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Decree of 21 December 2012 to amend the Market Conduct Supervision (Financial Institutions) Decree [*Besluit Gedragstoezicht financiële ondernemingen Wft*], the Market Abuse (Financial Supervision Act) Decree [*Besluit marktmisbruik Wft*], the Prudential Rules (Financial Supervision Act) Decree [*Besluit prudentiële regels Wft*] and other decisions in the domain of the financial markets (Financial Markets (Amendment) Decree 2013 [*Wijzigingsbesluit financiële markten 2013*])

We Beatrix, by the grace of God, Queen of the Netherlands, Princess of Orange-Nassau, etc. etc.

On the recommendation issued by Our Minister of Finance on 18 September 2012, FM/2012/1319M, State Treasury Agency, Financial Markets Directorate; Having regard to Articles 1:20 (1)(g), 1:81 (1), 2:54h (3); 3:5 (4), 3:9 (3), 3:10 (2), 3:17 (2), 3:53 (3), 3:57 (2), 3:72 (5), 4:9 (3), 4:10 (3), 4:11 (2) and (3), 4:14 (2), 4:15 (2), 4:17 (3), 4:19 (4), 4:20 (1), (3) and (4), 4:22 (1), 4:23 (3) (a) and (b), 4:24 (4) (e) and (5), 4:25 (1), 4:25a (1), 4:25b (1) and (2), 4:26 (3), 4:34 (3), 4:49 (2) (e), and 5:68 (1) of the Financial Supervision Act [*Wet op het financieel toezicht*], Article 1:3 (4) of the Financial Markets Act for Bonaire, St. Eustatius and Saba [*Wet financiële markten BES*], Article 31 of the Money Laundering and Terrorist Financing (Prevention) Act [*Wet ter voorkoming van witwassen en financieren van terrorisme*] and Article 143 (2), of the Pensions Act [*Pensioenwet*]; After hearing the advice of the Advice Division of the Council of State [*Raad van State*] (advice dated 14 November 2012, no. W06.12.0382/III); Having regard to the supplementary report of Our Minister of Finance dated 21 December 2012, FM/2012/1708U, State Treasury Agency, Financial Markets Directorate;

Have approved and decreed as follows:

ARTICLE III The Market Abuse (Financial Supervision Act) Decree [*Besluit marktmisbruik Wft*] is amended as follows:

The following will be inserted after Article 21:

Article 21a

1. An enterprise as referred to in Article 5:68 (1) of the Act, not being a clearing institution, will take adequate measures in order to ensure that it does not:
 - a. carry out transactions or has transactions carried out with a view to acquiring or offering a financial instrument that has been issued by an enterprise that produces, sells or distributes cluster munitions as referred to in Article 2 of the Convention on Cluster Munitions which was concluded in Dublin on 30 May 2008 (published in the Bulletin of Treaties 2009, 45) or essential parts thereof;
 - b. provide loans to an enterprise as referred to in subsection (a) above;

- c. acquire non-marketable holdings in the capital of any enterprise described under (a) above.
2. The first section above is equally applicable to carrying out transactions, or having them carried out, with a view to acquiring or offering a financial instrument that has been issued by any enterprise that holds more than half of the share capital of an enterprise as referred to in subsection 1 (a) and also to loans to, or non-marketable holdings in such an enterprise.
3. Section 1 above will not apply to:
- a. transactions based on an index in which enterprises described in subsection 1 (a) constitute less than 5 percent of the total;
 - b. transactions in investment funds operated by third parties in which enterprises described in subsection 1 (a) constitute less than 5 percent of the total; and
 - c. investments in clearly defined projects carried out by an enterprise described in subsection 1 (a) insofar as such funding is not utilized for the production, sale or distribution of cluster munitions.
4. Without prejudice to the provisions of section 1 above, enterprises that do hold financial instruments, loans or non-marketable holdings as described in that section should dispose of them or terminate them within a reasonable period of time.

EXPLANATORY NOTES

§ 2. Contents of the decree

g. cluster munitions

Article 21a of the Market Abuse (Financial Supervision Act) Decree [*Besluit marktmisbruik Wft*] imposes an obligation that prevents an enterprise directly supporting any national or foreign enterprise which produces, sells or distributes cluster munitions.

The Netherlands is a signatory to the Convention on Cluster Munitions (Bulletin of Treaties 2009, 45) which incorporates a far-reaching prohibition on the use, possession, production and transfer of cluster munitions that contain explosive submunitions. On 29 March 2011, the Upper House of the Dutch Parliament adopted a motion tabled by the MPs Haubrich-Gooskens, Vliegthart, Böhler, Ten Hoeve, Koffeman, Putters and Meurs¹. This motion called for steps to be taken towards a ban on demonstrable, direct investment in the production, sale and distribution of cluster munitions. On 13 December 2011, the Lower House of the Dutch Parliament adopted a motion on a similar theme, tabled by the MPs Voordewind and Eijnsink². Article 21a puts these two motions into effect.

Article 21a elaborates on the standards for honourable business practices set out in the Financial Supervision Act and the Pensions Act (Artt. 3:10, 3:17, 4:11, 4:14 and 5:68 FSA and Art. 143 Pensions Act), complementing them with the explicit rider that investments, loans or non-marketable holdings in or to an enterprise that produces, sells or distributes cluster munitions will be deemed to be at variance with honourable business practices.

§ 3. Administrative burden and compliance costs

f. Cluster munitions

¹ *Parliamentary documents I 2010/11, 32 187 (R1902), F*

² *Parliamentary documents II 2011/12, 33 000 X, no. 57*

The underlying principle is to restrict, as much as possible, investments in enterprises that produce, sell or distribute cluster munitions. Within the given framework, an option has been chosen whereby the obligations imposed on the basis of this measure do not extend beyond that which can reasonably be expected of financial institutions and pension funds and that which can effectively be enforced by the supervisory body.

This measure will have little or no initial effect. It is already the case that financial institutions and pension funds exclude, to a significant degree, investments in enterprises that produce, sell or distribute cluster munitions. In order to pursue such exclusion policies, the financial institutions and pension funds have already introduced measures that enable them to identify enterprises that have any affiliation with cluster munitions. The measure is not expected to add any structural administrative burden, since it is not accompanied by any requirement to submit reports or provide information. Although there will be some limited structural compliance costs, the expense incurred by the financial institutions and pension funds in adapting their business processes will be modest, since the measure is already largely aligned to their present policies.

On the other hand, the introduction of this provision is accompanied by stricter requirements in regard to the monitoring of and compliance with this policy. The costs involved are estimated at EUR 1,750 per financial institution per annum. The provision will affect some 1,400 financial institutions and pension funds (approx. 80 banks, 180 fund managers, 120 collective investment schemes, 285 investment firms, 1 enterprise with a certificate of supervised status as meant in Article 3:110 (1) of the Financial Supervision Act, 450 pension funds, 8 premium pension institutions and 270 insurers). The total costs in this context are therefore estimated at EUR 2,450,000 per annum (1400 financial institutions and pension funds * EUR 1,750).

Additional to this are the structural compliance costs involved in providing the supervisory body with evidence that efforts are being made to avoid investments in enterprises that produce, sell or distribute cluster munitions. These costs are estimated at EUR 250 per enterprise per annum. The total costs in this context are therefore estimated at EUR 350,000 per annum (1400 financial institutions and pension funds * EUR 250).

It can therefore be concluded that the measure will not entail an administrative burden; the total structural compliance costs will be EUR 2.8 million per annum (EUR 2,450,000 plus EUR 350,000).

§ 4. Consultations

f. Cluster munitions

A number of respondents recommended that Article 21a of the Market Abuse (Financial Supervision Act) Decree should also apply to everyone within the territorial jurisdiction of the Netherlands or for subsidiaries of Dutch financial institutions located outside the Netherlands. An extension of the scope of the provision on this scale would, however, be pushing against the bounds of enforceability. It would, for instance, be almost impossible to monitor the activities of all private Dutch investors outside the Netherlands, and the supervisory body has no legal competence to monitor whether or not an autonomous foreign subsidiary of a Dutch enterprise is actually abiding by Dutch law. By way of explanation, the Explanatory Notes explicitly mention that the provision is also applicable to the branch offices of [Dutch] financial institutions located outside the Netherlands because, in such cases, responsibility for their operations rests with the head office which is located in the Netherlands.

The majority of the respondents felt that it would be desirable for the government, supported perhaps by an external commission, to publish a list of the names of manufacturers that fall within the scope of the provision. Nearly all the institutions to which the provisions will apply have already instituted policies that exclude investment in cluster munitions, and have found ways to put those policies into practice. Were the government to compile a list of manufacturers, that would also effectively lay a large part of the responsibility for compliance with the provision on the shoulders of the government. This would run contrary to the precept that corporate social responsibility is a prime example of an issue that should be the responsibility of the sector itself. An initiative by which the sector compiles its own collaborative list of such manufacturers would be a good reflection of this responsibility. If such an initiative were to come about, the government would of course be supportive and make an active contribution where necessary.

On the basis of the reactions to the consultations, a new second subsection has been added so that the provision is not only applicable to investments, loans or non-marketable holdings in an enterprise that itself produces, sells or distributes cluster munitions, but also to investments in an enterprise that holds more than half the shares of such an enterprise. Without this addition, it would be relatively easy to evade the provision by establishing a parent company (holding) in which investments could be made and transferring the activities related to cluster munitions to a separate, wholly or partly-owned subsidiary.

The reactions to the consultations also prompted the clarification of, or a tighter rewriting of, a number of passages in the Explanatory Notes. The sentence about adequate measures has been amended to stress the fact that the emphasis of the provision lies on the taking of precautionary measures. Other changes include a reference to what is known as the 'execution only' situation, an explanation of the term 'essential parts', and a clarification of the role of the supervisory body after an appeal to the exemption referred to in Article 21a (3) (c).

Notes on individual sections

Article III

A and B

The new Article 21a of the Market Abuse (Financial Supervision Act) Decree [*Besluit marktmisbruik Wft*] imposes an obligation that prevents an enterprise directly supporting any national or foreign enterprise which produces, sells or distributes cluster munitions.

The Netherlands is a signatory to the Convention on Cluster Munitions (Bulletin of Treaties 2009, 45) which incorporates a far-reaching prohibition on the use, possession, production and transfer of cluster munitions that contain explosive submunitions. On 29 March 2011, the Upper House of the Dutch Parliament adopted a motion tabled by the MPs Haubrich-Gooskens, Vliegenthart, Böhler, Ten Hoeve, Koffeman, Putters and Meurs³. This motion called for steps to be taken towards a ban on demonstrable, direct investment in the production, sale and distribution of cluster munitions. On 13 December 2011, the Lower House of the Dutch Parliament adopted a motion on a similar theme, tabled by the MPs Voordewind and Eijnsink⁴. Article 21a puts these two motions into effect.

³ *Parliamentary documents I 2010/11, 32 187 (R1902), F*

⁴ *Parliamentary documents II 2011/12, 33 000 X, no. 57*

Article 21a elaborates on the standards for honourable and controlled business practices set out in the Financial Supervision Act (Artt. 3:10, 3:17, 4:11, 4:14 and 5:68)⁵ and in the Pensions Act (Art. 143), complementing them with the explicit rider that investments, loans or non-marketable holdings in or to an enterprise that produces, sells or distributes cluster munitions will be deemed to be at variance with honourable business practices.

Articles 3:10 (2), 3:17 (2), 4:11 (2) and (3), and 4:14 (2) of the Financial Supervision Act and Article 143 (2) of the Pensions Act have been incorporated into the Market Abuse (Financial Supervision Act) Decree as the legal basis of the new Article 1a. They provide the requisite legal basis for subsections (b) and (c) of Article 21a (1), described in more detail below.

Article 21a applies to parties operating in the Netherlands that have substantial dealings with the financial markets: the institutions described in Article 5:68 (1). An exception is made for clearing institutions, because when they are settling securities transactions they have no direct knowledge of the actual parties involved. Article 21a also applies to branch offices and tied agents of these parties outside the Netherlands, insofar as the operations of those branch offices and agents fall - under the Financial Services Act - under the responsibility of the head office located in the Netherlands. Implementation of the [EU] Directive on Alternative Investment Fund Managers⁶ means that the managers of hedge funds and private equity funds will fall under the scope of the definition of 'manager' as given in Article 1:1 of the Financial Services Act, and therefore be subject to the provisions of Article 21a [of the Decree]. The intention is to have the legislation for the implementation of the directive on alternative investment fund managers come into force [in the Netherlands] in the summer of 2013.

Article 21a does not apply to individuals, to legal entities other than those specified in the first section, or to the foreign subsidiaries of the financial institutions specified in the first section. This limitation is prompted by enforcement considerations. Although it might initially seem more effective to make the standard applicable to as wide a group as possible, true effectiveness can only be achieved if the provisions can also be enforced vis-à-vis such a wide group. And this would not be feasible in the case of individuals, legal entities other than those specified in the first section, or the foreign subsidiaries of the financial institutions specified in the first section. In practice, it would not be possible to monitor the investments made by all individuals and legal entities in the Netherlands. Moreover, the supervisory body has no legal competence to verify whether or not an autonomous foreign subsidiary is abiding by Dutch law. For that reason it has been decided to limit the target group of Article 21a to financial institutions which are active in the [Dutch] financial markets and in respect of which effective enforcement of the standard is possible.

The adequate measures to prevent investment, referred to in Article 21a, pertain particularly to measures that are legally possible and are unilaterally enforceable by an institution. This is at least the case when an institution is acting on its own behalf and for its own account, is itself manager of an investment fund or receives explicit instructions from a client, without an associated request for advice, to invest in an enterprise as referred to in subsection 1 (a); this is known as an 'execution only' situation.

⁵ See also the Financial Supervision Acts (Updating and Harmonization) Act [*Wet actualiseren en harmonisatie financiële toezichtswetten*]: Parliamentary documents II, 2001/02, 28373, no. 3, paragraph 3.1 and 3.2.

⁶ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ EU 2011, L 174).

Subsection 1 (a), which has its legal basis in Article 5:68 (1) of the Financial Supervision Act, contains an obligation to preclude that an institution carries out transactions, or has transactions carried out, with a view to acquiring a financial instrument that has been issued by an enterprise that produces, sells or distributes cluster munitions or essential parts thereof. A definition of cluster munitions can be found in Article 2 of the Convention on Cluster Munitions (published in the Bulletin of Treaties 2009, 45). 'Essential parts' are only those which are indispensable for the functioning of the cluster munitions. 'Dual use components', that can also be used for purposes other than cluster munitions, do not therefore fall within the scope of the definition given in this provision.

Subsection 1 (a) is not only concerned with transactions carried out by an institution itself, but also extends to transactions that an institution has carried out on its behalf. This includes, but is not limited to, delegating asset or investment management to an institution registered in another country. This reflects Sections 3:18 and 4:16 of the Financial Supervision Act, which provide that financial enterprises that delegate work to third parties are obliged to ensure that those third parties also comply with the overall criteria required of sound ethical business operations. A similar obligation is imposed upon pension funds by way of Article 34 of the Pensions Act.

Subsections 1 (b) and (c) are based on the provisions of Articles 3:10 (2), 3:17 (2), 4:11 (2) and (3), and 4:14 (2), of the Financial Supervision Act and on Article 143 (2) of the Pensions Act. These subsections are designed to prevent financial support being offered to an enterprise defined in that same subsection under (a) by other means. Subsection 1 (b) is concerned with the provision of loans, and subsection 1 (c) with non-marketable holdings in those enterprises referred to in subsection 1 (a). A direct holding in an enterprise's capital can be deemed to be not freely marketable if restrictions are imposed on the transferability of that holding.

Article 21a (2) declares the first section applicable by analogy to investments in an enterprise that holds more than half of the share capital of an enterprise as referred to in subsection 1 (a). This supplementary provision is necessary in order that Article 21a cannot be evaded by transferring the activities related to cluster munitions to a subsidiary.

Subsection (3) (a) provides an exception for transactions based on an index, when less than five percent of the total assets of that index are invested in one or more enterprises as referred to in subsection 1 (a). Transactions based on an index are deemed to include, among others, index funds, index trackers, the replication of indices in a 'basket', and similar financial products. Characteristic of such transactions is that the composition of the investment portfolio is subject to frequent changes over which the individual passive investor has no direct control. If, however, enterprises defined in subsection 1 (a) constitute more than 5 percent of an index, it is unlikely that an investor will be unaware of this fact.

Subsection 3 (b) provides an exception for transactions in investment funds managed by third parties, where one or more of the enterprises defined in subsection 1 (a) constitute less than five percent of the total. In the case of an investment fund managed by a third party, an investing institution could not take unilaterally enforceable measures to exercise control over the composition of that fund. On the basis of this provision, institutions and their clients can invest in the major technology funds, for example, while the five percent threshold is a reminder that investments in funds that are manifestly intended to provide financial support to enterprises such as those described in subsection 1 (a) must be avoided. Subsection 3 (c) has been included to facilitate investment in projects that are not aimed at cluster munitions, even if cluster munitions

are produced or developed elsewhere in the enterprise. There must, however, be a guarantee that the invested funds will not be used for the development or production of cluster munitions, and this must be verifiable for the supervisory body. Options in this respect include a written statement from the enterprise that is carrying out the project.

The obligations imposed by the first subsection will apply from the date on which the provisions of the Article come into force. In addition, subsection 4 provides that, in the case of existing financial instruments, loans and non-marketable holdings, there is an obligation to dispose of them or terminate them within a reasonable period of time. The interpretation of 'reasonable period of time' will depend on the institution involved, the nature and term of the investments and the possibilities to terminate the commitment. Another important consideration is whether compliance with the obligation to terminate or dispose of financial instruments, loans and non-marketable holdings within a reasonable period of time is legally possible and can be unilaterally enforced by an institution. Where there is no intention to retain a financial instrument as referred to in subsection 1 (a), the same obligations apply as for the situation in which an enterprise acquires such an instrument either (i) acquiring it temporarily as collateral, (ii) acquiring it definitely following conversion, or (iii) by the devolution of an estate.