Global Financial Services Regulatory Guide - Netherlands

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Last updated: March 2024

# 1. Who regulates banking and financial services in your jurisdiction?

## Who regulates banking and financial services in your jurisdiction?

Like certain other EU countries, financial supervision in the Netherlands is based on the so-called twin peaks model. The first peak is formed by prudential supervision consisting of supervising the liquidity and solidity of financial companies. This supervision is exercised by the Dutch Central Bank (De Nederlandsche Bankor DNB). DNB carries out its supervision of banks as an ancillary supervisor to the European Central Bank (ECB). As supervisors, DNBs and the ECBs aim is to ensure the solidity of the Dutch financial system as a whole by, for example, regulating access to financial markets and supervising compliance with capital requirements.

The second peak is formed by market conduct supervision, which supervision is exercised by the Netherlands Authority for the  Financial Markets (Autoriteit Financiële Markten or AFM). Market conduct supervision is aimed at regulating the way in which market participants conduct their operations. The AFM aims to promote orderly and transparent market processes, proper treatment of consumers and fair relationships between financial undertakings.

These twin peaks also correlate with what is generally recognized as the functions of financial supervision: (i) systemic supervision; (ii) commercial supervision; and (iii) conduct supervision. As a result, responsibilities are not centralized but allocated between the different supervisors:

DNB regulates banks, insurance companies and companies active in the payment and clearing industry. It does so by regulating market access through the provision of licenses — except for banks requiring a license from the ECB — and various other systemic and prudential tasks, such as supervising compliance with capital requirements and granting approval to certain take-overs.

The AFM supervises market conduct for all financial undertakings and provides licenses for companies engaging in various activities, such as offering financial services, providing investment services and managing regulated investment funds. The AFM is also responsible for supervising and enforcing the rules and regulations surrounding transparency, market abuse and prospectus supervision.

The ECB, in cooperation with DNB, is the Eurozone bank supervisor under the Single Supervisory Mechanism. The ECB provides licenses for Dutch banks and is directly responsible for the prudential and systemic supervision of large Dutch banks.

The European Supervisory Authorities (ESAs) — i.e., the European Banking Authority, the European Securities and Markets Authority, and the European Insurance and Occupational Pension Schemes Authority — have limited supervisory powers in the Netherlands. However, they play an important role in drafting and issuing technical standards and preparing guidance relating to various European directives and regulations. The ESAs aim to accomplish efficient and harmonized financial supervision across the EU.

# 2. What are the main sources of regulatory laws in your jurisdiction?

## What are the main sources of regulatory laws in your jurisdiction?

Much of the regulatory laws in the Netherlands are derived from European directives and regulations. European regulations are directly applicable in the Netherlands and do not require national implementation. European directives generally do require national implementation. As directives sometimes only set certain minimum or maximum standards — and often offer optional provisions to be implemented at a member state’s own discretion — the laws implementing a particular directive can vary widely across EU member states.

The introduction of the Dutch functional model of supervision in 2002 (described in question 1 above) brought with it an extensive reorganization of Dutch financial regulations. This eventually led to the adoption of the Dutch Financial Supervision Act (Wet op het financieel toezicht or DFSA) on 1 January 2007. The DFSA (including lower regulations and decrees) is the primary source of financial regulations in the Netherlands.

Aside from the DFSA, various other laws contain financial regulatory provisions. For example, pension funds are also subject to the requirements set forth in the Dutch Pension Act (Pensioenwet) and the DFSA. Another example is trust offices, which must comply with the Dutch Act on the Supervision of Trust Offices (Wet toezicht trustkantoren).

In addition, the provisions of the Fourth ((EU) 2015/849) and Fifth ((EU) 2018/843) Anti-Money Laundering Directives have been implemented in the Dutch Act on the prevention of money laundering and terrorism financing (Wet ter voorkoming van witwassen en financieren terrorisme or Wwft). The Wwft imposes certain know-your-customer requirements relevant to most financial undertakings operating in the Netherlands.

# 3. What types of activities require a license in your jurisdiction?

## What types of activities require a license in your jurisdiction?

A broad range of financial activities are subject to supervision in the Netherlands. Many undertakings operating in the financial sector require either a license or are under an obligation to notify the relevant supervisor of their intent to carry out their business in the Netherlands. These undertakings include the following:

Banks – Banks (or more specifically, credit institutions) are entities whose business is to receive repayable funds, beyond a restricted circle, from parties other than professional market operators and which grant credits for their own account. There is a general prohibition on accepting repayable funds (such as deposits)in the Netherlands without being appropriately licensed or otherwise authorized.

Insurers –This includes life, non-life, funeral expenses and benefits in kind insurers as well as reinsurers.

Payment service providers – Regulated payment services include a broad range of activities, such as executing payment transactions, money remittance, issuing and/or acquiring payment instruments, account information services and payment initiation services.

Trust offices – A trust office is a legal entity, partnership or natural person that provides one or more trust services on a commercial basis, including acting as director, providing an address or correspondence, acting as trustee, etc.

Clearing institutions – Clearing institutions settle transactions relating to financial instruments through a central counterparty, thereby guaranteeing the commitments of the traders  on whose behalf they act.

Electronic money institutions – Electronic money institutions issue “electronic money” in exchange for legal currency. Electronic money is a prepaid electronic payment product, which can be card- or account-based and is represented as a balance in an electronic wallet or on a physical card.

Pension funds – “Ordinary” pension funds are required to notify DNB of their establishment. "Premium" pension funds — a new form of pension administrator — are subject to licensing requirements and may operate on a cross-border basis.

Money transactions offices – This covers institutions that pursue the business of performing exchange transactions consisting of currency exchange transactions or the payment of notes and coins upon presentation of credit card or a check.

Collective investment schemes and their managers – Collective investment schemes cover undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs). Regulations relating to AIFs and UCITS are mainly addressed to the fund’s manager, rather than the fund itself.

Settlement agents – Settlement agents provide services aimed at relaying requests that relate to the approval of payment orders, approving such orders on behalf of payment service providers, or certain particular netting services.

Investment firms – This includes undertakings offering investment advice, asset management services or execution-only services in relation to financial instrument trading. In addition, certain firms engaging in own account trading in financial instruments may also qualify as investment firms.

Financial service providers – "Financial service providers" refers to a broad range of undertakings and includes undertakings that — for example — offer certain financial products, provide advisory services, or act as an intermediary.

Please note that in the Wwft, an additional registration requirement has been introduced for providers of crypto wallets and crypto exchange services. While this is not a license obligation, registration does require quite a detailed application form and requirements, including screening of (co)policymakers by DNB.

# 4. How do the licensing requirements apply to cross-border business in your jurisdiction?

## How do the licensing requirements apply to cross-border business in your jurisdiction?

Dutch licensing requirements generally apply to firms that offer services or perform acts “in the Netherlands”. Offering services “in” the Netherlands also includes offering online services in a different EU member state through a Dutch company or through a Dutch branch of a company with its registered seat in a non-EU member state.

When services are provided to cross-border Dutch clients, it can be difficult to assess whether these services are being provided “in the Netherlands.”

As a rule of thumb, where Dutch clients are actively solicited by the foreign institution, that foreign institution will be subject to Dutch financial regulations. Specific territorial scope rules have been formulated for certain financial institutions, such as non-life insurance companies.

Dutch law recognizes the concept of reverse solicitation for certain financial institutions: if an undertaking enters into a business relationship with a Dutch client as a result of reverse solicitation, this generally will not trigger any Dutch licensing or authorization requirements. "Reverse solicitation" refers to the situation where a client decides to approach a foreign undertaking at its exclusive initiative, without being approached by that particular undertaking.

The reverse solicitation exemption only has a statutory basis (and requirements) for investment services (based on the MiFID II Directive (EU) 2014/65). For other financial services, Dutch regulators have issued very little guidance with regard to the exact scope of the reverse solicitation exemption. In general, it is clear though, that the scope of the reverse solicitation exemption must be interpreted quite narrowly. Based on case law and the limited guidance available, a number of factors will help determine whether a foreign financial undertaking has actively marketed its services to Dutch clients. These include the following:

Not using disclaimers and/or selling restrictions (if applicable), or poorly enforcing them

Making use of media for promotional purposes that include the Netherlands in their coverage area

Using Dutch language on a website or in promotional and/or informational materials

Having Dutch customers referred to by an intermediary

Providing information on Dutch tax regimes

Directly addressing potential customers based in the Netherlands (for example, via email)

Referencing or providing information on Dutch law

Please note that reverse solicitation has been explicitly recognized to be applicable to investment firms (based on MiFID II as set out above) and alternative investment fund managers. Reverse solicitation has not been recognized to apply to every category of financial undertaking. There is, therefore, some ambiguity as to whether other types of financial undertakings can rely on reverse solicitation.

# 5. What are the requirements to obtain authorization in your jurisdiction?

## What are the requirements to obtain authorization in your jurisdiction?

The exact requirements to obtain authorization differ, depending on the type of undertaking. Most of the overlapping requirements can be grouped as follows:

Integrity and suitability requirements – Managing directors and supervisory board members of financial institutions must be trustworthy and suitable. Therefore, the relevant supervisor will screen potential candidates for integrity and suitability. Candidates will have to submit their personal details, diplomas, references and a curriculum vitae, as well as disclose possible antecedents ranging from criminal to tax law, and disclose certain qualified holdings.

Ethical business operations requirements – Financial undertakings are required to implement adequate policies to ensure ethical operational requirements, such as in relation to conflicts of interest, systemic risk, and the management of integrity risks.

Sound business operations – Business processes and risks have to be appropriately managed. Financial undertakings need to have a clear, balanced and adequate organizational structure, division of duties, powers and responsibilities. They need to keep adequate records, reporting lines and communications channels. Some types of financial undertakings are also required to have a certain number of natural persons as managing directors or supervisory board members.

Outsourcing requirements – The DFSA provides for a number of requirements relating to outsourcing.

Minimum own finds, solvency and liquidity provisions. – A number of financial undertakings, such as banks, insurers and investment firms, are subject to solvency and liquidity requirements.

Anti-money laundering – Most financial undertakings are required to implement policies and procedures to combat money laundering pertaining to, *inter alia*, client due diligence, reporting “unusual” transactions, and internal anti-money laundering compliance.

# 6. What is the process for becoming authorized in your jurisdiction?

## What is the process for becoming authorized in your jurisdiction?

The application's actual process depends on a number of factors, such as the type of license or authorization being applied for. However, most application processes take the form set out below.

The application process starts with the submission of the relevant forms and other essential documents. When these have been received in good order, the relevant supervisor will evaluate the firm’s compliance with the applicable requirements, as set out in question 5 above. In general, DNB and the AFM have 13 weeks to decide on an application for a license. Different consideration periods may apply for specific licenses (for example, the AFM has 26 weeks to decide on the application for a license as an alternative investment fund manager). However, the actual consideration period depends on many factors, and this consideration period may be extended. This is often due to an inadequate or incomplete application or due to the submitted documents giving rise to further information requests.

In addition to the relevant license application forms, the following forms and documents have to be submitted by most undertakings:

Forms, including supporting documents, regarding the suitability and integrity of managing directors and supervisory board members

A business plan that contains at least the names and titles of the employees, the way in which customers are solicited, potential cooperation agreements with other companies, remuneration policies, turnover for each financial product and/or service for the coming three years, and an overview of costs for the coming three years

A description of business processes, including governance manuals, compliance manuals, internal controls, anti-money laundering policies, remuneration policies, etc.

An organizational chart that includes the majority shareholders and the names of all managing directors

A recent extract from the trade register

A form disclosing that all day-to-day policymakers and/or supervisors who are not subject to the aforementioned suitability and integrity requirements have taken a “banker’s oath” or will do so within three months

# 7. What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

## What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

Most undertakings holding a Dutch license may rely on the European “passporting” regime to provide their services within the EU. This passport allows the undertaking to provide cross-border services and/or establish a branch in an EU member state without having to apply for a separate license. These firms must generally notify the relevant Dutch supervisor of their intention to provide their services in that particular member state.

Undertakings with a license under the DFSA that is not based on harmonized EU legislation generally do not have passport rights. For example, financial service providers that have a license for providing consumer credit typically cannot passport such a license to other EU member states.

# 8. Authors and contact information

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