Netherlands update – the Act on Financial Supervision: a ‘banker’s oath’ for FI professionals and the introduction of disciplinary rules for bank employees

Summary

On 18th September 2014, the Dutch House of Representatives accepted proposed amendments of the Act on Financial Supervision ("AFS"). These amendments, which have now been forwarded to the Senate for approval, provide for various measures including –

- the requirement for employees of financial undertakings to take an oath and
- the introduction of disciplinary rules for bank employees.

Background

On 1st January 2010 the Dutch banking sector introduced a code, with the aim of restoring trust in the financial sector. This Banking Code ("Code Banken") was drawn up by the Netherlands Bankers Association ("NVB") in response to the report entitled “Restoring Trust” ("Naar herstel van vertrouwen"), which was published by the Advisory Committee on the Future of Banks ("Adviescommissie Toekomst Banken") on 7 April 2009. The Code Banken included moral and ethical conduct declarations, to be signed by each individual member of the executive board, declaring that he or she shall perform their tasks in a meticulous, expert and fair manner, taking into account the applicable laws, codes of conduct and regulations (the so called "bankers’ oath").

The NVB has now introduced a Social Charter, an updated Code Banken and the bankers’ oath with corresponding rules of conduct and disciplinary system, as a further measure aimed at regaining the trust of society.

Statutory measures

The Dutch Parliament (on its own initiative) amended the AFS, with effect from 1 January 2013, to require the board of banks and insurers and the policy makers of Dutch financial undertakings to swear a "bankers’ oath". As from 1 January 2015, the requirement to take an oath will be expanded to all employees that influence the risk profile of the financial undertaking or are directly involved in the provision of financial services to clients. For banks, the oath will be mandatory for all employees.

The Social Charter and the updated Code Banken - scope

The Social Charter and the Code Banken apply to all banks established in the Netherlands and licensed by the DCB pursuant to Section 2:11 of the AFS (in relation to all activities performed in, or directed towards, the Netherlands). As a consequence Netherlands branches of non-EEA banks will have to comply. In the event of a conflict between the NVB Code Banken (which qualifies as self-imposed sector regulation) and international regulations or the policies of regulators, the latter will prevail.
The regime of professional disciplinary sanctions will be mandatory for all bank employees and individuals performing work for a Dutch bank where their work is directly related to banking activities in the Netherlands.

**Disciplinary rules**

The binding behavioral standards of integrity and duty of care are a translation of the text of the oath. The regime resembles, to a certain extent, the self-regulatory tribunals that are known for medical professionals, attorneys and notaries. One important difference, however, is that bank employees will be subject to the disciplinary rules on the basis of private law; the disciplinary framework is developed and controlled by the banks and not by a professional association.

The disciplinary rules must provide adequate safeguards for due process and be applied and implemented by an independent and external disciplinary board. The Dutch Securities Institute will fulfill the role of the required independent disciplinary committee.

The NVB (as representative of the sector) requested that the disciplinary rules should be given a legal basis and this was supported by the government and resulted in the inclusion of the obligation in the proposed amendments to the AFS for 2015. As the obligation will be part of the AFS, the Dutch Authority for the Financial Markets and the Dutch Central Bank will be authorised to supervise and monitor the correct application of the disciplinary rules by the banks.

As the direct application of disciplinary rules has a private law basis, administrative or criminal proceedings could, in theory, run in parallel. The government, however, expects that double penalization can be avoided by adequate coordination and by disciplinary measures taking into account other sanctions that have been imposed.

**The timetable and next steps**

The new Banking Code comes into effect on January 1st 2015 (and applies to all banks with a registered office in the Netherlands). The formal introduction of the bankers’ oath and the rules of conduct to all individuals depends on the Senate adopting the AFS amendments. It is intended that the rules will have immediate effect for employees appointed after 1 January 2015. For current employees with an existing employment agreement, the rules will apply from the moment they have taken the new oath which has to take place before 31 December 2015.

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