FINNIUS

OUTLOOK 2018

INTRODUCTION OUTLOOK 2018

RETROSPECTION 2017

A lot of developments have been implemented in 2017. A number of important steps have been taken in the field of the pursued capital market union. Examples are the relaxation of the Regulation on Venture Capital investment funds and the national expansion of the exemption of the prospectus requirement for small emissions. At a European level, we saw an active attitude of the supervisory authorities EBA, EIOPA and ESMA as initiators of a range of new rules. This trend will continue substantially in the coming years.

At the same time, the regulators in Europe and the Netherlands could not always keep up with the pace of the developments. The Minister of Finance announced in September 2017 that the mandatory implementation of PSD2 in Dutch law before 13 January 2018 is no longer achievable. In addition, the final lower Dutch implementation regulation on MiFID II was only published shortly before it took effect (at the end of December). Furthermore, the European Commission has at the request of the European Parliament and 16 Member States proposed to expand the date of effectiveness of the Insurance Distribution Directive (IDD) with six months until 1 October 2018. We have previously seen a similar postponement for the MiFID II and the PRIIPS Regulation. The postponement of the introduction of important new legislation can also be considered a new trend.

OUTLOOK 2018

This Outlook shows that the new year will again not bring any tranquillity to the realm of supervision. Not only do the rules keep developing, we can also see new activities and services in the financial sector which must be addressed by the legislators. As usual, this Outlook lists the developments that were published at the turn of the year and discusses our supervisory expectations for 2018. We will discuss both new legislation and priorities of supervisors that are important to your institution. One thing is certain: 2018 will, again, not be boring when it comes to supervision.

WHAT ARE YOU INTERESTED IN?

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FINANCIAL MARKETS LEGISLATION GENERAL DEVELOPMENTS

TOPICS

- DNB Supervision priorities 2018
- DNB Supervision Vision 2018-2022
- Bill on Transparent Supervision on Financial Markets
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- Brexit Developments
- Entry into force Benchmark Regulation
- Capital market union
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- Entry into force General Data Protection Regulation
- More clarity on duty of care for accountant firms
- Impact of Fourth Anti-Money Laundering Directive

DNB Supervision priorities 2018

DNB published its supervision priorities for the year 2018 in the Supervision Outlook 2018 in November 2017. The document describes the main risks and challenges DNB foresees for the Dutch financial sector. The main risks are the starting point for the supervision agenda and the focus of the supervision of DNB in the coming year. The document contains an overview of the investigations DNB intends to carry out at institutions in 2018 and provides a time-schedule for some specific investigations, so that institutions know when to expect which investigation.

There are three sector-transcending investigations scheduled for 2018, being:

- Technical innovation: this includes audits into:
  - Room for opportunities: InnovationHub and Customisation for Innovation
  - Managing risks: information security
- Focus on the future and sustainability: this includes audits into:
  - Capacity for change
  - Climate risks
  - Tail risks
  - Unintended effects of laws and regulations
- Stringent reinforcement of financial-economic sanction violations: this includes audits into:
  - Preparing for changing laws and regulations
  - Systematic Integrity Risk Analysis (SIRA)
  - Terrorism financing and sanction violations.

DNB SUPERVISION VISION 2018-2022

DNB published the 'Supervision Vision 2018-2022' document in November 2017 in which it has set out its priorities for the coming years. DNB wants to focus on three topics in the coming period:

(i) DNB addresses technological innovations;
(ii) DNB places emphasis on the future and sustainability; and
(iii) DNB is strict concerning financial-economic crime.

- **Technological innovations: Technological innovation has an impact on the entire financial sector**. DNB wants to give technological innovations space. Technological innovation can simultaneously lead to a profound shift in the business models of institutions and new risks. For this reason, DNB emphasises future-oriented and sustainable business models in its supervision.

" DNB will focus on strengthening and professionalising the compliance and audit functions."

- **Focus on the future and sustainability:** DNB wants to take action in five areas:
  - Capital and liquidity buffers
  - Sufficient capacity for change
  - Being prepared for crises
  - Scope of the supervision
  - Proportional supervision
- **Financial-economic crime:** some highlights of this priority are:
  - DNB will focus on strengthening and professionalising the compliance and audit functions.
  - DNB will in case of found abuses and shortcomings in the sound business operations use the existing legal options to hold policy-makers personally liable.
  - DNB will consult with the Public Prosecutor on possible prosecution of natural persons if shortcomings are found that are criminally relevant.
  - DNB indicates that it will use the existing legal options to be more transparent about sector results and the taken reinforcement measures, referring to the Bill on Transparent Supervision of Financial Markets. See below.

BILL ON TRANSPARENT SUPERVISION ON FINANCIAL MARKETS

The Bill on Transparent Supervision on Financial Markets has been submitted to the House of Representatives on 4 September 2017. The proposal aims to increase transparency of the supervision of financial

markets. The proposal gives the AFM and DNB more powers to publish violations by financial institutions. Besides the Bill, on 21 December 2017, the Minister of Finance published a consultation document on the Decree transparent supervision on financial markets. The consultation will run until 28 January 2018.

The bill gives the AFM and DNB the power to publish warnings in case of violations that may harm stakeholders. Based on the bill, this can be the case for all violations of rules or prohibitions set by or under the Wft if this is necessary to prevent or limit damage. Supervisors can also respond faster if institutions publish any information about their violations themselves. The bill also empowers DNB to periodically publish overviews to compare key figures of banks. The information which will be published, including the leverage ratio, will be designated by a general administrative order. According to the explanatory memorandum, the power of DNB to periodically disclose key figures matches the obligation of the banks under CRD IV and CRR to disclose certain specific figures. The principle is that correct and complete information about the risk profile of banks should be available. Publishing these figures can contribute to the public confidence in banks according to the explanatory memorandum. DNB will publish an overview with data published by banks based on CRR, and data published by banks based on the laws relating to annual accounts.

The previous proposal to publish audit reports with data that can be traced back to individual institutions is not included in the bill. This is because the recommendations of the Council of State state that this is at odds with EU law considering the closed system of disclosure of confidential information. Confidential information must by default be kept confidential unless the European regulations contain an exception for disclosure. Refer in this context, for example, to a recent opinion of A.G. Bot to a request for a preliminary ruling to the European Court of Justice. Supervisors can keep publishing reports with aggregated data.

The bill also contains a new exception to the principle that administrative sanctions by the AFM and DNB are by default published. In addition to the current exceptions, disclosure based on the proposal will not take place if this is 'not in line with the goal of the imposed administrative sanction unless it concerns a decision to impose an administrative fine'. According to the explanatory memorandum, this intends to clarify that supervisors do not need to disclose any decisions to impose an administrative sanction if this would contradict the primary purpose of the sanction. The goal is mainly to prevent DNB from feeling forced to disclose prudential measures which by their nature intend to reinforce the solidity of the offender while disclosure would harm this solidity.

REVISION OF WFT

We already announced the plans for a revision of the Wft in the General section of our Outlook 2017. The consultation of the Ministry of Finance in late 2016 has resulted in 40 consultation reactions (including a reaction from Finnius). The responses showed that a majority of the respondents was in favour of "Option 4": the introduction of a sectoral model in which the Wft is restructured and the rules of each category of financial institution, type of service, or type of product are categorised together as much as possible. The AFM objects to such revision of the Wft due to the associated high costs and the questionable benefits, according to the AFM.

No public documents on this topic have been published since the consultation. We are currently waiting what the Ministry of Finance will do with the outcome of the consultation.

BILL IMPLEMENTING SFTR REGULATION

The Bill implementing SFTR Regulation (*Securities Financing Transactions Regulation*, no. 2015/2365) has been submitted to the House of Representatives on 4 December 2017. The bill mainly concern the elaboration of certain SFTR provisions which the European legislator has left to the national Member States. We highlight two important provisions:

- Profession ban for executives

The SFTR stipulates that the supervisor must have the power to impose a temporary profession ban for certain violations on a person with executive responsibilities. This power is not limited to financial institutions. The option to deny the right to exercise certain duties to executives as set out in the current Article 1:87 Wft is limited to financial institutions. The bill serves to supplement Article 1:87 Wft, where based on a general administrative order the decision can be made to impose this ban on non-financial companies.

- Securities financing transactions in breach of SFTR not invalid under civil law

The validity of a civil law action in violation of the SFTR is unassailable. The new proposed Article 1:23 Wft extends the existing rule related to civil law actions that violate the Wft to civil law actions that violate the SFTR: they are unassailable except as provided otherwise. The SFTR is the cause of the supplement, but it is so generally formulated that it also applies to other regulations.

The bill is expected to take effect in Q2 2018.

RECOVERY DECREE FINANCIAL MARKETS 2018

A draft for the Recovery Decree Financial Markets 2018 has been published for market consultation on 28 November. The consultation period ends on 31 December 2017. This decree provides for the recovery of shortcomings and omissions that have occurred during the implementation of European legislation in the field of financial markets. This decision contains changes in the Prudential Rules Decree, the Market Conduct Supervision Financial Institutions Decree, and the Market Access Financial Institutions Decree. We expect this decree to take effect in Q2 2018.

FINANCIAL MARKETS AMENDMENT ACT 2018

On 21 December 2017, the proposal for the Financial Markets Amendment Act 2018 was submitted to the House of Representatives. The proposal includes amendments with respect to – inter alia – the following topics:

- Prohibition on garnishment under DNB;
- Extension of decision period banking license application.

The consultation version of this proposal also included other changes, such as the introduction of an approval requirement for 403-guarantees, rules with respect to the concentration of bank and securities law cases at the Amsterdam District Court, and some changes in the applicability of the Dutch bonus cap. These changes are not included in the final proposal. However, from the consultation report follows that the approval requirement for guarantees will be included in a next amendment act. Also, the changes with respect to the applicability of the Dutch bonus cap will be included a later legislative proposal, together with any change in this respect that may follow from the general evaluation of the Wbfo (see below).

The Financial Markets Amendment Act 2018 is expected to take effect mid-2018.

EVALUATION ACT ON THE REMUNERATION POLICY OF FINANCIAL UNDERTAKINGS WFT (WBFO)

The Ministry of Finance has worked on the evaluation of the Act on the Remuneration Policy of Financial Undertakings Wft (Wbfo) in 2017. The goal of the evaluation was (i) determining whether the intended effects have been achieved, and (ii) studying the consequences of the Wbfo on the competitive position of Dutch financial institutions and the business climate in the Netherlands. At the request of the government, the use of exemptions to the bonus cap and compliance with the bonus ban by state-supported companies will be studied specifically.

In the summer of 2017, the former Minister of Finance, Jeroen Dijsselbloem, announced in a letter to the House of Representatives that the evaluation will take place in two parts: the first part would be completed no later than 1 December 2017, and the second

part in the first quarter of 2018. As far we could tell, the first phase of the evaluation is not yet complete. We expect both parts to be made available in 2018.

2018 WORK PROGRAMME OF JOINT COMMITTEE OF ESAS

The Joint Committee of the European Supervisory Authorities – a body with EBA, ESMA and EIOPA as its members – has published its 2018 Work Programme in November 2017. The ESAs, chaired by ESMA, will prioritise the following topics in 2018:

- Cross-sectoral risks;
- Consumer protection;
- Anti-money laundering;
- Financial conglomerates;
- Accounting and auditing.

BREXIT DEVELOPMENTS

In our Outlook 2017, we already wrote that the UK was asked to inform the European Council of its decision to withdraw from the EU (Article 50 Notification) before the end of March 2017. On 27 March 2017, the UK has indeed published such notification to the European Council. The Council has subsequently published a set of political guidelines on 29 April 2017 with the framework for the negotiations. On 22 May 2017, the General Affairs Council (Article 50) has authorised the Commission to start the negotiations with the UK and issued corresponding negotiation guidelines.

After months of negotiations, the Commission has on 8 December 2017 submitted a recommendation to the Council to conclude that sufficient progress has been made in the first stage of the Article 50 talks. This is based on a shared report of both negotiators. The report shows that the parties have reached a principle agreement on three points: (i) the rights of EU citizens in the UK and the rights of UK citizens in the EU; (ii) the border between Ireland and Northern Ireland; and (iii) the financial settlement. The precise implications for financial institutions are as yet unclear. We expect that the expiration of the European passport for branches and cross-border services will be the main result. We recommend that market parties keep a close eye on the negotiations in 2018 and to seek advice on the possibilities and legal obligations after the Brexit.

The Council also came to the conclusion that sufficient progress has been made in the first stage of the negotiations, and has issued new guidelines for the second phase of the negotiations. The Commission has adopted these guidelines. The second stage of the negotiations concerning the future (trade) relations between the EU and the UK start in 2018.

Finally, we remark that the Brexit must have taken place no later than 29 March 2019. This means that the parties must have reached an agreement before October 2018 to enable the European Parliament, the UK, and the other EU Member States to accept the deal.

ENTRY INTO FORCE OF BENCHMARK REGULATION

The Benchmark Regulation has taken effect on 1 January 2018. This has taken legal effect in the Netherlands by way of the following regulations:

- Dutch Implementation Act of the Benchmarks Regulation
- Dutch Implementation Decree of the Benchmark Regulation

National legislation was needed because the Benchmark Directive (i) requires more powers of the AFM than it currently has (as arranged in the Implementation Act), and (ii) makes changes to the consumer credit directive and the mortgage credit directive, which changes lead to amendments of the Bgfo (as arranged in the Implementation Decree).

The Benchmark Regulation regulates the provision of benchmarks, the use of benchmarks for financial products, and the provision of input data for benchmarks. A benchmark is an index based on which a payable fee or the value of a financial instrument is determined for a financial instrument or a financial agreement or an index which is used to measure the performance of an investment fund.

An important benchmark is the EURIBOR, for example. The Benchmark Directive makes offering benchmarks subject to a license requirement and prohibits financial companies from using benchmarks without a license. The Benchmark Regulation contains rules for the development of benchmarks, the registration of benchmarks, the management of benchmarks, and the supervision on benchmarks.

"The Benchmark Directive makes offering benchmarks subject to a license requirement and prohibits financial companies from using benchmarks without a license."

In the Netherlands, the AFM is responsible for granting licenses and ongoing supervision on compliance with the Benchmark Regulation.

ESMA has a useful Q&A on its website concerning the Benchmark Regulation with answers to questions about the scope, definitions, and transitional measures.

CAPITAL MARKET UNION

In June 2017, the European Commission presented an interim evaluation of the capital market union action plan drawn up in 2015. Two-thirds of the 33 objectives of this action plan have been achieved. New proposals have been made to increase the attractiveness of the EU as an investment region:

- setting up a personal European pension product to help people finance their retirement (for more information, refer to the Banking Outlook and the Investment Firms Outlook);
- the continuation of the supervisory role of the Commission in the capital market union;
- more proportionate regulations for small and medium enterprises and investment funds;
- increasing the potential of Financial Technology (e.g. crowdfunding)
- encouraging sustainable investments.

The Fact Sheet that is attached to the interim evaluation is useful. The EC answers the question 'what has been done so far' and distinguishes between (i) completed, (ii) ongoing, and (iii) upcoming legislative proposals. We can expect the following legislative initiatives in 2018:

- covered bonds (Q1);
- more tailored rules for listing of SMEs (Q2);
- non-performing loans (Q1);
- cross-border distribution of investment funds (Q1).

EMIR AMENDMENT

On 4 May 2017, the European Commission published a proposal for a regulation that amends EMIR (no. 648/2012). Investigations have shown that the clearing obligation and reporting duty under EMIR have disproportionate effects on certain market parties. This proposal aims to remove these effects. We have listed the main changes.

- Reporting duty:
- Transactions between a financial and a non-financial counterparty should now be reported by the financial counterparty on behalf of both parties.
- So-called intra-group transactions where one of the two counterparties is a non-financial counterparty do no longer need to be reported.
- Derivative transactions concluded through an exchange will be reported by the involved central counterparties as of January 2018.
- Reporting historical transactions (transactions that were excluded before the clearing obligation took effect and that are still ongoing when it took effect) do no longer need to be reported.

The amended reporting duties take effect twenty days after the publication of the amended regulation in the Official Journal of the EU. The expectation is that it will be published at the start of 2018. We recommend that market parties check whether the amended reporting duties have an impact and to keep a close eye on the publication of the amended directive if this is the case.

- Clearing obligation for small financial counterparties

- The proposal introduces a clearing threshold for small financial counterparties.
- For financial counterparties with a small volume of derivative transactions, the mandatory clearing of these derivatives transactions is not feasible.
- The clearing threshold is 1 billion or 3 billion gross notional value, depending on the kind of derivative transactions.
- When calculating the clearing threshold, all OTC derivative contracts concluded by the financial counterparty or by entities within the same group must be included.

This change will take effect six months after the publication of the amended directive in the Official Journal of the EU, which is expected to be in Q3 2018. We recommend that market parties determine whether they can make use of this exemption to the clearing obligation.

ENTRY INTO FORCE GENERAL DATA PROTECTION REGULATION

The following topic maybe somewhat off topic from this General Outlook but is very relevant for market parties active in the financial sector: the revision of EU privacy legislation. This has resulted in the 'General Data Protection Regulation'. An important effect of the regulation is that there are more obligations for market parties processing personal data. Key topics of the regulation are:

- The requirement of market parties to report the processing of personal data to the Dutch Personal Data Protection Authority will expire. Market parties must keep an overview of all processing of personal data themselves.
- Risky processing of personal data must be preceded by a privacy impact assessment. In certain cases, permission from the Dutch Personal Data Protection Authority is required.
- Market parties that process a lot of personal data are required to appoint a personal data protection officer.
- The enforcement capabilities of the Dutch Personal Data Protection Authority increase. The Dutch Personal Data Protection Authority is under the regulation authorised to impose administrative fines of up to EUR 20 million or up to 4% of the global annual turnover of the market party.

The regulation will take effect on 25 May 2018. The Dutch Government has introduced a Bill in order to transpose, where necessary, the Regulation into national law.

MORE CLARITY ON DUTY OF CARE FOR ACCOUNTANT FIRMS

On 20 December 2017, the Rotterdam administrative court ruled on the appeal filed by EY and PWC against the penalties imposed by the AFM in 2016, because it believed both organisations failed to meet their duty of care (see the press release of the AFM). It is, at the moment of publication of this Outlook, unknown whether the AFM will appeal against this ruling.

The AFM believes that the accountants of PwC and EY were not in the possession of sufficient and suitable information to provide a positive statement concerning the annual accounts in various audit files. The key question of the proceedings was whether the accountant's duty of care is violated if an audit by the AFM reveals that there are severe shortcomings in multiple individual statutory audits of the annual accounts.

The court believes that shortcomings in the audit work of the external accountants of an accountant firm are not by default sufficient for the conclusion that this accountant firm fails to fulfil its duty of care. This conclusion can by default only be drawn based on an audit of the implementation of the duty of care by the accountant firm. This may not be the case in special circumstances.

In this press release, the AFM again emphasises its supervisory approach concerning accountant firms of public interest entities. Its supervision focuses on:

(i) Measurements of the quality of statutory audits and internal quality assurance;
(ii) The implementation and assurance of improvement measures are studied; and
(iii) The impact on the quality of the structure within which accountant firms operate and the resulting incentives.

This approach resulted in rules concerning suitability audits and independent internal supervision (currently at the Senate). Accountant firms will also be held to take recovery measures if shortcomings in the annual accounts have been found.

IMPACT OF FOURTH ANTI-MONEY LAUNDERING DIRECTIVE

The implementation of the Fourth Anti-Money Laundering Directive will probably take effect in the Netherlands in the spring of 2018. A bill to this effect has been submitted to the House of Representatives on 12 October 2017. For an overview of the consequences, we refer to the Wwft section of this Outlook.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR PAYMENT PROCESSING INSTITUTIONS IN 2018

ONDERWERPEN

- CPMI-IOSCO Revised Report Recovery Financial Market Infrastructures
- CPMI Consultatie Reducing the risk of wholesale payments fraud related to endpoint security
- Cybersecurity
- SEPA Instant Credit Transfer en TIPS

CPI-IOSCO REVISED REPORT RECOVERY FINANCIAL MARKET INFRASTRUCTURES

Payment processing institutions (in Dutch: *afwikkelondernemingen*) must comply with a large number of Principles for Financial Market Infrastructures (PFMIs). These PFMIs have been drawn up by the Committee on Payments and Market Infrastructures (CMPI) and the International Organization of Securities Commissions (IOSCO). July 2017 CPMI-IOSCO published a review of their 2014 report on recovery planning.

Compared to the 2014 report, the revised version includes clarifications on the following four points: (i) operationalisation of the recovery plan, (ii) addition of funds, (iii) 'non-default' losses, and (iv) transparency related to recovery instruments and when these instruments can be used.

We recommend that payment processing institutions assess whether their recovery plan meets the revised report and adjust it where necessary.

CPMI CONSULTATIE REDUCING THE RISK OF WHOLESALE PAYMENTS FRAUD RELATED TO ENDPOINT SECURITY

In September 2017, CPMI published a discussion document with a strategy for the prevention of fraud in wholesale payments and corresponding reactions and communication. CMPI sees a growing risk of such fraud. Stakeholders could respond to the deliberations until the end of November 2017. CPMI has indicated that it intends to offer guidance based on the acquired input. This guidance will be developed at the start of 2018. It is not yet clear whether the guidance will actually be published in 2018.

"In September 2017, CPMI published a discussion document with a strategy for the prevention of fraud in wholesale payments."

CYBERSECURITY

Cyber resilience will be an important subject in 2018 again. As announced in the General section of this Outlook, the Dutch Central Bank (*De Nederlandsche Bank*, DNB) has in its Supervisory Strategy 2018-2022 indicated that it considers cyber risk a rapidly growing threat to the financial sector.

"DNB has announced that it will audit the IT risks and cyber resilience at various market parties in 2018."

DNB has announced that it will audit the IT risks and cyber resilience at various market parties in 2018. The audit will, in any case, take place at each of the three payment processing institutions that are licensed in the Netherlands. DNB has developed a framework for simulating sophisticated cyber-attacks to check the resilience of financial core infrastructure institutions, of which payment processing institutions are part (Threat Intelligence Based Ethical Red-teaming (TIBER)). DNB will also publish its conclusions of its Business Continuity Management audits carried out at payment processing institutions in 2017 and demand these conclusions will be observed.

In this context, we note that payment processing institutions fall within the scope of the Act on Data Processing and Cyber Security Reporting Duty. Payment processing institutions must be considered vital providers (as part of the financial core infrastructure). These vital providers must immediately inform the Minister of Justice and Security of a cyber-attack; a breach of security or a loss of integrity of the IT system which may or will significantly interrupt the availability or reliability of the payment processing service. This reporting duty will take effect on 1 January 2018 (via the Decree reporting cyber security).

SEPA INSTANT CREDIT TRANSFER EN TIPS

The SEPA Instant Credit Transfer (SCT Inst) Scheme Rulebook of the European Payments

Council (EPC) took effect in November 2017. This Rulebook contains an infrastructure for instant payments. An instant credit transfer will be immediately credited to the bank account of the beneficiary and the funds will be available within seconds. The Rulebook contains technical standards that payment services providers must meet to participate in the payment schedule. Even though payment service providers are not required to offer instant payments, the expectation is that this will be implemented on a large scale in the near future.

The rules on clearing and settlement that are particularly relevant to payment processing institutions that want to make available instant payments for payment service providers are explicitly not within the scope of the SCT Inst Rulebook. In this context, the ECB has developed the TARGET instant payment settlement (TIPS) service. TIPS enables payment processing institutions and banks and their affiliated payment service providers to allow instant payments in central bank money (using TARGET2). TIPS is expected to take effect in November 2018.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR BANKS IN 2018

TOPICS

- SSM: ECB Supervisory Priorities
- SSM: ECB risk analysis
- SSM: Harmonisation
- SSM: Legal protection against ECB decisions
- CRD 5 en CRR 2
- Amendments to BRRD/SRMR
- SRM: SRB priorities 2018-2020
- SRM: New SRB policy MREL
- DNB Supervision Priorities 2018
- DNB Supervisory Strategy 2018-2022
- Basel IV
- EBA Priorities 2018
- EBA Guidelines on internal governance
- ESA Guidelines on assessment of qualified participation
- ECB guide for the assessment of applications for a general credit institution license
- ECB guide for the assessment of applications for a FinTech credit institution license
- Critical report Dutch Court of Audit on 'Supervision on banks in the Netherlands'

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FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR BANKS IN 2018

- Case study AFM into governance culture of financial companies
- Thematic DNB audit into risk management in case of outsourcing
- Include risks of organisational changes in SIRA
- PRIIPs Regulation
- New advertising rules
- Implementation of Uniform Recovery Framework Interest Derivatives SME by banks
- Introduction of new reporting rules (IFRS 9, 15 and 16)
- Integrity: Impact of Fourth Anti-Money Laundering Directive

For 2018, we foresee a large quantity of new regulations applicable to banks. These new rules will include statutory measures, but also more detailed technical standards and interpretations at the level of the supervisors. In the Outlook 2018, we will only discuss the most important developments in our view.

SSM: ECB SUPERVISORY PRIORITIES

The ECB has published its Supervisory Priorities for 2018 in December 2017. These mainly concern banks supervised by the European Central Bank (ECB) (significant banks) but, as explained below, the Dutch Central Bank (*De Nederlandsche Bank*, DNB) will also adopt the ECB's priorities in its supervision of less significant banks.

The ECB has identified a wide range of risks for 2018. It has cooperated with the national supervisors and considered the input of the Joint Supervisory Teams, its own analyses, and reports of international organisations. The risks for banks concern: the persistently low-interest rates, high levels of non-performing loans, geopolitical uncertainties, cybercrime and IT disruptions and competition by non-banks (also refer to the chapter on risks below). ECB has studied its supervision priorities to enable banks to effectively address these risks. This resulted in the following four priority areas in the ECB banking supervision for 2018:

- Business models and profitability factors: Business models and profitability factors remain a priority for the ECB in 2018, as was the case in 2017. Its activities in 2018 mainly concern investigating the development of the profitability of banks in the current climate and assessing the implications of the interest risk for the banks. In their examinations, the ECB considers the results of a recently completed horizontal analysis of the factors that determine the profitability of banks. The ECB also announces that it will take follow-up actions (together with national supervisors) based on the impact of possible changes to the interest level on banks.

- Credit risk: The ECB notes that a number of institutions still have a great number of non-performing loans (NPLs) that may ultimately affect the lending by banks to the economy. In its supervision dialogue, the ECB continues to primarily focus on studying NPL strategies and improving the timeliness of facilities and depreciations for NPLs. Another credit risk which attracts the attention of the ECB is the concentration of the risk positions of banks in certain asset categories. The ECB intends to study exposure to real estate and will include in its supervision approach a combination of off-site and on-site elements (as in its study of shipping portfolios) in 2018. It will also focus on the manner in which banks manage and appraise their collateral.

- Risk management: The ECB will focus on three initiatives in this field. Firstly, the targeted review of internal models (TRIM) project will continue in 2018 (and 2019). In this context, the ECB will in 2018 again carry out on-site audits at banks concerning the processing of credit, market and counterparty credit risk in their internal models. The results of these on-site audits will be used by the ECB in its horizontal analysis, which will also serve as an input for the follow-up activities and the revision of the ECB guide on internal models for the supervisor. Secondly, the ECB has after a dialogue with the banks honed and supplemented its supervision guideline concerning ICAAPs and ILAAPs. This guideline will be completed in 2018 after a public consultation which will start at the beginning of the year. Finally, the ECB will ensure that banks introduce the new standards of IFRS 9. An interim evaluation showed that there is still room for improvements concerning the preparations and the introduction of IFRS 9. The ECB will also study the preparations of banks concerning other changes in legislation (the net stable funding ratio, the leverage ratio, and the Minimum Requirement for own funds and Eligible Liabilities (MREL)).

- Activities focussed on multiple risk dimensions: The ECB will in 2018 focus more on the practical implementation of the policy developed concerning the Brexit. It will continue to assess the plans of banks for moving the activities from the United Kingdom to the Euro area in consultation with the national supervisors. The ECB mainly wants to prevent the incorporation of empty shell institutions in the countries of the SSM while the actual activities remain in the UK. 2018 will also revolve around the stress test. It will consist of two additional

tests. G-SIBs will be part of an EU-wide stress test led by the EBA. The ECB will carry out an additional stress test for the remaining important institutions that do not participate in the EU-wide stress test. The results of these tests will be included in the Supervisory Review and Evaluation Process (SREP).

The ECB and DNB will take actions for each of these priorities that will be implemented at the individual banks in 2018. We recommend that the supervision team of banks consult with their relevant supervisor on the supervision planning for 2018 and possibly anticipate on this.

SSM: ECB RISK ANALYSIS

The ECB in cooperation with national supervisors issues an update of the SSM risk mapping every year in which the various risks that may affect the European banking system are identified:

- **Low interest rate:** The ECB considers the sustained period of low interest rates a challenge for the profitability of banks. Even though the low interest rates also offer benefits (low financing costs and more economic growth), it reduces the profit margin on interest. This could lead to changes to business models and/or cost structures of banks. The search for higher profits should not lead to irresponsible risk-taking.

- **NPLs:** A significant number of banks in the euro area has a high concentration of non-performing loans (NPLs) on their balance sheets. This has a negative effect on profitability and the ability to attract funding. This is why the ECB believes that it is important that banks spend additional energy on drawing up and implementing credible plans concerning these NPLs. (Also see the above supervision priorities of the ECB).

- **Debts:** The expectation is that the economic growth in 2018 will support banks in improving their asset quality and profitability. Banks must be aware of the differences between the various Member States of the euro area. For some Member States, it is doubtful whether the national debt will remain manageable in the long-term.

- **Changes in capital market:** Banks must remain vigilant for sudden changes on the financial markets. The historically high geopolitical uncertainty could lead to abrupt changes in the risk appetite of the financial markets. The uncertainty of the outcome of the Brexit negotiations also plays a role. This results in challenges relating to continuity, macroeconomic risks, and supervision.

- **Miscellaneous:** Finally, ECB points to a variety of risks faced by banks. Examples are cybercrime and IT failures, the increasing competition for traditional banks by FinTech and volatility on the real estate markets.

SSM: HARMONISATION

The harmonisation of the banking regulations within the SSM will be further completed in 2018, also for less significant banks. Some examples are given below.

- **ECB:** In April 2017, the ECB published a Guideline and a Recommendation for the application of options and national discretions (ONDs) in CRD IV and CRR by national supervisors at less significant institutions. In short, also in relation to less significant institutions, the national supervisors must largely comply with the ECB guide on the standardisation of ONDs for significant institutions, which is in effect as of 1 January 2016.

- **DNB:** The Dutch Central Bank (*De Nederlandsche Bank* (DNB)) has indicated that it will comply with the requirements of the Guideline as of 1 January 2018. The exception to this is a specific provision concerning the outflows from stable retail deposits in the context of the Liquidity Coverage Ratio which DNB will comply with as of 1 January 2019, in line with the Guideline. DNB has also indicated that it already incorporates the ECB's Recommendation in its supervision on less significant banks as of April 2017.

- **EBA:** In 2017, EBA has again focussed on increasing the convergence in banking supervision between different national supervisors. In its annual report on this subject, it stated that supervisors must take steps to implement the guidelines of EBA and the ECB concerning the SREP. The expectation

is that the revision and clarification of the SREP framework - in line with the Pillar 2 roadmap - further increases cohesion. In the context of a harmonised approach, EBA has also issued a method for the stress test in 2018, specifically taking into account the new requirements of IFRS 9 (see below). In October 2017 EBA has issued new Guidelines for consultation that aim for a revision of the guidelines on the SREP method, the IRRBB Guidelines, and stress tests. The consultation period ends on 31 January 2018. In these new guidelines, EBA discusses the Pillar 2 capital guidance (P2G), among other things. EBA expects that these new guidelines will take effect on 1 January 2019. Another development in respect of supervisory convergence is the EBA consultation on the draft RTS concerning various methods of prudential consolidation under Article 18 CRR. These consultations will end 9 February 2018. EBA gives a number of criteria for the use of the different consolidation methods by supervisory authorities.

"We expect that the prudential supervision on banks and the corresponding supervision methods will be fully harmonised in the coming years."

We expect that the prudential supervision on banks and the corresponding supervision methods will be fully harmonised in the coming years. It is important to determine whether the methods used by the ECB or DNB are in line with these European harmonised rules. If this is not the case, the relevant supervisory authorities may be challenged in this connection.

SSM: LEGAL PROTECTION AGAINST ECB DECISIONS

ECB SSM decisions can be challenged at the European Court of Justice. As far as we are currently aware, 18 cases have been brought before the Court (partly concerning similar matters). The European Banking Institute has published a useful overview. The Court has rendered a ruling in two of these cases (Landeskreditbank Baden-Württemberg/ECB en Crédit mutuel Arkéa/ECB). Landeskreditbank Baden-Wurttemberg argued that it was wrongly considered 'significant' by the ECB. Crédit mutuel Arkéa opposed the grounds of consolidated supervision exercised by the ECB and the capital (CET 1) requirement imposed. In both cases, the Court dismissed the actions and - essentially - acknowledged the authorities of the ECB. Landeskreditbank Baden-Wurttemberg appealed to the European Court of Justice against the first ruling. The term for appeal in the second case is ongoing and Crédit mutuel Arkéa has informed the media that it wants to make use of this option.

"We believe that the case law and the imminent rulings in the other pending cases will contribute to the maturity of the SSM."

We believe that the case law and the imminent rulings in the other pending cases will contribute to the maturity of the SSM. Our expectation is that the number of procedures before the Court will increase in the coming years given the ECB's signals that it will take more enforcement measures. The ECB in its 2016 Annual Report on supervisory activities indicated that in the first stage of SSM banking supervision the emphasis was mainly on becoming aware of the prudential status and situation of the supervised entities. Thus, in 2015 only four proceedings were initiated by the ECB. In 2016, the ECB started 41 sanction proceedings and one enforcement proceeding, in relation to 36 significant institutions. There are currently two published penalty decisions available on the ECB website.

CRD 5 AND CRR 2

The EC introduced its proposals on CRD 5 and CRR 2 at the end of 2016. Over the course of the past year the EU bodies have made progress in negotiating the final proposals but have not yet reached an agreement.

An exception is the Regulation on transitional arrangements to phase in the regulatory capital impact of the International Financial Reporting Standard (IFRS) 9 international accounting standard. IFRS 9 took effect as

of 1 January 2018, just like the Regulation.

The Regulation requires banks in the EU to use the IFRS 9 standard in the preparation of their financial statement for financial years starting on or after 1 January 2018. IFRS 9 aims to strengthen the accounting provisions for losses of financial instruments. However, this may lead to a sudden increase of provisions for expected credit losses and therefore to a sudden decline in a bank's capital buffers. Transitional arrangements are needed as of 1 January 2018. Under the Regulation, banks can add back to their Common Equity Tier 1 capital a portion of the increased expected credit loss provisions as extra capital during a five-year transitional period. This added amount will be reduced to zero in increments over a 5-year period.

We expect that an agreement will be reached on the other proposals concerning CRD 5 and CRR 2 at the end of 2018. The other proposals for CRD 5 and CRR 2 were supposed to take effect in 2019, but we expect this to be 2020 or 2021 at the earliest. Until that time, we recommend that banks keep a close eye on these developments since some proposals will have a major impact on them.

We want to remind you of the main aspects of the CRD 5/CRR 2 regulations for banks.

1. Measures on capital requirements for banks

- Trading book: These are more risk-sensitive capital requirements for banks trading in securities and derivatives.
- Adjustments to the large exposures regime: The capital that may be included in the calculation of the large exposure limit is reinforced (only Tier 1 capital). The large exposure limit for G-SIBs (Global Systemically Important Banks) will also be increased from 10% to 15%.
- New rules for bank holdings: The proposal is to introduce a licensing requirement for holdings of banking groups and financial conglomerates (ficos). The question is whether all these proposals, particularly the requirement that banking groups from outside the EU must have a central holding in the EU, will actually become law.
- Pillar 2 capital add-ons: The conditions under which Pillar 2 capital add-ons may be required by supervisors will be harmonised and tightened.
- Leverage ratio: A binding leverage ratio of 3% will be introduced. The Dutch government coalition agreement contains a provision that the Netherlands will stick to a 4% requirement until the introduction of the new Basel IV requirements. CRR 2 leaves room for a higher leverage ratio than 3% with respect to G-SIBs.
- Net Stable Funding Ratio: The Net Stable Funding Ratio (NSFR) will finally be introduced as a binding requirement. Currently, the NSFR needs to be reported only.

2. Measures to improve the lending capacity of banks

- SME financing: Capital reductions are proposed with the loans for major SME financing.
- Remuneration proportionality: The proposals include a proportional treatment of a number of remuneration rules for non-complex, small banks.
- Proportionality concerning reports and disclosures: The EC call for evidence related to the financial regulatory burden has shown that the current capital framework can be applied more proportionality, taking into account the specific situation of each bank.

AMENDMENTS TO BRRD/ SRMR

In addition to the introduction of CRD 5 and CRR 2, the EC also proposed a number of adjustments to the Bank Recovery and Resolution Directive (BRRD) and SRMR in 2016. These revisions concern the introduction of the Total Loss Absorbing Capacity (TLAC), a moratorium before resolution, and the harmonisation of the ranking of creditors for debt instruments. A new Directive on creditor hierarchy was published in December 2017. We discuss these new rules and the other BRRD/SRMR proposals below.

- **Harmonisation ranking debt instruments; creditor hierarchy**
  The creditor hierarchy of debt instruments is currently arranged at a national level. The new Directive provides for an EU har-

monised hierarchy for specifically issued 'non-preferred' unsecured debt instruments (senior debt). This facilitates banks to issue a new class of loss-absorbing debt instruments that can be used for a possible bail-in under the BRRD. The Directive entails that senior debts will rank between the fully subordinated capital instruments and the regular unsecured claims. As a result, banks may issue this new type of debt instrument to meet the requirements for loss absorption under the BRRD. This new "non-preferred" debt instrument meets the BRRD's Minimum Required Eligible Own Funds and Liabilities (MREL) and the "total loss absorption capacity" standard (TLAC). The TLAC must be used by global systemically relevant banks (ING in the Netherlands) as of 2019.

"Banks can issue a new class of loss-absorbing debt instruments that could be used for a possible bail-in."

On 5 December 2017, the Dutch legislator has published a consultation version on the Dutch implementation act on this Directive (which was closed on 9 January 2018). The proposal amends the Bankruptcy Act. It merely enables banks to issue the new non-preferred debt instrument. Banks will still be able to finance themselves using subordinated capital instruments and 'regular' unsecured debt. The changes will not affect the existing debt instruments and their ranking in bankruptcy, with the exception of the debt instruments that already meet the relevant criteria under the Directive and which explicitly refer to the intended (future) ranking. The means that banks can already issue the loss-absorbing debt instrument prior to the introduction of the rules. We expect that the final act will be discussed in the course of 2018 and will enter into force no later than the implementation date of 1 January 2019.

- **Other proposals**
  We also want to briefly highlight the most important other proposals for the amendment of the BRRD. It is not yet clear when these will be adopted, but we expect this to be in the course of 2018:
  - Total Loss Absorbing Capacity (TLAC) requirement: The proposals introduce an obligation for Global Systemically Important Institutions (G-SIIs) to comply with the TLAC requirement. They must maintain a minimum amount of equity and other instruments that can absorb losses in case of a resolution. This requirement will be integrated into the existing MREL requirement.
  - Moratorium before resolution: The proposals contain a moratorium instrument for the supervisor for payment obligations of a bank. These payment obligations will be postponed for up to five business days. Currently, this power already exists for a bank in resolution, but the proposal expands this power to the early intervention phase.

SRM: SRB PRIORITIES 2018-2020

The Single Resolution Board (SRB) has published its multi-year plan (2018-2020) and 2018 Work Programme (see both) for the Single Resolution Mechanism (SRM). The SRB supervises the resolution of significant banks and cross-border groups in the euro countries and the management of the Single Resolution Fund (SRF) under the SRM.

The SRB has laid down four relevant topics it wants to develop in the coming three years: (i) enhancing the resolvability of SIs and LSIs; (ii) promoting a robust resolution framework; (iii) preparing and implementing effective crisis management, and (iv) the operationalisation of the SRF.

The SRB will in 2018 primarily focus on four fields that can have a direct effect on banks:

- **Resolvability of SRB entities and supervision of LSIs:** The SRB will in 2018 draw up and adopt resolution plans for almost all groups under its supervision. The timeline for the preparation of these plans will be somewhat adjusted. The SRB will start in January 2018 with the banks without a resolution college and from September 2018 focus on banks with cross-border activities. The SRB aims to introduce binding MREL targets.

- **Resolution framework:** The SRB will focus on the development of policies on solo/internal MREL, the calibration of MREL under transfer strategies and liquidity

during the resolution. It will also work on policies for identifying and addressing significant obstacles to a resolution.

- **Crisis management:** The SRB will in 2018 continue with a number of projects (including the Resolution Readiness Project and the Valuation Project) to increase its capacity to respond to a crisis situation.

- **The Single Resolution Fund:** With respect to the funding of the SRF, the SRB will in 2018 determine the contributions of the various banks that fall under the scope of the SRM and instruct the national resolution authorities correspondingly. No later than 17 January 2018 the institutions must submit the data needed to calculate the contributions. The institutions will be informed in writing of the calculated contributions no later than 1 May 2018. The payment must have taken place within six weeks after the date of this letter (see FAQ DNB).

SRM: NEW SRB POLICY MREL

The SRB has published its policy concerning the MREL for the upcoming planning cycle resolution on 20 December 2017. This policy serves as the basis for establishing the consolidated MREL targets at banks that are the responsibility of the SRB. The most striking change is a shift from informative to specifically binding MREL targets for the majority of the largest and most complex SRB banks, including the G-SIBs and the banks that are supervised by a resolution college.

The new approach provides for a gradual transition of multiple years to the final MREL targets. A transitional period will be established for each bank which gives the institution the time to expand the MREL capacity to the desired level.

We recommend banks to consult with the SRB on the MREL requirements and take corresponding measures.

DNB SUPERVISION PRIORITIES 2018

DNB has published its supervision priorities for banks in 2018 in November 2017. For CRD IV supervision DNB is primarily bound to the priorities of the ECB (discussed above) but it also has a number of priorities of its own. The cross-sectoral priorities of DNB (refer to the General part of this Outlook) also apply to banks.

Banks can prepare for the following audits and priorities of DNB in 2018:

- **Sustainability of business models:** DNB informs banks that the monetary policy, the low interest rates, (geo) political developments, and technological innovations affect the profitability of banks and thus the sustainability of business models. DNB asks banks to be alert to timely address relevant changes. DNB pays specific attention to the impact of low interest rates. It will audit the business models of individual banks in 2018.

- **Introduction of PSD2:** In addition to the opportunities offered by the introduction of PSD2, DNB warns banks for the (operational) changes caused by the guideline. DNB points out the stringent requirements for security and authentication and reporting incidents in payment transactions. DNB will pay attention to these new requirements in the context of controlled business operations and business continuity management.

- **Reassessment of internal models:** The SSM has started with the implementation of the Targeted Review of Internal Models (TRIM) project in 2017 to (i) reach harmonisation of supervision on internal models, and (ii) achieve a higher quality of these models. The retail models of banks have been the subject of an ongoing study which will continue in 2018. Additional studies into corporate SME models will take place in the first half of 2018, while a study into wholesale models will start in the second half of 2018. DNB expects to complete the TRIM project at the end of 2019.

- **Credit risk:** In the context of the SSM, DNB started an investigation into the quality of loans of Dutch banks to SME based on an Asset Quality Review in 2017. This study

will continue in 2018 and the results will be presented halfway through the year. DNB has also started with a study of the credit risks in shipping portfolios at the end of 2017.

- **Stress test banks:** The bi-annual bank stress tests will take place at significant banks under the management of the EBA. The final results of the stress tests will be included in the Supervisory Review and Evaluation Process (SREP).

- **Financial-economic crime:** One of the national supervisory tasks of DNB is to prevent financial-economic crimes and the sound business operations of banks. This supervision is not part of the SSM. As a result, DNB is also the primary integrity supervisor for significant banks. This makes integrity a very important focus of the DNB supervision. DNB will communicate a supervision programme for compliance with relevant laws and regulations to each of the significant banks at the start of 2018 which will be in line with the specific risk profile of that significant bank. In this context, DNB will continue to exercise supervision at less significant banks in an intensive, risk-based manner, both throughout the sector and at specific institutions.

"In 2018, DNB will, inter alia, focus on sound internal procedures"

DNB SUPERVISORY STRATEGY 2018-2022

DNB publishes its Supervisory Strategy once every four years. In it, DNB sets out its strategies for the coming years. DNB wants to focus on three topics in the coming period: (i) technological innovations; (ii) focus on the future and sustainability; and (iii) financial-economic crime.

We will briefly discuss the three pillars of the supervision of the coming years:

- **Technological innovations:** In the coming years, DNB wants to address technological developments within and outside the sector and match these with proper supervisory actions. DNB wants to allow technological innovations to achieve a diverse and competitive financial landscape and improved services. However, innovation also leads to more stringent forms of supervision. DNB pays particular attention to the risks associated with IT outsourcing such as cloud computing. There are also risks associated with the IT security of financial institutions. DNB has developed a framework for simulating sophisticated cyber-attacks to check the resilience of financial core infrastructure institutions, including the largest banks (Threat Intelligence Based Ethical Red-teaming (TIBER)). In addition to risks, DNB also sees a number of opportunities associated with technological innovations. For example, it wants to make use of the greater availability of data in the exercise of its own supervisory duties.

- **Focus on the future and sustainability:** DNB wants market parties to be able to adapt in a controlled manner to changing circumstances, so they can remain financially sound and meet their commitments to customers. In its pursuit of a flexible and agile sector, DNB has established five priorities. These include the proper assessment of (financial) risks, studying the resilience of business models, and the capacity of financial institutions to change. DNB also wants to contribute to the focus on the future of the sector by including sustainability in its supervision. It wants to analyse the significance of potential sustainability risks such as climate risks and how these relate to prudential risks. We expect that DNB will also focus on corporate social responsibility by banks. We do question however whether this is part of the statutory supervisory powers of DNB.

"We expect many integrity audits at banks where DNB will not shy away from taking measures."

- **Strict concerning financial-economic crime:** DNB will also impose strict supervision on financial-economic crime. Examples are money laundering, corruption, the financing of terrorism, and tax evasion by clients. Financial institutions have a key role in signalling and preventing criminal fund streams. Institutions and their management have

a personal responsibility to avoid getting in contact with financial-economic crime. In this context, DNB will focus on strengthening and professionalising the compliance and audit functions. In case of abuses, it wants to use its powers and hold policymakers personally liable where necessary. DNB will contact the Public Prosecutor if an abuse has criminal consequences. We expect many integrity audits at banks where DNB will not shy away from taking measures.

BASEL IV

After years of negotiations, the Basel Committee has reached an agreement (see the summary) on a number of revisions to the Basel 3 framework (Basel 4, also called Basel 3.5). Most revisions must be implemented before 1 January 2022. The new 'output floor' of 72.5% applies as of 1 January 2027.

The Basel 4 framework means that credit risk calculations based on internal models (Internal Ratings Based (IRB)) must meet a minimum requirement (the 'input floors') calculated on the basis of a Standardised Approach. Banks can, for example, no longer fully use of the IRB approach for asset classes that cannot be modelled in a robust and prudent manner. This includes exposures for (medium) large companies, banks and other financial institutions. Other noteworthy developments are a higher leverage ratio for G-SIBs as a surcharge on top of the current 3% standard.

It is very important that an 'output floor' will be introduced for which will have a negative impact Dutch banks using internal models. These are particularly the larger Dutch banks. This output floor means that in risk weighting calculations based on internal models the capital requirement may never be lower than 72.5% of the capital requirements calculated using the Standardised Approach. This output floor has very negative consequences on the significant mortgage portfolios of Dutch banks. The Standardised Approach risk weighting of mortgage loans is based solely on the amount of the Loan-to-Value (LTV), which LTV is relatively high for Dutch mortgage portfolios. The current internal models used by Dutch banks are mainly based on the structurally low losses of Dutch mortgage portfolios. Thus banks that currently use internal models must hold more capital for their mortgage portfolios.

We point out that these new rules will only take effect once transposed into EU legislation. It is very important that Dutch banks actively monitor the transposition of the Basel 4 rules in EU legislation and potentially anticipate the new package of requirements. Finalising the EU legislation will take years.

EBA PRIORITIES 2018

EBA has published its Work Programme for 2018 in October 2017. It has listed all of its priorities for technical standards, guidelines, and reports for specific rules under CRD IV and CRR, but also concerning the BRRD, payment services, shadow banking, or anti-money laundering regulations. EBA has indicated that it will focus on the coming introduction of CRD V/CRR 2, Brexit, further convergence of supervisory practices, the use of the TLAC standard, and a continuation of the discussion on proportionality in regulations in 2018.

These documents will in fact largely make up the regulatory framework for banks, as the ECB and DNB consider themselves bound by them. Considering the major impact on banks, it is important to carefully monitor these EBA proposals. Some of the most important new guidelines will be briefly discussed below.

EBA GUIDELINES ON INTERNAL GOVERNANCE

In the Outlook 2017, we have informed the market parties of the proposal of EBA for revised guidelines for internal governance as a replacement of the existing guidelines from 2011. These new guidelines have become final in September 2017 and will apply as of 30 June 2018. The old guidelines will be void from this date.

ESA GUIDELINES ON ASSESSMENT OF QUALIFIED PARTICIPATION

As per 1 October 2017 revised guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, will apply. It concerns joint guidelines from EIOPA, EBA and ESMA. Prospective shareholders need to obtain a Declaration of No Objection (DNO) before acquiring a qualifying holding in an undertaking in the financial sector. The guidelines are being revised to overcome divergent interpretations across EU Member States and to provide clarity on the procedural rules and the assessment criteria for the prudential assessment of acquisitions and increases of qualifying holdings.

Relevant topics:

- Concept of acting in concert: The supervisor must aggregate holdings of parties which act in concert, to determine whether a qualifying holding is acquired. Parties must be considered to act in concert when there is an agreement between those parties, whereby the competent authority must take into account all relevant factors. The guidelines specify a non-exhaustive list with those factors. A few examples: (i) the existence of family relations (ii) whether the proposed acquirer has a management function, (iii) the same source of finance and (iv) consistent voting behaviour.

- Significant influence: For a proposed acquisition or increase of a participation of less than 10% of the capital or voting rights of the target undertaking, a notification is only required if that participation allows the proposed acquirer to exert significant influence on the management of the target undertaking. The guidelines specify a non-exhaustive list with factors to determine this. A few examples: (i) whether the proposed acquirer enjoys additional rights in the target undertaking, by virtue of contract or the articles of association, (ii) any rights to appoint a representative in the management or supervisory body of the target undertaking, and (iii) any relations and any shareholders agreement that would enable the proposed acquirer to exercise significant influence.

- Indirect acquisitions of a qualifying holding: The guidelines contain new tests for assessing whether an indirect qualifying holding is obtained, and for determining the extent of that participation if: (i) a natural or legal person acquires or increases a direct or indirect participation in a particular holder of a qualifying holding or (ii) a natural or legal person has a direct or indirect participation in a person who acquires or increases a direct participation in a target undertaking. Step 1 of the test: apply the 'control criterion'. All persons which meet the control criterion (i.e. hold more than 50% of the shares or voting rights) should be considered as indirect acquirers of a qualifying holding. Step 2 of the test: apply multiplication criterion.

- Decision to acquire: The guidelines specify a non-exhaustive list of elements which supervisors should take into account in order to assess whether a decision to acquire has been made: (i) was the proposed acquirer acquainted or should he be acquainted with the acquisition / increase of a qualifying holding and the transaction giving rise to this? And (ii) was the proposed acquirer able to influence or object to the proposed acquisition or increase or prevent the proposed acquisition or increase?

- Proportionality principle: The supervisor must perform the prudential assessment of proposed acquirers in accordance with the proportionality principle. This proportionality principle must be applied to: (i) the intensity of the assessment taking into account the suspected influence that the proposed acquirer will have on the target company and (ii) the composition of the required information, which must be in proportion to the nature of the proposed acquirer and the intended acquisition.

- Assessment criteria for a proposed acquisition: Finally, the guidelines provide further clarity on the assessment criteria to be applied by the supervisors.

The new criteria concerning the method for assessing if a qualifying holding is acquired indirectly and the size of such holding are the most notable changes. DNB applies these guidelines as of October 2017. We expect that the ECB, which ultimately decides on declarations of no-objection for

banks, will also apply these new guidelines in 2018.

ECB GUIDE FOR THE ASSESSMENT OF APPLICATIONS FOR A GENERAL CREDIT INSTITUTION LICENSE

In September 2017, the ECB has issued a draft guide concerning the assessment of applications for general banking licenses. The ECB ultimately decides in bank license applications. The ECB gives an overview of the assessment criteria, the procedure to be followed, and the possible outcomes of a license application.

With this guide, the ECB aims to promote the awareness of and improve the transparency of the assessment criteria and procedures for the establishment of a credit institution within the SSM. Market parties that want to apply for a banking license can use this guide as a starting point to better understand the applicable procedures.

ECB GUIDE FOR THE ASSESSMENT OF APPLICATIONS FOR A FINTECH CREDIT INSTITUTION LICENSE

The ECB has a published a draft guide on the assessment of applications for FinTech institution licenses. The ECB has drawn up this guide because it notices an increase in the number of license applications and related questions of FinTech banks. A FinTech bank has been defined by the ECB as a bank with: "*a business model in which the production and delivery of banking products and services are based on technology-enabled innovation*". Examples are Bunq or Adyen, which have recently been awarded a banking license by DNB.

The guide has been drawn up in cooperation with national supervisors. The guide includes considerations used by the supervisors in the assessments that specifically match the specific nature of banks with a FinTech business model. A listed specific example is whether the managing bodies have the relevant skills and knowledge in the field of technology. This requirement can be met according to the ECB by assigning a Chief Technology Officer as an executive manager. The general policy of the ECB for granting a license to a bank will also apply to license applications by FinTech banks.

The goal of the guide is to introduce a consistent approach for the assessment of license applications for both new FinTech banks and subsidiaries of existing credit institutions with a FinTech business model. We recommend that market parties that consider requesting a banking license with a FinTech business model to consult this guide when preparing the license application.

CRITICAL REPORT DUTCH COURT OF AUDIT ON 'SUPERVISION ON BANKS IN THE NETHERLANDS'

The Dutch Court of Audit (*Algemene Rekenkamer*) has studied how DNB exercises its prudential supervision of medium and small banks in the Netherlands and how the supervisor in turn is supervised. The Dutch Court of Audit draws a number of critical conclusions in a report published at the end of September 2017. We will list two of those conclusions below.

- The first conclusion is that DNB must exercise its supervision of the capital and liquidity positions of medium and small banks in compliance with extensive and complex regulations that change rapidly. The supervision is soundly structured and both intensive and stringent, but a number of aspects can still be improved. The Dutch Court of Audit particularly makes recommendations for improvements to the internal work processes at DNB and to take measures to improve the transparency on the capital requirements imposed on medium and small banks (for example, in the SREP decision).

- The second conclusion concerns the role of the Minister of Finance in the supervision of DNB. The Dutch Court of Audit concludes that the Minister of Finance has sufficient powers to supervise

the DNB but only exercises limited supervision in practice. A number of recommendations are made to this end.

Both DNB and the Minister of Finance have responded to the (draft) report. In its response, DNB commits to the development and documentation of the work processes regarding the SSM in line with the report. It will also pay special attention to the transparency of the SREP process and expressly emphasise how the capital and liquidity requirements are established and make more use of existing internal safeguards for quality assurance. The Minister promises, among other things, to provide more clarity concerning the use of the indicated powers and more clearly explain how the supervision on DNB takes place in practice. He will also study how the regular contact moments between DNB and the Ministry of Finance can be set up to better communicate them with others.

CASE STUDY AFM INTO GOVERNANCE CULTURE OF FINANCIAL COMPANIES

After DNB has focussed on the behaviour and culture of banks since 2011, the AFM has now also studied the governance culture of medium and small banks. According to the AFM, the study shows that as a result of group dynamics and a shared frame of reference, some banks mainly focus on customer satisfaction rather than customer interest. The report 'Balanced decision-making; dealing with blind spots' and the 'handout' of the AFM contain best practices and six concrete applicable insights into how decision-making within the management of a bank can be improved.

The insights make clear how the AFM views behaviour, culture and governance at banks and are relevant for Management Boards and management teams, but also for specific departments such as Risk, Compliance and the Internal Audit Department. We expect that the AFM will have an increased focus on this topic in 2018. The question is what the AFM's powers on this subject (governance at banks) are, and whether this should be an exclusive authority of the ECB and DNB.

THEMATIC DNB AUDIT INTO RISK MANAGEMENT IN CASE OF OUTSOURCING

DNB has carried out an audit into the risk management in case of outsourcing at the start of 2017. This audit revealed a number of weaknesses in the field of internal control related to outsourcing: (i) the management information on outsourced services is inadequate; (ii) institutions do not carry out enough or any internal audits on their own supervision measures; (iii) the control of access rights to sensitive data is faulty; and (iv) the control and management of continuity measures (business continuity management - BCM) - is not arranged properly.

DNB will publish a number of good practices on its website in the first quarter of 2018 to help banks better supervise the material activities they outsource.

INCLUDE RISKS OF ORGANISATIONAL CHANGES IN SIRA

In 2018, as mentioned, DNB shall further increase its focus on integrity. In this regard the Systematic Integrity Risk Analysis (SIRA) that banks should have and carry out is at the heart of DNB's attention this year. DNB concludes based on an audit that institutions make no or only limited use of the SIRA for the management of integrity risks in case of substantial organisational changes. A number of institutions that do not use the SIRA carry out separate risk analyses to gain insight into all risks and formulate (additional) management measures. DNB also concludes that institutions are still not always explicitly aware of integrity risks in case of organisational changes and have correspondingly not developed sufficiently visible and effective management measures.

DNB expects that institutions in their daily operations:

- Sufficiently involve the first line and take ownership concerning the identification and management of integrity risks and the SIRA process. The compliance department acts as a sparring partner and countervailing power.
- Financial institutions use the SIRA much more as a dynamic instrument so that it actually is part of the identification and management of integrity risks that are relevant to their work.
- Financial institutions explicitly identify all risks in their SIRA, including any risks they estimate to be low.

PRIIPS REGULATION

The PRIIPs Regulation will apply throughout the European Union as of 1 January 2018. This regulation contains rules for the development and selling in the retail market of so-called Packaged Retail and Insurance-based Investment Products (PRIIPs). PRIIPs fall into two categories: (i) packaged retail investment products and (ii) insurance-based investment products. Structured deposits fall within the scope of the PRIIPs Regulation. The developer of a PRIIP must draw up an Essential Information Document (Eid) for retail investors which must be provided to the client by the seller (usually an intermediary). PRIIPs entered into force at a national level when the following regulations came in effect:

- Implementation Act PRIIPs (took effect on 1 January);
- Implementation Decree PRIIPs (took effect on 1 January);
- Amended Detailed regulation conduct supervision financial companies (took effect on 1 January 2018).

In addition, the Delegated Regulations (which prescribes both the form and content of the Eid) on essential information documents for PRIIPs are important at a European level (besides the PRIIPs Regulations itself), and the Q&A of EBA, EIOPA and ESMA on PRIIPs of 20 November 2017. We also refer to the guidelines of the Commission concerning the Eid. Banks that develop or offer PRIIPs must as of 1 January 2018 meet the requirements of the PRIIPs Regulation

NEW ADVERTISING RULES

As a result of the introduction of the PRIIPs Regulation, rules concerning voluntary precontractual information (including advertising) have been amended in the new Detailed regulations conduct supervision financial companies Wft. The main amendments are:

- Definition of complex investment product: These include structured deposits.
- New risk indicator: With the abolition of the financial information leaflet for complex products, the requirement to include the associated risk indicator in advertising will also expire. New risk indicators will be introduced for complex products that also fall within the scope of the PRIIPs Regulation. The new images can be downloaded from www.afm.nl/reclameteksten.
- Information about returns: The introduction of the PRIIPs Regulation and the abolition of the financial information leaflet also has consequences for the manner in which providers of complex (investment) products may communicate about the returns of their products in precontractual information such as advertisements and quotations. Amendments to the Nadere regeling gedragstoezicht financiële onderneming, 'NRgfo' (Further Regulations on the Supervision of the Conduct of Financial Undertakings) match the system of the PRIIPs Regulation and the calculations on future returns, main risks and costs as laid down in the Delegated Regulation essential information documents. Only future returns based on the performance scenarios of the delegated regulation essential information documents may be presented. Deviations from the calculation method prescribed in the delegated regulation essential information documents are allowed for a specific group of complex investment products in favour of individualised information.

IMPLEMENTATION OF UNIFORM RECOVERY FRAMEWORK INTEREST DERIVATIVES SME BY BANKS

In December 2017, the AFM has drawn up a progress report on the implementation of the Uniform Recovery Framework Interest Derivatives (URFID) which has been sent to the House of Representatives by the Minister of Finance (see press release AFM). The report shows that the implementation of the URFID is again delayed. This delay is largely due to issues with the data and automation systems at a number of banks.

The independent expert has, in consultation with the banks involved, agreed to extend the expiration period for claims of SME companies that fall within the scope of the recovery framework of which the claim expires during the implementation of the URFID (also refer to the press release of the Derivatives Commission).

In the release, the AFM emphasises that the banks must keep their clients informed of the implementation of the recovery framework and the timelines. Banks must record the current state of affairs on their websites and regularly actively inform their clients, even in case of delays in the process. SME companies can ask questions about the URFID and its implementation at their banks. Independent evaluators will continue to assess whether the recovery framework is being implemented in the agreed manner to ensure companies can expect a controlled offer. The AFM will check whether the entire process has taken place properly in the interim and afterwards. It will again report on the progress of the implementation of the URFID mid-2018. This progress is regularly discussed in the media.

INTRODUCTION OF NEW REPORTING RULES (IFRS 9, 15 AND 16)

In addition to IFRS 9, IFRS 15, concerning turnover justification, took effect on 1 January 2018. IFRS 16 (Leases) will enter into force on 1 January 2019 (see press release AFM).

In addition, starting in the financial year 2017, Public Interest Entities with more than 500 employees must report on non-financial information in their annual report. Examples are risks and performance in the field of environmental, social and staff policies, compliance with human rights, and the fight against corruption and bribery.

The AFM expects a quantitative explanation of the impact of the introduction of IFRS 9 and 15 in the annual accounts 2017. This also applies to IFRS 16 if it is applied early. The AFM will check compliance with the new rules on non-financial information in 2018. The AFM recommends institutions to involve the EU Guidelines and the recommendations of the Task Force on Climate-Related Financial Disclosures. The AFM's supervision will focus on the actual implementation of the standards in 2019 and 2020.

INTEGRITY: IMPACT OF FOURTH ANTI-MONEY LAUNDERING DIRECTIVE

The implementation of the Fourth EU Anti-Money Laundering Directive will likely take effect in the Netherlands in the spring of 2018. A bill to this effect has been submitted to the House of Representatives on 12 October 2017. For an overview of the consequences, we refer to the Dutch Money Laundering and Terrorist Financing Prevention Act (Wwft) section of this Outlook.

"We expect that the focus of DNB on tax evasion will increase in 2018."

Also, as discussed above, DNB has made a strict approach towards financial-economic crime through banks one of its supervision priorities in the coming years. In this context, it is important that DNB will focus on combatting the risk of tax evasion by or through clients of banks. DNB expects that a bank checks its list of business relationships using the published lists of tax evaders (such as the Panama Papers and Paradise Papers) and that it reports any hits. We expect that the focus of DNB on tax evasion will increase in 2018 and that DNB will publish corresponding guidance or regulations.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR INVESTMENT FUND MANAGERS IN 2018

TOPICS

- MiFID II: Impact on investment fund managers
- PRIIPs Regulation: Mandatory preparation Key Information Document (KID)
- Changes to EuVECA and EuSEF Regulation – requesting a label becomes easier
- Review van AIFMD (AIFMD II?)
- Impact Benchmark Regulation
- Money Market Fund Regulation
- Impact proposal Amendment Act on Financial Markets 2018 for investment fund managers within a group
- Expansion of ESMA powers
- Advertising investments as an alternative to savings
- Guidance + Q&As AFM and ESMA in relation to AIFMD and UCITS
- DNB Supervision priorities 2018
- License requirement for UCITS depositaries from March 2018
- Implementation 4th Anti-Money Laundering Directive and Sector-specific risk factors for client due diligence
- Changes AFM Guidance Wwft, Wwft BES and Dutch Sanction Act
- Reporting unusual transactions

MIFID II: IMPACT ON INVESTMENT FUND MANAGERS

MiFID II takes effect on 3 January 2018 after having been postponed for one year. The MiFID II-package consists of a directive (2014/65/EU), a regulation (600/2014/EU (MiFIR), and further guidance in level 2 regulations and level 3 regulations. MiFID II in principle applies to investment firms. For an overview of these changes, we refer to the Investment Firms section of this Outlook. MiFID II also has an impact on certain investment fund managers. We will briefly discuss this impact below.

"MiFID II also has an impact on certain investment fund managers."

Impact on investment fund managers providing investment services
Firstly, the MiFID II is relevant for investment fund managers who may provide certain MiFID services based on their AIFMD or UCITS license. The AIFMD and UCITS allow an investment fund manager (with permission of the AFM) to offer individual portfolio management services and in addition thereto advising on financial instruments and holding the participation rights in AIFs or UCITS. An investment fund manager which also provides such MiFID services must, based on a specific referral clause in the AIFMD and UCITS, meet specific requirements of MiFID, for example in relation to the provision of information and business operations (such as the prevention of conflicts of interest). MiFID II has further expanded these requirements. These include:

- product governance;
- rules on cross-selling;
- knowledge and competence requirements;
- transparency into *all* costs of the services; and
- inducement rules, including the calculation of research costs.

Impact on investment fund managers that cooperate with distributors
MiFID II is also relevant for investment fund managers who make use of the services of investment firms (distributors) to market their AIFs and UCITS. These distributors must primarily implement a number of changes themselves to comply with the new requirements of MiFID II. However, because a number of these new requirements affect the *products* (i.e. the AIFs and UCITS) offered by them, certain components of these requirements will also apply to investment fund managers of AIFs and UCITS. Examples are product governance (including determining the target group), cost transparency of the service related to the AIFs or UCITS (for the benefit of the investment firm) and revised inducement rules.

MiFID II does not directly apply to these investment fund managers, but they will indirectly be affected by it because investment firms will depend on the input provided by the investment fund managers for their own compliance with MiFID II.

Impact on investment fund managers that invest in derivatives on behalf of funds
Finally, MiFID II is relevant for investment fund managers that invest in derivatives on behalf of the funds they manage. MiFIR mainly provides a trading obligation of derivatives for financial counterparties under EMIR. This includes (managers of) investment funds, both licensed and registered managers. The trading obligation means that certain derivatives must be traded on organised trading platforms rather than over-the-counter (OTC). MiFIR determines which derivatives may no longer be traded OTC. This obligation also applies to the investment fund managers that invest in derivatives on behalf of funds. MiFIR also contains position limits that apply to persons holding a position in commodity derivatives that are traded on a trading platform. An investment fund manager investing in commodity derivatives may not hold a net position in a commodity derivative which exceeds the position limit. The trading platforms must be informed of the positions.

PRIIPS REGULATION: MANDATORY PREPARATION KEY INFORMATION DOCUMENT (KID)

General
The PRIIPs Regulation took effect on 1 January 2018. PRIIPs contains rules for

the development and selling of so-called *Packaged Retail and Insurance-based Investment Products* (PRIIPs). Participation rights in an AIF or UCITS are examples of PRIIPs. Therefore PRIIPs in principle also applies to investment fund managers. This means that investment fund managers must in principle draw up a Key Information Document (KID) for retail investors (being non-professional clients within the meaning MiFID II), which must then be provided to the client by the seller (often an intermediary).

"This means that investment fund managers must in principle draw up a Key Information Document (KID) for retail investors."

The requirement to draw up a KID does not apply if only professional clients within the meaning of MiFID II are targeted. The PRIIPs Regulation contains general requirements for the form and content of the KID and the associated Delegated Regulation (no. 2017/653) contains specific requirements. On a national level, the PRIIPS Regulation is transposed through the following legislative measures:

- Implementation Act PRIIPS (applicable as of January 1st);
- Implementation Decree PRIIPS (applicable as of January 1st);
- (a modified) Further Regulations on the Supervision of the Conduct of Financial Undertakings *Nadere Regeling gedragstoezicht financiele ondernemingen*, Nrgfo) (applicable as of January 1st). The Nrgfo primarily contains rules regarding optional pre-contractual information (for example advertisements). For investment funds, however, there is a transitional period till the end of 2019 pursuant the PRIIPS Regulation (see below).

Temporary exemption for AIFs and UCITS that prepare a KIID
Investment fund managers that are obliged under the current framework to prepare a Key Investor Information Document (KIID) (*Essentiële beleggersinformatie, Ebi*) are temporarily exempt from the obligation to draw up a KID. This exemption applies until 31 December 2019. From 1 January 2020 all investment fund managers must prepare a KID for retail investors in respect of their AIFs and UCITS under management.

Light managers and high-net-worth individuals
Please note: registered investment fund managers (also referred to as light managers) and AIFMD licensees who provide services to high-net-worth individuals (i.e. those that invest more than EUR 100,000) cannot benefit from an exemption from the KID requirement. These managers do not need to prepare a KIID and must therefore prepare a KID as of 1 January 2018. Even though the AIFMD retail top-up regime does not apply to marketing to high-net-worth individuals, such investors do not per se qualify as a professional client within the meaning of MiFID II. This means that they fall within the scope of PRIIPs and a KID must be prepared, unless these high-net-worth individuals can be classified as professional client within the meaning of MiFID II.

We recommend investment fund managers that do not need to prepare a KIID and have not yet drawn up a KID for their active investment funds, to draw up an KID as soon as possible.

CHANGES TO EUVECA AND EUSEF REGULATION – REQUESTING A LABEL BECOMES EASIER

On 1 March 2018, various changes to the European Venture Capital Funds Regulation (EU) No. 345/2013 (EuVECA II) and the European Social Entrepreneurship Funds Regulation (EU) No. 346/2013 (EuSEF II) (the Amendment Regulations) take effect.

The EuVECA and EuSEF regulations provide for a specific framework for small investment fund managers covered by the AIFMD registration regime (that do not have a full AIFMD license) to apply for an 'EuVECA' or 'EuSEF' label in addition to the registration for the funds they manage. This label functions as a European passport for the respective fund. It allows the manager to offer the participation rights in the EuVECA or EuSEF fund in other Member States without these being able to impose additional conditions.

Certain conditions must be met to obtain a label. The main condition is that the funds must primarily (for at least 70% of the assets

under management) invest in venture capital companies or social entrepreneurship companies respectively. The internal organisation of the manager must also meet certain requirements – to be assessed by the AFM – and information requirements must be observed.

The changes relate to, among other things:

- Expansion of the type of managers that may market EuVECA and EuSEF funds to include AIFMD licensees.
- Expansion of the type of companies in which EuVECA funds may invest to non-listed companies with up to 499 employees and the ability to make follow-up investments in a company.
- Broadening the scope of companies in which EuSEF funds may invest to include companies that provide services or goods which generate a social return.
- Establishing a mandatory initial capital (EUR 50,000) and a minimum equity (at least 1/8th of the fixed costs of the manager and – if the assets under management exceed EUR 250 million - 0.02% of the amount exceeding EUR 250 million).
- Simplification of the application process for a label and limitation of the costs; the AFM must assess an application for a label within two months and may not charge any costs.
- Mandatory reporting of material changes to the conditions for the initial registration before these changes can be implemented.

"After changes have taken effect, the process for obtaining a EuVECA or EuSEF label becomes easier and the funds will be eligible for a label more quickly thanks to the expansion of the scope in relation to the assets."

After changes have taken effect, the process for obtaining a EuVECA or EuSEF label becomes easier and the funds will be eligible for a label more quickly thanks to the expansion of the scope in relation to the assets. (Exempt) managers that mainly invest in venture capital companies or social enterprises (e.g. in the field of sustainability) may check whether such label fits their operations. This allows the (exempt) manager to freely market the funds among all EU Member States.

REVIEW OF AIFMD (AIFMD II?)

The European Commission has started with a review of the AIFMD. The European Commission has initiated a tender procedure on 28 March 2017 to find a party that will examine the functioning of the AIFMD. It was announced that the tender was awarded to KPMG Germany on 23 October 2017. This review is currently taking place and the results of the report of KPMG Germany are currently not yet (publicly) available.

The topics that need to be assessed by the European Commission include:

- the marketing of AIFs within the EU;
- investments in AIFs by or on behalf of European professional investors;
- the potential adverse impact on small investors;
- the impact of the AIFMD on the depositary function;
- the impact of reporting, reporting requirements and information obligations;
- the impact of the AIFMD on the viability of private equity and venture capital funds;
- the impact of the asset-stripping rules.

We expect that the European Commission will decide in what manner it will continue its review based on the report of KPMG Germany (e.g. by market consultation or a call for evidence). We expect to have more clarity in the course of 2018.

We recommend that managers who experience difficulties in (the implementation of) one or more of the above topics to use the review and express these concerns.

IMPACT BENCHMARK REGULATION

General

On 1 January 2018, the Benchmark Regulation took effect in the EU Member States. The Benchmark Regulation regulates the provision and use of benchmarks and the submission of input data for a benchmark. Whether there is a benchmark within the meaning of the regulation depends on the

existence of an index. An index is defined as any figure (a) that is published or made available to the public; (b) that is regularly determined: (i) entirely or partially determined by the application of a formula or any other method of calculation, or by an assessment, and (ii) on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys. Examples of benchmarks are LIBOR, EURIBOR, the S&P 500, DAX or the AEX. Benchmarks can also relate to precious metals such as gold and silver or even the weather.

Relevant for investment fund managers
The Benchmark Regulation can be specifically relevant for investment fund managers if they use a benchmark to measure the performance of an investment fund (AIF or UCITS) in order to:

- track the return of such index or combination of indices;
- define the asset allocation of a portfolio; or
- compute the performance fees.

A manager may in principle only use a benchmark if (i) the provider of the benchmark is registered and/or (ii) the benchmark is included in the ESMA register.

Transitional regime
The Benchmark Regulation provides for a transitional regime which in summary boils down to: investment fund managers that are use a benchmark that already existed on 1 January 2018 may continue to use such benchmark until 1 January 2020. The provider of the benchmark and/or the benchmark itself must be included in the ESMA register after this date. Benchmarks that are introduced after 1 January 2018 may only be used if the provider and/or benchmark is included in the ESMA register. Non-EU benchmarks may be used until 1 January 2020.

We recommend investment fund managers that use a benchmark to check whether they can continue to use this benchmark until 1 January 2020 based on the transitional regime. We also recommend managers to include information about the benchmark in the prospectus/the information memorandum from 1 January 2018 onwards.

MONEY MARKET FUND REGULATION

The Money Market Fund Regulation will take effect in the EU on 21 July 2018. The Money Market Fund Regulation provides for a framework for a specific type of investment fund: the money market funds (MMFs). An MMF is (i) an investment fund (AIF or UCITS); which (ii) invests in short-term assets; and (iii) has distinct or cumulative objectives offering returns in line with money market rates or preserving the value of the investment. MMFs are an alternative to holding cash positions due to their liquid nature and the type of assets invested in by the MMFs (short-term financial assets). MMFs are often used to (temporarily) store excess cash.

The Money Market Fund Regulation among others provides for rules related to financial instruments that are eligible for investments by an MMF, the portfolio of an MMF and the valuation thereof, as well as the reporting requirements related to an MMF. The Money Market Fund Regulation expands the regulatory framework of the AIFMD and UCITS and supplements these directives. Investment fund managers that already have a license pursuant to the AIFMD or UCITS must follow an additional procedure if an AIF or UCITS managed by them also qualifies as an MMF. The manager must then comply with the requirements of the Money Market Fund Regulation and the AIFMD or UCITS, unless the Money Market Fund Regulation determines otherwise. There is a transitional scheme for existing AIFs and UCITS that qualify as an MMF. The managers of these MMFs must submit a request to be able to manage an MMF no later than 21 January 2019.

We recommend investment fund managers to check whether they manage AIFs or UCITS that qualify as MMF. If this is the case, these managers must prepare their application to manage these MMFs in 2018 and submit it to the AFM no later than 21 January 2019.

IMPACT PROPOSAL AMENDMENT ACT ON FINANCIAL MARKETS 2018 FOR MANAGERS WITHIN A GROUP

On 27 July 2016, the Ministry of Finance published the draft Amendment Act Financial Markets 2018 to the market for consultation. A significant change for *managers that are part of a group* is the limitation of the overall exception to the bonus cap. The initial proposal was to apply the bonus cap to all employees of a manager to the extent this manager forms part of a group to which any form of consolidated supervision applies. Following the input from market parties on this broad introduction of the bonus cap for managers, the Ministry of Finance has indicated to refrain from this. This means that – as it looks now – the bonus cap will only apply to managers that are part of a banking group to which CRD IV applies and only to employees of the manager that qualify as *identified staff*.

The amount of the bonus cap will match the CRD IV. This means that the variable remuneration of employees of the listed managers may annually be up to 100% (or 200% with the permission from the shareholder) of the fixed salary of the employee. The regular 20% bonus cap will not apply to them.

The Amendment Act has been submitted to the House of Representatives on 20 December 2017. The Act and the Explanatory memorandum to the Act show that the legislator, at this moment, refrains from adjusting the bonus cap rules, since the legislator awaits the results from a more general consultation on the remuneration rules in the Dutch Financial Supervision Act (*Wet op het financieel toezicht* (Wft)) (see also our General Outlook). The results of the consultation are expected in Q1 2018. It is expected that the changes to the bonus cap for managers that form part of a group, will be implemented together with any changes as a consequence of the evaluation of the remuneration rules.

Investment fund managers that form part of a banking group that is subject of prudential consolidated supervision based on CRD IV, must timely review their remuneration policies for *identified staff*, taking into account the upcoming bonus cap.

EXPANSION OF ESMA POWERS

On 20 September 2017, the European Commission published a proposal for stronger and more integrated European financial supervision on the Capital Markets Union. This proposal includes the expansion of the powers of the European Securities and Markets Authority (ESMA). Specifically for investment fund managers, the European Commission proposed to transfer the direct supervision on European Venture Capital Funds (EuVECA), European Social Entrepreneurship Funds (EuSEF), and European Long-Term Investment Funds (ELTIF) to ESMA (including the provision of the relevant labels). According to the European Commission, this will contribute to the uniform application of the rules and help managers of these funds to reduce their transaction costs and operational costs which will ultimately benefit investors.

The proposal is currently being discussed in the European Parliament and the Council. There may be more clarity on the actual outline in 2018. We recommend that managers that consider requesting an EuVECA, EuSEF or ELTIF label follow the latest developments in this respect.

ADVERTISEMENTS ON INVESTMENTS AS AN ALTERNATIVE TO SAVINGS

The AFM has drawn attention to advertisements in which investing is presented as an alternative to saving. The AFM takes note of – partly because of the low interest rates – a lot of advertisements in which investing is presented as an alternative to saving. In these advertisements, savers are told to invest their savings. The AFM expects market parties to clearly present the differences in risks between saving and investing in such advertisements to ensure that they are not misleading for (potential) investors. The information must be presented in an understandable, accessible and balanced manner. The AFM can impose

an enforcement measure for misleading advertisements based on the Wft or the Dutch Act on Unfair Commercial Practices.

"We recommend investment fund managers that advertise their funds by including a comparison with saving, to ensure that their advertisements are prepared with due care and consideration and take into account the comments of the AFM."

GUIDANCE + Q&AS AFM AND ESMA IN RELATION TO AIFMD AND UCITS

The AFM and ESMA have published Questions & Answers (Q&As) on their websites concerning the scope and application of the AIFMD and update these regularly. The ESMA also regularly publishes Q&As on the scope and application of UCITS. The latest Q&As of ESMA have been published on 5 October 2017 (AIFMD) (UCITS). The latest Q&A of the AFM has been published on 17 November 2017.

DNB SUPERVISION PRIORITIES 2018

DNB has published its (main) focus areas of 2018. The general supervision priorities are discussed in the General section of this Outlook. DNB has indicated to focus on the following areas in 2018 specifically with respect to investment funds managers.

(i) Adequate capital buffers and economically healthy business operations

DNB has in recent years focussed on adequate capital buffers and economically healthy business operations at managers of investment firms. DNB has indicated to continue to do this in 2018. It will also pay additional attention to the Internal Capital Adequacy Assessment Process (ICAAP). DNB also warns that it will take enforcement measures if capital deficits are found.

(ii) On-site audits

DNB has carried out a number of on-site audits at investment fud managers in 2017. DNB has mainly studied the sustainability of business models of said managers, liquidity risk for open-end investment funds, risks related to outsourcing, and IT risks. The results of these audits will be worked out in further detail and may lead to additional audits and measures in 2018.

We recommend investment fund managers to take a careful look at these components of their organisation and to amend them where necessary to ensure they are prepared for the questions asked by DNB.

LICENSE REQUIREMENT FOR UCITS DEPOSITARIES FROM MARCH 2018

Depositaries of both UCITS and AIFs without a bank or investment firm license have a license obligation as a result of the Dutch implementation of UCITS V in March 2016. The implementation act included a transitional scheme for depositaries that were already assigned for an UCITS or AIF. They must have a license no later than 18 March 2018. Some depositaries are exempt from the license obligation. This applies to depositaries that are an alternative depositary of closed-end investment funds that do not invest in custody assets and of which the participants did not acquire any right to purchase or redemption of participation rights for a period of 5 years from the moment the rights to participation have first been acquired.

We recommend investment fund managers to verify whether their depositary is subject to the license obligation and whether this license will indeed be acquired by March 2018. The investment fund manager is responsible for ensuring that the appointed depositary has the required license or meets the conditions for exemption from the license obligation.

IMPLEMENTATION 4TH ANTI-MONEY LAUNDERING DIRECTIVE AND SECTOR-SPECIFIC RISK FACTORS FOR CLIENT DUE DILIGENCE

The implementation of the Fourth Anti-Money Laundering Directive will probably take effect in the Netherlands in the spring of 2018 (although this was scheduled for June 2017). For an overview of the consequences, we refer to the Wwft section of this Outlook. Specifically for investment fund managers, it is relevant that the ESA's published the financial guidelines concerning simplified and more strict client due diligence and the corresponding risk factors on 26 June 2017 (The Risk Factor Guidelines). The guidelines contain a number of risk factors for each sector that are particularly relevant to that specific sector. An example of a risk factor for an investment fund is a client who regularly deposits more money than necessary in the fund and requests the fund to refund the excess amount or regularly changes to the bank details of a client.

We recommend that managers consult the Risk Factor Guidelines and incorporate the listed risk factors in their internal policy and adjust their client due diligence accordingly.

CHANGES AFM GUIDELINE WWFT, WWFT BES AND DUTCH SANCTION ACT

The AFM has indicated to revise its Wwft Guidelines, Wwft BES and Dutch Sanction Act in connection with the implementation of the Fourth Anti-Money Laundering Directive. We expect that the AFM will publish an amended Wwft Guideline, Wwft BES and Dutch Sanction Act approximately simultaneously with the entry into force of the Fourth Anti-Money Laundering Directive in the Netherlands.

On 3 October 2017, the AFM published a news report about compliance with the Wwft and the Dutch Sanctions Act by registered 'light' managers. The AFM concludes - following a questionnaire distributed among all light managers - that compliance with certain parts of the Wwft and Dutch Sanctions Act by the group demands improvement. The AFM also adopts the position that a manager must not only carry out a client due diligence with respect to participants in the fund, but also for 'other commercial relationships such as the seller of real estate in which is invested or the persons behind a start-up in which is invested'. Our expectation is that this position of the AFM will be explained in the amended AFM Guideline Wwft, Wwft BES and Dutch Sanction Act.

We recommend that managers consult the amended AFM Guideline after its publication and to adjust their procedures accordingly.

REPORTING UNUSUAL TRANSACTIONS

Late December 2017, the AFM issued a press release that it has noticed that in 2016 and 2017 (managers of) investment funds have notified relatively few reports of (possible) unusual transactions to the Financial Intelligence Unit Netherlands (FIU-Netherlands). The AFM believes that this low number may indicate an insufficient level of compliance and risk awareness in respect of the Wwft.

The AFM indicates in its press release that the threshold for reporting unusual transactions is low. The suspicion of a link with money laundering or the financing of terrorism is sufficient for an institution to report a transaction to FUI Netherlands. The AFM informs (managers of) investment funds that reporting unusual transactions is also part of sound and prudent business operations. The website of the AFM lists two examples of (possible) unusual transactions.

In 2018, the AFM will monitor closely the reporting obligation of these unusual transactions. If no report is made while this should have been done, the AFM may undertake enforcement measures. The Public Prosecutor may also instigate a criminal investigation.

We recommend that (managers of) investment funds review their internal policy and procedures on the reporting of (possible) unusual transactions and revise and improve them where necessary. This can be done by stipulating clear objective and subjective indicators on the basis of

which the institution can assesses whether a transaction is potentially unusual.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR INVESTMENT FIRMS IN 2018

TOPICS

- MiFID II
- New prudential framework for investment firms
- Developments related to local firms
- DNB Supervision priorities 2018
- PRIIPs Regulation
- AFM investigation Wwft compliance by investment firms
- Regulation on sound remuneration policy 2017
- Impact proposal Financial Markets Amendment Act 2018 for dealers for own account within a group
- ESMA supervision priorities 2018
- ESMA measures on CFDs and binary options
- EBA guidelines on internal governance
- Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders
- Pan-European Personal Pension Product (PEPP)
- Bitcoin Futures: general duty of care of investment firms
- Reporting unusual transactions
- New advertising rules

MIFID II

You cannot have missed it; MiFID II took effect on 3 January 2018 after a one-year delay. The MiFID II-package consists of a directive (2014/65/EU), a regulation (600/2014/EU (MiFIR), an elaboration of level 2 regulations and legal 3 regulations. The website of the European Commission contains a practical overview of all RTSs and ITSs concerning the MiFID II. Such overview also exists for detailed MiFIR rules. The ESMA website contains a practical overview of all Guidelines.

MiFID II took effect at a national level by the entry into force of the following regulations: Dutch Implementation Act MiFID II, Dutch Implementation Decree MiFID II and the Regulation professional competence for investment firms staff.

There are a lot of documents that are part of the MiFID II/MiFIR package at a European level. The abovementioned overviews on the EC and ESMA websites give the full picture. The Delegated Regulation 2017/565 is very important to the daily practice as it concerns organisational requirements and conditions for businesses. In the last months of 2017, ESMA has been very active in producing MiFID II documentation. The ESMA Library has ordered these documents chronologically.

MiFID II amends regulations for (inter alia) investment firms. Important changes have been made to the following subjects: scope (more financial instruments, more activities and more parties are covered by the MiFID II than was the case under MiFID), the introduction of a new trading platform (the organised trading facility), the regime for third country investment firms, algorithmic trading, commodity derivatives and position limits, and product development and product intervention.

Market parties have worked hard throughout 2017 to be MiFID II-proof on 3 January 2018. What is important in 2018 in terms of MiFID II?

Complying with MiFID II as of 3 January 2018: hardly any transitional regime
The AFM has at the end of November 2017 indicated that market parties must make all possible efforts to comply with MiFID II as of 3 January 2018. Market parties may find interesting that the AFM has also indicated that it will only exercise leniency in cases where regulations have only become available very late. If a market party believes that it cannot comply with a certain MiFID II obligation because this requirement was only published very late and it was unable to become MiFID II compliant on time, despite taking all necessary steps, the AFM will act proportionally in its supervision. ESMA has issued a guidance to the national supervisory authorities on the transition of MiFID I to MiFID II. Furthermore, ESMA has indicated that in respect to the Legal Entity Identifiers (LEI) obligations stemming from MiFID II a transition period of six months has to be implemented (see statement ESMA).

Key issues MiFID II supervision 2018
The AFM will focus its MiFID II supervision as of 3 January 2018 on (i) investor protection, and (ii) implementing safeguards for the proper performance of capital markets. With respect to investor protection, the themes cost transparency and product development will be key topics for the AFM. The AFM will also continue to pay attention to subjects such as professional competence, information provision, quality of investment services and inducements. With respect to the capital markets, transaction reporting, market transparency (pre-post trade transparency) and regulations aimed at orderly market structure will remain key issues of the MiFID II supervision of the AFM.

National Regime
The MiFID II requirements will also lead to changes to the so-called National Regime. These changes were not yet final on 3 January 2018. This means that as long as the National Regime is not changed, the current National Regime will apply. Parties must meet the current requirements until the National Regime is amended. Then they must meet the requirements of the amended National Regime. These parties must therefore pay close attention when the proposed requirements of the amended National Regime are presented to the public for consultation. The required changes to the Wft Exemption Regulation are expected to be open for public consultation in the first quarter of 2018.

Regulation professional competence for investment firms staff
On 3 January 2018, the Regulation professional competence for investment firms staff entered into force. The name

of this ministerial regulation is somewhat misleading, as it arranges a lot more than just professional competence requirements. This regulation is MiFID II implementation legislation and contains (i) professional competence requirements for certain employees of investment firms, (ii) rules on the cooperation and information exchange of the AFM with foreign supervisors and ESMA, and (iii) finally contains some important changes to the Wft Exemption Regulation. The changes to the Wft Exemption Regulation can be summarised as follows:

- The currently existing exemption for investment firms with registered offices in Australia, America and Switzerland providing investment services in the Netherlands (Article 10 of the Wft Exemption Regulation) will only be available for entities with registered offices in Australia, America or Switzerland if they only provide investments services in the Netherlands to professional investors (per se) or eligible counterparties, or if they only deal for own account in the Netherlands.
- An exemption from the license requirement and ongoing supervision requirements is also introduced for investment firms with registered offices in a Non-Member State that intend to deal in the Netherlands exclusively for own account.

NEW PRUDENTIAL FRAMEWORK FOR INVESTMENT FIRMS

On 20 December 2017, the European Commission published proposals for a new prudential regime for investment firms. In our Outlook 2017, we already discussed the EBA consultation document of 4 November 2016 concerning a new prudential regime for investment firms. Subsequently, on 29 September 2017 EBA published its 'Opinion of the European Banking Authority in response to the European Commission's Call for Advice on Investment Firms', in which EBA described the outlines of the new regime. The proposals of 20 December 2017 expand on this.

The proposals contain a regulation on prudential requirements for investment firms, a directive on prudential supervision on investment firms and a *Commission Staff Working Document*, which accompanies these two documents. The European Commission has also published a practical Q&A on the proposals.

The proposals introduce a new prudential framework, in which inter alia:

- the largest investment firms ('*Class 1 - systemic investment firms*', this will only be a small group) will remain to be fully subject to CRD IV/CRR and are regulated in the same way as significant banks. This means that the ECB will be their direct supervisor.
- a new prudential framework is introduced for Class 2 en 3 '*non-systematic firms*'. The vast majority of investment firms will be in this category. The group of non-systematic firms is dividend in '*Class 2 - other investment firms*' and '*Class 3 - Small and non-interconnected firms*'.
- Class 2 firms will be subject to a capital requirement, existing of the highest of the capital requirement for Class 3 firms (see below), or a requirement based on a new K-factor approach for measuring their risks.
- Class 3 firms are subject to a minimum capital requirement which would be either the level of initial capital required for their authorisation or a quarter of their fixed costs (overheads) for the previous year, whichever is higher.

The proposals will now be discussed by the European Parliament and the Council. Once adopted, an implementation period of 18 months is envisaged before the new regime starts to apply. Given the impact of the new framework, we advise investment firms to closely follow the developments with respect to this topic in 2018.

DEVELOPMENTS RELATED TO LOCAL FIRMS

On 13 November 2017, DNB surprised the proprietary traders sector (but not in a good way) with a letter in which it indicated to end the national regime for local firms. Local firms still had an own regime up to that point, characterised by (i) an exemption of the CRR, replaced by the applicability of a solvency requirement which at all times had to be at least equal to the overall net margin requirements (*haircut*) of the clearing members under whose responsibility and guarantee the investment firm acted for its

own account, and (ii) an exemption from the bonus cap.

The letter of DNB was based on a *Breach of Union Law* investigation of the EBA into the compatibility of the interpretation of the term 'local firm' applied by by DNB with Union law. The conclusion of EBA was that DNB interpreted the term 'local firm too broadly, whereas EBA uses a strict interpretation and application of the CRR. The EBA put forward the argument that a "local firm" within the meaning of Article 4(1)(4) CRR may be active as a dealer for its own account on both the derivatives markets and the cash markets but that this investment activity for the cash markets must be limited to transactions solely intended to hedge its positions on derivative markets. This limitation (trading on cash markets is allowed, but only for hedging purposes) was not applied by DNB.

In its letter, DNB indicates that it has informed EBA that it will take immediate steps to apply the CRR to the involved investment firms. The haircut requirement will no longer apply to these types of investment firms, but the solvency requirement of CRR. The expectation is that the available capital needed by these parties will be significantly higher. DNB does believe that a transitional period is necessary. Investment firms have until 31 March 2018 to meet the applicable requirements of the CRR. DNB is expecting the first report on the applicable capital requirements under CRR no later than 12 May 2018. If there is a capital shortage on 31 March 2018, DNB will require the investment firm in question to draw up a capital recovery plan in which it demonstrates that it will meet the CRR requirements no later than 31 December 2019.

It is the question whether EBA will accept this transitional scheme. In its press release of 6 December 2017, EBA was quite critical about DNB's transitional scheme. DNB must inform EBA before 30 April on the number of traders that need to draw up a capital recovery plan.

With respect to the applicability of the Dutch bonus cap of 20%, the AFM will not reinforce compliance with this requirement until 31 December 2019. It is not certain whether the Dutch bonus cap will still exist for these parties at that time, as the Minister of Finance has indicated to want to negotiate with the AFM and the sector on the future structure of the national remuneration rules for this sector. For clarity's sake: the negotiations will not concern the European bonus cap.

DNB SUPERVISION PRIORITIES 2018

DNB published its Supervision Outlook 2018 in November 2017 to lay down its supervision priorities for the coming year. The general supervision priorities are discussed in the General section of this Outlook. DNB will with respect to investment firms focus on the following subjects in 2018:

- ICAAP
  DNB worries about adequate capital buffers and healthy operations of investment firms. In order to proactively mitigate capital shortages, DNB will in its regular supervision in 2018 demand extra attention for the *Internal Capital Adequacy Assessment Process* (ICAAP).

- MiFID II
  DNB expects to be working on the introduction of MiFID II in the first half of 2018. MiFID II will place more new companies under the supervision of the AFM and DNB (for example, traders for own account). DNB must assess these MiFID II permit applications from a prudential perspective and must handle the related requests for a declaration of no objection.

- Follow-up study based on the results of 2017
  In 2017, DNB studied the sustainability of business models of investment firms, risks related to outsourcing and IT risks. The results of these studies will be developed and may lead to additional studies and measures in 2018.

- Informing the market of the new capital framework for investment firms
  DNB will keep consulting with the sector on the design of the new capital framework for investment firms using seminars, newsletters and dialogue with industry associations.

PRIIPS REGULATION

The PRIIPs Regulation applies throughout the European Union since 1 January 2018. This Regulation contains rules for the manufacturing and selling of so-called *Packaged Retail* and *Insurance-based Investment Products* (PRIIPs). PRIIPs fall into two categories: (i) packaged retail investment products and (ii) insurance-based investment products. Examples of PRIIPs are participation rights in an investment institution or icbe, life insurance contracts with an investment component, structured products and structured deposits. The Regulation does not apply to products that invest directly in assets such as shares or bonds, pension products and life insurances which only pay in the event of death, injury, illness or disability. The manufacturer of a PRIIP must draw up a Key Information Document (KID) for retail investors which must be provided to the client by the seller (usually an intermediary).

PRIIPs took effect at a national level by the entry into force of the following regulations:

- Implementation Act PRIIPs (applicable as of January 1st);
- Implementation Decree PRIIPs (applicable as of January 1st);
- (a modified) Further Regulations on the Supervision of the Conduct of Financial Undertakings (*Nadere Regeling gedragstoezicht financiele ondernemingen, Nrgfo*) (applicable as of January 1st).

"Investment firms that provide investment services related to PRIIPs must as of 1 January 2018 meet the requirements of the PRIIPs Regulation. Investment firms that manufacture PRIIPs must draw up a KID as of 1 January 2018."

One of the more striking changes is the following. Before 1 January 2018, the obligation applied in the Netherlands to provide a financial information leaflet for complex products. Because a lot of the complex products fall within the scope of the PRIIPs Regulation as of 1 January 2018, the BGfo will no longer have the obligation as of 1 January 2018 to draw up and provide a financial information leaflet. The Nrgfo has also changed as a result.

At a European Level, apart from the PRIIPs Regulation itself, the Delegated Regulation (which prescribes both the form and content of the KID) on key information documents for PRIIPs is important, as well as the Q&A of EBA, EIOPA and ESMA on PRIIPs of 20 November 2017. We also refer to the guidelines of the Commission concerning the KID. Investment firms that provide investment services related to PRIIPs must as of 1 January 2018 meet the requirements of the PRIIPs Regulation. Investment firms that manufacture PRIIPs must draw up a KID as of 1 January 2018.

AFM INVESTIGATION WWFT COMPLIANCE BY INVESTMENT FIRMS

In 2017, AFM investigated fund managers who are exempted from the license requirement in terms of compliance with the Wwft and the Dutch Sanction Act. The results of this investigation were disappointing according to the AFM in a publication on its website in October 2017. A major concern was the lack of a written Wwft and Dutch Sanction Act Policy. The results of the investigation also apply to investment firms. In 2018, the AFM will investigate the compliance with the Wwft by licensed investment firms. Investment firms would do well to check whether their policy and procedures meet the requirements of the Wwft and the Dutch Sanction Act. The implementation of the Fourth Anti-Money Laundering Directive (AML4) in the Wwft next year, will require Wwft firms to identify and document their anti-money laundering and terrorism financing risks. The Wwft-institution must take corresponding measures to limit and manage these risks. For an overview of the consequences of the implementation of the Fourth Anti-Money Laundering Directive, we refer to the Wwft section of this Outlook.

The AFM has indicated also to revise its Wwft Guidelines, Wwft BES and Dutch Sanction Act in relation to the implementation of the Fourth Anti-Money Laundering Directive. We expect that

the AFM will publish an amended Wwft Guideline, Wwft BES and Dutch Sanction Act approximately simultaneously with the entry into force of the Fourth Anti-Money Laundering Directive.

REGULATION ON SOUND REMUNERATION POLICY 2017

The new Regulation on sound remuneration policy 2017 (Rbb 2017) was published in the Government Gazette on 7 December 2017. It entered into force on 8 December 2017. This regulation replaces the Rbb from 2014. The reason to draw up and update this regulation of DNB is the introduction of European sectoral remuneration rules with sector-specific accents. DNB has, therefore, decided to better match the scope of the requirements laid down in the various directives and the contents of the guidelines of the European supervisors. This essentially means that the requirements of the new Rbb 2017 will only apply to banks and investment firms within the meaning of the CRR.

Connected to the new Rbb 2017 is the revision of the interpretations (Q&As) which DNB earlier published on its site (Open Book Supervision). The principle is that DNB does not provide a more detailed explanation or interpretation if the European supervisory authorities have already done this. DNB has removed most Q&As of July 2014 related to the remuneration policy based on the Wft because these have become obsolete due to the Guidelines adopted by the EBA concerning a controlled remuneration policy (EBA/GL/2015/22) of 27 June 2016. The policy as laid down in the Q&A Proportional application Rbb categories Identified Staff will be continued as long as no further interpretation of the proportionality principle is provided under the CRD IV. The Q&A Further interpretation of the exception to the bonus cap of 20% for the parent company of a group will also remain relevant.

IMPACT PROPOSAL FINANCIAL MARKETS AMENDMENT ACT 2018 FOR DEALERS FOR OWN ACCOUNT WITHIN A GROUP

One and half years ago, on 27 July 2016, the Ministry of Finance published the draft Financial Markets Amendment Act 2018 to the market for consultation. A significant change for investment firms that only deal for own account was the limitation of the overall exception to the Dutch bonus cap. The initial proposal was to apply the bonus cap to dealers acting for own account to the extent they belong to a group to which any form of consolidated supervision applies. Following the consultation reactions to this broad introduction of the bonus caps for dealers for own account, the Ministry of Finance has indicated to refrain from this. This means that - as it looks now - the bonus cap will only apply to dealers for own account that are part of a banking group to which CRD IV applies and only to employees of the investment firm that qualify as *identified staff*.

The amount of the bonus cap will match CRD IV. This means that the variable remuneration of employees of the dealers for own account may annually be up to 100% (or 200% with the permission from the shareholder) of the fixed salary of the employee. The regular 20% bonus cap will not apply to them.

The Amendment Act has been submitted to the House of Representatives on 20 December 2017. The Act and the Explanatory memorandum to the Act show that the legislator, at this moment, refrains from adjusting the bonus cap rules at this moment, since the legislator awaits the results from a more general evaluation on the remuneration rules in the Dutch Financial Supervision Act (*Wet op het financieel toezich*t (Wft)) (see also our General Outlook). The results of the consultation are expected in Q1 2018. The adjustment of the application of the bonus cap will be included in a later legislative proposal, together with any legislative amendment that may follow from the general evaluation. Dealers for own account that are part of a banking group that is the subject of prudential consolidated supervision based on CRD IV, must timely review their remuneration policies for

identified staff, taking into account the bonus cap.

ESMA SUPERVISION PRIORITIES 2018

ESMA published its supervision priorities for the coming year on 29 September 2017. These set out the supervision priorities for 2018 from the perspective of ESMA. The main cross-sector concerns of ESMA in 2018 are:

- ESMA will supervise a consistent implementation of new supervision requirements. They will focus specifically on MiFID II and MiFIR, complete IT systems (required by legislation or that may contribute to the efficiency of ESMA and/or a national supervisor), and the development and application of tools that can contribute to the convergence of supervision;
- Identifying the risks for investors, financial markets and the stability of the financial sector based on stress testing, impact assessments, product interventions, and monitoring the stability of the sector;
- Completing the 'Single Rulebook' by developing guidelines and recommendations that concern, among other things, securitisation, Prospectus, MMF and EMIR Review;
- Intensifying the monitoring of specific financial institutions (*Credit Rating Agencies* (CRA) and *Trade Repositories* (TR)) to ensure these institutions act in the spirit of the regulations.

ESMA MEASURES ON CFDS AND BINARY OPTIONS

On 15 December 2017, ESMA has issued a press release in which it announces that marketing, distributing and selling certain CFDs and rolling spot forex to retail investors may be restricted and that the marketing, distributing and selling of binary options will most likely be banned in Europe (also see the press release of the AFM).

ESMA is currently considering the following measures concerning certain CFDs and rolling sport forex (i) leverage limit; (ii) a 'margin close-out' rule; (iii) protection against negative value using loss limits; (iv) a restriction on 'benefits incentivising trading'; and (v) a standardised warning. ESMA will submit the envisaged measures for consultation in January 2018.

We recommend that market parties (continue to) keep an eye on the developments in 2018.

EBA GUIDELINES ON INTERNAL GOVERNANCE

The new EBA guidelines on internal governance will take effect on 30 June 2018. The previous EBA guidelines from 27 September 2011 will expire on that date. The new EBA guidelines on internal governance will take effect simultaneously with the new 'Joint ESMA and EBA guidelines on the assessment of the suitability of members of the management body and key function holders' (see below).

The new proposed guidelines put more emphasis on the role of the Supervisory Board in highlighting the risk culture of the investment firm. The Executive Board and the Supervisory Board must be more involved in the risk management and the role of committees will become more important. The status of the risk management function is further reinforced. The risks during change processes must also be included more explicitly. The guidelines also include a handy list of concerns for the development of internal governance. We recommend paying close attention to the new guidelines and include them in the existing governance of the investment firm as much as possible.

JOINT ESMA AND EBA GUIDELINES ON THE ASSESSMENT OF THE SUITABILITY OF MEMBERS OF THE MANAGEMENT BODY AND KEY FUNCTION HOLDERS

The Joint ESMA and EBA Guidelines on the assessment of the suitability of members of the management body and key function holders' will also take effect

on 30 June 2018. The previous guidelines from 22 November 2012 will expire on that date. The new guidelines are based on the requirements of CRD IV and MiFID II and aim to achieve improvements and harmonisation of the suitability test within the EU. The guidelines contain criteria for assessing the knowledge, skills and experience of key staff and members of the management (including the daily policymakers and internal supervisors), as well as criteria for assessing the reliability, integrity and independence. It also includes criteria on the allocation of time. The guidelines also deal with the importance of diversity. EBA and ESMA have developed a model suitability matrix to assess the group.

PAN-EUROPEAN PERSONAL PENSION PRODUCT (PEPP)

On 29 June 2017, the European Commission has submitted a proposal for a regulation for a Pan-European framework for 3rd pillar pension products, the Pan-European Personal Pension Product (PEPP). The PEPP proposal is part of the capital market union.

A PEPP is a new type of voluntary personal pension and is intended to offer savers more options for saving money for later and offer them more competitive products. The PEPP Regulation contains measures to achieve a pension product with a number of product features standardised at a European level which will be implemented and can be transferred across borders. The regulation provides an additional European framework for individual, voluntary pension products which is complementary to existing national existing national laws and regulations, which means that it is a legal regime which exists besides the existing national regimes and can be used voluntarily. The goal is to facilitate switching between providers of PEPPs and enable consumers to transfer the pension accrued in this new product to another Member State.

The proposal offers licensed insurers, banks, IORPs (pension funds, PPIs and pension institutions from other Member States), certain investment firms and asset managers the opportunity to offer PEPP. It is striking that EIOPA is granted a lot of powers in the proposal. Financial institutions can request a 'product passport' from EIOPA which will grant its approval in advance based on a product proposal. EIOPA will assess whether the product meets the standardised product conditions of the regulation. EIOPA will also keep a register of approved PEPP products and can withdraw granted permissions. National supervisors that are already charged with the supervision of licensed entities must continuously supervise compliance with the obligations under the regulations. When EIOPA has granted approval for a PEPP, providers may offer this product across borders.

Our government has rendered a negative opinion on the proposal and has indicated that the alleged necessity of a separate framework for PEPP is insufficiently substantiated. The government is critical given the limited added value for pension products in the Netherlands and the potential impact of the proposals on the second pillar pension system.

We expect to have more clarity on the feasibility of the proposal in 2018.

BITCOIN FUTURES: GENERAL DUTY OF CARE OF INVESTMENT FIRMS

The AFM has issued a press release on 16 December 2017 in which it informs investment firms of their general duty of care when offering Bitcoin futures to (retail) investors in the Netherlands.

This duty of care means that investment firms must represent the interests of (potential) clients in an honest, fair and professional manner. The AFM expects that investment firms include their statutory obligations, including the duty of care provisions and the operational standards, in their considerations concerning the facilitation of trading the Bitcoin futures. If enabling this trading affects the interest of the client, investment firms must refrain from Bitcoin futures.

In its press release, it specifically refers to the Product Oversight & Governance (POG) standards in the MiFID II that are in force as of 3 January 2018. Considering this new framework, the AFM believes that the requirements concerning Bitcoin futures are very high. One of the priorities of the AFM

in 2018 will be the supervision of product development and distribution. It will pay additional attention to compliance with the POG standards.

We recommend market parties to pay special attention to the risks related to Bitcoin futures in their business operations.

REPORTING UNUSUAL TRANSACTIONS

The AFM has found that in 2016 and 2017 investment firms have submitted relatively few reports of (possible) unusual transactions to the Financial Intelligence Unit Netherlands (FIU-Netherlands). Both in 2016 and 2017, only 4 unusual transactions were reported. The AFM believes that this lower number may indicate a low level of compliance and risk awareness concerning the Wwft. That is why the AFM has announced that she will more strictly supervise the reporting of these transactions. If no report is made while this should have been done, the AFM will take enforcement actions. The Public Prosecutor may also start a criminal investigation.

The website of the AFM lists two examples of (possible) unusual transactions.

We recommend that investment firms study their internal policy and procedures on the reporting of (possible) unusual transactions and revise and improve them where necessary. This can be done by including clear indicators.

NEW ADVERTISING RULES

As a result of the entry into force of the PRIIPs Regulation per 1 January 2018, the rules concerning voluntary pre-contractual information (including advertising) have been amended in the new Further Regulations on the Supervision of the Conduct of Financial Undertakings. The main amendments are:

- Definition of complex investment products: These include a life insurance with an investment component.
- Scope: The new rules also apply to third-pillar pension products. With the introduction of the PRIIPs Regulation and changes to the Market Conduct Supervision Financial Institutions Decree (*Besluit gedragstoezicht financiële ondernemingen*, 'Bgfo') concerning the abolition of the financial information leaflet and the introduction of the essential information document for third-pillar pension products, there are complex products for which no financial information leaflet needs to be drawn up and for which no essential information document will be required as of 1 January 2018. This group includes composite products without investment (accrual) components such as an interest-only mortgage linked to a risk-based life insurance, an own property saving account, and a savings capital insurance.
- New risk indicator: With the abolition of the financial information leaflet for complex products and third-pillar pension products, the requirement to include the associated risk indicator in advertising will also expire. New risk indicators will be introduced for complex products that also fall within the scope of the PRIIPs Regulation and third-pillar pension products. The new images can be downloaded from www.afm.nl/reclameteksten.
- Information about returns: The entry into force of the PRIIPs Regulation and the abolition of the financial information leaflet also has consequences for the manner in which providers of complex products and third-pillar pension products may communicate about the returns of their products in pre-contractual information such as advertisements and quotations. Amendments to the Further Regulations on the Supervision of the Conduct of Financial Undertakings (*Nadere regeling gedragstoezicht financiële onderneming*, 'NRgfo') match the system of the PRIIPs Regulation and the calculations on future returns, main risks and costs as laid down in the Delegated Regulation essential information documents. Only future returns based on the performance scenarios of this Regulation may be presented. Deviations from the calculation method prescribed herein are allowed for a specific group of complex investment products in favour of individualised information.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR PAYMENT SERVICE PROVIDERS IN 2018

TOPICS

- Implementation PSD2
- EBA guidelines on PSD2
- EBA Regulatory Technical Standards PSD2
- DNB Supervision priorities 2018
- Ongoing requirements payment institutions 2018
- Thematic DNB audit into risk management in case of outsourcing
- Integrity Regulations (Wwft)

IMPLEMENTATION PSD2

The revised Payment Services Directive (PSD2) should have been implemented in the Dutch legislation as of 13 January 2018. The Minister of Finance has indicated in September 2017 that this is not feasible (see the letter to the House of Representatives) and the implementation will likely take place in the spring of 2018. The bill Implementation Act Payment Services Directive PSD2 has been submitted by the Minister of Finance for parliamentary deliberations on 23 October 2017.

PSD2 amends the regulations for existing payment service providers but also places certain market parties that were previously not subject to supervision within the scope of the regulations on payment services. The scope of the payment service regulations will be expanded, which means that 'payment initiation services' and 'account information services' will be regulated as new payment services. A number of exemptions to the license obligation will also be formulated more restrictively (e.g. 'limited network', 'telecom exception' and 'commercial agent'). Parties that currently make use of these exemptions may fall within the scope of the financial regulations. The delayed implementation gives these parties a longer period to prepare for the new rules.

Some important aspects of the PSD2 are:

- *PSD2 license application:*
  As long as the PSD2 has not been implemented in the Dutch legislation, DNB does not have the power to grant corresponding licenses. In anticipation of that moment, license applications can be submitted to DNB, but DNB has not yet indicated from what moment it will process such license applications. If you are planning to apply for a license under PSD2, keep a close eye on the DNB website.

- *Qualifying participation in a payment institution:*
  When PSD2 is implemented, holders of a qualified holding in a payment institution will be required to apply for a declaration of no objection from DNB. A qualified holding is an (in)direct interest of at least 10% of the subscribed capital of a payment institution or comparable control by the direct or indirect exercise of at least 10% of the voting rights. Qualified holdings that have been acquired before 13 January 2018 require a declaration of no objection as from 13 January 2019 (postponed effect). However, this transitional scheme does not apply in some situations. For example, if the holder of the qualified holding expands the holding after 12 January 2018 to such extent that one of the upper limits (of 20, 30 or 50 percent) is reached or exceeded.

- *Transitional arrangement PSD to PSD2:*
  Payment institutions that have taken up activities in accordance with the PSD and local law by 13 january 2018 may continue their activities in accordance with the PSD regime until 13 July 2018. Market parties that make use of an exemption under the current PSD scheme may use this exemption until 13 January 2019. These market parties do not need to meet any applicable provisions of PSD2 until that moment.

EBA GUIDELINES ON PSD2

- **EBA guidelines on fraud reporting:**
  The deliberations initiated by EBA on 2 August 2017 with respect to the draft guidelines on reporting requirements for statistical fraud data based on the PSD2, have been completed. The final guidelines have not yet been published. The guidelines define "fraudulent payment transactions" in relation to mandatory reports based on the guidelines. The method for comparing and reporting data, including data analysis, reporting periods, frequency and reporting deadlines are also discussed. Payment service providers will undergo two reporting cycles. High-level data must be provided quarterly as of Q2 2018. This will be supplemented by an annual report with more detailed data. The annual report must first be submitted in the first half of 2020. EBA has published an Opinion on the transition from PSD to PSD2. From this opinion arises that the application date of the fraud reporting guidelines cannot be estimated by EBA. We recommend payment service providers to keep track of any changes and mean-while determine which data must be reported and take timely measures to be able to create the reports.

- **EBA guidelines concerning the criteria to determine the minimum amount of the professional liability insurance:**
  On 7 July 2017, EBA published the final guidelines on the criteria and indicators to determine the minimum monetary amount of the professional liability insurance for the two new forms of payments services that are introduced by PSD2: the payment initiation service and the account information service. The guidelines take effect on 13 January 2018.

- **EBA guidelines on incident reporting:**
  PSD2 requires payment service providers to report major incidents to the supervisor. EBA has developed guidelines for payment service providers to recognise and classify such incidents. The guidelines describe the reporting method for payment service providers that have found a major incident. EBA has included a reporting form for incidents for payment service providers in the annex to the guidelines. The guidelines take effect in Q1 2018.

"The guidelines describe the reporting method for payment service providers that have found a major incident."

- **EBA guidelines on security measures to manage operational and security risks:**
  On 12 December 2017, EBA published guidelines on the requirements that payment service providers must meet to limit operational and security risks resulting from the provision of payment services. It covers the governance, including the framework for operational and security risk management, the risk management and control models, and outsourcing. The guidelines also contain the standards for risk assessment, including the identification, classification and risk assessment of functions, processes and assets. These EBA guidelines are expected to have a significant impact on the internal business operations of payment service providers. We recommend that payment service providers check whether their business operations sufficiently match the guidelines. The guidelines take effect in Q1 2018.

EBA REGULATORY TECHNICAL STANDARDS PSD2

- **RTS on strong customer authentication:**
  Payment service providers must implement strong customer authentication based on Article 97 PSD2. Strong customer authentication is actually an advanced form of identifying and verifying the identity of a payment service user and must be applied in certain cases, for example, if a payer accesses his/her bank account over the internet. Authentication under the current PSD scheme focusses of authorisation of the used payment instrument. Under PSD2, 'authentication' is a procedure with which a payment service provider can verify the identity of a payment service user or the validity of the use of a specific payment instrument. Strong customer authentication is also required if a payment service user starts using new payment services (the payment initiation service or account information service). A number of payment service providers are exempted from the obligation to apply strong customer authentication. These include payments of up to EUR 500 that constitute a low risk of fraud. The RTS contains a number of verification elements to determine whether there is a low risk of fraud for a certain category of payments.

The main provisions in the RTS are:

- The strong customer authentication will be based on two or more factors in the knowledge category (something only the user knows, like a PIN), possession (something only the user has, like a debit card), and inherent characteristic (something the user is, for example, a biometric quality such as a fingerprint). The chosen factors must be independent of each other. This means that the factors may not undermine the reliability of the other factors.
- If strong customer authentication is used, payment service providers must take additional security measures. For example, by linking the authentication code to the amount of the payment transaction and the payment recipient.
- Payment service providers must have processes that ensure that all payment transactions and other interactions with the payment service user, with other payment service providers and other entities are traceable in the context of the

provision of the payment service.
- Specific requirements for the account servicing payment service providers with respect to the provision of access to accounts and the manner of communication.

We expect the RTS to apply as of September 2019. We recommend that market parties start identifying what the impact on their business operations will be and what measures must be taken to comply with the RTS.

- **RTS on the designation of central points of contact:**
On 11 December 2017 EBA has published the final proposal related to the RTS concerning the designation of a central point of contact within the meaning of Article 29(4) PSD2. The central point of contact is responsible for the provision of information to the supervisor. For payment institutions and electronic money institutions that offer payment services to other Member States through agents, PSD2 offers the option to the recipient Member States to designate a central point of contact for these institutions. It follows from the bill Implementation Act Payment Services Directive PSD2 that the Netherlands will make use of this option.

EBA draws up criteria in the RTS which must be met before a Me Member State is authorised to demand that a payment service provider or electronic money institution designates a central point of contact. For example, if a payment service provider has more than 10 agents that provide payment services on behalf of the payment service provider. There is a reporting duty for payment institutions to inform the supervisor in the host country if the criteria for the designation of a central point of contact are met. The RTS takes effect twenty days after its publication in the EU Official Journal. It is currently unclear when this will be. According to the Opinion of EBA in respect to the transition from PSD1 to PSD2 the date of application may fall sometime in the second half of 2019.

DNB SUPERVISION PRIORITIES 2018

DNB has published its supervision priorities for the year 2018. The general supervision priorities of DNB are discussed in the General section of this Outlook. DNB will with respect to payment service providers specifically focus on the following subjects in 2018:

- **DNB capacity:** DNB has expanded its capacity for the supervision of payment institutions in 2017. This will result in supervision audits at payment institutions.
- **Systematic Integrity Risk Analysis (SIRA):** DNB considers it important that payment institutions draw up policy on the basis of the identified risks and take adequate measures to manage these risks . For example, in the control functions or in the field of information technology. Payment institutions have included this in their SIRA tool. Based on supervision audits DNB has concluded that the SIRA is not consistently used in practice, but serves as a static instrument. DNB will pay additional attention to this in 2018 and will assess whether payment institutions actively assess integrity risks and are sufficiently aware of the effectiveness of taken control measures.

“DNB has concluded that the SIRA is not consistently used in practice”

- **Special attention to cryptocurrency transactions:** the DCB finds it important that payment institutions monitor all transactions to prevent fraud and money laundering. If payment institutions are not able to monitor cryptocurrency transactions in a proper way due to the anonymity of those transactions, these institutions are also unable to manage risks of fraud and money laundering. According to the DCB these payment institutions are prohibited to provide cryptocurrency transactions. The DCB will launch an examination regarding terrorist financing in 2018 and will approach a number of payment institutions to participate.

- **Implementation PSD2:** DNB devotes time and attention to actively informing payment service providers about the impending requirements imposed on the business operations by PSD2.

ONGOING REQUIREMENTS PAYMENT INSTITUTIONS 2018

In order to inform payment institutions and electronic money institutions about the supervisory data requests they have to comply with and when, the DCB made an up-to-date overview of the supervision calendar. Please note that the DCB may also make intermittent requests in addition to the scheduled report submissions. We advise market parties to properly place the dates mentioned in the supervision calendar in the agenda and to make sure that they comply with all obligations therein.

THEMATIC DNB AUDIT INTO RISK MANAGEMENT IN CASE OF OUTSOURCING

DNB has carried out an audit into the risk management in case of outsourcing at the start of 2017. This audit revealed a number of weaknesses in the field of internal control related to outsourcing: (i) the management information on outsourced services is inadequate; (ii) institutions do not carry out sufficient internal audits on their own supervision measures; (iii) the control of access rights to sensitive data is inadequate; and (iv) the control and management of continuity measures (business continuity management - BCM) - is not arranged properly.

DNB will publish a number of good practices on its website in the first quarter of 2018 to help payment service providers better supervise the material activities they outsource.

INTEGRITY REGULATIONS (WWFT)

- **Impact of Fourth Anti-Money Laundering Directive:** The implementation of the Fourth Anti-Money Laundering Directive will probably take effect in the Netherlands in the spring of 2018. A bill to this effect has been submitted to the House of Representatives on 12 October 2017. For an overview of the consequences, we refer to the Wwft section of this Outlook.

- **Transaction monitoring:** DNB pays a lot of attention to its supervisory duties regarding Wwft. DNB found that audited payment service providers did identify money laundering and terrorist financing risks in their SIRA, but did not include this in the transaction monitoring process. DNB has published a guideline on post-event transaction monitoring process of payment institutions mid-September 2017. We recommend that payment institutions assess their transaction monitoring process and make improvements where necessary.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR CROWDFUNDING AND FINTECH IN 2018

TOPICS

- European legal framework crowdfunding?
- National framework (*loan based*) crowdfunding?
- Evaluation of crowdfunding regulations AFM
- PSD 2: FinTechs get access to bank accounts
- Possible lighter licenses for FinTechs
- AFM warns about ICOs
- Revision scope of 'acting as an intermediary' in FinTech environment?
- Customization for Innovation and InnovationHub and DNB supervision priorities
- Rules for robot advice (automated advice)?
- FinTech consultation European Commission
- ECB publishes draft guide for the assessment of applications for a FinTech credit institution license
- EBA priorities 2018 - FinTech
- EBA guidance for cloud computing
- ESMA report on Distributed Ledger Technology (DLT)
- Platforms for trading cryptocurrencies within the scope of anti-money laundering rules?

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FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR CROWDFUNDING AND FINTECH IN 2018

- DNB supervision priority: payment institutions and cryptocurrencies
- Answers to parliamentary questions about the warning of the AFM for digital IPOs (ICOs)

EUROPEAN LEGAL FRAMEWORK CROWDFUNDING?

In the context of the Capital Markets Union, the European Commission analyses the desirability of and possibilities for a European legal framework for crowdfunding and peer-to-peer finance. The research of the European Commission focusses on forms of crowdfunding in which investors receive a financial performance from the person receiving the funds and focusses on both equity and loan-based crowdfunding.

On 30 October 2017, the European Commission published an Inception Impact Assessment in which it sets out the main aspects of the challenges in the field of crowdfunding and what possible measures may be taken. The goal of potential measures is to facilitate cross-border activities of crowdfunding platforms within the EU and to increase the trust in crowdfunding platforms (for example, in the field of loan defaults, fraudulent activities, and the termination of a platform due to unlawful acts). The European Commission uses this impact assessment to determine whether measures are necessary. The European Commission is considering the following policy options:

1. No European framework
2. Self-regulation with minimum EU requirements
3. A harmonised EU framework with a crowdfunding license for all platforms with passport options and governance and transparency obligations
4. An opt-in crowdfunding license (including governance and transparency obligations) for platforms that want to carry out cross-border activities, excluding purely nationally operating platforms

The deadline for the submission of a response was 27 November 2017. Whether a European legal framework for crowdfunding is actually drafted is currently not yet clear. The European Commission has indicated that it intends to take the next steps in Q1 2018.

NATIONAL FRAMEWORK (*LOAN BASED*) CROWDFUNDING?

The Dutch national government also considers a regulatory framework for crowdfunding platforms. Both equity-based and loan-based crowdfunding platforms are, in principle, subject to the supervision of the Netherlands Authority for the Financial Markets (AFM). Equity-based platforms qualify as investment firms and are subject to an EU harmonised regulatory framework pursuant to the Markets in Financial Instruments Directive II (MiFID II). Loan-based crowdfunding platforms, on the other hand, are covered by national laws and regulations. Currently, the platforms usually operate based on an exemption from the prohibition to act as an intermediary in repayable funds (in this case the loans provided by (private) investors to a company) with certain conditions (as supplemented by the AFM). There is no clear legal framework. Where the borrower is a consumer, the crowdfund platform requires a license to provide credit to consumers.

The AFM has in its annual legislative letter of 2016 indicated that a complete regulatory framework for such platforms is desirable. This has been endorsed by the Minister of Finance. Almost simultaneously with the Inception Impact Assessment of the European Commission (see above), the Ministry of Finance published a consultation on 12 October 2017 to identify in what manner the regulatory framework for loan-based crowdfunding platforms can be reinforced. The consultation period ended at the end of November 2017.

"It will be interesting to what extent the Ministry will choose for a national framework or if it will wait for the developments taking place at a European level."

We expect that the Ministry of Finance will publish the consultation report, including an overview of the subsequent steps, in the course of 2018. It will be interesting to what extent the Ministry will choose for a national framework or if it will wait for the

developments taking place at a European level (see above). We recommend that loan-based platforms keep an eye on these developments in 2018.

EVALUATION OF CROWDFUNDING REGULATIONS AFM

The AFM has evaluated the crowdfunding rules introduced on 1 April 2016. It has published its main findings in a report in July 2017 and some aspects of the existing regulations will be amended accordingly. A new requirement will require that all project information must be available on the platform to all investors 48 hours before the registration opens. The 24-hour cooling-off period after the moment of the investment, does not change.

"A new requirement will require that all project information must be available on the platform to all investors 48 hours before the registration opens."

The AFM also indicates that the sector must make significant efforts to ensure that investors more often take the advice to invest no more than 10 percent of their free investable capital through crowdfunding. If an investor deviates from this, a platform must for each case be able to explain to the AFM why it is justified that the investor has invested more than 10 percent through crowdfunding. This could be justified if the platform has verified that the investor will not be financially vulnerable if the crowdfunding has disappointing results. Finally, the frequency of the repeated investor check is reduced (the investor check itself does remain). The investor check must be repeated for each subsequent investment where the total investment amount exceeds EUR 5,000, EUR 10,000, EUR 20,000 and EUR 40,000 respectively.
The AFM also reports that measures are being studied in cooperation with platforms and other European supervisors to reduce specific risks (e.g. the risk that investors invest more than 10 percent of their funds through crowdfunding). The AFM expects that platforms will study how they can effectively implement these crowdfunding regulations.

It is not entirely clear when the amended regulations will enter into force. We expect that the AFM will at least apply these regulations to new exemptions and licenses and that it will publish the amended regulations on its website in the course of 2018. We recommend crowdfunding platforms to implement the amended regulations in their business operations and to pay special attention to the 10% rule.

PSD2: FINTECHS GET ACCESS TO BANK ACCOUNTS

PSD2 will take effect in the Netherlands in 2018. For an overview of relevant changes, we refer to the Payment Service Providers section of this Outlook. However, PSD2 is also highly relevant to FinTech companies. One of the goals of PSD2 is to promote market innovations. PSD2 introduces two new payment services to this end: the *payment initiation service and the account information service*. A lot of these services will be offered by parties that do not fulfil a role as a bank (the FinTechs) and will be available online or by using a (mobile) app. Providers of these services must apply for a license from the Dutch Central Bank (*De Nederlandsche Bank*, DNB).

In this Outlook, we will highlight two elements that are specifically relevant to FinTechs.

Late implementation PSD2 in the Netherlands
PSD2 had to be transposed in national legislation on 13 January 2018. However, in the Netherlands, this deadline was determined to be not realistic. The implementation has been postponed by the Dutch legislator until (presumably) the (early) summer of 2018. DNB has indicated that it will base its supervision on PSD rather than PSD2 until then. This means that DNB will not enforce compliance with PSD2 during this period. However, this also means that DNB is not in a position to grant any licenses to FinTechs that want to offer the new payment services. Such payment services are not yet regulated and the FinTechs should be able to (continue to) offer the services in anticipation to the

implementation. However, these services require access to the bank account of clients, which will lead to difficulties since banks are not yet required to allow such access (see below). It looks like FinTechs will need to be patient before they can offer their services in the Netherlands under PSD2. DNB has also indicated to accept license applications in the period leading up to the implementation of PSD2 in order to review them and issue them (hopefully) soon after the implementation to the new market entrant. DNB will organise a seminar on PSD2 on 8 February 2018 where the licensing process for parties that consider requesting a license for PSD2 will be discussed.

Access to bank accounts (no screen scraping)
FinTechs need to have access to the bank accounts of their clients to offer the new payment services (account information and payment initiation). This requires the cooperation of the banks of such clients. PSD2 obliges banks to grant this access. The European Banking Authority (EBA) must draw up guidelines (so-called Regulatory Technical Standards (RTS)) under PSD2 to determine the manner in which banks must grant this cooperation and how FinTechs and banks can communicate. The European Commission has finally – after a lengthy discussion between EBA and the European Commission on the precise content of the RTS – adopted the RTS in November 2017. A hot topic was whether FinTechs would be given access to the bank account using a technique called 'screen scraping'. FinTechs (given permission by the client) would be able to get access to the same information related to the bank account as available to the client using the 'normal' client channel. The FinTech market tried to achieve this, while the banks aimed to prevent it.

"A hot topic was whether FinTechs would be given access to the bank account using a technique called 'screen scraping'."

This discussion seems to have been settled in favour of the banks. In accordance with the RTS, FinTechs will in principle only have access to information of clients using special interfaces created and managed by the bank (also called Application Programming Interface (API)). Banks decide what information is provided to FinTechs using these interfaces. The RTS will most likely only take effect as of September 2019. Until that time (from the implementation of PSD2 to the introduction of the RTS), the banks must also provide access to bank accounts, but the way this needs to take place has not been prescribed. The parties must determine this themselves.

We recommend that FinTechs that wish to provide new payment services to keep a close eye on the website of DNB and start with the preparations for the license application.

POSSIBLE LIGHTER LICENSES FOR FINTECHS

It is striking that FinTechs are explicitly mentioned in the coalition agreement 2017-2021. It states that the access of FinTechs to the market will be simplified by the implementation of a 'lighter banking and other license, providing sufficient protection to clients'. According to the coalition agreement, financial technology innovations contribute to innovation and competition in the financial sector. It remains to be seen how this new license will be structured, but we are very curious what this new government will do.

AFM WARNS ABOUT ICOS

The AFM issued a warning in November 2017 concerning the great risks involved in so-called Initial Coin Offerings (ICOs). ICOs offer companies (mostly start-ups) the possibility to acquire funding from the public by issuing a digital token. In an ICO, the company issues digital tokens using blockchain technology. The AFM warns consumers for investing in ICOs. According to the AFM, ICOs are currently vulnerable to deception, fraud and manipulation and an ideal breeding ground for scams. Depending on the exact set up of an ICO, it is not subject to the supervision of the AFM. This may not be the case if the tokens (i) qualify as a security within the meaning of the Dutch Financial Supervision Act (Wft) (which means that a prospectus obligation in principle applies - also refer to the Issuer section of this

Outlook); (ii) qualify as a participation right in an investment fund (based on which a license or registration obligation applies - also refer to the Investment fund manager section of this Outlook). If there is a security and/or participation right in an investment fund and a party enables the sale of these assets using a platform, there may also be a license obligation.

The House of Representatives has asked questions about the warning of the AFM. The Ministry of Finance has indicated that it will respond to this and will deliberate with the supervisors. We expect that the Ministry and the supervisors will determine whether regulation in this field is needed.

We recommend that market parties that consider offering services related to ICOs (or cryptocurrencies as in general) to carefully assess whether these activities fall within the scope of the Wft (and thus supervision by the AFM). It is also important to carefully monitor any legislative initiatives of the Ministry of Finance.

REVISION SCOPE OF 'ACTING AS AN INTERMEDIARY' IN FINTECH ENVIRONMENT?

New FinTech initiatives often aim to make access to financial products and financial services easier for customers. New FinTech initiatives increasingly focus on a specific aspect of financial services to make the product or service easily accessible for customers (e.g. using online or mobile channels). The FinTech initiative will often conclude a partnership with (existing) market parties. Each party in the chain must assess whether the services are supervised by the AFM or DNB. In practice, the ban on acting as an intermediary in financial products often leads to difficulties.

The AFM has in a Q&A on the website indicated that it realises that the definition 'acting as an intermediary' has a broad scope. The AFM indicates that the question is whether certain FinTech activities are or are not covered by this definition. This is currently a grey area because the legislator has not intended to regulate these activities. The AFM is currently still studying this. The scope of the definition 'acting as an intermediary' may be revised.

We recommend that market parties that want to introduce a new initiative consult the website of the AFM for the latest developments in this field.

CUSTOMIZATION FOR INNOVATION AND INNOVATIONHUB AND DNB SUPERVISION PRIORITIES

DNB and the AFM have indicated that they will continue to develop the InnovationHub and Customization for Innovation (*Maatwerk voor Innovatie*) in 2018 to keep addressing new developments. DNB indicates in its Supervision Outlook 2018 that it actively anticipates on developments in the field of innovation, paying attention to areas such as increasing digitisation, cybersecurity and data security.

RULES FOR ROBOT ADVICE (AUTOMATED ADVICE)?

The draft of the Amendment Decision Financial Markets 2017 contained detailed rules concerning automated advice (also called robot advice). However, the decision was made not to introduce any new rules concerning automated advice at this moment. A study took place in 2017 to determine whether such rules are needed to further regulate automated advice. It was indicated that if this analysis shows that detailed rules are necessary, they will be included in the Amendment Decision Financial Markets 2019.

FINTECH CONSULTATION EUROPEAN COMMISSION

The European Commission has published a consultation on technology and the impact thereof on the European financial sector (titled: "FinTech: a more competitive and innovative European financial sector") on 23 March 2017. The consultation aimed to obtain information on the impact of new technologies on the financial sector from the market and to determine whether the rules

and supervision requirements of the EU are sufficient and what measures must be taken in the future.

The European Commission focusses on three core principles to help the FinTech sector freely exploit activities throughout the EU:

a. Technology neutrality must result in innovation and a level playing field because the same rules apply to 'traditional' services and 'FinTech' services.
b. Proportionality must ensure that the rules are appropriate for the business model, the scope, and the activities of the regulated entities.
c. Integrity must provide the consumer with transparency, respect, and protection of his privacy.

We expect to have more clarity on the proposals of the European Commission to further facilitate the FinTech sector in 2018 and we recommend FinTechs to keep an eye on the developments at a European level.

ECB PUBLISHES A DRAFT GUIDE FOR THE ASSESSMENT OF APPLICATIONS FOR A FINTECH CREDIT INSTITUTION LICENSE

The European Central Bank (ECB) has published a draft guide on the assessment of an application for FinTech credit institution licenses in September 2017. The ECB has drawn up this guide because it noted an increase in the number of license applications and related questions of FinTech banks. A FinTech bank has been defined by the ECB as a bank with: "*a business model in which the production and delivery of banking products and services are based on technology-enabled innovation*". Examples are Bunq or Adyen, which have recently obtained a banking license from DNB.

The guide has been drawn up in cooperation with national supervisors. The guide includes considerations used by the supervisors in the assessments that specifically match the specific nature of banks with a FinTech business model. An example is whether the managing bodies have the relevant skills and knowledge in the field of technology. This requirement can be met according to the ECB by assigning a Chief Technology Officer as an executive board member. The general policy of the ECB for granting a license to a bank will also apply to license applications by FinTech banks.

The goal of the guide is to introduce a consistent approach for the assessment of license applications for both new FinTech banks and subsidiaries of existing credit institutions with a FinTech business model. We recommend that market parties with a FinTech business model that consider requesting a banking license to consult this guide when preparing the license application.

EBA PRIORITIES 2018 - FINTECH

EBA has published its Work Programme for 2018 in October 2017. It has listed all its priorities for technical standards, guidelines and reports for specific rules that are part of its scope such as payment services and electronic money. For an overview of the priorities for banks and payment service providers, refer to the Banks and Payment Service Providers sections of this Outlook.

These priorities are also relevant to FinTechs as EBA has indicated to monitor financial innovation in 2018. EBA indicates to focus on the following fields: (i) regulation of FinTech companies (indicated that it will explore regulations concerning 'sandboxes' and 'innovation hubs'; (ii) risks and opportunities for credit institutions, payment institutions, and electronic money institutions, (iii) the impact on the business models of credit institutions, payment institutions, and electronic money institutions, (iv) consumer protection, (v) the impact of FinTech on decision-making processes of financial companies, and (vi) the impact of FinTech on the prevention of money laundering and the financing of terrorism.

EBA indicates that it wants to provide more publications on the above-mentioned fields. We recommend that FinTech market parties that are active in the field of payment services and electronic money to consult

these publications by EBA once they become available.

EBA GUIDANCE FOR CLOUD COMPUTING

EBA has published draft recommendations in May 2017 related to 'cloud computing' available. The recommendations concern the following five fields: (i) security of data and systems, (ii) the location of data and the processing of data, (iii) access rights to data, (iv) outsourcing, and (v) emergency plans and exit strategies. The recommendations are intended for credit institutions, investment firms, and competent authorities.

EBA published its final recommendations on 20th December 2017. The recommendations will take effect on July 1st 2018. We recommend that FinTechs that make use of cloud computing to assess to what extent they (already) apply the EBA recommendations.

ESMA REPORT ON DISTRIBUTED LEDGER TECHNOLOGY (DLT)

ESMA has published a report in February 2017 on Distributed Ledger Technology (DLT, also called 'blockchain'). ESMA indicates that the technology is still evolving at this moment and that practical applications of DLT at this time are still too limited for a full study. ESMA indicates that it will continue to monitor the developments in the field of DLT and will assess whether regulatory measures are needed.

PLATFORMS FOR TRADING CRYPTOCURRENCIES WITHIN THE SCOPE OF ANTI-MONEY LAUNDERING RULES?

Platforms for the exchange of virtual currencies (cryptocurrencies) and so-called custodian wallet providers (parties where you can hold a 'wallet' of cryptocurrencies) will potentially become subject to the requirements of the anti-money laundering rules. The European Commission has published a proposal to this end in July 2016. This proposal (also called the fifth Anti-Money Laundering Directive) would mean that these exchange platforms and custodian wallet providers are required to carry out a client due diligence and report unusual transactions to the Financial Intelligence Unit (FIU).

The proposal is currently being discussed in a trialogue between the European Parliament, the European Commission and the Council of Ministers. It is not yet clear when the (revised) directive will enter into force. Parties that are active as a platform or wallet provider should follow the developments closely since the application of this regulation can have a major impact on the structure of their business model.

DNB SUPERVISION PRIORITY: PAYMENT INSTITUTIONS AND CRYPTOCURRENCIES

DNB believes that it is important that payment institutions monitor all transactions to prevent fraud and money laundering. If payment institutions are unable to adequately monitor transactions with cryptocurrencies due to anonymity, these institutions are not able to properly manage the risks of fraud or money laundering. According to DNB, these services may not be offered in that case. DNB will study terrorism financing in 2018 and approach a number of payment institutions to this end.

ANSWERS TO PARLIAMENTARY QUESTIONS ABOUT THE WARNING OF THE AFM FOR DIGITAL IPOS (ICOS)

On 22 December 2017, the Minister of Finance has answered parliamentary questions on the warning of the AFM about ICOs (see elsewhere in this section of the Outlook for more details).

In the answers, the Minister discusses the rules that apply to the issuance of cryptocurrencies through ICOs. The initial

sale of cryptocurrencies through ICOs will only in specific cases fall within the scope of financial supervision legislation. The AFM will in each case assess whether these rules apply. A cryptocurrency or token may be based on its legal characteristics qualify as a security within the meaning of the Wft and (European) prospectus rules may apply and the rules arising from the AML4 (and Dutch Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, 'Wwft') may apply to companies that enable the trading of these 'securities'.

If a token qualifies as a security, a prospectus approved by the AFM is required upon its issuance based on (European) prospectus rules, or, in case of an exemption or exception, a mandatory advance notice. Providers are also required to provide information to investors in the form of an information document. This document must be provided to the AFM together with the notice. Companies that enable the trading of these 'securities' must meet the rules arising from the AML4 (and Wwft).

If a token does not qualify as a security but as a right of participation in an investment firm, the AIFMD and the corresponding rules from the Wft apply. Investment firms may by default only offer participation rights to the public with a license provided by the AFM.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR FINANCIAL SERVICES PROVIDERS IN 2018 (SUCH AS ADVISERS AND INTERMEDIARIES)

This part of the Finnius Outlook deals with important developments in 2018 for financial services providers. This catch-all category includes, inter alia, advisers and intermediaries for financial products, such as insurance and consumer credit facilities. Consumer credit providers are also deemed financial services providers in the Dutch Financial Supervision Act. Developments for these consumer credit providers are included in a separate part of the Finnius Outlook. Developments that affect crowdfunding or FinTech concepts of financial services providers are discussed in the respective relevant part of the Outlook.

TOPICS

- Impact of Insurance Distribution Directive
- Evaluation of inducement ban
- Advertising rules concerning risky financial products
- New National Regime under MiFID II
- Key Information Document (KID) by providers of investment objects
- Obligations for credit documentation when using benchmarks
- New advertising rules
- Codification of the exemption for deferred payment in normal trading practices
- Application of the Financial Undertakings Remuneration Policy Act (Wbfo)
- Impact of Fourth Anti-Money Laundering Directive

IMPACT OF INSURANCE DISTRIBUTION DIRECTIVE

On 1 October 2018, the Dutch legislation implementing the Insurance Distribution Directive (IDD) into Dutch law will – likely – enter into force. It was the intention that the IDD would already enter into force on 23 February 2018, but on 20 December 2017, the European Commission has proposed to push back the application date of IDD by seven months to 1 October 2018. The European Parliament and the Council will need to agree on the new application date in an accelerated legislative procedure. The date 1 October 2018 is now generally being considered as new entry into force date. The implementation date – the date on which the IDD must be transposed into national law – remains to be 23 February 2018 (but will only enter into force on 1 October 2018).

At a national level, the entry into force of the IDD will take place when the following regulations take effect:

- Dutch IDD Implementation Act
- Dutch IDD Implementation Decree
- Dutch IDD Implementation Regulation, which draft regulation is under consultation till February 2018.

The IDD package, including the IDD itself, consists at a European level of:

- Two Delegated Regulations that contain rules on product development, product governance, insurance-based investment products, conflicts of interest, and the demands-and-needs test.
- The Commission Implementing Regulation 2017/1469 to adopt a standardised presentation form of the information document for insurance products.
- EIOPA Guidelines for the *execution only* sale of complex insurance-based investment products.

The IDD applies to insurance companies, insurance intermediaries and insurance advisers. A number of important rules are:

- More licenses
  Under the IDD, a number of parties that were previously exempt from the license requirement will need to apply for an intermediary license (e.g. parties that act as an intermediary in insurance products as supplement to a good or service, that exceed the limit set out in Article 1 of the IDD, or travel agencies (unless they stay under the limit set out in Article 1 of the IDD)).
- Demands and needs
  Prior to the conclusion of an insurance agreement, a financial services provider must determine the demands and needs of the client and only provide him with information on insurance products that match these demands and needs. This obligation applies to both advice and execution only.
- Product development
  Insurance companies or intermediaries that offer or compile insurance products and make them available on the market must determine the target market of each insurance product. They have to test and evaluate the insurance products and determine the distribution strategy. Parties that do not manufacture insurance products but only distribute them must set up and evaluate a distribution process.
- IPID
  Financial services providers must provide clients prior to the conclusion of an agreement concerning a non-life insurance product with an information document in respect of the non-life insurance product in question, which must be drawn up by financial services providers that offer or compile non-life insurance products and make them generally available on the market. The information document contains standardised information about the non-life insurance product. EIOPA published a template that may (but does not necessarily need to) be used for the IPID on 11 December 2017.
- Insurance-based investment products
  Advisers with respect to insurance-based investment products must determine the suitability of the client and provide a suitability statement in which the advice is specified to the client prior to the conclusion of the insurance agreement. Intermediaries in insurance-based investment products must use the knowledge and experience check to determine whether the product is suitable for the client.
- Cross-selling
  If an insurance product supplements the delivery of a good or the provision of a service, the insurance company or intermediary must offer the client the opportunity to also purchase the good or service without the insurance. A service may be sold which supplements an

insurance without selling the components separately, provided that the insurance company or intermediary communicates this clearly with the client and the service is an 'ancillary service'.

- Active remuneration transparency
  Financial services providers only need to inform their non-life clients on the amount of the inducement if the client pays it directly to them. The Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) has in its consultation response to the Dutch IDD Implementation Decree argued that service providers must always actively inform their clients about the inducement amount. Even if it is not paid directly by the client but through the insurance premium.

EVALUATION OF INDUCEMENT BAN

An evaluation study into the market effects of the inducement ban for financial services providers was commissioned by the Dutch Ministry of Finance in April 2017. The inducement ban has been in effect since 1 January 2013. The study focused on three main themes: culture change, accessibility, and playing field. Relevant parties such as trade associations, market parties and consumer organisations have been requested to provide input. The study ended in September 2017. The results are not yet known.

ADVERTISING RULES CONCERNING RISKY FINANCIAL PRODUCTS

The Dutch Ministry of Finance has consulted a proposal on the introduction of advertising rules concerning risky financial products at the start of last year. It was proposed to include a provision in the Market Conduct Supervision Financial Institutions Decree (*Besluit Gedragstoezicht financiële ondernemingen Wft*, BGfo) which would give the AFM the power to assign certain financial products for which no advertising targeted at customers in the Netherlands may take place to protect the interests of consumers. The AFM has simultaneously consulted a change to the Further Regulations on the Supervision of the Conduct of Financial Undertakings (*Nadere regeling gedragstoezicht financiële ondernemingen Wft*, Nrgfo) in which it assigns products which would be the subject of the advertising ban. The AFM wants to assign short-term loans (known as 'payday loans') and other loans with unreasonably high costs of credit, among others.

The scope of the advertising ban is limited by Article 1:16(1) Dutch Financial Supervision Act (*Wet op het financieel toezicht,* Wft); online advertising concerning financial products assigned by the AFM in principle fall outside the scope of the proposed advertising rules if these services are provided from a location in another Member State. According to the explanatory memorandum to the proposal, the Ministry, therefore, intends to bring the financial products assigned by the AFM within the scope by means of a separate legislation. This legislation will be based on Article 1:16(2) Wft. This would enable the AFM to take enforcement measures for advertising related to the indicated loans offered from other countries online.

The advertising ban was to take effect on 1 July 2017 according to the consultation of the Ministry. It has been unclear whether and when the advertising ban would take effect since that date.

NEW NATIONAL REGIME UNDER MIFID II

The National Regime is an exemption scheme concerning part of the MiFID requirements. Intermediaries that advise on combined products with an investment component in the form of transactions in financial instruments that are directly for the risk and account of the client fall in principle also under the scope of the MiFID. Examples are services related to securities-based mortgages, pension products, bank saving products, and other capital accrual products with an investment component in the form of transactions in financial instruments that are directly for the risk and account of the client. The National Regime is particularly relevant to parties that advise investors on combined products that consist of a loan and an investment account in which transactions in

participation rights in investment institutions (investment funds) are concluded for the risk and account of the client. These combination products are also called 'securities-based mortgages'.

The National Regime will continue to exist under MiFID II, but what amended requirements will apply to intermediaries will only be clear in the first quarter of 2018. Only then will there be an amended Exemption Regulations under the Financial Supervision Act (*Vrijstellingsregeling Wft*). The National Regime as in effect now will remain applicable until that time.

Intermediaries (such as mortgage loan advisers) registered under the National Regime must in Q1 2018 determine whether any new rules require them to change their business operations and/or customer communication.

KEY INFORMATION DOCUMENT (KID) BY PROVIDERS OF INVESTMENT OBJECTS

The PRIIPs Regulation (no. 1286/2014) applies to investment objects, which means that providers of investment objects with a license and providers that offer investment objects based on an exemption scheme must as of 1 January 2018 provide a Key Information Document (KID) to retail investors. The KID is a self-contained, standardised document of up to three pages in A4 format. The PRIIPs Regulation contains general requirements for the form and content of the KID and the Commission Delegated Regulation (no. 2017/653) specific requirements. The KID must contain information concerning the nature and the main characteristics of the investment object, the goals of the investment object and the means to achieve these, the target group, the risk and return profile, and the costs associated with the investment. The KID must help investors understand and compare investment objects.

PRIIPs took effect at a national level by the entry into force of the following regulations:

- Implementation Act PRIIPs (came into effect on 1 January 2018);
- Implementation Decree PRIIPs (came into effect on 1 January 2018);
- a modified Nrgfo (came into effect on 1 January 2018).

The developer of an investment object must draw up the KID and publish it on its website. The person who advises on the investment object or sells the investment object must provide the KID to the retail investor before the investor is bound to an agreement or an offer related to the investment object (this can be done at a later time for distance contracts and offers under certain conditions). A retailer investor in this context is any investor who does not qualify as a professional investor within the meaning of the Wft such as banks and pension funds. A high net worth individual is therefore in principle also a retail investor.

"The developer of an investment object must draw up the KID and publish it on its website."

We recommend that providers of investment objects that have not drawn up a KID yet to do so as soon as possible.

OBLIGATIONS FOR CREDIT DOCUMENTATION WHEN USING BENCHMARKS

The Benchmarks Regulation has taken effect on 1 January 2018. This regulation is part of the European response to some high-profile fraud cases involving commonly used benchmarks for loans such as LIBOR and EURIBOR. Prohibiting the manipulation of benchmarks is considered to be insufficient for eliminating all risks that arise when establishing and using benchmarks. The Benchmarks Regulation, therefore, offers a regulatory framework for the establishment and use of benchmarks in the European Union to improve the integrity, the reliability, and suitability of financial benchmarks.

The regulation contains several elements to achieve this, mainly focused on parties that provide/manage or contribute to benchmarks. However, there are also rules for users of benchmarks. Only benchmarks

of administrators captured in the European benchmark register may be used. If a benchmark is used for a loan, information about the benchmark must be provided to the consumer. The latter has been set out in the BGfo as a result of the Benchmarks Implementation Decree which implements the small part of the Benchmarks Regulation which has no direct effect in the Member States. The obligation to provide information about the benchmark only applies to credit agreements concluded after 30 June 2018.

Intermediaries and advisers that provide services related to credit products that use benchmarks must ensure that the documentation provided to the consumer contains the required information on the relevant benchmark at the latest as of 1 July 2018. If the intermediary or adviser uses a European benchmark, the following things are relevant:

- if this took place before 1 January 2018, the intermediary or adviser can continue to use the benchmark until at least 1 January 2020 without restrictions. The benchmark may then only be used if the administrator of this benchmark has been captured in the ESMA register;
- if a new benchmark (which has been created after 1 January 2018) is used after 1 January 2018, this is only allowed if the benchmark is captured in the ESMA register;
- if the intermediary or adviser uses a non-European benchmark, the use of this benchmark will at least be allowed until 1 January 2020.

We recommend that intermediaries and advisers always check whether credit products with benchmarks where they are involved in, meet the new rules.

NEW ADVERTISING RULES

As a result of the entry into force of the PRIIPs Regulation, rules concerning voluntary precontractual information (including advertising) have been amended in the new Further Regulations on the Supervision of the Conduct of Financial Undertakings (*Nadere regeling gedragstoezicht financiële ondernemingen Wft*, Nrgfo). The main amendments are:

- Definition of complex investment product: These include a life insurance with an investment component.
- Scope: The new rules will also apply to third-pillar pension products. With the entry into force of the PRIIPs Regulation and changes to the BGfo concerning the repeal of the financial information leaflet (*financiële bijsluiter*) and the introduction of the key information document for third-pillar pension products, there are complex products for which no financial information leaflet needs to be drawn up and for which no key information document will be required as of 1 January 2018. This group includes composite products without investment (accrual) component, such as an interest-only mortgage loan linked to a risk-based term life insurance, a savings account associated with homeownership, and a savings capital sum insurance.
- New risk indicator: With the repeal of the financial information leaflet for complex products and third-pillar pension products, the requirement to include the associated risk indicator in advertising will also expire. New risk indicators will be introduced for complex products that also fall within the scope of the PRIIPs Regulation and third-pillar pension products. The new images can be downloaded from www.afm.nl/reclameteksten.
- Information on return: The entry into force of the PRIIPs Regulation and the repeal of the financial information leaflet also has consequences for the manner in which providers of complex products and third-pillar pension products may communicate about the return of their products in precontractual information such as advertisements and offers. The amendments to the Nrgfo match the methodology of the PRIIPs Regulation and the calculations on future return, main risks and costs as laid down in the Commission Delegated Regulation on key information documents. Only future return based on the performance scenarios of the delegated regulation on key information documents may be presented. Deviations from the calculation method prescribed in the delegated regulation on key information documents are allowed for a specific group of complex investment products in favour of individualised information.

CODIFICATION OF THE EXEMPTION FOR DEFERRED PAYMENT IN NORMAL TRADING PRACTICES

In December 2017 the Dutch Ministry of Finance has presented to the market the Amendment Regulations concerning the exemption for deferred payment (the consultation runs until 1 February 2018). Some aspects of the Exemption Regulations under the Financial Supervision Act (*Vrijstellingsregeling Wft*) will be adjusted because there was a lack of clarity on the market concerning the question whether granting a deferment of payment falls within the scope of the Dutch Financial Supervision Act (*Wet op het financieel toezicht,* Wft) and therefore is subject to a licensing obligation. The new Exemption Regulations codify the existing practices, which means that if there are payment arrears at any time during normal trading, a deferment of payment may be granted if the consumer is unable to meet his payment obligations. The new Exemption Regulations clarify that this also concerns granting a deferment of payment concerning an agreement on credit within the meaning of Article 1:20 Wft. The exemption only applies if only the statutory interest or a fee for extrajudicial collection costs is charged to the consumer. If any additional costs other than the costs mentioned above are charged, a license must still be applied for.

The new Exemption Regulations are of interest to intermediaries because there is also an exemption for intermediaries that grant a deferment of payment for a payment obligation arising from a credit agreement where only the statutory interest or a fee for extrajudicial collection costs is charged to the consumer. This matches the exemption that will be codified for providers of deferred payment arrangements. Newly introduced is the new exemption for intermediaries which act as an intermediary in credit other than described in Article 1:20 Wft. This exemption applies in case the intermediary does not charge any other costs than included in the original credit agreement. The Explanatory Memorandum of the exemption includes two examples of situations in which intermediary activities may take place free of charge.

The new Exemption Regulations will enter into force as soon as possible after the consultation has ended.

APPLICATION OF THE FINANCIAL UNDERTAKINGS REMUNERATION POLICY ACT (WBFO)

The Market Monitor Advisors and Intermediaries 2017 (*Marktmonitor Adviseurs en Bemiddelaars 2017*) of the AFM shows that not all licensees (fully) comply with the rules of the Financial Undertakings Remuneration Policy Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) yet. The remuneration policy of a number of licensees has been adjusted at the request of the AFM. These cases concerned cooperation with one or more freelancers. Due to the high variable remuneration of the freelancer(s), the variable remuneration percentage exceeded 20% of the overall wage sum at company level.

“Intermediaries must realise that the remuneration rules are not a dead letter to the AFM and that it actually supervises compliance with these rules that are still most often wrongly associated with just banks.”

The AFM again explicitly explains one of the exceptions to the maximum variable remuneration of 20%. This exception concerns employees that are employed under the responsibility of the company in the Netherlands for whom the remuneration is not or only partially arranged in a collective agreement. If certain conditions are met, a variable remuneration exceeding 20% may be granted. The variable remuneration may not be more than 100% of the fixed remuneration and the average variable remuneration of all employees that mainly carry out work in the Netherlands may not exceed more than 20% of the fixed remuneration at company level.

Intermediaries must realise that the remuneration rules are not a dead letter to the AFM and that it actually supervises compliance with these rules that are still most often wrongly associated with just banks.

IMPACT OF FOURTH ANTI-MONEY LAUNDERING DIRECTIVE

The implementation of the Fourth Anti-Money Laundering Directive will probably take effect in the Netherlands in the spring of 2018. A bill to this effect has been submitted to the House of Representatives on 12 October 2017. For an overview of the consequences, we refer to the Wwft section of this Outlook.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR CREDIT PROVIDERS IN 2018

TOPICS

- Code of Conduct NVB lending to small business customers
- Best practices interest-only mortgage loans
- Limitation of compensation for change to debit interest rate
- AFM audit into improvements for responsible lending
- Ongoing management of mortgage loans
- New borrowing standards mortgage loans as of 1 January 2018
- Obligations for benchmark use
- Codification of the exemption for deferred payment in normal trading practices
- Impact of Fourth Anti-Money Laundering Directive

CODE OF CONDUCT NVB LENDING TO SMALL BUSINESS CUSTOMERS

Following the consultation in 2016 on the effectiveness and desired level of protection for independent contractors and SME entrepreneurs with respect to financial services and products (so-called small business customers), the Dutch Banking Association (NVB) has started to draw up a code of conduct on lending to small business customers. The code of conduct specifies what small business customers can expect from banks with respect to financing (such as clear information and cost transparency). Furthermore it is important that the option of credit providers to unilaterally change the terms and conditions is restricted. Another important part of the code of conduct is that it aims to establish accessible complaints handling.

The Dutch Minister of Finance has already announced that the effectiveness of the code of conduct will be monitored by the Ministry and that it will be evaluated after three years. If there are earlier signals that the level of protection is improving insufficiently, for example, because the code of conduct insufficiently addresses the found issues, or if the evaluation shows that the protection of small business customers is insufficiently secured, the Minister will consider whether further (legislative) measures are needed to achieve the desired level of protection.

The code of conduct will probably apply from mid-2018 to banks that underwrite this code of conduct. These banks must carry out an impact analysis and carry out any improvements to their operations and communication with customers as soon as possible.

BEST PRACTICES INTEREST-ONLY MORTGAGE LOANS

The Financial Stability Committee has called on credit providers at the end of 2017 to develop a target approach to the risks of interest-only mortgage loans and to involve the intermediaries. The Financial Stability Committee is chaired by the president of the Dutch Central Bank (*De Nederlandsche Bank,* DNB) and includes representatives of DNB, the Netherlands Authority for the Financial Markets (*Autoriteit Financiële Markten,* AFM), and the Dutch Ministry of Finance to talk about the developments in the field of the stability of the Dutch financial system. The CPB Netherlands Bureau for Economic Policy Analysis (*Centraal Planbureau*, CPB) participates in the meetings as an external expert.

The approach that is already being used by four major banks and which the Financial Stability Committee intends to implement for the rest of the market should include the following elements:

- *Risk identification:* segmenting customers based on risk profile, improving information on the financial position of customers, including capital pledged to the mortgage loan.
- *Proactive customer contact:* using contact moments to give customers insight into their situation and the possibilities to reduce their risk, for example, by informing customers of the possibility to use the financial room caused by lower interest expenses to lower the interest-only debt.
- *Customisation*: developing an effective approach which distinguishes based on risk profile which quickly offers the riskiest customers the opportunity to take rapid action. This involves effective cooperation with intermediaries.
- *Information provision:* setting up a central information point for households with questions and where possible solutions are explained.

Credit providers should implement these elements as best practices as much as possible.

LIMITATION OF COMPENSATION FOR CHANGE TO DEBIT INTEREST RATE

A change to the Market Conduct Supervision Financial Institutions Decree (*Besluit Gedragstoezicht financiële ondernemingen Wft*, BGfo) implemented mid-2018 will most likely determine that a provider of mortgage loans cannot charge a fee which is higher than the financial disadvantage suffered by the provider resulting from a change to the

debit interest rate during a fixed-interest period. This rule corresponds to what already applies to fees for early repayment. The Financial Markets Amendment Decree 2018 is still in the consultation stage.

AFM AUDIT INTO IMPROVEMENTS FOR RESPONSIBLE LENDING

The AFM has audited credit providers in 2017 concerning the prevalence of over-indebtedness and the way in which payment arrears for consumer credit are handled and has found that there is room for improvement. The AFM notes that there is still over-indebtedness. The AFM also remarks that credit providers must make more efforts to find a good solution for payment arrears, together with the customer. The AFM will carry out a follow-up audit in 2018.

Considering the topics that will be discussed in this follow-up audit, we recommend credit providers to do the following:

- Ensure that the type of loan matches the spending goals of the customer in the product approval and review process.
- Collect sufficient information about the customer. The AFM remarks that the information collected about the expenditure of their customers is lacking.
- Use the collected information when determining the financial position of the customer.
- Apply the payment arrears guideline of the AFM to procedures and measures for defaulters; the AFM remarks that it fails to sufficiently see this in practice and that credit providers are still too focussed on collection.

ONGOING MANAGEMENT OF MORTGAGE LOANS

The AFM expects mortgage loan providers to pay more attention to the contact with their customers during the term of the mortgage loan. An example is identifying economic developments or changes in the personal situation that cause additional risks to customers that may lead to payment arrears. The AFM observes the principle that mortgage loan providers must within a reasonable period but at least within 3 months study the possible causes of the payment issues together with the customer. The AFM states this is far from being the case. It stands to reason that the AFM in 2018 will again check whether the market is making improvements in this regard.

"The AFM expects mortgage loan providers to pay more attention to the contact with their customers during the term of the mortgage loan."

We recommend that mortgage loan providers pay more attention to special management (what to do in case of payment arrears) and preventive management (what to do to prevent payment arrears) in 2018.

NEW BORROWING STANDARDS MORTGAGE LOANS AS OF 1 JANUARY 2018

The borrowing standards that determine the maximum mortgage loan change as of 1 January 2018. The maximum mortgage loan compared to the value of the house will be 100%. Any costs related to the transfer and other additional costs can no longer be included in the loan. The income standards will also change.

These borrowing standards will apply to everyone who has been given a binding mortgage loan offer after January 1st. There is no transition period for borrowers that have submitted their application in 2017. Mortgage loan providers can only deviate from the applicable borrowing standards if justified in a personal situation - the so-called explain options.

OBLIGATIONS FOR BENCHMARK USE

The Benchmarks Regulation has taken effect on 1 January 2018. This regulation is part of the European response to some high-profile fraud cases involving commonly used benchmarks for loans such as LIBOR and EURIBOR. Prohibiting the manipulation of benchmarks is considered to be insufficient for eliminating all risks that arise when establishing and using benchmarks. The Benchmarks Regulation, therefore, offers a regulatory framework for the establishment and use of benchmarks in the European Union to improve the integrity, the reliability, and suitability of financial benchmarks.

The regulation contains several elements to achieve this, mainly focused on parties that provide/manage or contribute to benchmarks. However, there are also rules for users of benchmarks. Only benchmarks of administrators captured in the European benchmark register may be used. If a benchmark is used for a loan, information about the benchmark must be provided to the consumer. The latter has been set out in the BGfo as a result of the Benchmarks Implementation Decree which implements the small part of the Benchmarks Regulation which has no direct effect in the Member States. The obligation to provide information about the benchmark only applies to credit agreements concluded after 30 June 2018.

Credit providers that use benchmarks must ensure that their documentation contains the required information on the relevant benchmark at the latest as of 1 July 2018. If the credit provider uses a European benchmark, the following things are relevant:

- if this took place before 1 January 2018, the credit provider can continue to use the benchmark until at least 1 January 2020 without restrictions. The benchmark may then only be used if the administrator of this benchmark has been captured in the ESMA register;
- if a new benchmark (which has been created after 1 January 2018) is used after 1 January 2018, this is only allowed if the benchmark is captured in the ESMA register;
- if the credit provider uses a non-European benchmark, the use of this benchmark will at least be allowed until 1 January 2020.

CODIFICATION OF THE EXEMPTION FOR DEFERRED PAYMENT IN NORMAL TRADING PRACTICES

In December 2017 the Dutch Ministry of Finance has presented to the market the Amendment Regulations concerning the exemption for deferred payment (the consultation runs until 1 February 2018). Some aspects of the Exemption Regulations under the Financial Supervision Act (*Vrijstellingsregeling Wft*) will be adjusted because there was a lack of clarity on the market concerning the question whether granting a deferment of payment falls within the scope of the Dutch Financial Supervision Act (*Wet op het financieel toezicht,* Wft) and therefore is subject to a licensing obligation. The new Exemption Regulations codify the existing practices, which means that if there are payment arrears at any time during normal trading, a deferment of payment may be granted if the consumer is unable to meet his payment obligations. The new Exemption Regulations clarify that this also concerns granting a deferment of payment concerning an agreement on credit within the meaning of Article 1:20 Wft. The exemption only applies if only the statutory interest or a fee for extrajudicial collection costs is charged to the consumer. If any additional costs other than the costs mentioned above are charged, a license must still be applied for.

The new Exemption Regulations will enter into force as soon as possible after the consultation has ended. Since this is mainly a legally enshrining of already existing practices, the impact will be limited.

IMPACT OF FOURTH ANTI-MONEY LAUNDERING DIRECTIVE

The implementation of the Fourth Anti-Money Laundering Directive will probably take effect in the Netherlands in the spring of 2018. A bill to this effect has been submitted to the House of Representatives on 12 October 2017. For an overview of the consequences, we refer to the Wwft section of this Outlook.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR TRUST OFFICES IN 2018

TOPICS

- Legislative process Act on the Supervision of Trust Offices 2018
- Systematic Integrity Risk Analysis (SIRA)
- Amendment Wwft (AML4)
- UBO register
- Focus DNB 2018

LEGISLATIVE PROCESS ACT ON THE SUPERVISION OF TRUST FIRMS 2018

After conclusion of the consultation phase, the bill Wtt 2018 has been sent to the Council of State by the Minister of Finance. In the consultations report of the Minister the main changes in comparison to the Wtt are explained:

- a trust office has at least two day-to-day policy-makers and must be a legal entity in the form of an NV, BV or SE (European NV);
- the compliance function can no longer be outsourced;
- the obligation to make an effort with respect to the acquisition of information in the context of the client due diligence will be made more stringent. The requirement set out in the consulted draft that information must be determined 'with near certainty' has been toned down after the consultation responses (of Finnius and others);
- when a client of a trust office moves to another trust office, that trust office must exchange information on any found integrity risks related to this former client;
- a client may not be provided trust services in case there is a relationship with tax advice provided by (a group entity of) the trust office to the same client;
- the Wtt will contain a legal basis which enables a categorical prohibition of the provision of trust services under certain circumstances;
- to standardise the UBO term in Dutch legislation, it will match the UBO term in the Wwft; and
- DNB will have more enforcement measures (publication of measures, public warning, imposing a 'berufsverbot'). DNB will also have more opportunities to revoke a license.

"The regulatory framework for the trust sector will tighten."

The wish to tighten the rules of the trust sector and to give the supervisor more powers have also been announced in the coalition agreement 2017-2021 'confidence in the future': "The regulatory framework for the trust sector will tighten and the measures of the supervisor (*De Nederlandsche Bank*, DNB) will be expanded."

SYSTEMATIC INTEGRITY RISK ANALYSIS (SIRA)

Trust offices have created a SIRA tool and included it in their regular risk management cycle in recent years. On the basis of supervision audits DNB has concluded that the SIRA is not always consistently used in practice by the trust offices but mainly serves as a static instrument. DNB will pay additional attention to this in 2018 and assess whether trust offices actively revise their integrity risks and are sufficiently aware of the effectiveness of their control measures in place. DNB also considers it important that trust offices formulate a risk appetite and use this in their day-to-day risk assessments.

AMENDMENT WWFT (AML4)

The bill on the implementation of the Fourth Anti-Money Laundering Directive is being discussed in the House of Representatives after its submission on 12 October 2017 and is expected to take effect in the spring of 2018. For an extended overview of the consequences, we refer to the Wwft section of this Outlook. The bill maintains the current structure where trust offices must carry out the client due diligence in the context of the trust services based on (Article 10 of) the Wtt and the corresponding rules in the Wwft do not apply. If the amendments to the Wwft take effect before the Wtt 2018, trust firms will carry out the client due diligence based on the current Wtt and Rib 2014, while other Wwft institutions must carry out the client due diligence based on the changed Wwft scheme.

UBO REGISTER

Based on the Fourth Anti-Money Laundering Directive, a UBO register will be introduced. This register is accessible to authorities, national FIUs, reporting entities (within the meaning of the Wwft) and persons or organisations that can demonstrate a legitimate interest. In the Netherlands the UBO register is created by registering the ultimate beneficial owner(s) of a company or a legal entity in the Commercial Register

of the Chamber of Commerce. It will be introduced through a separate legislative process and is not part of the bill on the amendment of the Wwft (bill on the Implementation Act Registration Ultimate Beneficial Owners).

"In the Netherlands the UBO register is created by registering the ultimate beneficial owner(s) of a company or a legal entity in the Commercial Register of the Chamber of Commerce."

It is our expectation that the Bill will be submitted to the House of Representatives in early 2018. The goal of the UBO register is to prevent businesses and legal entities from being used to (i) conceal the origins of proceeds from crime and (ii) keeping perpetrators out of sight of the authorities using legal vehicles. The Ministry of Finance foresees that this bill will take effect in the summer of 2018.

FOCUS DNB 2018

DNB has announced to specifically focus on compliance with the Dutch Sanctions Act in is supervisory examinations of trust offices in 2018. It will also pay attention to 'financial-economic crime', a subject which DNB has set as a priority in its Supervisory Strategy 2018-2022. Financial institutions must safeguard integer business operations and take measures to prevent any involvement in this type of crime. It is clear that DNB will pay attention to the manner in which trust offices set up and carry out transaction monitoring.

As described above, DNB will audit how trust offices apply and use their SIRA tool in day-to-day practice. Finally, DNB has indicated to pay attention to the timely preparation and implementation of new regulations (i.e. the Wtt 2018 and amendment of the Wwft).

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR ISSUERS IN 2018

TOPICS

- Regulations on investment objects and investment bonds
- Revising prospectus rules
- PRIIPs Regulation: obligation to draw up a KID from 1 January 2018
- Euronext rules on reserve listings
- ESMA priorities financial reporting on 2017
- Advertising investment bonds: no comparison with saving
- Introduction of new reporting rules (IFRS 9, 15 and 16)

REGULATIONS ON INVESTMENT OBJECTS AND INVESTMENT BONDS

The Dutch Ministry of Finance has in 2016 held an online consultation on a bill concerning, among others, the introduction of supervision on the management of investment bonds. This supervision must be equal to the supervision on managers of investment institutions, according to the Minister. The bill contains a license obligation for a manager of investment bonds. It also contains provisions that in certain circumstances require managers to appoint a depositary. Investment bonds are bonds for which the return is used for collective investments, the return of which in turn is used to repay the bond and pay the interest on the bond.

The bill is not only relevant to providers/managers of investment bonds but also to providers/managers of investment objects as the existing regulations for this latter category will become more stringent. The legislative process is slow and the bill is currently being prepared to be sent to the Council of State. We expect that 2018 will finally provide clarity on the future supervisory framework for providers/managers of investment bonds and investment objects. The question is when this new supervisory framework will take effect. We would be surprised if this will be in 2018 but it will not take long at this point.

The new law is relevant for everyone who wants to issue investment bonds or offer investment objects after the act takes effect. The new rules will have a considerable impact on business operations. When bonds are issued in 2018, it is important to determine the status of the bill and whether the new regulations have an effect on the company.

REVISING PROSPECTUS RULES

The new Prospectus Regulation has taken effect on 20 July 2017. This regulation applies directly in all Members States as of 21 July 2019, with the exception of certain exemptions that come into effect earlier. The goal of the Prospectus Regulation is to make drawing up a prospectus simpler, faster and cheaper. The main changes are:

- less burdensome prospectus rules for SMEs;
- the exemption for small issuances is expanded;
- secondary issuances for listed companies are simplified;
- the summary of the prospectus should be limited to six A4 pages; and
- an accelerated approval process for issuers who make frequent issuances.

The Dutch legislator has taken action ahead of the coming into force of the Prospectus Regulation with respect to the exemption for small issuances. The exemption for small issuances has been extended from EUR 2.5 million to EUR 5 million since 1 October 2017. However, there are additional rules for the new exemption limit. If a provider of securities wants to make use of the EUR 5 million exemption, he must inform the AFM in advance. This report must be provided with information in a fixed format, concerning the maximum amount of the offer in Euro, the offer period, the category of the offered securities, and the use of the funds deposited by the investors (including the investment strategy and the manner in which return is generated).

“The exemption for small issuances has been extended from EUR 2.5 million to EUR 5 million since 1 October 2017.”

We hope that increasing the exemption threshold to EUR 5 million will make the capital market more accessible to the SMEs in the Netherlands in 2018. It is important that the reporting and information obligation is not overlooked.

PRIIPS REGULATION: OBLIGATION TO DRAW UP A KID FROM 1 JANUARY 2018

The PRIIPs Regulation took effect on 1 January 2018. PRIIPs contains rules for the development and offering in the retail market of Packaged Retail and Insurance-based Investment Products (PRIIPs). Products

issued by Special Purpose Vehicles are examples of PRIIPs, as well as certain structured bonds. This is why the PRIIPs Regulation also applies to certain issuers. This means that these issuers must draw up a Key Information Document (KID) for retail investors (being non-professional clients as referred to in MiFID II), which must then be provided to the client by the seller (often an intermediary). The requirement to draw up a KID does not apply if only professional clients within the meaning of MiFID II are served. We point out that a high net worth individual is in principle not considered as a professional client if no opt-up procedure can be and has been completed. The PRIIPs Regulation contains general requirements for the form and content of the KID and the associated Commission Delegated Regulation (no. 2017/653) contains specific requirements. The AFM and the ESAs have published various Q&As on PRIIPs and the KID.

PRIIPs took effect at a national level by the entry into force of the following regulations:

- Implementation Act PRIIPs (came into effect on 1 January 2018);
- Implementation Decree PRIIPs (came into effect on 1 January 2018);
- a modified Further Regulations on the Supervision of the Conduct of Financial Undertakings (*Nadere regeling gedragstoezicht financiële ondernemingen Wft*, Nrgfo) (came into effect on 1 January 2018).

We recommend that issuers always check whether the issued products qualify as PRIIPs to determine whether a KID must be drawn up.

EURONEXT RULES ON RESERVE LISTINGS

As of 1 January 2018, each company which lists its shares through a so-called 'reserve listing' must meet the new rules drawn up by Euronext and the AFM. A reverse listing means that a company acquires an empty company with listed shares. This enables the acquiring company to relatively easily exchange its unlisted shares for listed shares. Companies that use a reverse listing must meet at least the following new rules:

- exist at least three years;
- publish an extensive information document similar to a prospectus;
- at least 25% of the shares must be made available to the public; and
- pay the listing fees for reverse listings (EUR 40,000).

The information document will not be approved by the AFM. The board of Euronext has the discretionary power to decide whether a company may acquire the listed empty company.

"A reverse listing will be less easy and quick in 2018 than in the past."

A reverse listing will be less easy and quick in 2018 than in the past. We recommend that companies that consider a reverse listing to timely start with the preparations.

ESMA PRIORITIES FINANCIAL REPORTING ON 2017

ESMA annually publishes a statement containing the topics it and the national supervisors will explicitly supervise when assessing the financial statements of issuers. These are the main priorities for the financial statements for the year 2017:

- Publication of the expected impact of the implementation of the main new accounting standards during the period of their first application. ESMA emphasises the need for a high-quality implementation of IFRS 9 and IFRS 15.
- ESMA draws specific attention to the treatment of certain aspects of financial reporting such as intangible assets, mandatory tender offers, and the provision of information on the fair value.
- ESMA emphasises the importance of valuation and publication of non-performing loans by credit institutions, the continuing relevance of the fair presentation of financial performance, and the publication of the impact of Brexit.

We recommend that issuers pay additional attention to the above supervision priorities when drawing up the financial reports for 2017.

ADVERTISING INVESTMENT BONDS: NO COMPARISON WITH SAVING

The AFM has issued a press release on 14 July 2017 in which it stated that it notices a lot of advertising where investing is presented as an alternative to saving. The AFM believes that it is important that providers of investment products clearly identify the risks between saving and investing. The AFM considers investment much riskier because the value of investments can fluctuate and the investor can lose his deposit. The information must be presented in an understandable, accessible and balanced manner. The AFM will focus on this in 2018.

"The AFM believes that it is important that providers of investment products clearly identify the risks between saving and investing."

We recommend that issuers check their advertisements to determine whether the risks of the investment are made sufficiently clear and no indiscriminate comparison with saving is made.

INTRODUCTION OF NEW REPORTING RULES (IFRS 9, 15 AND 16)

The results of two self-assessments of the AFM show that the AFM believes that investors are not sufficiently informed by listed companies on the possible impact of the new reporting rules on financial instruments (IFRS 9) and turnover justification (IFRS 15) that have entered into force on 1 January 2018. IFRS 16 (Leases) will apply from 1 January 2019 (see press release AFM).

In addition, starting in the financial year 2017, Public Interest Entities with more than 500 employees must report on non-financial information in their annual report. Examples are risks and performance in the field of environmental, social and staff policy, compliance with human rights, and the fight against corruption and bribery.

The AFM expects a quantitative explanation of the impact of the introduction of IFRS 9 and 15 in the annual accounts 2017. This also applies to IFRS 16 if it is applied early. In 2018, the AFM will check compliance with the new rules on non-financial information. The AFM recommends institutions to involve the EU Guidelines and the recommendations of the Task Force on Climate-Related Financial Disclosures. In 2019 and 2020, the supervision of the AFM will focus on the actual implementation of the standards.

FINANCIAL MARKETS LEGISLATION IMPORTANT INFORMATION FOR INSURERS IN 2018

TOPICS

- DNB Supervision priorities 2018
- PRIIPs Regulation
- Insurance Distribution Directive
- Act on Recovery and Resolution Insurance Companies
- General feedback DNB about SIRA
- Solvency without VA and/or UFR
- New advertising rules
- Consultation on amendment of EIOPA capital requirements Solvency II
- UFR decrease
- EIOPA Annual Work Programme 2018
- Greater role EIOPA in approval of internal models
- Pan-European Personal Pension Product (PEPP)
- IASB (IFRS 17)
- Impact of Fourth Anti-Money Laundering Directive

DNB SUPERVISION PRIORITIES 2018

DNB published its supervision priorities for the next year in November 2017. The general supervision priorities are discussed in the General section of this Outlook. DNB will with respect to insurers focus on the following subjects in 2018:

- **Opportunities and risks of InsurTech:** DNB started to analyse the impact of technological innovation on the insurance sector (InsurTech) in 2017. In the next year, DNB will continue to study risk-mitigating actions that must ensure that the sector will responsibly deal with the new developments in the future. DNB will ask insurers to set up their strategy, operations and organisation to ensure that they can properly deal with InsurTech developments. The market will be informed about this in 2018.

- **Insight into determining the Net Capital Generation:** DNB has found that insurers apply different definitions of the term 'capital generation' (NCG). Insurers use the NCG to indicate how their capital position develops. This enables NCG to play an important role in the capital and dividend policy and in mergers and acquisitions. In 2018 DNB intends to submit a questionnaire to various parties concerning the NCG to the extent it is not yet in the possession of this information. It wants to use this questionnaire to study whether the way insurers deal with NCG in their policies can lead to prudential risks. DNB does not intend to issue regulations.

"DNB wants to gain more insight into the performance of the compliance function and assess whether the concerns found in the study of 2015 have been adequately addressed in 2018."

- **Insight into technical facilities and experience loss:** DNB will study whether the experience loss is estimated consistently and based on realistic assumptions, whether it is checked afterwards and what the level of uncertainty is at a number of life and funeral insurers. The conclusions of these studies will be shared with the studied parties and the market.

- **Compliance function:** DNB has studied the setup of the key functions, including the compliance function, back in 2015. The main concerns were the positioning of the compliance function in relation to the management board and the formalisation of the so-called compliance charter. DNB wants to gain more insight into the performance of the compliance function and assess whether the concerns found in the study of 2015 have been adequately addressed in 2018. DNB will carry out on-site audits at a number of insurers for this purpose.

PRIIPS REGULATION

The PRIIPs Regulation applies throughout the European Union since 1 January 2018. This Regulation contains rules for the manufacturing and selling of so-called *Packaged Retail and Insurance-based Investment Products* (PRIIPs). PRIIPs fall into two categories: (i) packaged retail investment products and (ii) insurance-based investment products. Examples of PRIIPs are participation rights in an investment institution or icbe, life insurance contracts with an investment component, structured products and structured deposits. The Regulation does not apply to products that invest directly in assets such as shares or bonds, pension products and life insurances which only pay in the event of death, injury, illness or disability. The manufacturer of a PRIIP must draw up a Key Information Document (KID) for retail investors which must be provided to the client by the seller (usually an intermediary).

PRIIPs took effect at a national level by the entry into force of the following regulations:

- Implementation Act PRIIPs (applicable as of January 1st);
- Implementation Decree PRIIPs (applicable as of January 1st);
- (a modified) Further Regulations on the Supervision of the Conduct of Financial Undertakings (*Nadere Regeling gedragstoezicht financiele ondernemingen*, Nrgfo) (applicable as of January 1st).

One of the more striking changes is the following. Before 1 January 2018, the obligation applied in the Netherlands to provide a financial information leaflet for complex products. Because a lot of the complex products fall within the scope of the PRIIPs Regulation as of 1 January 2018, the BGfo will no longer have the obligation as of 1 January 2018 to draw up and provide a financial information leaflet. The Nrgfo has also changed as a result.

At a European Level, apart from the PRIIPs Regulation itself, the Delegated Regulation (which prescribes both the form and content of the KID) on key information documents for PRIIPs is important, as well as the Q&A of EBA, EIOPA and ESMA on PRIIPs of 20 November 2017. We also refer to the guidelines of the Commission concerning the KID.

Insurers that offer PRIIPs must as of 1 January 2018 meet the requirements of the PRIIPs Regulation. Insurers that manufacture PRIIPs must draw up a KID as of 1 January 2018.

INSURANCE DISTRIBUTION DIRECTIVE

On 1 October 2018, the Dutch legislation implementing the Insurance Distribution Directive (IDD) into Dutch law will – likely – enter into force. It was the intention that the IDD would already enter into force on 23 February 2018, but on 20 December 2017, the European Commission has proposed to push back the application date of IDD by seven months to 1 October 2018. The European Parliament and the Council will need to agree on the new application date in an accelerated legislative procedure. The date 1 October 2018 is now generally being considered as new entry into force date. The implementation date – the date on which the IDD must be transposed into national law – remains to be 23 February 2018 (but will only enter into force on 1 October 2018).

At a national level, the entry into force of the IDD will take place when the following regulations take effect:

- Dutch IDD Implementation Act
- Dutch IDD Implementation Decree
- Dutch IDD Implementation Regulation, which draft regulation is under consultation till February 2018.

The IDD package, including the IDD itself, consists at a European level of:

- Two Delegated Regulations that contain rules on product development, product governance, insurance-based investment products, conflicts of interest, and the wishes and needs test.
- The Implementing Regulation 2017/1469 to adopt a standardised presentation form of the information document for insurance products.
- EIOPA Guidelines for the execution only sale of complex insurance-based investment products.

The IDD applies to insurers, intermediaries and insurance advisers. A number of important rules are:

- More licenses
  Under the IDD, a number of parties that were previously exempt from the license requirement will need to apply for an intermediary license (e.g. parties that mediate in insurances as supplement to a good or service, that exceed the limit set out in Article 1 of the IDD, or travel agencies (unless they stay under the limit set out in Article 1 of the IDD));
- Wishes and needs
  Prior to the conclusion of an insurance agreement, a financial services provider must determine the wishes and needs of the client and only provide him with information on insurances that matches these wishes and needs. This obligation applies to both advice and execution only.
- Product development
  Insurers or intermediators that offer or compile insurance products and make them available on the market must determine the target audience of each insurance product. They have to test and evaluate the insurance products and determine the distribution strategy. Parties that do not manufacture insurances but only distribute them must set up and evaluate a distribution process.
- IPID
  Financial service providers must provide clients prior to the conclusion of an agreement concerning a non-life insurance product with an information document in respect of the non-life insurance in question, which must be drawn up by financial service providers that offer or compile non-life insurances and make

them generally available on the market. The information document contains standardised information about the non-life insurance. EIOPA published a template that may (but does not necessarily need to) be used for the IPID on 11 December 2017.

- Insurance-based investment products
  Advisers with respect to insurance-based investment products must determine the suitability of the client and provide a suitability statement in which the advice is specified to the client prior to the conclusion of the insurance agreement. Intermediaries in insurance-based investment products must use the knowledge and experience check to determine whether the product is suitable for the client.
- Cross-selling
  If an insurance supplements the delivery of a good or the provision of a service, the insurer or intermediary most offer the client the opportunity to also purchase the good or service without the insurance. A service may be sold which supplements an insurance without selling the components separately, provided that the insurer or intermediary communicates this clearly with the client and the service is an 'ancillary service'.
- Active remuneration transparency
  Financial service providers only need to inform their non-life clients on the level of the commission if the client pays it directly to them. The AFM has in its consultation reaction to the Dutch IDD Implementation Decree argued that service providers must always actively inform their clients about the commission amount. Even if it is not paid directly by the client but through the insurance premium.

ACT ON RECOVERY AND RESOLUTION INSURANCE COMPANIES

The Bill on Recovery and Resolution Insurance Companies has been submitted to the House of Representatives on 29 November 2017, accompanied with an explanatory memorandum and an opinion of the Council of State. The bill reinforces the legal framework for recovery and resolution of insurers. The bill is based on the existing tools for the recovery and resolution of banks. The proposal includes preparatory crisis plans, settlement plans, bail-in, transfer instruments, and advances on distributions from the estate of an insurer.

The bill distinguishes between the preparatory and resolution phases. The preparatory phase is the phase in which insurers and DNB have obligations related to recovery and resolution planning. The resolution phase is the phase in which DNB is assigned powers to effectuate the recovery and resolution of insurers.

"Insurers will need to draw up a 'preparatory crisis plan' to be able to take immediate measures if the insurer experiences financial difficulties."

The bill contains different rules for both phases. The rules that apply to the preparatory phase have the most impact on insurers in the short term because these rules must be met when this bill takes effect. Insurers will need to draw up a 'preparatory crisis plan' to be able to take immediate measures if the insurer experiences financial difficulties. In the preparatory crisis plan, insurers will need to make clear to what extent there are recovery options if the solvency requirements (SCR/MCR) are infringed on or are likely to be infringed on. The obligation to draw up a preparatory crisis plan does not apply to Solvency II-Basic insurers.

These rules on recovery and resolution of insurers are expected to take effect mid-2018.

GENERAL FEEDBACK DNB ABOUT SIRA

DNB has been studying the use and operation of the systematic integrity risk analysis (SIRA) in practice for some time. Previous studies by DNB have demonstrated that the SIRA has in practice not been sufficiently implemented. Financial institutions make use of the good practices of DNB but insufficiently use the SIRA to actually consider and manage integrity risks. When DNB completes the study into the

effect of the SIRA on insurers (to the extent they experience significant organisational or strategic changes), the involved institutions will be informed. DNB will give general feedback on the findings to the entire sector in the first quarter of 2018.

SOLVENCY WITHOUT VA AND/OR UFR

Solvency II contains a number of elements aimed at reducing (market) volatility of the Solvency II ratio of insurers. This includes the UFR extrapolation and the so-called Long-Term Guarantee (LTG) measures, including the Volatility Adjustment (VA). By using these instruments, the impact of the current low interest rate is not fully visible in the regulatory solvency of (life) insurers. DNB has been worrying about this for some time and fears that insurers fail to pay sufficient attention to a healthy solvency position without these instruments.

- In its 'Principles for the policy on capital management' of December 2016, DNB remarked that insurers with long-term liabilities must explicitly consider the economic reality in their capital policy, including the impact on the solvency position of the VA and UFR and an extension to these.
- When making projections (both for the capital policy and the ORSA), insurers must also consider the so-called UFR and VA drag. The UFR and VA drag is the annual decrease of the Solvency II equity as a result of the difference between the risk-free market interests and the Solvency II interest term structure.
- Finally, insurers must adopt an own, soundly supported valuation of their technical facilities. This must be based on the alternative interest term structure used for the quarterly report with a correction for the impact of the VA and the UFR.

We expect that DNB in 2018 will focus on the solvency of insurers without VA or UFR. DNB has indicated that it will assess the above actions of insurers. This will be risk-based and at an institutional level.

NEW ADVERTISING RULES

As a result of the entry into force of the PRIIPs Regulation per 1 January 2018, the rules concerning voluntary pre-contractual information (including advertising) have been amended in the new Further Regulations on the Supervision of the Conduct of Financial Undertakings. The main amendments are:

- Definition of complex investment products: These include a life insurance with an investment component.
- Scope: The new rules also apply to third-pillar pension products. With the introduction of the PRIIPs Regulation and changes to the Market Conduct Supervision Financial Institutions Decree (*Besluit gedragstoezicht financiële ondernemingen*, 'Bgfo') concerning the abolition of the financial information leaflet and the introduction of the essential information document for third-pillar pension products, there are complex products for which no financial information leaflet needs to be drawn up and for which no essential information document will be required as of 1 January 2018. This group includes composite products without investment (accrual) components such as an interest-only mortgage linked to a risk-based life insurance, an own property saving account, and a savings capital insurance.
- New risk indicator: With the abolition of the financial information leaflet for complex products and third-pillar pension products, the requirement to include the associated risk indicator in advertising will also expire. New risk indicators will be introduced for complex products that also fall within the scope of the PRIIPs Regulation and third-pillar pension products. The new images can be downloaded from www.afm.nl/reclameteksten.
- Information about returns: The entry into force of the PRIIPs Regulation and the abolition of the financial information leaflet also has consequences for the manner in which providers of complex products and third-pillar pension products may communicate about the returns of their products in pre-contractual information such as advertisements and quotations. Amendments to the Further Regulations on the Supervision of the Conduct of Financial Undertakings (*Nadere regeling gedragstoezicht financiële onderneming*, 'NRgfo') match the system of the PRIIPs

Regulation and the calculations on future returns, main risks and costs as laid down in the Delegated Regulation essential information documents. Only future returns based on the performance scenarios of this Regulation may be presented. Deviations from the calculation method prescribed herein are allowed for a specific group of complex investment products in favour of individualised information.

CONSULTATION ON AMENDMENT OF EIOPA CAPITAL REQUIREMENTS SOLVENCY II

EIOPA has been working on the Solvency II SCR review since mid-2016; an evaluation of the standard formula SCR under Solvency II. EIOPA recently published two documents in the context of this review:

- It sent a first set of opinions to the European Commission on 30 October 2017 for the evaluation of the Solvency II capital requirements. Important aspects are the recognition of the Nationale Hypotheek Garantie, simplified calculations of the capital requirements, the use of ratings, and guarantees of regional governments and local authorities.

- EIOPA published a consultation document on 6 November with a second set of opinions on other aspects of the Solvency II capital requirements. This set includes opinions on twenty topics, including LAC DT, the volume benchmark for the premium risk, interest risk, and risk margin. Stakeholders could respond to this consultation document until 5 January 2018.

Based on the submitted responses, EIOPA will in the first quarter of 2018 draw up a final opinion on these aspects of the capital requirements and send it to the European Commission. The European Commission will make proposals for amendments to Solvency II regulations in the same year.

UFR DECREASE

In April 2017, EIOPA published a proposal for a new calculation method for the interest with which insurers must determine the current value of their future liabilities; called the Ultimate Forward Rate (UFR). The UFR is the interest level of the long-term interest rate. EIOPA proposed to lower the UFR, which was at 4.2 percent, to 4.05 percent as of 1 January 2018. Based on this method, the UFR would actually be 3.65 percent, but the proposal also means that annual changes will be limited to 0.15 percentage point. Technical specifications and an analysis of the impact of this change can be found on the EIOPA website. EIOPA also published a convenient FAQ on the how and why of the reduction of the UFR.

The proposal received some criticism. In the Netherlands, the Dutch Association of Insurers considered it unwise to tinker with the UFR two years after the introduction of Solvency II. A complete evaluation of the package with so-called long-term guarantee measures (LTG measures) of Solvency II is scheduled for 2020. Since the UFR determines the actuarial rate together with the LTG measures, it is logical to carry out a revision of the UFR in conjunction with a revision of the LTG measures, according to the Association in a press release of April 2017.

“EIOPA proposed to lower the UFR, which was at 4.2 percent, to 4.05 percent as of 1 January 2018. Based on this method, the UFR would actually be 3.65 percent.”

The European Commission has the ultimate say on the proposal of EIOPA. The proposal of EIOPA was to take effect as of 1 January 2018 and the market actually seems to assume that the UFR has changed on this date. However, we have not seen a formal decision-making document from the European Commission yet.

EIOPA ANNUAL WORK PROGRAMME 2018

EIOPA has published its 'Work Programme 2018' in September 2017. EIOPA wants to carry out its work in line with three strategic objectives. These objectives aim to (i) reinforce the protection of consumers, (ii) improve the internal European market for pensions and insurances, (iii) improve the financial stability for the pension and insurance sector. We will briefly list a number of important aspects below.

- EIOPA has focussed on the development of detailed rules in recent years, among other things. It wants to ensure that the supervision activities of the various national supervisors increasingly align in 2018. This is done by, among other things, a consistent implementation of the IDD and PRIIPs;
- With respect to Solvency II, EIOPA expects to develop a detailed RTS for the European Commission in 2018. It also considers the upcoming review of the standards and guidelines arising from the directive;
- EIOPA intends to carry out a stress test for insurers in 2018 to gain insight into the health and resilience of the sector.

GREATER ROLE EIOPA IN APPROVAL OF INTERNAL MODELS

The European Commission published a proposal for a guideline on changes to Solvency II in September 2017. The proposed changes consider the role of EIOPA when approving internal models of insurers. Under Solvency II, insurers can calculate the solvency capital requirement using the standard formula provided by Solvency II (which currently is being revised, see above) or using a self-developed internal model. The latter is only allowed with the approval of the supervisor.

Differences in the supervision on the approval of internal models lead to contradictions and result in an uneven playing field for market participants, according to EIOPA. The proposal, therefore, promotes the convergence in the supervision by reinforcing the role of EIOPA in relation to internal models using provisions on cooperation and the exchange of information, together with powers for EIOPA to issue opinions and at its own initiative contribute to the settling of disputes between supervisory authorities, including by means of binding mediation.

PAN-EUROPEAN PERSONAL PENSION PRODUCT (PEPP)

On 29 June 2017, the European Commission has submitted a proposal for a regulation for a Pan-European framework for 3rd pillar pension products, the Pan-European Personal Pension Product (PEPP). The PEPP proposal is part of the capital market union.

A PEPP is a new type of voluntary personal pension and is intended to offer savers more options for saving money for later and offer them more competitive products. The PEPP Regulation contains measures to achieve a pension product with a number of product features standardised at a European level which will be implemented and can be transferred across borders. The regulation provides an additional European framework for individual, voluntary pension products which is complementary to existing national existing national laws and regulations, which means that it is a legal regime which exists besides the existing national regimes and can be used voluntarily. The goal is to facilitate switching between providers of PEPPs and enable consumers to transfer the pension accrued in this new product to another Member State.

The proposal offers licensed insurers, banks, IORPs (pension funds, PPIs and pension institutions from other Member States), certain investment firms and asset managers the opportunity to offer PEPP. It is striking that EIOPA is granted a lot of powers in the proposal. Financial institutions can request a 'product passport' from EIOPA which will grant its approval in advance based on a product proposal. EIOPA will assess whether the product meets the standardised product conditions of the regulation. EIOPA will also keep a register of approved PEPP products and can withdraw granted permissions. National supervisors that are already charged with the supervision of licensed entities must continuously supervise compliance with the obligations

under the regulations. When EIOPA has granted approval for a PEPP, providers may offer this product across borders.

Our government has rendered a negative opinion on the proposal and has indicated that the alleged necessity of a separate framework for PEPP is insufficiently substantiated. The government is critical given the limited added value for pension products in the Netherlands and the potential impact of the proposals on the second pillar pension system.

We expect to have more clarity on the feasibility of the proposal in 2018.

IASB (IFRS 17)

The International Accounting Standards Board (IASB), an international body charged with drawing up standards for the preparation of annual reports and annual accounts, has published the International Financial Reporting Standard 17 (IFRS 17) on 18 March 2017. The standard describes how insurance companies must appraise their insurance contracts. One of the main changes introduced by the IFRS 17 is that insurance obligations must be calculated based on the market value, not the historical value.

Insurance companies have until 1 January 2021 to implement the new standard, provided that the EU adopts the standard.

IMPACT OF FOURTH ANTI-MONEY LAUNDERING DIRECTIVE

The implementation of the Fourth Anti-Money Laundering Directive will probably take effect in the Netherlands in the spring of 2018. A bill to this effect has been submitted to the House of Representatives on 12 October 2017. For an overview of the consequences, we refer to the Wwft section of this Outlook.

HOW TO CONTACT US?

(click on the profile photos)

Bart Bierman

Andries Doets

Rosemarijn Labeur

Casper Riekerk

Pien Kerckhaert

Tim de Wit

Astrid Schouten

Annabel Loeters

Nienke van Opbergen

DISCLAIMER

In this Outlook we signal certain developments for 2018. This Outlook does not contain a complete overview of all relevant supervisory regulations for the financial companies mentioned herein. This Outlook is therefore not intended as legal advice. We are not liable for any loss ensuing from the use of this Outlook.

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FINANCIAL MARKETS LEGISLATION CHANGES TO WWFT

TOPICS

- Legislative process amendment Wwft (AML4)
- UBO register
- Fifth Anti-Money Laundering Directive (AML5)?

LEGISLATIVE PROCESS AMENDMENT WWFT (AML4)

On 13 October 2017, a bill was submitted to the House of Representatives on the implementation of the Fourth Anti-Money Laundering Directive. Our expectation is that the Implementation Act Fourth Anti-Money Laundering Directive (a bill is available) will take effect in the spring of 2018. The implementation period of the Fourth Anti-Money Laundering Directive ended on 26 June 2017. Therefore, on 19 July 2017, The European Commission sent a letter of formal notice to The Netherlands in light of the late implementation. Where relevant, market parties will prior to the implementation of the act be able to appeal to the direct effect of the provisions of the directive.

The following aspects of the Wwft will be amended as a consequence of the implementation of the bill (not an exhaustive list):

- *Written risk profile (institution level)*

Institutions must have a written risk profile (an individual risk assessment). This policy document contains an inventory of the risks that the institution is subject to in the field of money laundering and the financing of terrorism. When assessing the risks, institutions must consider the types of clients, the jurisdictions and the geographic regions where the institutions are active, and the products or services they offer. The document contains a description of the measures taken and the manner in which a systematic review of their effectiveness takes place. The methodology of the risk assessment is similar to the Systematic Integrity Risk Analysis (SIRA) that is mandatory for financial institutions under the Wft. The European Commission made a supranational risk assessment of the risk of money laundering and the financing of terrorism within the European Union. On a national level a similar risk assessment must be carried out. These risk assessments are used by the supervisors to set up their policy based on the Wwft and can be used by institutions to make their own risk assessments.

- *Motivating risk classification (client level)*

The bill adds a new paragraph to Article 3 Wwft (client due diligence). The client due diligence must 'demonstrable' take into account the relevant risks. This means that an institution cannot simply include a risk classification (e.g. low, medium, high), but for each client individually it must be determined on what specific criteria a specific risk classification was based. The annexes to the Fourth Anti-Money Laundering Directive contain lists with risk variables (Annex I) and examples of risk reducing (Annex II) and risk increasing (Annex III) factors.

- *In-depth client due diligence*

The scope of the client due diligence must be risk-based, just like under the current Wwft. The institution must, at least, consider the risk variables and the risk factors set out in the annexes to the Directive (see above). The bill contains a new obligation that additional measures must be taken if there are complex or large transactions or unusual transactions patterns with 'no clear economic or legal purpose'. This provision seems to be related to the current social debate and the changes in public opinion by publications such as the Panama and Paradise papers.

"The bill contains a new obligation that additional measures must be taken if there are complex or large transactions or unusual transactions patterns with 'no clear economic or legal purpose'."

- *Appointing a Wwft responsible manager + compliance and audit function*

Under the new rules, an institution must appoint a manager who will ultimately be responsible for compliance with the Wwft,. Where appropriate given the nature and size of the company, an institution must also implement an independent compliance and audit function in its organisation.

- *Amended definitions*

A number of definitions in the Wwft will be amended. When interpreting the term 'ultimate beneficial owner' (UBO), it is important that in the context of a one-off transaction, an UBO can be 'the natural person(s) for whom/whose account a transaction or activity is carried out.' Senior

management can also be considered an UBO if no (other) UBO can be appointed or if there are any doubts about the appointed UBO(s). These new definitions will be worked out in further detail in further regulations to the Wwft, of which the text is not yet publicly available. Which persons must be considered an UBO for foundations, associations and partnerships, is also going to be defined in further regulations.

The interpretation of the term 'politically exposed person' (PEP) will also be expanded. The distinction between 'domestic' and 'foreign' PEPs will be removed in the new definition: in all transactions or professional relationships with clients who qualify as a PEP or where the UBO of a client qualifies as a PEP, or in cases where the beneficiary of a life insurance or where the UBO of such beneficiary is a PEP, more stringent client due diligence measures must be taken (regardless of residence and nationality of the PEP).

- *Whistle-blower scheme*

Institutions that fall within the scope of the Wwft must have a whistle-blower scheme in relation to the Wwft. Employees must be able to internally and anonymously report potential violations. Whistle-blowers must also have employment protection.

"Employees must be able to internally and anonymously report potential violations."

Further guidance implementation AML4

Further relevant guidance concerning the (implementation of) AML4 has been published in 2017. Please find below an overview:

- ESA, Final Report on draft Joint Regulatory Technical Standards on the measures credit institutions and financial institutions shall take to mitigate the risk of money laundering and terrorist financing where a third country's law does not permit the application of group-wide policies and procedures (6/12/2017);
- ESA, Final Report on joint draft regulatory technical standards on the criteria for determining the circumstances in which the appointment of a central contact point pursuant to Article 45(9) of Directive (EU) 2015/849 is appropriate and the functions of the central contact point (26/6/2017);
- ESA, Joint Guidelines under Articles 17 and 18(4) of Directive (EU) 2015/849 on simplified and enhanced customer due diligence and the factors credit and financial institutions should consider when assessing the money laundering and terrorist financing risk associated with individual business relationships and occasional transactions (26/6/2017);
- New Commission proposal concerning the list of high-risk third countries (27/10/2017). It is not certain whether the EP will accept the proposal this time (as it has already been rejected three times);
- ESA, Common guidelines concerning the characteristics of a risk-based approach to supervision on money laundering and terrorist financing and the measures that must be taken when risk-based supervision takes place (7/4/2017).

UBO REGISTER

Based on the Fourth Anti-Money Laundering Directive, Member States are required to have a UBO register which is accessible to authorities, national FIUs, reporting entities (within the meaning of the Wwft) and persons or organisation that can demonstrate a legitimate interest. The UBO register in the Netherlands is created by registering the ultimate beneficial owner(s) of a company in the Commercial Register of the Chamber of Commerce. The UBO register will be implemented through a separate legislative process (Implementation Act registration ultimate beneficial owners) and is not part of the bill to amend the Wwft. On 31 March 2017, a draft of the bill was published for consultation. The goal of the UBO register is to prevent companies and legal entities from being used to conceal profits of crime and to avoid perpetrators to use legal vehicles to stay out of sight of the authorities. The Ministry of Finance foresees that this bill will take effect in the summer of 2018.

FIFTH ANTI-MONEY LAUNDERING DIRECTIVE (AMLD5)?

The Fourth Anti-Money Laundering Directive has not even been implemented in the Netherlands, yet negotiations on the Fifth Anti-Money Laundering Directive are already taking place at a European level. The European Commission published a proposal on 5 July 2016. It contains (based on the draft documents) rules on (i) more stringent measures for high-risk countries, (ii) bringing the cryptocurrencies trading platforms within the scope of the Wwft, (iii) reinforced measures for prepaid products by lowering the threshold for the application of a client due diligence from EUR 250 to EUR 150, (iv) expanding the powers of FIU and the cooperation between FIUs and, (v) granting FIUs access to information on holders of bank and checking accounts (using a central register or electronic data system).

The proposal is currently being discussed in a trialogue between the European Parliament, the European Commission and the Council of Ministers. It is not yet clear when the (revised) directive will take effect. Considering the current (political) importance of integrity, market parties should be prepared that the European Commission will pursue a swift implementation period.