

## Brexit – Dutch bonus cap rules

Since the outcome of the Brexit, there is a lively debate on whether there will be an exodus of the financial industry from the City of London and, if that were to be the case, what the new primary European centre for the financial industry would be. In that context, Amsterdam is often mentioned as one of the options, next to Dublin, Paris and Frankfurt.

In view of the above, the debate on the Dutch bonus cap rules is taking place again. This client briefing intends to provide clarity on the Dutch bonus cap rules and also focuses on the exceptions to these rules.

The Dutch Act on the Remuneration Policies Financial Undertakings (*Wet beloningsbeleid financiële ondernemingen*, 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 IV) and the Alternative Investments Fund Managers Directive (AIFMD).

Unlike CRD IV, the Act, including the bonus cap, applies to a broader selection of firms than just banks and investment firms and the personnel scope is not limited to Identified Staff, but includes all staff.

### 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.

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) 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 of the group (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. Branches of banks and investment firms, with their official seat in another EU Member State, however, are excluded. For these branches, the CRD IV bonus cap of the EU Member 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 (however see below on "Draft bill on asset managers belonging to a group"). 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).

### **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 in the Netherlands of banks and investment firms that have their official seat in another EU Member State (the CRD IV bonus cap applicable in that EU Member State applies);
- managers of AIFs, UCITS and proprietary trading investment institutions.

## 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

### 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

guaranteed bonuses (which are 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.

## Non-compliance

Payments and arrangements in violation of the Act are 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*).

## Draft bill on asset managers belonging to a group

Recently the public consultation-process ended in relation to a new draft bill that would increase the scope of the bonus cap rules and would significantly limit the exception of the bonus cap for managers of AIFs, UCITS and proprietary trading investment institutions.

Pursuant to the draft bill, managers of AIFs, UCITS and proprietary trading investment institutions that are part of a consolidated group (i.e. banks, investment firms, payment institutions and electronic money institutions, insurers and financial conglomerates) would no longer benefit from the exception of the bonus cap referred to above and, consequently, would fully be caught by the bonus cap rules.

## A perspective on the future

The Act was introduced by the current cabinet which is a coalition between VVD (Liberals) and PvdA (Labour). In March 2017, there will be elections in the Netherlands. The outcome of such elections may have an impact on bonus cap rules in the financial sector. Depending on who wins the elections, we may see an increase in pay constraints, including a possible increase in the scope of the bonus cap to managers of AIFs, UCITS and proprietary trading investment institutions that are part of a consolidated group (as referred to above).

Regardless of who wins the elections, there seems little appetite to loosen the bonus cap rules or to introduce a special regime for foreign banks as that would not be acceptable for most of the electorate.

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