

# First measure by Disciplinary Commission for Dutch banks: what lies ahead?

The world's first disciplinary board for bankers rooted in law has now issued its first disciplinary measure. In its decision published on 15 December 2016, the Disciplinary Commission of the Dutch Foundation for Banking Ethics Enforcement has imposed a 6 month disqualification from the profession for violation of the banker's oath and related code of conduct. This decision right at the end of 2016 provides a preview of what lies ahead for the banking sector in 2017, both in the Netherlands and beyond.

## Culture change and rebuilding trust

Since 1 April 2016 banks with a seat in the Netherlands and Dutch branches of banks with seats in non EU/EEA member states must ensure that their employees are bound by disciplinary rules. This obligation was introduced on 1 April 2015 but the banks were given a one-year transitional period to comply. The introduction of disciplinary rules was part of a set of measures taken by the Dutch legislator and the banking sector to bring about cultural change within banks and rebuild trust in the financial markets.

These measures included the banker's oath and code of conduct. By taking an oath, bank employees declare to uphold certain norms and values that are set out in the related code of conduct. The code prescribes

that bank employees should, for example, conduct themselves prudently and with integrity, put client interests centre stage and contribute to society's trust in the bank. If bank employees violate the code of conduct, disciplinary action may be initiated and subsequently, if applicable, disciplinary measures may be imposed.

The Foundation for Banking Ethics Enforcement (*Stichting Tuchtrect Banken*) was set up to handle the disciplinary proceedings. It's been receiving complaints against bank employees from the moment it became operational in April 2015. Up to mid December of this year, only a handful of decisions had been published on its website and these concerned review requests with regard to inadmissibility decisions (for instance, for inadequate substantiation of the complaint or because the oath hadn't been taken yet). In 2 out of 15 cases a retrial was granted.

## Straightforward means to review conduct?

On 15 December 2016, the Disciplinary Commission of the Foundation published its first substantive decisions. One of these decisions has led to a disciplinary measure. In this case the bank employee in question had looked at customer information without any business reason. Such conduct was in breach of internal rules of the bank and the bank filed a complaint. The disciplinary board has concluded that this constitutes a violation of the banker's oath and code of conduct. Instead of the maximum term it has imposed a 6 month disqualification from the profession, as the bank had already terminated employment and blacklisted the employee.

In another case the Disciplinary Commission also found that the bank

employee involved had violated the internal rules of the bank. A customer filed a complaint because his bank account had been wrongfully blocked. As such the bank employee had not put the customer's interest first. At the customer's request no disciplinary measure was imposed, however, as the blocking had rapidly been undone and the bank and the employee apologized for the course of events. A further case was dismissed by the disciplinary board as the conduct in question had not taken place in the context of the professional duties and therefore falls outside scope of banker's oath.

The reasoning of the Disciplinary Commission in these first substantive decisions is relatively brief. A more telling body of case law is yet to take shape. Having said that, on the face of it, these disciplinary proceedings seem to have been a relatively straight-forward means - not only for customers but also for banks - to have conduct of bank employees reviewed as opposed to more elaborate judicial proceedings, with possibly further requirements such as giving reasons and presenting evidence. The decisions may be appealed before the Appeals Commission of the Foundation in due course.

## Supervisory and enforcement powers of DNB

The obligation for banks to bind their employees to disciplinary rules is part of the banks' broader regulatory obligations to have adequate procedures and set up their business operations in such manner that these safeguard a sound and controlled

execution of their banking business. For this reason the obligation was laid down in the Dutch Financial Supervision Act (*Wet op het financieel toezicht*) enabling supervision by De Nederlandsche Bank (DNB), the financial regulator in this respect.

According to the Explanatory Memorandum to the relevant change in the law, for bank employees to be actually *subjected* to disciplinary rules, banks must report disciplinary complaints to the Foundation if their employees violate the code of conduct. The following factors may be relevant for DNB when considering whether a bank has sufficiently complied with its obligation to introduce disciplinary rules:

- severity and/or consistency of the objectionable conduct of the employee
- the bank culture in relation to such conduct
- adequacy of bank procedures to detect, investigate and handle objectionable conduct
- the reasons for filing disciplinary complaints or taking other measures to deal with such conduct

DNB has powers to investigate the banks' compliance with their obligation to subject their employees to disciplinary rules. Under the General Administrative Law Act (*Algemene wet bestuursrecht*), DNB has general authority to ask questions to banks, to inspect or to request copies of information from the bank's administration. If a bank does not (sufficiently) comply with its obligation in respect of disciplinary rules, DNB can consider taking enforcement measures, such as imposing administrative fines.

## Example for foreign legislators and regulators?

In light of the financial regulator's power to supervise and enforce the obligation of effectively subjecting employees to disciplinary rules, it is important for banks to be able to demonstrate to DNB that they soundly assess whether to file disciplinary complaints against employees and depending on all circumstances sufficiently report complaints when warranted. For instance through:

- implementing a specific policy on reporting disciplinary complaints
- monitoring conduct to ensure signs of potential irregularities are picked up
- investigating internally any objectionable conduct
- assessing the extent of any violations of code of conduct
- having a procedure to decide on a potential complaint to the Foundation
- documenting the various steps taken for regulatory review

The Netherlands is the first country to introduce such a regulatory obligation for banks to have an effective disciplinary system. As with other initiatives in the financial sector, the Netherlands may again set an example for foreign legislators and regulators. The European Central Bank, for example, expressed an interest in the Dutch financial regulators' approach to conduct and culture in financial institutions and it's examining if this way of supervising conduct and culture may be introduced internationally.

The banker's oath, code of conduct and disciplinary rules are very much part of this growing focus on conduct and culture.

## Contacts



**Simone Peek**

+31 20 711 9182

simone.peek@cliffordchance.com



**Floris van de Bult**

+31 20 711 9158

floris.vandebult@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, Droogbak 1A, 1013 GE Amsterdam, PO Box 251, 1000 AG Amsterdam

© Clifford Chance 2016

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571. Registered office: 10 Upper Bank Street, London, E14 5JJ. We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications. Clifford Chance LLP is registered in the Netherlands with the commercial register of the Chamber of Commerce under number 34360401. For our (notarial) third party account details, please see [www.cliffordchance.com/nlregulatory](http://www.cliffordchance.com/nlregulatory)

[www.cliffordchance.com](http://www.cliffordchance.com)

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta\* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.