



# **Dutch Banking Sector Agreement on international responsible business conduct regarding human rights**

Legal Report on the Possibilities for Increased Transparency in light of the Adhering Banks' Client Confidentiality Obligations

29 June 2017

# Definitions

Definition	Meaning		
Adhering Bank	A bank adhering to the Agreement	SER	Social and Economic Council of the Netherlands
Agreement	Dutch Banking Sector Agreement on international responsible business conduct regarding human rights	Wft	Dutch Act on Financial Supervision ( <i>Wet op het financieel toezicht</i> )
CSOs	The civil society organisations that are a party to the Agreement	Wwft	Dutch Act on the Prevention of Money-Laundering and the Financing of Terrorism ( <i>Wet ter voorkoming van witwassen en financieren van terrorisme</i> )

# Relevant provisions of the Agreement

## Article 1(2) of the Agreement:

Adhering banks will, to the extent that this is not yet the case, implement and embed their responsibility to respect human rights in their operations and confirm to act in conformity with the OECD Guidelines and UNGPs in the full scope of a bank's business activities for new and existing clients<sup>4</sup>, the bank's own operations and staff, including their subsidiary companies<sup>5</sup>.

## Article 2(1) of the Agreement:

In this agreement, the Parties and the adhering banks will focus on corporate lending and project finance activities due to their global reach, the actual and potential adverse human rights impacts in this area, the material relevance, the potential of greater leverage and – within legal boundaries – the potential opportunities for action and information exchange in this area to have significant effect on the impacts<sup>8</sup>. The remainder of this agreement contains the commitments of the Parties and the adhering banks in this field of corporate loans and project finance activities.

## Article 4(1) of the Agreement:

Most members of the NVB already undertake efforts to deploy human rights due diligence, but may still find themselves confronted with adverse human rights impacts. Adhering banks will, to the extent that this is not yet fully the case, implement human rights due diligence in their operations in conformity with the OECD Guidelines and the UNGPs within two years of signing the declaration of adherence. In doing so, they will take into account the work of the OECD Working Party on Responsible Business Conduct on due diligence in the financial sector.

## Article 7(1) of the Agreement:

Adhering banks confirm, in conformity with the responsibility set out in the OECD Guidelines, the UNGPs and ILO, that when enterprises identify through their human rights due diligence process or other means that they have caused or contributed to an adverse impact they should provide for or cooperate in their remediation through legitimate processes (UNGPs 22 and 29, OECD GL art. 6 of chapter IV) and act upon the findings as described in these guidelines

## Article 6(10)(c) of the Agreement:

The Parties will jointly explore options for greater transparency and report on the results including:  
Discussions on how client confidentiality and mutual competition relate to the increased expectations (from society and international business and human rights standards) that enterprises show how they put their responsibility to respect human rights into practice.

# Instruction

## Instruction

- The SER has instructed NautaDutilh to analyse the financial regulatory law, civil law and contractual possibilities and constraints that may enable or impede Adhering Banks from providing greater transparency within the framework of the Agreement

## Limitation

- Our instruction is limited to legal considerations; our analysis will not extend to policy, commercial and operational considerations

# Main question and sub-questions

## Main Question

- To what extent are Adhering Banks legally able to provide (i) the CSOs or (ii) the public with individual client information regarding the outcome of a human rights due diligence investigation and any measures taken pursuant thereto within the framework of the Agreement?

## Sub-Questions

- Are there any regulatory law constraints that may prevent Adhering Banks from providing individual client information?
- Are there any civil law constraints (including case law) that may prevent Adhering Banks from publishing individual client information?
- Are there any contractual constraints that may prevent Adhering Banks from publishing individual client information?

# Scope

## Agreement

- Our analysis is limited to the provision of information to CSOs and the public within the framework of the Agreement

## Banking Activities

- Corporate lending
- Project finance

## Type of Clients

- Corporate clients
- No natural persons

## Analysed Laws

- Regulatory law
- Civil law (including case law)
- No privacy law or competition law

## Limitation

- Applicable laws in the Netherlands (including EU Regulations directly applicable in the Netherlands and Dutch law implementation of EU Directives)
- Adhering Bank is located in the Netherlands and acting through a Dutch office and the client is located in the Netherlands and acting through a Dutch office. For clients located outside of the Netherlands or for banks located in the Netherlands, but acting through an office outside of the Netherlands, in addition to what is set out below, the laws of the jurisdiction of the client or the office may contain additional rules.

## Contracts

- Dutch law governed Standard Loan Market Association documentation used for corporate lending and project finance (Multi-Currency Term and Revolving Facilities Agreement)
- General Banking Terms (*Algemene Bankvoorwaarden*)

# Regulatory law analysis (I)

## Question

- Are there any regulatory law constraints that may prevent Adhering Banks from publishing individual client information?

## Wft

- The statutory regulatory duty of care (*zorgplicht*, Article 4:24a Wft) does not apply to corporate lending or project finance (this is different for the civil law duty of care; see slide 11).
- General prudential requirements for banks do not prohibit sharing information with CSOs or the public.
- Pursuant to Article 3:17b(2) Wft), a bank with its seat in the Netherlands must have procedures and take measures to ensure that the persons working under its responsibility in the Netherlands take the bankers' oath or promise. If the bank does not comply with this requirement, it may be subject to sanctions pursuant to the Wft. Such sanctions include, but are not limited to, a fine or penalty payment or a withdrawal of the license. In addition, the management board members, supervisory board members or the second echelon may be deemed to no longer be suitable or integrity as a result of which the bank will be asked to dismiss such person. These persons may also become subject to a prohibition to work for a financial institution for a certain period.
- For management board members, supervisory board members and the so-called second echelon of banks, the *Regeling eed of belofte financiële sector 2015* prescribes the exact language of the bankers' oath which includes a confidentiality promise (see below), as well as the requirement to draw a careful balance between the interests of all parties associated with the business, being the customers, shareholders, employees and the society in which the business operates.
- For other persons, the *Regeling eed of belofte financiële sector 2015* prescribes the minimum contents of the bankers' oath. These minimum contents include, amongst others, the requirement to execute his/her function ethically and with care, to draw a careful balance between the interests of all parties associated with the business, being the customers, shareholders, employees and the society in which the business operates and when drawing that balance, make the customer's interests central.
- The *Regeling* is a *regeling* of the Ministry of Finance and can thus be changed by a new decision from the Ministry of Finance, taking into account the normal rules that apply to such a *regeling*, The original *regeling* has been the subject of a public consultation.
- Conduct Rule 5 of the Rules of Conduct (*Gedragsregels NVB*), applicable to persons in the Netherlands working for banks with a seat in the Netherlands, contains a stipulation that confidential information regarding clients may not be provided to third parties. Exceptions to this, according to the Conduct Rule, are (i) client consent and (ii) where such disclosure is required pursuant to the law, a court order or on instruction of a supervisory authority.
- The Conduct Rules may be changed by the members of the NVB. The original Conduct Rules were the subject of a public consultation.
- A violation of the Conduct Rules by an individual may be reported to the Banks' Disciplinary College. Disciplinary sanctions range from reprimands to fines – up to a maximum of €25,000 – and/or a three year moratorium on working anywhere in the Dutch banking industry.

## The Banker 's Oath

Ik zweer/beloof binnen de grenzen van mijn functie die ik op enig moment in de bancaire sector vervul:

- dat ik geheim zal houden wat mij is toevertrouwd;

## Conduct rule 5

### 5 You keep confidential information secret

This means, among other things, that you do not disclose confidential information about customers to third parties without their permission. You only disclose information about customers to others if you are required to do so under the law, a court order or the regulator. Neither do you misuse information available to you.

# Regulatory law analysis (II)

## Market Abuse Regulation (MAR)

- Applicable for clients with a listing of financial instruments on a regulated market, multilateral trading facility or organised trading facility.
- The MAR prohibits unlawful disclosure of 'inside information' regarding aforementioned clients.
- Inside information is non-public information regarding an issuer that if it were made public, would be likely to have a significant effect on the price of the issuer's financial instruments.
- Non-public information which becomes known to the bank either as a result of its normal client relationship or from specific human rights due diligence research and/or measures taken may constitute 'inside information'.
- Information that is already public will not be considered inside information.
- Making inside information public is the responsibility of the issuer, not of an Adhering Bank.
- Disclosure of such inside information by an Adhering Bank to CSOs or the public is unlawful, if the relevant information has not been made public by the issuer. Violation of the MAR is a criminal act and punishable as such. In addition, the AFM may amongst others impose a fine or a penalty payment on the bank.
- The MAR is a directly applicable EU law Regulation, a Dutch law rule may not deviate from the MAR. Changing the MAR will require a proposal from the European Commission and subsequent approval from the European Parliament and the European Council.

### Article 7(1)(a) Market Abuse Regulation

For the purposes of this Regulation, inside information shall comprise the following types of information: information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments;

### Article 14 Market Abuse Regulation

A person shall not:  
unlawfully disclose inside information.

### Article 10(1) Market Abuse Regulation

1. For the purposes of this Regulation, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.

# Regulatory law analysis (III)

## Wwft

- Banks have to carry out client due diligence with respect to money laundering and the financing of terrorism, monitor client relationships and report unusual transactions to the FIU-NL.
- Not entering into a client relationship after abovementioned client due diligence or terminating a client relationship must be reported as an unusual transaction to the FIU-NL.
- Banks must keep the events giving rise to an unusual transaction report confidential.
- However, we note that a negative outcome for a human rights due diligence does not necessarily entail an unusual transaction, that this outcome would not have to be reported to the FIU-NL and that there would be no confidentiality obligation in those instances.
- The confidentiality obligation follows from the EU AML Directives, a Dutch law derogation is not permitted. Changing the AML Directives will require a proposal from the European Commission and subsequent approval from the European Parliament and the European Council.
- Violation of the confidentiality obligation in the Wwft is a criminal act and punishable as such. In addition, the Dutch Central Bank may amongst others impose a fine or a penalty payment on the bank.

## Article 23(1) Wwft

Een instelling en de personen die werkzaam zijn voor een instelling zijn, behoudens voor zover uit deze wet de noodzaak tot bekendmaking voortvloeit, verplicht tot geheimhouding jegens een ieder van:

- a. een melding ingevolge [artikel 16](#) door die instelling;
- b. nadere inlichtingen verstrekt ingevolge [artikel 17](#) door die instelling;
- c. het gegeven dat een melding of verstrekking aanleiding heeft gegeven tot een onderzoek naar witwassen van geld of financieren van terrorisme of dat het voornemen bestaat een dergelijk onderzoek te verrichten;
- d. overleg over de naleving van [artikel 16](#) met betrekking tot een transactie.

# Regulatory law analysis (Recap)

## Wft

- Individual bank employees are obliged to keep information confidential. Exceptions are available if (i) the client consents to publication or (ii) if the information must be shared pursuant to the law, a court order or on a lawful instruction of a supervisory authority.
- These confidentiality obligations may be amended by the Minister of Finance and the NVB.

## MAR

- For listed clients, non-public findings either resulting from the normal client relationship or from human rights due diligence research that constitute 'inside information' may not be made public nor shared with CSOs.

## Wwft

- If results from human rights due diligence relate to unusual transaction reports, results from human rights due diligence must be kept confidential.

# Civil law analysis

## Civil law duty of care

- According to longstanding Dutch case law, banks have a special duty of care (*bijzondere zorgplicht*) under civil law.
- The Dutch Civil Code provides several articles that can form the basis for a duty of care claim (amongst others Article 6:162 Dutch Civil Code).
- A duty of care is also included in Article 2 of the General Banking Conditions.
- One district court ruling said that a bank's duty of care included a confidentiality obligation.
- Whilst neither the Dutch Civil Code nor Article 2 of the General Banking Conditions provides so explicitly, it cannot be excluded that the Dutch High Court will also hold that the duty of care for banks also includes a confidentiality obligation.
- Violation of the duty of care may result in liability of the bank towards the client or, in certain circumstances, third parties.
- A legal requirement for disclosure would, in our view, prevail over the aforementioned confidentiality obligation.

### Article 2 of the General Banking Conditions

*We have a duty of care. You must act with due care towards us and you may not misuse our services.*

### The Hague District Court 19 March 2008 (ECLI:NL:RBSGR:2008:BE8973)

4.8. De rechtbank neemt met [eiser sub 1.] c.s. tot uitgangspunt dat reeds de op Staal Bank rustende geheimhoudings- en bijzondere zorgplicht meebracht dat deze aan derden, waar—onder journalisten, geen mededelingen doet over een cliënt, laat staan mededelingen die feitelijk onjuist zijn en schadelijk zouden kunnen zijn voor de reputatie van een cliënt.

# Contract analysis

## General

- Loan agreements generally contain a confidentiality obligation
- The scope of the confidentiality obligation may differ per loan agreement
- In the pre-contractual phase, parties generally use Non-Disclosure Agreements to ensure confidentiality
- In principle, parties have freedom of contract (*contractsvrijheid*), but the templates of the Loan Markets Association (LMA) are market practice.
- Exceptions to the confidentiality obligation are (i) client consent, and (ii) where disclosure is required pursuant to a statutory obligation.

## Market practice (LMA)

- The Template for LMA Facilities Agreement contains a far-reaching confidentiality obligation.
- Adhering Banks may not disclose to anyone the information regarding the client that they obtain in the process of becoming or in its capacity of being a finance party,
  - unless the disclosure is made pursuant to a statutory obligation, or
  - Unless the client and/or others consent to such disclosure (depends on agreement).

## Article 1.1 of the Dutch Law LMA Facilities Agreement Template

["**Confidential Information**"] means all information relating to the [...], any Obligor, the Group[, the Target Group], the Finance Documents or a Facility of which a Finance Party becomes aware in its capacity as, or for the purpose of becoming, a Finance Party or which is received by a Finance Party in relation to, or for the purpose of becoming a Finance Party under, the Finance Documents or a Facility from either:

- (a) any member of the Group[, the Target Group] or any of its advisers; or

## Dutch Law LMA Facilities Agreement Template

### 40.1 Confidentiality

Each Finance Party agrees to keep all Confidential Information confidential and not to disclose it to anyone, save to the extent permitted by Clause 40.2 (*Disclosure of Confidential Information*) [and Clause 40.3 (*Disclosure to numbering service providers*)] and to ensure that all Confidential Information is protected with security measures and a degree of care that would apply to its own confidential information.

## Dutch Law LMA Facilities Agreement Template

### 40.2 Disclosure of Confidential Information

Any Finance Party may disclose:

- (b) to any person:
  - (v) to whom information is required or requested to be disclosed by any court of competent jurisdiction or any governmental, banking, taxation or other regulatory authority or similar body, the rules of any relevant stock exchange or pursuant to any applicable law or regulation;
  - (ix) with the consent of the [...],

# No statutory obligation

## General

- There is no statutory obligation to disclose individual cases regarding human rights violations.

## Non-financial statement

- The EU Non-Financial Reporting Directive contains a new disclosure obligation:
  - A description of the policies pursued by the undertaking in relation to the respect for human rights, and
  - A description of the principal risks related to respect for human rights, which may include risks relating to business relationships and how the undertaking manages the risks.
- In our view, this provides a legal basis for a general description of business relationships that constitute a risk for the respect for human rights and the measures taken, but does not justify specific descriptions and disclosure of the identity of such business relationships.

### Article 29a of the EU Non-Financial Reporting Directive (2014/95/EU)

1. Public-interest entities which are parent undertakings of a large group exceeding on its balance sheet dates, on a consolidated basis, the criterion of the average number of 500 employees during the financial year shall include in the consolidated management report a consolidated non-financial statement containing information to the extent necessary for an understanding of the group's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including:

(b) a description of the policies pursued by the group in relation to those matters, including due diligence processes implemented;

(d) the principal risks related to those matters linked to the group's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the group manages those risks;

# General Recap



Individual client information can be made public or shared with CSOs with client consent or pursuant to a statutory obligation (unless MAR (slide 8) or Wwft (slide 9) applies)



Individual information in anonymous form can be shared or made public



Aggregated anonymous information can be made available



Individual client information cannot be made public or shared with CSOs without client consent