FINNIUS

Outlook 2020

2010 - 2020: Finnius 10 years

Introduction Outlook 2020

2019 in retrospect

The year 2019 was marked by integrity matters and supervision thereon. Financial institutions – major banks in particular – faced rigorous measures when it came to their compliance policies, especially with regard to the Anti-Money Laundering and Anti-Terrorist Financing Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*). Simultaneously and in the same context, questions arose on proportionality and effectiveness of these rules. How far should the responsibility of financial institutions as gatekeepers reach? And should the same traditional means of identification be used by institutions when providing relatively simple, digital, FinTech services? Integrity has been high on the agenda, and compliance related matters demanded substantial capacity from institutions as well as supervisory authorities.

In any event, 2019 was not a year for major legislative procedures. Supervisory authorities and regulators were more concerned about low interest rates and their severe negative impact on the financial soundness of institutions. At the same time, the rising stock markets accompanying these low interest rates created favourable conditions for investment management and a new range of different types of investment products. This also drew attention of the supervisory authorities: are consumers actually provided with adequate information about these products, and is this information provided in an honest way? FinTechs providing payment services matured and became more visible following the entry into force of PSD2. The crypto hype seems to have been tempered (even though the first crypto related regulation – AMLD5 – has yet to come into force). In 2019 once again lots of guidance on, and extension of, regulations was provided to us by the supervisory authorities EBA, EIOPA and ESMA. But what happened to Brexit?

Outlook 2020

It is quite easy to predict 2020 will start off with a very impactful event: Brexit. However, predicting the precise terms and the consequences thereof is not that easy. Neither can adequate predictions be made on how the financial economy will hold up in 2020 in the midst of geopolitical uncertainties. Interest rates will probably remain low, but will this be accompanied by a recession, as is suggested for quite some time now? In view of this looming recession and increasing debt levels we anticipate supervisory authorities to focus attention on the financial soundness of financial institutions. This is reinforced by the upcoming new European frameworks on prudential requirements: CRD V and CRR 2 for banks and the IFD and IFR for investment firms.

Aside from a focus on financial soundness, regulators and supervisory authorities shall continue to zoom in on integrity in the broadest sense. Anti-money laundering, tax evasion, sustainable finance, IT-security and governance: we expect such cross-sectoral regulations to remain high on the supervisory agenda. Concrete measures and regulations will be introduced regarding the manner in which financial institutions incorporate climate risks in their risk policy. In an ever-growing digital world, the manner in which consumers are approached and serviced when offering financial products and services online will be under continuing focus. In this Outlook 2020 we once again provide you with an overview of these and other developments for the forthcoming year.

We are pleased to guide you through our supervisory expectations for 2020. We have based ourselves on developments and proposals that were publicly available at the turn of the year. We will discuss both new regulations as well as priorities of supervisory authorities and regulators that might impact your business. However, we will start off with the views on 2020 of some very important players on the financial markets. We hope this Outlook once again serves as your beacon in navigating the supervisory landscape in 2020.

Views on 2020

The regulator

Ursula von der Leyen, President of the European Commission

"The complexity and sophistication of our financial system has opened the door to new risks of money laundering and terrorist financing. We need better supervision and a comprehensive policy to prevent loopholes."

'A Union that strives for more – My agenda for Europe', Ursula von der Leyen EC agenda 2019-2024, September 2019

The supervisory authority

Andrea Enria, Chair of the Supervisory Board of the ECB

"I understand that banks are different. They differ in size and in complexity. And yes, I am in favour of regulating and supervising banks in a proportionate manner. However, this must not be taken to the point where we overlook, neglect and thus reinforce risks. Regulation has to follow the risks.
And this is also true for sustainable finance. Climate change is one of the biggest challenges we face right now – if not the biggest. But the role of bank regulators and supervisors is limited; our job is to ensure safe and sound banks. So, if climate change leads to particular risks for banks, we have a duty to take this into account. And if there should be a risk differential between green and brown assets, we will take this into account too. All else is beyond our mandate."

Speech at the Retail Banking Conference 'Creating sustainable financial structures by putting citizens first' of the European Savings Bank Group, Brussels, 21 November 2019

The Brexiteer

John Glen, the Economic Secretary to the Treasury and City Minister

"We will strain every sinew to help [the City] flourish. A deep and comprehensive relationship with the EU in financial services will help us do this. It will preserve cross-border market access in key areas, but also give us the freedom to set our own rules to enable the sector to thrive, while ensuring continued financial stability in the UK and the rest of Europe. We are absolutely committed to upholding open financial markets, underpinned by the highest standards of regulation and appropriate supervisory oversight."
"But it would be wrong to think we need to choose between Europe and the World. Our vision for the future must be big and brave enough to encompass both. A strong and enduring relationship with the continent of Europe and an ever-expanding array of partners around the globe."

Speech to financial sector leaders at the fifth UK Financial Services Beyond Brexit Summit, London, 28 October 2019.

The consultant

McKinsey & Company

"While the jury is still out on whether the current market uncertainty will result in an imminent recession or a prolonged period of slow growth, the fact is that growth has slowed. As growth is unlikely to quicken in the medium term, we have, without question, entered the late cycle. Compounding this situation is the continued threat posed by fintechs and big technology companies, as they take stakes in banking businesses. The call to action is urgent: Whether a bank is a leader and seeks to "protect" returns or is one of the underperformers looking to turn the business around and push returns above the cost of equity, the time for bold and critical moves is now."

'The last pit stop? Time for bold late-cycle moves', McKinsey Global Banking Annual Review 2019

The disruptor

Mark Zuckerberg

"When I think about all the different ways that people interact privately, I think payments is one of the areas where we have an opportunity to make it a lot easier."
"I believe it should be as easy to send money to someone as it is to send a photo."

Speech at Facebook's F8 annual software developer conference, San Jose, 30 April 2019

What are you interested in?

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

GENERAL DEVELOPMENTS

This section discusses developments that cannot be specifically assigned to one specific sector. Only the overarching aspects of the cross-sectoral developments are covered in this section. Any sector-specific aspects of these developments are included in the appropriate sections of the Outlook. In addition, we have drawn up separate sections for all developments in the areas of Integrity legislation (Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, Wwft)) and Sustainability (specials).

AFM SUPERVISION

AFM Trend Monitor 2020

Just as in 2018, at the end of 2019 the AFM again gave its vision on the trends with regard to the supervision of the financial markets for 2020. In October 2019, the AFM published its [Trend Monitor 2020] online. This report identifies important trends in the financial sector and the risks associated with them. These studies contribute to determining the supervision priorities of the AFM, which will be specifically translated into its supervision activities calendar for 2020 and further, the 'Agenda 2020-2022'. The AFM has identified five trends in Trend Monitor 2020, which put a number of emerging risks and supervisory issues in perspective. These are trends that are relevant for better indicating a number of changes in the financial sector and which affect the supervision by the AFM. These are the following trends:

- **Digitalisation**: The AFM sees the use of digital data as the driving force behind innovations in the financial sector. Although traditional institutions remain dominant, they often work with FinTech parties and the BigTechs are entering the market. Furthermore, financial undertakings are becoming more dependent on external parties, such as software developers. They play an increasingly important role in financial services. The threat of cyberattacks due to digitisation is also high.
- **Macroeconomic developments:** Due to the historically low interest rate, the AFM sees risks for the financial sector, such as with regard to the profitability of banks and life insurers. Furthermore, this low interest rate also has negative effects on the customer side, such as the growing risk of excessive loans and an unbalanced search for returns.
- **Changes in European legislation:** The AFM still sees (despite it being relatively calm in the area of new legislation) many new regulations that impact the financial sector in the area of its supervision, for example regarding the role that the AFM has in drawing up recovery plans for central counterparties (CCPs) and insurers. In addition, the capital market union regulations can give a boost to the European capital market, which should benefit consumers and companies.
- **Political uncertainty:** Brexit remains a major source of uncertainty in the financial markets. Certain risks which were identified in previous years – such as access to CCPs and British broker dealers – were largely addressed. However, a number of other risks, including event risk, risks on the retail market and supervisory arbitration, remain current. Furthermore, in the geopolitical field outside of Europe, trade tensions between the US and China in particular are a source of increased political uncertainty. Combined with macroeconomic developments, this leads to a continuing sensitivity of the capital markets to a shift in sentiment.
- **Transition to a sustainable society and economy:** Climate change is the last trend identified by the AFM. This has an increasing impact on the economy and financial sector. The demand for and the supply of sustainable investments are growing strongly. As a result, the most important point of attention for the AFM remains the availability and quality of information throughout the entire chain of sustainable financing, also in order to counteract risks such as greenwashing.

Based on these trends, the AFM identifies three supervisory themes that will once again be important in 2020: vulnerabilities in the financial position of households, stable capital markets post-Brexit and finally digitisation. Within these themes, the AFM identifies three current topics that will probably be central to its supervision in 2020:

1. **Risks on expiring of interest-only mortgages around 2035**: For a long time, interest-only mortgages were a popular way to finance a home. Many of these interest-only mortgages expire in fifteen years – around the year 2035. Homeowners must redeem or refinance them at that time. However, that coincides with the time that many of these homeowners retire and lose their right to mortgage interest relief. Most consumers can now reduce these risks, mainly due to the lengthy remaining term of their mortgage. That is why the AFM considers it important that mortgage lenders and consumers take timely action in this regard. The AFM monitors the progress

of this process and will set out the outlines to prevent problems.

2. **Risks associated with the introduction of new reference rates (IBOR transition):** Interbank Offered Rates (IBORs) are reference interest rates or interest rate benchmarks on which financial contracts, such as mortgages, are based. At present, the IBORs widely used in Europe and the Netherlands are the London Interbank Offered Rate (LIBOR), the Euro Overnight Index Average (EONIA) and the European Interbank Offered Rate (EURIBOR). This concerns contracts with a value of approximately EUR 150,000 billion. However, as a result of the Benchmark Regulation (more on this below), the main European interest benchmarks are currently being reformed or replaced to meet new requirements. The most important IBORs have until 1 January 2022 to comply with the Benchmark Regulation. According to the AFM, this transition creates financial, legal and operational challenges. For example, the financial risks are greatest if a benchmark ceases to exist while there are no suitable alternatives. A replacement has already been found for EONIA in the Euro Short Term Rate (€STR). However, the adjusted EURIBOR has now been approved, but there is still no benchmark with a term structure that can serve as an alternative. From a legal point of view, it can be difficult in practice to adjust a large number of existing financial contracts (such as loans, derivatives, securitisations) that are based on current IBORs. The AFM is currently holding talks with market parties about their approach to the transition to new reference rates.

3. **Risks of digitisation in retail services**: Finally, the AFM sees that the developments in digitisation are progressing at lightning speed. The AFM considers the influence of digitisation on the sector primarily as positive. Digitisation can improve financial services, but it also brings risks. For example, the increasing ease with which digital financial products are concluded can lead to the use of unsuitable products by consumers. The AFM is thinking here of cryptocurrencies, contracts for difference (CFDs) and binary options. The AFM continues to monitor these developments, regularly talks to parties putting new digital and other services on the market and indicates what it expects of the market in various policy statements. Within the legal framework and the explanation given by the AFM in the form of previously published guidelines, the AFM pays attention to the extent to which new service concepts are in the customer's interest and the extent to which the risks apply to these concepts.

AFM Best practices for reflection

In a blog post at the end of 2019, one of the AFM's regulatory officials shared a number of best practices for reflection (document 'Best practices: reflecting on decision-making helps both consumer and undertaking'). The best practices shared in this post are intended as examples to encourage financial undertakings to apply the principles of reflection to their own decision-making processes. According to the AFM, reflection helps financial undertakings be balanced in their decision-making, and this means reorienting the thinking towards the customer's interest. The author called for building in reflection moments as a standard element of the decision-making process at an early stage. This is one of the latest contributions in the AFM's long-standing calls for attention to behaviour and culture within financial undertakings.

DNB SUPERVISION

DNB relocation

In a more practical vein, but also important for financial undertakings that have discussions with DNB: In the second half of 2020, DNB is likely to temporarily move its head office to a new location. DNB has adopted the provisional design for the headquarters to be renovated on Frederiksplein in Amsterdam. After more than fifty years, the current DNB building is due for a thorough refurbishment. It is hoped that a refurbished, sustainable, future-proof and more open building will be opened on Frederiksplein by 2023. In the meantime, DNB will occupy the Toorop building (next to the Amstel Station in

Amsterdam). We expect that the relocation in 2020 will affect DNB's capacity somewhat.

FINANCIAL SUPERVISION ACT (WFT)

Review of the Financial Supervision Act (*Wet op het financieel toezicht, Wft*)

In the **Outlook 2017** we already reported on the Ministry of Finance's initial plans from 2016 for a comprehensive review of the Financial Supervision Act. However, after extensive consultation of the market, it remained largely silent about these plans for a while.

An **update** from the Minister of Finance on motions and undertakings in the field of the financial markets from May 2019 shows that the Minister does not consider it appropriate to start a full review process however. The study of the review has revealed that the Financial Supervision Act exhibits flaws in terms of both clarity and accessibility. However, a complete review of the Financial Supervision Act means a large and long-term demand on capacity, not only at the Ministry of Finance, but also at the supervisors and the financial sector itself, which will lead to significant costs for those involved as a result of a process of adjustment and transition.

The Minister therefore prefers legal-technical improvements on an occasional basis. Given the major involvement of all stakeholders in the exploration, the Ministry of Finance will also involve them in the drafting of the occasional changes. We therefore also expect a number of legislative proposals to improve the Financial Supervision Act in 2020 (see, for example, below).

Financial Markets Amendment Act/Rectification Act 2020

In the **Outlook for last year** we reported on the Financial Markets Amendment Act 2019. The Amendment Act forms part of an annual change cycle and contains all changes to national legislation and regulations regarding the financial sector. According to the **planning brief 2019** from the Ministry of Finance to the House of Representatives dated December 2018, the Financial Markets Amendment Act 2020 was planned for May 2019. At the end of 2019, however, little was known about the Amendment Act 2020 except that the **planning brief 2020** published at the end of 2019 spoke of a 'Financial Markets Rectification Act 2020'. The object of the Amendment Act is the rectification of omissions and loopholes in completed and ongoing implementation processes; as such it is likely that this act will include the annual rectifications and amendments to various legislation. This Rectification Act is scheduled for March 2020 and we expect more clarity on this in the course of 2020. It should also be noted that this planning, as the **MinFin itself also indicates**, is subject to some uncertainty. Although the Amendment Act generally appeared before the start of the calendar year in question, in recent years – such as in 2019 – it has occurred that the Amendment Act is only submitted at the start of, and appears during, the calendar year to which it relates.

Financial Markets Amendment Act 2021

The draft proposal for the Financial Markets Amendment Act 2021 was presented for **consultation** at the end of December 2019. It contains mainly amendments that do not directly affect financial undertakings. The consultation period ends on 3 February 2020. The **planning brief 2020** indicates that the Financial Markets Amendment Act 2021 is scheduled for May 2020.

ESAs

ESAs Joint Committee planning 2020

The Joint Committee of the European Supervisory Authorities (ESAs) has indicated in its **Work Programme** for 2020 that from 2020 it will focus on cybersecurity and services to consumers as well as the protection of depositors, consumers and investors. Through the Joint Committee, the ESAs (EBA, EIOPA and ESMA) coordinate their activities with a view to cross-sectoral consistency and supervisory convergence. Below we highlight some relevant areas of attention for 2020:

- **PRIIPs Regulation:** the committee will evaluate the PRIIPs regulation and in February 2020 intends to make proposals for amendments to (in part) the KID in the form of Regulatory Technical Standards (RTS).
- **Sustainability disclosure requirements**: the ESAs will issue six RTSs in 2020 with regard to disclosure requirements that will apply under the Regulation on Disclosures relating to Sustainable Investment and Sustainability Risks (Disclosure Regulation, DR – see more extensively on this regulation the **Sustainability** section in this Outlook):
  - Two RTSs relating to due diligence statements concerning the possible adverse effects of investment decisions on climate goals;
  - Two RTSs relating to the pre-contractual information that states how a 'green' product meets climate goals;
  - RTS relating to publication obligations on the website; and
  - RTS relating to periodic reporting obligations entailing how financial products satisfy their sustainability goals and the overall impact thereof.
- **Artificial intelligence**: assessment of FinTech with focus on potential consumer protection deficiencies, the benefits and risks and steps to be taken by regulatory and supervisory bodies.
- **Cross-sectoral risk analysis**: analysis of the most important developments and vulnerabilities in financial stability through a cross-sectoral approach.

ESAs report on supervision of cross-border retail services

On 9 July 2019, the ESAs published a joint **report** on the supervision of cross-border retail services. The report provides insight into the ESAs' view on supervision of branches and cross-border financial services and online services, and also contains recommendations for future regulatory developments. The report covers all types of financial services and products, including investment funds.

In this report, the ESAs identify the most important issues that national supervisors encounter when supervising financial undertakings offering cross-border retail financial services within the EU:

- **institutional and organisational issues:** the distribution of responsibilities between home and host supervisors is not always clear;
- **supervision and enforcement issues:** the ESAs see a risk that national supervisors focus too much on financial undertakings posing a high risk to their own country, certainly in cases where a financial undertaking operates almost exclusively in another Member State; and
- **regulatory gaps and regulatory arbitrage**: the ESAs believe that regulatory arbitrage – institutions establishing themselves in a specific Member State purely for the sake of the friendly regulatory climate, in order to subsequently be exclusively or almost exclusively cross-border active – must be prevented.

They also make recommendations to EU legislators in particular on how these issues can be addressed. We list a number of interesting recommendations below:

- To prevent regulatory arbitrage, the ESAs propose laying down that institutions can only obtain an authorisation in a Member State if they also intend to carry out at least part of their activities in that Member State.
- The ESAs propose applying quantitative criteria to the question of whether an institution active in a Member State through online services is deemed to operate across borders in that Member State (as a result of which the host supervisor must perform the market conduct supervision of that institution).
- In the case of services provided by branches, that branch often cooperates with the head office established in another Member State. In practice, the question often arises as to whether a service has been provided to a consumer by the branch office (in which case the host supervisor conducts market conduct supervision), or by the head

office (in which case the home supervisor conducts market conduct supervision). The ESAs propose laying down that for services in a host Member State, the service must be deemed to have been provided by the branch, or that the institution makes clear to the consumer whether the service is provided by a branch or head office.

We expect that EU legislators will further study the conclusions and recommendations of this report and follow up on at least some of the recommendations. We recommend that fund managers offering cross-border retail AIFs or UCITS keep an eye on this. They may need to adjust the manner in which they approach investors in another EU Member State.

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 on the review 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. A trialogue agreement was reached on these proposals in March 2019 and the European Parliament approved it in April 2019. The texts are now being legally and linguistically checked, after which they are expected to be published in early 2020.

The ESFS review package amends eight different European regulations and directives. The powers of the ESAs are strengthened in six areas. The tools at the ESAs' disposal to achieve supervision convergence will be strengthened. The peer reviews of national supervisors will be tightened up and the ESAs can each identify two supervisory issues that national supervisors will have to focus on. 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 administrators of critical benchmarks. The role of EIOPA will be strengthened in terms of coordinating the authorisation of internal risk models of insurers and reinsurers within Solvency II. Finally, ESAs are given more powers to perform stress tests, comparable to the powers already available to EBA. Furthermore, and not least, EBA in particular will be given more powers in the context of the prevention of money laundering and the financing of terrorism through the use of the financial system. See the **Integrity** section of this Outlook.

In our opinion, from 2020 the changes will lead to more and further harmonisation and convergence of the regulatory rules and methods at European level.

ESMA calls for stricter supervision of suspicious transaction reports (MAR)

Certain financial institutions have an obligation under the **Market Abuse Regulation** to submit a suspicious transactions and order report (STOR). The STOR is an important tool for supervisors to detect and investigate market abuse. National supervisors should effectively monitor the STOR reporting obligation to ensure that the reporting persons fully meet the requirements. That is why ESMA has carried out a peer review on this matter. **The report** identifies an increase in STORs. The supervisors generally perform STOR analyses well, but there are areas for improvement. ESMA has examined all national supervisors in six areas and classified them in one of the four score categories in each area. In general, four recommendations were made:

- The supervisors must be sure that all financial institutions to which the STOR obligation applies, including wholesale market participants such as asset managers, meet the STOR requirements.
- The supervisors must address signs of non-submission of reports or poor quality reports in order to improve the STOR framework.
- If necessary in certain cases, supervisors must be mindful of their full supervisory toolkit

- (including sanctions). Now problems are mainly solved bilaterally.
- Each supervisor must ensure that they have appropriate IT tools to fully maximise the usefulness of regulatory data for the STOR analysis.

The AFM has achieved a good score in this review and we therefore do not expect any radical changes in the STOR framework.

CENTRAL COUNTERPARTIES (CCPs)

Central counterparties (general)

A category of regulated players that has not been given its own section in this Outlook, but does play an important role within the financial sector, is the category of central counterparties (CCPs). A CCP is a private market party that puts itself between the original counterparties of a derivatives contract. The CCP therefore arranges for the clearing of the derivatives transactions, as a result of which the original counterparties no longer run counterparty risk. The obligation to conduct central clearing of over-the-counter (OTC) derivatives via CCPs, and the authorisation requirement for CCPs, ensue from EMIR.

There are currently 16 authorised CCPs in the EU, two of which are in the Netherlands. A further 33 CCPs from third countries have been recognised under the EMIR equivalence provisions, allowing them to offer their services in the EU. The three CCPs from the United Kingdom will belong to the CCPs from third countries after Brexit. With regard to CCPs, the necessary developments will also occur in 2020. We will list a few below.

Revised legislation on CCPs

New regulations on CCPs are being implemented through a review of EMIR (also called EMIR 2.2) and this regulation determines what the supervision of CCPs from the EU and from third countries should look like in the future. These new regulations were **published** on 12 December 2019, and took effect under direct and general applicability on 1 January 2020. The consequences of Brexit on the European financial system in particular are taken into account. The aim of the reform is stricter supervision of CCPs to take account of the growing size, complexity and cross-border dimension of clearing in Europe. The reform provides for a unique mechanism within ESMA to pool CCP supervision expertise and to ensure closer cooperation between the supervisory authorities and the central banks responsible for the EU currencies. In any case, ESMA has already made use of its power to advise the European Commission on CCPs from third countries. **The advice** concerns, among other things, the criteria to determine whether a third-country CCP is systemically important and how to determine whether there is comparable compliance. On the basis of the ESMA's advice, the European Commission will prepare delegated regulations in the course of 2020.

Review of EMIR with regard to clearing and reporting obligations

A lot has changed in 2019 in the area of the **European Market Infrastructure Regulation** (EMIR), and 2020 also seems to be an important year for EMIR. The EMIR REFIT Regulation (REFIT), which amends the EMIR on certain highly relevant points, entered into force in June 2019. REFIT aims to eliminate the disproportionate effects of clearing and reporting obligations under the EMIR on certain market parties. Below we list some important changes:

- The definition of 'financial counterparty' (FC) has been extended to include alternative investment funds (AIFs) regardless of the location of their manager (AIFM).
- The introduction of the 'small financial counterparty' (SFC). An SFC is a financial counterparty whose positions in OTC derivative contracts do not exceed the clearing thresholds. In short, an SFC will be exempt from the clearing obligation. An SFC must comply with the risk

mitigation obligations, including the margin obligations.
- If two counterparties, at least one of which is an NFC, belong to the same group of which the top company is not a financial counterparty and they are subject to centralised risk assessment and management procedures, they no longer have to report their intra-group contracts.
- REFIT delegates the reporting obligation and responsibility to the financial counterparty for the derivative contracts it has concluded with an NFC and to the manager who has concluded derivative contracts for a fund. The delegation of this reporting obligation will enter into force from 18 June 2020.

As a result of the adjustments to the scope of the clearing obligation by REFIT, a mismatch occurs with the trading obligation under the MiFIR. After all, the trading obligation for derivatives also relates to counterparties that fall under the clearing obligation. MiFIR has not yet been brought in line with the REFIT amendments. In October 2019, ESMA published a **proposal** for consultation on the basis of which it intends to propose to the European Commission to bring the scopes back into line with each other. We expect that this will happen in 2020.

In addition, work is currently being done on an amendment of the EMIR that relates to central counterparties, EMIR 2.2. See above under 'Revised legislation on CCPs'.

European framework for the recovery and resolution of CCPs

Given their systemic interest in the financial sector, the huge amounts that are involved in clearing and the relatively small number of CCPs, CCPs are seen as the new category of players which are too big to fail. In 2016, the European Commission published a **proposal** on a Regulation establishing a European framework for the recovery and resolution of CCPs. This increases the recovery and resolution possibilities for CCPs, so as to ensure, as much as possible, continuity in the conduct of the critical activities by CCPs and thus also to safeguard financial stability. The proposal is currently still in the negotiation phase. The Finnish Council Presidency has indicated that it wants to reach a Council Agreement before the end of 2019. We assume that the new rules will be published in 2020 and will enter into force around 2022.

BENCHMARK REGULATION

Benchmark Regulation (general)

We already reported on the Benchmark Regulation in the **Outlook** for 2019. Below we provide an update on some developments since then and developments expected for 2020 that are specifically relevant for administrators as (potential) users of benchmarks.

Transitional period for critical benchmarks and non-EU benchmarks

The Benchmark Regulation originally provided that with effect from 1 January 2020, institutions subject to European supervision could, briefly put, only use benchmarks that comply with the Benchmark Regulation and that are registered, and also offered by a licensed or registered administrator. In the meantime, however, the following developments have occurred with regard to critical benchmarks:
- **Extension of the deadline for critical and non-EU benchmarks**: In November 2019 the transitional regime for critical benchmarks (EONIA, EURIBOR, LIBOR, STIBOR and WIBOR) and non-EU benchmarks (benchmarks managed by an administrator established in a third country) was **extended** to 31 December 2021. This was partly due to uncertainty about the continuation of EURIBOR and EONIA – which are the most important benchmarks for the Eurozone (and for the Netherlands) – after 1 January 2020 and uncertainties regarding the recognition and endorsement procedures for non-EU benchmark administrators.
- **Publication €STR**: On 2 October 2019 the ECB started **publishing** the Euro Short-Term

Rate (€STR). €STR is an unsecured, one-day interest rate for the euro and serves as an alternative to EONIA, which sets the one-day interbank interest rate.
- **Transition EONIA to €STR:** The transition from EONIA to €STR, which started in October 2019, should be completed by December 2021, after which EONIA will most likely disappear. Since October 2019, EONIA has been linked to €STR with a difference of 8.5 basis points (lower). This linked EONIA is valid until 3 January 2022.
- **EURIBOR reform:** EURIBOR has been adapted by the administrator (EMMI) to a hybrid EURIBOR and in 2019 the relevant supervisor (FSMA) authorised EMMI to offer this EURIBOR. The hybrid EURIBOR will be 1 to 5 basis points below EURIBOR.

The aforementioned developments do not affect the fact that many steps still have to be taken, such as the adjustment of financial contracts and instruments with EONIA and EURIBOR as a benchmark. We recommend that market parties use the extended deadline to be ready in time for the transition, including by identifying which EU benchmarks they use have been approved for use after the transition phase and which have not.

Review of regulation and third country regime report

In the context of the review of the Benchmark Regulation, the EC must have submitted its report on the effectiveness of the Benchmark Regulation by 1 January 2020. At the time of writing, this report has not yet been published, nor is it known whether the publication date will be met. The report will have to indicate whether an amendment of the regulation is required and possibly contain proposals for amendment. Prior to this, in October 2019, the EC published a **document** for market consultation regarding, among other things:
- New supervisory powers to require a change of methodology from administrators of critical benchmarks;
- Possible contingency plans to be drawn up by financial institutions for instances where a critical benchmark is no longer representative;
- The scope of the regulation, possible amendments to the framework applying to non-significant benchmarks and whether quantitative thresholds are appropriate tools for categorising benchmarks;
- New supervisory powers to verify whether climate-related benchmarks comply with the regulation and whether the related investment strategy aligns with the benchmark;
- Improvement of equivalence, recognition and endorsement procedures for non-EU administrators.

Partly on the basis of the aforementioned consultation, on 1 April 2020 the EC will also report on the implementation of the third country regime, any amendments to it, and the consequences of the extended transition period for non-EU administrators. Whether and in which areas the Benchmark Regulation will ultimately be revised remains to be seen, but the topics submitted for consultation and ultimately to be reported provide some indication of what can be expected for 2020.

Benchmark Regulation Implementation Act

The **Financial Benchmark Regulation (Implementation) Act** was dealt with as a formality at the end of 2019 and should have be implemented on 1 January 2020 according to the deadline. At the time of writing the implementing act however had not yet been published officially. Although the directly effective Benchmark Regulation largely requires no implementation, a few aspects necessitate a change in the law. For example, under the Implementation Act, the supervisor can now deny certain persons the power to perform a function at a benchmark administrator. Violation of certain provisions is also a criminal offence under the Economic Offences Act (*Wet op de economische delicten*, WED).

Best practices benchmark transition

On the basis of a questionnaire sent to various financial undertakings in mid-2019, the AFM and DNB identified **best practices** for the benchmark transition at the end of 2019. These may be useful to anticipate the transition in good time in 2020. Established practices worthy of mention include:

- having a detailed overview of benchmarks and terms used by the institution;
- identifying alternatives to benchmarks, assigning them to products and using them where possible;
- a project team that oversees all activities related to benchmarks, reports on them at management level, in which the planning followed is in line with the transition timeline;
- for new contracts, commencing the transition to alternative benchmarks;
- identifying different scenarios and using them to schedule the transition; and
- having a communication plan ready for informing customers and already start communicating in so far as possible.

Proposal on low carbon and positive carbon impact benchmarks

At the end of 2019, the **Proposal** for a regulation on low carbon and positive carbon impact benchmarks was adopted. Among other things, the regulation introduces two new categories of low carbon benchmarks and additional ESG disclosure requirements for a majority of benchmarks. For a substantive discussion of this and other developments in the field of sustainability, we refer to the **Sustainability** section of this Outlook.

BREXIT

Exit is close

2020 will finally be the year in which Brexit will actually be implemented with a Brexit agreement, certainly now that Boris Johnson's conservative party has won the elections at the end of December 2019. The date of exit is most likely 31 January. Negotiations on a trade agreement with the EU then start, which must lead to an agreement within a year.

At the time of writing there is therefore still a lot of uncertainty about what the deal between the United Kingdom and the EU will look like. We assume that a hard Brexit without any deal is off the table. We would like to draw your attention to a number of developments that are relevant in the context of Brexit in any case.

Implementation period

In their agreement, the EU and the United Kingdom have agreed on an implementation period, which will commence on the exit date and – as currently foreseen – apply until the end of December 2020. During this period, financial undertakings can continue to use their passport as they currently do. These companies must also comply with both current European law and future European law as recorded now that will enter into force before December 2020.

The supervisors

DNB and the AFM signed a **Memorandum of Understanding** (MoU) with the English Prudential Regulatory Authority (PRA) and Financial Conduct Authority (FCA) in May 2019. This MoU provides a basis for these supervisors to continue working together and exchange supervisory information after Brexit. It is based on an **EBA framework** in this context. In principle the MoU would only take effect in the case of a no-deal Brexit. The MoU includes agreements on what information can be exchanged about institutions that carry out cross-border activities between the Netherlands and the UK. It also contains practical agreements on how to cooperate in the performance of joint supervisory tasks. The MoU applies to all institutions that are supervised by DNB, the AFM, PRA and FCA, with the exception of (re)insurers and pension funds. Within the EIOPA context, **Multilateral MoUs** have been agreed for these two categories between supervisors from the EU member states (including DNB and the AFM) and the PRA, FCA and the British pension supervisor TPR. Depending on the final deal, the MoU may be significant for daily supervisory practice.

DNB and the AFM are warning the institutions under its supervision to continue to prepare for a no-deal Brexit. In that respect, DNB has investigated the Brexit contingency plans at the relevant financial undertakings. This showed that many parties were well prepared. In that respect, DNB still sees some residual risks, such as with regard to outsourced services, the exchange of personal data and informing clients about Brexit. DNB also points to the potentially large impact of Brexit on the financial markets, for example due to considerably increasing volatility and decreasing market liquidity. It is important that financial institutions also take this scenario into account in their risk hedging and liquidity management in the coming period.

UK as a third country

The European Commission notes 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.

Brexit Collective Act

At the end of March 2019, the Act 'Amending certain laws and making provisions in connection with the United Kingdom's withdrawal from the European Union', the **Brexit Collective Act**, was adopted. This law must ensure that the consequences of Brexit do not cause any problems for Dutch citizens and companies. The Brexit Collective Act has the nature of an emergency Act and in short, gives the Dutch government the power to take emergency measures for a year after Brexit, in which it is allowed to depart from what is currently laid down in the law. There was a great deal of criticism of Article X of the Act, which provides for the possibility, in the event of an emergency, of departing from higher legislation (an Act of Parliament) by means of further legislation, such as an order in council or ministerial regulation. This article has nevertheless been maintained so that the regulator can respond quickly to unforeseeable consequences of Brexit. It is relevant for the financial sector that an order in council is being drawn up concerning the finality of payments for systems within the meaning of the Settlement Finality Directive (as implemented in the Bankruptcy Act).

With regard to the foregoing, we of course note that how the consequences of Brexit will ultimately play out depends on day-to-day developments.

ENFORCEMENT & PROCEEDINGS

Enforcement

Enforcement

Whereas in recent years the trend seemed to be that in the event of violation of standards, DNB and the AFM were more likely to suffice with informal enforcement measures such as instructive conversations on compliance with standards and warning letters, that trend now seems to have turned. As is apparent from press releases – and as we also note in our practice – the AFM and DNB are (again) increasingly taking formal enforcement measures, such as instructions, orders subject to a penalty for noncompliance and fines. Moreover, these measures are becoming increasingly far-reaching, for example because the amount of the fines imposed increases. We expect that this trend to intensify in 2020.

It does not seem illogical that this trend is at least partly related to formal enforcement powers granted to supervisors in previous years by various legislative changes. Among other things, the maximum penalty levels have been considerably increased and, in addition, provision has been made for increased publication powers. Political and international expectations may also play a role here, for example in the field of the combatting of money laundering and terrorist financing. In any case, a sharp increase in formal enforcement activities can be observed, particularly in the latter field. For all kinds of institutions under supervision, this translates into far-reaching instructions and orders subject to a penalty for noncompliance aimed at restoring a situation that is in conformity with standards, and/or high fines. We have no indications that the AFM and DNB will take a step back in this respect in 2020, and it will be interesting to see whether DNB and the AFM will also make (more frequent) use of the possibility to relate the amount of the fine to the turnover of the party being fined (or of the group to which it belongs).

With regard to enforcement powers employed we observe, especially when it comes to the

AFM, a further intensifying of investigations into digital stored data. This may include e-mails, but we also observe that during unannounced on-site inspections board members and other officers are required to hand over their (privately used) cellular phones in order to retrieve data from these devices. Given the fact that this entails an imminent threat of intrusion into the private life of the persons concerned, we do not rule out the possibility that the legal permissibility of such demands will be called into question, or will be submitted to the courts, more often.

Disclosure of fines

Market parties that are confronted with enforcement measures should pay special attention to the fact that such measures may be made public (in full and not anonymized) by the supervisor. A distinction must be made between disclosure after the relevant decision has become irrevocable and early disclosure, which takes place almost immediately after the decision has been taken, regardless of whether objections/appeals are lodged. While the starting point under the Financial Supervision Act, and for example also the Trust Offices Supervision Act 2018 is that all administrative sanctions, including instructions, must be made public once they are irrevocable, only (certain high) fines and imposed orders subject to a penalty for noncompliance may be made public early. However, with the trend noted above, it can be safely assumed that the AFM and DNB will also want to proceed with early publication of decisions more often in 2020. In addition, we also expect that the AFM in particular will make more frequent use of the publication powers granted to it by the Transparent Supervision of Financial Markets Act, which was enacted on 1 July 2018, for example by issuing public warnings with regard to institutions under supervision.

Actual managers and fellow perpetrators

A final expectation with regard to the sanctions to be imposed by DNB and the AFM in 2020 is related to the power granted to these supervisors, in short, to also impose fines and orders subject to a penalty for noncompliance on actual managers and fellow perpetrators. Although we do not know or keep up to date statistics on this, it is our impression that the supervisors are increasingly using this power, with the level of these fines also showing an upward trend. Incidentally, natural persons, in particular directors and supervisory directors, can also be directly affected by enforcement decisions by DNB and the AFM if they contain a negative opinion regarding their suitability and/or reliability. We do not exclude that 2020 will also show an increase in such enforcement decisions.

Proceedings

Bearing in mind the aforementioned developments, it is not surprising that the number of market parties (and their directors) that oppose enforcement measures taken by DNB and the AFM, or the disclosure thereof, is increasing. Incidentally, opposition does not mean that an appeal is always made to the court, since that can also be limited to filing an objection with the AFM or DNB. This does not alter the fact that it seems justified to expect that the number of appeal proceedings against DNB and the AFM will increase, as well as the number of preliminary relief procedures, in particular where they are aimed at preventing the aforementioned early disclosure. It should be borne in mind that, perhaps unlike in the (more distant) past, strict enforcement measures are now also imposed on larger and reputable institutions under supervision that the supervisor moreover will often want to make public. We note that these parties also turn to the court more often because they do not fully agree with the sanction, or want to submit to the independent court, for example, whether there has been a violation of the law or whether the fine is proportional.

With regard to the foregoing, it cannot be ignored that enforcement measures imposed by DNB and the AFM, certainly in the case of fines, may entail serious supervisory antecedents for the directors and supervisory directors involved. In combination with the increased awareness in the market that supervisors are increasingly attaching consequences to this in connection with the reliability and/or suitability of those directors and supervisory directors, it seems likely that this will also entail that decisions by DNB and the AFM are submitted to the court for assessment more frequently. It seems certain that the above-mentioned principle that most administrative sanctions are only made public after they have become irrevocable contributes to an increase in the number of objection and appeal proceedings. By exercising these remedies it can thus at least be achieved that the sanctions in question will not be published for the time being, and often for a longer period of time.

IMPORTANT INFORMATION FOR PAYMENT PROCESSING INSTITUTIONS IN 2020

DNB SUPERVISION

Consultation on Suitability Policy Rule

On 14 June 2019, the AFM and DNB submitted the proposed changes to the 2012 Policy Rule on Suitability (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: the **2019 draft decree** to amend the Suitability Policy Rule 2012 and the **draft amended text** of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework that DNB and the AFM use in the suitability assessments of policymakers in the financial sector. DNB and the AFM have amended the Policy Rule in response to changes in national and European legislation and regulations. Market parties could respond to the consultation until 1 September 2019.

Below we briefly discuss the most important changes to the Draft Policy Rule:

- Persons who exclusively qualify as an applicant of a declaration of no objection will be excluded from the amended application of the Policy Rule. The reputations of those persons will be assessed with due observance of the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, adopted by the European Supervisory Authorities consisting of EBA, EIOPA and ESMA (**link**).
- Payment processing institutions with a registered office in the Netherlands are explicitly included in group A in the Draft Policy Rule, which means that the general principle based provisions (section 1) of the policy rule apply to policymakers to be assessed. As a result of this change, the AFM and DNB can apply customisation to the assessments, while it is possible to take into account the constellation within both large, complex and small start-ups.
- DNB and AFM have chosen to clarify that the suitability topic 'balanced and consistent decision-making' also means that policymakers act with independence of mind;
- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences: because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the AFM and DNB have decided to explicitly include the requirement of 'sufficient time' under the suitability requirements in the Draft Policy Rule. In addition, a separate section has been included in the explanatory notes about what AFM and DNB mean by sufficient time;
- The old Policy Rule includes an exception for small companies because the requirements of managerial skills in a hierarchical relationship could be too restrictive for these types of undertakings. In the Draft Policy Rule it has been added that the nature, size and complexity of the company must also be taken into account in deciding whether or not to employ the exception so that the AFM and DNB can include more circumstances in their consideration.

The Policy Rule will take effect in 2020.

Positive decisions and requests for information to go through DLT

Beginning 1 January 2020, DNB will be sending all positive decisions on prospective appointments through the DLT (Digital Supervision Portal). This change comes along with the request to institutions to also send a copy of the decision to the candidate. DNB will still be informing candidates of the results by telephone. DNB will only send decisions to the institution and the candidate by post in cases in which DNB does not consent to the appointment. Likewise, requests for information concerning reviews submitted and confirmations of reappointments will henceforth be sent to the institution through DLT. Institutions can also return the information requested by DNB through DLT.

DNB Guidelines for artificial intelligence in financial sector

On 25 July 2019, DNB published a **discussion paper** containing guidelines for the use of artificial intelligence (AI).

DNB has established that financial undertakings increasingly use AI to improve their business processes, products and services. DNB indicates that financial undertakings can improve their existing business processes and deliver new added value by using AI. At the same time, incidents with AI, certainly if this technology is not used responsibly, can harm a financial undertaking and its customers – with potentially serious consequences for the reputation of the financial system as a whole. DNB sees that due to the interwovenness of the financial system, such incidents may ultimately even have an impact on financial stability. That is why it is important that financial undertakings use AI in a responsible manner, i.e. based on controlled and ethical business operations.

In DNB's opinion, responsible use of AI in the provision of financial services means that when developing applications, undertakings must take into account aspects, such as soundness, accountability, fairness, ethics, skills and transparency (SAFEST). DNB indicates that as the use of AI becomes more important in the decision-making process of a financial undertaking, and the potential consequences of this for the undertaking and its customers become greater, the bar for a responsible and transparent use of AI will be higher. In its supervision of financial institutions, DNB will explicitly monitor this and will further investigate the main aspects of the use of AI.

DNB emphasises that this discussion paper contains a provisional view with regard to the responsible use of AI in the financial sector. DNB is of the opinion that the issues and ideas discussed in this document would benefit from a broader discussion, and has therefore called on relevant stakeholders to share their comments and suggestions with DNB. DNB has stated that it will report on the outcome of this process in the course of 2020.

ECB

ECB Decision on the supervision of systemically important payment systems (SIPS)

Based on the Principles for Financial Market Infrastructures (PFMI) developed by CPSS-IOSCO, a payment system must be subject to effective supervision on the basis of clearly defined and public criteria, in connection with the systemic risk that such an institution may cause if it is insufficiently protected against the risks that the payment system is subject to. For less significant retail payment systems (PIRPS and ORPS) the PFMIs have been converted by the Eurosystem into the Revised Oversight Framework for Retail Payment Systems. The ECB has implemented the principles for systemically important payment systems (SIPS) in the SIPS Regulation (Regulation (EU) No 795/2014). On the basis of this SIPS Regulation, the ECB published a **decree** in August 2019, which sets out further procedures and conditions for the performance of the supervisory duties in the SIPS Regulation. In short, the decree contains rules about:

- requesting information and documents from the SIPS operator;
- the appointment of an independent expert to carry out certain investigations at the SIPS operator;
- on site investigations by the supervisor of the SIPS operator; and
- rights of the SIPS operator in such investigations.

The decree entered into force at the beginning of September 2019 and is directly applicable to the relevant SIPS operators. These are currently system operators of TARGET2, EURO1, STEP2-1 and CORE (FR). However, the new rules may also apply to critical service providers (CSPs) of the SIPS operators. This should be taken into account when drafting service agreements between the SIPS and the CSPs, so that the supervisor can actually exercise its powers.

ECB Retail payments strategy and PEPSI

Twenty years after the introduction of the euro, there is still no European card scheme. The largest market share for card schemes lies with non-European parties and newcomers on the market. The desire to gain more European autonomy is now part of the pan-European retail payments strategy. A group of European banks intends to set up their own European payment network, called PEPSI (Pan European Payment Solution Initiative), and is supported in this by the ECB. In his **speech** at a conference on retail payments (the last conference in a series), ECB director Benoît Cœuré stressed that the ECB will encourage market initiatives to ensure that effective pan-European, user-friendly and cost-effective solutions are put in place that also enable people to pay securely and which contribute to European identity and serve the interests of European customers. In addition, such a new pan-European payment system must also be accepted worldwide. There is hope that the European retail payment market will thus become less dependent on non-European players and less susceptible to external disruptions such as cyber threats.

OTHER DEVELOPMENTS

Act on Further Remuneration Measures for the Financial Sector

In response to the **Agenda for the financial sector**, the Ministry of Finance presented the **legislative proposal** for consultation on the Act on further remuneration measures for the financial sector in 2019. Significant changes that have been proposed are:

- The introduction of a five-year retention period for shares and comparable financial instruments that are part of the fixed remuneration.
- Tightening of the exception to the 20% bonus cap for employees who are not covered by a collective labour agreement. The proposed tightening makes it explicit that this exception can only be used in exceptional cases and is in any event not an option for those who (i) perform internal control functions or (ii) are directly involved in providing financial services to consumers.
- The introduction of an obligation to describe in the remuneration policy how the undertaking accounts for the relation of the remunerations of managing directors, supervisory directors and employees of the undertaking to its social function and the way in which this relation has been formed.
- Extension of the supervisory authority's approval period for retention bonuses exceeding 20% of the fixed salary from six to nine weeks.

The **planning brief 2020** of the Ministry of Finance shows that the legislative proposal on the Act on further remuneration measures for the financial sector is scheduled for September 2020. In addition to the aforementioned further remuneration measures, this legislative proposal contains several more technical changes to the remuneration rules for the financial sector that originally were part of the proposal for the Financial Markets Amendment Act 2018, as well as the continuation of existing policy pertaining to traders for their own account.

CPMI-IOSCO report on cooperation between regulatory authorities on FMIs

On 10 December 2019, CPMI and IOSCO published a **report** in which they shared experiences and lessons learned about how regulatory authorities have been cooperating on promoting the security and efficiency of financial markets infrastructures (FMIs) in an increasingly global market. The report is based on the Principles for Financial Market Infrastructures (PFMI). One element of these principles is that achieving this security and efficiency will depend on central banks, market regulatory authorities and other relevant institutions at both the national and international levels working together as closely as possible.

SEPA Instant Credit Transfer Rulebook

The **new version** of the SEPA Instant Credit Transfer Rulebook will take effect as of 17 November 2019. This version will be applicable up to and including November 2021. Annex III of the new Rulebook contains an overview of the changes compared to the previous version from 2017.

Brexit

For an overview of the situation regarding Brexit, please see the **General Developments** section of this Outlook.

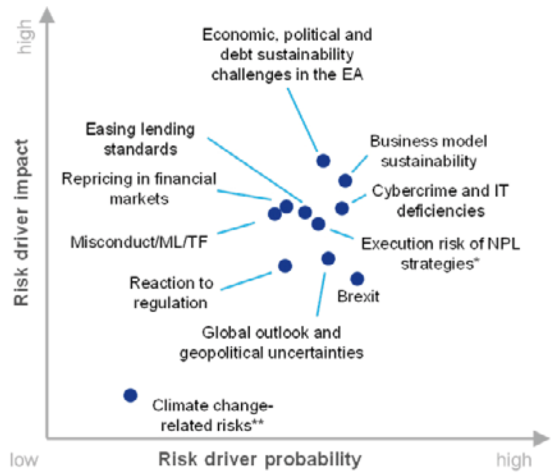
IMPORTANT INFORMATION FOR BANKS IN 2020

In 2020 too, there will 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 2020, we will only discuss developments in supervisory legislation that are generally important for the banking sector. For banks that provide several types of services, other sections of this Outlook may also be relevant, such as the section for Investment Firms and/or for Consumer Credit.

ECB SUPERVISION

ECB's risk analysis for 2020

The ECB published its annual **risk analysis** for the year 2020 in October 2019, in which a selection of the most important risks was identified based on the two usual risk dimensions: 'probability' and 'impact'. This risk analysis was carried out in close cooperation with the national supervisors and also based on discussions with the supervised banks. The three main risk factors for the euro area banking system in the next two to three years are expected to be: (i) economic, political and debt sustainability challenges in the euro area, (ii) business model sustainability and (iii) cybercrime and IT deficiencies. This risk analysis is closely linked to the ECB supervisory priorities for 2020, as discussed below. The risk analysis is visually represented as follows:



ECB's supervisory priorities for 2020

The ECB announced its **supervisory priorities** for the year 2020 in October 2019, in which the subjects that will receive extra attention in the supervisory work in the coming year are discussed. The ECB, in cooperation with national supervisors, has identified the sources of banking sector risk. Whereas in the early years of the SSM, supervision was focused on the recovery of bank balance sheets, the focus of the supervisor has now shifted more towards making banks future-proof and the sustainability of their business models. All priorities for the coming year can be classified under (i) continuing balance sheet repair, (ii) strengthening future resilience, and (iii) other priorities. All the ECB's priorities are briefly listed below. The ECB emphasises that this overview is not exhaustive.

- **Continuing balance sheet repair:**
  - **Follow-up on NPL guideline:** The aim is to maintain progress in reducing legacy risks and achieve consistent coverage of the stock and flow of NPLs over the medium-term.
  - **Follow-up on internal ratings-based models**: Following the findings from the targeted review of internal models (TRIM), work will continue on ensuring the adequacy of internal models used by banks in calculating their regulatory capital requirements.
  - **On-site missions for trading risk and asset valuation:** The ECB will continue its on-site investigations on trading and market risk aspects. In particular, inspections will be carried out at banks which are exposed to complex instruments marked at fair value.

- **Strengthening future resilience:**
  - **Credit underwriting criteria and exposure quality (e.g. real estate, leveraged finance):** On the basis of the comprehensive data collection that aimed to identify pockets of risks, the ECB will conduct a follow-up analysis with a view to acquiring a deeper understanding of banks' loan origination practices and processes. This may lead to bank-specific measures. The ECB will carry out on-site inspections in areas such as commercial real estate, residential real estate and leveraged finance.
  - **Capital and liquidity management:** Work on the quality of the ICAAP and ILAAP of banks will continue. Work will also proceed on improving transparency around the risk drivers of the Pillar II capital requirements.
  - **Business model sustainability and profitability**: The ECB continues its work and attention in the field of business models and profitability, given that economic conditions and, inter alia, competition from non-banks, digitisation and legacy issues pose a threat to the business models and profitability of the banks.
  - **IT and cyber risk:** Through on-sites and the SREP, the ECB will pay special attention to IT risks and cyber risk. Significant banks must report any significant cyber incidents to the ECB under the SSM cyber incident reporting process.
  - **Stress testing**: In 2020 the biennial EU-wide EBA stress test will again take place for a number of significant banks. In parallel, the ECB will conduct an additional stress test for the remaining significant banks not participating in the EU-wide stress test. The outcome of both exercises will feed into the SREP. The stress test also serves to encourage banks to enhance their own stress testing and risk management capabilities.
  - **Governance:** The ECB is of the view that major improvements are still needed in the banks' governance frameworks. This therefore remains a central theme. For all the aforementioned subjects that contribute to future resilience, attention is also paid to the governance aspects thereof. This is in addition to the regular assessment of the functioning of the governance in the context of SREP.

- **Other priorities:**
  - **Brexit:** The ECB continues to expect banks to be prepared for all sorts of scenarios through executable Brexit plans and looks at the operational models that banks intend to use within the euro zone.

DNB SUPERVISION

Climate risks within banking supervision

DNB plays an active role worldwide in putting sustainability on the agenda within the context of prudential supervision, for example through its participation in the Network of Central Banks and Supervisors for Greening the Financial System (NGFS). At the end of 2019, DNB held a consultation at the national level for its **Good Practices**: Integration of climate-related risk considerations into banks' risk management. Banks are invited to respond to these Good Practices up to 14 February 2020. The Good Practices aim to provide tools for the further integration of climate-related risks in (i) governance, (ii) risk management and (iii) the disclosure from/by banks. Climate risks include both physical risks (for example, damage due to extreme weather conditions) and transition risks (for example, changes in climate business models and regulations for a CO2 neutral economy). To prepare these Good Practices among other things, the findings from the Climate Risk self-assessment which less significant banks (LSIs) had to complete and other market observations from DNB were used. The Good Practices are also in line with the work of the NGFS and the attention that the ECB devotes to climate risks in its analysis of the risk priorities in 2020. Banks should be prepared for DNB to pay constant attention to climate risks and expect banks to have drawn up and implemented a fully-fledged climate policy within the foreseeable future. For more on this and other developments related to climate risks and sustainability, we refer to the **Sustainability** section of this Outlook.

Changed DNB position regarding the independent functioning of the Supervisory Board

In the summer of 2019, DNB changed its **position** on the independence of the Supervisory Board on a number of points to align with the EBA **Guidelines** on the assessment of suitability of members of the management body and key function holders. When screening supervisory board members, DNB looks at 'independence in mind', 'independence in appearance' and 'independence in state'. To assess whether a supervisory board member is formally independent, DNB uses the criteria from the Guidelines, which are stricter in a number of respects than DNB's former policy. DNB maintains its position that at least half (50%) of the Supervisory Board must consist of formally independent supervisory board members. DNB applies its position to all institutions that it supervises.

Consultation on Suitability Policy Rule

On 14 June 2019, DNB submitted the proposed changes to the Suitability Policy Rule 2012 (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: the **2019 draft decree** to amend the Suitability Policy Rule 2012 and the **draft amended text** of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework used by DNB and the AFM for the suitability tests of policymakers in the financial sector. The Policy Rule has been amended in response to changes in national and European legislation and regulations.

- DNB and AFM have chosen to clarify that the suitability topic 'balanced and consistent decision-making' also means that policymakers are 'independent in mind'. This was previously the case for bank supervisory board members based on DNB policy.
- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences. Because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the AFM and DNB have decided to explicitly include the requirement of 'sufficient time' under the suitability requirements in the Draft Policy Rule. In addition, a separate section has been included in the explanatory notes on what AFM and DNB mean by sufficient time.
- Persons who exclusively qualify as an applicant of a declaration of no objection will be excluded from the scope of the amended application of the Policy Rule. The reputations of those persons will be assessed pursuant to the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, adopted by the European Supervisory Authorities consisting of EBA, EIOPA and ESMA (**link**).
- The old Policy Rule includes an exception for small companies because the requirements of managerial skills in a hierarchical relationship could be too restrictive for these types of undertakings. In the Draft Policy Rule it has been added that the nature, size

and complexity of the company must also be taken into account in deciding whether or not to employ the exception so that the AFM and DNB can include more circumstances in their consideration.

The Policy Rule will enter into force in 2020.

Regulation on risk weighting of mortgage loans

To increase the resilience of banks, DNB intends to impose a minimum floor for the risk weighting of mortgage loan portfolios. The risk weighting for Dutch mortgage loans is currently among the lowest in the EU. DNB considers this risk weighting to be insufficient from a macroprudential point of view, given the increased systemic risk in the housing market. On 15 October 2019, DNB published a **consultation paper** of the Regulation on the risk weighting of mortgage loans, in which DNB announces that it will impose a minimum floor on the risk weighting of the mortgage loan portfolios of banks that use internal models and in which DNB indicates how this minimum floor should be calculated. The expectation is that this Regulation will enter into force in the autumn of 2020 and will in principle apply for a period of two years. The measure is therefore not an addition to the new capital requirements based on the Basel 3.5 agreement, which will probably be introduced in phases from 2022 onwards. It is expected that the risk weights for mortgages as a result of the Basel 3.5 agreement will have a similar effect. Due to this minimum floor, the total amount in capital which Dutch banks, taken together, must maintain due to higher risk weighting will increase by almost EUR 3 billion, of which more than EUR 2 billion is core capital.

Amendments to assessment of the application for a declaration of no objection

A declaration of no objection (*verklaring van geen bezwaar*, vvgb) from DNB is required to hold or acquire a qualifying holding (i.e. an economic or controlling interest of 10% or more) in a bank. EBA, EIOPA and ESMA published **Joint Guidelines** for the assessment of applications for a declaration of no objection. The guidelines provide insight into how the ESAs think that the competent authorities should interpret the criteria that have been set for issuing a declaration of no objection based on, among other things, the Capital Requirements Directive. When assessing an application for a declaration of no objection, DNB **applies** the European revised Joint Guidelines of EBA, EIOPA and ESMA and their application has recently led to changes in the way DNB assesses an application for a declaration of no objection:

- **Assessment of the reputation of the proposed DNO acquirer:** when a declaration of no objection is applied for, DNB assesses the propriety (integrity) of the proposed acquirer. His or her reputation will also be assessed as of 1 July 2019. In addition to a propriety assessment, the assessment will also comprise a professional competence test consisting of management competence and technical competence.
- **Tightening of the assessment of DNOs for group companies**: when granting declarations of no objection for group companies, DNB will from now on assess all the group companies in the control chain.
- **Calculation method for indirect qualifying holdings**: in addition to direct shareholders in a financial target undertaking, there may also be persons who indirectly acquire significant influence in the target undertaking. These are indirect holdings of 10% or more in a financial target undertaking, which also requires a declaration of no objection. DNB assesses whether there is significant influence and applies the calculation method from the Joint Guidelines. This means that DNB first applies a material control criterion (as laid down in paragraph 6.3 of the Joint Guidelines), and then, if application of this criterion does not lead to an obligation to acquire a declaration of no objection, a formal multiplication criterion (as laid down in paragraph 6.6 of the Joint Guidelines).

We expect to gain more clarity in 2020 about how DNB deals in practice with reputation assessments and the new calculation method for indirect qualifying holdings. Furthermore, according to the explanatory notes to the Financial Markets Amendment Act 2021, the legislator **intends** amending the Financial Supervision Act with respect to the group DNO, in order to align with the ESA guidelines.

DNB guidance on tax integrity

In relation to the subject of integrity, a great deal of attention has recently been paid to integrity risks with regard to tax avoidance by customers of financial undertakings. DNB **published** good practices with regard to tax integrity risks for bank customers on 4 July 2019. The good practices were written in response to the Panama Papers, the Paradise Papers and data breaches which show that individuals and companies worldwide use financial structures to obstruct their visibility to government agencies, such as tax authorities. In short, DNB wants the banks to investigate whether the tax behaviour of their customers can lead to integrity risks for the bank. These measures must be seen in the context of the obligation for banks to take measures to ensure ethical business operations and prevent involvement in financial and economic crime.

The good practices show how banks can organise their internal processes and measures, such as the Systematic Integrity Risk Analysis (SIRA), customer due diligence and transaction monitoring, in order to better identify and manage the tax integrity risks associated with customers. We expect that in 2020 DNB will look even more closely at how banks mitigate their tax integrity risks. The good practices of DNB do raise legitimate questions about DNB's powers in this respect. For example, the question can be asked whether DNB has sufficient legal basis to take measures with regard to tax integrity risks at banks.

This guidance by DNB fits in with a greater European trend in which market parties have to focus more on tax integrity risks. For example, intermediaries such as tax advisers, accountants and financial institutions must, based on a European **directive**, report cross-border constructions that can be used to avoid tax to the Tax Authorities from 1 July 2020.

ASPSP may offer customer dashboard

In a **Q&A** on its website DNB has confirmed that banks which act as Account Servicing Payment Service Providers (ASPSPs) may offer their customers an overview of the permissions granted by the respective customer for access to the account by third party providers (TPPs), which provide payment initiation and account information services to that customer under PSD2. An ASPSP may also in a neutral manner offer the customer the possibility to withdraw this consent through the overview. When consent is withdrawn, the ASPSP must inform the TPP accordingly using a standardised notification in the interface used.

Positive decisions and requests for information to go through DLT

As of 1 January 2020, DNB will be sending all positive decisions on prospective appointments through the DLT (Digital Supervision Portal). Institutions will be requested to also send a copy of the decision to the candidate. DNB will still be informing candidates of the results by telephone. DNB will only send decisions to the institution and the candidate by post in cases in which DNB does not consent to the appointment. Likewise, requests for information concerning appointment notification forms submitted and confirmations of reappointments will henceforth be sent to the institution through DLT. Institutions can also submit the information requested by DNB through DLT.

DNB legislative letter: still omissions in resolution legislation

Every year DNB sends a legislative letter with points for attention and wishes to the Ministry of Finance. In its **Legislative Letter** 2019, DNB addresses, among other things, that the resolution legislation with regard to banks, i.e. the implementation of the European Bank Recovery and Resolution Directive, is lacking on a number of important points that may make the smooth and effective application of the instruments more difficult. DNB is discussing this with the ministry. No new legislative requirements have been included with regard to banks in the Legislative Letter 2019. We expect the Legislative Letter 2020 to be published in April 2020.

DNB Guidelines for artificial intelligence in the financial sector

On 25 July 2019, DNB published a **discussion paper** containing guidelines for the use of artificial intelligence (AI).

DNB has established that financial undertakings increasingly use AI to improve their business processes, products and services. DNB indicates that financial undertakings can improve their existing business processes and deliver new added value by using AI. At the same time, incidents with AI, certainly if this technology is not used responsibly, can harm a financial undertaking and its customers – with potentially serious consequences for the reputation of the financial sector as a whole. DNB sees that due to the interconnectedness of the financial system, such incidents may ultimately even have an impact on financial stability. That is why it is important that financial undertakings use AI in a responsible manner, i.e. based on controlled and ethical business operations.

In DNB's opinion, responsible use of AI in the provision of financial services means that when developing applications, undertakings must take into account aspects such as soundness, accountability, fairness, ethics, skills and transparency (SAFEST). DNB indicates that as the use of AI becomes more important in the decision-making process of a financial undertaking, and the potential consequences of this for the undertaking and its customers become greater, the bar for a responsible and transparent use of AI will be higher. In its supervision of financial institutions, DNB will explicitly monitor this and will further investigate the main aspects of the use of AI.

DNB emphasises that this discussion paper contains a provisional view with regard to the responsible use of AI in the financial sector. DNB is of the opinion that the issues and ideas discussed in this document would benefit from a broader discussion, and has therefore called on relevant stakeholders to share their comments and suggestions with DNB. DNB has stated that it will report on the outcome of this process in the course of 2020.

SRB

SRB Priorities 2020

The Single Resolution Board (SRB) published its **Work Programme** for 2020 in October 2019. The plans included therein are in line with the long-term plan 2018-2020 that the SRB published in 2018. The focus points for 2020 for each objective in the long-term plan are set out below.

- **Strengthening the resolvability of SRB banks and LSIs:** From 2020, the SRB will realign all SRB banks to a uniform 12-month resolution planning cycle in 2020, regardless of whether the banking groups are organised in a resolution college or not, which in terms of timing should be consistent with the SREP cycle and the annual cycle for banks' recovery plans. Work is continuing on improving existing resolution plans, drawing up new plans and increasing the practicality of all these plans in practice, partly by removing obstacles to resolution in consultation with the banks. The SRB will monitor compliance with the MREL requirements. The new MREL reporting obligations from BRRD2 are a point of attention, for which EBA is currently developing reporting templates. Because of Brexit and cooperation with Bulgaria, the SRB expects an increase in the number of institutions for which it must prepare resolution plans and MREL decisions. The SRB further emphasises the importance of the National Resolution Authorities (NRAs) drawing up resolution plans for the LSIs, where the SRB works closely with the NRAs to ensure consistency.

- **Robust resolution framework:** In 2019 an expanded resolution planning manual was prepared for internal use by the SRB and the NRAs. The main focus for 2020 will be on the implementation of the new banking package reforms, in particular the MREL requirements and the rules from CRR II, SRMR II and BRRD II.

- **Effective crisis management:** SRB will increase its preparedness by, among other things, investing in early warning systems, IT tools, close cooperation with relevant (non-EU) authorities and stakeholders, further dry runs and attention for lessons learned so far.

- **Single Resolution Fund:** The realisation of the SRF continues and the SRB expects the banks to deposit in total around EUR 8 billion in *ex ante* contributions in 2020, leading to a total SRF amount of just under EUR 33 billion. The SRB is developing its preparedness for a potential use of the SRF for liquidity or capital support, covering any possible combination of resolution tools.

- **Efficient internal organisation SRB:** In addition to the increase in employee numbers, in the coming year the SRB will also focus specifically on data quality, data flows, statistical reports and legal support and procedures.

SRB Best practices for resolvability

In November 2019, SRB published its '**Expectations for Banks**' document for consultation. Seven dimensions of resolvability are discussed in this document, including governance, liquidity and loss absorbing capital. It reflects best practice in and sets benchmarks for assessing resolvability. This document and the consultation at the end of 2019 should provide clarity to the market and contribute to the dialogue between the SRB and the institutions on their resolvability with a view to further improving that resolvability.

EBA

EBA Work Programme 2020

EBA has formulated its plans for 2020 in its **Work Programme 2020**. EBA identifies various concrete actions that will be taken in six strategic areas. The six focus areas are:

- support the development of the risk reduction package and the implementation of the global standards in the EU;
- providing efficient methodologies and tools for supervisory convergence and stress testing;
- moving towards an integrated EU data hub and a streamlined reporting framework;
- making AML a real priority for the EU;
- contributing to the sound development of financial innovation and sustainability;
- promoting an operational framework for resolution.

AFM

AFM Trend Monitor 2020

On 10 October 2019, the AFM published its annual analysis of trends and developments in the financial markets, **Trend Monitor 2020**. In this report, the AFM identifies trends that have an impact on its supervision in 2020, and supervisory themes that the AFM considers important in 2020. Although Trend Monitor 2020 does not yet contain any specific actions or policy or legislation requests from the AFM – these will become known when the AFM Agenda 2020 and the long-term strategy 2020-2022 are published early in 2020 – Trend Monitor 2020 gives a certain indication of what banks should expect in 2020. This includes:

- **Risks in the market for sustainable investments**: More concretely, the AFM will focus on the risk that companies present non-sustainable projects as sustainable (greenwashing) as a result of the large demand for sustainable investments. In addition, attention will be given to the risk that parties using unfair earning models or attempting to mislead investors will enter the market for sustainable investments. The AFM will supervise this and take action against such parties. We refer to the **Sustainability** section in this Outlook.
- **IBOR transition:** Interbank Offered Rates (IBORs) play an important role in a well-functioning financial system. IBORs are a series of reference rates based on rates that banks charge each other for credit transactions. These reference rates are used extensively in financial contracts,

such as business loans, derivatives and mortgages. As a result of the Benchmark Regulation, interest rate benchmarks used in credit agreements will in short have to be converted into/replaced by an interest rate benchmark that complies with the Benchmark Regulation. At the end of 2019, administrators of critical benchmarks and third country administrators received an extension until 1 January 2022 to comply with the Benchmark Regulation. Since October 2019, the transition has started from EONIA to the Euro Short-Term Rate (€STR) published since then by the ECB. EURIBOR has since been adjusted in accordance with the Benchmark Regulation and the administrator has been authorised by the competent regulator (FMSA) to offer this hybrid EURIBOR. The AFM emphasises the need for proper preparation, partly in view of the financial, legal, operational, valuation and hedging risks of the transition. AFM requests market parties therefore to adjust their existing contracts, risk and valuation models and hedging strategies in a timely manner and to anticipate the new reference rates in new contracts. It will follow this process with specific attention for dealing with the interests of customers. The AFM emphasises the importance of informing small business customers and consumers in a timely and correct manner and of adjusting the contracts in a careful, fair and transparent manner. We refer to what we note later in this section under 'best practices for benchmark transition', as originating from the AFM and DNB.

SSM HARMONISATION

In 2020, the harmonisation of rules for banks and supervisory authorities within the SSM will continue. In 2019, new policies, guidelines and standards were again published or adopted to increase the convergence in banking supervision and which relate, for example, to the internal business operations of banks and to capital requirements. Some examples are given below.

ECB publications

Among other things, the ECB published in 2019:

- **The new Guide for the assessment of licence applications**, which should encourage a more harmonised application of the assessment criteria. In this final review there are additional guidelines concerning the assessment of the capital and the programme of operations. Applicants can consult the guide when preparing a licence application to anticipate how it will be assessed.

- **An updated version of the LSI SREP Methodology Booklet** for less significant banks. The aim is to harmonise the SREP methodology for these LSIs as much as possible within the SSM. National supervisory authorities will follow this methodology for all LSIs no later than in 2020. National supervisors must have implemented the Pillar 2 Guidance (P2G) in the coming year and additional attention will be paid to IT risks in the SREP in the coming period. This document is therefore very useful for LSIs to gain insight into how the SREP assessment takes place with respect to their organisation.

- **The updated Guide to internal models** of banks, in which the ECB explains how it views the obligations regarding internal models arising from CRR and which serve to ensure a uniform assessment of compliance with those rules and models within the euro zone.

- **A report on time commitment of non-executive directors**. Based on the assessment requests for board members in 2018, the ECB has investigated the declared time commitment of non-executive directors in the euro zone and published a report. The report does not contain any formal recommendations or guidelines, but it does provide an insight into the ECB's points for attention in this area and banks and directors can benchmark themselves compared to the outcomes of the ECB's investigation. The ECB announced that the time commitment of non-executive directors will be a point of attention in its assessment of the governance of banks in the near future.

- **Its changed supervisory expectations concerning non-performing exposures (NPEs)** in the portfolios of banks, following new European rules regarding the Pillar 1 treatment of such non-performing exposures. The ECB has also adjusted the Addendum to the ECB Guidance to banks on non-performing loans.

EBA publications

In 2019, EBA published among other things:

- **Revised Guidelines on outsourcing arrangements**, which apply to banks, investment firms, payment service providers and electronic money institutions since 30 September 2019. The guidelines create a harmonised framework for the outsourcing of activities, which in recent years has become an increasingly interesting option in the context of cost reduction, flexibility and efficiency, and the adaptation of bank's business models to new technological developments. These guidelines also contain the rules on cloud outsourcing.

- **Final Guidelines on ICT and security risk management**, which states how EBA expects institutions to manage their internal and external ICT risks and security risks. These guidelines apply from 30 June 2020. The guidelines on security measures for operational risks and security risks under PSD2 are fully integrated into these new guidelines.

- **Updated Guidelines on harmonised definitions and templates for the reporting of banks' funding plans**. Earlier in 2019, EBA also published a report with findings from **EBA's analysis of banks' funding plans**, in which the EBA concludes, among other things, that banks expect their total assets to continue to grow in the next few years, that deposits will remain the main source of financing, that banks intend to issue more debt instruments, that public sector funding will decrease, that the interest rate spread will remain low and that market-base funding costs will possibly increase.

- **A consultation on the amendment of the Implementing Technical Standards (ITS) and Regulatory Technical Standards (RTS) on passport notifications** for opening branches or providing cross-border services within the EU. The intended amendments concern both the information that banks must provide with such notification and the communication between the home state supervisor and the host state supervisor. The consultation runs until 13 February 2020.

- **A consultation on Implementing Technical Standards (ITS) on supervisory reporting** that require amendment as a result of CRR II and the Backstop Regulation. EBA expects to be able to submit a proposal to the EC in June 2020 and that the new ITS will apply from June 2021.

- **A consultation for Regulatory Technical Standards (RTS) with respect to the criteria for the designation of 'identified staff'** under the remuneration rules from CRD. The consultation period runs up to 19 February 2020.

- **A consultation on Implementing Technical Standards (ITS) with regard to Pillar 3 disclosures** under the new CRR II. The proposal integrates different standards into one all-inclusive ITS. The aim is to strengthen market discipline by making sufficiently comparable information about the risk profile of institutions available to market parties. The disclosure ITS have been developed fostering consistency with supervisory reporting, and a mapping between quantitative disclosure data and reporting is provided in order to facilitate compliance by institutions. The consultation ran until 16 January 2020. The ITS is expected to apply in June 2021.

- **Draft Guidelines on loan monitoring and origination**, on risk management, special management and monitoring of NPLs. Specific provisions concern banks with an NPL ratio of more than 5%. The expectation is that these Guidelines will apply to all banks from 30 June 2020.

- **A consultation on new supervisory reporting requirements for market**

risk, concerning the first parts of the Fundamental Review of the Trading Book (FRTB) implemented through CRR II in Europe. Partly for the purposes of the FRTB, the EBA has also published Final Regulatory Technical Standards (**RTS**) with respect to the application of the Standardized Approach for Counterparty Credit Risk, including a methodology for the identification of material risk drivers in derivatives transactions.

- **The Guidelines on disclosure of non-performing exposures (NPEs)** published at the end of 2018 entered into force on 31 December 2019. EBA also published an **Opinion** in October 2019 on the regulatory treatment of securitisations of NPEs, in which EBA proposes changes to the CRR and the Securitisation Regulation.

- **Final Regulatory Technical Standards** (**RTS**) with conditions for calculating capital requirements for securitised exposures (Kirb) by institutions according to the purchased receivables approach from CRR.

- **An Opinion on disclosure to consumers in cross-border digital services.** The opinion is addressed to the EC and contains recommendations to ensure that the rules on disclosure adequately take the increased digital marketing of financial products and financial services into account. The opinion refers to the Distance Selling Directive (2002/65/EC), which lays down rules regarding the online sale of financial products to consumers. The EC is currently evaluating this Directive. The EC may already come up with concrete proposals for adaptation of the Distance Selling Directive in 2020.

- **An Opinion on the various aspects of implementation of the DGS Directive** (including coverage ratio and cooperation between DGS systems) and an **Opinion** on strengthening the position of deposit holders. A third opinion with regard to DGS funding and the use of DGS funds is expected to appear in early 2020.

- **A Report in which EBA addresses various potential barriers to the provision of cross-border banking and payment services** in the EU. EBA discusses three areas in which the integration of the European banking and payment services market needs to be improved and promoted, namely: authorisations and licensing, consumer protection and conduct of business and anti-money laundering and countering the financing of terrorism. EBA calls on the EC to address the identified issues.

- **An updated list with types of capital instruments** that competent regulatory authorities will designate as CET1.

Although not all EBA publications lead to binding regulations, supervisors do expect banks to adhere to them. All in all, there are many new standards that banks must act upon in their daily business.

In addition, EBA, together with the other ESAs, has published a **report** on cross-border supervision of financial services to retail customers, **Joint Guidelines** for cooperation within the field of AML/CFT (in part in the form of setting up AML/CFT Colleges) and **advice** on IT risk management and cybersecurity. In 2019 DNB published an **overview** on its website of various guidelines and standards for the implementation of PSD2 that EBA is working on.

ESMA consultation on Market Abuse Regulation

On 3 October 2019, ESMA published, at the EC's request, **a consultation paper** on various sections from the **Market Abuse Regulation**. Approximately three years after the entry into force of this Regulation, it is now time to review the current legal framework and assess whether it is still effective or appropriate, and whether amendments need to be made.

The consultation paper addresses a multitude of topics from the Market Abuse Regulation and is particularly relevant for market parties (and their daily management) who issue financial instruments that will be or have already been admitted to trading. Topics covered include the definition and delayed disclosure of inside information in certain situations and the effectiveness of the mechanism to delay this disclosure, the scope of the reporting obligations under the exemption for buy-back programmes of own shares admitted to trading, but also the question whether FX contracts should fall within the scope of the Market Abuse Regulation. Among other things, it is relevant for investment firms that the aim is to simplify the system of reporting for buy-back programmes. In that context, ESMA is of the opinion that some references in the MAR to MiFIR can be removed, which would better streamline various obligations of issuers and investment firms in this regard. In addition, ESMA is currently analysing the interaction between the obligation to disclose inside information under the MAR and other disclosure obligations from the regulatory framework (referred to as CRD, CRR and BRRD) that apply to investment firms. The MAR may need to be further adjusted in some respects in this regard.

Stakeholders have now been given the opportunity to provide feedback on the consultation paper. ESMA aims to present the final report to the EC in the spring of 2020.

BANKING PACKAGE

Publication of Banking Package

The regulations from the Banking Package were published in the Official Journal on 7 June 2019. This is another important step towards the completion of the Banking Union. The regulations in the Banking Package attempt to further reduce the risks in the banking sector, while at the same time increasing the proportionality of the regulations. The Banking Package includes various Basel 3 standards. The Basel 3.5 standards are not yet part of this package of new rules. The new rules are expected to be implemented (where necessary) and will apply in 2021.

CRD V and CRR II

At the end of 2016, the European Commission published its proposals for CRD V and CRR II, completing the implementation of Basel 3. Since then, the proposals have been adopted, and the final CRD V (Directive (EU) 2019/878) and CRR II (Regulation (EU) 2019/876) were published in the **Official Journal** on 7 June 2019. Most of CRR II takes effect on 28 June 2021. CRD V must have been implemented in the national legislation of the member states by 28 December 2019. The legislative proposal for the Dutch CRD V and CRR II implementation act is currently being **prepared** by the Ministry of Finance. The implementation deadline being used for this is also 28 December 2020.

Below we outline a number of the major points with respect to the final texts.

- **Pillar 2 capital add-ons:** The conditions under which Pillar 2 capital add-ons may be required by competent authorities will be harmonised and tightened. A distinction between Pillar 2 capital add-ons and macro-prudential tools will be introduced. The new rules offer regulatory authorities more clarity and flexibility with respect to macro-prudential tools (such as the systemic risk buffer and the aforesaid leverage ratio buffer). The new rules also codify, amongst others, the existing practice regarding the Pillar 2 Requirements and the Pillar 2 Guidance.

- **Leverage ratio**: A binding leverage ratio (LR) of 3% and an additional leverage ratio buffer for G-SIBs are introduced.

- **Net Stable Funding Ratio**: The Net Stable Funding Ratio (NSFR) as agreed within the Basel Committee on Banking Supervision is implemented in a slightly modified form in line with the recommendations of EBA (in order to make it the least problematic for financing within the European economy and to make the NSFR as compatible as possible with the EU liquidity coverage ratio (LCR)).

- **Trading Book:** In view of the fact that the Basel Committee has changed the fundamental review of the trading book (FRTB) standard significantly since 2016 and postponed its implementation to 1 January 2022, institutions have decided that instead of the original EC proposals a reporting requirement will be introduced. This requirement will be incorporated into Level 2 regulations.

- **Proportionality**: The new rules leave room for a proportional approach to non-complex, smaller banks with respect to a number of subjects, including the rules with respect to remuneration and reporting.

- **Credit risk:** The system for large items is changing. The capital to be included for the calculation of the large exposure limits is being expanded (now only Tier 1 capital), and the rules specific to G-SIBs are also being amended. During the legislative process, the institutions decided to make two additional amendments to the rules with respect to credit risk pertaining to (i) rules that help banks sell their NPLs with a limited impact on their capital requirements ('massive disposals') and (ii) a more favourable treatment of pensions and salary-backed loans.

- **New rules for non-EU banking groups**: Banking groups outside the EU that have at least two entities and over €40 billion in assets within the EU must have a European holding company (intermediate EU parent undertaking). A transitional system will apply.

- **SME financing:** The capital requirements for certain loans will be reduced for the purposes of SME financing.

BRRD II and SRMR II

The European Commission presented proposals for a new BRRD and SRMR at the end of 2016. The proposals have now been adopted, and the final BRRD II (Directive (EU) 2019/879) and SRMR II (Regulation (EU) 2019/877) were published in the **Official Journal** on 7 June 2019. The SRMR II takes effect on 28 December 2020, on which date the BRRD II must also be implemented into the national laws of the member states. The legislative proposal for the Dutch implementation act of the BRRD II and SRMR II, containing the new MREL rules, is currently being **prepared** by the Ministry of Finance. The implementation deadline being used for this is also 28 December 2020.

In a nutshell, the new rules comprise:

- **Changes in MREL framework:** For both G-SIBs and non-GSIBs, things are changing with respect to the minimum requirement for own funds and eligible liabilities (MREL). For G-SIBs and a number of other types of banks, a minimum Pillar 1 MREL requirement is being introduced (with a transitional system in effect until 2022). For some of these banks, the resolution authorities may also decide to apply an additional Pillar 2 MREL requirement. For banks that do not qualify as G-SIB or 'top tier' bank, a bank-specific Pillar 2 MREL requirement applies. The additional changes include an 'MREL guidance' system where necessary to ensure confidence in the market or the safeguarding of critical functions. The SRB has announced that it will publish its SRMR II/BRRD II MREL policy at the beginning of 2020, and expects to be able to communicate the MREL decisions under the new policy to the banks early 2021.

- **Total loss-absorbing capacity (TLAC)**: Since 1 January 2019, G-SIBs have had to be compliant with international TLAC standards. TLAC and MREL serve the same purpose, but have their differences. The new rules take the TLAC standards into account and effectively implement them into the MREL system.

- **Moratorium before resolution:** The new rules contain a moratorium mechanism for the situation in which a bank is 'failing or likely to fail' but is not yet in resolution. Under certain conditions the resolution authorities can suspend the payment obligations of the bank for a period of two days. The original EC proposals were somewhat more liberal on this point. During this moratorium period, resolution authorities have the opportunity of assessing whether the conditions for resolution have been met and what resolution instruments are necessary.

EBA Roadmaps for mandates from the Banking Package

In November 2019 EBA published its **Risk Reduction Package Roadmaps** containing its plans and timelines for the implementation of its mandates under the new regulations of CRD V / CRR II and BRRD II. Most of the more than 100 mandates aim to further develop the Single Rulebook within the Banking Union and to implement the new rules efficiently and consistently. EBA discusses the strategy, plans and timelines for mandates in the six main areas and announces, in summary, the publication of the following documents:

- **Roadmap Governance and remuneration policy:**
  - Mid 2020: final Regulatory Technical Standards (RTS) for identified staff.
  - Beginning of 2021: guidelines regarding gender neutral remuneration, adjustment of the guidelines for internal governance and suitability of board members.
  - End of 2021: guidelines on data collection with regard to high earners and the benchmarking of remuneration practices.

- **Roadmap Large exposures**:
  - Mid-2020: Implementing Technical Standards (ITS) on supervisory reporting.
  - End of 2020: draft RTS for large exposures with regard to certain derivatives and guidance on collateral.
  - End of 2021: guidelines concerning the circumstances in which the large exposure limits may be exceeded, draft RTS for criteria for the identification of shadow banking entities and a report on the quantitative impact of limiting or removing certain exemptions under the framework.
  - End of 2022: draft RTS on connected clients.

- **Roadmap Pillar 2 requirements**:
  - End of 2021: adapted guidelines for the SREP methodology, in which – among other things – more proportionality is applied, ESG risks may play a role, more attention is paid to the prudential aspects of AML/CFT, Pillar 2 capital add-ons and Pillar 2 Guidance and new standards regarding IRRBB.

- **Roadmap Resolution**:
  - Mid and late 2020: various RTS on MREL eligible liabilities instruments, ITS and reports on MREL and/or TLAC reports and monitoring, various RTS on determining MREL and various RTS and ITS on contractual provisions with regard to bail-in.
  - Mid and end of 2022: various reports on MREL.

- **Roadmap Transparency Requirements under Pillar 3**:
  - Mid and end of 2020: draft ITS with regard to public disclosure on different topics, draft ITS related to disclosure and reporting on MREL and TLAC.
  - Mid-2021: ITS related to disclosure on ESG risks.
- **Roadmap Supervision Reports**:
  - Numerous adjustments to the reporting framework as a result of the Banking Package through ITS, the majority of which will appear mid or end of 2020.

CURRENT LEGISLATION AND REGULATIONS

Basel 3.5

In December 2017, after years of negotiation, an agreement was reached on the final components of the Basel 3 framework, due to its scope also known as Basel 3.5. Most adjustments will have to be introduced from 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 adverse consequences for Dutch banks due to their large mortgage portfolios. Banks that use internal models will have to hold more capital for their mortgage portfolios.

Last year, EBA, following a call for evidence, advised the EC on the impact of these new components of the Basel 3 framework in the EU, which EBA based on data from 189 banks. EBA has also made a number of policy recommendations. Based on its impact assessment EBA expects that with full and timely compliance with the new rules, the minimum capital requirement for banks will increase by an average of 24.4% and will

result in a total capital shortfall of around EUR 135 billion. EBA endorses the measures as they contribute to a safer banking sector. The EC held a **consultation** and asked the most important stakeholders for feedback on the Basel 3.5 topics. Another **consultation** of the EC concerned its Inception Impact Assessment. The EC will take the recommendations of EBA and the responses to the market consultation into account in its legislative process.
In line with its Core principles of effective banking supervision, the Basel Committee on Banking Supervision (BCBS) and the Basel Consultative Group emphasised in November 2019 in one **joint statement** that the principle of proportionality must be taken into account in the implementation of the Basel 3 framework.

Amendment of CRR in connection with reduction of Non-Performing Exposures

In April 2019 the **Regulation** to amend CRR as regards minimum loss coverage for non-performing exposures entered into force. This regulation is part of the integrated strategy to deal with non-performing exposures (NPEs) within the EU. The prudential back-up as laid down in this Regulation aims to ensure that credit losses on future NPEs are adequately covered.

Basel Committee publishes revised market risk framework

In 2019 the Basel Committee published the **revised market risk framework** following the Fundamental Review of the Trading Book (FRTB). Important changes relate to the distinction between the banking book and the trading book, more risk sensitivity in the standard model so that this is a credible alternative to the internal model and the introduction of new rules for internal models for trade desks. The new framework comes into effect on 1 January 2022 and replaces the first version from 2016. The framework will be transposed into European legislation.

Updated CRD and CRR 2019 Regulation

On 1 October 2019, the updated **Regulation** on Specific Provisions CRD and CRR 2019 (*Regeling specifieke bepalingen CRD en CRR 2019)* entered into force. This Regulation specifies how DNB implements in its supervision the options and discretions from the Capital Requirements Directive (CRD IV) and the Capital Requirements Regulation (CRR). This updated Regulation is the successor to the Regulation on Specific Provisions CRD and CRR 2013 which has now completely lapsed. The amendments were prompted, inter alia, by the distinction between significant banks and less significant banks and their supervision, the ECB Guideline on the exercise of national options and discretions (Guideline (EU) 2017/697) and already phased-out CRR requirements that were included in the previous Regulation. DNB intends to consult the market again in 2020 on amendments to the Regulation in connection with the implementation of CRD V and CRR II.

DNB published another **consultation paper** on 15 October 2019 for the amendment of the Regulation on Specifi Provision CRD and CRR 2019 in connection with the adjustment of the risk weighting for mortgages (see 'Regulation on risk weighting for mortgage loans' above).

Further remuneration measures for the financial sector

In response to the **Agenda for the financial sector**, the Ministry of Finance published the **legislative proposal** for market consultation on the Act on further remuneration measures for the financial sector in 2019. Significant changes that have been proposed are:

- The introduction of a five-year retention period for shares and comparable financial instruments that are part of the fixed remuneration.
- Tightening of the exception to the 20% bonus cap for employees who are not covered by a collective labour agreement. The proposed tightening makes it explicit that this exception can only be used in exceptional cases and is in any event not an

option for those who (i) perform internal control functions or (ii) are directly involved in providing financial services to consumers.
- The introduction of an obligation to describe in the remuneration policy how the undertaking accounts for the relation of the remunerations of managing board members, supervisory board members and employees of the undertaking to its social function and the way in which this relation has been formed.
- Extension of the supervisory authority's approval period for retention bonuses exceeding 20% of the fixed salary from six to nine weeks.

The **planningsbrief 2020** of the Ministry of Finance shows that the legislative proposal for the Act on further remuneration measures for the financial sector is scheduled for September 2020. In addition to the aforementioned remuneration measures, this legislative proposal contains several more technical changes to the remuneration rules for the financial sector that originally were part of the proposal for the Financial Markets Amendment Act 2018, as well as the continuation of existing policy pertaining to parties dealing on own account.

Amendment to the Financial Supervision Funding Decree 2019

It was envisaged that the **amending decree** to the Financial Supervision Funding Decree (Bbft) 2019 would enter into force on 1 January 2020. However, the amending decree has not yet been published in the Bulletin of Acts and Decrees. The most relevant point of the decree is that as from its effective date it adjusts the following categories of supervision by which the costs of supervision are apportioned:

- For the supervision category 'advisers and intermediaries' the criterion 'revenue' will apply instead of 'number of persons employed'.
- For the category 'own account investment firms' (instead of the 'number of traders' criterion) a criterion combining 'qualifying capital' and 'number of transactions' will apply. This applies to both the AFM's and DNB's supervision costs, with the proviso that only when DNB is passing on in respect of 'qualifying capital', the consolidated situation must be taken into account.
- As from 2020, the supervision costs will be passed on to trading platforms based on a combination of a fixed amount (type of licence) and turnover. The 'commission income' and 'number of transactions' criteria will be deleted.
- There is now a new standard for persons who fall under the supervision of the AFM in conjunction with the Securitisation Regulation.
- For the 'payment institutions' supervision category, the 'gross commission income' criterion will apply instead of the 'commission income' criterion.

PRIIPs Regulation

Amendments to PRIIPs Regulation

In the **Outlook 2019** we reported on the consultation paper of 8 November 2018 that was jointly published by the ESAs and that pertained to amendments to the PRIIPs Delegated Regulation. However, these amendments were ultimately never implemented. In February 2019 the ESAs published a **Final Report** containing a summary of responses received during the consultation period and the follow-up steps to be taken. The report shows that the ESAs no longer considered the 'rapid' but drastic amendments to the PRIIPs Delegated Regulation as proposed in 2018 to be appropriate. Consultation respondents generally did not agree with the proposed amendments, in particular with regard to the implementation of amendments before the more comprehensive PRIIPs review by the EC had taken place. Moreover, immediately following the consultation period the EC extended the temporary exception to the KID obligation for UCITSs (which was originally set to expire on 31 December 2019, thus necessitating the 'rapid' change proposal of 2018) until 31 December 2021. Consequently, instead of the 'rapid' amendments of 2018 the ESAs have decided to conduct a more integral review in 2019. This has resulted in a consultation paper that proposes more substantial amendments:

- **Performance scenarios for the future**: early 2019 the ESAs issued a **joint supervisory statement** addressing the risk of too positive performance scenarios through recommendations to developers and national supervisory authorities. Following on from these recommendations, the consultation paper now proposes the following:
  a simplification of the information to be provided by removing the 'stress scenario' and 'moderate scenario' from the list of the four performance scenarios that PRIIP developers must use to illustrate the performance of the PRIIP, and
  a revised methodology for estimating future performance and a compensation system for unforeseen failure of the methodology. According to the ESAs, this revised methodology would lead to a more realistic representation of future returns.
- **Information about past performance**: ESAs propose rules on the basis of which information on past performance should be provided for PRIIPs offered by certain UCITS, AIFs and certain insurance-based investment products.
- **Transaction costs**: with regard to the calculation and presentation of transaction costs, the ESAs consider changes so that all relevant costs are included and the products can be better compared by investors. These amendments include:
  substantial amendments to the cost table to be included in a KID, including improved compatibility with the disclosure requirements of MiFID II and a more specific description of the type of costs that must be disclosed.
  adjustment of some methodologies for the disclosure of transaction costs arising from the purchase and sale of the underlying investments of a PRIIP.
- **PRIIPs with multiple investment options**: the ESAs consider that in respect of PRIIPs with multiple investment options, PRIIP developers must from now on provide more detailed information about at least four of the most relevant investment options, together with more general information about the other investment options. They are also considering further adjustments to the KID for this type of PRIIP, including an explanation indicating whether all costs are shown or not.
- **The expiry of the UCITS exception**: finally, the ESAs are considering changes in preparation for the UCITS exception ending 31 December 2021. More specifically, the ESAs consult on which elements of the Key Investor Information Regulation (Implementing Regulation (EU) 583/2010 as regards key investor information) should be included in the PRIIPs Delegated Regulation to address potential bottlenecks.

Stakeholders had until 13 January 2020 to respond to the consultation paper. The ESAs expect to have assessed the responses and submit their ultimate amendment proposals to the EC in the first quarter of 2020. Depending on what happens in the European legislative procedure, the proposals could take effect in 2021.

We advise market parties to pay close attention to the developments surrounding the PRIIP regulations and the KID. Additionally, we recommend checking whether all KIDs currently comply with the additional disclosure requirement set out in the ESAs' joint advisory statement.

Regulatory Technical Standards KID

In its **Work Programme** for 2020, the Joint Committee of the European Supervisory Authorities (ESAs) expressed the intention to evaluate the PRIIPs Regulation, and in February 2020 intends to make proposals for amendments to (in part) the KID in the form of Regulatory Technical Standards (RTS).

Amendments to EMIR

A lot has changed in 2019 in the area of the European Market Infrastructure Regulation (EMIR), and 2020 also seems to be an important year for EMIR. The amendments to EMIR will, among other things, lead to changes to MiFIR. We refer to the **General Developments** section in this Outlook for an explanation.

Benchmark Regulation

Benchmark Regulation (general)

We have already reported on the Benchmark Regulation in the **Outlook** for 2019. Below we provide an update on some developments that have occurred since then and developments expected for 2020 that are specifically relevant for investment companies as users or potential users of benchmarks. You can read more on the developments that are particularly relevant to offering and/or managing a benchmark in the **General Developments** section of this Outlook.

Transitional period for critical benchmarks and non-EU benchmarks

As a result of the Regulation, with effect from 1 January 2020 institutions subject to European supervision may, briefly put, only use benchmarks that comply with the Benchmark Regulation and that are registered, and also offered by a licensed or registered administrator. However, in November 2019 the transitional regime for critical benchmarks (EONIA, EURIBOR, LIBOR, STIBOR and WIBOR) and non-EU benchmarks (benchmarks managed by an administrator established in a third country) was **extended** to 31 December 2021. This was partly due to uncertainty about the continuation of EURIBOR and EONIA – which are the most important benchmarks for the Eurozone (and for the Netherlands) – after 1 January 2020 and uncertainties regarding the recognition and endorsement procedures for third country benchmark administrators. We recommend that market parties use the extended deadline to be ready in time for the transition, including by identifying which EU benchmarks they use have been approved for use after the transition phase and which have not.

Best practices benchmark transition

On the basis of a questionnaire sent to various financial undertakings in mid-2019, the AFM and DNB identified **best practices** for the benchmark transition at the end of 2019. These may be useful to anticipate the transition in good time in 2020. Established practices worthy of mention include:

- having a detailed overview of the benchmarks and terms used by the institution;
- identifying alternatives to benchmarks, assigning them to products and using them where possible;
- a project team that oversees all activities related to benchmarks, reports on them at management level, in which the planning followed is in line with the transition timeline;
- for new contracts, commencing the transition to alternative benchmarks;
- identifying different scenarios and using them for transition planning, and
- having a communication plan ready to inform customers and already start communicating in so far as possible.

Integrity legislation (AML/CFT)

In the past year, European and Dutch supervisory authorities have published a great deal in relation to integrity. At the national level, 2020 will be marked in particular by the implementation of the Fifth Anti-Money Laundering Directive (AMLD5), the UBO register and the legislative proposal on the Anti-Money Laundering Action Plan Act. At the European level, there is an increasingly urgent call for the harmonisation of all anti-money laundering rules and the centralisation of anti-money laundering supervision. For an overview of the consequences of AMLD5, the UBO register and other relevant European developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

NEW LEGISLATION AND REGULATIONS

Proposal for a directive on credit servicers, credit purchasers and the recovery of collateral

The European Commission made a **proposal** on 14 March 2018 for a directive on credit servicers, credit purchasers and the recovery of collateral. The proposal forms part of an **action plan** of the European Council from 2017 to tackle non-performing loans (NPLs) in Europe. In the EC's view, large NPL volumes are hampering bank performance in two ways: (i) NPLs generate less income for a bank than high-yield loans, which reduces the bank's profitability and may lead to losses that reduce its capital and (ii) NPLs take up a significant amount of human and financial resources from banks, reducing their capacity to provide credit.

To reduce these risks, the EC proposes the introduction of a joint procedure for accelerated extrajudicial collateral enforcement (AECE) in order to increase the efficiency of collateral recovery procedures. In addition, the EC is proposing the introduction of an EU framework for credit services and credit purchasers to stimulate the development of secondary markets for NPLs. Below we briefly describe what the proposals entail:

- **AECE**: this proposal gives banks and other entities providing secured loans the opportunity to collect their claims arising from secured loans to corporate borrowers out of court. This extrajudicial procedure is only accessible if the lender and borrower have agreed this in advance and have recorded this in the loan agreement. The procedure does not apply to consumer credit and is designed in such a way that the procedures for preventive restructuring or insolvency proceedings and the ranking of creditors in the event of insolvency are not affected.
- **Common framework:** this proposal provides for a number of common rules that credit service providers must adhere to in order to operate in the EU. The proposal contains common standards to ensure proper application and monitoring of these rules in the EU, while at the same time allowing competition between credit service providers by harmonising market access in the Member States. With regard to credit purchasers, the proposal provides, among other things, for a lender to provide all necessary information to a credit purchaser to enable him to assess the value of the credit agreement and the likelihood of recovering the value of that agreement before entering into a contract to transfer the credit agreement.

The proposal is currently subject to a trilogue discussion between the European Parliament, the EC and the Council of Ministers. The proposal states that the directive must be implemented by 31 December 2020 at the latest and must therefore be applied from 1 January 2021.

Interest deduction limit for banks and insurers

As a component of the **Tax plan 2020** the **minimum capital rule** announced in the 2017-2021 coalition agreement will be introduced for banks and insurers. This thin cap rule limits the interest deduction on loan capital above 92% of the commercial balance sheet total. This minimum capital rule therefore limits the tax interest deduction if there is an excess of loan capital. This applies to a bank or banking group if the leverage ratio is less than eight percent. The new minimum capital rule applies to financial years starting on or after 1 January 2020.

Legislative proposal on the Bank Data Retrieval Portal Act

On 10 December 2019 the **Legislative proposal on the Bank Data Retrieval Portal Act** was adopted by the *Tweede Kamer*. This legislative proposal purports to automate the process of the provision of certain identifying data and other data by banks and other payment service providers, as well as the demanding and retrieving of those identifying data from those banks and other payment service providers by certain government agencies, and thus with a view to ensuring this process runs more efficiently. In this context, a number of amendments to the Financial Supervision Act are envisaged, on the basis of which parties offering accounts with a Dutch IBAN identification number are required to connect to a 'bank data retrieval portal'. This is a technical link that makes it possible for affiliated payment service providers and banks to meet certain demands (for information) or requests from government bodies such as FIU-Netherlands and the Tax and Customs Authorities in an automated manner. This legislative proposal is in line with the obligation under the Fifth Anti-Money Laundering Directive for each EU Member State to provide a central electronic data retrieval system, which allows timely identification of natural or legal entities who are holders of, or have control over, bank and payment accounts with an IBAN identification number or a bank vault.

Entry into force of rules for covered bonds

In our previous **Outlook (2019)** we considered the new European-law framework for 'covered bonds'. Covered bonds are debt instruments issued by credit institutions and backed by a separate asset pool from which bondholders can recover directly as preferential creditors. The framework consists of a **regulation** with direct effect and a **directive** that will need to be implemented in Dutch law. The intention is to encourage the use of covered bonds in more Member States and to create a harmonised framework for the supervision of covered bonds. The directive introduces a definition of the term '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.

Both the regulation and the directive were officially published on 18 December 2019 and entered into force 7 January 2020. The regulation shall apply from 8 July 2022 and implementation of the directive and the application of the directive is on the Ministry of Finance's agenda for June 2020.

Proposal Sovereign Bond Backed Securities (SBBS) Regulation

The EC presented its **proposal** for a regulation on securities covered by government bonds (known as sovereign bond-backed securities (SBBS)) on 24 May 2018. The objective of this proposal is to promote the issuance 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 concerning the situations and conditions in which departure from the design requirements for SBBS can be allowable without losing this favourable prudential treatment. A first reading by the European Parliament took place on 21 March 2019, and subsequently a report was issued with a few amendments to the proposal. From the last **quarterly report** by the Dutch government it appears that negotiations in the European Council have not yet started and the Finnish Presidency – like the Austrian and Romanian Presidency – has stated that they have not yet designated a Council working group to discuss the proposal. It must therefore currently be awaited how long this process will take and whether it is realistic that this legal framework will enter into force in 2020. We would not be surprised at all if this did not happen until 2021.

Sanctioning powers DNB for IBAN discrimination

The fight against IBAN-discrimination will enter into a new phase since the number of complaints remains undiminished. IBAN-discrimination is the phenomenon by which a paying or receiving party declines to accept a payment towards, or stemming from, a foreign IBAN. IBAN-discrimination mostly occurs in the context of collections, but also in the context of salary payments or cashback offers. A statutory sanctions regime shall enter into force Q1 2020. As of then, DNB will be authorised to impose on infringers an order for periodic penalty payments or an administrative fine.

OTHER DEVELOPMENTS

Amendment to National Mortgage Guarantee

The Dutch Home ownership Guarantee Fund (*Stichting Waarborgfonds Eigen Woning*) **announced** an amendment of the National Mortgage Guarantee (*Nationale Hypotheek Garantie*, NHG) in November 2019. DNB has established that the NHG does not meet the conditions for qualification as credit protection when using the Standardised Approach (SA) or the elementary internal ratings-based (IRB) approach. Payment in the event of default only takes place after the collateral has been sold at a loss, as a result of which the payment required by the Capital Requirements Regulation (CRR) within two years after default is not guaranteed. To bring the NHG in line with the CRR, the Home Ownership Guarantee Fund amends the NHG so that all lenders (new and current loans with NHG) can receive provisional payment of the expected loss if the property is not sold within 21 months of default and the default continues. The loss paid will be settled with the final loss on the final home sale or termination of non-payment.

Banks applying the Standardised Approach (SA) or the elementary internal ratings-based (IRB) approach can immediately use this provisional payment after the publication of the amended NGH terms and conditions in Q1 2020. Until then, DNB will use its discretion to recognise the NHG as eligible credit protection under the SA and IRB.

Measures to combat excessive lending

On 29 November 2019, the AFM again called attention to excessive lending in a **news item**. It also provided some insight into the measures the AFM had taken against credit providers in the past year. These included two published fines and seven warnings. The AFM states that the combating of excessive lending is still a priority of the AFM. For more information on this and on other relevant credit-related topics, please refer to the **Consumer Credit** section of this Outlook.

Interest-only mortgages

On 4 April 2019, the Minister of Finance responded to a number of parliamentary questions about the Agenda for the financial sector. In the **answers** the Minister discussed, among other things, the approach to the risks of interest-only mortgages (see also the **Consumer Credit** section of this Outlook). In its Trend Monitor 2020, the AFM has indicated that it will ensure that the sector takes all necessary steps to reduce the risks associated with interest-only mortgages. It will also do this in consultation with prudential supervisors.

Basel Committee publishes guidelines for sectoral countercyclical capital buffers

In November 2019 the Basel Committee published **guiding principles** for sectoral countercyclical capital buffers (SCCyBs). An SCCyB should give national supervisors the option of temporarily imposing additional capital requirements that can compensate for an accumulating risk in a particular sector. These guiding principles are not part of the Basel framework and are also not binding. National supervisors can apply these voluntarily.

Brexit

For a general picture of the situation regarding Brexit, please see the **General Developments** section of this Outlook.

IMPORTANT INFORMATION FOR MANAGERS OF INVESTMENT FUNDS IN 2020

This section discusses the rules for managers of alternative investment funds (AIFs) and undertakings for collective investment in transferable securities (UCITS). Instead of the formal legal term 'investment institution', we use the generally used market term 'investment fund' as a generic term for all types of investment vehicles. Managers who may also provide investment services in addition to managing investment funds, must comply with a large number of rules that apply to investment firms in respect of that part of the services. That is why we recommend these managers to read the section about investment firms in addition to the present section of this Outlook.

AFM SUPERVISION

AFM Trend Monitor 2020

On 10 October 2019, the AFM published its annual analysis of trends and developments in the financial markets, **Trend Monitor 2020**. In this report, the AFM identifies trends that have an impact on its supervision in 2020, and supervision themes that the AFM considers important in 2020. Although Trend Monitor does not yet contain any specific actions, or policy or legislation wishes of the AFM - these will become known when the AFM Agenda 2020 and the long-term strategy 2020-2022 are published in early 2020 -, Trend Monitor 2020 gives a certain indication of what market parties should expect in 2020.

One of the trends signalled by the AFM pertains to the transition to a sustainable economy and society. In sustainable investments the AFM identifies certain risks: a green bubble (more demand than supply) and the associated greenwashing (the improper use of the word 'sustainable') and misuse. The AFM also supervises this and will take action against parties trying to mislead investors. The key point of attention for the AFM in this respect is the availability and quality of information in the entire chain of sustainable financing. The AFM therefore supervises a careful and transparent integration of sustainability into the sector.

Fund managers managing funds that provide for a sustainable solution for investors, must closely monitor these developments and take this theme into account when providing information. In this context, we also refer to the **Sustainability** section of this Outlook.

AFM investigation into risk management (Wwft)

On 23 May 2019, the AFM published **a news item** indicating that it was to investigate risk management of, among other things, managers of investment funds. Specifically, the AFM seems to refer here to the compulsory company-wide risk analysis on the basis of the Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, 'Wwft'), which has become compulsory in the Netherlands since 25 July 2018 as a consequence of the implementation of the Fourth Anti-Money Laundering Directive. The AFM conducts this investigation in several undertakings. The AFM expects that it will be able to share its general findings with the market in early 2020.

For that matter, fund managers managing UCITS or retail AIFs must also make a systematic integrity risk analysis on the basis of the Market Conduct Supervision (Financial Institutions) Decree (*Besluit Gedragstoezicht financiële ondernemingen Wft*, BGfo). This is broader than money laundering and terrorism risks and comprises all integrity risks (such as fraud, bribery, etc.). The risk analysis on the basis of the Wwft may be part of that.

Fund managers that have not made a company-wide risk analysis on the basis of the Wwft, are urgently advised to do so as soon as possible. We recommend fund managers to consult the AFM's general findings in 2020 and to implement them where relevant.

Five points of attention for fund managers

The AFM provided fund managers with general feedback on the market-wide investigation it conducted in November 2018 into compliance of fund managers with a legally converted AIFMD licence. The investigation was aimed at determining the extent to which these fund managers followed up on the best practices that the AFM published in January 2018 (and slightly clarified end of 2019 with regard to inactivity, risk management, the depositary, outsourcing, the compliance function, conflicts of interests and Wwft obligations).

The AFM formulates five key findings in the feedback from answers that were given by managers to the questionnaire sent by the AFM in November 2018:

- **The manager must safeguard the independent effect of the risk management function.** In principle, executive tasks (such as the valuation of assets) must not be performed by persons involved in the risk management function. It is interesting to see that the AFM seems to offer room, more than in previous communications, for the application of the principle of proportionality to the main rule that there must be a strict functional and hierarchical division between risk management and portfolio management. The principle of proportionality may be invoked, provided this (i) is substantiated, (ii) the substantiation is evaluated annually, (iii) measures are taken to otherwise safeguard the independent effect of the risk management function, and (iv) the constant effectiveness of the risk management function is safeguarded.
- **If the compliance function and the risk management function are combined, additional requirements must be met.** In that case, managers must substantiate why the combination is justified considering the principle of proportionality, and must evaluate this substantiation at least every year. In addition, the manager must take additional measures to guarantee the compliance function's effectiveness.
- **In the event of delegation, the continuity of the manager and the efficient and effective supervision of the AFM must be guaranteed.** Managers must have a termination protocol in place that identifies the steps required to carry out the delegated tasks themselves and/or to assign them to a new delegate. In the event of far-reaching delegation, it should be examined whether this could impede the supervision of the AFM. The AFM has provides more extensive general feedback on the inventory of outsourcing it conducted earlier in 2019 (see below).
- **Managers must have more insight into the depositary's performance of tasks.** Managers must understand the depositary's role and its tasks, or at least understand it better. For example, the manager must be aware of whether the depositary outsourced its task or not. The depositary's performance must be assessed periodically.
- **Managers must keep their AO/IB (handbook and procedures) up to date.** It is not sufficient to assume that existing procedures that were assessed by the AFM at some point, still meet the requirements. A regular review and update is necessary in order to comply with all rules on a continuous basis.

At the end of 2019, the AFM indicated to start an investigation among several managers into compliance with the AIFM Directive. In addition to individual feedback, it is expected that in the course of 2020 there will also be general feedback from lessons that the AFM wants to provide to the market for AIFMD compliance. In anticipation of this, we recommend that fund managers verify the extent to which the aforementioned five points of attention have been adequately addressed in their business operations.

Adjusting best practices regarding compliance with AIFMD

In January 2018, the AFM published a report with best practices for the market resulting from an investigation among several AIFMD fund managers. The AFM claims that it received different responses to the report from the market. These were partly the reason that several aspects of the best practices were clarified. The clarifications pertain to topics, such as the scope of the concept 'day-to-day management', the method of recording the performance of an internal supervisory body and the method of recording the review of the principle of proportionality.

We recommend that fund managers consult the amended best practices and adjust their (internal) organization accordingly, where necessary.

Points of attention in outsourcing

Over the past two years, the AFM has conducted a survey under the name 'Keten in Beeld' (Picture of the Chain) among a large group of fund managers, among others. The purpose of this survey was to gain insight into the activities that are performed for fund managers by third parties, and to form a picture of the extent to which fund managers have taken the required control measures when outsourcing. Meanwhile, the AFM has provided general and extensive **feedback** with regard to the survey. The AFM assumes that fund managers will use this feedback to investigate the organization of their business operations in respect of the engagement of third parties and improve the same, if necessary.

We expect that this will require many fund managers to make adjustments, because the AFM has established that (i) several fund managers have difficulties recognising relationships with third parties as outsourcing relationships, and (ii) a considerable group of fund managers does not fully comply with all the outsourcing rules, including the basic control measures. The AFM announced that outsourcing will be a more explicit topic of its supervisory activities, including in relation to fund managers, in 2020. In that context, the AFM will also contact interest groups to further discuss any uncertainties pertaining to outsourcing. We expect there to be some more on the subject of outsourcing in 2020.

Mutual recognition of investment funds in the Netherlands and Hong Kong

Last year, the AFM and the Hong Kong supervisory authority Securities and Futures Commission (SFC) concluded an agreement with regard to the mutual recognition of investment funds. As of 1 April 2019, Hong Kong has thus become a designated state. Briefly put, this means that certain types of Hong Kong investment funds that are subject to the SFC's supervision may offer their units of participation to retail investors in the Netherlands if they meet a number of conditions. Vice versa, Dutch UCITS may offer their units of participation in Hong Kong. See the **website** of the AFM for more background information.

The new rules provide additional opportunities for trading UCITS outside the EU. Market parties for whom this is a relevant market can capitalise on this.

Principles for information security

At the end of December 2019, the AFM published its **Principles for Information Security** after having incorporated the comments and recommendations received on the subject during the **consultation period** in May 2019.

The AFM provides eleven principles that define expectations in the realm of information security. These are a set of rules that are not new, and which serve as mechanisms for compliance with the legal standards with respect to operations under the Financial Supervision Act, MiFID II, the Audit Firms Supervision Act and European regulations. In view of the increasing impact of technology in our daily lives, the rise of cyber-based threats, and issues of integrity and confidentiality in the handling of client data, the AFM expects fund managers, investment firms, financial services providers and all actors in the financial sector to act with due care with regard to information security risks. In essence, this means that there are three basic principles to be observed (an up-to-date information security policy, a governance structure that facilitates information security, and a risk identification and assessment), which in turn dictate four principles (with respect to people & culture, technology, operating processes and physical security), and that data must be adequately secured (principle nine). The last three principles are incident management, information security in outsourcing situations, and the information chain.

Based on the responses received during the consultation period, the AFM has produced a **feedback statement** linked to these principles, expressing the expectation that undertakings must strive for a proportional application of the eleven principles. This means that in consideration of the size of the undertaking and nature of services, smaller parties may be subject to less onerous information security measures. With regards to undertakings subject to DNB regulation, the AFM shall, where necessary, apply the Information Security Principles in line with DNB's Good Practice on Information Security. It should be noted here that the AFM states that undertakings that apply the ESMA information security framework should theoretically already be in compliance with the AFM's expectations.

AIFMD light regime not so light anymore

The AIFM Directive provides for an exemption from full supervision under the AIFM Directive for fund managers managing limited assets. If a number of conditions have been met, the AIFM Directive requires these 'small managers' to register only with the competent supervisory authority in the country of establishment. For the rest, the AIFM Directive does not apply. This exemption is available to fund managers whose managed assets – to put it briefly – at the aggregated level do not exceed EUR 500 million, or in case of leveraged or open-end funds, EUR 100 million. In addition, the manager must offer units of participation in the managed AIFs to (i) exclusively professional investors, (ii) less than 150 individuals, (iii) with a minimum equivalent value of EUR 100,000 or (iv) with a minimum nominal value of EUR 100,000. In the Netherlands, reference is often made to (i) the '*de minimis* exemption' (referring to the thresholds for the managed assets), (ii) the 'light regime' or (iii) the registration regime. Internationally, this regime is often designated as the 'small managers regime', the 'sub-threshold regime' or the 'Article 3 (2) exemption'.

In the Netherlands, this regime is now still open only to fund managers with their seats in the Netherlands. These Dutch fund managers must register with the AFM and annually report their financial data to DNB. Registration within the meaning of the AIFM Directive does not give entitlement to a European passport. This means that the registration in one country cannot automatically be used to offer the AIF in other EU Member States as well. This is only possible pursuant to a full licence within the meaning of the AIFM Directive. That is why it must be verified for each Member State which requirements are set for small fund managers by the relevant Member State. However, for specific investment funds, i.e. the Venture Capital Funds and Social Entrepreneurship Funds, it is – in principle – possible for a registered manager to obtain a passport at fund level.

Participation in the registration regime does not mean that the fund managers do not have to concern themselves with compliance with supervisory laws and regulations. On the contrary: our experience is that the registration regime is not so light as many fund managers might hope. In recent years, the AFM has become increasingly aware of this and has drawn particular attention to compliance by exempt managers with the Money Laundering and Terrorist Financing (Prevention) Act (Wwft) and the Sanctions Act 1977, the PRIIPs Regulation and the Unfair Commercial Practices Act (Ohp Act).

We recommend for 2020 that light managers pay attention to all compliance aspects applicable to them, particularly pursuant to the Wwft. In addition, we recommend that light managers who approach the thresholds of the exemption regime take preparatory measures in good time before the moment that the thresholds are exceeded and the exemption can no longer be used. In this respect, we would like to point out that it certainly takes several months to prepare a licence application as a fund manager. It is therefore not possible to wait until the last moment, since an application must be submitted to the AFM within 30 days after the thresholds have been structurally exceeded.

Frequently asked questions on AIFM Directive

The AFM published Questions & Answers (Q&As) on its **website** relating to the scope and application of the AIFM Directive, which they continuously update. These Q&As will be adjusted periodically by the AFM, without further notification. The most recent Q&A of the AFM is from 25 September 2019.

Consultation on Suitability Policy Rule

On 14 June 2019, the AFM and DNB presented the proposed amendments to the Suitability Policy Rule 2012 (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: the **2019 draft decree** to amend the Suitability Policy Rule 2012 and the **draft amended text** of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework that DNB and the AFM use in the suitability assessments of policymakers in the financial sector. DNB and the AFM have amended the Policy Rule in response to changes in national and European legislation and regulations. Market parties could respond to the consultation until 1 September 2019.

We will briefly discuss the main amendments to the Draft Policy Rule below:

- Persons who exclusively qualify as an applicant of a declaration of no objection will be excluded from the amended application of the Policy Rule. The reputations of those persons will be assessed with due observance of the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, adopted by the European Supervisory Authorities consisting of EBA, EIOPA and ESMA (**link**).
- DNB and AFM have chosen to clarify that the suitability topic 'balanced and consistent decision-making' also means that policymakers are independent in mind.
- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences. Because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the AFM and DNB have decided to explicitly include the requirement of 'sufficient time' under the suitability requirements in the Draft Policy Rule. In addition, the explanatory notes contain a separate section on what the AFM and DNB mean by sufficient time.
- The old Policy Rule includes an exception for small companies because the requirements of managerial skills in a hierarchical relationship could be too restrictive for these types of undertakings. In the Draft Policy Rule it has been added that the nature, size and complexity of the company must also be taken into account in deciding whether or not to employ the exception so that the AFM and DNB can include more circumstances in their consideration.

The Policy Rule will in principle take effect in 2020.

DNB SUPERVISION

Investigation into quality of CET1 capital

In August/September 2019, DNB conducted an investigation among several small and medium-sized investment institutions into the quality of their Common Equity Tier 1 (CET1) capital. The fact is that the capital of these institutions must meet certain requirements of the CRR in order for it to be included as qualifying capital: CET1 capital. The CRR's assumption is that the CET1 capital is the first to absorb any losses, and in the event the undertaking is being wound up, the last in line to recover money. It was not always clear to DNB whether these requirements were met by the institutions. Points of attention for DNB included cumulative shares and share premium that shares in the profit. Both examples have preference over other shareholders, which means that the amounts in question do not count as equity, as a result of which the undertaking possibly has insufficient capital to bear its risks.

Institutions whose capital instruments do not meet the requirements of the relevant legislation, will be asked to take remedial action. DNB was expecting to publish the results of the investigation end of 2019. At the time of writing no results were yet published. Upon publication DNB shall inform the sector of the main points of attention regarding the quality of capital at investment institutions. We recommend that fund managers closely monitor this process, and subsequently take remedial action, where necessary.

New file layout of AIFMD reports

Effective 1 January 2020, the method of reporting to DNB by AIFMD fund managers has changed. As of today, fund managers must report via a new reporting portal, the Digital Reporting Portal (DLR). Reports can only be made in the DLR by generating reports in the form of XML Files, which requires specific IT knowledge. The XML File must meet the specifications of ESMA. On ESMA's **website** you will find samples of those XML Files (AIFSample.xml for fund reports and AIFMSample.xml for manager›s reports). Also see the **website** of DNB for more information.

The first reports must be submitted to DNB no later than 31 January 2020. We understand that this form of reporting is not easy without the required IT knowledge. It is an option to (i) purchase a software package to generate the reports in-house or (ii) engage a service provider who can provide the reports. In the latter case, this will probably qualify as outsourcing, for which the outsourcing rules must be observed.

Fund managers who have not yet implemented a plan of action, must do so as quickly as possible. If this proves no longer feasible and the deadline is likely to be missed, we recommend that you formally request postponement from DNB as soon as possible and then put the necessary measures in place as soon as possible to get the reports done.

Amendments to assessment of the application for a declaration of no objection

A declaration of no objection (*verklaring van geen bezwaar*, vvgb) from DNB is required to hold or acquire a qualifying holding (namely an economic or controlling interest of 10% or more, or similar control) in a manager of UCITS. When assessing an application for a declaration of no objection, DNB will apply the revised European **Joint Guidelines** of EBA, EIOPA and ESMA. The application of those guidelines has recently resulted in changes in various areas in the way that DNB assesses applications for declarations of no objection:

- **Assessment of the reputation of the proposed acquirer of a declaration of no objection:** when a declaration of no objection is applied for, DNB tests the reliability of the proposed acquirer. As of 1 July 2019, his or her reputation is also assessed. In addition to a reliability test, the assessment will then also comprise a professional competence test consisting of management competence and technical competence.
- **Tightening of the assessment of declarations of no objection for group companies**: when granting declarations of no objection for group companies, DNB will from now on assess all the group companies in the control chain.
- **Calculation method for indirect qualifying holdings**: in addition to direct shareholders in a financial target undertaking, there may also be persons who indirectly acquire significant influence in the target undertaking. These are indirect holdings of 10% or more in a financial target undertaking, which also requires a declaration of no objection. DNB assesses whether there is significant influence and applies the calculation method from the Joint Guidelines. This means that DNB first applies a material control criterion (as laid down in paragraph 6.3 of the Joint Guidelines), and then, if application of this criterion does not lead to an obligation to acquire a declaration of no objection, a formal multiplication criterion (as laid down in paragraph 6.6 of the Joint Guidelines).

We expect to gain more clarity in 2020 about how DNB deals in practice with reputation assessments and the new calculation method for indirect qualifying holdings. Additionally, according to the explanatory notes to the Financial Markets Amendment Act 2021, the legislator **intends** amending the Financial Supervision Act with respect to group declaration of no objection, in order to bring them into line with the ESA guidelines.

DNB Guidelines for artificial intelligence in financial sector

On 25 July 2019, DNB published a **discussion paper** containing guidelines for the use of artificial intelligence (AI).

DNB has established that financial undertakings increasingly use AI to improve their business processes, products and services. DNB indicates that financial undertakings can improve their existing business processes and deliver new added value by using AI. At the same time, incidents with AI, certainly if this technology is not used responsibly, can harm a financial undertaking and its customers – with potentially serious consequences for the reputation of the financial system as a whole. DNB sees that due to the interwovenness of the financial system, such incidents may ultimately even have an impact on financial stability. That is why it is important that financial undertakings use AI in a responsible manner, i.e. based on controlled and ethical business operations.

In DNB's opinion, responsible use of AI in the provision of financial services means that when developing applications, undertakings must take into account aspects, such as soundness, accountability, fairness, ethics, skills and transparency (SAFEST). DNB indicates that as the use of AI becomes more important in the decision-making process of a financial undertaking, and the potential consequences of this for the undertaking and its customers become greater, the bar for a responsible and transparent use of AI will be higher. In its supervision of financial institutions, DNB will explicitly monitor this and will further investigate the main aspects of the use of AI.

DNB emphasises that this discussion paper contains a provisional view with regard to the responsible use of AI in the financial sector. DNB is of the opinion that the issues and ideas discussed in this document would benefit from a broader discussion, and has therefore called on relevant stakeholders to share their comments and suggestions with DNB. DNB has stated that it will report on the outcome of this process in the course of 2020.

ESMA

ESMA Work Programme 2020

ESMA published its **2020 Annual Work Programme** on 26 September 2019. It describes the supervision priorities for 2020 from ESMA's perspective. Specifically for the fund industry it is important that ESMA deals with the necessary implementation of its new tasks with regard to cross-border funds distribution and the Sustainable Finance Disclosure Regulation. In addition, ESMA indicates that it will continue its efforts to reach agreement on supervision and supervisory practices within the EU Member States, such as by issuing Q&A on subjects such as the AIFMD and UCITS.

ESMA consultation with regard to performance fees in UCITS

On 16 July 2019, ESMA circulated a **consultation** with regard to performance fees of UCITS. In this consultation document, ESMA provides draft guidelines with regard to (i) general principles pertaining to the method of calculating performance fees, (ii) consistency between the performance fee model and the investment goals, strategy and policy of the UCITS, (iii) frequency of performance fees, (iv) circumstances in which a performance fee may be paid out, and (v) transparency of the performance fee model.

Market parties could respond until 31 October 2019. We expect ESMA to publish the final guidelines in 2020. Subsequently, UCITS fund managers must implement those guidelines with regard to the UCITS managed by them.

ESMA Guidelines on stress tests of liquidity risk of funds

On 2 September 2019, ESMA **published** its final report with guidelines for stress tests of liquidity risks pertaining to UCITS and AIFs. Liquidity risks in investment funds have been the subject of much discussion recently, notably because of the realisation of such risks in a number of open-end funds that were invested in illiquid assets, which prevented the fund from meeting its redemption obligations. With these Guidelines, ESMA intends to control the liquidity risks of UCITS and AIFs. The Guidelines are applicable to (i) managers of UCITS and AIFs (except for closed-end and unleveraged AIFs), (ii) depositaries of UCITS and AIFs, and (iii) the national supervisory authorities.

ESMA formulates many Guidelines on many different subjects that managers must observe. Those Guidelines pertain to subjects, such as:

- the drafting of liquidity stress tests (LST);
- the understanding of liquidity risks;
- governance principles with regard to LST;
- LST policy;
- frequency of LST (in principle every quarter, but more or less frequently depending on the characteristics of the funds);
- the use of the LST outcome;
- adjustment of LST, depending on the type of fund;
- various scenarios for LST;
- use of data;
- product development;
- stress tests with regard to the assets and debts, in order to determine the effect on fund liquidity; and
- specific rules for funds investing in less liquid assets.

The Guidelines will affect the managers' business operations in various ways. The Guidelines are applicable as from 30 September 2020. We recommend that fund managers implement these Guidelines in their business operations as soon as possible, so that any challenges in the implementation can be identified in good time.

On 5 September 2019, consequently several days after the Guidelines, ESMA also **published** an economic report on stress simulation for investment funds, investigating the risks run by the market.

ESMA consultation on Market Abuse Regulation

On 3 October 2019, ESMA published, at the EC's request, **a consultation paper** on various sections from the **Market Abuse Regulation**. Approximately three years after the entry into force of this Regulation, it is now time to review the current legal framework and assess whether it is still effective or appropriate, and whether amendments need to be made.

The consultation document discusses various subjects from the Market Abuse Regulation and is particularly relevant to market parties (and their day-to-day management) issuing financial instruments that will be or have been admitted to trading. Topics covered include the definition and delayed disclosure of inside information in certain situations and the effectiveness of the mechanism to delay this disclosure, the scope of the reporting obligations under the exemption for buy-back programmes of own shares admitted to trading, but also the question whether FX contracts should fall within the scope of the Market Abuse Regulation.

Stakeholders have now been given the opportunity to provide feedback on the consultation paper. ESMA aims to present the final report to the EC in the spring of 2020. We look forward to seeing the results and are interested to find out whether any changes will be made to the Market Abuse Regulation.

ESMA Q&As with regard to AIFMD and UCITS

ESMA published Questions & Answers (Q&As) on its website relating to the scope and application of the AIFMD and UCITS, which they continuously update. ESMA's most recent Q&As relating to UCITS date from **4 June 2019** and relating to the AIFMD from **4 December 2019**. Updates are usually announced in ESMA's news service.

CURRENT LEGISLATION AND REGULATIONS

Developments 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 first step in the review was an engagement to KPMG to conduct an investigation into the functioning of the AIFMD. On 10 January 2019, the European Commission **published**

KPMG's report. We understand that the European Commission has asked various EU Member States to provide input to the review of the AIFMD. Based on informal rumours, we understand that the AFM intends to initiate a consultation in Q1 2020 in order to collect input for AIFMD 2. We also understand that the European Commission intends to publish the first proposals for amendments to the AIFMD in the upcoming year.

We are obviously interested to see which subjects the market will be consulted about and what the results of the AIFMD review will be. We expect that the AIFMD will certainly be tightened in a number of places, but an AIFMD 2 such as MiFID II is not in line with our expectations. In any case, fund managers are advised to monitor these developments. They can use the AFM's consultation to provide input.

Further remuneration measures for the financial sector

In response to the **Agenda for the financial sector**, the Ministry of Finance published the **legislative proposal** for market consultation on the Act on further remuneration measures for the financial sector in 2019. Important proposed amendments that also apply to fund managers are:

- The introduction of a five-year retention period for shares and comparable financial instruments that are part of the fixed remuneration.
- The introduction of an obligation to describe in the remuneration policy how the undertaking accounts for the relation of the remunerations of managing directors, supervisory directors and employees of the undertaking to its social function and the way in which this relation has been formed.

The **planning brief 2020** of the Ministry of Finance shows that the legislative proposal for the Act on further remuneration measures for the financial sector is scheduled for September 2020. In addition to the aforementioned further remuneration measures, this legislative proposal contains several more technical changes to the remuneration rules for the financial sector that originally were part of the proposal for the Financial Markets Amendment Act 2018, as well as the continuation of existing policy pertaining to traders for their own account.

PRIIPs Regulation

Amendments to PRIIPs Regulation

In the **Outlook 2019** we reported on the consultation paper of 8 November 2018 that was jointly published by the ESAs and that pertained to amendments to the PRIIPs Delegated Regulation. However, these amendments were ultimately never implemented. In February 2019 the ESAs published a **Final Report** containing a summary of responses received during the consultation period and the follow-up steps to be taken. The report shows that the ESAs no longer considered the 'rapid' but drastic amendments to the PRIIPs Delegated Regulation as proposed in 2018 to be appropriate. Consultation respondents generally did not agree with the proposed amendments, in particular with regard to the implementation of amendments before the more comprehensive PRIIPs review by the EC had taken place. Moreover, immediately following the consultation period the EC extended the temporary exception to the KID obligation for UCITS (which was originally set to expire on 31 December 2019, thus necessitating the 'rapid' change proposal of 2018) until 31 December 2021. Consequently, instead of the 'rapid' amendments of 2018 the ESAs have decided to conduct a more integral review in 2019. This has resulted in a consultation paper that proposes more substantial amendments:

- **Performance scenarios for the future**: in early 2019 the ESAs issued a **joint supervisory statement** addressing the risk of too positive performance scenarios through recommendations to developers and national supervisory authorities. Following on from these recommendations, the consultation paper now proposes the following:
  - a simplification of the information to be provided by removing the 'stress scenario' and 'moderate scenario' from the list of the four performance scenarios that PRIIP developers must use to illustrate the performance of the PRIIP, and

- a revised methodology for estimating future performance and a compensation system for unforeseen failure of the methodology. According to the ESAs, this revised methodology would lead to a more realistic representation of future returns.

- **Information about past performance**: ESAs propose rules on the basis of which information on past performance should be provided for PRIIPs offered by certain UCITS, AIFs and certain insurance-based investment products.
- **Transaction costs**: with regard to the calculation and presentation of transaction costs, the ESAs consider changes so that all relevant costs are included and the products can be better compared by investors. These amendments include:
  substantial amendments to the cost table to be included in a KID, including improved compatibility with the disclosure requirements of MiFID II and a more specific description of the type of costs that must be disclosed.
  adjustment of some methodologies for the disclosure of transaction costs arising from the purchase and sale of the underlying investments of a PRIIP.
- **PRIIPs with multiple investment options**: the ESAs consider that in respect of PRIIPs with multiple investment options, PRIIP developers must from now on provide more detailed information about at least four of the most relevant investment options, together with more general information about the other investment options. They are also considering further adjustments to the KID for this type of PRIIP, including an explanation indicating whether all costs are shown or not.
- **The expiry of the UCITS exception**: finally, the ESAs are considering changes in preparation for the UCITS exception ending 31 December 2021. More specifically, the ESAs consult on which elements of the Key Investor Information Regulation (Implementing Regulation (EU) 583/2010 as regards key investor information) should be included in the PRIIPs Delegated Regulation to address potential bottlenecks.

Stakeholders had until 13 January 2020 to respond to the consultation paper. The ESAs expect to have assessed the responses and submit their ultimate amendment proposals to the EC in the first quarter of 2020. Depending on what happens in the European legislative procedure, the proposals could take effect in 2021.

We advise market parties to pay close attention to the developments surrounding the PRIIP regulations and the KID. Additionally, we recommend checking whether all KIDs currently comply with the additional disclosure requirement set out in the ESAs joint advisory statement.

Extending exception for retail AIFs and UCITS

In addition to new rules on marketing, the regulations package with regard to the cross-border fund distribution (see below) also provides for a very important amendment to the PRIIPs Regulation. Article 32 of the PRIIPs Regulation (Regulation 1286/2014) contains a temporary exemption from the obligation to prepare a KID (Key Information Document) for providers of retail UCITS and AIFs. The exemption's term ran until 31 December 2019, but has now been extended to 31 December 2021.

This term is extended, because the European Commission was not yet able to perform the review of the PRIIPs Regulation and needs more time. The European Commission wants to avoid that two different documents are presented to investors for the same fund and therefore extends the exemption by 24 months.

Consequently, fund managers managing retail (non-transferable or open-end) AIFs or UCITS can make use of the exemption for preparing a KID for two more years.

Regulatory Technical Standards KID

The Joint Committee of the European Supervisory Authorities (ESAs) indicated in its **Work Programme** for 2020 that it would evaluate the PRIIPs Regulation and intends to make proposals for amendment concerning various subjects including the KID via Regulatory Technical Standards (RTS) in February 2020.

Benchmark Regulation

Benchmark Regulation (general)

We have already reported on the Benchmark Regulation in the **Outlook** for 2019. Below we provide an update on some developments since then and developments expected for 2020 that are specifically relevant for fund managers as (potential) users of benchmarks. You can read more on the developments that are particularly relevant to offering and/or managing a benchmark in the **General Developments** section of this Outlook.

Transitional period for critical benchmarks and non-EU benchmarks

As a result of the Regulation, with effect from 1 January 2020 institutions subject to European supervision may, briefly put, only use benchmarks that comply with the Benchmark Regulation and that are registered, and also offered by a licensed or registered administrator. However, in November 2019 the transitional regime for critical benchmarks (EONIA, EURIBOR, LIBOR, STIBOR and WIBOR) and non-EU benchmarks (benchmarks managed by an administrator established in a third country) was **extended** to 31 December 2021. This was partly due to uncertainty about the continuation of EURIBOR and EONIA – which are the most important benchmarks for the Eurozone (and for the Netherlands) – after 1 January 2020 and uncertainties regarding the recognition and endorsement procedures for non-EU benchmark administrators. We recommend that market parties use the extended deadline to be ready in time for the transition, including by identifying which EU benchmarks they use have been approved for use after the transition phase and which have not.

Best practices benchmark transition

On the basis of a questionnaire sent to various financial undertakings in mid-2019, the AFM and DNB identified **best practices** for the benchmark transition at the end of 2019. These may be useful to anticipate the transition in good time in 2020. Established practices worthy of mention include:

- having a detailed overview of benchmarks and terms used by the institution;
- identifying alternatives to benchmarks, assigning them to products and using them where possible;
- a project team that oversees all activities related to benchmarks, reports on them at management level, in which the planning followed is in line with the transition timeline;
- for new contracts, commencing the transition to alternative benchmarks;
- identifying different scenarios and using them to schedule the transition; and
- having a communication plan ready for informing customers and already start communicating in so far as possible.

Compulsory mention of exemption for transferable closed-end units of participation expired?

With the implementation of the Prospectus Regulation, a number of provisions in the Financial Supervision Act that related to the old prospectus system have expired. One of these was the legal basis for the inclusion of a mandatory exemption notice on the front page of announcement documents like information memoranda when invoking an exception to the prospectus obligation. This exemption notice is referred to as the ‘AFM banner’, or sometimes the ‘wild west sign’. It is notable that the further regulations in which this obligation is described (and which prescribes the form and wording of the icon) has not been changed, and so remains in place. Likewise, the AFM’s website still lists the obligation of placing an exemption notice whenever an exception to the prospectus obligation is utilised.

Here the question arises of whether eliminating the legal basis for the exemption notification was done deliberately or whether this was an apparent error on the part of the legislator. We certainly cannot rule out the latter, and consider there to be a significant chance that the legislature will rectify this in 2020. We are looking forward to see the outcome and recommend that market parties continue to include the mention of exemption for the time being.

Further detailing of European Long-Term Investment Funds (ELTIFs) Regulation

Since late 2015, the European Long-Term Investment Funds (ELTIF) Regulation has been in effect. This Regulation contains the rules for licence granting applicable throughout the EU, the investment policy and the business circumstances of European long-term investment funds. ELTIFs are AIFs that make long-term investments in companies and projects. For this reason, ELTIFs must meet the requirement that at least 70% of their capital is invested in eligible assets (and that not more than 30% of their capital is invested in other assets). The ELTIF Regulation enables AIFMs having an AIFMD licence to apply for the ELTIF label for European investment funds managed by them that qualify as ELTIFs. ELTIFs can be offered to both professional and retail investors throughout Europe, provided the requirements included in the ELTIF Regulation are continuously complied with. In connection with the possible participation of retail investors, several obligations including the transparency obligations must continuously be complied with. In early 2019, ESMA published a consultation document for Regulatory Technical Standards (RTS) with regard to cost transparency, which ELTIFs must provide. The consultation responses and feedback statement were published in late 2019. ESMA expects that the final RTS will be established in 2020.

Integrity legislation (Money Laundering and Terrorist Financing (Prevention) Act (Wwft))

In the past year, European and Dutch supervisory authorities have published a great deal in the area of integrity. At the national level, 2020 will be marked in particular by the implementation of the Fifth Anti-Money Laundering Directive (AMLD5), the UBO register and the legislative proposal on the Anti-Money Laundering Action Plan Act. At the European level, there is an increasingly urgent call for the harmonisation of all anti-money laundering rules and the centralisation of anti-money laundering supervision. For an overview of the consequences of AMLD5, the UBO register and other relevant European developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

NEW LEGISLATION AND REGULATIONS

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

On 12 July 2019, a new regulatory package was published to facilitate the cross-border distribution of investment funds. The package consists of a **Directive** amending the AIFMD and UCITS Directives and a **Regulation** partly amending the EuVECA and EuSEF Regulations and providing for several other obligations for all types of fund managers. The package provides, among other things, a definition of pre-marketing (testing interest in a new fund). Under the new rules, a fund manager may engage in pre-marketing, except where the information provided to investors:

- is sufficient to enable investors to undertake to acquire units of participation (subscription or pre-registration);
- amounts to subscription forms or similar documents, either in draft or in final form;
- amounts to incorporation documents, a prospectus or offering documents of a fund not yet constituted, in final form.

When a fund manager wants to send draft fund documentation, the information included therein may not be of such nature that an investor can base its investment decision on it. In addition, a disclaimer must be included indicating that (i) the document does not constitute an offer or invitation for subscription, and (ii) the information included therein cannot be relied upon, because it is incomplete and is subject to change. The rules require a fund manager to notify the home Member State that it has carried out pre-marketing in one or more Member States, stating specific information, within two weeks of starting the pre-marketing. When an investor subsequently subscribes to the fund within 18 months after the pre-marketing, this qualifies as an offer falling within the scope of the regulations. This means that reverse solicitation can no longer be invoked. A definition of pre-marketing will put an end to much uncertainty in the market about what is meant by this, although there is room for interpretation in the application of the new rules.

In addition, the package provides for a number of rules with regard to cross-border marketing of investment funds, including in relation to (i) notification, (ii) provision of information, (iii) ceasing of activities in another Member State (de-notification), (iv) advertisements.

The Directive must be implemented in national laws and regulations of EU Member States by 2 August 2021 at the latest. As of that date, the Regulation has direct effect in the EU Member States. Consequently, the market still has some time to prepare for the new rules. At the same time, we believe that we can already look at the definition in this package for the specific details of what pre-marketing should mean. For that matter, we believe that it does not differ that much from the current supervisory practices in the Netherlands with regard to pre-marketing.

Changes to depositary function under AIFMD and UCITS will enter into force

On 30 October 2018, the EU Official Journal published two delegated regulations amending the depositary function under the **AIFMD** and **UCITS**. The delegated regulations will have direct effect and the new rules will enter into force on 1 March 2020.

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 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 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 have great impact on the custody chain. They 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. We advise fund 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 points of attention of the AFM's supervision in the near future. Managers are responsible for this custody chain; also see the five points of attention of the AFM in respect of managers as discussed above.

Sustainability measures

The past year has seen a great deal of attention devoted to sustainability and climate change. An important development concerns the European legislation and regulations to channel capital flows towards sustainable economic activities. This is done, among other things, by using disclosure requirements for investors in respect of the sustainability of financial products and sustainability labels for benchmarks to facilitate ESG investors. The AFM also intends to bring a focus in its supervision of market conduct in 2020 to sustainability-related disclosure requirements. Another point of attention is the resilience of the financial sector to climate change. We are seeing that climate change and natural disasters are entailing new risks for financial market parties. The ESAs, the AFM and DNB have been sharing insights and recommendations on the impact on operations and risk management. We expect to see much more about these points for attention and other sustainability-related aspects in 2020. This aspect will have an impact on the operations of many market parties. For an overview of the developments in the area of sustainability, see the **Sustainability** section of this Outlook.

OTHER DEVELOPMENTS

ESAs advice on ICT risk management & cyber resilience

In April 2019, the ESAs published a joint **advice** on ICT risk management and cybersecurity risks. This advice is relevant for fund managers, among others. According to the ESAs, the increased ICT use in the financial sector requires improved regulation of ICT risk management. To improve ICT risk management, they have presented sectoral and cross-sectoral proposals. We highlight a few of those proposal below.

Some of the sectoral proposals that are relevant to specific managers include:

- Specific references to cybersecurity to be introduced by the EC in, among other things, the AIFMD and the UCITS Directive. According to the ESAs, these regulations currently contain insufficient specific requirements concerning cybersecurity and the cybersecurity terminology used is inconsistent. According to the ESAs, complementarity is needed to streamline and harmonise supervisory requirements and definitions on ICT risk and cybersecurity risk, and the use of consistent terminology is recommendable.
- Reporting obligations in the event of incidents concerning cybersecurity to be introduced in, among other things, the AIFMD and the UCITS Directive. These regulations currently do not yet contain any provisions on incident reporting, to which a reporting obligation in the event of cybersecurity incidents could be attached. These obligations would have to determine aspects such as the criteria for causing the reporting obligation to arise, the content of the report and the receiving party.

Some of the cross-sectoral proposals are:

- a proposal to streamline sectoral frameworks for incident reporting pertaining to ICT security, to be controlled by the EC by facilitating the development of harmonized standards and terminology; and
- a proposal to the EC to create a supervisory framework, in which activities of third-party providers can be adequately monitored. As the use of cloud service providers (CSPs) for outsourcing ICT services is on the rise and only a few CSPs serve the financial sector, a cyberattack on a CSP may have serious consequences for the financial sector. Current regulations do not address this third-party concentration risk, which is the reason for this proposal.

Having regard to the ESAs' proposals, we advise fund managers to keep an eye on developments in ICT control in the year ahead and take those developments into account in their business operations as much as possible.

EBA Opinion on disclosure to consumers buying financial services through digital channels

On 23 October 2019, EBA published an **opinion** on disclosure to consumers buying financial services through digital channels. The opinion was addressed to the European Commission and contains recommendations. With this opinion, EBA intends to safeguard that the rules on disclosure adequately take account of the increased digital marketing of financial products and financial services. The opinion pertains to the Distance Selling Directive, in which rules have been laid down with regard to the online sale of financial products to consumers. The European Commission is currently reviewing this directive.

EBA believes that it is of essential importance that consumers are able to make an informed decision on financial products and services. This means that they must have high-quality information that is presented in a timely and appropriate manner. EBA gives recommendations on several subjects, including the following:

- scope and consistency with other disclosure requirements from sector-specific rules;
- timing of the provision of information;
- presentation of information;
- type of information;
- accessibility of information and effectiveness; and
- review of the effectiveness.

We expect the European Commission to take EBA's recommendations to heart. The European Commission may come up with concrete proposals for adapting the Distance Selling Directive in the course of 2020.

We recommend that market parties offering their products or services online consult the recommendations of EBA. It is important not only from a regulatory point of view but also from a civil law point of view that consumers have appropriate information regarding products and services. Furthermore, the provision of digital services is also one of the AFM's priorities.

IOSCO report on framework for assessment of leverage of investment funds

In December 2019,the International Organization of Securities Commissions (IOSCO) published its definitive report with recommendations for a framework for the assessment of leverage of investment funds (see **report** and **press release**). The framework is intended to facilitate the supervision of the use of leverage by investment funds, which can result in risks to financial stability. The recommendations are addressed to supervisory authorities. IOSCO recommends that regulatory authorities use the framework as a basis for their assessment of leverage-related risks in funds. We are not ruling out the possibility that – partly because of the continuing low interest rate and increasing level of debt on financial markets – the AFM and DNB will integrate these recommendations in their supervisory practice regarding funds. We expect 2020 to bring more clarity regarding this matter.

Brexit

For a general picture of the situation regarding Brexit, please see the **General Developments** section of this Outlook.

IMPORTANT INFORMATION FOR INVESTMENT FIRMS IN 2020

AFM SUPERVISION

AFM Trend Monitor 2020

On 10 October 2019, the AFM published its annual analysis of trends and developments in the financial markets, **Trend Monitor 2020**. In this report, the AFM identifies trends that have an impact on its supervision in 2020, and supervision themes that the AFM considers important in 2020. Although Trend Monitor 2020 does not yet contain any specific actions, or policy or legislation wishes of the AFM – these will become known when the AFM Agenda 2020 and the long-term strategy 2020-2022 are published in early 2020 –, Trend Monitor 2020 gives a certain indication of what investment firms should expect in 2020. This includes:

- **Dealing with data:** Investment firms offering automatic or semi-automatic asset management must take into account a critical AFM when it comes to dealing with data. The AFM is of the opinion that the increasing role of data involves risks with regard to information security and cybersecurity. In this context, the AFM has already published **Principles for information security** that can be used by companies (also see later on in this section). Expectations are that legislation in the field of dealing with data and cybersecurity will be further developed.
- **IBOR transition**: Interbank Offered Rates (IBORs) play an important role in a well-functioning financial system. IBORs are a series of reference rates based on rates that banks charge each other for credit transactions. These reference rates are used extensively in financial contracts, such as business loans, derivatives and mortgages. The most commonly used interest rate benchmarks in the euro area, EONIA and EURIBOR, will be adapted or replaced to comply with the European Benchmark Regulation by 1 January 2022 at the latest. An estimated EUR 150,000 billion of financial contracts currently refer to EONIA or EURIBOR; these contracts need to be amended. This extensive transition involves financial, operational and legal risks. Financial institutions, including investment firms, must prepare for this transition in a timely and proper manner. The AFM considers it important that consumers and small-business clients are correctly informed and that products for these clients are carefully adjusted.

Compliance with professional competence requirements

Employees of investment firms who inform or advise clients about investments must be demonstrably competent. This has been the case since the entry into force of MiFID II on 3 January 2018, but at that time there were no accredited exams available to demonstrate professional competence. These courses and exams are now available for both the institutional and the retail domain. The AFM indicated that it therefore assumes that all persons concerned demonstrably comply with the applicable rules. In its **Q&A of 10 July 2019** 'MiFID II - knowledge and competence - Frequently asked questions regarding the ESMA guidelines on knowledge and competence', the AFM further discusses its requirements and expectations on this point.

We recommend that investment firms verify whether their employees who inform or advise clients about investments are demonstrably competent. All the more so, because the AFM and the Education Executive Agency (*Dienst Uitvoering Onderwijs*, DUO) signed a **cooperation agreement** on 21 November 2019. As a result of this cooperation agreement the DUO will administer an information system with details on the competence of employees and natural persons working under the responsibility of, inter alia, investment firms. From now on, the AFM will be able to request this information from DUO and thus immediately check whether the persons employed by investment firms have the diplomas required by law. This facilitates the AFM's supervision of compliance with the professional competence requirements, to which it has expressly drawn attention on its website by means of the publications referred to above. You can therefore expect the AFM to pay attention to this next year.

AFM's points for improvement on MiFID II compliance

In 2018-2019, the AFM conducted a compliance assessment with the MiFID II rules with respect to cost transparency, product governance and commission policy & practice among ten banking and investment institutions and fund managers providing exclusively investment services to professional investors and eligible counterparties (ECPs). At the end of December 2019, the AFM published its **report** on this compliance assessment setting out its findings. In short, the AFM observed a general failure in compliance with, in particular, the MiFID II obligations with respect to cost transparency and product governance. As an example, some undertakings were shown to be under the mistaken impression that the cost statements they had drafted and the measures and procedures with respect to suitability requirements under MiFID I met the obligations under MiFID II with respect to cost transparency and product governance obligations. In its report the AFM also offers a number of tools to help investment firms improve their services and operations. Overall, the report covers observations made during the assessment, the AFM's position on the issues raised, and the interpretation of applicable standards on cost transparency, product governance and commission. The AFM expects investment firms that provide services to professional investors and ECPs to use these tools to make the improvements necessary and take a critical look at their compliance with the other MiFID II obligations. Please see the report for the complete list of the observations made during the assessment and the tools offered.

AFM investigation into risk management (Wwft)

On 23 May 2019, the AFM **published** a news item indicating that it was to investigate risk management of managers of investment funds and investment firms. Specifically, the AFM seems to refer here to the compulsory company-wide risk analysis on the basis of the Money Laundering and Terrorist Financing (Prevention) Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, 'Wwft'), which has become compulsory in the Netherlands since 25 July 2018 as a consequence of the implementation of the Fourth Anti-Money Laundering Directive. The AFM conducts this investigation in several undertakings. The AFM expects that it will be able to share its general findings with the market in early 2020.

Investment firms that have not made a company-wide risk analysis on the basis of the Wwft, are urgently advised to do so as soon as possible. We recommend investment firms to consult the AFM's general findings in 2020 and to implement them where relevant.

Points of attention with respect to in outsourcing

Over the past two years, the AFM conducted a survey under the name 'Keten in Beeld' (Visible Chain) among several groups including a large group of investment firms. The purpose of this survey was to gain insight into the activities that are performed for investment firms by third parties, and to form a picture of the extent to which investment firms have taken the required control measures when outsourcing activities. Meanwhile, the AFM has provided general and extensive **feedback** with regard to the survey. The AFM assumes that investment firms will use this feedback to investigate the organization of their business operations in respect of the engagement of third parties and improve the same, if necessary.

We expect that this will prompt many investment firms to make adjustments, because the AFM has established that (i) several investment firms have trouble recognising relationships with third parties as outsourcing relationships, and (ii) a considerable group of investment firms does not fully comply with all the outsourcing rules, including the basic control measures. The AFM announced that outsourcing will be a more explicit topic of its supervisory activities, including in relation to investment firms, in 2020. In that context, the AFM will also contact interest groups to further discuss any uncertainties pertaining to outsourcing. We expect there to be some more on the subject of outsourcing in 2020.

Principles for information security

At the end of December 2019, the AFM published its **Principles for Information Security** after having incorporated the comments and recommendations received on the subject during the **consultation period** in May 2019.

The AFM provides eleven principles that define expectations in the realm of information security. These are a set of rules that are not new, and which serve as mechanisms for compliance with the legal standards with respect to operations under the Financial Supervision Act, MiFID II, the Audit Firms Supervision Act and European regulations. In view of the increasing impact of technology in our daily lives, the rise of cyber-based threats, and issues of integrity and confidentiality in the handling of client data, the AFM expects fund managers, investment firms, financial services providers and all actors in the financial sector to act with due care with regard to information security risks. In essence, this means that there are three basic principles to be observed (an up-to-date information security policy, a governance structure that facilitates information security, and a risk identification and assessment), which in turn dictate four principles (with respect to people & culture, technology, operating processes and physical security), and that data must be adequately secured (principle nine). The last three principles are incident management, information security in outsourcing situations, and the information chain.

Based on the responses received during the consultation period, the AFM has produced a **feedback statement** linked to these principles, expressing the expectation that undertakings must strive for a proportional application of the eleven principles. This means that in consideration of the size of the undertaking and nature of services, smaller parties may be subject to less onerous information security measures. With regards to undertakings subject to DNB regulation, the AFM shall, where necessary, apply the Information Security Principles in line with DNB's Good Practice on Information Security. It should be noted here that the AFM states that undertakings that apply the ESMA information security framework should theoretically already be in compliance with the AFM's expectations.

Binary options prohibition

We have already reported in our Outlooks of 2018 and 2019 that ESMA had prohibited the marketing, distribution and sale of binary options to retail investors. Effective 1 July 2019, however, ESMA **ended** this prohibition, because the national supervisory authorities took permanent intervention measures of a similar purport. In the Netherlands, the AFM took **two national product intervention measures**: a prohibition of binary options and a sales restriction on contracts for difference. The measures entered into force on 19 April 2019 and will be in force for the time being (for an indefinite period of time) in 2020.

Continuation of tolerance policy for remunerations of own-account traders in 2020

On 13 November 2017, DNB surprised the sector of own-account traders with a letter in which it indicated that it was going to end the national regime for own-account traders who were 'local firms'. Until then, local firms had their own regime, characterised, among other things, by an exception to the bonus cap. We have already described this in detail in our **Investment Firms Outlook 2018**.

Since then, the AFM has adopted a tolerance policy for this group of own-account traders and allows this group not to fall under the 20% bonus cap. In September 2019, the AFM **indicated** that this tolerance policy was to be continued after 31 December 2019, because it is in line with future European and

Dutch legislation. By doing so, the AFM acts in anticipation of the **draft legislative proposal** of the Act on further remuneration measures for the financial sector, which was presented for consultation on 5 July 2019. The AFM has indicated that the tolerance policy will continue to apply until this legislative proposal enters into force or until the prospect of legalization lapses. If legalization does not materialize, the AFM will revise the existing tolerance decision.

Observations on cost transparency, product governance and commissions

In 2018 and 2019, the AFM investigated compliance with MiFID II obligations regarding cost transparency, product governance and commissions at ten investment firms that provide investment services exclusively to professional investors and eligible counterparties, on which it published a report in late 2019. The AFM emphasizes that compliance with the new and stricter MiFID II obligations will require a serious effort on the part of investment firms. According to the AFM, this investigation shows that careful compliance with the regulations poses major challenges. All the investment firms investigated have yet to take the necessary steps to fully comply with the obligations in relation to the three topics investigated. The AFM expects all investment firms to implement improvements in their organizations where necessary on the basis of the content of the report. The AFM also expects investments firms to assess whether the results are relevant to comply with obligations in relation to other topics under MiFID II. We recommend that investment firms subject their compliance with the rules for cost transparency, product governance and commissions to critical evaluation once again in relation to the AFM report at the beginning of 2020.

Results of compliance function investigation

In 2019, the AFM started an investigation into the impact and organization of the compliance function in investment firms. With the investigation among investment firms, the AFM wants to get a clear picture on how the compliance function is organized, how this function is embedded in the organization and what impact it has. To this end, it selected a number of investment firms, which were sent a questionnaire and which were visited. Feedback on the results is scheduled to be given to the investigated firms in the first quarter of 2020. It is expected that the AFM will provide the market with public feedback on its general findings shortly thereafter, including points of attention for the organization of the compliance function.

Consultation on Suitability Policy Rule

On 14 June 2019, the AFM and DNB presented the proposed amendments to the Suitability Policy Rule 2012 (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: the **2019 draft decree** to amend the Suitability Policy Rule 2012 and the **draft amended text** of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework that DNB and the AFM use in the suitability assessments of policymakers in the financial sector. DNB and the AFM have amended the Policy Rule in response to changes in national and European legislation and regulations. Market parties could respond to the consultation until 1 September 2019.

We will briefly discuss the main amendments to the Draft Policy Rule below:

- For policymakers of investment firms (and data reporting service providers) additional requirements have been included in the Draft Policy Rule. For example, among other things, a policymaker must be able to take its own sound, objectively autonomous decisions and form opinions when carrying out the tasks and responsibilities;
- The Draft Policy Rule also states that significant and/or listed investment firms must have sufficient policymakers that are qualified as independent;
- Persons who exclusively qualify as an applicant of a declaration of no objection will be excluded from the amended application of the Policy Rule. The reputation of those persons will be assessed with due observance of the Joint Guidelines on

the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, adopted by the European Supervisory Authorities consisting of EBA, EIOPA and ESMA (**link**).
- DNB and AFM have chosen to clarify that the suitability topic 'balanced and consistent decision-making' also means that policymakers are independently-minded;
- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences. Because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the AFM and DNB have decided to explicitly include the requirement of 'sufficient time' under the suitability requirements in the Draft Policy Rule. In addition, a separate section has been included in the explanatory notes on what AFM and DNB mean by sufficient time.
- The old Policy Rule includes an exception for small companies because the requirements of managerial skills in a hierarchical relationship could be too restrictive for these types of undertakings. In the Draft Policy Rule it has been added that the nature, size and complexity of the company must also be taken into account in deciding whether or not to employ the exception so that the AFM and DNB can include more circumstances in their consideration.

The Policy Rule will take effect in 2020.

DNB SUPERVISION

DNB Investigation into quality of CET1 capital

In August/September 2019, DNB conducted an investigation among several small and medium-sized investment firms and investment institutions into the quality of their Common Equity Tier 1 (CET1) capital. Thecapital of these institutions must meet certain requirements of the Capital Requirements Regulation (CRR) in order for it to be included as qualifying capital: CET1 capital. The CRR's assumption is that the CET1 capital is the first to absorb any losses, and in the event the undertaking is being wound up, the last in line to recover money. It was not always clear to DNB whether these requirements were met by the institutions. Focal points for DNB included cumulative shares and share premium that shares in the profit. Both examples have preference over other shareholders, which means that the amounts in question do not count as equity, as a result of which the undertaking possibly has insufficient capital to bear its risks.

Institutions whose capital instruments do not meet the requirements of the relevant legislation, will be asked to take remedial action. When making the investigation results public, DNB will inform the sector of the main focal points regarding the quality of capital in investment firms and investment institutions. We recommend that investment firms closely monitor this process, and subsequently take remedial action, where necessary.

Amendments to assessment of the application for a declaration of no objection

A declaration of no objection (*verklaring van geen bezwaar*, DNO) from DNB is required to hold or acquire a qualifying holding (namely an economic or controlling interest of 10% or more, or comparable control) in an investment firm. When assessing an application for a DNO, DNB will apply the revised European **Joint Guidelines** of EBA, EIOPA and ESMA. The application of those guidelines has recently resulted in changes in various areas in the way that DNB assesses applications for DNO's:

- **Assessment of the reputation of the proposed acquirer of a DNO:** when a DNO is applied for, DNB tests the reliability of the proposed acquirer. His or her reputation will also be assessed as of 1 July 2019. In addition to a reliability test, the assessment will then also comprise a professional competence test consisting of management competence and technical competence.
- **Tightening of the assessment of DNO's for group companies**: when granting DNO's for group companies, DNB will from now on assess all the group companies in the control chain.

- **Calculation method for indirect qualifying holdings**: in addition to direct shareholders in a financial target undertaking, there may also be persons who indirectly acquire significant influence in the target undertaking. These are indirect holdings of 10% or more in a financial target undertaking, which also requires a DNO. DNB assesses whether there is significant influence and applies the calculation method from the Joint Guidelines. This means that DNB first applies a material control criterion (as laid down in paragraph 6.3 of the Joint Guidelines), and then, if application of this criterion does not lead to an obligation to acquire a DNO, a formal multiplication criterion (as laid down in paragraph 6.6 of the Joint Guidelines).

We expect to gain more clarity in 2020 about how DNB deals in practice with reputation assessments and the new calculation method for indirect qualifying holdings. Additionally, according to the explanatory notes to the Financial Markets Amendment Act 2021, the legislator **intends** amending the Financial Supervision Act with respect to the group declaration of no objection, in order to bring them into line with the ESA guidelines.

DNB Guidelines for artificial intelligence in financial sector

On 25 July 2019, DNB published a **discussion paper** containing guidelines for the use of artificial intelligence (AI).

DNB has established that financial undertakings increasingly use AI to improve their business processes, products and services. DNB indicates that financial undertakings can improve their existing business processes and deliver new added value by using AI. At the same time, incidents with AI, certainly if this technology is not used responsibly, can harm a financial undertaking and its customers – with potentially serious consequences for the reputation of the financial system as a whole. DNB sees that due to the interwovenness of the financial system, such incidents may ultimately even have an impact on financial stability. That is why it is important that financial undertakings use AI in a responsible manner, i.e. based on controlled and ethical business operations.

In DNB's opinion, responsible use of AI in the provision of financial services means that when developing applications, undertakings must take into account aspects, such as soundness, accountability, fairness, ethics, skills and transparency (SAFEST). DNB indicates that as the use of AI becomes more important in the decision-making process of a financial undertaking, and the potential consequences of this for the undertaking and its customers become greater, the bar for a responsible and transparent use of AI will be higher. In its supervision of financial institutions, DNB will explicitly monitor this and will further investigate the main aspects of the use of AI.

DNB emphasises that this discussion paper contains a provisional view with regard to the responsible use of AI in the financial sector. DNB is of the opinion that the issues and ideas discussed in this document would benefit from a broader discussion, and has therefore called on relevant stakeholders to share their comments and suggestions with DNB. DNB has stated that it will report on the outcome of this process in the course of 2020.

ESMA & EBA

ESMA Work Programme 2020

ESMA published its **2020 Annual Work Programme** on 26 September 2019. It describes the supervision priorities for 2020 from ESMA's perspective. ESMA's priorities for 2020 are linked to three significant developments of 2019 that shifted a significant amount of new tasks and mandates to ESMA:

- **ESAs' Review**: In 2019, a political consensus was reached on a comprehensive revision of the tasks and mandates of the European Supervisory Authorities (ESAs). ESMA's governance, organizational structure and mission will change significantly as a result of this ESAs Review.
- **EMIR 2.2.**: Also in 2019, a political consensus was reached on a substantial amendment/expansion of Regulation 648/2012 on OCT derivatives, central counterparties and trade repositories (EMIR), commonly known as 'EMIR 2.2'. Under EMIR 2.2, ESMA must set up a new supervisory

framework, begin monitoring 'third country central counterparties', and expand its convergent role with respect to European central counterparties. EMIR 2.2 was officially published on 12 December 2019 and became fully and directly applicable on 1 January 2020.
- **Capital Markets Union (CMU), Sustainable Finance, and Fintech Actions Plan:** Finally, in 2019, under the CMU (Sustainable Finance and Fintech Actions Plan), a consensus was reached on new tasks for ESMA with regard to cross-border funds distribution, the new prudential framework for investment undertakings, and the Sustainable Finance Disclosure Regulation.

This development has given ESMA substantially more powers, and it expects that it will need the whole of 2020 to implement them.

ESMA transparency system calendar

At the end of 2019, ESMA released its **2020 calendar** for data publications relating to the MiFID II/MiFIR transparency rules and SI calculations. 2020 is the first time that ESMA will be providing transparency and SI calculations with respect to derivatives. These were not published in 2019 due to data quality issues. The calendar sets out the following data publications:

- **Quarterly liquidity assessments**: on the basis of the quarterly liquidity assessments, market parties falling under the transparency system can evaluate whether there is a liquid market for the shares in which they trade. This is relevant for the purposes of post-trade transparency obligations under MiFID II. The assessments to be released pertain to bonds, and are to be published on 1 February 2020, 1 May 2020, 1 August 2020 and 1 November 2020.
- **SI calculations**: with the SI calculations, investment firms can compare the number and volume of client orders with respect to a given instrument that they run on their own books against the total number and volume in the EU. If this comparison shows that relative limits are being exceeded, the investment firm is qualified as an investment firm with systematic internalisation (SI), which entails certain SI-specific obligations. The SI calculations pertain to bonds, shares and negotiable instruments considered equivalent to shares or rights, and are published on 1 February 2020, 1 May 2020, 1 August 2020 and 1 November 2020. The SI calculations for May, August and November 2020 will also comprise derivatives.

The annual transparency calculations will also be published (1 March 2020 for shares and negotiable instruments considered equivalent to shares, 30 April for bonds and derivatives), as well as the updates of tick size calculations (28 September 2020 for shares and negotiable instruments considered equivalent to shares).

ESMA consultation on Market Abuse Regulation

On 3 October 2019, ESMA published, at the EC's request, **a consultation paper** on various sections from the **Market Abuse Regulation**. Approximately three years after the entry into force of this Regulation, it is now time to review the current legal framework and assess whether it is still effective or appropriate, and whether amendments need to be made.

The consultation paper addresses a multitude of topics from the Market Abuse Regulation and is particularly relevant for market parties (and their daily management) who issue financial instruments that will be or have already been admitted to trading. Topics covered include the definition and delayed disclosure of inside information in certain situations and the effectiveness of the mechanism to delay this disclosure, the scope of the reporting obligations under the exemption for buy-back programmes of own shares admitted to trading, but also the question whether FX contracts should fall within the scope of the Market Abuse Regulation. Among other things, it is relevant for investment firms that the aim is to simplify the system of reporting for buy-back programmes. In that context, ESMA is of the opinion that some references in the MAR to MiFIR can be removed, which would better streamline various obligations of issuers and investment firms in this regard. In addition, ESMA is currently analysing the interaction between the obligation to disclose inside information under the MAR and other disclosure obligations from the regulatory framework (referred to as CRD, CRR and BRRD) that apply to investment firms. The MAR may need to be further adjusted in some respects in this regard.

Stakeholders have now been given the opportunity to provide feedback on the consultation paper. ESMA aims to present the final report to the EC in the spring of 2020. We await the results with interest and will be interested to see whether they will result in changes to the Market Abuse Regulation.

ESMA consultation on compliance function guidelines MiFID II

In the summer of 2019, ESMA presented the '**Guidelines on certain aspects of the MiFID II compliance function requirements**' for consultation. The purpose of these draft guidelines is to create more clarity and convergence in the implementation of certain aspects of the MiFID II compliance function requirements. The intention is to replace the **existing ESMA guidelines** from 2012 by these new guidelines.

The new (draft) guidelines confirm the existing guidelines (albeit in a clarified or redefined form), and additionally contain new guidelines ensuing from MiFID II or resulting from activities of national supervisory authorities with regard to the application of the MiFID II compliance function requirements. Examples of new guidelines are guidelines relating to the duties and powers of the compliance function in the product governance requirements, and guidelines relating to skills, knowledge, expertise and authority of the compliance function.

ESMA will assess the **consultation responses** in Q4 2019/Q1 2020 and expects to publish the final guidelines in Q2 2020. We expect that the AFM will involve these guidelines in its supervision (just like it is currently doing with the 2012 guidelines). For that reason we recommend that investment firms keep a close eye on the publication of the final guidelines, and as soon as these guidelines are available, check the extent to which the organization of their compliance function complies with the guidelines. In light of the aforementioned AFM investigation, the compliance function receives a great deal of attention both at the national and at the European level.

EBA consultation on new ITS Pillar 3 disclosures

In 2019, EBA started a **consultation** on Implementing Technical Standards (ITS) with regard to Pillar 3 disclosures under the new CRR II (Regulation (EU) 2019/876). The proposal integrates different standards into one all-inclusive ITS. The aim is to strengthen market discipline by making sufficiently comparable information about the risk profile of institutions available to market parties. To facilitate compliance by institutions, a connection has been sought with the regulatory reports. The consultation ran until 16 January 2020. The ITS is expected to apply in June 2021.

EBA review of ITS supervisory reporting & Backstop Regulation

In 2019, EBA started a **consultation** on Implementing Technical Standards (ITS) with regard to supervisory reporting that require adaptation as a result of CRR II (Regulation (EU) 2019/876) and of the Backstop Regulation (Regulation (EU) 2019/630). EBA expects to be able to submit a proposal to the European Commission in June 2020 and that the new ITS will apply from June 2021.

Amendment EBA outsourcing guidelines

Earlier this year, EBA published **guidelines** on outsourcing by financial institutions. These guidelines provide various governance requirements for outsourcing activities and have entered into effect on 30 September 2019. DNB issued an 'intend to comply' statement regarding these guidelines. The guidelines are an update to the old **CEBS guidelines on** outsourcing (of 2006) and replace the EBA recommendations on cloud outsourcing.

Several major changes ensuing from the guidelines include:

- A more detailed definition is given of what is meant by 'outsourcing of critical and important functions', the new name for material outsourcing.
- All outsourcing agreements entered into on or after 30 September 2019 must comply with the new guidelines. A transitional regime applies to all existing outsourcing agreements, pursuant to which the agreements must be adapted in accordance with the guidelines at the next contract award opportunity, but in any event before 31 December 2021.
- Institutions were already required to have outsourcing policies and business continuity plans in place, but the guidelines further specify what these should include.
- Institutions must establish an outsourcing function or appoint a senior member of staff responsible for controlling the risks of the outsourcing arrangements.
- Institutions must keep a register up to date with information on all of the institution's outsourcing arrangements.
- Institutions must take steps to ensure that ethical and social responsibilities are also respected in the case of (sub)outsourcing in third countries.
- The access, information and audit rights of institutions themselves and their supervisors will be further specified. In case of critical or significant functions, both institutions and supervisors must have a full right of access, inspection and audit. In case of 'non-critical or non-significant' outsourcing, institutions may guarantee these rights on a risk-based basis.
- Institutions must report all critical or significant outsourcing agreements to DNB.

We recommend that investment firms review their outsourcing contracts and policies and assess whether they comply with the guidelines. In view of the AFM investigation into outsourcing by investment firms discussed above, it is to be expected that outsourcing will be one of the AFM's supervision priorities in 2020.

EBA Guidelines on ICT and security risk management

As of 30 June 2020 new EBA Guidelines on ICT and security risk management will come into force. These Guidelines shall apply to banks, investment firms and payment service providers and provide details on how these financial institutions should address ICT and security risks in order to comply with the CRD (article 74) and PSD2 (article 95). The Guidelines pertain to:

- Governance and strategy
- ICT and security risk management framework
- Information security
- ICT operations management
- Management of ICT project and alterations to ICT systems
- Business continuity management
- Payment service provider requirements regarding payment service users

The EBA Guidelines on security measures for operational and security risks of payment services (EBA/GL/2017/17) have been integrated, under amendment, in the new Guidelines and will be repealed after the new Guidelines come into force. DNB has expressed the intention to notify EBA that she will apply and enforce the new Guidelines in full.

EBA Opinion on disclosure to consumers buying financial services through digital channels

On 23 October 2019, EBA published an opinion on disclosure to consumers buying financial services through digital channels. The opinion was addressed to the European Commission and contains recommendations. With this opinion, the EBA intends to safeguard that the rules on disclosure adequately take account of the increased digital marketing of financial products and financial services. The opinion refers to the Distance Selling Directive (2002/65/EC), which lays down rules regarding the online sale of financial products to consumers. The European Commission is currently evaluating this Directive.

EBA believes that it is of essential importance that consumers are able to make an informed decision on financial products and services. This means that they must have high-quality information that is presented in a timely and appropriate manner. EBA gives recommendations on several subjects, including the following:

- scope and consistency with other disclosure requirements from sector-specific rules;
- timing of the provision of information;
- presentation of information and method;
- type of information;
- accessibility of information and effectiveness; and
- review of the effectiveness.

We expect the European Commission to take EBA's recommendations to heart. The European Commission may come up with concrete proposals for adapting the Distance Selling Directive in the course of 2020.

We recommend that market parties offering their products or services online consult the recommendations of EBA. It is important not only from a regulatory point of view but also from a civil law point of view that consumers have appropriate information regarding products and services. Furthermore, the provision of digital services is also one of the AFM's priorities.

CURRENT LEGISLATION AND REGULATIONS

Further remuneration measures for the financial sector

In response to the **Agenda for the financial sector**, the Ministry of Finance published the **legislative proposal** for market consultation on the Act on further remuneration measures for the financial sector in 2019. Significant changes that have been proposed are:

- The introduction of a five-year retention period for shares and comparable financial instruments that are part of the fixed remuneration.
- Tightening of the exception to the 20% bonus cap for employees who are not covered by a collective employment agreement. The proposed tightening makes it explicit that this exception can only be used in exceptional cases and is in any event not an option for those who (i) perform internal control functions or (ii) are directly involved in providing financial services to consumers.
- The introduction of an obligation to describe in the remuneration policy how the undertaking accounts for the relation of the remunerations of managing directors, supervisory directors and employees of the undertaking to its social function and the way in which this relation has been formed.
- Extension of the supervisory authority's approval period for retention bonuses exceeding 20% of the fixed salary from six to nine weeks.

The **planning brief 2020** of the Ministry of Finance shows that the legislative proposal for the Act on further remuneration measures for the financial sector is scheduled for September 2020. In addition to the aforementioned further remuneration measures, this legislative proposal contains several more technical changes to the remuneration rules for the financial sector that originally were part of the proposal for the Financial Markets Amendment Act 2018, as well as the continuation of existing policy pertaining to traders for their own account.

MiFID II review European Commission

Article 90 MiFID II requires the EC to review certain elements of MiFID II by 30 March 2020 at the latest. The EC has to report on these topics to the European Parliament and the Council. ESMA will assist the EC in doing so by issuing technical advice to the EC, based on a **timetable** agreed upon with the EC. The topics forming part of the MiFID II review include the following:

- the functioning of OTFs;
- the functioning of the regime of SME growth markets;
- the impact of the requirements for algo trading and high-frequency trading;
- the experience with product intervention mechanisms. In this respect, ESMA published

a **call for evidence** on 30 September 2019, in which it asked market parties and investors about their experiences with the product intervention measures of ESMA and national supervisory authorities;

- the impact of the use of position limits and position management on commodity derivatives markets. In this context, ESMA presented a **draft advisory report** for consultation on 5 November 2019, to which reactions may be submitted until 8 January 2020. ESMA expects to send its final report to the EC by the end of March 2020;
- the developments with regard to prices for pre-trade and post-trade transparency data of regulated markets, MTFs, OTFs and APAs;
- the impact of the commission transparency obligation as referred to in Article 24(9) MiFID II. In the summer of 2019, ESMA published a **call for evidence** on the effects of this obligation, consisting of a survey to assess the extent to which investment firms are complying with the obligation in practice and whether there are differences in application per Member State. That survey will also include, at the specific request of ESMA, the cost transparency rules in a broad sense.

We can therefore expect EC reports on all these topics in 2020, preceded by an ESMA advice and possibly additional calls for evidence.

PRIIPs Regulation

Amendments to PRIIPs Regulation

In the **Outlook 2019** we reported on the consultation paper of 8 November 2018 that was jointly published by the ESAs and that pertained to amendments to the PRIIPs Delegated Regulation. However, these amendments were ultimately never implemented. In February 2019 the ESAs published a **Final Report** containing a summary of responses received during the consultation period and the follow-up steps to be taken. The report shows that the ESAs no longer considered the 'rapid' but drastic amendments to the PRIIPs Delegated Regulation as proposed in 2018 to be appropriate. Consultation respondents generally did not agree with the proposed amendments, in particular with regard to the implementation of amendments before the more comprehensive PRIIPs review by the EC had taken place. Moreover, immediately following the consultation period the EC extended the temporary exception to the KID obligation for UCITSs (which was originally set to expire on 31 December 2019, thus necessitating the 'rapid' change proposal of 2018) until 31 December 2021. Consequently, instead of the 'rapid' amendments of 2018 the ESAs have decided to conduct a more integral review in 2019. This has resulted in a consultation paper that proposes more substantial amendments:

- **Performance scenarios for the future**: in early 2019 the ESAs issued a **joint supervisory statement** addressing the risk of too positive performance scenarios through recommendations to developers and national supervisory authorities. Following on from these recommendations, the consultation paper now proposes the following:
    - a simplification of the information to be provided by removing the 'stress scenario' and 'moderate scenario' from the list of the four performance scenarios that PRIIP developers must use to illustrate the performance of the PRIIP, and
    - a revised methodology for estimating future performance and a compensation system for unforeseen failure of the methodology. According to the ESAs, this revised methodology would lead to a more realistic representation of future returns.
- **Information about past performance**: ESAs propose rules on the basis of which information on past performance should be provided for PRIIPs offered by certain UCITS, AIFs and certain insurance-based investment products.
- **Transaction costs**: with regard to the calculation and presentation of transaction costs, the ESAs consider changes so that all relevant costs are included and the products can be better compared by investors. These amendments include:
    - substantial amendments to the cost table to be included in a KID, including improved compatibility with the disclosure requirements of MiFID II and a more specific description of the type of costs that must be disclosed.

- adjustment of some methodologies for the disclosure of transaction costs arising from the purchase and sale of the underlying investments of a PRIIP.

- **PRIIPs with multiple investment options**: the ESAs consider that in respect of PRIIPs with multiple investment options, PRIIP developers must from now on provide more detailed information about at least four of the most relevant investment options, together with more general information about the other investment options. They are also considering further adjustments to the KID for this type of PRIIP, including an explanation indicating whether all costs are shown or not.
- **The expiry of the UCITS exception**: finally, the ESAs are considering changes in preparation for the UCITS exception ending 31 December 2021. More specifically, the ESAs consult on which elements of the Key Investor Information Regulation (Implementing Regulation (EU) 583/2010 as regards key investor information) should be included in the PRIIPs Delegated Regulation to address potential bottlenecks.

Stakeholders had until 13 January 2020 to respond to the consultation paper. The ESAs expect to have assessed the responses and submit their ultimate amendment proposals to the EC in the first quarter of 2020. Depending on what happens in the European legislative procedure, the proposals could take effect in 2021.

We advise market parties to pay close attention to the developments surrounding the PRIIP regulations and the KID. Additionally, we recommend checking whether all KIDs currently comply with the additional disclosure requirement set out in the ESAs' joint advisory statement.

Regulatory Technical Standards KID

In its **Work Programme** for 2020, the Joint Committee of the European Supervisory Authorities (ESAs) expressed the intention to evaluate the PRIIPs Regulation, and in February 2020 intends to make proposals for amendments to (in part) the KID in the form of Regulatory Technical Standards (RTS).

Amendments to EMIR

A lot has changed in 2019 in the area of the European Market Infrastructure Regulation (EMIR), and 2020 also seems to be an important year for EMIR. The amendments to EMIR will, among other things, lead to changes to the MiFIR. We refer to the **General Developments** section in this Outlook for an explanation.

Updated CRD & CRR 2019 Regulation

On 1 October 2019, the updated **Regulation** on Specific Provisions CRD and CRR entered into effect. This Regulation specifies how DNB, in its supervision, implements options and discretions arising from the Capital Requirements Directive (CRD IV) and the Capital Requirements Regulation (CRR) and is the successor to the Regulation on Specific Provisions CRD and CRR 2013 (which has now completely lapsed). The amendments were prompted, inter alia, by the distinction between significant banks and less significant banks and their supervision, the ECB Guideline on the exercise of national options and discretions (Guideline (EU) 2017/697) and already phased-out CRR requirements that were included in the previous Regulation. DNB intends to consult the market again in 2020 on amendments to the Regulation in connection with the implementation of CRD V and CRR II.

DNB published another **consultation paper** on 15 October 2019 for the amendment of the CRD and CRR 2019 Specific Provisions Regulation in connection with the adjustment of the risk weighting for mortgages (see 'Regulation on risk weighting for mortgage loans' below). DNB intends to consult the market again in 2020 on amendments to the Regulation in connection with the implementation of CRD V and CRR II.

Amendment to the Financial Supervision Funding Decree 2019

It was envisaged that the **amending decree** to the Financial Supervision Funding Decree (Bbft) 2019 would enter into force on 1 January 2020. However, this decree has not yet been published in the Bulletin of Acts and Decrees. For investment firms, the most relevant point of the decree is that as from its effective date it adjusts, inter alia, the following categories of supervision by which the costs of supervision are apportioned:

- For the category 'own account investment firms' (instead of the 'number of traders' criterion) a criterion combining 'qualifying capital' and 'number of transactions' will apply. This applies to both the AFM's and DNB's supervision costs, with the proviso that only for the purpose of the DNB-calculation of 'qualifying capital', the consolidated situation must be taken into account.
- As from 2020, the supervision costs will be passed on to trading platforms based on a combination of a fixed amount (type of licence) and turnover. The 'commission income' and 'number of transactions' criteria will be deleted.

Benchmark Regulation

Benchmark Regulation (general)

We have already reported on the Benchmark Regulation in the **Outlook** for 2019. Below we provide an update on some developments that have occurred since then and developments expected for 2020 that are specifically relevant for investment firms as users or potential users of benchmarks. You can read more on the developments that are particularly relevant to offering and/or managing a benchmark in the **General Developments** section of this Outlook.

Transitional period for critical benchmarks and non-EU benchmarks

As a result of the Regulation, with effect from 1 January 2020 institutions subject to European supervision may, briefly put, only use benchmarks that comply with the Benchmark Regulation and that are registered, and also offered by a licensed or registered administrator. However, in November 2019 the transitional regime for critical benchmarks (EONIA, EURIBOR, LIBOR, STIBOR and WIBOR) and non-EU benchmarks (benchmarks managed by an administrator established in a third country) was **extended to 31 December 2021**. This was partly due to uncertainty about the continuation of EURIBOR and EONIA – which are the most important benchmarks for the Eurozone (and for the Netherlands) – after 1 January 2020 and uncertainties regarding the recognition and endorsement procedures for non-EU benchmark administrators. We recommend that market parties use the extended deadline to be ready in time for the transition, including by identifying which EU benchmarks they use have been approved for use after the transition phase and which have not.

Best practices benchmark transition

On the basis of a questionnaire sent to various financial undertakings in mid-2019, the AFM and DNB identified **best practices** for the benchmark transition at the end of 2019. These may be useful to anticipate the transition in good time in 2020. Established practices worthy of mention include:

- having a detailed overview of the benchmarks and terms used by the institution;
- identifying alternatives to benchmarks, assigning them to products and using them where possible;
- a project team that oversees all activities related to benchmarks, reports on them at management level, in which the planning followed is in line with the transition timeline;
- for new contracts, commencing the transition to alternative benchmarks;
- identifying different scenarios and using them for transition planning, and
- having a communication plan ready for informing customers and already start communicating in so far as possible.

Integrity legislation (Money Laundering and Terrorist Financing (Prevention) Act (Wwft))

In the past year, European and Dutch supervisory authorities have published a great deal in the area of integrity. At the national level, 2020 will be marked in particular by the implementation of the Fifth Anti-Money Laundering Directive (AMLD5), the UBO register and the legislative proposal on the Anti-Money

Laundering Action Plan Act. At European level, there is an increasingly urgent call for the harmonisation of all anti-money laundering rules and the centralisation of anti-money laundering supervision. For an overview of the consequences of AMLD5, the UBO register and other relevant European developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

NEW LEGISLATION AND REGULATIONS

New prudential framework

In our **Outlook 2019** we have already extensively discussed the proposals for a new prudential framework for investment firms. On 20 December 2017, the European Commission published proposals for a new prudential framework for investment firms. The proposals comprise (i) a **Regulation** on prudential requirements for investment firms (often referred to as IFR, Investment Firm Regulation); and (ii) a **Directive** on prudential supervision of investment firms (often referred to as IFD, Investment Firm Directive). The proposals introduce an entirely new prudential framework, with investment firms being divided into three classes: Class 1 firms, Class 2 firms and Class 3 firms:

- 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.
- 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 equity and the fixed overhead requirement.
- Class 3 firms shall be subject to a capital requirement based on minimum equity and the fixed overhead requirement.

Compromise proposals then followed in October 2018; click **here** for the Regulation and **here** for the Directive. These include a number of substantial changes, such as the introduction of a new subclass under Class 1, the Class 1 minus, for large investment firms trading for their own account and/or placing financial instruments on a firm commitment basis, and the use of the K-factor Clearing Member Guaranteed (K-CMG) as a stand-alone alternative to market risk.

The proposals were subsequently discussed in the European Parliament and the Council. On 26 February 2019, the Council announced in a **press release** that a compromise had been reached between the Presidency and the European Parliament. On 20 March 2019, COREPER (the Permanent Representatives (Ambassadors) guarding the interests of their Member States in Brussels) then endorsed the compromise. On 27 November 2019, the Presidents of the European Parliament and the Council signed the proposals. On 5 December 2019, the IFD and IFR were published in the Official Journal. Please see **here** for the IFR and **here** for the IFD.

The IFR and the (implementing legislation for the) IFD apply in mid-2021. For the IFD, this means that Member States have 18 months to transpose the Directive into national law. The **letter** from the Minister of Finance to the Senate dated 9 November 2019, including an overview of the legislative proposals in the field of Finance, shows that an implementation act for the implementation of the IFD is now being prepared internally at the national level.

We recommend that investment firms study the rules, determine which class they fall into and what consequences this will have for them. In order to be able to comply with the new prudential rules by mid-2021, preparations will have to be made in 2020.

Sustainability measures

The past year has seen a great deal of attention devoted to sustainability and climate change. An important development concerns the European legislation and regulations to channel capital flows towards sustainable economic activities. This is done, among other things, by using disclosure requirements for investors in respect of the sustainability of financial products and sustainability labels for benchmarks to facilitate ESG investors. The AFM also intends to bring a focus in its supervision of market conduct in 2020 to sustainability-related disclosure requirements. Another point of attention is the resilience of the financial sector to climate change. We are seeing that climate change and natural disasters are entailing new risks for banks and insurers. The ESAs, the AFM and DNB have been sharing insights and recommendations on the impact on operations and risk management. We expect to see a good deal more about these points for attention and other sustainability-related aspects in 2020. This aspect will have an impact on the operations of many market parties. For an account of the developments in the area of sustainability, see the **Sustainability** section of this Outlook.

OTHER DEVELOPMENTS

Obligation to apply behavioural insights when providing services

General

A clear theme in supervision in recent years has been the emphasis on the application of behavioural insights by financial undertakings. The idea behind this is that for a long time the prevailing view has been that if you provide consumers with the right information, they automatically make appropriate – rational – decisions. In practice, however, this theoretical view of a human being who thinks and acts rationally does not hold true in many situations. Consumers often have limited time, motivation and ready knowledge, and choices are made quickly and more intuitively. Precisely because a decision is made on a partly intuitive basis, the way in which choices are presented has a powerful steering effect. Consequently, there are so many developments in this area, as will be discussed in more detail below.

AFM's expectations with regard to the choice architecture

On 21 November 2019, the AFM presented the market with a consultation paper containing **principles for the choice architecture**. In this policy document, the AFM outlines its expectations about the way in which consumers are offered choices in their financial decision-making process. The choice architecture can (unintentionally) influence the choices a consumer makes. The AFM has established twelve principles which describe its expectations on the set-up of the choice architecture. The principles are not new rules, but contain starting points on a topic which is founded on different statutory standards which are supervised by the AFM. This consultation period ran until 16 January 2020.

The policy document will be adjusted on the basis of the responses and where necessary. The AFM will then publish it on its website. A 'feedback statement' will also be published, in which it is indicated what the AFM has done with the responses to the consultation. The definitive 'Principles for Choice Architecture' will therefore be published at the beginning of 2020. Financial service providers must then determine the extent to which they must incorporate these principles into their choice architecture.

Guidelines on the Protection of Online Consumers (ACM)

On 3 December the Netherlands Authority for Consumers & Markets (ACM) published the 'Guidelines on the Protection of Online Consumers – Boundaries of Online Persuasion' for consultation. The AFM has stated that it **endorsed** the principles laid down in these guidelines because many of the points are also relevant to financial undertakings. The AFM cites the following three elements:

- **Artificial scarcity can be misleading**: By creating a sense of urgency in consumers by means of supposed 'scarcity' ('this offer is only available for a limited time') consumers will make a choice more quickly and are more likely to make a purchase. In the Information Provision Policy Rule the AFM addresses misleading trade practices in relation to financial services or activities.
- **Default settings influence choice**: How a choice is offered, is never neutral and always steers people in some way. The default setting can - rightly or wrongly – be very determinative.

- **Misleading ranking:** The ACM also mentions examples where the ranking of online products is not based on the consumer's interests. The AFM points out that this also applies, for example, to financial comparison sites. Most comparison sites first display a paid-for Top 3 after making a comparison. The AFM does not believe a 'paid-for' Top 3 is desirable. The ranking of an offer may not be misleading.

In the Guidelines, the ACM hints that where 'seduction turns into deception' there could even be a misleading trade practice of the financial undertaking (conflict with the professional commitment duty) and thus a wrongful act. The importance for market parties of taking these guidelines seriously has consequently found its way into the domain of civil law. This consultation period ran until 16 January 2020. The ACM wants to establish the definitive guidelines shortly after that.

MinFin Action Plan on consumer choices

MinFin endorses the AFM's view that application of behavioural insights is important in the financial sector. In its recently published **Action Plan Consumer Choices** it again calls for market parties to jointly tackle the consumer choices issue. The Minister states that advice and appropriate information with a view to action that is visible and available, at the time when consumers have to make certain choices, is important. Financial undertakings, consumer organizations, financial advisers and comparison sites play an essential role in this respect, according to the Minister.

ESAs' advice on ICT risk management & cyber resilience

The ESAs published a joint **advice** on ICT risk management and cybersecurity risks in April 2019. This advice is relevant for investment firms, among others. According to the ESAs, the increased ICT use in the financial sector requires improved regulation of ICT risk management. To improve ICT risk management, they have presented sectoral and cross-sectoral proposals. We highlight a few of those proposal below.

Some of the proposals specifically pertaining to investment firms include:

- Specific references to cybersecurity to be introduced by the EC in MiFID II. According to ESMA, these regulations currently contain insufficient specific requirements concerning cybersecurity and the cybersecurity terminology used is inconsistent. According to ESMA, complementarity is needed to streamline and harmonise regulatory requirements and definitions on ICT risk and cybersecurity risk, and the use of consistent terminology is recommendable.
- Reporting obligations in the event of incidents concerning cybersecurity to be introduced in MiFID II and EMIR. These regulations currently do not yet contain any provisions on incident reporting, to which a reporting obligation in the event of cybersecurity incidents could be attached. These obligations would have to determine aspects such as the criteria for causing the reporting obligation to arise, the content of the report and the receiving party.

Some of the cross-sectoral proposals are:

- a proposal to streamline sectoral frameworks for ICT security incident reporting, to be steered by the EC by facilitating the development of harmonised standards and terminology;
- a proposal to the EC to create a supervisory framework, in which activities of third-party providers can be adequately monitored. Since use of cloud service providers (CSPs) for outsourcing ICT services is increasing and only a few CSPs serve the financial sector, a cyberattack on a CSP could have serious consequences for the financial sector. Current regulations do not address this third-party concentration risk, which is the reason for this proposal.

In view of the ESAs' proposals, we advise investment firms to keep an eye on developments in ICT management in the year ahead. Although it is not yet possible to say to what extent the proposals will materialise in new legislation and regulations, they now offer some indication of what might be expected from Europe with regard to ICT risk management.

Brexit

For a general picture of the situation regarding Brexit, please see the **General Developments** section of this Outlook.

IMPORTANT INFORMATION FOR PAYMENT SERVICE PROVIDERS IN 2020

DNB

Changed DNB-position regarding the independent functioning of the Supervisory Board

In the summer of 2019, DNB changed its **position** on the independence of the Supervisory Board on a number of points to fit in with the EBA **Guidelines** on the assessment of the suitability of members of the management body and key function holders. When reviewing supervisory directors, DNB looks at the independence in mind, the independence in appearance and the independence in state. To assess whether a supervisory director is formally independent, DNB uses the criteria from the Guidelines, which are stricter in a number of respects than DNB's former policy. DNB maintains its position that at least half (50%) of the Supervisory Board must consist of formally independent supervisory directors. DNB applies its position to all institutions that it supervises.

Amendments to the assessment of the application for a declaration of no objection

Since the implementation of PSD2 in the Netherlands on 19 February 2019, a declaration of no objection (*verklaring van geen bezwaar*, vvgb) from the DNB is required for retaining or acquiring a qualifying participation (a beneficial interest or controlling interest of 10% or more, or similar control) in a payment institution. When assessing an application for a declaration of no objection, DNB will apply the revised European **Joint Guidelines** of EBA, EIOPA and ESMA. The application of those guidelines has recently resulted in changes in various areas in the way that DNB assesses applications for declarations of no objection:

- **Assessment of the reputation of the proposed acquirer of a declaration of no objection:** when a declaration of no objection is applied for, DNB tests the reliability of the proposed acquirer. His or her reputation will also be assessed as of 1 July 2019. In addition to a reliability test, the assessment will then also comprise a professional competence test consisting of management competence and technical competence.
- **Tightening of the assessment of declarations of no objection for group companies**: when granting declarations of no objection for group companies, DNB will from now on assess all the group companies in the control chain.
- **Calculation method for indirect qualifying holdings**: in addition to direct shareholders in a financial target undertaking, there may also be persons who indirectly acquire significant influence in the target undertaking. These are indirect holdings of 10% or more in a financial target undertaking, which also requires a declaration of no objection. DNB assesses whether there is significant influence and applies the calculation method from the Joint Guidelines. This means that DNB first applies a material control criterion (as laid down in paragraph 6.3 of the Joint Guidelines), and then, if application of this criterion does not lead to an obligation to acquire a declaration of no objection, a formal multiplication criterion (as laid down in paragraph 6.6 of the Joint Guidelines).

We expect to gain more clarity in 2020 about how DNB deals in practice with reputation assessments and the new calculation method for indirect qualifying holdings. Additionally, according to the explanatory notes to the Financial Markets Amendment Act 2021, the legislator **intends** amending the Financial Supervision Act with respect to the group declaration of no objection, in order to bring them into line with the ESA guidelines.

Consultation on Suitability Policy Rule

On 14 June 2019, the AFM and DNB presented the proposed amendments to the Suitability Policy Rule 2012 (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: the **2019 draft decree** to amend the Suitability Policy Rule 2012 and the **draft amended text** of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework that DNB and the AFM use in the suitability assessments of policymakers in the financial sector. DNB and the AFM have amended the Policy Rule in response to changes in national and European legislation and regulations. Market parties could respond to the consultation until 1 September 2019.

Below, we discuss the most important changes to the Draft Policy Rule for payment institutions:

- Persons who exclusively qualify as an applicant of a declaration of no objection will be excluded from the amended application of the Policy Rule. The reputations of those persons will be assessed with due observance of the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, adopted by the European Supervisory Authorities consisting of EBA, EIOPA and ESMA (**link**);
- In the Draft Policy Rule, payment institutions and e-money institutions are transferred from group C to group A. This means that for this group of financial institutions, the suitability is determined based on a principle-based framework instead of a rules-based framework. As a result of this change, the AFM and DNB can apply customisation to the assessments, while it is possible to take into account the constellation within both large, complex and small start-ups.
- DNB and AFM have chosen to clarify that the suitability topic 'balanced and consistent decision-making' also means that policymakers are independently-minded;
- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences: Because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the AFM and DNB have decided to explicitly include the requirement of 'sufficient time' under the suitability requirements in the Draft Policy Rule. In addition, a separate section has been included in the explanatory notes about what AFM and DNB mean by sufficient time;
- The old Policy Rule includes an exception for small companies because the requirements of managerial skills in a hierarchical relationship could be too restrictive for these types of undertakings. In the Draft Policy Rule it has been added that the nature, size and complexity of the company must also be taken into account in deciding whether or not to employ the exception so that the AFM and DNB can include more circumstances in their consideration.

The Policy Rule will take effect in 2020.

ASPSP can offer customer dashboard

In a **Q&A** on its website, D&B has confirmed that banks that act as Account Servicing Payment Service Providers (ASPSPs) may offer their customers an overview of the permissions granted by the customer in question for access to the account by third party providers (TPPs), which provide payment initiation and account information services to that customer under PSD2. An ASPSP may also provide the customer with the opportunity to revoke the permission given within this overview neutrally. When revoking permission granted, DNB does require that the ASPSP inform the TPP about this via a standardised notification on the interface used.

Positive decisions and requests for information to go through DLT

Beginning 1 January 2020, DNB will be sending all positive decisions on prospective appointments through the DLT (Digital Supervision Portal). This change comes along with the request to institutions to also send a copy of the decision to the candidate. DNB will still be informing candidates of the results by telephone. DNB will only send decisions to the institution and the candidate by post in cases in which DNB does not consent to the appointment. Likewise, requests for information concerning reviews submitted and confirmations of reappointments will henceforth be sent to the institution through DLT. Institutions can also return the information requested by DNB through DLT.

DNB Guidelines for artificial intelligence in financial sector

On 25 July 2019, DNB published a **discussion paper** containing guidelines for the use of artificial intelligence (AI).

DNB has established that financial undertakings increasingly use AI to improve their business processes, products and services. DNB indicates that financial undertakings can improve their existing business processes and deliver new added value by using AI. At the same time, incidents with AI, certainly if this technology is not used responsibly, can harm a financial undertaking and its customers – with potentially serious consequences for the reputation of the financial system as a whole. DNB sees that due to the interwovenness of the financial system, such incidents may ultimately even have an impact on financial stability. That is why it is important that financial undertakings use AI in a responsible manner, i.e. based on controlled and ethical business operations.

In DNB's opinion, responsible use of AI in the provision of financial services means that when developing applications, undertakings must take into account aspects, such as soundness, accountability, fairness, ethics, skills and transparency (SAFEST). DNB indicates that as the use of AI becomes more important in the decision-making process of a financial undertaking, and the potential consequences of this for the undertaking and its customers become greater, the bar for a responsible and transparent use of AI will be higher. In its supervision of financial institutions, DNB will explicitly monitor this and will further investigate the main aspects of the use of AI.

DNB emphasises that this discussion paper contains a provisional view with regard to the responsible use of AI in the financial sector. DNB is of the opinion that the issues and ideas discussed in this document would benefit from a broader discussion, and has therefore called on relevant stakeholders to share their comments and suggestions with DNB. DNB has stated that it will report on the outcome of this process in the course of 2020.

Wish for financial statements and an audit provision

In the **DNB's legislative letter** of 27 March 2019, it expressed, among other things, the wish to create a statutory obligation for all licenced payment service providers (payment institutions and electronic money institutions) to provide a statement of income and expenditure audited by an auditor or financial statements with an audit opinion. The reason given by DNB for this is, among other things, that it is important in terms of the prudential supervision of these institutions to be able to rely on the financial data provided. In part against this backdrop, DNB believes it is desirable to align the situation for payment institutions and electronic money institutions with that of other financial undertakings that it supervises. To this day, this wish for legislation has not been included in a legislative proposal. We are waiting to see whether this wish of DNB will be fulfilled in 2020.

EBA

Strong customer authentication and common and secure open communication standards

On 14 September 2019, **technical regulatory standards** related to strong customer authentication were added to delegated regulations, and common and secure open communication standards took effect. The regulations have significant consequences for payment institutions, among other parties. For example, requirements will be adopted that payment institutions must comply with when executing security measures that enable them to:

- apply strong customer authentication, SCA, and grant exemptions from the application of the security requirements for SCA;
- safeguard the confidentiality and integrity of the payment service provider's personal security data; and
- adopt common and secure open standards for the communication between account-holding payment service providers, payment initiation service providers and account

information service providers, payers, payment beneficiaries and other payment service providers related to the provision and use of payment services.

Because not all market parties were ready on 14 September 2019 to comply with the requirements for the way users must authenticate themselves with a payment service provider, the EBA is giving the national supervisory authorities the possibility to give payment service providers that process online card transactions until 31 December 2020 to apply the SCA, provided these payment service providers draw up and execute migration plans for that purpose. Next, **DNB expects** payment service providers to execute the migration according to plan and report to DNB about the progress based on the standards included in the relevant EBA opinions. In this context, the EBA published the following two relevant opinions: (i) **EBA opinion** on strong customer authentication and (ii) **EBA opinion** on the deadline for strong customer authentication of e-commerce credit card-based payment transactions. Both opinions are primarily aimed at the national supervisory authorities; in the Netherlands, this is DNB. In this respect, also see **DNB news item** on its website.

Central points of contact under PSD2

The EBA had already adopted **draft technical regulatory standards** on 11 December 2017 that are a further fleshing out of Article 29(5) PSD2 (**Revised Payment Services Directive**). Based on this article, briefly put, the possibility was created to report regarding an agent or branch of a payment institution that is based in the territory of a different Member State to the local supervisory authority there regarding the activities that were performed in said different Member State. To allow the home state supervisory authority to cooperate effectively with the host state supervisory authority as the need arises, technical regulatory standards are proposed in which (i) further criteria are stipulated on the basis of which it can be determined when it is appropriate to appoint a central contact person in the aforementioned context and (ii) what duties this central contact person must have. Despite the fact that the EBA's final report dates from two years ago, the technical regulatory standards have not yet become applicable. It is currently unclear whether this legal framework will see the light of day in 2020.

Cooperation between the home state and host state supervisory authorities under PSD2

On 31 July 2018, the EBA drew up **draft technical regulatory standards** related to the cooperation between the competent supervisory authorities in the home state and in the host state for the supervision of payment institutions operating across borders under PSD2. These technical regulatory standards propose a further legal framework for the cooperation between various national supervisory authorities and the mutual exchange of information in this respect. They also discuss in more detail the templates to be used by a payment institution when reporting to competent supervisory authorities of the host state regarding the payment services performed there. Just like the technical regulatory standards regarding central points of contact under PSD2 discussed above, these technical regulatory standards have not yet become applicable. In this respect as well, it is currently unclear whether 2020 will be the year in which this legal framework enters into force and thus becomes relevant for payment institutions that perform cross-border payment services.

Commencement of reports on detected fraud under PSD2

In the **Outlook 2019**, we already briefly discussed the **EBA guidelines on fraud reporting under PSD2**. In these guidelines, the EBA gives further particulars regarding the statistical data about fraud related to various means of payment to be provided to the competent supervisory authorities by payment service providers under PDS2. DNB adheres to these guidelines. Based on a decision by DNB, these guidelines entered into force in the Netherlands on 1 July 2019. As a result, Dutch payment service providers will de facto have to report on the second half of 2019 for the first time in early 2020. That is because payment institutions are obliged to report every six months in accordance with the provisions in these guidelines. DNB will further inform payment institutions on the exact obligations in this context. We note that this obligation to report fraud also applies to exempted payment service providers and these market parties must also comply with it.

EBA Work Programme 2020

This year, the EBA has again presented its work programme for the coming year in the **EBA Work Programme 2020**. Among other things, the EBA work programme includes the strategic supervisory priorities (objectives) and its activities in this regard for 2020. The work programme covers various aspects related to supervision, with which the EBA envisages again taking a step for the achievement of its mission and objectives.

This section does not discuss the entire contents of the work programme. Instead, we limit ourselves to aspects related directly to payment institutions. The EBA states that it also wants to continue to ensure the effective implementation of PSD2 in 2020, as this will be the first full calendar year in which consumers can benefit from a greater range of payment service providers and the increased competition on the market for payment service providers. Also key in this respect is the further harmonisation of supervisory practices for payment services in Europe. With regard to payment service activities, the EBA has put the following activities on the agenda:

- assessing the reports received from the national supervisory authorities under the EBA guidelines for reporting major incidents, and taking action where necessary;
- implementing and managing the EBA register under PSD2 and ensuring that competent authorities keep the information in it up to date;
- monitoring the consistent implementation by the national supervisory authorities and financial institutions of the EBA guidelines on fraud reporting under PDS2 and contributing to the integration of these guidelines in the ECB's upcoming reporting framework;
- assessing the EBA guidelines on data that must be provided for the licensing of payment institutions;
- investigating the need for regulatory or supervisory measures as a result of the fact that the Regulation on interchange fees for card-based payment transactions ((EU) 2015/751) has been added to EBA's area of action; and
- providing payment-related input regarding supra-EBA initiatives.

Lastly, it is important to note that integrity legislation (anti-money laundering and anti-terrorist financing legislation) is a spearhead for the EBA in 2020. This directly affects payment institutions, because these laws and regulations are applicable to them. For more information on this, please see the **Integrity** section of this Outlook.

EBA Report on potential impediments to the cross-border provision of banking and payment services

On 29 October 2019, the EBA published a **report** in which it addresses various potential impediments regarding the provision of banking and payment services in the EU. In essence, the report also touches on other financial institutions and FinTech companies that perform cross-border activities in Europe. This report, which elaborates on the 2018 **EBA FinTech Roadmap**, identifies three regulatory topics for improving and promoting the integration of the European banking and payment services market, namely:

- **Procedures for authorisations and licensing**: in that context, the EBA notes, among other things, that national supervisory authorities take different approaches when it comes to granting licences. The EBA observes that market parties have complained that there are significant differences between national supervisory authorities regarding the regulatory requirements before authorisation can be obtained to be able to provide services (via branches) in the rest of Europe. The EBA also determined that there is insufficient information available publicly to enable financial service providers to understand what their obligations are when offering cross-border services.

- **Consumer protection and conduct of business requirements:** In this context, the EBA specifies that there is a deficit of harmonisation in the area of advertisements and information that financial service providers must provide in their services to consumers. In addition, according to the EBA, the way complaints should be handled is not completely harmonised. According to the EBA, as a result of a lack of clarity regarding the allocation of responsibilities to the home state and the host state supervisory authority, this can lead to blind spots in the supervision and facilitate supervisory arbitration.
- **Legislation for the prevention of money laundering and terrorist financing**: with regard to this section, the EBA notes that Member States deal differently with integrity legislation in the EU and that every Member State applies different standards. As a result of the fact that there is minimum harmonisation under the anti-money laundering directives, Member States have introduced various requirements at national level regarding, for example, customer identification and the acceptance of digital identification standards.

In the report, the EBA mentions various solutions for removing the aforementioned obstacles. Regarding the first section, the EBA proposes to further tighten the obligations in terms of informing the supervisory authorities of the home state and the host state in the case of cross-border activities. In addition, it is expected that the EBA will also devote more guidance to this section via the customary Q&As. According to the EBA, when it comes to diverse requirements in the EU with regard to consumer protection, among other things there must be a further harmonisation of the legal framework for requirements of disclosure to consumers, but also for the allocation of responsibilities to supervisory authorities of both the home state and the host state in terms of handling complaints related to cross-border activities. The EBA proposes, for the facilitation of further harmonisation regarding the prevention of money laundering and terrorist financing, that additional obligations be implemented under various EU directives. Who knows? This could be a step towards a regulation in this area.

The EBA's report clearly shows that the European legislature still has a lot of work to do to achieve further integration of the European financial markets. It is our expectation that the financial regulatory developments will continue at a rapid pace in the years ahead in order to achieve this goal, so that the impediments it identified in connection with cross-border banking and payment services will also be removed for the most part. We await these developments with interest.

EBA Opinion on disclosure to consumers buying financial services through digital channels

EBA published an **opinion** on 23 October 2019 on disclosure to consumers buying financial services through digital channels. The opinion was addressed to the European Commission and contains recommendations. With this opinion, EBA intends to safeguard that the rules on disclosure adequately take account of the increased digital marketing of financial products and financial services. The opinion pertains to the Distance Selling Directive, in which rules have been laid down with regard to the online sale of financial products to consumers. The European Commission is currently evaluating this Directive.

EBA believes that it is of essential importance that consumers are able to make an informed decision on financial products and services. This means that they must have high-quality information that is presented in a timely and appropriate manner. EBA gives recommendations on several subjects, including the following:

- scope and consistency with other disclosure requirements from sector-specific rules (such as PSD2 (Payment Services Directive 2) or the MCD (Mortgage Credit Directive));
- timing of the provision of information;
- presentation of information;
- type of information;
- accessibility of information and effectiveness; and

- review of the effectiveness.

We expect the European Commission to take EBA's recommendations to heart. The European Commission may come up with concrete proposals for adapting the Distance Selling Directive in the course of 2020.

We advise payment service providers that offer their products or services online to consult the EBA's recommendations. It is important not, only from a regulatory point of view but also from a civil law point of view, that consumers have appropriate information regarding products and services.

Amendment EBA outsourcing guidelines

Earlier this year, EBA published **guidelines** on outsourcing by financial institutions. These guidelines provide various governance requirements for outsourcing activities and have entered into effect on 30 September 2019. DNB issued an 'intend to comply' statement regarding these guidelines. The guidelines are an update to the old **CEBS guidelines on outsourcing** (of 2006) and replace the **EBA recommendations on cloud outsourcing**.

Several major changes ensuing from the guidelines include:

- A more detailed definition is given of what is meant by 'outsourcing of critical and important functions', the new name for material outsourcing.
- All outsourcing agreements entered into on or after 30 September 2019 must comply with the new guidelines. A transitional regime applies to all existing outsourcing agreements, pursuant to which the agreements must be adapted in accordance with the guidelines at the next contract award opportunity, but in any event before 31 December 2021.
- Institutions were already required to have outsourcing policies and business continuity plans in place, but the guidelines further specify what these should include.
- Institutions must establish an outsourcing function or appoint a senior member of staff responsible for controlling the risks of the outsourcing arrangements.
- Institutions must keep a register up to date with information on all of the institution's outsourcing arrangements.
- Institutions must take steps to ensure that ethical and social responsibilities are also respected in the case of (sub)outsourcing in third countries.
- The access, information and audit rights of institutions themselves and their supervisors will be further specified. In case of critical or significant functions, both institutions and supervisors must have a full right of access, inspection and audit. In case of 'non-critical or non-significant' outsourcing, institutions may guarantee these rights on a risk-based basis.
- Institutions must report all critical or significant outsourcing agreements to DNB.

We advise payment institutions to take a close look at their outsourcing agreements and outsourcing policy, and to assess whether these comply with the guidelines.

EBA Guidelines on ICT and security risk management

As of 30 June 2020 new **EBA Guidelines on ICT and security risk management** will come into force. These Guidelines shall apply to banks, investment firms and payment service providers and provide details on how these financial institutions should address ICT and security risks in order to comply with the CRD (article 74) and PSD2 (article 95). The Guidelines pertain to:

- Governance and strategy
- ICT and security risk management framework
- Information security
- ICT operations management
- Management of ICT project and alterations to ICT systems
- Business continuity management
- Payment service provider requirements regarding payment service users

The EBA Guidelines on security measures for operational and security risks of payment services (EBA/GL/2017/17) have been integrated, under amendment, in the new Guidelines and will be repealed after the new Guidelines come into force. DNB has **expressed** the intention to notify EBA that she will apply and enforce the new Guidelines in full.

CURRENT LEGISLATION AND REGULATIONS

Further remuneration measures for the financial sector

In response to the Agenda for the financial sector, the Ministry of Finance published the legislative proposal for market consultation on the Act on further remuneration measures for the financial sector in 2019. Significant changes that have been proposed are:

- The introduction of a five-year retention period for shares and comparable financial instruments that are part of the fixed remuneration.
- Tightening of the exception to the 20% bonus cap for employees who are not covered by a collective labour agreement. The proposed tightening makes it explicit that this exception can only be used in exceptional cases and is in any event not an option for those who (i) perform internal control functions or (ii) are directly involved in providing financial services to consumers.
- The introduction of an obligation to describe in the remuneration policy how the undertaking accounts for the relation of the remunerations of managing directors, supervisory directors, and employees of the undertaking to its social function and the way in which this relation has been formed.
- Extension of the supervisory authority's approval period for retention bonuses exceeding 20% of the fixed salary from six to nine weeks.

The planning brief 2020 of the Ministry of Finance shows that the legislative proposal on the Act on further remuneration measures in the financial sector is scheduled for September 2020. In addition to the aforementioned further remuneration measures, this legislative proposal contains several more technical changes to the remuneration rules for the financial sector that originally were part of the proposal for the Financial Markets Amendment Act 2018, as well as the continuation of existing policy pertaining to traders for their own account.

Amendment to the Financial Supervision Funding Decree 2019

It was envisaged that the amending decree to the Financial Supervision Funding Decree (Bbft) 2019 would enter into force on 1 January 2020. However, this decree has not yet been published in the Bulletin of Acts and Decrees. The most relevant point of the decree is that as from its effective date it adjusts the various categories of supervision by which the costs of supervision are apportioned. For the 'payment institutions' supervision category, the 'gross commission income' criterion will apply instead of the 'commission income' criterion.

Integrity legislation (Wwft)

In the past year, European and Dutch supervisory authorities have published a great deal in the area of integrity. At the national level, 2020 will be marked in particular by the implementation of the Fifth Anti-Money Laundering Directive (AMLD5), the UBO register and the legislative proposal on the Anti-Money Laundering Action Plan Act. At the European level, there is an increasingly urgent call for the harmonisation of all anti-money laundering rules and the centralisation of anti-money laundering supervision. For an overview of the consequences of AMLD5, the UBO register and other relevant European developments in the area of integrity, we refer to the Integrity section of this Outlook.

NEW LEGISLATION AND REGULATIONS

Legislative proposal on the Bank Data Retrieval Portal Act

On 10 December 2019 the Legislative proposal on the Bank Data Retrieval

Portal Act was adopted by the House of Representatives. This legislative proposal purports to automate the process of the provision of certain identifying data and other data by banks and other payment service providers, as well as the demanding and retrieving of those identifying data from those banks and other payment service providers by certain government agencies, and thus with a view to ensuring this process runs more efficiently. In this context, a number of amendments to the Financial Supervision Act are envisaged, on the basis of which parties offering accounts with a Dutch IBAN identification number are required to connect to a 'bank data retrieval portal'. This is a technical link that makes it possible for affiliated payment service providers (and banks) to meet certain demands or requests (for information) from government bodies such as FUI-Netherlands and the Tax and Customs Administration in an automated manner. This legislative proposal is in line with the obligation under the Fifth Anti-Money Laundering Directive for each EU Member State to provide a central electronic data retrieval system, which allows timely identification of natural or legal entities who are holders of, or have control over, bank and payment accounts with an IBAN identification number or a bank vault.

Sustainability measures

The past year has seen a great deal of attention devoted to sustainability and climate change. An important development concerns the European legislation and regulations to channel capital flows towards sustainable economic activities. This is done, among other things, by using disclosure requirements for investors in respect of the sustainability of financial products and sustainability labels for benchmarks to facilitate ESG investors. The AFM also intends to bring a focus in its supervision of market conduct in 2020 to sustainability-related disclosure requirements. Another point of attention is the resilience of the financial sector to climate change. We are seeing that climate change and natural disasters are entailing new risks for banks and insurers. The ESAs, the AFM and DNB have been sharing insights and recommendations on the impact on operations and risk management. We expect to see a good deal more about these points for attention and other sustainability-related aspects in 2020. This aspect will have an impact on the operations of many market parties. For an account of the developments in the area of sustainability, see the **Sustainability** section of this Outlook.

Sanctioning powers DNB for IBAN discrimination

The fight against IBAN-discrimination will enter into a new phase since the number of complaints remains undiminished. IBAN-discrimination is the phenomenon by which a paying or receiving party declines to accept a payment towards, or stemming from, a foreign IBAN. IBAN-discrimination mostly occurs in the context of collections, but also in the context of salary payments or cashback offers. A statutory sanctions regime shall enter into force Q1 2020. As of then, DNB will be authorised to impose on infringers an order for periodic penalty payments or an administrative fine.

OTHER DEVELOPMENTS

The consequences of PSD2 for exempted payment service providers

There are a considerable number of payment service providers in the Netherlands that use an exemption from the licensing requirement as a payment institution. That exemption can be used as long as various requirements are met. This includes, among other things, a maximum transaction volume of payments of an average of EUR 3 million per month. The implementation of PSD2 in Dutch legislation also resulted in some changes for exempted payment service providers. These changes pertain primarily to an increase of statutory obligations and pertain in particular to the controlled operation of the company. For example, an exempted payment service provider should compile a risk analysis in which it identifies risks, including operational risks, and describe in more detail how these are managed. At the end of 2019, DNB issued a request to the market, including to exempted payment service providers. In that request, DNB asked market parties to submit their risk analysis in the first quarter of 2020. PSD2 also introduced an obligation for exempted payment service providers to report major incidents that occur within the organisation. Lastly, we state that exempted payment service providers must also comply with integrity legislation as laid down in the Wwft. For more information on this integrity legislation, please see the **Integrity** section of this Outlook.

Despite the fact that exempted payment service providers are exempted from a licensing requirement for offering payment services, they are thus subject to various other statutory requirements to be used for setting up their organisation. DNB held a separate information meeting about this in late November 2019. We were present and concluded that there is currently still a great deal of ignorance among exempted payment service providers in terms of obligations that ensue from the financial supervision law. We therefore strongly recommend that exempted payment service providers take follow-up steps for setting up their organisation accordingly. We expect the number of statutory obligations for exempted payment service providers to further increase in the next few years and that in any event, DNB will keep a close eye on this group of service providers. We believe that at some point, DNB will issue a request to exempted payment service providers. It will be important that an organisation has set up its legal matters properly.

For the sake of completeness, we note that the foregoing also applies to electronic money institutions (EMIs), which in that capacity perform payment services and in that context, utilise an exemption from the licensing obligation they have as an EMI.

Motions and undertakings Minister of Finance

The Minister of Finance submitted **motions and undertakings** in the field of the financial markets autumn 2019 to the House of Representatives. These show which motions have been implemented and what undertakings were made, including for payment services.

The following is relevant for regular or large payment institutions:

- **ACM Report on the Dutch Payment Market - BigTech**: in the autumn of 2019, the Authority for Consumers and Markets (ACM) began monitoring developments on the Dutch payment market in relation to BigTechs. In this context, the ACM will publish a position paper and outline the impact of the possible entry of BigTechs on the payment market, containing (i) a sketch of the theoretical framework of recent developments on the Dutch payment market, (ii) an indication of what BigTechs and digital platforms are, and (iii) a fleshing out of possible scenarios related to the entry of BigTechs to the Dutch payment market. It also identifies what the actual and expected activities of BigTechs on the Dutch payment market are and discusses the possible effects of the arrival of these parties on the Dutch payment market. The ACM is expected to present a final report in mid-2020. The outcomes in this report may serve as a basis for monitoring market conditions at European level as a result of PSD2, as requested in the motion.
- **Evaluation PSD2:** The supervisory authorities have collectively concluded that it is still too soon for an evaluation of PSD2. For an effective evaluation, more PSD2 parties must first be active on the payment market. At present, the experiences with the supervision are too limited and it is not possible to already draw clear conclusions now. The Minister of Finance, along with the supervisory authorities, considers a period of three years after the aforementioned legislation enters into force to be a realistic period for an evaluation of PSD2. The findings of the European Commission (EC) from the 2021 evaluation will be considered in the general evaluation of PSD2 at national level.
- **Developments related to PSD2**: the 2019 annual report by the National Forum on the Payment System (*Maatschappelijk Overleg Betalingsverkeer*, or MOB) will discuss the developments related to PSD2. This annual report is expected in mid-2020 and will then be presented to the House of Representatives.
- **Draft guidelines on relationship General Data Protection Act (AVG) and PSD2**:

we deduce from this document from the Minister of Finance that draft guidelines are being drawn up at European level by the European Data Protection Board (EDPB), about the relationship between the AVG and PSD2. In view of the many overlaps between the two, we believe this is a good development. We will report on this in more detail once developments occur in this area.

ESAs' advice on ICT risk management & cyber resilience

The ESAs published a joint **advice** on ICT risk management and cybersecurity risks in April 2019. The advice is also relevant for payment service providers. According to the ESAs, the increased ICT use in the financial sector requires improved regulation of ICT risk management. To improve ICT risk management, they have presented sectoral and cross-sectoral proposals. We highlight a few of those proposals below.

In respect of sectoral proposals regarding payment service providers, the EBA proposes new PSD2 provisions, with operational resilience as a requirement for operations. Operational stability would address the international connectedness and dependence on technology in the financial sector and the resulting operational disruptions. Emergency plans and continuity plans would be part of this operational stability and it would have to be principle-based operational management and internal control mechanisms.

Some of the cross-sectoral proposals are:

- a proposal to streamline sectoral frameworks for ICT security incident reporting, to be steered by the EC by facilitating the development of harmonised standards and terminology;
- a proposal to the EC to create a supervisory framework, in which activities of third-party providers can be adequately monitored. Since the use of cloud service providers (CSPs) for outsourcing ICT services is increasing and only a few CSPs serve the financial sector, a cyberattack on a CSP could have serious consequences for the financial sector. Current regulations do not address this third-party concentration risk, which is the reason for this proposal.

We advise payment service providers to bear their ICT risk management and related regulations in mind in the year ahead. Although it is not yet possible to say to what extent the proposals will materialise in new legislation and regulations, they now offer some indication of what might be expected from Europe with regard to ICT risk management.

Brexit

For a general picture of the situation regarding Brexit, please see the **General Developments** section of this Outlook.

IMPORTANT INFORMATION FOR FINANCIAL SERVICE PROVIDERS (SUCH AS ADVISERS AND INTERMEDIARIES)

This section deals with important developments in 2020 for financial service providers. This aggregate category includes advisers and intermediaries in financial products, such as insurance and credit facilities. Providers of consumer credit and insurers are also deemed financial service providers under the terms of the Dutch Financial Supervision Act (*Wet op het financieel toezicht,* Wft). Developments for these providers of consumer credit are included in a separate section of the Finnius Outlook. The developments in the area of FinTech and alternative financing that are relevant for financial service providers will be discussed in the section of this Outlook of the same name, FinTech and Alternative Financing. In addition, there are other specific sections in this Outlook that may naturally be relevant for financial service providers.

AFM SUPERVISION

AFM Trend Monitor 2020

On 10 October 2019, the AFM published its annual analysis of trends and developments in the financial markets, **Trend Monitor 2020**. In this report, the AFM identifies trends that have an impact on its supervision in 2020, and supervision themes that the AFM considers important in 2020. Although Trend Monitor 2020 does not yet contain any specific actions, or policy or legislation wishes of the AFM – these will become known when the AFM Agenda 2020 and the long-term strategy 2020-2022 are published in early 2020 –, Trend Monitor 2020 gives a certain indication of what financial service providers should expect in 2020. This pertains to, among other things, the increasing digitisation of retail financial services. This has made it easier for consumers to purchase a financial product, and services can be personalised more easily. However, this is not without risks. For example, the AFM believes that the risk of unsuitable products being purchased is increasing, because, as a result of digitisation and the use of data, the possibilities of intricately targeting consumers and reacting to biases in decision-making are increasing. The AFM continues to maintain a critical attitude towards customers' interests.

Compliance with professional competence requirements

The AFM and the Education Implementation Service (*Dienst Uitvoering Onderwijs*, DUO) signed a **cooperation agreement** on 21 November 2019. As a result of this cooperation agreement DUO will administer an information system with details on the competence of employees and natural persons working under the responsibility of, inter alia, financial service providers. This is particularly relevant for financial service providers who also provide advisory services, because with regard to this group it is mandatory to prove professional competence by means of Wft diplomas: guaranteeing professional competence as part of the business activities (for example with internal courses) is not sufficient for financial service providers for advisory services. From now on the AFM can request diploma details from DUO and consequently immediately check whether the persons working with financial service providers who provide advisory services possess the diplomas required by law. You can thus assume that the AFM will be checking this in the coming year.

Market Monitor advisers and intermediaries

In the spring of 2020, advisers and intermediaries must once again complete a Market Monitor and submit it to the AFM. That was not required in 2019, but it will be again next year. In 2019, the AFM revised the questionnaire, so there is a possibility that the Market Monitor 2020 will be more extensive than before.

Principles for information security

At the end of December 2019, the AFM published its **Principles for Information Security** after having incorporated the comments and recommendations received on the subject during the **consultation period** in May 2019.

The AFM provides eleven principles that define expectations in the realm of information security. These are a set of rules that are not new, and which serve as mechanisms for compliance with the legal standards with respect to operations under the Financial Supervision Act, MiFID II, the Audit Firms Supervision Act and European regulations. In view of the increasing impact of technology in our daily lives, the rise of cyber-based threats, and issues of integrity and confidentiality in the handling of client data, the AFM expects fund managers, investment firms, financial services providers and all actors in the financial sector to act with due care with regard to information security risks. In essence, this means that there are three basic principles to be observed (an up-to-date information security policy, a governance structure that facilitates information security, and a risk identification and assessment), which in turn dictate four principles (with respect to people & culture, technology, operating processes and physical security), and that data must be adequately secured (principle nine). The last three principles are incident management, information security in outsourcing situations, and the information chain.

Based on the responses received during the consultation period, the AFM has produced a **feedback statement** linked to these principles, expressing the expectation that undertakings must strive for a proportional application of the eleven principles. This means that in consideration of the size of the undertaking and nature of services, smaller parties may be subject to less onerous information security measures. With regards to undertakings subject to DNB regulation, the AFM shall, where necessary, apply the Information Security Principles in line with DNB's Good Practice on Information Security. It should be noted here that the AFM states that undertakings that apply the ESMA information security framework should theoretically already be in compliance with the AFM's expectations.

Renewed service document generator

Providers, intermediaries and advisers are obliged to furnish a standardised service document (*dienstverleningsdocument*, DVD) to the consumer for products that fall under the inducement ban. The DVD must always be up to date. The DVD will no longer be up to date if the service concept changes or if the number of products available on the market (the benchmark) changes. The AFM **announced** in November 2019 that it had renewed the benchmark of the DVD generator, which is available via the AFM's Digital Portal. Consequently financial service providers might have to adjust their DVD. We therefore advise financial service providers to check whether their DVD is still accurate.

Consultation on Suitability Policy Rule

On 14 June 2019, the AFM and DNB presented the proposed amendments to the Suitability Policy Rule 2012 (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: the **2019 draft decree** to amend the Suitability Policy Rule 2012 and the **draft amended text** of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework that DNB and the AFM use in the suitability assessments of policymakers in the financial sector. DNB and the AFM have amended the Policy Rule in response to changes in national and European legislation and regulations. Market parties could respond to the consultation until 1 September 2019.

Below we briefly discuss the most important amendments to the Draft Policy Rule from the perspective of consumer credit providers:

- DNB and AFM have chosen to clarify that the suitability topic 'balanced and consistent decision-making' also means that policymakers act with independence of mind;
- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences: Because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the AFM and DNB have decided to explicitly include the requirement of 'sufficient time' under the suitability requirements in the Draft Policy Rule. In addition, a separate section has been included in the explanatory notes about what AFM and DNB mean by sufficient time;
- The old Policy Rule includes an exception for small companies because the requirements of managerial skills in a hierarchical relationship could be too restrictive for these types of undertakings. In the Draft Policy Rule it has been added that the nature, size and complexity of the company must also be taken into account in deciding whether or not to employ the exception so that the AFM and DNB can include more circumstances in their consideration.
- The Draft Policy Rule also clarifies how a policymaker of a small consumer credit provider can demonstrate suitability. If the policymaker does not have a higher professional education diploma following a course that is relevant for the undertaking, it is important for the policymaker to have gained experience in a relevant working environment. These activities must have

taken place consecutively in a specific period.

The Policy Rule will take effect in 2020.

CURRENT LEGISLATION AND REGULATIONS

Amendment of examination targets for professional competence under the Wft 2020

From 4 October 2019 to 1 November 2019 the Ministry of Finance presented a paper on the Amendment of examination targets for professional competence under the Wft 2020 for **consultation** because of current events observed by the Expertise in Financial Services Board (*College Deskundigheid Financiële Dienstverlening*, CDFD). The regulation presented for consultation seeks to update the Regulation on examination targets financial services Wft – which regulates what examination targets apply for the various Wft exams in the framework of the professional competence requirements – in connection with developments for the new PE (permanent education) year, which starts on 1 April 2020.

A development which recurs in this amendment regulation is the experience which has been gained with a review of knowledge on data protection since the entry into force of the General Data Protection Regulation (GDPR), AMLD4 and AMLD5. An amendment is also necessary on account of an amendment in the National Regime after the entry into force of MiFID II (see in this respect our **Outlook 2019**). We refer to a more detailed overview of the amendments to the **overview** of the CDFD.

PRIIPs Regulation

Amendments to PRIIPs Regulation

In the **Outlook 2019** we reported on the consultation paper of 8 November 2018 that was jointly published by the ESAs and that pertained to amendments to the PRIIPs Delegated Regulation. However, these amendments were ultimately never implemented. In February 2019 the ESAs published a **Final Report** containing a summary of responses received during the consultation period and the follow-up steps to be taken. The report shows that the ESAs no longer considered the 'rapid' but drastic amendments to the PRIIPs Delegated Regulation as proposed in 2018 to be appropriate. Consultation respondents generally did not agree with the proposed amendments, in particular with regard to the implementation of amendments before the more comprehensive PRIIPs review by the EC had taken place. Moreover, immediately following the consultation period the EC extended the temporary exception to the KID obligation for UCITSs (which was originally set to expire on 31 December 2019, thus necessitating the 'rapid' change proposal of 2018) until 31 December 2021. Consequently, instead of the 'rapid' amendments of 2018 the ESAs have decided to conduct a more integral review in 2019. This has resulted in a consultation paper that proposes more substantial amendments:

- **Performance scenarios for the future**: in early 2019 the ESAs issued a **joint supervisory statement** addressing the risk of too positive performance scenarios through recommendations to developers and national supervisory authorities. Following on from these recommendations, the consultation paper now proposes the following:
    - a simplification of the information to be provided by removing the 'stress scenario' and 'moderate scenario' from the list of the four performance scenarios that PRIIP developers must use to illustrate the performance of the PRIIP, and
    - a revised methodology for estimating future performance and a compensation system for unforeseen failure of the methodology. According to the ESAs, this revised methodology would lead to a more realistic representation of future returns.
- **Information about past performance**: ESAs propose rules on the basis of which information on past performance should be provided for PRIIPs offered by certain UCITS,

AIFs and certain insurance-based investment products.

- **Transaction costs**: with regard to the calculation and presentation of transaction costs, the ESAs consider changes so that all relevant costs are included and the products can be better compared by investors. This concerns:
  - substantial amendments to the cost table to be included in a KID, including improved compatibility with the disclosure requirements of MiFID II and a more specific description of the type of costs that must be disclosed.
  - adjustment of some methodologies for the disclosure of transaction costs arising from the purchase and sale of the underlying investments of a PRIIP.
- **PRIIPs with multiple investment options**: the ESAs consider that in respect of PRIIPs with multiple investment options, PRIIP developers must from now on provide more detailed information about at least four of the most relevant investment options, together with more general information about the other investment options. They are also considering further adjustments to the KID for this type of PRIIP, including an explanation indicating whether all costs are shown or not.
- **The expiry of the UCITS exception**: finally, the ESAs are considering changes in preparation for the UCITS exception ending 31 December 2021. More specifically, the ESAs consult on which elements of the Key Investor Information Regulation (Implementing Regulation (EU) 583/2010 as regards key investor information) should be included in the PRIIPs Delegated Regulation to address potential bottlenecks.

Stakeholders had until 13 January 2020 to respond to the consultation paper. The ESAs expect to have assessed the responses and submit their ultimate amendment proposals to the EC in the first quarter of 2020. Depending on what happens in the European legislative procedure, the proposals could take effect in 2021.

We advise market parties to pay close attention to the developments surrounding the PRIIP regulations and the KID. Additionally, we recommend checking whether all KIDs currently comply with the additional disclosure requirement set out in the ESAs' joint supervisory statement.

Regulatory Technical Standards KID

In its **Work Programme** for 2020, the Joint Committee of the European Supervisory Authorities (ESAs) expressed the intention to evaluate the PRIIPs Regulation, and in February 2020 intends to make proposals for amendments to (in part) the KID in the form of Regulatory Technical Standards (RTS).

Amendment to the Financial Supervision Funding Decree 2019

It was envisaged that the **amending decree** to the Financial Supervision Funding Decree 2019 would enter into force on 1 January 2020. However, the amending decree has not yet been published in the Bulletin of Acts and Decrees. The most relevant point of the decree is that from its effective date it adjusts the criterion for the supervision category 'advisers and intermediaries' by which the costs of supervision are apportioned: for advisers and intermediaries, the criterion 'revenue' will apply instead of 'number of persons employed'.

Further remuneration measures for the financial sector

In response to the **Agenda for the financial sector**, the Ministry of Finance published the **legislative proposal** for market consultation on the Act on further remuneration measures financial sector (*Wet nadere beloningsmaatregelen financiële sector*) in 2019. Significant changes that have been proposed are:

- The introduction of a five-year retention period for shares and comparable financial instruments that are part of the fixed remuneration.
- Tightening of the exception to the 20% bonus cap for employees who are not covered by a collective labour agreement. The proposed tightening makes it explicit that this exception can only be used in exceptional cases and is in any event not an

option for those who (i) perform internal control functions or (ii) are directly involved in providing financial services to consumers.
- The introduction of an obligation to describe in the remuneration policy how the undertaking accounts for the relation of the remunerations of managing directors, supervisory directors and employees of the undertaking to its social function and the way in which this relation has been formed.
- Extension of the supervisory authority's approval period for retention bonuses exceeding 20% of the fixed salary from six to nine weeks.

The **letter** of the Ministry of Finance on its timetable for the upcoming period shows that the legislative proposal for the Act on further remuneration measures financial sector is scheduled for September 2020. In addition to the aforementioned further remuneration measures, this legislative proposal contains several more technical changes to the remuneration rules for the financial sector that originally were part of the proposal for the Financial Markets Amendment Act 2018, as well as the continuation of existing policy pertaining to traders for their own account.

Regulatory Technical Standards professional liability insurance IDD

Fixed basic amounts have been included in the **Insurance Distribution Directive** for the mandatory professional liability insurance and the financial capacity of insurance and reinsurance intermediaries. The EIOPA was therefore instructed to review these basic amounts on a regular basis (in 2018 for the first time and then every five years) in order to take changes in consumer prices into account. According to the EIOPA's Regulatory Technical Standards, the prices rose by 4.03% in the period from 1 January 2013 through 31 December 2017. The basic amounts must therefore be adjusted accordingly and that is arranged in this **delegated regulation**. As we are talking about the amendment of a directive, Member States will be given time to adjust this and this regulation will enter into force on 12 June 2020.

Consultation on Amendment regulations on transfer of credit claims and change of coverage amounts under professional liability insurance

On 24 December 2019, the Ministry of Finance opened a **consultation period** on an amendment to the Exemption Regulations under the Financial Supervision Act in connection with changes to the provisions relating to the transfer of claims under a credit agreement. Additionally, the consultation period pertains to a change of the Wft Implementing Regulations in connection with the increase of the amounts of coverage of professional liability insurance for insurance advisers and intermediaries and reinsurance intermediaries.

If claims under a credit agreement are transferred to an investor (commonly an institutional investor), and that investor has not itself signed the credit agreement with the consumer, then the investor is exempt from the licence obligation as a credit provider if the credit provider that has signed the agreement with the customer continues to manage and execute the credit agreement. By this change the Ministry intends to prevent institutional investors from having to apply for a licence as a credit provider, and to clarify that the original provider can continue to manage and execute the agreement on the basis of its licence as a provider of credit.

Responses can be submitted up to 16 February 2020. The change is scheduled to take effect on 1 April 2020.

Integrity legislation (Wwft)

In the past year, European and Dutch supervisory authorities have published a great deal in the area of integrity. At the national level, 2020 will be marked in particular by the implementation of the Fifth Anti-Money Laundering Directive (AMLD5), the UBO register and the legislative proposal on the Anti-Money Laundering Action Plan Act. At the European level, there is an increasingly urgent call for the harmonisation of all anti-money laundering rules and the centralisation of anti-money laundering supervision. For an overview of the consequences of AMLD5, the UBO register and other relevant European developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

NEW LEGISLATION AND REGULATIONS

No prohibition on tying insurance as a supplement to payment account

As a result of the entry into force of the **Financial Markets Amendment Act 2019** on 1 January 2020, the provisions regarding tying for insurance have changed.

In Articles 4:63a(1) and 4:75a(1) Wft, it was determined that if an insurance is a supplement to the supply of a movable property or the provision of a service, the insurer or insurance intermediary must offer the customer the option of purchasing the movable property or service without insurance. However, on the basis of Article 24(3) of the Insurance Distribution Directive, this obligation does not apply to payment accounts (= a payment service). The third paragraph therefore stipulates that Articles 4:63a and 4:75a respectively, do not apply to insurance policies as a supplement to a payment account. If a payment account is offered with an insurance policy (for example, a purchase protection insurance) then the customer does not have to be offered the option to take the payment account without insurance.

Sustainability measures

The past year has seen a great deal of attention devoted to sustainability and climate change. An important development concerns the European legislation and regulations to channel capital flows towards sustainable economic activities. This is done, among other things, by using disclosure requirements for investors in respect of the sustainability of financial products and sustainability labels for benchmarks to facilitate ESG investors. The AFM also intends to bring a focus in its supervision of market conduct in 2020 to sustainability-related disclosure requirements. Another point of attention is the resilience of the financial sector to climate change. We are seeing that climate change and natural disasters are entailing new risks for banks and insurers. The ESAs, the AFM and DNB have been sharing insights and recommendations on the impact on operations and risk management. We expect to see a good deal more about these points for attention and other sustainability-related aspects in 2020. This aspect will have an impact on the operations of many market parties. For an overview of the developments in the area of sustainability, see the **Sustainability** section of this Outlook.

OTHER DEVELOPMENTS

No division into three categories of financial service providers who provide advisory services

On 18 October 2019, the Minister of Finance submitted an **overview** to the House of Representatives regarding how he executed motions and undertakings in the field of the financial markets. This included the Minister's proposal to divide financial service providers who give advice into three categories. In early 2019, in a **letter** to the House of Representatives, the Minster had stated that he wanted to prescribe requirements for financial service providers who advise regarding complex products, with which an adviser providing independent advice must comply. He proposed distinguishing three types of advisers: (i) independent advisers, (ii) independent advisers (unaffiliated advisers that do not compare a sufficient number of products) and (iii) advisers working for a bank or insurer. Because various parties have indicated that the proposed division into three categories would not offer much clarity for consumers, the Minister abandoned this proposal.

The Minister did indicate that he would be taking further steps to make the information in the financial services document more effective. For example, he will investigate how consumers can be best informed regarding whether the advice is independent and the underlying characteristics of advisers who determine whether or not the advice is independent. We expect this to lead to an amendment of the financial services document.

Obligation to apply behavioural insights when providing services

General

A clear theme in supervision in recent years has been the emphasis on the application of behavioural insights by financial undertakings. The idea behind this is that for a long time the prevailing view has been that if you provide consumers with the right information, they automatically make appropriate – rational – decisions. In practice, however, this theoretical view of a human being who thinks and acts rationally does not hold true in many situations. Consumers often have limited time, motivation and ready knowledge, and choices are made quickly and more intuitively. Precisely because a decision is made on a partly intuitive basis, the way in which choices are presented has a powerful steering effect. Consequently, there are so many developments in this area, as will be discussed in more detail below.

AFM's expectations with regard to the choice architecture

On 21 November 2019, the AFM presented the market with a consultation paper containing **principles for the choice architecture**. In this policy document, the AFM outlines its expectations about the way in which consumers are offered choices in their financial decision-making process. The choice architecture can (unintentionally) influence the choices a consumer makes. The AFM has established twelve principles which describe its expectations on the set-up of the choice architecture. The principles are not new rules, but contain starting points on a topic which is founded on different statutory standards which are supervised by the AFM. This consultation period ran until 16 January 2020.

The policy document will be adjusted on the basis of the responses and where necessary. The AFM will then publish it on its website. A 'feedback statement' will also be published, in which it is indicated what the AFM has done with the responses to the consultation. The definitive 'Principles for Choice Architecture' will therefore be published at the beginning of 2020. Financial service providers must then determine the extent to which they must incorporate these principles into their choice architecture.

Guidelines on the Protection of Online Consumers (ACM)

On 3 December the Netherlands Authority for Consumers & Markets (*Autoriteit Consument & Markt*, ACM) published the 'Guidelines on the Protection of Online Consumers – Boundaries of Online Persuasion' for consultation. The AFM has stated that it **endorsed** the principles laid down in these guidelines because many of the points are also relevant to financial undertakings. The AFM cites the following three elements:

- **Artificial scarcity can be misleading**: By creating a sense of urgency in consumers by means of supposed 'scarcity' ('this offer is only available for a limited time') consumers will make a choice more quickly and are more likely to make a purchase. In the Information Provision Policy Rule the AFM addresses misleading trade practices in relation to financial services or activities.
- **Default settings influence choice**: How a choice is offered, is never neutral and always steers people in some way. The default setting can - rightly or wrongly – be very determinative.
- **Misleading ranking:** The ACM also mentions examples where the ranking of online products is not based on the consumer's interests. The AFM points out that this also applies, for example, to financial comparison sites. Most comparison sites first display a paid-for Top 3 after making a comparison. The AFM does not believe a 'paid-for' Top 3 is desirable. The ranking of an offer may not be misleading.

In the Guidelines, the ACM hints that where 'seduction turns into deception' there could even be a misleading trade practice of the financial undertaking (conflict with the professional commitment duty) and thus a wrongful act. The importance for market parties of taking these guidelines seriously has consequently found its way into the domain of civil law. This consultation period ran until 16 January 2020. The ACM wants to establish the definitive guidelines shortly after that.

MinFin Action Plan on consumer choices

MinFin endorses the AFM's view that application of behavioural insights is important in the financial sector. In its recently published **Action Plan Consumer Choices** it again calls for market parties to jointly tackle the consumer choices issue. The Minister states that advice and appropriate information with a view to action that is visible and available, at the time when consumers have to make certain choices, is important. Financial undertakings, consumer organizations, financial advisers and comparison sites play an essential role in this respect, according to the Minister.

EBA Opinion on disclosure to consumers buying financial services through digital channels

EBA published an **opinion** on 23 October 2019 on disclosure to consumers buying financial services through digital channels. The opinion was addressed to the European Commission and contains recommendations. With this opinion, EBA intends to safeguard that the rules on the disclosure adequately take account of the increased digital marketing of financial products and financial services. The opinion pertains to the Distance Selling Directive, in which rules have been laid down with regard to the online sale of financial products to consumers. The European Commission is currently reviewing this directive.

EBA believes that it is of essential importance that consumers are able to make an informed decision on financial products and services. This means that they must have high-quality information that is presented in a timely and appropriate manner. EBA gives recommendations on several subjects, including the following:

- scope and consistency with other disclosure requirements from sector-specific rules (such as PSD2 (Payment Services Directive 2) or the MCD (Mortgage Credit Directive));
- timing of the provision of information;
- presentation of information;
- type of information;
- accessibility of information and effectiveness; and
- review of the effectiveness.

We expect the European Commission to take EBA's recommendations to heart. The European Commission may come up with concrete proposals for adapting the Distance Selling Directive in the course of 2020.

We recommend that market parties offering their products or services online consult the recommendations of EBA. It is important not only from a regulatory point of view but also from a civil law point of view that consumers have appropriate information regarding products and services. Furthermore, the provision of digital services is also one of the AFM's priorities.

EIOPA warning to travel insurance industry

In a recent **report**, EIOPA warned of consumer protection issues that it is seeing with regard to the travel insurance market. In the report, EIOPA examines problematic business models with pay structures based on extremely high commissions and extremely low claim ratios, which means that consumers get little value for money. Insurers should review their product offering and approval process to ensure that products offer consumers fair value and are suitable to meet consumer needs. The distribution agreements with intermediaries should also be reviewed to assess whether they are fair and in the best interest of the consumer. EIOPA and national supervisors will closely monitor this and risk-based supervision in this area will be intensified.

Attention for abuse by debt collection agencies

On 8 February 2019 the government **announced** – in line with agreements from the coalition agreement – that it would be tackling the abuses in the debt collection market. This is part of the government's comprehensive approach to tackling debt and poverty. One of the intended measures is the introduction of a debt collection agency register in which debt collection agencies must be listed. Registration in the debt collection agency register will be a prerequisite for allowance to operate as a debt collection agency. Only if certain requirements are satisfied which relate, inter alia, to the quality of the work to be executed and the running of the business and the professional interaction with debtors, will a party be granted consent to operate on the debt collection market.

There will be different sanction options, including being able to impose a fine and cancellation of the registration if a debt collection agency does not satisfy the prescribed requirements. The legislative proposal establishing the debt collection agency register is currently being drafted. The Minister for Legal Protection indicated in a **letter** on 8 February 2019 that he assumes that the debt collection agency register will be up and running in the middle of 2021. In any event, the AFM already has a **special webpage** which guides consumers when they wish to lodge a complaint regarding a debt collection agency which has been engaged by a financial undertaking.

Brexit

For a general picture of the situation regarding Brexit, please see the **General Developments** section of this Outlook.

IMPORTANT INFORMATION FOR FINTECH & ALTERNATIVE FINANCING IN 2020

AFM SUPERVISION

AFM Trend Monitor 2020

On 10 October 2019, the AFM published its annual analysis of trends and developments in the financial markets, **Trend Monitor 2020**. In this report, the AFM identifies trends that have an impact on its supervision in 2020, and supervision themes that the AFM considers important in 2020. Although Trend Monitor 2020 does not yet contain any specific actions, or policy or legislation wishes of the AFM - these will become known when the AFM Agenda 2020 and the long-term strategy 2020-2022 are published in early 2020 -, Trend Monitor 2020 gives a certain indication of what market parties should expect in 2020.

In its Trend Monitor 2020, the AFM identifies five important trends that result in points of attention for AFM supervision. One of those is particularly relevant for FinTech parties and pertains to the digitisation of the financial sector. In this context, the AFM identifies the following trends:

- **Collection and use of data**: collecting, processing and using data in an increasingly greater and more advanced manner is currently the driving force behind innovation in the financial sector.
- **Existing players and BigTechs**: the AFM points out that FinTechs are primarily complementary and cooperative with the existing financial institutions and not so much competitive and disruptive. Start-ups often do not have sufficient scale to obtain a position in the market and compliance costs are also a barrier to this. FinTechs do seem to be acquiring an independent position on the market for payment services and mortgage lending to start-ups. The BigTechs seem to be moving towards the regulated financial market, and Libra is cited as an example. Incidentally, the AFM is devoting quite a lot of attention to the Libra as a stable coin. In view of recent developments, in which various cooperation partners abandoned their support for the Libra, it is still very much the question of whether the Libra will ever be launched.
- **Digitisation of the capital market**: the automated electronic trade in financial instruments is increasing. In principle, this development is positive for the market because of cost savings, but there are also risks, such as the management of operational risks and IT risks of trading platforms, the management of trade algorithms in volatile markets and the supervision of market abuse in very fast-acting international markets.
- **Role of external suppliers**: external parties, such as software developers and cloud providers, play an important role in financial services. It is important for the institution to control the services it provides, even if parts of that have been outsourced to third parties, and to be aware of the risks that may be involved. The AFM devotes attention to this in the supervision.
- **Cyber incidents**: the threat of cyberattacks continues to be very high and the number of cyber incidents seems to be increasing, which underscores the importance of cyber security measures. The AFM supervises operational and IT risks. Pursuant to this task, the AFM drew up **Principles for information security** in which the AFM gives the expectations of the information security of financial institutions.

In addition to the aforementioned aspects of the digitisation, the AFM also specifically discusses the digitisation of retail financial services in its Trend Monitor 2020. The AFM considers the rise of digitisation positive, but does give attention to the risks. For example, the AFM points out developments in the area of the semi-automation of asset management, an increase in execution-only services and the use of advisory software for (investment) advice and touches upon points of attention.

A major risk is that the increasing ease with which financial products can be purchased and the personalisation of financial products can lead to non-suitable products for consumers. The possibility that digitisation offers to be able to specifically target consumers and to react to biases in decision-making plays an important role in this. According to the AFM, this is quite visible at the perimeters of the regulated financial sector. For example, in the case of crypto-assets, consumers are encouraged, while being given limited information, to buy, and in the case of binary options and CFDs (contracts for difference), they are encouraged to continue trading. The AFM will monitor these developments and will regularly speak with parties wishing to launch new (digital) services on the market and states what it expects from the market in all sorts of various communications.

Experiences and Insights InnovationHub & Regulatory Sandbox

On 28 August 2019, the AFM and DNB **published** a report containing lessons learned after three years of InnovationHub and Regulatory Sandbox. A total of 650 queries were answered in this period, in particular regarding crypto-assets and PSD2. One general finding is key: dialogue, both with the market and internally, is very important when responding to innovation in the financial sector. The InnovationHub and Regulatory Sandbox contributed to that. The AFM and DNB mention nine lessons learned:

- There is a need for an easily accessible point of contact for innovation;
- The InnovationHub, Regulatory Sandbox and regular supervision mutually reinforce each other;
- The InnovationHub reduces uncertainty about financial supervision;
- New legislation or policy is often not necessary;
- The multitude of laws and regulations is a barrier for market participants;
- Interpreting rules or policies can be a bespoke solution;
- Sometimes the market calls for more clarity than can be swiftly provided;
- The term 'sandbox' is confusing; and
- The provision of information is essential.

Each of these lessons learned is explained in more detail, but it would be outside the scope of this Outlook to discuss these in more detail. The AFM and DNB also formulate a number of follow-up steps in the report, including (i) more emphasis on the provision of information, (ii) reinforcing the cooperation between supervisory authorities and experts, (iii) launching the iForum, with which DNB wants to discuss the subject of technological innovation in the financial sector proactively and across the sector (iv) and maintaining alignment with international initiatives.

Consultation on Suitability Policy Rule

On 14 June 2019, the AFM and DNB presented the proposed amendments to the Suitability Policy Rule 2012 (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: the **2019 draft decree** to amend the Suitability Policy Rule 2012 and the **draft amended text** of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework that DNB and the AFM use in the suitability assessments of policymakers in the financial sector. DNB and the AFM have amended the Policy Rule in response to changes in national and European legislation and regulations. Market parties could respond to the consultation until 1 September 2019.

We will briefly discuss the main amendments to the Draft Policy Rule below:

- Persons who exclusively qualify as an applicant of a declaration of no objection will be excluded from the amended application of the Policy Rule. The reputations of those persons will be assessed with due observance of the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, adopted by the European Supervisory Authorities consisting of EBA, EIOPA and ESMA (**link**).
- In the Draft Policy Rule, payment institutions and e-money institutions are transferred from group C to group A. This means that for this group of financial institutions, the suitability is determined based on a principle-based framework instead of a rules-based framework. As a result of this change, the AFM and DNB can apply customisation to the assessments, while it is possible to take into account the constellation within both large, complex and small start-ups.
- DNB and AFM have chosen to clarify that the suitability topic 'balanced and consistent decision-making' also means that policymakers act with independence of mind;

- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences: Because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the AFM and DNB have decided to explicitly include the requirement of 'sufficient time' under the suitability requirements in the Draft Policy Rule. In addition, a separate section has been included in the explanatory notes about what AFM and DNB mean by sufficient time;
- For policymakers of investment firms (and data reporting service providers) additional requirements have been included in the Draft Policy Rule. For example, among other things, a policymaker must be able to take its own sound, objectively autonomous decisions and form opinions when carrying out the tasks and responsibilities;
- The Draft Policy Rule also states that significant and/or listed investment firms must have sufficient policymakers that are qualified as independent;
- The old Policy Rule includes an exception for small companies because the requirements of managerial skills in a hierarchical relationship could be too restrictive for these types of undertakings. In the Draft Policy Rule it has been added that the nature, size and complexity of the company must also be taken into account in deciding whether or not to employ the exception so that the AFM and DNB can include more circumstances in their consideration.
- The (indirectly) authorised agent was included in the Draft Policy Rule in the summary of financial undertakings whose policymakers must have general and specific subject matter expertise. The AFM and DNB state that, because this involves rule-based standards, this amendment will not affect policymakers who, based on the current principles (= under the old Policy Rule) have already been found to be suitable. The amendment also means that the (indirectly) authorised agent is exempted from section 2.8 (small financial service provider) of the Draft Policy Rule;
- The Draft Policy Rule also clarifies how a policymaker of a small financial service provider can demonstrate that he is suitable. If the policymaker does not have a higher professional education diploma following a course that is relevant for the undertaking, it is important for the policymaker to have gained experience in a relevant working environment. These activities must have taken place consecutively in a specific period.

The Policy Rule will in principle take effect in 2020.

Principles for information security

At the end of December 2019, the AFM published its **Principles for Information Security** after having incorporated the comments and recommendations received on the subject during the **consultation period** in May 2019.

The AFM provides eleven principles that define expectations in the realm of information security. These are a set of rules that are not new, and which serve as mechanisms for compliance with the legal standards with respect to operations under the Financial Supervision Act, MiFID II, the Audit Firms Supervision Act and European regulations. In view of the increasing impact of technology in our daily lives, the rise of cyber-based threats, and issues of integrity and confidentiality in the handling of client data, the AFM expects fund managers, investment firms, financial services providers and all actors in the financial sector to act with due care with regard to information security risks. In essence, this means that there are three basic principles to be observed (an up-to-date information security policy, a governance structure that facilitates information security, and a risk identification and assessment), which in turn dictate four principles (with respect to people & culture, technology, operating processes and physical security), and that data must be adequately secured (principle nine). The last three principles are incident management, information security in outsourcing situations, and the information chain.

Based on the responses received during the consultation period, the AFM has produced a **feedback statement** linked to these principles, expressing the expectation that undertakings must strive for a proportional application of the eleven principles. This means that in consideration of the size of the undertaking and nature of services, smaller parties may be subject to less onerous information security measures. With regards to undertakings subject to DNB regulation, the AFM shall, where necessary, apply the Information Security Principles in line with DNB's Good Practice on Information Security. It should be noted here that the AFM states that undertakings that apply the ESMA information security framework should theoretically already be in compliance with the AFM's expectations.

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DNB SUPERVISION

DNB Guidelines for artificial intelligence in financial sector

On 25 July 2019, DNB published a **discussion paper** containing guidelines for the use of artificial intelligence (AI).

DNB has established that financial undertakings increasingly use AI to improve their business processes, products and services. DNB indicates that financial undertakings can improve their existing business processes and deliver new added value by using AI. At the same time, incidents with AI, certainly if this technology is not used responsibly, can harm a financial undertaking and its customers – with potentially serious consequences for the reputation of the financial system as a whole. DNB sees that due to the interwovenness of the financial system, such incidents may ultimately even have an impact on financial stability. That is why it is important that financial undertakings use AI in a responsible manner, i.e. based on controlled and ethical business operations.

In DNB's opinion, responsible use of AI in the provision of financial services means that when developing applications, undertakings must take into account aspects, such as soundness, accountability, fairness, ethics, skills and transparency (SAFEST). DNB indicates that as the use of AI becomes more important in the decision-making process of a financial undertaking, and the potential consequences of this for the undertaking and its customers become greater, the bar for a responsible and transparent use of AI will be higher. In its supervision of financial institutions, DNB will explicitly monitor this and will further investigate the main aspects of the use of AI.

DNB emphasises that this discussion paper contains a provisional view with regard to the responsible use of AI in the financial sector. DNB is of the opinion that the issues and ideas discussed in this document would benefit from a broader discussion, and has therefore called on relevant stakeholders to share their comments and suggestions with DNB. DNB has stated that it will report on the outcome of this process in the course of 2020.

DNB establishes iForum

At the end of last year, DNB established iForum (see DNB **news item**). This initiative is intended to improve cooperation across the sector on innovations in technology. As part of this, in the coming year DNB will be launching the iPanel (innovation panel at administrative level), setting up a virtual platform to facilitate information-sharing and cooperation, and will be starting up its first concrete activities in the first quarter of 2020. The working arrangements and a roadmap have been developed in collaboration with representatives from banking, insurance, pension and payment institutions. For more information about the cooperation envisioned by DNB, and to register for iForum, see the DNB news item. Market parties with an interest in participating in iForum are invited to contact DNB.

INTERNATIONAL DEVELOPMENTS

ESMA Work Programme 2020

On 26 September 2019, ESMA published its work programme for 2020: **ESMA Work Programme 2020.** In that programme, ESMA discusses its main supervision priorities for 2020. These priorities are relevant for various types of financial market parties, including FinTech companies, investment firms, managers of investment institutions and central counterparties. As a result of the expansion of ESMA's powers, its work programme focuses on achieving further harmonisation in its supervisory tasks. Below, we will discuss a number of objectives from the work programme that are relevant for or directly related to FinTech companies:

- Identifying opportunities and risks related to financial innovation and the systematic monitoring of retail trends and developments.
- Bringing about a coordinated approach related to regulations and supervision practice of new or innovative financial activities and advising EU institutions, market parties and consumers.
- Ensuring a harmonised approach with regard to the identification of products regarding which product intervention can or must be carried out based on MiFIR.

Much of the output related to these objectives consists of monitoring trends and developments in these areas. ESMA specifically intends to issue guidelines in 2020 related to cloud service providers. Cybersecurity and (cloud) outsourcing are important topics when it comes to supervision, the importance of which we expect to increase. We advise market parties involved in this in practice to closely monitor these developments.

EBA Work Programme 2020

This year, the EBA (European Banking Authority) has again presented its work programme for the coming year (2020) in the **EBA Work Programme 2020**. Among other things, the EBA work programme includes the strategic supervisory priorities (objectives) and its activities in this regard for 2020. The work programme covers various aspects related to supervision, with which the EBA envisages again taking a step for the achievement of its mission and objectives.

This section does not discuss the entire contents of the work programme. We limit ourselves to aspects related directly to FinTech companies. One of EBA's six strategic priorities in 2020 is contributing to a prudential development of financial innovation and sustainability. The EBA continues to monitor financial innovation in this area, it will monitor the impact of financial innovation on business models and it will investigate specific topics, such as open banking and Distributed Ledger Technology. Cyber resilience is also an important theme in that respect. The EBA will provide output regarding these topics in 2020.

FSB Work Programme 2020

The Financial Stability Board (FSB) has published its work programme for 2020 (**FSB 2020 work programme** and **press release**). The programme for 2020 covers a number of subjects, including: FinTech, global stablecoins, cross-border payment systems, interest rate benchmarks and running evaluations. The work programme also provides an indicative timeline of the principal FSB publications slated for 2020.

Launch of FinTech Innovation Forum (EFIF) & Work Programme 2020

In 2019, the collective European Supervisory Authorities launched the European Forum for Innovation Facilitators (EFIF). Innovation facilitators means innovation hubs and regulatory sandboxes. The objective of the EFIF is to improve cooperation and coordination for the application of new technological developments in the European financial sector. Participants in the forum (the ESAs and national supervisory authorities) can exchange their experiences.

It follows from the **appendix** to the ESA Work Programme that the EFIF will focus on, among other things:

- The design and operation of innovation facilitators, such as innovation hubs and sandboxes;
- The innovative products identified in the context of the innovation facilitators;
- Artificial intelligence, big data and machine learning;
- Tokenisation and distributed ledger technology;
- Open banking and application programme interfaces (APIs); and
- Platforms that contribute to the unbundling of financial services, both for retail and institutional.

We expect to see the initial output of the EFIF in 2020.

ESMA Report on the licensing of FinTech firms across the EU

On 12 July 2019, ESMA published a **report** related to the licensing of FinTech firms across the EU. This report is a specific point for action from the FinTech Action Plan and was drawn up in response to two surveys distributed among national supervisory authorities. ESMA's overall conclusion is that national supervisory authorities do not make any specific distinction between FinTech companies and other undertakings because they assess the financial service or the financial product and not the underlying technology. ESMA mentions the following main findings:

- The primary areas where potential problems have been identified and where FinTech companies do not fit in well in the existing supervisory framework are related to Initial Coin Offerings (ICOs), crypto-assets and Distributed Ledger Technology (DLT). National supervisory authorities want more clarity in these areas. According to ESMA, this is in line with the findings it previously observed in the report Initial Coin Offerings and Crypto-Assets (see **Outlook 2019**).
- There is a demand for more clarity related to governance and risk management of both cybersecurity and cloud outsourcing. Regarding this as well, ESMA states that similar problems are already being addressed by two Joint Advices of the European Supervisory Authorities (ESAs) regarding (i) the necessity of improvements in laws and regulations related to ICT risk management in the financial sector (**link**) and (ii) the cost/benefit analysis for the development of a coherent assessment framework for cyber resilience for significant market parties and infrastructures in the entire European financial sector (**link**).
- There is a direct connection and there are mutual dependencies between initiatives to support innovation, such as sandboxes and innovation hubs, and the supervisory authorities' approach in connection with licensing. Based on these initiatives, it will be easier to identify those areas in which legislation or licensing requirements should be modified.
- Lastly, there is an ongoing discussion regarding the desirability of an EU crowdfunding framework, in particular in so far as the crowdfunding is based on non-MiFID II instruments.

ESMA observes that most of the FinTech business models can currently operate within the European supervisory frameworks. Other than current proposals regarding the aforementioned topics, it does not make any additional recommendations at present.

EBA Report on regulatory perimeter, regulatory status and authorisation approaches

On 19 July 2019, so only a few days after the ESMA report discussed above, the EBA also published a **report** about the regulatory perimeter, regulatory status and authorisation approaches in relation to FinTech activities. This report is a specific point for action from the FinTech Action Plan and contains the EBA's findings from a study of possible problems related to the possibilities for FinTech companies to access the market, viewed within the various EU Member States. The EBA's overall conclusion regarding these topics is as follows:

- **Regulatory perimeter**: The EBA has observed that there are limited national

initiatives for new regulations that could lead to an unlevelled playing field.
- **Regulatory status**: the EBA observes two developments regarding the regulatory status: (i) a shift of services from non-regulated to regulated (in particular, payment initiation and account formation services) and (ii) the activities or services of FinTech companies that are not regulated are of an ancillary/non-financial nature (with the exception of crowdfunding and certain crypto services).
- **Authorisation approaches**: As to authorisation approaches, the EBA found that the concepts 'proportionality' and 'flexibility' are applied in the same way, regardless of the applicant (FinTech or a traditional market party). Supervisory authorities apply the proportionality principle based on the nature, scale and complexity, the scope and the organisational structure. The EBA will continue to monitor whether the principle is used to accelerate FinTech applications. However, the EBA did observe differences in the conditions, limits and restrictions that were attached to authorisations by the competent supervisory authorities in the various EU Member States. The EBA continues to monitor this in order to ensure an equal playing field.

The EBA finds that it is currently not necessary to make specific recommendations, in part because of the fact that action is already being taken at European level in respect of crowdfunding (by means of the EU proposal for a crowdfunding framework) and crypto-assets (via the EBA report on crypto-assets). With regard to crowdfunding, the EBA believes it would be desirable to introduce harmonised rules related to (i) consumer protection and (ii) anti-money laundering rules.

EBA Opinion on disclosure to consumers buying financial services through digital channels

EBA published an **opinion** on 23 October 2019 on disclosure to consumers buying financial services through digital channels. The opinion was addressed to the European Commission and contains recommendations. With this opinion, EBA intends to safeguard that the rules on disclosure adequately take account of the increased digital marketing of financial products and financial services. The opinion pertains to the Distance Selling Directive, in which rules have been laid down with regard to the online sale of financial products to consumers. The European Commission is currently reviewing this directive.

EBA believes that it is of essential importance that consumers are able to make an informed decision on financial products and services. This means that they must have high-quality information that is presented in a timely and appropriate manner. EBA gives recommendations on several subjects, including the following:

- scope and consistency with other disclosure requirements from sector-specific rules (such as PSD2 (Payment Services Directive 2) or the MCD (Mortgage Credit Directive));
- timing of the provision of information;
- presentation of information;
- type of information;
- accessibility of information and effectiveness; and
- review of the effectiveness.

We expect the European Commission to take EBA's recommendations to heart. The European Commission may come up with concrete proposals for adapting the Distance Selling Directive in the course of 2020.

We recommend that market parties offering their products or services online consult the recommendations of EBA. It is important not only from a regulatory point of view but also from a civil law point of view that consumers have appropriate information regarding products and services. Furthermore, the provision of digital services is also one of the AFM's priorities.

ESAs' advice ICT risk management & cyber resilience

The ESAs published a joint **advice** on ICT risk management and cybersecurity risks in April 2019. The advice is relevant for all sorts of financial undertakings. According to the ESAs, the increased ICT use in the financial sector requires improved regulation of ICT risk management. To improve ICT risk management, they have presented sectoral and cross-sectoral proposals. The sectoral proposals are aimed at banks, payment service providers, insurers, investment firms and fund managers. For more about these sectoral proposals, we refer to the similarly named sections of this Outlook. Some of the cross-sectoral proposals are:

- A proposal to streamline sectoral frameworks for ICT security incident reporting, to be steered by the EC by facilitating the development of harmonised standards and terminology;
- a proposal to the EC to create a supervisory framework, in which activities of third-party providers can be adequately monitored. Since use of cloud service providers (CSPs) for outsourcing ICT services is increasing and only a few CSPs serve the financial sector, a cyberattack on a CSP could have serious consequences for the financial sector. Current regulations do not address this third-party concentration risk, which is the reason for this proposal.

In view of the ESAs' proposals, we advise FinTech market parties to keep an eye on developments in ICT management in the year ahead. Although it is not yet possible to say to what extent the proposals will materialise in new legislation and regulations, they now offer some indication of what might be expected from Europe with regard to ICT risk management.

Report Working Group Capital Market Union

On 9 October 2019, a number of EU Member States published a joint **report** entitled Report Next Capital Markets Union High-Level Group: The next CMU. The report was compiled by the Next CMU High-Level Expert Group (hereinafter: Next CMU Group), whose members include experts from various EU Member States. It was the Next CMU Group's task - five years after the launch of the Capital Markets Union - to analyse the current state and capacity of the EU capital market and make recommendations.

In the report, the Next CMU Group also discusses FinTech and digital financing. The Next CMU Group finds that innovative technologies can contribute to removing fragmentation and the further integration of the EU capital markets. The stimulation of innovation, financial technology and digitisation should therefore be a top priority, and a Digital Finance Action Plan should be fleshed out. The Next CMU Group recommends action regarding the following topics:

- Crypto-Assets and Distributed Ledger Technology
- Pan-European Innovation Facility
- A European sandbox led by the ESMA
- The EU regulations should be assessed regarding their digital readiness
- Big Data and Artificial Intelligence
- Ensuring trust by consumers and investors in digital finance

The Report contains recommendations to the ministers of the EU Member States. There are currently no prospects of specific follow-up steps in response to the Report.

BCBS Report on Open Banking and APIs

In November 2019, the Basel Committee on Banking Supervision (BCBS) published a **report** on open banking and application programming interfaces (APIs). The Committee stated that traditional banking is slowly developing towards open banking, but that the extent to which this is happening still differs per jurisdiction. In the report, the BCBS also identifies various points for attention and potential risks for banks and supervisory authorities. FinTech companies that have set up their business model based on open banking would be wise to study the BCBS' points for attention and where relevant, take action.

FSB Reports on the use of cloud services and BigTech in financial services

The Financial Stability Board (FSB) published two **reports** in which it weighs the impact on the financial stability in the area of:

- **An increasing offer of financial services by BigTech companies**: according to

FSB, there are various advantages to the participation of BigTech companies in offering financial services, including the potential for more innovation, diversification and efficiency in the provision of financial services. At the same time, it also entails risks for financial stability, such as operational risks. A further consideration is that a small selection of BigTech companies can grow rapidly, which can lead to market dominance by them instead of market diversification.

- **The increasing use of cloud computing and data services spread across multiple functions in financial institutions**: the use of these services may offer financial undertakings advantages over the current technology. FSB also points out possible problems for financial undertakings if they engage cloud service providers, including as a result of operational, governance and supervision considerations, in particular in a cross-border situation. Incidentally, the report does not directly identify financial stability risks in the use of cloud services by financial undertakings. Conversely, the report does argue for a further discussion between competent authorities with a view to (i) the soundness of regulatory standards for outsourcing agreements, (ii) the possibility of coordinating and cooperation (including the sharing of information) and (iii) the ongoing standardisation efforts in order to safeguard the mutual exchangeability and data portability in cloud environments.

It is our expectation that the AFM and DNB will include these reports in the execution of their supervision of financial undertakings including, in particular in view of the topics, FinTech companies as well. They would be wise to consult these considerations of FSB and where necessary, include these in the setup of their business operations.

CPMI report on wholesale digital tokens

In December 2019, the Committee on Payments and Market Infrastructures (CPMI) of the Bank for International Settlement (BIS) published a report setting out criteria for developers and market parties to consider in the development of digital tokens for use in wholesale transactions (large inter-bank transactions) (**report** and **press release**). A digital token can be used to settle an individual transaction. The report describes the crucial elements of wholesale arrangements in relation to digital tokens, discusses a number of possible choices for their development, and provide a nonexhaustive list of questions that developers need to consider when developing tokens. Parties considering developing such tokens should consult the CPMI report.

ROFIEG report on supporting framework for FinTech

On 13 December 2019 the Expert Group on Regulatory Obstacles to Financial Innovation (ROFIEG), set up by the European Commission within the framework of the FinTech Action Plan, published a **report** containing 30 recommendations for the establishment of a supporting framework for FinTech in the EU. The recommendations address the innovative use of technology in financial services, the preservation of a level playing field, access to data, and data collection for financial purposes and the ethical use of such data. As yet it is still too early to make any concrete predictions for 2020. The European Commission may be considering these recommendations in the formulation of upcoming regulations.

EC consultations on crypto-assets and digital operational resilience

On 19 December 2019, the European Commission opened two public consultations (**press release**), namely:

(i) a **consultation** relating to any EU framework for markets in crypto-assets (including 'stablecoins'), and

(ii) a **consultation** pertaining to digital operational resilience for financial services (defences against cyberattacks).

Consultation (i) pertains to the suitability of existing regulations for crypto-assets and a call for perspectives on the utility and necessity of new regulations in this area. Consultation (ii) is a request for input with respect to the way in which the existing statutory framework can be improved to ensure that the financial sector is in a position to address cyberattacks and other risks.

Interested market parties have until 12 March 2020 to respond. We are interested in seeing the extent to which these consultations will serve as a start for new regulations in these areas. This is something that may become clear over the course of 2020.

ALTERNATIVE FINANCING

European legal framework crowdfunding

As part of the FinTech Action Plan, the European Commission (EC) published a proposal for a European licensing regime for Crowdfunding platforms in 2018. This concerns a combination of the **Crowdfunding Regulation** and a **directive** proposing an amendment to MiFID II. Based on the initial proposal, a provision is made for a European licence for crowdfunding platforms, under which crowdfunding platforms may perform crowdfunding activities both nationally and across borders. The envisaged rules pertain to both crowdfunding in securities (equity based) and crowdfunding in loans (loan based) to undertakings. Consumer crowdfunding falls outside the scope of this Regulation. ESMA will be the competent authority to grant a European licence and to conduct European supervision of crowdfunding platforms.

Based on the proposed rules, crowdfunding platforms have a choice: (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.

The proposed 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.

The most recent update regarding the EC's proposal dates from **26 June 2019**, when the European Council announced its position regarding the EC's proposal. A considerable number of aspects of the Council's proposal differ from the EC's proposal and the interim announcement of the European Parliament's position on **27 March 2019**, including with regard to the scope, governance, prudential requirements, organisational requirements and investor protection. A striking change in respect of the EC's proposal is increasing the EUR 1 million limit to EUR 8 million, which, incidentally, the Parliament also proposed. At the end of 2019, the Council and the Parliament **reached a political consensus** on the prospective Crowdfunding Regulation; this consensus was ultimately reduced back to an amount of EUR 5 million. What remains at the time of this writing are technical processing of the text of the regulation and general approval by the European Parliament and the Council.

It is currently not clear when the proposed Crowdfunding Regulation and Directive will definitively 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, but at the same time, to this day, the legislative process is progressing relatively slowly. We advise crowdfunding platforms to closely monitor these developments and to determine a strategy regarding the question of 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

In the **Outlook 2018** and **2019**, we already discussed the plans for a national regulatory framework for crowdfunding platforms. In May 2019, the Minister of Finance sent the **motions and undertakings** in the area of financial markets for the spring of 2019 to the House of Representatives. In that document, the Minister stated with regard to this proposal that the European Commission's proposal (see above) allows leeway for a separate national regulatory framework for providing non-cross-border crowdfunding services. The Minister did state, however, that the precise scope and content of the European proposal is still being discussed. According to the Minister, it is therefore currently difficult to estimate to what extent an additional national framework will be desirable and possible in addition to the European framework. The Minister will wait until the European process has been completed before taking a decision about this.

Position of crowdfunding platforms in SME Financing Market

In a **letter** of 5 November 2019, the State Secretary for Economic Affairs and Climate informed the House of Representatives of his vision of the SME financing market and the actions that must be taken to improve financing within this market. The Dutch SME financing markets also include the capital markets. This policy vision interfaces with the final report of the capital market union working group (NextCMU) discussed above. In the letter, the State Secretary identifies a number of trends, such as:

- SME entrepreneurs have difficulty seeing and evaluating all the financing options, and additionally the range of financing offerings should be expanded.
- Entrepreneurs looking for relatively small amounts of risk-bearing capital have difficulty finding it.
- In the Netherlands, a relatively high percentage of credit applications from SMEs are rejected (for a variety of reasons).
- There is growth in alternative forms of financing, but in terms of volume these financing forms are still quite limited in comparison to bank financing.

Specifically with respect to credit provision, SMEs in the Netherlands are receiving less financing than the European average. Achieving growth and transition will require more investments that are, generally, risky in nature. This is why the state secretary believes that good propositions are essential. On this, the government is a proponent of further integration of the European capital markets to create a larger pool of capital (and risk capital in particular) for the financing of investments by SMEs and other business sectors. The solutions to these issues in the SME financing market must be in proportion to other policy goals, such as those with respect to the achievement of the banking union and capital market union, monetary policy and financial stability.

The state secretary further notes that a broad financing landscape is an important element of strengthening the Dutch entrepreneurial ecosystem. One action to be taken to increase financing options would be to create an IPO fund for SMEs to allow the European SME sector to attract share capital more easily. In line with the European Commission's vision, the state secretary considers it prudent to further strengthen the capital market union in order to achieve a deeper and more integrated European capital market. This would be a boon to start-ups and scale-ups. Harmonisation will boost growth in alternative financing forms such as crowdfunding. The State Secretary's policy vision is in keeping with the European trend towards a capital market union. We are very interested to see the concrete steps that the Netherlands will be taking in 2020 to make a worthy contribution to this movement.

CRYPTO-ASSETS

AMLD5 Implementation Act: Registration obligation for crypto platforms and wallet providers

As a result of the implementation of AMLD5 in the Netherlands, the service providers and the providers of custodial wallets (hereinafter: crypto service providers) must register with

DNB for exchanging virtual currencies and fiat currencies. The legislature had included a licence obligation for crypto services providers in the consultation version of the AMLD5 Implementation Act, but withdrew it on the recommendation of the Advisory Division of the Council State (see the **Outlook 2019** for a discussion of the draft legislative proposal). A few aspects regarding this registration obligation include:

- **Continuing obligations**: The registration obligation creates all sorts of new obligations for the crypto service providers. For example, the crypto service provider's business operations must be controlled and ethical and include, among other things, a Wwft policy and a policy against conflicts of interests. In addition, the crypto service provider must ensure that the control structure is not so non-transparent that it interferes with DNB's supervision and that the suitability and trustworthiness of day-to-day policymakers and holders of qualifying participations are assessed by DNB.
- **Registration obligation**: Registration with DNB is a condition for being able to offer services in or from the Netherlands. A crypto service provider may therefore not commence or continue its services without being registered with DNB. The obligation to register applies to everyone who resides in or is domiciled in the Netherlands, or has its registered office there, and who wishes to provide exchange services or custodial wallets professionally or commercially in or from the Netherlands. The registration obligation also applies to providers who wish to offer services from another Member State in the Netherlands, regardless of whether it is also registered in said other Member State, and to providers who only offer cross-border services from the Netherlands.
- **DNB's Role**: DNB has been designated as a Wwft supervisory authority for crypto service providers. This means that DNB will supervise the integrity of the crypto service providers. DNB's supervision will thus not pertain to setting prudential standards or to consumer protection because such rules fall outside the scope of the Wwft supervision.
- **Transitional regime**: It should be noted that the AMLD5 Implementation Act provides a six-month transitional regime for crypto service providers. Crypto service providers can only utilise this transitional period if, when the implementation act enters into force - or prior to that - they have submitted a request for registration to DNB. In addition to the request for registration, crypto service providers must also have submitted a request for the assessment of the trustworthiness of the day-to-day policymakers and the holders of the qualifying participation. This transitional period pertains solely to the registration obligation and to the obligation for day-to-day policymakers and any holders of a qualifying participation to be trustworthy and suitable. However, during the transitional period, crypto service providers must comply with the substantive obligations under the Wwft (those regarding CDD, for example).

In the autumn of 2019, DNB **signalled** that crypto service providers should prepare in good time for the pending DNB's integrity supervision. More specifically, DNB indicated that it would like to consult with these parties and asked them to register with DNB. DNB made the draft registration forms available at the end of 2019, and additionally published **drafts of the explanatory notes** to the request for registration form to allow providers to prepare for the application. Because the legislative process has not yet been completed, amendments to the legislation (and thus the ultimate registration requirements) may still be made.

We advise parties wishing to operate as a crypto service provider to register with DNB as soon as possible in order to be able to use the transitional regime.

Guidance by supervisory authorities

In 2019, various supervisory authorities published reports regarding crypto-assets. We mention these briefly below:

- ESMA advice to EU regarding ICOs and crypto-assets (**link**)
- EBA report containing advice to the EU regarding crypto-assets (**link**)

- ECB article about risks and complications related to crypto-assets (**link**)
- FATF report on a risk-based approach to virtual currencies and virtual currency service providers (**link**)

For now, no specific action has been planned for 2020. Market parties operating on the crypto market must assess whether the reports are relevant for them and to act accordingly, for example, by verifying whether the crypto-assets they offer qualify as financial products.

Stable coins

In part as a result of the envisaged introduction of the Libra, the stablecoin initiated by Facebook, there have been many different supervisory authorities that have published reports regarding stablecoins. A stablecoin is a crypto coin with a value that is linked to a fiat currency. This could be the euro or the American dollar, for example. We mention various publications briefly below:

- IOSCO (International Organization of Securities Commissions) communication regarding emerging global stablecoin proposals (**link**).
- FSB (Financial Stability Board) on potential supervision challenges regarding stablecoins (**link**). FSB will conduct a follow-up study of stablecoins in 2020.
- G7 working group report on the potential impact of global stablecoins (**link**).

In addition, on **5 December 2019**, the European Council and the Commission stipulated, in a joint statement, that not a single stablecoin may be launched in the EU until the legal, regulatory and oversight challenges and risks have been adequately identified and addressed. In view of this, it is therefore not possible for the foreseeable future to launch such a stablecoin.

BCBS discussion paper on prudential framework for crypto-assets

In December 2019 the BCBS published a discussion paper on the design of a prudential treatment for banks' crypto-asset exposures (**discussion paper** and **press release**). With this discussion paper, the committee is hoping to solicit comments from interested parties with respect to the following issues:

- the features and risk characteristics of crypto-assets that should inform the design of a prudential framework for banks' crypto-asset exposures; and
- general principles and considerations to guide the design of a prudential treatment of banks' exposures to crypto-assets, including an illustrative example of potential capital and liquidity requirements for exposures to high-risk crypto-assets.

Interested market parties have until 13 March 2020 to submit comments.

Parliament response to blockchain and law study

In a **letter** of 17 December 2019, the Minister for Legal Protection sent the government's response to the exploratory survey 'Blockchain and the law' to the Lower House of Parliament. The Ministry commissioned the assessment of blockchain and private law, data protection law and administrative law, as well as the financial supervision of tokens. The government endorses the study report's conclusion that responsible use of blockchain is dependent on the law. In order to prevent consequences at odds with the law, it is important to take ethical principles and legal standards into account at the design stage of blockchain applications. With respect to the issue of tokens and financial supervision, the Minister's letter highlights the study report's recommendation that the regulations on and exercise of financial supervision over tokens must be further clarified. On this subject, the letter points out (i) that the Minister of Finance's announcement of an investigation into whether the Financial Supervision Act's definition of securities needs to be amended to ensure that the issue of tokens that are substantially equivalent to securities can, to the extent necessary, be qualified as the issue of securities, and (ii) the investigations currently being carried out at the EU level of whether existing EU regulations on financial markets should be amended to better regulate crypto-assets and tokens.

The government is seeking partnerships to help move blockchain technology forward in a manner that is secure, responsible, and beneficial to society. It is following the developments in this area closely and taking action where necessary. We expect to see these developments continue to take shape in 2020.

PAYMENT SERVICES / ONLINE PAYMENT

EBA Report on potential impediments to the cross-border provision of banking and payment services

On 29 October 2019, the EBA published a [report](#) in which it addresses various potential impediments regarding the provision of banking and payment services in the EU. In essence, the report also touches on other financial institutions and FinTech companies that perform cross-border activities in Europe. This report, which elaborates on the 2018 [EBA FinTech Roadmap](#), identifies three regulatory topics for improving and promoting the integration of the European banking and payment services market, namely:

- **Procedures for authorisations and licensing**: in that context, the EBA notes, among other things, that national supervisory authorities take different approaches when it comes to granting licences. The EBA observes that market parties have complained that there are significant differences between national supervisory authorities regarding the regulatory requirements before authorisation can be obtained to be able to provide services (via branches) in the rest of Europe. The EBA also determined that there is insufficient information available publicly to enable financial service providers to understand what their obligations are when offering cross-border services.
- **Consumer protection and conduct of business requirements:** In this context, the EBA specifies that there is a deficit of harmonisation in the area of advertisements and information that financial service providers must provide in their services to consumers. In addition, according to the EBA, the way complaints should be handled is not completely harmonised. According to the EBA, as a result of a lack of clarity regarding the allocation of responsibilities to the home state and the host state supervisory authority, this can lead to blind spots in the supervision and facilitate supervisory arbitration.
- **Legislation for the prevention of money laundering and terrorist financing**: with regard to this section, the EBA notes that Member States deal differently with integrity legislation in the EU and that every Member State applies different standards. As a result of the fact that there is minimum harmonisation under the anti-money laundering directives, Member States have introduced various requirements at national level regarding, for example, customer identification and the acceptance of digital identification standards.

In the report, the EBA mentions various solutions for removing the aforementioned obstacles. Regarding the first section, the EBA proposes to further tighten the obligations in terms of informing the supervisory authorities of the home state and the host state in the case of cross-border activities. In addition, it is expected that the EBA will also devote more guidance to this section via the customary Q&As. According to the EBA, when it comes to diverse requirements in the EU with regard to consumer protection, among other things there must be a further harmonisation of the legal framework for requirements of disclosure to consumers, but also for the allocation of responsibilities to supervisory authorities of both the home state and the host state in terms of handling complaints related to cross-border activities. The EBA proposes, for the facilitation of further harmonisation regarding the prevention of money laundering and terrorist financing, that additional obligations be implemented under various EU directives. Who knows? This could be a step towards a regulation in this area.

The EBA's report clearly shows that the European legislature still has a lot of work to do to achieve a further integration of the European financial markets. It is our expectation that the financial regulatory developments will continue at a rapid pace in the years ahead in order to achieve this goal, so that the impediments it identified in connection with cross-border banking and payment services will also be removed for the most part. We await these developments with interest.

IMPORTANT INFORMATION FOR CONSUMER CREDIT IN 2020

This section discusses the foreseeable developments in 2020 which are specifically directed at providers of credit (mortgage and consumer credit) that are obliged to obtain authorisation. If these consumer credit providers also provide additional services, such as advisory services, we recommend that they also take a look at the sections in this Outlook which relate to such services. In addition, credit providers with a licence to act as bank, insurer, payment service provider or investment firm, will also find noteworthy information in the relevant parts of this Outlook.

AFM SUPERVISION

AFM Trend Monitor 2020

In line with the overarching supervisory topic 'vulnerabilities in the financial position of households' in its **Trend Monitor 2020** the AFM devoted attention to the vulnerabilities related to interest-only mortgages. The AFM has called attention to risks in the longer term: around 2035 a large number of interest-only mortgages will come to an end, while around this same time, for roughly 80% of the households involved, the main breadwinner will be retiring, meaning income will fall. In addition, for many people the mortgage interest tax relief will lapse, entailing an increase in expenses. This will make it difficult to take out a new mortgage. In addition, for a small group of consumers there is the risk of being left with a residual debt, which is greatly influenced by the value of the house and to a great extent is beyond the control of consumers.

In view of the still considerable remaining term of the loan for most consumers, the AFM sees possibilities for them to reduce potential risks in time, for example by, in the coming years, setting aside freely disposable capital or making extra repayments during the term of the loan. The AFM also places some responsibility with mortgage lenders. It emphasises that mortgage lenders have an active duty of care with regard to customers with an interest-only mortgage and that they are responsible for informing the customer, indicating actions that can be taken and encouraging them to take action where necessary. The AFM will continue to monitor the progress of this process and provide guidance to prevent problems.

We advise mortgage lenders to go over their portfolio of interest-only mortgages and to inventory to what extent the identified risks could arise on the part of their customers and in what manner they could actively assist these customers in addressing those risks in time.

Compliance with professional competence requirements when providing advisory services

The AFM and the Education Executive Agency (*Dienst Uitvoering Onderwijs*, DUO) signed a **cooperation agreement** on 21 November 2019. As a result of this cooperation agreement the DUO will administer an information system with details on the competence of employees and natural persons working under the responsibility of, inter alia, consumer credit providers. This is particularly relevant for credit providers who also provide advisory services, because with regard to this group it is mandatory to prove professional competence by means of Wft diplomas: guaranteeing professional competence as part of the business activities (for example with internal courses) is not sufficient for consumer credit providers for advisory services. From now on the AFM can request diploma details from DUO and consequently immediately check whether the persons working with consumer credit providers who provide advisory services possess the diplomas required by law. You can thus assume that the AFM will be checking this in the coming year.

Measures to combat excessive loans

In a **news item** published on 29 November 2019 the AFM again called attention to excessive loans. It also provided some insight into the measures it had taken against consumer credit providers in the past year. The measures related to two published fines and seven warnings issued.

The AFM states that the combating of excessive loans is still a priority of the AFM. People who wish to borrow money must, after payment of interest and repayment, still have enough money left to pay for their living expenses and fixed charges. Consequently, excessive lending is prohibited by law. The AFM emphasises that consumer credit providers, before offering a loan, must carefully review the financial situation of their customers. Only then can they determine whether they would be acting responsibly in providing the loan.

At the beginning of 2019 the AFM called on industry organisations to assess and improve the lending standards they had drawn up. It is anticipated that at the beginning of 2020 the consumer credit providers will implement a new lending standards method. The AFM also stated in the news item that for most loans a maturing credit is a better and safer alternative than a revolving credit. In addition, the AFM anticipates that there will be better (preventative) after-care for people, to prevent or resolve problems caused by, for example, a change in circumstances.

The published fines show that the AFM believes that market parties must be able to be aware of fines which have been imposed on other parties due to breach of the rule to prevent irresponsible consumer lending, so that these market parties can learn from this for their own practice. Important lessons from the fines which have been imposed are in any event that a provider must endeavour to chart all structural expenses – such as alimony, premium payments, but also payment arrangements with third parties and DUO loans - and include them in the income assessment (ILT check). With regard to income, the provider must look at precisely what income is available for repayment of the loan. A travel allowance, for example, will not qualify. Consumer credit providers are subject to a further-reaching duty to investigate than the fined parties had apparently assumed.

We expect that in 2020 the AFM will actively continue to supervise compliance with the rules for responsible credit provision and, where necessary, take enforcement action. It is therefore recommended that consumer credit providers actively continue to review whether their excessive lending policy satisfies the AFM criteria.

Influence of the lending environment on consumer decision-making

Report: Making responsible borrowing decisions easier

At the end of 2019 the AFM **called on** consumer credit providers to review how they offer loans online (in the online lending environment or choice architecture). More specifically the AFM expects a lending environment which is carefully set up and in which the interest of the customer is the focal point. Incorrect guidance in the lending environment can entail that the credit product does not fit in with the needs and interests of the consumer.
The AFM made a number of suggestions for the set-up, such as:

- Set the pre-filled in loan amount at the minimum so that consumers do not borrow more than is necessary.
- Offer consumers the option of actively choosing a fixed number of months for repayment so that they are encouraged to keep the term of the loan short. Adjust the creditworthiness review to this too, so it reviews the actual monthly costs.
- Make sure that consumers, in the online application process, are actively involved in the total costs of the loan.

In addition, the AFM encourages consumer credit providers to carry out further research into the link between the objective of the loan and the loan amount so that consumers choose a loan amount that they actually need and not a multiple of a pre-filled in standard amount (e.g. EUR 5,000). For example, a consumer credit provider could enquire about the customer's reason for taking out the loan and then make (mandatory) recommendations regarding the maximum term of the loan.

We expect that also in 2020, the AFM will also devote attention to the careful treatment of customers and the decision-making of consumers when obtaining financial products. When setting up their lending environment we recommend that consumer credit providers keep an eye on the customer's interest. This topic will play an increasingly important role in the AFM's supervision, for example in the framework of the rules for information provision and product governance.

The AFM's expectations with regard to the choice architecture

On 21 November 2019, the AFM presented the market with a consultation paper containing **principles for the choice architecture**. With this expression of its policy the AFM is outlining its expectations about the way in which consumers are offered choices in their financial decision-making process. The choice architecture can (unintentionally) influence the choices a consumer makes. The AFM has established twelve principles which describe its expectations on the set-up of the choice architecture. The principles are not new rules, but contain starting points on a topic which is founded on different statutory standards which are supervised by the AFM. The consultation ran until 16 January 2020.

The policy document will be amended where required on the basis of the responses. The AFM will then publish it on its website. A 'feedback statement' will also be published, in which it is indicated what the AFM has done with the responses to the consultation. The definitive 'Principles for Choice Architecture' will therefore be published at the beginning of 2020. Consumer credit providers will then have to determine to what extent these principles must be incorporated in the choice architecture they use.

Online consumer protection guideline (ACM)

On 3 December the Netherlands Authority for Consumers & Markets (ACM) published the 'Guidelines on the Protection of Online Consumers – Boundaries of Online Persuasion' for consultation. The AFM has stated that it **endorses** the principles laid down in these guidelines because many of the points are also relevant to financial undertakings. The AFM cites the following three elements:

- **Artificial scarcity can be misleading**: By creating a sense of urgency in consumers by means of supposed 'scarcity' ('this offer is only available for a limited time') consumers will make a choice more quickly and are more likely to make a purchase. In the Information Provision Policy Rule the AFM addresses misleading trade practices in relation to financial services or activities.
- **Default settings influence choice**: How a choice is offered, is never neutral and always steers people in some way. The default setting can - rightly or wrongly – be very determinative.
- **Misleading ranking:** The ACM also mentions examples where the ranking of online products is not based on the consumer's interests. The AFM points out that this also applies, for example, to financial comparison sites. Most comparison sites first display a paid-for Top 3 after making a comparison. The AFM does not believe a 'paid-for' Top 3 is desirable. The ranking of an offer may not be misleading.

In the Guidelines, the ACM hints that where 'seduction turns into deception' there could even be a misleading trade practice of the financial undertaking (conflict with the professional commitment duty) and thus a wrongful act. The importance for market parties of taking these guidelines seriously has consequently found its way into the domain of civil law. The consultation ran until 16 January 2020. The ACM wants to establish the definitive guidelines shortly after that.

Renewed service document generator

Providers, intermediaries and advisors are obliged to furnish a standardised service document to consumers for products that fall under the commission prohibition. The service document must always be up to date. The service document will no longer be up to date if the service concept changes or if the number of products available on the market (the benchmark) changes. The AFM **announced** in November 2019 that it had renewed the benchmark of the service document generator, which is available via the AFM's Digital Portal. Consequently financial service providers might have to adjust their service document. We therefore advise financial service providers to check whether their service document is still accurate.

Consumer credit providers and the IBOR transition

As a result of the Benchmark Regulation, interest rate benchmarks used in credit agreements will in short have to be converted into/replaced by an interest rate benchmark that complies with the Benchmark Regulation. At the end of 2019, administrators of critical benchmarks and non-EU administrators received an extension until 1 January 2022 to comply with the Benchmark Regulation. Since October 2019, the transition has started from EONIA to the Euro Short-Term Rate (€STR), as published since then by the ECB. EURIBOR has been adjusted in accordance with the Benchmark

Regulation and the administrator has been authorised by the competent regulator (FMSA) to offer this hybrid EURIBOR.

The AFM highlighted the transition in its **Trend Monitor 2020** and emphasised the need to properly prepare for this, partly in view of the financial, legal, operational, valuation and hedging risks of the transition. AFM therefore requests market parties to amend their existing contracts, risk and valuation models and hedging strategies in a timely manner and to anticipate the new reference rates in new contracts. It will follow this process with specific attention for dealing with the interests of customers. The AFM emphasises the importance of informing small business customers and consumers in a timely and correct manner and of adjusting the contracts in a careful, fair and transparent manner. The AFM advises consumer credit providers, because of their substantial number of customers, to examine whether they can accelerate this process using generic solutions. We also refer consumer credit providers to our comments further on in this section under (the) 'best practices for benchmark transition', as issued by the AFM and DNB.

Mail order credit

The AFM asked the Minister of Finance in its annual **legislative letter** for a statutory arrangement relating to mail order credit. These are revolving credit facilities provided by home shopping organisations and webshops whereby the term of the credit is not related to the spending objective of the goods purchased with the credit facility. For vulnerable consumers this can lead to problematic debts as the revolving repayment obligations, due to lack of sufficient income, can lead to even more purchases of goods to be paid in instalments. The Minister of Finance has previously expressed concerns about mail order credit and expects mail order credit providers to ascertain that the credit and the term of the credit are appropriate for the customer and the spending objective. However, the AFM wants this rule to apply to all forms of credit, which comes down to regulations pursuant to which consumer credit providers will not enter into a credit agreement with a consumer if the product conditions do not tie in the consumer's spending objective. In addition, the AFM proposes linking the credit facility to the economic life of the purchased product.

At the time of writing it was not yet known whether this wish would be fulfilled, but it cannot be excluded that regulations on this matter will appear in 2020. After all, another wish expressed in the legislative letter, i.e. additional measures to tackle the problems relating to payday loans, was subsequently picked up by the legislator, resulting in the 'Scheme for Tackling Payday Loans' which is discussed elsewhere in this section.

Principles for information security

At the end of December 2019, the AFM published its **Principles for Information Security** after having incorporated the comments and recommendations received on the subject during the **consultation period** in May 2019.

The AFM provides eleven principles that define expectations in the realm of information security. These are a set of rules that are not new, and which serve as mechanisms for compliance with the legal standards with respect to operations under the Financial Supervision Act, MiFID II, the Audit Firms Supervision Act and European regulations. In view of the increasing impact of technology in our daily lives, the rise of cyber-based threats, and issues of integrity and confidentiality in the handling of client data, the AFM expects fund managers, investment firms, financial services providers and all actors in the financial sector to act with due care with regard to information security risks. In essence, this means that there are three basic principles to be observed (an up-to-date information security policy, a governance structure that facilitates information security, and a risk identification and assessment), which in turn dictate four principles (with respect to people & culture, technology, operating processes and physical security), and that data must be adequately secured (principle nine). The last three principles are incident management, information security in outsourcing situations, and the information chain.

Based on the responses received during the consultation period, the AFM has produced a feedback statement linked to these principles, expressing the expectation that undertakings must strive for a proportional application of the eleven principles. This means that in consideration of the size of the undertaking and nature of services, smaller parties may be subject to less onerous information security measures. With regards to undertakings subject to DNB regulation, the AFM shall, where necessary, apply the Information Security Principles in line with DNB's Good Practice on Information Security. It should be noted here that the AFM states that undertakings that apply the ESMA information security framework should theoretically already be in compliance with the AFM's expectations.

Disclosure requirements and GDPR

In the past year it turned out that when providing credit tension can arise in connection with (the interpretation of) the limits to the gathering of privacy-sensitive information of customers set by the General Data Protection Regulation (GDPR). The significant consequences of this tension also became apparent in AFM's enforcement practice, as a number of consumer credit providers were fined for insufficient information gathering when seeking to comply with supervisory regulations, whereby they appear to have come up against the (GPDR-)limits of the quantity of information which may be requested from the customer. In addition, the AFM asked consumer credit providers to review their own codes of conduct in terms of focus on the customer's interest. The Dutch Banking Association (NVB) in turn asked the AFM to study the problem together with the Dutch Data Protection Authority. In addition, the NVB indicated that together with the Dutch Association of Finance Companies (VFN) and the Nibud it would review the calculation of the borrowing scope for customers.

In view of the aforementioned observations we expect that in 2020 we will see further discussion regarding the aforementioned matter. For 2020 we advise consumer credit providers when obtaining information to be on guard for situations in which compliance with disclosure requirements could be at odds with privacy legislation. It is also advisable to periodically review the codes of conduct to see whether they are still adequate.

Consultation on Suitability Policy Rule

On 14 June 2019, the AFM and DNB presented the proposed amendments to the Suitability Policy Rule 2012 (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: the 2019 draft decree to amend the Suitability Policy Rule 2012 and the draft amended text of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework that DNB and the AFM use in the suitability assessments of policymakers in the financial sector. DNB and the AFM amended the Policy Rule in response to changes in national and European laws and regulations. Market parties could respond to the consultation until 1 September 2019.

Below we briefly discuss the most important amendments to the Draft Policy Rule from the perspective of consumer credit providers:

- DNB and AFM have chosen to clarify that the suitability topic 'balanced and consistent decision-making' also means that policymakers act with independence of mind;
- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences: because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the AFM and DNB have decided to explicitly include the requirement of 'sufficient time' under the suitability requirements in the Draft Policy Rule. In addition, a separate section has been included in the explanatory notes about what AFM and DNB mean by sufficient time;
- The old Policy Rule includes an exception for small companies because the requirements of managerial competence in a hierarchical relationship could be too restrictive for these types of undertakings. In the Draft Policy Rule it has been added that the nature, size and complexity of the company must also be

- taken into account in deciding whether or not to employ the exception so that the AFM and DNB can include more circumstances in their consideration.
- The Draft Policy Rule also clarifies how a policymaker of a small consumer credit provider can demonstrate suitability. If the policymaker does not have a higher professional education diploma following a course that is relevant for the undertaking, it is important for the policymaker to have gained experience in a relevant working environment. These activities must have taken place consecutively in a specific period.

The Policy Rule will take effect in 2020.

Notional interest rate for mortgages to 5% for Q1 2020

The AFM has set the notional interest-rate for the first quarter of 2020 at 5% (see **AFM news item**). For mortgages with a fixed-interest period of less than 10 years, the calculation of whether a mortgage is advisable must be based on a notional interest rate.

CURRENT LEGISLATION AND REGULATIONS

Amendment to National Mortgage Guarantee

In November 2019, the Dutch Home ownership Guarantee Fund (*Stichting Waarborgfonds Eigen Woning*) **announced** that it would be amending the National Mortgage Guarantee (Nationale Hypotheek Garantie, NHG). DNB has established that the National Mortgage Guarantee does not currently meet the conditions for qualifying as credit protection for banks applying the standardised approach (SA) or the elementary internal ratings-based approach (IRB) and for insurers applying the standard formula.

The amendment to the National Mortgage Guarantee means that the Home Ownership Guarantee Fund offers all lenders (new and current loans with National Mortgage Guarantee) the possibility of receiving a provisional payment of the expected loss if the property is not sold within 21 months after default of payment and if default of payment still exists. The loss paid out will later be set off later against the final loss on final sale of the property or termination of default of payment.

Further remuneration measures for the financial sector

In response to the **Agenda for the financial sector**, the Ministry of Finance presented the **legislative proposal** for consultation on the Act on further remuneration measures for the financial sector in 2019. Significant changes that have been proposed are:
- The introduction of a five-year retention period for shares and comparable financial instruments that are part of the fixed remuneration.
- Tightening the exception to the 20% bonus cap for employees who are not covered by a collective labour agreement. The proposed tightening makes it explicit that this exception can only be used in exceptional cases and is in any event not an option for those who (i) perform internal control functions or (ii) are directly involved in providing financial services to consumers.
- The introduction of an obligation to describe in the remuneration policy how the undertaking accounts for the relation of the remunerations of managing directors, supervisory directors and employees of the undertaking to its social function and the way in which this relation has been formed.
- Extension of the approval period of the supervisor for retention bonuses exceeding 20% of the fixed salary from six to nine weeks.

The **planning brief 2020** of the Ministry of Finance shows that the legislative proposal for the Act on further remuneration measures in the financial sector is scheduled for September 2020. In addition to the aforementioned further remuneration measures, this legislative proposal contains several more technical changes to the remuneration rules for the financial sector that originally were part of the proposal for the Financial Markets Amendment Act 2018, as well as the continuation of existing policy pertaining to traders for their own account.

Consultation period on Amendment Regulation on transfer of claims under credit agreements

On 24 December 2019, the Ministry of Finance opened a **consultation period** on an amendment to the Wft exemption scheme in connection with changes to the articles relating to the transfer of claims under a credit agreement.

If claims under a credit agreement are transferred to an investor (commonly an institutional investor), and that investor has not itself signed the credit agreement with the consumer, then the investor is exempt from the permitting obligation as a credit provider if the credit provider that has signed the agreement with the customer continues to manage and perform the credit agreement. With this change the Ministry intends to prevent institutional investors from having to apply for a permit as a credit provider, and to clarify that the original provider can continue to manage and perform the agreement on the basis of its permit as a provider of credit.

Responses can be submitted until 16 February 2020. The amendment is scheduled to take effect on 1 April 2020.

Integrity legislation (Wwft)

In the past year, European and Dutch supervisory authorities have published a great deal in the area of integrity. At the national level, 2020 will be marked in particular by the implementation of the Fifth Anti-Money Laundering Directive (AMLD5), the UBO register and the legislative proposal on the Anti-Money Laundering Action Plan Act. At the European level, there is an increasingly urgent call for the harmonisation of all anti-money laundering rules and the centralisation of anti-money laundering supervision. For an overview of the consequences of AMLD5, the UBO register and other relevant European developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

Benchmark Regulation

Benchmark Regulation (general)

We have already reported on the Benchmark Regulation in the **Outlook** for 2019. Below we provide an update on some developments since then and developments expected for 2020 that are specifically relevant for administrators as (potential) users of benchmarks. You can read more on the developments that are particularly relevant to offering and/or managing a benchmark in the **General Developments** section of this Outlook.

Transitional period for critical benchmarks and non-EU benchmarks

As a result of the Regulation, with effect from 1 January 2020 institutions subject to European supervision may, briefly put, only use benchmarks that comply with the Benchmark Regulation and that are registered, and also offered by a licensed or registered administrator. However, in November 2019 the transitional regime for critical benchmarks (EONIA, EURIBOR, LIBOR, STIBOR and WIBOR) and non-EU benchmarks (benchmarks managed by an administrator established in a third country) was **extended** to 31 December 2021. This was partly due to uncertainty about the continuation of EURIBOR and EONIA – which are the most important benchmarks for the Eurozone (and for the Netherlands) – after 1 January 2020 and uncertainties regarding the recognition and ratification procedures for non-EU benchmark administrators. We recommend that market parties use the extended deadline to be ready in time for the transition, including by identifying which EU benchmarks they use have been approved for use after the transition phase and which have not.

Best practices benchmark transition

On the basis of a questionnaire sent to various financial undertakings in mid-2019, the AFM and DNB identified *best practices* for the benchmark transition at the end of 2019. These may be useful to anticipate the transition in good time in 2020. Established practices worthy of mention include:

- having a detailed overview of benchmarks and terms used by the institution;
- identifying alternatives to benchmarks, assigning them to products and using them where possible;
- a project team that oversees all activities related to benchmarks, reports on them at management level, in which the planning followed is in line with the transition timeline;
- for new contracts, commencing the transition to alternative benchmarks;
- identifying different scenarios and using them to schedule the transition; and
- having a communication plan ready for informing customers and already start communicating in so far as possible.

New disclosure requirement for consumer credit providers

The Benchmark Regulation sets requirements, inter alia, for information provision regarding benchmarks, including providing the information pursuant to the Consumer Credit Directive (2008/48/EC) and the Mortgage Credit Directive (2014/17/EU). A new obligation is added to the disclosure requirements already included for the implementation of these directives in Dutch legislation under the **Financial Benchmarks Regulation Implementing Act**. This entails that if along with a credit facility use is made of a benchmark, the consumer credit provider must inform the consumer as to the name of the benchmark, the manager and the possible consequences for the consumer if the credit facility makes use of a benchmark.

Amendment of examination targets for professional competence under the Wft 2020

From 4 October 2019 to 1 November 2019 the Ministry of Finance presented a paper on the Amendment of examination targets for professional competence under the Wft 2020 for **consultation** because of current events observed by the Expertise in Financial Services Board (CDFD). The regulation presented for consultation seeks to update the Regulation on examination targets financial services Wft – which regulates what examination targets apply for the various Wft exams in the framework of the professional competence requirements - in connection with developments for the new PE (permanent education) year, which starts on 1 April 2020.

A development which recurs in this amendment regulation is the experience which has been gained with a review of knowledge on data protection since the entry into force of the General Data Protection Regulation (GDPR), AMLD4 and AMLD5. An amendment is also necessary on account of an amendment in the National Regime after the entry into force of MiFID II (see in this respect our **Outlook 2019**). We refer to a more detailed overview of the amendments to the **overview** of the CDFD.

NEW LEGISLATION AND REGULATIONS

Scheme for tackling payday loans

The **Scheme for Tackling Payday Loans** was presented for consultation last summer. The Scheme sets out that financial undertakings which offer consumer credit to consumers in the Netherlands from an office in another EU member state via the internet, may not charge a higher lending rate than the maximum lending rate (now 14%). At this time the licensing requirement of the Wft and the maximum lending of the Dutch Credit Fees Decree does not apply to these parties according to the Scheme, which as the AFM **noted** in its legislative letter 2019, would leave scope for avoiding the maximum lending rate. We wonder whether the Scheme is truly necessary, because we believe that the Electronic Commerce Directive entails that consumer credit providers which operate from another member state must comply with civil law consumer protection provisions. One of those provisions is the maximum lending rate which is laid down in the Dutch Civil Code. We therefore advise online consumer credit providers from another member state to always adhere to the maximum lending rate.

Where the AFM expressed the wish to bring these payday loan credit providers fully under the scope of the Wft, the Scheme which was subsequently presented for consultation goes less far as it only declares the Credit Fee Decree and the maximum lending rate set out therein to apply to these providers.

The Scheme was available for consultation as of 22 July up to and including 2 September 2019. In so far as the scheme does ultimately go ahead, for 2020 this in any event means, on paper, a more level playing field on the Dutch market for consumer credit providers.

New lending standards for mortgage credit as of 1 January 2020

1 January 2020 sees an amendment the lending standards that determine the maximum mortgage loan for the purchase of a home via the **Mortgage Credit Amendment Regulation 2020**. The financing scope for two-income households has been expanded further: providers may assume a financing costs percentage that belongs with the highest assessed income by 80 percent of the lower assessed income (previously 70 percent). If the mortgage is intended for more than one consumer, one of whom has reached retirement age and the other consumer has not, the financing costs percentage will be applied that belongs with the highest assessed income. It has furthermore been clarified that a provider, both when providing a mortgage credit and when increasing an existing mortgage credit to make energy-saving provisions in a home, can exclude a maximum amount of EUR 9,000 when determining the financing costs. Finally, the financing burden percentages are calculated as of a gross annual income of EUR 21,500 and the income tables have been replaced in conformity with the Nibud's advice.

Proposal for a directive on credit servicers, credit purchasers and the recovery of collateral

The European Commission made a **proposal** on 14 March 2018 for a directive on credit servicers, credit purchasers and the recovery of collateral. The proposal forms part of an **action plan** of the European Council from 2017 to tackle non-performing loans (NPLs) in Europe. In the Commission's view, large NLP volumes are hampering bank performance in two ways: (i) NPLs generate less income for a bank than high-yielding loans, which reduces the bank's profitability and may lead to losses that reduce its capital and (ii) NPLs take up a significant amount of human and financial resources from banks, reducing their capacity to provide credit.

To reduce these risks, the EC proposes the introduction of a joint procedure for accelerated extrajudicial collateral enforcement (AECE) in order to increase the efficiency of collateral recovery procedures. In addition, the EC is proposing the introduction of an EU framework for credit services and credit purchasers to stimulate the development of secondary markets for NPLs. Below we briefly describe what the proposals entail:

- **AECE**: this proposal gives banks and other entities providing secured loans the opportunity to collect their claims arising from secured loans to corporate borrowers out of court. This extrajudicial procedure is only accessible if the credit provider and borrower have agreed this in advance and have recorded this in the loan agreement. The procedure does not apply to consumer credit and is designed in such a way that the procedures for preventive restructuring or insolvency proceedings and the ranking of creditors in the event of insolvency are not affected.
- **Common framework:** this proposal provides for a number of common rules that credit service providers must adhere to in order to operate in the EU. The proposal contains common standards to ensure proper application and monitoring of these rules in the EU, while at the same time allowing competition between credit service providers by harmonising market access in the Member States. With regard to credit purchasers, the proposal provides, among other things, for a credit provider to provide all necessary information to a credit purchaser to enable him to assess the value of the credit agreement and the likelihood

of recovering the value of that agreement before entering into a contract to transfer the credit agreement.

The proposal is currently subject to a trialogue discussion between the European Parliament, the EC and the Council of Ministers. The Proposal states that the directive must be implemented by 31 December 2020 at the latest (and must therefore be applied by 1 January 2021). It is not yet known at the time of writing whether this deadline will be met.

Sustainability measures

The past year has seen a great deal of attention devoted to sustainability and climate change. An important development concerns the European legislation and regulations to channel capital flows towards sustainable economic activities. This is done, among other things, by using disclosure requirements for investors in respect of the sustainability of financial products and sustainability labels for benchmarks to facilitate ESG investors. The AFM also intends to bring a focus in its supervision of market conduct in 2020 to sustainability-related disclosure obligations. Another point of attention is the resilience of the financial sector to climate change. We are seeing that climate change and natural disasters are entailing new risks for banks and insurers. The ESAs, the AFM and DNB have been sharing insights and recommendations on the impact on operations and risk management. We expect to see a good deal more about these points for attention and other sustainability-related aspects in 2020. This aspect will have an impact on the operations of many market parties. For an account of the developments in the area of sustainability, see the **Sustainability** section of this Outlook.

OTHER DEVELOPMENTS

Minister of Finance's view on tackling the risks of interest-only mortgages.

On 4 April 2019, the Minister of Finance responded to a number of parliamentary questions about the Agenda for the financial sector. In the **answers** the minister went into, among other things, tackling the risks of interest-only mortgages.

The minister is pleased that consumer credit providers, together with the supervisory authorities, are now working on charting possible risks for consumers and allowing customers to make a conscious choice on their interest-only mortgage. Consumer credit providers do this by giving their customers insight into their mortgage situation and by offering solutions. It is important that the consumer credit provider persuades the customer to take action in time so that it can determine on the basis of the customer's personal circumstances whether additional action is necessary. Customers have the time to now start making (extra) repayments or saving funds. However, the Minister realises that consumers cannot be forced to do something about their situation. Some consumers must take action in the short term because in the future it might be difficult to finance a new mortgage, for example on the basis of the expected lower pension income when reaching retirement age.

As ensues from the above-discussed Trend Monitor 2020 the AFM will see to it that the sector will take all necessary steps to reduce the risks which accompany an interest-only mortgage.

The policy objectives of the Minister of Finance: Consumer credit not as default option

The Ministry of Finance shares the AFM's view that application of behavioural science is important in the financial sector. In its recently published **Action Plan Consumer Choices** it again calls for market parties to jointly tackle the consumer choices issue. The idea behind this is that for a long time the prevailing view has been that if you provide consumers with the right information, they automatically make appropriate - rational - decisions. In practice, however, this theoretical view of a human being who thinks and acts rationally does not hold true in many situations. Consumers often have limited time, motivation and ready knowledge, and choices are made quickly and more intuitively. Precisely because a decision is made on a partly intuitive basis, the way in which choices are presented has a powerful steering effect. The Minister mentions, as examples of a choice architecture in which this is taken into account in an appropriate manner, (i) making it easy and attractive to open a savings account or repay the mortgage and (ii) credit facilities which are not offered as a default option.

Attention for abuse by debt collection agencies

On 8 February 2019 the government **announced** – in line with agreements from the coalition agreement – that it would be tackling the abuses in the debt collection market. This is part of the government's comprehensive approach to tackling debt and poverty. One of the intended measures is the introduction of a debt collection agency register in which debt collection agencies must be listed. Registration in the debt collection agency register will be a prerequisite for allowance to operate as a debt collection agency. Only if certain requirements are satisfied which relate, inter alia, to the quality of the work to be executed and the running of the business and the professional interaction with debtors, will a party be granted consent to operate on the debt collection market.

There will be different sanction options, including being able to impose a fine and cancellation of the registration if a debt collection agency does not satisfy the prescribed requirements. The legislative proposal establishing the debt collection agency register is currently being drafted. The Minister for Legal Protection indicated in a **letter** on 8 February 2019 that he assumes that the debt collection agency register will be up and running in the middle of 2021. In any event, the AFM already has a **special webpage** which guides consumers when they wish to lodge a complaint regarding a debt collection agency which has been engaged by a financial undertaking.

EBA's opinion on disclosure to consumers buying financial services through digital channels

EBA published an **opinion** on 23 October 2019 on disclosure to consumers buying financial services through digital channels. The opinion was addressed to the European Commission and contains recommendations. With this opinion, EBA intends to safeguard that the rules on the provision of information adequately take account of the increased digital marketing of financial products and financial services. The opinion pertains to the Distance Selling Directive, in which rules have been laid down with regard to the online sale of financial products to consumers. The European Commission is currently reviewing this directive.

EBA believes that it is of essential importance that consumers are able to make an informed decision on financial products and services. This means that they must have high-quality information that is presented in a timely and appropriate manner. EBA gives recommendations on several subjects, including the following:

- scope and consistency with other disclosure requirements from sector-specific rules (such as PSD2 (Payment Services Directive 2) or the MCD (Mortgage Credit Directive));
- timing of the provision of information;
- presentation of information;
- type of information;
- accessibility of information and effectiveness; and
- review of the effectiveness.

We expect the European Commission to take EBA's recommendations to heart. The European Commission may come up with concrete proposals for adapting the Distance Selling Directive in the course of 2020.

We advise market parties that offer their products or services online to consult EBA's recommendations. It is important not only from a regulatory point of view but also from a civil law point of view that consumers have appropriate information regarding products and services. Furthermore, the provision of digital services is also one of the AFM's priorities.

Brexit

For a general picture of the situation regarding Brexit, please see the **General Developments** section of this Outlook.

IMPORTANT INFORMATION FOR TRUST OFFICES IN 2020

DNB SUPERVISION

Organization of the compliance function

In 2019, DNB focused in its supervision of trust offices on the organization of an independent and effective implementation of the compliance function. In doing so, it assessed whether the implementation of the compliance function is being complied with as described in (Article 15 of) the Trust Offices Supervision Act 2018 . Compliance with this obligation will continue to receive DNB's attention in 2020. Against this background, some aspects of the supervisory practice that relate to the organization of the compliance function by trust offices are highlighted (also see DNB's **Factsheet on Trust Offices Supervision Act 2018**):

- The required segregation of duties between (i) first-line tasks on the one hand and operational compliance work on the other, and (ii) operational compliance work on the one hand and policy formulation on the other does not always go well.
- The requirement to assign the end responsibility for the execution of the compliance function and the audit function to two different policymakers has not always been implemented correctly.
- In order for the compliance function to really operate independently and effectively, it needs to be filled not only with sufficient expertise, but also with sufficient seniority. In this way, a trust office can ensure that compliance has real power of expression in the organization.
- Part of the compliance function is a reporting obligation to the management (and if applicable the supervisory body) of the trust office. In its supervisory investigations, DNB has found that such reports are sometimes lacking or are too numerical in nature. DNB's expectations with regard to the set-up of the compliance reports have been explained by DNB in a **newsletter for trust offices**.

Factsheet on Trust Offices Supervision Act 2018

DNB published a **Factsheet on Trust Offices Supervision Act 2018** addressing questions and focal points with regard to the Trust Offices Supervision Act 2018 and further legislation. It is a dynamic document that discusses and/or explains a variety of topics. DNB shares its insights in this document with regard to the way in which it explains standards and obligations or how it would like to see them implemented. The document (dated October 2019) will be updated and will thus be an important source of information for trust offices in 2020 as well.

Consultation on Good practices tax integrity risks

In early 2019, DNB **consulted** the market on the **Good practices** tax integrity risks for trust offices. A similar guideline was published for banks in July 2019. The final version for trust offices has been **published** in September 2019. DNB's guideline is a more thorough version of the guidelines on the SIRA and on 'risk appetite' respectively. More recently, DNB presented its findings on the study into the management of tax integrity risks by trust offices in a **newsletter**. The improvements that are still possible in the set-up of an SIRA were also discussed in that newsletter. It is self-evident that DNB has processed these findings in the final version of the Good practices tax integrity risks for trust offices. For that matter, there is limited guidance from DNB how the implementation of DAC 6 in Dutch legislation (see below) impacts the Good practices.

Consultation on Suitability Policy Rule

On 14 June 2019, the AFM and DNB presented the proposed amendments to the Suitability Policy Rule 2012 (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: **the 2019 draft decree** to amend the Suitability Policy Rule 2012 and the **draft amended** text of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework that DNB and the AFM use in the suitability assessments of policymakers in the financial sector. DNB and the AFM have amended the Policy Rule in response to changes in national and European legislation and regulations. Market parties could respond to the consultation until 1 September 2019.

There are no amendments that specifically pertain to trust offices. However, there are several amendments of a more general nature that are relevant to trust offices. These amendments include:

- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences. Because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the requirement of 'sufficient time' has been explicitly included under the suitability requirements in the Draft Policy Rule. In addition, the explanatory notes to the Policy Rule contain a separate section to clarify what is meant by 'sufficient time';
- The topic 'balanced and consistent decision-making' is further explained and it is made clear that this concept also entails that policymakers should act with independence of mind;
- The explanatory notes to the Policy Rule explain that the 'diversity in the policymakers' collective' is encouraged. DNB clarifies that variation in knowledge, experience, age, gender and professional and geographical background enables a broader view and different perspectives. As the Trust Offices Supervision Act 2018 introduced the requirement of a 'two-director' board, this theme also became relevant to managing boards of trust offices;
- The definition of 'policymaker' in the different supervisory rules for the financial sector vary slightly. In order to indicate who falls within the circle of policymakers (and thus the circle of persons to be assessed), it is made explicit in the explanatory notes that all persons who determine the policy and decision-making of companies, or have a substantial influence on them, qualify as policymakers within the meaning of the Policy Rule.

The Policy Rule will take effect in 2020.

Consultation on Social Decency Policy Rule

DNB presented the draft version of the **Social Decency Policy Rule** for consultation in the summer of 2019. The final version of the Policy Rule will be available in 2020. Contrary to what the title of the Policy Rule might suggest, it does not provide an interpretation of what is socially acceptable. With the Policy Rule, DNB indicates how trust offices should design their internal processes and policies so that 'the risk of involvement of the trust office or its employees in actions that are so contrary to what is considered appropriate under unwritten law in society that they could seriously damage confidence in the trust office or in the financial markets' can be mitigated. DNB requires trust offices to record how a balanced assessment of interests is made with regard to social decency and when this is done.

DNB Guidelines for artificial intelligence in financial sector

On 25 July 2019, DNB published a **discussion paper** containing guidelines for the use of artificial intelligence (AI).

DNB has established that financial undertakings increasingly use AI to improve their business processes, products and services. DNB indicates that financial undertakings can improve their existing business processes and deliver new added value by using AI. At the same time, incidents with AI, certainly if this technology is not used responsibly, can harm a financial undertaking and its customers – with potentially serious consequences for the reputation of the financial system as a whole. DNB sees that due to the interwovenness of the financial system, such incidents may ultimately even have an impact on financial stability. That is why it is important that financial undertakings use AI in a responsible manner, i.e. based on controlled and ethical business operations.

In DNB's opinion, responsible use of AI in the provision of financial services means that when developing applications, undertakings must take into account aspects, such as soundness, accountability, fairness, ethics, skills and transparency (SAFEST). DNB indicates that as the use of AI becomes more important in the decision-making process of a financial undertaking, and the potential consequences of this for the undertaking and its customers become greater, the bar for a responsible and transparent use of AI will be higher. In its supervision of financial institutions, DNB will explicitly monitor this and will further investigate the main aspects of the use of AI.

DNB emphasises that this discussion paper contains a provisional view with regard to the responsible use of AI in the financial sector. DNB is of the opinion that the issues and ideas discussed in this document would benefit from a broader discussion, and has therefore called on relevant stakeholders to share their comments and suggestions with DNB. DNB has stated that it will report on the outcome of this process in the course of 2020.

Positive decisions and requests for information to go through DLT

Beginning 1 January 2020, [DNB] will be sending all positive decisions on prospective appointments through the DLT (Digital Supervision Portal). This change comes along with the request to institutions to also send a copy of the decision to the candidate. DNB will still be informing candidates of the results by telephone. DNB will only send decisions to the institution and the candidate by post in cases in which DNB does not consent to the appointment. Likewise, requests for information concerning reviews submitted and confirmations of reappointments will henceforth be sent to the institution through DLT. Institutions can also return the information requested by DNB through DLT.

Intended changes in control structures subject to permission

On its website, DNB has posted a list of information that trust offices must at a minimum provide to DNB in the event of an intended changes of the official or actual control structure of the group to which the trust office belongs. Trust offices must now apply to DNB for approval of such changes. In short, this application must include (in part) the reason for the intended change, an organisational chart of the current and intended structure, and lists of all holders of a qualified participation in the trust office under the current and intended structure. See the DNB **news item** for the detailed list of the information to be provided.

CURRENT LEGISLATION AND REGULATIONS

Integrity legislation

In the past year, European and Dutch supervisory authorities have published a lot in the area of integrity. At the national level, 2020 will be marked in particular by the implementation of the Fifth Anti-Money Laundering Directive (AMLD5), the UBO register and the legislative proposal on the Anti-Money Laundering Action Plan Act. At the European level, there is an increasingly urgent call for the harmonisation of all anti-money laundering rules and the centralisation of anti-money laundering supervision. For an overview of the consequences of AMLD5, the UBO register and other relevant European developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

NEW LEGISLATION AND REGULATIONS

Implementation of the EU Directive in relation to reportable cross-border arrangements (DAC 6)

EU Directive 2018/822 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements is implemented in Dutch regulations. **The new regulations** will enter into force on 1 July 2020. To this end, two laws are being amended (the International Assistance

(Levying of Taxes) Act and the State Taxes Act). The Directive is an implementation of action point 12 of the OECD project regarding base erosion and profit shifting (BEPS2).

The Directive intends to contribute to tax transparency and to counter aggressive cross-border tax planning arrangements. To this end, a reporting obligation has been introduced for 'intermediaries' with regard to 'reportable cross-border arrangements'. Trust offices are not specifically named as entities with a reporting obligation, but may be subject to this reporting obligation if they qualify as 'intermediaries'. This could be the case if the trust office makes the structure for implementation available or manages this implementation, or if the trust office acts as the managing director.

Sustainability measures

The past year has seen a great deal of attention devoted to sustainability and climate change. An important development concerns the European legislation and regulations to channel capital flows towards sustainable economic activities. This is done, among other things, by using disclosure requirements for investors in respect of the sustainability of financial products and sustainability labels for benchmarks to facilitate ESG investors. The AFM also intends to bring a focus in its supervision of market conduct in 2020 to sustainability-related disclosure requirements. Another point of attention is the resilience of the financial sector to climate change. We are seeing that climate change and natural disasters are entailing new risks for banks and insurers. The ESAs, the AFM and DNB have been sharing insights and recommendations on the impact on operations and risk management. We expect to see a good deal more about these points for attention and other sustainability-related aspects in 2020. This aspect will have an impact on the operations of many market parties, possibly including trust offices. For an account of the developments in the area of sustainability, see the **Sustainability** section of this Outlook.

IMPORTANT INFORMATION FOR ISSUERS & CAPITAL MARKETS IN 2020

AFM SUPERVISION

AFM Trend Monitor 2020

As supervisory authority, the AFM has actively propagated its vision of the supervision of the financial markets in the Netherlands. On 10 October 2019, it published its '**Trend Monitor 2020**' online. This report identifies important trends in the financial sector and the risks associated with them. The studies in Trend Monitor 2020 contribute to determining the supervision priorities of the AFM, which will be translated into its supervision activities calendar for 2020 (expected to be published in the first quarter of 2020). The **General Developments** section of this Outlook discusses the AFM's analysis in general terms.

For issuing institutions, Trend Monitor 2020 focuses primarily on sustainable investments. The AFM has noted an increase in the issue of green, social and combined bonds, particularly in the form of sustainable investments. Meanwhile, retail investors are also exhibiting increased interest in sustainable investments. The expectation is that this trend will continue over the coming years. The AFM notes that the risks associated with sustainable investments, such as 'greenwashing' and abuse by investors, will need to be a point of focus in the supervision in the future. With these factors in mind, in Trend Monitor 2020 the AFM identifies the availability and quality of information throughout the entire chain of sustainable financing as a critical consideration, in view of the fact that this is an essential precondition for responsible sustainable investment. The AFM observes that the provision of information in the area of sustainability is still at a rudimentary stage of development, and undertakings (in particular listed undertakings) have much to improve. We therefore expect that going forward, the AFM will be placing a greater emphasis on the provision of sustainability-related information by issuers. For more on this and other aspects relating to sustainability, see the **Sustainability** section of this Outlook.

Increasing importance of reporting on value creation

On 5 December 2019, the AFM published its study on value creation, alongside the follow-up on the Non-Financial Information Disclosure Decree, in its **In Balance Report 2019**. This report looked at the 2018 annual reporting of 39 listed undertakings (AEX and AMX) to assess their reporting on value creation. The study's primary goal is to provide a picture of the reporting on value creation and have an influence on undertakings to promote a higher level of accountability in this area.
An undertaking's business model must describe the way it generates and maintains long-term value through its products or services. It is clear that long-term value creation is increasingly becoming the central focus in this reporting, but there is still room for improvement. The reporting must be more specific and more in-depth. For example, little attention is being devoted to medium-term value creation, to potential value destruction, to outcome and impact, to the link between long-term value creation and governance, and to the risks with respect to natural, manufactured and intellectual capital.
In addition, there has been some follow-up on the Non-Financial Information Disclosure Decree. Large public-interest entities are obliged to comply with this decree. As the **Outlook 2019** describes, the AFM researched this in 2018. In 2019, this follow-up investigated 33 undertakings that reported disappointing results. Approximately half of these showed improvement. That improvement is primarily seen in the undertakings that lag far behind in compliance with the Non-Financial Information Disclosure Decree. The other half shows little improvement and continues to lag behind, with many different failures being identified. The AFM expects to integrate the compliance with the Non-Financial Information Disclosure Decree into the ongoing supervision as of 2020. The undertakings must take further steps to improve the quality of the non-financial reporting.

ESMA & EBA

ESMA Work Programme 2020

ESMA published its **2020 Annual Work Programme** on 26 September 2019. It describes the supervision priorities for 2020 from ESMA's perspective. ESMA's priorities for 2020 are linked to three significant developments of 2019 that shifted a significant amount of new tasks and mandates to ESMA:

- **ESAs Review**: In 2019, a political consensus was reached on a comprehensive revision of the tasks and mandates of the European Supervisory Authorities (ESAs). ESMA's governance, organizational structure and mission will change significantly as a result of this ESAs Review.
- **EMIR 2.2.**: Also in 2019, a political consensus was reached on a substantial amendment/expansion of Regulation 648/2012 on OTC-derivatives, central counterparties and trade repositories (EMIR), commonly known as 'EMIR 2.2'. Under EMIR 2.2, ESMA must set up a new supervisory framework, begin monitoring 'third country central counterparties', and expand its convergent role with respect to European central counterparties.
- **Capital Markets Union (CMU), Sustainable Finance, and Fintech Actions Plan:** Finally, in 2019, under the CMU (Sustainable Finance and Fintech Actions Plan), a consensus was reached on new tasks for ESMA with regard to cross-border funds distribution, the new prudential framework for investment undertakings, and the Sustainable Finance Disclosure Regulation.

This development has given ESMA substantially more powers, and it expects that it will need the whole of 2022 to implement them.

ESMA consultation on Market Abuse Regulation

On 3 October 2019, ESMA published, at the EC's request, **a consultation paper** on various sections from the **Market Abuse Regulation**. Approximately three years after the entry into force of this Regulation, it is now time to review the current legal framework and assess whether it is still effective or appropriate, and whether amendments need to be made.

The consultation paper addresses a multitude of topics from the Market Abuse Regulation and is particularly relevant for market parties (and their daily management) who issue financial instruments that will be or have already been admitted to trading. Topics covered include the definition and delayed disclosure of inside information in certain situations and the effectiveness of the mechanism to delay this disclosure, the scope of the reporting obligations under the exemption for buy-back programmes of own shares admitted to trading, but also the question whether FX contracts should fall within the scope of the Market Abuse Regulation. Among other things, it is relevant for investment firms that the aim is to simplify the system of reporting for buy-back programmes. In that context, ESMA is of the opinion that some references in the MAR to MiFIR can be removed, which would better streamline various obligations of issuers and investment firms in this regard. In addition, ESMA is currently analysing the interaction between the obligation to disclose inside information under the MAR and other disclosure obligations from the regulatory framework (referred to as CRD, CRR and BRRD) that apply to investment firms. The MAR may need to be further adjusted in some respects in this regard.

Stakeholders have now been given the opportunity to provide feedback on the consultation paper. ESMA aims to present the final report to the EC in the spring of 2020. We await the results with interest and will be interested to see whether they will result in changes to the Market Abuse Regulation.

ESMA report on the use of APMs

On 20 December 2019, ESMA published its report on the use by EU issuers of alternative performance measures (APMs) and their compliance with ESMA's APM Guidelines (see **report** and **press release**). ESMA's investigation revealed that there is room for improvement on compliance with the APM Guidelines. Only a minority of the issuers is in compliance with all principles of the Guidelines on their prospectuses and in other areas. ESMA has called upon issuers to improve their publications with respect to APMs. ESMA also highlighted that ratios and subtotals included in financial statements may also fall under the definition of an APM, and consequently must be in compliance with the Guidelines.

ESMA expects issuers to observe the findings of the report when they present their publications that contain APMs (specifically, but not exclusively, ad hoc publications, financial reports and prospectuses) to the market.

EBA Work Programme 2020

This year, the EBA (European Banking Authority) has again presented its work programme for the coming year (2020) in the **EBA Work Programme 2020**. Among other things, the EBA work programme includes the strategic supervisory priorities (objectives) and its activities in this regard for 2020. In this section, we outline the components that are relevant for issuers:

- the monitoring of the market developments surrounding the Securitisation Regulation and the drafting of technical regulation standards, guidelines and reports in this regard.
- the implementation of the Directive for the issue of covered bonds (see also the information on new legislation and regulations elsewhere in this section).
- contribution to the EC's '**Action plan: Financing sustainable growth**', which pertains to the taxonomy for sustainable financing and the standards for 'green bonds'.

CURRENT LEGISLATION AND REGULATIONS

Prospectuses

Prospectus Regulation (general)

In our previous **Outlook (2019)** we took a detailed look at the **new Prospectus Regulation** that took effect on 21 July of that year. In order to bring national legislation in line with this regulation, the **Prospective Regulation Implementation Act** and its corresponding **decree** also took effect on the same day. These new rules for prospectuses entailed a number of amendments, and have now replaced the Prospectus Directive. Since this implementation, ESMA has not been idle, and in October 2019 it issued **new guidelines** with respect to risk factors in the prospectus. In addition, ESMA also plans to issue new guidelines for 2020 (more on this elsewhere in this Outlook).

Guidelines for disclosure requirements under the Prospectus Regulation

ESMA presented the **draft guidelines** it drafted concerning the disclosure requirements for prospectuses under the Prospectus Regulation to relevant market parties for consultation. The consultation period ended on 4 October 2019. At present, the draft guidelines are being finalized based on the feedback received. The guidelines envisage clarifying which information must be included in the prospectus, and serve to ensure that the information that the issuers include in their prospectuses is complete, comprehensible and consistent across the entire EU. ESMA anticipates publishing the definitive guidelines on its website in the second quarter of 2020.

PRIIPs Regulation

Amendments to PRIIPs Regulation

In the **Outlook 2019** we reported on the consultation paper of 8 November 2018 published jointly by the ESAs that pertained to amendments to the PRIIPs Delegated Regulation. However, these amendments were ultimately never implemented. In February 2019 the ESAs published a **Final Report** containing a summary of responses received during the consultation period and the follow-up steps to be taken. The report shows that the ESAs no longer considered the 'rapid' but drastic amendments to the PRIIPs Delegated Regulation as proposed in 2018 to be appropriate. Consultation respondents generally did not agree with the proposed amendments, in particular with regard to the implementation of amendments before the more comprehensive PRIIPs review by the EC had taken place. Moreover, immediately following the consultation period the EC extended the temporary exception to the KID obligation for UCITSs (which was originally set to expire on 31 December 2019, thus necessitating the 'rapid' change proposal of 2018) until 31 December 2021. Consequently, instead of the 'rapid' amendments of 2018 the ESAs have decided to conduct a more integral review in 2019. This has resulted in a consultation paper that proposes more substantial amendments:

- **Performance scenarios for the future**: in early 2019, the ESAs produced a **joint supervisory statement** addressing the risk of overly positive performance scenarios with recommendations to developers and national supervisory authorities. Following on from these recommendations, the consultation paper now proposes the following:
    - a simplification of the information to be provided by removing the 'stress scenario' and 'moderate scenario' from the list of the four performance scenarios that PRIIP developers must use to illustrate the performance of the PRIIP, and
    - a revised methodology for estimating future performance and a compensation system for unforeseen failure of the methodology. According to the ESAs, this revised methodology would lead to a more realistic representation of future returns.
- **Information on past performance**: the ESAs set rules on the basis of which information on past performance must be provided for PRIIPs offered by certain UCITSs, AIIs, and certain insurance-based investment products.
- **Transaction costs**: the ESAs are considering changing the rules on the calculation and presentation of transaction costs in order to include all relevant costs and to make the products easier to compare for investors. This concerns:
    - substantial amendments to the cost table to be included in a KID, including improved compatibility with the disclosure obligations of MiFID II and a more specific description of the type of costs that must be disclosed.
    - adjustment of some methodologies for the disclosure of transaction costs arising from the purchase and sale of the underlying investments of a PRIIP.
- **PRIIPs with multiple investment options**: for PRIIPs with multiple investment options, the ESAs are considering requiring PRIIP-developers to provide more detailed information on at least four of the most relevant investment options plus additional, more general information about the other investment options. They are also considering further adjustments to the KID for this type of PRIIP, including an explanation indicating whether all costs are shown or not.
- **The expiry of the UCITS exception**: Finally, the ESAs are considering amendments in preparation for the UCITS exception that is due to expire on 31 December 2021. Specifically, the ESAs are consulting on what components of the KID Regulation (Implementing Directive (EU) 583/2010 as regards key investor information) must be included in the PRIIPs Delegated Regulation in order to address potential problems.

Interested parties had until 13 January 2020 to respond to the consultation paper. The ESAs expect to have assessed the responses and submit their ultimate amendment proposals to the EC in the first quarter of 2020. Depending on what happens in the European legislative procedure, the proposals could take effect in 2021.

We advise market parties to pay close attention to the developments surrounding the PRIIP regulations and the KID. Additionally, we recommend checking whether all KIDs currently comply with the additional disclosure obligation set out in the ESAs' joint advisory statement.

Applicability of PRIIPs Regulation to bonds

On 24 October 2019, the ESAs published a **statement** providing more clarity on the issue of when the **PRIIPs Regulation** may apply or will apply to an offer of bonds. This was prompted by the observation by European regulatory authorities that there is a lack of understanding of this issue on European bond markets. This statement is intended to clear up this issue and create a level playing field within Europe in this area. The statement discusses a number of different types of bonds (perpetual, subordinated, differing interest rates, etc.) and states, for each type, whether in the opinion of the ESAs the bond in question falls under the scope of the PRIIPs Regulation. In practical terms, the bottom line is that if a market party decides to issue a bond, it must always evaluate whether this issue falls under the scope of the PRIIPs Regulation. Whether it does will ultimately depend on the characteristics of the bonds being offered. It can be expected that in 2020 the AFM will be monitoring compliance with the statement of the ESAs.

Regulatory Technical Standards KID

In its **Work Programme** for 2020, the Joint Committee of the European Supervisory Authorities (ESAs) expressed the intention to evaluate the PRIIPs Regulation, and in February 2020 intends to make proposals for amendments to (in part) the KID in the form of Regulatory Technical Standards (RTS).

Securitisations

Securitisation Regulation (general)

In our previous **Outlook (2019)** we addressed the Securitisation Regulation in light of its coming into effect on 1 January 2019. Over the past year the European legislator has not been idle, and supplemental legislation in this area, including in the form of Regulatory Technical Standards, is currently being drafted. We will cover the amendments to be expected for 2020 in this area below. It is worth noting here that on 15 March 2019, DNB published a **news item** on its website stating that in 2018, growth was seen in the Dutch securitisation market for the first time since 2007, although this market has not yet recovered to pre-crisis levels.

Securitisation transparency

On 16 October 2019, the EC supplemented the Securitisation Regulation with **Regulatory Technical Standards** specifying the information on securitisation to be provided by the initiator, sponsor and SSPE (special purpose entity for securitisation purposes). In order to ensure that together this presents a complete picture of a securitisation, and to provide efficient access to all relevant information in this area, the EC has compiled all this information into this Regulatory Technical Standard. The delegated regulation for the implementation of this Regulatory Technical Standard is expected to take effect in the first quarter of 2020. This will very likely take effect simultaneously with its corresponding EC **Technical Implementing Regulation**, which pertains to the format and the standardised templates for the submission and provision of information on a securitisation.

STS-framework for synthetic securitisations

Under the Securitisation Regulation, EBA was to present a paper no later than 2 July 2019 on the feasibility of a specific legal framework for simple, transparent and standardized ('STS') synthetic securitisations and balance-sheet synthetic securitisations. In this form of securitisation, there is no legal transfer of the claims, but rather only the credit risk (for example, a claims portfolio) associated with the claims is transferred in whole or in part. EBA ultimately produced its **discussion paper** concerning this subject on 24 September 2019.

EBA's discussion paper contains, firstly, an extensive analysis of the market and trends for synthetic securitisations in the EU, including historical data on the default and losses on such securitisations. In the discussion paper, EBA recommends creating a cross-sectoral legal framework within the STSframework for synthetic securitisations, but only for the 'balance-sheet securitisations'. For this, the document introduces a list of STS-criteria that these synthetic securitisations must meet. The consultation on the discussion paper has now been concluded and the expectation is that EBA will file the final report containing its legislative and other recommendations with the EC in June 2020.

Obligation of exemption notice for announcement documents expired?

With the implementation of the Prospectus Regulation, a number of provisions in the Financial Supervision Act that related to the old prospectus system have expired. One of these was the legal basis for the inclusion of a mandatory exemption notice on the front page of announcement documents (like information memoranda) when using an exception to the prospectus obligation. This exemption notice is referred to as the 'AFM banner', or sometimes the 'wild west' icon. It is notable that the detailed system in which this obligation is described (and which prescribes the form and wording of the icon) has not been changed, and so remains in place. Likewise, the AFM's website still lists the obligation of placing an exemption notice whenever an exception to the prospectus obligation is utilised.

Here the question arises of whether eliminating the legal basis for the exemption notification was done deliberately or whether this was an apparent error on the part of the legislator. We certainly cannot rule out the latter, and consider there to be a significant chance that the legislature will rectify this in 2020. We are eagerly waiting to see what happens here, and for the time being, continue to advise market parties to include the exemption notice.

Amendment to the Financial Supervision Funding Decree 2019

Last year, an amending decree to the Financial Supervision Funding Decree 2019 was the subject of a **consultation**. The most relevant point of the amending decree is that from its effective date it adjusts the various categories of supervision by which the costs of supervision are apportioned. It also contains a new standard for persons who fall under the supervision of the AFM in conjunction with the Securitisation Regulation. The intention was for the amending decree to go into effect from 1 January 2020. However, this decree has not yet been published in the Bulletin of Acts and Decrees.

NEW LEGISLATION AND REGULATIONS

Entry into force of rules for covered bonds

In our previous **Outlook (2019)** we considered the new European-law framework for 'covered bonds'. Covered bonds are debt instruments issued by credit institutions and backed by a separate asset pool from which bondholders can recover directly as preferential creditors. The framework consists of a **regulation** with direct effect and a **directive** that will need to be implemented in Dutch law. The intention is to encourage the use of covered bonds in more Member States and to create a harmonised framework for the supervision of covered bonds. The directive introduces a definition of the term '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.

Both the regulation and the directive were officially published on 18 December 2019 and entered into force 7 January 2020. The regulation shall apply from 8 July 2022 and implementation of the directive and the application of the directive is on the Ministry of Finance's agenda for June 2020.

Proposal Sovereign Bond-Backed Securities (SBBS) Regulation

As we reported in our previous **Outlook (2019)**, on 24 May 2018 the EC presented its **proposal** for a regulation for sovereign bond-backed securities (SBBSs). 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 concerning the situations and conditions in which departure from the design requirements for SBBS can be allowable without losing this favourable prudential treatment.

The European Parliament gave this proposal an initial reading on 21 March 2019, and then issued a report with a few modifications to the proposal. The Dutch government's most recent **quarterly report** indicates that the negotiations in the European Council have not yet started, and that like the Austrian and the Romanian presidency, the Finnish presidency has not yet designated a Council working group to discuss the proposal. Consequently, at this time it not yet clear how long this process will take or whether there is any realistic expectation that this legal framework will take effect in 2020. We would not be surprised at all if this did not happen until 2021.

SME Growth Market Promotion Regulation

In our last **Outlook (2019)** we reported on the **SME Growth Market Promotion Regulation**. This is an amending regulation that will introduce a number of amendments to MiFID II and the current Market Abuse Regulation in addition to the new Prospectus Regulation. This initiative is strictly limited to SME growth markets and undertakings listed on such trading platforms. In short, the SME Growth Market Promotion Regulation aims to facilitate access by SMEs to capital markets, in part by reducing compliance costs and administrative burdens for issuers.

The SME Growth Market Promotion Regulation was published on 11 December 2019. The changes that the Regulation entails for MiFID II and the Prospectus Regulation have now been in effect since 31 December 2019. The changes with respect to the Market Abuse Regulation only go into effect on 1 January 2021.

Legislative proposal on expansion of shareholder disclosure obligations

On 23 May 2019, the **legislative proposal on the Act expanding shareholder disclosure obligations** was published for consultation. The consultation period has now ended. This preliminary draft introduces a new disclosure threshold of 2% for shareholders with a participation in a listed company. The primary objective of this system is to promote the transparency of substantial participation in listed undertakings and to contribute to the long-term value creation of these undertakings. After the act goes into effect, anyone who on that date knows or should reasonably be aware that he or she possesses a capital interest or voting interest of greater than 2% (but less than 3%) in an issuer (with the Netherlands as its Member State of origin) has four weeks' time to report this interest to the AFM. This threshold value of 2% is being introduced alongside the existing threshold value of 3%, and so does not replace the latter.

A number of respondents during the consultation period were quite critical of the legislative proposal, including the AFM, which appears to be no fan of the addition of extra disclosure thresholds to the Dutch regime. The most significant argument here is that it goes against creating a level playing field in Europe on the capital markets, being that the current legislative proposal departs still further from what is normal within Europe. In addition, in the opinion of the AFM this could also lead to an increase of the direct and indirect financial burden on shareholders.

The next step is to wait and see what the Dutch legislator does with the points of criticism received. Whatever the case, the government intends for the new act to take effect by no later than 1 January 2021.

Legislative proposal on investment objects and investment bonds

This legislative proposal, which in part introduces regulatory supervision on the management of investment bonds, has at this point a certain history behind it. We have already discussed it in some detail in our last two editions of Outlook, this after the Minister of Finance held an **internet consultation** on it back in 2016. The purpose of this legislation is to increase the level of protection of investors in investment objects and investment bonds and to exclude rogue providers from the market for investment objects and investment bonds by tightening up regulations and the associated supervision.

In our last **Outlook (2019)**, we reported that the legislative proposal had been included in the Minister of Finance's planning brief for 2019, which indicated that it was on the agenda for last year. That year is now behind us, and the act has yet to see the light of day. We have been given to understand that the legislator still has this legislative proposal on its radar, but we have to wonder whether anything will come of it in 2020, because it is nowhere to be found on the Minister's **planning brief for 2020**.

Sustainability measures

The past year has seen a great deal of attention devoted to sustainability and climate change. One major development has been the European legislation and regulations designed to channel capital flows into sustainable economic activities, for example, with disclosure obligations oriented towards investors on the sustainability of financial products and sustainability labels for benchmarks to facilitate ESG-investors. The AFM also intends to bring a focus in its supervision of market conduct in 2020 to sustainability-related disclosure obligations. Another point of attention is the resilience of the financial sector to climate change. We are seeing that climate change and natural disasters are entailing new risks for banks and insurers. The ESAs, the AFM and DNB have been sharing insights and recommendations on the impact on operations and risk management. We expect to see a good deal more about these points for attention and other sustainability-related aspects in 2020. This aspect will have an impact on the operations of many market parties. For an account of the developments in the area of sustainability, see the **Sustainability** section of this Outlook.

OTHER DEVELOPMENTS

Capital market union working group final report

On 10 October 2019, the Minister of Finance **published the capital market union working group's final report**. Agreement has now been reached on many of the legislative proposals from the European Commission's capital market union action plan of 2015. Nevertheless, the Dutch Minister of Finance considers it important that further steps be taken to expand the depth and breadth of the European capital market union. To achieve this, the Minister of Finance has, in concert with his French and German counterparts, taken the initiative to solicit recommendations for the future of the capital market union from experts in the financial sector. The result is this final report.

The working group observes that there is an urgent need for further deepening in the capital market union in Europe. Internal barriers create fragmentation of capital markets, and further diversification of financing options is needed. Additionally, recent technological and geopolitical developments and an increasing interest in sustainability are creating an essential need for a new impulse in the further development of capital markets. Based on this, the working group has formulated the following two primary goals in its final report:

- capital markets must be encouraged to offer savings products that meet the needs of consumers, and
- capital must be applied towards investments that create value for the real, innovative and sustainable economy.

The working group also considers an integrated and liquid European capital market vital to

Europe's position as a global financial centre. To achieve these goals, the working group formulates four priorities for the EU that will require action at both the national and European levels:

- **Generation of more long-term savings and investment opportunities**: This is made more concrete with the recommendation to increase the direct participation of consumers in the capital markets.
- **Push development of share markets**: according to the working group, this can be achieved in a number of ways, for example by stimulating venture capital and private equity, simplifying access by SMEs and mid-caps to public share markets, and also by accelerating the establishment of a central access point for regulated information on listed undertakings.
- **The improvement of financial flows between European financial markets**: the working group also has specific recommendations here, including revision of the framework for central securities depositories in order to better facilitate cross-border securities transactions.
- **Enhance the international role of the euro**: the working group concludes that an integrated capital market contributes to boosting the euro as an international currency. With this in mind, the working group recommends that member states encourage and standardise the issue of green government bonds, and also reinvigorate the securitisation markets. According to the working group, the latter is important to give credit providers more balance sheet headroom, but also because this gives investors options to indirectly invest in credits with an appropriate risk profile.

In recent years, many steps have been taken towards creating a capital market union in Europe. This final report shows that still many steps need to be taken before this goal can be achieved to a substantial degree. It remains to be seen which recommendations the European legislator will take up and which, over the coming years, will lead to new legislation and regulations. In any event, the Minister of Finance will be urging the EC to use this final report to draft a new action plan with new proposals for the European capital market union. It remains to be seen whether we will see any initial outlines of this movement in 2020.

Policy vision on SME financing market

In a letter of 5 November 2019, the State Secretary for Economic Affairs and Climate informed the House of Representations of his vision of the SME financing market and the actions that must be taken to improve financing within this market. The Dutch SME financing markets also include the capital markets. This policy vision interfaces with the final report of the capital market union working group (Next CMU) discussed above. In his letter, the state secretary identifies a number of trends, such as:

- SME entrepreneurs have difficulty seeing and evaluating all the financing options, and additionally, the range of financing offerings should be expanded.
- Entrepreneurs looking for relatively small amounts of risk-bearing capital have difficulty finding it.
- In the Netherlands, a relatively high percentage of credit applications from SMEs are rejected (for a variety of reasons).
- There is growth in alternative forms of financing, but in terms of volume, these financing forms are still quite limited in comparison to bank financing.

Specifically with respect to credit provision, SMEs in the Netherlands are receiving less financing than the European average. Achieving growth and transition will require more investments that are, generally, risky in nature. This is why the state secretary believes that good propositions are essential. On this, the government is a proponent of further integration of the European capital markets to create a larger pool of capital (and risk capital in particular) for the financing of investments by SMEs and other business sectors. The solutions to these issues in the SME financing market must be in proportion to other policy goals, such as those with respect to the achievement of the banking union and capital market union, monetary policy and financial stability.

The state secretary further notes that a broad financing landscape is an important element of strengthening the Dutch entrepreneurial ecosystem. One action to be taken to increase financing options would be to create an IPO fund for SMEs to allow the European SME sector to attract share capital more easily. In line with the European Commission's vision, the state secretary considers it prudent to further strengthen the capital market union in order to achieve a deeper and more integrated European capital market. This would be a boon to start-ups and scale-ups. Harmonisation will boost growth in alternative financing forms such as crowdfunding. The state secretary's policy vision is in keeping with the European trend towards a capital market union. We are very interested to see the concrete steps that the Netherlands will be taking in 2020 to make a worthy contribution to this movement.

Brexit

For a general picture of the situation regarding Brexit, please see the **General Developments** section of this Outlook.

IMPORTANT INFORMATION FOR INSURERS IN 2020

This section discusses the developments foreseeable in 2020 that relate specifically to insurers. We recommend that insurers that also provide additional services, such as credit or advisory services, consult the sections in this Outlook relating to these services - i.e., Credit Providers and Investment Firms respectively. Furthermore, we would like to point out that as 'insurance providers' insurers also fall under the concept of financial service providers, as a result of which the likewise-named section, Financial Service Providers in this Outlook, is also important for insurers.

DNB SUPERVISION

Changed DNB position regarding the independent functioning of the Supervisory Board

In the summer of 2019, DNB changed its **position** on the independence of the Supervisory Board on a number of points to fit in with the EBA **Guidelines** on the assessment of suitability of members of the management body and key function holders. When reviewing supervisory directors, DNB looks at the independence in mind, the independence in appearance and the independence in state. To assess whether a supervisory director is formally independent, DNB uses the criteria from the Guidelines, which are stricter in a number of respects than DNB's former policy. DNB maintains its position that at least half (50%) of the Supervisory Board must consist of formally independent supervisory directors. DNB applies its position to all institutions that it supervises.

Assumptions of ORSA forecasts

A 2019 **DNB review of the forecasts in ORSA** has revealed that the assumptions behind the forecasts are not suitably transparent. For example, the quality of the NCG (Net Capital Generation) reports that are generally used to substantiate solvency forecasts is generally inadequate. Problems observed include a 'residual items' line that is generally excessive without allocation of profit sources, no connections drawn to previous years, and spotty quality of data, all of which impede the process of economic analysis. DNB will be investigating the actions that can be taken to improve the general quality of NCG reporting.

Positive decisions and requests for information to go through DLT

Beginning 1 January 2020, DNB will be sending all positive decisions on prospective appointments through the DLT (Digital Supervision Portal). This change comes along with the request to institutions to also send a copy of the decision to the candidate. DNB will still be informing candidates of the results by telephone. DNB will only send decisions to the institution and the candidate by post in cases in which DNB does not consent to the appointment. Likewise, requests for information concerning reviews submitted and confirmations of reappointments will henceforth be sent to the institution through DLT. Institutions can also return the information requested by DNB through DLT.

Q&A climate-related risks

In November 2019, DNB answered the following question via a **Q&A** on its website: 'Does DNB expect Dutch insurers to take climate-related risks into account?' DNB's answer is clear: yes, DNB does expect this and this also follows explicitly from Solvency II now that the Solvency II Delegated Regulation prescribes that the Own Risk and Solvency Assessment (ORSA) should also include climate-related risks. More specifically, the Q&A shows that:

- DNB expects insurers to include climate-related risks in their ORSA by analysing and describing the impact of these risks in their risk profile.
- DNB expects the results of this analysis to be reflected and explained in the ORSA report. If the analysis shows that climate-related risks are not considered material – for example because the insurer is not or could not be exposed to these risks – DNB expects to see this reflected in this explanation.
- If there is a material risk, DNB expects the institution to work out a relevant scenario for this in the ORSA.

The **Good Practice** 'Starting points for addressing climate-related risks in the ORSA' published by DNA provides further guidance for this. We advise insurers to take note of these good practices and to ensure that ORSA 2020 also takes climate risks into account.

Good Practice & self-assessment on management of authorisations

At the end of August 2019 DNB published the **Good Practice** 'Managing authorisations non-life insurers'. In this document, DNB addresses the legal requirements in the area of authorisations (including Solvency II, the Sanctions Act, the Insurance Distribution Directive, the Financial Supervision Act (*Wet op het financieel toezicht*, Wft) and Prudential Rules (Financial Supervision Act) Decree (*Besluit prudentiële regels*, Bpr)) and DNB's expectations in that regard. The Good Practice was established after consultation with the sector, and replaces the Standards on Authorisations from 2013. We mention six important points from the good practices:

- **Strategy document**: an insurer demonstrates that the use of the authorised agents is based on a strategic substantiation. Its strategic vision and substantiation is recorded in a strategy document.
- **SIRA**: when carrying out the annual systematic integrity risk analysis (SIRA), an insurer also looks at the integrity risks that may arise during outsourcing via the authorised agent.
- **Outsourcing policy**: the insurer's outsourcing policy must pay specific attention to outsourcing to authorised agents. Among other things, the following aspects must be addressed:
  - requirements for the customer acceptance procedure at the authorised agent;
  - requirements for selection and assessment of the authorised agent;
  - compliance with the Sanctions Act and the Insurance Distribution Directive (IDD), and monitoring thereof;
  - business continuity plans (emergency plans), including exit strategies for outsourced critical or important activities.
- **Outsourcing agreement:** the outsourcing agreement with the authorised agent must include:
  - everyone's role in the product approval process and the definition of the target market;
  - who is responsible for the Sanctions Act screening of policyholders and who (the insurer or authorised agent) reports any hits to DNB;
  - agreements on the use of the Risk Management Work Programme by the authorised agent, the reporting times and the monitoring thereof by an external auditor.
- **Intermediary audit**: the insurer carries out checks at the file level of the authorised agent to be able to determine the reliability of the data and IT sufficiently.
- **Second and third line functions**: the good practices focus primarily on first line but also contain good practices for the second and third line functions at the insurer:
  - the insurer's risk reporting devotes attention to the risks related to the

- management of outsourcing through an authorised agent;
- the insurer uses an audit programme for authorisation audits, which has been assessed by the compliance officer;
- the actuarial officer assesses and advises on the quality of the data supplied from the authorised agents;
- the internal audit function assesses all process steps of management of authorisations (strategy, policy, granting authorisation, monitoring, reporting and evaluation). They check whether procedures are being complied with and assesses whether findings from authorisation audits are followed.

A number of insurers were approached by DNB in September 2019 and they were requested to carry out a self-assessment on the basis of the Good Practice. The self-assessment revealed that most insurers apply many examples taken from the Good Practice. An initial analysis did, however, reveal the following points for attention:

- only 47% of insurers in the analysis use risk management as part of the decision-making surrounding the authorized agents-strategy, and only 53% assessed the compliance function in the management programme for the agency audits.
- 73% of insurers in the analysis set requirements in the policy on compliance with the Guidelines by the authorised agent, but only 47% set requirements on compliance with the Insurance Distribution Directive (IDD).
- only 53% of the insurers surveyed include clauses governing post-contract data use in their outsourcing agreements.
- only 47% of respondents were able to establish that the level of information security of the authorised agent is equal to their own internal policies.

A more detailed analysis will be carried out in the first quarter of 2020. DNB will be publishing the results and determining follow-up actions for 2020 on the basis of the conclusions. We recommend that insurers who distribute via authorised agents study the good practices and, if necessary, update outsourcing policies and agreements. We also recommend that you keep an eye on the DNB website with regard to this point.

Good Practice intra-group relationships

DNB published the Good Practice 'Intragroup Relationships Insurers' in May 2019. This document replaces the old 'standards on intra-group agreements and positions of insurers'. With the new good practices, DNB provides insight into the legal requirements with regard to intra-group relationships (IGRs) and what is expected from insurers. We highlight a number of important points from the Good Practice:

- **Policy Document**: the procedures and measures to control the risks of IGRs are laid down in a policy document, which includes:
  - procedures for conducting regular risk analyses of all IGRs within the group;
  - risk management procedures and measures, such as (i) the nature or type of IGRs permitted within the group, (ii) limits and collateral to be received, (iii) at-arms-length requirements; (iv) risk monitoring and limit monitoring and (v) risk reporting to senior management.
- **Limiting financial risks**:
  - the size of an insurer's exposure to another group entity is in sound proportion to the independent repayment capacity of that group entity;
  - current account relationships between an insurer and other group entities arise solely on the basis of specific activities that fit within the normal course of business operations of the insurance business (for example: the settlement of costs of internal service activities within the group).
- **Operational implementation**: the purchase or sale of assets or liabilities between entities within a group takes place at arm's length conditions.
- **Legal guarantee**: each IGR is clearly described and laid down in a contract between the insurer and the counterparty with an adequate legal basis, in which the respective rights and obligations are clearly defined.

Insofar as insurers have not yet done so, we recommend that insurers in an insurance group review their IGRs and assess to what extent they comply with these good practices and take remedial measures where necessary.

Update Good Practice outsourcing

DNB published an update of the Good Practice 'Outsourcing Insurers' in May 2019. DNB published the first version of this in August 2018 (we reported this in our Outlook 2019). Feedback from the sector prompted DNB to publish an improved version.

The Good Practice lists relevant legislation and regulations for insurers regarding outsourcing and includes a number of examples, good practices, on how an insurer can implement these regulations. The Good Practice applies only to material outsourcing.

The May 2019 update includes additions and improvements to the following topics:

- additional assessment criteria that insurers use to perform the materiality assessment (with which the insurer assesses whether an outsourcing is important or critical);
- DNB has clarified that not all examples are applicable to all insurers. An insurer makes its own assessment of which measure fits its specific risks and size. An insurer can include a proportionality test as part of the risk analysis.
- DNB has clarified examples of good practices in the event of sub-outsourcing.

DNB has stated that it expects insurers to review their own outsourcing processes with the help of the Good Practice 'Outsourcing Insurers'. Insofar as insurers have not yet done so, we therefore recommend that insurers review their outsourcing and assess to what extent they comply with these Good Practices and take remedial measures if necessary.

Good Practice preparatory crisis plan

DNB published the Good Practice 'Preparatory Crisis Plan' (PCP) in July 2019. This is related to the Recovery and Resolution Insurers Act, which came into effect on 1 January 2019. The obligation for insurers to have a PCP that has been approved by DNB is part of this law.

The PCP is aimed at analysing possibilities in a situation where there is a shortfall in the capital requirements and the starting position of the going concern could come under pressure. It is mainly about anticipating and working out what measures can be taken in crisis situations and considering the implementation thereof in those situations beforehand.

In this Good Practice, DNB provides practical guidance and examples of how insurers can meet the legal requirements set for a PCP. In the Good Practice, DNB provides an overview of the general content of a PCP. Insurers can use this when drafting, and DNB expects that too.

Insofar as insurers have not yet done so, we recommend that insurers prepare their PCPs with due observance of these Good Practices.

Regular Supervisory Report

Under Solvency II, insurers must submit a Regular Supervisory Report (RSR) to DNB at least once every three years. The RSR is an extensive supervisory report with qualitative explanations, the structure and content of which are prescribed in Solvency II Regulation and the EIOPA Guidelines for reporting and disclosure.

In an October 2019 news item DNB reported that insurers submitted a first full RSR for 2016 in almost all cases. A new three-year cycle was therefore started in 2019. DNB therefore expects all insurers to provide a full RSR for 2019 to be submitted in 2020. Insofar as applicable, DNB expects that the report will specifically address the questions and comments that DNB has included in the feedback letters about the 2016 annual statements about the RSR.

Amendments to assessment of the application for a declaration of no objection

A declaration of no objection (*verklaring van geen bezwaar*, DNO) from DNB is required to hold or acquire a qualifying holding (namely an economic or controlling interest of 10% or more, or comparable control) in an insurer. When assessing an application for a DNO, DNB applies the European revised Joint Guidelines of EBA, EIOPA and ESMA. The application of these Guidelines has recently led to changes in various ways in the way DNB assesses an application for a DNO:

- **Assessment of the reputation of the proposed acquirer of a DNO:** when a DNO is applied for, DNB tests the reliability of the proposed acquirer. His or her reputation will also be assessed as of 1 July 2019. In addition to a reliability test, the assessment will then also comprise a professional competence test consisting of management competence and technical competence.
- **Tightening of the assessment of DNO's for group companies**: when granting DNO's for group companies, DNB will from now on assess all the group companies in the control chain.
- **Calculation method for indirect qualifying holdings**: in addition to direct shareholders in a financial target undertaking, there may also be persons who indirectly acquire significant influence in the target undertaking. These are indirect holdings of 10% or more in a financial target undertaking, which also requires a DNO. DNB assesses whether there is significant influence and applies the calculation method from the Joint Guidelines. This means that DNB first applies a material control criterion (as laid down in paragraph 6.3 of the Joint Guidelines), and then, if application of this criterion does not lead to an obligation to acquire a declaration of no objection, a formal multiplication criterion (as laid down in paragraph 6.6 of the Joint Guidelines).

We expect to gain more clarity in 2020 about how DNB deals in practice with reputation assessments and the new calculation method for indirect qualifying holdings. Additionally, according to the explanatory notes to the Financial Markets Amendment Act 2021, the legislator **intends** amending the Financial Supervision Act with respect to the group DNO, in order to bring them into line with the ESA guidelines.

Q&A: subscription, insurance or not

Although there is no explicit link to 2020, the new DNB **Q&A**: 'Subscriptions: insurance or not?' is so important for practice that we would like to point it out. DNB has also published a **feedback statement** pertaining to this Q&A. The Q&A and this feedback statement together contain useful information related to a question that we often encounter in practice, namely whether a certain service subscription is an insurance or not.

In the Q&A, DNB takes the position that if the requirements set by the Dutch Civil Code for a non-life insurance policy are met, a service subscription could qualify as insurance but that this does not have to be the case. The criterion used by DNB is whether, according to social views, a subscription – by whatever name – should be regarded as non-life insurance. In the light of social views, DNB does *not* consider a subscription that deals with the repair of a product as non-life insurance if:

- the subscription is a subordinate part of the purchase agreement for the product (and is therefore absorbed as it were); and
- the subscription is for the repair of defects that relate to the nature of the product and that therefore must not be attributed to external causes; and
- the duration of the subscription does not clearly exceed the economic life that can reasonably be expected of the purchased product.

Q&A: warranties in purchase agreements

The above mentioned Q&A about subscriptions is closely related to the **Q&A** 'Warranties in purchase agreements: insurance or not?' When purchasing a product, sellers regularly offer consumers warranties with regard to the product supplied. In such cases, the question arises whether the warranty is considered to be non-life insurance within the meaning of the Wft.

In this Q&A, too, DNB takes the position that if the requirements set by the Dutch Civil Code for a non-life insurance policy are met, insurance could exist but that this does not have to be the case The criterion used by DNB is whether a warranty according to social views should be regarded as non-life insurance. In the light of social views, DNB does not consider a warranty as non-life insurance if:

- the warranty is a subordinate part of a purchase agreement (and is therefore absorbed, as it were); and
- the warranty relates solely to the nature or defect of the purchased product; and
- the duration of the subscription does not clearly exceed the economic life that can reasonably be expected of the purchased product.

Q&A reinsurance

DNB published the **Q&A** 'recognition of reinsurance contracts as risk mitigation techniques in the Solvency II Standard Formula'.

Reinsurance contracts can form part of the efficient and effective risk management of an insurer. A well-constructed reinsurance contract can reduce the risks and thereby also the solvency capital requirement of an insurer. A reinsurance contract transfers risks, but at the same time introduces counterparty credit risk (to the reinsurer). This risk manifests itself in credit events, such as bankruptcy and downgrading of the reinsurer.

The Q&A deals in particular with:

- situations where the reinsured risks and investment risks are significant for the reinsurer, and the counterparty risk is therefore correlated with these risks;
- the aspects relevant to the recognition of the risk-mitigating effect of reinsurance contracts in the calculation of the solvency capital requirement according to the Standard Formula;
- aspects that DNB expects insurers to take into account when entering into a reinsurance contract.

We recommend that insurers who have placed risks with a reinsurer or who are considering entering into a reinsurance contract consult the Q&A and measure their reinsurance contracts against the benchmark of this Q&A.

DNB repeats legislative wish for an audit of financial reports of insurance group reports

In its **2019 legislative letter** DNB again drew attention to the absence of an audit of consolidated financial reports of insurance directive groups. DNB believes that this is key to prudential supervision of insurers and wants legislation to provide for this. DNB states that without an audit it cannot be assumed that quality of group reports is sufficient. Imposing re-reports often proves necessary when DNB carries out audits. By making an audit a statutory requirement, DNB can focus more effectively on its primary task: the prudential assessment of the reports. The Minister of Finance's **reaction** to this request from DNB shows that the Minister is not yet convinced that the gain outweigh the expense. Parties are consulting on this.

DNB Guidelines for artificial intelligence in financial sector

On 25 July 2019, DNB published a **discussion paper** containing guidelines for the use of artificial intelligence (AI).

DNB has established that financial undertakings increasingly use AI to improve their business processes, products and services. DNB indicates that financial undertakings can improve their existing business processes and deliver new added value by using AI. At the same time, incidents with AI, certainly if this technology is not used responsibly, can harm a financial undertaking and its customers – with potentially serious consequences for the reputation of the financial system as a whole. DNB sees that due to the interwovenness of the financial system, such incidents may ultimately even have an impact on financial stability. That is why it is important that financial undertakings use AI in a responsible manner, i.e. based on controlled and ethical business operations.

In DNB's opinion, responsible use of AI in the provision of financial services means that when developing applications, undertakings must take into account aspects, such as soundness, accountability, fairness, ethics, skills and transparency (SAFEST). DNB indicates that as the use of AI becomes more important in the decision-making process of a financial undertaking, and the potential consequences of this for the undertaking and its customers become greater, the bar for a responsible and transparent use of AI will be higher. In its supervision of financial institutions, DNB will explicitly monitor this and will further investigate the main aspects of the use of AI.

DNB emphasises that this discussion paper contains a provisional view with regard to the responsible use of AI in the financial sector. DNB is of the opinion that the issues and ideas discussed in this document would benefit from a broader discussion, and has therefore called on relevant stakeholders to share their comments and suggestions with DNB. DNB has stated that it will report on the outcome of this process in the course of 2020.

AFM SUPERVISION

AFM and DNB's points for attention concerning artificial intelligence in the insurance sector

In the summer of 2019, AFM and DNB published a joint **study** on artificial intelligence (AI) in the insurance sector. The study relates to AI applications by insurers in processes that are insurance-specific and insurance-related in nature, such as selecting, estimating and pricing risks, handling claims and detecting potentially fraudulent claims. The use of AI by insurers is currently being further developed. The regulators expect that the use of AI will increase dramatically.

The use of AI offers insurers not only opportunities but also entails uncertainties and risks. The supervisors point out that AI must be used in a responsible manner and in accordance with the requirements regarding ethical and controlled operational management, product development and the duty of care. The study contains 10 key considerations, some of which are important:

- In some of the ten considerations, the AFM and DNB focus on technical characteristics and organisational conditions. Part of this is a clear policy and how it is embedded in applications.
- The study also focuses on business and customer processes. These concern, for example, how AI applications for online decision environments can encourage consumers to make decisions that are in their best interest.
- The study has also examined the effect of AI on solidarity. Depending on the application, AI can have both a positive and a negative impact on insurability and solidarity.

The regulators expect the insurance sector that the aforementioned key considerations serve as a starting point for further development. We therefore advise insurers that use or want to use AI applications to take note of this study.

Consultation on Suitability Policy Rule

On 14 June 2019, AFM and DNB submitted the proposed changes to the Suitability Policy Rule 2012 (the Draft Policy Rule) to the market for consultation. The consultation comprised two documents, namely: the **2019 draft decree** to amend the Suitability Policy Rule 2012 and the **draft amended text** of the Suitability Policy Rule 2012, including explanatory notes. The amended Policy Rule describes the framework that DNB and the AFM use in the suitability assessments of policymakers in the financial sector. DNB and the AFM have amended the Policy Rule in response to changes in national and European legislation and regulations. Market parties could respond to the consultation until 1 September 2019.

We will briefly discuss the main amendments to the Draft Policy Rule below:

- Persons who exclusively qualify as an applicant of a declaration of no objection will be excluded from the amended application of the Policy Rule. The reputations of those persons will be assessed with due observance of the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, adopted by the European Supervisory Authorities consisting of EBA, EIOPA and ESMA (**link**).

- DNB and AFM have chosen to clarify that the suitability topic 'balanced and consistent decision-making' also means that policymakers act with independence of mind;
- The old Policy Rule only refers to the requirement of 'sufficient time' in the appendix with relevant competences: Because of the importance of having sufficient time on the one hand and the non-cumulative nature of the list of competences on the other hand, the AFM and DNB have decided to explicitly include the requirement of 'sufficient time' under the suitability requirements in the Draft Policy Rule. In addition, a separate section has been included in the explanatory notes about what AFM and DNB mean by sufficient time;
- The old Policy Rule includes an exception for small companies because the requirements of managerial skills in a hierarchical relationship could be too restrictive for these types of undertakings. In the Draft Policy Rule it has been added that the nature, size and complexity of the company must also be taken into account in deciding whether or not to employ the exception so that the AFM and DNB can include more circumstances in their consideration.

The Policy Rule will take effect in 2020.

EIOPA

EIOPA planning 2020

On 30 September 2019 EIOPA published its '**Single Programming Document 2020-2022 with Annual Work Programme 2020**'. Important themes in 2020 are digitisation/cyber and sustainable finance. Furthermore, attention is devoted to contributing to a consistent and high quality of supervision and consumer protection. The special priorities for 2020 are in particular:

- **RegTech/SupTech:** investigating whether new innovative technologies can be used for regulatory and supervisory purposes.
- **Monitoring market developments and the evolution of new technologies:** addressing issues that may arise when using technologies such as Distributed Ledger Technology (DLT)/Blockchain and AI.
- **Cyber resilience of the insurance market**: focussing on IT security and governance and the promotion of supervisory convergence and cooperation in cyber areas.
- **Cyber underwriting market**: creating a strong cyber insurance market as a driver of the digital economy.
- **Sustainable finance**: identifying key areas of supervision and promoting supervisory convergence in the assessment of ESG risks.
- **Convergence towards high quality prudential supervision throughout the EU:** the development of Union-wide strategic monitoring priorities and, on request, technical advice on the application of internal models. EIOPA will develop cross-border platforms for cooperation between supervisors.
- **Advancing market conduct supervision:** EIOPA will improve the available information for supervisors on consumer trends and retail risk indicators. In addition, EIOPA will conduct thematic investigations in certain areas where more attention is needed from supervisors.
- **Strengthening the financial stability of the insurance and pension sector:** EIOPA will develop a joint methodology to identify financial institutions to be included in Union-wide assessments and to assess the impact of environmental risks on financial stability. EIOPA can also recommend on-site inspections related to stress tests.

In addition, EIOPA discusses the strategic goals and specific priorities and the associated operational activities in this document.

2020 Solvency II Review - EIOPA consultation

Solvency II provides for an evaluation of the long-term guarantee (LTG) measures (including the UFR extrapolation) and other parts of Solvency II, five years after the entry into force of Solvency II. The EC has asked EIOPA for advice on this. It ultimately concerns 19 topics, including the evaluation of the LTG measures. EIOPA will issue an advice to the EC in June 2020 on all these topics. This is called the 2020 Solvency II Review - click **here** for a useful factsheet published by EIOPA. Below we highlight some relevant elements:

- **Consultation**: The draft of this advice from EIOPA was submitted to the market for **consultation** (consultation period ran from 15 October 2019 to 15 January 2020). The consultation paper has roughly three parts:
  - Evaluation of long-term guarantee measures including UFR extrapolation;
  - Macroeconomic resilience;
  - Evaluation of the existing Solvency II framework, including equity, SCR, MCR, reports, proportionality and group supervision.

  Some highlights from the consultation paper are:
  - Considerations on whether or not to choose a later starting point for the extrapolation of the interest rate term structure for the euro (30 years or 50 years) or to change the extrapolation method to take market information into account even after the starting point
  - Considerations to adjust the Volatility Adjustment (VA) to address overshooting problems and to take into account the liquidity characteristics of obligations
  - A proposal to adjust the calibration for interest rate risk, in line with the EIOPA recommendation for the SCR review in 2018
  - A proposal to add macro-prudential instruments to the Solvency II framework
  - A proposal for minimum harmonisation for recovery and resolution frameworks.

- **Request for information and impact assessment**: Together with the consultation paper, EIOPA has **requested information** from insurers about the impact of individual options, such as the impact of two alternative options for the VA. DNB has selected a number of insurers and asked them to participate in this request for information. The market could respond to this request for information up to and including 6 December 2019 and the regulators up to and including 8 January 2020.

In addition to this request for information, EIOPA will also perform a holistic impact assessment in March 2020. Then insurers are not asked to calculate the impact of individual adjustments, but to calculate the impact of the full package of recommendations. After processing consultation responses and the holistic impact assessment, EIOPA will send a final recommendation to the EC in June 2020.

EIOPA consultation on supervisory reporting and public disclosure

In the context of the 2020 Solvency II Review from July 2019 to October 2019, EIOPA held a **consultation** on supervisory reporting and public disclosure. The subjects were:

- general issues concerning supervisory reporting and public disclosure;
- individual quantitative reporting templates;
- solvency and financial condition report;
- narrative supervisory reporting; and
- financial stability reporting.

EIOPA identifies four important aspects that play a role in whether or not supervisory reporting obligations meet their goals, whether they are consistent and whether they are reasonable and proportionate:

- Proportionality
- National particularities
- Overlap and inconsistency
- Legal problems when sharing data

The current proposal from EIOPA aims to have proportional and a fit-for-purpose supervisory reporting and public disclosure framework in which all the above considerations and aspects have been taken into account. Said solutions include amendment of Article 35 Solvency II, improvement of the risk-based thresholds, simplification of the quarterly submission, removing some Quantitative Reporting Templates (QRTs) and simplification of a number QRTs.

EIOPA will include the results and conclusions of this consultation in its final recommendation to the EC in June 2020.

EIOPA assesses revised and new templates

As part of the abovementioned reporting and disclosure review, EIOPA has launched a **field test** on the amended and new proposed templates. The purpose of the field test is to give insurers the option of implementing new and amended reporting obligations, identifying and reporting important issues. Real data does not have to go to the NCAs. During the test phase, EIOPA would like to receive feedback and questions. Comments can be submitted up to and including 31 January 2020.

EIOPA Financial Stability Report

EIOPA published the **Financial Stability Report 2019** in June 2019. Although no concrete action points for 2020 follow from this, we do expect that the conclusions reached in this report will guide EIOPA's priorities in 2020. In the report, EIOPA identifies financial stability risks that are important to insurers. Some specific points that are highlighted:

- The long period of low interest rates continues to present significant challenges for life insurers. It is becoming increasingly difficult for them to get sufficient return on investments to meet their long-term financial obligations. This can further encourage search-for-yield behaviour.
- Climate risk and cyber risk continue to require attention. Physical climate risks are present in the underwriting activities of insurers, while transition risks affect investment portfolios. Cyber threats are also more prominent. The industry is taking increasingly more action to mitigate these risks. Correct monitoring and assessment of climate risks and cyber risk remains challenging.
- The solvency ratios of European insurers in general improved slightly in 2018 and remain high at around 200%, but the profitability of insurers is under increasing pressure. Insurers are increasingly struggling to meet promises on policies issued in the past. The investment composition is fairly stable, but EIOPA continues to monitor the potential search-for-yield behaviour.

EIOPA warning to travel insurance industry

In a recent **report**, EIOPA warned of consumer protection issues that it is seeing with regard to the travel insurance market. In the report, EIOPA examines problematic business models with pay structures based on extremely high commissions and extremely low claim ratios, which means that consumers get little value for money. Insurers should review their product offering and approval process to ensure that products offer consumers fair value and are suitable to meet consumer needs. The distribution agreements with intermediaries should also be reviewed to assess whether they are fair and in 'the best interest' of the consumer. EIOPA and national supervisors will closely monitor this and risk-based supervision in this area will be intensified.

EIOPA call for research proposals

EIOPA has identified that there are ongoing debates on policy and regulations for insurers. Many questions that arise in these debates require both appropriate theoretical foundations and in-depth empirical analysis. That is why EIOPA **called** on researchers on 21 October 2019 to participate in research on the following topics:

- Allocation of investments by insurers;
- Liquidity stress testing in the insurance sector;
- Early warning systems for insurance;
- System relevance of the insurance sector and the interwovenness with the financial sector;
- Economic valuation of the liability of the insurer; best estimate and risk margin.

Stakeholders can submit a properly substantiated research proposal to EIOPA. Both theoretical and empirical research proposals are welcome. EIOPA will then approve a number of proposals. In the implementation of an approved proposal, the research team will always collaborate with an EIOPA expert. EIOPA will inform the proposers on 28 February 2020 whether their proposal has been approved.

EIOPA report on cyber resilience

On 17 September 2019, EIOPA published its [report]'Cyber Risk for Insurers – Challenges and Opportunities'.
Insurers are susceptible to cyber threats because they have sensitive information, but insurers also offer cover for cyber risk through underwriting activities. This report analyses the risk from both sides. The results show that a 'cyber resilience' framework for insurers is needed and the report identifies the major challenges for cyber risk underwriters. This report contains, in particular, new information on cyber risk for the European insurance sector, both from an operational risk management perspective and from an underwriting perspective. Some important conclusions are

- clear, common obligations on the governance of cyber security as part of operational resilience would help with the safe provision of insurance (including a consistent set of definitions);
- further actions to arm the insurance sector against cyber vulnerabilities are essential;
- cover against cyber risks is currently often not explicitly included or excluded in an insurance policy, which leads to uncertainty;
- by collecting better data about cyber incidents and the related damage, it becomes easier for insurers to manage and price their cyber risk.

EIOPA consultation for Guidelines on ICT security and governance

On 12 December 2019, EIOPA opened a consultation period on its proposed Guidelines on ICT security and governance (see **consultation** and **press release**). With this, EIOPA hopes to provide guidance to national supervisory authorities and market parties on how to apply the regulations concerning operational risks from Solvency II and the Solvency II Delegated Regulation in the areas of ICT security and governance. The guidelines cover the following areas: governance and risk management, ICT operations security and ICT operations management. The intention is for the Guidelines to take effect on 1 July 2020.

Submissions to the consultation period will be accepted up to 13 March 2020.

EIOPA consultation - Guidelines on outsourcing to cloud service providers

In the summer of 2019, EIOPA published a draft of its Guidelines on outsourcing to cloud service providers for **consultation**. The draft guidelines build on EIOPA's previous **report** on this topic from March 2019, 'Outsourcing to the cloud; EIOPA's contribution to the European Commission Fintech Action Plan'.
The draft guidelines also take into account the **EBA Guidelines on outsourcing**. The draft guidelines are addressed to insurers and national regulators. The guidelines concern:

- criteria to assess whether cloud services fall under the definition of outsourcing;
- principles and governance with regard to cloud outsourcing;
- documentation requirements, including the information for reporting to supervisors;
- the pre-outsourcing analysis, including materiality assessment, risk analysis and due diligence to the service provider;
- requirements for the outsourcing agreement;
- access and audit rights;
- data security;
- sub-outsourcing;
- monitoring and exit strategies;
- principle based instructions to national supervisors for monitoring cloud outsourcing, including at group level.

The final guidelines have not yet been published. It is expected that the guidelines will enter into force on 1 July 2020 and apply to all cloud outsourcing arrangements that either take effect after that date or are amended after that date. For existing cloud sourcing arrangements there is a transitional arrangement. That means that existing cloud contracts must comply with the guidelines by 1 July 2022 at the latest.
We recommend that insurers keep an eye on the publication of the definitive guidelines and, as soon as they become available, bring their existing cloud outsourcing arrangements, where necessary, into line with the guidelines.

EIOPA opinion on integration of climate-related risks in Pillar 1

In mid-2018, the EC sent a request to the European insurance regulator EIOPA asking how sustainability can be more explicitly incorporated into Solvency II. In that context, EIOPA recently published an **opinion**. In its opinion, EIOPA points out, among other things, the importance of climate scenario analyses, indicating that these can be accommodated in the ORSA. EIOPA's opinion addresses the integration of climate risks in the Solvency II Pillar 1 requirements EIOPA believes that Solvency II as a risk-based, forward-looking and market-consistent framework is ideal for accommodating sustainability risks. Climate risks are uncertain and the impact, both physical and transitional, can have far-reaching consequences and should be taken into account. Insurers are called upon to implement measures regarding their climate risk, including the impact on their business strategy. In addition, the scenario analysis is important in risk management. The insurers should consider the impact of their underwriting activities on the environment. We refer to the **Sustainability** section for more on this opinion as well as other sustainability-related supervisory topics.
The EC will consider the opinion. The final impact on current legislation and regulations is unclear at the moment.

EIOPA consultation remuneration policy insurance sector

In the summer of 2019, EIOPA published a draft of its Opinion on the supervision of remuneration principles in the insurance and reinsurance sector for **consultation**. The remuneration principles of Solvency II afford a great deal of discretion to insurers and supervisors, which has led to divergent practices in the European Union. Through this opinion, EIOPA wants to improve supervisory convergence by focusing on a set of remuneration principles.

The opinion contains remuneration rules for staff of insurers whose variable remuneration is at least EUR 50,000 and which amounts to at least a quarter of the total remuneration, and which falls into one of the following categories:

- members of the executive board, supervisory board or other supervisory bodies;
- other executive directors who effectively run the company;
- key function holders as referred to in EIOPA's Guidelines for the governance system; or
- persons whose professional activities may affect the company's risk profile.

The opinion contains rules for the ratio between fixed and variable remuneration (this must be a maximum of 1:1, says EIOPA), for deferment and composition of variable remuneration. We do not expect that these guidelines (the final version of which is yet to be published) will change Dutch practice much. The Remuneration Policy (Financial Undertakings) Act already provides for detailed remuneration rules, including the 20% bonus cap.

CURRENT LEGISLATION AND REGULATIONS

Declaration of no objection obligation for (among other things) dividend payments by Dutch insurance holding companies

In our **Outlook 2019** we reported on the obligation to acquire a declaration of no objection (DNO) ensuing from the **Financial Markets Amendment Act 2019** for Dutch insurance holdings. This Act **came into force** on 1 January 2020 and means that it will be prohibited for a mixed financial holding company or insurance holding company with its registered office in the Netherlands, other than after having obtained a DNO from DNB, to reduce 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 (Article 3:97 Wft), but not yet for holding companies.

No prohibition on cross-selling insurance as a supplement to payment account

As a result of the entry into force of the Financial Markets Amendment Act 2019 on 1 January 2020, the provisions regarding cross-selling for insurance will change.

In Articles 4:63a(1) and 4:75a(1) Wft, it was determined that if an insurance is a supplement to the supply of a movable item or the provision of a service, the insurer or insurance broker must offer the customer the option of purchasing the movable item or service without insurance. However, on the basis of Article 24(3) of the Insurance Distribution Directive (IDD), this obligation does not apply to payment accounts (= a payment service). The third paragraph therefore stipulates that Articles 4:63a and 4:75a Wft, respectively, do not apply to insurance policies as a supplement to a current account. If a current account is offered with an insurance policy (for example, a purchase protection insurance) then the customer does not have to be offered the option to take the current account without insurance.

Further remuneration measures for the financial sector

In response to the **Agenda for the financial sector**, the Ministry of Finance presented the **legislative proposal** for consultation on the Act on further remuneration measures for the financial sector in 2019. Significant changes that have been proposed are:

- The introduction of a five-year retention period for shares and comparable financial instruments that are part of the fixed remuneration.
- Tightening of the exception to the 20% bonus cap for employees who are not covered by a collective labour agreement. The proposed tightening makes it explicit that this exception can only be used in exceptional cases and is in any event not an option for those who (i) perform internal control functions or (ii) are directly involved in providing financial services to consumers.
- The introduction of an obligation to describe in the remuneration policy how the undertaking accounts for the relation of the remunerations of managing directors, supervisory directors and employees of the undertaking to its social function and the way in which this relation has been formed.
- Extension of the supervisory authority's approval period for retention bonuses exceeding 20% of the fixed salary from six to nine weeks.

The **planning brief 2020** of the Ministry of Finance shows that the legislative proposal for the Act on further remuneration measures in the financial sector is scheduled for September 2020. In addition to the aforementioned further remuneration measures, this legislative proposal contains several more technical changes to the remuneration rules for the financial sector that originally were part of the proposal for the Financial Markets Amendment Act 2018, as well as the continuation of existing policy pertaining to traders for their own account.

PRIIPs Regulation

Amendments to PRIIPs Regulation

In the **Outlook 2019** we reported on the consultation paper of 8 November 2018 that was jointly published by the ESAs and that pertained to amendments to the PRIIPs Delegated Regulation. However, these amendments were ultimately never implemented. In February 2019 the ESAs published a **Final Report** containing a summary of responses received during the consultation period and the follow-up steps to be taken. The report shows that the ESAs no longer considered the 'rapid' but drastic amendments to the PRIIPs Delegated Regulation as proposed in 2018 to be appropriate. Consultation respondents generally did not agree with the proposed amendments, in particular with regard to the implementation of amendments before the more comprehensive PRIIPs review by the EC had taken place. Moreover, immediately following the consultation period the EC extended the temporary exception to the KID obligation for UCITSs (which was originally set to expire on 31 December 2019, thus necessitating the 'rapid' change proposal of 2018) until 31 December 2021. Consequently, instead of the 'rapid' amendments of 2018 the ESAs have decided to conduct a more integral review in 2019. This has resulted in a consultation paper that proposes more substantial amendments:

- **Performance scenarios for the future**: in early 2019 the ESAs issued a **joint supervisory statement** addressing the risk of too positive performance scenarios through recommendations to developers and national supervisory authorities. Following on from these recommendations, the consultation paper now proposes the following:
  - a simplification of the information to be provided by removing the 'stress scenario' and 'moderate scenario' from the list of the four performance scenarios that PRIIP developers must use to illustrate the performance of the PRIIP, and
  - a revised methodology for estimating future performance and a compensation system for unforeseen failure of the methodology. According to the ESAs, this revised methodology would lead to a more realistic representation of future returns.
- **Information about past performance**: ESAs propose rules on the basis of which information on past performance should be provided for PRIIPs offered by certain UCITS, AIFs and certain insurance-based investment products.
- **Transaction costs**: with regard to the calculation and presentation of transaction costs, the ESAs consider changes so that all relevant costs are included and the products can be better compared by investors. This concerns:
  - substantial amendments to the cost table to be included in a KID, including improved compatibility with the disclosure requirements of MiFID II and a more specific description of the type of costs that must be disclosed.
  - adjustment of some methodologies for the disclosure of transaction costs arising from the purchase and sale of the underlying investments of a PRIIP.
- **PRIIPs with multiple investment options**: the ESAs consider that in respect of PRIIPs with multiple investment options, PRIIP developers must from now on provide more detailed information about at least four of the most relevant investment options, together with more general information about the other investment options. They are also considering further adjustments to the KID for this type of PRIIP, including an explanation indicating whether all costs are shown or not.
- **The expiry of the UCITS exception**: finally, the ESAs are considering changes in preparation for the UCITS exception ending 31 December 2021. More specifically, the ESAs consult on which elements of the Key Investor Information Regulation (Implementing Regulation (EU) 583/2010 as regards key investor information) should be included in the PRIIPs Delegated Regulation to address potential bottlenecks.

Stakeholders had until 13 January 2020 to respond to the consultation paper. The ESAs expect to have assessed the responses and submit their ultimate amendment proposals to the EC in the first quarter of 2020. Depending on what happens in the European legislative procedure, the proposals could take effect in 2021.

We advise market parties to pay close attention to the developments surrounding the PRIIP regulations and the KID. Additionally, we recommend checking whether all KIDs currently comply with the additional disclosure requirement set out in the ESAs' joint advisory statement.

Regulatory Technical Standards KID

In its **Work Programme** for 2020, the Joint Committee of the European Supervisory Authorities (ESAs) expressed the intention to evaluate the PRIIPs Regulation, and in February 2020 intends to make proposals for amendments to (in part) the KID in the form of Regulatory Technical Standards (RTS).

Securitisation Regulation

Securitisation Regulations (general)

In our previous **Outlook (2019)** we addressed the Securitisation Regulation in light of its coming into effect on 1 January 2019. Over the past year the European legislator has not been idle, and supplemental legislation in this area, including in the form of Regulatory Technical Standards, is currently being drafted. We will cover the amendments to be expected for 2020 in this area below. It is worth noting here that on 15 March 2019, DNB published a **news item** on its website stating that in 2018, growth was seen in the Dutch securitisation market for the first time since 2007, although this market has not yet recovered to pre-crisis levels.

Securitisation transparency

On 16 October 2019, the EC supplemented the Securitisation Regulation with **Regulatory Technical Standards** specifying the information on securitisation to be provided by the initiator, sponsor and SSPE (special purpose entity for securitisation purposes). In order to ensure that together this presents a complete picture of a securitisation, and to provide efficient access to all relevant information in this area, the EC has compiled all this information into this Regulatory Technical Standard. The delegated regulation for the implementation of this Regulatory Technical Standard is expected to take effect in the first quarter of 2020 (February). This will very likely take effect simultaneously with its corresponding EC **Technical Implementing Regulation**, which pertains to the format and the standardised templates for the submission and provision of information on a securitisation.

STS framework for synthetic securitisations

Under the Securitisation Regulation, EBA was to present a paper no later than 2 July 2019 on the feasibility of a specific legal framework for simple, transparent and standardized ('STS') synthetic securitisations and balance-sheet synthetic securitisations. In this form of securitisation there is no legal transfer of the claims, but rather only the credit risk (for example, a claims portfolio) associated with the claims is transferred in whole or in part.

EBA ultimately published its **discussion paper** concerning this subject on 24 September 2019.

EBA's discussion paper contains, firstly, an extensive analysis of the market and trends for synthetic securitisations in the EU, including historical data on the default and losses on such securitisations. In the discussion paper, EBA recommends creating a cross-sectoral legal framework within the STS framework for synthetic securitisations, but only for the 'balance-sheet securitisations'. For this, the document introduces a list of STS criteria that these synthetic securitisations must meet. The consultation on the discussion paper has now been concluded and the expectation is that EBA will file the final paper containing its legislative and other recommendations with the EC in June 2020.

Integrity legislation (Wwft)

In the past year, European and Dutch supervisory authorities have published a great deal in the area of integrity. At the national level, 2020 will be marked in particular by the implementation of the Fifth Anti-Money Laundering Directive (AMLD5), the UBO register and the legislative proposal on the Anti-Money Laundering Action Plan Act. At the European level, there is an increasingly urgent call for the harmonisation of all anti-money laundering rules and the centralisation of anti-money laundering supervision. For an overview of the consequences of AMLD5, the UBO register and other relevant European developments in the area of integrity, we refer to the **Integrity** section of this Outlook.

NEW LEGISLATION AND REGULATIONS

Pan-European Personal Pension Product

In our **Outlook 2019** we extensively discussed the European plans related to the Pan-European Personal Pension Product (PEPP). Below we will briefly discuss the PEPP.

On 29 June 2017, the EC made a **proposal** for a regulation for a pan-European framework for third pillar pension products, the PEPP. 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 offers licensed insurers, banks, IORPs (pension funds, PPIs and pension institutions from other Member States), certain investment firms and asset managers the opportunity to offer a PEPP. Our government initially **rejected** the proposal. On 15 May 2018, the Council of the European Union published its **compromise proposal**. The objections raised by the Dutch government were partly addressed in this proposal.

Meanwhile, the **PEPP regulation** was published on 25 July 2019 in the **Official Journal**. This means that the Regulation entered into force 20 days thereafter, but will only apply 12 months after the publication of certain delegated acts. EIOPA must file the relevant Implementing Regulatory Standards (ITS) and Regulatory Technical Standards (RTS) with the EC no later than 15 August 2020. In December 2019, EIOPA opened a **consultation period** on its approach and considerations for the release of Technical Advice, ITS and RTS. These considerations pertain, in part, to the presentation of the Eid, any annual review of the PEPP Eid by the provider, the reporting to regulatory authorities, cost caps, risk mitigation and product intervention authorities. This consultation period runs up to 2 March 2020.

Interest deduction limit for insurers & banks

As a component of the **Tax plan 2020** the minimum capital rule announced in the **2017-2021 coalition agreement** is introduced for banks and insurers. This thin cap rule limits the interest deduction on loan capital above 92% of the commercial balance sheet total. This minimum capital rule therefore limits the tax interest deduction if there is an excess of loan capital. This applies to a bank or banking group if the leverage ratio is less than eight percent. For an insurer or insurance group there is a lack of equity if the equity ratio is less than eight percent. The new minimum capital rule applies to financial years starting on or after 1 January 2020.

IAIS framework for internationally operating insurance groups

On 14 November 2019 the International Association of Insurance Supervisors (IAIS) published a **set of documents** under the title 'Common Framework for the Supervision of Internationally Active Insurance Groups'. These documents aim to contribute to effective cross-border supervision of internationally active insurance groups and to global financial stability. The set includes:

- The **Common Framework** (ComFrame) with **explanatory notes** and the **Q&A**;
- The **Insurance Capital Standard Version 2.0** (ICS) with, among other things the **explanatory notes**; and
- The **Holistic Framework for systemic risk**, with, among other things **explanatory notes**.

ComFrame is a complete and outcome-oriented framework, aimed at effective group supervision of IAIGs (Internationally Active Insurance Groups). ComFrame includes both qualitative and quantitative minimum requirements, focused on the international activities and size of IAIGs. The group-wide supervisor (GWS) is, in collaboration with other supervisors involved, responsible for the identification of IAIGs, after it has been determined that a group satisfies both of the following criteria:

- **Internationally active**:
  - Premiums are collected in at least three jurisdictions; **and**
  - The gross premium income generated outside the home country amounts to at least 10% of the total gross premium income of the group
- **Size** (based on an average of three years):
  - Total assets amount to at least USD 50 billion; **or**
  - Total gross premium income is at least USD 10 billion.

Proposal Sovereign Bond-Backed Securities (SBBS) Regulation

The EC presented its **proposal** for a regulation on securities covered by government bonds (known as sovereign bond-backed securities (SBBS)) on 24 May 2018. We also reported on this legislative proposal in our previous **Outlook (2019)**. 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 concerning the situations and conditions in which departure from the design requirements for SBBS can be allowable without losing this favourable prudential treatment.

A first reading by the European Parliament took place on 21 March 2019, and subsequently a report was issued with a few amendments to the proposal. From the last **quarterly report** by the Dutch central government it appears that negotiations in the European Council have not yet started and the Finnish Presidency – like the Austrian and Romanian Presidency – has stated that they have not yet designated a Council working group to discuss the proposal. Consequently, at this time it not yet clear how long this process will take or whether there is any realistic expectation that this legal framework will take effect in 2020. We would not be surprised at all if this did not happen until 2021.

Sustainability measures

The past year has seen a great deal of attention devoted to sustainability and climate change. An important development concerns the European legislation and regulations to channel capital flows towards sustainable economic activities. This is done, among other things, by using disclosure requirements for investors in respect of the sustainability of financial products and sustainability labels for benchmarks to facilitate ESG investors. The AFM also intends to bring a focus in its supervision of market conduct in 2020 to sustainability-related disclosure requirements. Another point of attention is the resilience of the financial sector to climate change. We are seeing that climate change and natural disasters are entailing new risks for banks and insurers. The ESAs, the AFM and DNB have been sharing insights and recommendations on the impact on operations and risk management. We expect to see a good deal more about these points for attention and other sustainability-related aspects in 2020. This aspect will have an impact on the operations of many market parties. For an account of the developments in the area of sustainability, see the **Sustainability** section of this Outlook.

OTHER DEVELOPMENTS

AFM complaint report

Dutch insurers had to report to the AFM for the first time in 2019 on the complaints they received (in 2018). From now on they will have to do that every year.

The complaint report helps the AFM to make its supervision more efficient and effective. In addition, the AFM shares the aggregated data with EIOPA for the annual Consumer Trends Report. The AFM complaint report shows the number of registered complaints per phase of the service. The compla int report says nothing about whether a complaint was justified or how it was handled.

The complaints must be delivered in a fixed format. A number of details must be reported on each complaint. The format provided by the AFM and further practical guidance can be found **here**.

Evaluation Solvency II basic regime

In the 2019 annual plan, the Minister of Finance had reserved room for the evaluation of the Basic regime. This evaluation actually started at the end of 2019. The expectation is that this evaluation will be completed by the end of the first quarter of 2020.

Amendment to National Mortgage Guarantee

In November 2019, the Dutch Home ownership Guarantee Fund (Stichting Waarborgfonds Eigen Woning) **announced** that it would be amending the National Mortgage Guarantee (Nationale Hypotheek Garantie, NHG). DNB has established that the National Mortgage Guarantee does not currently meet the conditions for qualifying as credit protection for banks applying the standardised approach (SA) or the elementary internal ratings-based approach (IRB) and for insurers applying the standard formula. If a guarantee does not meet the conditions for credit protection, banks and insurers may not assign a lower risk weight to the part of the loan covered by the guarantee. The Capital Requirements Regulation(CRR) and Solvency II contain conditions that payment under guarantee must take place within two years of default and that the claim against the debtor does not first have to be instituted. Now that under the National Mortgage Guarantee payment in the event of non-payment only takes place after the collateral has been sold at a loss, payment within two years is not guaranteed.

The amendment to the National Mortgage Guarantee means that the Home Ownership Guarantee Fund offers all lenders (new and current loans with National Mortgage Guarantee) the possibility of receiving a provisional payment of the expected loss if the property is not sold within 21 months after default of payment and if default of payment still exists. The loss paid out will later be set off later against the final loss on final sale of the property or termination of default of payment. As a result, the National Mortgage Guarantee will still qualify as credit protection under the CRR, but not under Solvency II. However, DNB and the government are committed to a solution. For example, the EIOPA **consultation paper** on the Solvency II revision process – through input from DNB – contains a proposal to add the right to provisional payment and counter-guarantees to Solvency II as a form of credit protection.

For insurers applying the standard formula the above means that the National Mortgage Guarantee does not qualify as credit protection under Solvency II even after a change. Insurers that use a (partly) internal model under Solvency II can continue to use the National Mortgage Guarantee as credit protection. Insurance groups that provide National Mortgage Guarantee mortgages through a bank subsidiary can use the early payment offered to banks and therefore use the National Mortgage Guarantee as credit protection.

ESAs' advice on ICT risk management & cyber resilience

The ESAs published a joint **advice** on ICT risk management and cybersecurity risks in April 2019. The advice is relevant for banks, payment service providers, insurers, investment firms and fund managers. According to the ESAs, the increased ICT use in the financial sector requires improved regulation of ICT risk management. To improve ICT risk management, they have presented sectoral and cross-sectoral proposals. We highlight a few of those proposal below.

Some of the proposals for the insurance sector are

- New Solvency II provisions with operational stability as a requirement for operational management. Operational stability would address the international connectedness and dependence on technology in the financial sector and the resulting operational disruptions. Emergency plans and continuity plans would be part of this operational stability and it would have to be principle-based operational management and internal control mechanisms.
- EIOPA will draw up guidelines for national supervisors on the risks specific to insurers in the area of ICT security, as well as a new section in EIOPA's Supervisory Handbook that includes good practices on ICT risk management.

Some of the cross-sectoral proposals concern:

- a proposal to streamline sectoral frameworks for ICT security incident reporting, to be steered by the EC by facilitating the development of harmonised standards and terminology;
- a proposal to the EC to create a monitoring framework in which activities of third party providers can be adequately monitored. Since use of cloud service providers (CSPs) for outsourcing ICT services is increasing and only a few CSPs serve the financial sector, a cyberattack on a CSP could have serious consequences for the financial sector. Current regulations do not address this third-party concentration risk, which is the reason for this proposal.

In view of the ESAs' proposals, we advise insurers to keep an eye on developments in ICT management in the year ahead. Although it is not yet possible to say to what extent the proposals will materialise in new legislation and regulations, they now offer some indication of what might be expected from Europe with regard to ICT risk management.

ESMA consultation on Market Abuse Regulation

On 3 October 2019, ESMA published, at the EC's request, **a consultation paper** on various sections from the **Market Abuse Regulation**. Approximately three years after the entry into force of this Regulation, it is now time to review the current legal framework and assess whether it is still effective or appropriate, and whether amendments need to be made.

The consultation document discusses various subjects from the Market Abuse Regulation and is particularly relevant to market parties (and their day-to-day management) issuing financial instruments that will be or have been admitted to trading. Topics covered include the definition and delayed disclosure of inside information in certain situations and the effectiveness of the mechanism to delay this disclosure, the scope of the reporting obligations under the exemption for buy-back programmes of own shares admitted to trading, but also the question whether FX contracts should fall within the scope of the Market Abuse Regulation.

Stakeholders have now been given the opportunity to provide feedback on the consultation paper. ESMA aims to present the final report to the EC in the spring of 2020. We look forward to seeing the results and are interested to find out whether any changes will be made to the Market Abuse Regulation.

Brexit

For a general picture of the situation regarding Brexit, please see the **General Developments** section of this Outlook.

IMPORTANT INFORMATION WITH REGARD TO INTEGRITY IN 2020

DNB SUPERVISION

DNB guidance on tax integrity

Regarding the topic integrity, a great deal of attention has been spent on integrity risks in respect of tax avoidance by customers of financial undertakings. On 4 July 2019 DNB **published** good practices regarding tax integrity risks at bank customers. The good practices were written in response to the Panama Papers, the Paradise Papers and data breaches which show that individuals and companies worldwide use financial structures to obstruct their visibility to government agencies, such as tax authorities. In short, DNB wants the banks to investigate whether the tax behaviour of their customers can lead to integrity risks for the bank. These measures must be seen in the context of the obligation for banks to take measures to ensure ethical business operations and prevent involvement in financial and economic crime.

The good practices show how banks can organise their internal processes and measures, such as the Systematic Integrity Risk Analysis (SIRA), customer due diligence and transaction monitoring, in order to better identify and manage the tax integrity risks associated with customers. We expect that in 2020 DNB will look even more closely at how banks mitigate their tax integrity risks. The good practices of DNB do raise legitimate questions about DNB's powers in this respect. For example, the question can be asked whether DNB has sufficient legal basis to take measures with regard to tax integrity risks at banks. Another question is to what extent possible tax avoidance by customers (which is not prohibited in itself) can nevertheless be sanctioned by DNB.

This guidance by DNB fits in with a greater European trend in which market parties have to focus more on tax integrity risks. For example, intermediaries such as tax advisers, accountants and financial institutions from 1 July 2020 must, based on a European **directive**, report cross-border constructions that can be used to avoid tax to the Tax Authorities.

Revision of DNB Guidelines Wwft and Sw

On 18 December 2019, the **revised guidelines** on the Wwft and the Sw (Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, Wwft) and Sanctions Act (*Sanctiewet*, Sw)) were published. A number of components of this document were changed based on the responses to the draft presented for consultation. DNB has released a **feedback statement** explaining the changes made on the basis of the responses received. It has also indicated that the next revision of the guidelines, in response to the implementation of AMLD5 and the UBO Register (as well as other legislative developments) is scheduled for the first half of 2020. We advise all market parties to look out for this upcoming revision.

EUROPE

Conclusions of the European Council regarding money laundering and terrorist financing

In **conclusions** of 5 December 2019, the European Council notes that the anti-money laundering regulatory framework was recently improved significantly. The fifth revision of the Anti-Money Laundering Directive (AMLD5), which was approved in May 2018, the new capital requirements for banks (CRD5), which were approved in May 2019, and the evaluation of the functioning of the European supervisory authorities, which was approved on 2 December, will all lead to a tightening of the rules against money-laundering practices and terrorist financing.

In this context, the European Council insists that all anti-money laundering legislation be transposed quickly into national law and that it actually be enforced more strictly.

The conclusions also build on the communication from the European Commission (EC) and four reports that were published in July 2019. These contain an overview of the current challenges, and also identify a series of shortcomings related to banks, anti-money laundering authorities, prudential supervisory authorities and the cooperation within the EU. The conclusion is that there is fragmentation in terms of both anti-money laundering regulations and supervision.

The Council therefore requests the EC to explore new measures to make anti-money laundering regulations more vigorous, and to consider in particular:

- how to achieve more robust and effective cooperation between the authorities and bodies that are authorised to combat money laundering practices and terrorist financing, including by removing impediments to the mutual exchange of information;
- whether it would be better to stipulate certain aspects in a regulation; and
- what possibilities, advantages and disadvantages are related to the allocation of certain supervisory tasks and powers to an EU institution.

ESA's Opinion regarding the risks involved in money laundering and terrorist financing

On 4 October 2019, the European Supervisory Authorities (ESAs) published a joint **opinion** in which the current and future risks in the area of money laundering (ML) and terrorist financing (TF) for the financial sector in the European Union (EU) are identified and analysed. The opinion is based on information from the national supervisory authorities that the ESAs received in the context of their activities.

The ESAs divided the ML/TF risks into two categories: cross-border risks and sector-specific risks.

The ESAs see risks in the area of cross-border ML/TF risks related to Brexit, new technologies, virtual currencies, differences in the area of legislation, differences in supervisory practice, shortcomings in internal control mechanisms, terrorist financing and de-risking. For example, they see an important challenge in the uncertainty that is arising as a result of the departure of the United Kingdom (UK) from the EU and the accompanying concerns about the ability of the national supervisory authorities to adequately supervise the companies that are relocated from the UK to the EU. The ESAs are also concerned about the shortcomings in the internal control mechanisms that the financial undertakings have implemented, in particular in respect of transaction monitoring and reporting suspicious transactions in sectors with a high volume of transactions. In addition, the ESAs realise that the development of company-wide and customer risk analyses are still a challenge for various financial undertakings. This is therefore also an area that, in the eyes of the ESAs, would benefit from guidance from the national supervisory authorities. The ESAs acknowledge that the use of new technologies can offer opportunities to better combat financial crime, but also state that the increasing use of new technologies by credit institutions and financial undertakings can lead to ML/TF risks if vulnerabilities are not recognised and mitigated. The rapid circulation of virtual currencies is also a concern for the ESAs because of the lack of a common regulatory framework and the anonymity of virtual currencies.

According to the ESAs, to effectively tackle these risks and concerns, national supervisory authorities must play a more active role and increase their involvement in the private sector in order to develop a better understanding of new technologies, products and services available to credit institutions and financial undertakings. The national supervisory authorities must also consider whether they have adequate insight into risks and audits in those sectors in which they only performed limited assessments and whether they should possibly review their supervisory approach.

In the area of sector-specific ML/TF risks, based on the input from the national supervisory authorities, the ESAs identified the most common ML/TF risks per sector and analysed the companies' control measures. The ESAs included the following aspects in the opinion for each type of institution (for example banks, payment institutions, etc.):

- Inherent risks
- The quality of the control measures and frequently occurring violations
- Risk profile
- Emerging risks

- Recommendations by the national supervisory authorities

Supplemental to the opinion, the ESAs developed an **online tool**. It is our expectation that national supervisory authorities will take into account the ML/TF risks identified above in their integrity supervision. Market parties would therefore be wise to prepare for this and adapt their policy to this if necessary.

EBA opinion on the link between money laundering and terrorist financing concerns and prudential objectives

In July 2019, the European Banking Authority (EBA) published an **opinion** on the link between money laundering, terrorist financing and prudential objectives. The opinion is part of the EBA's battle against money laundering and terrorist financing in Europe, and is a response to a request from the European Union's 2018 anti-money laundering action plan. In the opinion, the EBA invited prudential supervisory authorities to inform supervised institutions that prudential supervisory authorities are or will be taking anti-money laundering/combating terrorist financing (AML/CFT) issues into account in their prudential supervision and are or will be cooperating closely with AML/CFT supervisory authorities to this end.

In the EBA's opinion, money laundering and terrorist financing can have a considerable negative impact on the safety and soundness of a supervised institution. Prudential supervisory authorities must therefore be aware of and act accordingly in respect of ML/TF risks if these constitute a prudential risk for the institution that they supervise. In particular, the supervisory authorities must take ML/TF risks into account in the case of:

- The licence application or the assessment of an intended qualifying holding;
- The ongoing supervision, such as the assessment of an institution's governance and risk-management systems; and
- Taking corrective measures in respect of potential weak points, to be addressed from a prudential perspective.

In its 2018 action plan, the European Council made it clear that the connection between ML/TF risks and prudential objectives means that prudential supervisory authorities and AML/CFT supervisory authorities must work together closely or more closely and must share information when performing their supervisory tasks. If institutions operate cross-border, the EBA expects the competent supervisory authority to cooperate with its international counterpart.

It is our expectation that the competent prudential supervisory authorities (in the Netherlands: DNB) will increasingly incorporate ML/TF risks in their supervision. Market parties must actively consider these risks when setting up their policy and preparing their SIRA.

EBA centralises information about the sanction regimes of national supervisory authorities

The EBA published an **overview page** on its website, which enables users to gain access to information about sanctions and administrative measures imposed by the national supervisory authorities for the violation of anti-money laundering and terrorist financing rules.

IMPLEMENTATION OF AMLD5

AMLD5 Implementation Act

On 2 July 2019, the Minister of Finance submitted the **Implementation Act on the amendment of the fourth anti-money laundering directive** (AMLD5 Implementation Act) to the House of Representatives. The AMLD5 Implementation Act implements the Fifth Anti-Money Laundering Directive (AMLD5) in the Netherlands. One of the most important changes is that the providers of crypto services also fall under the scope of the Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*, Wwft) by means of a registration obligation, more about which elsewhere in this section at 'Registration obligation for crypto platforms and wallet providers'. At the time of writing, the AMLD5 Implementation Act is being discussed in the Senate. We expect that this implementing act will take effect in the first quarter of 2020. The EU Member States (including the Netherlands) had until 10 January 2020 to transpose AMLD5 into national laws and regulations.

In our **2019 Outlook**, we already discussed the new requirements ensuing from AMLD5. In the area of customer due diligence (CDD), financial undertakings must take the following measures, among others:

- In the event that only a member of the senior management can be identified as the customer's ultimate beneficial owner (UBO), the undertaking must document the measures taken and the difficulties experienced during the verification process;
- In any event, a financial undertaking must update its CDD investigation if the relevant circumstances of the customer change, if an institution is obliged under the Wwft to contact the institution or if the institution is required to do so in the context of administrative cooperation in the area of taxes;
- When entering into a new business relationship, the institution must have an extract from the Chamber of Commerce and the institution must determine whether the UBO has been included in the UBO register;
- If there are complex transactions, unusually large transactions, transactions with an unusual pattern and transactions without a clear or legitimate purpose, an institution has the general obligation to increase the intensity and nature of the monitoring. Institutions must therefore submit the entire business relationship to an enhanced audit to determine whether the aforementioned transactions or activities of that business relationship appear to be unusual; and
- If a customer or transaction is related to a state designated by the EC as having a higher risk of money laundering or terrorist financing, the institutions must take the additional measures prescribed by law in their enhanced CDD.

Below, in addition to the foregoing, we will discuss the most recent situation regarding a number of important elements from AMLD5.

Registration obligation for crypto platforms and wallet providers

As a result of the implementation of AMLD5 in the Netherlands, the service providers for exchanging virtual currencies and fiat currencies and the providers of custodial wallets (hereinafter: crypto service providers) must register with DNB. The legislature had included a licence obligation for crypto service providers in the consultation version of the AMLD5 Implementation Act, but withdrew it on the recommendation of the Advisory Division of the Council of State (see the **Outlook 2019** for a discussion of the draft legislative proposal). A few aspects regarding this registration obligation include:

- **Continuing obligations**: The registration obligation creates all sorts of new obligations for the crypto service providers. For example, the crypto service provider's business operations must be controlled and ethical and include, among other things, a Wwft policy and a policy against conflicts of interests. In addition, the crypto service provider must ensure that the control structure is not so non-transparent that it interferes with DNB's supervision and that the suitability and trustworthiness of day-to-day policymakers and holders of qualifying holdings are assessed by DNB.
- **Registration obligation**: Registration with DNB is a condition for being able to offer services in or from the Netherlands. A crypto service provider may therefore not commence or continue its services without being registered with DNB. The obligation to register applies to everyone who resides in or is domiciled in the Netherlands, or has its registered office there, and who wishes to provide exchange services or custodial wallets professionally or commercially in or from the Netherlands. The registration obligation also applies to providers who wish to offer services from another Member State in the Netherlands, regardless of whether it is also registered in said other Member State, and to providers who only offer cross-border services from the Netherlands.
- **DNB's Role**: DNB has been designated as a Wwft supervisory authority for crypto service providers. This means that DNB will supervise

the integrity of the crypto service providers. DNB's supervision will thus not pertain to setting prudential standards or to consumer protection because such rules fall outside the scope of the Wwft supervision.

- **Transitional regime**: It should be noted that the AMLD5 Implementation Act provides a six-month transitional regime for crypto service providers. Crypto service providers can only utilise this transitional period if, when the implementation act enters into force - or prior to that - they have submitted a request for registration to DNB. In addition to the request for registration, crypto service providers must also have submitted a request for the assessment of the trustworthiness of the day-to-day policymakers and the holders of the qualifying holding. This transitional period pertains solely to the registration obligation and to the obligation for day-to-day policymakers and any holders of a qualifying holding to be trustworthy and suitable. However, during the transitional period, crypto service providers must comply with the substantive obligations under the Wwft (those regarding CDD, for example).

In the autumn of 2019, DNB **identified** that crypto service providers should prepare in good time for DNB's pending integrity supervision. More specifically, DNB indicated that it would like to consult with these parties and asked them to register with DNB. At the end of 2019, DNB made the draft forms for the registration application available. It also published **draft explanatory notes** to allow service providers to prepare for the application. Because the legislative process has not yet been completed, changes may still be made to the legislation (and thus the ultimate registration requirements).

We advise parties wishing to operate as a crypto service provider to register with DNB as soon as possible in order to be able to use the transitional regime.

AMLD5 Implementation Decree

On 26 September 2019, the Minister of Finance issued the **Implementation Decree amendment of the Fourth Anti-Money Laundering Directive** (AMLD5 Implementation Decree) for consultation. The purport of the AMLD5 Implementation Decree is to implement the obligations under AMLD5 together with the AMLD5 Implementation Act. The AMLD5 Implementation Decree elaborates those aspects on which the trustworthiness of a day-to-day policymaker and/or holder of a qualifying holding in a crypto service provider is assessed, how the controlled and ethical business operations of a crypto service provider is set up and the Administrative Fines (Financial Sector) Decree (*Besluit bestuurlijke boetes financiële sector*, Bbbfs) is amended to ensure that the new obligations under AMLD5 can be enforced.

UBO Register

Part of the Fourth Anti-Money Laundering Directive (AMLD4) is the obligation for Member States to maintain a UBO register that can be consulted in connection with the UBO(s) of companies or legal entities. The UBO Register was scheduled to enter into force in all EU Member States on 10 January 2020.

The legislative proposal for the implementation of the UBO Register, the **Implementation Act** on the registration of ultimate beneficial owners of companies and other legal entities (UBO Register Implementation Act) was submitted to the House of Representatives on 4 April 2019. At the time of writing, the UBO Register Implementation Act is being discussed in the Senate. We expect that this implementing act will take effect in the first quarter of 2020.

The register is part of the trade register of the Chamber of Commerce (CoC). Companies and other legal entities must collect and keep the information related to the UBOs up to date. The UBOs are obliged to provide the necessary information to enable the entities to fulfil that obligation. 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 relevant UBOs. Some of the data in the UBO Register are publicly available. The data that are not publicly available can only be accessed by the competent authorities of the Financial Intelligence Unit-Netherlands (FIU). A number of relevant aspects in this respect include:

- **Provision of information**: Once the Implementation Act UBO Register has entered into force, institutions have 18 months to provide all relevant UBO information. It should be noted that the period of 18 months only applies for the initial provision of UBO data and the initial filing of UBO documents from institutions that were already entered in the trade register when the UBO Register Implementation Act entered into force or regarding which data had already been provided for entry in the trade register. After this initial provision of data and the filing of documents, the ordinary maximum period of one week within which institutions must update their data applies. The period of 18 months is not applicable to institutions that report information for the initial entry in the trade register after the Implementation Act UBO Register enters into force.
- **Privacy**: The UBO may submit a request to the CoC for the blocking of its UBO information. In addition, the UBO will have to demonstrate that the disclosure of the information will result in one of the following situations: exposure to a disproportionate risk, a risk of fraud, kidnapping, blackmail, extortion, bullying, violence or intimidation, the involvement of a minor or some other type of legal incapacity. The decision by the CoC on a request to block the UBO information is a decision within the meaning of Section 1:3 of the General Administrative Law Act (*Algemene wet bestuursrecht*, Awb) for which legal protection is available. During the period that is necessary to enable the UBO to submit a request, to enable the CoC to decide on that request and, if applicable, to handle an objection and appeal, the UBO information will not be publicly available. In the **memo in response to the report**, the Minister of Finance announced additional measures related to privacy. For example, UBOs are given insight into the number of times their data are consulted (unless the information was accessed by the FIU and other competent authorities) and the identification of those who consult the information is improved by increasing the reliability of the identity based on (electronic) means of identification.
- **Implementation Decree**: In addition to the UBO Register Implementation Act, the **Implementation Decree** on the registration of ultimate beneficial owners of companies and other legal entities was published for consultation on 20 May 2019. Among other things, the decree designates documents for the substantiation of the beneficial interest of a UBO, designates the competent authorities that have access to the UBO Register or the blocked part thereof, and arranges a protection regime for exceptional circumstances.
- **UBO registers for trusts**: The legislature decided to implement the UBO register for UBOs of trusts and similar legal constructions in the Netherlands via a separate legislative proposal. At the time of writing, the consultation document for this legislative proposal has not yet been published or submitted to the House of Representatives. In principle, the Netherlands has up to 10 March 2020 inclusive to implement the UBO register for trusts. The EC has the task of linking all national UBO registers together by 10 March 2021 at the latest. It follows from the Ministry of Finance's letter on its **timetable for the upcoming period** that the Ministry of Finance intends to submit the legislative proposal to the House of Representatives in July 2020. Financial undertakings must ensure that the UBO Register is consulted after it has been implemented.

Central register for account holders under AMLD5

Under AMLD5, Member States are also obliged to have 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 all natural or legal persons holding a safe with a bank. Prior to the introduction of AMLD5, the Netherlands was already working on setting up a similar register via the **Bank Data Retrieval Portal Act (*Wet verwijzingsportaal bankgegevens*)** (see the **Banks** section of this Outlook for a discussion of this legislative proposal). The legislature has indicated that this legislative proposal satisfies the requirements that AMLD5 imposes on such a register. However, the scope of application of the Bank Data Retrieval Portal Act is broader than the ALMD5 prescribes because more government agencies are connected and more types of identifying data can be requested.

Banks and other payment service providers that offer accounts with an IBAN identification number that contains the country code 'NL', along with banks that offer safes, are obliged to connect to the bank data retrieval portal. Those banks and other payment service providers must provide these data related to their customers or a request or claim by the government agencies (the police, for example) in automated form. For the connected banks and payment service providers, this specifically means that they must create an automatic link between their own (customer) system and the bank data retrieval portal. This will be fleshed out in more detail via an order in council (*algemene maatregel van bestuur*, AMvB) (see the **Bank Data Retrieval Portal Decree**).

The following identifying data will be available via the portal:

- **in respect of natural persons**: the name, the name of the account, the safe or the financial product, address, domicile, correspondence address, date of birth and administrative characteristics (such as whether the product is active or has been terminated, whether the relevant individual himself is the customer or whether he exercises control as an authorised representative on behalf of someone else);
- **in respect of legal persons**: the name, name of the account, the safe or the financial product, address, location of the registered office, correspondence address, registration number at the CoC and administrative characteristics.

In addition, at a later time, a number of non-identifying data will be available via the portal, specifically data regarding the ultimate beneficial owner of an account or safe and the date on which an account or safe was opened and closed.

In view of the approaching implementation deadline of 10 September 2020, we advise to go ahead and take the technical and other preparatory measures regarding the bank data retrieval portal.

CURRENT LEGISLATION AND REGULATIONS

New powers EBA

In the **Outlook 2019**, we already reported about a **proposal** by the EC to give the EBA a greater role in the combating of terrorist financing and expand existing (supervisory) powers of the EBA and to transfer the ESAs' activities related to AML/CFT to the EBA.

For financial institutions, the proposal entails that the EBA will be given the power to act as European supervisory authority in the area of AML/CFT. Among other things, this will reduce the scope for national supervisory authorities to organise integrity supervision as they see fit. One of the main aspects of the proposal is that the EBA be given the power to request national supervisory authorities to investigate or take action against breaches in the area of AML/CTF. If a national supervisory authority fails to do so or fails to do so sufficiently, the EBA may, as a last resort, take a decision itself in respect of the institution concerned.

The new **regulation** was published in the Official Journal on 27 December 2019. The proposal was changed somewhat in the trialogue discussions between the European Parliament, the European Council and the EC, but as far as we can tell the key developments were retained. Some provisions, including the provisions pertaining to the new authorities of EBA, took effect on 1 January 2020. All other provisions will take effect on 1 January 2022.

Link CRD V and AML/CFT measures

The European legislatures have taken a number of steps to reinforce the link between prudential supervision and AML/CFT supervision. This was done based on, among other things, a **call** by the EC in 2018. Among other things, these steps pertained to the amendment of the Capital Requirements Directive V (**CRD V**).

For example, CRD V provides that if prudential supervisory authorities have good cause to suspect that money laundering or terrorist financing is being committed in connection with that institution, or an attempt at or increased risk of that, this must play a role in the question of whether the members of the management body are still, briefly put, trustworthy, that a prudential supervisory authority will immediately inform the EBA and the competent AML/CFT supervisory authority that in its evaluation of the governance regulations, the business model or the activities of an institution, it is picking up ML/TF signals and prudential supervisory authorities work closely together within the limits of their powers and provide each other with information that is relevant for their supervision.

On 16 December 2019 the ESAs established **guidelines** that, in part, regulate the method of cooperation and information exchange between the authorities referred to above.

Wwft investigation by AFM of investment firms and fund managers

Last year, the AFM conducted an investigation into compliance with the Wwft, with special attention for transaction monitoring, at a number of investment firms and fund managers. Those investigations are being finalised and we have learned that the AFM intends to circulate best practices across the market in response to those investigations. We believe this is a good development, as the market will benefit from more specific tools with regard to compliance with the Wwft. We advise market parties to consult these best practices and adapt their policy accordingly.

Consultation Amendment Wwft BES

The **consultation** of the amendment of the Wwft BES was published on 19 July 2019. The purport of the amendment is to reinforce the key obligations for the prevention of money laundering and terrorist financing, to better align the law with the standards of the Financial Action Task Force (FATF) and to tackle the bottlenecks that arose in practice. The consultation does not discuss the improvement of the supervision of attorneys and civil-law notaries, the regulation of crypto currencies and regulations related to cash transports. These topics might be included in the ultimate legislative proposal. The deadline for market parties to respond to the consultation was 13 September 2019. It follows from the Ministry of Finance's letter on its timetable for the upcoming period that the Ministry of Finance intends to submit the legislative proposal to the House of Representatives in April 2020.

Consultation on General Guidelines Wwft by Ministry of Finance

On 22 December 2019 the Ministry of Finance opened a **consultation period** on the general guidelines for the Money Laundering and Terrorist Financing Prevention Act (Wwft). These are an update of the existing guidelines to reflect the implementation of the fourth anti-money laundering directive on 25 July 2018. This update was necessary because this directive fundamentally altered the Wwft and its underlying legislation. It also includes recommendations and guidance on the FATF. This consultation period runs up to 3 February 2020.

NEW LEGISLATION AND REGULATIONS

Anti-Money Laundering Action Plan Act

The Minister of Finance and the Minister of Justice and Security initiated a **consultation** for their Anti-Money Laundering Action Plan Act (*Wet plan van aanpak witwassen*). To improve the prevention and combating of money laundering, the Dutch government drew up an anti-money laundering action plan. This plan consists of various measures for raising the barriers to money laundering, for increasing the effectivity of the gatekeeper function and the supervision of the compliance and for enhancing detection and prosecution.

A number of measures that require legislation were included in the legislative proposal.

Below, we discuss the main elements of the legislative proposal:

- **Prohibition on cash payments starting at EUR 3,000**: The legislative proposal implements a prohibition on professional traders or traders acting in a commercial capacity effecting cash transactions in excess of EUR 3,000. The prohibition only applies to parties trading goods professionally or in a commercial capacity. The prohibition thus does not apply to private individuals. As a result of the prohibition, the current obligation for traders to conduct CDD and report unusual transactions has lapsed. The prohibition does not affect the objective reporting thresholds and subjective obligation to report for other Wwft institutions, such as financial undertakings and other professional groups that are subject to the reporting obligation.
- **Exchanging the customer file between institutions**: Wwft institutions are obliged in the case of an enhanced CDD to investigate whether a customer previously requested services from an institution in the same category (banks, for example, are qualified as a category in the legislative proposal). In that event, the institution must make inquiries at said institution and ask whether there had been any indication of integrity risks (risks of money laundering or terrorist financing). A Wwft institution from which information is requested by another Wwft institution regarding a (former) customer is required to immediately provide information about integrity risks detected (even if this involves personal data of a criminal nature). When entering into the business relationship and when providing services, Wwft institutions must inform their customers of this statutory obligation for these institutions.
- **Outsourcing transaction monitoring and the exchange of transaction details**: As a result of the amendment of the Wwft, it becomes expressly possible to outsource transaction monitoring to a third party on the basis of an outsourcing agreement or an agency agreement. Wwft institutions will remain fully responsible for compliance with the requirements in the Wwft. In addition, the legislative proposal provides a basis for sharing data collected in connection with transaction monitoring with other Wwft institutions if this is necessary for reporting unusual transactions to the FIU. The prohibition on tipping off in the Wwft remains applicable in full. This means that if a transaction is qualified as unusual, the Wwft institutions may not inform each other of this unless one of the exceptions is applicable. For example, the tipping-off prohibition does not apply in the case of a report between institutions that are part of the same group.

Market parties have until 14 January 2020 to respond to the consultation. It follows from the Ministry of Finance's letter on its timetable for the upcoming period that the Ministry of Finance intends to submit the legislative proposal to the House of Representatives in July 2020.

NVB Action Plan

On 21 November 2019, the Dutch Banking Association (*Nederlandse Vereniging van Banken*, or NVB) issued a **plan** and a **position paper** containing five action points for the international public/private tackling of financial crime. The NVB believes that EU legislation should explicitly allow these types of cooperation (and other types of cooperation between institutions) which would make it possible to improve the effectivity of the battle against ML/TF risks.

Among other things, the Plan contains proposals for a new central EU regulation regarding AML/CFT, full access to the UBO Register, a European AML/CFT supervisory authority and an EU-wide FIU.

The NVB notes, among other things, that there are significant differences in the interpretation of the AML/CFT legislation because the rules are laid down in European directives. The NVB therefore proposes transposing most of the provisions from the directives into European regulations in order to create a harmonised framework for AML/CFT in the EU. Against this backdrop, the NVB would welcome the creation of a new European AML/CFT supervisory authority that would directly supervise the institutions with the highest risk (similar to the current SSM supervision by the European Central Bank (ECB)). In the NVB's opinion, a European supervisory authority would simplify the current supervisory framework, remove inefficiencies in the area of the exchange of, for example, information and coordination and combat supervisory arbitrage.

It is our expectation that the NVB will endeavour in 2020 to achieve the points in its plan at European or national level.

Directive on combating money laundering by criminal law

In the **Outlook 2019**, we noted that the **directive** on combating money laundering by criminal law (the Directive) entered into force on 2 December 2018. The directive aims to harmonise the criminalisation of money laundering in the EU. Against this backdrop, the directive sets minimum rules for the criminal-law liability for money laundering, along with the definition of criminal offences that must be considered basic offences for money laundering and the criminal-law liability of legal entities.

At first glance, the existing criminalisation of money laundering, as included in the Title XXXA, Book 2 of the Criminal Code (*Wetboek van Strafrecht*) seems to largely 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.

OTHER DEVELOPMENTS

BIS guidelines for interaction prudential supervision and AML/CFT supervision

On 8 November 2019, the Basel Committee on Banking Supervision (BIS) published a **consultation paper** titled: 'The introduction of guidelines on interaction and cooperation between prudential and AML/CFT supervision'. The BIS proposes to amend the June 2017 **guidelines for the sound management of risks** related to money laundering and financing of terrorism by providing detailed and practical guidelines regarding the interaction and cooperation between prudential and AML/CFT supervision. These proposed guidelines are intended to improve the effectivity of the supervision of ML/TF risks in line with the FATF standards and the guidelines of the BIS.

The BIS believes that there must be an adequate exchange of information and cooperation between various supervisory functions, regardless of the institutional setting and in both a national setting and a cross-border setting. The proposed guidelines contain principles and recommendations for the exchange of information and cooperation in respect of the issue of a licence by a bank, continuing supervision and enforcement measures. The guidelines also discuss possible implementation methods, including mechanisms to make such cooperation easier based on examples and supervisory practices.

Market parties have until 6 February 2020 to respond to the consultation document. It is our expectation that the European legislatures will adopt the BIS' suggestions in due course.

ECB measures AML/CFT

Against the backdrop of the European measures in the area of prudential supervision and AML/CFT supervision, the ECB **stated** that, when performing its task as prudential supervisory authority, it would act if issues surrounding money laundering and terrorist financing could have consequences for the safety and soundness of the bank. Issues surrounding money laundering and terrorist financing (particularly if these are based on assessments of the relevant risks (at individual institutions) by AML/CFT authorities will be taken into account in connection with prudential supervision mainly, but not exclusively, in the case of:

- **Licence issuing**: In that respect, a determination will be made regarding the extent to which the applicant's business model, the envisaged risk management and control systems, along with the suitability of shareholders, (members of) the management body, the upper management and the most important employees entail risks related to money laundering and terrorist financing;

- **The current supervision**: in the assessment of the acquisition of qualifying holdings and of the expertise and trustworthiness of the management body;
- **Supervisory review and evaluation process (SREP)**: in the assessment of risks, business models, lending, governance and internal risk management; and
- **The imposition of possible prudential administrative measures**: in particular fines or instituting a procedure for withdrawing the licence. This ensures that weak aspects related to AML/CFT having a prudential impact are taken into account in the application of prudential supervisory measures and exercising the powers related to supervision.

The ECB also indicates that, primarily, banks themselves must ensure that they are not used for ML/TF purposes and that the management gives sufficient attention to combating money laundering and terrorist financing. In the ECB's view, this means, among other things, that the members of the management body and the upper management must always have a good reputation and sufficient knowledge, skills and experience in order to perform their duties. In addition, it is the institutions' responsibility to create an appropriate governance and risk management framework they can use to identify, assess and control the risks to which they are or might be exposed, which risks include money laundering and terrorist financing risks.

We expect that the ECB will increase its supervision of ML/TF risks. We advise market parties to take this into account if necessary, and to possibly take preparatory measures.

Minutes plenary meeting FATF October 2019

The plenary meeting of the FATF was held in Paris from 16 through 18 October 2019. The Ministry of Finance published the **minutes** of the plenary meeting. According to the minutes, the following topics, among other things, were discussed at the meeting:

- **Method in respect of virtual assets:** Last year, the FATF modified the standards, with an accompanying explanation, to clarify how these should be applied to activities related to virtual assets (see, for example: *Mitigating Risks from Virtual Assets, Virtual Assets and Related Providers* and *Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers*). Next, the FAFT modified the method used to evaluate countries in order to establish global, consistent regulation and supervision of virtual assets and virtual assets service providers (VASPs) in respect of AML/CFT regulations. The modification of the method means that from now on countries will also be evaluated regarding the integrity policy in respect of virtual assets in the country evaluations. The FAFT has undertaken to evaluate the progress in June 2020.
- **Integrity risks of stablecoins:** During the meeting, the integrity risks that stablecoins involve were discussed. Stablecoins are virtual assets, the value of which is linked to one or more currencies and in regard to which it is claimed that these are more index proof than other cryptocurrencies. Libra, for example, is a stablecoin. The FATF states that stablecoins generally fall under the FATF standards and that the FATF will further investigate what the risks of stablecoins are for money laundering and terrorist financing.
- **Investigation of digital means of identification and verification:** The FATF has stated that it is investigating the possibilities of new electronic identification and verification methods (eID) for CDD. To this end, the FATF published a **draft guideline** to which interested parties could respond until 29 November 2019. It is the FATF's intention to publish the final version of the guideline at the end of February 2020.
- **Jurisdictions with increased risks**: The FATF published two lists containing jurisdictions with strategic shortcomings in their national policy for the prevention and combating of money laundering and terrorist financing. The **first list** is what is known as a public statement and contains jurisdictions that are showing no commitment to implementing improvements or that have made insufficient progress in the reduction of their strategic shortcomings and which could constitute a threat to the international

financial system (Iran and North Korea). The **second list** pertains to countries that have strategic shortcomings in their national regimes for the prevention and combating of money laundering and terrorist financing and which are committed to tackling these shortcomings (Iceland, Mongolia and Zimbabwe, for example). See also, for example, a communication from **DNB** in response to the publication of these lists.
- **Report on transparency in respect of UBOs of legal entities**: The plenary meeting adopted a **report** with Best Practices on Beneficial Ownership for Legal Persons.

Lastly, it is worth mentioning that the Netherlands will be evaluated by the FATF in October/November 2020, and the results will be discussed during the plenary meeting in June 2021.

New FATF guidance for risks involved in money laundering and terrorist financing

In June 2019, the FATF published a **guidance** especially for trust offices that offers trust offices tools for the analysis of the risks related to money laundering and terrorist financing and the setup of an effective control framework. The report devotes a great deal of attention to CDD, the continued monitoring of the business relationship and the detection of unusual transactions.

EC Communication AML/CFT and reports

On 24 July 2019, the EC adopted a **communication** regarding the European Parliament and the European Council that pertains to a better application of the framework for AML/CFT. In addition, the EC published a number of reports in which the ML/TF risks are assessed and aspects requiring improvement in the area of AML/CFT are proposed. These reports will be discussed successively below.

Supranational risk assessment

The EC published its second **supranational risk assessment** (Supranational Risk Assessment Report, SNRA) in which the EC discusses the risks that money laundering and terrorist financing entail for the European internal market in so far as these risks impact the internal market and are related to cross-border activities. According to the SNRA, various parties have carried out most of the recommendations in the first SNRA. At the same time, there are still a few weak spots in European and national laws and regulations, in particular regarding anonymous products, the identification of UBOs and new unregulated products such as virtual currencies. The EC expects that some of these weak spots will be remedied by the upcoming transposition of AMLD5.

Unlike the first SNRA report, the EC identified four new sectors in which the risk of money laundering and/or terrorist financing is higher: cash machines held by private individuals, paid football, safe harbours and legislation relating to investor citizenship and investor residence. The next SNRA will be published in 2021 and will address, among other things, the progress that has been made regarding the proposals made by the EC in respect of AML/CFT.

Report on the assessment of perceived money laundering by EU credit institutions

After a number of exchanges of opinions with the European Parliament and a **request** by the European Council in December 2018, the EC analysed 10 recent, commonly known money-laundering cases by banks in the EU in order to get an idea of current shortcomings and to present a possible solution.

The EC's **report** showed, among other things, that:
- A number of banks did not really comply with the anti-money laundering rules or did not adhere to them entirely. Those banks lacked the proper internal mechanisms for preventing money laundering and although some had a risky business model they did not make any provisions for this in their policy for combating money laundering and terrorist financing. The EC also observed that the relevant policy lines both within

individual entities and at group level had been insufficiently coordinated;

- The national authorities' supervisory measures diverged greatly in respect of timing and efficiency. There were huge differences in prioritisation, means, expertise and available tools. In particular, the supervisory authorities tended in their supervision of bank groups to put too much faith in the anti-money laundering framework of the host Member States. This was to the detriment of the effectivity of the supervisory measures in cross-border cases at European level. In addition, the distribution of the powers led to ineffective cooperation between anti-money laundering institutions, supervisory authorities, financing intelligence units and law enforcement authorities.

Based on the report, the EC concludes that there needs to be more harmonisation between the Member States and the supervision must be enhanced to tackle the current shortcomings in the current anti-money laundering rules.

Report on the collaboration between financial intelligence units

Based on AMLD5, the EC must evaluate the framework for the cooperation between FIUs and third countries and the impediments to and possibilities for closer cooperation between European FIUs, including the possibility of setting up a coordinating and support mechanism. The EC followed this up in a **report**. In the report, the EC notes the following points, among others:

- Because of differences in terms of status, powers and organisation, certain FIUs do not have access to relevant information, including information from financial, administrative and law enforcement institutions, and are unable to share that information.
- The exchange of information between FIUs is still inadequate and often proceeds very slowly.
- In addition, FIUs sometimes do not have the correct IT resources for the effective import and export of data via the network intended for that purpose (**www.fiu.net**).
- The limited scope of the EU's FIU platform is insufficient for creating legally binding models, guidelines and standards.

The report suggests a number of specific changes, such as a new support mechanism to promote the cooperation between the FIUs in the EU.

Report on the interconnection of central registers for bank accounts

Based on AMLD5, the EC must submit a report to the European Parliament and the European Council about the evaluation of the conditions and technical features that are necessary for a secure and effective interconnection of the central registers for bank accounts. The EC did so based on a **report**.

The report contains a number of elements that should be taken into account in terms of a possible interconnection of central registers of bank accounts and information retrieval systems. The EC suggests that a decentralised system with a common platform could be used for that purpose at EU level. To achieve the interconnection – following consultation with the Member States, the FIUs and law enforcement agencies and agencies for the confiscation of assets – legislation will have to adopted.

Stablecoins in the EU

On **5 December 2019**, in a joint statement, the European Council and the EC stipulated that not a single stablecoin may be launched in the EU until the legal, supervisory-law and oversight-related challenges and risks have been adequately identified and addressed. In view of this, it is therefore not possible for the foreseeable future to launch such a stablecoin.

IMPORTANT INFORMATION WITH REGARD TO SUSTAINABILITY IN 2020

In this section we will look ahead at developments related to sustainability and climate change. In 2019 considerable steps were taken toward making the financial sector more sustainable and we expect that this trend will continue in 2020. The Action Plan on Sustainable Finance of the European Commission is one of the more important sources from which the various developments originated and the three underlying goals of the Action Plan function as an orderly guideline for the developments to be discussed, being:

- managing risks related to climate change
- financing a more substainable economy
- promoting transparency and long-term thinking among companies

We apply a somewhat comparable three-way split to categorize the relevant developments at national and international level. Investment or financing activities are referred to as sustainable if, in the decision making process on investments or financing, attention is paid to ecological and social considerations, leading to investments in sustainable activities geared to the long term. The term ESG-criteria or –considerations refers to environmental, social and governance-matters.

If topics relate to specifically determined sectors, this is indicated by the following abbreviations:

Banks:	ba	Investment Firms:	invf
Consumer Credit:	crdp	Issuers & Capital Markets:	iss
Financial Service Providers:	fsp	Payment Processing Institutions:	ppi
FinTech & Alternative Financing:	ftech	Payment Service Providers:	psp
Fund Managers:	fmng	Trust Offices:	trst
Insurers:	ins		

The developments regarding sustainability have sometimes not yet been concretely laid down in legislation or regulations. With a we will indicate which developments market parties can or should start working on at this time.

EUROPE GENERAL

EC: European Green Deal

On 11 December 2019 the EC presented its '**European Green Deal**'. It is a renewed commitment of the EC to tackle the climate change problem. This comes down to a new growth strategy which seeks to make the European economy sustainable and to make the EU a climate-neutral continent by 2050. In the document the EC sets out a roadmap of policy points and measures which are required to be able to realise the Green Deal. The EC does this with regard to all sectors of the economy, including the financial sector.

With regard to the financial sector the EC repeats the point for attention set out in the **Action Plan on Sustainable Finance** of 8 March 2018 and other reports, that the green transition cannot be realised without financing of this transition by the private sector. According to the EC, this requires long term signals to steer capital flows to sustainable investments and to avoid stranded assets. Stranded assets are assets which lose their value as a result of changes in climate policy, technologies and market sentiment which accompany the green transition. In Q3 2020 the EC will present a renewed strategy relating to sustainable finance. This renewed strategy will focus on the following three action points:

- **Reinforcing the foundations for sustainable investments**. There are several aspects to this reinforcement:
  - According to the EC, the main requirement is to adopt the European taxonomy system for classifying climate-sustainable activities. For more information on this taxonomy system see, inter alia, the Taxonomy Regulation discussed elsewhere in this section (under 'EU Taxonomy: one definition of sustainability').
  - Sustainability must become more embedded in the corporate governance structure of companies, as currently the attention of companies primarily goes to the short term financial performance rather than to long term value and sustainability-related aspects.
  - Companies and financial institutions must report in greater detail on climate and environmental aspects so that investors are fully informed about the sustainability of their investments. That is why the EC will subject the Directive relating to the disclosure of non-financial information and information on diversity (Non-Financial Reporting Directive, NFRD) to a review.
  - Lastly, the EC will assist companies and other stakeholders in the development of standardised 'natural capital accounting practices' at European and international level.
- **The creation of new opportunities for investors and undertakings by easy and**

reliable identification of sustainable investments. This can be done by means of clear green labels for retail investment products - for initiatives already undertaken in this area, see 'EU Ecolabel for financial products' elsewhere in this section - and by the developing of a European standard for green bonds which facilitates sustainable investments in the most appropriate manner – see for more on this matter the topic included elsewhere in this section '**EU Green Bond Standard'**.

- **The management and integration of climate and environmental risks in the financial system**. According to the EC this comes down to a number of action points:
    - A better integration of climate and environmental risks in the European prudential (regulatory) framework and an assessment whether the currently applicable capital requirements are suitable for application with regard to green assets. With regard to this point we refer to the publications of EBA, EIOPA and DNB discussed elsewhere in this section, in which they equally call upon market parties to better integrate climate risks in the prudential area, such as in risk management and stress tests. In view of this EC action point, the request of supervisory authorities to the market parties might find support in amending prudential legislation and regulations for better alignment with climate change risks.
    - The EC will research how the financial system can contribute to promoting resilience to climate and environmental risks, in particular physical risks and loss ensuing from climate disasters. We would like to point out that EIOPA has already taken steps in this area and at the end of 2019 called upon insurers to increase the resilience of society to climate change via their underwriting and investment activities. For more on this matter, see the topic discussed elsewhere in this section '**EIOPA climate risks and Solvency II**'.

At first glance, the action points announced in the Green Deal with regard to the financial sector are primarily a solidification of the action points already included in the EC Action Plan on Sustainable Finance, and now (partly) implemented, concerning the EU Taxonomy, reporting of non-financial information, sustainability labels for investment products and integration of climate risks in the prudential area. At the same time, the recommitting of the EC to these action points to make the European financial sector sustainable offers a strong indication that with regard to these action points it can in any event be expected that they will come to further fruition in 2020.

NGFS call for action

In its **Call for Action** of April 2019 the Network for Greening the Financial System (NGFS) made six recommendations to supervisory authorities, central banks, policymakers and financial institutions to promote their role in climate risk management and sustainability of the financial sector. The NGFS is an international collective consisting of supervisory authorities and central banks. With knowledge sharing and best practices it seeks to increase the role of the financial institutions in climate risk management and the channelling of capital into sustainable investment. Below we will discuss the supervisory law recommendations of the report.

The NGFS recommended to central banks and supervisory authorities to start with the integration of climate risks in the stability supervision and the supervision of institutions. In particular the integration in the prudential supervision is relevant in this respect, inter alia by:

- Ensuring, in consultation with financial institutions, that climate-related risks are understood and discussed at management level, are taken into consideration in risk management and the making of investment decisions and are integrated into the strategy;
- together with financial institutions secure the identification, analysis, management and reporting of climate-related financial risks; and
- determining supervisory law expectations in order to provide guidance for financial institutions.

In addition, the NGFS recommended that policymakers, central banks and supervisory authorities develop an adequate international framework for reporting on climate risks.

This is for the purpose of an adequate and internationally consistent measuring of stability risks and climate risks for companies and from the perspective that an internationally used reporting standard can contribute to reporting quality and can function as guidelines for the sector. This entails, more specifically:

- a recommendation to listed companies and financial undertakings to report in line with the reporting standard of the Task Force on Climate-related Financial Disclosures (TFCD recommendations);
- a recommendation to policymakers and supervisory authorities to encourage the use of TFCD recommendations, inter alia by the creation of awareness and sharing of best practices;
- suggestions for supervisory authorities to encourage the establishing of an international reporting framework, such as by:
  - entering into a dialogue with financial institutions to align expectations on the type of information to be reported;
  - giving additional guidelines to help financial institutions to determine what climate-related risks are material enough to be involved in their reporting.

As, inter alia, DNB, the ECB and the Basel Committee are members of the NGFS, it is conceivable that the lines which have been set out will ultimately find a way into supervisory practice and/or legislation and regulations. Additionally, according to NGFS Chairman and DNB supervisory director Frank Elderson there will be **three NGFS publications** in 2020 on climate scenarios for risk analyses, methodologies for the assessment of climate risks, and the integration of climate risks into regulatory supervision.

CLIMATE & RISK MANAGEMENT

DNB Report on climate change challenges (ba-ins)

At the beginning of 2019, DNB published a **report** in which it addresses the challenges that climate change poses to financial institutions. On the basis of its own research it concluded that various environmental challenges such as water scarcity, commodity scarcity and loss of biodiversity constitute risks for the financial sector. They do not necessarily constitute a risk to solvency, but:

- **physical risks**: such as the risk of the worsened financial position of financed companies as a result of climate change;
- **transition risks**: such as the risk of declining creditworthiness of financed companies by altered regulations or views of consumers; and
- **reputation risks**: such as the risk of reputation damage and liability claims as a result of negative publicity relating to climate change.

These risks then materialise among financial institutions like banks and insurers as the already known risks, like credit risk, market risk, operational risk and underwriting risk.

On the basis of research into the internal steering of the sustainability policy among 25 large and medium-sized banks, insurers and pension funds which by balance sheet value represent 82% of the financial sector, DNB also concluded that the majority of financial institutions have not yet fully integrated their sustainability ambitions into their business operations. In particular steering mechanisms such as indicators and targets are lacking and few institutions chart the effects of their efforts. According to DNB, this can lead to unfulfilled expectations or defaulted commitments relating to the sustainability policy, resulting in reputation risks.

DNB therefore makes the recommendation in the report to financial institutions:

- **To further analyse and, where necessary, mitigate environmental risks**: by having an integral picture of their risks, including how environmental risks contribute to their total risk, so that mitigating action can be taken in a proportional manner. For example, by using scenario analyses or stress tests. In addition, by applying a holistic approach to risk management and taking into consideration the relationship between the climate risks.
- **To improve instruments to manage climate risks**: ESG factors are usually integrated into the provision of credit or investment decisions but the indicators used

do not always properly measure the risk. The integration and analysis of exposure to climate risks must, moreover, not only be applied to new loans but also to, already existing, integral portfolios.

- **To guarantee fulfilment of commitments and expectations relating to sustainability**: by setting up good steering instruments and anchoring the sustainability policy more firmly in the business operations.

In addition, it ensues from the report that DNB will continue working on reinforcing and sharing knowledge of environmental risks and that it finds it important that financial institutions have an insight into the impact of environmental risks on their solvency in the short and long term.

In view of the recommendations and intentions of DNB, institutions which are under DNB supervision, like banks, insurers and pension funds can take account of the fact that in the coming year DNB might pay extra attention to, inter alia, their analysis of the climate risks relevant for them, their instruments to manage these risks and the integration of their sustainability policy in the business operations.

DNB Consultation on how banks deal with climate risks (ba)

At the end of November 2019 DNB offered its Good Practice relating to the integration of climate-related risk considerations in the risk management of banks for consultation. The report provides insight into DNB's expectations regarding the management of climate risks by banks. We will highlight these risks below, as well as DNB's observations regarding the management thereof and its good practices.

In view of the essential risks ensuing from climate-related risks for banks, DNB expects that banks will include these climate-related risks in their risk management. DNB refers to the following regulations as the statutory basis for the obligation to see to risk management of climate risks:

- The requirement, pursuant to the Capital Requirements Directive IV (CRD IV) that banks must possess solid governance schemes, including effective procedures for detection, management, monitoring and reporting of risks to which they are or could be exposed. The same applies to the requirement which applies for the implementation thereof pursuant to the Financial Supervision Act that the business operations have been set up in such way that they guarantee controlled and ethical business operations, which requires, inter alia, management of financial risks and other risks that could affect the solvency of the financial undertaking.
- The requirement that applies pursuant to the Prudential Rules Decree of the Financial Supervision Act to possess solid comprehensive strategies and procedures and alignment of the qualifying capital as to amount, composition and distribution with regard to the size and nature of the short and long term risks which the bank is or could be exposed to. In view of the long term character of climate change and climate-related risks, DNB deems this requirement to apply equally with regard to climate-related risks.

DNB points out in this respect that if a climate risk does not form a material risk for a bank, such as when the bank is not exposed or cannot be exposed to that climate risk, a bank can suffice with an analysis as to why the climate risk in question does not form a material risk. Banks are expected to be transparent on this in their reports, for example in their ICAAP reports.

In its consultation DNB then presented good practices for the integration of climate-related risks in the business operations of banks. These non-binding guidelines relate to the governance, the risk management and reporting.

Banks can respond up to and including 14 February 2020 to the consultation and DNB expects to publish an overview of the responses in the first quarter of 2020.

DNB Consultation on climate risks in the ORSA (ins)

At the end of November, DNB published a Good Practice (incl. Q&A) on the subject of integrating climate-related risks into the ORSA. The Good Practice follows the EIOPA opinion on climate risks (see 'EIOPA climate risks and Solvency II' below). Being that according to the Solvency II Delegated Regulation, the ORSA must cover risks to which an insurer is exposed or potentially exposed, and climate risks influence both the asset side of the balance sheet and the technical provisions, DNB expects insurers to include climate risks in their ORSAs:

- DNB expects insurers to analyse and describe the influence of climate risks (physical and transition) on their risk profiles, and to work out ORSA scenarios for material risks in observance of the nature, scope and complexity of the risks inherent to the insurer's activities.
- DNB expects the ORSA report to include an account, with explanatory notes, of the results of this analysis. If climate risks are not seen as material risks, DNB expects the explanatory notes to clarify this.

A few good practices DNB identifies include:
- inclusion of physical risks and transition risks (and their impact) on the asset side of the balance sheet.
- when using individualised scenarios, non-life insurers should use the premises from relevant stress tests for the assumptions in the climate-related ORSA scenario, as well as the climate scenarios of the Royal Netherlands Meteorological Institute (KNMI).
- life insurers, benefits in kind insurers, funeral insurers and healthcare insurers should (i) take the indirect effects of climate risks into account in their impact analyses, (ii) allow for an increase in the mortality rates, and (iii) take potential health risks of climate change into account in the ORSA.

DNB has indicated that the DNB energy transitions stress test offers models for incorporating cross-sector transition risks into an ORSA scenario. Beyond using their own individualised scenarios, non-life insurers can also use the EIOPA Stress Test 2018 and DNB's nonlife stress test 2017.

EBA Action Plan on Sustainable Finance (ba)

In December 2019 EBA published its **Action Plan on Sustainable Finance**. The action plan sets out EBA's plans and timeline for reports, advice, guidelines and technical standards on sustainable finance it will be publishing. It also makes a number of recommendations to institutions for steps to be taken in the interim.

For 2020 and subsequent years publications are expected with regard to the following topics:
- **Strategy and risk management**: on 28 June 2021, EBA will present a report on the matter to the EC. EBA will have to report therein on the making of a uniform definition of ESG risks (including physical and transition risks), the establishing of criteria and methods to assess the impact of ESG risks on the financial stability of institutions, the policy plans to be implemented by institutions and strategies to assess and manage ESG risks and the possible addition of ESG risks to the Supervisory Review and Evaluation Process (SREP). In Q2/Q3 2020 a discussion paper will first be published on the matter, after which EBA will include the received feedback in the final report to be published on 28 June 2021. Depending on the feedback received on the discussion paper, in 2022-2024 EBA will possibly also issue guidelines regarding the uniform inclusion of ESG risks in the SREP as well as modify other policy lines, such as those relating to business operations, loans and outsourcing agreements. The final report will provide more clarity regarding the topic and publication date of these guidelines and/or modified policy lines.
- **Data measurements and disclosure requirements**: on 28 June 2020 EBA will present draft Implementing Technical Standards (ITS) to the Commission for elaboration of the disclosure requirements laid down in Part Eight of the CRR ('Disclosure by institutions'). The ITS will specify criteria and formal requirements for these disclosure requirements and give instructions which disclosures must satisfy pursuant to Titles II and III of Part Eight CRR. ESG-related disclosure requirements will be developed on the basis of existing initiatives such as the Taxonomy Regulation and the reporting standard recommended by the Task Force on Climate-related Financial Disclosures (TFCD recommendations). They will be applicable as of June 2022.
- **Climate stress tests and scenario analyses**: EBA seeks to develop stress

tests to identify the vulnerabilities of banks relating to climate-related risks and the share of exposures of banks which can potentially be affected by the physical and transition risks of climate change. As part of the regular risk assessment of European banks, in the second half of 2020 a climate risk analysis could be carried out among a group of voluntarily participating banks with regard to transition risks and long term risks. The analysis would promote the knowledge and the understanding of the vulnerabilities of banks relating to climate risks and could give an estimate of the quantity of green exposures and brown exposures (in short exposures to CO_2-intensive projects and activities, i.e. non-green).
- **Prudential handling of green exposures**: EBA will study in the coming years whether a specific prudential approach could be justified of exposures related to assets or activities which are substantially in line with environmental goals or social goals. EBA will study, inter alia, methodologies to determine the risk of such exposures, the making of suitable review criteria for physical risks and transition risks (including risks related to a decrease in value of assets as a result of regulatory changes) and the potential effect of such a prudential treatment on financial stability and bank lending in the Union. After data and quantitative analyses EBA will publish a discussion paper in the period 2022-2024, and subsequently include the feedback received thereon in a report to be published 28 June 2025 at the latest on the classification and prudential treatment of these exposures.

EBA emphasises in its report that financial institutions such as banks and investment firms must set up their assessment criteria, strategies and risk management on the potential pending physical and transition risks of climate change. It therefore believes the quickest possible action with regard to the above-grouped topics to be important and recommends even before the final EBA documentation to be published in this respect to take all of the following measures in the areas of:
- **Strategy and risk management**: incorporate ESG considerations actively in business strategy and risk management and integrate ESG risks in business plans, risk management, internal control frameworks and decision making processes.
- **Disclosure requirements**: continue the established line of reporting on non-financial information and participate in initiatives in this respect. Prioritise the designation of criteria which provide transparency on how climate change-related risks, including transition risk, are included in business goals, strategies, decision making processes and risk management. With regard to reporting EBA refers to the **Guidelines on non-financial reporting** of the EC: Supplement on reporting climate-related information.
- **Stress tests and scenario analyses**: make use of climate change-related scenarios and use scenario analysis to understand the relevance of exposures to physical risk and transition risk as well as the potential magnitude thereof.

EIOPA climate risks and Solvency II (ins)

In September 2019 EIOPA published an **opinion on Solvency II and sustainability** to chart how insurers via their investment and underwriting activities can contribute to the identification, measuring and management of the risks ensuing from climate change. In the opinion, EIOPA called upon insurers to implement measures in connection with climate change-related risks, particularly in view of the effect of those risks on the business strategy of insurers. EIOPA therefore emphasises that adequate scenario analyses are relevant for the management of these risks.

Although Solvency II is well equipped to accommodate the calculation of sustainability risks and factors, according to EIOPA climate change entails considerable challenges for, inter alia, the valuation of assets and liabilities, underwriting and investment practices as well as risk management. A few of the related recommendations are, inter alia:
- **Valuation of assets**: when the current mandatory information about alternative valuation methods is provided, in so far as relevant, ask whether account has been taken of sustainability considerations and which ones. In addition, on behalf of accurate valuation apply scenario analyses to chart uncertainties regarding the effect

of climate change on the valuation of assets and apply mitigation strategies to address risks ensuing from these uncertainties.

- **Valuation of liabilities**: use of recent climate science insights for sensitivity analyses and scenario analyses for the adequate estimation of expected future developments in the external environment, including climate-related risks. In addition, see to it that historical information on losses is up-to-date, take account of insured incidents which are not covered by this information and develop and use forward-looking climate (disaster) models.
- **Investment activities**: if long term assets are linked to long term liabilities, it must be considered whether climate change affects the ability to hold these assets in the long term and/or the cash flows in the long term.
- **Underwriting activities**: with underwriting activities insurers will have to contribute to the promoting of social resilience to climate change and further adjustment of, and the mitigation of, climate change. This is possible, inter alia, by developing insurance products and modifying existing ones in such a way that these reduce sustainability risks and favourably influence ESG aspects (impact underwriting), such as new products geared to climate change-related risks, integration of ESG considerations in the underwriting practice and entering into dialogue with public authorities.
- **Risk management/capital requirements**: with regard to capital requirements EIOPA points out, inter alia, that the current capital requirements for insurers related to the risk of environmental disasters are calibrated on the basis of historical data concerning events from the past. These data do not take account of the climate risks as these are expected to materialise in the coming 10 to 20 years, such as an increasing frequency and/or severity of environmental disasters, and are thus a poor predictor of future climate risks. The fluctuations to be expected in this area must therefore be included in the risk management strategies and ORSA in a forward looking manner. In addition, EIOPA is considering carrying out further research to see whether the way in which the Solvency II framework addresses the climate change-related risks such as drought and forest fires, needs to be improved.

We advise insurers to keep track of the developments relating to this topic in 2020 as well. The recommendations offer insurers a useful guideline for assessing their individual degree of sustainability and climate change resilience and they provide some insight for the possible sustainability measures for the insurance sector which may be expected in 2020 from Europe.

ESA's advice on amendment of MiFID II, AIFMD, UCITS, Solvency II & IDD (fmng-ins-invf)

In 2018 EC asked ESMA and EIOPA for advice on the integration of sustainability risks and sustainability factors in delegated regulations under MiFID II, AIFMD, UCITS, Solvency II and IDD. According to the request, following receipt of the advice the EC would decide on changing and/or supplementing these regulations. While awaiting definite reports on the matter we will highlight below a few changes recommended by ESMA and EIOPA which ensue from their **advice concerning MiFID II**, **AIFMD, UCITS**, **Solvency II and IDD** which appeared on 30 April 2019. The advice is relevant for investment firms, fund managers and insurers or insurance intermediaries. The key point is the question how, and where, these market parties should integrate sustainability risks and sustainability factors in their business models and procedures.

MiFID II delegated regulations

- **Organisational**: the addition that ESG considerations must be taken into account when complying with the already required general organisational requirements if ESG considerations are relevant for the investment services to clients;
- **Risk management**: the addition that sustainability risks must be included in the determining, implementation and maintaining of codes of conduct and procedures for risk management;
- **Conflicts of interest**: the addition that the identification of conflicts of interests also relates to conflicts in distribution of sustainable investments, including misrepresenting investment products and strategies as sustainable (greenwashing);

- **Product development process**: the addition that ESG preferences must be included in the assessment whether a financial instrument satisfies the needs and characteristics of the target group.

AIFMD & UCITS delegated regulations

- **Organisationally**: the addition that managers take account of sustainability risks when complying with the already applicable general organisational regulations;
- **Resources (UCITS only)**: the addition that the obligation for UCIT management companies relating to skilled and expert employees and honest and professional job performance from now on encompasses taking account of the necessary expertise for effective integration of sustainability risks;
- **Internal control**: the addition that the management board of the manager is responsible for the integration of sustainability risks;
- **Operationally**: the addition that upon identification of conflicts of interests, conflicts related to integration of sustainability risks must be included, such as those ensuing from rewards, personal transactions or leading to unjustified presenting investments as being sustainable;
- **Care requirements investment selection and monitoring**: the addition that upon compliance with applicable care requirements, account is taken of possible sustainability risks and the negative influence of investment decisions on sustainability. In addition, the addition that where possible strategies are deployed to reduce the negative influence of companies for sustainability goals, to be used, for example, in the exercising of control rights;
- **Risk management policy**: the addition that the policy must make it possible to assess the exposure to sustainability risks.

Solvency II delegated regulations

- **Organisationally**: the addition that the risk management function encompasses the identification and assessment of sustainability risks and that the remuneration policy checks on the consistency thereof with the integration of sustainability risks;
- **Operationally**: the additional obligation to integrate sustainability risks in the assessment of risk, quality, liquidity and profitability of the investment portfolio and to take account of the long term sustainability impact of investment strategy and decisions. In addition, a new requirement that the ESG preferences of investors and policyholders are reflected in their investment portfolio when these are relevant for the target group demarcation of the product approval process. Lastly, sustainability risks as additional point of attention for the advice of the actuarial function on the guideline on entering into underwriting commitments.
- **Risk management**:
  - for the requisite risk policy to manage the risk relating to loss or unfavourable value changes of insurance commitments, the addition that this risk can (also) be the result of sustainability risks;
  - for the requisite risk policy to manage investment risk, measures for adequate identification, assessment and management of sustainability risks related to the investment portfolio as an added requirement; and
  - the addition that the assessment of overall solvency requirements from now on also encompass the effect of sustainability risks, including climate change.

IDD delegated regulations

- **Conflicts of interests**: the addition that upon identification of conflicts of interests, conflicts of interests related to ESG factors will also be included, particularly if customers have passed on ESG preferences;
- **Product development**: the addition that producers of insurance products consider ESG factors in the product approval process if the product is intended for distribution to customers who are looking for ESG insurance products.

We expect that in 2020 it will become clear how and to what extent the EC will ultimately implement the aforementioned changes/ additions of the delegated regulations. For now the advice which has been presented offer for investment firms, managers and insurers and insurance intermediaries an indication of what is to be expected with regard to, inter alia, organisational requirements, operational requirements, risk management and target group demarcation.

ESMA guidelines for credit rating agencies

As from 30 March 2020, the **ESMA guidelines on reporting requirements for credit rating agencies (CRAs)** go into effect. One element of these guidelines is guidance oriented towards providing better insight and transparency into the manner in which sustainability factors are taken into account in a credit rating. If ESG factors have been one of the primary motivating elements for a change in a credit rating published in accordance with the Credit Rating Agencies Regulation, ESMA as from 30 March 2020 expects credit rating agencies to include in the accompanying press release:

- an explanation of whether any of the primary motivators for change of the credit rating corresponds to the rating agency's categorisation of ESG factors.
- an identification of what primary motivating factors the rating agency considered to be ESG factors.
- an explanation of why these ESG factors were of material significance for the credit rating.
- a link to the section on the credit rating agency's website or another document explaining how ESG factors are included in the consideration for the purposes of credit ratings.

FINANCING SUSTAINABILITY

EU Taxonomy: one definition of sustainability

In order to channel private capital flows to sustainable investments (Action Plan Goal 1) a healthy internal market for green financial products is required. However, this market is impeded by use of different classification systems (or taxonomies) relating to sustainability. These taxonomies categorise, in short, economic activities according to the degree of sustainability on the basis of criteria drawn up by the taxonomy, so that the sustainability of investment products and strategies is to be determined on the basis of the taxonomy. The current use of multiple taxonomies impede the market as:

- sustainability characteristics (labels) for green financial products available in Europe are based on various taxonomies – i.e. sustainability criteria – so ESG investors cannot adequately compare and assess these products. As some Member States prescribe the use of a specific taxonomy to offer products as green products, pan-European offers are accompanied by extra costs. The pan-European investing in, and offering of, green products with sustainability labels is impeded in this manner.
- 'green' fund managers and institutional investors apply various taxonomies when informing on the sustainability of their investment strategies, so investors cannot adequately compare and assess the sustainability of the offer. This also discourages sustainable investing and diminishes investor confidence.

In order to promote the green investment market and consequently the capital flows toward sustainability, the EC therefore presented a **proposal** in 2018 for a framework to facilitate sustainable investments (Taxonomy Regulation). The Regulation introduces a uniform classification system which determines on a pan-European level which economic activities are environmentally sustainable. The Regulation is expected to enter into force Q1/Q2 2020. It will then become applicable in stages, from 1 July 2020 up to and including 31 December 2021. Bearing this in mind, we will highlight the most important points below:

- **EU Taxonomy**: the taxonomy latches on to the sustainability of the economic activity of undertakings:
  - if all the activities a company carries out, qualify as sustainable economic activities on the basis of the EU Taxonomy, the financing of the undertaking (by means of investments) is sustainable and thus the issued shares are sustainable;
  - if only a part of the activities qualify as sustainable according to the Taxonomy criteria, the sustainability level is determined on the basis of the turnover

percentage that these activities generate. Investments in those assets which serve to finance the sustainable activities will then be sustainable. This is also how sustainability is to be determined with regard to an investment portfolio consisting of investments in several companies.

- **Sustainable economic activities**: these are activities which substantially contribute to one or more of the six climate goals set out below, are not significantly contrary to the other six climate goals and are executed in accordance with the international minimum standards in the social field and in the field of labour.
- **Climate goals**: the climate goals in question are the mitigation of climate change, adjustment to climate change, sustainable use and protection of water and water sources, transition to a circular economy, prevention of waste and recycling, prevention and management of pollution, protection of healthy ecosystems.

Application of the EU Taxonomy via sustainable labels for green financial products must simplify the cross-border raising of capital for green activities. Application in the event of disclosure requirements towards investors relating to sustainability increases the comparability of green investments available in the EU and consequently the market confidence. All of this is to channel capital flows toward sustainability. For more on these two applications see the topic discussed elsewhere in this section 'EU Taxonomy & sustainability labels' and 'EU Taxonomy & disclosure requirements relating to sustainable investments'.

Because of the staged introduction/applicability, further delegated regulations are expected up to 31 December 2022 with technical screening criteria per climate goal regarding the substantial contribution of an economic activity to the relevant climate goals and the substantial damage to the other climate goals. On 1 July 2020 the first delegated regulations will enter into force (relating to 'mitigation of climate change'). The other regulations will enter into force on 31 December 2021 (relating to 'transition to a circular economy, waste prevention and recycling' and 'pollution prevention and control') and 31 December 2022 respectively (relating to 'sustainable use and protection of water and marine resources' and 'protection of healthy eco systems').

EU Taxonomy & sustainability labels

Sustainability labels (general)

The second action point of the EC Action Plan, 'Creating standards and labels for green financial products', relates to the introduction of EU standards and labels as a hallmark for sustainable financial products. Already existing labels differ in method and taxonomy regarding the sustainability qualification which makes comparison of the labelled green products difficult for investors. The disclosure defects and uncertainties ensuing from non-harmonised labels impede the internal market for green financial products and consequently the channelling of capital flows toward sustainability (EC Action Plan goal 1). The EU Green Bond Standard and the EU Ecolabel for financial products to be discussed hereafter are based on the EU Taxonomy and must address this problem.

EU Green Bond Standard (iss)

On 18 June 2019 the Technical Expert Group on sustainable finance (TEG) published its **report** on the EU Green Bond Standard (EU-GBS). The TEG is a group of experts set up by the EC which assists the EC in establishing various laws and regulations on sustainable financing, including the EU-GBS. The EU-GBS is a voluntary standard which issuers can use on certain conditions as a hallmark (or label) for green bonds. Green bonds are, in short, bonds under which the money raised is used to fully or partly finance or refinance existing or new green projects.

Although there are already various hallmarks/labels for green bonds, there is, inter alia, uncertainty on the market practices used, confusion on the sustainability classification of the projects to be financed with the funds raised, concerns regarding greenwashing, poor information provision on how the green bonds contribute to increased investments in green projects and activities and inconsistencies in the quality of external verifications. This impedes the market for green bonds and the EU-GBS is intended to address this. More specifically, this is addressed by using the harmonised and more detailed EU Taxonomy for classification of the green element of the financed projects and by establishing obligations - not just recommendations like current labels - regarding the alignment of the EG-GBS with the EU Taxonomy, the confirmation of this alignment and the external review thereof which will also have to be published.

The recommendations to the EC in the TEG report regarding the EU-GBS regulations encompass a draft proposal for the EU-GBS, which comes down to four requirements which institutions must satisfy before being able to use the EU-GBS as a hallmark for green bonds:

- **Financing of Green Projects**: the proceeds from the issue or an amount equal thereto will be exclusively used for the financing or refinancing of Green Projects. These are projects which pursuant to the Taxonomy Regulation are to be deemed 'environmentally sustainable economic activity' (see above). These can be green assets such as loans but also green expenditure, such as capital expenditure and operational costs to promote the value or economic life of green assets or research and development costs.
- **Confirmation of alignment**: the issuer will have to make an explicit case that the debt instrument aligns with the EU-GBS. It will have to do this in its 'Green Bond Framework', the framework commonly used when issuing green bonds in which the issuer sets out, inter alia, how it uses the monies raised to finance green projects and provides the information relevant for the investment decisions.
- **Verification of alignment to EU-GBS standard**: an external party accredited for verification will have to have verified that the debt instrument does indeed align with the EU-GBS standard.
- **Allocation and Impact reporting**: for issuers of the EU-GBS there is a specific reporting requirement which can be divided into two reporting obligations based on current market practices:
  - Allocation reporting: entailing, inter alia, information on the funds raised and what amount thereof has been allocated to Green Projects at sector level and the regional distribution of Green Projects at national level.
  - Impact reporting: entailing, inter alia, a description of the Green Projects, which climate goals of the Taxonomy Regulation they are seeking to satisfy, what the Green Project finances and information and any measuring results which are in line with the commitments and methodologies described in the Green Bonds Framework.

The prescribed reports are allowed to take place on a project basis or at portfolio level and must be published on the issuer's website. The Green Bond Framework which is required at the time of issue, the Final Allocation Report and Impact Report to be published upon full allocation of the funds raised and the external verifications must all remain available during the entire term of the EU-GBS.

The TEG proposes to implement the EU-GBS by means of non-binding regulations, such as a European Commission Recommendation or Communication. Furthermore it proposes that after a period of 2-3 years after introduction the EC assess whether the intended goal of the EU-GBS has been achieved, such as expanding the market for green bonds and channelling financial resources toward the mitigation of climate change.

EU Ecolabel for financial products

As part of its Action Plan on sustainable financing, in 2019 the EC began an investigation into the application of the EU Ecolabel framework for certain financial products. The EU Ecolabel is a voluntary quality mark allocated to the most environmentally-friendly products and services to encourage their use. According to the EC, financial products are 'services for distribution' within the definition of the **EU Ecolabel Regulation**, which means that use of the Ecolabel can facilitate the identification and comparison of green retail investment products and the advancement of sustainable financial markets. At the end of December 2019, the EC published a **second technical report** containing the product scope and criteria. These shall be discussed in the Ad-Hoc Working Group (AHWG) meeting in early 2020, with some amendments proposed. In the following, we highlight selected aspects of the scope and criteria.

At present, the scope pertains to the following services for distribution:
- asset management for investment products packaged in conformity with the PRIIPs Regulation, including shares funds, hybrid shares funds and bond funds, and insurance-based investment products.
- fixed-term deposits and savings deposits offered by credit institutions as defined in the Deposit Guarantee Schemes Directive.

These product categories are in scope if offered to retail investors.

For these products, use of the EU Ecolabel is subject to the following criteria:
- A defined minimum percentage of the assets under management is invested in or serves to finance ecologically sustainable economic activities within the definition of the Taxonomy Regulation.
- The investment portfolio does not contain shares or bonds issued by, nor is credit extended to, undertakings that earn more than 5% of their turnover from the environmentally damaging activities specifically excluded in the technical report.
- The investment portfolio does not contain shares or bonds issued by, nor is credit extended to, undertakings that do not meet the social minimum standards or minimum corporate governance benchmarks set in the report.
- Fund managers apply an engagement policy under which they engage in dialogue with semi-green undertakings for the purposes of further increasing the sustainability of these undertakings, which may include through the exercise of any voting rights held in said undertakings.
- In the report, the fund manager or provider of the deposit provides a summary of information to investors on aspects such as the percentage of assets under management invested in undertakings that meet the first criterion, and how the dialogue with undertakings is conducted. Additionally, the website of the manager/provider must present annual reporting that covers the ESG aspects and sustainability performance of the financial product.

Regulation on low carbon and positive carbon impact benchmarks (crdp-fmng-invf)

The Regulation on 'EU climate transition benchmarks' and 'EU Paris-aligned Benchmarks' and information provision on sustainability on benchmarks was officially **published** on 9 December 2019 and entered into force on 10 December 2019.

The regulation introduces the 'EU climate transition benchmark' (EU Climate Transition Benchmark, hereinafter: CTB) and the 'EU Paris-aligned Benchmark' (hereinafter: PAB) as new categories of low carbon benchmarks. Low carbon benchmarks enable investors to measure the sustainability performance of investment portfolios, but the market is fragmented and benchmarks varying in ambitions are offered under the same denominators. The clearly distinguishable minimum standards of the CTB and PAB and transparency on methodologies (see below) must make climate benchmarks more reliable and better comparable and encourage the use thereof – again for the purpose of reorienting of capital flows toward sustainability. They would also prevent greenwashing.

Administrators who satisfy the requirements of the Regulation by 30 April 2020 latest can use these qualifications as hallmark (or label) for their benchmark. At latest by 30 April 2020 the transparency relating to methodology and ESG goals to be discussed below will also have to have been satisfied.

The Regulation contains various minimum standards and methodologies for the CTB and PAB:
- **CTB methodology**: for the CTB, for selection or weighing up of the assets, companies must be taken into consideration that set as their goal the reduction of carbon emissions so that the benchmark portfolio is on a decarbonisation trajectory. These goals must have been made public, encompass a credible commitment to decarbonise and be technically feasible.
- **PAB methodology**: for the PAB the underlying assets must be weighed in such way that the benchmark portfolio aligns with the goals of the Paris Climate

Agreement and the activities connected with the underlying assets must not cause serious impairment to other ESG goals.

For both benchmarks the administrators must publish the methodology used to calculate the benchmark, which encompasses, inter alia, the announcing of the measuring method of carbon emissions of underlying assets and the total carbon footprint. These methodologies must have been based on scientifically substantiated decarbonisation trajectories or in general must be in accordance with the goals of the Paris Climate Agreement.

The Regulation also introduces ESG disclosure requirements. All benchmark administrators, excluding administrators of interest rate and currency benchmarks, must explicitly state in their benchmark statement from now on whether or not their benchmarks strive to meet ESG goals and whether the administrator offers them. For benchmarks which do not strive to meet carbon emission targets, it is sufficient to clearly indicate in the benchmark statement that these goals are not being seen as goals to be met.

We recommend that administrators of benchmarks check whether they must perform the ESG disclosure requirements applicable as of April 2020, and if so, to what extent they already do so. In addition, we recommend that administrators of low carbon benchmarks take further note of the regulations relating to the CTB and PAB.

DISCLOSURE & REPORTING OBLIGATIONS

AFM Trend Monitor 2020

The AFM published its [AFM Trend Monitor 2020] in October 2019. In its Trend Monitor the AFM highlights the five most important trends and risk drivers and the points for attention resulting therefrom for the AFM supervision, its long term strategy 2020-2022 and its Agenda 2020 to be presented in January 2020. One of the highlighted trends and thus points for attention for the supervision for the coming years is the transition to a sustainable economy and society.

- **Information quality and availability**. In 2020 the most important point of attention for AFM supervision on the market for sustainable investments will be the availability and quality of information in the chain of sustainable financing. This is partly to combat risks such as greenwashing. According to the AFM, a number of aspects of the market for sustainable investments demand this point of attention:
  For the financial sector the integration of sustainability in its work remains a challenge;
  - information defects form an impediment to effective sustainable investment and monitoring of investment strategies;
  - there is still too little non-financial investment information available with regard to listed companies;
  - the external verification of reporting on sustainability factors still has to come to fruition; and
  - due to lack of a shared definition of sustainability the degree of sustainability of a financial product is difficult to demonstrate and monitor.

The AFM will therefore in its supervision pay attention to the careful and transparent integration of sustainability in the sectors under its supervision.

- **Risks on the market for sustainable investments**. In its supervision the AFM supervision will also pay attention to the risks on the market for sustainable investments, more specifically the risk that undertakings will present non-sustainable projects as sustainable (greenwashing) as a side-effect of the excessive demand for sustainable investments. Attention will also be paid to the risk that the parties which use unfair earnings models or attempt to abuse investors, will enter the market for sustainable investments. The AFM will supervise this and take action against such parties.

Market parties would thus be wise to keep an eye on the points highlighted by the AFM. This is particularly the case now that the reasons signalled by the AFM to place emphasis in its supervision on information quality and availability are also signalled at European level as well, and which have led to, inter alia, the Taxonomy Regulation (see: 'EU Taxonomy: one definition of sustainability') and EU Green Bond Standard (see: 'EU Taxonomy & sustainability labels') and the Disclosure Regulation which is discussed below (see: 'EU Taxonomy & disclosure requirements on sustainable investments').

EU Taxonomy & disclosure requirements on sustainable investments (fmng-fsp-ins-invf)

The Regulation on information provision on sustainability in the financial services sector (Disclosure Regulation, DR) was officially published on 9 December 2019 and entered into force on 29 December 2019. However, the Regulation will only become applicable as of 10 March 2021, so that addressees can utilise 2020 and part of 2021 as a transition period for the necessary adjustments. Bearing this in mind, we will set out the relevant obligations of the DR below. These are, in short, relevant for, inter alia, investment firms and fund managers which provide investment advice and/or asset management as well as insurance intermediaries or insurers who advise on IBIPs or make these available.

The DR seeks to bring about improved information provision regarding the sustainability of investments and that fund managers, investment advisors and insurance distributors who make investment decisions for clients or advise thereon, internally integrate ESG considerations and inform clients in this respect. The final goal of these obligations is that investors in green financial products can be certain that the assets financed with the financial product are actually sustainable. An increasing certainty in this respect would make it more appealing to invest sustainably and thus reinforce the market for sustainable financing.

The DR applies to the following parties:

- **Financial advisors**: insurance intermediaries or companies which offer insurance advice regarding insurance-based investment products (IBIPs) and credit institutions, investment firms, AIF managers or UCIT managers who provide investment advice;
- **Financial market participants**: Insurers which make IBIPs available (including IBIPs made available to professional investors), investment firms which provide asset management services, institutions providing occupational retirement provisions (IORPs), developers of pension products, AIF managers (including EuVECAs, EuSEFs and ELITFs), providers of pan-European personal pension products (PEPPs), UCIT management companies and credit institutions which provide asset management services.

Transparent integration of sustainability risks in investment policy

The DR obliges financial advisors and financial market participants to provide investors/customers with information on:

- **Conduct rules relating to sustainability risks**: by mandatory publication on a company's own website on conduct rules relating to the integration of sustainability risks in the investment decision process or insurance or investment advice.
- **Integration of sustainability risks**: by including in precontractual information a description of:
  - the way in which sustainability risks are integrated into investment decisions or investment or insurance advice;
  - the results of the assessment of the likely effects of sustainability risks on the return on the financial products which they provide or on which they give advice; and
  - (possibly) an explanation as to why they do not deem sustainability risks to be relevant.

Precontractual disclosure requirements

For financial market participants there are additional transparency obligations for the precontractual information such as when offering a:

- **financial product that promotes environmental or social features**: information on the way in which those features are satisfied, whether and how a designated reference benchmark is consistent with this, the calculation method of this index;

- **financial product with sustainable investment goal and reference benchmark**: information on alignment method index for this goal and an explanation how this differs from a broad market index;
- **financial product with a sustainable investment goal without a reference benchmark**: explanation on a method for achieving the goal;
- **financial product with the goal of a reduction in CO_2 emissions**: information on the goal of low carbon emission exposure, bearing in mind the goals of the Paris Climate Agreement.

Publication obligations on website and periodic reporting

For financial participants, when offering the above products there are, in addition, additional transparency obligations for indicating on the website and in periodic reports whether account is taken of the negative influence of investment decisions on ESG factors and, when this is taken into account, a publication of the due diligence policy.

Delegated regulations

As the qualification of sustainability is based on the EU Taxonomy, delegated regulations which specify the precise, technical scope of the DR disclosure obligations will only appear after the publication of the technical screening criteria regarding the 'environmentally sustainable economic activities' criterion from the Taxonomy Regulation. The **Work Programme 2020** of the Joint Committee of the European Supervisory Authorities (ESAs) indicates that the ESAs intend in 2020 to issue six Regulatory Technical Standards (RTS) with regard to the disclosure requirements which ensue from the DR, being:

- 2 RTSs relating to due diligence statements concerning the possible adverse effects of investment decisions on climate goals;
- 2 RTS relating to the precontractual information which states how a 'green' product aligns with climate goals;
- RTS relating to the disclosure requirements on the website;
- RTS relating to periodic reporting obligations entailing how financial products satisfy their sustainability goals and the overall impact thereof.

The ESAs will also (optionally) issue an Implementing Technical Standard (ITS).

As a result of the DR, disclosure requirements will increase for various financial institutions, with possible additional administrative and/or financial burdens. **According to the Minister of Finance** this is set off by the fact that – thanks to the DR - green institutions can objectively distinguish themselves from institutions which greenwash and the fact that, thanks to an increase in market confidence, the demand for green investments will increase. The Minister even expects that additional burdens will decrease in time or even work out lower as a result of the more uniform terminology and taxonomy relating to sustainability. From that perspective the extra disclosure requirements could thus, via the increased capital flow toward sustainable investments, not only benefit the climate but also green financial institutions.

Integration of ESG considerations in suitability test under MiFID II & IDD (invf-ins)

In 2018 the EC started with a public consultation on the obligations of institutional investors and asset managers in the area of sustainability. Following this, at the beginning of 2019 the EC published draft delegated regulations **to amend MiFID II delegated regulations** and **to amend IDD delegated regulations**. Although the suitability test, as these are to be implemented by investment firms when providing investment advice or portfolio management and by insurance intermediaries or insurers when advising on insurance-based investment products, encompasses the obtaining of information on the investment goals of the investors, these are only their financial investment goals. Non-financial investment goals, and thus ESG preferences, are consequently usually not included in the suitability test. In order to deal with this, the proposed amendments oblige the aforementioned market parties, in the context of the suitability test:

- to obtain information on the customer's ESG preferences via questionnaires addressed to the customer;

- to include the ESG preferences in the selection process of the financial products which are offered to this customer/about which the customer is advised; and
- in the report to be drawn up (MiFID II) or the suitability statement (IDD), explain to the customer how the recommendation aligns with the customer's ESG preferences.

These ESG preferences will have to be addressed after the customer's financial investment goals have been charted. This amended suitability test will, in addition, not apply to already existing advice and asset management agreements which have been made by the aforementioned parties.

The delegated regulations will be in effect twenty days after official publication but will only enter into force after one year. Market parties thus have a transition period of one year after the delegated regulations become effective to comply with the new obligations relating to the sustainability test. At the time of writing, publication has not yet taken place and it is still unclear when this will take place.

However, at this time there is also a soft law basis for integration of ESG preferences in the sustainability test. This is included in the **ESMA Guidelines on certain aspects of MiFID II suitability requirements**, which was published in May 2018 in which ESMA formulates as good practices that investments firms must also look at non-financial matters when obtaining information on investment goals of the customer and thus also obtain information on the ESG preferences of customers.

EC guidelines for climate reporting NFID (ba-ins-iss)

One of the ways the EC Action Plan is intended to facilitate the third goal (promoting transparency and long-term thinking) is by enhancing the disclosure and accounting-technical regulations on sustainability. The Non-Financial Information and Diversity Regulation (NFID) already stipulates the requirement of climate reporting. Undertakings falling under the NFID must, in their directors' report, report on the climate information necessary for a proper understanding of (i) the impact of climate change on the development, performance and position of the undertaking and (ii) the impact on the climate of the undertaking's activities. Because of lapses in the quality and comparability of climate information reported, the EC in 2019 supplemented its **guidelines on non-financial reporting** (with respect to the reporting methodology) with a **supplement on reporting climate-related information**. The NFID and the guidelines apply (in essence) to listed companies, banks and insurers that have more than 500 employees.

The guidelines contain proposals, recommendations and instructions for climate reporting under the NFID, within the reporting themes: business model, policies and due diligence processes, outcomes, principal risks and their management, and key performance indicators (KPIs). Annex I of the supplement provides further guidance for banks and insurance companies, and banks and insurance companies should view the reporting proposed in Part 3 of the guidelines from the perspective of their specific operating activities (lending, investing, insurance, asset management). The guidelines are non-binding and must be read in conjunction with the **NFID and its national implementing legislation**. However, it must be noted that at the end of 2019 DNB **opined** that it would be a good idea to consider whether the guidelines (including the supplements) should be declared binding in the foreseeable future.

Allocation reporting in green bonds prospectus? (iss)

In April 2019 the AFM and the French Authority for the Financial Markets (AMF) published a **position paper** in which they present their position on the lack of an obligation to provide an explanation in the prospectus for green bonds on the sustainable spending of the proceeds. This is not required at this time under the Prospectus Regulation, but the AFM and AMF point out that, as such, the prospectus does not provide ESG investors with the information which is materially relevant for their investment decision, the chance of greenwashing is increased and that supervisory authorities during approval procedures cannot demand such information from the issuer.

The AFM and AMF therefore argue for an additional disclosure requirement for issuers of green bonds according to which, under the already mandatory heading 'use of proceeds', they will from now on have to include specific information on the degree in which the sustainable goal is served by the issue. This by means of proposals to:

- **Amend the Prospectus Regulation (Level 2 Regulation)** to introduce a minimum requirement for information to be provided with which the issuer indicates how the funds raised are used for the financing or refinancing of sustainable projects or assets.
- **Mandatory publication of the green bond framework** on the website, including reference thereto in the prospectus. In this framework the issuer sets out in the same manner how funds raised will be spent on green projects.
- **A requisite statement of intent**, in which the issuer indicates (whether or not) it satisfies international standards for green bonds, for example the EU Green Bond Standard discussed elsewhere, that it will engage an external assessor and periodically inform investors during the term of the bond.

This position does not stand alone. According to its Action Plan, the EC would determine the contents of prospectuses for green bonds in Q2 2019 in order to provide investors with additional information relating to sustainability. ESMA suggested in a **consultation of 2017 on the form and contents of prospectuses** a stand-alone and more prominent section on 'use of proceeds' in prospectuses. However, the EC has not yet followed up on the action point and ESMA ultimately set aside its proposal, albeit with the **reservation** that a brief description of the use of the proceeds (such as 'general corporate purposes') will not suffice in the event of specific financing goals, in particular if these are sustainability goals. On the other hand, providing information on the sustainable use of proceeds for the 'EU Green Bond Standard' (see above for more details) has already been made mandatory, albeit *not* via the prospectus but via the website and periodic reporting. Looking ahead to 2020 it will thus be interesting to see to what extent informing on the sustainable use of proceeds as proposed by the AFM and AMF will find its way into new prospectus obligations.

Climate commitment of the financial sector

On 10 July 2019 some fifty Dutch banks, insurers, pension funds and asset manager signed a **climate commitment** in which they committed themselves to contribute to the reduction of CO_2 emissions as intended in the Climate Agreement, i.e. the reduction in 2030 of 49% compared to 1990. More concretely, these financial institutions undertook to participate in the financing of the energy transition and took on a best-efforts obligation in this respect. They also undertook to take action to measure the CO_2 level of their relevant financing and investments and as of the financial year 2020 to publicly report on this point in the form most suitable for them. Although the parties can choose their own method, they bound themselves to the mutual exchange of experiences and to act for improvement and expansion of the measurement, all while aligning with international developments and standards in this area. In addition, they committed to announce in 2022 latest to announce their action plans including reduction goals for 2030 for all their relevant financing and investments, including an explanation on which actions they are taking to contribute to the Paris Climate Agreement.

The climate commitment relates both to offering financing arrangements for sustainability and to the integration of climate goals in the company's own strategy, such as CO_2 reduction goals.

Via the Sustainable Finance Platform, the parties involved will share knowledge and experience between themselves about financing of sustainability projects and the measuring of the CO_2 level of their relevant financing and investments. The platform will also organise work conferences about the measuring and steering with regard to climate impact, so that thanks to an exchange of best practices, market parties can help each other in the development of an effective approach.

Monitoring exposure to CO_2-intensive sectors

In August 2019 the parliamentary letter '**Market survey for green finance**' was presented by the Minister of Finance, in which an overview is given of the various initiatives relating to sustainable financing. Although it provides an overview of what is already being deployed at European and national level, the letter also provides some insight on Minister's points of attention when it comes to green finance. For example, the Minister indicates in the letter that he has asked DNB to keep monitoring the exposure of financial institutions to transition-sensitive sectors (CO_2-intensive sectors). The Minister emphasises in this respect the importance of an adequate risk management whereby the impact of climate change and the energy transition is calculated and calls upon the supervisory authorities to integrate sustainability risks in their supervision.

In view of the reports and good practices relating to exposure to CO_2-intensive sectors coming from other sectors, this means there is a substantial possibility that such exposure will receive attention in 2020 as well. For more about the continuation of monitoring practices requested from DNB we refer to the **DNB data survey of 2017** in which DNB reports on a study regarding the three biggest banks, six insurers and six pension funds relating to (exposure to) the fossil fuel sector, energy generation, heavy industry, transport and agriculture. At the time the research focused on the impairment of assets related to these CO_2-intensive sectors and value reduction as a result of changing regulations and market sentiment (stranded assets).

An observation of the Minister regarding sustainable finance which we would like to present in closing this section, is the observation that the measures from the Climate Agreement will provide green finance and investments with a more favourable risk-return profile. For example, green finance and investments will be less risky due to the minimum CO_2 price in the electricity sector and the 'smart CO_2 tax' to be introduced for the industry which will make it more attractive for the financial sector to allocate funds to green investments, as the relative return on CO_2-limiting investments will increase thanks to the CO_2 charge.

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