

## THE NETHERLANDS – Full Answers

---

### 1. Provision of banking services by a foreign bank, without a local licence, on cross border basis

#### 1.1 To what extent can a foreign bank (which is not locally authorised) provide the services listed in 1.3 (on a cross border basis) to local retail customers, commercial clients and wholesale counterparties?

A bank is defined as the party which business it is to receive repayable funds, outside a restricted circle, from parties other than professional market parties, and to grant credits for its own account.

- Attracting repayable funds (deposits etc.) without licence and offer credit facilities to consumers is only allowed with a license of the Dutch Central Bank (DNB) or the Authority Financial Markets.
- Pursuing the business of a payment service provider is forbidden unless holding an authorisation issued by DNB.
- Lending, factoring, leasing (secured or unsecured) to non-consumers is permitted without licence.

#### 1.2 Where local authorisation or licensing is required, are there any useful exemptions?

The prohibition to conduct the business of a bank without authorisation does not apply to a 'group finance company' which attracts repayable funds by issuing securities, holds a guarantee from an authorised bank or its parent company in respect of the full amount of repayable funds and grants at least 95 per cent of its balance sheet total as credit within the group of which it forms part (Section 3:2 of the Financial Supervisions: "FSA"). There is a proposal pending in parliament to change this legislations as per 1.1. 2015 and to add conditions to prevent evasive structures.

The activities are listed in Section 1:5a(2) of the FSA (or Wft) Also, under certain conditions, payment service providers may be exempted from the authorisation requirement. These conditions, all of which must be satisfied, are enumerated in Section 1a of the Exemption Regulation under the FSA (Vrijstellingsregeling Wft, hereafter 'Exemption Regulation'). The exemption applies only to providers of payment services 1–5 and 7 as listed in the Payment Services Directive. No exemption is possible for payment service 6 (money remittance).

Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations to non-consumers.

DNB may grant dispensation for acquiring repayable funds 'beyond a restricted circle' and 'from parties other than professional market parties'. DNB will only decide to grant dispensation if the interests which the Part of the FSA on prudential supervision aims to protect – more particularly: the soundness of financial undertakings and the stability of the financial sector is sufficiently safeguarded. Dispensation will be granted only if a written guarantee is produced that warrants fulfilment of all obligations on the part of the applicant and whether the applicant really needs the dispensation.

### **1.3 To what extent can a foreign bank (which is not locally authorised) promote the services below locally? Where there are restrictions on promotion, are there any useful exemptions?**

- **Deposit taking and payment services/provision of bank accounts;**
- **Lending (either secured, e.g. on land/real estate, or unsecured) and other forms of finance such as trade finance;**
- **Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations.**

Deposit taking and payment services/provision of bank accounts;

- When deposit taking, payment services agreements have been concluded with residents of the Netherlands; the bank uses the Dutch language; the bank makes it known that its services are aimed at residents of the Netherlands; reference is made to the applicability of Dutch legislation or the Dutch tax system; reference is made to service points located in the Netherlands; advertisements are directly made to residents of the Netherlands, payments are accepted from Dutch payment accounts whether or not in conjunction, this considered indicative for the fact that the services are being provided in the Netherlands.

Lending (either secured, e.g. on land/real estate, or unsecured) and other forms of finance such as trade finance.

- Promotion of services is only permitted when directed at non-consumers. For lending in the form of factoring and leasing for non-consumers no licence is required.

Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations.

- Promotion of services is only permitted when directed at non-consumers.

### **1.4 Can a foreign bank establish a local representative office to promote such services where these are to be conducted by the bank on a cross border basis (and not by the local office)?**

Within the limitations described above [in previous question].

## **2. Provision of investment services from home country without a local license**

### **2.1 To what extent can a foreign bank or investment firm (which is not locally authorised) provide the services below to local retail customers, commercial clients and wholesale counterparties? Are there any useful exemptions?**

Section 2:96 of the FSA (Wft) provides that no entity may provide investment services in the Netherlands without an authorisation granted by the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten / AFM)

Investment firms having their registered office in the designate states the United States, Switzerland or Australia are conditionally exempted from the authorisation requirement referred to in Section 2:96 of the FSA. The exemption from prudential supervision applies only to investment firms that focus exclusively on professional investors. The exemption does not apply to investment firms from these states that focus (or also focus) on retail or non-professional investors.

Investment firms from non-designated states and investment firms not covered by the Exemption Regulation must meet the prudential requirements set out in the AFS regarding solvency, minimum own funds, submission of statements, and conducting controlled and ethical operations.

Investment firms from non-designated states and investment firms not covered by the Exemption Regulation may apply for dispensation from submitting statements. DNB will grant the requested dispensation provided that the applicable statutory requirements have been met. In doing so, DNB will attach amongst others the following stipulations to the dispensation:

- the applicant's provision of investment services in the Netherlands must be targeted exclusively at professional investors;
- the investment services that the applicant provides in the Netherlands must be subject to supervision by the supervisory authority/authorities of the country of origin for the full term of the relevant dispensation;
- the applicant must notify DNB without delay if at any time it is no longer subject to supervision by one or more supervisory authorities in the country of origin or no longer meets the requirements of the relevant supervisory authority/authorities;
- the applicant must furnish a recent statement regarding its assets under management in the Netherlands, etc.

## **2.2 To what extent can a foreign bank or investment firm (which is not locally authorised) promote the services below locally? Are there any useful exemptions?**

- **Dealing in/buying/selling investments (as principal or as agent)**
- **Investment advice**
- **Discretionary management**

When an investment firm from a non-designated states limits its service to non-resident clients it is not required to have a licence. With respect to service to Dutch clients by a non-designated firm can be noticed that the AFM also uses the restriction that if cross-border provision of services (not by means of a branch office) to Dutch customers only occurs on the initiative of those clients and takes not place in the Netherlands (the so-called services. ' initiative test '). As a consequence foreign investment firm cannot promote its services actively in Netherland. The use of the Dutch language; or when the investment firm makes it known that its services are aimed at residents of the Netherlands or reference is made to the applicability of Dutch legislation or the Dutch tax system; reference is made to service points located in the Netherlands; advertisements are directly made to residents of the Netherlands, payments are accepted from Dutch payment accounts whether or not in conjunction, this considered indicative for the fact that the services are being provided in the Netherlands.

### 3. Local rules

#### **3.1 When a foreign bank/investment firm enters into an agreement with a local customer, are there any restrictions on the contract being governed by foreign law and the courts of the foreign country having exclusive jurisdiction (i.e. is the contract required to be governed by local law and/or must the local courts have jurisdiction)?**

In principle (professional) parties entering a contract are free to choose the governing law and jurisdiction and will be bound by this choice.

### 4. Regulatory appetite for foreign banks

#### **4.1 What is the attitude of your national regulatory authority to cross border business and the presence of foreign banks?**

The regulatory authorities have a rather open attitude to foreign banks. As the application process is strict and thorough, DNB facilitates a pre-application process during which informal discussions are possible on the business model and the requirements to be met for the application for authorisation. During this process as a first step the business plan (including financial projections for the first three years), the business strategy, but also the proposed governance (management board and supervisory board) and, if known, aspects relating to ethical and sound operational management (compliance, IAD, outsourcing and ICT) are assessed.

In the second phase the draft application is reviewed and a detailed written response as to the completeness and quality of the submitted documents and a description of any additional information that should be added in the case of a formal application is provided.

#### **4.2 Is it generally more common for foreign banks to operate locally through a branch or a subsidiary, or both (and does this depend on the activities the bank carries out)?**

There is no clear pattern and probably dictated by the type of business and the expectations of the targeted customers and markets, the long term strategy and the size of the operation.

#### **4.3 Is it mandatory, in any situation, to operate through a branch or subsidiary?**

As such the FSA shows no preference for a legal form of the entity applying for licence.

#### **4.4 What are the benefits/disadvantages of operating through a branch or subsidiary?**

From a regulatory point of view there are not really advantages the other areas such as tax, corporate employment law etc. are out of scope and would require other specialist input.

### 5. Establishing a branch

#### **5.1 Does a branch have rights/recognition to trade in other countries**

In principle yes, but it depends on the extent of the authorisation granted by DNB.

#### **5.2 How is a branch regulated?**

A bank with a seat outside of the EEA that intends to conduct the business of a bank in the Netherlands as meant in the FSA through a branch requires authorisation of DNB. The requirements a branch has to comply with are almost identical to the requirements of a bank seated in the Netherlands.

## 6. Establishing a subsidiary

A subsidiary of a non EEA has to comply with the same requirements as a bank seated in the Netherlands. As a result of passporting across the EEA is possible.

## 7. Supervision

### **7.1 Which national regulatory authority authorises, regulates and supervises foreign banks/investment firms/subsidiaries in your jurisdiction?**

The Dutch Central Bank and the Authority Financial Markets since 2004 the Netherlands applies the TwinPeaks supervisory model (prudential supervision by DNB and conduct-of-business supervision by the Netherlands Authority for the Financial Markets (AFM)).

### **7.2 Is there any split in supervision between the local regulator and the foreign/home regulator – e.g. in the case of a locally authorised branch?**

Depending on the home-country of the supervised entity, the existence and content of the cooperation agreement with the home-country regulator and assessment of the branch the DNB may consent to a split in supervision.

## 8. Individuals

### **8.1 Where a local branch or subsidiary is established and (if applicable) authorised, are individuals personally regulated and/or liable to fines?**

AFM and DNB have the possibility to impose an administrative penalty, as a fine, to one or more natural persons that have (actually) been in charge of the offense by a regulated entity person, such as the director(s) of a financial institution that has committed a violation. Natural and legal persons are subject to the same range of fines.

### **8.2 Does this extend to individuals overseas/in the home country?**

Relevant is if the person has (actually) been in charge of a violation of the FSA not the location where he was when the violation was committed.

### **8.3 Which officers and employees are subject to local vetting, and are the owners/controllers subject to local vetting?**

As a principle the integrity and suitability of directors and supervisory board members are crucial to the integrity of the financial sector. This is why DNB assesses all directors and other policymakers in the financial sector. The aim of the screening is to ensure that, ultimately, only people with sufficient knowledge and skills are appointed as directors and supervisory board members. Owners/controllers are also vetted in relation to the independent functioning of the SB as an organ and of the individual SB member's vis-à-vis one another, the Managing Board, the shareholder, the Company Council (Ondernemingsraad), the employees etc. and from an AML perspective.

In case of a branch the responsible management as well as owners/controllers will be vetted.

208735227

This report is for general purposes and guidance only and does not constitute legal or professional advice and should not be relied on or treated as a substitute for specific advice relevant to particular circumstances. For legal advice, please contact your main contact partner at the relevant CMS member firm. If you are not a client of a CMS member firm, or if you have general queries about Law-Now or RegZone, please send an email to: [law-now.support@cmslegal.com](mailto:law-now.support@cmslegal.com) so that your enquiry can be passed on to the right person(s).

All Law-Now and RegZone information relates to circumstances prevailing at the date of its original publication and may not have been updated to reflect subsequent developments.

CMS Legal Services EEIG (CMS EEIG), has its head office at: Barckhausstraße 12-16, 60325 Frankfurt, Germany. The contact email address for CMS EEIG is [info@cmslegal.com](mailto:info@cmslegal.com), its Ust-ID is: DE 257 695 176 and it is registered on Handelsregister A in Frankfurt am Main with the registration number: HRA 44853. CMS Legal Services EEIG (CMS EEIG) is a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG's member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices.

CMS EEIG member firms are:

CMS Adonnino Ascoli & Cavasola Scamoni, Associazione Professionale (Italy); CMS Albiñana & Suárez de Lezo S. L. P. (Spain); CMS Bureau Francis Lefebvre S. E. L. A. F. A. (France); CMS Cameron McKenna LLP (UK); CMS China (China); CMS DeBacker SCRL / CVBA (Belgium); CMS Derks Star Busmann N. V. (The Netherlands); CMS von Erlach Poncet Ltd (Switzerland); CMS Hasche Sigle Partnerschaft von Rechtsanwälten und Steuerberatern mbB (Germany); CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH (Austria); CMS Russia and CMS Rui Pena, Arnaut & Associados RL (Portugal).

For more information about CMS including details of all of the locations in which CMS operates please visit: [www.cmslegal.com](http://www.cmslegal.com).

© CMS Legal 2015. All rights reserved.