THE NETHERLANDS

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1. REGULATORY REGIME FOR THE NETHERLANDS

1.1. Background

Until the beginning of 1986, no regulatory framework existed in the Netherlands for the protection of investors in unlisted shares and other unlisted securities. Apart from the Act on the Supervision of the Credit System (Wet Toezicht Kredietwezen) (the "Banking Act"), which subjects certain Dutch issuers of debentures to banking supervision and which prohibits the public issue of unlisted debentures in or from the Netherlands below a minimum denomination (except with a license), no regulations existed in respect to the issue and public offering of unlisted securities.

In the field of trading in unlisted securities, the Stock Exchange Decree of 1947 (Beschikking Beursverkeer 1947) did require that, in the absence of a specific exemption, all sales of shares and securities had to take place through a member of the Amsterdam Stock Exchange, but as a general rule, this Decree was not actively enforced.

In contrast, listed securities were always subject to the regulations on the admission and issue of and trade in shares and debentures of the Amsterdam Stock Exchange and, with regard to share, gold, silver index and currency options, of the European Options Exchange and, with regard to financial futures, the Amsterdam Financial Futures Market. The implementation of these regulations in respect to shares and debentures listed on the Amsterdam Stock Exchange takes place through the Amsterdam Stock Exchange Association (the "Association") whose members are permitted to trade in both listed and unlisted securities. Non-compliance with the Association's regulations may result in dealings in the listed

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1 This background information can be found in F.G.B. Graaf, Introduc- tion, in The Netherlands Securities Act and Securities Trading Decree vii (1986).

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securities concerned being suspended or prohibited.

Under the present Dutch securities regulations, the exchanges are subject to the Securities Board of the Netherlands (Stichting Toezicht Effectenverkeer), an autonomous body responsible for the supervision and regulation of the Dutch securities market.

1.2. Relevant Legislation

1.2.1. Introduction

The Securities Trading Act (Wet Effectenhandel) (the "STA") was enacted on October 30, 1985 and took effect as of May 1, 1986. The Stock Exchange Decree was repealed with effect from the same date. The STA was an interim measure to provide statutory protection against fraudulent investment offers relating to unlisted securities, particularly for non-professional investors. The STA did not affect trading in securities subject to the rules of the Amsterdam Stock Exchange, the European Options Exchange or the Amsterdam Financial Futures Market.

The STA was replaced by the Act on the Supervision of Securities Transactions (Wet Toezicht Effectenverkeer) (the "New Securities Act") and the Act on Investment Institutions (Wet Toezicht Beleggingsinstellingen) (the "Investment Institutions Act"). The Investment Institutions Act was enacted on June 27, 1990 and came into force on October 15, 1990. The New Securities Act was enacted March 7, 1991 and entered into force on June 15, 1992.

Together, the Investment Institutions Act and the New Securities Act are intended to establish the framework of the regulations covering the offering and trading of securities and the operation of investment institutions in the Netherlands.

1.2.2. The STA and New Securities Act

a. Scope

The goals of both the STA and the New Securities Act are: (i) the adequate functioning of securities markets to ensure efficient pricing and allocation of capital, and (ii) protection of investors against fraudulent practises, lack of sufficient information and lack of expertise. The STA provided for
regulations on the offering of securities, stock brokers and
(unit) trusts. As noted above, the STA did not and the New
Securities Act does not affect trading in securities listed on the
Amsterdam Stock Exchange, the European Options Exchange,
or the Amsterdam Financial Futures Market.

The scope of the New Securities Act is wider in some
respects than that of the STA. For instance, with regard to
investor protection, the New Securities Act provides for a new
element of protection such as the regular disclosure of relevant
information by issuers of unlisted securities. This obligation
does not apply where offerings are made to a limited group,
but does apply if securities are offered to professional investors
only.

b. Main Prohibition

The New Securities Act prohibits doing any of the following
in or from the Netherlands outside a limited group:

(a) in the case of unlisted securities, to offer these
securities upon issue, without publishing a prospectus
available to the public which meets the requirements of
the Decree on the Supervision of Securities Transac-
tions (Besluit Toezicht Effectenverkeer) of 18 December
1991 and to which every written announcement of the
offer refers; and
(b) (to offer) to act as an intermediary in securities
transactions (including providing securities brokerage
services).³

The prohibition against offering securities upon issue aims
to ensure that new securities offered upon issue to the public
are adequately described in a prospectus. (On some occasions
the prospectus requirement also applies to certain previously
issued securities.)³ The prospectus requirements incorporated
in the Decree on the Supervision of Securities Transactions are
based on the regulations of existing stock, options, and futures
exchanges in the Netherlands. As far as shares and deben-
tures are concerned, they closely follow the European Commu-

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² New Securities Act, art. 5, para. 1.
³ Id. art. 6, para. 1.
⁴ Id. art. 3, para. 3.
nities Listing Directives.

Pursuant to the Exemption Decree of March 25, 1992 (Vrijstellingsregeling Wet Toezicht Effectenverkeer), securities may be offered to professional investors in or from the Netherlands without the publication of a prospectus meeting the requirements of the New Securities Act. However, the continuing disclosure obligations remain applicable. Normally a selling restriction will be included in the offer document (and the subscription agreement where applicable) to achieve circulation only to professional investors. Professional investors who benefit from this exemption include: (investment) banks, pension funds, insurance companies, security firms, investment institutions, central governments, large international or supranational organizations, and other entities, including, inter alia, treasuries and finance companies of large corporations active on a regular and professional basis in the financial markets for their own account.

The Exemption Decree also provides for exemptions from the prospectus requirements if the denomination of the securities is NLG 100,000 (or the counter value in foreign currency) or more, if the securities qualify as "Euro-securities" and if the securities are offered to persons who are not resident in the Netherlands. These exemptions are subject to various conditions. If use is made of the first and last exemption, the issuer will also be exempted from the continuing disclosure obligations.

1.2.3. The Investment Institutions Act

a. Scope

The aims of the Investment Institutions Act are similar to those of the New Securities Act. In view of those objectives, the Investment Institutions Act imposes requirements as to the expertise and trustworthiness of those involved in investment institutions, the soundness of the institutions, and the

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5 Id. art. 4.
6 See infra section 2.4.1.
7 Exemption Decree, art. 8.
8 See id. arts. 4, 8.
9 Id. art. 9.
information to be furnished to the public. The supervision is not aimed at the performance of the institutions; the Investment Institutions Act does not afford any protection against trading losses.

The Investment Institutions Act applies to investment institutions which solicit or obtain monies beyond a limited group for collective investment, in order to allow the participants to share in the income from such investments. Those investment institutions can take the form of an investment company or investment fund. In most cases, the form will be that of a corporation with limited liability, so that the shares in the company constitute the participation rights of the investment institution. An investment fund is not a legal entity; it is constituted by assets that are administered and kept by third parties for the benefit of the unit holders.

b. Main Prohibition

Under the Investment Institutions Act it is prohibited, except within a limited group, to solicit or obtain, in or from the Netherlands, monies or other goods by way of participation in a non-licensed investment institution, or to offer participation rights in such an institution. Where an investment fund is involved, the provisions of the Investment Institutions Act apply to the management company.

Pursuant to the Minister of Finance’s power to grant exemptions under this Act, recognized private venture capital companies and investment institutions which solicit funds solely from professionals have been exempted from the prohibition against non-licensed activities.

The license can be granted by the Minister of Finance (who has delegated his powers to The Netherlands Central Bank) when certain requirements are met; these requirements concern expertise and trustworthiness, financial resources, management and the information to be furnished to the public.

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10 See, e.g., Investment Institutions Act, art. 5.
11 Id. art. 4
12 Id. art. 1, sub. b.
13 Id. art. 4.
14 The Decree of 9 October 1990.
investors of the investment institution and the public.\textsuperscript{15} Upon request, the Minister may also grant a license to an applicant, who must show first that it is not reasonably possible to meet the prescribed requirements fully, and second, that the aims which the Investment Institutions Act seeks to accomplish have been adequately achieved in other ways.\textsuperscript{16} Such an exemption or dispensation may be subject to certain conditions.

1.2.4. The Banking Act

a. Scope

The Banking Act describes the various financial undertakings subject to banking supervision. It deals with the licensing and registration of banks, gives details of the controls which may be imposed by a bank, and describes how other financial institutions are supervised.

b. Main Prohibition

Under the Banking Act, it is prohibited to offer to the general public debentures with a denomination of less than NLG 100,000 or to attract borrowings of a smaller denomination from the general public unless (i) the instruments are or will be listed on an exchange in the European Communities, (ii) the company issuing or dealing in the instruments is already subject to supervision by The Netherlands Central Bank as a credit institution, or (iii) a dispensation has been obtained from the Ministry of Finance.\textsuperscript{17} This prohibition may apply concurrently with the New Securities Act.

\textsuperscript{15} Investment Institutions Act, art. 5, para. 1, in conjunction with Investment Institutions Decree of 25 September 1990, arts. 2-6 (Besluit Toezicht Beleggingsinstellingen).

\textsuperscript{16} Investment Institutions Act, art. 5, para. 3.

\textsuperscript{17} Banking Act, art. 42, in conjunction with the Decree of 29 January 1979 and the Decree of 11 October 1982.
1.2.5. The Savings Certificates Act

a. Scope

The Savings Certificates Act (Wet inzake Spaarbewijzen) (the "SCA") of May 21, 1985 became operational at the beginning of 1987 and, without intending to so do, impacts on the issue and trading of commercial paper and certificates of deposit. The SCA contains rules applicable to savings certificates (spaarbewijzen). It was enacted in order to put an end to tax evasion by investment in bearer savings certificates. The SCA defines savings certificates as "bearer securities constituting a claim for a fixed amount on the issuing institution and paying no interest during their term." It is more or less by accident that commercial paper, certificates of deposit, and medium term notes issued in or from the Netherlands may fall within this definition of savings certificates.

By Decree dated March 11, 1987, an agreement of February 2, 1987 between the Central Bank, the Association of Bankers, and the Postbank N.V. which established a uniform code of conduct concerning bearer savings certificates issued after February 1, 1987 (the "Agreement") was declared generally binding pursuant to the SCA on enterprises and institutions that issue savings certificates. Breach of the Agreement by such enterprises or institutions is a criminal offense.

b. Main Prohibition

According to the SCA, all transactions concerning saving certificates have to be conducted by a member of the Stock Exchange. According to the Agreement, a registration note (registratie nota) must be issued by any enterprise or institution entering into any transaction concerning savings certificates. This note must mention the name, address, and domicile of the counterparty; the nature of the transaction; and

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18 Memorandum on bearer savings certificates submitted to the Second Chamber (Tweede Kamer) of the Dutch Parliament on 9 April 1981 (Kamerstukken 16 532, no. 5).
19 SCA, art. 1, sub. a.
20 Id. art. 2.
21 Id. art. 3.
a clear description of the number, type, and serial numbers of the savings certificates concerned. 22 A “transaction” is described as “any activity whereby a savings certificate is physically transferred.”

Furthermore, Article 4 of the Agreement provides that unless savings certificates are quoted on a stock exchange, they must contain a legend referring to the requirement for a registration note. Article 5 of the Agreement prohibits any reference in publications concerning savings certificates to the words “to bearer” (aan toonder). The certificate itself may be expressed to be “to bearer” but only in a way that is customary in relation to securities generally.

2. PUBLIC AND NON-PUBLIC OFFERINGS

2.1. General

Since the STA took effect, practitioners in the Netherlands have been devising selling restrictions and warnings for use in international debt offerings by Dutch issuers. This task was complicated by the SCA, which affects the issue and trading of commercial paper and certificates of deposit. A third category of selling restrictions are those intended to avoid the application of banking supervision to the Dutch issuer; these restrictions will be discussed below. 25 Selling restrictions are utilized to avoid a breach of the relevant regulations by the issuer and/or the syndicate and to limit the risk of liability vis-à-vis purchasers other than professional investors. 26 The conditions under which an exemption for offerings to professional investors is granted further provide that selling restrictions have to be included in all documents relating to the offering of the securities. This Article will mention the most important selling restrictions and the circumstances in

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22 The Agreement, art. 2.
23 Id.
24 According to the territorial approach concerning the SCA adopted by the Ministry of Finance and The Netherlands Central Bank, this can only mean the Amsterdam Stock Exchange.
25 See infra section 2.4.1.
26 The question whether the issuer must take precautions to prevent a resale of the securities to the general public is currently the subject of litigation in the Netherlands.
which they may be used.\textsuperscript{27}

2.2. Public Offerings

From the statutory regime discussed in section 1, supra, it is clear that Dutch legislation aims to ensure that securities issued to the public in or from the Netherlands are fully described in a generally available prospectus that meets detailed statutory requirements. Even when such securities issues are described in a prospectus, a dispensation from the Minister of Finance is necessary if (unlisted) debentures with a denomination of less than NLG 100,000 are involved, unless the company issuing the debentures is subject to supervision by The Netherlands Central Bank.\textsuperscript{28} Breach of these regulations can result in imprisonment and a fine.

In practice, the prospectus is customarily distributed during the initial offering period. It will often mention that application has been made for official listing of the bonds or notes on a stock exchange (e.g., the Amsterdam or London Stock Exchange). The Decree on the Supervision of Securities Transactions provides that the Securities Board can, in accordance with the relevant EC Directives, recognize a prospectus used in connection with an offering and listing of securities in another EC Member State.\textsuperscript{29}

In connection with the requirement that a prospectus be prepared and distributed in accordance with the detailed guidelines under the New Securities Act (which need not be the same as those set by the relevant Stock Exchange), in the event that securities not yet listed or about to be listed, on an EC Stock Exchange are offered upon issue to the general public in or from the Netherlands, an issuer should use a selling restriction to the effect that:

If application to list the securities on the [ ] exchange is refused these securities may only be offered or sold as part of their initial distribution to individuals or legal entities who or which trade or invest in securities in the conduct of a profession or trade within the

\textsuperscript{27} See infra sections 2.2. and 2.4.
\textsuperscript{28} See supra section 1.2.4.
\textsuperscript{29} Decree on the Supervision of Securities Transactions, art. 2, para. 4.
meaning of The Netherlands Act on the Supervision of Securities Transactions (Wet Toezicht Effectenverkeer) of March 7, 1991.

This restriction is useful only where application is made to list the securities on an EC Stock Exchange. A listing on a U.S., Japanese, or other exchange does not exempt an offering of securities to the general public in or from the Netherlands from the prospectus requirements of the New Securities Act, as the prospectus cannot be recognized by the Securities Board. Such issues should either have the benefit of an individual dispensation from the Securities Board or be accompanied by a prospectus complying with the New Securities Act.

2.3. Gray Area Between Primary and Secondary Market

There exists a gray area between primary and secondary market transactions. In the event that debt securities are listed on an EC Stock Exchange to allow, through the use of a recognized prospectus, the offering of such securities to the general public in the Netherlands, an issuer arguably has an interest in including a warning in the prospectus and the syndication documents. Such a warning would cover the contingency that a syndicate member (i.e., any of the managers, underwriters or selling group members) or any subsequent dealer is not a member of the Exchange on which the securities are listed and not otherwise exempted or licensed under the New Securities Act and still offers to provide intermediary services in respect to the securities to non-professional investors in or from the Netherlands (which is prohibited under Article 6 of the New Securities Act, regardless of where the intermediary is domiciled). Such a warning could read as follows:

Persons, firms or companies may only offer to act as an intermediary in selling or purchasing [the securities] to or from non-professional investors in the Netherlands if they are licensed under The Netherlands Act on the Supervision of Securities (Wet Effectenverkeer) of

30 Id.
31 New Securities Act, arts. 5, 6, 8 and 9.
7 March 1991 or exempt from the requirement to obtain a license pursuant to that Act.

However, the Ministry of Finance takes the view that syndicate members act as such "intermediaries" only if they offer the securities for the issuer's account and not for their own. For example, in the normal Eurobond syndicate the above restriction is not required, because syndicate members act as principals, not as agents; the initial distribution of the securities is covered exclusively by Article 3 of the New Securities Act.

2.4. Non-Public Offerings

2.4.1. As Defined By Nature of Investor

As mentioned in section 1, supra, where debt securities are not listed on an EC Stock Exchange and no exemption from Article 3 of the New Securities Act has been obtained in respect to a proposed offering to the general public in or from the Netherlands, an issuer must either prepare and distribute a prospectus complying with the requirements under the New Securities Act or, alternatively, abandon the idea of a public issue altogether. In that case, the issuer can restrict the offering of securities to persons who are not residents of the Netherlands, and comply with the conditions attached to this exemption. It can further use the "Euro-securities" exemption provided that no general advertising or canvassing campaign is conducted. Euro-securities are securities defined as those:

(a) the issuance of which is "taken over" by a syndicate of which at least two members are domiciled in different EC Member States;
(b) of which sixty percent or more is taken over by syndicate members which are situated in one or more states (n.b. not only EC Member States) other than the state in which the statutory seat of the issuing entity is located; and
(c) which can only be subscribed for or bought in first instance through the mediation of credit institutions

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subject to the supervision of the Dutch Central Bank or other financial institutions.\textsuperscript{33}

The issuer can also contemplate issuing securities with a denomination of NLG 100,000 (or the counter value if foreign currency) or more. Frequently, however, it would limit the offering to professional investors or limited groups under the New Securities Act. To achieve the latter objective, the following selling restriction is often used:

The [securities] may not be offered, transferred or sold to any individual or legal entity as part of their initial distribution, except to individuals or legal entities who or which trade or invest in securities in the conduct of a profession or trade within the meaning of the Exemption Decree issued pursuant to The Netherlands Act on the Supervision of Securities Transactions (\textit{Wet Toezicht Effectenverkeer}) March 7, 1991 (which includes banks, pension funds, brokers, dealers, other institutional investors and commercial enterprises which regularly, as an ancillary activity, invest in securities).\textsuperscript{34}

The following text is optional:

Because these [securities] have not been admitted for official listing on a recognized securities exchange in the Netherlands nor has a prospectus been prepared and made available in accordance with the regulations issued pursuant to The Netherlands Act on the Supervision of Securities Transactions (\textit{Wet Toezicht Effectenverkeer}) of March 7, 1991 nor has an exemption or dispensation under such Act been obtained in connection with the issue of these [securities].

As far as the exception for offers to limited groups is concerned, one needs to realize that a group will not easily be considered a limited group; it needs to be limited in number, specifically defined, the relation between members of the group and the issuer may not be of a financial nature only, and it must be clear that the offer is only available to the group members. For example, an association of which one can easily

\textsuperscript{33} Exemption Decree, art. 1, sub. g.
\textsuperscript{34} GRAAF, supra note 32, at 178-79.
become a member most likely will not be considered a limited group.\(^{35}\)

The above-mentioned restrictions should, as a minimum requirement, be imposed on the syndicate and printed in the issue documents. Also, it is useful, but not necessary, to print them on the securities themselves. A more restrictive and far reaching “professionals only” selling restriction is necessary in the event that (a) a Dutch finance company is involved that wishes to avoid a breach of Dutch banking regulations, or (b) an issue of unlisted debentures takes place in or from the Netherlands which must be limited to professional parties only to avoid a breach of the Banking Act.\(^{36}\) This restriction then sets aside the STA “professional only” restriction.

2.4.2. As Defined By Nature of the Product

a. Listed Securities

As mentioned above, the prohibition against issuing securities without making available a prospectus does not apply to securities that are or will be officially listed on a recognized stock exchange in the Netherlands as defined in the New Securities Act (including securities officially listed on the Amsterdam Parallel Market).\(^{37}\)

Although listing with an exchange in another EC Member State would not as such provide a basis for an exemption under the New Securities Act, such a listing normally implies that a prospectus has been issued that meets the requirements of the applicable EC directive.\(^{38}\) Such a prospectus can normally be recognized by the Securities Board and adapted rather easily to meet Dutch requirements. If the prospectus is in English, this usually only involves adding a loose page with additional information on the treatment of the securities under Dutch tax law.

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\(^{35}\) New Securities Act, Explanatory Memorandum (Memorie van Toelichting), at 7.

\(^{36}\) See supra section 1.2.4.b.

\(^{37}\) New Securities Act, art. 3, para. 2 and art. 16.

\(^{38}\) Decree on the Supervision of Securities Transactions, art. 2, para. 4.
b. Commercial Paper, Certificates of Deposit and Medium Term Notes

Under the Agreement commercial paper and certificates of deposit each have an ambiguous status. Article 1 of the Agreement excludes transactions in commercial paper and certificates of deposit from its application, but only to the extent that such transactions are carried out "between professional lenders and borrowers." The exception was provided for because commercial paper and certificates of deposit are usually only traded between professional parties and are unlikely to be used for tax evasion purposes. In addition, the issuance of guilder commercial paper and certificates of deposit has been allowed since January 1, 1986, making constraints on their trade counterproductive.

The Ministry of Finance takes the view that the "professional lenders and borrowers" that are exempted under the Agreement are the same group as the professional circuit exempted under the New Securities Act. This means that it is a group which includes professional dealers and intermediaries and commercial enterprises with corporate treasury departments that regularly invest in securities.

Because of the unfortunate (underlined) wording of the above-mentioned exemption, commercial paper or certificates of deposit may become subject to the Agreement's requirements upon the first trade with a non-professional. Because such a trade cannot be effectively precluded by any amount of drafting, the legend required by Article 4 of the Agreement should be printed on the instrument as a precaution.

Article 3 of the SCA provides that, as long as the Agreement is in force, a transfer and acceptance of savings certificates may only take place either (a) through the mediation of a member of the Amsterdam Stock Exchange Association (Vereniging voor de Effectenhandel) or the issuer itself; or (b) by and between individuals not acting in the course of their profession or business.

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39 See supra section 1.2.5.a.
40 GRAAF, supra note 32, at 180.
41 Id.
42 Id.
43 See supra section 1.2.5.
Again due to the unfortunate (underlined) wording of Article 3, the above restrictions also apply in situations that are outside the scope of the Agreement, even though the purpose of Article 3 is merely to ensure compliance with the Agreement. Its restrictions, therefore, serve little purpose in cases where the Agreement is not applicable (i.e., with regard to professionally traded commercial paper and certificates of deposit). Nevertheless, the Ministry of Finance takes the view that, although the Agreement does not apply to inter-professional transactions in commercial paper or certificates of deposit, Article 3 of the SCA continues to apply to such transactions.\textsuperscript{44}

All savings certificates (regardless of their maturity) were excluded from the definition of "securities" under the STA.\textsuperscript{45} Therefore, the STA did not apply to the issue or trading of commercial paper, certificates of deposit and medium term notes qualifying as savings certificates within the above definition. The New Securities Act, however, does include savings certificates (including medium term notes, commercial paper, certificates of deposit, etc.).\textsuperscript{46} A prospectus for these savings certificates is required for offerings to the public and brokers do need a license when offering intermediary services in respect of commercial paper or certificates of deposit in or from the Netherlands.

As long as they are represented by a global note, commercial paper, certificates of deposit, and medium term notes do not qualify as savings certificates because participation in a global note is acquired and the securities are traded in book-entry form in the records of the clearing system with which the global note has been deposited.\textsuperscript{47} Once the global note is partly or wholly exchanged for definitive bearer paper, such paper will, in principle, qualify as savings certificates.\textsuperscript{48} There is some argument that the global note itself (i.e., the typed instrument) also qualifies as a savings certificate.\textsuperscript{49}

In the event that commercial paper or certificates of

\textsuperscript{44} GRAAF, supra note 32, at 180-81.
\textsuperscript{45} STA, art. 3, sub. a.
\textsuperscript{46} New Securities Act, art. 1, sub. a and art. 2.
\textsuperscript{47} GRAAF, supra note 32, at 181.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
deposit are issued in physical definitive form by a Dutch issuer and qualify as savings certificates, the benefit of the exemption from the Agreement for professionally traded commercial paper and certificates of deposit should, in principle, be sought. To that effect, the issue documentation should contain a warning that the paper may not be offered or transferred in, or from, the Netherlands or may not be offered or transferred by or to a resident of the Netherlands, except between professional lenders and borrowers. It is advisable, but not legally required, to print such a warning on the face of the paper as well.

Because the Ministry of Finance takes the view that "professional lenders and borrowers" has the same meaning as the professional circuit exempted under the STA and the regulations issued under the New Securities Act, the following text can be used:

These Notes may not be offered in or from the Netherlands or by or to a resident of the Netherlands, except between individuals or legal entities who or which trade or invest in securities in the conduct of a profession or trade (which includes banks, brokers, dealers, insurance companies, pension funds, other institutional investors and commercial enterprises which regularly, as an ancillary activity, invest in securities).

As mentioned above, compliance with this restriction does not avoid application of Article 3 of the SCA and, consequently, the restriction must be expanded to read as follows:

These Notes may not be offered or transferred in or from the Netherlands or by or to a resident of the Netherlands, except between individuals or legal entities who or which trade or invest in securities in the conduct of a profession or trade (which includes banks, brokers, dealers, insurance companies, pension funds, other institutional investors and commercial enterprises which regularly, as an ancillary activity, invest in securities) and then only if such transfer and

50 Id. at 180.
51 See supra section 2.4.2.b.
acceptance is effected through the mediation of a member of The Amsterdam Stock Exchange Association (Vereniging voor de Effectenhandel) or by the Issuer.

However, because the professional investor/dealer exemption from the Agreement only applies to the extent that commercial paper or certificates of deposit are de facto traded exclusively between such professionals, and because one cannot entirely avoid incidental trades with non-professional investors, the legend as required by the Agreement should be printed on the face of the paper as a precaution. The above mentioned restrictions can be added in order to ensure that the legal position is understood entirely. This gives rise to the following text to be printed on the face of the global and definitive notes:

If a purchase, sale, delivery or transfer of this Note takes place wholly or partly within the Netherlands or involves residents of the Netherlands, such transaction must be effected by [insert name of Dutch issuer] or through the mediation of a member of The Amsterdam Stock Exchange Association (Vereniging voor de Effectenhandel) and must be either:

(i) between individuals or legal entities who or which trade or invest in securities in the conduct of a profession or trade (which includes banks, brokers, dealers, insurance companies, pension funds, other institutional investors and commercial enterprises which regularly, as an ancillary activity, invest in securities); or,

(ii) in any other case, recorded in a transaction note, including the name and address of each party to the transaction, the nature of the transaction and the details and serial number of this Note.

The usual New Securities Act selling restrictions apply to the offering of interests in the global note. Therefore, the complete selling restriction for commercial paper and certificates of deposit, to be inserted in the dealer agreement and in the information memorandum, reads as follows:

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52 GRAAF, supra note 32, at 182.
53 See supra section 2.4.2.b.
(I) The Notes, when in the form of rights representing an interest in a Global Note, may not be offered, directly or indirectly, as part of their initial distribution in or from the Netherlands except:

(a) to individuals or legal entities who or which trade or invest in securities in the conduct of a profession or trade within the meaning of the regulations issued under The Netherlands Act on the Supervision of Securities Trading (Wet Toezicht Effectenverkeer) (which includes banks, brokers, dealers, insurance companies, pension funds, other institutional investors and commercial enterprises which regularly, as an ancillary activity, invest in securities).

[(b) [in circumstances which constitute an offer] within a limited group within the meaning of the Act on the Supervision of Securities Trading.]

(II) Definitive Notes and Global Notes may not be offered or transferred in or from the Netherlands or by or to a resident of the Netherlands, except between individuals or legal entities as referred to in (I)(a) above and then only if such transfer and acceptance is effected by the Issuer or through the mediation of a member of The Amsterdam Stock Exchange Association (Vereniging voor de Effectenhandel).

c. Euro Commercial Paper, Euro Certificates of Deposit and Euro Medium Term Notes issued from the Netherlands

Since the last quarter of 1989, the Ministry of Finance of the Netherlands and the Central Bank have adopted the view that when securities qualify as savings certificates (including commercial paper, certificates of deposit and medium term notes) and are issued by a Netherlands entity outside the Netherlands, and therefore in principle subject to foreign securities laws, the offering of such securities in the Netherlands will only be subject to the SCA and the Agreement will only apply if the offer is made as part of the initial distribution of these securities or immediately subsequent to such distribu-
tion abroad.\textsuperscript{54}

According to this "official" interpretation, the SCA and the Agreement have no extra-territorial scope: they apply only to savings certificates issued outside the Netherlands but offered in the Netherlands as part of their initial distribution or immediately thereafter.\textsuperscript{55} Therefore, commercial paper, certificates of deposit or medium term notes issued by a Dutch entity on a foreign domestic market or on the Euromarkets will be outside the scope of the SCA and the Agreement, if they are not offered or sold in the Netherlands, as part of the initial distribution or immediately thereafter.

These securities nevertheless qualify as securities under the New Securities Act and should comply with its provisions. Consequently, the following selling restriction should be complied with to keep commercial paper, certificates of deposit or medium term notes issued by a Dutch entity on a foreign domestic market or on the Euromarkets in compliance with the New Securities Act, the SCA, and the Agreement:

(i) The Notes and the Global Note may not, directly or indirectly, as part of their initial distribution or immediately thereafter, be offered, sold transferred or delivered in the Netherlands; and

(ii) The Notes, the Global Note and rights representing an interest in the Global Note may not be offered, sold or transferred as part of their initial distribution, directly or indirectly, to entities other than individuals or legal entities which trade or invest in securities in the conduct of a profession or trade within the meaning of the regulations issued under The Netherlands Act on the Supervision of Securities Trading (\textit{Wet Toezicht Effectenverkeer}) of 7 March 1991 (which includes banks, brokers, dealers, insurance companies, pension funds, other institutional investors and commercial enterprises which regularly, as an ancillary activity, invest in

\textsuperscript{54} GRAAF, \textit{supra} note 32, at 183.

\textsuperscript{55} What is meant, presumably, is that the legending requirement does not apply in those situations; any secondary market trades of "extra-territorial" commercial paper or certificates of deposit must surely comply with the SCA and the Agreement if such trades involve residents of the Netherlands or take place wholly or partly within the Netherlands.
The selling restrictions and the legend discussed in section 2.4.2.b., supra, were utilized for Euro commercial paper, Euro certificates of deposit and Euro-medium term notes issued by Netherlands entities in the period before the authorities adopted the territorial approach to the SCA and the Agreement. They remain useful in the following situations:

(a) for commercial paper and certificates of deposit issued in the Dutch domestic market; and
(b) for foreign commercial paper/certificates of deposit or Euro commercial paper/Euro certificates of deposit issued by a Dutch entity and to be offered in part or in whole in the Netherlands during or immediately after its initial distribution; and
(c) for foreign commercial paper/certificates of deposit or Euro commercial paper/Euro certificates of deposit issued by a Dutch entity that does not wish to rely on pseudo-legislative interpretation letters from the Ministry and the Central Bank; and
(d) in the event that a Dutch issuer qualifies under the territorial approach but wishes to inform its dealers of the Dutch restrictions on secondary market trades taking place wholly or partly within the Netherlands or involving residents of the Netherlands.

To the extent that medium term notes are issued in discounted form, the above discussion applies, mutatis mutandis, to such securities when issued in or from the Netherlands.

d. Securities in Non-Licensed Investment Institutions

The prohibition against soliciting or obtaining, in or from the Netherlands, monies or other goods by way of participation in a non-licensed investment institution or offering participation rights in such an institution, beyond a limited group, does not apply to:

(a) investment institutions (i) whose registered office is situated in another Member State of the European Communities which has implemented the UCITS Directive; (ii) whose object, under its instrument of
incorporation or its rules, is solely to invest in securities on the principle of risk spreading; and (iii) whose units will be repurchased or redeemed, at the unit holders request, directly or indirectly out of the assets; provided The Netherlands Central Bank is notified of the intention to offer units in the Netherlands. The investment institution mentioned in this paragraph can be a legal entity but also a mutual fund. The participation rights may be shares but also participation rights in a mutual fund;
(b) the offer of units by natural persons except if made in the course of their occupation or business, (so-called non-professionals); and
(c) those to whom exemption is granted.\(^5^6\)

\textbf{e. Debentures}

An exemption or dispensation from the Netherlands Minister of Finance is necessary unless, as mentioned in section 1.2.4., \textit{supra}, in the case of a public issue of debentures (not shares) with a denomination of less than NLG 100,000 in or from the Netherlands (a) the instruments are or will be listed on a stock exchange in the European Communities; or (b) the company issuing the instruments is subject to supervision by The Netherlands Central Bank as a credit institution.\(^5^7\)

\section*{3. Resales of Privately Placed (Professionals-only) Securities}

The New Securities Act treats the offering of certain previously issued securities as equal to an initial offering. As a result, the prohibitions mentioned in section 1.2.2.b, \textit{supra}, apply. In particular, this concerns the offering of:

(a) securities previously issued and held outside the Netherlands (within or outside a limited group); and
(b) securities previously issued in the Netherlands (or possibly elsewhere) and issued within a limited group

\(^{56}\) Investment Institutions Act, art. 4, para. 1 and art. 14.
\(^{57}\) Banking Act, art. 42.
at that time; and
(c) securities previously issued in the Netherlands
outside a limited group but subject to a dispensation
(i.e., without making a prospectus available).

The STA included a similar provision which applied only to
subsection (b) securities. The New Securities Act does not
explicitly restrict the offering of previously issued securities
from the Netherlands. It is uncertain whether this was
intended. Resales that are not covered in any of the above
categories of secondary offerings are not subject to legal
restrictions in the Netherlands; the ordinary rules applicable
to intermediary services apply.

4. MARKET REGULATION ISSUES IN NON-PUBLIC OFFERINGS

4.1. Intermediary Services

Under the New Securities Act and the Exemption Decree
the prohibition against offering intermediary services (includ-
ing securities brokerage) without a license in or from the
Netherlands does not apply when

(a) offering exclusively to professional investors; or
(b) offering within a limited group; or
(c) the services are offered by members of a recognized
stock exchange and relate exclusively to securities that
are or will be officially listed on that exchange;
(d) the services are offered by an authorised credit
institution; or
(e) member of securities exchanges in other EC Mem-
er States in respect of securities listed on such ex-
changes.

Also the above exemptions are subject to various condi-
tions.
Pursuant to articles 11 and 12 of the Exemption Decree

58 STA, art. 4, para. 3.
59 See infra section 4.1.
60 See supra section 2.4.1 for a discussion of the scope of this concept.
61 New Securities Act, arts. 8, 9, and Exemption Decree, arts. 11-17.
62 Id.
and subject to the conditions mentioned therein, the members of the Association along with banks and financial institutions already subject to supervision by the Dutch Central Bank are authorized to act as intermediaries with respect to any securities irrespective of whether they are listed or where they are listed. International securities houses in the Netherlands that are either members of the Association, or branches of non-Dutch banks subject to the supervision of the Dutch Central Bank also benefit from this general exemption.

4.2. Printing Requirements

Securities (bearer and registered) issued by a Dutch issuer or specifically targeted to the Dutch market should comply with the following printing requirements set out in Royal Decree no. H7 of 8 January 1947:

(a) if the securities carry coupons: the coupons must be printed in one or more colors which are interrupted by a vertical white band in the middle of the coupon with a width of one to one and a half centimeters; or

(b) if the securities carry no coupons: they should be printed in one or more colors which are interrupted by a vertical white band in the middle of the instrument with a width of three to five centimeters;

in both cases, in such manner that the printed text on such instruments runs through the white band as well as through the colored parts on either side.

In addition, each bond or note and each coupon should mention the issuer's full name and domicile. The offering circular/prospectus should identify the Chamber of Commerce with which the issuer is registered and the registration number. Where the issuer's share capital is mentioned, the amount of shares issued and the amount paid upon such issued shares should be disclosed.3

3 See Articles 75 and 186 of Book 2 of the Netherlands Civil Code.
5. EUROPEAN COMMUNITY INFLUENCE

When promulgating the Investment Institutions Act, the Netherlands Government complied with its obligations under the European Communities Directive of December 20, 1985 on the Coordination of Laws, Regulations and Administrative Provisions relating to Undertakings for Collective Investments in Transferable Securities. This EC Directive provides for unification of the laws of the Member States relating to collective investment undertakings, particularly with regard to the obligations and controls imposed on those undertakings. This Directive was intended (i) to make it easier for a collective investment undertaking situated in one Member State to market its units in other Member States; (ii) to facilitate the removal of the restrictions on the free circulation of the units of collective investment undertakings in the European Communities; and (iii) to help bring about a European capital market.

Although the EC Directive's sole object is the collective investment in transferable securities of publicly raised capital, the Investment Institutions Act has a broader range. A further coordination at the European Communities-level was not possible due to appreciable differences among the Member States.


6. CONCLUSION

The general objective of the Netherlands legislation discussed is to promote the proper functioning of the financial markets through supervision of stock exchanges and investment institutions, and to protect (potential) investors in these markets. In addition, the relevant Netherlands legislation is

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65 See preamble to EC Directive 85/611.
66 Operating on the principle of risk spreading, the units of which are repurchased or redeemed at the requests of holders, directly or indirectly, out of those undertakings' assets ("open-undertaking").
based on the principle that professional investors do not need as much protection as other investors since they should have sufficient knowledge about the expertise, trustworthiness, financial resources, management, legal structure and operations of an investment fund or investment institution in which they intend to invest. The relevant legislation also imposes requirements upon issues regarding the contents of the issue documentation (prospectus) made available. The new securities legislation is a flexible though solid framework, which should be able to respond to the demands of rapid internationalization of the capital markets and obligatory implementation of EC Regulations.