

## Credit to you: 2021, surviving a year of regulatory developments in the Dutch credit landscape

Last year was quite a busy year for service providers in the Dutch credit landscape facing proposals for new rules and regulations, observations of regulators, changes to guidelines of branch organisations and roaring rulings. It is great to observe that market participants have a strong will to be compliant and deal with regulatory challenges in a flexible and innovative manner. Time to look back and reflect on the variety of regulatory developments with an impact on the credit sector. In this update we will flag the most important developments. We hope this may help you to look forward and prepare for a sparkling 2022, while turning regulatory complexity into your competitive advantage!

- **Enhanced verification obligation.** In view of responsible lending, Dutch law requires that consumer credit providers verify the financial situation of the consumer prior to entering into a credit agreement with a credit amount exceeding EUR 1,000. Consumer credit providers should document sufficient information with respect to the financial situation of the consumer in writing or on a durable medium. This is the so-called verification obligation. In February 2021, the Dutch Minister of Finance [announced](#) a contemplated change of the verification obligation, lowering the threshold from EUR 1,000 to EUR 250. As a result, consumer credit providers will be required to already verify the financial position of the consumer for credit of EUR 250 and higher. The procedure to amend the Decree on Conduct of Business Supervision of Financial Undertakings Wft (*Besluit Gedragstoezicht financiële ondernemingen Wft*) will be followed. It is, however, not yet clear when this change will be effectuated.
- **Alternative Financing and protection of SME.** In April 2021, the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten*, AFM) published a [report](#) with its observations on the fast growing market of alternative financing for SME in the current credit climate. The AFM identifies certain risks for SME, amongst others, a lack of clear information on cost of credit and insufficient attention for creditworthiness. The AFM deems further investigation desirable to determine if additional legislative measures are necessary as opposed to self-regulation. In [response](#), the Minister of Finance announced in June 2021 to investigate whether regulating certain aspects of this type of lending can effectively contribute to protecting SME, taking into account the findings of the AFM. When it comes to potential measures, the current idea of the national legislator is to further investigate the introduction of a maximum for cost of credit and/or a uniform cost measure. The Minister of Finance is positive towards initiatives with respect to self-regulation, such as the code of conduct of the Foundation for SME Financing (*Stichting MKB Financiering*), but will consider legislative measures if insufficient results are shown by mid-2022.
- **New lending standard.** For consumer credit, the lending standards for responsible lending have been further specified in the codes of conduct of the Association of Finance Companies in the Netherlands (*Vereniging van Financieringsondernemingen in Nederland*) and the Dutch Banking Association (*Nederlandse Vereniging van Banken*). After a transition period, a

new [method](#) for determining the financial situation of consumers is applicable per 1 April 2021. Cost for childcare, a car and an owner-occupied home, for example, will need to be taken into account in the calculation. The AFM considers the codes of conduct to be the minimal interpretation of the open standard for responsible lending as laid down in Section 4:34 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, DFSA).

- **Revolving credit and variable interest.** We observe an increase of impactful rulings of the Arbitration Committee and Appeals Board of the Dutch Institute for Financial Disputes (*Geschillencommissie en Commissie van Beroep van het Klachteninstituut Financiële Dienstverlening*). For example, in this binding [ruling](#), the Appeals Board ruled in March 2021 that consumers may legitimately expect that the interest on their revolving credit will remain in line with the relevant market interest rate during the term of that credit, which is in line with its [2019 rulings](#). The rulings resulted in settlements and set a precedent for similar disputes.
- **Private lease.** Currently, private lease is exempted from the obligations under the DFSA. This follows from the exception for operational lease agreements included in the [Consumer Credit Directive](#). The European Commission has, amongst others, [proposed](#) to delete this exception. As a result, private lease would fall within the scope of the Consumer Credit Directive and regulation similar to rules for consumer credit would apply to private lease contracts. In July 2021, the Dutch Minister of Finance shared the [results](#) of the research on the private lease market. In December 2021, the Minister of Finance [repeated](#) that he is positive about the proposal to place private lease under the scope of the Consumer Credit Directive. It appears from his [response](#) that this proposal cannot count on much support within the European Council. If such proposal would not make it, a national approach through legislation or self-regulation will be considered.
- **Information to include in consumer credit agreement and ESIC.** In a [judgement](#) of the Court of Justice of the European Union of September 2021, the court clarified in detail which information should be included in consumer credit agreements and standardized pre-contractual information (ESIC). This is important given the potential consequences of an omission in this respect, such as nullification of the credit agreement.
- **Proposal for a revised Consumer Credit Directive.** In June 2021, the European Commission proposed [a revision of the Consumer Credit Directive](#). The European Commission wishes to improve rules with respect to creditworthiness, to promote financial education and to ensure debt advice is made available to consumers. However, in our view the proposal to remove the exemption for credit with no or insignificant cost charged and repaid within three months, will have major consequences for the manner in which consumer credit providers currently structure the option of deferred payment. If the Consumer Credit Directive is amended in line with the current proposal, consumer credit providers would need a license for offering the option of such deferred payment. In the Dutch cabinet's point of view - the so-called "[BNC-Fiche](#)" - of September 2021, the Dutch Minister for Foreign

Affairs largely endorses the proposal of the European Commission. The proposal includes a proposed implementation date of two years after the publication of the final version of the amended Consumer Credit Directive in the Official Journal. It generally takes quite some time between the publication of the first proposal for amendment of a European directive and the publication of it in its final form in the Official Journal. As such, we do not expect any amendments to the Consumer Credit Directive to become applicable in The Netherlands before (mid) 2024.

- **Non-performing loans.** In November 2021, the final version of the Directive on credit servicers and credit purchasers ((EU) 2021/2167) was [published](#). This directive standardises the rules for credit servicers and credit purchasers across the European Union and facilitates the sales of non-performing loans. Furthermore, it aims to harmonise the authorisation requirements for credit servicers and it aims to establish reasonable forbearance measures, taking into account the rights and interests of consumers before starting enforcement proceedings. The implementation date is 29 December 2023.
- **Management of consumers in arrears.** In November 2021, the AFM published a [report](#) on how consumer credit providers deal with clients with payment difficulties. The report contains principles regarding the communication with clients, which are relevant for all consumer credit providers. The AFM has listed five principles for good arrears management:
  - There is productive contact between provider and customer;
  - The solution is based on the customer's personal (financial) situation;
  - The arrears management policy is of good quality;
  - Employees of the credit provider are able to offer a proper solution; and
  - Agreements with collection partners are focused on the interest of the customer.The report contains a lot of practical best practices, which may help consumer credit providers to adequately define and properly effect their arrears management.
- **Maximum credit compensation.** Currently, the maximum credit percentage consists of the statutory interest of two percent and a surcharge of eight percent. This maximum is the result of temporarily reductions whereby the surcharge on statutory interest has been reduced to a maximum of eight percent due to the corona crisis until 1 July 2022. In November 2021, the Minister of Finance launched the [consultation of a legislative proposal](#) with respect to the structural reduction of the surcharge to eight percent as per 1 July 2022. The question is whether a structural maximum credit compensation will help solving problematic debts. It may be part of the solution, but may also lead to a shift to other – unregulated - forms of credit.
- **Crowdfunding Regulation.** As of 10 November 2021, Regulation (EU) 2020/1503 on European crowdfunding service providers for business (the [Crowdfunding Regulation](#)) applies to crowdfunding service providers (CSPs) in the European Union. CSPs that are established in The Netherlands will need to apply for a licence with the AFM. The Crowdfunding Regulation applies to two types of crowdfunding: (i) crowdfunding in the form

of loans and (ii) crowdfunding in the form of securities. The Crowdfunding Regulation is not applicable to crowdfunding services in respect of lending to consumers; this remains subject to national laws and regulations (and requires a license as consumer credit offeror as well as a dispensation for a specific prohibition under Dutch law). Furthermore, the offering size of a fundraising via a CSP's platform under the Crowdfunding Regulation is limited to EUR 5 million in a period of 12 months. Existing crowdfunding service providers may rely on a transitional period of one year and need to have obtained their license under the Crowdfunding Regulation ultimately on 10 November 2022. Recently, the AFM [announced](#) that existing CSPs must apply for a licence by 10 May 2022. The entry into force of the Crowdfunding Regulation means that CSPs that fall within the scope of this Regulation no longer need a dispensation or a licence on the basis of the Dutch Financial Supervisory Act.

- **Loan originating AIF's.** In November 2021 the European Commission published its long awaited [proposal](#) for amendment of the AIFMD as part of the Capital Markets Union action plan. The proposal introduces, amongst others, common minimal rules regarding direct lending by alternative investment funds to companies. These rules will allow loan-originating funds to operate cross-border and ensure that they can be an alternative source of funding for companies in addition to bank lending. At the same time the proposed rules will address potential risks related to this type of lending. The proposal will follow the EU legislative procedure, which is not expected to be finalized prior to the end of 2024.

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If you have any questions regarding the Dutch credit landscape, please do [reach out!](#)

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