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Introduction

The year 2020 was, in many respects, a turbulent year and brought significant challenges to many sectors, including the Dutch financial environment. First, there was the unexpected COVID-19 crisis, which paralysed the whole of society and which led, for consumers and businesses, to an uncertain situation, which uncertainty may go on until the majority of people have been provided with an effective vaccine. Secondly, preparation for upcoming Brexit (deal or no deal) led to further uncertainty, as the EU–UK Trade and Cooperation Agreement (the **TCA**) was concluded in a very late stage of the process and financial institutions had to prepare for Brexit in order to safeguard an uninterrupted provision of services. Whilst market parties did more or less expect that the TCA would be of limited importance for financial services, the total absence of any arrangement as to financial services in the TCA still came as a surprise for many market parties. The fact that the European Commission did not come to an "equivalence decision" for UK financial service providers led to a cut-off of the EU market for those companies.

For the Dutch financial market, Brexit has, though not for all market parties, turned out to have positive aspects. Equity trading on the Amsterdam stock exchange has for the first time overtaken the volume of the London market to become the largest trading centre in Europe. Trading volumes in Amsterdam quadrupled within one month in January 2021 as a result of Brexit (whereas in London, much less was traded after Brexit). After the Brexit withdrawal bill was passed in UK parliament in December 2019, many trading platforms moved their European equity trading from the London stock exchange to those in Amsterdam and Paris. Information has been spread that the Dutch Ministry of Economic Affairs actively lobbied to entice financial trading firms to relocate to Amsterdam and that, in addition thereto, managers of those companies would be driven around Amsterdam free of charge for appointments with regulators, real estate agents and executives of flash trading companies.

The COVID-19 crisis has brought ongoing challenges for Dutch banks; however, fortunately, Dutch banks have been frontrunners in offering online banking services to their customers, which has turned out to be beneficial. Online servicing has already been the standard for many years in the Dutch banking environment, and without internet access, for both consumers and businesses, is it almost impossible to get access to banking services. The COVID-19 crisis has accelerated the use of online banking and online payments, though it also appeared that customers still appreciate personal contact. Furthermore, the crisis led to the Dutch (being renowned as savers rather than spenders) saving even more than they used to. Finally, there has been the issue of loyalty towards financial service providers where a fair number of bank customers have switched providers, in the expectation that a new service provider would give better support in times of COVID-19. Many of these customers switched to "BigTech" and "FinTech" companies.

Enhanced rules in respect of client identification and prevention of money laundering in the Netherlands has caused Dutch banks to be extremely reluctant when entering into new client relationships and even maintaining existing relationships. Businesses experience extreme hiccups when opening bank accounts with Dutch banks. Sometimes, banks even decide unilaterally to close bank accounts in respect of customers that have involved a trust office (*trustkantoor*) (Dutch management company) in their management, albeit that trust offices must be licensed and, following licensing, are subject to ongoing supervision of the DCB (as defined below).

Regulatory architecture: Overview of banking regulators and key regulations

Dutch regulatory framework

The Dutch regulatory framework for financial services comprises the Dutch Act on Financial Supervision (*Wet op het financieel toezicht*, the **AFS**), the decrees promulgated thereunder and EU regulations that directly apply in Dutch law. The AFS is, for the majority of its provisions, based on EU directives, including but not limited to the Markets in Financial Instruments Directive II (**MiFID II**), the Second Payment Services Directive (**PSD 2**), the Transparency Directive, and Capital Requirements Directives IV and V (**CRD IV** and **CRD V**).

The AFS is drafted as "principle-based" law rather than "rule-based" law, which means that it provides a framework and that market parties have the relative freedom to determine how to interpret compliance. A (limited) level of self-regulation is permitted.

The AFS has been designed for functional supervision rather than sectoral supervision. Its chapters are: (1) general provisions, scope, sanctions and provisions regarding cooperation of the supervisory authorities; (2) market access for financial enterprises (*inter alios*, banks, payment institutions, investment firms, managers of alternative investments funds, insurance firms, credit providers, advisors and financial intermediaries); (3) prudential supervision of financial institutions and rationalisation measures; (4) conduct supervision of financial institutions; (5) market conduct supervision; (6) specific measures in respect of the stability of the financial system; and (7) concluding provisions.

Regulatory authorities in the Netherlands

As set forth above, the AFS has been designed for functional supervision, to be distinguished in prudential supervision and market conduct supervision. Two regulatory authorities are engaged in supervision: the Dutch Central Bank (*De Nederlandsche Bank N.V.*, the **DCB**); and the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, the **AFM**). The DCB conducts prudential supervision in cooperation with the European Central Bank (the **ECB**), while the AFM is engaged in conduct supervision. The mutual cooperation of both regulators is laid down in the AFS, in bilateral agreements among the DCB and AFM and in the Dutch General Administrative Law Act (*Algemene Wet bestuursrecht*).

The DCB

The DCB is responsible for prudential supervision of financial undertakings, integrity supervision and supervision of compliance with the Anti-Money Laundering and Anti-Terrorist Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, the **Wwft**). The DCB grants (in cooperation with the AFM) licences to payment institutions, insurance companies and pension funds. Furthermore, the DCB is the central bank of the Netherlands and, in that role, carries out supervision of the banking system in the Netherlands in general, of the Dutch payment system and the balance of payments as well as carrying out monetary tasks. The DCB's attitude when exercising supervision is rather

more pragmatic than formalistic and the DCB is, in comparison with other supervisory authorities in Europe, approachable to market parties.

The ECB

The ECB is, since the introduction of the EU Banking Union in 2014, the relevant authority exercising prudential supervision of banks with their seat within the Eurozone (the countries that have adopted the euro as their legal tender) whereas that task, in respect of supervision and licensing of Dutch banks, was formerly designated to the DCB. The ECB directly supervises seven "significant entities" in the Netherlands, working together with the DCB, and the DCB exercises supervision of the less significant financial institutions in the Netherlands. The ECB is the licensing authority for all banks (irrespective of whether they are significant entities or not) and for granting declarations of no objection in respect of, *inter alia*, major holdings in banks. Furthermore, the ECB is an influential supervisor as it is engaged in adopting regulations and issuing guidelines and binding regulations. The ECB's supervision is less pragmatic than the DCB's supervision; it operates from a greater distance from market parties and, consequently, is not as approachable as the DCB.

The AFM

The AFM is the competent authority for conduct supervision in the Netherlands, on all financial institutions active in the Netherlands. Conduct supervision is designed to safeguard orderly and transparent procedures in the Dutch financial markets as well as sound trading procedures, and further focuses on trustworthiness and expertise of the persons in relevant functions as financial institutions. Though the AFM is approachable for market parties, it acts in a fairly formalistic manner and does not hesitate to publish violations of the AFS by market parties (which it is obliged to do pursuant to the AFS) and to impose penalties. The AFM is also engaged in supervision of compliance with the Financial Reporting (Supervision) Act (*Wet toezicht financiële verslaggeving*).

Recent regulatory themes and key regulatory developments in the Netherlands

Brexit

Brexit has been the main topic that has dominated the European financial markets environment in 2021, and it is expected to remain of importance in the foreseeable future.

As from 1 January 2021, the transitional period for financial services to and from the UK has ended. Passporting arrangements that allow EU (and EEA) financial institutions to provide financial services through a branch office or on a cross-border basis throughout the entire EU (and thus in the Netherlands) no longer apply to UK financial institutions. Currently there is no mutual recognition regime and there are no predefined equivalence determinations in relation to financial services regulation under the TCA. Unless the European Commission recognises that the regulatory or supervisory regime of a non-EU country (e.g. the UK) is equivalent to the corresponding EU regime, there is no substitute for the regulations that applied pre-Brexit. The European Commission has indicated that it will consider taking an equivalence decision, though no timeframe has been set.

UK financial institutions must now either seek permission for market access on an EU state-by-state basis by means of licensing and operating a branch office (which does not have a European passport), or touch base in the EU by means of incorporating and licensing a local entity incorporated in the EU, after which they will be in the position to passport their services throughout the EU, under EU legislation. Another consequence is that Dutch financial institutions have lost their authorisation to carry out passport financial services in the UK on the basis of a European passport.

Following the absence of any arrangements under the TCA, substantial changes to the cross-border financial services provision by UK banks to Dutch resident retail customers have come into effect due to Brexit. UK financial institutions may, from 31 December 2020 onwards, no longer provide cross-border deposit accounts for Dutch retail customers, unless the customer does not qualify as a resident of the Netherlands, e.g. if such customer can claim a privileged status under international law, such as military personnel stationed in the Netherlands. As a consequence, UK banks have told customers who are British citizens living in an EU country that they can no longer serve them and have to close their bank accounts unless further agreements between the UK and the EU are concluded. Relationships that qualify as being among professional market parties are not affected by the new situation.

To alleviate adverse consequences resulting from the post-Brexit regime, especially with respect to limited EU market access, large financial services firms that had touched base in the EU by means of having their headquarters in the UK have migrated to the EU.

One controversial matter among these options is the practice of "reverse solicitation" (pursuant to article 1:19c of the AFS, an implementation of MiFID II) whereby services to Dutch resident customers are provided on the sole initiative of the client. It is clear that a relationship between a Dutch customer and a UK financial institution is not deemed to be based on reverse solicitation if the relationship is renewed on the sole initiative of the customer, following Brexit. In order to prevent misuse of MiFID II, on 13 January 2021, the European Securities and Markets Authority (**ESMA**) issued a publication whereby it reminded firms that "where a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client". ESMA said that such is true "regardless of any contractual clause or disclaimer purporting to state, for example, that the third country firm will be deemed to respond to the exclusive initiative of the client". Therewith, the applicability of reverse solicitation seems narrow.

UBO register

A bill on the ultimate beneficial owner (**UBO**) register has been adopted and implemented in the Wwft and in the Dutch Commercial Register Act (*Handelsregisterwet*). This legislative step has been made pursuant to the Fourth EU Anti-Money Laundering Directive. Dutch legal entities must register their UBOs with the Netherlands Chamber of Commerce (*Kamer van Koophandel Nederland*) no later than 27 March 2022 – 18 months after its entry into force. The UBO register keeps records of the UBOs of legal entities, foundations and trusts, and certain exceptions apply; for example, one-man businesses are excluded. A UBO must be a natural person who (i) is the ultimate owner, or (ii) has a decisive influence on the respective legal entity. If no UBO can be identified, alternative criteria will determine an appropriate UBO substitute. For limited liability companies (legal persons), a UBO is a natural person who ultimately controls the company through (i) a direct or indirect ownership of more than 25% of the shares, voting rights or ownership interest, or (ii) other means; for example, the right to appoint or dismiss the majority of the members of the management board or to exercise decisive control over the legal entity.

PSD 2

PSD 2 was implemented in the AFS in February 2019, enabling payment service providers to offer more services to customers, such as payment initiation services (the providers of which may, subject to approval of the account holder, give an order to execute a payment from that

account) and account information services whereby the service providers, subject to approval of the account holder, obtain access to payment data of the account holder. The main goal of the new rules was to create a level playing field for financial service providers and the end of the monopoly position for banks. However, the expected revolutionary effect in the Dutch payment environment has so far failed to occur. Retail customers are hesitant to make use of the new services as plans for personal marketing on the basis of account information and spending patterns are not appealing and they do not want to give their specific consent. Around 18 FinTech companies have been licensed in the Netherlands to obtain payment information, though the activities of these companies mainly focus on business customers.

Banking Data Referral Portal Act

The Netherlands published a law amending the AFS pertaining to the automatic unlocking of identifying data via a central electronic system, as well as some other data by banks and other payment service providers (the Banking Data Referral Portal Act, *Wet verwijzingsportaal bankgegevens*) on 25 May 2020. This act implements the requirement to establish a centralised data retrieval portal as laid down in the Fifth EU Anti-Money Laundering Directive. The portal shall ensure timely and automatic access to bank account information.

COVID-19

On 17 September 2020, the DCB, acting in line with the ECB, confirmed that there are exceptional circumstances due to the COVID-19 pandemic. The DCB declared for smaller banks under its direct supervision, the same as the ECB declared for the larger banks under its own supervision, that there are exceptional circumstances that automatically result in a relief with regard to calculating, reporting and disclosing what is known as the leverage ratio. This allows banks to temporarily exclude specific central bank exposures when calculating, reporting and disclosing their leverage ratio. The relief measure shall apply until 27 June 2021.

Bank governance and internal controls

Based on the AFS, European legislation and the guidelines of the European Banking Association (the **EBA**), banks in the Netherlands are subject to a substantial number of requirements on their governance and internal controls, whereby the size and importance of the bank are dependent on the impact of those requirements (proportionality). A brief overview of the requirements is set forth below.

Integrity and suitability of persons

All policymakers (*beleidsbepalers*) of a bank, which includes the members of the board of directors (*bestuur*), the supervisory directors (*commissarissen*) and key staff members (those persons who are in a position to have influence on the bank's risk profile, such as senior members holding key positions), must undergo a screening of their integrity and a suitability test prior to being appointed in their function. Whether a person is a key staff member is determined by the bank's management.

Furthermore, all persons who hold a "qualifying interest", being participation in a Dutch bank of at least 10% (capital, voting rights or comparable influence), must obtain a declaration of no objection from the ECB prior to obtaining their qualifying interest. On the other hand, a bank with its seat in the Netherlands must obtain a declaration of no objection from the DCB for acquiring a qualifying interest in other companies, among which include financial institutions from outside the EU (third country) and non-financial institutions from the EU or in a third country, large asset deals and certain mergers.

Though Dutch corporate law recognises the principle of a "one-tier board" (which has executive directors and non-executive directors in one management board), Dutch banks are organised on the basis of a "two-tier board" with a separate board of directors and a board of supervisory directors (*raad van commissarissen*). Banks are obliged to establish a separate supervisory board. As banks qualify as "public interest entities" under the Audit Firms (Supervision) Act (*Wet toezicht accountantsorganisaties*), the supervisory board must establish an audit committee. Depending on the size of the bank, the supervisory board may be obliged to establish: (i) a nomination committee; (ii) a risk committee; and (iii) a remuneration committee.

<u>Internal control</u>

The DCB continuously expresses the importance it attaches to prevention of economic crime and systematic risk analysis. Pursuant to the AFS, a sound governance system must be in place in banks. Aspects of good governance are the presence of control functions, such as a risk control function, a compliance function and an internal audit function, following the "three-lines-of-defence model" as set forth in the AFS, for compliance, comprising: (i) governance of operations management and internal control; (ii) the setting up of an independent function that monitors and follows up the operational management's governance and internal control, at least annually; and (iii) an audit that reviews and evaluates overall governance and internal control.

The governance system requires in any case the presence of a systematic integrity risk analysis (**SIRA**), which must include procedures for the examination of the nature and magnitude of integrity risks and a management framework for drafting integrity policy, measures and procedures. A bank must first understand the risk of being exposed to money laundering, corruption and terrorist financing in order to understand which measures are needed to combat these crimes. A SIRA must be systematic: risks must be identified and analysed and required measures implemented periodically.

Furthermore, banks must have in place, *inter alia*:

(i) a risk management department; and
(ii) procedures for customer due diligence, prevention of conflicts of interest, incident reporting and recovery plans.

<u>Specific Dutch remuneration policies</u>

Though the rules that apply to remuneration in the financial sector in the Netherlands are based on the rules that apply in all EU Member States (from CRD IV and CRD V), the Dutch rules are stronger. The Netherlands has chosen a wider scope of the remuneration rules and a lower bonus ceiling than those indicated in the European regulations for financial institutions (banks, investment firms, insurers and managers of collective investment schemes). The Dutch Remuneration Policy (Financial Enterprises) Act (*Wet Beloningsbeleid Financiële Ondernemingen*) includes additional requirements for variable remuneration. These rules include the bonus ceiling, rules relating to retention payments, welcome and severance packages and publication obligations.

The bonus ceiling provides that bonuses for employees at Dutch financial institutions may not exceed 20% of their fixed salary (whereas EU rules allow for 100%, applying only to persons known as identified staff). So-called "guaranteed bonuses" are prohibited. Severance payments for directors (day-to-day policymakers) may not exceed one year's salary. Severance payments may not be paid out at all in the following situations: (i) voluntary leave of a person; (ii) in case of non-performance; or (iii) to directors (day-to-day policymakers) in case of a failing company. Furthermore, a bonus clawback applies. The supervisory board

of a financial institution may adjust or reclaim a bonus paid to a director, e.g. if the economic position of the financial institution is weak or if it has not achieved the objective for which the bonus was offered. This bonus clawback applies to all employees. In addition thereto, adjustment or reclaim is mandatory if employees contravene professional standards or are responsible for large losses. There are a few exceptions of the bonus cap available, though the law explicitly mentions and prohibits constructions that aim to circumvent the bonus cap or to apply measures that circumvent other applicable rules. It is sometimes said that the fact that the Netherlands has implemented extremely strict remuneration rules has affected the attractiveness of Amsterdam for financial institutions post-Brexit.

Though with the implementation of CRD V the Dutch government has, in principle, chosen not to implement substantial changes to the Dutch remuneration system, the implementation of CRD V leads to a change in scope. Where certain financial institutions were previously exempted from the bonus ceiling, e.g. managers of alternative investment funds and managers of UCITS, upon the implementation of CRD V, the bonus ceiling will apply insofar as those managers are subsidiaries of a bank or an investment firm (insofar as it regards "key personnel"). This means an expansion of the scope. For the latter category, the bonus ceiling will be a maximum of 100%. In respect of persons who are primarily active in a third country (non-EU country), the maximum will be 200% provided certain specific conditions are met (e.g. approval of the shareholders).

Outsourcing of functions by banks

The outsourcing of certain functions by banks is permitted but is subject to strict conditions laid down in the AFS, the order in council promulgated thereunder and the guidelines of the EBA. Outsourcing must be based on an agreement. The outsourcing bank remains at all times responsible for the performance of outsourced functions and activities.

Bank capital requirements

The capital requirements for banks are part of the EU Banking Union's single rulebook and implement the Basel III agreement – the internationally agreed bank capital adequacy standards – in EU legislation. Capital requirements applicable to Dutch banks are set forth in CRD IV, CRD V, the Capital Requirements Regulation (**CRR**) and Capital Requirements Regulation II (**CRR II**), and in several technical standards and guidelines. CRD IV and CRR have been effective in the AFS since 1 January 2014 onwards. CRD V was implemented in the AFS on 29 December 2020. CRR and CRR II (the latter from 28 June 2021 onwards), being regulations, apply directly in Dutch law without the need for separate implementation.

In brief, the following capital requirements apply under the legislative framework:

(i) Minimum of own funds: a buffer that is expressed as a percentage of risk-weighted assets. The risk-weighted assets concept in essence means that safer assets are attributed a lower allocation of capital, while riskier assets are given a higher risk weight. The riskier the assets, the more capital the bank has to maintain. Capital may comprise "Tier 1 capital", which is considered to be the going concern capital. Going concern capital allows a bank to continue its activities and keeps it solvent. The highest quality of Tier 1 capital is called Common Equity Tier 1 capital. Additional Tier 1 capital is formed by subordinated perpetual capital instruments contingently convertible into equity. "Tier 2 capital" is considered to be gone concern capital. The gone concern capital allows an institution to repay depositors and senior creditors if a bank becomes insolvent. Capital buffers may be extended with additional funds, e.g. a capital conservation buffer, a countercyclical buffer and a buffer for systemic importance. CRD V introduces a

binding leverage ratio of 3% and an additional leverage ratio for global systemically important banks (significant banks). Furthermore, CRD V introduces a liquidity requirement for long-term assets; the "Net Stable Funding Ratio" (**NSFR**).

(ii) Liquidity Coverage Ratio: a buffer to be kept that consists of sufficient liquid assets to fund cash outflows for 30 days whereby the buffer must always be higher than the (expected) outflows.

(iii) NSFR: under CRR II, disclosure of NSFR is a mandatory requirement. NSFR is the minimum amount of required stable funding a bank must maintain based on the liquidity, residual maturity and counterparty of the assets over a one-year time horizon. The ratio is calculated as available stable funding over required stable funding, taking into account the accounting value of assets, liabilities, off-balance-sheet items and regulatory capital.

(iv) Leverage ratio: pursuant to CRR II, a leverage ratio of at least 3% must be maintained, which is calculated by Tier 1 capital divided by consolidated assets where Tier 1 capital includes common equity, reserves, retained earnings and other securities after subtracting goodwill.

In the Netherlands (the DCB for Dutch banks that are not significant and the ECB for significant banks), a bank's capital position is assessed annually on the basis of the "Supervisory Review and Evaluation Process" (the **SREP**). The goal of the SREP is to promote a resilient banking system as a prerequisite for a sustainable and sound financing of the economy. The SREP involves a comprehensive assessment of banks' strategies, processes and risks, and takes a forward-looking view to determine how much capital each bank needs to cover its risks. Once a year, the ECB publishes a summary of all SREP results for the banks under its direct supervision.

Rules governing banks' relationships with their customers and other third parties

Duty of care

The AFS and the decree on conduct supervision promulgated thereunder contain various provisions regarding the duty of care (*zorgplicht*) of banks in relation to their customers whereby the degree of protection distinguishes between professional customers and retail customers. Furthermore, specific rules attach to various services that banks provide. The provision of regular banking activities (bank and savings account services), consumer credit and mortgage loans requires more protective measures and are more regulated when offered to retail customers than to customers who act in the course of a business or profession. The same applies to the provision of investment services (under MiFID II), which also require a higher level of duty of care. Duty of care provisions contain detailed rules in respect of the form and substance of agreements with customers, due execution rules, personal circumstances (financial and non-financial) of the customer and verification of the customer's knowledge of matters that are covered by the specific services, in order to establish that a certain product or service is suitable for that specific customer. Violation of the rules of the AFS may lead to the AFM or DCB imposing penalties or, in certain matters, criminal liability under the Economic Offenses Act (*Wet op de economische delicten*). Apart from that, there is the general duty of care as laid down in Dutch law, violation of which may lead to civil liability (unlawful act) towards the affected party. The latter duty of care generally does not distinguish between consumers and professional parties. It is noted that banks and other financial service providers (in particular when they perform services to retail customers) are deemed to hold a special role in the society that imposes an additional duty of care.

Deposit Guarantee Scheme and Investor Compensation Scheme

If a bank has gone bankrupt and is thus no longer able to meet its obligations, its customers may invoke the terms of the relevant Deposit Guarantee Scheme (*depositogarantiestelsel*) or the Investor Compensation Scheme (*beleggerscompensatiestelsel*) if certain criteria have been met. Both compensation schemes are based on EU legislation. Currently, the Deposit Guarantee Scheme, operated by the DCB, offers a guaranteed amount of EUR 100,000 per bank per person (irrespective of the number of bank accounts held by that bank). The Deposit Guarantee Scheme is pre-funded and all Dutch banks contribute to the Dutch Deposit Guarantee Fund, *pro rata*, the size of their activities. However, if the Deposit Guarantee Scheme appears to be insufficiently funded to cover all its obligations (e.g. in case of bankruptcy of a large bank), the deficits will have to be made up by the taxpayers of the country of origin. The European Commission has proposed to come to an overall European Deposit Guarantee Scheme, though it is yet unclear whether and, if yes, when that will come into force. Retail investors who are provided with an investment service or ancillary service within the meaning of MiFID II, or who put their financial instruments in the care of a bank, will be compensated on the basis of the Investor Compensation Scheme if the bank is no longer able to meet its obligations under the investment service agreement. The maximum amount compensated is EUR 20,000 per person/investor.

Dispute resolution

All Dutch financial institutions are obliged to connect with the Dutch Financial Services Complaints Tribunal (*Klachteninstituut Financiële Dienstverlening*, **KiFiD**). KiFiD is a form of alternative dispute resolution for consumers. KiFiD's goal is to provide a low-threshold facility for retail clients (consumers) who have a dispute and want to institute a claim against their financial service provider. KiFiD offers mediation facilities in the form of an ombudsman and also offers alternative legal proceedings. If so requested by both parties, KiFiD may express binding advice. Such advice cannot be challenged in a regular court other than through a marginal review (*marginale toetsing*) by which the regular court may only assess whether KiFiD could have come to their conclusion, taking into account the principle of reasonableness.

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