

CONDUCTING BANKING ACTIVITIES IN THE NETHERLANDS BY NON-EU BANKS

1. INTRODUCTION

The rules for conducting banking activities in the Netherlands are laid down in the European Regulation on the Single Supervisory Mechanism, SSM-Regulation (SSM), in the Dutch Act on Financial Supervision, Wet op het financieel toezicht (Wft), and the underlying regulations thereto. Pursuant to the Wft it is prohibited to perform banking activities in the Netherlands without a license granted for that purpose. The European Central Bank (ECB), in its role as prudential supervisor of all banks in the euro area decides on the granting of said license. Separately, the Autoriteit Financiële Markten (AFM) is responsible for the (on going) conduct-of-business supervision of financial institutions, including banks.

Banks that wish to do business in the Netherlands and have their seat in the EU (EU banks) can apply for a so-called EU-passport. The EU-passport allows these banks to perform banking activities in other EU member states based on the banking license obtained in their 'home state'. Unfortunately, this option is not available for banks that do not have their seat in the EU (non-EU banks). There are, however, several other options for non-EU banks to enter the Dutch market. This memo provides a brief overview of these options, primarily from a regulatory perspective. Corporate law and tax aspects are merely touched upon.

2. LICENSE AND ONGOING REQUIREMENTS

As mentioned in the introduction, an entity wishing to conduct the business of a bank in the Netherlands is, in principle, subject to the requirement to obtain a banking license from the ECB. A bank is an undertaking which is carrying out the business of taking deposits or other repayable funds from the public and of granting credits for its own account. Once a license is obtained, the entity is allowed to perform certain banking activities.¹ Apart from the requirement to obtain a license, other on-going requirements apply. The license application procedure, the types of banking activities and the on-going requirements will be further discussed in this section.

2.1 License Application Procedure

The license application procedure is characterised as a two-stage model. Within this model the Dutch Central Bank, De Nederlandsche Bank (DNB) acts as a single point of entry. This means that any application for obtaining a banking license has to be submitted to DNB. In this stage DNB will assess whether the application complies with all conditions which are required for obtaining the banking

¹ A non-EU bank may also obtain a banking license that covers the provision of investment services. If the bank wishes to become a so-called 'bank-investment firm', it must indicate so in its license application. This memo takes 'regular' banks as a starting point.

license set out in the Wft. If this is the case, DNB will take a draft decision to propose to the ECB to grant the license. In the second stage, the ECB will on its turn assess whether the application complies with all conditions for authorisation laid down in the relevant EU-law. If, in the view of the ECB, these conditions are met, the ECB shall grant the banking license

The license application procedure may be time-consuming and expensive. The applicant is required to provide a broad set of information, including but not limited to the following: a comprehensive business plan; (personal) information with respect to persons of the (envisaged) management and supervisory board as well as with respect to other persons/entities that might have a certain degree of control over the bank; an overview of the governance structure; descriptions of policies and day-to-day management relating to the soundness of business operations; and data regarding the current and expected funding, solvability and liquidity of the bank.

Based on this information DNB will decide whether or not to propose to the ECB to grant the authorisation. A decision on the application must be made within 13 (26) weeks after receipt. In practice, this period is often longer because the period can be extended in case additional information is required. Possible reasons for declining a license are a lack of sufficient expertise and/or trustworthiness of persons that are proposed to form part of the management of the bank or a lack of transparency of the structure of the group of which the bank forms part, impeding adequate supervision of the bank.

If DNB is satisfied that the application complies with all conditions for authorisation laid down in the Wft, DNB will prepare a draft decision proposing that the ECB grant the banking license. The ECB will then assess the application in the basis of the conditions for authorisation laid down in the relevant EU-law.

2.2 Activities covered

When ECB decides to grant a banking license, it is standard practice to issue a 'full' banking license. This means that the licensee is allowed to engage in all activities listed in Annex I to the Capital Requirements Directive IV (no. 2013/36/EU). Examples of such activities are the acceptance of deposits and other repayable funds, lending, financial leasing, portfolio management and advice, trading, participation in securities issues and the safekeeping and administration of securities.²

2.3 Prudential Supervision

Within the euro-area, all banks are under prudential supervision of the ECB. The ECB exercises direct supervision over all 'significant' banks within the euro-area whereas the 'less-significant' banks within the euro-areas are under indirect prudential supervision of the ECB. The 'less-significant' banks are therefore under prudential supervision of the national competent authorities (NCAs). In the Netherlands the NCA is DNB.

A bank within the euro-area is considered to be 'significant' if any of the following conditions is met:

² The full list of activities can be found in Annex I to the recast Banking Directive (no. 2006/48/EC), *PbEU* 2006, L 177.

- the total value of its assets exceeds EUR 30 billion;
- the ratio of its total assets over the GDP of the participation Member State of establishment exceeds 20 %;
- the bank is considered by the relevant NCA as an institution of significant relevance with regard to the domestic economy and the ECB accepting this consideration;
- the ECB considers the bank, on its own initiative, as to be of significant relevance due to the fact that the bank has established banking subsidiaries in more than one participating Member State and its cross-border assets or liabilities represent a significant part of its total assets or liabilities;
- the bank has requested or received directly financial assistance from the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM);
- the bank is one of the three most significant bank in the Member State where it has its establishment.

2.4 On-going Requirements

Once a license is obtained, a bank operating in the Netherlands must comply with a large number of on-going requirements. The main goal of these requirements is to protect creditors and counterparties against losses. On-going requirements relate to, amongst other things: trustworthiness and/or expertise of persons who are involved in the policy or are member of a supervisory board; soundness of and control over operations; outsourcing; and solvency and liquidity requirements. The competent authorities may enforce compliance with these requirements by imposing directives on the party in breach or by imposing penalties, which directives and penalties may be made public. Ultimately, the ECB may revoke the license of a significant or a less significant bank if regulations are often and/or severely disregarded.

3. CONDUCTING BANKING ACTIVITIES

As mentioned in the introduction, there are several options for non-EU banks to conduct banking activities in the Netherlands. It is not possible for a non-EU bank to obtain a banking license in the Netherlands if it has no physical establishment in the Netherlands. It is however possible for a non-EU bank to take deposits from the Netherlands on a cross-border basis, if certain conditions are met, but not as a bank and, given the conditions that would have to be met, it is quite an undertaking to do so. If a non-EU bank has a physical establishment in the Netherlands, it will depend on the activities of such establishment whether a banking license is required. This section discusses the possibilities and their corresponding legal consequences and requirements.

3.1 Cross-border

There is no specific provision in the Wft nor in the relevant EU-law regarding the performing of banking activities from a non-EU country in the Netherlands on a cross-border basis. However, under the Wft it is prohibited to attract deposits or other repayable funds in the Netherlands from the public in the course of a profession or business, without an exemption applying or dispensation having been granted. This prohibition makes it virtually impossible for a non-EU bank to take deposits from the Netherlands on a cross-border basis. On the other hand, the provision of credit to professional

parties does not require a license, so that a non-EU bank may provide credit to professional parties on a cross-border basis.

3.2 Via a Branch Office or a Subsidiary

A branch office is an office of a non-EU bank in the Netherlands which is not a separate legal entity under Dutch law but a legally dependent part of the non-EU bank. If this branch is to perform banking activities in the Netherlands, a (branch) banking license from DNB is required. In our experience, DNB is less and less inclined to grant a license to a branch of a non-EU bank since it is of the view that it cannot effectively supervise such branch. Alternatively, a non-EU bank can choose to create a separate legal entity, a subsidiary, to perform banking activities in the Netherlands. The subsidiary would also require a banking license from ECB.

Both the license application and on-going requirements for subsidiaries and branches of non-Dutch banks are virtually the same. An advantage of having a subsidiary or branch office over the cross-border conducting of activities is local presence, as it allows for better access and a more direct relationship with the Dutch supervisory authorities.

3.3 A Representative Office

Finally, it is also possible for a non-EU bank to establish a representative office (rep office) in the Netherlands. The opening of a representative office is not subject to any regulations and/or supervision by DNB/ECB. However, it is important to note that such an office is not allowed to conduct banking activities. Representative offices may only conduct certain activities such as market research, advertising and the gathering of information, provided that these activities do not create the impression that the representative office is licensed as a bank and subject to supervision in the Netherlands. If an entity has an organisational structure in the Netherlands out of which services are provided to clients, a permanent presence may be deemed to have been established in the Netherlands and this would trigger a licence requirement for the entity. Therefore, if a non-EU bank effectively wishes to conduct banking activities via an establishment in the Netherlands, a banking license is required and on-going requirements will apply.

Kindly note that pursuant to the Wft institutions that are not licensed as a bank in the Netherlands may not use the word 'bank' or translations, abbreviations or other forms thereof in their name if these institutions are active in the Netherlands. This also applies to rep offices.

4. BREXIT

Following the referendum of 2016, the UK is expected to leave the EU in March 2019. This so called Brexit entails that, unless otherwise agreed in the overall settlement agreement to be entered into between the EU and the UK, UK banks will no longer have the benefit of an EU-passport and will thus no longer be allowed to provide banking services in the EU on the basis of their present banking licence. This will have important consequences for non-EU banks that currently use the UK as their 'hub' into the EU by relying on the banking licence of a UK based subsidiary. After Brexit this will no longer be possible. The interests of these banks would probably be served best by a tailored

agreement between the EU and the UK that would allow UK based banks to continue to provide their services in the EU on the basis of their present banking license. However, it is highly unlikely that the negotiations that are currently taking place between the EU and the UK will result in such an outcome. That means that these banks must look for other solutions to retain access to the EU. The most viable solution in this connection is probably relocation, i.e. setting up a banking subsidiary in an EU Member State, obtaining a banking license for that subsidiary in that EU Member State and having this subsidiary provide banking services throughout the EU, on the basis of the banking license granted to this subsidiary.

Please note that it is mandatory for such subsidiary to have substance in the EU Member State where it is established. It will therefore not be possible to obtain a banking license for a mere letter box company that has outsourced all or the larger part of its activities to a UK based entity.

It is the ambition of the Netherlands government to have a significant number of these banking entities set up in the Netherlands so as to further enhance the position of the Netherlands as a financial centre. There are plenty of arguments to support that position: the Netherlands is well known for its open economy and financial stability, a competitive tax climate, a sophisticated infrastructure, stable industrial relations, a productive and well educated workforce, reliable IT facilities. Furthermore the judiciary and the bar are of a high quality.

5. CORPORATE AND TAX ASPECTS

5.1 Corporate Law Aspects

Once it has been decided which of the above-mentioned options would optimally suit a non-EU bank's needs from a regulatory law perspective, the preferred legal form of its presence in the Netherlands should also be explored from a Dutch corporate law perspective. The main difference between the options is that only a subsidiary office requires to be legally incorporated. If a non-EU bank chooses to enter the Dutch market either on a cross-border basis, via a representative office or via a branch office, no Dutch legal entity is required. Both representative and branch offices have no legal personality and consequently they cannot acquire assets or incur liabilities: this is done on the basis of the non-EU bank's foreign legal personality. Despite the lack of legal personality, both representative and branch offices can have an authorised representative acting in their name.

In case of a subsidiary office a legal entity will have to be created. Although there are various options, the public limited liability company (naamloze vennootschap) is most commonly applied when establishing an entity that will carry out banking services through a separate legal entity. Alternatively a subsidiary office can take the form of a private limited liability company (besloten vennootschap). There are differences between these two company types, but these mostly relate to rather technical provisions of Dutch corporate law.

Since representative and branch offices are not legal entities, corporate law formalities are less stringent than those governing the incorporation of a legal entity. The act of registration of the representative or branch office (and any representatives) with the Dutch Trade Registry is sufficient for its creation. This will require submitting certain information and (notarised) documentation to

the Trade Registry. Performing banking activities on a cross-border basis requires no legal entity, nor registration in the Trade Registry.

5.2 Tax Law Aspects

The Dutch tax system offers attractive advantages for international businesses, such as access to an extensive tax treaty network, a favourable holding regime and the possibility to obtain advance confirmation from Dutch Revenue on Dutch tax consequences and transfer pricing aspects. The Dutch tax system is also characterised by an advantageous income tax regime for expats.

A representative office can be set up in such a way that it is not subject to Dutch corporate income tax. It is possible to obtain confirmation on this from Dutch Revenue in advance. A subsidiary or branch office will be subject to Dutch corporate income tax. One of the main issues is the allocation of equity to the Dutch bank for tax purposes. Dutch Revenue can be approached to come to a practical arrangement on that issue.

This document is intended as a summary of the matters covered. It is not intended to be comprehensive or to provide legal advice. For more information, please contact one of the following NautaDutilh lawyers:

Larissa Silverentand (T+31 20 71 71 716)

larissa.silverentand@nautadutilh.com

Frans van der Eerden (T+31 20 7171 697)

frans.vandereerden@nautadutilh.com

Pim Rank (T+31 20 71 71 864)

pim.rank@nautadutilh.com