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Banking and Securities Regulation in the Netherlands

By Bas Jennen and
Niels van de Vijver



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Banking and Securities Regulation in the Netherlands

Dutch Business Law

The series Dutch Business Law is a continuous publication in loose-leaf form under the editorial supervision of Steven R. Schuit, a former partner of Allen & Overy and professor of law at Utrecht University and at Nyenrode Business University.

This current publication is a bound edition of the series previously published in loose-leaf form.

The purpose of Dutch Business Law is to provide a good understanding of the practical implications of the relevant areas in Dutch law under consideration. The authors are seasoned practitioners, experienced in representing international clients in the Dutch legal arena.

This series makes no pretence at being a survey of the entire Dutch business law – either in scope or in substance. It contains generalisations and simplifications and cannot be regarded as presenting complete and in depth advice in the areas covered.

Foreword

This book was written in turbulent times. In many ways, writing it was the natural consequence of the introduction of the Dutch Financial Supervision Act in 2007. This Act aimed to consolidate and modernise previously existing legislation in the areas of banking, insurance, capital markets and consumer finance. The idea of the Act was to abandon, at least from a regulatory point of view, the sectoral approach that the regulators had previously adopted with respect to the various players in the financial markets, and to formulate, to the extent practically feasible, principle-based (rather than rule-based) rules which would apply across the board. The implementing regulations were designed to provide more detailed rules, fine-tuned to deal with the specific characteristics of the markets and their participants. The result has been that this Act and its implementing regulations now provide a modern, highly sophisticated and rather complex regulatory framework, within which the implementing provisions of the various European Directives should relatively easily be able to find their place. There are now some 20 EU Directives relevant to the Dutch financial regulatory climate, so that it may be more accurate by and large to state that the Act is a “vehicle” for implementing EU Directives rather than being Dutch legislation per se.

At the time of the introduction of the Act, the hope and expectation was that this huge legislative exercise would be the beginning of a period of relative calm on the regulatory front. It was of course recognised that there were still a few European directives, notably MiFID and the Transparency Directive, that needed to be implemented in Holland, and that in reality regulation of the financial markets is a neverending task. But the seismic subsequent events, both on a global scale and locally in the Netherlands, proved this hope and expectation to be groundless. The Netherlands was relatively more vulnerable to these events because of the

disproportionately large size and international reach of its financial institutions. The takeover of ABN AMRO Bank by the RBS, Santander and Fortis consortium was the first of these events. This takeover has led to some serious soul-searching as to the powers of government and supervisory authorities in ensuring that the interests of all stakeholders are properly protected. This dramatic transaction was soon followed by the near-collapse of Fortis Bank Nederland and the ensuing takeover of this bank by the Dutch State. The credit crisis was by then raging and nearing its peak, and the ensuing support that the Dutch government felt should be provided to ING, Aegon, ABN AMRO Bank and SNS had dramatically changed the Dutch financial landscape. The EU rules and requirements on the consequences of this State support are now substantially contributing to this dramatic change, as is the now apparently general perception that the “bancassurance” model that Dutch institutions in the past embraced with some enthusiasm seems no longer effectively workable or in any event out of favour. There is as yet much uncertainty, both in Brussels and in Holland, as to what the ideal regulatory requirements are for financial institutions in terms of structure, solvency and liquidity. On top of all this, the collapse of two small banks, first Van Der Hoop and more recently DSB, as well as the effect in Holland of the demise of the Icelandic banks, raised serious questions as to the efficacy of Dutch (and indeed European) bank insolvency rules and the efficiency of the supervisory authorities in applying these rules.

All these developments have led to much uncertainty, and will undoubtedly lead to further changes in the regulatory environment, largely prompted by Brussels. But the sophisticated framework of the Act and its implementing regulations will remain in place. This book is the first attempt in the Netherlands to provide an in-depth overview of the rules governing the banking and the securities sector in the Netherlands. It accordingly provides a unique insight into the Dutch regulatory system. The two authors are experts in this field and have been actively and directly involved, as practitioners, in the events described above, and this naturally has substantively contributed to the quality and usability of this book. Of course, as their colleague, I am biased. But I genuinely believe this book to be a very useful addition indeed to the scarce literature on this topic.

The Act and its implementing regulations provide a complex set of rules, which, perhaps inevitably, is not very accessible or user-friendly. I would hope and expect that this book will help the reader not only in understanding the system, but also in finding his or her way in this vast but fascinating maze.

Prof. Mr Victor de Sérière

Preface

In the past two decades, Netherlands financial regulation has been one of the fastest changing areas of the law, with supervisory authorities such as the Ministry of Finance, the Authority for the Financial Markets (AFM) and the Dutch Central Bank (DNB) having to constantly adjust the regulatory environment to bring it in line with the latest market developments. In addition, an impressive amount of new legislation has been and is still being produced at EU level and this requires continuing local implementation. The recent financial crisis is expected to lead to yet another wave of EU and international legislation which may mean that this publication can be expected to become out of date relatively quickly. The reader should therefore be aware that the law in this area is still constantly changing and that this work reflects the laws and regulations as stated at the time of writing.

This publication contains a summary of the most important Netherlands banking and securities laws and regulations and does not pretend to give an exhaustive and detailed overview thereof. Its primary aim is to give the non-Dutch reader an insight into the basic structure and concepts of this abstract and sometimes complicated area of the law. Only few English language publications have appeared on the issues dealt with herein and hopefully this work can be a small contribution to a better comprehension of Netherlands financial law.

This publication is a joint effort of two lawyers of the Amsterdam office of Allen & Overy LLP. Bas Jennen, a senior associate specialising in Financial Regulation in the Litigation Department, is responsible for Chapter 1 and Niels van de Vijver, a partner and head of the office's International Capital Markets team, is responsible for Chapter 2. We would like to thank our colleagues who have assisted with the drafting and review of this book. In particular, we would like to

Preface

thank Victor de Serière and Ali Anakhrouch for their help with Chapter 1 and Ellen Cramer-De Jong and Joost Elsenburg for their help with Chapter 2.

We have stated the law as at 1 June 2010, although coverage is included of a limited number of provisions not yet in force at that date.

Niels van de Vijver

Bas Jennen

Amsterdam, July 2010

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