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How to market hedge funds in the Netherlands

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As part of a series of *Complinet* articles that cover the marketing of hedge funds in important jurisdictions, Derk Lemstra and Lars Groenewoud of Stibbe N.V. outline the law and regulation that is applicable to the promotion of hedge funds in the Netherlands.

Relevant legislation

The main legislation that is applicable to the marketing of hedge funds in the Netherlands includes:

- The Financial Supervision Act (Wet op het financieel toezicht).
- The Decree on the Supervision of the Conduct of Financial Enterprises (Besluit Gedragstoezicht financiële ondernemingen Wft).
- The Exemption Regulation Wft (Vrijstellingsregeling Wft).
- The Prospectus Regulation (No 809/2004).
- Euronext Amsterdam Rulebooks one and two.

The analysis below gives a broad overview of the main restrictions that are applicable to the marketing in the Netherlands of foreign domiciled non-UCITS hedge funds. Such funds have traditionally been targeted at qualified investors, which include financial institutions, funds of funds and pension funds. More recently, funds that are capable of being marketed to a retail audience have emerged. Such funds offer shares or units to the public under the so-called "adequate supervision regime" and are listed on Euronext Amsterdam. Some examples are MW TOPS Limited, Boussard & Gavaudan Holding Limited and Tetragon Financial Group Limited.

Collective investment schemes

An important question which is relevant to determine the legal and regulatory regime that is applicable to the marketing of hedge funds in the Netherlands is whether the vehicle in question qualifies as a "collective investment scheme" (beleggingsinstelling) for the purposes of the FSA. Collective investment schemes assume the form of either an investment company or an investment fund. An "investment company" is a legal person who requests or acquires funds or other goods for collective investment to have the participants share in the return on the investments. An "investment fund" is not a legal person and is best described as a pool of investments that an investment manager manages on behalf of the participants, in which funds or other goods are requested or acquired for collective investment to have the participants share in the return on the investments. A collective investment scheme can be "open-ended" or "closed-ended". A collective investment scheme is open-ended if it allows participants to request for redemption or repayment of their shares or units.

Regulatory regime — collective investment schemes

The FSA prohibits any person from offering participation rights in a collective investment scheme in the Netherlands, unless:

- the investment manager of the collective investment scheme has obtained a licence from the Netherlands Authority for the Financial Markets to manage collective investment schemes;
- the investment company — if it concerns an investment company without a separate investment manager — has obtained a licence from the AFM; or
- an exemption applies or dispensation has been granted.

The most commonly relied on exemptions in the context of marketing of hedge funds are:

- An offer made or directed at "qualified investors" only.
- An offer made to or directed at fewer than 100 persons in the Netherlands other than "qualified investors".
- A minimum subscription amount per offeree of at least €50,000, or the equivalent.

When these exemptions are used it must be made clear — both upon making the offer and in the documents or advertisements in which the offer is referred to — that (i) the offering of the participations does not require the collective investment scheme to have a licence pursuant to the FSA; (ii) the collective investment scheme is not subject to the supervision of the AFM; and (iii) — in the case of offering to qualified investors — the offering is made to qualified investors only.

If no exemption is available, a licence must be obtained. Obtaining and maintaining a licence subjects the fund to a full set of rules, including the requirement to draw up a prospectus and to keep this prospectus updated. Note that this is a not a PD prospectus (as defined below) and that this requirement is not applicable if the participation rights qualify as securities under the [Prospectus Directive](#). Such a prospectus for open-ended funds and closed-ended retail funds that issue non-negotiable participation rights does not require AFM approval. In the case that the participation rights qualify as securities, a PD prospectus may be required as set out under the heading "Regulatory regime — closed-ended funds".

Adequate supervision regime

Under the FSA, the prohibition from offering participation rights in a collective investment scheme in the Netherlands does not apply, therefore, no requirement to obtain a licence exists in respect of the offer of participation rights in a collective investment scheme with its seat in a state which the Dutch Minister of Finance has designated as a state with an adequate level of supervision. The following states have been so designated: Guernsey, Jersey, Luxembourg, United Kingdom, Ireland, France, Malta and the United States of America (if they are Securities and Exchange Commission-registered).

A collective investment scheme with its seat in one of these states that proposes to offer participation rights in the Netherlands should notify the AFM and submit to it a declaration of supervision that the regulatory authority of such state has issued. The fund may start to offer its participation rights after eight weeks unless the AFM has notified the fund that the offering would not be in accordance with Dutch regulations. In practice, however, if the AFM deems the envisaged offering in accordance with Dutch regulations, it will generally provide the fund with a consent letter within a much shorter period of time. A fund that qualifies under the "adequate supervision regime" is subject to supervision rules in its home jurisdiction, therefore, in the Netherlands it will benefit from less onerous marketing and continuing obligation rules than Dutch licensed funds.

Regulatory regime — closed-ended funds

A recent development in the hedge fund industry has been the establishment of "closed-ended" vehicles, as hedge fund managers have looked to raise permanent capital and broaden their investor base. These vehicles do not allow investors to redeem their shares upon request, but rather list on a stock exchange to enable investors to realise their investment by selling their shares on the market. Funds that are capable of being marketed to a retail audience have been emerging. These funds offer shares or units to the public in the Netherlands using the "adequate supervision regime" and have applied for a listing on Euronext Amsterdam. In doing so, in addition to the regulatory rules for collective investment schemes set out above, the rules that relate to the listing of shares and the offer of shares to the public must also be complied with.

Offer to the public

When making an "offer to the public" in the Netherlands of securities in a closed-ended hedge fund or when listing such a fund, a prospectus that complies with the content requirements set out in the FSA and the Prospectus Regulation is required. Certain exemptions are available. The AFM (or the regulator in another European Economic Area member state) must approve the prospectus and it must be "passported" into the Netherlands (a "PD prospectus"). If no PD prospectus has been prepared, care will therefore need to be taken to ensure that the marketing activities fall within an exemption. The FSA provides for exemptions which are similar to the exemptions that are provided for the offering of participations in collective investment schemes. The most commonly relied upon exemptions in this context are also:

- An offer made to or directed at "qualified investors" only.
- An offer made to or directed at fewer than 100 persons in the Netherlands other than "qualified investors".
- A minimum subscription amount per offeree of at least €50,000, or the equivalent.

Where admission to trading on a regulated market (including the regulated market of Euronext Amsterdam by NYSE Euronext) is being sought for the hedge fund's securities, a PD prospectus will be required whether or not a public offer is being made.

The 'advertisement' regime

It is often the case that marketing materials other than the PD prospectus will be used when marketing a hedge fund's securities. Such materials are likely to constitute "advertisements" for the purposes of the FSA and, consequently, care must be taken to ensure that:

- The relevant document is clearly recognisable as an advertisement.
- Information that is contained in the advertisement is not inaccurate or misleading.
- Information that is contained in the advertisement is consistent with the information in the PD prospectus that has been, or will be, published.

Other relevant regimes

Any person who proposes to market hedge funds in the Netherlands should carefully consider whether they will be conducting a regulated activity for which they must have an AFM licence pursuant to the FSA. Due care must be paid to avoiding committing certain criminal offences that are contained in the Economic Offences Act (Wet op de economische delicten), or running afoul of market abuse rules under the FSA. In addition, as in every jurisdiction, potential liability under general contract and tort law in respect of misrepresentation and negligent misstatement must also be avoided. The regulatory regimes that are applicable to the marketing of hedge fund securities in the Netherlands are sometimes complex and the consequences of breaching the applicable restrictions can potentially be severe. It is advisable therefore that marketing strategies and materials are discussed with lawyers and those in a compliance function before the marketing process begins.

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