Client briefing December 2013

Dutch Government proposes bonus cap for financial sector

On 26 November 2013, the Dutch Government issued a draft legislative proposal including further remuneration rules for employees in the financial sector. This proposal is drafted in the form of a consultation document to which market parties can respond before it will be submitted to Parliament as a formal legislative proposal. It is currently envisaged that the rules would take effect per 1 January 2015. The proposal's remuneration requirements and restrictions would apply on top of the restrictions already imposed under the Dutch rules implementing the Capital Requirements Directive (CRD III and CRD IV), the Alternative Investments Fund Managers Directive (AIFMD Directive) and the Undertakings for Collective Investment in Transferable Securities Directive (UCITS Directive). Besides a more general requirement to establish a remuneration policy that meets certain criteria, to be specified by the Netherlands Authority for the Financial Markets (AFM) and the Dutch Central Bank (DCB), the proposal includes some additional restrictions and requirements, among which a bonus cap of 20% of fixed salary for all employees. The most important rules and restrictions, as well as the scope of the proposal, are set out below.

Scope

The rules would apply to "financial institutions" incorporated or established under Dutch law. The umbrella concept of "financial institution" covers banks, investment firms, fund managers, payment services providers, custodians, insurers and certain other financial services providers. The rules would also apply to the foreign and Dutch subsidiaries of such Dutch financial institutions. Furthermore, if the ultimate parent company of the Dutch financial institution is also established in the Netherlands, such parent company would be required to apply the remuneration rules throughout its group (unless the main business of the group as a whole is not in the financial sector). In addition, the bonus cap of 20% (see below) would also apply to Dutch branch offices of foreign financial institutions, except for those of EEA based banks and investment firms (which would only be subject to the CRD IV remuneration rules of their home Member State). The bonus cap would furthermore not apply to fund managers (including AIFMD and UCITS managers) and neither to investment firms which have no external clients and trade exclusively for their own account.

General

Institutions which are covered by the proposal would be required to adopt a written remuneration policy that must be tailored to the scope and organization of the relevant institution, and to the character, scope and complexity of its activities. The remuneration policy would have to describe the remuneration components and structures which might contribute to the institution taking unacceptable risks or acting in a way that is detrimental to customers or clients, and measures and procedures to control such components and structures. The remuneration policy would have to include at least the following elements:

- the relation between fixed and variable remuneration
- the components of variable remuneration.

Further rules on the remuneration policy and its components may be imposed by the AFM and the DCB. Affected institutions would be required to publish their remuneration policy, in their annual report as well as on their website, and address certain issues in accordance with the Dutch Financial Supervision Act and possible further rules imposed by the AFM or DCB. This would include a reporting on the measures institutions have taken to implement the remuneration rules as well as information on the number of employees that are entitled to variable payments and/or total annual earnings of more than €1 million.

Bonus cap

The proposal provides that as from 1 January 2015, affected institutions would no longer be allowed to award a bonus of more than 20% of the fixed annual salary. It would be possible to deviate from this cap in relation to employees whose remuneration is not fully governed by an applicable collective labour agreement provided that the average bonus awarded to the relevant group of employees is no more than 20%. Another possibility to deviate from the cap would be in relation to employees that primarily perform services outside of the Netherlands, in which case the employee may be granted a bonus of 100% of the fixed annual salary. A bonus of 200% of the fixed annual salary may be awarded to employees that primarily perform services in states that are not part of the European Economic Area provided that the relevant company's shareholders have agreed to this. In addition, a Dutch holding company of an international group of companies may provide for bonus arrangements of 100% of the fixed annual salary if during at least three years, over a five-year period, at least 75% of the total employee population primarily performed services outside of the Netherlands. As mentioned, the bonus cap restrictions would not apply to employees of:

- AIFMD managers
- UCITS managers
- Dutch branch offices of EEA banks and EEA investment firms
- investment firms which have no external clients and trade exclusively for their own account.

Key issues

- Bonus cap of 20%
- Guaranteed bonuses and retention arrangements restricted
- Transitional rules for 2015
- Consultation period ends on 31 December 2013

Additional restrictions and requirements

The proposal includes various restrictions and requirements in addition to the bonus cap. A high-level summary is set out below:

Retention arrangements aimed at retaining key-employees for the institution's business would be allowed even if the 20% bonus cap would be exceeded (but subject to a 100% bonus cap), but only in the event of structural changes to the organisation such as a merger, acquisition or disposal and furthermore subject to the AFM's or DCB's consent.

All guaranteed bonuses would be prohibited except for signing bonuses which may only be awarded in the event the company has sufficient equity.

Severance payments could only be awarded if the employment is terminated at the initiative of the institution. No severance payment could be awarded if the employee decides to resign. Severance arrangements are also prohibited in the event of termination for poor performance, either on part of the employee or the business. The latter will in any event be the case if the company received state-aid.

All institutions covered by the new rules would need to establish claw-back arrangements and policies.

Transitional arrangements

Employees who are employed on 1 January 2015, may be granted a bonus of more than 20% of fixed salary during 2015 if such was agreed prior to 1 January of that year. As from 1 January 2016, bonuses may not be more than 20% of the fixed annual salary, subject to the exceptions mentioned above.

Consultation period

Market parties are invited to submit their comments on the proposal by 31 December 2013.

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