

Financial Markets Newsletter

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The Netherlands | Law and legislation

Update on amendment of Financial Markets Supervision Act and delegated regulations

Financial Markets Amendment Act 2010

Other than planned, this amending legislation¹ has not yet come into force. The Minister is now aiming for an effective date in March of this year. The most recent development in the parliamentary process is the Sixth Memorandum of Amendments (see [below](#)), which contains changes regarding the “wild west sign” and the major dispensation for offerors of investment objects. The plenary debate in the Second Chamber of the Dutch Parliament will take place in the week of 8 March. Meanwhile, some provisions of the Financial Markets Amendment Regulation 2010 and the Financial Markets Amendment Decree 2010 have come into effect.

Financial Markets Amendment Regulation 2010

This Amendment Regulation has been published in the Government Gazette² and came into force on 1 January, with the exception of article 53 of the Exemption Regulation FMSA, which will come into force at the same time as the Financial Markets Amendment Act 2010.

The regulations amended include:

- Exemption Regulation FMSA
- FMSA Implementing Regulation
- Regulation implementing the Prevention of Money Laundering and Terrorist Finance Act

The amendments are mainly of a technical nature but there are also some substantive changes.

Amendment of the exemption for offers with a total equivalent value of less than EUR 2.5 million

Article 53.2 of the Exemption Regulation FMSA provides for an exemption from the provisions of chapter 5.1 FMSA where the securities are part of an offer with a total equivalent value, calculated over a 12-month period, of less than EUR 25 million.

¹ Parliamentary Papers II, 2000/2010, 32 036; the planned date for entry into force was 1 January 2010

² Government Gazette 2009, 2007

The Amendment Regulation makes the following changes to this article:

- Clarification is given that the calculation of the total equivalent value of the offer refers to the total equivalent value within the European Economic Area and not merely the total equivalent value in the Netherlands.
- In addition, the scope of the exemption in chapter 5.1 FMSA will now be limited only to the category of securities, rather than category and class. By making this change, the Ministry of Finance intends to follow more closely the interpretation of the Prospectus Directive in other Member States.
- A new third paragraph has been added to the exemption. It provides that in calculating the amount of exemption, offers by group companies will be added together.
- The fourth paragraph (new) has been amended in view of the Financial Markets Amendment Act 2010. It now provides that in advertising and documents announcing the offer or listing, offerors must mention that there is no statutory obligation to make a prospectus generally available which has been approved by the AFM in connection with the offer or listing and that no supervision has been exercised by the AFM (the wild-west sign).

Financial Markets Amendment Decree 2010

This Amendment Decree has been published in the Bulletin of Acts and Decrees³. It contains amendments to various decrees issued in connection with the FMSA. Most amendments have been made to correct errors or omissions. Some entered into force on 1 January 2010. The other amendments will take effect when the Financial Markets Amendment Act 2010 enters into force.

Tightening of rules on payment of commissions and transparency of remuneration

The Decree on Conduct of Business Supervision of Financial Undertakings was amended on 1 January to tighten the rules on payment of

³ Bulletin of Acts and Decrees 2009, 524

commissions and transparency of remuneration⁴.

The main changes are:

- The rules on payment of commissions and transparency of remuneration now also apply to providers of protective payment insurance and funeral insurance.
- A prohibition on paying and receiving bonus commissions has been added. An exception applies for certain non-monetary types of commission.
- Offerors of complex products and mortgages must provide information on the price. They must also explain the costs of complex products with a capital accumulation component.

The Decree on Administrative Penalties for Financial Firms has been amended to reflect these changes.

Banking Code published

The Banking Code has been published in the Government Gazette and entered into force on 1 January 2010⁵. The Code sets out rules on the composition, expertise and duties of the supervisory board and managing board, and on risk management, audits, and the remuneration policy.

The Code applies to all banks with a banking licence pursuant to the FMSA. The “comply or explain” principle applies to the Code.

Netherlands | Other

Ministry of Finance publishes legislative programme for 2010

The Ministry of Finance has published its [legislative programme for 2010](#) (in Dutch). The following draft legislation is to become law this year:

- Financial Markets Amendment Act 2010; planned entry into force: March 2010
- Bill on introduction of premium pension institutions (July 2010)
- Implementation of Consumer Credit Directive (11 June 2010)

⁴ Decree of 16 September 2009, Bulletin of Acts and Decrees 2009, 401

⁵ Government Gazette. 2009, 20066

- Amendment of the FMSA in connection with the Rating Agencies Regulation (July 2010)
- Amendment of the FMSA in connection with the implementation of Directive 2007/44/EG (holdings in the financial sector, "Antonveneta Directive") (December 2010)
- Implementation of the Settlement Finality Directive (30 December 2010)
- Implementation of amendments to Capital Adequacy Directives (31 December 2010)

Bill implementing Directive on holdings in the financial sector submitted to parliament

The Minister of Finance has submitted a [Bill](#) (in Dutch) amending the FMSA in connection with the implementation of the EU Directive on holdings in the financial sector (also known as the Antonveneta Directive)⁶. To comply with the directive, the provisions in the FMSA with regard to acquisitions and increase of qualifying holdings are to be changed.

Directive on holdings in the financial sector

The Directive followed the European Commission's finding that the number of cross-border takeovers and acquisitions of holdings in the European financial sector was lagging behind compared to other sectors. Studies showed that non-prudential considerations played a role in the assessment of a proposed acquisition, in particular considerations on the (un)desirability of the acquisition of an entity in one member state by an entity from another member state.

The Directive provides for an amendment of the prudential assessment criteria and procedure. This should ensure a more consistent and transparent assessment of a proposed qualifying holding. In addition, the Directive introduces a limited set of (strictly prudential) criteria. The purpose of the exhaustive nature of this set of assessment criteria

⁶ Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Directive 92/49/EEC of the Council and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation of acquisitions and increase of holdings in the financial sector (OJ L 247)

is to ensure that all member states apply the same assessment to a proposed qualifying holding.

Amendments to the FMSA

The Directive makes amendment of the FMSA necessary. As the Directive precludes other assessment criteria from being included in the evaluation of an application for clearance, the existing content-based assessment by the Minister of Finance will be removed. The Dutch Central Bank assesses, as prudential supervisor, the solidity of a proposed acquisition or increase of a qualifying holding. However, the Minister of Finance's responsibility for the stability of the financial system and regulation of the financial sector is considered to be important and should be taken into account in considering acquisitions and increases of such qualifying holdings. Accordingly, a provision has been added requiring the Dutch Central Bank to timely inform the Minister of Finance of applications for clearance or plans to grant or withdraw clearance if these are relevant to the proper functioning and organisation of the financial system. The Dutch Central Bank will be allowed to inform the Minister with a view to his responsibility for the financial system and the Minister will have to treat this information as strictly confidential. The Dutch Central Bank will not be allowed to supply information to the Minister which is essential for the processing and assessment of the application, i.e. the concrete financial solidity assessment carried out by the Dutch Central Bank.

Implementation deadline

The deadline for implementing the Directive in the Netherlands was 21 March 2009. Since that date national legislation has to be interpreted and applied in conformity with the Directive. This means that until the implementation bill becomes law there is a de facto transition period. During that period the Minister of Finance is still formally entitled to co-decide on applications for clearance but the Central Bank is in fact carrying out the entire assessment. In doing this, the Central Bank may only apply the prescribed prudential criteria in assessing a new application. The assessment made by the Dutch Central Bank – and by the Minister of Finance in the case of the “big five” –

as to the desirability of the acquisition can no longer be made.

Sixth memorandum of amendments to proposed Financial Markets Amendment Act 2010

Wild west sign

The proposed Financial Markets Amendment Act 2010⁷ introduces an obligation to inform the public that there is no supervision when securities are offered that are exempt, pursuant to section 5:3.1 FMSA, from the prohibition on offering securities to the public without a prospectus. The Minister clarifies in the recently published [sixth memorandum of amendments](#) (in Dutch) to this bill that this exemption notice is not mandatory where an offer is being made exclusively to qualified investors.

The AFM is holding a consultation on the format of the mandatory exemption notice ([see below](#))

Major dispensation for offerors of investment objects

The bill also changes the “major dispensation” for offerors of investment objects. Pursuant to the current section 2:55.2 FMSA, the AFM may grant dispensation to these offerors from all licence requirements but the offerors continue to be subject to the continuous supervision rules. Under the bill the major dispensation extends to the continuous supervision as well. In addition, the bill provides that the authority to grant a major dispensation no longer extends to insurance brokering and offering participation rights in collective investment schemes (UCITS), as the relevant European directives do not allow those dispensations. The sixth memorandum of amendments proposes imposing an obligation on the AFM to withdraw the dispensations in question

Claw back to be given a statutory basis

The Minister of Finance is preparing a [bill](#) allowing claw back of wrongly awarded bonuses. He wants to submit the bill to parliament before the summer,

⁷ Parliamentary Papers II, 2009/2010, 32 036

with a proposed entry into force by 1 January 2011.

New FMSA translation

The Ministry of Finance has published a new [translation](#) of the Financial Markets Supervision Act (text as per 1 April 2009).

Financial sector reforms - progress and plans

The Minister of Finance has informed the Second Chamber of parliament in a [letter](#) (in Dutch) on plans and measures announced or taken since the publication on 10 July 2009 of the Cabinet's [view](#) (in Dutch) on the future of the financial sector. The letter contains a schedule showing what stage the announced measures are at.

The Minister writes in his letter that restoring trust in and stability of the financial sector is first and foremost the responsibility of the financial institutions themselves. A first step is the creation of the Advisory Committee on the Future of Banks and adoption of the Banking Code.

In addition, the Minister believes that supervision should be increased and widened on a number of points. He mentions the following concrete measures:

- the implementation of the amendments to the Capital Adequacy Directive;
- the principles for a controlled remuneration policy of the Netherlands Authority for the Financial Markets (AFM) and the Dutch Central Bank;
- the Dutch Central Bank's new "Macro-prudential analysis" division and the formation of the European Systemic Risk Board;
- an expedient approval in Europe of the new accounting standard, IFRS 9, which will replace a part of the existing rules for the valuation of financial assets;
- extending supervision to credit rating agencies, private equity and hedge funds, and over-the-counter derivatives trade;
- the legislative programme of the EU, the creation of colleges of supervisors, and agreeing on the sharing of the costs of cross-border crisis management.

Last, the government will have to carry out reforms and, in particular, strengthen crisis management.

In that connection, the Minister mentions the timeliness, transparency and predictability of intervention on the basis of an "intervention ladder". He also discusses a number of instruments that he wants to develop further:

- the living will: a dynamic document which is drawn up by the financial institution itself in order to be better prepared for stress situations.
- the introduction of convertible hybrid capital, which has to be converted into shares at a previously defined moment;
- temporary limitation of the rights of corporate bodies;
- revision of the deposit guarantee system.

It is preferable that international agreement is reached on these new instruments. The Netherlands will make efforts to achieve this.

Measures on remuneration policy in financial enterprises

Minister Bos of Finance has informed the Second Chamber of parliament on the [remuneration policy of financial enterprises](#) (in Dutch) In his letter he addresses the powers of the Dutch Central Bank and discusses a number of measures:

- The Banking Code took effect on 1 January. The Cabinet aims to create a statutory basis for the Code.
- The Dutch Central Bank will publish the [principles for a controlled remuneration policy](#) of 6 May 2009 in the form of a policy guideline.
- The controlled remuneration policy will have a further basis in the Decree on Conduct of Business Supervision of Financial Undertakings FMSA. This should give the AFM a concrete and wide basis for supervision and enforcement with regard to all relevant financial undertakings and financial products, regardless of the distribution channel used. The Minister of Finance furthermore intends to add to the Decree on Prudential Rules FMSA explicit and specific rules in respect of controlled remuneration policy. He will shortly submit this issue to the market for consultation.

In addition, the AFM and the Dutch Central Bank have asked parliamentary questions on their powers and opinions regarding the remuneration policy of financial enterprises.

Measures on short selling

AFM extends notification rules for short positions

The AFM has extended the [notification rules for short positions](#) (in Dutch). These rules require investors to notify the AFM of short positions in Dutch financial institutions when these reach, exceed or fall below specific thresholds. The AFM will repeal this measure as soon as market conditions allow. The AFM continues to work towards permanent European measures that will increase the transparency of short selling. In the context of CESR, the AFM is therefore working on proposals for a European notification system for short positions.

Evaluation of Act of 9 October 2008 amending the FMSA (prohibition on short selling)

The AFM has sent an [evaluation](#) (in Dutch) of this Act to the Minister of Finance. The Act gives supervisory authorities the power in special circumstances to issue temporary, generally binding rules to promote the orderly and transparent financial market processes as referred to in section 1:25 FMSA⁸. The prohibition on short selling is an example of this. In addition, the Act clarifies that the AFM may designate categories of transactions or trading orders which fall under the prohibition on market manipulation. In its evaluation, the AFM lists and explains the measures it has taken. It also briefly discusses its enforcement strategy.

AFM Publications

Interpretations of public offer rules

The AFM has published three [interpretations](#) (in Dutch) of the public offer rules (as set out in the Public Offers Decree:

- The first interpretation relates to the increase in the offer price pursuant to article 15.4 of the offer rules. In the AFM's view it is allowed under this article to add to a price already offered (and specified in the offer document) but not to change the price otherwise. A bid can

be increased by offering a higher amount in cash than the amount originally offered, or by adding a cash element to the offer.

- The second interpretation concerns voluntary bids which are continued as mandatory bids. The AFM's opinion is that when a statutory obligation to make a bid arises, a bidder should be able to meet this obligation through the existing voluntary bid. The bidder can do this by shaping the existing bid in such a way that it meets the requirements for a mandatory bid.
- Finally, the AFM gives its interpretation of the prohibition on potestative conditions pursuant to article 12 of the public offer rules (i.e. conditions which are dependent on an event that is within the control of a contracting party). According to the AFM, the prohibition itself and the final character of the public offer imply that a condition may not contain an element enabling the bidder to influence the fulfilment of a condition.

Guidelines for sound financial advice

The AFM has set out its vision with regard to [sound capital accumulation advice](#) in two reports: one set of guidelines for financial service providers and one for investment firms.

The AFM's vision is based on studies and discussions with market parties which are already providing sound advice.

Results of survey on audits of financial companies

The AFM has reported on a [review](#) it carried out in 2008 on audits by the four major accountant firms of the 2007 annual accounts of financial companies which were affected by the financial crisis. The AFM reports that relevant shortcomings were found in eleven of the eighteen audits that it assessed. In its report the AFM elaborates on the shortcomings and makes a number of recommendations for improvement.

The AFM conducted a similar review in 2009 on which it will report later this year. The 2009 survey focused on the one hand on aspects of the credit crisis and on the other hand on specific aspects of quality control.

⁸ Bulletin of Acts and Decrees 2008, 394

Report on cost transparency for pension contribution agreements

The information on costs in connection with pension contribution agreements should be improved. Participants should be aware what part of the contribution is used for pension accrual and what part for costs and risk premiums. The AFM writes this in its [report](#) (in Dutch; [summary](#) in English) on cost transparency relating to defined-contribution schemes.

Review of disclosures in financial reports

The disclosures in financial reports of listed companies need substantial improvement. The AFM has announced this following [reviews](#) (in Dutch; [summary](#) in English) conducted in 2009. Disclosures are of great importance to investors in assessing the company's position. The AFM believes that disclosures on a number of items in financial reports require improvement and that they should be more specific.

AFM Consultations

Consultation on exemption notice

Companies which are exempt from supervision by the AFM or from licence or prospectus obligations are required by law to notify investors of the exemption. From 1 July 2010 this notice will have to be given according to a specific format. The AFM has developed standard phrases and symbols for this purpose, which have been submitted to market parties for [consultation](#) (in Dutch). The definitive rules will be published in April.

Parties offering investment objects or participation rights in investment funds have been obliged for some time to inform potential investors if the offer falls outside the AFM's supervision, but there has been no standard format for these notices. This will change on 1 July, when all exemption notices will have to follow the new format.

Consultation on standard risk profiles

Financial enterprises often apply different risk profiles when offering and managing investment products. If they do use the same risk profiles these are shaped differently, and this leads to

differences in the risk and return of the profiles. The AFM has drawn up a standard classification for profiles. The [consultation](#) on this ended on 1 February.

Dutch Central Bank publishes 2010 supervision themes

The Dutch Central Bank has published [DNB supervision: themes in 2010](#) (in Dutch; [summary](#) in English). The first priority remains to ensure that financial institutions are dealing with the financial crisis in an adequate fashion. In addition, the Dutch Central Bank pays special attention this year to conduct and culture, strategy and business models, and investment policy

NYSE Euronext revises composition indices

NYSE Euronext has announced the [new composition](#) of the AEX-index, AMX-index and AScX-index. The AEX-index will not change. Delta Lloyd will be included in the AMX-index. The changes will take effect on 2 March.

Court of Audit's report on the financial crisis

The Court of Audit has published a [report](#) summarizing the developments in the financial crisis and containing an update on the interventions and arrangements made by the Ministry of Finance in response to the financial crisis⁹. The report relates to the second and third quarter of 2009.

Court of Audit's report on the system for supervising the stability of the financial markets

The Court of Audit has conducted an [exploratory study](#) of the system to supervise the stability of financial markets (part of its Markets Supervision review)¹⁰. The purpose of the programme is to contribute to effective supervision and an adequate interpretation of ministerial responsibility. This first report deals with the supervision of the financial markets by the Dutch Central Bank and the structure of the supervisory system. The next report will deal with the manner in which the Dutch

⁹ Parliamentary Papers II, 2009/2010, 31 941, no. 4

¹⁰ Parliamentary Papers II, 2009/2010, 32 255, no. 2

Central Bank exercises its supervisory role in practice.

International | Regulations

Amendment of Capital Adequacy Directives

On 2 December a Directive came into effect amending the Capital Adequacy Directives¹¹.

- The directive specifies the conditions for including hybrid capital instruments in core capital.
- The Directive sets out new rules for monitoring and managing major positions of credit institutions.
- With regard to supervision of credit institutions whose parent entity is located in a third country, the competent authorities should be able to cooperate in colleges of supervisors. The Committee of European Banking Supervisors should, where necessary, adopt guidelines and recommendations to enhance the convergence of supervisory practices.

The implementation deadline of the Directive is 31 October 2010.

International | Other

CESR Publications

CESR issues advice on implementation UCITS Directive

CESR has advised the European Commission on measures to implement the UCITS Directive:

- a technical advice on mergers of UCITS, master-feeder UCITS structures and cross-border notification
- two methodologies for Key Investor Document for UCITS.

The UCITS Directive came into effect on 7 December 2009. The deadline for implementation is 30 June 2011.

In addition, CESR has published a summary outlining the tasks of UCITS depositaries in the various Member States, the laws and regulations applicable to depositaries, their civil liability, and the sanctions in case of breach of the rules.

¹¹ OJ 2009, L 302/97)

New FAQ's Prospectus Directive

CESR has published a new version of the FAQ's with regard to the Prospectus Directive. The new questions relate to free offers.

CEBS Publications

- Revised Guidelines on Financial Reporting
- Draft implementation guidelines on instruments referred to in Article 57(a) of the Capital Requirements Directive (consultation)
- Draft guidelines on concentration risk (consultation)
- Draft guidelines on stress testing (consultation)
- Draft Guidelines for the operational functioning of colleges (consultation)
- Implementation Guidelines for Hybrid Capital Instruments
- Guidelines on Liquidity Buffers
- Guidelines on the Revised Large Exposures Regime
- Guidelines on common reporting of large exposures

Consultations Basel Committee on Banking Supervision

- Strengthening the resilience of the banking sector (consultation).
- International framework for liquidity risk measurement, standards and monitoring (consultation)

Joint Forum publishes Review of the Differentiated Nature and Scope of Financial Regulation

The Basel Committee on Banking Supervision, IOSCO and the International Association of Insurance Supervisors (the Joint Forum) have published a joint report on the key differences in regulation for and supervision of banks, insurers, and issuing institutions in the G20 countries. The authors of the report also looked at financial groups, mortgages, hedge funds, and transfer of credit risk. The Joint Forum makes a number of recommendations for more effective and more consistent supervision in the various sectors.

If you have any questions about this newsletter
please contact:

Francine Schlingmann

T + 31 20 577 1564

E francine.schlingmann@debrauw.com

Joost Schutte

T +31 20 577 1688

E joost.schutte@debrauw.com

Marnix Somsen

T +31 20 577 1628

E 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

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