The Banking Regulation Review

Seventh Edition

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EDITOR'S PREFACE

Nearly eight years after the collapse of Lehman Brothers it might have been expected that fundamental questions about the business models, governance and territorial scope of large banks would have been answered clearly, but that is not yet truly the case. Debates rage on in many countries about 'too big to fail', management accountability in banks, resolution planning and conduct issues in the banking sector. What is the 'safest' form of international banking and what might shareholders in banks reasonably expect as a long-term rate of return on their investment? When is all this uncertainty going to end? Perhaps it never will for so long as large banks remain as important to the global economy as they are and the political classes throughout the world remain divided on whether this is a good thing. It is also worth remembering that the reform agenda that was born in the financial crisis of 2007–2009 established a very long implementation period – to 2019 and beyond – for many of the regulatory changes agreed upon by the G20 and the Basel Committee. So we are still in the midst of what will no doubt be seen in decades to come as the 'post-crisis' period in banking regulation.

Looking forward then, what can we see beyond the implementation of the post-crisis reforms? That depends, of course, in part on whether there is another cross-border banking crisis. It is worth noting in this context that localised banking failures remain commonplace, and with more countries around the world introducing specialised bank resolution regimes there will be further opportunities to test the uses and pitfalls of bail-in and other resolution powers.

The continuing debate about the impact of technology on banks has increased significantly in volume in much of the world in the past year. Forecasts of the eventual eclipse of banks by technology firms seem wide of the mark in the short to medium term, although there is clearly an 'adapt or die' threat to many banks in the longer term. One adaptation of sorts that we may well see more of in the next few years is banks acquiring technology firms (or otherwise entering into strategic partnerships with them).

The most obvious benefits of new technology in the banking sector concern the customer interface and market infrastructure. However, some important but less immediately obvious ways in which technology will continue to revolutionise banking arise in the context of the safety and soundness of banks. For example, some banks are looking at how innovative uses of technology can improve their risk management, and ultimately the credibility of their recovery and resolution plans through, for example, more precise classification and management of derivative positions and counterparty relationships.

Many of the largest cross-border regulatory investigations into past conduct in the banking sector have drawn to a close over the past year. While for some that signalled the close of a painful and costly chapter in the post-crisis development of the banking sector, it remains difficult to conclude that the threat of further such investigations has gone away.

As an English lawyer it would be odd if I did not mention the June 2016 referendum in the UK on membership of the European Union, parochial though that may seem to some readers outside Europe. The legal and regulatory regime that will apply to business that banks undertake in and from London is, however, of global interest, and the result of the referendum, and its aftermath, will therefore be of very considerable importance to all large banks and many smaller ones.

This seventh edition of *The Banking Regulation Review* contains chapters provided by authors in 39 countries and territories in March and April 2016, as well as chapters on International Initiatives and the European Union. My sincere thanks, as in previous years, go to the authors who have made time to contribute their chapters despite their heavy workload.

The team at Law Business Research have, once again, tolerated the hectic schedules and frequent absences on business of many of the authors, and I would like to thank them for doing so with such good humour and understanding. Thank you also to the partners and staff of Slaughter and May in London and Hong Kong for continuing to encourage projects such as this book, and in particular to Ben Kingsley, Peter Lake, Nick Bonsall, Edward Burrows, Tim Fosh, Kristina Locmele and Helen McGrath.

Jan Putnis
Slaughter and May
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Chapter 26

NETHERLANDS

Mariken van Loopik and Maurits ter Haar[1]

I INTRODUCTION

The Netherlands has a long history as an open trading nation, with household name institutions ING Bank, cooperatively owned Rabobank and ABN AMRO operating worldwide. The Dutch banking sector is highly concentrated with this same small group of systemically important banks accounting for the bulk of domestic lending to households and businesses. The lion's share of Dutch savings is held in accounts with these banks, and they also handle most non-cash payment processing. Measured against the size of the Dutch economy, the Dutch banking sector is large. In 2014, the size of the assets relative to the GDP of the Netherlands amounted to 400 per cent although the trend in recent years has been downward as banks deleveraged to meet the new capital requirements.[2]

Despite the modest economic recovery, Dutch banks (and others) are still operating within a challenging environment. This is caused by the need for banks to adjust their business models to market conditions characterised by, *inter alia*, low or negative interest rates and a slowdown in growth, and to a regulatory landscape that continues to change in various respects, mainly due to various new measures at the European level.[3]

1 Mariken van Loopik is a partner and Maurits ter Haar is a senior associate at De Brauw Blackstone Westbroek.

2 Dutch Central Bank, Perspective on the structure of the Dutch banking sector, 18 June 2015; KPMG report, the state of Dutch banks in 2015, July 2015.

3 Most important among these measures are the Capital Requirements Directive IV (2013/36/EU) (CRD IV) and the Capital Requirements Regulation (575/2013) (CRR), the Regulation regarding the Single Supervisory Mechanism (1024/2013) (the SSM Regulation), the Deposit Guarantee Scheme Directive (2014/49/EU), the Markets in Financial Instruments Directive II (2014/65/EU) (MiFID II), the Regulation on Markets in Financial Instruments

II THE REGULATORY REGIME APPLICABLE TO BANKS

i Basic structure of banking regulation

The Netherlands has a 'twin peaks' supervision model. This model focuses on system and prudential supervision on the one hand, and conduct-of-business supervision on the other. The European Central Bank (ECB) and the Dutch Central Bank (DCB) are the system and prudential supervisors. For its part, the Netherlands Authority for the Financial Markets (AFM) is responsible for the conduct-of-business supervision, which is aimed at fostering orderly and transparent market processes, maintaining integrity in the relationship between market parties and overseeing due care in the provision of services to customers. This cross-sectoral functional approach is reflected in the Dutch Financial Markets Supervision Act (FMSA), which came into force on 1 January 2007. The FMSA and the various decrees and regulations deriving from it include the majority of regulatory rules that apply to the financial markets. Many of the rules contained in the FMSA follow from the implementation of European directives.[4] However, with the aim of further integrating the single market, more and more regulatory requirements are adopted in the form of European regulations.

ii Regulation of banks with registered office in the Netherlands

Banks established in the Netherlands are required to obtain a banking licence from the ECB. The DCB is responsible for the processing of licence applications. To obtain a banking licence, banks must, *inter alia*, comply with the following requirements:

- *a* the day-to-day policymakers of a bank and its management team members[5] must be suitable for the banking business; in addition, the members of the supervisory board (or comparable body) should also be suitable for the performance of their supervisory tasks;
- *b* the integrity of the persons determining or co-determining the day-to-day policy, the management team members and the members of the supervisory board (or comparable body) of the bank must be beyond doubt;
- *c* the bank must have sound and prudent business operations, including procedures and measures for adequate risk management and client acceptance;
- *d* at least two natural persons should determine the day-to-day policy of the bank and perform their activities from within the Netherlands;
- *e* the supervisory board (or comparable body) should consist of at least three persons;
- *f* the bank must have a transparent control structure safeguarding adequate supervision; and

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(600/2014) (MiFIR), the Bank Recovery and Resolution Directive (2014/59/EU) (BRRD), the Regulation regarding the Single Resolution Mechanism (806/2014) (the SRM Regulation) and the Payment Services Directive II (2015/2366) (PSD II).

4 Including CRD IV, the Markets in Financial Instruments Directive (2004/39/EC), the Payment Services Directive (2007/64/EC), the Acquisitions Directive (2007/44/EC), the Consumer Credit Directive (2008/48/EC) and the Electronic Money Directive (2009/110/EC).

5 Since 1 April 2015, the DCB also screens the bank's management team members (i.e., the bank's senior officers who work directly below the level of the day-to-day policymakers and who are responsible for those persons whose activities may have a material impact on the bank's risk profile) on suitability and integrity.

g the bank must comply with certain financial safeguards, such as minimum own funds, solvency and liquidity requirements.

Once the licence has been granted, these requirements must be complied with on an ongoing basis. Dispensation may be granted from certain specific requirements for obtaining a banking licence provided the applicant demonstrates that he or she cannot reasonably comply with the requirements, and that the objectives the requirements seek to protect can be achieved through alternative means.

In addition, only licensed banks may use the word 'bank' or translations or forms thereof in their names or in the conduct of their business.

If a bank wishes to render investment services or perform investment activities in the Netherlands, it must apply for a wider banking and investment firm licence. In this case, additional licence requirements apply. These relate to the conduct-of-business requirements that investment firms need to comply with (see Section IV, *infra*).

A licensed bank does not need a separate licence for the provision of payment services or certain other financial services also regulated under the FMSA, such as the offering of (consumer) credit, providing advice about financial products (other than financial instruments), and acting as an intermediary with respect to such products. The services involved, however, need to be covered by the banking licence, and the bank involved is subject to additional conduct-of-business rules when offering such services (see Section IV, *infra*).

iii Regulation of foreign banks and activities

In general, branches of foreign banks established to carry out regulated banking activities in the Netherlands are subject to the same licence requirements and ongoing obligations as banks with a registered office in the Netherlands. This means that these branches usually require a banking licence. However, foreign banks with their registered office in another eurozone country may conduct banking activities in the Netherlands under their ECB banking licence, provided the ECB has been notified thereof. Other banks with their registered office in an EU or EEA Member State that is not a eurozone country may conduct certain regulated business through a branch office or on a cross-border basis in the Netherlands without having a Dutch banking licence, provided they hold a 'European passport'. To obtain this passport, banks must at a minimum have obtained a banking licence from the competent authorities in their home Member State covering the business they intend to conduct in the Netherlands. They must also follow a notification procedure there. Those non-eurozone banks holding a European passport in the Netherlands are directly supervised by the ECB under Article 4(2) of the SSM Regulation. The DCB remains responsible for the supervision of non-EEA banks having established a branch or providing cross-border services in the Netherlands.

III PRUDENTIAL REGULATION

i Relationship with the prudential regulator

As the prudential supervisor of the most significant Dutch banks,[6] the ECB has far-reaching investigatory and supervisory powers under the SSM Regulation.[7] In addition, the ECB has at its disposal the supervisory powers granted to the DCB under the FMSA. To the extent necessary to carry out the tasks conferred on it by the SSM Regulation, the ECB may require the DCB to use these powers.[8] The DCB will in principle exercise its enforcement powers under the FMSA regarding the banks that are identified as 'less significant'. Under the FMSA, the DCB is entitled to enter any place for inspection and may request information from any party. The DCB is also entitled to request business data and documents for inspection and to make copies of these. Everyone is obliged to fully cooperate with the DCB. If the DCB concludes that a bank has violated a rule under the FMSA or, if applicable, a European regulation, it may take enforcement action. The DCB can choose from various enforcement measures and sanctions, including, but not limited to:

a imposing a certain course of action in order to comply with the FMSA (instruction order);
b appointing one or more persons as trustee over all or certain bodies or representatives of a bank;
c imposing a particular duty, backed by a judicial penalty for non-compliance;
d imposing an administrative fine;
e publishing an imposed duty or fine on the DCB's website and by press release;
f imposing a suspension of voting rights of shareholders or partners responsible for a breach of a bank's licence or declaration of no objection requirement (see Section VI, *infra*);
g imposing a temporary ban against a natural person who is held responsible for non-compliance with the CRR provisions from exercising his or her functions;
h imposing certain measures including, but not limited to, higher solvency or liquidity requirements and the termination of banking business activities with a high risk to the solidity of the bank;
i requesting the Amsterdam District Court to declare the emergency regulation applicable; and
j withdrawing the banking licence; the ECB will be exclusively responsible for the withdrawal of a banking licence of both significant and 'less significant' Dutch banks.

The liability of the DCB (and the AFM) under the FMSA is limited to wilful misconduct and gross negligence.

6 ING Bank, ABN AMRO, Rabobank, SNS Bank, Nederlandse Waterschapsbank (NWB), Bank Nederlandse Gemeenten (BNG) and the Royal Bank of Scotland (RBS) have been identified as such.

7 The ECB may request information, conduct general investigations and carry out on-site inspections (see Articles 10 to 13 SSM Regulation); specific supervisory powers include substantial powers of early intervention, and the right to impose fines and other administrative sanctions (see Articles 14 to 16 SSM Regulation).

8 Article 22 SSM Framework Regulation (ECB Regulation 468/2014).

ii Management of banks

Most Dutch banks are limited liability companies. Although a statutory basis exists for the creation of a one-tier board structure, limited liability companies in the Netherlands traditionally have a two-tier board structure composed of a managing board and a supervisory board. The managing board is responsible for carrying out the company's day-to-day affairs. As such, a bank's managing board is responsible for compliance with the FMSA. The managing and supervisory boards are jointly responsible for compliance (on a comply-or-explain basis) with the Dutch Corporate Governance Code, adherence to which is mandatory for listed Dutch banks.[9] The Code includes principles that are held to be generally accepted, as well as detailed best practice provisions relating to both managing and supervisory boards, the general meetings, the auditing process and the external auditor. The Dutch Banking Code[10] contains principles that are based on the Dutch Corporate Governance Code, but focuses on the managing and supervisory boards, risk management, auditing and remuneration policy of banks. The Banking Code applies on a comply-or-explain basis to all banks with a banking licence under the FMSA and compliance is monitored by a special monitoring commission. The Dutch Banking Association recommends that the Banking Code be applied by all entities that operate in the Netherlands (irrespective of their country of incorporation), including banks operating in the Netherlands under a European passport. Under the rules based on the CRD IV, managing and supervisory board members of the most significant banks may in principle not hold more than one executive and two non-executive positions, or four non-executive positions.

Restrictions on remuneration

A far-reaching Act on financial sector remuneration entered into force on 7 February 2015. One of the most important changes is that the variable remuneration of all persons working under the responsibility of banks with their registered office in the Netherlands and Dutch branches of banks outside the EEA may not exceed 20 per cent of the fixed component. Several exceptions apply, including for persons working predominantly in another country and, subject to approval by the DCB or the ECB, for retention bonuses. In such cases, the maximum variable remuneration is as set out in CRD IV: 100 per cent of the fixed component or, depending on the exception, 200 per cent subject to shareholder approval. The Act also restricts severance payments. Moreover, the supervisory board may (and under certain circumstances must), *inter alia*, claw back bonuses where payment was based on incorrect information or the non-achievement of underlying objectives and revise bonus payments if these were unacceptable according to standards of reasonableness and fairness. The rules also provide for a statutory ban on bonuses for management (and certain others) of state-aided banks.

9 Non-listed banks often apply the Dutch Corporate Governance Code on a voluntary basis.

10 The original Banking Code was applicable as of 1 January 2010. A revised Banking Code entered into force on 1 January 2015.

iii Regulatory capital and liquidity

Rules of prudential supervision are provided for in the FMSA, the Decree on Prudential Supervision FMSA, the CRR and regulations issued by the DCB. These rules relate to, *inter alia*, solvency (regulatory capital), liquidity and additional supervision with respect to financial conglomerates.

Solvency

Licensed banks are required to be sufficiently solvent. The Decree on Prudential Rules FMSA provides that a bank's solvency is sufficient if the bank complies with the requirements set out in Part 3 of the CRR. These requirements include both quantitative requirements (i.e., a Common Equity Tier 1 (CET 1) capital ratio of 4.5 per cent of the bank's risk-weighted assets (RWA), a Tier 1 capital ratio of 6 per cent of a bank's RWA and a total capital ratio of 8 per cent of a bank's RWA) and qualitative requirements (conditions own fund items and subordinated liabilities must meet to qualify as CET 1 capital, Additional Tier 1 capital or Tier 2 capital). The DCB or the ECB may also impose an additional 'pillar 2' buffer on a specific bank following the supervisory review and evaluation process when they identify risks not adequately covered by the standard capital requirements.

The DCB has issued a regulation on the specific provisions set out in CRD IV and the CRR (the DCB CRD IV and CRR regulation). The DCB CRD IV and CRR regulation sets out how the DCB uses certain options and discretions that the CRR grants to competent national authorities, including a number of (transitional) provisions set out in the CRR, and implements the method for calculating the maximum distributable amount. For significant banks, the ECB in March 2016 published a regulation setting out how it will use these options and discretions.

Capital buffers

CRD IV introduces four capital buffers:

a a capital conservation buffer equal to 2.5 per cent CET 1 capital;

b an institution-specific countercyclical capital buffer of a percentage, in principle, between zero and 2.5 per cent CET 1 capital;

c a global systemically important institutions (G-SII) buffer of a percentage, in principle, of between 1 and 3.5 per cent CET 1 capital; or an other systemically important institutions (O-SII) buffer of a percentage, in principle, of between zero and 2 per cent CET 1 capital; and

d as a Member State option, a systemic risk buffer of a percentage, in principle, between 1 and 3 per cent CET 1 capital.

With regard to the G-SII, O-SII and systemic risk buffers, in principle only the highest of the three applies. In the Netherlands, the G-SII buffer only applies to ING Bank (1 per cent), and the O-SII buffer applies to ING Bank, Rabobank, ABN AMRO (each 2 per cent) and SNS Bank and BNG (each 1 per cent). The government has chosen to apply a systemic risk buffer of 3 per cent to ING Bank, Rabobank and ABN AMRO. In December 2015, DNB set the countercyclical capital buffer at zero per cent. The necessity of increasing this percentage will be reviewed on a quarterly basis.

As a result, banks can be subject to a combination of buffers, referred to as the combined buffer requirement. When banks fail to meet the combined buffer requirement, specific restrictions apply and certain measures may be imposed, such as a limitation to make distributions or payments in connection with their CET 1 and Additional Tier 1 instruments, and the required production of a capital conservation plan including at least an estimate of income and expenditure and a forecast balance sheet, measures to increase the capital ratios, and a plan and time frame for increasing the own funds with the objective of meeting the combined buffer requirement.

Liquidity

Banks must hold sufficiently liquid assets.[11] The Decree on Prudential Rules FMSA provides that the liquidity of a bank is sufficient if the existing liquidity at least equals the required liquidity. At present, due to the phase-in of the liquidity framework of the CRR, three parallel liquidity requirements are applicable. First of all, banks must comply with the two liquidity requirements of the CRR: the liquidity coverage ratio (LCR) and stable funding requirement. The LCR, as further specified in the LCR delegated regulation, has a binding minimum of 60 per cent in 2016, 80 per cent in 2017 and 100 per cent in 2018 and after.[12] For the stable funding requirement currently only a general rule exists requiring institutions to ensure that their long-term obligations are adequately met with a diversity of stable funding instruments under normal and stress conditions. A binding minimum standard for a net stable funding ratio (NSFR) has yet to be determined.

Second, in addition to the phase-in of the LCR, the DCB requires Dutch banks and Dutch branches of non-EEA banks to comply with a national LCR (NLCR) of 100 per cent as of 1 October 2015.[13] An exception is applicable to Dutch banks that do not have a bank as a subsidiary. The difference between the LCR and NLCR is solely that, subject to conditions, the latter allows the netting of liquidity outflows and inflows for cash pooling products. The NLCR will only apply until the LCR is fully phased-in or until the DCB so decides at an earlier date, at which point the LCR of 100 per cent will start to apply.

Finally, Dutch banks, but not Dutch branches of EEA banks, are still required to continue to report to the DCB on the basis of the previous Dutch liquidity requirements until the end of 2016.[14]

Leverage ratio

Banks are required to calculate their leverage ratios in accordance with the methodology set out in Part 7 of the CRR, report such to the relevant supervising authority and disclose them. A binding minimum leverage ratio has not yet been introduced. Calibration at the level of the Basel Committee will be finalised in the course of 2016. The Dutch Minister of Finance has indicated that he intends to pursue the introduction of a harmonised minimum leverage ratio requirement of 4 per cent for all systemically important banks in the Netherlands (as well as in the EU as a whole) by 2018.

Consolidated application of regulatory capital and liquidity requirements

The above-mentioned capital, liquidity and leverage requirements apply to banks on both an individual and consolidated basis. The DCB or ECB may, when certain criteria are met, waive

11 Section 3:63 et seq. of the FMSA.

12 Regulation (EU) 2015/61.

13 DCB regulation on phase-in and reporting of the LCR for banks, October 2015.

14 On the basis of the DCB regulation on liquidity FMSA 2011.

the requirement to comply on an individual basis. The capital and leverage requirements apply on the basis of the consolidated situation of a bank's highest holding entity in each Member State and in the EU as a whole. The liquidity requirements must be met on the basis of the consolidated situation of the highest holding entity in the EU. In addition, application of the capital requirements on a sub-consolidated basis applies in case of subsidiary banks, investment firms or financial institutions in a third country.

Supplementary supervision of banks in a financial conglomerate

The FICO Directive[15] was implemented in the FMSA and the Decree on Prudential Supervision of Financial Groups FMSA. The FICO Directive introduces supplementary supervision of banking (insurance and investment) activities carried out in a financial conglomerate. The rules relate, *inter alia*, to supplementary capital adequacy requirements, risk concentration, intra-group transactions, internal control mechanisms and risk management processes. The holding company of a financial conglomerate must calculate the supplementary capital adequacy in accordance with certain methods described under the FMSA.

DCB policy rule in respect of EBA guidelines

In the Netherlands, most guidelines issued by the European Banking Authority (EBA) in accordance with Article 16 of the EBA Regulation are applied by the DCB.[16] To indicate which guidelines the DCB applies, it has issued a policy ruling in which it has listed the EBA guidelines it applies, which include the Guidelines on internal governance (GL44), and the Guidelines for the joint assessment of the elements covered by the supervisory review and evaluation process (SREP) and the joint decision regarding the capital adequacy of cross-border groups (CP39).

iv Recovery and resolution

BRRD and SRM

The Dutch Act implementing the Banking Recovery and Resolution Directive (BRRD) entered into force on 26 November 2016 and the SRM Regulation became fully applicable on 1 January 2016. These two legal acts, together with the international agreement on the transfer and mutualisation of contributions to the Single Resolution Fund, provide a comprehensive European framework for the recovery and resolution of banks.

The new rules aim to ensure that banks and authorities make adequate preparation for crises, that supervisory authorities are equipped with the necessary tools to intervene at an early stage when a bank is in trouble, that resolution authorities have the necessary tools to take effective action when bank failure cannot be avoided, including the power to 'bail-in' creditors, and that banks contribute to an *ex ante* funded resolution fund. The DCB has been designated as the national resolution authority for the Netherlands. However, for significant banks and other cross-border groups in the eurozone, the Single Resolution Board (SRB) forms, on the basis of the SRM Regulation, together with the national resolution authorities, the Single Resolution Mechanism. The SRB and DCB are expected to adopt resolution plans for the major Dutch banks in the course of 2016, including the bank-specific minimum requirement for own funds and eligible liabilities (MREL). The exact calibration

15 Directive 2002/87/EC as amended by Directive 2011/89/EU.

16 Regulation (EU) 1093/2010.

and method of calculation of the MREL, including any requirement for such liabilities to be subordinated, is still uncertain, as is the European method of implementation of the international standard for total loss-absorbing capacity (TLAC), which was finalised by the Financial Stability Board in November 2015.

Deposit insurance

The Decree implementing the (third) Deposit Guarantee Scheme Directive into Dutch law entered into force on 26 November 2015.[17] The new rules introduce an *ex ante* funded guarantee scheme with wider coverage and shorter pay-out periods. The fund should in principle reach a target level of 0.8 per cent of insured deposits. However, in view of the highly concentrated Dutch banking sector, which makes the use of resolution proceedings, as opposed to liquidation and use of the deposit guarantee fund, in case of failure very likely, the Netherlands has requested the Commission to approve a lower target level of 0.5 per cent. No decision has yet been taken by the Commission.

Dutch Intervention Act

Ahead of the BRRD and the SRM Regulation, Dutch rules for bank recovery and resolution were introduced by the Dutch Intervention Act in 2012. Pursuant to this Act, the DCB had the power to take various measures in respect of banks if it perceived signs of dangerous developments regarding the bank's solvency or liquidity. These powers, and the criteria that must be met to use them, have been replaced by those following from the implementation of the BRRD. The powers granted by the Act to the Minister of Finance to take immediate measures if he is of the view that the situation of a bank causes a serious and immediate danger to the stability of the financial system continue to apply. These include the temporary suspension of shareholder voting rights, the suspension of management or supervisory board members, and the expropriation of assets or liabilities of a bank or its parent companies with a corporate seat in the Netherlands.

IV CONDUCT OF BUSINESS

i Conduct-of-business rules

Conduct-of-business rules for banks are for the most part set forth in the FMSA. Compliance with many of these rules is in practice supervised primarily by the DCB or the ECB, or both, because there is an overlap with the requirements for obtaining a banking licence (see Section II, *supra*). Compliance with the remaining conduct-of-business rules, including those set out in the Decree on conduct-of-business supervision FMSA, is supervised by the AFM. These rules mostly relate to the activities of a bank as a financial services provider, a payment services provider or an investment firm (providing investment services or investment activities). This means that a bank will in practice be subject to conduct-of-business rules that are supervised by the AFM if it:

a provides investment services or performs investment activities (rules relating to, *inter alia*, client classification, the provision of information, know-your-customer requirements, conflicts of interest, best execution, inducements and customer-order handling rules);

17 Directive 2014/49/EU.

b offers or advises on mortgage or consumer credit or offers electronic money to consumers (requirements as to, *inter alia*, adequate measures to protect clients' rights, outsourcing and the availability of an internal complaints regulation); or

c provides payment services (requirements as to, *inter alia*, information obligations of the payment service provider towards its (potential) clients and the availability of an internal complaints regulation).

ii Consumer and mortgage credit

Under the FMSA, banks must comply with certain conduct-of-business rules when offering credit to consumers. Irrespective of the credit amount,[18] additional requirements may apply to banks (and other entities) pursuant to both the Dutch Civil Code and the Act on Consumer Credit. The additional rules stem mainly from the implementation of the Consumer Credit Directive.[19] These rules relate to the civil law relationship between the bank and the consumer or borrower, and include requirements with respect to pre-contractual information, the form and contents of the credit agreement and the consumer's right to rescind a credit agreement up to 14 calendar days after entering the agreement. Violation of the rules may lead to civil liability. When offering consumer credit, banks must also take into account the 2012 Code of Conduct for Consumer Credit as drawn up by the Dutch Banking Association. In addition, by 21 March 2016 the Mortgage Credit Directive should have been implemented, but the implementing act is delayed and the timing of its entry into force is uncertain. The Mortgage Credit Directive will result in amendments to the FMSA and the Dutch Civil Code, relating *inter alia* to new rules on creditworthiness assessments, information obligations and consumer rights in case of early repayment and arrears and foreclosures.[20]

iii Payment services

Due to the implementation of the Payment Services Directive,[21] payment services providers are subject to certain conduct-of-business requirements under both the FMSA and the Dutch Civil Code. The rules in the Dutch Civil Code relate to the civil law relationship between a payment service provider and client, including the payment service contract governing the execution of payment transactions, the amendment and termination of such contract, the required consent of the payer regarding the execution of a payment transaction, the right of withdrawal, the maximum period to execute payment transactions, and costs and liability. The AFM supervises compliance with all conduct-of-business rules, including those under the Dutch Civil Code. The Dutch Competition Authority (ACM) supervises competition issues relating to access to payment systems. In November 2015, PSD II was adopted.[22] PSD II modernises the current rules on payment services by opening the EU payment market to

18 The Netherlands has chosen to apply the provisions implementing the Consumer Credit Directive (2008/48/EC) to all credit agreements, including those with a value of less than €200 and more than €75,000.

19 Directive 2008/48/EC.

20 Directive 2014/17/EU.

21 Directive 2007/64/EC.

22 Directive (EU) 2015/2366.

payment initiation service providers, introducing new security requirements and enhancing consumer rights. An implementing act is expected to be published for public consultation in the course of 2016.

iv Anti-money laundering and terrorist financing

Pursuant to the Dutch Prevention of Money Laundering and Terrorist Financing Act, licensed banks (and other financial institutions) are subject to a number of obligations so as to prevent money laundering and terrorist funding. Adequate client identification forms an important part of these obligations. Banks must identify clients with whom they intend to establish a continuing business relationship in or from within the Netherlands, or with whom they enter into an incidental transaction, or a series of related transactions, worth €15,000 or more. If a bank suspects that a transaction is related to money laundering or terrorist financing, the Financial Intelligence Unit (FIU) Netherlands must be notified. The FIU is designated to receive information relating to suspicious transactions, to investigate and, if necessary, to report the transactions to the public prosecutor to initiate criminal proceedings. The Third Anti-Money Laundering Directive, on which the Dutch Act is currently based, will be replaced by the Fourth Anti-Money Laundering Directive and accompanying regulation, which were adopted in 2015.[23] The new rules facilitate the work of FIUs to identify and follow suspicious transfers, facilitate the exchange of information between FIUs and establish a coherent policy towards non-EU countries with deficient anti-money laundering regimes. It also introduces a centralised register with information on all ultimate beneficiary owners. An implementing act is expected to be submitted to the Dutch parliament in the course of 2016.

v The bankers' oath, code of conduct and disciplinary measures

Dutch banks must ensure that all persons with an employment contract with the bank or that otherwise carry out activities that are part of the operation of the banking business or its essential supporting business processes take the bankers' oath. The bankers' oath is linked to the bankers' code of conduct and a set of disciplinary measures. A newly established foundation supervises compliance with the code of conduct and can impose disciplinary measures including reprimands, fines and a temporary ban from carrying out a function in the banking sector.

vi Banking secrecy

There is no specific legal provision on banking secrecy in the Netherlands. As a general principle, Dutch law requires banks to keep all client data confidential. This requirement has various sources of origin, including custom, general principles of contract law (i.e., reasonableness and fairness) and the obligation of due care, which stems in turn from the General Banking Conditions used by most banks in the Netherlands. Several exceptions to the 'banking secrecy' requirement apply. The more general exception provides that a bank is authorised to disclose client data to third parties, including regulatory authorities or supervisors, if it is under a statutory obligation to do so (see Section III.i, *supra*). Violation

23 Directive (EU) 2015/849 and Regulation (EU) 2015/847.

of banking secrecy may result in civil liability as a result of a breach of contract or, as the case may be, tort law. Obviously, and perhaps more importantly, violating bank secrecy may also lead to reputational damage.

V FUNDING

Dutch banks raise funds from different sources, including deposits (corporate and non-corporate), interbank (including the ECB) transactions and capital markets funding. In general, Dutch banks are more dependent on financing through the financial markets than other European banks. This is because Dutch banks lend more than banks in other countries, which is mainly due, *inter alia*, to above-average high mortgage loans. The relatively large financing deficit, in combination with a relatively large financial sector in the Netherlands, causes Dutch banks to be vulnerable to problems in the capital markets.[24] The gradual reduction of the loan-to-value limit and increasing competition on the mortgage market from non-banks is expected to reduce this vulnerability.[25] The increased capital requirements are largely being met by deleveraging and retention of profits. However, several large Dutch banks launched successful issues of Additional Tier 1 instruments in 2015. Further issues of debt instruments are to be expected as more certainty is obtained on the calibration of the leverage ratio and on the MREL and TLAC standards.

VI CONTROL OF BANKS AND TRANSFERS OF BANKING BUSINESS

i Supervision of participations in banks

The Acquisitions Directive[26] has been implemented in the FMSA. Each person who holds, acquires or increases a qualifying holding in a bank with corporate seat in the Netherlands requires a declaration of no objection (DNO) from the ECB.[27] The DCB is responsible for processing the DNO application. A 'qualifying holding' is a direct or indirect holding of 10 per cent or more of the issued share capital of the bank, direct or indirect voting power, or a right to exercise equivalent control of 10 per cent or more within the bank. This definition is subject to certain aggregation principles – for instance, voting rights held through subsidiary companies or voting agreements are to be included.[28] Provided the integrity of the person holding the qualifying holding is beyond doubt, the DNO will be granted, unless another ground for refusal applies. A DNO will be refused if:

a the integrity of the proposed acquirer or the persons who as a result of their qualifying holding can determine the day-to-day policy of the bank is not beyond doubt;

b the persons who as a result of their qualifying holding will determine the day-to-day policy of the bank are not fit;

24 The financing deficit is the gap between loans and deposits.

25 DCB, Overview of Financial Stability Autumn 2015.

26 Directive 2007/44/EC.

27 Section 3:95 et seq. of the FMSA.

28 Section 1:1 juncto, Section 5:45 of the FMSA, pursuant to which the Dutch rules implementing the Transparency Directive (2004/109/EC) apply.

c the financial soundness of the proposed acquirer, in particular in relation to the business activities of the bank, is not beyond doubt;

d the qualifying holding would constitute an impediment for the bank to comply with the prudential requirements it is subject to;

e there are reasonable grounds to suspect that, in connection with the acquisition of the qualifying holding, money laundering or terrorist financing is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof; or

f the information provided by the proposed acquirer is incorrect or incomplete (e.g., in the event of a proposed participation of more than 50 per cent, the applicant must submit a detailed business plan with its application for a DNO).

Where the applicant for a DNO is a legal entity, the integrity of all of its directors and other persons, if any, who can determine or co-determine the day-to-day policy of the applicant is tested. An additional DNO must be obtained for every subsequent increase as a result of which a threshold of 20, 33, 50 or 100 per cent is reached or passed.

On the basis of Dutch law, the applicant can request a 'bandwidth' DNO. As long as the qualifying holding remains within the range granted, no additional DNO needs to be obtained for any subsequent increase as a result of which a threshold is reached or passed but only a notification must be made. The applicant can also request a 'group' DNO. If a group DNO is obtained, the scope of applicability of the DNO is extended to all companies within a group collectively and no additional DNOs are required for transfers of qualifying holdings within a group. Recent experiences with the DNO application process with the ECB give reason to doubt whether the ECB applies the Dutch regime for a 'bandwidth' and 'group' DNO. If any control relating to a qualifying holding is exercised without having been granted a DNO or in violation of any conditions attached to a DNO, the resolution adopted will be liable for nullification.

ii Supervision of holdings by and restructuring of banks

In addition to the rules regarding holdings in banks, a bank with corporate seat in the Netherlands must also obtain a DNO from the DCB[29] for:

a acquiring or increasing a qualifying holding in another bank, an investment firm, insurance company or a financial institution with a corporate seat outside the EU or the EEA, unless the balance sheet total of the bank or insurance company involved does not exceed 1 per cent of the consolidated balance sheet total of the acquiring or increasing bank;

b if the target is not a bank, investment firm, insurance company or a financial institution, a DNO will be necessary if the total price paid for the holding amounts to 1 per cent or more of the consolidated balance sheet total of the bank;

c acquiring the whole, or a substantial part, of the assets and liabilities of another enterprise or institution, unless the total amount of the assets or liabilities to be taken over does not exceed 1 per cent of the existing consolidated own funds of the bank; or

d undertaking a financial or corporate restructuring of its own business.

29 If it concerns an application by a significant Dutch bank, the DCB will consult the ECB before granting the DNO.

iii Transfers of banking business

Apart from the rules as set out under the FMSA (see Section VI.i and ii, *supra*) and the antitrust rules,[30] there are no legal provisions in the Netherlands specifically aimed at prohibiting or limiting the transfer of a banking business, either by Dutch entities or by foreign entities. The transfer of a banking business is subject to the general rules of Dutch civil and corporate law, including rules on legal mergers and divisions and on transfers of assets and liabilities. Although cooperation and cross-participation are permitted in the Netherlands,[31] a merger into a single legal entity of a bank and an insurance company is prohibited.

VII THE YEAR IN REVIEW

In the Dutch banking sector, the main event of 2015 was the successful initial public offering by the state of the first batch of shares in ABN AMRO, which had been nationalised during the financial crisis. The state will seek to sell further shares in ABN AMRO in 2016. SNS Bank, the other still state-owned Dutch bank, is also expected to be privatised in the course of 2016, having divested its insurance activities (REAAL) in 2015. ING Bank further decreased its stake in its former insurance business, NN Group, and RBS decided to significantly scale down its Dutch activities. Profits and buffers in the Dutch banking sector are decent, but significant uncertainties remain (see Section VIII, *infra*).

In regulatory terms the year saw the introduction and further development of several significant pieces of EU legislation for the banking sector. This included, most importantly, the entry into force of the Dutch Act implementing the BRRD and the start of operations of the Single Resolution Mechanism, the further development of supervision by the ECB under the Single Supervisory Mechanism, and the continuing phase-in of the CRD IV and CRR capital and liquidity requirements.

On a national level, the year included the entry into force of the Dutch Act on Financial Sector Remuneration, greatly restricting the pay-out of variable compensation and severance pay. The new Dutch Banking Code entered into force, accompanied by the expansion of the banking oath to nearly all persons employed in the banking sector and by the introduction of a set of disciplinary rules and measures. The year also saw the expansion of the group of persons within a bank that are screened on suitability and integrity by the DCB.

VIII OUTLOOK AND CONCLUSIONS

Despite the modest economic recovery and the strengthening by banks of their balance sheets over recent years, the sentiment on the financial markets, and in relation to banking sector securities in particular, is cautious. This is ascribed to uncertainty over the level of non-performing loans, the slowdown in global growth, the impact of financial technology, the low or negative interest rate environment and new regulatory burdens.[32] The start of

30 These rules include that a proposed acquisition or merger of a bank that qualifies as a concentration under the Dutch Competition Act or EU competition rules should be notified to and approved by the ACM or the European Commission.

31 Section 3:36 of the FMSA.

32 DCB, Overview of Financial Stability Autumn 2015 and DCB, Supervision Outlook 2016.

the European Banking Union, with the full operationalisation of the Single Supervisory Mechanism and a Single Resolution Mechanism, should help to create a more stable environment for Dutch (and other eurozone) banks although its supervisory approach requires some familiarisation and is consequently still causing some uncertainty.

Although the main elements are in place, reform of the banking sector is ongoing. In particular the Basel Committee's ongoing 'Basel IV' revisions of the standardised and internal approaches to risk-weighting, including of the standardised approach to credit and market risks and the introduction of new capital floors, are resulting in a high degree of uncertainty in the sector. These proposals are expected to have a significant impact on Dutch banks, in particular for their mortgage business. Other ongoing uncertainties include a number of elements of the BRRD which are still subject to further development and implementation, in particular the setting of the MREL, and the finalisation under Basel III and CRD IV/CRR of the calibration of the minimum leverage ratio and NSFR.

Notwithstanding the above, the post-crisis regulatory reform agenda for the banking sector is slowly nearing completion. Indeed, in the past year the first signs of 'regulatory easing' and stocktaking could be seen, most notably in the form of the announced set of proposals under the Capital Markets Union, launched in September 2015 with the aim of increasing and diversifying funding sources for businesses in Europe and in the form of the Commission's call for evidence of September 2015 on the consistency and coherence of the financial legislation adopted in response to the financial crisis.

Appendix 1

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