

# Newsletter

## *Introduction Dutch Financial and banking law*

October 2008

The regulation of banks and other financial companies (such as investment funds and asset and fund managers) operating in the Netherlands is based on various regulations issued by the EU. Some fundamental changes have been effected in recent years, the latest being the entry into force of the Dutch Financial Supervision Act (Wet op het financieel toezicht, or "FSA") on January 1, 2007 and the implementation of the EU's Market in Financial Instruments Directive (MiFID) on November 1, 2007. The main Dutch financial regulations are now incorporated in the FSA as one act. The Dutch acts on the supervision of trust offices (Wet toezicht trust kantoren) and audit firms (Wet toezicht accountants organisaties) and the Act on the prevention of money laundering and finance of terrorism (Wet ter voorkoming van Witwassen en Financiering van Terrorisme), are not included in the FSA but are separate acts.

The FSA regulates the supervision of banks, investment funds, asset and fund managers, insurers, clearing institutions, dealers, brokers and others operating in the financial markets. The offering of securities and prospectus approval, disclosure of major shareholdings, market abuse and public offers, the operation of regulated markets are also important issues dealt with in the FSA.

### **General aspects of the Dutch Financial Supervision Act**

The FSA is the result of the restructuring of the supervisory regime for the Dutch financial markets. The supervision was historically structured by means of sector specific legislation. The FSA is intended to give the supervision of financial markets a more purposeful and market-oriented approach.

Supervision is divided in prudential supervision and market conduct supervision. Prudential supervision is mainly focused on the financial aspects of the parties active in the financial markets. Market conduct supervision on the other hand is focused on an orderly and transparent financial market, the relation between the parties in the financial markets and the treatment of customers. Prudential supervision under the

terms of the FSA is normally conducted by the Dutch Central Bank (*De Nederlandsche Bank*, "DCB"), while the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, "AFM") conducts market conduct supervision.

### **Investment funds (Collective Investment Schemes)**

A collective investment scheme ("investment fund") is an investment company or a unit trust that solicits or obtains monies or other goods for collective investment, so that the holders of participation rights in it may share in the revenues it gains. It is prohibited to offer a unit or participation right in an investment fund in the Netherlands unless the management company of the investment fund, or the fund itself if no manager is appointed, has been authorized by the AFM to manage an investment fund or to act as such.

Authorization is given by way of a license. Investment funds are excepted from the obligation to obtain a license if the units are offered to qualified investors only (always licensed dealer brokers, banks, other investment funds et cetera) or to less than 100 persons not being qualified investors.

Pursuant to the FSA, exemption *inter alia* is possible if the units offered can only be acquired for a minimum amount of EUR 50,000 per participant, the nominal value of each unit amounts to EUR 50,000 or more or if the units are offered to board members (supervisory and management) of the investment fund.

## **UCITS**

Management companies of Undertakings for Collective Investments in Transferable Securities ("UCITS"), incorporated and duly licensed as such in a Member State of the European Union (not being the Netherlands), may offer their participation rights in the Netherlands subject to notification to the AFM, either cross-border or via a Netherlands branch. The AFM maintains a special register of these UCITS. Investment funds that are not EU-based UCITS, but having their seat in a country where adequate supervision is exercised (currently, but subject to change: Guernsey, Ireland, Jersey, Luxembourg and the United States of America), and intending to offer their participation rights in the Netherlands, are obliged to first inform the AFM and then provide them in due course with a 'certificate of supervised status' issued by the regulator of the 'adequate supervision country'. The AFM may reject such an application if either the contemplated offering or the related distribution scheme is not in accordance with the applicable Dutch provisions. The AFM maintains a register of these 'adequately supervised' collective investment schemes.

## **Banking**

Under the FSA a credit institution (bank) is defined as: any company that obtains 'repayable funds' outside a closed circle (*besloten kring*) from (legal) persons, not being a professional market party and grants loans in the conduct of its business for its own account.

In the Netherlands, it is forbidden to operate as a bank or to use the term bank without a license granted by the DCB, provided no exemptions are applicable or specific dispensation has been granted by the DCB.

Licensed institutions such as investment funds and banks, qualify as professional market parties under the FSA. Any banking activities with such parties fall out of the scope of the FSA.

The same applies for all offers by a credit institution within a closed circle. The background is that a closed circle implies the knowledge of all parties involved of the financial situation within the party acting as a credit institution. A closed circle formally exists between persons or companies belonging to a group. Such group should be objectively limited. The criteria of access are to be determined in advance, so as to ensure that access is not easily realizable. Finally, a legal relationship between the credit institution and the parties providing the funds must exist when attracting the funds.

Credit institutions with a license granted by a supervisory authority of one of the EU Member States, intending to act as such in the Netherlands through a branch office, are exempted from the obligation to apply for a DCB license. Such credit institutions may rely on the license of their home state pursuant to a European passport. Prior notification of the DCB is required.

## **Offering securities and prospectus approval**

In the Netherlands, no securities may be offered to the public or be admitted for trading on a regulated market situated or operating in the Netherlands, unless a prospectus approved by the AFM has been made available to the public. This applies to participation in licensed and excepted or exempted investment funds as well.

Investment institutions and securities issuers ("Issuing Companies") existing under the laws of an EU Member State may offer their securities within the EU if a prospectus, approved by their home state regulator, is made publicly available.

The AFM is the supervisory authority responsible for supervising Issuing Companies based in the Netherlands. Even if securities issued by them are not to be

offered in the Netherlands, the AFM must still approve the prospectuses concerned.

The FSA provides several grounds for exception from the prospectus requirement. These include *inter alia* offerings of securities being offered to qualified investors only, to less than 100 persons not being qualified investors, in listed companies to employees and board members of such listed companies ("ESOP") or offerings concerning securities with a minimum consideration per investor or a minimum denomination per security of EUR 50,000. Exempted are offerings with a consideration lower than EUR 2.5 million over a period of 12 months and not for offerings by profit organizations.

Issuing Companies and related service providers (mostly securities intermediaries and portfolio managers) are required to have a licence to offer or render such services in or from the Netherlands. To obtain a licence, such parties must pass certain financial, administrative, organizational, reliability and solidity tests. The requirements that Issuing Companies and related service providers have to fulfil are quite elaborate, and these institutions are closely monitored by the AFM for compliance.

It is sufficient for companies based in the EU and having a licence to offer their services in another Member State to notify the AFM. Services may be offered in the Netherlands, either through a branch or on a 'cross-border' basis, although several additional Dutch rules will apply.

### **Securities exchanges and market abuse**

Securities exchanges are also required to have a licence to operate as such in the Netherlands. The Ministry of Finance grants these. Euronext Amsterdam N.V. currently holds a licence for the Dutch securities markets.

The EU's Market Abuse Directive has been fully implemented in the Netherlands as a part of the FSA. The AFM, together with the Public Prosecution Service (*Openbaar Ministerie*) is responsible for the

enforcement of the relevant provisions of the Market Abuse Directive. Transactions in or from the Netherlands involving listed securities (either in the Netherlands or in a regulated market in another member State) or similar instruments while having inside information about the issuing (listed) company are not allowed. Inside information is information about a company that has not been published and, if published, can be expected to significantly influence the price of the issued securities (or linked financial instruments). Issuers must maintain and regularly update insider lists. Manipulating any regulated market worldwide on which securities are traded that are also admitted to a regulated market in the Netherlands, is forbidden.

### **Declaration of no objection**

Under the FSA, the DCB is responsible for granting declarations of no objection (*verklaringen van geen bezwaar*) with regard to qualifying shareholdings in banks, management companies of UCITS, insurance companies and investment funds.

Only qualifying shareholdings of 20% or more will be under the supervision of the DCB, whereas for the above entities thresholds starting at 10% will apply.

Under certain conditions, it is the Dutch Ministry of Finance having exclusive authority to grant declarations of no objection regarding qualifying shareholdings. An example is the acquisition of ABN AMRO Bank by Fortis, Banco Santander and Royal Bank of Scotland.

### **Approval and supervision of decision makers**

No decision maker or co-decision maker (mostly members of the management board of a financial company, such as banks, investment funds, asset manager) may be appointed without being verified (with a positive result) on trustworthiness and expertise.

There are two procedures under the FSA regarding the verification of the trustworthiness and expertise of a decision maker or co-decision maker. Each is

supervised by a different supervising authority; one by the DCB and the other by the AFM. It can be that the trustworthiness of a decision maker within a financial company has to be verified twice. In order to avoid this second verification, the FSA includes the following rule: if the trustworthiness has been verified by one supervisory authority, the trustworthiness does not have to be verified again if the decision maker or co-decision maker changes his position, unless there have been any relevant changes in his records which may put his trustworthiness in doubt.

### **Disclosure of major holdings in listed companies**

The rules for the disclosure of voting rights, major holdings and capital interest in certain companies ("Disclosure Rules") are also included in the FSA. The supervision of the compliance with the Disclosure Rules is mainly delegated to the AFM.

The Disclosure Rules only relate to public limited liability companies (*naamloze vennootschappen*, or *N.V.s*) that are incorporated under the law of the Netherlands and having shares (or depositary receipts) listed at a regulated market in the Netherlands, another EU member State or an European Economic Area State, and to legal entities that are incorporated under the laws of a state not being an EU member and whose shares (or depositary receipts) are listed on a regulated market in the Netherlands.

The Disclosure Rules impose the obligation on all parties that acquire or lose the disposal of shares (or depositary receipts), provided their holding in the capital or voting rights reaches, exceeds or falls below a certain threshold, to disclose this to the AFM. A change in the issued capital of the company concerned can also cause a change creating an obligation to disclose. The thresholds which are currently used are: 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%. Any notifications under the Disclosure Rules will be made to the AFM.

The Issuing Company itself must inform, without delay, the AFM of the total of the change in its share capital by 1% or more. It must also periodically inform the AFM of the total of changes in its share capital on other grounds. It must also notify the AFM without delay of any change in its voting rights not ensuing from a change in its share capital, and periodically inform them of any further changes in its voting rights. Finally, the Issuing Company must immediately notify the AFM if a member of its management board or supervisory board resigns or is dismissed. Such members also have a separate obligation to inform the AFM upon disposal of shares and voting rights held in an Issuing Company or its subsidiaries.

### **Clearing Institutions**

One of the most important recent updates to the FSA was the introduction of the supervision of clearing institutions or clearing members. The function of a clearing member is mostly fulfilled by banks or securities institutions, which generally combine their clearing member activities with other activities. Only a few institutions are exclusively active as a clearing member. In the past, clearing institutions were monitored by Euronext Amsterdam N.V., but under the updated FSA their supervision has been transferred to the DCB.

If the clearing member operates as a credit institution there is no need to apply for any further authorization. If, however, the clearing member operates as a securities institution, that is provided with an AFM authorization, the clearing member must also acquire a DCB authorization (prudential supervision). A clearing member who does not operate as a credit institution or securities institution must, in accordance with the FSA, obtain a license from DCB.

Foreign clearing members are not allowed to operate as a clearing member in the Netherlands without the authorization of the DCB. In this respect the FSA introduces a mutual recognition procedure for clearing members that have their statutory seat in a country that is approved by the Dutch

Ministry of Finance. Such a clearing member does not have to obtain a DCB license.

### **Expertise and experience**

The persons within the Banking, Securities and Finance Law Practice Group of Eversheds Faasen are, amongst others, specialized in:

- advice on risk mitigation issues for banks, investment funds, asset and fund managers, dealer-brokers and collective investment schemes;
- regulatory and corporate issues regarding ESOPs;
- advice and assistance in finance arrangement (syndicated loans, acquisitions, real estate) securities rights and legal opinions;
- establishment and assistance investment funds (drafting documentation, regulatory issues, corporate issues)
- turn key management of application proceedings for licensing banks, banks, investment funds, asset and fund managers, dealer-brokers and collective investment schemes, financial service providers and financial institutions;
- (guidance on and review of) drafting the required prospectus in offerings of investment funds participations and approval by the AFM;
- notification of UCITS, advice on notification of investment brokers and banks under the European Passport regime;
- advice on Dutch market conduct rules;
- transaction management and documentation of various mergers & acquisitions involving banks, financial companies and investment funds;
- advice and assistance with listing applications (IPO's and secondary offerings);
- drafting of required listing documentation;
- acting as intermediary in contacts with DCB and AFM;
- ongoing advice on Dutch banking and securities law;
- drafting corporate documentation (participation agreements, incorporation documents, limited partnership agreements, management agreements,

shareholders agreements, option agreements, et cetera) and regulatory compliance documentation for i.e. (incorporators of, investors in and investment funds and banks;

- advice and assistance on the implementation of compliance measures; and
- advice and litigation on banking and securities related disputes such as prospectus liability, security lease, et cetera.

### **Information**

For further detailed information on aspects of and the applicability of the FSA or any of the above, please contact.

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