

# FINNIUS

## Recommendations for purchasers and sellers of financial intermediaries

---

6 December 2024

 7 MINUTES

The acquisition market for intermediaries who advise on and intermediate in insurance and consumer loans (so-called financial service providers) is booming. We regularly assist purchasers or sellers with preparing (vendor) due diligence reports and obtaining the required regulatory approvals from the AFM. I am happy to share our knowledge and experiences gained in the form of recommendations for purchasers and sellers of financial service providers such as intermediaries.

## **1.Sellers: Realize that the compliance standard has changed**

Many intermediaries have had their regulatory license for years. At the time the license was obtained, the rules were a lot more limited than in the present. Moreover, AFM supervision was less intensive. The majority of long-standing intermediaries therefore obtained the license relatively easily and almost never had anything to do with the AFM. As a result, it happens that some intermediaries are not sufficiently aware of the changed supervisory standards.

New regulatory requirements for intermediaries have been added to the law over the years. Examples are remuneration rules and product governance requirements. In addition, the AFM provides greater substance to existing open standards, requiring intermediaries to account for, among other things, the AFM's expectations in the areas of information security, incidents, outsourcing, and the general theme of "customer at central". Moreover, the applicability of the Dutch Anti Money Laundering and Terrorist Financing Prevention Act (Wwft) to life insurance intermediaries is proving to be a *blind spot* for a number of parties, or at least quite a challenge to properly implement. Recently, the AFM highlighted this in its report under the heading [Sector in View / Financial Service Providers](#).

The fact that "things have been done this way for years" is obviously not a convincing argument for potential purchasers to mitigate comments in a due diligence report about lack of compliance. Sellers would therefore do well to verify, for example by using a compliance checklist, whether all required procedures and measures have been recorded in such a way that they are clear to an outsider prior to the transaction process. It is often the case that, although there is a set way of working or certain processes are adhered to in practice, these are not laid down in writing. As a result, regulatory compliance is difficult to demonstrate to not only the AFM, but also to potential purchasers.

If a seller identifies *gaps* in its business, it may be a conscious choice to close such gaps prior to the transaction process, or instead leave them to the care of the future owner. There is something to be said for both choices, depending on the circumstances of the specific situation. What matters most is that a seller avoids being caught off guard by a purchaser's observations about the compliance state of the licensee(s) to be sold. The commercial negotiations between parties will run more smoothly if the seller is well-prepared in terms of regulatory rules and regulations.

## **2.Purchasers: be aware of the nature of regulatory approvals and procedure**

The transaction documentation needs to take into account required approvals from the AFM before the transaction can be executed. Especially for non-Dutch purchasers, the nature of these approvals and the associated procedure often prove confusing. Therefore, I list below the most common misunderstandings.

The AFM does not have prior approval authority with respect to the transaction as such. However, the AFM does have this authority with respect to certain persons who will be involved with the licensee(s) as a result of the transaction. This concerns in the first place the so-called co-policymakers of the target, who will always change after a share transfer. Indeed, the directors of the new direct and indirect majority shareholders will in any case qualify as co-policymakers. In addition, the AFM will have to assess the integrity and suitability of any new directors (referred to as day-to-day policymakers) of the licensee if they would already be appointed per closing, as well as persons operating as so-called internal supervisors of the target. The latter category may consist of supervisory board members at the level of the licensee, but also of other persons who exercise a supervisory function with respect to the licensee on the basis of, for example, internal regulations or (statutory or contractual) *reversed matters*. Please note that the regulatory qualification of persons with a role with respect to a regulated undertaking is not quite aligned with the corporate bodies of that company.

It is the legal responsibility of the licensee that all of the above persons are not active or appointed until the AFM has completed the assessment of all relevant persons. Therefore, this also means that formally the licensee, and not the new shareholder, will receive this approval from the AFM. The AFM must communicate this via the account of the licensee within the digital AFM Portal. The transaction documentation will therefore have to include the seller's obligation to submit the documentation for the purpose of the approvals to be obtained. At the same time, the fulfilment of that obligation is not possible without the intended purchaser providing all the information required for that purpose to the seller. That information consists of (i) an overview of the intended new control structure, on the basis of which the AFM can determine who the new (co-)policymakers will be, and (ii) the required documents for the person reviews. Fulfilling the *regulatory approvals* is thus a joint effort in which purchaser and seller depend on each other. In particular, this is not always clear in advance to purchasers who have not previously been active in the financial sector.

### **3.Both: Know how to put expressions by the AFM in a DD report in the right perspective**

There is the Dutch Financial Supervision Act (DFSA), and there are various expressions by the AFM. These elements do not always fit together seamlessly. In practice, the AFM provides guidance in applying regulatory open standards, often in the form of guidance documents and reports. For example, the AFM recently published the [Report on the Quality of Mortgage Advice](#), in which the AFM explains how market parties currently implement the legal advice standard of Article 4:23 DFSA and what the AFM believes should be improved. For this expression there is a direct

link to a clear legal basis, which means that the risk of formal enforcement in the event of violation of standards can be classified as real in the context of a DD report.

In addition, the AFM expresses different expectations towards intermediaries, which do not always have such a direct legal basis. This is true, for example, with respect to its [public](#) (and non-public) expressions regarding outsourcing by financial service providers. The legal framework for outsourcing for this category of financial firms is extremely limited. The AFM would like to see this changed, according to its [request to the Minister of Finance](#) in May. At the moment the AFM is not able to supervise sufficiently effectively the aspects that it deems important for the sector; the AFM derives from existing regulations for asset managers, such as keeping a register of outsourced activities, recording outsourcing in a written agreement and applying risk management to these outsourcing activities. I agree with the AFM that these aspects can add to controlled operations. However, when a licensee does not (yet) have an outsourcing register, unlike the absence of an incident register, this is not a violation of a legal obligation. Such a finding then therefore deserves a different risk weighting in a (V)DD report.

The same applies to the AFM's increasing attention to the design of the compliance function. This is not specifically prescribed for intermediaries. However, the ever-increasing expectations of the AFM in this area are addressed in the aforementioned report [Sector in Beeld / Financial Service Providers](#). There it takes a very short cut to the standards that apply to the asset management sector. The AFM includes in the report a direct link to another report with tools for improving the compliance function from 2020 that is addressed to fund managers and investment firms, which do have very detailed legal provisions for the compliance function!

A well-functioning compliance function is important for the future-proofing of any financial undertaking. It is useful that the AFM draws attention to this. However, it does so in a legally dubious way. Reason enough to include this in the conversation between purchase and seller in a transaction process, but also to see it in the right legal perspective when formulating indemnifications.

## **Conclusion**

An acquisition process of a financial intermediary involves even more than what is discussed in this blog. Observing the recommendations above may well ease the journey quite a bit. For those who want to read more recommendations, I conclude with a reference to the four pillars the AFM [published](#) in October this year for a future-proof financial sector. Also useful when no acquisitions are in the pipeline, by the way.