

Financial Markets Newsletter

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June 2009

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Netherlands | Laws and Regulations

Prohibition on short selling lapses; new temporary measures in force

The prohibition on short selling lapsed as of 1 June 2009 and in the light of current market circumstances the AFM considers it unnecessary to continue the prohibition.

However, the AFM considers vigilance necessary and has implemented [new temporary measures](#)¹.

These measures require that short positions in Dutch financial institutions be notified to the AFM. To limit the administrative burden, short positions need only be reported to the AFM when reaching, exceeding or falling under certain thresholds². The notification obligation is effective until 1 January 2010, but both the duration and the substance of the measures may be amended before expiry of this term.

Relief scheme for life insurers; amounts set

The Ministry of Finance has determined the amounts that will be available under the relief scheme for life insurers in the event a life insurer falls into financial difficulties (Section 3:156 subsection 1 FMSA)³.

Netherlands | Other

Cabinet agrees to proposed First Act amending the FMSA (*Wijzigingswet Wft 1*)

The Cabinet is in [agreement](#) (in Dutch) with a proposed bill containing both small substantive amendments and technical non-substantive amendments to the FMSA. The proposed bill also amends the Dutch Civil Code (*Burgerlijk Wetboek*), the Bankruptcy Act (*Faillissementswet*), the Consumer Protection (Enforcement) Act (*Wet handhaving consumentenbescherming*), the Audit Firms (Supervision) Act (*Wet toezicht accountantsorganisaties*) and the Economic Offences Act (*Wet op de economische delicten*). An important element of the bill is the development and expansion of the mandatory exemption notice that currently exists for offers of investment objects

¹ Government Gazette 2009, 97, page 19

² 0,25%, 0,35%, 0,45%, 0,55% etc

³ Government Gazette 2009, 80, page 1

and rights of participation in an investment institution. From now on, certain offers of securities must also mention that there is no supervision, for example, of investments of at least EUR 50,000 or offers of securities to fewer than 100 persons. Specific rules concerning the form of exemption notices will also be introduced.

The proposed bill will also introduce a voluntary supervisory regime for investment institutions. Currently, if investment institutions offer participation rights only to qualified investors they are not required to have a licence. However, some foreign institutional investors are only allowed to invest in supervised investment institutions. The new regime will make it possible for investment institutions to be voluntarily supervised and therefore open to these foreign institutional investors.

The Cabinet has agreed to consult the Council of State regarding the bill. Both the bill and the advice of the Council of State will be made public during submission to the Second Chamber of Parliament. The Act is intended to enter into force as of 1 January 2010. The [consultation version](#) (in Dutch) of the proposed bill can be found on the website of the Ministry of Finance.

Consultation on implementation of the Payment Services Directive (*Richtlijn betaaldiensten*)

The Ministry of Finance has held a consultation on the implementation of the Payment Services Directive⁴. This directive is intended to harmonise the conditions under which payment services are offered in Europe. A proposed bill implementing this directive was submitted earlier this year to the Second Chamber of Parliament⁵.

The current consultation relates to a [draft decree](#) (in Dutch) elaborating on the proposed bill. It amends the Decree on Market Access of Financial Firms FMSA (*Besluit markttoegang financiële ondernemingen Wft (Bmfo)*), the Decree on Prudential Rules FMSA (*Besluit prudentiële regels Wft*), the Decree on Market Access of Financial Firms (*Besluit prudentiële toezicht financiële groepen*) and the Decree on Conduct of Business

Supervision of Financial Undertakings FMSA (*Besluit gedragstoezicht financiële ondernemingen Wft*).

Consultation on implementation of the Consumer Credit Directive (*Richtlijn consumentenkrediet*)

The Ministry of Finance has commenced a [consultation](#) (in Dutch) on the implementation of the Consumer Credit Directive⁶. This directive aims to improve the working of the internal market for consumer credit and to protect consumers entering into credit agreements.

This draft bill as published amends Book 7 of the Dutch Civil Code (*Burgerlijk Wetboek*) and the Financial Markets Supervision Act (FMSA) (*Wet op het financieel toezicht (Wft)*). The amendments to the Dutch Civil Code relate to information and rights regarding credit agreements, while the amendments to the FMSA relate, *inter alia*, to rules regarding credit advertising, precontractual information and the creditworthiness test. These rules are further elaborated in a draft decree, which has been published, amending the Decree on Conduct of Business Supervision of Financial Undertakings FMSA.

Market parties, supervisory bodies, branch organisations and other relevant parties have until 17 July 2009 to respond to the draft.

Finance Minister responds to questions from Parliament on disclosure obligations for derivatives

The Minister of Finance, Mr Bos, has [responded](#) to questions from the Second Chamber of Parliament on disclosure obligations for financial instruments that may entitle the holder to voting rights. The questions arose in connection with the decision of the British Financial Services Authority (FSA) to include cash settled options and equity swaps when assessing whether a party has exceeded the 30% threshold for a public offer as of 1 June 2009 and to include contracts for difference in the calculation of the threshold for disclosure obligations in respect of substantial interests as of September 2009.

⁴ 2007/64/EC

⁵ Parliamentary Paper II, 2008/09, 31 892

⁶ 2008/48/EC

In his response, Mr Bos announced that a consultation document will be published before the summer on the reporting regime of the FSA and on the issue of what the scope of any disclosure obligation should be to prevent the undisclosed acquisition of interests.

Report of expert working group on deposit guarantee scheme

A working group of experts at the Ministry of Finance, the DNB and the Netherlands Bankers' Association (*Nederlandsche Vereniging van Banken*) has published a report on the deposit guarantee scheme. The goal of the report is to reconsider the deposit guarantee scheme and possibly revise certain parts.

The report concludes that while the deposit guarantee scheme meets a public need, certain parts of the current scheme could be improved. The scheme fails to give the correct incentives to deposit holders and banks, the procyclic allocation of banks' costs may be at the wrong time and is complicated for banks and the DNB, and the laws and regulations are unclear in parts.

AFM publishes amended information brochures on notification regulations

The AFM has amended its [information brochures](#) (in Dutch) for shareholders and issuing institutions, managing directors and supervisory directors in connection with the implementation of the Transparency Directive. The brochure contains previously published policy on securities lending and repurchase agreements. The English version of the updated brochures will be available shortly.

AFM publishes notification of list of minimum data safekeeping requirements for investment firms

Pursuant to article 35 paragraph 5 of the Decree on Conduct of Business Supervision of Financial Undertakings FMSA, the AFM will compile a list of the minimum data that an investment firm must retain. This list is currently officially published in the Government Gazette⁷ and is identical to the list placed on the AFM [website](#) (in Dutch) in September 2007.

⁷ Government Gazette 2009, 87

AFM and DNB publish principles for controlled remuneration policy

The AFM and the DNB have published a number of [principles](#) (in Dutch) for the remuneration policy of financial enterprises. The supervisory bodies will actively control how enterprises apply these principles within their organisations. The principles are intended to combat the incentives that may cause undesirable and irresponsible risk-taking. The principles apply to all financial enterprises and pension funds that fall under the supervision of the AFM or the DNB pursuant to the FMSA, the Pension Act (*Pensioenwet*) or the Obligatory Occupational Pension Schemes Act (*Wet verplichte beroepspensioenregeling*). They are applicable to employees and directors whose remuneration has, or may have, a significant variable component.

In a [letter](#) (in Dutch) to the Second Chamber, the Minister of Finance, Mr Bos, provided further clarification on the principles and how the AFM and the DNB can ensure the remuneration policy is upheld. Mr Bos also writes that the controlled remuneration policy will be clearly and specifically implemented in the FMSA. He anticipates presenting a proposal to the Second Chamber of Parliament in the near future.

AFM consults on the guidelines for appropriate commissions for financial services providers

New provisions have been included in the Decree on the Conduct of Business Supervision of Financial Undertakings FMSA regarding commission payments and remuneration transparency of financial service providers as of 1 January 2009. These provisions are based on the MiFID inducement rules and are intended to improve consumer protection when acquiring complex products or mortgage loans.

The AFM has published [draft guidelines](#) (in Dutch) for the application of the inducement rules. It has stated that in doing so it is not imposing further rules and does not intend to prohibit certain commission structures in advance.

Interested parties have until 19 June 2009 to respond to the draft guidelines.

AFM publishes 2008 annual report

In 2008 the AFM took almost twice as many supervisory measures as it did in 2007. The [2008 annual report](#) (in Dutch) also shows that the number of activities transgressing normal standards, fines imposed, orders to comply subject to a penalty, and public warnings increased significantly.

The AFM recently published its [2009 Budget](#) (in Dutch) in which it sets out its priorities and goals for this year. It intends, *inter alia*, to tackle market manipulation more effectively and improve the provision of information by a larger number of pension providers. For share issues and public offers the AFM also intends to improve the balance between investor protection, speed, cost and predictability for market parties.

Memorandum of Understanding concerning cooperation between central counterparties

The AFM, the DNB and the British Financial Services Authority have entered into agreements concerning the supervision of clearing service providers. To this end they have signed a [Memorandum of Understanding](#) which took force on 24 April 2009.

Report on DNB supervision of Icesave

The main conclusion of a [report](#) compiled at the request of the Minister of Finance, Mr Bos, on the supervision exercised by the DNB in respect of Icesave, is that the core problem surrounding Icesave lay in the attitude taken by Landsbanki and the Iceland supervisor, FME, within the European system of home state control and, by implication, in the deficiencies of that system. The main recommendation of the report is that the European system be thoroughly revised. In any event, the situation where a country bears the risk of a possible bankruptcy of a financial institution – via the deposit guarantee scheme - whereas it has next to no control over the management of that risk should be avoided. The report argues that supervisors in the host member states should receive increased supervisory powers, or supervision at a European level or cooperation and conflict resolution between supervisors should be improved.

The report concludes that the DNB was not permitted to warn against the situation at Landsbanki/Icesave, although it does note that it finds the grounds on which the DNB based its assessment insufficiently clear.

DNB presents supervisory themes in 2009

In 2009, the DNB will pay particular attention to matters such as computer criminality in addition to themes closely related to the financial crisis. These themes are expounded in a [brochure](#) (in Dutch). The DNB has also published its [Annual Report 2008](#), in which it takes an in-depth look at the causes and consequences of the financial crisis in the Netherlands, Europe and the United States.

Euronext Amsterdam updates policy concerning listing measures

Euronext has recently provided clarification⁸ concerning its authority to take [listing measures](#) in the event of a suspension of payments or bankruptcy of an issuing institution. It addresses the consequences and duration of the listing measures and explains the conditions it imposes on an issuing institution with negative shareholders equity in order to prevent listing measures being taken.

In addition, Euronext has amended its policy on two points:

- return to the official listing is possible on the basis of an approved prospectus or approved semi-annual accounts;
- this update has a retroactive effect and is therefore also applicable to securities that are subject to a listing measure at the time of publication of this announcement.

International | Legislation

Amendment of Settlement Finality Directive (*Finaliteitsrichtlijn*) and Financial Collateral Arrangements Directive (*Richtlijn financiële zekerheidsvereenkomsten*)

The directive to amend the Settlement Finality Directive⁹ and the Financial Collateral

⁸ NYSE Euronext-Amsterdam Notice 2009-001

⁹ 98/26/EC

Arrangements Directive¹⁰ has been adopted and will enter into force on 30 June 2009¹¹.

The amendments were required to amend the two directives to reflect developments in the financial markets and supervision. Settlements that take place at night and settlements between linked systems will also fall under the Settlement Finality Directive.

The scope of both directives will be extended to include credit claims that are assignable as collateral for credit transactions of central banks as of 1 January 2009. Ultimately, the Commission intends these amendments to simplify the application of the two directives. European member states have until 30 December 2010 to implement the directive.

International | Other

European Parliament adopts Solvency Directive II (*Richtlijn solvabiliteit II*)

The European Parliament has adopted the proposed [Solvency Directive II](#).

The purpose of the Directive is to improve the financial stability of insurers and reinsurers by introducing solvency requirements that take risk management into account. Supervisory bodies will be required to be proactive and Colleges of supervisors comprised of various national supervisory bodies will be assembled to improve the exchange of information and consultation.

The Council of the European Union has reached agreement on the proposal and member states have until 31 October 2012 to implement the directive into their national legislation.

European Parliament adopts Regulation on credit rating agencies (*Verordening kredietbeoordelaars*)

The European Parliament has adopted a [proposal](#) for a regulation regarding credit rating agencies.

¹⁰ 2002/47/EC

¹¹ Directive 2009/44/EC of the European Parliament and the European Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims.

The new rules are designed to prevent conflicts of interest regarding ratings, improve the quality of ratings and increase transparency. Credit rating agencies will be required to appoint independent specialists to their advisory council and a system of registration for credit rating agencies will be introduced. Credit ratings from third countries may be used under strict conditions. Agreement on the proposal has already been reached with the Council of the European Union.

The Minister of Finance, Mr Bos, wrote a [letter](#) (in Dutch) to the Second Chamber of Parliament in which he stated that he was satisfied with the regulation.

European Commission aims to improve protection for investors in packaged retail investment products

The European Commission aims to improve protection for investors in packaged retail investment products (such as investment funds, insurance-related investments and structured products). The aim is to improve regulations for product disclosure and the rules regarding selling process and make them more consistent.

In a [Communication](#) to the European Parliament and the Council of Europe, the Commission proposes a new approach to legislation in this field. They anticipate that they will be able to provide more detailed information on the legislative proposals by the end of the year.

Recommendations of European Commission on remuneration of directors and risk-taking staff of financial institutions

The European Commission has adopted two [Recommendations](#) on remuneration in the financial sector.

The first recommendation relates to the rules for the remuneration of directors of listed companies; the second relates to the remuneration policy for risk-taking staff in the financial sector.

In the Recommendations, member states are asked to take a number of measures in various areas (such as structure of remuneration policy, governance, supervision and disclosure).

The Commission intends to bring remuneration policies within the scope of prudential oversight. To this end it has currently presented legislative

proposals to revise the Banking Directive (*Bankenrichtlijn*) to ensure that risk assessment processes adequately cover the risk inherent in trading books, securitisation positions and remuneration policies of banks.

European Commission proposes regulations for managers of alternative investment funds

The European Commission has published a [proposed directive](#) providing rules for Alternative Investment Fund Managers – legal entities that professionally manage one or more investment institutions that do not fall under the obligation to have a licence pursuant to the UCITS Directive (*Icbe-richtlijn*).

The proposed directive will require managers of hedge funds to apply for a licence if they manage assets in excess of EUR 100 million and managers of private equity to apply for a licence if they manage assets in excess of EUR 500 million. Managers will also be obliged to provide information to supervisory bodies and investors. In addition, the directive also provides codes of conduct, rules regarding the own funds requirement and rules regarding transparency and delegation.

European Commission consultations

Consultation revising the Market Abuse Directive (Richtlijn marktmisbruik)

The European Commission will present its recommendations to revise the Market Abuse Directive later this year. In a [Call for evidence](#), it details its provisional plans and raises, *inter alia*, the following issues.

- Should the scope of the directive be extended to include non-regulated markets?
- Should the definition of financial instruments in the Market Abuse Directive be brought into line with the definition of financial instruments in MiFID?
- Both ESME and various national supervisory bodies have reported problems related to the obligation of issuing institutions to disclose inside information as soon as possible. Would this be improved if the definition of inside information is specifically amended for this obligation?

- Should the obligation to compile lists of insiders be revised?

Harmonisation of securities law

The European Commission has held a [Consultation](#) on the harmonisation of securities law. The deadline for responses to the Commission's Working Document *Legislation on legal certainty of securities holding and dispositions* was 11 June 2009.

Reforms of financial supervision

The European Commission has commenced [Consultations](#) on reforms to the framework of financial markets supervision. Two new institutions will be created:

- the European Systemic Risk Council (ESRC), whose task will be to ensure financial stability and issue timely warnings of possible systemic risk, and
- the European System of Financial Supervisors (ESFS), a unity of national supervisory bodies which will cooperate with three new supervisory bodies: the European Securities Authority, the European Banking Authority, and the European Insurance and Occupational Pensions Authority.

The Commission has followed the [advice](#) of the de Larosière group.

Interested parties can respond to the Commission until 15 July 2009.

Review of the Directive on Deposit Guarantee Schemes (Richtlijn inzake de depositogarantestelsels)

The European Commission will present a report by the end of 2009 to the European Parliament on the Directive on Deposit Guarantee Schemes. If necessary, it will also submit proposals to amend the directive.

In preparation for this, the Commission has published a document containing questions on the directive. It would like to know how Europeans assess the level of coverage, whether they think there should be a minimum coverage or a fixed amount, and whether one European body should replace the existing 40 deposit guarantee schemes. The Commission also posed questions on the term within which payments must be made,

the manner in which claims should be verified, and the manner in which the schemes should be financed.

Interested parties have until 27 July 2009 to respond to the [Consultation document](#).

Responsible lending and borrowing in the European Community

The European Commission intends to adopt measures aimed at increasing responsible lending and borrowing¹². In order to analyse the market, it has published a consultation document [Responsible lending and borrowing in the EU](#) in which it asks market parties about their experience when providing or entering into loans. The Commission also asks market parties to indicate whether additional regulation would be useful. The consultation is open until 31 August 2009.

Markets in Financial Instruments Directive (MiFID) publications

Questions on MiFID

The European Commission has launched a special [website](#) for questions and answers on MiFID, which replaces its current Q&A list. CESR¹³ has also published a third update of its list with answers to [frequently asked questions](#) on MiFID.

CESR consultation on MiFID appropriateness test

Pursuant to article 19(5) of MiFID an investment firm must “ask the client or potential client to provide information regarding his knowledge and experience in the investment field relevant to the specific type of product or service offered or demanded so as to enable the investment firm to assess whether the investment service or product envisaged is appropriate for the client”. An exception to these obligations applies to various non-complex financial instruments. CESR wants increased clarity on the issue of which products are considered non-complex. In its [Consultation document](#) it analyses a number of products to assess whether they are complex or

non-complex. Market parties have until 17 July 2009 to respond to the consultation document.

Waivers from pre-trade transparency obligations

Member states may waive certain MiFID conditions regarding pre-trade and post-trade transparency obligations under certain conditions. [CESR](#) has published a number of examples of situations in which such a waiver may or may not be granted to a market party or an investment enterprise operating a Multilateral Trading Facility.

CESR publishes Third set of guidelines on Market Abuse Directive

CESR has published a [Third set of guidelines](#) on the common operation of the Market Abuse Directive, which considers:

- Insider lists
- Reporting suspicious transactions
- Stabilisation and buy back programmes
- Inside information: how an issuing institution should respond to rumours

CESR publishes FAQs on Transparency Directive

CESR has published answers to frequently asked questions on the [Transparency Directive](#). The questions concern, *inter alia*, additional information in annual and semi-annual financial reports, the calculation of notification thresholds on the basis of all shares with voting rights and the publication of regulated information by an issuing institution. The document will be updated regularly.

CESR publishes report on credit rating agencies (CRAs)

CESR has investigated whether credit rating agencies (CRAs) in the European Union comply with the IOSCO code of conduct. According to the [report](#) one in three CRAs have not implemented a code of conduct. CRAs with a code of conduct generally use the general conditions of the 2004 IOSCO code of conduct. As a rule, the amendments IOSCO made in 2008 have not been incorporated. The majority of CRAs are waiting for the proposed European [Regulation on credit rating agencies](#).

In addition, CESR has ascertained that 24 CRAs may be eligible for registration on the grounds of

¹² COM (2009) 114 definitief

¹³ Committee of European Securities Regulators

the new regulation. Twenty of these are local credit rating agencies and four have branches in various member states.

CESR consults on risk management of UCITS

The European Commission asked CESR for provisional advice on measures to implement the new UCITS Directive (*Icbe-richtlijn*)¹⁴. CESR has currently published its draft advice on risk management, particularly on the measurement by UCITS of all material risks related to derivatives¹⁵. The consultation will end on 15 July 2009.

CESR, CEBS and CEIOPS publish key principles for the delegation of tasks between competent authorities

CESR, CEBS and CEIOPS¹⁶ have published key principles for the delegation of tasks between supervisory bodies in various member states. In addition, the committees have published a report in which they considered the delegation of responsibilities and what these entail. This report also contains a summary of the provisions regarding delegation in the various directives as well as a summary listing whether supervisors in various member states are liable under civil law and, if so, in which situations.

Consultation on proposed amendment of Financial Conglomerates Directive (*Richtlijn financiële conglomeraten*)

CEBS and CEIOPS have proposed amendments to the Financial Conglomerates Directive¹⁷. The joint committee recommended, *inter alia*, that certain definitions require clarification to achieve the objectives of the directive. The consultation process will end on 28 August 2009.

CEBS publications

Advice on exchange of information between supervisors

At the request of the European Commission, CEBS has published a report on the information supervisory bodies in various member states may provide to each other when they supervise credit institutions providing services in member states other than where their head office is located (Article 42 Banking Directive¹⁸). This advice will form the basis for the European Commission amendments to the Banking Directive.

Principles for remuneration policies for financial enterprises

CEBS has published high-level principles for remuneration policies intended as a guideline for financial enterprises to adopt a well-functioning remuneration policy.

CEIOPS publishes a summary of powers of supervisory bodies

CEIOPS has published a summary of the powers of various European supervisors pursuant to regulations implementing European insurance and reinsurance directives and the administrative and criminal penalties that can be imposed for violating these regulations.

¹⁴ The proposed directive was approved by the European Parliament in February and the Council of the European Union is expected to agree to the proposal in June

¹⁵ Article 51(3) of the proposed directive

¹⁶ Committee of European Securities Regulators, Committee of European Banking Supervisors and Committee of European Insurance and Occupational Pensions Supervisors

¹⁷ 2002/87/EC

¹⁸ 2006/48/EC

If you have any questions or require further information regarding this newsletter please contact:

Francine Schlingmann

T + 31 88 888 1564

francine.schlingmann@debrauw.com

Joost Schutte

T +31 88 888 1688

joost.schutte@debrauw.com

Marnix Somsen

T +31 88 888 1628

marnix.somsen@debrauw.com

Amsterdam

Tripolis

Burgerweeshuispad 301

P.O. Box 75084

1070 AB Amsterdam

The Netherlands

T +31 88 888 1888

F +31 88 888 1889

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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