Remuneration in the Dutch financial sector: Tougher curbs (including a 20% bonus cap) now proposed to parliament.

What is proposed?
All-encompassing legislation requiring financial undertakings with their seat in the Netherlands to maintain sound remuneration policies and to curb excessive variable pay. According to the Dutch government, it is imperative that the financial sector, and everyone working in it, takes responsibility in this regard.

Why is it proposed?
The Legislative Proposal is part of the Dutch government’s wider endeavours aimed at a sound and sustainable Dutch financial sector serving the public good. It aims at counteracting risk-taking that – it states – comes with excessive variable pay.

Which firms are impacted?
- The new rules are set to apply to financial undertakings with their seat in the Netherlands that are currently subject to the Dutch Financial Supervision Act, as well as to premium pension institutions (“PPIs”).
- Each financial undertaking and PPI, seated in the Netherlands (“FU”) must ensure that all of its subsidiaries comply with the new rules, irrespective of their location and irrespective of whether such subsidiaries qualify as FUs themselves.
If the FU is part of a group and the ultimate parent company of the FU (the “Head of the Group”) has its seat outside the Netherlands, that Head of the Group is not obliged to comply with the new rules itself. However, any FU that is part of an international group seated outside the Netherlands will not be exempted from the applicability of the new rules.

The general scope of the Legislative Proposal as set out above is demonstrated as follows (the FU responsible for also ensuring compliance at its subsidiaries is shown in dotted lines):
If the Head of the Group does have its seat in the Netherlands and the group’s main activities are in the financial sector, the Head of the Group must comply with the rules itself and must in addition ensure that its subsidiaries (in or outside the Netherlands and irrespective of whether these qualify as FUs themselves) also comply with the new rules. This can be demonstrated as follows:
• If the Head of the Group does have its seat in the Netherlands but the Group’s main activities are not in the financial sector, the Head of the Group is not under the obligation to ensure that its subsidiaries (in or outside the Netherlands) comply with the new rules. The FU seated in the Netherlands bears that responsibility. This can be demonstrated as follows:

• The above implies that the new rules will not apply if a Head of the Group does have its seat in the Netherlands and its main activities in the financial sector, but does not have any FUs seated in the Netherlands.
Which staff is impacted?

- The Legislative Proposal has consequences for all persons working at the in-scope undertakings as set out above.
- The applicability of some specific new rules has been restricted to certain staff. For example, the proposed 100% cap on severance payments is limited to persons responsible for the day-to-day management of the FU (“controlling position”). More details on this are set out below.

What are the key changes?

Although the proposed 20% bonus cap has received most of the headlines, the Legislative Proposal provides a legislative basis for a variety of new rules and extends the scope of some currently existing rules. A summary:

1  20% bonus cap

This places a limit on variable pay of 20% of the fixed salary of all employees as well as all other persons working under the responsibility of FUs (including contractors and secondees).

This proposed cap is very stringent compared to the bonus caps of 100% or 200% as recently introduced by CRD IV (for identified staff only). These less stringent EU bonus caps are about to enter into effect in the Netherlands in relation to the year 2014.

Under the Legislative Proposal, transitional rules apply to current employees. Pursuant to these transitional rules, variable pay in relation to the year 2014 may still exceed the 20% cap, provided that such pay is based on contractual agreements entered into prior to 1 January 2015. As from 1 January 2016 the 20% bonus cap will also apply to current employees, so that their variable pay relating to calendar year 2015 may not exceed 20% of their fixed pay.
Exceptions apply, as follows:

**Main rule**
max. 20%

**Exception 1**
on-CLA employees
= max. 100%

**Exception 2**
non-NL employees within EEA
= max. 100%

**Exception 3**
non-NL employees outside EEA
= max. 200%

**Exception 4**
NL-based international holding companies
= max. 100%

**Exception 5**
Retention payments
= max. 100% or max. 200%

Persons working in the Netherlands without their remuneration being (fully) based on a collective labour agreement: variable pay to such persons in excess of the 20% bonus cap is allowed to a maximum of 100%, as long as the average variable pay to such persons collectively does not exceed the 20% cap.

Persons working at least 50% of their time outside the Netherlands: their variable pay can be increased to 100%, if they work in a Member State of the European Economic Area (“EEA”).

Persons working at least 50% of their time outside the Netherlands: their variable pay can be increased to 200%, if they work in a non EEA Member State.

A bonus cap of 100% applies to persons working at international holding companies with their seat in the Netherlands and the majority of their activities outside the Netherlands. This exception only applies if at least 75% of the group’s employees work outside the Netherlands during 3 out of 5 years of the group’s existence.

Retention payments: such variable payments may exceed the 20% bonus cap only in exceptional circumstances (such as takeovers) and under strict conditions (including prior approval by the regulator).
The government acknowledges that the 20% bonus cap may trigger a further increase in fixed pay in view of compensatory measures. It emphasizes that such compensation should always be plain and sober in light of (i) the challenges the sector is facing, (ii) the already high levels of fixed pay compared with other sectors and (iii) the public disquiet relating to remuneration in the financial sector. It continues by stating that refraining from increasing fixed pay, or only doing so in a limited manner, will contribute to repairing the breach of trust between the financial sector and its customers.

**Relevant to:** FUs, their subsidiaries (including foreign subsidiaries), group companies of Dutch financial holding companies (under certain conditions), as well as Dutch branch offices of foreign FUs (with the exception of branch offices of foreign banks and those investment firms to which the EU bonus caps of 100% or 200% will apply).

The 20% bonus cap does not apply to managers of investment institutions, managers of UCITS and to investment firms which only trade for own account without external customers.

2 **Controlled remuneration policy and disclosure requirements for all FUs**

Already introduced by CRD III for a limited number of FUs, the obligation to have a controlled remuneration policy and related disclosure requirements is now extended in scope and size.

**Relevant to:** FUs, subsidiaries of FUs (including foreign companies), group companies of Dutch financial holding companies (under certain conditions).

3 **100% cap on severance payments for persons in a controlling position**

CRD III already introduced the principle of “no reward for failure”. Under the Legislative Proposal no severance payment may be paid to any person working in the FU if the contractual relationship terminates at the initiative of the individual, in case of the individual’s serious negligence or in case of failure of the company if the individual held a controlling position.

In addition, a statutory cap on severance payments is introduced for the latter category of persons. The maximum severance payment to these persons is 100% of their fixed annual pay. This cap could impact existing contractual arrangements (e.g. golden parachutes). Severance payments awarded by a court are not caught by this cap.

**Relevant to:** FUs, subsidiaries of FUs (including foreign companies), group companies of Dutch financial holding companies (under certain conditions).
4 Ban on guaranteed variable payments

Already introduced by CRD III for a selected number of financial undertakings, the ban on guaranteed variable pay is expanded in scope under the Legislative Proposal. A guaranteed variable payment (such as a sign-on bonus or “golden hello”) is only permitted if the following three conditions are met: (i) when hiring new staff, (ii) when limited to the first year of employment and (iii) in case the FU meets the relevant solvency requirements.

Relevant to: FUs, subsidiaries of FUs (including foreign companies), group companies of Dutch financial holding companies (under certain conditions).

5 Clawback and malus requirements

The Legislative Proposal introduces an obligation for FUs to apply clawback and malus in case for example the FU’s financial position has deteriorated substantially as a result of an individual’s actions. In addition, the scope for clawback and malus is widened to all persons working in the financial undertaking (i.e. not just identified staff and now also including for example contractors and secondees). Moreover, the Dutch government re-confirms that clawback and malus arrangements also capture severance payments.

Relevant to: FUs, subsidiaries of FUs (including foreign subsidiaries), group companies of Dutch financial holding companies (under certain conditions).

When will the new rules come into force?

The Dutch government aims to implement the new rules on 1 January 2015. The final rules and their effective date may change as the pending legislative process unfolds in the coming period. The Legislative Proposal still raises many questions. We will continue to closely monitor it and update you on relevant developments as they arise. In the meantime, please contact us if you have any queries.