INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

**Banking in the crosshairs: Investigations by financial regulators and competition authorities in the banking industry – Libor, Forex, what next?**

**Banking, Finance and Capital Markets Law Commission**

**Antitrust Commission**

**Commercial Fraud Commission**

**53rd Annual AIJA Congress**

**London, 2015 – Working Session 6**

# National Report of The Netherlands

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2 April 2015

**Certain episodes of benchmark manipulation (Libor, Forex, etc) have generated global doubt and concern with regards to the integrity of many benchmarks, undermining the integrity of the system and legal and commercial certainty, and resulting in major losses for investors.**

**1. Have the authorities from your jurisdiction proposed or adopted any measures to ensure the necessary integrity of the market and of its benchmarks, guaranteeing that they are not distorted by any conflict of interest, that they reflect economic reality and that they are used correctly? (i.e.: measures to better protect investors, reinforce confidence, address unregulated areas, and/or ensure that supervisors are granted adequate powers to fulfil their tasks)**

*Market Abuse Directive*

Yes. In 2003, the Market Abuse Directive (2003/6/EC) entered into force. Directive 2003/6/EC introduced rules on the preventing of insider trading and market manipulation (market abuse). These rules have been implemented in the national legal framework of The Netherlands.

In 2010, the European Commission services launched a public consultation on the review of Directive 2003/6/EC, as it was felt that it was not adequate. The outcome of the consultation (inter alia) showed that there were gaps in the regulation of new types of trading platforms and in the regulation of commodities and commodity derivatives, painfully exposed by the Libor scandal. Furthermore, effective enforcement possibilities were lacking.

As part of its review of Directive 2003/6/EC, the European Commission proposed, on 20 October 2011, the Directive on criminal sanctions for insider dealing and market manipulation (EU Market Abuse Directive (2014/57/EU), MAD), to replace Directive 2003/6/EC. This new Directive complemented a separate proposal for a Market Abuse Regulation (Regulation (EU) No. 596/2014, MAR), which was endorsed by the Parliament in September 2013. Shortly before its endorsement, in June 2013, the MAR had been amended to include benchmark manipulation, as a consequence of manipulation of Libor.

The Commission opted for a regulation since it, unlike a directive, does not require separate implementation by the member states and will have direct effect. The MAR will secure the same market abuse rules throughout the EU and will come into force in July 2016.

*Impact in The Netherlands, pro-active legislation initiative*

Not all changes proposed in the new legislation will have significant impact in the Netherlands, as a number of the proposed measures have already been legislated. The prohibitions on insider dealing and market manipulation are, for example,

already subject to criminal sanctions. Changes that are expected to have certain impact in the Netherlands include the following:

- the extension of the scope of the market abuse rules to also include trading on OTFs, commodities and related markets, and the claims market
- the application of the market abuse rules to the manipulation of benchmarks such as Libor and Euribor
- if an issuer delays the disclosure of insider information, it must inform the Netherlands Authority for the Financial Markets (the Dutch supervisor, the AFM) of that delay when making that insider information public
- transactions by persons in managerial positions will have to be notified to the AFM and the issuing institution. In addition to transactions in "own shares" and corresponding derivative financial instruments, these persons will also have to notify transactions in debt instruments issued by the company.

With regard to the second bullet point - application of the market abuse rules to the manipulation of benchmarks such as Libor and Euribor – the Dutch legislator has decided not to wait until the MAR comes into effect. As of 1 January 2015, a new Section is added to the Financial Supervision Act (FSA), Section 5:58a FSA, which explicitly prohibits benchmark manipulation.

*Proposed Benchmark Regulation*

Furthermore (also on EU level), on 18 September 2013 the European Commission has issued a proposal for a Regulation on benchmarks, with the aim of improving the functioning and governance of benchmarks produced and used in the EU and ensuring they were not subject to manipulation. The proposed Regulation implements and is in line with the principles agreed at international level by the International Organization of Securities Commissions (IOSCO) in 2012 and 2013.

On 13 February 2015, the European Council agreed on a negotiating mandate towards agreement with the European Parliament on that proposal. Once the European Parliament has agreed a position, EU co-legislators will negotiate in order to find a final agreement on the text.

## 2. Which authority monitors financial bodies in your jurisdiction?

The AFM or the Dutch Central Bank (DNB), as we have a two tier model. According to the Ministry of Finance, effective action against benchmark manipulation is key in protecting market participants and safeguarding trust in the financial markets.

As of 1 January 2015, therefore, the AFM has the explicit authority to act against benchmark manipulation. This measure anticipates European legislation, including the MAR. The new power supplements the existing instruments available to the Dutch supervisors, in that it provides the possibility to instigate criminal proceedings in addition to existing administrative law powers.

DNB and the AFM can take action under administrative laws against benchmark manipulation by financial institutions under their supervision. They are also able to report integrity breaches and (potential) criminal offences to the public prosecutor's office to be tried under criminal law.

Legal basis underpinning DNB's/AFM's supervisory powers against benchmark

manipulation:

DNB → Sections 3:10 and 3:17 FSA, requirement to pursue sound and ethical business policies.

AFM → Equivalent powers under Sections 4:11 and 4:14 FSA. And, as mentioned before, as of 1 January 2015: Section 5:58a FSA (explicit prohibition on benchmark manipulation).

**3. [For EU and EFTA member states] has your country completed the transposition of Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments (also known as «MiFID II»)? If not, when will transposition be completed?**

The implementation of MiFID II into national law has not been completed yet. It is expected that implementation of MiFID II will be completed on 3 July 2016 ultimately, and the new rules will come into effect in the beginning of 2017.

**4. Have the authorities in your jurisdiction conducted any inquiry on leading banks or institutions in relation anti-trust practices with regards to essential financial information and/or the clearing system?**

Dutch Rabobank was involved in the 'Libor scandal'. The Libor scandal was first exposed in June 2012, when Barclays was fined for its role in attempting to manipulate the Libor rate. Since then Royal Bank of Scotland, Swiss bank UBS and the money broker Icap have been fined.

Rabobank was the fifth financial institution that incurred a huge fine for attempting to rig the benchmark interest rate. In October 2013, U.S. and European regulators (among which the AFM) fined Rabobank 774 million euros for rigging benchmark interest rates. 30 Rabobank employees were involved in "inappropriate conduct" in scam to manipulate the Libor and Euribor rates. Top management was neither involved nor aware of inappropriate conduct. However, at the announcement of the settlements with various authorities, the CEO of Rabobank (Piet Moerland) simultaneously announced that he would immediately resign as chairman of the Executive Board.

**5. Which new requirements have been established in order to reinforce governance and oversight and introducing measures sanctioning those responsible for LIBOR and other index manipulation?**

Please see answer to 1 above.

In addition, please note that the topic is on top of mind of both Dutch politics, the Dutch supervisors and the financial institutions. In 2014, DNB and the AFM launched a joint thematic review regarding the contributions to benchmarks, the risks of manipulation and the level of success achieved by Dutch financial institutions in managing the inherent integrity risks. The review also focuses on the role of benchmark users.

In February 2015, DNB and the AFM have published their findings in a report "The financial yardstick applied: Dutch involvement with financial benchmarks".

The review showed that financial institutions involved with benchmarks do not yet adequately manage the inherent risks. This is problematic, as DNB and the AFM expect professional market participants to properly recognise and manage the risks of benchmark manipulation. They should actively pursue a high ethical standard regarding their involvement with benchmarks. The Libor scandal and, more recently, the international settlements concerning exchange rate manipulation underline the importance of this objective.

According to DNB and the AFM, some Dutch financial institutions have taken valuable steps forward in the assessment and management of risks associated with benchmarks. On the whole, however, there is still room for improvement.

In order to guide and promote the improvement process, DNB and the AFM have formulated a set of good practices. Institutions may use these as a guideline in their efforts to prevent and detect benchmark manipulation.

**6. Has any similar scandal-malpractice affected your jurisdiction? Have penalties been imposed? and/or administrative or criminal sanctions? If not, which sanctions are foreseen in your jurisdiction for this type of misconducts?**

As explained above, Rabobank was involved in the Libor scandal and was sanctioned by a heavy fine. No further administrative or criminal sanctions were imposed. Please note that since 1 July 2009, the Dutch supervisors have the authority to take enforcement measures not only against financial institutions, but also against natural persons, such as actual policymakers/actual directors (pursuant to Section 5:1 (3) General Administrative Law Act in conjunction with Section 51 of the Dutch Criminal Code.

We have not seen similar cases regarding financial benchmarks/indices in The Netherlands.

**7. How are the potential conflicts of interest affecting banks or other financial institutions addressed in your jurisdiction? Which requirements are adopted to ensure that benchmarks reflect economic reality and that they are used correctly?**

Dutch financial supervision law provides for a broad range of rules and regulations in order to prevent conflicts of interest. Pursuant to Section 3:9 FSA, the policy of financial institutions having its registered office in the Netherlands shall be determined or co-determined by persons whose properness is beyond doubt. If a body within the financial enterprise is responsible for supervising the policy and the general affairs of the financial enterprise, the properness of the persons exercising this supervision shall be beyond doubt.

Financial institutions shall pursue an adequate policy that safeguards controlled and sound business operations (Section 3:10 FSA), meaning:

a. measures are taken to prevent conflicts of interest;

b. measures are taken to prevent the financial enterprise or its employees from committing offences or other transgressions of the law that could damage confidence in the financial enterprise or in the financial markets;

c. measures are taken to prevent confidence in the financial enterprise or in the financial markets from being damaged because of its clients; and

d. measures are taken to prevent the financial enterprise or its employees from performing other acts that are so contrary to generally accepted standards as to seriously damage confidence in the financial enterprise or in the financial markets.

Chapter 4 FSA regulates market conduct of financial institutions. Section 4:24a FSA contains a provision regarding the general duty of care (which is an open standard). "

Just very recently, as of 1 April 2015, Dutch bankers are bound to the mandatory Banker's Oath. All 90,000 Dutch bankers (regardless their position within the bank) will have to swear an oath that they'll do their "utmost to maintain and promote confidence in the financial-services industry. So help me God." This oath is part of a major attempt by regulators and banks to improve the financial service industry's reputation. It consists of eight statements, including promises not to abuse knowledge and "to know my responsibility towards society."

In conclusion (as mentioned above) Section 5:58a FSA stipulates an explicit prohibition on benchmark manipulation (which Section is called the "Anti Libor scandal clause").

**8. Are any measures foreseen in your jurisdiction for the protection of "whistleblowers"?**

In the Netherlands, the public sector has various whistleblower procedures for civil servants who discover misconduct in their own organisations. However, in the Netherlands there is no specific legislation dealing with whistleblower procedures in the private sector, or more specific in the financial sector.

Legislation does impose certain general requirements relating to such policies, including the Dutch Corporate Governance Code and the Dutch Data Protection Act.

Notwithstanding the above, the Dutch government established an independent agency called the Whistleblower Advisory Point on 1 October 2012. Advising and supporting both potential and actual whistleblowers, the Whistleblower Advisory Point focuses on public sector and private sector misconduct involving society as a whole. If the whistleblower considers the outcome of a company or government organisation's internal report to be unsatisfactory, he may requestthe Whistleblower Advisory Point to provide a recommendation on an appropriate external organisation where the complaint may be notified (e.g. the relevant supervisory authority). However, it does not actually conduct investigations into

misconduct itself.

**9. Is there any measure in place in your jurisdiction to guarantee suitable and appropriate evaluation of benchmarks?**

There are no specific measures in place (besides the measures mentioned before).

**10. Which requirements and/or transparency rules –if any- are undertaken in your jurisdiction in order to prevent distortions of competition resulting from divergences between other national laws and/or to provide more legal certainty for market participants? (i.e. to prevent or limit regulatory complexity and potential regulatory arbitrage)**

As EU member State, Dutch financial institutions are bound to (and Dutch legislators are obliged to implement) the ongoing stream of EU legislation, creating a European level playing field, to provide more legal certainty for market participants.