Finance for your clients: Harmonisation of Capital Markets

Commission(s) in charge of the Session/Workshop:

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National Report of the Netherlands

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1. **Briefly describe the level of integration of the capital markets at the infra-national, national and supra-national levels.**

Most of the rules and regulations governing the Dutch capital markets originate from European Union (EU) legislation (for example, Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive), Regulation (EC) 809/2004 implementing Directive 2003/71/EC as regards prospectuses and dissemination of advertisements (Prospectus Regulation), Directive 2004/39/EC on markets in financial instruments (MiFID) and so on). Such EU legislation has been implemented into Dutch law or, in the case of regulations, is directly applicable in The Netherlands. The Financial Supervision Act (*Wet financieel toezicht*) (FSA) is the main body of national law governing the Dutch capital markets.

We don't have the concept of state or regional laws in respect of capital markets in The Netherlands, so the level of integration at infra-national level is non-existent.

2. **Which measures have been adopted (or are foreseen) in your jurisdiction to support access to finance by small and medium sized enterprises ("SMEs")? Measures might include (i) supporting venture capital and equity financing; (ii) lowering information barriers; (iii) enhancing access to public markets; (iv) supporting equity financing; (v) facilitating infrastructure investment; and/or (vi) promoting innovative forms of corporate financing.**

SMEs are important for the Dutch economy. The joint contribution of SME's to the gross domestic product in 2014 was 64.2%. This is high not only in absolute terms, but also in comparison to other European countries where the average SME contribution is 57.8%.

Due to a lack of internal resources, many SME's depend on external financing. The total amount of SME financing by banks amounted to around EUR 135 billion at the end of 2014. Some 92% of SMEs regard one of the three major banks - ABN AMRO, ING, or Rabobank - as the main bank for SME financing. Besides the major banks, there are very few others operating in the market for SME financing.

Although alternative forms of financing are on the rise, they currently meet only a marginal part of the demand for financing. Rabobank (2015) estimates alternative forms of financing at a factor of a thousand times smaller than bank financing. Alternative forms of financing are not expected to significantly reduce the dependence of SME's on banks in the foreseeable future.

There have been many changes in the Dutch SME financing market over the last few years. SMEs have been hit hard by the recent credit crisis in that banks have been providing less financing, particularly to smaller enterprises. The liquidity and capital requirements set for banks (pursuant to Basel III)have increased significantly. A number of banks have merged or have been taken over since 2008, such as the takeover of Friesland Bank by Rabobank, while others have downscaled their SME activities (e.g. Deutsche Bank) or discontinued them (e.g. SNS Bank). Lastly, although the growth rate of new players, such as Svenska Handelsbanken, and alternative forms of financing has increased in recent years, these are still limited in size.

Although banks are by far the main providers of financing to SME's, alternative forms of SME financing have recently emerged. These alternative forms of financing currently meet only a small portion of the total demand for SME financing. The absolute amount from alternative providers of financing has nonetheless increased strongly in recent years. Crowdfunding, for example, has grown in the Netherlands from EUR 2.5 million in 2011 to EUR 63 million in 2014. Competitive pressure from alternative forms of financing could thus also increase in future.

There are many different alternative forms of financing for SMEs. They differ with regard to the amount of the financing, whether they involve venture capital or borrowed capital, and the identity of the lenders, namely private individuals, enterprises, or institutional investors. A summary of the main forms of alternative financing in The Netherlands follows below.

- *Credit unions* are a form of financing in which a cooperative of business owners within a sector or region deposit money in a common fund. The credit union uses this to fund members of the union that require financing. A credit union operates on a non-profit basis.
- *Crowdfunding* is a form of financing in which a large group of individuals (the crowd) each invest relatively small amounts in an enterprise via a platform. The Netherlands has a few dozen crowdfunding platforms. These platforms can vary greatly in terms of procedures and target groups. A number of platforms specialize in a certain niche, such as social and sustainable enterprises.
- *Asset-based finance* is a form of financing in which a specific asset or receivable on the balance sheet of the enterprise is used as collateral security. Leasing and factoring are two well-known and specific forms.
- *SME funds* grant subordinated loans under which investors receive their money back only after all other creditors have been paid. As the investor under a subordinated loan runs morerisk, the interest rates are relatively high.
- *Participating interests*: investors contribute towards the equity and so become co-owners of the enterprise. These investors are generally active

shareholders and make their knowledge, money, and network available. Participating interests may take on various forms. If wealthy individuals make individual investments in enterprises, they are referred to as informalinvestors or business angels. Participating interests can also be acquired through a venture capital company.

- *NPEX* is a trading platform that focuses specifically on the listing of small and medium-sized enterprises. enterprises can issue shares or bonds in their business via this platform.

The important economic role of SME's is also recognized by the government, which tries to support SME's through all types of initiatives. In most cases, the support is given in conjunction with private parties. Some of the main examples are:

- *Qredits* is a private, non-profit foundation that provides financing of up to EUR 250,000 to start-ups and existing business owners from all levels of society. This lender also provides coaching and resources to SME's. Qredits works together with the authorities at national, provincial, and municipal level. It is partly financed by the Dutch Ministry of Economic Affairs.
- The Dutch Investment Institution (*Nederlandse Investeringsinstelling)* is a cooperative venture among institutional investors (insurers and pension funds) with the aim of making Dutch investment projects in SMEs, among others, more accessible to institutional investors.
- *Guarantee schemes*: the government acts as guarantor for both loans and equity capital of enterprises via three initiatives. Via the government-guaranteed scheme for loans to small and medium-sized enterprises (*Borgstelling MKB* - BMKB), the guarantee for business financing *(Garantie Ondernemingsfinanciering* - GO), and the Growth Facility (*Groeifaciliteit*), the government tries to make investment in Dutch SMEs more appealing. Most of the guarantees relate to bank financing but venture capital companies and other alternative investors are also eligible.

3. Has your jurisdiction adopted (or are there any trends indicating that may do so in the future) any measures to remove barriers to cross-border investment? Measures could include (i) improving market infrastructure; (ii) fostering convergence of insolvency proceedings; (iii) removing cross-border tax barriers; (iv) strengthening supervisory convergence.

The Dutch capital markets have a strong international focus and are very open to cross border investments. The Dutch investment market recently experienced unprecedented demand by foreign investors, with cross-boarder investments comprising almost two thirds of the total investment volume. While the domestic market was generally responsible for at least 50% of total investment turnover in pre-crisis years (before 2008), the share of foreign investments has strongly increased after the trough in 2009. An important driver for the current influx of foreign investments are strategies anticipating on property values bottoming out, fuelled by economic recovery. Particularly overseas private equity parties have proved to be highly responsive to changing market dynamics and low asset prices.

The Netherlands has expressed its support to the Capital Markets Union (CMU) as proposed by the EC. In a joint reaction of the Netherlands Ministry of Finance, the Netherlands Financial Markets Authority and the Dutch Central Bank, The Netherlands accentuated that it strongly agrees with the five prioritized areas for short term action, as identified by the EC. Lowering barriers for access to capital markets, while widening the investor base for SMEs, creating a high quality securitisation market, boosting long-term investment funds and developing private placement markets, are all key priority areas.

Beyond these five priority areas for short term action, the Netherlands have proposed the following areas for further action:

> "1) Improve the access of retail and institutional investors to capital markets. In particular, it should be investigated how new technologies, for example in the fieldof trading on an exchange platform and on-line tools, can be used to enable retail investors to make a well-informed investment decision with better insights in costs, expected returns and risks, while ensuring an adequate level of retail investor protection.
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> 2) In order to reduce barriers for cross border capital flows, it is key that the application of European regulation is predictable and consistent across borders. Another important element is supervisory convergence. The European Supervisory Authorities (ESA's) are already playing an important role in this respect. One could examine how their role could be strengthened within the current legal framework. There are several important instruments at hand in this context: peer reviews of National Competent Authorities (NCA's), intervention in case of breach of union law, guidelines and recommendations and the settlement of disagreements between NCA's in cross border situations.
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> 3) Support developments in the field of alternative financing, such as crowdfunding and credit unions. We believe it is essential to boost and diversify the supply of funding for companies, in order to be less reliant on bank financing. The development of alternative sources of financing is therefore crucial. It is essential that the possible risks associated with such initiatives are adequately addressed, while ensuring that national or EU

legislation is not unnecessary hampering the development of alternative sources of finance.

4) Establish an effective framework for the recovery and resolution of central counter parties (CCP's). A fundamental precondition for a well functioning capital markets union is stability of the financial system, in particular the financial infrastructure. A European framework for the recovery and resolution of CCP's would ensure that critical services can continue to be provided, or where necessary, certain activities can be wound-down in an orderly manner

4. Have specific measures been adopted (or are foreseen) to increase choice and competition in cross-border retail financial services and/or insurance?

The rules and regulations applicable to cross-border retail financial services within the EU follow from EU regulation, implemented in our national law (the EU Single Market Directives, such as MiFID, BCD, AIFMD and UCITS), or having direct effect (Regulations).

As a result of these Single Market Directives, the competition is mainly focused on financial service providers within the EU, whereas EU financial service providers can easily offer their services in other EU member states, on the basis of the passporting procedures.

Aside these EU initiatives, there are no specific Dutch measures to increase choice and stimulate competition in cross-border retail financial services and/or insurance on a European or global level. In general, the offering of cross border services in The Netherlands by a non EU financial service provider is rather complicated from a Dutch legal perspective (although there are exceptions).

5. Capital markets harmonisation aims to facilitate companies' access to finance, particularly for SMEs by promoting more diversified funding channels that are complementary to bank financing. Is non-bank financing significant in your country? Please consider the role of private equity, venture capital, alternative finance, loan-originating funds, etc.

Alternative forms of financing has increased in recent years, but these are still limited in size. I refer to the answer to question 2 above.

6. **While loans traditionally represent the bulk of the banking assets, most financial entities also invest in capital markets. Do financial institutions in your jurisdiction invest highly in the capital markets? Are bonds and equity investments a significant proportion of the assets of financial institutions in your jurisdiction?**

Yes, there are no overall figures available (only on individual basis, as published in the annual report of the respective bank), but it is generally known that Dutch banks highly invest in the capital markets. Nationwide, there has been a lot of discussion regarding the nature of such investments, as banks (in the past) have strongly invested in controversial companies, branches and/or products (i.e. the arms and nuclear industry). Such investments are considered to be in conflict with the corporate and social responsibility of banks and this has lead to the incorporation of new Dutch banks (Triodos and ASN), mainly focussing on lending and savings, promoting old fashioned, social responsible banking.

7. **Harmonisation requires standardisation, particularly in terms of credit information. Is SME credit information easily available in your jurisdiction? Is your jurisdiction adopting any measures to boost availability and standardisation of SME credit information at the national and supra-national levels?**

At the moment, SME credit information is provided by private credit reporting agencies only. Those agencies heavily rely on information available form public registers (the main source is the Trade Register, which publish the annual accounts of all Dutch SME's).

However, there is a growing sense that standardisation of credit information is essential, especially to small sized enterprises and their access to finance. Therefore, the Dutch Ministry of Economic Affairs only very recently (Q4 2015) launched a pilot named 'FINK' (Financing Link) FINK operates an online portal (www.financieringslink.nl), where SME's can submit a financing application based on standardised credit information (on the basis of a standardised form) to one or more banks or financial institutions (to be selected by the SME). The affiliated banks will reply within a couple of working days (either a rejection or an invitation to further discuss the application).

8. **Is there any recent or proposed legislation in your jurisdiction aimed to establish a framework for simple, transparent and standardised securitisation? Examples might include measures (i) to simplify prospectus requirements; (ii) to increase/decrease the information required to be provided to investors before making an investment decision; or (iii) to reduce barriers for smaller firms to access capital markets. If there have been no recent developments, please describe the current situation of securitisation in your jurisdiction.**

In the mid-1990s the first Dutch public securitisation transactions came alive. Since then, the Netherlands has become one of the markets in Europe where the highest volume of residential mortgage-backed securities (RMBS) transactions take place. We do not have a legislative framework tailored specifically for securitisation. Therefore, securitisation transactions are structured on the general legal framework for capital markets and lending. Generally speaking, in structuring securitisation transactions a number of credit, legal, tax and regulatory issues must be taken into consideration.

In October 2012, The Dutch Securitisation Association was established, with the aim of promoting the interests of both issuers of and investors in Dutch securitisation transactions. Among its members are ABN AMRO Bank, ING Bank and SNS Bank. Its ultimate objective is to create a healthy and well functioning market for Dutch securitisation transactions, by developing a standard for Dutch securitisation transactions, both in respect of documentation and investor reporting.

9. **In your experience as a banking/capital markets lawyer, have you detected in your jurisdiction any unnecessary regulatory burdens, interactions, inconsistencies and/or rules that have unintended consequences which threaten the ability of the companies to finance themselves?**

In daily practice, I deal with EU financial services passporting regimes and Dutch licensing procedures and I have detected some barriers to a truly single EU market. As the directives allow EU member states to impose additional requirements, it is sometimes unclear to foreign clients whether they can freely operate cross border under a true capital markets union and whether they require a Dutch license (we have seen activities regulated in The Netherlands are not regulated in other jurisdictions, or vice versa). As a result thereof, financial service providers are forced to seek local legal advice in each jurisdiction and find solutions to local entry barriers. In practice, this could lead to ‘exotic’ structures, contrary to the spirit of the capital markets union.

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