FINNIUS

Outlook 2019

Introduction Outlook 2019

Retrospection 2018

Yet again we have had an eventful year in the financial supervision field. It has been the first year of MiFID II and MiFIR. Aside from some start-up problems with regards to MiFIR reporting, it appears to have passed quite well. Also, it has been the year of the – late – implementation of PSD II and the Fourth Anti-Money Laundering Directive into Dutch law, resulting in a lot of work for most financial enterprises. And similar to previous years, 2018 provided us with a lot of interpretations and increase in regulation from the supervisory authorities EBA, EIOPA and ESMA.

Also, 2018 has been the year of legislators and supervisory authorities responding to new events. For example in the Netherlands, take the proposed tightening of rules concerning remuneration, the focus on tax evasion in integrity supervision and the search for a supervisory framework for crypto currencies and initial coin offerings. And throughout 2018, one very dark and unpredictable event has been hanging over the financial supervision landscape – Brexit.

Outlook 2019

What will 2019 look like? This Outlook provides for an ambiguous picture. On the one hand, we expect a relatively calm year; as opposed to 2017 and 2018, no large-scale implementations of new European directives are planned for 2019 (considering PSD II a 2018 directive). On the other hand, 2019 will likely turn out to be a turbulent year with the upcoming departure of the United Kingdom from the European Union. And not only Brexit will keep you occupied. Supervisory authorities and regulators will come up with very extensive and detailed elaboration of existing regulations, and several impactful EU directives that have to be implemented by 2020 or 2021 will likely be adopted.

This Outlook sets out all developments for the coming year. We would like provide you with our regulatory expectations for 2019. These are based on developments and proposals that were known at the turn of the year. We will discuss both new regulations as well as priorities of supervisory authorities and legislators that might be important for your business. We hope this Outlook gives you the solid overview you need in 2019.

What are you interested in?

Go directly to a specific section of this Outlook by clicking on one of the links above.

Financial markets legislation
General developments

DNB Supervision Priorities 2019

DNB Vision on Supervision 2018-2022

DNB Report proportional and effective supervision

AFM Trend View 2019

Financial Markets (Amendment) Act 2019

Financial Supervision (Funding) Act 2019

Review and Extension of Act on remuneration policy for financial undertakings

ESA's 2019 Work Programme

Revision EMIR & adjustment of supervision of central counterparties

European framework for the recovery and settlement of central counterparties

Amendment applicable legal system under ISDA documentation

Establishment of European Investment Stabilisation Function (EISF)

Proposals to strengthen ESAs and the European Systemic Risk Board (ESFS review package)

Benchmark Regulation – transitional periods expire

European Commission Action Plan: financing sustainable growth

Current Benchmark Regulation; some amendments envisaged

Agenda for the financial sector

AFM Exploration of vulnerabilities in accountancy sector structure and announcement of the 'Committee on the Future of the Accountancy Sector'

Consequences of Baumeister ruling

Consequences of Brexit

Brexit; European Commission activates contingency plan

AMLD5

DNB Supervision Priorities 2019

In November 2018, DNB published its supervision priorities for the year 2019 through the **Supervision Outlook 2019**. The document describes the main risks and challenges that DNB sees for the Dutch financial sector in 2019. These main risks form the starting point for the supervision agenda and will therefore be central to DNB's supervision activities in the coming year. Starting this year, DNB will inform financial institutions about upcoming supervision studies via a digital agenda for supervision activities, which will be posted on the DNB website from time to time.

For 2019, DNB sees the following risks that require special attention in terms of supervision (most of which were already included in DNB's supervision priorities in 2018):

- political uncertainty;
- change capacity;
- cyberattacks and IT disruptions;
- financial and economic crime;
- repricing of risks and changing yield curve;
- vulnerabilities in the property markets.

DNB also sees various long-term trends and risks. These include:

- a fragmented value chain of the banking business due to increasing competition from non-traditional sectors;
- the ongoing competition in the mortgage market from insurers and pension funds, which can pose a risk to the continuity of individual institutions;
- cryptocurrencies and the underlying blockchain technology, which through new service forms and value relocation could potentially have a lasting impact on the financial system;
- the increase of climate-related risks in the coming years.

With regard to DNB's supervision of financial institutions in the Caribbean Netherlands, DNB first of all notes that it wishes to further shape its cooperation with the Central Bank of Curaçao and Sint Maarten (CBCS). Moreover, DNB is preparing for a possible expansion of the prudential supervision of financial institutions in the Caribbean as a result of the introduction of a permanent establishment requirement. For the year 2019, there are two spearheads that DNB will emphasize in its supervision:

- **Business integrity:** Awareness of integrity risks and their management in the financial sector in the Caribbean Netherlands remains a point for attention. When investigating banks and money transaction offices, DNB will check for adequate and risk-based transaction monitoring and compliance with the duty to report unusual transactions.
- **Cooperation with FIUs:** DNB works closely with Financial Intelligence Units (FIUs) in the Caribbean Netherlands. In 2018, this led to a joint analysis of integrity risks and joint information on money laundering risks and the obligation to report unusual transactions. DNB hopes to continue this cooperation and information in 2019.

In the Supervision Outlook 2019, DNB will also discuss how it will further implement the spearheads as formulated in its 'Vision on Supervision 2018-2022' in 2019. These are further discussed below.

DNB Vision on Supervision 2018-2022

In November 2017, DNB published the document '**Vision on Supervision 2018-2022**', in which DNB formulated the following spearheads:

- responding to technological developments;
- focus on future orientation & sustainability;
- strict on financial and economic crime.

In its **Supervision Outlook 2019**, DNB examines these spearheads for 2019 in more detail. These are briefly discussed below.

DNB responds to technological innovations

- DNB will continue and where necessary improve the DNB-AFM Innovation Hub and Innovation Customisation in 2019.
- DNB will remain involved in the exploration of crypto regulation.
- In 2019, DNB will conduct further research into, among other things,

artificial intelligence and distributed ledger technology (DLT).
- As part of its digital ambition (as expressed in the Vision on Supervision 2018-2022), DNB will also this year use digitisation to strengthen its internal business operations. In doing so, it aims for efficient and effective supervision and, where possible, tries to reduce costs.

DNB focuses on future orientation and sustainability

- In 2019, DNB will study the change capacity of a risk-based selection of small banks, insurers, pension funds and trust offices. DNB will focus on their change capacity, for example with regard to technological innovation and the ability to solve persistent problems. The studies focus in particular on the role of internal supervision and middle management.
- This year, DNB is again committed to increasing the role of the financial system in managing climate-related risks and financing green investments. DNB has announced that it will also embed the management of climate-related risks in the assessment frameworks for the supervision of banks, insurers and pension funds.

DNB is strict on financial and economic crime

- In 2019, DNB will continue to conduct risk-based thematic and institution-specific studies at institutions into the management of integrity risks. DNB will monitor and validate the progress of these studies and, where necessary, impose punitive measures. DNB will hold executive and other managers and supervisory directors accountable for their responsibility and duty ensuring the right attitude is adopted within the institutions.
- In 2019, the initiatives explored (in 2018), such as a public-private task force to combat serious crime and interbank cooperation in the field of customer screening and transaction monitoring, must be translated into concrete terms.
- DNB will focus its thematic studies on three specific areas, namely (a) the prevention of institutions' involvement in money laundering and terrorist financing, (b) tax risks and social impropriety, and (c) undermining and organised crime.

DNB Report proportional and effective supervision

Ten years after the outbreak of the financial crisis, DNB considered it an opportune time to examine whether the regulation introduced since the crisis also had unintended effects, which were not foreseen at the time of its introduction, particularly when such effects increase the risks for institutions, the sector or the system as a whole. This resulted in the '**Report on proportional and effective supervision**'. Three subjects were examined, namely:

(i) proportionality of regulation and supervision;
(ii) the influence of regulations on directors' attention to strategy and risk management;
(iii) the impact of regulation on institutions' business models and on systemic risks.

The main findings of the report are as follows:
- there is room for improving the proportionality of regulation and supervision;
- according to banks, insurers and pension funds, risk management and strategy receive sufficient attention;
- while higher capital requirements and stricter rules ensure safer individual institutions, there are also signs that the homogeneity of the financial sector has increased.

Based on these findings, DNB made a number of recommendations in the report:
- pay more attention to proportionality in regulation and supervision;
- reduce ambiguities and complexity in the existing regulations;
- devote more attention in regulation and supervision to promoting heterogeneity in the financial sector.

In the report, DNB also formulates proposals for actions, which give further substance to the above recommendations. In total, DNB formulated 22 actions. Some of these actions can be carried out by DNB itself as prudential supervisory authority. Other proposals are addressed to legislators, supervisory authorities and the financial sector. For a complete overview of these actions, please refer to the report.

AFM Trend View 2019

Not only DNB, but also the AFM has been active in providing a vision on the supervision of the financial markets. In October 2018, the AFM published its '**Trend View 2019**' online. It identifies important trends and associated risks in the financial sector. The explorations in Trend View 2019 contribute to determining the supervision priorities of the AFM, which will be translated into its supervision activities calendar for 2019.

In Trend View 2019, the AFM has highlighted three trends that put a number of (emerging) risks and supervision issues in perspective. These are trends that are currently relevant to the interpretation of a number of ongoing changes in the financial sector. These are the following trends:

1) political uncertainty;
2) digitisation of the financial sector;
3) transition to a sustainable society and economy.

The underlying risks and points for attention associated with these trends are listed separately below.

Political uncertainty

- Brexit and other examples of problematic international cooperation;
- uncertainty about monetary policy;
- potential trade war between world powers.

Digitisation of the financial sector

- increasing use of data when using technology-driven innovations in the financial sector;
- increase in cybercrime;
- increasing pressure on the gatekeeper function of institutions to prevent financial crime;
- the rise of players from other sectors as a result of an increase in outsourcing of tasks and activities;
- risks (and opportunities, incidentally) associated with digital possibilities for exerting influence.

Transition to a sustainable society and economy

- growing retail offering of sustainable financing and investment funds;
- points for attention in integrating sustainability in asset management and capital markets;
- increasing importance of non-financial information and reporting;
- policy developments and their implications for financial supervision.

Financial Markets (Amendment) Act 2019

The aim is for the Financial Markets (Amendment) Act 2019 to enter into force in mid-2019. The **legislative proposal** and the accompanying explanatory memorandum were consulted in January 2018.

The legislative proposal includes a provision that allows DNB and the AFM to amend, withdraw or limit, in whole or in part, licences granted by them, or to attach further requirements to them, if the licence holder does not comply or no longer complies with the rules laid down in or pursuant to the Sanctions Act 1977. Under current law, the supervisory authority is entitled to revoke a licence if the rules relating to business integrity are no longer complied with. Generally, non-compliance with the Sanctions Act 1977 will lead to the conclusion that the licence holder does not comply with business integrity standards. The explicit regulation of this ground for withdrawal prevents possible discussions in the event of a withdrawal due to non-compliance with the obligations in the Sanctions Act 1977 and also expresses the importance attached to compliance with the Sanctions Act 1977.

Financial Supervision (Funding) Act 2019

The **Financial Supervision Funding Act 2019** revised and replaced the current Financial Supervision Funding Act. The new Act was published in the Bulletin of Acts and Decrees on 15 November 2018 and entered into force on 1 January 2019 (with the exception of Article 21). The revision concerns the distribution of costs among the supervised (legal) persons. The Financial Supervision (Funding) Act 2019 includes the new principles for passing on the costs of supervision to the sector. An opportunity has also been taken to amend the structure of the Act to ensure that in the future the supervision practice and the statutory cost allocation are more closely aligned. From 2019, the allocation of supervision costs will be further detailed in lower regulation. This will enable the necessary adjustments to be implemented more quickly.

- The Financial Supervision (Funding) Decree 2019 determines the allocation of the costs of ongoing supervision (**consulted** in February and March 2018, Council of State issued an opinion on 28 November 2018). This Decision has not yet entered into force on 1 January 2019.
- The Regulation on the funding of financial supervision of one-off transactions determines the rates for one-off transactions. This Regulation has come into force on 1 January 2019.

We advise financial undertakings to carefully study the changes that the Regulation entails for one-off transactions. Many rates are going up sharply. This applies, for example, to certain licence applications (see the various sections in this Outlook). But eligibility tests, for example, will also become considerably more expensive; these costs will now amount to €2,900 instead of €1,500. Reliability tests, on the other hand, will be less expensive; this rate will be lowered to €700.

Review and Extension of Act on remuneration policy for financial undertakings

In July 2018, the Minister of Finance presented the **Report** on the review of the Remuneration Policy (Financial Undertakings) Act (Wbfo). This Act entered into force in early 2015 and the 20% bonus ceiling a year later. The review consists of a report compiled by a team of external researchers and a report compiled by stakeholders and experts. Questions were also submitted via DNB, the AFM and sector associations. The review examines the effectiveness, side effects and feasibility of the Wbfo.

The Minister concludes that the Wbfo was reviewed too early to draw sufficient conclusions about its influence on, for example, the establishment of banks or labour mobility. The same applies to the development of remuneration in the financial sector. According to the Minister, there was no evident abuse of the legal possibilities to deviate from the bonus ceiling. However, the Minister did announce that he would enter into talks with market parties that use the possibility to deviate from the bonus ceiling for employees who are not covered by the collective labour agreement. The Minister also announced that the Wbfo would again be reviewed in five years' time.

The Social **consultation** on remuneration measures for the financial sector was also held in the summer of 2018. In this consultation, proposals for three additional measures relating to fixed remuneration were consulted, namely:

- an extension of the claw back of part of the fixed remuneration of directors in the event that State aid is granted to the bank or insurer;
- a statutory obligation to retain elements of fixed remuneration whose value depends on the market value of the own undertaking for a number of years;
- a statutory obligation requiring financial undertakings to include in their remuneration policies the relationship between the remuneration of directors and employees and the social function of the undertaking.

In a **letter to Parliament** dated 17 December 2018, the Minister of Finance announced three statutory measures to tighten up remuneration policy in the financial sector. These are:

1. An obligation to hold shares and (certain) other components of fixed remuneration, the value of which depends on the market value of the own company for directors and employees of financial companies for 5 years.

2. An obligation for financial undertakings to describe in their remuneration policy how the company takes account of the relationship between the remuneration of directors and employees and its function in the financial sector and its position in society, and to account for this.
3. A restriction of the exception to the bonus cap for people who do not fall under a collective agreement. The exception will only be available for exceptional cases, and in any event should not be applied to persons performing internal monitoring functions or those directly engaged in providing financial services to consumers.

The Minister is also considering the introduction of a statutory obligation to recover part of the fixed remuneration from directors of systemically important banks in the event of state aid (claw back). The Advisory Division of the Council of State has been asked to provide information on the European law sustainability of such a claw back. The response of the Council of State and information to the House of Representatives are expected in the first half of 2019.

ESA Work Programme 2019

Last year, the Mixed Committee of the European Supervisory Authorities (EBA, ESMA and EIOPA) published its **2019 Work Programme**. In 2019, the Mixed Committee will focus, among other things, on providing guidance for the PRIIPs Regulation, Fintech, sustainable finance and securitisation. In the area of anti-money laundering and counter-terrorist financing (AML/CFT), the Mixed Committee will focus on reviewing and updating guidance where necessary, as well as improving supervision cooperation in that area.

Revision EMIR & adjustment of supervision of central counterparties

In 2017, the European Commission presented two proposals to amend the EMIR Regulation. These amending regulations were a response to a study by the European Commission into the effectiveness, efficiency and costs of EMIR. The **regulation** aimed at revising EMIR to eliminate the disproportionate effects of clearing and reporting obligations under EMIR on certain market parties.

In addition to the regulation amending EMIR, a **regulation** was also presented to adjust the supervision of Central Counterparties (CCPs). A CCP is a private market party that places itself between the original counterparties of a derivatives contract. With this regulation on CCPs, the European Commission aims to centralise and strengthen supervision of cross-border infrastructure both within and outside the EU. This is also relevant in the context of Brexit, since more transactions outside the EU will be cleared after Brexit. In addition, there is a risk that countries that have been declared equivalent may change their legislation and supervision practice after this declaration. The European Commission does not currently have sufficient control over this.

The Commission proposes to give ESMA and central banks a more important role in supervision alongside national supervisory authorities. In addition, it is proposed to introduce certain measures to mitigate risks of non-EU CCPs by subjecting such CCPs to supervision by ESMA and relevant central banks. To strengthen supervision of EU CCPs, it is proposed to establish a new supervisory body within ESMA, the CCP Executive Session (CES). This will operate alongside the existing EMIR supervisory bodies. The CES will take over a number of tasks currently carried out at national level. For non-EU CCPs, it is proposed to classify them into low or high risk, which risk will determine the supervision of the CCPs. This could go as far as obliging a non-EU CCP to establish itself in the EU in order to continue offering its services there.

The proposal has recently been amended, please refer to the latest **version**. The regulations have therefore not yet been definitively adopted. Also, the expected date of entry into force is still unclear.

European framework for the recovery and settlement of central counterparties

In 2016, the European Commission published a **proposal** for a Regulation establishing a European framework for the recovery and settlement of central counterparties (CCPs). The purpose of this Commission proposal is to increase the recovery possibilities for CCPs, so as to ensure, as much as possible, continuity in the conduct of their business and thus also to safeguard financial stability. After all, CCPs perform critical functions in the financial system and discontinuation of these functions may pose problems for financial stability.

Despite being on the European Commission's work agenda for 2018, the regulation had not yet entered into force at the time of writing this Outlook. We are curious to see what 2019 will bring for CCPs in this area.

Amendment applicable legal system under ISDA documentation

UK law generally applies to the ISDA documentation of European parties for swap and derivative transactions. Partly against the background of Brexit and the consequences this will have for contracting parties, the International Swaps and Derivatives Association (ISDA) is currently working to make Irish and French (and even possibly Dutch) legislation possible as applicable law. Since the amendment of the applicable law in existing contracts also requires the cooperation of the other party, this may (or will) in practice lead to discussions between the contracting parties. ISDA may still have a role to play here, but that remains to be seen.

Establishment of European Investment Stabilisation Function (EISF)

On 31 May 2018, the European Commission published the **proposal** for a regulation establishing a European Investment Stabilisation Function. This draft regulation regulates the establishment of the European Investment Stabilisation Function (EISF). This stabilisation function aims to help Member States to better respond to rapidly changing economic conditions and to stabilise their economies in the event of major asymmetric shocks. The European Commission has called for the creation of such a stabilisation function in its Communication on 'new budgetary instruments for a stable euro area within the Union framework'. The stabilisation function is designed for euro area Member States and, following a positive decision by these members, should also be open to non-euro area Member States that have joined the ERM II exchange rate mechanism.

According to the proposal in question, the European Commission would acquire the power to provide financial support to Member States facing a severe asymmetric shock by borrowing on the financial markets or from financial actors for the purpose of lending these funds in support of the Member State concerned. It also provides for an interest-rate subsidy to cover the interest costs incurred by the beneficiary Member State on the loan. The European Commission intends applying the regulation from 1 January 2021.

Proposals to strengthen ESAs and the European Systemic Risk Board (ESFS review package)

In 2017, in the context of the completion of the capital market union, the European Commission presented a **proposal** for the revision of the European Supervisory Authorities (ESAs) and the European Systemic Risk Board (ESRB), the 'ESFS review package'. This proposal aims at better integrating the European supervision framework by strengthening the role of the ESAs. To this end, eight different European regulations and directives are amended.

The powers of the ESAs are strengthened in six areas. The tools at the ESAs' disposal to achieve supervision convergence will be strengthened. In addition, the ESAs will have a stronger advisory role in decision-making on equivalence of third countries. The ESAs will acquire a stronger coordinating role on FinTech and environmental, social and governance (ESG) issues. The ESMA's direct supervision powers will be complemented, for example in the context of supervision of a number of categories of prospectuses, specific investment funds and managers of key benchmarks. The role of EIOPA will be strengthened in coordinating the authorisation of internal risk models of (re-)insurers within Solvency II. Finally, the ESAs will be given more powers to carry out stress tests, as already available to EBA.

In 2018, the Commission again **amended** this proposal, this time to give the ESAs (in particular EBA) more powers to combat money laundering and terrorist financing through the use of the financial system (see **Integrity**). The date of entry into force is still unclear, and we recommend that you monitor these developments.

Benchmark Regulation – transitional periods expire

On 1 January 2018, the Benchmark Regulation entered into force in the EU Member States. The Benchmark Regulation regulates the provision and use of benchmarks and the provision of input data for a benchmark. The Benchmark Regulation makes the offering of benchmarks subject to the requirement of having a licence and prohibits financial undertakings from making use of benchmarks without a licence. The Benchmark Regulation comprises rules for the development, registration, managing and monitoring of benchmarks. A benchmark may only be used if (i) the provider of the benchmark is registered and/or (ii) the benchmark is included in an ESMA register.

The Benchmark Regulation provides for a transitional regime, which in short means that benchmarks that already existed on 1 January 2018 may continue to be used until 1 January 2020. Thereafter, the provider of the benchmark and/or the benchmark itself must be included in an ESMA register. Non-EU benchmarks may continue to be used until 1 January 2020.

In view of the transitional regime, we advise parties that use a benchmark to check whether they can continue to do so until 1 January 2020.

European Commission Action Plan: financing sustainable growth

On 8 March 2018, the European Commission presented the **Action Plan Financing Sustainable Growth**. This plan follows recommendations of a group of experts on sustainable financing who, in early 2018, presented the results of their research and made several recommendations for a European strategy to finance sustainable growth. This action plan has three objectives:

1. redirecting capital flows towards sustainable investments;
2. managing financial risks arising from climate change, resource depletion, environmental degradation and social issues;
3. promoting transparency and long-term thinking among financial institutions.

Building on this action plan, a number of concrete proposals have been presented:

- a proposal for a Regulation on a framework for sustainable investment (see: **Issuers**);
- a proposal for a Regulation on low carbon benchmarks with positive carbon balance (see below);
- a proposal for a Regulation on sustainability considerations in investment and advice (see: **Managers**); and
- proposals to amend MiFID II and the IDD to make ESG (environmental, social and governance) criteria mandatory in a customer's suitability test.

Current Benchmark Regulation; some amendments envisaged

On 25 May 2018, the **proposal** was introduced at European level to amend the current Benchmark Regulation in connection with low-carbon benchmarks and positive carbon impact benchmarks. This proposal is part of a wider package of European Commission initiatives on sustainable development.

The proposal introduces the following two new types of benchmarks:

- **'low-carbon' benchmarks**: a benchmark where the underlying assets contribute to lower CO_2 emissions compared to the assets underlying the comparable 'normal' benchmarks; and
- **'positive carbon impact benchmarks'**: in this benchmark, the underlying assets represent an absolute saving in CO_2 emissions in the sense that the underlying assets only contain components with emission reductions greater than the CO_2 emissions.

The proposal adds a new appendix to the Benchmark Regulation, which provides that benchmark administrators shall record and disclose the methodology they use for their calculation of aforementioned benchmarks. The appendix also defines the information that must at least be included in the description of the methodology. In addition, the administrator must explain how the low carbon benchmark differs from the underlying standard index and the extent of the positive carbon impact of each underlying asset included in the benchmark. Furthermore, the European Commission intends adopting delegated acts setting minimum requirements for 'low-carbon benchmarks' and 'positive carbon impact benchmarks' for the criteria to be considered when selecting and weighting the underlying assets and the method to be used to calculate CO2 emissions and savings.

The underlying proposal (and other related legislative acts) aims to integrate ESG (environmental, social and governance) considerations coherently into the investment and advisory process across the various sectors. This should ensure that all financial market participants—such as managers of ABIs, insurers and investment advisors—who are mandated by their clients or beneficiaries to make investment decisions on their behalf incorporate ESG considerations into their internal processes and inform their clients accordingly. A **compromise proposal** was submitted on 14 December 2018, introducing some further changes to the original proposed amendment

Agenda for the financial sector

On 17 December 2018, the Minister of Finance presented the **Agenda for the financial sector** containing the most important measures for this government's term of office. In this agenda, the Minister focuses on (i) stability, (ii) integrity and (iii) innovation.

In the context of innovation, the Minister included a number of objectives relating to sustainable financial institutions. First, the aim is to devote more attention to sustainability in supervision by encouraging DNB and the AFM to integrate these issues into their supervision. At the European and global level, too, more attention will be devoted to sustainability in supervision. In addition, the financial sector itself will also be expected to adopt an active attitude. Financial institutions are encouraged to report their carbon footprint and to comply with the agreements made in the Climate Agreement regarding reduction targets. In 2019, a green government bond will also be introduced that can contribute to this objective. A final sustainability objective concerns consideration for broader sustainability criteria. The Minister hopes to encourage financial institutions to report broadly on the ESG criteria.

AFM Exploration of vulnerabilities in accountancy sector structure and announcement of the 'Committee on the Future of the Accountancy Sector'.

The AFM has explored the vulnerabilities in the structure of the accountancy sector. This study resulted in a **report** by the AFM, in which the possible causes of the underperformance of statutory audits were examined from the economic theory of market failure. The AFM concludes as follows:

- There are indications in the scientific literature that the current structure of the accountancy sector contains several sources of market failure, which (may) have a negative influence on the quality of statutory audits.

- There are possibilities to address market failures within the current structure. The negative impact of market failure is reduced by quality improvement measures, but sources of market failure remain.
- Sources of potential market failure can be eliminated by introducing alternative structure models. This requires significant interventions in the market for statutory audits or in the structure of audit firms. Further analysis is therefore needed.

Following the AFM report, the Ministry of Finance announced, in a **letter** dated 21 November 2018, his intention to create an independent committee ('Committee on the Future of the Accountancy Sector') to examine how the quality of statutory audits can be improved in a sustainable manner.

The committee will be charged with investigating and advising on the question of how the quality of statutory audits can be guaranteed in the long term and advising on any desired policy and/or legislative changes and their legal feasibility. In doing so, the committee will consider possible adjustments to the structure of the market for statutory audits and/or audit firms. A number of structure models to be used will be prescribed by the Minister of Finance, including the audit-only model, the intermediary model and government audits of public institutions. But the committee need not confine itself to this, it can also examine other structural solutions that guarantee the quality of statutory audits. The study will have to consider the undesirable (side) effects of the measures and their proportionality for the sector and audit customers (both for public institutions and undertakings).

The Minister of Finance expects the committee to be able to start its study in early 2019. The committee is then expected to send its advice to the Minister within 12 months. This advice, together with a report on the other OIE audit organisation to be issued by the AFM in 2019 and a probable third report by the Audit Monitoring Committee, will provide more insight into the effect of the measures taken so far and the need for additional measures to improve the quality of the statutory audit.

Consequences of Baumeister ruling

In its **Baumeister ruling** of 19 June 2018, the Court of Justice of the European Union ruled on the interpretation of the concept of 'confidential information' in the MiFID II provision on professional privilege. It is important to note that the CJEU states that neither the context nor the purpose of the European law on national supervision of financial services suggests that all information provided — in this case — to the German supervisory authority (BaFIN) is by definition confidential. In the event of disputes, the national court must assess which information qualifies as confidential and is therefore covered by professional privilege and which is not. Disclosure must not prejudice the interests of the provider and third parties or the proper functioning of supervision. For information older than five years, the CJEU reverses the burden of proof. In principle, these data no longer need to be confidential, unless it is convincingly demonstrated that disclosure would harm essential interests. In the event of disagreement, the national court must decide.

Although the ruling concerns the interpretation of a provision of MiFID II that applies to investment firms, it is clear that this interpretation of the concept of 'confidential information' is also important for the interpretation of the professional privilege of DNB and the AFM, which it must observe with regard to parties other than investment firms.

In any event, it has become clear that it is an illusion that all information provided by market parties to supervisory authorities is by definition considered confidential.

Consequences of Brexit

On 29 March 2019, the United Kingdom will officially leave the EU. At present there is still a great deal of uncertainty about a possible deal between the United Kingdom and the EU. We would like to draw your attention to a number of developments that are (possibly) relevant in the context of Brexit. These are discussed below.

AFM

The **AFM** states that companies still need to take into account a *no-deal* scenario (a 'hard Brexit') and prepare for any transition risks. Aspects that parties should take into account include:

- **Outsourcing:** Parties that have outsourced services to UK institutions may no longer meet their licensing requirements after a no-deal Brexit. Services may in principle only be outsourced to companies in a 'supervisory regime that is declared equivalent', which will not include the UK after a hard Brexit. This is particularly relevant for asset managers.
- **Market access:** A hard Brexit will immediately stop the market access of parties from the UK to the EU and vice versa. The result is a limitation in transaction opportunities, which may lead to higher risks, fewer investment opportunities and lower returns for parties. The AFM advises parties to consult with their UK service providers and, if necessary, to look for an alternative.
- **Clearing obligation:** Parties entering into derivative transactions to which the clearing obligation of EMIR applies should take into account the fact that, after a no-deal Brexit, they can no longer perform this obligation with a CCP established in the United Kingdom.
- **Ratings:** Credit rating agencies (CRAs) run the risk that ratings produced in the United Kingdom will no longer be valid in the EU. The three main CRAs with a 90% market share are based in London and need to relocate their operations to the EU.

Branches

The European Commission states that, following Brexit, **branches** in the EU of a company incorporated in the United Kingdom will qualify as branches of companies from third countries. They will therefore be subject to new rules and may require new approvals.

Passporting

The UK supervisory authority FCA provides a number of possible scenarios for the passporting of entities under its supervision:

- **Implementation period:** In their agreement, the EU and the UK have agreed on an implementation period, which will start on 29 March 2019 and last until the end of December 2020. During this period, companies and funds can continue to use their passporting rights as they currently do. These companies must also comply with both current European law and future European law that will enter into force before December 2020.
- **Consent regime:** In the event of a no-deal scenario, the United Kingdom will qualify as a 'third country'. In this context, the UK supervisory authority proposes a **temporary consent regime** for companies that carry out activities in the United Kingdom from the EEA by means of passporting rights. The intention is to ensure that the business operations of these companies are disrupted as little as possible. This gives companies and funds a limited period of time after Brexit to apply for a full licence in the United Kingdom. To this end, they must inform the supervisory authority in good time of their wish to be covered by this temporary consent regime. The **website** of the FCA contains information on how – prior to 29 March 2019 – notification must be made.

For banks and insurers using passporting rights, the Bank of England has published more information on its **website**. See also the **Banks** and **Insurers** sections in this Outlook.

Existing contracts

Brexit will have an impact on contracts concluded before Brexit (see **letter** from the European Parliament). This could include OTC derivatives contracts, but also insurance agreements. Many insurance contracts have a short term of, for example, one year. For the limited number of agreements that continue after Brexit, they remain valid. With regard to non-cleared OTC derivatives, many contracts expire before Brexit. In principle, other derivatives contracts remain valid. This has been confirmed by the Governor of the Bank of England.

Statutory controls

The European Commission has issued a **notice** setting out the consequences of Brexit for the performance of statutory audits. As soon as Brexit enters into force, UK auditors will no longer be considered as 'statutory auditors' under the Directive on statutory audits. This means that statutory audits prescribed in a Member State under this directive may no longer be carried out by UK auditors. In addition, this has consequences for the registration of auditors and audit entities. A UK auditor wishing to provide a report on the annual accounts of a company incorporated outside the EU whose securities are admitted to trading on a regulated market in an EU Member State must be registered in that Member State under the Statutory Audit Directive. Otherwise the report has no legal effect.

Post-transactional financial services

The European Commission has in a **notice** on post-trade financial services set out the consequences of Brexit when EMIR, MiFIR, the SFT Regulation and the Settlement Finality Directive no longer apply to the United Kingdom. Aspects that parties should take into account include:

- Derivatives traded on a regulated market in the United Kingdom will no longer be 'exchange-traded derivatives' under EU law because they are not traded on a regulated market in the EU or in an equivalent third country. As a result, they will be classified as OTC derivatives.
- OTC derivative transactions must meet all the conditions set out in EMIR, including the EMIR clearing obligation as soon as it is established.
- OTC derivatives to be cleared should be cleared by a CCP authorised and established in an EU Member State or in a third country recognised by ESMA. CCPs in the United Kingdom must first be recognised before they can comply with this clearing obligation.
- Exposures from derivative positions held by EU credit institutions and investment firms in CCPs not recognised in third countries shall be subject to a higher capital surcharge.
- Derivative transactions that are subject to a reporting obligation under EMIR or the SFT Regulation must report to a trade repository from a third country that is registered in the EU or recognised by ESMA. From Brexit onwards, UK trade repositories will be third country trade repositories.
- After Brexit, systems will lose their 'designated system' status under the Settlement Finality Directive, including the associated rights and benefits.

ESMA proposal to amend RTS EMIR

Also in the context of EMIR, ESMA has made a number of **preparations** in anticipation of Brexit. ESMA has therefore proposed amending three RTS in relation to EMIR. In its proposal, ESMA introduces a limited exemption to allow renewal of a number of non-centrally cleared OTC derivatives contracts with non-EU counterparties during a specific time frame. This would allow EU parties with UK counterparties to replace their counterparty with one established in the EU without having to comply with the normal clearing obligation. Parties would have 12 months to renew their contract. These changes would only apply if the United Kingdom does not reach an agreement with the EU, i.e. in the case of a no-deal scenario.

Brexit Collective Act

Halfway through November 2018, the Minister of Foreign Affairs proposed the so-called '**Brexit Collective Act'**. In short, this legislative proposal gives the Dutch government the power to take emergency measures for a year after Brexit, whereby it is allowed to deviate from what is currently laid down in the law. There is much criticism of this Act, so whether and, if so, how it will be implemented is still uncertain at the time of writing.

The above contains only part of what is relevant in the context of Brexit. It is not an exhaustive overview. In each chapter of this Outlook we will touch on a number of issues that are specifically relevant to the type of financial undertaking in question

Brexit; European Commission activates contingency plan

On 19 December 2018, the European Commission **decided** to put forward its 'no deal' contingency plan in view of the continuing uncertainty over the ratification of the EU-UK withdrawal agreement. This contingency plan includes 14 measures in different areas where a 'no deal' scenario would cause serious disruption to EU citizens and businesses, including in the area of financial services.

The European Commission notes in the contingency plan that, after a thorough examination of the risks of a 'no deal' scenario in the financial sector, only a few emergency measures are needed to safeguard financial stability in the EU. In this context, the European Commission has adopted the following decisions in the 'no deal' contingency plan, which will apply if the withdrawal agreement is not ratified by 29 March 2019:

- A temporary and conditional equivalence decision for a fixed, limited period of 12 months to ensure that there is no immediate disruption to central clearing of derivatives.
- A temporary and conditional equivalence decision for a fixed, limited period of 24 months to ensure that there is no disruption to central depositary services for EU operators currently using UK operators.
- Two delegated regulations to facilitate the renewal for a fixed 12-month period of certain OTC derivative contracts when a contract is transferred from a UK counterparty to an EU counterparty.

AMLD5

Over the past year, the European and Dutch supervisory authorities have published a great deal of relevant guidance in the area of integrity. In addition, 2019 will probably see the upcoming amendment of the Fourth Anti-Money Laundering Directive. The Fifth Anti-Money Laundering Directive (AMLD5) must be implemented in the Netherlands by 10 January 2020. For an overview of the consequences of AMLD5 and other relevant developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

Financial Markets Legislation Important Information For Payment Processing Institutions In 2019

Cyber security

Target2 Instant Payment Settlement

CPMI report Reducing the risk of wholesale payments fraud related to endpoint security

CPMI report Cross-border retail payments

SEPA Instant Credit Transfer Rulebook

Review and extension of Act on remuneration policy for financial undertakings

Cyber security

As in 2018, cyber security will again be high on the agenda of supervisory authorities for payment processing institutions in 2019. Both DNB and the ECB have identified IT and cyber risk as one of the main risks in the financial sector in their supervisory priorities for 2019 and will monitor these risks (see: **General** and **Banks**).

International

As supervisor for a number of systemically important payment systems (SIPS) in the euro area, the ECB also deals with the cyber resilience of financial market infrastructures (FMIs) in the Euro area. In doing so, the ECB builds on work taking place at an international level, for example on the CPMI-IOSCO Guidance on resilience for financial market infrastructures of 2016 (which complements the Principles for financial market infrastructures (PFMIs)) and the G7 fundamental elements of Cybersecurity of 2016. In December 2018, the ECB published a **report** entitled Cyber resilience oversight expectations for financial market infrastructures, with the aim of:

- providing FMIs with detailed steps on how to operationalize the CPMI-IOSCO Guidance, ensuring they are able to foster improvements and enhance their cyber resilience over a sustained period of time;
- providing supervisors with clear expectations to assess the FMIs for which they are responsible;
- providing a basis for meaningful discussions between the FMIs and their respective supervisors.

The report includes expectations regarding the governance framework, identification of critical systems and processes and dependence on external parties, detection of cyber incidents, measures to mitigate and control the impact of a cyber incident, response to and recovery from cyberattacks, testing the cyber resilience framework and increasing awareness. We recommend payment processing institutions to study the ECB report and assess to what extent the internal risk management processes are in line with the ECB's expectations.

National

As of 1 January 2018 payment processing institutions are, as vital providers, obliged to notify the Minister of Justice immediately of a cyberattack (on the basis of the Data Processing Act and the Cyber Security Notification Obligation Act and the Cyber Security Notification Obligation Decree). On 9 November 2018, the **Network and Information Systems Security Act** entered into force, implementing Directive (EU) 2016/1148 on security of network and information systems. Under this new Act, payment processing institutions will remain obliged to report (i) incidents with significant consequences for the continuity of services, (ii) breaches of the security of network and information systems that *could possibly* have significant consequences for the continuity of services ('near misses').

Target2 Instant Payment Settlement

In November 2018, the ECB launched the TARGET2 Instant Payment Settlement (TIPS) system. By participating in this system, banks and payment processing institutions and affiliated payment service providers can offer their customers real-time transfers in euro. TIPS supplements the existing TARGET2 network and offers the possibility of final and irrevocable settlement of payments in central bank money. It is based on the SEPA instant credit transfer scheme. The criteria for joining TIPS are similar to the criteria for joining TARGET2. Furthermore, since 30 November 2018 new bilateral conditions have also been applicable to TARGET2.

CPMI report Reducing the risk of wholesale payments fraud related to endpoint security

In May 2018, the CPMI published its **report** on strategy for detecting and preventing wholesale payments fraud. The strategy contains seven elements that comprehensively address the topics of fraud prevention, detection, response and communication.

CPMI report Cross-border retail payments

In February 2018, the CPMI published a **report** on cross-border retail payments. In this report, the CPMI called for improvements to the infrastructure for such payments. Mobile payments and e-banking have made cross-border payments easier, but towards the future it is essential to have more diversity in back-end providers, i.e. more diversity and better choices on the clearing and settlement side.

SEPA Instant Credit Transfer Rulebook

A **new version** of the SEPA Instant Credit Transfer Rulebook will apply as from 17 November 2019. This version is applicable until November 2021. Annex IV of the new Rulebook contains an overview of the changes compared to the previous version from 2017.

Review and extension of Act on remuneration policy for financial undertakings

A review of the Remuneration Policy (Financial Undertakings) Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) took place in the summer of 2018. In addition, in a **letter to Parliament** dated 17 December 2018, the Minister announced three statutory measures to tighten remuneration policy in the financial sector. These measures are:

1. An obligation to hold shares and (certain) other components of fixed remuneration, the value of which depends on the market value of the own company for board members and employees of financial companies for 5 years.
2. An obligation for financial companies to describe in their remuneration policy how the company takes account of the relationship between the remuneration of board members and employees and its function in the financial sector and its position in society, and how to account for this.
3. A restriction of the exception to the bonus cap for persons who do not fall under a

collective labour agreement. The exception will only be available for exceptional cases, and in any event should not be applied to persons performing internal control functions or persons directly engaged in providing financial services to consumers.

For a detailed overview of the developments with regard to the remuneration policy, we refer to the **General** section of this Outlook.

Financial Markets Legislation
Important Information For Banks In 2019

SSM: ECB Risk assessment

SSM: ECB Supervisory priorities

DNB Supervisory Priorities 2019

EBA Priorities 2019

SRM: SRB Priorities 2019

SSM: Harmonisation

Legal protection within the SSM

CRD V and CRR II

Adjustment BRRD and SRMR

SRB MREL policy for 2019

Basel 3.5

Amendment CRR in connection with reduction of Non-Performing Exposures

Entry into force of the Securitisation Regulation

Proposal Regulation Framework for Sustainable Investments

Benchmark Regulation – transitional periods expire

Amendments to current Benchmark Regulation

Developments Deposit Guarantee Scheme

ECB Guides ICAAP and ILAAP

ECB Guide to the licensing of FinTech banks

EBA Guidelines on suitability

EBA Guidelines on Non-Performing and Forborne Exposures

EBA Guidelines on fraud reporting

EBA Guidelines on outsourcing

EBA Guidelines on ICT and security risk management

Amendments to the Key Information Document (KID) for PRIIPs proposed by ESAs

Financial Markets (Amendment) Act 2018

Banking Details Reference Portal Act

Amendment to the Bankruptcy Act regarding participation in payment and securities settlement systems in third countries

Approval right of Minister of Finance with regard to bankers' remuneration

Agenda for the financial sector

DNB Legislative Letter 2018

Review and extension of Act on remuneration policy for financial undertakings

DNB investigation terrorism financing

AFM Information Provision Policy Rule

Consequences of Brexit

AMLD5

In 2019 there will again be many new regulations for banks. This concerns statutory regulations, but also more detailed technical standards and interpretations by legislators and supervisory authorities, both at European and national level. In order to be able to limit the scope of this chapter, we had to make a selection. In this Outlook 2019, we will only discuss developments in supervisory legislation that are generally important for the banking sector.

SSM: ECB risk assessment

In October 2018, the European Central Bank (ECB) published its annual **risk assessment** for the SSM for the year 2019. This risk assessment is used, inter alia, to determine the supervisory priorities of the ECB and national banking supervisors. This risk assessment is prepared by the ECB in cooperation with national supervisory authorities. This risk assessment can be useful in predicting which general risks within a bank will receive additional attention from supervisors in 2019. The ECB has identified several key risk drivers that entail the most risk for banks in the eurozone. The three most prominent risk drivers are:

1. **Geopolitical uncertainties:** The ECB sees geopolitical uncertainties as an increasing risk for global financial markets and to the economic outlook within the euro area. Political uncertainties have increased in some euro area countries. Brexit also entails various risks, including business continuity and transitional risks, contract continuity, risks of regulatory arbitrage related to national differences in regulations. Banks and supervisors need to continue their contingency planning and preparations for Brexit. There are also concerns about increasing regulatory fragmentation, increasing trade protectionism, and a possible escalation of trade disputes.

2. **Non-Performing Loans (NPLs):** Despite visible improvements in asset quality at banks, the high level of NPLs remains a concern for some significant banks in the euro area. High numbers of NPLs constrain these banks' balance sheets, profitability and capital. To date, significant progress has already been made in reducing the number of NPLs in significant banks. Nevertheless, the current level of NPLs is still too high compared to international standards. Therefore, reducing the number of NPLs remains an important priority in banking supervision. Another point for attention for the supervisors is to prevent future accumulation of NPLs due to the current search for yield by banks. Easing of credit standards for loans was a visible trend in 2018. Leveraged loan issuance in the euro area picked up, as well as covenant-lite loans and unsecured loans.

3. **Cybercrime and IT disruptions:** Banks are increasingly exposed to cyber risks. Banks are under pressure to modernise their core IT infrastructure in order to reduce costs, become more efficient, improve the quality of the customer's experience and compete with FinTech/BigTech companies. Cyber incidents can lead to financial losses and can even have a systemic impact.

Other risk factors identified by the ECB are:

- risk of an abrupt and significant repricing in the financial markets (the high search for yield resulted in high asset valuations in some markets);
- solvency of central counterparties (which may pose a systemic risk);
- the low interest rates (which affects the balance sheet structure of banks; however, the ECB expects aggregated net interest income to rise again in 2019 and 2020);
- regulatory initiatives (which may challenge profitability in the short term, but increase resilience and stability in the medium and long term);
- economic growth prospects (which seem to improve significantly, although structural reforms are needed in euro area countries);
- the sustainability of public sector debt (despite the current cyclical recovery, stock imbalances still remain elevated in several countries, leaving them vulnerable to potential repricing of sovereign risk; and

- lending for residential real estate (some vulnerabilities are still visible and relaxation in lending standards regarding LTVs and debt service-to-income ratios on new loans may have resulted in higher credit risk).

In addition to these risks, the ECB states that the following issues also deserve careful attention in supervision:

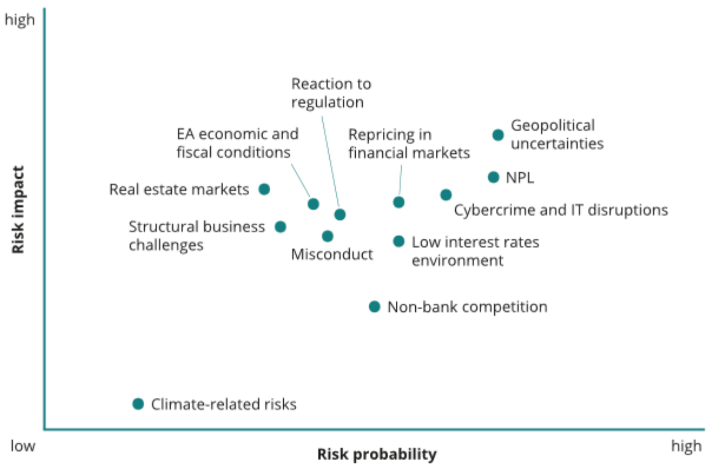
- misconduct risks: the combination of stricter rules for the protection of personal data and the ongoing search for yield may lead to a larger number of events in which behavioural risk plays a role;

- structural business challenges: there are structural weaknesses in the business operating environment of SSM banks, as well as the rigidity of the cost structure which is weighing on banks' efficiency;

- competition from non-banks: FinTechs, insurers and other organisations enter the lending market, potentially affecting credit margins over time. Furthermore, BigTechs may be a strong competitor due to their vast client database; and

- climate-related risks: banks can be impacted indirectly, but nonetheless materially, by more frequent and severe extreme weather events or by the ongoing transition to a low-carbon economy.

The ECB has visualised the risks as follows:



SSM: ECB Supervisory priorities

At the end of October 2018, the ECB published not only its risk assessment, but also its (resulting) **supervisory priorities** for the year 2019. In order to ensure that supervised institutions address the risks identified in the ECB's 2019 risk assessment, the ECB has identified various supervisory priorities for the year 2019.These largely build on those of 2018 and can be summarised as follows:

- Credit risk:
  - **Follow-up on NPLs:** The ECB notes that progress has been made in reducing the number of NPLs, but that the number of NPLs is still too high. Therefore, the ECB will continue its work in this area.
  - **Credit underwriting criteria:** In addition, the ECB will assess the quality of banks' lending practice and lending standards. The quality of specific asset class exposures will be examined through dedicated on-site inspections related to areas such as commercial real estate, residential real estate and leverage finance.

- Risk management:
  - **Continuation TRIM:** The ECB intends to continue the targeted review of internal models (TRIM). This aims to reduce the unnecessary variety in the internal models for risk weighted assets and to examine and confirm the appropriateness of banks' approved Pillar 1 internal models. The ECB will conduct a horizontal analysis, prepare a final report and update the existing ECB guide on internal models.
  - **ICAAP/ILAAP:** The ECB guides on ICAAP and ILAAP have been finalised and can be implemented in 2019. The ECB will also work on improving the transparency around the risk-by-risk composition of the Pillar II capital requirements.
  - **IT and cyber risk:** The ECB will continue to assess the IT and cyber risks. To this end, it will launch a number of on-site inspections on IT risk-related topics. Significant institutions will remain obliged to report significant cyber incidents to the ECB.
  - **Liquidity stress test:** The ECB's annual stress test in 2019 will assess the resilience

of banks to liquidity shocks. The individual banks' stress test results will inform the SREP assessments.

- Activities comprising multiple risk dimensions:
  - **Brexit preparations:** Brexit will be a major priority for the ECB in 2019, given the UK's departure from the EU scheduled on 29 March 2019. Supervisors will closely monitor the implementation of banks' Brexit plans. Given the persisting uncertainties, the ECB stresses that each bank individually should be ready for all possible circumstances in its contingency plans. Moreover, the ECB is preparing to take over the direct supervision of a number of institutions that have recently been identified as significant as a result of relocating activities from London to an SSM country.
  - **Market risk:** The ECB will examine to what extent significant institutions are prepared for the Fundamental Review of the Trading Book rules. Banks must have their systems ready in time to comply with the new market risk framework.

We advise banks to consult the Joint Supervision Team (JST) or the designated contact person within DNB on the supervision planning for 2019 and, where necessary, to anticipate this planning.

DNB Supervisory Priorities 2019

In November 2018, DNB published its **Supervision Outlook 2019**, including its supervisory priorities for 2019. In addition to DNB's cross-sectoral key points (see: **General**), DNB also set national priorities for banks. Banks may be confronted with questions and surveys related to these topics. In addition to this, DNB will of course also include in its supervision the SSM priorities set by the ECB.

- **Brexit:** DNB expects supervised institutions to identify and manage the risks of a Brexit that are relevant to them, so that even in the event of a hard Brexit, the continuity of service provision is not jeopardised and the institutions do not run any material risks.

- **Governance and risk management:** In its supervisory practice, DNB experiences that many banks need to improve their Internal Governance and Risk Management. DNB believes that better design and functioning of the banks' governance and risk management is needed. DNB will devote more attention to this in the SREP and will raise it in regular supervisory dialogues. DNB will also investigate the functioning of internal supervision at a number of banks, with an emphasis on countervailing power.

- **Exposures to emerging markets:** Dutch banks with large exposures to emerging economies (e.g. Turkey, Brazil and India) are potentially vulnerable. As a precautionary measure, DNB asked the relevant banks last year to hold additional capital buffers. This will be maintained as long as necessary and DNB will also insist on additional control measures if necessary.

- **Mortgage portfolios:** DNB sees a relaxation of the lending conditions for mortgage loans. The associated credit risks and management thereof will be taken into account by DNB in the stress test that will be conducted in 2019.

- **Interest-only mortgages:** DNB wants lenders to provide insight into the risks and actively approach customers and point out their future obligations and possibilities. DNB works closely together with the AFM and the ECB on this matter.

- **Targeted Review of Internal Models (TRIM):** This SSM-wide project coordinated by the ECB will be continued and (is likely to be) completed in 2019 (see also ECB Supervisory Priorities 2019). DNB has a role in the execution of this project.

- **Simple, transparent and standardised securitisations:** In January 2019 the new European legislation containing more requirements and higher risk weights for all European securitisations enters into force. At the same time, a specific framework for simple, transparent and standardised (STS) securitisations will come into force, the risk weight of which will be less significantly increased. DNB will be responsible for 'product supervision'.

- **Change capacity**: Current developments require an ability to change on the part of banks. In 2019, DNB will examine the implications of the most important developments for business models and the future role of banks.

- **SSM:** DNB will continue to participate in thematic on-site campaigns in 2019.

- **Integrity supervision:** In 2019, DNB will examine the progress and realisation of the recovery and improvement programmes that banks have set up to prevent involvement in financial and economic crime. In the event of serious findings or delayed recovery, DNB will take enforcement measures where necessary. Also, DNB will investigate and assess to what extent the banks control the tax integrity risks associated with customers and the risk of becoming involved in crime that is socially subversive.

EBA Priorities 2019

In October 2018, the EBA published its Work Programme for 2019, which sets out its goals, priorities and concrete action points for the coming years. The five strategic focus areas for EBA in 2019 are:

1. leading the Basel III implementation in the EU;
2. understanding risks and opportunities arising from financial innovation;
3. collecting, disseminating and analysing banking data,
4. ensuring a smooth relocation of the EBA from London to Paris in the context of Brexit, and
5. fostering the increase of the loss-absorbing capacity of the EU banking system.

Policy work will be performed in relation to further implementing the proportionality principle, strengthening supervisory convergence and integrity within the Single Rulebook, enhancing consumer protection, preparations for the UK's withdrawal from the EU. EBA is expected to publish some 20 new guidelines and recommendations in 2019. We advise banks to monitor the developments.

Furthermore, in March 2018 the EBA published its Roadmap Fintech, which sets out its priorities for 2018 and 2019 in the area of FinTech and announced the EBA FinTech Knowledge Hub.

SRM: SRB Priorities 2019

In November 2018, the SRB published its priorities for the year 2019. These fit within its multi-year programme 2018-2020 that was published last year. In 2019, the SRB will focus on further developing resolution strategies and identifying impediments to resolvability, which the banks concerned should address as much as possible. The Minimum Requirement for Own Funds and Eligible Liabilities (MREL) is an important tool in this respect. The key points for 2019 for each objective in the multi-year plan are set out below.

- **Improve resolvability of SRB banks and LSIs:** The resolution plans will increase in number and quality. In this context, the significance of the bank in question in the Banking Union is always examined proportionally. This year, the SRB will also take more binding MREL decisions in which the SRB will determine, among other things, the amount of the MREL for individual banks. Obstacles to resolution will be raised with the banks concerned. The SRB will perform an oversight function for LSIs, whereby the SRB aims to ensure consistent application of resolution activities within the SRM. The national resolution authorities (NRAs) will receive more and more detailed plans from LSIs. The SRB and the NRAs will continue to work closely together.

- **Robust resolution framework:** SRB policy will be further developed in 2019 to support planning and resolution decisions. The SRB will issue policies on nine topics in 2019, which will be included in the 2019 and 2020 resolution plans. Furthermore, the SRB will also draw up operational guidance regarding on-site inspections that it can carry out for resolution planning purposes. The SRB will continue to work with other resolution authorities and relevant bodies, both within the EU and globally.

- **Effective crisis management:** In order to act effectively, the SRB constantly evaluates its actions and decisions. The SRB will also conduct dry runs in 2019, for example, in cooperation with the NRAs.

- **Operationalising the Single Resolution Fund:** In 2019, the IT tools for retrieving data and contributions to the Single Resolution Fund will be improved and further preparations will be made for the possibility of ex-post financing situations. Work will also continue in 2019 on a framework with more resolution tools assuming the use of resources from the SRF.

- **Efficient internal organisation SRB:** Areas for investment in 2019 include among other things human resources, a solid IT framework and expansion of the data infrastructure.

SSM Harmonisation

In 2019, the harmonisation of rules for banks and supervisory authorities within the SSM will be further completed. Some examples are given below.

- **ECB:** Publications by the ECB in 2018 include:
  - The guides for **ICAAP** and **ILAAP**, which can be used by banks in the coming year.
  - An ECB **guide** to internal banking models, in which the ECB explains how it understands general (non-model specific) issues related to internal models, in particular with regard to the Internal Ratings-based (IRB) Approach.
  - An ECB **report** on recovery plans, in which lessons learnt and best practices regarding banks' recovery plans over the past three years are discussed. In the coming years, recovery plans will have to become even more operational and effective. Best practices to achieve this are holding dry-run exercises within the bank and having a playbook. The report provides examples and elements that can be used for this purpose. This can be included in the 2019 version of the recovery plan.
  - A **report** on the outcome of an SSM-wide thematic study on banks' profitability and business models. The results of this study per bank will be followed up by the supervisory authority in 2019.
  - The renewed ECB **guide** to fit and proper assessment, updated following the EBA Guidelines on the assessment of the suitability of members of the management body and key function holders that entered into force on 30 June 2018.
  - As regards the supervision of less significant banks within the SSM, an updated **booklet** on the SREP methodology for LSIs. The aim is also to harmonise the SREP methodology for these LSIs as much as possible within the SSM. National supervisory authorities will follow this methodology. This document is therefore very useful for LSIs to gain insight into how the SREP assessment takes place with respect to their organisation.
  - An ECB **guide** to on-site inspections and internal model investigations, which banks can use in their preparations for such an on-site inspection or investigation by the ECB.
  - An ECB **guide** to the assessment of license applications, which should promote a more harmonised application of assessment criteria.
- **EBA:** New guidelines were again published or adopted in 2018 to enhance convergence in banking supervision and to improve banks' internal operations, the SREP and capital requirements. As part of its Pillar 2 Roadmap, EBA has revised the following guidelines:
  - **SREP Guidelines:** EBA has revised its **Guidelines** on procedures and methodologies for the SREP and supervisory stress testing. The SREP framework does not change, but the criteria for supervisory stress testing have been clarified, as well as how results of such stress tests can be incorporated into the calculation of the

Pillar 2 Guidance (P2G). These revised guidelines entered into force on 1 January 2019.

- **Guidelines for stress testing:** The revised **Guidelines** for stress testing also entered into force on 1 January 2019. These guidelines aim at convergence in the way banks design and conduct their own stress testing.

- **IRRBB Guidelines:** EBA has amended its **Guidelines** on IRRBB following the 2016 BCBS Standards on IRRBB. These BCBS Standards are also further implemented in CRD V / CRR II. These revised guidelines will enter into force on 30 June 2019 (some provisions are subject to a transitional regime until 31 December 2019).

Legal protection within the SSM

Several ECB sanction decisions have been published on the ECB's website by now and enforcement through sanctions is increasingly gaining momentum. At the beginning of December 2018, a total of six ECB sanction decisions and five NCA sanction decisions initiated at the ECB's request had been published. Objections and/or appeals were lodged against most ECB decisions and are still pending. In the judgment of the General Court on Crédit mutuel Arkéa/ECB (**T-52/16**) and the judgment of the General Court on Landeskreditbank Baden-Württemberg/ECB (**T-122/15**), the General Court dismissed the actions as unfounded and – in short – acknowledged the powers of the ECB. In both cases an appeal has been lodged with the European Court of Justice (case numbers C-153/18 P and C-450/17 P respectively), but at the time of writing no final judgments had yet been issued by the ECJ.

We expect that the number of proceedings before the ECJ will also increase in the coming years because the ECB has announced it will make more use of enforcement instruments.

CRD V and CRR II

At the end of 2016, the European Commission introduced its proposals for CRD V and CRR II, completing the implementation of Basel III. In the past year, progress has again been made in the legislative process. Political agreement on the proposals was reached in December 2018. At the time of writing, the European Parliament is expected to vote in April 2019. This means that CRD V and CRR II may enter into force in the course of 2021.

The Regulation on transitional arrangements to limit the impact on qualifying capital of International Financial Reporting Standard (IFRS) 9 was negotiated quicker and already entered into force on 1 January 2018. The Regulation requires EU banks to apply this standard in preparing their annual accounts for financial years beginning on or after 1 January 2018. IFRS 9 aims to strengthen the accounting provision for losses related to financial instruments. However, this may lead to a sudden increase in provisions for expected credit losses and thus to a sudden decrease in capital buffers. Under the Regulation, banks can make use of a transitional period of 5 years (from 1 January 2018) to add part of the increased provisions for expected credit losses as additional capital to their Core Equity Tier 1 capital. This additional amount will be reduced gradually to 0 during the transitional period. The impact of IFRS 9 on banks' capital ratios was examined in the EU-wide EBA stress test 2018, the **results** of which were published in November 2018. The results show that the negative impact on banks' aggregated fully loaded CET1 capital was -20 basis points.

We would like to briefly recall the most important points for banks from the CRD V and CRR II proposals.

- **Trading book**: This concerns more risk-sensitive capital requirements for banks trading in securities and derivatives.

- **Amendment of the large exposure rules:** The capital that may be included in the calculation of the large exposure limit will be strengthened (Tier 1 capital only). The large exposure limit for G-SIBs (Global Systemically Important Banks) will be increased from 10% to 15%.

- **New rules for bank holding companies:** The proposals introduce a licensing requirement for the holding companies of banking groups and financial conglomerates (FICOs). In addition – in short – non-EU banking groups with at least two entities and more than EUR 30 billion in assets in the EU will need a European holding company. The EUR 30 billion threshold does not apply to globally significant non-EU institutions. This is a politically-sensitive part of the proposals.

- **Pillar 2 capital add-ons:** The conditions on the basis of which Pillar 2 capital add-ons may be required by supervisory authorities will be harmonised and tightened.

- **Leverage ratio:** A binding leverage ratio of 3% will be introduced. Until the introduction of the new Basel 3.5 requirements, the Netherlands will maintain the 4% requirement. With regard to G-SIBs, CRR II leaves room for a higher leverage ratio than 3%.

- **Net Stable Funding Ratio:** The binding Net Stable Funding Ratio (NSFR) will be definitively introduced as a commitment.

- **SME financing:** Capital reductions are proposed for loans to large SMEs.

- **Proportionality with regard to remuneration:** The proposals provide for a proportionate treatment of non-complex, small banks with regard to a number of rules on remuneration.

- **Proportionality in reporting and disclosure:** The European Commission's call for evidence regarding the financial regulatory burden has shown that the current regime could be applied in a more proportionate way, taking into account the specific situation of banks.

Adjustment BRRD and SRMR

In addition to the proposals for CRD V and CRR II, the European Commission also submitted proposals in 2016 for amendments to the BRRD and SRMR. These revisions include the introduction of the Total Loss Absorbing Capacity (TLAC), a moratorium tool and the harmonisation of the ranking of debt instruments. With regard to the creditor hierarchy, an agreement was reached in the European trialogue at the end of 2017 and a Directive was published in December 2017. We discuss the new regulations and other proposals below.

- **Harmonisation of ranking of debt instruments, creditor hierarchy:** The Directive establishes an EU harmonised ranking of specifically issued unsecured debt instruments (senior debt). This will make it easier for banks to issue loss-absorbing debt instruments with the aim that this new category of debt instruments can easily be used in the event of a possible bail-in under the BRRD. The Directive results in senior debt being categorised between fully subordinated capital instruments on the one hand and ordinary unsecured claims on the other. This will allow banks to issue this new type of debt instrument, thus meeting the requirements for loss absorption. This new category of \`non-preferred' debt meets the minimum requirement under the BRRD for MREL and TLAC.

  In November 2018, the Implementation Act of this directive was published in the Dutch Bulletin of Acts and Decrees (*Staatsblad*). This Act amends the Bankruptcy Act and creates the possibility for banks to issue the new type of debt instrument. The changes will not affect existing debt instruments and their ranking under a bankruptcy, with the exception of those debt instruments that already meet the relevant criteria and therefore refer to the intended (future) downgrade in rank. The Act entered into force in December 2018.

- The most important other changes to the BRRD will be:

  - **Changes relating to MREL:** The MREL requirement is set by the resolution authority and differs per individual bank. The proposal amends the current MREL framework. Under the current framework, subject to discretion of the resolution authority, an MREL can be imposed of twice the capital requirements plus twice the buffer requirements, plus any increase for reasons of market confidence. The European Commission proposes to reduce the MREL to twice the capital requirements, with a possible add-on in the form of guidance (which only becomes a 'hard' MREL requirement once it is deliberately ignored by the institution). The proposal also introduces various measures that the supervisory authority and resolution authority must take if a bank no longer complies with its MREL requirement.

- **Total loss absorbing capacity (TLAC) standard**: From 2019, global systemically important banks (G-SIBs) must comply with the TLAC standard. They must hold a minimum amount of own capital and other instruments to absorb losses upon resolution. This TLAC requirement will be integrated into the MREL requirement.

- **Moratorium tool prior to resolution:** The proposals include a harmonised moratorium instrument that the supervisory authority can use with regard to a bank's payment obligations. The moratorium would allow the outflow of payments to be frozen for a short period. This would allow more time, if necessary, for the valuation of a bank and the use of resolution tools. It allows the suspension of all payment and delivery obligations of a bank for a period up to 5 business days. Currently, this power already exists in respect of a bank that is already in resolution. The proposal extends this power to the early intervention phase or to the moment of assessing whether a bank is failing (i.e. pre-resolution).

The European Parliament is expected to vote on the adoption of the new regulations in April 2019. This means that BRRD II and SRMR II may enter into force in the course of 2021. We advise banks to timely evaluate how the new rules can affect their buffers, recovery plans and the discussions with the SRB on resolution plans.

SRB: MREL policy for 2019

In November 2018, the SRB and the NRAs published the MREL **policy** for the upcoming resolution planning cycle. The consolidated MREL targets that are binding for banks will be set on the basis of this policy. The policy document contains information on the methodology for calculating the MREL and its quality. The policy provides for a gradual transition towards the MREL targets. For banks that do not yet meet the MREL targets, a transition period of up to four years may be granted on an individual basis. For the most complex banks that have a resolution college, the MREL target is set on the basis of more comprehensive policies that, at the time of writing, had not yet been published. On the basis of this policy document, banks can prepare themselves for the new MREL decisions of the SRB.

Basel 3.5

After years of negotiation, in December 2017 agreement was reached on a number of revisions to the Basel 3 framework (also known as Basel 3.5). Most of the adjustments will have to be implemented by 1 January 2022. The new output floor of 72.5% is fully effective as of 1 January 2027. This output floor means that in the risk weighting calculations based on internal models, the capital requirements may never be lower than 72.5% of the capital requirements as calculated according to the standardized approach. This output floor has very negative consequences for the large mortgage portfolios of Dutch banks. The risk weighting of mortgage financing under the standardized approach is based only on the Loan-to-Value (LTV) level, which is relatively high for Dutch mortgage portfolios. The current internal models used by Dutch banks are mainly based on the structural low losses of Dutch mortgage portfolios. In short, banks that use internal models will have to hold more capital for their mortgage portfolios.

Although the agreement has yet to be laid down in EU legislation, in the coming years the supervisory authorities will monitor banks' preparations for the phased-in implementation of the new rules and the new output floor.

Amendment CRR in connection with reduction of Non-Performing Exposures

As part of the action plan to reduce the number of non-performing loans (NPLs) in the banking sector (see also the ECB's supervisory priorities), the European Commission has **proposed** an amendment to CRR as a complementary measure. This proposed amendment provides for a statutory prudential backstop against excessive increase of NPLs and non-performing exposures (NPEs) without sufficient loss coverage on banks' balance sheets. The statutory prudential backstop ensures that credit losses on future NPEs are adequately covered, making them easier to resolve or sell. It is not yet clear when this CRR amendment will be adopted and enter into force.

Entry into force of the Securitisation Regulation

As of 1 January 2019, the Securitisation Regulation is in force (see also: **Issuers**). With this regulation, the European legislator aims to encourage what is known as `STS securitisations'. `STS' in this case stands for `Simple, Transparent and Standardized'. The Securitisation Regulation provides the criteria with which such securitisations must comply. This Securitisation Regulation joins the **CRR Amendment Regulation**, which amends CRR and provides a new prudential framework for (STS) securitisations. The CRR Amendment Regulation is also effective from 1 January 2019 and introduces a new ranking of methods for determining the risk weighting of securitisation positions, and under the applicable method distinguishing between STS securitisations and non-STS securitisations. A transitional regime applies: with regard to securitisations for which the securities were issued before 1 January 2019, banks can continue to apply the old provisions of the CRR until 31 December 2019.

In July 2018, EBA published the final **Regulatory Technical Standards** on the risk retention requirements for originators, sponsors and original lenders under the new Securitisation Regulation. At national level, in the summer of 2018 the Decree on the implementation and enforcement of the Securitisation Regulation and the CRR Amendment Regulation was consulted on, which aims to implement and enforce the relevant regulations in the Netherlands. With the entry into force of the STS framework, DNB will become responsible for 'product supervision'. This means that DNB must determine – in this case for the time being independent of the SSM – whether securitisations that are designated as STS by issuers meet the relevant criteria. DNB has stated on its **website** that it will assess transactions *ex post*, i.e. after issuance and any notification to ESMA. For the assessment of the generic requirements, DNB expects institutions to cooperate with any further requests for information relating to sample checks. For the assessment of the STS criteria, institutions must inform DNB (or the AFM) as soon as an STS securitisation has been notified to ESMA (in accordance with the Regulation).

Proposal Regulation Framework for Sustainable Investments

After the European Commission presented its action plan 'Financing sustainable growth' (see: **General**), a proposal for a **Regulation** on the establishment of a framework to facilitate sustainable investments followed on 24 May 2018. This Regulation is an elaboration of the first objective of the action plan, namely the reorientation of capital flows towards sustainable investments. It aims at introducing a classification for sustainability in investments. The Regulation should be seen as a first step in establishing a larger framework for sustainable investments. This proposal is relevant for both financial institutions using sustainable financial products and financial institutions(such as banks) offering these products.

Benchmark Regulation – transitional periods expire

On 1 January 2018, the Benchmark Regulation entered into force in the EU Member States. The Benchmark Regulation regulates the provision and use of benchmarks and the provision of input data for a benchmark. In principle, a bank should only use a benchmark if (i) the provider of the benchmark is registered and/or (ii) the benchmark is included in an ESMA register.

The Benchmark Regulation provides for a transitional regime that – in short – means that banks may continue to use benchmarks that already existed on 1 January 2018 until 1 January 2020. After that date the provider of the benchmark and/or the benchmark itself must be included in an ESMA register. Non-EU benchmarks may continue to be used until 1 January 2020.

We advise banks that use a benchmark to check whether the benchmark they use ensures that they are included in the ESMA register from 1 January 2020 at the latest.

Amendments to current Benchmark Regulation

On 25 May, the **proposal** was introduced at European level to amend the current Benchmark Regulation in connection with low-carbon benchmarks and positive carbon impact benchmarks. This proposal is part of a wider package of European Commission initiatives on sustainable development.

The proposal introduces the following two new types of benchmarks:

- **'low-carbon' benchmarks**: a benchmark where the underlying assets contribute to lower CO_2 emissions compared to the assets underlying the comparable 'normal' benchmark; and

- **'positive carbon impact benchmarks'**: in this benchmark, the underlying assets represent an absolute saving in CO_2 emissions in the sense that the underlying assets only contain components with emission reductions greater than the CO_2 emissions.

The proposal adds a new appendix to the Benchmark Regulation, which provides that banks shall record and disclose the methodology used by them for their calculation of aforementioned benchmarks. The appendix also defines the information that must at least be included in the description of the methodology. In addition, the bank must explain how the low-carbon benchmark differs from the underlying standard index and the extent of the positive carbon impact of each underlying asset included in the benchmark. Furthermore, the European Commission intends adopting delegated acts setting minimum requirements for 'low-carbon benchmarks' and 'positive carbon impact benchmarks' for the criteria to be considered when selecting and weighting the underlying assets and the method to be used to calculate CO2 emissions and savings.

The underlying proposal (and other related legislative acts) aims to integrate ESG (environmental, social and governance) considerations coherently into the investment and advisory process across the various sectors. This should ensure that all financial market participants – such as banks – who are mandated by their clients or beneficiaries to make investment decisions on their behalf incorporate ESG considerations into their internal processes and inform their clients accordingly. A **compromise proposal** was submitted on 14 December 2018, introducing some further changes to the original proposed amendment.

Developments Deposit Guarantee Scheme

On 19 October 2018, DNB published the **consultation document** on the first round of amendments to the national deposit guarantee scheme (DGS) regulations. This concerns the amendment of the following rules:

- **Policy Rule Individual Customer Profile** (*Beleidsregel Individueel Klantbeeld*)**:** The main proposed changes submitted for consultation concern (i) a marking for deposits collected on the basis of a European passport for services and (ii) the possibility of making a more accurate estimate of the guaranteed amount in third-party accounts for the purposes of periodic reporting.

- **Policy Rule Scope and Implementation DGS** (*Beleidsregel Reikwijdte en Uitvoering Depositogarantiestelsel*)**:** With the proposed changes, DNB provides clarity to deposit holders on how one deals with a number of situations that may arise during a DGS payment and in the event of changes at one or more banks. The main additions to the policy rule concern the handling of temporary high deposits, structured deposits and customers who hold deposits in several countries.

- **Statements from Financial Undertakings (Financial Supervision Act) Regulation:** DNB also intends to amend the Statements from Financial Undertakings Regulation in order to facilitate the obligation for banks to provide data every quarter for the purpose of setting contributions to the Deposit Guarantee Fund.

The changes and additions are the result of questions from banks, the ongoing implementation of the Individual Customer Profile and DNB's wish to further clarify a number of specific DGS situations. DNB intends to publish the final amendments to the rules in early 2019. After publication, the DGS Data Delivery Manual will also be amended, where applicable.

At European level (in addition to the SSM and SRM) work is being done towards realising the third pillar of the Banking Union, the European Deposit Insurance Scheme (EDIS). In 2015, the European Commission presented a legislative proposal for setting up EDIS. EDIS builds on national deposit guarantee schemes. Under EDIS, all deposits below EUR 100,000 with European banks would be covered and the vulnerability of national schemes would be reduced. EDIS is intended to be built up slowly with the protection of bank deposits being fully provided by EDIS in the future.

In the roadmap for completing the Banking Union it is agreed that political discussions on EDIS should start as soon as sufficient further progress has been made on risk reduction measures within the banking sector. Meanwhile, a significant part of these measures have been agreed by the Council, but it is not yet sufficient to start political negotiations. EDIS is a politically sensitive issue at EU level. Once the European Parliament has reached a position, the trialogue negotiations will start. This is not yet the case at the time of writing. It is generally expected that significant steps will first be taken in mid-2019.

ECB Guides ICAAP and ILAAP

In November 2018, the ECB published guides to the Internal Capital Adequacy Assessment Process (ICAAP) and Internal Liquidity Adequacy Assessment Process (ILAAP) of banks. With this guidance the ECB aims to harmonise these processes for significant institutions. ICAAP and ILAAP are an important source of information for the annual Supervisory Review and Evaluation Process (SREP), on the basis of which the supervisor determines, among other things, the capital requirements for individual banks. Improvement of ICAAP and ILAAP and their integration into the SREP is one of the ECB's supervisory priorities for 2019. Banks are required to incorporate the ECB's new instructions into their ICAAP and ILAAP 2019.

- **ICAAP:** The Guide aims to provide transparency by making public the ECB's understanding of the ICAAP requirements following from Article 73 CRD IV and describes seven principles that the ECB takes into account in the assessment of the ICAAP as part of the SREP:
    - the management body is responsible for the sound governance of the ICAAP;
    - the ICAAP is an integral part of the overall management framework;
    - the ICAAP contributes fundamentally to the continuity of the institution by ensuring its capital adequacy from different perspectives;
    - all material risks are identified and taken into account in the ICAAP;
    - internal capital is of high quality and clearly defined;
    - the ICAAP risk quantification methodologies are adequate, consistent and independently validated;
    - regular stress testing shall is aimed at ensuring capital adequacy in adverse circumstances.

- **ILAAP**: The Guide aims to provide transparency by making public the ECB's understanding of the ILAAP requirements following from Article 86 CRD IV and describes seven principles that the ECB takes into account in the assessment of the ILAAP as part of the SREP:

- the management body is responsible for the sound governance of the ILAAP;
- the ILAAP is an integral part of the overall management framework;
- the ILAAP contributes fundamentally to the continuity of the institution by ensuring its liquidity adequacy from different perspectives;
- all material risks are identified and taken into account in the ILAAP;
- the internal liquidity buffers are of high quality and clearly defined; the internal stable sources of funding are clearly defined;
- the ILAAP risk quantification methodologies are appropriate, consistent and independently validated;
- regular stress testing is aimed at ensuring liquidity adequacy in adverse circumstances.

ECB Guide to the licensing of FinTech banks

In March 2018, the ECB published its **Guide** to the assessment of license applications of FinTech credit institutions. The Guide discusses the considerations of the supervisor when assessing banking licence applications, which are particularly relevant in view of the specific nature of banks with a FinTech business model. The Guide should be read in conjunction with the general ECB guides related to the assessment of licence applications and fit and proper assessments. Among other things, the ECB explains what it means by a "FinTech bank" and explains the assessment of the following aspects: suitability of management, suitability of the shareholders, internal organization, programme of operations, capital, liquidity and solvency. The Guide can be used both by new market entrants and FinTech bank subsidiaries of existing licensed banks.

EBA Guidelines on suitability

The new Guidelines on the assessment of the suitability of members of the management body and key function holders entered into force on 30 June 2018. These Guidelines describe the requirements for suitability and explain among other things the notions of sufficient time commitment; honesty, integrity and independence of mind of a member of the management body; adequate collective knowledge, skills and experience of the management body; and adequate human and financial resources devoted to the induction and training of such members. The notion of diversity to be taken into account for the selection of members of the management body is also specified. The requirements for the suitability of the heads of internal control functions and the CFO where they are not part of the management body and other key function holders are also discussed. The Guidelines are used by DNB and the AFM in fit and proper tests and in the context of ongoing supervision. In the event of conflict with the national Suitability Policy Rule 2012, the EBA Guidelines shall prevail.

The ECB's **Guide** to fit and proper assessments issued in May 2018 describes that the suitability of board members and key function holders is assessed by the ECB against the following five criteria: experience, reputation, conflict of interest and independence of mind, time commitment and collective suitability.

When determining whether someone is subject to a fit and proper test, banks should pay close attention to the terminology, because Dutch law refers to daily policymakers, while the Guidelines speak of members of the management body and key function holders. If in doubt as to whether someone should be subject to a fit and proper assessment by EBC/DNB, the bank can consult the Joint Supervisory Team (JST) or the relevant contact person at DNB.

EBA Guidelines on Non-Performing and Forborne Exposures

In October 2018, EBA published its final **Guidelines** on management of non-performing and forborne exposures (NPEs and FPEs), in which EBA sets out how credit institutions should have a sound risk management framework for managing and reducing their NPEs and FPEs. EBA introduces a threshold of a gross NPL ratio of 5% as of when the credit institution must have NPE strategies and take measures. The Guidelines also provide criteria which the supervisor can use when assessing NPE control by banks in the context of the SREP. The Guidelines will apply from 30 June 2019. Banks should therefore take into account that the supervisors may already apply these Guidelines in performing the SREP of 2019.

EBA Guidelines on fraud reporting

In July 2018, EBA published **Guidelines** on reporting requirements for fraud data under PSD2 with the aim of reducing the risk of fraud as much as possible. From 2019, banks that provide payment services must in principle report on fraud involving various payment instruments and payment services every six months. This means that from the third quarter of 2019, institutions will in principle be required to report for the first time on the first half of 2019. In order to achieve this, institutions must adapt their registration systems in a timely manner. DNB has announced that it will provide more clarity about this in due course. For more information, see the **Payment Service Providers** section of this Outlook.

EBA Guidelines on outsourcing arrangements

In the summer of 2018 EBA consulted the market on its **draft Guidelines** on outsourcing arrangements. These Guidelines are a revision of the CEBS Guidelines from 2006. They aim to establish a harmonised framework for the outsourcing of activities. In recent years, outsourcing has become an increasingly interesting option in the context of cost reduction, flexibility and efficiency, and the adaptation of the bank's business models to new technological developments. The new Guidelines apply to credit institutions, investment firms, payment service providers and electronic money institutions and provide rules on a governance framework with respect to outsourcing for these types of institutions. These Guidelines also include for example EBA's recommendations on outsourcing to cloud service providers. Under no circumstances may outsourcing result in the institution becoming an 'empty shell'. The management board remains ultimately responsible for outsourced activities at all times. When outsourcing activities to parties established in a third country, the financial institutions must act with utmost care and specific criteria apply to the outsourcing of critical or important functions. According to the Guidelines, the supervisors should be vigilant with regard to concentration of risk with one or more service providers. The Guidelines are expected to apply from 30 June 2019.

In the context of outsourcing, it is also relevant that with the entry into force of the aforementioned EBA **recommendations** regarding outsourcing to cloud service providers on 1 July 2018, the DNB Cloud Circular of 2011 no longer applies. DNB adheres to the recommendations from EBA.

EBA Guidelines on ICT and security risk management

On 13 December 2018, EBA published a **consultation** for Guidelines on ICT and security risk management. The EBA states that the complexity of ICT risks is increasing, as is the number of ICT-related incidents and their potential significant impact on financial institutions. These Guidelines introduce a number of requirements for – among others – credit institutions, relating to the mitigation and management of these ICT risks. The Guidelines cover a number of requirements related to, inter alia, governance, risk assessment and information security. Parties can respond to this consultation until 13 March 2019.

Amendments to the Key Information Document (KID) for PRIIPs proposed by ESAs

On 8 November 2018, the ESAs published a **consultation document** on the amendment of the PRIIPs Delegated Regulation. The aim is to make changes to the KID in order to remove duplications in the disclosure requirements. These new rules are relevant for banks offering and selling PRIIPs. The consultation closed on 6 December 2018. The ESAs aim to send their proposal for the amendments to the European Commission as soon as possible in 2019. The amendments should enter into force on 1 January 2020.

Financial Markets (Amendment) Act 2018

On 15 November 2018, the Financial Markets (Amendment) Act 2018 was **published** in the Dutch Bulletin of Acts and Decrees (*Staatsblad*). The Act entered into force on 1 January 2019. The most important changes for banks are the following.

- With the entry into force of the Financial Markets (Amendment) Act 2018, it is no longer possible to garnishee DNB. One of the reasons for the abolition of the possibility of having a garnishee order issued under DNB is that a garnishee order on an asset held by a bank under DNB means that this bank can no longer make payments in these systems. This immediately disrupts the available liquidity for other participants in the systems and has potential consequences at a Dutch, European and global level. Such garnishment is therefore a risk to financial stability and hence undesirable.

- The statutory period for taking a decision on the application for a banking licence will be extended from 13 to 26 weeks. This is more in line with practice. Most European Member States apply a period of between 6 and 12 months. The CRD requires a maximum period of 12 months.

- The AFM will make use of an information system on professional qualifications. This system consists of a systematic and orderly collection of data relating to the professional expertise of employees and other natural persons and the professional qualifications, recognised professional qualifications or certificates. In this way, the AFM can efficiently and at lower costs supervise the professional expertise requirements referred to in Section 4:9 Financial Supervision Act (Wft).

Banking Details Reference Portal Act

The **proposal** for the Banking Details Reference Portal Act (*Wet verwijzingsportaal bankgegevens*) was consulted on in the summer of 2018. This legislative proposal is based on the Fourth Anti-Money Laundering Directive and aims to automate and improve the process of the provision of certain identifying data by banks and other payment service providers, as well as the process of certain government agencies (such as the Public Prosecutor's Office, Financial Intelligence Unit-Netherlands, Tax and Customs Administration) demanding and retrieving such identifying data from those banks and other payment service providers. Currently this type of data is usually requested manually and on an individual basis. This legislative proposal amends the Dutch Financial Supervision Act (Wft) by adding a section on a banking data reference portal, which requires parties offering accounts with a Dutch IBAN number and banks offering safes to connect to this banking data reference portal. It is not yet clear when this Act will be adopted and enter into force.

Amendment to the Bankruptcy Act regarding participation in payment and securities settlement systems in third countries

In August 2018, a **legislative proposal** was submitted to improve the position of Dutch banks participating in payment and securities settlement systems in countries outside the European Union. At present, Dutch banks cannot guarantee that transfer orders they enter into a system in a third country will not be reversed in the event of bankruptcy of the bank that made the transfer. As a result of this legislative proposal, they can do so. With this legislative proposal, the Netherlands would implement an option in the Settlement Finality Directive to apply this directive to domestic institutions participating in payment systems in third countries. The legislative proposal was adopted as a formality in both the House of Representatives and the Senate. At the time of writing, it is not yet clear when the amendments will enter into force.

Approval right of Minister of Finance with regard to bankers' remuneration

On 23 October 2018, the ECB published an **opinion** that it provided to the Dutch Ministry of Finance on the question whether a prior approval right of the Minister of Finance with regard to fixed remuneration of board members of significant banks would be conflicting with the powers of the ECB. The ECB advice was prompted by a **legislative proposal** published in March 2018, as a political response to the proposed salary increase of ING's CEO Ralph Hamers. The purpose of this legislative proposal is to tighten the definition of 'fixed remuneration' within the meaning of the Dutch Financial Supervision Act (Wft) and to introduce a prior approval right of the Minister of Finance for the proposed determination of the fixed remuneration of new board members or an intended increase in the fixed remuneration of incumbent board members of significant credit institutions. The proposal provides that the Minister may refuse consent if in the Minister's opinion the amount of the fixed remuneration is not appropriate with a view to a prudent, controlled and sustainable remuneration policy that can count on public support. The Council of State advised that this is conflicting with the powers of the ECB as the ECB is competent to supervise the governance of credit institutions, including the assessment of the credit institution's remuneration policy and practice.

The ECB indicated in its opinion that this legislative proposal does not appear to conflict with the powers of the ECB, as long as the Minister, when assessing the amount of the individual fixed remuneration, does not also assess whether the credit institution meets the statutory requirement to have sound governance arrangements in place. However, in light thereof, the ECB notes that it is important to avoid that any delegated regulations detailing the rules on the appropriateness of the amount of the fixed remuneration do give rise to a conflict with the ECB's supervisory powers.

At present, the legislative proposal is under discussion in the House of Representatives and it is not yet clear whether the legislative proposal will be adopted and when exactly the Act will enter into force. If the Act is adopted, significant banks will have to adjust their internal remuneration policy accordingly.

Agenda for the financial sector

On 17 December 2018, the Minister of Finance presented the **Agenda for the financial sector** containing the most important measures for this government's term of office. In this agenda, the Minister focuses on stability, integrity and innovation.

The Minister has drawn up a number of agenda items that are relevant to banks. For example, the Minister hopes to increase the resilience of financial institutions in the context of stability. To this end, higher buffers must be maintained, which the Minister will continue to work on in the coming period. To achieve this, a minimum leverage ratio will be introduced for all banks. At European level, national systemic banks will be required to add a mark-up to this ratio. In addition, efforts will be made to ensure the proper implementation of Basel III. Higher requirements for bail-in buffers will also become mandatory. Finally, the tax deductibility of loan capital will be limited, for example by a thin cap.

In the context of increasing the resilience of financial institutions, the completion of the European Banking Union is also on the agenda. To this end, appropriate action with regard to non-performing loans and asset quality reviews will be taken on European level. In addition, Europe will have to focus on a proper risk valuation of government bonds. Once these two items have been achieved, EDIS can also be introduced as the final element of the Banking Union. In addition to completing the Banking Union, the further realisation of the European Capital Market Union will also remain an agenda item.

In the context of combating money laundering and terrorist financing, the Minister stated that he would monitor developments in the banking sector and compliance with integrity legislation with the aid of DNB's annual ZBO report.

DNB Legislative Letter 2018

In its **legislative letter 2018**, DNB expressed the following new legislative wishes to the Minister of Finance.

1. DNB asked the Minister of Finance to prepare a proposal in order to create a legal basis for limiting the amount of funds that can be raised by non-EEA branches covered by the Dutch deposit guarantee scheme (or to impose other additional conditions).

2. DNB asked the Minister of Finance to review the BES Act following the implementation of the Fourth Anti-Money Laundering Directive in the Dutch Money Laundering and Terrorist Financing Prevention Act (Wwft).

Review and extension of Act on remuneration policy for financial undertakings

A review of the Remuneration Policy (Financial Undertakings) Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) took place in the summer of 2018. In addition, in a **letter to Parliament** dated 17 December 2018, the Minister announced three statutory measures to tighten remuneration policy in the financial sector. These measures are:

1. An obligation to hold shares and (certain) other components of fixed remuneration, the value of which depends on the market value of the own company for board members and employees of financial companies for 5 years.
2. An obligation for financial companies to describe in their remuneration policy how the company takes account of the relationship between the remuneration of board members and employees and its function in the financial sector and its position in society, and how to account for this.
3. A restriction of the exception to the bonus cap for persons who do not fall under a collective agreement The exception will only be available for exceptional cases, and in any event should not be applied to persons performing internal monitoring functions or those directly engaged in providing financial services to consumers.

For a detailed overview of the developments with regard to the remuneration policy, we refer to the **General** section of this Outlook.

DNB investigation terrorism financing

In 2018 DNB conducted an investigation into the (post-event) transaction monitoring process to prevent terrorist financing at a selection of financial institutions (four banks, two payment institutions and two money transfer offices). DNB examined the extent to which these institutions identify and control the risk of (international) terrorist financing on the basis of their systematic integrity risk analysis (SIRA). DNB published its preliminary findings in September 2018. The first results of the investigation show that the transaction monitoring process of the institutions investigated, especially when it concerns the detection of possible transactions related to terrorist financing, is still inadequate. DNB is of the opinion that the transaction monitoring process requires improvement. In general, it has been found that these institutions:

- do not always conduct adequate screening when onboarding a client, which means that there is no proper risk analysis with respect to such client;
- rarely (or too late) ask the question whether the use of the service meets the expectations that the institution had when accepting the client;
- do not always make full use of the transaction monitoring systems available to them;
- have too little (expert) capacity to handle alerts; and
- make too little use of the (external and internal) available data when performing their client due diligence.

The study was completed at the end of 2018. DNB will publish its findings that are relevant to the entire sector. At the time of writing, this had not yet been done. We expect DNB to follow-up on the sector's handling of general findings in its integrity supervision. In view of the public attention given to this subject, we expect DNB to continue to closely supervise transaction monitoring and the quality of the underlying SIRAs in 2019.

AFM publishes Information Provision Policy Rule

On 31 December 2018, the AFM **published** the Information Provision Policy Rule (*Beleidsregel Informatieverstrekking*). In this policy rule, the AFM explains which elements it takes into account when assessing the provision of information by financial undertakings about financial products and services. In this consultation document it included a new chapter entitled 'Savings: what are relevant characteristics' and a chapter 'Borrowing: what are relevant characteristics'. In these chapters, the AFM explains which aspects of a savings product or loan must be communicated to the customer in the context of the obligations under Section 4:20 Wft.

Consequences of Brexit

As stated in the supervisory priorities of the various supervisory authorities, Brexit and its impact on the banks is high on the agenda.

- ECB and DNB call on banks to be prepared for all scenarios, including a hard Brexit. This means, among other things, that banks must identify the risks and implications and prepare the mitigating measures with regard to their business plan and internal operations as well as authorisations in order to ensure continuity of its services. DNB conducted a national survey among all LSIs to monitor the above. The ECB monitors this at the significant banks.

- EBA also issued a similar call in an **opinion** in June 2018. This EBA opinion as well as an SRB **Position Paper** of November 2018 discuss the consequences of a Brexit for the resolvability of banks and related capital requirements (MREL) and, for example, the possibility of upstreaming/downstreaming capital and liquidity and losses.

- Last year, the ECB published information and Q&As on its **website** for institutions wishing to relocate to the euro area.

- In early 2018, the European Commission published a general **notice** on the consequences of Brexit for banking and payment services.

- In March 2018, the Bank of England (PRA) published a **Supervisory Statement** explaining its approach to the authorisation of international banks operating in the UK that wish to remain there after Brexit.

- On the Bank of England's **website** you can find information about a *temporary permissions regime*, a temporary regime that banks with a passport can use after the Brexit date during the time that the application process for their new authorisation is pending. In order to use this regime, timely application to the PRA is required. Banks can only apply for this temporary permissions regime between 7 January 2019 and 28 March 2019. Also for banks that are under supervision of the PRA, such application needs to be filed via **FCA Connect**.

On 19 December 2018, the European Commission presented a 'no deal' contingency plan (see the **General** section of this Outlook). One of the elements of that contingency plan is that if the withdrawal agreement between the EU and the UK has not been ratified by 29 March 2019, the following decisions will apply:

- A temporary and conditional equivalence decision for a fixed, limited period of 12 months to ensure that there is no immediate disruption to central clearing of derivatives.
- A temporary and conditional equivalence decision for a fixed, limited period of 24 months to ensure that there is no disruption to central depositary services for EU operators currently using UK operators.
- Two delegated regulations to facilitate the renewal for a fixed 12-month period of certain OTC derivative contracts when a contract is transferred from a UK counterparty to an EU counterparty.

In summary, Brexit is imminent and banks must have their contingency plan ready before that time in which they prepare for all scenarios. Banks that wish to make use of the temporary permissions regime under which they can continue to use their current outgoing passport to the UK after 29 March 2019, need to make a notification before 28 March 2019 (see above).

AMLD5

Over the past year, the European and Dutch supervisory authorities have published a great deal of relevant guidance in the area of integrity. In addition, in 2019 probably progress will be made with respect to the amendment of the Fourth Anti-Money Laundering Directive. The Fifth Anti-Money Laundering Directive (AMLD5) must be implemented in the Netherlands by 10 January 2020. For an overview of the consequences of AMLD5 and other relevant developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

Financial Markets Legislation

Important Information For Fund Managers Of Investment Firms In 2019

Further investigation by the AFM into licensed managers

Proposed amendments to Key Information Document (KID) under PRIIPs

Cross-border distribution of investment funds (definition pre-marketing)

Changes to depositary function under AIFMD and UCITS

Review of AIFMD (AIFMD 2?)

Proposal Framework for Sustainable Investments Regulation

ESMA consultation: Sustainability risks within the AIFMD and UCITS frameworks

End of transitional regime for existing money market funds (MMF Regulation)

ESMA Work Programme 2019

Guidance + Q&As AFM and ESMA with regard to AIFMD and UCITS

Risk management in the field of outsourcing – Good practices DNB

Improvement of AIFMD fund reporting

Hong Kong becomes designated state

FATF guidelines relevant to managers

New Securitisation Regulation relevant for certain managers

Current Benchmark Regulation; some amendments envisaged

Benchmark Regulation — transitional periods expires

Significant increase in licence fees

Review and Extension of Act on remuneration policy for financial undertakings

AFM consultation Information provision Policy Rule

Consequences of Brexit

AMLD5

Further investigation by the AFM into licensed managers

In January 2018, the AFM published a **report** following an investigation into compliance with the statutory requirements concerning the soundness of business operations, governance and asset segregation among 12 managers of alternative investment institutions who in 2014 by operation of law obtained an AIFMD license. The report shows that, according to the AFM, there is substantial room for improvement in terms of business integrity, governance and asset segregation of this group of managers. Examples of shortcomings identified in the report are:

- the risk management of many of the managers was inadequate;
- outsourcing to a large number of asset managers did not comply with legislation and regulations;
- the conflicts of interest policy was often incomplete; and
- compliance with the Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, Wwft) was often below level.

The report concludes with a number of best practices drawn up by the AFM. The AFM expects other managers to take note of the findings of this report and the best practices and, where necessary, to implement improvements in their organisation. In the light of the findings, the AFM intends conducting similar investigations in the coming years of other managers with an AIFMD licence obtained by operation of law. It will also assess whether these managers have started implementing the findings and good practice examples included in this report.

In this context, the AFM has already taken a first step this year by sending a questionnaire to all authorised managers of alternative investment institutions in the Netherlands. The AFM also stated that it intends conducting follow-up study of managers of investment institutions in 2019. The managers' answers to the questionnaire serve as a basis for the approach of the follow-up study in 2019.

This means that all managers, but certainly managers with a license by right, must critically examine their compliance with the AIFMD and integrity legislation in order to be well prepared for any AFM study.

Proposed amendments to Key Information Document (KID) under PRIIPs

On 8 November, the joint supervisory bodies (EBA, ESMA and EIOPA) **published** a consultation on the PRIIPs Regulation. The proposed amendments relate to:

i. The performance scenarios and the way they are presented, in particular because the scenarios now seem to give a too positive overview of the expected performance of the product.
ii. The inclusion of past performance to the extent that such information is available.
iii. The obligation for UCITS funds and — in the Netherlands — AIFs offered to retail investors to prepare a KID. This obligation will in principle apply from 1 January 2020. Currently, these funds are still exempt from the obligation to prepare an KID because they need to prepare a Key Investor Information Document (*Essentiële beleggersinformatie*, KIID). This transitional regime will expire on 1 January 2020. This would mean — at least for UCITS funds — that both a KIID and KID would have to be made available. There are a number of significant differences between the two (such as with regard to type of subjects, performance calculation and risk indicators). The ESAs consider it undesirable that retail investors will be presented with two different documents and have drawn attention to this in a **letter** to the European Commission dated 1 October 2018. In anticipation of this further analysis, changes are now being proposed that take into account that the exception will cease to be available per 1 January 2020 and try to achieve a certain degree of harmonisation.

The consultation ran until 6 December 2018. The ESAs aim to send their proposal for the amendments to the European Commission as soon as possible in 2019. The amendments should enter into force on 1 January 2020.

We recommend that managers who currently make use of the exemption make preparations for the preparation of a KID in the course of 2019, taking into account any possible changes to the KID. More clarity about this should be available in Q1 2019.

Cross-border distribution of investment funds (definition pre-marketing)

On 12 March 2018, the European Commission published a proposal for new rules to facilitate the cross-border distribution of investment funds. The package consists of a **Directive** amending the AIFMD and UCITS Directives and a **Regulation** amending the EuVECA and EuSEF Regulations. The proposed amendments include:

- A definition of pre-marketing (testing interest for a new fund) is provided. Pre-marketing does not qualify as offering to which the rules already apply. As currently provided, a manager may engage in pre-marketing activities, except where the information provided to investors: (i) relates to or contains a reference to an existing fund, (ii) offers investors a subscription or pre-subscription opportunity or (iii) amounts to a prospectus or documents of incorporation of the fund not yet constituted, or other types of offering documents, both in draft and final form, that enable investors to make an investment decision.
- The requirements for notification to the supervisory authority are harmonised in the Member States.
- A manager making a cross-border offering in a Member State must make sure to provide information to investors in that Member State. In addition to a representative in that Member State, this may be arranged by telephone or electronically.
- A manager may terminate the offering in a certain Member State only if, inter alia, there are fewer than 10 investors who hold up to a maximum of 1% of the assets under management of the relevant investment fund.
- National supervisory authorities are required to publish national rules on the offering of investment funds. They should inform ESMA and ESMA should then publish this on its website.
- Supervisors may also require that advertisements are first submitted to them and may give instructions. However, supervisors should apply the same rules to all managers, regardless of where the manager is located. Those rules should be published on the website of the supervisory authority.

A definition of pre-marketing will put an end to much uncertainty in the market about what constitutes pre-marketing, although there is still room for interpretation in the application of the new rules. It is currently not clear when the new rules will enter into force. In particular, managers operating in other Member States on the basis of a European passport are should monitor these developments and implement the new rules in good time.

Changes to depositary function under AIFMD and UCITS

On 30 October 2018, two delegated regulations amending the depositary function under the **AIFMD** and **UCITS** were published in the EU Official Journal. The rules specifically address a situation where financial instruments belonging to a fund are held in custody by different custodians in a chain (the custody chain). The basic principle is that the depositary of an AIF or UCITS takes the financial instruments into custody and that to this end they must open a separate account per fund. However, AIFMD and UCITS also allow these custody functions to be delegated to a custodian or even one or more sub-custodians. These new rules provide for the safe custody of the financial instruments.

The rules allow a custodian or sub-custodian to hold the financial instruments belonging to one depositary (i.e. the funds for which the depositary acts) in an omnibus account. However, no financial instruments of the custodian or other clients of the custodian may be held on this account. This applies *mutatis mutandis* to any sub-custodian. In doing so, the new rules aim to strike the right balance between market efficiency and the protection of participants' interests.

The delegated regulations also provide for rules on, among other things: (i) periodic verification between the omnibus account and the depositary's own details, (ii) information provision to the depositary, (iii) administration by the depositary of all assets included in an omnibus account, (iv) written outsourcing agreement and (v) appointment of custodians in countries outside the EU.

The new rules primarily concern the depositary: in practical terms, the depositary must ensure that the custody of financial instruments is organised in accordance with these rules. They are also the ones who must enter into the outsourcing agreement with the custodian. The delegated regulations will have direct effect and the new rules will enter into force on 1 March 2020. We advise managers who invest in financial instruments to adequately verify with the depositary whether these rules are complied with and, if there is any uncertainty about this, to take measures. The fund manager is responsible for appointing the depositary for each fund. We certainly do not rule out the possibility that the custody chain will become one of the key points of attention of the AFM's supervision in the near future.

Review of AIFMD (AIFMD 2?)

The AIFMD is currently being evaluated by the European Commission. Article 69(1) AIFMD required the European Commission to start a review of the application and scope of the AIFMD by 22 July 2017 at the latest. The review must include a general overview of the functioning of the AIFMD's requirements and of the experience gained with its application. The tender for the study underlying the evaluation was won by KPMG.

KPMG circulated a survey in the market in early 2018 to collect input from relevant stakeholders (such as managers, funds, custodians, investors, advisors, distributors and investment firms) on the basis of specific questions. KPMG supplemented this survey with a factual analysis of the effectiveness, efficiency, relevance and coherence of the AIFMD and whether the AIFMD has added value for the EU and for third countries in accessing EU investment capital. The study is currently underway and the results of KPMG's report are not yet (publicly) available.

It is our expectation that, following the KPMG report, the European Commission will determine how it will follow up its review (for example by a market consultation or a call for evidence). We expect more clarity about this in the course of 2019. It is then very questionable whether — given the type of regulations being evaluated — a review of the AIFMD will take place similar to that for MiFID. We expect that the AIFMD will certainly be tightened in a number of places, but an AIFMD 2 such as MiFID 2 is not in line with our expectations. Managers are advised to follow these developments. During the evaluation, they may be able to provide input for the European Commission's consultation proposals.

Proposal Framework for Sustainable Investments Regulation

On 24 May 2018, the European Commission published a **proposal** for a regulation on information provision in relation to sustainable investments and sustainability risks. The proposal provides for certain transparency obligations that various managers must observe in relation to sustainable investments. Managers must integrate sustainability considerations (such as sustainability risks and sustainability objectives) into their internal (investment) processes and inform participants accordingly. The proposal provides for a definition of 'sustainable investments'. In short, this means an investment that contributes to (i) achieving an environmental objective, (ii) achieving a social objective (such as (a) addressing inequality, (b) promoting social cohesion, social inclusion and industrial relations or (c) human capital or in economically or socially disadvantaged communities) or (iii) good governance practices, in particular companies with good management structures, that maintain good relations with their employees, reward the staff concerned well and properly comply with tax legislation.

The proposal includes the following obligations:

- Publication on the website of written policies on the integration of sustainability risks in the investment decision process;
- Pre-contractual information on sustainability risks — this information should be included in the prospectus by managers;
- Transparency on financial products designed to achieve sustainable return on investment and using an index as a reference benchmark, and, in the absence of a benchmark, information on how the sustainable return on investment objective is achieved;
- Transparency of sustainable return on investment on the website and in periodic reports.

It is currently not clear when the new rules will enter into force. Since it is a regulation, it would have direct effect from its entry into force. It does not need to be implemented in the Netherlands. We advise managers who manage funds that focus on sustainable investments to keep an eye on this proposed regulation closely. Where possible, they should anticipate the new rules, for example, with regard to the provision information in the prospectus.

ESMA consultation: Sustainability risks within the AIFMD and UCITS frameworks

On 18 December 2018, ESMA **published** a consultation 'On integrating sustainability risks and factors in the UCITS Directive and AIFMD'. The European Commission (EC) has requested ESMA to issue an opinion on the integration of sustainability risks into internal processes and procedures of AIFs or UCITS managers. With this consultation, ESMA aims to gather input for this advice. First of all, ESMA notes that the AIFMD and UCITS Directive prescribe obligations in a principle-based manner for the internal processes and procedures of a manager, including those relating to risks. Thus, ESMA is of the opinion that the setting of rules with regard to the integration of sustainability risks should also be based on such a principle-based approach, just as with regard to other risks such as interest rate risk or credit risk. In the consultation proposal, ESMA therefore requires managers to consider sustainability risks — in addition to all other risks — in their due diligence process and to analyse and weigh the sustainability risks arising from their investments.

In concrete terms, ESMA proposes amendments with regard to the following obligations:

- **General organisational requirements**: integration of sustainability risks into organisational processes and controls to ensure that they are adequately integrated into investment and risk management processes.
- **Resources**: ensure that managers have sufficient resources and expertise for the integration of sustainability risks.
- **Management's responsibility**: clarification that the integration of sustainability risks is part of the management's responsibility.
- **Conflicts of interests**: consideration of the types of conflicts of interest that may arise with regard to the integration of sustainability risks and sustainability factors.
- **Due diligence obligations**: consideration of sustainability risks in the selection and monitoring process, by setting up policies and procedures for this purpose.
- **Risk management**: explicit implementation of sustainability risks in determining, implementing and maintaining an adequate and documented risk management policy.

The consultation period runs until 19 February 2019. On 4 February 2019, ESMA will also organise a public hearing on the consultation. ESMA was requested by the EC to subsequently issue its advice on these subjects by 30 April 2019.

We are increasingly seeing that sustainability is being integrated into the financial sector and that financial market parties are expected to explicitly consider these developments and the associated risks in the context of their business operations. Managers should consult ESMA's advice as soon as it is final and adjust their processes accordingly.

End of transitional regime for existing money market funds (MMF Regulation)

The Money Market Fund Regulation came into force on 21 July 2018. This regulation provides a framework for a specific type of investment fund: the money market funds (MMFs). An MMF is (i) an investment fund that (ii) invests in short-term assets; and (iii) has a separate or collective objective that aims to provide a return in accordance with money market rates or safeguard the value of the investment. The Money Market Fund Regulation builds on the regulatory framework of the AIFMD and UCITS Directives and applies in addition to these Directives.

Managers already authorised under the AIFMD or UCITS Directive must follow an additional procedure when an AIF or UCITS to be managed by them also qualifies as an MMF. A transitional regime is anticipated for existing funds qualifying as MMFs. The managers of these MMFs must apply to manage an MMF by 21 January 2019 at the latest. If managers have not already done so, we recommend that they do so as soon as possible.

On the basis of the Money Market Funds Implementation Decree, the **consultation version** of which was published on 2 November 2018, the AFM is designated as the competent supervisory authority. DNB will be the competent supervisory authority with respect to stress tests, due to their prudential nature.

ESMA Work Programme 2019

On 26 September 2018, ESMA **published** its Annual Work Programme for 2019. Interesting for managers is that in 2019 ESMA will focus on increasing the convergence and consistency of the supervisory practice and approach of various national supervisory authorities. In this area, ESMA focuses specifically on the following legislation: AIFMD, UCITS, PRIIPs, MMF, ELTIF, EuVECA and EuSEF. ESMA will advance convergence and consistency of this legislation across Member States by issuing Q&As, guidelines and other supervisory tools. ESMA will also develop guidance on leverage limits.

Guidance + Q&As AFM and ESMA with regard to AIFMD and UCITS

The AFM and ESMA have published Questions & Answers (Q&As) on their websites relating to the AIFMD which they continually update. In addition, ESMA publishes Q&As about the scope and application of UCITS. The most recent Q&As of ESMA are from **4 October 2018** (AIFMD) and **23 July 2018** (UCITS). The most recent Q&A of the AFM is from 17 November 2017.

Risk management in the field of outsourcing – Good practices DNB

In 2017, DNB conducted a thematic study among, inter alia, fund managers into the management of outsourcing risks. Following this study, DNB published 11 **good practices** in June 2018. For example, managers must properly assess and record the risks of outsourcing and the service provider must undergo a thorough selection process. For an overview of all good practices, we refer to DNB's news report. We recommend that managers — if they have not already done so — implement the good practices in their outsourcing policy.

Improvement of AIFMD fund reporting

Last year, DNB and the AFM conducted a study into liquidity risks at open-end investment funds. The supervisory authorities found substantial shortcomings in the reports of some of the managers. The market was informed of this. In the near future, the supervisory authorities will devote extra attention to improving the quality of AIFMD fund reporting. Managers are advised to critically and accurately peruse their reports this year.

Hong Kong becomes designated state

On 12 November 2018, the Ministry of Finance published a consultation on an amending Decree for designated states under the Financial Supervision Act (Wft). In this draft decree, Hong Kong is designated as the state where investment institutions are adequately supervised in a manner that is comparable to the supervision in the Netherlands (what is known as a designated state). This means that managers established in Hong Kong do not have to apply for a separate licence from the AFM, but may send a notification to the AFM. The condition is that these investment institutions only offer to non-professional investors and are registered with the relevant Hong Kong supervisory authority, the Securities and Futures Commission.

FATF guidelines relevant to managers

On 26 October 2018, the Financial Action Task Force **published** guidelines, inter alia, for managers in the combat against money laundering. The AFM **expects** managers — where relevant — to take these guidelines into account when implementing their policy. For all other relevant developments in the field of integrity legislation, we refer to the **Integrity** section of this Outlook.

New Securitisation Regulation relevant for certain managers

2019 started with the entry into force (on 1 January) of the **Securitisation Regulation**. This European legislation harmonises the regulatory framework for securitisations and has thus replaced the (fragmented) sectoral regulations. Through the **CRR Amendment Regulation**, the Securitisation Regulation also amended the Capital Requirements Regulation (CRR), which concerns prudential requirements for credit institutions and investment firms. At national level, on 20 December 2018, the Decree on the Implementation and Enforcement of the Securitisations Regulation and the Capital Requirements Amendment Regulation entered into force, which aims to implement and enforce the relevant regulations in the Netherlands.

With the aforementioned regulations, the legislator aims to encourage 'STS securitisations'. 'STS' in this case stands for 'Simple, Transparent and Standardized'. The Securitisation Regulation sets out the criteria with which such securitisations must comply. In essence, securitisations should be made easier to understand through standardisation and simplification of their design. STS securitisations should also provide more transparency about the underlying assets, so that investors can better understand the underlying risks. In addition, the CRR Amendment Regulation provides for a more advantageous prudential framework regime for STS securitisations, which is intended to promote such securitisations.

For managers who have an exposure to securitisations in connection with their investment portfolio, the new regulation is directly relevant because it contains rules on risk retention and due diligence that also apply to managers. This also applies to registered managers (under the AIFMD light regime). Managers with an investment portfolio that is exposed to a securitisation should be aware of the new rules.

Current Benchmark Regulation; some amendments envisaged

On 25 May, the **proposal** was introduced at European level to amend the current Benchmark Regulation in connection with low-carbon benchmarks and positive carbon impact benchmarks. This proposal is part of a wider package of European Commission initiatives on sustainable development.

The proposal introduces the following two new types of benchmarks:

- **'low-carbon' benchmarks**: a benchmark where the underlying assets contribute to lower CO_2 emissions compared to the assets underlying the comparable 'normal' benchmark; and

- **'positive carbon impact benchmarks'**: in this benchmark, the underlying assets represent an absolute saving in CO_2 emissions in the sense that the underlying assets only contain components with emission reductions greater than the CO_2 emissions.

The proposal adds a new appendix to the Benchmark Regulation, which provides that benchmark administrators shall record and disclose the methodology they use for their calculation of aforementioned benchmarks. The appendix also defines the information that must at least be included in the description of the methodology. In addition, the administrator must explain how the low carbon benchmark differs from the underlying standard index and the extent of the positive carbon impact of each underlying asset included in the benchmark. Furthermore, the European Commission intends adopting delegated acts setting minimum requirements for 'low-carbon benchmarks' and 'positive carbon impact benchmarks' for the criteria to be considered when selecting and weighting the underlying assets and the method to be used to calculate CO_2 emissions and savings.

The underlying proposal (and other related legislative acts) aims to integrate ESG (environmental, social and governance) considerations coherently into the investment and advisory process across the various sectors. This should ensure that all financial market participants — such as investment fund managers — who are mandated by their participants to make investment decisions on their behalf, incorporate ESG considerations into their internal processes and inform their participants accordingly. A **compromise proposal** was submitted on 14 December 2018, introducing some further changes to the original proposed amendment.

Managers using such benchmarks should monitor these changes and make timely adjustments.

Benchmark Regulation—transitional periods expire

On 1 January 2018, the Benchmark Regulation entered into force in the EU Member States.

The Benchmark Regulation regulates the provision and use of benchmarks and the provision of input data for a benchmark. Specifically for managers, the Benchmark Regulation may be relevant when they use a benchmark to measure the performance of an investment fund for the purposes of:

- tracking or imitating the performance of that benchmark;
- determining the composition of the portfolio of the investment fund; or
- calculating the performance fee for the manager.
- In principle, a manager should only use a benchmark if (i) the provider of the benchmark is registered and/or (ii) the benchmark is listed in an ESMA register.

The Benchmark Regulation provides for a transitional regime, which in short means that benchmarks that existed on 1 January 2018 may continue to be used until 1 January 2020. Thereafter, the provider of the benchmark and/or the benchmark itself must be included in an ESMA register. Non-EU benchmarks may continue to be used until 1 January 2020.

We advise managers who use a benchmark to check whether the benchmark they use ensures that it is included in the ESMA register from 1 January 2020 at the latest.

Significant increase in licence fees

In the General part of this Outlook, we have briefly discussed the Financial Supervision (Funding) Act 2019, which came into force on 1 January 2019. Supplementary to this Act, the financial supervision funding **scheme** for one-off actions also came into force on 1 January 2019. This scheme changes the fees that DNB and the AFM can charge for one-off actions, such as an application for a licence. In addition, this regulation introduces hourly fees for a number of actions in order to better respond to requests of different size and complexity. For example, with the entry into force of the AIFMD, a number of additional requirements have been introduced for managers of investment institutions with regard to the licence application, which the AFM has had to take into account when processing licence applications. With this regulation, these additional costs will be charged on.

Managers of an investment institution should take into account the replacement of the fixed rate of EUR 5,500 for a licence application by an hourly rate of EUR 200, rising to a maximum of EUR 100,000. A licence application can therefore become considerably more expensive than before.

Review and Extension of Act on remuneration policy for financial undertakings

A review of the Remuneration Policy (Financial Undertakings) Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) took place in the summer of 2018. In addition, in a **letter to Parliament** dated 17 December 2018, the Minister announced three statutory measures to tighten up remuneration policy in the financial sector. This concerns, in so far as relevant for managers:

1. An obligation to hold shares and (certain) other components of fixed remuneration, the value of which depends on the market value of the own company, for directors and employees of financial companies for 5 years; and
2. An obligation for financial companies to describe in their remuneration policy how the company takes account of the relationship between the remuneration of directors and employees and its function in the financial sector and its position in society, and to account for this.

For a detailed overview of the developments with regard to the remuneration policy, we refer to the **General** section of this Outlook.

AFM consultation Information provision Policy Rule

On 31 December 2018, the AFM **published** the Information Provision policy rule. In this policy rule, the AFM explains what it pays attention to when assessing the provision of information by financial undertakings about financial products and services. In this consultation, it has included a new chapter entitled 'Investing: what are relevant characteristics? In this chapter, the AFM explains which aspects of an investment must be communicated to the client in the context of the obligation under Section 4:20 Wft. The AFM concretises what, in its opinion, are the relevant characteristics of a right of participation in an investment institution, a security and a shipping investment respectively.

Consequences of Brexit

Brexit is currently the largest source of political uncertainty for the financial sector. How this will work out exactly when Brexit takes place will also depend on the outcome of the negotiations between the EU and the United Kingdom (UK). For managers, a Brexit will particularly impact their marketing opportunities in the UK.

For Dutch managers it is particularly important what the new English rules for investment funds will be after Brexit. After all, these rules will determine the conditions for marketing a fund under participants established in the UK. In recent months, the UK government has published a variety of bills to address the post-Brexit situation. These bills incorporate EU legislation into UK law. The following bills are important to managers:

1. The **Draft** Alternative Investment Fund Managers (Amendment) (EU Exit) Regulations 2018 (draft AIFMD SI).
2. The Draft Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2018 (draft CIS SI).

The draft AIFMD SI incorporates the AIFMD framework in the UK and the draft CIS SI incorporates the UCITS framework in the UK. Both bills provide for a 'no-deal' or 'hard' Brexit. Specifically with regard to Dutch managers, it is relevant that both the draft AIFMD SI and the draft CIS SI (for the time being) provide for a transitional regime (the temporary permission regime). Alternative investment funds (including EuVECA and EuSEF) and UCITS funds that could have been traded in the UK prior to Brexit may continue to be traded. The same applies to AIFMD or UCITS authorised managers managing a UK AIF or UCITS: they may continue to operate under the same conditions as pre-Brexit. However, managers must submit a notification to the FCA before Brexit that they wish to make use of the transitional regime. Moreover, managers will in principle not be able to develop their activities (such as launching new funds or offering them to a new category of investors). As currently foreseen, the transitional period will last a maximum of three years from Brexit. The **website** of the FCA contains information on how – prior to 29 March 2019 – notification must be made.

AMLD5

Over the past year, the European and Dutch supervisory authorities have published a great deal of relevant guidance in the area of integrity. In addition, 2019 will probably see the upcoming amendment of the Fourth Anti-Money Laundering Directive. The Fifth Anti-Money Laundering Directive (AMLD5) must be implemented in the Netherlands by 10 January 2020. For an overview of the consequences of AMLD5 and other relevant developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

Financial Markets Legislation
Important Information For Investment Firms In 2019

ESMA Supervision Priorities 2019

New prudential framework for investment firms

Proposed amendments by the ESAs to the Key Information Document (KID) for PRIIPs

Extension of prohibition of binary options

Proposal Framework for Sustainable Investments Regulation

SME Growth Market Promotion Regulation

Entry into force of the Securitisation Regulation

New National Regime

AFM publishes Information Provision Policy Rule

Client's account for investment firms

AFM sector-wide outsourcing study

AFM investigation into compliance with Wwft

EBA Guidelines on outsourcing

EBA consultation: Guidelines on ICT and security risk management

AFM MiFID II study into fees, product governance and cost transparency

AFM report on client complaints

Integration of ESG criteria in suitability test for advice and investment management

Consequences of Baumeister ruling

Significant increase in licence fees

Benchmark Regulation – transitional periods expire

Current Benchmark Regulation; some amendments envisaged

Review and Extension of Act on remuneration policy for financial undertakings

Consequences of Brexit

FATF guidance on anti-money-laundering

AMLD5

ESMA Supervision Priorities 2019

ESMA published its **2019 Annual Work Programme** on 26 September 2018. This describes the supervision priorities for 2019 from ESMA's perspective. The key priorities for ESMA in 2019 are:

- **Promoting supervisory convergence:** in the area of the implementation of MiFID II/MiFIR, prospectuses and securitisations, ESMA aims for more convergence/equality in regulation and supervision in the various EU Member States.
- **Assessing risks**: In particular with regard to the data requirements of MiFID II/MiFIR, ESMA will assess risks to investors, markets and financial stability.
- **Single Rulebook:** ESMA will strive to finalise the harmonised framework on the Capital Market Union and Fintech Action Plan.
- **Direct supervision by ESMA:** ESMA will directly supervise credit rating agencies, Trade Repositories, securities financing transactions and certain securitisations, among others.

New prudential framework for investment firms

Original proposals

On 20 December 2017, the European Commission published proposals for a new prudential framework for investment firms. The proposals include (i) a **regulation** on prudential requirements for investment firms; and (ii) a **directive** on the prudential supervision of investment firms. The proposals introduce a new prudential framework, including e.g.:

- The largest investment firms ("Class 1 – Systemic investment firms", which will be only a small group) will continue to be covered by CRD IV/CRR and regulated in the same way as significant banks. They will also fall under the definition of credit institution in CRR. This means, inter alia, that the ECB will become their direct supervisory authority.
- A new prudential framework will also be introduced for Class 2 and 3 non-systemic firms. This will cover the vast majority of investment firms. This group is divided into 'Class 2 – Other investment firms' and 'Class 3 – Small and non-interconnected firms'.
- Class 2 firms are subject to a capital requirement consisting of the higher of either a requirement calculated on the basis of 'K-factors' or a capital requirement based on minimum own funds and the fixed cost requirement.
- Class 3 firms shall be subject to a capital requirement based on minimum equity and the fixed cost requirement.

An ECB **opinion** on the proposals was published on 22 August 2018 at the request of the European Parliament and the Council. The ECB is generally positive about the proposals, but is rather critical of the proposal to include Class 1 investment firms (the largest investment firms) within the definition of credit institution in the CRR. In the ECB's view, this has far-reaching and unintended consequences and therefore requires careful consideration. The ECB opinion has not (yet) been responded to.

Compromise proposals

In a **letter to Parliament** dated 17 December 2018,the Minister of Finance informed the House of Representatives about the progress of European decision-making on the new prudential framework. The Presidency (previously headed by Austria and as of 1 January 2019 by Romania) worked in Council Working Groups on a compromise proposal. The latest compromise proposal discussed in the Council Working Groups is mostly in line with the most important elements of the Dutch objective, as expressed in the **BNC fact sheet of 16 February 2018** and in **answers to the written questions** about the fact sheet of 17 July 2018.

In so far as we have been able to ascertain, the latest compromise proposals are dated 9 October 2018 (click **here** for the directive, and **here** for the regulation), and they include the following elements, among other things:

- A new subcategory under category 1 is introduced, the Class 1 minus. It is proposed that investment firms between €15 billion and €30 billion that trade for their own account and/or underwrite financial instruments on a firm commitment basis should also be kept within the scope of the prudential framework for banks (CRR/CRD). However, the definition amendment credit institution does not apply to this category.

- In addition, national supervisors are given the option of placing investment firms between €5 billion and €15 billion also under Class 1 minus.
- The capital requirements for category two investment firms—K-factors—are largely followed. With regard to the K-factors that apply to market risk, the compromise proposal allows the use of the K-factor Clearing Member Guaranteed (K-CMG) as an independent alternative to market risk, subject to conditions and with the consent of the supervisory authority. This is what the Netherlands wanted.
- The latter compromise proposal proposes reducing the initial capital requirement for trading platforms, provided they are not trading for their own account, from EUR 750,000 to EUR 150,000.
- At the request of several Member States, the last compromise includes the possibility for Member States to impose a national bonus ceiling on investment firms. This Member State option allows enforcement of the Dutch bonus ceiling for investment firms.

We recommend that investment firms closely monitor developments with regard to the new prudential framework. The proposal is now being discussed in the European Parliament and the Council. Once adopted, an implementation period of 18 months is expected before the new regime enters into force. It is now expected to be by mid-2020. So we expect the proposals to be adopted in 2019. From that moment on, investment firms will be able to definitively determine in which class they fall and what consequences this will have for them. This will enable them to assess whether it is advisable to adjust their services or restructure the company in order to limit the undesired impact of the new regime.

Proposed amendments by the ESAs to the Key Information Document (KID) for PRIIPs

On 8 November 2018, the ESAs published a **consultation document** on the amendment of the PRIIPs Delegated Regulation. The aim is to make changes to the KID in order to remove duplications in the disclosure requirements for investment funds. These new rules are relevant to investment firms that sell PRIIPs in respect of these investment funds. The consultation ran until 6 December 2018. The ESAs aim to send their proposal for the amendments to the European Commission as soon as possible in 2019. The amendments should enter into force on 1 January 2020.

Extension of prohibition of binary options

On 2 July 2018, ESMA prohibited the marketing, distribution and sale of binary options to retail investors for a period of 3 months. Thereafter, ESMA extended the deadline, most recently on 9 November 2018. Then ESMA **decided** that from 2 January 2019 the prohibition will be maintained for another three months.

Proposal Framework for Sustainable Investments Regulation

Several months after the European Commission had presented its action plan 'Financing sustainable growth' (see: **General**), a **Regulation** on the creation of a framework to promote sustainable investments followed on 24 May 2018. This Regulation is an elaboration of the first objective of the action plan, namely the reorientation of capital flows towards sustainable investments. It aims at introducing a classification for sustainability in investments. This will make it possible to determine which investments are sustainable and is aimed at making a positive contribution to promoting sustainable investments. The Regulation should be seen as a first step in establishing a larger framework for sustainable investment. The current proposal is relevant for both financial institutions using sustainable financial products and financial institutions offering them (such as investment firms). The aim is to create an EU classification, which could be used at a later stage as a standard for other measures arising from the action plan.

SME Growth Market Promotion Regulation

Despite the fact that the new Prospectus Regulation is not yet directly applicable in the Netherlands, the SME Growth Market Promotion Regulation already proposes some substantive changes. This **proposal** by the European Commission for a regulation to promote the SME growth market is part of the package of measures to strengthen the European capital markets union. The 'SME growth market' is a specific form of an MTF introduced by the MiFID II Directive, but aimed at SMEs.

The SME Growth Market Promotion Regulation is an amendment regulation, which will introduce a number of amendments to the current Market Abuse Regulation in addition to the new Prospectus Regulation. This initiative is strictly limited to SME growth markets and companies listed on MTFs. In short, the SME Growth Market Promotion Regulation aims at facilitating access by SME to capital markets, inter alia by reducing compliance costs and administrative burdens for issuers.

The SME Growth Market Promotion Regulation has a particular impact on issuers. For more information on this, please refer to the **Issuers** section of this Outlook. However, the SME Growth Market Promotion Regulation also contains a number of technical amendments to the existing **implementing regulation on organisational requirements and conditions for investment firms** (based on MiFID II). These changes are intended to:

- make it easier for SMEs that exclusively issue debt instruments to have those debt instruments listed on an SME growth market; and
- allow an operator of an SME growth market to provide that SMEs that have issued only a debt instrument are not obliged to publish half-yearly figures.

At the date of this Outlook, the proposal for this Regulation is still in the negotiation phase. The Council of the European Union and the European Parliament (as European legislators) have yet to determine their position. It is therefore not yet known when the SME Growth Market Promotion Regulation will enter into force.

Entry into force of the Securitisation Regulation

2019 started with the entry into force (on 1 January) of the **Securitisation Regulation**. This European legislation harmonises the supervisory framework for securitisations and has thus replaced the (fragmented) sectoral regulations. Through the **CRR Amendment Regulation**, the Securitisation Regulation also amended the Capital Requirements Regulation (CRR), which concerns prudential requirements for credit institutions and investment firms. At national level, on 20 december 2018, the Decree on the Implementation and Enforcement of the Securitisations Regulation and the Capital Requirements Amendment Regulation entered into force, which aims to implement and enforce the relevant regulations in the Netherlands.

With the aforementioned regulations, the legislator aims to encourage 'STS securitisations'. 'STS' in this case stands for 'Simple, Transparent and Standardized'. The Securitisation Regulation sets out the criteria with which such securitisations must comply. In essence, securitisations should be made easier to understand through standardisation and simplification of their design. STS securitisations should also provide more transparency about the underlying assets, so that investors can better understand the underlying risks. In addition, the CRR Amendment Regulation provides for a more advantageous prudential framework regime for STS securitisations, which is intended to stimulate such securitisations.

New National Regime

In September and October 2018, an amendment to the Wft Exemption Regulation was **consulted** on the amendment of the National Regime in connection with MiFID II. A number of new rules of conduct will apply and the professional standards will be tightened up. As far as investor protection is concerned, the National Regime is increasingly moving towards the full licence regime.

The National Regime includes persons as referred to in Section 11 of the Wft Exemption Scheme. This concerns persons who mediate in life insurance or mortgage credit (such as securities mortgages (mortgage combined with a securities portfolio), an investment account associated with homeownership or a pension accrual product. These persons are subject to the National Regime if, in the context of life insurance or mortgage credit, they advise on or receive and transmit orders in relation to units in an investment institution or UCITS. These persons may also advise on individual units of an investment vehicle or UCITS. Finally, the National Regime includes other persons who provide the investment services (receive/transmit orders, and investment advice as referred to in items a or d of the definition of the provision of an investment service in Section 1:1 Wft) in relation to units in an investment institution or UCITS, and do not provide these services in the context of advising on life insurance or mortgage credit.
The new National Regime includes the following new substantive requirements:

- Product governance requirements;
- Order administration;
- Reporting obligations to clients;
- Cost transparency towards clients;
- Recording of telephone and electronic communications;
- Provision of information to clients must meet more detailed requirements;
- Know your customer requirements (client profile and suitability test) are set out in more detail and more robustly;
- Retention obligation from 1 to 5 years;
- Finally, the professional standards are changed.

The Minister of Finance aimed to have the amendment to the Wft Exemption Regulation enter into force on 1 January 2019. However, until the date of this Outlook, no announcement thereto has been made public yet. No transitional period has yet been included in the consultation version. Parties registered under the National Regime must therefore check as soon as possible whether any new rules require adaptation of their business operations and/or client communication.

AFM publishes Information provision Policy Rule

On 31 December 2018, the AFM **published** the Information Provision policy rule. In this policy rule, the AFM explains what it pays attention to when assessing the provision of information by financial undertakings about financial products and services. In this consultation, it has included a new chapter entitled 'Investing: what are relevant characteristics? In this chapter, the AFM explains which aspects of an investment must be communicated to the client in the context of the obligation under Section 4:20 Wft. The AFM concretises what, in its opinion, are the relevant characteristics of a right of participation in an investment institution, a security and a shipping investment respectively.

Client's account for investment firms

In legislative letters of 2016 and 2017, DNB and the AFM expressed the wish to introduce a client's account for investment firms (and payment institutions). The Ministry of Finance has expressed a favourable opinion on this matter. The introduction of such a client's account offers the possibility of placing client funds held via an investment firm in an omnibus account in the investment firm's own name with a bank. As a result, these funds would fall outside the bankruptcy of the investment firm and no separate foundation for clients' funds would be required. DNB and the AFM believe that this will increase investor protection. In addition, we see in practice that there is also a demand among investment firms for such a client's account.
DNB and the AFM are in talks with the Ministry about how this wish can be fulfilled. We expect and hope that proposals for such a scheme will follow in the course of 2019.

AFM sector-wide outsourcing study

In 2017, DNB conducted a thematic study among, inter alia, investment firms into the management of outsourcing risks. Further to that, DNB published '**Good practices for managing outsourcing risks**' in May 2018. These good practices have 11 spearheads: (i) Outsourcing: assessing risks, (ii) Policy process, (iii) Supervisory requirements, (iv) Selection of service providers, (v) Evaluation of service providers, (vi) Management information, (vii) Quality of the agreement, (viii) Business continuity management, (ix) Critical data, (x) Service level reports and (xi) Assurance reports. We recommend that investment firms—if they have not already done so—implement the good practices in their outsourcing policy.

The results of the 2017 DNB survey have led to the AFM now starting a study. At the end of October 2018, the AFM started a study into outsourcing and purchasing activities or services from third parties. This study is carried out by means of a sector-wide information request. More than 300 investment firms have been contacted. The following information is requested:

(i) Which activities or services investment firms outsource and purchase;
(ii) To or from which third parties investment firms outsource and purchase these activities;
(iii) Which control measures investment firms have taken with regard to contracted outsourcing or purchases.

It is quite possible that the AFM will publish further guidance of good practices in 2019 as a result of this study.

AFM investigation into compliance with Wwft

On 17 December 2018, the AFM **published** the results of its 2018 survey on compliance with the Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en financiering van terrorisme*, Wwft) for investment firms. The survey showed that investment firms do not comply well with all the requirements of the Wwft. For example, it appeared that many investment firms:

- interpret the concept 'client' and 'transaction' too narrowly;
- fail to comply with their obligation to train staff so that they are familiar with the provisions of the Wwft; and
- do not periodically assess the client on the basis of the risk profile created.

The AFM has indicated that it will intensify the Wwft supervision in the coming years. This will mean, among other things, that the AFM will carry out more risk-driven investigations. For example, extra attention will be devoted to the obligation to report to the FIU and transaction monitoring. If necessary, we advise that investment firms bring their internal business operations into line with the requirements of the Wwft.

EBA Guidelines on outsourcing

In the summer of 2018, EBA consulted on its **draft Guidelines** on outsourcing. These Guidelines, which revise the 2006 CEBS Guidelines, aim to provide a harmonised framework for the outsourcing of activities. In recent years, outsourcing has become an increasingly interesting option in the context of cost reduction, flexibility and efficiency, and the adaptation of the bank's business models to new technological developments. The new Guidelines apply to credit institutions, investment firms, payment service providers and electronic money institutions and provide rules for a governance framework with respect to outsourcing for these types of institutions. These Guidelines also include EBA's recommendations on outsourcing to cloud service providers, for example. Under no circumstances may outsourcing result in the institution becoming an "empty shell". The management board remains ultimately responsible for outsourced activities at all times. When outsourcing to parties established in a third country, the financial institutions must be extra careful and specific criteria apply for the outsourcing of critical or important functions. According to the Guidelines, the supervisory authorities will have to be vigilant with regard to concentration of risk with one or more service providers. The Guidelines are expected to apply from 30 June 2019.

In the context of outsourcing, it is also relevant that the entry into force of the aforementioned EBA recommendations regarding outsourcing to cloud service providers on 1 July 2018 meant that the DNB Cloud Circular of 2011 lapsed. DNB has adopted the recommendations of EBA.

EBA consultation: Guidelines on ICT and security risk management

On 13 December 2018, the EBA published a **consultation** for Guidelines on ICT and security risk management. The EBA states that the complexity of ICT risks is increasing, as is the number of ICT-related incidents and their potential significant impact on financial institutions. These Guidelines introduce a number of requirements, including for investment firms, relating to the mitigation and management of these ICT risks. The Guidelines cover a number of requirements in the context of, inter alia, governance, risk assessment and information security. Parties may respond to this consultation until 13 March 2019.

AFM MiFID II study into fees, product governance and cost transparency

In the summer of 2018, the AFM conducted a study among 10 investment firms providing services exclusively to professional investors and eligible counterparties. The study focused on the following three MiFID II topics:

- commission rules;
- product governance;
- cost transparency.

The AFM has indicated that the broader population will be informed about the results of the study in early 2019.

AFM report on client complaints

MiFID II requires (bank) investment firms to report information on client complaints to the AFM from 2018. With the information provided by (bank) investment firms, the AFM expects to see developments in the market sooner and to counteract the undesirable effects of these developments. For 2018, the AFM had made a basic format available to meet the reporting obligation. The AFM will make a complete format available for 2019 in which more information is requested about the subject of the complaint, the complainant and the type of product or service that the complaint relates to. The first report in the full format will take place over the first six months of 2019 and must be submitted no later than 8 August 2019.

Integration of ESG criteria in suitability test for advice and management

MiFID II entered into force on 3 January 2018. The MiFID II package also includes Delegated Regulation 2017/565 on organisational requirements for investment firms. On 24 May 2018, the European Commission published a **proposal** for a regulation amending this delegated regulation. The proposed changes concern the integration of ESG (Environmental, Social and Governance) criteria into the investment process.

MiFID II requires investment firms providing investment advice or portfolio management services under the suitability test to obtain from clients the necessary information on, inter alia, their knowledge and experience, their loss-bearing capacity and their investment objectives. The information that currently needs to be requested on investment objectives is often of a financial nature. In the proposal, the European Commission proposes to amend Regulation 2017/565 so that, in the context of a client's investment objectives, his or her ESG preferences should also be explicitly requested.

Consequences of Baumeister ruling

In its **Baumeister ruling** of 19 June 2018, the European Court of Justice decided on the interpretation of the concept of 'confidential information' in the MiFID II provision on professional privilege. This ruling has implications for the field.

Baumeister was one of the thousands of investors who at the turn of the century entrusted a total of 674 million euro to Phoenix Kapitaldienst in Frankfurt. In 2005, this turned out to be a pyramid structure and the company was dismantled. Some 259 million euro was refunded to investors. Baumeister demanded access to certain documents from the German regulator (BaFIN) on Phoenix, but was not granted access because BaFIN invoked professional privilege. The German court then asked the ECJ to indicate how strictly this professional privilege should be interpreted.

It is important to note that the ECJ states that neither the context nor the purpose of the European law on national supervision of financial services suggests that all information provided—in this case—to the German regulator (BaFIN) is by definition confidential. In the event of disputes, the national court must assess which information qualifies as confidential and is therefore covered by professional privilege and which is not. Disclosure must not prejudice the interests of the provider and third parties or the proper functioning of supervision. For information older than five years, the ECJ reverses the burden of proof. In principle, these data no longer need to be confidential, unless it is convincingly demonstrated that disclosure would harm essential interests. In the event of disagreement, the national court must decide.

In any case, it has become clear that it is an illusion that all information provided by market parties to regulators is by definition considered confidential.

Significant increase in licence fees

In the General part of this Outlook, we briefly discuss the Financial Supervision (Funding) Act 2019, which came into force on 1 January 2019. Supplementary to this Act, the **Scheme** for funding the supervision of one-off actions also came into force on 1 January 2019. This scheme changes the fees that DNB and the AFM can charge for one-off actions, such as an application for a licence. In addition, this scheme introduces hourly fees for a number of actions in order to respond better to requests of different size and complexity. For example, MiFID II has introduced a number of new rules for investment firms in recent years, which the AFM must take into account when processing a licence application. With this regulation, these additional costs will be charged on.

Investment firms must take account of changes in the fixed fee for a licence application from EUR 5,500 to EUR 45,100. The costs of applying for a licence therefore increase considerably for investment firms.

Benchmark Regulation – transitional periods expire

On 1 January 2018, the Benchmark Regulation entered into force in the EU Member States. The Benchmark Regulation regulates the provision and use of benchmarks and the provision of input data for a benchmark. In principle, an investment firm should only use a benchmark if (i) the provider of the benchmark is registered and/or (ii) the benchmark is included in an ESMA register.

The Benchmark Regulation provides for a transitional regime, which in short means that investment firms may continue to use benchmarks that existed on 1 January 2018 until 1 January 2020. Thereafter, the provider of the benchmark and/or the benchmark itself must be included in an ESMA register. Non-EU benchmarks may continue to be used until 1 January 2020.

We advise investment firms that use a benchmark to check whether the benchmark they use ensures that they are included in the ESMA register from 1 January 2020 at the latest.

Current Benchmark Regulation; some amendments envisaged

On 25 May, the **proposal** was introduced at European level to amend the current Benchmark Regulation in connection with low-carbon benchmarks and positive carbon impact benchmarks. This proposal is part of a wider package of European Commission initiatives on sustainable development.

The proposal introduces the following two new types of benchmarks:

- **'low-carbon' benchmarks**: a benchmark where the underlying assets contribute to lower CO2 emissions compared to the assets underlying the comparable 'normal' benchmark; and

- **'positive carbon impact benchmarks'**: in this benchmark, the underlying assets represent an absolute saving in CO_2 emissions in the sense that the underlying assets only contain components with emission reductions greater than the CO_2 emissions.

The proposal adds a new appendix to the Benchmark Regulation, which provides that investment firms shall record and disclose the methodology they use for their calculation of aforementioned benchmarks. The appendix also defines the information that must at least be included in the description of the methodology. In addition, the investment firm must explain how the low-carbon benchmark differs from the underlying standard index and the extent of the positive carbon impact of each underlying asset included in the benchmark. Furthermore, the European Commission intends adopting delegated acts setting minimum requirements for 'low-carbon benchmarks' and 'positive carbon impact benchmarks' for the criteria to be considered when selecting and weighting the underlying assets and the method to be used to calculate CO2 emissions and savings.

The underlying proposal (and other related legislative acts) aims to integrate ESG (environmental, social and governance) considerations coherently into the investment and advisory process across the various sectors. This should ensure that all financial market participants—such as investment firms—who are mandated by their clients or beneficiaries to make investment decisions on their behalf incorporate ESG considerations into their internal processes and inform their clients accordingly. A **compromise proposal** was submitted on 14 December 2018, introducing some further changes to the original proposed amendment.

Review and Extension of Act on remuneration policy for financial undertakings

A review of the Remuneration Policy (Financial Undertakings) Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) took place in the summer of 2018. In addition, in a **letter to Parliament** dated 17 December 2018, the Minister announced three statutory measures to tighten up remuneration policy in the financial sector. These are:

1. An obligation to hold shares and (certain) other components of fixed remuneration, the value of which depends on the market value of the own company for directors and employees of financial companies for 5 years.
2. An obligation for financial companies to describe in their remuneration policy how the company takes account of the relationship between the remuneration of directors and employees and its function in the financial sector and its position in society, and to account for this.
3. A restriction of the exception to the bonus cap for people who do not fall under a collective agreement The exception will only be available for exceptional cases, and in any event should not be applied to persons performing internal monitoring functions or those directly engaged in providing financial services to consumers.

For a detailed overview of the developments with regard to the remuneration policy, we refer to the **General** section of this Outlook.

Consequences of Brexit

Brexit is currently the largest source of political uncertainty for the financial sector. How exactly this will work out when Brexit take place will also depend on the outcome of the negotiations between the EU and the United Kingdom (UK). A hard Brexit is certainly not ruled out.

Largest consequences for investment firms

Worth reading is the **letter from the European Commission of 8 February 2018**, in which it sets out the main consequences of Brexit in the area of the markets for financial instruments, such as:

- **Licences**
  - UK investment firms will no longer be able to obtain a MiFID licence to provide MiFID investment services and activities (they will lose their European passport) and will become third-country firms.
  - EU-27 subsidiaries (legally independent firms established in the EU Member States and controlled by or linked to UK-based investment firms) can continue to operate as EU investment firms if they have an MiFID license in one of the EU Member States.
  - EU branches of UK-based investment firms will be branches of third-country investment firms and will have to comply with national conditions applicable in the Member State where the branch is established. The provision of services/ activities will be limited to the territory of that Member State.
  - Market players/UK investment firms operating a trading or execution platform will no longer be able to benefit from the MiFID licence.
  - Trading platforms and central counter-parties (CCPs) in the UK will no longer have open and non-discriminatory access to EU trading platforms and CCPs and EU benchmarks, respectively.
- **Agreements**
  - EU-based firms trading in financial instruments subject to the MiFID trading obligation can no longer rely on certain UK-based firms/platforms.
  - Nor can clients any longer have direct electronic access to EU-based trading platforms through UK-based firms.

Finally, a major Brexit risk in the securities market is that the large broker dealers (parties such as Goldman Sachs, JP Morgan, etc.) and a large part of the market infrastructure are located in the UK and post-Brexit lose their market access to the EU. They would then no longer be able to serve Dutch and other European customers. As a result, Dutch customers, such as Dutch asset managers, may face higher costs or may no longer be able to execute some transactions.

Focus DNB in 2019

In November 2018, DNB published its **supervision priorities for the coming year**. The general supervision priorities will be discussed in the General part of this Outlook. Specifically with regard to investment firms, DNB notes that in 2019, with a view to Brexit, it will focus on the controlled transition of activities and the question whether new licence holders comply with legislation and regulations. Since the introduction of MiFID II in 2018, a licensing requirement has applied not only to the Multilateral Trading Facility, but also to the operation of an Organised Trading Facility. As a result, a larger number of institutions have come under the supervision of DNB and the AFM. DNB will continue to monitor the (potential) prudential risks arising from trading platforms that require a license.

The Netherlands as the centre for financial trading infrastructure of the European Union

Meanwhile, the AFM has received several licence applications from Brexiteers, not least from trading platforms (MTFs and OTFs) and traders for their own account. The AFM is of the opinion that the Netherlands will become the financial trading infrastructure centre of the European Union (EU). The AFM assumes that between thirty and forty percent of European trade in financial instruments will take place in the Netherlands. Points of attention are:

- **Preparing for a no-deal Brexit:** The AFM **calls on Dutch financial undertakings** to prepare adequately for a no-deal Brexit. According to the AFM, a hard Brexit will have disruptive consequences for the financial sector. For example, Dutch financial institutions may no longer meet the licensing requirements if they have outsourced services to UK institutions. This is only allowed to institutions in a so-called `supervisory regime that is declared equivalent'. In the case of a hard Brexit, this does not apply to the UK. This could have major consequences for Dutch asset managers.

- **Trend view 2019:** In its report **Trend View 2019**, the AFM explores trends and risks in the financial markets. It discusses Brexit in detail in this report. For a further description of Trend View 2019, see the General part of this Outlook.

- **Expansion of the AFM:** The migration of a significant part of the trading infrastructure to the Netherlands means an expansion of the AFM's tasks. The AFM has indicated that investments in extra capacity, knowledge and support services such as the processing of transaction data are necessary. The AFM is currently under great pressure due to the increased workload. In practice, this has consequences for the timing and prioritisation of application and supervision processes.

Transition period or temporary approval regime FCA

The UK regulator FCA provides a number of possible scenarios for the passporting of entities under its supervision:

- In their agreement, the EU and the UK have agreed on an implementation period, which will start on 29 March 2019 and last until the end of December 2020. During this period, companies and funds can continue to use their passporting rights as they currently do. These companies must also comply with both current European law and future European law that will enter into force before December 2020.
- In the event of a no-deal scenario, the United Kingdom will qualify as a 'third country'. In this context, the UK supervisory authority proposes a **temporary permissions regime** for companies that carry out activities in the United Kingdom from the EEA by means of passporting rights. The intention is to ensure that the business operations of these companies are disrupted as little as possible. This gives companies and funds a limited period of time after Brexit to apply for a full licence in the United Kingdom. To this end, they must inform the regulator in good time of their wish to be covered by this temporary consent regime. The **website** of the FCA contains information on how – prior to 29 March 2019 – notification must be made.

ESMA: obligation for investment firm to inform clients about Brexit consequences

On 19 December 2018, ESMA published a **document** in which it (applied to the Netherlands) reminded Dutch investment firms serving English clients or English investment firms serving Dutch clients of their obligation to adequately inform clients about the consequences of Brexit. These investment firms must provide their clients with the following information as quickly as possible:

- Impact of Brexit on the specific client;
- Actions that the investment firm itself takes, has taken or will take;
- Implications of any corporate restructuring;
- Impact at contract level.

FATF guidance on anti-money-laundering

In October 2018, the Financial Action Task Force (FATF), the international organisation active in the fight against money laundering and terrorist financing, published a **guidance document**, 'Guidance for a risk-based approach—Securities Sector'.

These guidelines describe the risk-based approach to anti-money laundering and combatting the financing of terrorism. The guidelines are intended to assist the securities sector in applying this risk-based approach to AML/CFT. The guidelines provide support to both the private sector and regulators in assessing money laundering and terrorist financing risks and implementing related control measures.

The AFM has indicated that it expects investment firms to take note of these guidelines. The AFM assumes that institutions take the guidelines into account when implementing and applying their AML/CFT policies, procedures and measures to limit and effectively manage the risks they have identified.

AMLD5

Over the past year, the European and Dutch supervisory authorities have published a great deal of relevant guidance in the area of integrity. In addition, 2019 will probably see the upcoming amendment of the Fourth Anti-Money Laundering Directive. The Fifth Anti-Money Laundering Directive (AMLD5) must be implemented in the Netherlands by 10 January 2020. For an overview of the consequences of AMLD5 and other relevant developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

Financial Markets Legislation

Important Information For Payment Service Providers In 2019

PSD2 Implementation

Exception regulation

EBA guidelines and RTS on PSD2

ICT and security risk management (consultation EBA)

Transparency obligations Payment Account Directive

Proposal to amend SEPA Regulation

Outsourcing

DNB Supervision Priorities 2019

Review and Extension of Act on remuneration policy for financial undertakings

Customer's account for payment institutions

Consequences of Brexit

AMLD5

PSD2 Implementation

The **Implementation Act Revised Payment Services Directive** was published on 27 December 2018 and enters into force in the first quarter of 2019. That completes the implementation of the Revised Payment Services Directive (PSD2). An important effect of the entry into force is that DNB will acquire a formal framework for deciding on the conversion of payment institutions' licences into a PSD2 licence. After all, as long as the legislation implementing PSD2 in the Netherlands was not yet in force, DNB could only consider an application in draft form.

The implementation of the PSD2 introduced a declaration of no objection requirement for payment institutions. This required existing holders of a qualifying holding in a payment institution to apply for a declaration of no objection. DNB handled the declaration of no objection applications of that group. For new licence applications, the declaration of no objection has become an integral part of the application process.

In addition to the Act, an **Implementation Decree** also came into force, which gives shape to specific regulations concerning, among other things, IT security and market access for the new payment services (payment initiation and account information).

Exception regulation

Commercial agent exception

Implementation of the PSD2 has changed the regime regarding exceptions to the licensing obligation for payment service providers. This is highly relevant for online trading platforms and service providers who continue to pay third parties in the context of their services. Such parties may fall within the scope of the regulation of payment services. This has an impact because such parties usually provide forward payment as an additional service and certainly not as a core activity. Under the PSD2 regime, they then in principle require a licence for this ancillary activity, unless an exception applies or an exemption can be used. The exception often used by the parties is the exception for **commercial agents**. This requires, among other things, a continuing cooperation between the service provider (as commercial agent) and its customer (either the buyer or the seller), with the agent also having a role in the formation of the underlying sale/purchase transaction.

'Limited use' exception

An exception affected by the PSD2 is the 'restricted use' exception. This exception is mainly used by providers of limited-use payment instruments and card issuing institutions (including gift cards), for whom this exception may also apply. 'Limited use' is defined as a limitation within the meaning of (i) a limited network or (ii) a very limited number of goods or services. The change introduced by the PSD2 concerns a further tightening of the limitation. A notification obligation has also been introduced that means that parties who make use of this exception must report to DNB if the total value of transactions (payment volume) they have executed in the past 12 months exceeds EUR 1 million. Based on the notification, **DNB** assesses whether a party is rightly using the exception, in which case the party concerned will be entered in a public register.

EBA guidelines and RTS on PSD2

Alongside implementation of the PSD2 in national legislation, the standards for payment services will also be further elaborated at European level. The European Banking Authority (EBA) is drawing up a number of Guidelines and Regulatory Technical Standards (RTS), which will further substantiate the PSD2 rules. A complete overview of the existing guidelines and standards can be found on the EBA website. In this Outlook we will highlight a few of them.

- **EBA guidelines on fraud reporting under PSD2** (**EBA/GL/2018/05**). These guidelines will be applicable for Dutch payment institutions from 1 July 2019. From that moment on, they will in principle be required to report every six months on fraud involving various payment instruments and services (this is a regular report that must be distinguished from incident reports). The first report to DNB will take place at the start of 2020, which report will cover the second half of 2019. **DNB will further inform** the payment institutions on the exact obligation.

- **Joint Committee on guidelines on complaint procedures.** **Guidelines** on the handling of complaints by financial institutions were issued in June 2014. An update of these guidelines in October 2018 (**JC 2018 35**) provides for the extension of the scope of the guidelines from 1 May 2019 and their application to the new payment service providers introduced in PSD2 (Payment Initiation and Account Information Services).

- **EBA guidelines on security measures to control operational and security risks** (**EBA/GL/2017/17**) are further elaborated in RTS regarding strong customer authentication (**EBA/RTS/2017/02**). In December 2018, EBA published an opinion to answer questions about the use of eIDAS certificates and to clarify how to deal with the use of 'qualified certificates for electronic seals (QSealCs)' and 'qualified certificates for website authentication (QWACs)'. The aim is to achieve uniform standards for interfaces between payment service providers and to ensure secure data communication.

ICT and security risk management (consultation EBA)

On 13 December 2018 the EBA published draft guidelines for ICT and security risk management (**EBA/CP/2018/15**). Parties may respond to this consultation until 13 March 2019.

EBA states that the complexity of ICT risks increases, as does the number of ICT-related incidents and the potentially significant impact on financial institutions. The new guidelines introduce a number of requirements for payment institutions, among other things, on how to mitigate and control these ICT risks. The guidelines are related to a number of requirements in the framework, among other things, of governance, risk assessment and information security. For payment service providers a number of specific guidelines are included which are related to the communication between the payment service provider and the user of payment services. For example, the user of payment services must be given a warning in the event of an initiated payment transaction or a failed attempt to initiate a payment transaction. The payment service provider must also support the user of payment services in case of questions and requests for assistance.

At this time payment service provider are subject to the 'Guidelines on security measures' pursuant to PSD2, which will be withdrawn the moment the proposed guidelines enter into force.

Transparency obligations Payment Account Directive

As of 31 October 2018, providers of payment accounts must comply with a number of transparency provisions arising from the Payment Accounts Directive (**PAD**). Among other things, the PAD aims to make the costs for payment accounts and related services more transparent and comparable. To this end, the use of European information templates is made compulsory. As of 31 October 2018, the **AFM supervises** compliance with the new transparency provisions. In 2019 it is therefore also important for providers of payment accounts to ensure that they comply with these transparency provisions.

Proposal to amend SEPA Regulation

The SEPA Regulation lays down rules on cross-border payments in euros. This has created two regimes for cross-border payment transactions: (i) transactions in euros from SEPA countries and (ii) transactions in euros from non-SEPA countries. As a result, the transaction costs of these transactions vary widely. The European Commission has made a **proposal** to ensure that the costs of such transactions (from non-SEPA country) are equated with the costs of a local payment transaction.

Outsourcing

In the summer of 2018, EBA consulted on its **draft Guidelines** on outsourcing. These Guidelines are a revision of the 2006 CEBS Guidelines and aim to create a harmonised framework for the outsourcing of work. In recent years, outsourcing has become an increasingly interesting option in the context of cost reduction, flexibility and efficiency, and the adaptation of the bank's business models to new technological developments. The EBA Outsourcing Guidelines will also apply to payment service providers and electronic money institutions. The Guidelines include rules on a governance framework for outsourcing and EBA' recommendations on outsourcing to cloud service providers are also included in these Guidelines. Under no circumstances may outsourcing result in the institution becoming an `empty shell'. The management of the company remains ultimately responsible for outsourced activities at all times. When outsourcing to parties established in a third country, the financial institutions must be extremely careful and specific criteria apply to the outsourcing of critical or important functions. In accordance with the Guidelines, the supervisory authorities will have to be vigilant with regard to concentration of risk at one or more service providers. EBA's work programme indicates that the Guidelines will be published in the first quarter of 2019. The Guidelines are expected to apply from 30 June 2019.

In the context of outsourcing, it is also relevant that the entry into force of EBA **recommendations** regarding outsourcing to cloud service providers on 1 July 2018 meant that, the DNB Cloud Circular of 2011 lapsed. DNB has adopted the EBA recommendations. The '**Good practices for managing outsourcing risks**' published by DNB in June 2018 will be maintained.

Material outsourcing (including outsourcing in the cloud) must be reported to DNB. DNB indicated in December 2018 that these notifications must be made via Digital Supervision Portal and developed a separate form for this with an extensive **explanation**.

DNB Supervision Priorities 2019

In its **Supervision Outlook 2019**, DNB stated that the supervision of payment institutions in 2019, to a large extent, will be dominated by the issue of licences under PSD2 and by ensuring that new market parties comply with the statutory requirements.

DNB will also investigate compliance with the requirements under the Money Laundering and Terrorist Financing (Prevention) Act and the Sanctions Act on online services provided by money transfer organisations. The background is that money transfer organisations offer online services that use smartphone applications or blockchain technology. These online services are increasingly being offered across borders by players from different countries. This has DNB's attention.

DNB will also deploy substantial capacity to combat financial and economic crime. As an extension of the study that DNB conducted in 2018 on the risk profile of currency exchange offices, a number of on-site studies will be conducted in 2019 at currency exchange offices with an increased inherent risk of involvement in financial and economic crime. Here too, the emphasis is on investigating unusual transaction patterns and compliance by these institutions with obligations under the Money Laundering and Terrorist Financing (Prevention) Act and Sanctions Act.

DNB has also reported that it will develop supervision of cryptocurrency-related services as soon as they are regulated. Here too, the mission is to combat financial and economic crime and increase compliance with integrity regulations (Money Laundering and Terrorist Financing (Prevention) Act and the Sanctions Act). DNB also announces that it will continue to explore this sector and strives to have a continuous overview of relevant forms of crypto, including 'A current consideration of integrity regulation with adequate identification is made for every form of crypto'.

Review and Extension of Act on remuneration policy for financial undertakings

A review of the Remuneration Policy (Financial Undertakings) Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) took place in the summer of 2018. In addition, in a **letter to Parliament** dated 17 December 2018, the Minister announced three statutory measures to tighten up remuneration policy in the financial sector. These are:

1. An obligation to hold shares and (certain) other components of fixed remuneration, the value of which depends on the market value of the own company for directors and employees of financial companies for 5 years.
2. An obligation for financial companies to describe in their remuneration policy how the company takes account of the relationship between the remuneration of directors and employees and its function in the financial sector and its position in society, and to account for this.
3. A restriction of the exception to the bonus cap for people who do not fall under a collective agreement The exception will only be available for exceptional cases, and in any event should not be applied to persons performing internal monitoring functions or those directly engaged in providing financial services to consumers.

For a detailed overview of the developments with regard to the remuneration policy, we refer to the **General** section of this Outlook.

Customer's account for payment institutions

In legislative letters of 2016 and 2017, DNB and the AFM expressed the wish to introduce a customer's account for payment institutions, among others. The Ministry of Finance has expressed a favourable opinion on this matter. The introduction of such customer account offers the possibility of placing customer funds held via a payment institution firm in an omnibus account in the payment institution's own name with a bank. As a result, these funds would fall outside the bankruptcy of the payment institution and no separate foundation for customers' funds would be required. The protection of the deposit-guarantee scheme would also apply to each beneficiary. DNB and the AFM are consulting with the Ministry about how this wish can be fulfilled. We expect and hope that proposals for such a scheme will follow in the course of 2019.

Consequences of Brexit

The European Commission has drafted a **notification** for parties that may be affected by the UK's withdrawal from the EU in the area of banking and payment services. It examines the effects of Brexit on the European passport, which the parties will lose in relation to the United Kingdom. The exact moment depends on whether or not a transitional regime around Brexit enters into force. In the event of a hard Brexit, payment service providers and electronic money institutions established in the EEA will in principle no longer be able to provide services in the United Kingdom. The FCA has reported that a temporary permissions regime is created as a 'backstop', so that services can be continued. The FCA keeps this information about this regime continuously up to date on its **website** and has opened a window for notifications for the temporary permissions regime.

AMLD5

Over the past year, the European and Dutch supervisory authorities have published a great deal of relevant guidance in the area of integrity. In addition, 2019 will probably see the upcoming amendment of the Fourth Anti-Money Laundering Directive. The Fifth Anti-Money Laundering Directive (AMLD5) must be implemented in the Netherlands by 10 January 2020. For an overview of the consequences of AMLD5 and other relevant developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

Financial Markets Legislation
Important Information For Crowdfunding And Fintech In 2019

European legal framework crowdfunding

National framework (loan-based) crowdfunding

Project information on crowdfunding platforms not sufficient

FinTech Action Plan

PSD 2: FinTechs acquire access to payment account

EBA Priorities 2019 – FinTech

ESMA Report on ICOs and crypto-assets

ESMA Annual Work Programme 2019

AFM, DNB and MinFin study cryptocurrencies legislation

AFM: Cryptocurrencies with property as underlying value are subject to supervision

AFM Trend View 2019 – FinTech

DNB Supervision Priorities 2019

Crypto platforms and crypto wallet providers within scope Wwft

FATF Guidance on virtual currency

European Parliament: resolution on blockchain

European Commission: plan on artificial intelligence

MinFin – Agenda for the financial sector

European legal framework crowdfunding

As part of the FinTech Action Plan (see below), the European Commission (EC) has published a proposal for a European licensing regime for Crowdfunding platforms. The proposal consists of a combination of the **Crowdfunding Regulation** and a **directive** proposing an amendment to MiFID II. Currently, many Member States have a national crowdfunding regime. Due to major differences between these national regimes, it is difficult in practice to carry out cross-border crowdfunding activities. The EC proposal aims to solve this problem by introducing a European licence for crowdfunding platforms, under which crowdfunding platforms may perform crowdfunding activities both nationally and across borders among the member states. The Regulation covers both crowdfunding in securities (equity-based) and crowdfunding in loans (loan-based) to companies; consumer crowdfunding falls outside the scope of this regulation. ESMA will be the competent authority to issue a European licence and to conduct European supervision of crowdfunding platforms.

Crowdfunding platforms have a choice under the proposed rules: (i) apply for a licence under the regulation, after which it is possible to carry out cross-border activities, or (ii) operate within the 'normal' national regime applicable to the platform. Platforms *must* make a choice: it is not possible to combine licences. If a platform falls within the scope of the proposed Crowdfunding Regulation, MiFID II does not apply.

This regulation also provides for a number of restrictions and obligations for crowdfunding platforms. For example, a restriction of EUR 1 million applies to the offered project. If a project has a higher value, this project can only be offered on a platform with a national licence. In addition, a crowdfunding platform must meet a number of requirements with regard to business operations and information provision. Moreover, a crowdfunding platform is required to be clear and transparent, for which purpose a key investor information sheet (KIIS) must be provided to potential customers.

It is currently not clear when the proposed Crowdfunding Regulation and Directive will be adopted. The regulation provides that it will apply in the Member States 12 months after its entry into force and the directive must be implemented at the latest six months before the regulation applies. This is a very short implementation period. We advise crowdfunding platforms to closely monitor these developments and to determine a strategy for whether they wish to apply for a licence under the Crowdfunding Regulation or to remain active under the national regime.

National framework (loan-based) crowdfunding

The **consultation** on a national regulatory framework for crowdfunding platforms closed at the end of 2017. There were no new developments in this area in 2018. We understand that feedback on this consultation will be given to the House of Representatives in the course of 2019. We advise crowdfunding platforms to keep an eye on these developments. We are curious to see how the new proposal will fit in with the proposed Crowdfunding Regulation (see above).

Project information on crowdfunding platforms not sufficient

On 26 April 2018, the AFM **published** a report with study results and recommendations for the provision of information by loan-based crowdfunding platforms. The AFM concluded that the provision of information, such as regarding (i) financial data, (ii) financial prospects, (iii) earnings model and (iv) characteristics of the loan, was inadequate. The AFM included a number of recommendations to improve the provision of information. The AFM uses the 2018 self-assessment to check whether platforms have adopted the recommendations. Platforms are advised — if they have not already done so — to follow these recommendations of the AFM. Feedback may follow from the self-assessments.

FinTech Action Plan

The EC presented a **FinTech Action Plan** in March 2018. The objectives of this programme are to strengthen Europe's position as a global FinTech hub and to develop the Capital Market Union.

The FinTech Action Plan proposes 19 actions that could have a concrete impact in 2019, including:

- In the last quarter of 2018, the EC intends to develop a more coordinated approach to FinTech standards, such as blockchain/distributed ledger technologies, application programming interfaces and identity management. On 2 January 2019, no such approach was published by the EC.
- In addition, the ESAs have **identified** best practices in the last quarter of 2018 regarding the different approaches of national supervisors, such as for an innovation hub or regulatory sandbox, which currently vary widely across Member States.
- In the first quarter of 2019, the ESAs will advise the EC where it is necessary to amend existing European legislation.
- Based on input from the ESAs, the EC will in the first quarter of 2019 publish best practices for the design and operation of regulatory sandboxes.
- In the first quarter of 2019, the ESAs will map out how national supervisory authorities deal with the licensing of innovative FinTech business models.
- In the first quarter of 2019, the ESAs will map how national supervisors supervise ICT security and ICT governance and whether guidance in this area is desirable.
- In the second quarter of 2019, an expert group set up by the EC will provide insight into whether and where there are legal barriers for FinTech companies that need to be removed.
- The EC encourages market parties to develop standardised APIs by mid-2019, in line with PSD2 and the General Data Protection Regulation (*Algemene verordening gegevensbescherming*, AVG). These could form the basis for a (Pan-) European rollout of open banking.

Of course, it remains to be seen whether all these deadlines will be met, but it is certain that the EC has set ambitious targets. We advise FinTech companies, for which this is relevant, to periodically check whether the actions relevant to them have been published.

PSD 2: FinTechs acquire access to payment account

PSD2 will (finally) enter into force in the Netherlands in the first quarter of 2019. For an overview of the relevant changes, we refer to the **Payment Service Providers** section of this Outlook. However, PSD2 is also very relevant for FinTech parties. One of the goals of PSD2 is to promote innovation in the market. To this end, PSD2 is introducing two new payment services: the *payment initiation service* and the *account information service*. Many of these services will be offered by parties other than banks (the FinTechs) and will be available via online channels or, for example, a (mobile) application. Parties who wish to become active as a payment initiation service provider or account information service provider must (soon) submit a licence application to DNB for this purpose.

In order to provide the new payment services (account information and payment initiation), FinTechs must have access to their customers' payment accounts. This requires the cooperation of the banks. PSD2 requires banks to cooperate. The European Banking Authority (EBA) has developed guidelines based on PSD2 (Regulatory Technical Standards (RTS)), which provide guidance on how banks should cooperate and how FinTechs and banks can communicate with each other via an application programme interface (API). The RTS will be applicable in September 2019. Until then, it will be up to the relevant banks to enable payment initiation service providers and account information service providers to access their customers' payment accounts. Practice will have to show how this will be implemented.

EBA Priorities 2019 —FinTech

In September 2018, EBA published its **Work Programme** for 2019, in which it presents its priorities for the coming year. As in 2018, EBA will continue to monitor financial innovations on an ongoing basis to assess where additional regulation and supervision are needed. With regard to FinTech, EBA indicates that it intends to focus its work on the following priorities: (i) a regulatory framework for new financial activities, sandboxing and innovation hub plans, (ii) FinTech's impact on business models, risks and opportunities for financial institutions, (iii) ICT risk management and cybersecurity, and (iv) regulatory obstacles to innovative technologies and business models. In addition, EBA will continue its work with respect to the FinTech Hub to share information and experience to create awareness and enable knowledge transfer.

In the context of FinTech, EBA plans to publish a number of reports, guidelines and opinions in 2019. These include a report on risks arising from emerging technologies and related guidelines for prudential supervisory authorities, a report on RegTech and guidelines on IT management and security for supervised institutions. We advise FinTech companies to keep a close eye on these and other planned developments.

ESMA Report on ICOs and crypto-assets

On 19 October 2018, the European Securities and Markets Authority's (ESMA) Securities and Markets Stakeholder Group (SMSG) **published** a report on Initial Coin Offerings (ICOs) and Crypto-Assets. SMSG has conducted a study into the risks associated with ICOs and crypto-assets, and in its report advises ESMA to take certain steps to manage those risks. SMSG notes that, on the basis of current legislation and regulations, it is still not clear whether certain ICOs and crypto-assets fall within the scope of existing supervisory legislation (such as MiFID II, MAD/MAR and the prospectus rules), particularly where asset tokens are concerned. SMSG also notes that these rules are implemented differently in the Member States with regard to ICOs and crypto-assets. SMSG proposes that ESMA should draw up level 3 regulations, for example with regard to the definition of 'commodity' and 'tradable securities' under MiFID II, in order to achieve convergence in supervisory practice in the various Member States, with the primary objective of protecting investors. SMSG also proposes sending a letter to the European Commission asking them to consider including so-called transferable payment tokens, transferable utility tokens and transferable asset tokens that are not related to a commodity in the list of financial instruments in MiFID II (ESMA does not have this power because it concerns level 1 regulations).

Developments in this area are progressing very rapidly and we believe it is only a matter of time before certain (new) legislation is introduced with regard to ICOs and crypto-assets. Undoubtedly there will be more clarity in this area in 2019. Parties considering an ICO or facilitating trade in crypto-assets are advised to follow developments in the area of legislation and regulations very closely.

ESMA Annual Work Programme 2019

On 26 September 2018, ESMA **published** its Annual Work Programme for 2019. It is relevant for FinTech that in 2019 ESMA will work towards realising a coordinated approach to the supervision and regulatory framework for innovative financial services. To this end, ESMA will closely monitor developments in this area, in particular with regard to FinTech and crypto-assets.

AFM, DNB and MinFin study cryptocurrencies legislation

At present, the AFM, DNB and the Ministry of Finance are jointly studying the desirability of supervisory regulations relating to cryptocurrencies. Many ICOs and cryptocurrencies currently fall outside the scope of current supervisory legislation, and therefore outside the scope of AFM or DNB supervision. The three parties are now jointly investigating whether changes to current legislation and regulations are desirable in order to bring ICOs and cryptocurrencies within the scope of supervisory legislation. This would obviously have a major impact on the cryptocurrency market. At this moment it is still completely unclear whether legislation will be proposed and if so, what the intended date of entry into force will be and whether it will provide for a transitional regime.

In the Agenda for the financial sector of MinFin (see also below under 'MinFin – Agenda for the financial sector'), the Minister indicates that DNB and the AFM have been asked in the spring of 2018 to draft an opinion about further measures regarding cryptocurrencies and that he expects to send it to the House of Representatives early 2019. Parties considering an ICO or facilitating trade in cryptocurrencies are advised to closely follow the outcome of this study.

AFM: Cryptocurrencies with property as underlying value are subject to supervision

On 23 November 2018, the AFM **published** a warning for parties offering and trading property investments in the form of cryptocurrencies. The AFM indicates that it sees an emergence of parties that invest in property and issue cryptocurrencies to investors to raise money for the investments. In principle, the vehicle will then qualify as an investment institution, which is subject to a licensing requirement, unless an exception or exemption applies. Parties carrying out similar activities must carefully check whether their services fall within the scope of the financial regulations.

AFM Trend View 2019 – FinTech

In October 2018, the AFM published its **Trend View 2019**, in which it maps out the main trends and associated risks in the financial sector for the coming year. The AFM identifies the following trends as a result of digitisation and innovation in the financial sector:

- **Increasing use of data and technology:** Financial institutions are making more use of customer data to personalise their financial services. This brings benefits, but also raises questions about data ownership and the storage, security and use of this data. The AFM points out that financial institutions must be able to demonstrate, within the framework of their duty of care, how they put the customer's interests first, for which they must be able to provide insight into the data. In addition, the AFM considers it necessary to conduct an international study into the legal and social limits of the use of customer data by third parties.

- **Increasing complexity of algorithms:** This trend may pose a risk to the effective governance and internal control of financial institutions. The AFM notes, for example, the possibility that self-learning algorithms may make socially undesirable or prohibited distinctions between customer groups. Financial institutions must take such risks into account in their business operations. The AFM indicates that this will be one of its points of attention in the supervision.

- **Risks in the context of the issuance of cryptocurrencies:** New technology makes the issue of cryptocurrencies easier. This makes this market easily accessible, also for parties with malicious intentions. The AFM, in collaboration with DNB and the Ministry of Finance, is therefore studying whether the regulatory framework for cryptocurrencies needs to be adjusted.

- **Outsourcing:** The AFM indicates that significant parts of the business operations of licensed institutions are regularly outsourced or offered via other players who are not subject to direct supervision. The AFM indicates that it wishes to inform these parties of the requirements arising from financial supervision.

- **The influence of gamification:** The AFM notes that financial institutions are introducing new forms of influence through gamification. The use of game techniques and the availability of financial products and services on easily accessible platforms such as smartphones make it easier for consumers to make financial decisions quickly. A positive effect of this is that consumers' interest in and knowledge of their finances will be increased. However, the AFM also sees negative effects, such as addiction risks and a reduced boundary between game and reality with the associated financial risks. The AFM expects an increase in initiatives in this area and indicates that further study is needed to investigate these effects.

Parties that are active in these areas are advised to take the risks identified by the AFM into account and address them where necessary.

DNB Supervision Priorities 2019

In November 2018, DNB published its Supervision Outlook 2019, including its supervision priorities for 2019. In the field of FinTech, the following priorities are important:

- **Innovation Hub and Customization for Innovation:** DNB will continue and where necessary improve the DNB-AFM Innovation Hub and Customization for Innovation in 2019.

- **Cryptocurrencies, artificial intelligence and distributed ledger technology (DLT):** In 2019, DNB will conduct further research into the risks and desirability of regulations regarding cryptocurrencies. DNB will also conduct a study into artificial intelligence and DLT in order to be able to understand the risks and opportunities involved.

- **Insurtech:** Technological innovation in the insurance sector (insurtech) remains a priority for DNB. DNB expects insurers to identify and adequately anticipate technological developments that may impact their business model. Insurtech can also lead to new competition and operational risks. Insurers must have demonstrable insight into the opportunities and risks and be able to substantiate their strategic decisions. In 2019, DNB will conduct a thematic study into IT risks and data quality control. In addition, DNB will continue its previously initiated study into the risks of insurtech in 2019.

Crypto platforms and crypto wallet providers within scope Wwft

On 9 July 2018, the amendment to the fourth anti-money laundering directive, also known as the Fifth Anti-Money Laundering Directive (AMLD5), came into force. The new directive is the result of an action plan to strengthen the fight against terrorist financing drawn up by the European Commission (EC) in 2016. For an overview of the relevant changes, refer to the **Integrity** section of this Outlook.

Specifically for the FinTech market, it is relevant that providers engaged in services for the exchange of virtual currency and fiat money (also known as: virtual currency exchange platforms) and/or providers of custodial wallets (also known as: custodial wallet providers) will fall within the scope of the directive. In concrete terms, this means that these providers must, among other things, conduct customer due diligence (CDD), monitor transactions and report unusual transactions to the relevant regulator. In addition, a registration obligation with the competent supervisory authority is also provided for. In the Netherlands this is given substance by introducing a licensing obligation for these providers of crypto services, with the license to be granted by DNB, if they offer their services *in or from* the Netherlands. They must then demonstrate that their business operations meet the requirements under the Wwft. These providers are expected to take far-reaching measures on the basis of the Wwft in the form of enhanced customer due diligence.

AMLD5 must be implemented in the Member States by January 2020. Providers of these crypto services must include this date in their agenda and must prepare and file their license application and bring their policy in line with the Dutch Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financiering van terrorisme*, Wwft) in 2019.

FATF Guidance on virtual currency

In October 2018, the Financial Action Task Force (FATF) published an update of its 2012 FATF Recommendations. This update includes a definition of 'virtual asset' and 'virtual asset service provider' (VASP) to clarify how anti-money laundering regulations should be applied to activities and businesses related to virtual currency. These include exchange platforms, custodial wallets and financial service providers at Initial Coin Offerings (ICOs).

Many of these new standards are consistent with the amendments resulting from AMLD5 (see above). As a result of the implementation of AMLD5, the Netherlands is expected to comply to a large extent with the amended FATF standards. In a few areas, however, the FATF goes further than AMLD5. AMLD5, for example, focuses on exchange platforms that convert fiat money into virtual assets and vice versa. The FATF also applies its standards to virtual-to-virtual exchange platforms. In addition, the directive does not currently cover financial service providers for ICOs, while the FATF standard does. How this should be implemented in European and Dutch legislation will be considered in the near future. It is also not yet clear exactly who should be considered to be a 'financial service provider for ICOs'. The FATF will be working on further details in the near future.

Parties involved in ICOs or enabling trade in cryptocurrencies must closely follow the AMLD5 legislative process. We expect that during this process it will become clear how the Netherlands will implement the FATF Recommendations in Dutch legislation (primarily the Wwft).

European Parliament: resolution on blockchain

The European Parliament adopted the preliminary version of the resolution "**Blockchain: a forward-looking trade policy**". With this resolution, the European Parliament calls on the European Commission to take a number of actions, including:

- Continuing to follow blockchain developments;
- Drawing up a number of guiding principles for the application of blockchain to international trade;
- Set up an advisory group on blockchains;
- Explore ways in which blockchain can contribute to trade and sustainable developments.

The European Parliament hopes that Europe can play a leading role in the field of blockchain and international trade.

European Commission: plan on artificial intelligence

On 7 December 2018 the European Commission (EC) presented a coordinated **plan** on artificial intelligence (AI) which was drawn up in cooperation with the member states. This plan was drawn up on the basis of a strategy regarding AI that the EC drafted in April 2018. This plan elaborates this strategy to stimulate the development and the use of AI in Europe. Agreement was reached on the following points:

1. Maximising investments through partnerships;
2. Creating European data rooms;
3. Promoting talent, skills and permanent education;
4. Developing ethical and reliable AI.

Concretely, this means for example that the EC will support training programmes in the field of AI with the help of scholarships in order to increase the number of experts in the EU. Also, in March 2019 experts will present a final version of a number of ethical guidelines to the EU. What is more, the Commission is calling on the member states to have implemented both the plan and a national strategy on AI by mid-2019, including investment levels and implementation measures. In short, there are many developments on the agenda for 2019 with regard to AI. We advise market parties that are involved in AI to keep a close eye on these developments.

MinFin – Agenda for the financial sector

On 17 December 2018, the Minister of Finance presented the **Agenda for the financial sector** containing the most important measures for this government's term of office. In this agenda, the Minister focuses on stability, integrity and innovation. For FinTech companies this entails a number of relevant New Year's resolutions.

In the context of integrity, and in particular countering money laundering and terrorist financing, the Minister indicates he will take a number of specific measures in order to mitigate risks regarding cryptocurrencies. To that end, the Minister proposes to introduce a licensing obligation for crypto custodian and exchange services (see above under 'Crypto platforms and crypto wallet providers within scope Wwft') This is also intended to prevent its use for money laundering and terrorist financing. In addition, the results of the AFM and DNB study expected in early 2019 will be used to take additional measures.

In the context of technological innovation, the Minister states that he wants to increase diversity in the sector. To this end, a broad investigation will be carried out into the opportunities and risks that FinTech brings with it. This study will result in a package of targeted measures to encourage the entry of new, innovative players. In addition, the Minister wants to promote the proportionality of regulation and supervision by approaching this at European level. Research will also be carried out into the efficiency benefits of using blockchain technology for payments and securities transactions. New technological developments entail a risk for cash. By means of periodic monitoring, DNB will ensure that cash continues to function sufficiently as a means of payment.

Financial Markets Legislation

Important Information For Financial Service Providers (Such As Advisers And Mediators) In 2019

This section deals with important developments in 2019 for financial service providers. This category includes advisers and intermediaries in financial products, such as insurances and consumer credit facilities. Consumer credit providers are also deemed financial service providers under the terms of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, Wft). Developments for these consumer credit providers are included in a separate section of the Finnius Outlook. The developments that affect financial service providers on crowdfunding or FinTech concepts are discussed in that specific section of the Outlook.

Codification exemption for deferred payment in normal trade

As of 1 January 2019, the Wft Exemption Regulation has been amended on a number of **points**, because there was uncertainty in the market about the question whether the granting of deferral of payment of an existing claim for payment of a sum of money falls within the scope of the Wft and is therefore subject to a licensing requirement. For this reason, the Wft Exemption Regulation now provides that the granting of a deferral of payment free of charge is exempted from the Wft. This codifies the existing practice, which means that if payment arrears occur at any time in the normal course of business, a deferral of payment can be granted if the consumer is unable to meet its payment obligations. The new Wft Exemption Regulation clarifies that this also concerns the granting, free of charge, of a deferral of payment of a claim for payment of a sum of money arising from a credit agreement as referred to in Section 1:20 Wft. 'Free of charge' means—somewhat misleadingly—that the statutory interest *or* stipulated interest may be charged for late payment of the claim and a compensation for extrajudicial collection costs. If the institution charges more costs than those referred to above, it must as yet apply for a licence.

The aforementioned exemption applies to both consumer credit providers and intermediaries. It is also important for intermediaries that the new Wft Exemption Regulation introduces an exemption from the Wft for intermediaries who mediate in credit other than as described in Section 1:20 Wft, in so far as the activities only relate to the granting of a free deferral of payment of claims arising from a credit agreement. This exemption applies in the event that the intermediary does not charge any costs other than those included in the original credit agreement. The notes to the exemption contain two examples of situations in which free mediation could occur.

Proposed amendments to Key Information Document (KID)

As is known, since 1 January 2018, providers of investment objects have been obliged to provide a Key Information Document (KID) to retail investors (based on the PRIIPs Regulation, No 1286/2014, which applies to investment objects).

On 8 November 2018, the ESAs published a **consultation document** on the amendment of the PRIIPs Delegated Regulation. The proposed amendments to the KID include:

- The performance scenarios and the way they are presented, in particular because the scenarios now seem to give too positive a picture of the expected performance of the product.
- The inclusion of past performance to the extent that such information is available.

The consultation ran until 6 December 2018. The ESAs aim to send their proposal for the amendments to the European Commission as soon as possible in 2019. The amendments should enter into force on 1 January 2020. We advise the providers of investment objects to follow the possible amendments to the KID, which should be clarified in Q1 2019.

Proposal for Investment Properties and Bonds Act: no progress made

As early as 2016, the Ministry of Finance held an **internet consultation** on a legislative proposal aimed, among other things, at introducing supervision of the management of investment properties. One of the objectives of the legislative proposal is to increase the level of protection of investors in investment properties and to exclude mala fide providers from the market for investment properties by tightening up regulations and the associated supervision. Over the past year, it has been (suspiciously?) quiet around this legislative proposal and, as far as we can see, no progress has been made. It is currently not clear whether, and if so when, this Act will enter into force. In a **letter** from the Ministry of Finance to the House of Representatives dated 27

November, we read that the Minister is working on the legislative proposal and intends to send it to the House of Representatives in the course of 2019. It follows from the **annual planning for 2019**, which the Minister announced on 18 December 2018, that the Minister intends to send the 'Legislative proposal on investment properties' to the House of Representatives in December 2019.

Examination targets financial services Wft

At the end of last year, the Ministry of Finance published an amendment to the Regulation on examination targets financial services (*Regeling eindtermen en toetstermen examens financiële dienstverlening*) Wft for **consultation**. The targets that will apply to the various Permanent Education (PE) examinations that will be held as of 1 April 2019 have been added to this regulation. Each adviser is required within the context of permanent education during every PE period, not being the PE period in which the diploma or certificate was acquired, to successfully pass a PE exam in order to continue providing advisory services after the PE period. The PE periods cover a period of 3 years. The next PE period starts on 1 April 2019. The amended Regulation should come into effect on 1 April 2019.

Proposal for a directive on credit service providers, credit buyers and security enforcement

Last March, the European Commission **announced** a package of measures to tackle banks' non-performing loans (NPLs). NPLs are loans from banks that are repaid late or perhaps not repaid at all by the borrower. Part of this is a European Commission **proposal** for a directive on credit services, credit buyers and security enforcement. The proposed directive applies to buyers and service providers of credit originally granted by a bank or its subsidiary, irrespective of the type of borrower. The directive also introduces an accelerated procedure for extra-judicial security enforcement, which applies to credit agreements concluded between creditors, mainly banks, and borrowers for their commercial, business or professional activities and are secured by movable and immovable assets owned by the borrower and pledged as security to a lender to ensure repayment of a loan.

The proposal assumes that Member States will have implemented the directive by 31 December 2020 at the latest and will apply those provisions from 1 January 2021 or 1 July 2021. The European Parliament and the Council still have to decide on the European Commission's proposal for the directive.

Mortgage credit: European Guidelines for the handling of complaints

As of 1 May 2019, the 'Guidelines for the handling of complaints by the securities sector (ESMA) and the banking sector (EBA)' will also apply in respect of complaints regarding the activities of creditors and credit intermediaries as referred to in the Mortgages Directive (No 2014/17/EU). The guidelines, which were published in 2014 by the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA), do not currently apply in relation to these activities. The Mortgage Directive has been applicable since March 2016. The scope of the guidelines has therefore now been adapted to cover complaints relating to the activities of creditors and credit intermediaries as referred to in that directive. The guidelines that will apply from 1 May 2019 can be found **here**. The AFM applies the guidelines in its supervision of compliance with the relevant rules of conduct of the Wft.

Benchmark Regulation – transitional periods expire

On 1 January 2018, the Benchmark Regulation entered into force in the EU Member States. The Benchmark Regulation regulates the provision and use of benchmarks and the provision of input data for a benchmark. A benchmark may only be used if (i) the provider of the benchmark is registered and/or (ii) the benchmark is included in an ESMA register.

The Benchmark Regulation provides for a transitional regime, which in short means that benchmarks that existed on 1 January 2018 may continue to be used until 1 January 2020. Thereafter, the provider of the benchmark and/or the benchmark itself must be included in an ESMA register. Non-EU benchmarks may continue to be used until 1 January 2020.

In view of the transitional regime, we advise intermediaries and advisors involved in benchmarked credit products to check whether they can continue to use these benchmarks at least until 1 January 2020.

Integration of ESG criteria in suitability test for unit-linked insurance

On 1 October 2018, the implementing legislation of the Insurance Distribution Directive (IDD) entered into force. The IDD package also forms part of the Delegated Regulation 2017/2359 regarding insurance-based investment products (unit-linked insurance). On 24 May 2018, the European Commission published a **proposal** for a regulation amending this delegated regulation. The proposed changes concern the integration of ESG (Environmental, Social and Governance) criteria into the investment process. The IDD requires insurers and intermediaries, when assessing whether a unit-linked insurance is suitable for their customer, to request information to assess whether the product meets the investment objective and of the customer or potential customer, including the risk tolerance of that person. The proposal is to add: "and his or her ESG preferences". In this way, insurers and intermediaries will be obliged, when selling unit-linked investment insurance, to also consider ESG criteria as part of the suitability test.

AFM publishes Information Provision Policy Rule

On 31 December 2018, the AFM **published** the Information Provision policy rule. In this policy rule, the AFM explains what it takes into consideration when assessing the provision of information by financial undertakings about financial products and services. Interpretations have been added and updated in the updated version of the policy rule. For example, the AFM has added examples of easily findable information concerning the services provided by comparison sites and the findability of service documents. New examples have been added of unclear and/or misleading information in areas such as product comparisons on comparison sites and unbalanced provision of information. For mortgage advisors and brokers, the additions in the chapter 'Savings: what are relevant characteristics?' and the chapter 'Borrowing: what are relevant characteristics?' are also relevant.

National regime regulation MiFID II

The National Regime is an exemption regulation from part of the MiFID requirements. In principle, intermediaries who advise on combined products with an investment component in the form of transactions in financial instruments that are directly for the risk and account of the customer also fall within the scope of the MiFID. This could include services in the context of securities mortgages, pension products, bank savings products and other wealth creation products with an investment component in the form of transactions in financial instruments that are directly for the risk and account of the customer. The National Regime is particularly relevant for parties who advise investors on combined products consisting of a credit and an investment account through which transactions in units in investment institutions (investment funds) are entered into for the risk and account of the customer. These combination products are also referred to as 'securities mortgages'. The National Regime is also of interest to parties that only advise on investment funds (and not on other financial instruments). Fact is that obtaining a National Regime registration is simpler than obtaining a full MiFID II licence.

In September and October 2018, an amendment to the Exemption Regulations under the Financial Supervision Act was **consulted** on in connection with the amendment of the National Regime in relation to MiFID II. A number of new rules of conduct will apply and the professional standards will be tightened up. As far as investor protection is concerned, the National Regime is increasingly moving towards the full licence.

The Minister of Finance aimed to have the amendment to the Wft Exemption Regulation enter into force on 1 January 2019. However, until the date of this Outlook, no announcement thereto has been made public yet. No transitional period has yet been included in the consultation version. Parties registered under the National Regime must therefore check as soon as possible whether any new rules require adaptation of their business operations and/or client communication.

Agenda for the financial sector of the Minister of Finance

On 17 December 2018 the Minister of Finance sent the Dutch House of Representatives the **Agenda for the Financial Sector**. The central theme is serviceability of the financial sector to society. The Minister announces his most important measures, including measures concerning mortgages, consumer credit and non-life insurance. Households must be sufficiently resilient to withstand shocks. Therefore, households must not be over-indebted.

To prevent high mortgage debts, the agenda includes the following measures by the Minister:

- Periodic monitoring of developments in mortgage debt, LTV and LTI.
- Working on (further) strengthening the financial skills of consumers, through education.
- Drawing up an action agenda for a better consumer choice environment.

In the context of the responsible provision of consumer credit, the agenda contains the following measures:

- Developing an alternative to the current credit warning.
- Addressing flash credits through an advertising ban or other legal possibilities for consumer protection.
- Reviewing the need for additional steps for home shipping credits in spring 2019.
- Reviewing additional AFM powers for revolving goods credits.

Finally, to increase the resilience of households, the Minister will take steps to increase transparency about commissions and services for consumers taking out non-life insurance. According to the agenda, the House of Representatives will be informed of this separately in the near future. In consultation with the AFM, the Minister will consider how best to achieve transparency in order to promote the interests of customers without disturbing the playing field between distribution channels.

AFM: incident reports must be improved

On 28 December 2018, the AFM **published** a press release on its website in which it indicated that advisors and intermediaries should report incidents better, because incidents are not always reported and established in time. The AFM established this after having visited approximately 40 financial service providers. The AFM points out that advisors and intermediaries are obliged under the Wft to report incidents and to have an incident reporting policy, and that possible cases involving abuse must also be reported to partners in the chain (chain responsibility).

Review and Extension of Act on remuneration policy for financial undertakings

A review of the Remuneration Policy (Financial Undertakings) Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) took place in the summer of 2018. In addition, in a **letter to Parliament** dated 17 December 2018, the Minister announced three statutory measures to tighten up remuneration policy in the financial sector. These are:

1. An obligation to hold shares and (certain) other components of fixed remuneration, the value of which depends on the market value of the own company for directors and employees of financial companies for 5 years.

2. An obligation for financial companies to describe in their remuneration policy how the company takes account of the relationship between the remuneration of directors and employees and its function in the financial sector and its position in society, and to account for this.
3. A restriction of the exception to the bonus cap for people who do not fall under a collective labour agreement The exception will only be available for exceptional cases, and in any event should not be applied to persons performing internal monitoring functions or those directly engaged in providing financial services to consumers.

For a detailed overview of the developments with regard to the remuneration policy, we refer to the **General** section of this Outlook.

Consequences of Brexit

On 29 March 2019, the United Kingdom will officially leave the EU. As Brexit approaches, it is important that financial service providers, insofar as they have not already done so, consider the impact Brexit will have on them, for example on market access. Mortgage credit intermediaries can operate in other EU Member States by means of a European passport. Mediators in (re)insurance in the Netherlands can be active in other EU Member States and vice versa. Dutch intermediaries operating in the UK on the basis of a European passport, or UK intermediaries operating in the Netherlands on the basis of a European passport, will have to ensure their continued access to the UK for possibly the three upcoming years under the **temporary permissions regime**, which is now open for the required notifications. Of course, it is also important to know how the UK rules on financial products and services relevant to intermediaries and advisers will read after Brexit.

FATF guidance on anti-money-laundering

In October 2018, the Financial Action Task Force (FATF), the international organisation active in the fight against money laundering and terrorist financing, published a **guidance document**, 'Guidance for a risk-based approach – Securities Sector'.

These guidelines describe the risk-based approach to anti-money laundering and combatting the financing of terrorism (AML/CFT). The guidelines are intended to assist the securities sector in applying this risk-based approach to AML/CFT. The guidelines provide support to both the private sector and regulators in assessing money laundering and terrorist financing risks and implementing related control measures.

The AFM has stated that it expects life insurance intermediaries to take note of these guidelines. The AFM assumes that institutions take the guidelines into account when implementing and applying their AML/CFT policies, procedures and measures to limit and effectively manage the risks they have identified.

AMLD5

Over the past year, the European and Dutch supervisory authorities have published a great deal of relevant guidance in the area of integrity. In addition, 2019 will probably see the upcoming amendment of the Fourth Anti-Money Laundering Directive. The Fifth Anti-Money Laundering Directive (AMLD5) must be implemented in the Netherlands by 10 January 2020. For an overview of the consequences of AMLD5 and other relevant developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

Financial Markets Legislation

Important Information For Consumer Credit Providers In 2019

Codification exemption for deferred payment in normal trade

AFM Customer Interest Dashboard 2018 – Consumer Credit: Service can be improved

Minister of Finance consumer credit market study, policy objectives and follow-up steps

Agenda for the financial sector of the Minister of Finance

Mortgage credit: Remuneration rules for change in debit interest rate and early repayment

AFM Customer Interest Dashboard 2018 – Mortgage risk premium: Service can be improved

New lending standards for mortgage credit as of 1 January 2019

FSC survey of policy options to prevent overheating of the housing market

Examination targets financial services Wft

Monitoring NVB Code of Conduct Small Business Financing

Code of Conduct SME Financing for alternative financiers

AFM publishes Information Provision Policy Rule

Proposal for a directive on credit service providers, credit buyers and security enforcement

Mortgage credit: European Guidelines for the handling of complaints

Advertising rules for high-risk financial products?

Benchmark Regulation – transitional periods expire

AFM: incident reports must be improved

Review and Extension of Act on remuneration policy for financial undertakings

Scheme for funding the financial supervision of one-off actions

Consequences of Brexit

AMLD5

Codification exemption for deferred payment in normal trade

As of 1 January 2019, the Wft Exemption Scheme has been amended on a number of **points**, because there was uncertainty in the market about the question of whether the granting of deferral of payment of an existing claim for payment of a sum of money falls within the scope of the Financial Supervision Act (*Wet op het financieel toezicht*, Wft) and is therefore subject to a licensing requirement. For this reason, the Wft Exemption Scheme now states that granting a deferral of payment free of charge is not a form of regulated lending. This codifies the existing practice, which means that if payment arrears occur at any time in the normal course of business, a deferral of payment can be granted if the consumer is unable to meet his payment obligations. An exemption is also provided for intermediaries involved in these forms of deferred payment.

The new Wft Exemption Scheme clarifies that this also concerns the granting, free of charge, of a deferral of payment of a claim for payment of a sum of money arising from a credit agreement as referred to in Section 1:20 Wft. 'Free of charge' means— somewhat misleadingly— that the statutory interest *or* stipulated interest may be charged for late payment of the claim and a compensation for extrajudicial collection costs. If the institution charges more costs than those referred to above, it must as yet apply for a licence.

Since the new Exemption Scheme mainly provides a statutory basis for existing interpretations, the impact should not be too great for most market parties.

AFM Customer Interest Dashboard 2018 – Consumer Credit: Service can be improved

In November last year, the AFM published its **Customer Interest Dashboard 2018 – Consumer Credit**. The AFM conducted a study among credit providers and assessed the extent to which they put the interests of the customer first. The AFM has seen that the market has taken steps, but that service can be improved even further. Some of the findings of the AFM are:

- Insufficient improvement in countering overextension of credit.
- Providers are more likely to grant a loan that matures than a revolving loan. The AFM is positive about this, but remains of the opinion that providers should make more effort to match the type of credit and its term with the customer's spending objective.
- Providers can do more to ensure that problems, such as 'locked-up' situations, do not arise during the term of the credit due to changed circumstances of the customer.
- The AFM expects providers to clearly and transparently communicate the consequences for customers in the event of interim interest rate changes.

We advise credit providers to take note of the findings of the AFM and make adjustments where necessary.

Minister of Finance consumer credit market study, policy objectives and follow-up steps

Last September, the Minister of Finance **informed** the House of Representatives about the results of the study into risks in the field of consumer lending and the objectives and follow-up steps. Together with the Ministry of Social Affairs and the AFM, the Minister looked at the relationship between consumer credit and the debt problem.

It follows from the study that the direct effect of consumer credit on problematic debts is difficult to determine. For many consumers, consumer credit is not the cause of their debt problems, but a credit with a high interest rate can be part of the problem. An **analysis** by the AFM of data from the Credit Registration Office (BKR) shows that the percentage of payment arrears in credits provided by mail-order firms is very high (34%). That percentage and the characteristics of the credit (revolving loans with longer maturities in combination with high interest rates) gives the Minister reason for concern. The Minister also refers to the AFM **report** `Lending behaviour under the microscope' of January 2018, in which the AFM concludes that responsible lending decisions largely depend on the structure of the lending environment of credit providers. At the insistence of the AFM, the online decision environment for consumer credit at various parties has been modified and the acceptance and management policies of providers improved, but according to the AFM improvements are still necessary for responsible lending.

The Minister's discussions with stakeholders revealed that market parties (partly at the request of the AFM) are developing various positive initiatives to prevent consumer problems. For example, as of 1 May 2018, organisations of mail-order firms have joined the (stricter) code of conduct of the Dutch Finance Houses' Association (*Vereniging van Financieringsondernemingen in Nederland*, VFN) and the VFN and the Netherlands Banking Association (*Nederlandse Vereniging van Banken*, NVB) intend to further tighten their codes of conduct. The discussions did not reveal any signs that the maximum annual credit payment of (currently) 14% would be too high or would affect (the arising of) problematic debts.

The Minister formulates the following policy objectives for the consumer credit market:

1. In the lending environment, providers do not steer consumers towards a higher loan amount and/or a longer term.
2. Borrowing for consumer spending is not a matter of course; providers do not present it as such.
3. Providers structure the lending environment in such a way that consumers realise that they are taking out credit with repayment obligations and (interest) costs.

The Minister translates these policy objectives into the next steps:

- The Minister will look for an alternative to the current credit warning 'Beware, borrowing money costs money'. An earlier **study** had shown that the warning in the context of an online decision environment of a bank credit provider has no immediate impact on consumer choices. It follows from the **annual planning for 2019**, which the Minister announced on 18 December 2018, that the Minister intends to inform the House of Representatives about an alternative to the current credit warning in December 2019.
- The Minister calls on member parties to use the revision of the various codes of conduct as an opportunity to put customers' interests first and to embrace the three policy objectives.
- The Minister expects the mail-order firms providing credit to take additional steps to significantly reduce the percentage of payment arrears and to take the three policy objectives to heart. This also means that they must ensure that the credit offered (or the term of the credit offered) is appropriate for the customer's situation and the purpose for which it is spent.

We expect the AFM to include these policy objectives in its supervision of lenders in 2019.

Agenda for the financial sector of the Minister of Finance

On 17 December 2018 the Minister of Finance sent the Dutch House of Representatives the **Agenda for the Financial Sector**. The central theme is serviceability of the financial sector to society. The Minister announces his most important measures, including measures concerning mortgage credit and consumer credit. Households must be sufficiently resilient to withstand shocks. Therefore, households must not be over-indebted.

To prevent high mortgage debts, the agenda includes the following measures by the Minister:

- Periodic monitoring of developments in mortgage debt, LTV and LTI.
- Working on (further) strengthening the financial skills of consumers, through education.
- Drawing up an action agenda for a better consumer choice environment.

In the context of the responsible provision of consumer credit, the agenda contains the following measures:

- Developing an alternative to the current credit warning. It follows from the **annual planning for 2019**, which the Minister announced on 18 December 2018, that

the Minister intends to inform the House of Representatives about an alternative to the current credit warning in December 2019.
- Addressing flash credits through an advertising ban or other legal possibilities for consumer protection.
- Reviewing the need for additional steps for home shipping credits in spring 2019.
- Reviewing additional AFM powers for revolving goods credits.

Mortgage credit: Remuneration rules for change in debit interest rate and early repayment

In 2019, the **draft decree on the remuneration of interest mediation**, to be implemented in the Market Conduct Supervision (Financial Institutions) Decree (*Besluit Gedragstoezicht financiële ondernemingen Wft*, BGfo), will probably stipulate that a mortgage loan provider may not charge a higher remuneration than the financial disadvantage that the provider suffers as a result of a change in the borrowing rate during a fixed-interest period. This rule is in line with what already applies to the remuneration for early repayment. It is also proposed to provide that, when calculating remuneration for early repayment, no distinction should be made between contracts where the borrowing rate has changed during the fixed interest period and contracts where this has not. The remuneration should be calculated in the same way.

The proposed amendments to the BGfo were consulted on at the end of 2017/early 2018 and submitted to the Senate and House of Representatives in November 2018.

If the draft decision is adopted unchanged, mortgage providers will have to consider whether the way in which they calculate the remuneration for interim adjustments to the debit interest rate needs to be adjusted.

AFM Customer Interest Dashboard 2018 – Mortgage risk premium: Service can be improved

In November last year, the AFM published its **Customer Interest Dashboard 2018 – Mortgage risk premium**. The AFM has conducted a study among mortgage providers into how they deal with the risk premium when determining the mortgage interest rate during the term of the mortgage. The AFM concludes that there is room for improvement as regards the risk surcharges. Some of the findings of the AFM are:

- By no means all mortgage providers automatically adjust the risk premium following a change to their risk. In such cases, customers do not pay the interest rate that corresponds to their risk profile. The possibility for customers to request an adjustment to the risk premium runs counter to the equal treatment of customers, as it results in proactive customers paying less interest and therefore receiving preferential treatment. The creation of additional thresholds, such as the demonstration of the current home value by customers, also leads to unequal treatment.
- Mortgage providers offer existing customers an interest rate that does not match the current risk profile of the customer (while new customers do receive an appropriate interest rate). Furthermore, the risk premium is not adjusted for all loan parts (with the exception of any savings loan parts) if customers end up in a different risk class and the guaranteed value accumulation in the savings-based mortgage is not taken into account when determining the (net) debt position.
- Customers are insufficiently informed about the risk premium used by the provider and insufficiently proactively informed about their possibilities to reduce the risk premium, preferably continuously and in any event at the time of the interest rate review.

New lending standards for mortgage credit as of 1 January 2019

1 January 2019 sees a **change** to the lending standards that determine the maximum mortgage loan for the purchase of a home. For the granting of a mortgage loan for the financing of a home with an energy index or an energy performance coefficient equal to or lower than zero, an amount of EUR 15,000 may be disregarded for the calculation of the financing costs. In that case no energy performance guarantee needs to be provided. For *NulopdeMeter* (energy-neutral) homes, an amount of EUR 25,000 can be excluded from the calculation of the financing cost. An energy performance guarantee must then be issued for that home for a period of at least ten years. The income tables have been replaced in accordance with the advice issued by the Nibud.

FSC survey of policy options to prevent overheating of the housing market

At its meeting on 1 November 2018, the Financial Stability Committee (FSC) discussed the Dutch housing market. We read, among other things, in the **minutes** of that meeting:

- Low interest rates and the lack of supply mean that prices in the housing market continue to rise, particularly in the four major cities.
- On balance, growth in mortgage lending remains low. Strong new mortgage lending is also offset by repayments, both as a result of the shift in recent years to annuity mortgages and through voluntary repayments. There has also been a shift from bank mortgages to insurance companies and pension funds.
- The FSC welcomes the initiative of the NVB and the banking sector to actively encourage households to consider possible risks with regard to interest-only mortgages and to take timely measures in consultation with their own banks. The FSC calls on mortgage providers to provide their customers with a (partially) interest-only mortgage with timely insight into their personal financial situation and, where necessary, to encourage them to take action.
- The FSC notes that the current functioning of the housing market is procyclical. An important risk is that expectations of a further rise in house prices may lead to a self-reinforcing dynamic and also encourage riskier lending behaviour. The FSC has discussed whether this is reinforced by existing bidding practices or the way in which valuations are made.
- The LTV limit hardly acts as a brake on lending, because the underlying value also increases with rising house prices.
- The NIBUD system used for loan-to-income (LTI) reinforces procyclical effects in the housing market.
- Activating the countercyclical capital buffer leads to extra capital at banks, but is expected to have a limited effect on lending and price developments.
- The capital framework for banks (Basel 3.5) leads to higher risk weights for mortgages; implementation of this could be brought forward.

The meeting held a first exploratory discussion on policy options to prevent overheating in the housing market. The FSC will discuss this further in February 2019.

Examination targets financial services Wft

With effect from 1 April 2019, the Regulation on examination targets financial services Wft (*Eindtermen en toetstermen examens financiële dienstverlening Wft*) will be **amended**. The targets that will apply to the various Permanent Education (PE) examinations that will be held as of 1 April 2019 have been added to this regulation. Each adviser is required within the context of permanent education during every PE period, not being the PE period in which the diploma or certificate was acquired, to successfully pass a PE exam in order to continue providing advisory services after the PE period. The PE periods cover a period of 3 years. The next PE period starts on 1 April 2019.

Monitoring NVB Code of Conduct Small Business Financing

The Code of Conduct for Small Business Financing of the Dutch Banking Association (NVB) came into force on 1 July 2018. The Code of Conduct lays down what self-employed persons and SMEs (small-business customers) can expect from banks in case of financing. As follows from the code, an independent and expert party commissioned by the NVB will monitor the Code of Conduct. According to the NVB website, this monitoring will be carried out in 2018 and 2019 by the Economic Research Foundation (*Stichting Economisch Onderzoek*, SEO) in collaboration with the University of Amsterdam (UvA), which will report annually on the findings regarding compliance with and the effects of the Code of Conduct. The first findings may therefore be expected in 2019.

Code of Conduct SME Financing for alternative financiers

The SME Finance Foundation was set up last year and, according to its **website**, its aim is to improve access to alternative (non-bank) financing opportunities for entrepreneurs. The Foundation is currently working on a Code of Conduct for SME Financing for alternative financiers. The aim was to publish this code of conduct before 1 January 2019. In addition, in 2018 the government started a study into the functioning of the market for (alternative) financing, which also includes how self-regulation can be improved (part of the **SME action plan**, Ministry of Economic Affairs and Climate).

Like the Code of Conduct for Small Business Financing of the NVB, which came into force on 1 July 2018, the code of conduct concerns a form of self-regulation of the sector.

AFM publishes Information Provision Policy Rule

On 31 December 2018, the AFM **published** the Information Provision policy rule. In this policy rule, the AFM explains what it takes into consideration when assessing the provision of information by financial undertakings about financial products and services. Interpretations have been added and updated in the updated version of the policy rule. For example, the AFM has added examples of easily findable information concerning, among other things, the findability of service documents. New examples have been added of unclear and/or misleading information in areas such as unbalanced information provision. For mortgage lenders, the additions in the chapter 'Savings: what are relevant characteristics' and the chapter 'Borrowing: what are relevant characteristics' are also relevant, including the possibilities of changing the fixed-interest period and (early) repayment.

Proposal for a directive on credit service providers, credit buyers and security enforcement

Last March, the European Commission **consulted** on a package of measures to tackle banks' non-performing loans (NPLs). NPLs are loans from banks that are repaid late or may not be repaid at all by the borrower. Part of this is a European Commission **proposal** for a directive on credit services, credit buyers and security enforcement. The proposed directive applies to buyers and service providers of credit originally granted by a bank or its subsidiary, irrespective of the type of borrower. The proposed directive also introduces an accelerated procedure for extra-judicial security enforcement, which applies to credit agreements concluded between creditors, mainly banks, and borrowers for their commercial, business or professional activities and are secured by movable and immovable assets owned by the borrower and pledged as security to a lender to ensure repayment of a loan.

The proposal assumes that Member States will have implemented the directive by 31

December 2020 at the latest and will apply those provisions from 1 January 2021 or 1 July 2021. The European Parliament and the Council still have to decide on the European Commission's proposal for the directive.

Mortgage credit: European Guidelines for the handling of complaints

As of 1 May 2019, the 'Guidelines for the handling of complaints by the securities sector (ESMA) and the banking sector (EBA)' will also apply in respect of complaints regarding the activities of creditors and credit intermediaries as referred to in the Mortgages Directive (No 2014/17/EU). The guidelines, which were published in 2014 by the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA), do not currently apply in relation to these activities. The Mortgage Directive has been applicable since March 2016. The scope of the guidelines has therefore now been adapted to cover complaints relating to the activities of creditors and credit intermediaries as referred to in that directive. The guidelines that will apply from 1 May 2019 can be found **here**. The AFM applies the guidelines in its supervision of compliance with the relevant rules of conduct of the Wft.

Advertising rules for high-risk financial products?

At the beginning of 2017, the Ministry of Finance **consulted** on a proposal to introduce advertising rules for high-risk financial products. With a view to protecting consumer interests, is proposed to include a provision in the Market Conduct Supervision (Financial Institutions) Decree (*Besluit Gedragstoezicht financiële ondernemingen*, BGfo), which gives the AFM the authority to designate certain financial products in respect of which no advertisements may be made aimed at consumers in the Netherlands. At the time, the AFM simultaneously started a **consultation** on an amendment to the Supplement to the Further Regulations on the Supervision of the Conduct of Financial Undertakings (Financial Supervision Act) (*Nadere regeling gedragstoezicht financiële ondernemingen*, Nrgfo), in which it designates the products to which the advertising ban should apply. The AFM wants to designate, among other things, flash credits and other credits with unreasonably high credit fees.

The intended date of entry into force of the advertising ban was, according to the consultation of the Ministry, 1 July 2017. Since then, however, it has been unclear whether and when the advertising ban will come into effect. In the Finance Minister's Agenda for the Financial Sector, which was published last December, we read that the Minister is examining a ban on the advertising of flash credits and other legal options for addressing flash credits.

Benchmark Regulation – transitional periods expire

On 1 January 2018, the Benchmark Regulation entered into force in the EU Member States. The Benchmark Regulation regulates the provision and use of benchmarks and the provision of input data for a benchmark. A benchmark may only be used if (i) the provider of the benchmark is registered and/or (ii) the benchmark is included in an ESMA register.

The Benchmark Regulation provides for a transitional regime, which in short means that benchmarks that existed on 1 January 2018 may continue to be used until 1 January 2020. Thereafter, the provider of the benchmark and/or the benchmark itself must be included in an ESMA register. Non-EU benchmarks may continue to be used until 1 January 2020.

In view of the transitional regime, we advise lenders using a benchmark to consider whether they can continue to use this benchmark until at least 1 January 2020.

AFM: incident reports must be improved

On 28 December 2018, the AFM **published** a press release on its website in which it indicated that advisors and intermediaries should report incidents better, because incidents are not always reported and established in time. The AFM established this after having visited approximately 40 financial service providers.

The AFM points out that advisors and intermediaries are obliged under the Financial Supervision Act (Wft) to report incidents and to have an incident reporting policy, and that possible cases involving abuse must also be reported to partners in the chain (chain responsibility).

Review and Extension of Act on remuneration policy for financial undertakings

A review of the Remuneration Policy (Financial Undertakings) Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) took place in the summer of 2018. In addition, in a **letter to Parliament** dated 17 December 2018, the Minister announced three statutory measures to tighten up remuneration policy in the financial sector. These are:

1. An obligation to hold shares and (certain) other components of fixed remuneration, the value of which depends on the market value of the own company for directors and employees of financial companies for 5 years.
2. An obligation for financial companies to describe in their remuneration policy how the company takes account of the relationship between the remuneration of directors and employees and its function in the financial sector and its position in society, and to account for this.
3. A restriction of the exception to the bonus cap for people who do not fall under a collective labour agreement The exception will only be available for exceptional cases, and in any event should not be applied to persons performing internal monitoring functions or those directly engaged in providing financial services to consumers.

For a detailed overview of the developments with regard to the remuneration policy, we refer to the **General** section of this Outlook.

Scheme for funding the financial supervision of one-off actions

In the General part of this Outlook, we have briefly discussed the Financial Supervision (Funding) Act 2019, which came into force on 1 January 2019. Supplementary to this Act, the **Scheme** for funding the financial supervision of one-off actions also came into force on 1 January 2019. This scheme changes the fees that DNB and the AFM can charge for one-off actions, such as an application for a licence. In addition, this regulation introduces hourly fees for a number of actions in order to respond better to requests of different size and complexity.

The fee for applying for a licence to offer credit will be increased from EUR 5,500 to EUR 14,600. Credit providers will therefore have to take into account the considerably higher costs of applying for a licence.

Consequences of Brexit

On 29 March 2019, the United Kingdom will officially leave the EU. As Brexit approaches, it is important that lenders, if they have not already done so, reflect on the impact Brexit will have on them, including how the UK rules for offering credit in the UK will be after Brexit. Although lenders other than mortgage credit providers cannot operate in other EU Member States by means of a European passport, there are lenders who offer their services online in the Netherlands from another EU Member State under the Directive on electronic commerce (No. 2000/31/EC, implemented in Section 1:16 Wft). If there is indeed no transitional period, UK lenders operating in the Netherlands on the basis of this Directive, or Dutch lenders operating in the UK on this basis, will have to consider alternatives to secure their market access. For mortgage credit providers, it is important to ensure continued access to the UK for possibly the three upcoming years under the **temporary permissions regime**, which is now open for the required notifications.

AMLD5

Over the past year, the European and Dutch supervisory authorities have published a great deal of relevant guidance in the area of integrity. In addition, 2019 will probably see the upcoming amendment of the Fourth Anti-Money Laundering Directive. The Fifth Anti-Money Laundering Directive (AMLD5) must be implemented in the Netherlands by 10 January 2020. For an overview of the consequences of AMLD5 and other relevant developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

Financial Markets Legislation
Important Information For Trust Offices In 2019

Trust Offices (Supervision) Act 2018

Money Laundering and Terrorist Financing Prevention Act, AMLD4 and AMLD5

DNB Supervision Outlook 2019.

Minister of Finance: Agenda for the Financial Sector

Trust Offices (Supervision) Act 2018

With the **Trust Offices (Supervision) Act 2018** (*Wet toezicht trustkantoren*, Wtt 2018) coming into force on **1 January 2019**, new and more demanding regulations have come into force for the trust sector. Some of the new rules are subject to a specific transitional regime, which means that they do not need to be applied immediately. This applies in any case to the rules regarding the required legal form. With regard to the stricter rules on client screening, these must — in short — be applied at the earliest opportunity. However, many of the new rules are not subject to transitional rules. These rules apply from the effective date of the Wtt 2018. Examples include the prohibition on combining trust services and tax advice, the requirement of having two policymakers, the internal compliance function (prohibition on outsourcing this function) and the training obligation. As regards the publication of formal supervisory measures, the same regime will apply to the trust sector as already applies under the Financial Supervision Act. In practice, all formal measures must in principle be published in full and in only exceptional cases will they not be published or will they be published in anonymised form.

In addition to the Wtt 2018, the **Decree on the Supervision of Trust Offices 2018** (*Besluit toezicht trustkantoren,* Btt 2018) and the **Regulation on the Supervision of Trust Offices 2018** (*Regeling toezicht trustkantoren*, Rtt 2018) entered into force on **1 January 2019**. This completes the new framework for trust offices. The Minister has also used the authority in the Btt 2018 to designate additional activities as licensed trust services. The ability to perform general management acts by instruction of a legal entity or company has been designated as a trust service within the meaning of the Wtt 2018. This trust service – also referred to as material acting as a director – is new in the legislation. It concerns all possible power of attorney variants, whereby the decisive factor is that the power of attorney actually extends to the performance of general management acts or is open in such a way that the person holding the power attorney can actually conduct the general management of the legal entity or company. A power of attorney for the performance of an individually defined act does not fall under this trust service. This activity is designated as a trust service against the background that the integrity risks associated with that activity are comparable to the integrity risks associated with formally acting as a director, which is already regulated.

With regard to the Rtt 2018, it should be noted that an exemption from the old regime has disappeared and an exemption has been added. Gone is the exemption for trust offices that provide services to target companies that are registered as investment institutions in the register of the AFM. In the Minister's opinion, such investment institutions no longer exist. New is the exemption for legal entities, insofar as they are assigned as director of a pension fund by a third party. Since pension funds are subject to DNB's supervision and its directors are tested for suitability and integrity, the person who acts as a director already falls under DNB's integrity supervision. Additional integrity supervision via the Wtt 2018 is then not deemed necessary.

Money Laundering and Terrorist Financing Prevention Act, AMLD4 and AMLD5

Some trust offices provide other services in addition to trust services. These services are generally governed by the Money Laundering and Terrorist Financing Prevention Act. Requirements with regard to the general risk assessment, client screening, transaction monitoring and retention obligation have been tightened since July 2018 as a result of the implementation of the Fourth Anti-Money Laundering Directive (AMLD4). The introduction of the UBO register, which is part of AMLD4, has been postponed – in line with an extended implementation period for that part – until January 2020 at the latest. The legislation with regard to the UBO register will be formulated together with the implementation of the Fifth Anti-Money Laundering Directive (AMLD5) (see the **parliamentary letter** on the establishment of the UBO register). Since the tightening up of the Money Laundering and Terrorist Financing Prevention Act in mid-2018 also brought into force a publication regime, it is expected that from 2019-Q2 publications will follow of measures taken by DNB with regard to violations of the Money Laundering and Terrorist Financing Prevention Act (usually violations of the duty to report unusual transactions). An update of DNB's guidelines for the Money Laundering and Terrorist Financing Prevention Act and the Sanctions Act is expected in January 2019.

For an overview of the consequences of AMLD5 and other relevant developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

DNB Supervision Outlook 2019

The **DNB Supervision Outlook 2019** sets out the emphasis that DNB will place on the supervision of trust offices in 2019. This reflects the continued focus on the management of integrity risks by trust offices. In 2019, DNB will assess the extent to which trust offices use 'Good Practice aggressive tax planning' in their risk management and how trust offices meet the requirement of social decency. With regard to this last point, the explanatory memorandum to the Wtt 2018 explains that it is up to trust offices to take account of social developments and to formulate policy on how to deal with them. Pursuant to Section 41 Wtt 2018, DNB must formulate policy rules on the way in which it supervises the interpretation that trust offices give to 'what is socially appropriate'. Furthermore, the SIRA remains the subject of study. DNB also states that it will check (including through regular reports) whether trust offices comply with the Wtt 2018 requirement to set up an independent and effective internal compliance function. DNB has formulated a target value that all trust offices must meet this requirement by the end of 2019.

An interesting quote from DNB in its Supervision Outlook 2019 is that the Wtt 2018 encourages further professionalization and that trust offices that are unable to comply with it "...must gradually disappear from the market (through enforcement or of their own accord). The expectation is that the steady shrinkage trend in the trust sector will continue in 2019."

Minister of Finance: Agenda for the Financial Sector

On 17 December 2018, the Minister of Finance presented the **Agenda for the financial sector** containing the most important measures for this government's term of office. In this agenda, the Minister focuses on stability, integrity and innovation.

In the context of combating money laundering and terrorist financing, the Minister stated that he will monitor developments in the trust office sector and compliance with trust office legislation with the aid of DNB's annual ZBO report. The Minister indicates that further measures will be investigated if no improvements are made.

Financial Markets Legislation
Important Information For Issuers In 2019

The new Prospectus Regulation

SME Growth Market Promotion Regulation

Amendment to Market Abuse Regulation
Amendment to new Prospectus Regulation
Some other technical amendments

Entry into force of the Securitisation Regulation; simple, transparent and standardised

ESMA publishes several guidelines to implement the Securitisation Regulation

Directive and Regulation on a European framework for covered bonds

Proposal Sovereign Bond Backed Securities Regulation (SBBS)

Proposal Framework for Sustainable Investments Regulation

ESMA priorities financial reporting on 2018

AFM Reports 'In Balance 2018' on application of new reporting rules

Proposed changes to the KID for PRIIPs

Proposal for Investment Properties and Bonds Act: no progress made

AFM publishes Information Provision Policy Rule

Code of Conduct SME Financing for alternative financiers

Consequences of Brexit

The new Prospectus Regulation

The new **Prospectus Regulation** entered into force on 20 July 2017. As of 21 July 2019, this Prospectus Regulation will be directly applicable in all Member States and will replace the current European Prospectus Directive (2003) and the current Prospectus Regulation (2004). Anyone wishing to offer securities to the public or to admit them to trading on a market regulated in a Member State will, from that date, be confronted with these new prospectus rules. At present, only one provision of the new Prospectus Regulation is applicable, but, as stated, that will change.

Although the Prospectus Regulation has direct effect, the legislative proposal `**Prospectus Regulation Implementation Act**' and the draft decree `**Prospectus Regulation Implementation Decree**' have also been published. The Dutch government submitted the legislative proposal in question to the House of Representatives on 17 December 2018 after the Council of State had no substantive comments on the legislative proposal.

The legislative proposal aims to implement various amendments to the Dutch Financial Supervision Act (Wet op het financieel toezicht, Wft), in particular in Section 5.1 Wft. The draft decree will mainly implement various amendments to subordinate financial supervision regulations. Both with the aim of bringing Dutch legislation and regulations into line with the new Prospectus Regulation.

The aim of the new Prospectus Regulation is to improve access to the capital markets, particularly for small and medium-sized enterprises (SMEs) and to achieve a fully harmonised prospectus regime within the EU. Against this background, the new Prospectus Regulation aims to simplify prospectus rules and create an appropriate prospectus regime for different types of issuers. Different (prospectus) regimes are therefore introduced:

- A **Universal Registration Document (URD)** for issuers whose securities are admitted to trading on a regulated market or an MTF, who expect to issue securities frequently. Drawing up a URD should allow the issuer to update the information when market conditions are favourable and to prepare a prospectus by merging the URD with a securities note and summary note. This new regime aims to speed up the approval process.

- A new regime for **EU growth prospectuses** that will be available to SMEs and other companies falling within certain size criteria. The content of such a prospectus will be less comprehensive than a regular prospectus and tailored to the characteristics of SMEs.

- A **simplified prospectus regime** for secondary issues of securities, where a simplified regulation with regard to publication applies to issuers that have been admitted to trading on a regulated market or an SME growth market without interruption for at least the last 18 months. In particular, this means that information already published by the issuer does not need to be published again in the event of a secondary issue.

In addition, an **exemption regime** for (small) offers of securities to the public will also apply in all Member States under the new prospectus regime. The Netherlands has anticipated this in the past year by raising this exemption limit to EUR 5 million (this was EUR 2.5 million), with the introduction of additional disclosure requirements in the form of a mandatory information document and a reporting obligation to the AFM. This exemption regime will be maintained under the new prospectus regime.

At European level, the first half of 2019 will also see the drafting and adoption of delegated and implementing regulations (level 2). This will include detailed provisions on the form and content of the various types of prospectuses and the way in which risk factors should be dealt with in a prospectus.

SME Growth Market Promotion Regulation

Despite the fact that the new Prospectus Regulation is not yet directly applicable in the Netherlands, the **SME Growth Market Promotion Regulation** already proposes some substantive changes to it. This proposal by the European Commission to promote the SME growth market is part of the package of measures to strengthen the European capital markets union. The '*SME growth market*' is a specific form of MTF introduced by the MiFID II Directive, but aimed at SMEs.

The SME Growth Market Promotion Regulation is an amendment regulation, which will introduce a number of amendments to the current **Market Abuse Regulation** in addition to the new Prospectus Regulation. This initiative is strictly limited to SME growth markets and companies listed on such trading platforms. In short, the SME Growth Market Promotion Regulation aims at facilitating access by SMEs to capital markets, inter alia by reducing compliance costs and administrative burdens for issuers.

Amendment to Market Abuse Regulation

The SME Growth Promotion Regulation aims to make five amendments to the Market Abuse Regulation. These amendments are intended to make it easier for issuers whose financial instruments are listed on an SME growth market to comply with the market abuse rules in order to fulfil the objective described above. This concerns the following changes (for issuers whose securities are listed on an SME growth market):

- SMEs intending to offer bonds only to 'qualified investors' will be exempted from the extended procedural rules applicable to market surveys;
- a special regime is proposed for entering into a so-called liquidity agreement between the issuer and an investment firm;
- an issuer will only have to render account on a delay in the disclosure of inside information to the supervisor upon request;
- the issuers will only have to draw up an insider list for permanent insiders (and not for ad hoc insiders); and
- a two-day time limit is introduced for the issuer to disclose transactions undertaken by a manager for his own account and risk in the issuer's securities, calculated from the time of receipt of the manager's report by the issuer. As a result, transaction reports should soon (after the entry into force of this Regulation) be made public no later than five days after such transactions have taken place.

Amendment to new Prospectus Regulation

The new Prospectus Regulation will introduce a new type of prospectus; the 'transfer prospectus'. This type of prospectus will be relevant for issuers which have been listed for at least three years on an SME growth market and want a listing on a regulated market. In that case, these issuers will not have to draw up a full prospectus, but can suffice with this transfer prospectus. The content of this prospectus will be similar to the simplified prospectus regime (for secondary issues), whereby the issuer will also be required to include the most recent financial statements with a comparison with the previous financial year.

Some other technical amendments

Alongside the intended changes described above, the SME Growth Market Promotion Regulation also contains a number of technical amendments to the existing **implementing regulation on organisational requirements and conditions for investment firms** (based on MiFID II). These changes are intended to:

(i) make it easier for SMEs that exclusively issue debt instruments to have those debt instruments listed on an SME growth market; and
(ii) allow an operator of an SME growth market to provide that SMEs that have issued only a debt instrument are not obliged to publish half-yearly figures.

At the date of this Outlook, the proposal for this Regulation is still in the negotiation phase. The Council of the European Union and the European Parliament (as European legislators) have yet to determine their position. It is therefore not yet known when the SME Growth Market Promotion Regulation will enter into force.

Entry into force Securitisation Regulation; simple, transparent and standardised

2019 started with the entry into force (on 1 January) of the **Securitisation Regulation**. This European legislation harmonises the regulatory framework for securitisations and has thus replaced the (fragmented) sectoral regulations. Along with the Securitisation Regulation, the Capital Requirements Regulation (CRR), which relates to prudential requirements for credit institutions, has also been amended via the **CRR Amendment Regulation**. At national level, on 20 December 2018, the Decree on the Implementation and Enforcement of the Securitisations Regulation and the Securitisations Capital Requirements Amendment Regulation entered into force, which aims to implement and enforce the relevant regulations in the Netherlands.

With the aforementioned regulations, the legislator aims to encourage `STS securitisations'. `STS' in this case stands for `Simple, Transparent and Standardized'. The Securitisation Regulation sets out the criteria with which such securitisations must comply. In essence, securitisations should be made easier to understand through standardisation and simplification of their design. STS securitisations should also provide more transparency about the underlying assets, so that investors can better understand the underlying risks. In addition, the CRR Amendment Regulation provides for a more advantageous prudential framework regime for STS securitisations, which is intended to stimulate such securitisations.

ESMA publishes several guidelines to implement the Securitisation Regulation

On 13 November 2018, ESMA published several documents relating to the implementation of the new European legal framework for securitisations. These include a **draft RTS Directive** which concerns the registration of a financial institution as a "securitisation repository" with ESMA. It also addresses the operational standards and access conditions for information collected and maintained by securitisation repositories. In addition, ESMA has published **its technical opinion (final report)** to the European Commission on the fees it charges under the Securitisation Regulation for the registration and supervision of securitisation repositories.

STS status securitisation

Furthermore, ESMA has provided further clarification to market participants on ESMA schemes as regards being informed about the STS status of a securitisation. This guidance consists of a set of reporting instructions and an interim STS notification template, pending the development of ESMA's STS register in the months ahead.

Directive and Regulation on a European framework for covered bonds

On 12 March 2018, the European Commission presented its proposal for a **directive** and **regulation** on a European framework for covered bonds. Covered bonds are issued by banks and are characterised by the dual recourse-mechanism. This means that the issuing bank will separate collateral, on which bondholders, as preferred creditors, can take direct recourse in the event that the issuing bank itself can no longer meet its payment obligations under the bond loan. The bondholders therefore have a double claim, which offers them additional security. Covered bonds are an important source of funding for European banks and their use has increased significantly in recent years. At present, however, there is no uniform European framework for covered bonds and there are major differences in regulations between Member States. At the same time, banks and investment firms investing in these bonds are entitled to preferential capital treatment.

This proposal aims to encourage the use of covered bonds in more Member States and to create a harmonised framework for the supervision and benefits of covered bonds. The proposed directive introduces a definition of covered bond and clarifies the main features of a covered bond. The regulation amends the CRR in order to strengthen and extend the conditions for the application of the preferential capital treatment.

The Netherlands has already brought its legislation largely in line with recommendations of the European Banking Authority (EBA) in 2015, on which this proposal builds. The content of this proposal will therefore not entail any major changes for the Netherlands.

Proposal Sovereign Bond Backed Securities Regulation (SBBS)

On 24 May 2018, the European Commission presented its **proposal** for a Regulation on Sovereign Bond-Backed Securities (SBBS). SBBS are standardised securitisations that bundle and tranche government bonds from all individual euro area Member States. The objective of this proposal is to promote the issue of SBBS. The advantage of SBBS is that financial institutions can hold more diversified portfolios of government bonds, which reduces the interdependence of banks and governments and thus reduces risks in the Banking Union.

At present, it is unattractive for private parties to market SBBS because of the current prudential treatment of securitisations. The proposal aims to change this and introduces a similar prudential treatment for SBBS as applies to regular government bonds. In addition, the proposal contains a number of rules in which cases and under which conditions it is possible to deviate from the design requirements for SBBS without losing this favourable prudential treatment. Finally, a number of rules relating to information provision, supervision and enforcement, among other things, will be introduced.

Proposal Framework for Sustainable Investments Regulation

A few months after the European Commission presented its action plan 'Financing sustainable growth' (see: **General**), a **Regulation** on the creation of a framework to promote sustainable investments followed on 24 May 2018. This Regulation is an elaboration of the first objective of the action plan, namely the reorientation of capital flows towards sustainable investments. It introduces a sustainability classification to identify investments that are sustainable and aims to make a positive contribution to promoting sustainable investments. The Regulation should be seen as a first step in establishing a larger framework for sustainable investment. The current proposal is relevant for both financial institutions using sustainable financial products and financial companies offering them (such as investment firms). The aim is to create an EU classification, which could be used at a later stage as a standard for other measures arising from the action plan.

In addition to this plan, and as an intermediate step towards its implementation, the European Commission will set up a technical expert group on sustainable financing. This group will publish a number of reports with an initial taxonomy in the first half of 2019. It is hoped that this future EU taxonomy will help to establish a number of concrete standards and labels for sustainable financial products. The action plan includes the following intentions relevant to issuers:

- The expert group on sustainable financing will prepare a report setting an EU standard for green bonds by Q2 2019.
- The European Commission will determine by Q2 2019 how the content of the prospectus for the issue of green bonds should be defined.

It is currently not clear when the new rules will enter into force. Since it is a regulation, it would have direct effect from its entry into force. It does not need to be implemented in the Netherlands. Where possible, the new rules can be anticipated, for example with regard to information provision in the prospectus.

ESMA priorities financial reporting on 2018

Every year ESMA publishes a **statement** in which it sets out the subjects on which it and the national supervisory authorities will focus when assessing the financial reporting by listed companies. The following priorities have been identified for the 2018 financial reports, which are to be audited and published in 2019:

- For the year 2018, IFRS 9 Financial Instruments and IFRS 15 Revenue from Contracts with Customers will have to be applied for the first time. ESMA indicates that it is devoting extra attention to how issuers implement this IFRS.
- IFRS 16 Leases came into force on 1 January 2019. ESMA expects issuers to provide information on the implementation and expected impact of this IFRS.
- ESMA emphasises the importance of disclosing non-financial information, in particular information related to the environment and climate change.
- ESMA draws particular attention to a number of elements of ESMA's Guidelines on Alternative Performance Measures.
- Finally, ESMA stresses the importance for issuers to keep a close eye on developments regarding Brexit and to map out the impact of the negotiations on their activities.

We recommend that listed issuers devote extra attention to the above priorities when preparing their financial reports for 2018.

AFM 'In Balance 2018' Reports on application of new reporting rules

In December 2018, the AFM **published** the results of two of its thematic reviews with the reports 'In Balance 2018' (part A and part B). The AFM investigated the reporting by large Public Interest Entities (PIEs)—listed and unlisted companies—of non-financial information in the 2017 directors' reports. As of the financial year 2017, these organisations are obliged to report this non-financial information in their directors' report.

The AFM, which also supervises the financial reporting of listed companies, notes that the reporting on the various non-financial aspects can and must be improved, and that:

- the Non-Financial Information Disclosure Decree is not complied with in all respects;
- non-financial information can be reported by the company in a more relevant, comparable and balanced way;
- companies should report more and more widely on diversity;
- companies increasingly report on Sustainable Development Goals (SDGs), but that the application of recommendations Task Force on Climate-Related Financial Disclosures (TCFD) is lagging behind; and
- more and more companies are subjecting their non-financial information to a separate audit by an auditor.

With regard to the new IFRSs (IFRS 9 'Financial instruments' and IFRS 15 'Revenue from contracts with customers'), the AFM notes that most companies provide a good explanation of the transition to IFRS 9 and IFRS 15 in the 2017 financial statements and the 2018 interim financial statements. The two new IFRSs have a significant effect on the financial statements of a limited number of companies. The AFM expects that IFRS 16 'Leases', which applies from 1 January 2019, will have a greater impact and expects listed companies to quantitatively explain the impact of IFRS 16 in the 2018 financial statements.

Proposed changes to the KID for PRIIPS

The ESAs have sent a **letter** to the European Commission expressing their concerns about the possibility of overlapping disclosure requirements for investment vehicles from 1 January 2020. In this context, the ESAs have stressed the need to introduce changes in legislation, including in the PRIIPs Delegated Regulation.

Against the background described above, the ESAs have prepared a joint **consultation document** on amending the current **Delegated Regulation PRIIPs**. The aim is to remove certain important issues that have come to light since the introduction of the KID (Key Information Document). In particular, the consultation document aims at changes that relate to the performance expectations of the investment product. The consultation ran until 6 December 2018. The ESAs aim to send their proposal for the amendments to the European Commission as soon as possible in 2019. The amendments should enter into force on 1 January 2020.

Proposal for Investment Properties and Bonds Act: no progress made

As early as 2016, the Ministry of Finance held an **internet consultation** on a legislative proposal aimed, among other things, at introducing supervision of the management of investment bonds. The purpose of this Act is to increase the level of protection of investors in investment properties and investment bonds and to exclude rogue providers from the market for investment properties and investment bonds by tightening up regulations and the associated supervision. Over the past year, it has been (suspiciously?) quiet around this legislative proposal and, as far as we can see, no progress has been made. It is currently not clear whether, and if so when, this Act will enter into force.

In a **letter** from the Ministry of Finance to the House of Representatives dated 27 November, we read that the Minister is working on the legislative proposal and intends to send it to the House of Representatives in the course of 2019. In that context it is interesting to note that the legislative proposal is included in **Annex 1** of the **Planning Letter 2019** of the Minister of Finance and has been placed on the agenda for December 2019. However, in that Annex the legislative proposal is cited as the "Legislative Proposal Investment Properties". Therefore the legislative proposal does not appear to have disappeared from the radar, but it remains as yet unclear whether the investment bonds will continue to be a part of that.

AFM publishes Information Provision Policy Rule

On 31 December 2018, the AFM published the **Information Provision Policy Rule**. In this policy rule it included a new chapter entitled 'Advertisements in the context of prospectuses – Section 5:20(1) Wft'. In this chapter, the AFM explains how an issuer must state that and where a prospectus is generally available or will be made generally available. In addition, an advertisement may not contain information that is incorrect, misleading or inconsistent with the prospectus. The AFM discusses this in more detail with some examples showing when information in an advertisement is incorrect or misleading and explains when information can be considered not to be in accordance with the prospectus.

Code of Conduct SME Financing for alternative financiers

The SME Finance Foundation was set up last year and, according to its **website**, its aim is to improve access to alternative (non-bank) financing opportunities for entrepreneurs. The Foundation is currently working on a Code of Conduct for SME Financing for alternative financiers. The aim was to publish this code of conduct before 1 January 2019. In addition, in 2018 the government started a study into the functioning of the market for (alternative) financing, which also includes how self-regulation can be improved (part of the **SME action plan**, Ministry of Economic Affairs and Climate).

Like the Code of Conduct for Small Business Financing of the NVB, which came into force on 1 July 2018, the code of conduct concerns a form of self-regulation of the sector.

Consequences of Brexit

Brexit is currently the largest source of political uncertainty for the financial sector. How exactly this will work out, should Brexit definitively proceed, will depend, among other things, on the outcome of the negotiations between the EU and the United Kingdom (UK). For issuers, a Brexit will interfere with the objectives of the 'Capital Markets Union'.

Currently, issuers with a registered office in the Netherlands (or another EEA Member State) can use a 'European passport' for their approved prospectus. This European passport allows securities to be offered or listed throughout the EEA (including the UK). Once Brexit is a fact, this European passport will no longer apply in the UK. As a result, Dutch companies wishing to offer securities in the

UK or to be listed on a stock exchange in the UK (e.g., the London Stock Exchange) in the future will also have to go through an approval process for their prospectus with the UK supervisory authority.

The UK's withdrawal may lead to changes in the current, harmonised national regulations (based on European directives), including those relating to listing and transparency requirements. The UK will also no longer be bound by ESA *guidelines* and *recommendations*.

An important imminent change is the new European Prospectus Regulation, about which we have written before. This will soon change the prospectus landscape in Europe, especially if there is no transitional period ('hard Brexit'). In any event, this Prospectus Regulation will no longer have direct effect in the UK in the event of a Brexit. With this, the prospectus regimes for issuers may already start to diverge across the UK and the EU. In particular, issuers with a registered office in another EEA Member State (including the Netherlands) that are listed in the UK, or a dual listing, may experience hindrance from this.

Financial Markets Legislation
Important Information For Insurers In 2019

DNB Supervision Priorities 2019

Insurers Recovery and Resolution Act

DNO obligation for (amongst others) dividend payments by Dutch insurance holding companies

Developments with regard to outsourcing

Review and Extension of Act on remuneration policy for financial undertakings

AFM Consultation Information Provision Policy Rule

Agenda for the financial sector

Abolition of tax deduction on remuneration of additional Tier 1 capital instruments (CoCos)

Q&A structure of key functions Solvency II insurers

New interest deduction limitation (minimum capital requirement) for insurers

Study into effectiveness of the compliance function

Study of compliance with the Premium Schemes (Improvements) Act

Entry into force of the Securitisation Regulation

Proposed amendment KID for PRIIPs

EIOPA Annual Work Programme 2019

EIOPA Report Cyber risks and cyber insurances

Outcomes of EIOPA stress test

EIOPA publishes second set of recommendations Solvency II SCR review

Integration of ESG criteria in suitability test for unit-linked insurance policies

Pan-European Personal Pension Product

Regulation implementing the EU-US bilateral agreement on prudential measures for insurance

Consequences of Brexit

AMLD5

DNB Supervision Priorities 2019

In November 2018, DNB published its supervision priorities for the coming year. The general supervision priorities will be discussed in the General part of this Outlook. Specifically as regards insurers, DNB reports that it will focus on the following subjects in 2019:

- **Actions following EIOPA stress test results:** The results of EIOPA stress tests will be made public at the end of 2018 or early 2019. Follow-up actions that DNB considers appropriate to the results of this stress test will be addressed by DNB in the 2019 supervisory plans of the individual insurers.

- **ORSA scenarios:** DNB wants to gain more insight into how insurers select the scenarios they use in ORSA. In 2019, DNB will focus primarily on the sensitivity of the baseline scenario and of stress scenarios for different profit sources and parameters. An important test question is whether the stress scenarios of insurers are heavy and diverse enough. From April to August 2019, DNB will analyse the ORSA reports submitted by (a selection of) insurers. Feedback of the results will take place in September 2019.

- **Risks for authorised agents:** In 2019, DNB wants to determine whether the risks for authorised agents are adequately controlled by insurers. DNB will pay specific attention to risks in relation to data quality and outsourcing.

- **Impact InsurTech:** In 2019, InsurTech will once again be in the spotlight at DNB. The impact of InsurTech —technological innovation in the insurance sector—remains a spearhead in supervision. InsurTech brings opportunities but also (operational) risks, partly because of the high(er) dependence on IT and data. The thematic study that DNB will carry out in 2019 will therefore also focus on the management of data quality and IT risks such as cyber risk.

- **Recovery and resolution insurers: On 1 January 2019,** the Insurers Recovery and Resolution (Insurers) Act (*Wet herstel en afwikkeling verzekeraars*) will enter into force. Under this new Act, insurers will have to draw up a preparatory crisis plan (*voorbereidend crisisplan*, VCP), among other things. DNB will draw up a good practice VCP for this, taking proportionality into account. Furthermore, a risk-based selection of insurers will be asked to draw up a draft VCP in line with the good practice. DNB will assess these VCPs and provide feedback on the findings to both the individual insurers and the sector as a whole.

Recovery and Resolution (Insurers) Act

On 21 December 2018, the Recovery and Resolution (Insurers) Act and the Recovery and Resolution (Insurers) Decree were published in the Bulletin of Acts and Decrees. Both the Act and the Decree entered into force on 1 January 2019.

The Insurers Recovery and Resolution Act revises the current recovery and resolution framework for insurers in order to strengthen and expand it. The Act is inspired by the existing instruments for the recovery and resolution of banks. For example, the current emergency regulations will be abolished (although a number of powers under the emergency regulations will be transferred to the Bankruptcy Act and granted to the receiver in bankruptcy).

The Act distinguishes between the preparation phase and the resolution phase. The Act provides different rules for each of the two phases. The rules that apply to the preparation phase have the greatest impact on insurers in the short term, because these rules must be met by the time this legislative proposal enters into force. For example, insurers will have to draw up a 'preparatory crisis plan' in order to be able to take immediate measures if the insurer gets into financial difficulties. In the preparatory crisis plan, insurers will have to provide insight into the extent to which there are recovery possibilities in the event that the solvency requirements (SCR/MCR) are breached or threaten to be breached. The obligation to draw up a preparatory crisis plan does not apply to Solvency II-Basic insurers.

On 5 and 7 February 2019, DNB will organise half-day seminars on the new Act for which insurers will be invited.

DNO obligation for (among other things) dividend payments by Dutch insurance holding companies

The Financial Markets (Amendment) Act 2019 is expected to enter into force in mid-2019. A **preliminary draft** of this Act and the accompanying draft explanatory memorandum were consulted on in January/February 2018.

For insurers, it is important that this Act in some circumstances introduces a DNO obligation (declaration of no objection) for dividend payments by mixed financial holding companies or insurance holding companies with their registered office in the Netherlands. After this Act comes into force, a mixed financial holding company or insurance holding company with its registered office in the Netherlands will be prohibited, other than after having obtained a declaration of no objection from DNB, from reducing its capital by repayment of capital or distribution of reserves or making a dividend payment if at the time of this repayment or distribution the group does not meet the solvency capital requirement or if it could be foreseen that it will no longer be able to meet this requirement in the next twelve months.

This provision already existed for insurers (Section 3:97 Wft), but not yet for holding companies.

Developments with regard to outsourcing

DNB has recently been active in the field of outsourcing by insurers. Although insurers need not expect specific developments in 2019, the subject has recently attracted so much attention that we provide a brief summary below:

- **Cloud computing:** The old DNB circular from 2011 has expired for insurers, according to the DNB **website** (it still applies to pension funds, for example). Material cloud outsourcing must be reported to DNB. As from 3 December 2018, this will no longer be possible by email, but must be done via the Digital Supervision Portal with *eHerkenning* (eRecognition), according to the **DNB Insurance Newsletter November 2018**.

- **Materiality assessment:** The institution itself decides whether an outsourcing is material. DNB provides the following criteria:
  - whether the activities are essential for the institution's operation/business continuity/viability and its obligations to its customers/participants/policyholders (in the sense that without this function or activity the institution would not be able to provide its services);
  - the operational impact of disruptions and the associated legal and reputational risks;
  - the effect that a disruption of activity may have on the expected income of the institution;
  - the impact that a breach of the confidentiality, integrity or availability of the data may have on the institution and its customers/participants/policyholders.

- **Risk analysis:** In addition to a materiality assessment, outsourcing institutions must carry out a risk analysis. DNB has provided an **example** of this. This risk analysis provides insight into the inherent risk, mitigating measures and the residual risk. DNB has selected **10 subjects** that the institution must include as a minimum in its risk analysis, including vendor lock-in, concentration, compliance with legislation and regulations, and data access.

- **Reporting to DNB:** Material outsourcing must be reported in advance to DNB. In the case of cloud outsourcing, too, only material outsourcings must be reported. The institution does this by filling in an 'Outsourcing Report Form' for each outsourcing via the Digital Supervision Portal. This form is accompanied by an **explanation**.

- **Good practice outsourcing by insurers:** DNB published its **Good Practice Outsourcing by Insurers** in 2018. The Good Practice is one of the results of the investigation on outsourcing and the related risk management, which DNB carried out in 2017. The Good Practice lists relevant legislation and regulations for insurers regarding outsourcing and contains a number of examples, good practices, on how an insurer can implement these regulations. The Good Practice only applies to material outsourcing.

Review and Extension of Act on remuneration policy for financial undertakings

A review of the Remuneration Policy (Financial Undertakings) Act (*Wet beloningsbeleid financiële ondernemingen*, Wbfo) took place in the summer of 2018. In addition, in a **letter to Parliament** dated 17 December 2018, the Minister announced three statutory measures to tighten up remuneration policy in the financial sector. These are:

1. An obligation to hold shares and (certain) other components of fixed remuneration, the value of which depends on the market value of the own company for directors and employees of financial companies for 5 years.
2. An obligation for financial companies to describe in their remuneration policy how the company takes account of the relationship between the remuneration of directors and employees and its function in the financial sector and its position in society, and to account for this.
3. A restriction of the exception to the bonus cap for people who do not fall under a collective agreement The exception will only be available for exceptional cases, and in any event should not be applied to persons performing internal monitoring functions or those directly engaged in providing financial services to consumers.

For a detailed overview of the developments with regard to the remuneration policy, we refer to the **General** section of this Outlook.

AFM publishes Information Provision Policy Rule

On 31 December 2018, the AFM **published** the Information Provision Policy Rule. In this policy rule, the AFM explains what it pays attention to when assessing the provision of information by financial undertakings about financial products and services. In this consultation, it has included a new chapter entitled 'Insurance: what are relevant characteristics?' In this chapter, the AFM explains which aspects of an insurance product must be communicated to the customer in the context of the obligation under Section 4:20 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht,* Wft). The AFM concretises what it considers to be the relevant characteristics of successively a term life insurance, funeral insurance, car insurance, disability insurance and an expiring annuity insurance.

Agenda for the financial sector

On 17 December 2018, the Minister of Finance presented the **Agenda for the financial sector** containing the most important measures for this government's term of office. In this agenda, the Minister focuses on stability, integrity and innovation. Specifically for insurers it is of importance with a view to stability that the Minister takes future-oriented insurers as one of the objectives. The Minister seeks to realise this via the evaluation of the Solvency 2 Directive, by means of which:

- a future-oriented business model is secured;
- the market-value approach is retained; and
- the long-term character of insurers is reflected in the capital requirements.

In addition, the Minister seeks to increase transparency on commissions and service provision for consumers who want to take out non-life insurance.

Abolition of tax deduction on remuneration of additional Tier 1 capital instruments (CoCos)

The 2019 Tax Plan provides for an amendment of the Corporate Income Tax Act 1969, which will abolish the tax deductibility of the coupon (remuneration) of additional Tier 1 capital instruments (contingent convertibles, or CoCos) for insurers, among others, with effect from 1 January 2019. This change is in line with the government policy aimed at encouraging financial institutions to maintain sufficient equity (as opposed to loan capital). In addition, the European Commission has previously indicated to the Dutch government by **letter** that the deductibility of this interest may constitute an unlawful form of state aid. For your information: the State Secretary for Finance clearly explains the objectives and backgrounds in this **parliamentary letter**.

Q&A Structure of key functions Solvency II insurers

On 13 December 2018, DNB drew up a **Q&A** containing criteria that DNB uses in assessing the set-up of the four key functions (risk management function, compliance function, actuarial function and internal audit function). The Q&A describes what DNB pays attention to in the proportional set-up of the operationally independent key functions of a Solvency II insurer. The Q&A was consulted via the Dutch Association of Insurers from the beginning of August to the end of September 2018.

In the Q&A, DNB states that a Solvency II insurer meets at least the following three criteria to guarantee the operational independence of the key functions:

a) Key functions are separated from each other and from other functions.
b) Key functions are not hierarchically subordinate to each other or to other functions, whereby any subordination to a member of the administrative and policy-making body (usually the management or board of directors) is not considered as such.
c) Key functions can report directly at any time and without the intervention of third parties to the administrative and policy-making body and, if present, to the supervisory body (usually the supervisory board).

The Q&A then explains on which conditions and under which circumstances an insurer may deviate from this.

New interest deduction limitation (minimum capital requirement) for insurers

In the **Coalition Agreement 2017-2021** a generic minimum capital rule (*thin cap rule*) is proposed which limits interest deduction on loan capital above 92% of the commercial balance sheet total. The draft legislation is expected in the course of 2019. The expected effective date is 1 January 2020.

Study into effectiveness of the compliance function

In the autumn of 2018, the DNB conducted a study into the operation of the compliance function at five insurers. The results include:

- In general, the compliance officers are sufficiently critical and expert in the performance of their duties, but the compliance function often feels only to a limited degree responsible for advising the management board and supervisory board on compliance with the Solvency II Directive. Consequently, it is often unclear whose responsibility it is.

- The activities performed to increase awareness of compliance and integrity risks within the organization (e.g. by sending newsletters and providing training) are insufficiently structured and often incident-driven. There is no analysis of the specific needs of the organization.

- A good substantiation of the required capacity for the compliance function is often lacking and available capacity is not always used on a risk basis. There is no clear link between the annual plan and a risk analysis.

- The monitoring programme is often not defined or determined in advance, as a result of which the capacity is insufficiently used for testing or monitoring.

- In practice, many of the compliance officer's activities are ad hoc in nature. The compliance officer mainly gives priority to properly fulfilling the advisory role and dealing with compliance and integrity incidents within the organisation. This entails the risk that the compliance officer's schedule will be largely determined by daily events and that the execution of a complete annual plan, including monitoring activities, will be compromised.

- Combining the compliance function with other functions, such as Legal Affairs or (operational) risk management, may be proportionate if justified by the nature, size and complexity of the insurer's operations. It is up to an insurer to demonstrate this in a reasoned manner, although independence of the compliance function must be established.

DNB has indicated that it will include the insights from the study in its executive supervision. In 2019, DNB will again conduct a study of the compliance function at four institutions. In the first half of 2019, DNB will also share conclusions and best practices with the entire sector and enter into a dialogue about them. DNB has published a **Q&A** "How does a Solvency II insurer organise its key functions operationally independent and proportionally".

Study of compliance with the Premium Schemes (Improvements) Act

Together with the AFM, DNB has investigated the extent to which insurers are aware of the Premium Schemes (Improvements) Act (*Wet Verbeterde Premieregeling*, WVP) and the resulting requirements. The WVP came into force on 1 January 2016 and amended the legal framework for all premium and capital agreements (premium schemes). In a nutshell: the capital built up under this scheme no longer has to be converted into a fixed payment on the retirement date, but can also be invested (partly) risk-bearing in the payment phase. A new pension type has been introduced for this purpose: the variable pension. Among other things, the WVP sets requirements in the areas of risk appetite, prudent person, life cycle investment and the design of the variable benefit product.
DNB has indicated that in 2019 it will carry out further studies at a selection of insurers into, among other things, determining risk appetite, investment profiles and the characteristics of the variable payment. The AFM also conducted a study into the development of variable pensions at insurers. The AFM will publish the results in the first quarter of 2019.

Entry into force of the Securitisation Regulation

2019 started with the entry into force (on 1 January) of the **Securitisation Regulation**. This European legislation harmonises the regulatory framework for securitisations and has thus replaced the (fragmented) sectoral regulations. Through the CRR Amendment Regulation, the Securitisation Regulation also amended the **Capital Requirements Regulation (CRR)**, which concerns prudential requirements for credit institutions and investment firms. At national level, on 20 December 2018, the Decree on the Implementation and Enforcement of the Securitisations Regulation and the Securitisations Capital Requirements Amendment Regulation (Bulletin of Acts and Decrees 2018, 484) entered into force, which aims to implement and enforce the relevant regulations in the Netherlands.

The requirements in the SR can be distinguished according to (i) generic requirements that apply to all securitisations (including requirements for transparency and risk retention) and (ii) specific requirements on the basis of which securitisations can qualify as "Simple, Transparent and Standardised" (STS). DNB will monitor compliance with the generic requirements by the institutions it directly supervises, including insurers. In addition, DNB will supervise all Dutch STS securitisations.

DNB has indicated that it will check compliance with the generic requirements on a random basis and, with regard to the specific STS requirements, will assess whether institutions correctly use the STS stamp for issued securitisations. DNB aims to do this within a maximum of three months of issuance. After completion of the assessment, DNB will inform the institutions about the outcome.

DNB expects insurers issuing securitisations to take responsibility for ensuring that they meet the generic and – insofar as relevant – specific requirements. The SR also stipulates that investing parties must ensure through due diligence that issuers comply with the rules.

DNB will assess transactions ex-post, i.e. after issuance and possible notification with ESMA. For the assessment of the STS criteria, DNB expects institutions to inform DNB as soon as an STS securitisation has been notified to ESMA.

Proposed amendments by the ESAs to the Key Information Document (KID) for PRIIPs

On 8 November 2018, the ESAs published a **consultation document** on the amendment of the PRIIPs Delegated Regulation. The aim is to make changes to the KID in order to remove duplications in the disclosure requirements for investment funds. The consultation ran until 6 December 2018. The ESAs aim to send their proposal for the amendments to the European Commission as soon as possible in 2019. The amendments should enter into force on 1 January 2020.

EIOPA Annual Work Programme 2019

In September 2018, EIOPA presented its **Work Programme 2019**. In this report it presents both its priorities for the year 2019 and a multi-year plan for the years 2019-2021. EIOPA aims to develop its work along three strategic objectives: (i) progress on codes of conduct and the related supervision, (ii) advancing convergence towards high-quality prudential supervision in the EU, and (iii) improving financial stability for the pension and insurance sectors. In addition, 'InsurTech' and sustainable financing will be two overarching themes relevant to all these objectives. These objectives apply to both the coming year and the long-term plan.
A number of important points for EIOPA in the coming year are:

- European supervision after Brexit and the new relationship with the United Kingdom;
- Further development of regulations in the context of the implementation of the Pan-European Personal Pension Product (PEPP);
- In 2019, EIOPA will present a number of initiatives in the field of scenario planning and environmental, social, and governance provisions in IORP II; and
- EIOPA will continue to work with the other ESAs on developing the KID for PRIIPs.

EIOPA report Cyber risks and cyber insurances

On 2 August 2018, EIOPA published its **report** on the understanding of cyber risks by insurers and reinsurers. The report shows that a better understanding of cyber risks is a key challenge for the European insurance sector. Cyber risk is an increasing concern for companies, institutions, private individuals and the financial markets. In less than five years, it has moved to the top positions in the list of global business risks.

The demand for cyber insurance is expected to increase substantially in the coming years. With the one-sided cyber insurance market, which is mainly based in the United States and serves only a fraction of the total market in Europe, the currently available reports and surveys in the context of cyber risks are aimed at the global or American insurance market. So far, little attention has been paid to the European insurance market. One of the main findings of the report confirms this.

With this report, EIOPA aims to increase the understanding of cyber risk acceptance with a focus on the European insurance market. EIOPA considers further work in this area necessary. Therefore, in addition to qualitative and quantitative questions, EIOPA has also included questions about cyber risks in its stress test.

Outcomes of EIOPA stress test

In 2018, EIOPA conducted a stress test to assess the resilience of the European insurance sector. To this end, it examined 42 European insurers on a number of different scenarios. Participants in the Netherlands include AEGON, NN Group, a.s.r. and Vivat. These included the scenario in which interest rates rise and surrender risk increases, the scenario in which interest rates fall and longevity risk is increased, and a scenario in which various natural disasters occur.

The results of this stress test were **presented** on 14 December 2018. Compared to their European peers, Dutch insurance groups are relatively vulnerable to a further fall in interest rates. They appear to be less susceptible to a sudden rise in interest rates combined with falling asset prices. Dutch insurers are also resistant to natural disaster scenarios. The sensitivity of Dutch insurance groups to lower interest rates is mainly due to the relatively high concentration of long-term life insurance policies among the insurers participating in the stress test.

EIOPA publishes second set of recommendations Solvency II SCR review

Since mid-2016, EIOPA has been working on the Solvency II SCR review; an evaluation of the standard formula SCR under Solvency II. After EIOPA published its first set of recommendations on this subject in October/ November 2017, EIOPA published its **second set of recommendations** on 28 February 2018. Some important elements are:

- **LAC DT:** With the proposals for LAC DT, EIOPA aims to increase harmonisation in Europe. The recommendation also contains proposals to better address the uncertainty about future profits in the underpinning of LAC DT.
- **Interest rate risk:** The current Solvency II calibration of interest rate risk means that life insurers barely hold any capital for interest rate cuts, while this is an important risk. The recommendation addresses this.
- **Risk margin:** The analysis of the risk margin shows that the cost of capital rate of 6% is also appropriate in the current low interest environment. EIOPA therefore recommends that the risk margin not be adjusted.

It was expected that the European Commission (EC), based on the EIOPA recommendations (but the EC may deviate from them), would make legislative proposals in 2018 for the amendment of the Solvency II regulations. This did not happen. We expect the European Commission's proposals to come soon.

Integration of ESG criteria in suitability test for unit-linked insurance

On 1 October 2018, the implementing legislation of the Insurance Distribution Directive (IDD) entered into force. The IDD package also includes the Delegated Regulation 2017/2359 regarding insurance-based investment products (unit-linked insurance). On 24 May 2018, the European Commission published a **proposal** for a regulation amending this delegated regulation. The proposed changes concern the integration of ESG (Environmental, Social and Governance) criteria into the investment process. The IDD requires insurers and intermediaries, when assessing whether a unit-linked insurance is suitable for their customer, to request information to assess whether the product meets the investment objective and that of the customer or potential customer, including the risk tolerance of that person. The proposal is to add: 'and his or her ESG preferences'. This way, insurers and intermediaries will be obliged, when selling unit-linked investment insurance, to also consider ESG criteria as part of the suitability test.

Pan-European Personal Pension Product

On 29 June 2017, the European Commission **proposed** a regulation for a pan-European framework for third pillar products, the pan-European personal pension product (PEPP). The PEPP proposal forms part of the capital market union. A PEPP is a new type of voluntary personal pension and aims to give savers more choice when they set aside money for retirement and offer them more competitive products. The proposal allows authorised insurers, banks, IORPs (pension funds, PPIs and pension institutions from other Member States), certain investment firms and asset managers to offer PEPPs.

The Dutch government **initially rejected** the proposal and indicated that it considered the need for a separate framework for PEPP to be insufficiently justified. The government is critical of the limited added value for the available pension products in the Netherlands and the possible impact of the proposals on the second pillar pension system.

On 15 May 2018, the Council of the European Union published its **compromise proposal**. Some of the objections raised by the Dutch government were addressed in this proposal:

- According to the compromise proposal, PEPP is explicitly a personal pension product, in which the employer is not involved. In doing so, PEPP explicitly qualifies as a third-pillar pension product. According to the compromise text, an IORP may only offer PEPP if it is licensed under (national) law to offer pension products in the third pillar. In addition, IORPs offering PEPP may not independently cover biometric risks. Under these conditions, the mandatory participation provided under Dutch law is safeguarded: mandatory industry pension funds in the Netherlands are not allowed to offer third-pillar products and the products they offer are characterised by risk solidarity.

- The compromise proposal does not extend the existing fiscal frameworks in support of PEPP. This is in line with the intention of the Dutch government. The tax treatment of third-pillar pension products therefore remains an exclusively national competence.

- In the European Commission's proposal, EIOPA had a decisive say in the authorisation of a PEPP prior to offering. The current compromise proposal limits EIOPA's role on this subject, which means that granting and refusing PEPP access to the market remains a national competence.

Minister Hoekstra has **indicated** that he remains of the opinion that PEPP has limited added value for the available pension products in the Netherlands, but the approaching compromise does address the main objections that the Netherlands had to the proposal. The European Commission's goal is to introduce PEPP by May 2019.

Regulation implementing the EU-US bilateral agreement on prudential measures for insurance

In early December 2018, the Regulation implementing the bilateral agreement between the EU and the US on prudential measures for insurance (*Regeling tot implementatie van de bilaterale overeenkomst tussen de EU en de VS m.b.t. prudentiële maatregelen voor verzekering)* was submitted for **consultation**. In this regulation, the United States is added as a designated state within the meaning of Section 2:26(d)(3) Wft in the Designated States (Financial Supervision Act) Decree. As a consequence, the prohibition of Section 2:26d(1) Wft —any party whose registered office is in a state that is not a Member State is prohibited from carrying out the business of reinsurer from a branch situated in the Netherlands without a licence granted by DNB for this purpose— does not apply to reinsurers from the United States that meet the requirements of the bilateral agreement between the EU and the United States on prudential measures concerning insurance and reinsurance. This agreement is annexed to the consultation document.

Thus, a US-based reinsurer does not need a licence to open a branch in the Netherlands, causing the reinsurer to be treated as a Member State re-insurer (see Section 2:26c Wft). The same applies if such an insurer wishes to provide services to the Netherlands on the basis of Section 2:26f(5) Wft. In that case, this insurer does not have to follow a notification procedure. There are no Dutch capital, disclosure and conduct requirements.

The agreement stipulates that if a reinsurer no longer meets the requirements and it also fails to meet those requirements in time, the benefits of the agreement no longer apply to it. The supervisory authority could then decide, for example, that the reinsurer must maintain collateral or may no longer conclude agreements in the Netherlands.

The intention is to have the regulation enter into force as soon as possible, and no later than 22 September 2019.

Consequences of Brexit

As Brexit approaches, it is of vital importance that insurers, insofar as they have not already done so, consider the impact that Brexit will have on them. Examples of such impact are:

- **Technical provisions, equity and capital requirements:** Brexit could have a significant impact on the prudential side of an insurer. EIOPA wrote an **opinion** on this in May 2018.
- **Market access**: Brexit obviously also impacts on market access. If there is indeed no transitional period, Dutch insurers operating in the UK on the basis of a European passport, or UK insurers operating in the Netherlands on the basis of a European passport will have to examine alternatives to secure their market access. It also has a material impact on existing insurance contracts, which may need to be transferred as a result of Brexit. EIOPA wrote an **opinion** on this in December 2017.

The UK provides for a so-called temporary permissions regime for financial undertakings that want to remain active, under the same conditions, in the UK after Brexit. Insurers must submit a **notification** to Prudential Regulation Authority (PRA), whereas the notification will be made through the FCA. The **website** of the FCA contains information on how – prior to 29 March 2019 – notification must be made.

AMLD5

Over the past year, the European and Dutch supervisory authorities have published a great deal of relevant guidance in the area of integrity. In addition, 2019 will probably see the upcoming amendment of the Fourth Anti-Money Laundering Directive. Indeed, the Fifth Anti-Money Laundering Directive (AMLD5) must be implemented in the Netherlands by 10 January 2020. For an overview of the consequences of AMLD5 and other relevant developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

Financial Markets Legislation
Integrity

Implementation Fifth Anti-Money Laundering Directive (AMLD5) in the Wwft

On 9 July 2018, the **amendment** to the Fourth Anti-Money Laundering Directive, also known as the Fifth Anti-Money Laundering Directive (AMLD5), came into force. The new directive is the result of an action plan to strengthen the fight against terrorist financing drawn up by the European Commission (EC) in 2016. AMLD5 aims to (i) amend the existing regulations to better combat the financing of terrorism and (ii) bring them into line with international developments and standards. In addition, the proposal is a response to the Panama Papers.

On 11 December 2018, the Minister of Finance submitted the **AMLD5 Implementation Act** for consultation. The consultation term closes on 15 January 2019. Below we discuss the most important changes based on the consultation version of the Act.

New service providers under the scope of Wwft

In line with AMLD5, providers engaged in services for exchanging virtual currency and fiat money (also known as virtual currency exchange platforms) and/or providers of custodian wallet providers (hereinafter: providers) will fall within the scope of the Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, Wwft). The legislator has chosen to make the providers subject to a licensing obligation. This means that the providers must apply for a licence from DNB. The licensing obligation will apply to every provider who wants to offer exchange services or custodial wallets professionally or commercially in or from the Netherlands.

In addition, providers must carry out a customer due diligence (CDD), monitor transactions and report unusual transactions to the Financial Intelligence Unit (FIU). The explanatory memorandum shows that far-reaching CDD measures are expected from the providers in the sense of enhanced customer screening. For example, the providers must be able to link virtual currency addresses to the identity of the owner of the virtual currency. The providers must also identify the recipient of the virtual currency. In the event that customers wish to convert their virtual currency into fiat money, the origin of this virtual currency and the source of the customers' assets will have to be determined. Providers must fulfil these obligations and DNB will – in the context of the licence application – check whether this fulfilment meets the standards set out in the Wwft.

The following service providers will be (further) regulated under the Wwft:

- art dealers (only if the value of a transaction or a series of interrelated transactions amounts to EUR 10,000 or more);
- natural persons who provide tax assistance, assistance or advice directly or through others in their profession or business;
- letting agents (only if the value of a transaction or a series of interrelated transactions amounts to EUR 10,000 or more).

Extension CDD in respect of prepaid payment instruments (e-money)

The threshold for the exception to the obligation to carry out CDD in respect of transactions carried out with a prepaid card (e-money) will be adjusted. The thresholds will be lowered from EUR 250 to EUR 150 so that, in more cases, CDD must be performed when using these prepaid payment instruments.

The threshold for CDD measures for (online) e-money transactions will also be lowered. Institutions must take CDD measures if the value of the transaction rises above the EUR 50 threshold. Under the current Wwft, the threshold value is still EUR 100.

Enhanced CDD with regard to third countries with a high risk of money laundering or terrorist financing

In line with the AMLD5, institutions will be required to take at least the following enhanced CDD measures with regard to **identified high-risk third countries**.

- obtain additional information on the customer and the UBO(s);

- obtain additional information on the purpose and nature of the business relationship;
- obtain information on the source of the funds and the source of the assets of the customer and the UBO(s);
- obtain information on the reasons for the transactions envisaged or carried out;
- obtain approval from senior management for entering into or continuing the business relationship;
- tightened monitoring of the business relationship by increasing the number and frequency of checks and by selecting transaction patterns that require further investigation.

In addition to the above measures, a ministerial regulation may stipulate that an institution must take one or more additional measures in respect of customers who execute transactions in respect of one of the identified countries. This could include the application of enhanced CDD.

Furthermore, the Wwft provides for the possibility of – by ministerial regulation – laying down one or more measures in respect of subsidiaries, branches or payment service agents of an (Dutch) institution in a high-risk country. For example, a Wwft institution may be prohibited from establishing a subsidiary, branch or payment service in a high-risk third country. The designated additional CDD measures need not apply equally to all institutions.

PEP lists

The Minister of Finance, together with the Minister of Justice and Security, will publish a list of positions that are considered prominent political positions in the Netherlands. This list will be kept up-to-date. International organisations, such as the UN, NATO and the World Trade Organisation, that are accredited on the territory of a member state must also draw up, and keep up-to-date, a list of prominent political positions. This list will in any event consist of the directors, deputy directors, and member of the board of directors or a person with an equivalent position. These lists will be provided to the EC and may be made public.

The EC will compile the same lists at European level. It is important to note that these lists refer to the *position*, and therefore do not mention persons by name.

Exchange of information between AML/CTF supervisory authorities

The legislative proposal creates a number of new opportunities for the exchange of information between supervisory authorities. For example, the possibility of exchanging information between the integrity supervisory authorities (those charged with AML/CTF supervision) and other supervisory authorities has been added.

The ESAs have consulted on **guidelines** clarifying the different forms of supervisory cooperation and information exchange and creating a framework to be used by supervisory authorities to support effective AML/CFT supervision of companies operating cross-border.

We advise financial institutions to prepare for the forthcoming implementation of AMLD5 in 2019. The minister intends to submit the legislative proposal to the House of Representatives in April 2019.The Netherlands has until 10 January 2020 at the latest to transpose AMLD5 into national legislation.

Status UBO register

As is known, the new Wwft came into force on 25 July 2018 as a result of the implementation of the Fourth Anti-Money Laundering Directive (AMLD4). Part of AMLD4 is the obligation for member states to maintain a UBO register in which the UBO(s) of a company or legal entity can be consulted.

Originally, the Implementation Act for the UBO register was to have been presented to the House of Representatives at the beginning of 2018. However, the Minister of Finance stated in a **letter** dated 20 April 2018 that, in view of the forthcoming implementation of AMLD5, the submission of the Act is expected in March 2019.

The new directive stipulates, among other things, that the UBO register must be accessible to the public. This means that natural persons and organisations no longer have to prove that they have a legitimate interest in gaining access to the register. These persons will at least acquire access to the name, country of birth, year of birth, country of residence, nationality and the nature and extent of the economic interest held by the UBO. Natural and legal persons wishing to access the same data in the UBO register for trusts and similar constructions must have a legitimate interest in doing so.

Companies and other legal entities must collect and maintain the information described above. The UBOs are obliged to provide the necessary information to enable the institutions to fulfil their obligation. Sanctions are drawn up to enforce this. As currently foreseen, the information that can be obtained from the register does not necessarily include all the necessary 'UBO information'. Moreover, according to AMLD4, institutions may not rely solely on information obtained from the UBO register. This means that institutions will still have to collect additional data from the UBOs.

When entering into a business relationship, institutions will be obliged to collect proof of registration or an extract from the relevant (European) UBO register. Member States have until 10 January 2020 to set up the register. It therefore seems likely to us that implementation of the UBO register will run parallel to the implementation of AMLD5. The EC has the task of linking all national UBO registers together by 10 March 2021 at the latest.

Under AMLD5, Member States are also obliged to set up a central register for account holders. The register must enable the identification of all natural or legal persons holding IBAN bank accounts. The register should also include any natural or legal person holding a safe with a bank.

The register must contain the following information:

i. **with regard to the account holder and any person who claims to act on behalf of the account holder:** the name, supplemented with other identification data or a unique identification number;
ii. **with regard to the UBO of the holder of the customer account:** the name, supplemented with other identification data or a unique identification number;
iii. **with regard to the bank or payment account:** the IBAN number and the date of opening and closing of the account;
iv. **with regard to the safe:** the name of the safe holder, supplemented with other identification data or a unique identification number and the duration of the rental.

Member States have until 20 September 2020 to set up the register.

Directive on countering money-laundering by criminal law

On 2 December 2018, the **directive** on combating money laundering by criminal law entered into force. The directive aims to harmonise the criminalisation of money laundering in the EU. The directive is part of the EC's 2016 action plan to strengthen the fight against terrorist financing.

The directive obliges EU Member States to criminalise money laundering in a uniform manner. For example, it sets minimum requirements for the level of maximum sentences for money laundering. In addition, Member States will be obliged to make 'self-laundering', the laundering of goods acquired through a crime of their own, punishable.

At first glance, the existing criminalisation of money laundering as included in the Title XXXA, Book 2 of the Penal Code seems to comply with the content of the directive. The Netherlands has until 3 December 2020 to implement the directive. The final legislative proposal must show how the directive will be implemented.

New EBA powers

In September 2018, the EC made a **proposal** to give the European Banking Authority (EBA) a greater role in the fight against money laundering and the financing of terrorism. With this proposal, the EC aims to achieve two objectives: (i) strengthening and extending existing (supervisory) powers and

(ii) concentrating the AML/CTF activities of the ESAs in EBA.

The most important changes will be discussed below:

- **Centralisation of tasks at EBA:** The proposal gives EBA a coordinating role in preventing the use of the financial system for money laundering and terrorist financing. To this end, a permanent internal committee will be set up, consisting of the heads of the national supervisory authorities in this field. The committee will focus on measures to combat money laundering and terrorist financing.

- **Information collection and database:** EBA will have the power to request information from national supervisory authorities on weaknesses identified in the processes and procedures, governance arrangements, expertise and reliability assessments, business models and activities of financial sector parties to prevent money laundering and terrorist financing, including measures taken by the competent authorities.

EBA will collect this information and keep it up to date in a central database. The information obtained shall be analysed by EBA and shared with the competent authorities on a need-to-know and confidential basis.

- **Coordination in contacts with third countries:** The proposal gives EBA a leading role in facilitating contact between European and third-country supervisory authorities on cross-border money laundering and terrorist financing issues.

- **Recommendations to national supervisory authorities and individual decisions:** EBA will have the power to request national supervisory authorities to investigate or take action against breaches of AML/CTF regulations. If a national supervisor fails to do so or fails to do so sufficiently, EBA may, as a last resort, take a decision itself in respect of the institution concerned.

The proposal is currently subject to a trialogue discussion between the European Parliament, the EC and the Council of Ministers. It is not yet clear when the new powers of EBA will enter into force. The EC has encouraged the parties to reach an early agreement.

The changes described above mean that financial institutions will in future have to deal with a European supervisory authority in the field of AML/CTF. The amendment will most likely also mean that the applicable standards will be harmonised at European level. This will reduce the scope for national supervisory authorities to organise integrity supervision as they see fit.

EC proposals to improve information exchange between supervisory authorities

In connection with AMLD5, the EC has called on the European Council and the European Parliament to confirm measures to strengthen the exchange of information between the various supervisory authorities in the field of AML/CTF.

For example, the EC considers it desirable that supervisory authorities that receive information on the basis of the Capital Requirements Directive (CRD IV) should be able to share this information with the supervisory authority charged with supervising compliance with anti-money laundering legislation. To this end, the prudential supervisory authorities should be exempted from their duty of confidentiality under CRD IV insofar as the information relates to the fight against money laundering and the financing of terrorism. The EC is of the opinion that the relevant supervisory authorities should be able to submit disagreements about the exchange of information to EBA, within the framework of EBA's mediation authority. In the EC's view, EBA could be given an explicit mandate to determine the manner of cooperation and information exchange between the supervisory authorities.

In addition, the EC has specified a number of concrete measures that the European supervisory authorities (ESAs and ECB) should take on the basis of their current powers. For example, the EBA is asked to draw up a list of anti-money laundering issues for prudential supervisory practice. In doing so, the EBA should also look at the existing possibilities for including anti-money laundering issues in prudential supervision. On the basis of this list, EBA is invited to establish common standards for the inclusion of money laundering and terrorist financing risks in prudential supervision.

On 4 December 2018, the European Council endorsed the EC proposal and adopted an **action plan** with short-term actions for 2019.

Relevant guidance of supervisory authorities

Over the past year, the various supervisory authorities have issued important guidance in the field of AML/CTF. An overview is given below.

- **ESA Risk factor guidelines:** On 4 January 2018, the ESAs (EBA, ESMA and EIOPA) published the English version of common **guidelines** describing the factors financial firms should consider when identifying the AML/CTF risks associated with (i) their own organisation; and (ii) a business relationship or transactions. The guidelines also describe how financial firms can align the scope and depth of their CDD with the AML/CTF risk they have identified.

- **Wwft guidance AFM:** As a result of the coming into force of the amended Wwft, the AFM has revised its Wwft, Wwft BES and Sanctions Act 1977 guidance (**Wwft Guidance**). In its Wwft Guidance, the AFM provides some pointers and insights into the various obligations of the Wwft. Together with the revised Wwft Guidance, the AFM updated the **FAQ** and provided examples of **unusual transactions**.

- **Wwft guidance DNB***:* At the time of writing, DNB has not yet published its revised Guidance on the Anti-Money Laundering and Counter-Terrorist Financing Act and the Sanctions Act (Wwft Guideline). The new Wwft Guideline is expected to be published in January 2019.

Relevant guidance FATF

In 2018, the FATF published a number of relevant guidance papers on AML/CTF. Below we briefly discuss a selection.

- **Risk-based guidance for the securities market:** The purpose of this **guidance** is to assist the players active in the securities market in the design and implementation of the risk-based approach. This may include the relevant AML/CTF supervisory authorities and FIU(s), but also the natural and legal persons who offer products and/or services to the securities market in their profession or business (e.g. asset managers and prime brokers). To achieve this, the FATF has issued a number of specific guidelines. The guidance emphasises that the AML/CTF risk assessment should reflect the nature, size and complexity of the business. It also underlines the important role of senior management in promoting a culture of compliance with anti-money laundering and anti-terrorism measures.

- **Risk-based guidance for the life insurance sector:** The FATF has also issued a **guidance** for players active in the life insurance sector. This includes, for example, the relevant supervisory authorities in the field of life insurance and insurers and intermediaries providing life insurance and other investment-related insurance. The guidance handles the nature and level of money laundering and terrorist financing risks in the life insurance sector. It also gives indications and examples of AML/CTF risks for a number of life insurance products. The FATF stresses that the AML/CTF risk assessment should reflect the nature, size and complexity of the business. A simple risk assessment is more likely for less complex life insurers and intermediaries. A complex risk assessment is more appropriate for the more complex (group) life insurers taking into account the group-wide risk appetite. Here too, the importance of the involvement of senior management is emphasised.

- **Concealment of beneficial ownership:** Together with the Egmont group, the FATF has published a **report** analysing the vulnerabilities associated with concealing the ultimate ownership. This provides insight into how criminals hide their assets and unlawfully acquired assets through legal entities, legal constructs and professional intermediaries. The report is intended to support the risk analyses of governments, financial institutions and other professional service providers. Together with the report, the FATF has published a **list** of risk factors that could relate to a situation in which the ultimate ownership is concealed.

We advise institutions to use the above guidance from the FATF to raise the AML policy to a higher level (where necessary).

Authority to publish – AFM/ DNB Wwft

Under the new Wwft, the AFM and DNB must in principle publish all sanction decisions that relate to violations of the Wwft. This obligation only applies to sanctions imposed for violations of the Wwft after 25 July 2018.

Under the new Wwft, the supervisory authorities can take various sanction decisions, such as an administrative fine, an order for periodic penalty payments, an instruction and a public warning. The Wwft leaves room for weighing up interests so that sanction decisions can be anonymised, published at a later date or not at all. This is possible, for example, if publication of a sanction decision causes disproportionate damage to the parties involved or jeopardises the stability of the financial system.

Institutions should be aware that in the event of a breach of the Wwft, the supervisory authority may publish the sanction decision.

Agenda for the financial sector

On 17 December 2018, the Minister of Finance presented the **Financial sector agenda** containing the most important measures for this government's term of office. In this agenda, the Minister focuses on stability, integrity and innovation.

With regard to integrity, the Minister aims to combat money laundering, underlying basic offenses and terrorist financing. To this end, the financial sector is encouraged to sufficiently invest in its gatekeeper role, and to pay more attention to integrity in the corporate culture. In addition, research will be conducted with the sector, DNB and the AFM to look into the possibilities for exchanging information to make CDD more effective and to look for possible regulatory changes.

The minister also indicates that he will follow the developments in both the trust sector and the banking sector. With regard to the trust sector, it will be examined whether they comply sufficiently with the trust legislation. If there is no improvement, the minister will investigate additional measures. With regard to the banking sector, the minister closely monitors compliance with the integrity legislation.

In order to achieve these objectives, the minister states that he wants to improve and strengthen the cooperation and information exchange between national supervisors. In addition, a number of specific measures will be taken to mitigate risks related to cryptos, including a license obligation for virtual currency exchange platforms and custodian wallet providers based on the Wwft (as discussed above). In addition, the outcome of the AFM's and DNB's investigation into cryptos (expected early 2019) will be used to take additional measures.

First results of DNB investigation into terrorist financing

DNB is conducting a **study** into the management of the risk of terrorist financing at various financial institutions. The initial findings show that there is still considerable room for improvement in the transaction-monitoring process at the financial institutions investigated. DNB believes that an effectively functioning process should enable financial institutions to identify possible unusual transaction patterns and transactions and, if necessary, report them to the FIU.

In general, DNB notes that the institutions investigated:

- do not always conduct adequate screening when accepting a customer, which means that there is no proper risk analysis of the customer;
- rarely ask the question (or ask it too late) whether the use of the service meets the expectations that the institution had of the customer when he was accepted;
- do not always make full use of the transaction monitoring systems available to them;
- have too little (expert) capacity to handle alerts; and
- make too little use of the (external and internal) available data in their customer screening.

The study will be completed by the end of 2018. DNB will share the findings that are relevant to the entire sector with the market. Financial institutions can use these findings to refine their own AML policy.

Answering parliamentary questions about explanation definition PEP

On 27 November 2018, the Minister of Finance **answered** parliamentary questions about the position of a close associate/business relationship of a PEP.

In his answer, the Minister discussed, among other things, the explanation and scope of the term PEP. For example, the Minister stated that if a PEP also qualifies as a UBO, the other UBOs of the organisation qualify as a 'person known as a close associate of a PEP'. This means that institutions must also take more stringent CDD measures with regard to the other UBOs. These measures must be applied as long as possible, but must continue for at least twelve months after the UBO no longer qualifies as a PEP. This tightened screening means that institutions must match the intensity and frequency of the CDD with the (higher) risks of the case.

Financial institutions should take this into account in their AML policy. This means that the institutions must conduct an active study and/or request information to find out whether one of the UBOs of a company qualifies as a PEP.

'Virtual assets' under the scope of the FATF standards

The Financial Action Task Force (FATF) amended the **FATF standards** on money laundering and terrorist financing in October 2018 to clarify how these standards should be applied to activities and companies in connection with 'virtual assets'. The FATF has chosen the term 'virtual assets' instead of cryptocurrencies to avoid the impression of legal tender.

The FATF standards include a definition of 'virtual assets' and 'virtual assets service providers' (VASPs). These include exchange platforms, custodial wallets and financial service providers at Initial Coin Offerings (ICOs). In the opinion of the FATF, VASPs must comply with AML/CFT obligations such as CDD, reporting unusual transactions and the retention obligation. In addition, a registration or licensing obligation will be imposed for VASPs, who will be subject to supervision or monitoring.

In the coming months, the FATF will be working on further detailing the regulatory framework for 'virtual assets'. In view of the rapid technological developments in the field of 'virtual assets', the FATF will evaluate the amendment in a year's time.

The amended FATF standards largely correspond to AMLD5. Although the scope of the FATF standards is broader than the scope included in AMLD5. For example, the FATF standards also appear on exchange platforms for virtual-to-virtual and financial service providers for ICOs. The Minister of Finance has stated that a study will be carried out in the near future on how the above can be incorporated into European and Dutch legislation.

In the consultation on the AMLD5 Implementation Act legislative proposal referred to above, the Minister of Finance has not yet discussed the new FATF standards. However, it is our assessment that the parliamentary debate on the Act will determine how the Netherlands will implement the FATF standards in Dutch legislation (primarily the Wwft).

AFM investigation into compliance with Wwft

On 17 December 2018, the AFM **published** the results of its 2018 survey on compliance with the Wwft for investment firms. The survey showed that investment firms do not comply well with all the requirements of the Wwft. For example, it appeared that many investment firms:

- interpret the concept 'client' and 'transaction' too narrowly;
- fail to comply with their obligation to train staff so that they are familiar with the provisions of the Wwft; and
- do not periodically assess the client on the basis of the risk profile created.

The AFM has indicated that it will intensify the Wwft supervision in the coming years. This will mean, among other things, that the AFM will carry out more risk-driven investigations. For example, extra attention will be devoted to the obligation to report to the FIU and transaction monitoring. If necessary, we advise that investment firms bring their internal business operations into line with the requirements of the Wwft.

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