

# The OECD Guidelines on Corporate Governance of State Owned Enterprises – an introduction

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## 1. Scope

This article refers in general terms to the *OECD Guidelines on Corporate Governance of State Owned Enterprises* ('the Guidelines'<sup>2</sup>) and provides an overview of the work of the OECD<sup>3</sup> in the field of corporate governance of state owned enterprises ('SOEs'). The Guidelines are based on and fully compatible with the OECD Principles of Corporate Governance (the 'Principles'), but focus on issues that are specific to the corporate governance of SOEs. The Principles were first published in 1999 and are primarily intended to be used by policy makers throughout the world as they develop and improve the legal and regulatory frameworks for corporate governance of listed (public) companies that reflect their own economic, social, legal and cultural circumstances.<sup>4</sup> Following the issue of the revised Principles in 2004, the Guidelines were adopted by the OECD in April 2005. The article starts with some background on SOEs after which the purpose of the Guidelines is explained. Each of the six chapters of the Guidelines is then briefly referred to. Furthermore, the article addresses further developments relating to the Guidelines and corporate governance of SOEs. Subsequently, by referring to the Guidelines, some challenges are identified which need to be tackled in the near future by the Dutch government as a consequence of the nationalisation of Fortis Nederland. The article ends with some concluding remarks.

## 2. Background

### 2.1. State intervention and SOEs<sup>5</sup>

SOEs in market economies effectively are the product of state intervention in the market.<sup>6</sup> Historically such state interventions have taken place in many countries due to war (Second World War), economic recession (the Great Depression in the 1930s) or financial crises.<sup>7</sup> State intervention is also accepted as a tool for repairing (potential) market failures;<sup>8</sup> the latter meaning for example the existence of national monopolies (e.g. energy networks and the railways), the mere existence of public goods for which no payment is due (such as the law) and the availability of merit goods (healthcare and education) for restricted groups.

### 2.2. SOEs and privatisation

Already in 1997 the OECD started to focus on corporate governance of state owned enterprises (SOEs) as part of the work undertaken by what was then called the OECD Privatisation Network. The programme amongst others focused on developing policy recommendations for the enhancement of corporate governance in public enterprises (i.e. SOEs), taking also into account the choice of privatisation methods on post-privatisation corporate governance and performance.<sup>9</sup> The main conclusions of the 1997 initiative were: (a) the weaknesses of governance in SOEs stem from insufficient market incentives and disciplines, (b) there is no credible threat of bankruptcy as SOEs are frequently bailed out, (c) privatisation has advantages when the SOEs in question exist primarily to serve non-commercial functions, (d) despite their short-comings, SOEs are likely to continue to be an important part of the state's assets in many countries.

### 2.3. Regulation of SOEs

Most jurisdictions have at least one statute dealing specifically with corporations, often referred to as corporate law. Apart from this generic corporate law, 'secondary' statutes exist dealing with specific classes of firms such as foreign firms or SOEs.<sup>10</sup> Until recently SOEs throughout the world have not often been the subject of such specific secondary legislation or regulation.<sup>11</sup> Recent exceptions include state planned economies (e.g. China) which while emerging to a market economy have been forced to set up specific policies for dealing with SOEs. Apart from this recent development in the 1980's and 1990's in many market economies (such as

1. Mr. L.C. Bouchez is advocaat in Amsterdam.
2. For further reference on corporate governance and SOEs see for example Enrico Perotti, 'State Ownership: A residual Role?', *Discussion Paper No. 2*, Global Corporate Governance Forum, October 2003; Simon Wong, 'Improving Corporate Governance in SOEs: An Integrated Approach', *Corporate Governance International*, Volume 7, Issue 2, June 2004; Maria Vagliasindi, 'Governance Arrangements for State Owned Enterprises', *Policy Research Working Paper 4542*, World Bank, March 2008, and Rodolfo Apreda, *Dual Governance in State-Owned Banks*, University of CEMA, Working Paper Series, Number 319, April 2006.
3. The Organisation for Economic Co-operation and Development ('the OECD') groups 30 member countries sharing a commitment to democratic government and the market economy. With active relationships with some 70 - 100 other countries, NGOs and civil society, it has a global reach. Its work covers economic and social issues from macroeconomics, to trade, education, development, science and innovation. The OECD plays a prominent role in fostering good governance in the public service and in corporate activity.
4. For an overview of the Principles see also Louis Bouchez, 'The OECD Principles of Corporate Governance', *Ondernemingsrecht* 2006, 116, p. 378-384; see for the full text of the Principles the OECD website: <[www.oecd.org/daf/corporate/principles/](http://www.oecd.org/daf/corporate/principles/)>.
5. The full text of the Guidelines can be obtained from the website: <[www.oecd.org/dataoecd/46/51/34803211.pdf](http://www.oecd.org/dataoecd/46/51/34803211.pdf)>.
6. See for an extensive rationale and historic overview *Privatising SOEs: an overview of policies and practices in OECD countries*, Chapter 1, OECD 2003, and also *Corporate Governance of State Owned Enterprises – A Survey of OECD Countries*, OECD 2005.
7. At the time of writing this article the global economy happens to be in financial turmoil due to an ongoing global credit crisis causing reduced lending activity and increased spreads on higher interest rates; this financial crisis has led to state intervention by the US government effectively nationalising mortgage banks Fannie Mae and Freddie Mac (see 'US takes control of Fanny and Freddie', *Financial Times*, 8 September 2008, frontpage) and insurance company AIG (see 'Rescue kickstarts sale of AIG assets', *Financial Times*, 18 September 2008, p. 2). Regarding the role of the state see 'Changing the rules of the game – Saving AIG was right, but what is the state's role to be?', *Financial Times*, 18 September 2008, editorial comment, p. 14.
8. See *supra* note 5.
9. See also OECD Proceedings, *Corporate Governance, State-Owned Enterprises and Privatisation*, OECD 1998.
10. Reinier Kraakman, Paul Davies, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda and Edward Rock, *The Anatomy of Corporate Law – A Comparative and Functional Approach*, Chapter 1, 2004, Oxford University Press.
11. The most common legal form of SOEs in OECD countries is the private limited liability company followed by the joint stock company; see *Corporate Governance of State Owned Enterprises – A Survey of OECD Countries*, OECD 2005, p. 36.

the OECD member states) privatisation programmes were set up for different reasons such as (i) the need to improve efficiency and performance of SOEs by introducing competition in monopolistic sectors such as for example telecom, post and utilities, (ii) capital market development and attraction of foreign investment, (iii) fiscal objectives based on governments' budget constraints, and (iv) political objectives, amongst others to limit state intervention and to facilitate the transition from state planned economy to market economy.<sup>12</sup> For such privatisation programmes often two sets of policy tools have been used, either (a) framework legislation or (b) case-by-case legislation.<sup>13</sup> In order to safeguard some post-privatisation state control instruments were introduced such as (a) golden shares, (b) partial privatisation and (c) a stable core of shareholders (in order to safeguard continuity).

#### 2.4. SOEs in OECD member states

As set out above privatisation programmes have led to a decrease of SOEs in OECD member states. However, the size, economic impact and strategic value of these SOEs is important. In some strategic sectors the role of SOEs is even growing; for example in the energy sector there has been a lot of activity.<sup>14</sup> Strategic sectors are perceived to include the production and distribution of energy, post, telecommunications, railways, air transport and sometimes financial services.<sup>15</sup> In 2003 on average more than half of the SOEs in OECD countries are fully owned by the state and 20% are majority state owned.<sup>16</sup> On average only 10% of SOEs in OECD countries are listed.<sup>17</sup>

### 3. The Guidelines

#### 3.1. Development of the Guidelines

In June 2002 the OECD Working Group on Privatisation and Corporate Governance of State-Owned Assets was mandated by the OECD Steering Group on Corporate Governance to develop specific guidelines to complement the Principles. The Working Group included representatives of all OECD member countries, which in many cases are ministries or dedicated agencies that perform the functions of corporate ownership, along with active observers such as the World Bank and the IMF. The main organisations representing management and labour at the OECD also took part in the relevant meetings and consultations. The Guidelines were adopted on a consensus basis following a process of broad consultations with representatives of shareholder organisations, SOEs and stakeholders in all OECD member countries and in more than twenty non-member countries.

The Guidelines set out what the OECD member countries deem to be good practices for ensuring that SOEs fulfill their assigned objectives, are efficient and report on their performance in a transparent manner. In essence the quality of governance in SOEs can have substantial impact on the performance of SOEs and consequently on a country's entire economic performance. While the Guidelines are primarily intended to cover commercial SOEs under central (or federal) government ownership, authorities could also promote their use by sub-national levels of governments that own enterprises.

The Guidelines consist of two parts: the first part presents six sections each headed by a single Guideline; these six Guidelines are followed by several supporting sub-Guidelines; the second part of the Guidelines contains annotations to the Guidelines which are intended to help understanding the rationale of the Guidelines.

#### 3.2. Ensuring an effective legal and regulatory framework for SOEs

*Guideline: The legal and regulatory framework for state-owned*

*enterprises should ensure a level playing field in markets where state-owned enterprises and private sector companies compete in order to avoid market distortions. The framework should build on, and be fully compatible with, the OECD Principles of Corporate Governance.*

This guideline promotes the introduction by governments of laws and regulation that is the same for both private and state owned enterprises which are each others competitors. In an increasingly international competitive environment this proves to be a challenge. This is in particular relevant in countries where incumbent SOEs are protected while foreign SOEs are restricted in entering the home market of the incumbent SOE. Therefore in particular there should be a strict separation of the state's ownership function and the market regulator function (often also under the responsibility of a state body).<sup>18</sup>

#### 3.3. The state acting as an owner

*Guideline: The state should act as an informed and active owner and establish a clear and consistent ownership policy, ensuring that the governance of state-owned enterprises is carried out in a transparent and accountable manner, with the necessary degree of professionalism and effectiveness.*

Governments should develop and disclose a transparent ownership policy for SOEs. Part thereof should be clear identification of the ownership function within the government and limiting political interference in day-to-day management of the SOEs while leaving SOE boards effectively undertake their responsibilities independently to achieve their goals. The co-ordinating entity or entity that exercises the ownership function within the state should be held accountable towards representative bodies (such as parliament).

#### 3.4. Equitable treatment of shareholders

*Guideline: The state and state-owned enterprises should recognise the rights of all shareholders and in accordance with the OECD Principles of Corporate Governance ensure their equitable treatment and equal access to corporate information.*

This guideline stresses the importance of equitable and transparent treatment of all shareholders in SOEs. In particular states should respect the rights of minority shareholders in SOEs and formulate a clear policy to facilitate such minority shareholders to enforce their shareholders' rights.

#### 3.5. Relations with stakeholders

*Guideline: The state ownership policy should fully recognise the state-owned enterprises' responsibilities towards stakeholders*

12. See *Privatising SOEs; an overview of policies and practices in OECD countries*, OECD 2003, and *Corporate Governance of State Owned Enterprises – A Survey of OECD Countries*, OECD 2005.

13. An example of the latter is the Dutch act on the privatisation of the civil servant pension fund (Wet van 21 december 1995, Stb. 1995, 639, houdende privatisering van het Algemeen burgerlijk pensioenfonds (Wet privatisering ABP)).

14. Reference is made to the merger between GDF and Suez on 22 July 2008 forming GDF Suez in which the French state holds more than 35% of the shares.

15. See Chapter 1 of *Corporate Governance of State Owned Enterprises – A Survey of OECD Countries*, OECD 2005, p. 23-36.

16. See *supra* note 13.

17. See *supra* note 13.

18. An example of failure of state intervention in this respect can be found in the 2000-2001 California electricity crisis where the state of California on the one hand imposed deregulation of the Californian electricity market while on the other hand through the regulator capped the price of electricity; see amongst others *The Western Energy Crisis, the Enron Bankruptcy and the FERC's Response*, retrieved from the FERC website (22 September 2008), <[www.ferc.gov/industries/electric/indus-act/wec/chron/chronology.pdf](http://www.ferc.gov/industries/electric/indus-act/wec/chron/chronology.pdf)>.

and request that they report on their relations with stakeholders.

Governments are urged to respect the rights conferred upon stakeholders both by law and through mutual agreements. In this regard SOEs that are publicly traded or that perform a public service mission are encouraged to report on their relationships with stakeholders. Moreover, the boards of SOEs are invited to develop and implement codes (also at subsidiary level) of ethics based on country norms and consistent with international standards.

### 3.6. Transparency and disclosure

*Guideline: State-owned enterprises should observe high standards of transparency in accordance with the OECD Principles of Corporate Governance.*

This guideline prescribes SOEs to strengthen internal control mechanisms and for them to be the subject of independent external audits performed in accordance with international standards. Also the entities exercising the ownership function within the state should develop aggregate reporting to convey an overall view of the evolution of the public-sector and the performance of SOEs. SOEs should disclose material information on all issues described in the Principles, including but not limited to: (a) the objectives of SOEs, (b) their ownership and control structures, (c) material risk factors, (d) all types of financial aid from the state, including guarantees and any other commitment undertaken on the SOEs' behalf, and (e) relations with affiliated entities.

### 3.7. The responsibilities of the board of SOEs<sup>19</sup>

*Guideline: The boards of state-owned enterprises should have the necessary authority, competencies and objectivity to carry out their function of strategic guidance and monitoring of management. They should act with integrity and be held accountable for their actions.*

The boards of SOEs should be in a position to fulfill effectively and independently their mission of strategic guidance and monitoring of management. Therefore their mandate should be defined clearly and their independence upheld. Boards are to be fully accountable to the owners. Moreover, this guidelines recommends a separation of functions between the chair and the chief executive officer, as well as giving the board the authority to appoint and dismiss CEOs. Finally, this guideline also recommends systematic monitoring of the board's performance.

## 4. Further developments relating to SOEs

### 4.1. Implementation Guide to Ensure Accountability and Transparency in SOEs

The Implementation Guide to Ensure Accountability and Transparency in State Ownership ('Guide'<sup>20</sup>) has been developed to help governments improve the corporate governance of SOEs in the area of accountability and transparency. The Guide provides practical recommendations and policy options to implement the Guidelines in five main areas, i.e. (i) how to set objectives; (ii) reviewing performance; (iii) auditing performance; (iv) reporting on performance; and (v) to ensure adequate disclosure and transparency by individual SOEs. Moreover the Guide contains viable policy options, practical steps to implement the Guidelines as well as examples that illustrate implementation. Governments can make use of the Guide in assessing their own practices and in implementing reforms. The Guide can also be used as a reference for policy dialogue, by international organisations (including inter governmental organisations) to inform their technical assistance and capacity building programmes, by donors as they assist developing country partners in improving the effectiveness of the public sector, and bu-

siness, labour and non-governmental organisations in their dialogue with governments.

### 4.2. The Global Network on Privatisation and Corporate Governance of SOEs

On 5 March 2008 the OECD launched the *Global Network on Privatisation and Corporate Governance of SOEs* which is intended as a network providing for (annual) structured policy dialogue on OECD's initiatives to support improvements in the governance of SOEs. Furthermore, for cases in which governments decide to privatise, the network can be used to provide support to ensure that it is done effectively and efficiently. The network involves participants from both OECD and non-OECD countries.

Apart from the Global Network, the OECD has set up regional SOE networks in Asia, the southern African region and the Middle East and North Africa region.<sup>21</sup>

## 5. Nationalising Fortis Nederland; the current SOE policy framework, the Guidelines and their influence

### 5.1. Corporate governance policy and the Dutch nationalisation of Fortis

Although this article is not intended to assess in detail how the Guidelines will, may or should influence the Netherlands policy on SOEs, the recent nationalisation of the Dutch part of Fortis (including ABN AMRO) by the state of the Netherlands<sup>22</sup> may trigger a more in depth assessment by both politicians and policy makers as well as a public debate on the Dutch state's policy on corporate governance of SOEs in the Netherlands. The Guidelines may provide for a framework for such debate. Considering the Guidelines in view of the nationalisation of Fortis will create dilemmas for the Dutch government; some of these dilemmas will be identified hereinafter after a short summary of the existing government policy on SOEs in the Netherlands.

### 5.2. The current policy framework on SOEs in the Netherlands

Currently the number of SOEs in the Netherlands is 35 (excluding Fortis/ABN AMRO); moreover the state effectively controls two foundations.<sup>23</sup> In December 2007 the current government adopted its new policy paper on SOEs, the 'Memorandum on the Policy regarding State Participations'<sup>24</sup> (the '2007 Memorandum'). This Memorandum meant a principal change in policy. Until the 2007 Memorandum the old policy included in the Memorandum's predecessor from 2001<sup>25</sup> prevailed. According to the Ministry of Finan-

19. For further reading on this topic see also Maria Vagliasindi, 'The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries', *Policy Research Working Paper 4579*, World Bank, March 2008.

20. The draft wording of the Guide can be found on the website of the OECD, <[www.oecd.org/daf](http://www.oecd.org/daf)>, see corporate governance.

21. See for the activities of these regional SOE networks <[www.oecd.org/daf/corporateaffairs/soe](http://www.oecd.org/daf/corporateaffairs/soe)>.

22. On 3 October 2008 the Dutch government announced it would take control over Fortis' banking and insurance operations in the Netherlands for an amount of € 16.8 billion (see amongst others 'Dutch to take over Fortis in Netherlands', *Financial Times*, 4 October 2008, frontpage).

23. According to the *Nota Staatsdeelnemingenbeleid, Kamerstukken II 2001/02*, 28 165, nr. 69, 7 December 2007, p. 2; the two foundations are National Stichting tot Exploitatie van casinospelen in Nederland and Stichting Exploitatie Nederlandse Staatsloterij. Reference is also made to the website of the Ministry of Finance which contains the entire list and also the annual report for 2006, *Jaarverslag 2006 Beheer Staatsdeelnemingen*, see <[www.minfin.nl](http://www.minfin.nl)>.

24. *Nota Staatsdeelnemingenbeleid, Kamerstukken II 2007/08*, nr. 69, 7 December 2007.

ce's website<sup>26</sup> the 2001 policy with regard to state participations can be summarised as follows: 'Deliberate venture capital investments as such are not a task for the government. Existing participations are therefore sold where possible, with due regard to the public and business interests.'. Pursuant to the 2001 policy the ownership function regarding Dutch SOEs was also formally transferred from several different ministries to one central ministry responsible for all SOEs, i.e. the Ministry of Finance. The 2007 Memorandum fundamentally deviates from the 2001 policy and prescribes that existing participations are to be kept and actively monitored unless state ownership does not have (sufficient) added value considering the underlying purpose of securing the public interests. Pursuant to this new policy the government wishes to serve the public interests more pro-actively. Practically this will be done using the following means (i) assessment of SOEs' strategy, (ii) assessment of SOEs' important investment decisions, (iii) assessment of SOEs' remuneration policies, and (iv) assessment of SOEs' capital structure.

### 5.3. Some challenges for the state's ownership function regarding Fortis Nederland

With the nationalisation of Fortis Nederland the government has created a string of challenges to be dealt with. One of these challenges will be the corporate governance of the newly acquired SOE Fortis. Using the Guidelines as benchmark hereinafter some preliminary challenges to be tackled by the Dutch government and Parliament are set out hereinafter.

(a) Sub-Guideline IA.: *There should be a clear separation between the state's ownership function and other state functions that may influence the conditions for state owned enterprises, particularly with regard to market regulation, and Sub-Guideline II.D.: The exercise of ownership rights should be clearly identified within the state administration. This may be facilitated by setting up a co-ordinating entity or, more appropriately, by the centralisation of the ownership function.*

This sub-Guideline challenges the Dutch government to take action. The reason for this being the fact that the Minister of Finance currently is responsible for different functions within the state which functions, when intermingled, may lead to future conflicts of interests.

As set out above, since 2001 the Ministry of Finance is formally responsible for implementing and managing the Dutch state's ownership function, including its 100% shareholdings in De Nederlandsche Bank N.V. ('DNB') and Fortis. DNB is responsible for safeguarding financial stability in the Netherlands, and, amongst others, supervises financial institutions and the financial sector.<sup>27</sup> Consequently DNB supervises Fortis Nederland. Also, pursuant to the Financial Supervision Act (*Wet op het financieel toezicht*) DNB advises the Minister of Finance on applications for a declaration of no objection regarding acquisitions of banks in the Netherlands.

Moreover the Minister of Finance is politically responsible for the Netherlands Authority for the Financial Markets ('AFM'), i.e. the market regulator which is responsible for supervising the operation of the financial markets.<sup>28</sup> AFM, amongst others, closely co-operates with DNB on applications for a declaration of no objection regarding acquisitions of banks in the Netherlands.

As such the Minister of Finance has now separate functions to be properly dealt with: the ownership function regarding DNB and Fortis Nederland, the political responsibility regarding the financial markets regulator AFM and ultimately political responsibility for financial stability in the Netherlands. In view of future developments, which for example may include a privatisation of Fortis Nederland, it

should be assessed whether the current policy framework in place is sufficient to prevent potential conflicts of interests.

(b) Sub-Guideline II.B.: *The government should not be involved in the day-to-day management of SOEs and allow them full operational autonomy to achieve their defined objectives and Sub-Guideline II.C.: The state should let SOE boards exercise their responsibilities and respect their independence.*

In a letter to Parliament of 6 October 2008<sup>29</sup> the Prime Minister and the Minister of Finance together provide information and background on the acquisition by the Dutch state of the Dutch part of Fortis. The letter states that the state will pursue its ownership function 'in accordance with the 2007 Memorandum both at the levels of the Board of Managing Directors and the Board of Supervisory Directors. This means that changes Board of Managing Directors and the Board of Supervisory Directors will be possible'. Apart from the fact that the 2007 Memorandum does not explicitly deal with the appointment of Managing Directors of SOEs, the letter seems to suggest the possibility of state interference in the appointment of Managing Directors which is not in line with the abovementioned Guidelines.

In view of the above the government should consider developing and communicating to the public a more detailed and transparent state ownership policy, including, but not limited to, a transparent board nomination process and guidelines for external reporting by SOEs. Apart from the Guidelines reference can be made to policy frameworks in place in other countries, for example Sweden.<sup>30</sup>

If the state ownership policy indeed will be amended the Guide referred to under 4.1 above may also be a useful tool.

## 6. Concluding remarks

The Guidelines, when used together with the Principles, form a useful tool to improve corporate governance of SOEs in any jurisdiction around the world. Not only for SOEs controlled by central government but also for sub-national level controlled SOEs.

Although intended for use by policy makers other stakeholders may well use the Guidelines as a benchmark in their relations with and assessment of SOEs. For now it has yet to become clear whether indeed the Guidelines are being used for said purposes.

The Guidelines are also important from another perspective: in May 2007 the OECD countries agreed to invite Chile, Estonia, Israel, Russia and Slovenia to open discussions for membership of the OECD and also offered enhanced engagement, with a view to possible membership, to each of Brazil, China, India, Indonesia and South Africa. The dominating role of SOEs in particular in each of Russia, China and India may thus play an important role in membership negotiations.

As far as practical use (for example with respect to implementation and enforcement) is concerned, the Guidelines might be compared with the Principles. The Principles have shown their value over the recent years; both legisla-

25. *Nota Deelnemingenbeleid Rijksoverheid, Kamerstukken II 2001/02, 28 165, nr. 2, 18 december 2001.*

26. The English language version of the website (<[www.minfin.nl](http://www.minfin.nl)>), notably, still refers only to the 2001 policy.

27. See also DNB's website <[www.dnb.nl](http://www.dnb.nl)>.

28. This means that AFM supervises the conduct of the entire financial market sector: savings, investment, insurance and loans. By supervising the conduct of the financial markets, AFM aims to make a contribution to the efficient operation of these markets; see also <[www.afm.nl](http://www.afm.nl)>.

29. *Brief van de Minister van Financiën en de Minister President, Minister van Algemene Zaken, Kamerstukken II 2008/09, 31 371, nr. 12, p. 5.*

30. See also <[www.regeringen.se/sb/d/8908](http://www.regeringen.se/sb/d/8908)>.

tors and regulators have used the Principles as the benchmark for drafting new rules on corporate governance. It is to be seen what the influence of the Guidelines will be. In potential their influence may be significant considering the very topic they deal with, i.e. the role of the state as an owner of (commercial and non-commercial) enterprises. A topic which is also closely connected to corporate governance of *sovereign wealth funds*.<sup>31</sup> If sovereign wealth funds are to be considered as a *species* of the *genus* SOEs, no doubt the Guidelines will be used by different stakeholders even more frequently in the years to come.

In view of the recent nationalisations of banks in several European countries the relevance of both the Guidelines and the Guide is underlined. Policymakers and politicians in the relevant countries should assess if and how the Guidelines

are implemented and whether the Guide can be used as an implementation tool. The Netherlands government may take a commendable role in assessing its state owner policy pursuant to the Fortis Nederland nationalisation.

31. In early 2008 a group of the world's largest sovereign wealth funds ('SWFs') together formed the International Working Group ('IWG') facilitated by the IMF. The IWG on 8 September 2008 has reached a preliminary agreement on a set of voluntary practices and principles in three key areas: (i) SWFs legal and macroeconomic framework; (ii) governance and institutional structures, and (iii) investment and risk management practices (the *Generally Accepted Principles and Practice for Sovereign Wealth Funds* (also referred to as the GAPP or 'Santiago Principles')); see also the specific part of the IMF website dealing with SWFs, <[www.iwg-swf.org/](http://www.iwg-swf.org/)>.

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## Effectenrecht in internationale situaties – revisited

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### 1. Inleiding

Dit artikel is een vervolg op het gelijknamige artikel uit 2002 over de werking van het effectenrecht in internationale situaties.<sup>2</sup> De kern van dat artikel was dat de Nederlandse effectenwetgeving in internationale situaties een ongewenste extraterritoriale werking heeft. Sindsdien is de effectenwetgeving ingrijpend gewijzigd. Het betreft met name:

- de implementatie per 1 juli 2005 van de Prospectusrichtlijn (2003/71/EG) in de Wte 1995;
- de implementatie per 1 oktober 2005 van de Richtlijn Marktmissbruik (2003/6/EG) in de Wte 1995;
- de overbrenging per 1 januari 2007 van de Wte 1995 en andere wetten naar de Wft;
- de implementatie per 28 oktober 2007 van de Overnamerichtlijn (2004/25/EG) in de Wft;
- de implementatie per 1 november 2007 van de MiFID (2004/39/EG) in de Wft;
- de voorziene implementatie per 1 januari 2009 van de Transparantierichtlijn (2004/109/EG) in de Wft.

De verschillende richtlijnen en de implementatie daarvan in de Nederlandse effectenwetgeving voorzien in een gewijzigde territoriale werking. Reden genoeg voor een hernieuwde analyse van de werking van het effectenrecht in internationale situaties. Het artikel uit 2002 had betrekking op in de Wte 1995 geregelde onderwerpen (aanbiedingen van effecten, informatievoorziening, openbare biedingen, effecteninstellingen, effectenbeurzen en gebruik van voorwetenschap). Al deze onderwerpen zullen – met inachtneming van de gewijzigde terminologie – ook in dit artikel aan de orde komen. Daarnaast zal worden ingegaan op de thans in de Wft opgenomen regelgeving ten aanzien van melding zeggenschap en kapitaalbelang. Achtereenvolgens komen aan de orde: aanbieden van effecten en toelating tot de handel op een gereguleerde markt, informatievoorziening door uitgevende instellingen en melding zeggenschap en kapitaalbelang, openbaar bod, beleggingsondernemingen, gereguleerde markten en marktmissbruik. Behoudens de regelgeving ten aanzien van beleggingsondernemingen, is alle regelgeving opgenomen in Deel 5 van de Wft (Gedragstoezicht financiële markten). De regelgeving ten aanzien van beleggingsondernemingen voor zover het betreft de toetreding tot de markt is opgenomen in Deel 2 van de Wft (Markttoegang financiële ondernemingen). Ten tijde van het schrijven van dit artikel was Hoofdstuk 5.1a van de Wft (Regels voor informatievoorziening door uitgevende in-

stellingen) nog niet van kracht. Voor dit artikel is uitgegaan van de tekst van het wetsvoorstel zoals aangenomen door de Eerste Kamer.<sup>3</sup>

### 2. Aanbieden van effecten en toelating tot de handel op een gereguleerde markt

De territoriale werking van de regelgeving ten aanzien van het aanbieden van effecten is ten opzichte van 2002 aanmerkelijk gestroomlijnd. Met de implementatie van de Prospectusrichtlijn in de Wte 1995 is het 'in of vanuit Nederland'-criterium verlaten. Overeenkomstig de Prospectusrichtlijn is de Nederlandse regelgeving nog slechts relevant indien effecten in Nederland worden aangeboden of toelating wordt verzocht tot de handel op een gereguleerde markt in Nederland. Aanvankelijk was het 'in of vanuit Nederland'-criterium nog wel van toepassing op zogeheten niet-richtlijn effecten. Dit waren effecten die niet vielen onder het begrip effecten uit de Prospectusrichtlijn (met name ten aanzien van de vereiste verhandelbaarheid). Met de invoering van de Wft is de gehele regeling voor niet-richtlijn effecten komen te vervallen. De huidige regelgeving zoals opgenomen in Hoofdstuk 5.1 van de Wft beperkt zich tot verhandelbare effecten met uitzondering van verhandelbare deelnemingsrechten in een open-end beleggingsinstelling.<sup>4</sup> Art. 5:2 Wft bepaalt kort en goed dat het is verboden in Nederland effecten aan te bieden aan het publiek of effecten te doen toelaten tot de handel op een gereguleerde markt in Nederland, tenzij ter zake van de aanbieding of de toelating een prospectus algemeen verkrijgbaar is dat is

1. Mr. R.J. Botter is advocaat in Amsterdam.
2. R.J. Botter & S.A.J. van Rossum, 'Effectenrecht in internationale situaties; de (ongewenste) extraterritoriale werking van de Nederlandse effectenwetgeving', *Ondernemingsrecht* 2002, p. 125-132.
3. Wijziging van de Wet op het financieel toezicht en enige andere wetten ter implementatie van Richtlijn 2004/109/EG, *Kamerstukken II* 2007/08, 31 093. Het wetsvoorstel is op 23 september 2008 door de Eerste Kamer aangenomen. De definitieve tekst is opgenomen in een gewijzigd voorstel van wet zoals ingediend bij de Eerste Kamer (*Kamerstukken I* 2007/08, 31 093, A).
4. De uitzondering voor verhandelbare deelnemingsrechten in een open-end beleggingsinstelling is als vrijstelling opgenomen in art. 5:2a Vrijstellingsregeling Wft. Met de invoering van Hoofdstuk 5.1a van de Wft, zal de uitzondering worden opgenomen in art. 5:1a lid 2 Wft.