's stated aim to establish a directive to ensure that there are insurance guarantee schemes in all member states and that these meet a minimum number of conditions. The aim is to prevent insurance claims from not being paid when an insurance company is unable to meet its contractual requirements. The consultation on this White Paper will continue until 30 November.

Commission publishes plans for financial reform

Corporate governance of financial institutions

The Commission, in response to the financial crisis, promised to improve corporate governance in financial institutions in its communication "On the path to European recovery" of March 2009. The Commission wants to promote that the interests of consumers and other interested parties are taken into account more, companies are managed in a more sustainable manner and bankruptcy risks decrease in the long term. The Commission has launched a [consultation](#) for a Green Paper which will address the following questions:

- How can the operation and composition of the management board of financial institutions be improved?
- How can a risk culture be created at all levels of a financial institution in order to ensure that

the long-term interests of the business are taken into account?

- How can the role of shareholders, financial supervisors and external auditors in matters concerning corporate governance be strengthened?
- How can the remuneration policy in companies be changed to discourage taking excessively high risks?

The consultation will continue until 1 September 2010. All future (legislative) proposals will be determined during 2011.

Bank resolution funds

The European Commission has made [proposals](#) concerning the EU establishing an EU funds network to prevent banks from failing. The funds are to be financed in advance from a levy on banks. The Commission wishes to ensure that future bank failures are not at the cost of the taxpayer or do not destabilise the financial system.

Other financial reform plans

In its communication "[Regulating financial services for sustainable growth](#)", the Commission provided an overview of the financial reform proposals that it wishes to present in the coming 6 to 9 months:

- The Commission will introduce proposals this summer on improving the operation of the derivatives markets.
- To protect investors and deposit holders, the Commission will propose a revision of the Directive on deposit guarantee systems and the Directive on investor compensation systems. Legislative proposals concerning package products for retail investments will be submitted to enhance consumers' interests in the sales process.

In addition, the scope of the Market Abuse Directive will be expanded to include non-regulated markets as well as derivatives. The Commission will make amendments to the Capital Requirements Directive to improve the quality and quantity of capital held by banks, and introduce capital buffers to ensure that capital is built up in good times which can be relied on in poorer economic times.

The Commission will present a statement about sanctions in the financial services sector to improve the convergence of sanctions among the various supervisory activities.

- The Commission will publish an action plan on crisis management that will lead to legislative proposals on the prevention and resolution of failing banks. The Commission will also pursue fostering worldwide unanimity on one packet of international accounting standards of high quality.

European Commission consultations

Amendment of the Transparency Directive

The European Commission has begun a consultation on modernisation of the Transparency Directive⁵. The following questions, among others, have been raised:

- How attractive are the regulated markets for smaller listed companies? What is the impact of the Transparency Directive and what adaptations need to be made to the Directive to make these markets more attractive?
- How can information on the acquisition or transfer of important participations be improved? Should it be required to make important participations in cash-settled derivatives known?
- Which stipulations of the Directive are not effective, for example because they are unclear or are insufficiently harmonised in national legislation and rules?

Responses to the [consultation](#) may be sent to the European Commission until 23 August 2010.

Revision of the Market Abuse Directive

The European Commission is holding a consultation on revision of the Market Abuse Directive. Changes are in relation to the scope of the Directive, improvement of the efficacy of supervisors' authorities, and enlargement of the harmonisation and coordination among supervisors. A few concrete proposals are:

- The scope of the Directive will be expanded to financial instruments admitted to trading on a

multilateral trading facility (MTF) but not traded on a regulated market.

- Supervisors must publish on their websites every measure taken or sanction levied because of violation of market abuse legislation.
 - Supervisors must be able to request a court's leave to enter a residence or take documents into custody.
 - Setting up a Community rulebook that includes rules on the requirement to publish price-sensitive information and the notification duty for persons in a managerial position with issuing institutions. The threshold for this duty will be increased from EUR 5,000 to EUR 20,000. This concerns the total transaction amount at the end of a calendar year.
- The [consultation](#) will continue until 23 July.

Short selling and derivatives

The European Commission held consultations until 10 July concerning:

- [Short selling and credit default swaps](#)
- [Derivatives and market infrastructures](#)

The Commission is proposing, among other things, to grant more authority to supervisors to (temporarily) limit or prohibit short selling and credit default swaps in emergencies. Transparency of short selling positions would also need to be enlarged and limit the risk of naked short selling. The Commission has proposed (organisational) requirements for central counterparties for notification duties for trade repositories. The Commission is striving to accept formal proposals for legislation in September.

Publications of the European Securities Regulators Committee

New version of FAQs regarding prospectuses

CESR has published a new version of [FAQs regarding prospectuses](#). The questions address the quality of the translation of prospectuses.

CESR lists accepted market practices

Accepted market practices (AMPs) are transactions which fall strictly under the definition of market manipulation but on one or more

⁵ 2004/109/EC

financial markets are considered “accepted” by the competent authorities. CESR has prepared an [overview](#) of the accepted market practices now allowed by various national supervisors. CESR has included the following practices on its list:

- Liquidity enhancement agreements. A liquidity enhancing agreement enables issuing institutions, under certain conditions, to trade in their own shares, via a third party, to strengthen the liquidity of the trading in their own shares. The AFM had already allowed this practice.
- Share buy-back to build up a share warehouse position (for example, to have shares if options are exercised).

CESR publishes guidelines on common definition of money market funds

CESR has published [guidelines](#) on a common definition of money market funds based on the definition used in the implementing directive of MiFID. The guidelines will enter into force on 1 July 2011, the same date on which the revisions of the UCITS Directive must be implemented.

Publications regarding MiFID

- CESR has held a consultation on the feasibility and desirability of [expanding](#) the transparency requirements in MiFID to transactions in other financial instruments than shares, such as notes, structured finance products and credit derivatives.
- CESR has also published an update of its [Questions and answers on MiFID](#).
- CESR has launched a consultation on [client categorisation](#).

Publications regarding the Regulation on Credit Rating Agencies

- CESR has published a new update of [Frequently asked questions regarding the EU Regulation on Credit Rating Agencies](#).

- CESR has published [draft guidelines](#) on common standards for assessment of compliance of credit rating methodologies with the requirements set out in article 8(3) of the Regulation.
- CESR held a consultation on [draft guidelines](#) on the enforcement practices and activities to be conducted under article 21.3(a) of the Regulation.

The consultations were held until 18 June 2010.

Publications of the European Banking Supervisors Committee

- [Consultation paper](#) on guidelines on Article 122a of the Capital Requirements Directive
- [Follow-up reports](#) presenting the findings of its assessment of banks’ disclosures
- Implementation [Guidelines](#) regarding Instruments referred to in Article 57(a) of Directive 2006/48/WF recast
- [Guidelines](#) for the operational functioning of colleges
- [Methodology](#) for the assessment of the equivalence of third countries’ confidentiality provisions
- [Report](#) on national implementation of CEBS’s high-level principles for remuneration policies
- [Consultation paper](#) on the amendments to the Guidelines on Common Reporting
- [Annual report 2009](#)

IOSCO publications

- [Principles regarding Cross-Border Supervisory Cooperation](#)
- [Objectives and Principles of Securities Regulation](#)
- [Final Report on Transparency of Structured Finance Products](#)

International literature

Capital Markets Law Journal

- A closer look at 'too big to fail': national and international approaches to addressing the risks of large, interconnected financial institutions / Edward F. Greene, Knox L. McIlwain and Jennifer T. Scott – Capital Markets Law Journal, vol. 5, no. 2, p. 117
- KISS, but tell all: short-form disclosure for retail investors / Lachlan Burn – Capital Markets Law Journal, Vol. 5, No. 2, p. 141
- Executive pay at ailing banks and beyond: a European perspective / Guido Ferrarini and Maria C. Ungureanu – Capital Markets Law Journal, Vol. 5, No. 2, p. 197
- Impact of the global financial crisis on OTC derivatives in structured debt transactions / Claude Brown and Timothy Cleary – Capital Markets Law Journal, Vol. 5, No. 2, p. 218

Journal of International Banking Law & Regulation

- An Exploration of the Proposed Changes tot Fee Disclosure and Risk/Reward Disclosure under the UCITS Regime / Robert W. Helm, Douglas P. Dick en Gared S. Schneberger – J.I.B.L.R. 2010, issue 5, p. 206
- Changes to Basel II and the EU Capital Requirements Directive – Implications for Securitisation / Leonard Ng – J.I.B.L.R. 2010, issue 6, p. 265
- Better Investor Protection under Proposed Changes to Dutch Securities Transfer Law? / Reinout M. Wibier – J.I.B.L.R. 201, issue 6, p. 304

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