LEGAL UPDATE

Personal integrity of a financial services provider

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In previous Legal Updates we discussed various fining decisions of the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*) ("**AFM"**). We have already discussed the possibility the AFM binding measures against actual policymakers and persons with actual control of violations. These fining decisions focussed on violations of the obligation to have ethical operational practices in place. Last Thursday the AFM once again published a decision, pertaining to revocation of a licence of a financial services provider. This case also focused on a violation of the obligation to have ethical operational practices in place. Even though the obligation to have ethical operational practices in place is not new, the AFM is apparently – taking into consideration the recent publications – paying more attention to this obligation since 2016. That is why this Legal Update will explain when financial services providers violate the obligation to have ethical operational practices in place.

Ethical operational practices comprise two aspects, namely (i) the personal integrity of the financial services provider (the obligation to conduct a policy aimed at ensuring integrity) and (ii) the organisational integrity (rules for implementing ethical operational practices). The recently published measures of the AFM focusses on the personal integrity of the financial services provider. The legislative history shows that personal integrity requires the organisations to strive for the maintenance of their integrity themselves. In other words, a principle-based approach.

Because of the principle-based approach there appears to (possibly) be a grey area between sufficient and insufficient endeavours to maintain integrity. The sole reference point given by the law in Article 4:11 paragraph 2 of the Financial Supervision Act (*Wet op het financieel toezicht*) ("**Wft**") is that it is important that the financial services provider or its employees are discouraged from committing offences or other violations of the law that may harm the confidence in the financial services provider or in the financial markets. Other reference points must be looked for in the published measures of the AFM and in the relevant case law.

A recurring subject in the case law[i] is the systematic violation of various (ranging from two to five per measure) statutory provisions. It can be concluded that the AFM will only intervene by means of fines or tougher measures once it can prove that the financial services provider is actually committing violations. Advance testing of a policy does not seem to occur in this regard. In our opinion this can be explained by the fact that the confidence in the enterprise or the financial markets will not be harmed as long as the financial services provider does not commit violations.

It is worth mentioning that in one case in the case law there was a financial services provider that (on its own initiative) endeavoured to implement operational practices in such manner that it would comply with the applicable legislation and regulations. Think of the establishment of a compliance position, talking to the AFM and collecting internal and external advice. According to the district court this was insufficient, because the policy was actually the basis for the violations of the law and because the violations of the law formed an essential part of the revenue model of the financial services provider in question. In another case it was pointed out that the policy of the enterprise did not make provision for the creation of awareness and the promotion and maintenance of ethical behaviour at all levels of the financial enterprise.

The court particularly assesses whether or not the confidence in the financial enterprise or the financial markets is harmed by means of the question of whether or not complaints have been submitted to the

financial services provider and what the intention of the statutory provisions that were violated is. Provisions in the Wft are almost always considered to be part of a statutory system that intends, inter alia, to protect the interests of consumers or to safeguard the integrity of the financial markets in a general sense and, as a result of this, it is almost always considered self-evident that the confidence in the financial markets is harmed in case these articles are violated.

A final observation that follows from the case law pertains to the scope of the requirement. One particular financial services provider argued that the requirement in Article 4:11 of the Wft is a requirement that only concerns the operational practices of the enterprise itself. The district court discussed this very briefly and only stated that this article implies a broader requirement that also covers other interests (including the protection of clients).

Because of the principle-based approach financial services providers are given a lot of leeway with respect to the implementation of a policy that safeguards the personal integrity of the enterprise. Nevertheless, the published case law and fining decisions of the AFM show that if there are multiple violations of the law (irrespective of whether or not it concerns financial regulatory legislation), the AFM will immediately act vigorously by fining enterprises or even by revoking the licence.

In view of the fact that the AFM has clearly been paying more attention to this topic lately and the significant measures that the AFM imposes, financial services providers would be wise to subject their current policy to a critical evaluation.

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[i]The case law analysis is based on the following case law: Rotterdam District Court 31 March 2017, ECLI:NL:RBROT:2017:3007; Rotterdam District Court 5 March 2018, ECLI:NL:RBROT:2018:1701, Rotterdam District Court 23 June 2016, ECLI:NL:RBROT:2016:4633 (first instance) and Trade and Industry Appeals Tribunal 26 July 2017, ECLI:NL:CBB:2017:284 (appeal), Rotterdam District Court 15 July 2016, ECLI:NL:RBROT:2016:5395 (first instance) and Trade and Industry Appeals Tribunal 12 October 2017, ECLI:NL:CBB:2017:326 (appeal).