



Banking Regulation

in 28 jurisdictions worldwide

Contributing editor: David E Shapiro

2013



Published by
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Banking Regulation 2013

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Banking Regulation 2013

Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

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ISSN 1757-4730

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Curaçao

Karel Frielink, Maike Bergervoet and Davina Mansur

Spigt Dutch Caribbean

Regulatory framework

- 1 What are the principal governmental and regulatory policies that govern the banking sector?

According to the Central Bank of Curaçao and Sint Maarten (CBCS), its prudential supervision of the banking sector is aimed primarily at promoting the stability, integrity, efficiency, safety, and soundness of the financial system of the Curaçao and Sint Maarten and safeguarding the interest of depositors and other creditors of the credit institutions.

Supervision mainly entails the licensing of financially sound institutions and the performance of ongoing supervision using a risk-based approach through both on-site and off-site supervision, with emphasis on monitoring the liquidity and solvency of the credit institutions. Furthermore, CBCS monitors, among other things, compliance by the credit institutions with regulations on the detection and deterrence of money laundering and terrorist financing and regulations on the disclosure of information to the public.

- 2 Summarise the primary statutes and regulations that govern the banking industry.

The banking industry is governed by the following statutes and regulations:

- The National Ordinance on the Supervision of Banks and Credit Institutions (NOSBC) and certain rules promulgated thereunder;
- Admission Requirements issued by the CBCS;
- CBCS Policy Memorandum on the Change of External Auditors of a Credit Institution;
- CBCS Policy Memorandum on the Periodic Filing of a Management Report;
- CBCS Policy Memorandum on the Sale or Transfer of Shares in a Supervised Credit Institution;
- the CBCS Supervisory Regulations; and
- various CBCS guidelines; for example, on the detection and deterrence of money laundering and terrorist financing for credit institutions, on disclosure of pricing information on consumer credit, on the disclosure of consolidated financial highlights of domestic banking institutions and for safe and sound electronic banking.

These statutes and regulations are all available on the CBCS website (www.centralbank.an).

- 3 Which regulatory authorities are primarily responsible for overseeing banks?

The Central Bank of Curaçao and Sint Maarten (CBCS) is responsible for overseeing banks.

- 4 Describe the extent to which deposits are insured by the government. Describe the extent to which the government has taken an ownership interest in the banking sector and intends to maintain, increase or decrease that interest.

Deposits are not insured by the government. PSB Bank NV is the only bank that is a government entity. To our knowledge, the government has no intention of decreasing that ownership interest.

- 5 Which legal and regulatory limitations apply to transactions between a bank and its affiliates? What constitutes an 'affiliate' for this purpose? Briefly describe the range of permissible and prohibited activities for financial institutions and whether there have been any changes to how those activities are classified.

CBCS Supervisory Regulations 2 provide for restrictions on transactions with affiliates and loans to affiliates. The restrictions depend on the type and volume of transactions with affiliates and the resulting receivables from these affiliates. An 'affiliate' of a supervised credit institution is defined for the purpose of the regulation to be:

- any company for which commonality of ownership exists with the credit institution: any company that controls the credit institution (parent company or other) and any other company that is controlled by the company that controls the credit institution (sister companies) and any company that controls the company that controls the credit institution (ultimate parent company or companies);
- subsidiaries of the credit institution;
- any company for which a commonality of directors exists with the credit institution: any company in which the majority of its (supervisory or managing) directors constitute a majority of the directors of the credit institution or any company that is controlled by the credit institution; or
- any company that the CBCS determines to have a relationship with the credit institution or its subsidiaries and affiliates, such that transactions with that company may be affected by the relationship of the company with the credit institution, its subsidiaries or affiliates.

The definition of affiliate does not include companies engaged solely in the following activities: holding the premises of the credit institution, conducting a safe deposit business, holding obligations of governments or holding real estate for execution on the short term. However, no transaction should be concluded with these affiliates other than those that are strictly necessary for the facilitation of their respective businesses to the benefit of the credit institution.

CBCS Supervisory Regulations 1 provide for rules limiting the amount of lending to executive officers, supervisory directors, principal shareholders being natural persons (including the related interests of those persons) and employees of the institution. The intended limitation will be applied to mentioned persons individually in

relation to the equity of the credit institution. However, for employees the limitation is on an aggregate basis for all employees.

- 6 What are the principal regulatory challenges facing the banking industry?

The biggest challenges facing the banking industry in Curaçao are not of a regulatory nature but of a monetary nature. The CBCS currently has a deficit in its foreign exchange account. A structural turnaround in the foreign exchange balance is not expected soon and as a result the CBCS continues to direct its monetary policy towards reducing liquidity in the domestic money market. The main instrument used is to increase the percentage of the reserve requirements (which at the time of writing is 15 per cent). This instrument aims at influencing commercial banks' liquidity and, hence, the growth in credit extension.

- 7 How has regulation changed in response to the recent crisis in the banking industry?

There have been no changes in regulation in response to the recent crisis. Generally, the banking industry in Curaçao has not been directly affected by the crisis. The banking industry has always had a conservative approach with respect to lending, applying conservative ratios and not offering high-risk products. Banks in Curaçao generally have an excess of liquidity. One notable change is an increase in cooperation among central banks to fight systemic liquidity risks.

- 8 In what ways do you anticipate the legal and regulatory policy changing over the next few years?

Recently, there have been discussions of a complete reform of the regulatory regime in Curaçao. This is mainly because of a reform that took place in the Netherlands in 2007.

The most important change would be an increase in market and business conduct rules for banks in Curaçao (eg, provisions with respect to credit assessments, marketing, etc), which also means more consumer protection. Whereas the current regulatory regime is divided into separate legislation for each regulated industry, the contemplated reform would result in a functional model in which all industries would be regulated by the same legislation. This model has already been introduced for the other Dutch Caribbean islands of Bonaire, Saba and St Eustatius, which have formed part of the Netherlands since 2010 owing to constitutional changes within the Kingdom of the Netherlands.

Supervision

- 9 How are banks supervised by their regulatory authorities? How often do these examinations occur and how extensive are they?

According to the CBCS, its prudential supervision of credit institutions is aimed primarily at promoting the stability, integrity, efficiency, safety, and soundness of the financial system of the countries Curaçao and Sint Maarten and safeguarding the interest of the depositors and other creditors of the institutions. Bank supervision entails mainly the licensing of financially sound institutions and the performance of ongoing supervision using a risk-based approach through both on-site and off-site supervision with emphasis on monitoring the liquidity and solvency of the credit institutions. Furthermore, the CBCS monitors, among other things, compliance by the credit institutions with regulations on the detection and deterrence of money laundering and terrorist financing and regulations on the disclosure of information to the public.

Examinations are conducted first on an off-site basis by account managers within the CBCS. An on-site inspection will only take

place if during an off-site inspection it is ascertained that there are high-risk issues and an on-site inspection is necessary. On-site inspections take place on average three or four times a year.

- 10 How do the regulatory authorities enforce banking laws and regulations?

Whenever the CBCS is of the opinion that a credit institution is not in compliance with the applicable laws and regulations, it may engage in informal discussions with a credit institution. The CBCS also has the power to issue warnings or orders to a bank. The CBCS also has the legal authority to impose a fine upon such credit institution, after first providing a written notice. In the event that violations are committed with wilful intention, the same shall be regarded as a felony and can be punished by imprisonment, a fine or both. If not committed intentionally, the violation shall be considered as a misdemeanour and can be punished by imprisonment, a fine or both.

- 11 What are the most common enforcement issues and how have they been addressed by the regulators and the banks?

This is hard to determine as the CBCS's enforcement policy and cases are confidential.

- 12 How has bank supervision changed in response to the recent crisis?

Lately there has been a slight increase in on-site inspections of all regulated entities, however this is not specifically aimed at banks nor is it a direct result of the recent crisis.

Resolution

- 13 In what circumstances may banks be taken over by the government or regulatory authorities? How frequent is this in practice? How are the interests of the various stakeholders treated?

In Curaçao a bank has never been taken over by the government or regulatory authorities. The CBCS has the authority to withdraw a banking licence under certain circumstances (such as non-compliance with a warning), but this does not mean that the bank is 'taken over' by the government or regulatory authorities.

The CBCS has the authority to request Court of First Instance in Curaçao to issue an emergency measure in the case the interest of the joint creditors in the liquidation of a bank whose licence has been cancelled, calls for special measures. The CBCS shall safeguard the interests of the joint creditors. The CBCS has issued emergency measures on certain occasions in the last couple of years.

- 14 What is the role of the bank's management and directors in the case of a bank failure? Must banks have a resolution plan or similar document?

In case an emergency measure is issued, the CBCS will to the exclusion of any other party, exercise all the powers of the directors and supervisory directors of the credit institution. The CBCS may appoint persons to exercise these powers. The directors and the supervisory directors of the bank must cooperate with the CBCS in any manner the CBCS requests. The CBCS has the power to authorise the directors to perform certain acts and to dismiss directors and supervisory directors.

- 15 Are managers or directors personally liable in the case of a bank failure?

From a regulatory perspective, prosecution can be instituted and punishments can be pronounced against any person who has instructed the bank to commit the punishable act or who has actually directed

the prohibited acts or neglects. A punishable act shall be considered to have been committed by or on behalf of the bank if it is committed by persons who, either on account of an employment relationship or otherwise, are acting in the sphere of the bank, regardless of whether these persons have each of them individually committed that punishable act, or whether elements of that act are present with all of them collectively.

From a corporate law perspective, the members of the board of directors are personally and severally liable towards the legal entity for any loss caused by the improper performance of duties. A member of the board is not liable if they can prove that he or she cannot be blamed for such improper conduct and that the activities concerned fall outside the scope of activities assigned to him or her, and that he or she has not been negligent in taking steps to avert the related consequences. A division of tasks among members of the board can influence the liability. A claim based on this provision can be instituted by the bankruptcy trustee.

16 How has bank resolution changed in response to the recent crisis?

Curaçao banks have not been affected directly by the crisis and resolution has not changed in response.

Capital requirements

17 Describe the legal and regulatory capital adequacy requirements for banks. Must banks make contingent capital arrangements?

A local general bank and a subsidiary of a foreign general bank must have a minimum equity capital of at least 5 million Netherlands Antillean guilders, free and unencumbered.

18 How are the capital adequacy guidelines enforced?

The capital adequacy requirements are requirements for granting a licence. Hence, if they are not met, the CBCS could withdraw an existing licence.

19 What happens in the event that a bank becomes undercapitalised?

See question 18.

20 What are the legal and regulatory processes in the event that a bank becomes insolvent?

An action or petition filed for bankruptcy of a bank – including the institution's own petition – shall not be considered, unless the bank is in possession of a banking licence. If the bank's licence has been rescinded, no decision will be taken about the action of the petition for bankruptcy until the Court of First Instance has given the CBCS the opportunity to express its opinion about the matter. The CBCS has the authority to request the Court to issue an emergency measure if the interest of the joint creditors in the liquidation of a bank whose licence has been cancelled calls for special measures.

21 Have capital adequacy guidelines changed, or are they expected to change in the near future?

To our knowledge, they have not changed and nor are they expected to.

Ownership restrictions and implications

22 Describe the legal and regulatory limitations regarding the types of entities and individuals that may own a controlling interest in a bank. What constitutes 'control' for this purpose?

Persons exercising a considerable influence on the affairs of the bank by means of voting rights derived from shares, or in any comparable manner, must be of high personal integrity. The objectives or antecedents of these persons must not influence the bank in an undesirable way. The ultimate beneficial owners must be known to the CBCS. A natural person, may not, without the approval of the CBCS, directly or indirectly control or hold more than 5 per cent of the bank's capital. The total of individual shareholding by natural persons may not, without the approval of the CBCS, exceed 25 per cent of the total share capital.

23 Are there any restrictions on foreign ownership of banks?

There are no specific restrictions on foreign ownership, but at all times at least two members of the board of managing directors must be residents of Curaçao. Also, the CBCS may decide not to grant a banking licence if the CBCS is of the opinion that the central bank or the authority of the country of origin of the corporation, which is responsible for the supervision of credit institutions, cannot exercise sufficiently adequate and effective supervision on a consolidated basis.

24 What are the legal and regulatory implications for entities that control banks?

The financial statements of the last three years of the parent or affiliated companies of the bank should reflect an unqualified opinion. A banking licence will not be granted or a licence may be withdrawn if, in view of the plans or antecedents of one or more persons exercising a considerable measure of authority in the corporation or institution by means of voting rights derived from shares in the general meeting of shareholders or in a comparable manner, the CBCS is of the opinion that there is or might be undesirable influencing of the corporation or institution. Also, the CBCS may decide not to grant a licence if it has reason to assume that the corporation has applied for the licence with the purpose of circumventing the rules and regulations with respect to the supervision in another state or if the structure of the group to which the bank belongs is such that the CBCS is not in a position to exercise adequate and effective supervision of the bank.

25 What are the legal and regulatory duties and responsibilities of an entity or individual that controls a bank?

No specific conditions or restrictions follow from the law. However, the CBCS may attach certain conditions and restrictions to the banking licence.

26 What are the implications for a controlling entity or individual in the event that a bank becomes insolvent?

The CBCS has regulatory authority over the regulated entity and not its controlling entity. That means that controlling entities indirectly face the consequences that are imposed on the level of the regulated entity.

Changes in control

27 Describe the regulatory approvals needed to acquire control of a bank. How is 'control' defined for this purpose?

Sale or transfer of shares in a supervised credit institution is subject to the prior written approval of CBCS. Banks are prohibited from, among other things, merging or reorganising without approval from the CBCS.

28 Are the regulatory authorities receptive to foreign acquirers? How is the regulatory process different for a foreign acquirer?

Yes. There is no difference. It depends on all the circumstances and information. The CBCS applies different requirements depending on whether the new shareholders are natural persons, non-bank companies or supervised credit institutions, whether foreign or local.

29 What factors are considered by the relevant regulatory authorities in an acquisition of control of a bank?

The management of the credit institution should inform the bank of the intention to sell or transfer the shares by the present shareholders to others by means of a letter, detailing the reasons why the shares

are being sold or transferred, and the consideration paid per share by the new shareholder. The CBCS must also review the antecedents and plans of the prospective shareholders.

In order to evaluate prospective shareholders, reference is made to information related to the identity, financial position and background of the prospective shareholders.

Among the most important factors are the business plan, background of the new shareholders, annual accounts and market analysis. There are numerous other factors that are considered as well.

30 Describe the required filings for an acquisition of control of a bank.

The CBCS needs to provide its prior written approval to an acquisition of control over a bank.

31 What is the typical time frame for regulatory approval for both a domestic and a foreign acquirer?

That depends on how fast the required information is delivered and whether the CBCS is of the opinion that more information is required. It is difficult to provide a hard estimate as all instances differ.

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