

DE BRAUW
BLACKSTONE
WESTBROEK

DNB and the AFM create regulatory sandbox

The Dutch Central Bank (DNB) and the Netherlands Authority for the Financial Markets (the AFM) have published a paper describing the next steps in facilitating an adequate supervisory approach towards innovative financial services and activities. One of these steps is the creation of a Dutch regulatory sandbox - an environment in which tailor-made solutions are created in order to safely test innovative products and business models. Furthermore, the DNB and the AFM will facilitate innovative businesses by offering the possibility of partial authorisations and by further exploring the existing options for them to issue authorisations with requirements and to provide businesses with an opt-in banking authorisation. This Legal Alert outlines the core features of the regulatory sandbox and the partial authorisations.

Regulatory Sandbox

In the context of the regulatory sandbox, the relevant regulator (either DNB or the AFM) will assess whether the applicants and their innovative concepts comply with the underlying purposes of applicable financial markets regulations rather than the strict letter of the law.

The relevant regulator will assess whether the applicant cannot reasonably be held to comply with specific relevant policies, rules or regulations. As an example, the regulators describe a situation in which a financial institution has developed a superior method for complying with rules pertaining to sound and controlled business operations using blockchain technology. By using this innovative method, however, the financial institution might deviate from standard or prescribed models or methods for ensuring sound and controlled business operations. Within the regulatory sandbox framework the relevant regulator may grant dispensation from these models or methods for a specified period of time and, if necessary, under specific tailor-made requirements.

Similarly, financial institutions introducing an innovative business model for which the current policies, rules and regulations do not yet provide a fitting regulatory framework (e.g. a new form of investment management) may be allowed to test their business model as long as they comply with the underlying purpose of the applicable financial markets regulation.

In addition, DNB and the AFM invite businesses that are experimenting with innovative non-regulated (e.g. by way of a regulatory exemption) financial activities to involve DNB or the AFM in the development of those operations. DNB and the AFM offer to help identify the risks and drawbacks of the innovative operations at an early stage. This would then add value when such operations are (eventually) brought into the financial regulatory

framework following successful experimentation.

Evaluating the tailor-made solution and amendment of established policies, rules and regulations

After a predetermined period, the relevant regulator will evaluate the tailor-made solution. The regulator may then decide to adjust, continue indefinitely, or terminate the tailor-made solution. The relevant regulator will also assess the effect of the tailor-made solution in relation to established policies, rules or regulations. In that context the regulator may, for example, declare the tailor-made solution universally binding if it is proven to improve the established policies, rules or regulations. If the relevant policies, rules and regulations fall outside their domain, the regulators may propose an amendment to the competent national or European authority.

Limitations to tailor-made solutions

The ability of the regulators to provide tailor-made solutions is limited by the extent to which the regulators are allowed to deviate from established policies, rules or regulations. Regulators will therefore have ample manoeuvrability regarding open legal standards – such as the required duty of care. In a framework where the ECB has exclusive competence, a tailor-made solution will only be possible if the Single Supervisory Mechanism supports the relevant interpretation or deviation.

Eligibility

The regulatory sandbox is open to all financial institutions – both aspiring and authorised – exploring an innovative concept aimed at contributing to the stability of the financial sector, the operation of the financial markets or sustainable financial wellbeing of consumers and investors. Additionally, the applicant's innovative concept must be currently hindered by policies, rules or regulations which the applicant cannot reasonably be held to comply with. Finally, in order to be eligible for the regulatory sandbox, the applicant has to show that adequate measures and procedures aimed at protecting the applicant and the interests of all relevant stakeholders are in place. These measures and procedures must guarantee that the innovative concept:

- is clearly described and defined, and that clear timelines are in place;
- is ready for use in a realistic environment;
- does not endanger the sound and controlled business operations of the applicant if the concept proves unsuccessful.

The regulatory sandbox will be available from 1 January 2017. Innovative businesses may apply to their relevant regulator in each phase of development. Applications are treated confidentially. The regulatory sandbox will not involve any extra charges. Regular costs for authorisation and continuous supervision however do apply.

Partial authorisation

In addition to the regulatory sandbox, the regulators offer innovative businesses the possibility to apply for partial authorisation. Partial authorisation may be issued when a financial institution does not wish to engage in all operations governed by a full authorisation or is not yet able to meet all eligibility requirements for such an authorisation. Partial authorisation may be granted on a temporary basis but may also have a more permanent nature. As such, partial authorisation may be used by businesses to develop a full-fledged financial institution step by step.

Impact of the regulatory sandbox and partial authorisation

We believe the regulatory sandbox and possibility of issuing partial authorisation will support innovation in the financial services sector. The power of the regulatory sandbox lies in its specificity. Applications for the regulatory sandbox are confidential and the tailor-made solutions are by definition individual. The tailor-made solutions will therefore not set precedent and do not constitute universally binding policies. As a result, we expect the regulators to be readily approachable and have a positive and constructive attitude towards innovation. In addition, the discussion on the underlying purpose of financial markets regulation is likely to drive the efficiency of financial supervision.

De Brauw can help

To ensure an efficient and effective process, the financial institution must have a well prepared plan and have already analysed whether or not its innovative product or innovative business process constitutes a regulated service. With our experience working with the InnovationHub of DNB and the AFM, we can assist you in preparing the analysis and in the ongoing discussions with DNB or the AFM. Please contact us if you want to discuss whether your idea may be eligible for a tailor-made solution.