

TRUST REGULATIONS AND PAYMENT SERVICES: DUTCH LAW IN 2019

Author

Lous Vervuurt

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Recently, Dutch legislators introduced a number of amendments to the Dutch financial regulatory environment. Two important changes are the new Act on the Supervision of Trust Offices 2018 (*Wet Toezicht Trustkantoren 2018*, or “W.T.T. 2018”) and the implementation of the second Payment Services Directive (“P.S.D. II”) into¹ Dutch law.

W.T.T. 2018

On January 1, 2019, the Act on the Supervision of Trust Offices was repealed and replaced by W.T.T. 2018. W.T.T. 2018 regulates the licensing and market conduct of Dutch trust offices (*trustkantoren*).

Under the new Dutch law, a trust office is defined as a legal entity, partnership, or natural person that provides one or more trust services on a commercial basis, whether or not in conjunction with other persons, legal entities, or partnerships.

The definition of trust services includes, *inter alia*, the following activities:

- Function as a managing director of a legal entity or as a partner of a partnership, on the instructions of a natural person or legal person that does not belong to the same group of companies as the managing director or partner.
- Provide domiciliation services (including a mailing address and/or physical address) for natural persons, legal persons, or partnerships in conjunction with one or more of the following services:
 - Providing legal advice
 - Arranging for the filing of tax returns and ancillary services
 - Providing services in connection with the preparation, review, or auditing of annual financial statements
 - Recruitment of directors for a legal person or partnership
- Make use of conduit companies (*i.e.*, legal entities that belong to the same group of companies as the principal but are used to provide trust services) on behalf of a client.
- Function as a trustee on the instructions of a natural person or legal person that does not belong to the same group of companies as the trustee.

Lous Vervuurt, an attorney at law at Buren N.V. in Amsterdam and the Hague, the Netherlands, specializes in business law and financial law, advising multinationals, listed companies, investment companies, and investment institutions. Lous is a member of the Board of Representatives of the Dutch Bar Association.

¹ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

Market for Trust Services

Europe is an important market for trust offices. Approximately 57% of trust offices worldwide are domiciled in Europe, primarily servicing internationally operating corporations. The Netherlands is a big market for trust services due to the favorable business climate in the country. In the Netherlands, approximately 3,500 people are engaged in providing trust services, and they service approximately 20,000 companies. Most trust officers are highly qualified, having university-level educations.

Nonetheless, the Dutch legislator is of the view that providers of trust services enable international groups to carry out abusive tax plans. Dutch companies were involved in some of the structures revealed in the Panama Papers and the Paradise Papers. Those trust companies usually did not meet in person with corporate clients and their ultimate beneficial owners. Instead, they relied primarily on written instructions from law firms and tax advisers.

As the Netherlands has concluded a fair number of tax treaties, tax-driven structures were often used in international planning – and frequently involved offshore jurisdictions. Increasingly these structures were aimed at providing as little transparency as possible through a daisy chain of asset-protection structures. Hence, a need existed to tighten regulations and intensify supervision.

Licensing Trust Services

As under prior law, W.T.T. 2018 prohibits anyone with a seat in the Netherlands from providing trust services in the pursuit of a profession or business without a license from the Dutch Central Bank (“D.N.B.”). A similar prohibition applies to anyone with a seat outside the Netherlands to provide trust services in the pursuit of a profession or business from that home country into the Netherlands or from a branch office located in the Netherlands without a license from the D.N.B.

The prohibition does not apply to natural persons, legal entities, or partnerships who are engaged in providing management and organizational services on an interim basis (*e.g.*, an interim manager), insofar as these activities qualify as trust services.

Financial legislation within the E.U. and the European Economic Area (“E.E.A.”)² is harmonized. All national legislation regarding banking services, investment services, and institutions for collective investment has been based on either E.U. directives or E.U. regulations. In comparison, the regulation of trust services is based on local law. This means that trust offices with a license to provide similar services in their home country cannot make use of a passporting regime under which a license in one member country enables the holder to operate in all member countries, as is common for most financial services. A company licensed to provide trust services in a member country outside the Netherlands must apply for a full license with the D.N.B. in order to operate from a base in the Netherlands.

W.T.T. 2018 contains a reciprocity provision allowing the Dutch legislator to designate states that have adequate supervision so that trust offices in those states may perform their services in the Netherlands without procuring a license from the D.N.B. Nonetheless, no designation has yet been made yet.

² The E.E.A. is comprised of the member states of the E.U. plus Liechtenstein, Norway, and Iceland.

Changes to Dutch Law under W.T.T. 2018

W.T.T. 2018 provides measures to (i) strengthen the integrity and professionalism of trust offices, (ii) improve client identification procedures, and (iii) extend the administrative instruments of the supervisory authority (*i.e.*, the D.N.B.) to enhance supervision and enforcement.

Organization of Trust Offices

With regard to strengthening integrity and professionalism, the main provisions adopted in W.T.T. 2018 are as follows:

- In order to obtain a license from the D.N.B., a trust office with seat in the Netherlands must be organized in the form of a public or private limited liability company under Dutch law or a *Societas Europaea*, which is a public limited liability company that can operate in different European countries using a single set of rules. Natural persons are no longer eligible for a license under W.T.T. 2018.
- A trust office must have a minimum of two people who are charged with the day-to-day policy making within the trust office to safeguard continuity, quality of service, and general governance.
- Each trust office must appoint a compliance officer. This function cannot be outsourced, as was allowed under prior law.

Client Identification

With regard to client identification procedures, the main provisions adopted in W.T.T. 2018 are as follows:

- Specific rules have been introduced regarding the provision of services to specified legal entities, including partnerships and trusts. In addition, rules apply to each specific trust service that is provided to a client.
- The concept of ultimate beneficial owner is expanded, thereby requiring a trust office to go beyond the formal control structure and examine the structure of *de facto* control.
- A trust office may no longer rely on client identification procedures carried out by an accountant, tax advisor, lawyer, or civil law notary; the trust office must independently carry out its client identification.

Segregation of Trust Services from Tax Advice

A specific prohibition has been adopted under which trust services cannot be provided if they relate to the implementation of tax advice given to the client by the trust office itself or by a natural person, legal person, or other entity forming part of the same group of companies as the trust office.

Expansion of Trust Services

The Decree on the Supervision of Trust Offices 2018 (*Besluit Toezicht Trustkantoren 2018*), promulgated under W.T.T. 2018, expands the definition of “trust services” to

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include acting as an attorney in fact on the basis of a power of attorney, insofar as such power of attorney extends to exercising general managerial powers for the company receiving the service.

IMPLEMENTATION OF THE PAYMENT SERVICES DIRECTIVE II IN DUTCH LAW

In December 2018, the Dutch senate approved draft legislation transposing P.S.D. II into Dutch law. As of February 19, 2019, both the legislative proposal for P.S.D. II and the decree to implement P.S.D. II have entered into force. Most terms of P.S.D. II have been implemented into the Dutch Act on the Financial Supervision (*Wet op het financieel toezicht*, or the “A.F.S.”) whereas certain terms have been implemented into Book 7 of the Dutch Civil Code (*Burgerlijk Wetboek*). P.S.D. II should have been implemented in the legislation of all E.U. Member States by January 13, 2018, and the Dutch legislator missed that deadline. This is not the first time that the Netherlands implemented E.U. directives on a delayed basis.

What Is P.S.D. II all About?

P.S.D. II is the replacement for the first Payment Services Directive (“P.S.D. I”),³ which regulates payment services and payment service providers throughout the E.U. and the E.E.A. The goal of the P.S.D. I was to enhance competition within the E.E.A. and to facilitate participation in the financial sector. Special focus was placed on the creation of a level playing field with respect to consumer protection and the rights and obligations of payment services providers and their customers/users. P.S.D. I introduced a new category of payment services providers: the payment institution.

Payment services are defined as⁴

- services enabling cash to be placed on a payment account as well as all operations required for operating a payment account,
- services enabling cash withdrawals from a payment account as well as all operations required for operating a payment account,
- execution of payment transactions, including transfers of funds on a payment account with the user’s payment service provider or with another payment service provider (including but not limited to execution of direct debits, execution of payment transactions through a payment card or a similar device, and execution of credit transfers),
- issuing of payment instruments and/or acquiring of payment transactions,
- payment initiation services, and
- account information services.

The last two services are new in P.S.D. II and are, as of the implementation of P.S.D. II into Dutch law, subject to an authorization requirement.

³ Directive 2007/64 EC.

⁴ As mentioned in Annex I to P.S.D. II.



Changes to Dutch Law under P.S.D. II

A brief overview of certain major changes imposed by P.S.D. II is given below. These changes have been recently enacted into Dutch law. Generally, most have been published in the *Official Journal of the European Union*. The scope of account information services may create opportunities with respect to financial services, costs savings, and marketing. However, this may expose consumer's personal data and financial information.

Two-Factor Authentication

Strong Customer Authentication ("S.C.A.") under P.S.D. II requires that businesses use two-factor authentication for verifying online payments from accounts or for initiating electronic payment transactions (e.g., through credit cards). As of September 14, 2019, transactions that do not meet the new authentication requirements and do not qualify for an exemption may be declined.

Two-factor authentication is defined as a combination of two out of three possibilities:

- "Something you know" (e.g., password, passphrase, pin, secret fact)
- "Something you own" (e.g., mobile phone, wearable, smart card, token)
- "Something you are" (e.g., fingerprint, facial features, voice patterns, DNA signature)

This means that credit card payments that make use of the card number and the Card Verification Code ("C.V.C.") will not be sufficient in the future.

One Leg Transactions

"One leg" transactions are transactions that are executed partly within the E.E.A. and partly outside of the E.E.A. These transactions fall within the scope of P.S.D. II. However, P.S.D. II legislation only covers the European part of the transaction. Entities established within the E.E.A. will be subject to a license requirement (or should register for an exemption), irrespective of the country to which payments are made. Transparency and conduct rules apply only to payments that are executed within the E.E.A. in an official currency of one of the E.E.A. countries.

Payment Initiation Services

Payment initiation services are made for use by holders of an account that is manageable online. Banks must grant third parties access to their customers' payment accounts in order to initiate payments by such customers. Payment initiation service providers may, subject to approval of the account holder, ask the bank to execute a payment order on behalf of the account holder, and the bank will process the order. These services are a new manner of making online payments and offer an alternative for credit card payments or payments through PayPal.

Account Information Services

Under P.S.D. II, banks must provide third parties with access to the payment accounts of their customers in order to access the account holder's payment data. These account information providers will be in the position to collect payment data and compile overviews and payment profiles for their customers.

This is particularly interesting for fintech companies. If a consumer grants a third party permission to analyze their personal payment data, that firm can collect payment data from the bank and provide specific reports. Fintech companies could combine the reports in an app that connects with a bank account, categorizing all receipts and expenses.

A mortgage service provider may not need paystubs if it can directly access salary details of a prospective customer.

In addition, a consumer may be able receive tailored marketing messages based on a payment profile. An example is a digital message from an insurance company advertising lower rates than currently paid for existing insurance.

While many see account information services as a miracle for companies engaged in marketing activities, these services can also help consumers gain insight into spending patterns in order to make better financial decisions through a digital budget planner. The former may be viewed as bad from a consumer protection viewpoint, and the latter may be viewed as good from an empowerment viewpoint. This type of data is easier to obtain using account information services, as opposed to personally reviewing and analyzing payment details.

Personal Data Protection Matters

With the newly created possibilities to access account data, privacy issues are of the utmost importance. Parliament has taken time to address account holder privacy and the processing of financial and personal data. Clearly, the gathering of payment data and personal data is a sensitive matter. Therefore, one of the most important provisions in P.S.D. II is that without explicit consent of the customer, no payment service provider may obtain access to the customer's personal data. This applies to all parties that have access to financial data of consumers, including banks, payment initiation service providers, and account information providers.

Consent must be given explicitly. Customers must have the right to easily withdraw consent at any time. Although no standardized form has been provided to obtain consent, the form used by parties having access to financial data must be request consent clearly and unambiguously. Tacit consent or pre-ticked boxes will not qualify as explicit consent.⁵ Consent must be given for each payment service, and if consent is given for a specific purpose, such consent is not deemed to apply to other parts of the contractual relationship between the payment service provider and the consumer. To illustrate, if a consumer has given explicit consent to a payment initiation service provider, this will effectively lead to a payment order to the bank. This consent cannot be revoked. However, if a consumer has given their consent for repeated payments to the same beneficiary, the consumer must have the right to contact the payment initiation service provider to withdraw that consent.

Consumers are not obligated to make use of payment initiation services. However, if those services are the only form of payment for online stores, they will not be able to buy products from those online stores.

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⁵ These provisions are consistent with the E.U.'s General Data Privacy Regulation (“G.D.P.R.”), which came into effect last year. For more on the global scope of the G.D.P.R., see [“G.D.P.R. Is Imminent – Is Your U.S. Business Prepared?” Insights 5, no. 4 \(2018\).](#)

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Regulatory Supervision

Several regulatory bodies in the Netherlands are empowered to oversee P.S.D. II matters. These include the D.N.B., which oversees the provision of financial services; the Authority for the Financial Markets, which oversees the stock exchanges; the Dutch Data Protection Authority; and the Dutch Authority for Consumers and Markets.

CONCLUSION

Europe is moving towards greater regulation and oversight of financial services providers. W.T.T. 2018 and P.S.D. II are two examples. The former establishes standards for the provision of trust services and the latter introduces, though authorized, access to financial information of consumers. From a policy standpoint, both initiatives raise the standard of professionalism for gatekeepers to corporate structures and providers of financial services.