

# Dutch 20% bonus cap effective per 7 February 2015

The Dutch Act on the Remuneration Policies Financial Undertakings (*Wet beloningsbeleid financiële ondernemingen*, the "Act"), which was originally envisaged to come into force on 1 January 2015, has been adopted by the Dutch Senate on 27 January 2015 and has come into effect on 7 February 2015. The Act is primarily known for the 20% bonus cap, but also provides for other pay constraints. The Act's requirements and restrictions on remuneration will apply on top of those contained in the Capital Requirements Directive (CRD III and CRD IV) and the Alternative Investments Fund Managers Directive (AIFMD).

Following our client briefing of December 2013 (*Dutch Government proposed bonus cap for financial sector*) this briefing addresses the scope and the most important elements of the Act.

## Which firms are caught by the Act?

The Act applies to financial undertakings (*financiële ondernemingen*) with their official seat in the Netherlands and their subsidiaries (including subsidiaries abroad). The definition of 'financial undertaking' is very broad and includes, amongst others, banks, insurers, investment firms, fund managers, payment services providers, custodians and premium pension institutions (*PPIs*).

Similar to CRD III and CRD IV, the Act has a group-wide scope. The Act is applicable to the whole group of companies (including those that are not financial enterprises) if: (i) there is at least one financial undertaking with its official seat in the Netherlands within the group and (ii) the ultimate

parent company (which does not have to be a financial undertaking) has its official seat in the Netherlands. Groups whose 'main activities' do not relate to the financial sector are exempted from such group-wide applicability.

## Variable pay

Remuneration is either fixed or variable. The Act has a broad definition of variable remuneration, "all remuneration that is not fixed remuneration", whereas the definition of fixed remuneration is "the part of the total remuneration that consists of unconditional financial or non-financial payments".

The central point of the Act is the 20% bonus cap: a financial undertaking cannot pay any person "working under its responsibility" variable remuneration that exceeds 20% of the

fixed remuneration on an annual basis. According to the Minister of Finance the annual fixed remuneration set out in the annual income statement (*jaaropgave*) – whereby (fixed) pension contributions are explicitly excluded – forms the basis for the bonus cap. Consequently, even though certain emoluments may qualify as fixed remuneration, such as regular pension contributions, these may not be taken into account when determining the basis for the maximum bonus. It goes without saying that this restrictive interpretation further decreases the actual maximum bonus amount.

## A 20%, 100% or 200% bonus cap?

The 20% bonus applies to any person working under the responsibility of the

financial undertaking. However, a number of exceptions apply:

- an average 20% collective bonus cap for staff in the Netherlands whose employment conditions are not exclusively covered by a collective labour agreement. The 20% cap does not apply on an individual basis, but to the average bonus of such staff collectively, provided that individually a 100% bonus cap applies;
- a 100% bonus cap for staff predominantly (at least 50% of their time) physically working outside the Netherlands but within the EEA;
- a 200% bonus cap for staff predominantly (at least 50% of their time) physically working outside the EEA, subject to shareholder approval and the procedure as determined in CRD IV;
- a 100% bonus cap for staff of a Dutch ultimate parent company only (thus not its subsidiaries) if at least 75% of all staff within the group of companies has predominantly worked outside the Netherlands during at least three out of the last five consecutive years;
- the bonus cap also applies to branch offices in the Netherlands of financial undertakings with their official seat in another state. Banks and investment firms, as defined under the Capital Requirements Regulation, however, are excluded. For these branches, the CRD IV bonus cap of the state where such company has its official seat applies;
- no bonus cap applies to managers of AIFs, managers of UCITS and of investment firms

trading solely and exclusively for their own account with their own funds and capital and that do not have external clients and that are a local undertaking (proprietary trading investment institutions). This exception also applies in the event the aforementioned managers are part of a group of companies that has to apply the Act on a group-wide basis. In the event the manager of AIFs, or the manager of UCITS, is also allowed to perform certain MiFID activities under the relevant AIFMD or UCITSD license, this exception also applies to such MiFID activities (ie individual investment management and investment advice).

### Other requirements

In addition to the bonus cap, the Act includes various other restrictions and requirements.

Retention bonuses (including the regular bonus) may only exceed the 20% bonus cap if: (i) such retention bonus is necessary in the context of a structural organisational change, such as a merger, demerger, change in control or the acquisition of the undertaking; (ii) the purpose of the retention bonus is to retain staff; (iii) the retention bonus plus the regular bonus does not exceed the 100% (or to the extent applicable in accordance with CRD IV 200%) bonus cap; and (iv) the regulator approved the retention bonus in writing.

This is not a new requirement as, since the introduction of CRD III (and contrary to the interpretation of the European Banking Authority), the Dutch Central Bank has taken the view that retention bonuses qualify as guaranteed bonuses (which are

### Exemptions bonus cap of 20%:

- staff in the Netherlands not covered by a collective labour agreement, provided that the average variable bonus of such staff collectively does not exceed 20% (an individual 100% bonus cap applies);
- staff predominantly working outside the Netherlands, in the EEA (an individual 100% bonus cap applies) or outside the EEA (an individual 200% bonus cap may apply);
- if at least 75% of all staff within the group has predominantly worked outside the Netherlands during at least three out of the last five consecutive years (an individual 100% bonus cap applies to the staff of the Dutch ultimate parent company only);
- branch offices of banks and investment firms that are branch offices in the Netherlands of financial undertakings with their official seat in another state (the CRD IV bonus cap applicable in that state applies);
- managers of AIFs, UCITS and proprietary trading investment institutions.

prohibited under CRD III and CRD IV and remain so under the Act) and therefore require the explicit consent of the Dutch Central Bank. Similar to CRD III and CRD IV, an exception to the prohibition of guaranteed bonuses applies for signing bonuses for new staff paid in the first year of employment which may only be awarded if the financial undertaking has a sound and strong capital base.

Severance payments are not allowed if (i) the employment agreement is terminated at the initiative of the individual or (ii) the termination is a result of a serious imputable act or omission of the individual. Severance payments to day-to-day policy-makers (*dagelijks beleidsbepalers*) are capped at 100% of their fixed remuneration on an annual basis.

Similar to CRD III and CRD IV, financial undertakings must have a sound remuneration policy (*beheerst beloningsbeleid*) which must contain, amongst others, sound and effective risk management. Performance criteria must be based on financial and non-financial criteria and the variable remuneration shall be based on at least 50% on non-financial criteria.

Malus and claw back provisions apply to all staff working for financial undertakings with their seat in the Netherlands, their subsidiaries and group.

#### **Most important other requirements under the Act:**

- sound remuneration policy
- strict rules for retention bonuses
- prohibition on guaranteed variable remuneration
- restraints on severance payments
- extended malus and claw back obligations

### **Transitional law**

Employees may be awarded a bonus exceeding 20% of the fixed pay in 2015 if such award stems from an obligation existing prior to 1 January 2015. The Minister of Finance has made it clear that this exception only applies to 2014 performance bonuses that are awarded in 2015. As from 1 January 2016, any bonus award is subject to the rules of the Act.

As of the date of entry into force, payments and arrangements in violation of the Act, including the transitional regime, will be void and deemed non-existent. A breach of the standards of a sound remuneration policy set out in the Act may lead to administrative fines pursuant to the Decree Financial Fines in the Financial Sector (*Besluit bestuurlijke boetes financiële sector*).

The 20% bonus cap does not apply to 2014 performance bonuses that are awarded in 2015 if such award stems from an obligation existing prior to 1 January 2015. As from 1 January 2016, any bonus award will be subject to the bonus cap rules.

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