

Financial Markets Newsletter

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Newsletter Financial Markets

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Netherlands | Law and regulations

FMSA Remedial Bill (*Reparatiewet Wft*) and FMSA Remedial Decree (*Reparatiebesluit Wft*) enter into force

On 1 January, both the FMSA Remedial Bill and the FMSA Remedial Decree entered into force.

These amend a large number of laws and regulations, as follows:

- Financial Markets Supervision Act (FMSA, *Wet op het financieel toezicht*)
- Decree on Funding Financial Markets Supervision (*Besluit bekostiging financieel toezicht*)
- Decree on Definitions pursuant to the FMSA (*Besluit definitiebepalingen Wft*)
- Decree on Market Access of Financial Undertakings pursuant to the FMSA (*Besluit Markttoegang financiële ondernemingen Wft*)
- Decree on the Scope of the Provisions of the FMSA (*Besluit reikwijdtebepalingen Wft*)
- Decree on Prudential Rules pursuant to the FMSA (*Besluit prudentiële regels Wft*)
- Decree on Special Prudential Measures, Investor Compensation and Deposit Guarantees pursuant to the FMSA (*Besluit bijzondere prudentiële maatregelen, beleggerscompensatie en depositogarantie Wft*)
- Decree on the Prudential Supervision of Financial Groups pursuant to the FMSA (*Besluit prudentieel toezicht financiële groepen*)
- Decree on the Supervision of the Conduct of Financial Enterprises pursuant to the FMSA (*Besluit gedragstoezicht financiële ondernemingen Wft*)
- Decree on the Disclosure of Major Holdings and Capital Interests in Securities-Issuing Institutions (*Besluit melding zeggenschap en kapitaalbelang in uitgevende instellingen*)
- Public Offers (Financial Markets Supervision Act) Decree (*Besluit openbare biedingen Wft*)
- *Besluit fondsen en spaarregelingen*
- Decree implementing Capital Requirements Directive (*Besluit implementatie kapitaalakkoord Bazel 2*)
- Decree pursuant to the Act on the Prevention of Money Laundering and Terrorist Financing

(*Uitvoeringsbesluit Wet ter voorkoming van witwassen en financieren van terrorisme*)

The FMSA Remedial Bill and the FMSA Remedial Decree in particular correct incorrect references, omissions and textual errors. The Ministry of Finance will address substantive amendments in the FMSA and the implementing Decrees later this year in an FMSA Amendment Bill.

New categories of professional market parties

One of the more substantive amendments of the FMSA Remedial Bill is an inclusion in the Decree on Definitions FMSA of a new category of professional market party. To section 3 of the Decree on Definitions FMSA a second paragraph has been added, which reads:

“2. Persons or companies from which redeemable funds are raised, received or held will be designated as a professional market party within the meaning of Subsection c of the definition of a professional market party in Section 1:1 of the Act in their legal relationship to the party which raises, receives or holds the redeemable funds, respectively, if:

- a. the nominal value of the first claim or the aggregate of the first claims jointly obtained under the legal relationship is at least €50,000 at one time; or
- b. the first claim or the aggregate of the first claims jointly obtained under the legal relationship can only be acquired or have only been acquired for an amount of at least €50,000 at one time.”

Implementation of Transparency Directive takes effect

On 1 January 2009, the Act implementing the Transparency Directive and the FMSA Decree implementing transparency guidelines for issuing institutions entered into force. The following regulations have been amended:

- FMSA
- Market Abuse Decree pursuant to the FMSA (*Besluit marktmisbruik Wft*)
- Decree on Public Takeover Bids (*Besluit openbare biedingen Wft*)

- Decree on fines pursuant to the FMSA (*Besluit boetes Wft*)
- Decree on Financial Reporting Supervision (*Besluit toezicht financiële verslaggeving*)

Legal alert

De Brauw has published a *legal alert* on the implementation of the Transparency Directive. Should you not have received this *legal alert* and wish to receive it yet, please contact your contact person at De Brauw. The *legal alert* can also be downloaded at www.debrauw.com.

Amendments to the Decree on the Supervision of the Conduct of Financial Enterprises pursuant to the FMSA (*Besluit gedragtoezicht financiële ondernemingen Wft*)

The Decree on the Supervision of the Conduct of Financial Enterprises pursuant to the FMSA has been amended. An obligation for financial services providers of complex products and mortgage credit to provide transparency regarding remuneration has been introduced. The amendments are intended to increase consumer protection. The new rules entered into force on 1 January. The AFM will exercise leniency until 1 April when enforcing this new measure/obligation.

Determination of costs of supervision

The Ministry of Finance has determined the costs for nonrecurring supervisory actions for 2008. The reason this was not done at an earlier date is related to the processing of decisions by the Trade and Industry Appeals Tribunal (*Commissie van Beroep voor het bedrijfsleven*)¹. The tribunal ruled at the time that supervisors may not pass on the costs of preparation for new legislation to market parties.

The Ministry of Finance has meanwhile stated that it will determine the level of fees for nonrecurring supervision for 2009 at a later date, too. Normally, this is done in January.

AFM prolongs measures against short selling

The Netherlands Authority for the Financial Markets (AFM) has decided to extend its measures against short selling until 28 February as a result of the continued exceptional market circumstances.

The AFM's consultation with market parties and other experts has not provided a clear picture of whether it is desirable to extend the measures or to allow them to expire. Currently, other supervisory authorities in Europe have extended their measures against short selling, either unchanged or in an altered form.

Mr Bos, the Minister of Finance, has reported on discussions with market experts and academics in a letter to the Second Chamber of Parliament regarding the prohibition on short selling. He notes that there is a general understanding for the temporary measures, but that doubts exist regarding the usefulness of the measures in the long-term. However, there is conviction that the ongoing exceptional circumstances in the financial markets have made intervention by governments and supervisors unavoidable. At this juncture, Mr Bos sees no reason to take permanent, more drastic measures with regard to short selling after the extension of the current temporary measures.

Netherlands | Other

Legislative proposal amending Securities Giro Transfer Act submitted to Parliament

A legislative proposal has been submitted to the Second Chamber of Parliament to amend the Securities Giro Transfer Act (*Wet giraal effectenverkeer*). This proposal intends to increase investor protection and introduces a far-reaching form of dematerialisation of securities transactions. Currently, the Securities Giro Transfer Act only offers protection to an investor in the event of bankruptcy of a bank or investment institution in case two conditions are met:

- The securities must be in the form envisaged by the Securities Giro Transfer Act, *i.e.* securities that the Central Securities Depository has determined could belong to a collective deposit and a giro depot.

¹ *Judgments of 18 June 2008: AWB 07/183, LJN BD4847; AWB 07/184, LJN BD4852*

- These securities should be held in accounts of institutions that are members of the Central Securities Depository.

The legislative proposal extends this protection to almost all securities under the FMSA. The protection will also apply to clients of intermediaries other than those that are members of the Central Securities Depository.

In addition, it is proposed that bearer securities may only be transferred to intermediaries and the Central Securities Depository for safekeeping by means of global certificates.

The explanatory memorandum clarifies that immediate and full dematerialisation by abolishing bearer securities would require an amendment of the Dutch Civil Code and would be a considerable burden for the business community. For this reason this approach was not adopted.

Cabinet approves Decree on Administrative Fines in Financial Sector

The cabinet has approved the Decree on Administrative Fines in the Financial Sector. This decree provides the manner and amount in which the Dutch Central Bank and the AFM can impose fines on financial enterprises and persons who breach financial laws. Several categories of fine are mentioned. In the case of repeated violations, for example, a higher fine can be imposed.

The decree is connected with the Bill Amending the System of Fines with regard to Financial Legislation, which is to be discussed in the Second Chamber of Parliament in the near future. The Bill provides for an increase in administrative fines to a maximum of EUR 2 million. The maximum fine is currently EUR 500,000. In the case of benefiting from market manipulation and insider trading the fine may even rise to twice the value of the benefit obtained.

The cabinet has agreed that the draft Decree should be submitted to the Council of State for its advice. The text of the Decree will be published in the Official Gazette (*Staatsblad*).

Evaluation of acquisition of ABN AMRO

Mr Bos has informed the Second Chamber of Parliament of his [conclusions](#) arising from the [evaluation report](#) on the actions of the AFM, the

Dutch Central Bank and the Minister of Finance during the acquisition of ABN AMRO. In his report, Minister Bos considered:

- the role of the shareholders in the acquisition
- the declaration of no-objection by the Central Bank and the Minister of Finance
- the supervision by the AFM of the acquisition process.

The Minister of Finance did not consider the more general aspects of the supervision exercised on financial institutions. He noted that he intends to reconsider this in the near future.

AFM publishes FAQ's on trading measures

The AFM has published frequently asked questions on [trading measures on the stock exchange](#).

The AFM may take trading measures if it considers this necessary for the protection of investors or for orderly trade.

The AFM has had this extensive authority to take trade measures since the implementation of the MiFID on 1 November 2007. Prior to this, the AFM could only take trading measures if price-sensitive information had been leaked.

Report on supervision of financial reporting

The AFM has published an [activity report](#) on the supervision of financial reporting of listed companies. It pays particular attention to the effect of the credit crisis on financial reporting.

Advice regarding amendment rules for public offers

The Capital Market Commission of the AFM has issued a second advice to the Minister of Finance on amendment of the rules regarding [public offers](#). This advice is a continuation of earlier advice by the Commission on [Market experts](#).

International | Law and regulations

Regulation on equivalent GAAP for third countries

Issuing institutions in America and Japan may use American and Japanese GAAP for reporting financial information that they must include in a prospectus pursuant to the Prospectus Directive

and for their financial reporting pursuant to the Transparency Directive.

Until 31 December 2011, Canadian, Chinese, Indian and South Korean GAAP can be used as well.

This is set out in a regulation and a decision published by the European Commission². The regulation amends the Prospectus Directive and is applicable as from 1 January.

International | Other

Consultation on amendment to Prospectus Directive

The European Commission is holding consultations regarding an [amendment of the Prospectus Directive](#). It intends to improve and simplify the application of the directive and lessen the administrative burden. The Commission proposals relate to:

- the definition of qualified investors;
- the exemption for personnel schemes and the event that securities are placed via financial intermediaries;
- the annual obligation to provide information;
- the length of the period in which investors have the right to withdraw their acceptance;
- the threshold of EUR 1,000 for issues of non-equity securities.

In addition, the Commission has asked market parties to submit their views on some other subjects, including (i) the definition of “offer of securities to the public”, (ii) disclosure requirements for small business, in the event that an issue is guaranteed by a member state and in claims issues, (iii) the summary of the prospectus, and (iv) the responsibility for the prospectus.

Report on gold plating in the Transparency Directive

The European Commission has investigated to what extent member states impose demands on issuing institutions that are more stringent than the demands set out in the Transparency Directive. In its [Working Document](#), the Commission provides a

summary of the provisions that involve more stringent demands for issuing institutions and investors and the consequences of this.

Amendment deposit-guarantee scheme

The Committee on Economic and Monetary Affairs of the European Parliament has agreed to the proposal of the European Commission to amend the [deposit-guarantee scheme](#). The compensation paid under this scheme will initially be increased to EUR 50,000. From 31 December 2010, the amount will increase further to EUR 100,000, unless the European Commission concludes that the amount is not achievable.

The operator of the deposit-guarantee scheme must pay the compensation within twenty days after the inability to pay has been determined. Applicants are also entitled to a partial payment of not more than EUR 5,000, which has to be paid within three days of receipt of the application. Mr Bos has informed Parliament of the consequences these changes will have for the legislative proposal to amend the FMSA and the Bankruptcy Act in connection with the concurrence of the depositor’s claim on the estate and the request for compensation pursuant to the “safety net scheme”. The amendment of the deposit-guarantee scheme partially removes the problems that this legislative proposal intends to resolve. However, the Minister of Finance continues to consider the legislative proposal worthwhile.

European Parliament approves passport for management companies

The European Parliament has approved a [review of the UCITS Directives](#). The purpose of this is to counteract the fragmentation of the European investment fund sector and improve efficiency. One important aspect is the passport for management companies, which makes it possible for management companies located in one member state to manage at a distance investment funds that have a licence in another member state. The Directive still requires approval of the Council of the European Communities. However, as an informal compromise has already been reached, this is just a formality. Member states must turn the

² Regulation (EC) nr. 1289/2008

Decision 2008/961/EC

new rules into national legislation before 1 July 2011.

Consultation alternative dispute resolution financial services

The European Commission will hold a consultation on the issue of how to improve [alternative dispute resolution](#) in the field of financial services by ombudsmen, complaints committees and mediators. The Commission also likes to know whether in this field European regulations are considered desirable.

Consultation on the regulation of hedge funds

The European Commission will hold consultations on possible regulations for [hedge funds](#). One point of discussion will be whether existing macro-prudential supervision provides supervisors with sufficient opportunity to respond to the risks arising with hedge funds and spreading to the rest of the market. Another discussion point will be whether the activities of hedge funds form a threat to the efficiency and integrity of the financial markets. Finally, the Commission will consider the risk management of hedge funds and the protection of investors.

Summary of aid measures for banks

The European Commission has published a new version of the [overview](#) of measures taken by European member states to save banks.

Clearing and settlement

Amendment of clearing and settlement regulations and credit claims

The European Parliament has [agreed](#) to amend the Settlement Finality Directive³ and the Financial Collateral Arrangement Directive⁴. The amendments are necessary due to the increasing number of links between payment and settlement systems. In addition, the scope of the Financial Collateral Arrangement Directive has been extended to include credit claims, which can be used as security for credit transactions since 1

January 2007. This will therefore simplify the transfer of credit claims.

Report CESAME

The Clearing and Settlement Advisory and Monitoring Experts' Group (CESAME) has published a report on clearing and settlement: [solving the industry Giovannini barriers to post-trading within the EU](#).

CESR supplements FAQs regarding Prospectus Directive and Markets in Financial Instruments Directive (MiFID)

In January the Committee of European Securities Regulators (CESR) published the eighth edition of its [Frequently asked questions regarding Prospectuses](#).

CESR also published a new version of the list of question and answers on the [MiFID](#).

Other CESR publications

Consultation on non-equity markets transparency
CESR will hold a [consultation](#) on transparency in the markets for corporate bonds, structured finance products and credit derivatives.

Rules for central counterparties and central securities depositories

CESR has published a [report](#) summarising the rules for central counterparties and central securities depositories in the different member states.

Prudential assessment of holdings in the financial sector

CESR, the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) have published joint [guidelines](#) for the prudential assessment of acquisitions and increases in holdings in the financial sector⁵.

Colleges of supervisors – 10 Common Principles

³ Directive 98/26/EC

⁴ Directive 2002/47/EC

⁵ Directive 2007/44/EC

CEBS, CEIOPS and their interim Working Committee on Financial Conglomerates (WCFC) have drawn up guidelines for the supervision exercised by so-called colleges of supervisors on banking groups, insurers and financial conglomerates operating in various member states.

In addition, a model agreement has been made available, which regulates the cooperation between the various supervisors in the college.

Report on provision of mortgages by non-credit institutions

At the request of the European Commission, London Economics has investigated "[the role and regulation of non-credit institutions in EU mortgage markets](#)". The European Commission will use this report to assess whether it is advisable to introduce regulations for such mortgage lenders at a European level.

Recommendations securitization markets

The Securities Industry and Financial Markets Association, the American Securitization Forum, the European Securitisation Forum and the Australian Securitisation Forum have published a report in which they make eight recommendations to restore confidence in the market: [Restoring Confidence in the Securitization Markets](#).

Press releases

Former AFM director: make supervisory authority immune to claims for damages

In the opinion of former AFM director Paul Koster, the risk of large scale liability claims impairs the effectiveness of supervision. He has received anonymous support from the financial sector. The discussion on liability is currently topical with a claim from the shareholders of Fortis hanging over the Dutch Central Bank. The court has ruled that an inquiry be conducted into the failure of the acquisition of ABN AMRO. This can form a basis for these shareholders to recover the damage they have suffered from the directors of the Fortis or, on the grounds of failing supervision, from the DNB.

The amount concerned is a collective loss in share price of EUR 50 billion.

Currently, the Dutch government does not rule out the liability of supervisory bodies or limit such liability. The Ministry of Finance refers to the report by Professor Cees van Dam commissioned by the Ministry of Justice almost three years ago, which concluded that the risk of liability of supervisory bodies "is not large".

The Basel Committee of supervisors, headed by the president of the Dutch Central Bank Nout Wellink, expressed itself years ago in favour of a quasi-immunity that only allows claims against financial supervisory bodies in the event of gross negligence or bad faith. This is the system used in Belgium and the United Kingdom. In Germany full immunity applies.

The advisor to the government, Van Dam, believes that liability of supervisory bodies keeps supervisors on their toes. Anonymous experts in the supervisory field note that the claim culture has reached the Netherlands (*Het Financieele Dagblad* dated 9 December 2008).

Dutch Minister of Finance opposed to supervision of banks by European Central Bank

Mr Bos, the Dutch Minister of Finance, is opposed to supervision of European cross-border financial institutions by the European Central Bank (ECB). "It isn't an obvious task of the ECB to exercise this centralized supervision", the minister has said in answer to parliamentary questions. He emphasized again that he does believe supervision should be concentrated in due course, but he had several reservations. His view is that an independent institution should be set up which will be accountable to national parliaments. The ECB is not such an institution. The minister also believes that there should be a reluctance to concentrate all financial responsibilities in the European Union in one place. EU treaties provide for the possibility to transfer supervisory tasks to the ECB. The minister warns that this only relates to banks, not to insurers.

Mr Bos would prefer to place the supervision with national institutions. The policy should be coordinated by a central European authority which

would cooperate with the ECB (*Het Financieele Dagblad* dated 3 February 2009).

Insurers learn lessons from credit crisis

To ensure a more sustainable and stable insurance sector, the Dutch Association of Insurers has formulated the following recommendations:

- A stronger focus on the risks connected with periods of strong growth. Management and supervisor should actively search for business segments which grow fast and show (very) high yields. In addition, more financial reserves should be built up to deal with periods of contraction.
- A more active role for supervisors. If necessary, intervention where a strong increase of risks is observed, but as much as possible in a coordinated international context.
- Risk management should be safeguarded at the company's top level. To this effect, risk models should become more transparent and, if possible, simpler.
- Solid independent capitalization of subsidiary companies. This will increase the financial stability of the insurance sector as a whole.

The recommendations are included in a press release of the Association of Insurers in connection with the publication of a position paper on the credit crisis. They follow a report prepared by the Boston Consulting Group at the request of the Insurance sector.

In addition, the principal conclusions of the Association are:

- The European supervisory framework Solvency II should be applied in an expedited manner.
- The IFRS bookkeeping rules should be modernized taking into account undesirable pro-cyclical effects of this system.
- Rating agencies should become subject to independent supervision.
- In contact with customers, even more attention should be given to the relationship between risk and yield.
- Although the remuneration system has played a minor role in the credit crisis, the Insurance sector will in a dialogue with the Dutch Central

Bank review the structure of the remuneration policy.

([press release](#) of the Dutch Association of Insurers dated 5 February 2009)

Real Estate asks for increased AFM monitoring

Large offerors of indirect real estate investment are jubilant that the AFM intends to supervise a larger part of this market, according to Robert Weisz, Chairman of Stichting Transparantie Vastgoedfondsen (STV).

23 of the largest offerors of real estate limited partnerships and real estate companies are members of STV. 80% of these investment products do not currently fall under the supervision of the AFM, because deposits by investors exceed EUR 50,000. Investments above this amount are exempt from AFM supervision.

Theodor Kockelkoren, a director of the AFM, said in *Het Financieele Dagblad* that he considered it inevitable that in a European context the supervisory limit will increase for real estate investments. This would mean that more real estate investments will fall under AFM supervision. Kockelkoren also said that the self-regulation in this market has made insufficient progress (*Het Financieele Dagblad* dated 15 January 2009).

New trading platform real estate

Leading offerors of unlisted indirect real estate investments are taking part in the Netherlands Participation Exchange (NPEX). This new trading platform started on 2 February. "It concerns investments to which parties are bound for three to ten years", says the founder Frans van den Broek. "The fact that this type of fund can be traded during that period at all is a completely new concept", adds co-initiator Adriaan Hendrikse. A fund manager pays NPEX EUR 10,000 to EUR 15,000 for a listing of its investment products. "In return, we carry out a part of the back office for the offeror", says Mr Hendrikse. "We enter the Financial aspects of the prospectus into the NPEX website. Prices of completed transactions will be added to that. The trading history, offering history, it all becomes transparent to everyone. We include the performance, so that investors can see the yields."

The performance calculations are derived from the fund offerors. NPEX contains a comparative programme which helps investors to navigate the multitude of real estate investment opportunities. (*Het Financieele Dagblad* dated 2 February 2009).

Euronext introduces *single order book*

NYSE/Euronext has since January worked with a single order book, *i.e.* the share orders placed for companies with several European listings are consolidated to increase liquidity. The option for a second or third listing remains, but the trade in the share is centralised. The administration of all transactions on the three stock exchanges is performed by Euroclear.

Euronext considers consolidation as the final step in the process of integrating the Paris, Brussels and Amsterdam stock exchanges (*Het Financieele Dagblad* dated 15 January 2009).

Contact information

If you have any questions on the subject of this Newsletter, please get in touch with your contact person at De Brauw Blackstone Westbroek or with any of the following individuals.

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