I Introduction

In our daily lives, we are all active on the financial markets. We have a mortgage, a payment account, various insurances, a pension and possibly investments in shares on the stock exchange. The financial crisis of 2007 has shown the importance of the functioning of the financial markets for our economy. The crisis eroded public confidence in the financial sector. This explains the increased public's and government's attention to the supervision of the financial sector.

Usually, the government's attention results in regulation, which is translated into legislation and supervision. For the financial sector, this relates in particular to the Financial Supervision Act (**FSA**).

This act is relatively unknown and therefore unloved by most lawyers and law students. In my opinion, this is completely unjustified. Dutch law cannot be more extensive, complex, dynamic and therefore more challenging than the FSA. The purpose of this Boom Basics Dutch FSA is to make the FSA more accessible to interested parties.

I would like to thank my colleagues Aron Berket, Auryn Bokma and Koen van Leeuwen who also contributed to this edition. This Boom Basics Dutch FSA describes the state of affairs up to 1 January 2020.

1 Position in Dutch law

Financial supervision law

The Financial Supervision Act (FSA) is one of several sources of 'financial supervision law', by which we mean 'the law for the supervision of the financial markets and their actors'. Other sources are *e.g.*:

- Pension Act;
- Sanctions Act 1977;
- Foreign Financial Relations Act;
- Securities Giro Act;
- Consumer Protection (Enforcement) Act;
- Savings Certificates Act;
- Money Laundering and Terrorist Financing (Prevention) Act;
- Audit Firms (Supervision) Act;
- Financial Reporting (Supervision) Act; and
- Trust Offices (Supervision) Act.

Overlap with other fields of law

In addition, the FSA overlaps with other fields of law such as administrative, criminal and civil law:

- Many of the supervisory powers of the regulators, the Authority for the Financial Markets (**AFM**) and the Dutch Central Bank (**DNB**), are subject to the General Administrative Law Act (**GALA**) (see No 16).
- Breaches of certain provisions of the FSA are sanctionable under criminal law under the Economic Offences Act (**EOA**).
- Resolutions that are adopted on the basis of voting rights attached to an interest in an undertaking (Art. 2:118/228 of the Dutch Civil Code (**DCC**)) obtained without the required declaration of no objection may be annulled (Art. 3:104(2) FSA).

2 Origin

Reason for the supervision of financial markets

On 27 July 1914, as a result of the impending First World War, a steep fall in prices on the Amsterdam stock exchanges took place. Subsequently, major lenders withdrew their loans. The fall in the prices of collateralised securities caused a concern that lenders would disadvantage their borrowers if those securities were sold under execution at lower prices. Two days later, the stock market closed to prevent a collapse.

This was the reason for the first supervisory law act in the Netherlands, the Stock Exchange Act 1914.

The Stock Exchange Act 1914 contained a scheme to protect borrowers against execution (by lenders). In response to the criticism from the major lenders that this law restricted their right of execution, the legislator stated: '*in such a serious crisis, protection does not apply to the "large ones" but to the "small ones"*'. This statement is a good reflection of the background of financial supervision.

The government left the practical organisation and the stock market supervision to the Dutch Stock Exchange Association; de facto self-regulation in addition to the more formal supervision of the government.

Further development

Influenced by European regulations and abuses, the government increasingly interfered with the stock market and securities trading from the 1980s onwards, as is evidenced by the following:

- In 1985 this development led to the Securities Transactions Act (**STA**), which focused on the regulation of off-exchange trading.
- In 1990, the Investment Institutions (Supervision) Act (**IISA**) replaced the provisions of the STA rules that related to investments funds.
- In 1991, the Disclosure of Major Holdings in Listed Companies Act (**DMHLCA**) set rules regarding the disclosure of control or an interest in listed companies.
- In 1992, the STA and the Stock Exchange Act 1914 were replaced by the Securities Transactions (Supervision) Act (**STSA**) which emphasised that the government has a responsibility for the adequate functioning of the securities markets, given their growing importance for the economy.

Non-investment-related supervision

Supervisory law also developed in other areas, including the following:

- **Banking**: the first supervision took place on the basis of one article in the Bank Act 1948. This statutory supervisory regime developed from the Credit System (Supervision) Act 1952, via the Credit System (Supervision) Act 1978, to the Credit System (Supervision) Act 1992 (**CSSA 1992**).
- **Insurance**: the supervision of life insurers originally took place under the Royal Decree of 1830, which expired in 1880. From 1923, the Life Insurance Act applied, and for non-life insurers, from 1961 the Non-life Insurance Act. Both were replaced in 1987 by the Insurance Industry (Supervision) Act, which in turn was replaced in 1994 by the Insurance Industry (Supervision) Act 1993 (**IIA 1993**).
- **Consumer credit**: the first provisions under public law were included in the 1936 Act on the repayment undertaking, which

was replaced in 1964 by the Instalment Credit Sales Act. A second law that was aimed at consumer protection was the Consumer Money Credit Act (replacing the 1932 Moneylenders Act). Both were (partially) merged into the Consumer Credit Act 1992 (CCA). This in turn was merged in 2006 with the Insurance Brokerage Business Act into the Financial Services Provision Act (**FSPA**).

Tilting from sectoral supervision to functional supervision

Until 2002, financial supervision in the Netherlands was of a sectoral nature; each sector had its own law and its own supervisor (see Table 1).

Table 1 Sectoral financial monitoring

Sector	Law	Regulator
Investment firms (at that time still referred to as 'securities institutions')	STSA	Securities Board of the Netherlands (**STE**, later the AFM)
AIFs	IISA	STE
Banks	CSSA 1992	DNB
Life and non-life insurers	IIA 1993	Pension and Insurance Supervisory Authority of the Netherlands (**PVK**, later merged into DNB)
Funeral expenses and benefits in kind insurers	Insurance Supervision (Benefits in Kind for Funerals) Act	PVK
Financial service providers (e.g. consumer lenders and insurance intermediaries)	FSPA	STE
Listed companies	DMHLCA	STE

This classification proved to be impractical as the boundaries between financial companies and products blurred increasingly, because:

- certain financial firms developed into financial conglomerates with activities in various segments of the financial sector (banking market, insurance market, investment market, etc.); and
- an increasing number of products appeared with a cross-sectoral market character such as the investment mortgage and annuity policies with an investment element.

This prompted the legislator to 'tilt' the supervisory model in 2002, from the sectoral supervisory model to the functional supervisory model (also referred to as the *'twin peaks' model*). Under this model, DNB is responsible for the prudential supervision of all financial firms, while the AFM is responsible for the conduct of business supervision of all financial firms (see No 3).

In 2007, the financial supervision laws were aligned with the functional supervisory model. These financial supervisory laws were transposed into a single law, the FSA.

Further developments

The FSA constantly adapts to:

- address incidents;
- stay in line with the developing financial markets; and
- implement new and amended European directives (see No 4).

3 Objectives (prudential and conduct of business supervision)

The FSA lays down the rules for prudential and conduct of business supervision, from which the objectives of the FSA are derived. Both types of supervision together concern the protection of procurers of financial services, such as investors, savers and policyholders.

Prudential supervision

Prudential supervision focuses on the soundness of financial firms and the stability of the financial system (Art. 1:24 FSA, see Nos 38-56).

- **Micro-prudential supervision**: regards the financial health of an undertaking, taking into account whether the undertaking has sufficient capital buffers to absorb potential losses.
- **Macro-prudential supervision**: regards the interaction between financial firms and their environment (other financial firms, financial markets, infrastructure and the real economy).

Conduct of business supervision

Conduct of business supervision focuses on fair and transparent financial market processes, balanced relationships between market parties and careful treatment of clients (Art. 1:25 FSA, see Nos 63-78).

This type of supervision also regards settling information asymmetry between providers of financial services and products and their customers, as well as between those customers.

4 *European influences*

European law

On the one hand, the FSA consists of national rules. On the other hand, the FSA consists of the implementation of a large number of European directives. The most well-known directives are:

- Alternative Investment Fund Managers Directive (2011/61/EU, **AIFMD**) with regard to AIFMs;
- Undertakings for Collective Investment in Transferable Securities Directive (2009/65/EC, **UCITS Directive**) regarding UCITS;
- Capital Requirements Directive (2013/36/EU, **CRD**) regarding capital requirements for Banks and Investment Firms;
- Markets in Financial Instruments Directive (2014/65/EU, **MiFID**) regarding investment firms, trading venues and data reporting service providers;
- Solvency II Directive regarding insurers (2009/138/EU);
- Transparency Directive (2004/109/EC) regarding holdings in issuers; and
- Payment Services Directive (2015/2366/EU).

Financial Services Action Plan

In 1999, the European Commission (**EC**) published the Financial Services Action Plan (**FSAP**) which proposed policy objectives and concrete measures to improve the single market for financial services by 2005.

The FSAP proposed priorities and a timetable for the implementation of 42 specific measures (*i.e.* directives and regulations). In doing so, three strategic objectives were pursued: