Global Financial Services Regulatory Guide - Netherlands

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

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# 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.

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