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Financials

# Dutch covered bonds

Updated Dutch covered bond law:  
the ins and outs



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## Introduction

**With the transposition of the EU Covered Bond Directive into Dutch law, the Dutch regulator has strived to make sure that not only the provisions of the Covered Bond Directive are met, but also the requirements for preferential treatment from the amended CRR Article 129. Thereby it is ensured that any Dutch covered bond issued per 8 July 2022, and old covered bonds issued under programmes adjusted in line with the new law, will be CRR compliant and able to use the label European Covered Bond (Premium). Old covered bonds from programmes not adapted to the new law, may still be CRR compliant if they continue to meet the old rules.**

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*“The Dutch covered bond law transposing the CBD entered into force on 8 July 2022”*

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The Dutch national measures transposing the EU Covered Bond Directive (EU 2019/2162) (CBD) and the EU Covered Bond Regulation (EU 2019/2160) amending the Capital

Requirements Regulation (CRR) (EU 575/2013) entered into force on 8 July 2022.

The EU Covered Bond Directive has been transposed into Dutch law via:

- The **Implementation Act** Covered Bond Directive of 15 December 2021 (published in the official gazette on 20 January 2022) ([link](#));
- The **Implementation Decree** Covered Bond Directive of 24 May 2022 (published in the official gazette on 13 June 2022) ([link](#)).<sup>1</sup>

There are no additional implementation rules, with the exception of the **Implementation Rule** Covered Bond Directive of 6 January 2022 (published in the government gazette of 21 January 2022) ([link](#)). This implementation rule cancelled chapter 9a on registered covered bonds of the Implementing Regulations FSA (ie, the old implementation rules). It also made some modest amendments to the Regulation on the Performance of Duties on Cross-border Cooperation Financial Supervisors FSA in light of the Covered Bond Directive. These amendments make sure the Dutch central bank will also consider the provisions from the Covered Bond Directive on the cooperation obligation between the competent authority and resolution authority when carrying out its duties.

In this report we give an overview of the changes that were made to the Dutch covered bond legislation in light of the implementation of the Covered Bond Directive. The main purpose of the publication is to give insight in the most important revisions compared to the old law, but also to share specifics on how the provisions from the Covered Bond Directive are exactly covered by the Dutch law. This is done in most detail in Appendix 1 to 3 to this report. Instead, the first part of this publication gives a summary discussion of what we find the most important changes and highlights.

Some revisions to the Dutch covered bond legislation are more noteworthy than others. In our view, particularly the extendable maturity and cover pool monitor provisions stand out for their further detail, while other typical Dutch provisions, such as the healthy ratio requirements and related stress tests, were removed. Meanwhile, the Dutch overcollateralisation requirements have become stricter, not only via the 100% coverage requirement for all liabilities, but also with loan parts above the LTV restriction no longer eligible to meet the 5% nominal overcollateralisation requirement. The 20% cap on substitution assets, now expressed versus the assets in the cover pool, has become a bit more lenient than before, when it was applied versus the covered bonds.

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<sup>1</sup> See the website of the Dutch Association of Covered Bond issuers (DACB) for the English translation ([link](#)).

# The most important takeaways

## Provisions that ceased to apply

When it comes to the implementation of the Covered Bond Directive in the Netherlands, the Dutch government opted to replace the existing covered bond law with new legislation phrased along the lines of the Covered Bond Directive. While the new regulatory provisions do have significant overlap with the old covered bond law, some features of the old covered bond legislation will no longer apply under the new law.

*“It is no longer allowed to issue non-legislative (structured) covered bonds in the Netherlands”*

For instance, the definition ‘registered covered bond’ was deleted from the Dutch law as the new legal requirements make this definition redundant. Besides, the issuance of non-registered (structured) covered bonds is no

longer allowed, unless the term covered bond would not be used in relation to the note. Covered bonds should always be registered to ensure special supervision. It is therefore prohibited to issue Dutch covered bonds without the permission of the Dutch central bank, De Nederlandsche Bank (DNB). The option for DNB to cancel the registration of a covered bond issuer was also removed from the amended legislation, even though there are cases that a permission to issue covered bonds can be revoked.

*“Asset encumbrance will be considered through ongoing prudential supervision, no more via healthy ratio requirements”*

The amended Dutch covered bond law no longer refers to the healthy ratio requirements. Under the old covered bond provisions, DNB would ensure the maintenance, at all times, of a healthy relationship between the nominal

value of the registered covered bonds outstanding and the consolidated balance sheet total of the issuing bank. Instead, per 8 July 2022 asset encumbrance will be considered by DNB in a general manner as part of the ongoing prudential supervision. Therefore, the amended legislation no longer requires that covered bond issuers regularly carry out stress tests to make sure a healthy ratio between the outstanding covered bonds and balance sheet total is maintained, including in periods of financial stress.

*“The geographical scope for cover assets is restricted to the EEA”*

Assets for which the debtor or the collateral assets are located outside the European Economic Area (EEA) cannot be included in the cover pool anymore. Under the old covered

bond rules, banks had the possibility to include cover assets from third countries that were considered by the European Commission as having in place requirements for supervision and regulation at least equivalent as those in the European Union. This change does not make much of a difference as, in practice, the cover assets securing Dutch covered bonds are located in the Netherlands.

The Dutch covered bond law also no longer provides for the possibility to introduce, via a separate decree, an asset segregation mechanism other than by means of a transfer of assets to a separate legal entity (the Covered Bond Company).

## Other important changes to the legal provisions

### Stricter coverage requirements

The old Dutch covered bond regulation provided for two nominal collateralisation requirements related to the outstanding covered bonds:

- A 105% collateralisation requirement where the value of the cover assets should at least be 105% of the nominal value of the covered bonds issued; and

- A 100% asset coverage requirement, which recognised the eligible cover assets only up to their respective CRR LTV cut-off percentages.

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*“Under the new Dutch covered bond legislation, loan parts above the 80% LTV can no longer count towards the legal 5% overcollateralisation requirement”*

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As such, under the old regulatory provisions loan parts above the 80% LTV cut-off could count towards the 5% overcollateralisation requirements. This has changed with the implementation of the Covered Bond Directive.

The Implementation Decree also provides for two coverage requirements, of which the second strengthens the nominal collateralisation provisions applicable under the old law:

- 1) A **100% coverage requirement related to all liabilities**, where the nominal value of all payment obligations related to the covered bonds<sup>2</sup> are fully covered by the total nominal value of the claims for payment attached to the cover assets in the cover pool<sup>3</sup>.
- 2) A **105% coverage requirement related to the outstanding covered bonds**, where the nominal value of the (primary and substitution) cover assets should be at least equal to the aggregate nominal value of the outstanding covered bonds (nominal principle), plus 5% nominal overcollateralisation versus the nominal value of the covered bonds outstanding.

The 105% collateralisation should be comprised of CRR Article 129(1)(a-g) eligible cover assets at nominal value. For the calculation of the nominal value, the CRR Article 129(1)-(3) restrictions apply. These include the applicable soft 80% LTV restriction for residential mortgage loans. Hence going forward, the 80% soft LTV restriction applicable for residential mortgage loans under CRR Article 129 will also apply towards to 5% nominal overcollateralisation requirement. This increases the collateralisation requirements for Dutch covered bonds, particularly after an episode of house price declines when a larger portion of the residential mortgage loans in Dutch cover pools would likely have indexed LTV levels above 80%.

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*“Article 129(1)(c) exposures to the covered bond issuer itself no longer have to be deducted from the cover assets”*

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Uncollateralised claims where a default has occurred, as per CRR Article 178, cannot contribute to the coverage. However, the new Dutch covered bond legislation no longer requires CRR Article 129(1)(c) eligible exposures

to be deducted from the value of the cover assets, if these relate to exposures to the bank issuing covered bonds or to entities belonging to the same group.

### **No mixed pools of residential and commercial mortgage loans**

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*“Only one type of CRR Article 129(1) assets is allowed as primary assets”*

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The Dutch Implementation Decree no longer allows for mixed cover pools comprised of both residential and commercial mortgage loans.

According to the Implementation Decree, a bank issuing covered bonds should include, for at least 80% of the total nominal value of the assets in the cover pool, **one type of eligible assets** under CRR Article 129(1)(a-g) as

<sup>2</sup> These include the interest and redemption payments due on the outstanding covered bonds, the payment obligations related to derivative contracts in the cover pool, and the expected costs related to the maintenance and administration for the winding-down of the covered bond programme.

<sup>3</sup> These include the primary assets, substitution assets, liquid assets held for 180 days liquidity buffer purposes, claims for payments attached to derivative contracts in the cover pool.

primary assets in the cover pool.<sup>4</sup> Only the substitution assets in the cover pool can be comprised of more than one type of eligible cover assets.

Similar to the new provisions, the old Dutch covered bond law also allowed covered bonds to be secured by only one type of primary cover assets. Nonetheless, banks could opt to include both residential and commercial mortgage loans as primary assets, as long as they predetermined a fixed proportion or bandwidth for the ratio between the residential and commercial mortgage loans. In practice however, Dutch covered bonds have always been solely secured by residential mortgage loans.

### Cap on substitution assets measured versus cover assets

*“The 20% cap on substitution assets is now applied versus the cover assets and no longer versus the covered bonds”*

Under the new covered bond legislation, a bank can only include substitution assets in the pool for maximum 20% of the total nominal value of the cover assets (ie, the pool of cover assets must be comprised for at least 80% of ordinary

assets). This is different from the old covered bond provisions where substitution assets were allowed up to 20% of the covered bonds outstanding. Besides, substitution assets are recognised at nominal value under the new law, where they were recognized at market value before.

According to the Implementation Decree, substitution assets can be comprised of one or more of the types of eligible cover assets identified in CRR Article 129(1)(a-g). For the calculation of the nominal value of the primary and substitution cover assets the bank will apply the restrictions stipulated by CRR Article 129(1)-(3). These include the relevant restrictions on the LTV for property loans, exposures to third country sovereigns, and on exposures to institutions. Under the old law only CRR Article 129(1)(a-c) assets (ie, exposures to sovereigns and institutions) were eligible as substitution assets, subject to the applicable limitations.

The amended CRR allows for the inclusion of substitution assets in the cover pool up to the limits on credit quality and exposure size defined under CRR Article 129(1) and (1a) but does not define an overall cap on substitution assets. Under the CRR the total exposures to credit institutions should never exceed 15% of the nominal outstanding covered bonds of the credit institution. Assets contributing to a minimum level of overcollateralization would under CRR Article 129 not be subject to the limits on exposures and would not count towards these limits. The latter also applies under the Dutch covered bond law (per Article 40g(6) Implementation Decree).

The 20% cap on substitution assets under the Dutch legislation is additional to these CRR requirements and as such not in conflict with the CRR. After all, the Dutch asset eligibility criteria are fully compliant with CRR Article 129(1)(a-g). When calculating the nominal value of the cover assets, banks would have to consider the restrictions specified by CRR Article(1)-(3). This includes the 15% cap on exposures to credit institutions.

As such, even at the minimum regulatory overcollateralisation level of 5%, the 15% cap is still binding for exposures to credit institutions. This despite the fact that the Dutch 20% cap on substitution assets versus the outstanding cover assets, would at these lower overcollateralisation levels allow for a somewhat higher amount of substitution assets than the 15% cap for exposures to credit institutions versus the outstanding covered bonds (with the overcollateralisation exempted from this cap) (see Figure 1). This simply means that the small difference would have to be comprised of other eligible substitution assets than exposures to credit institutions.

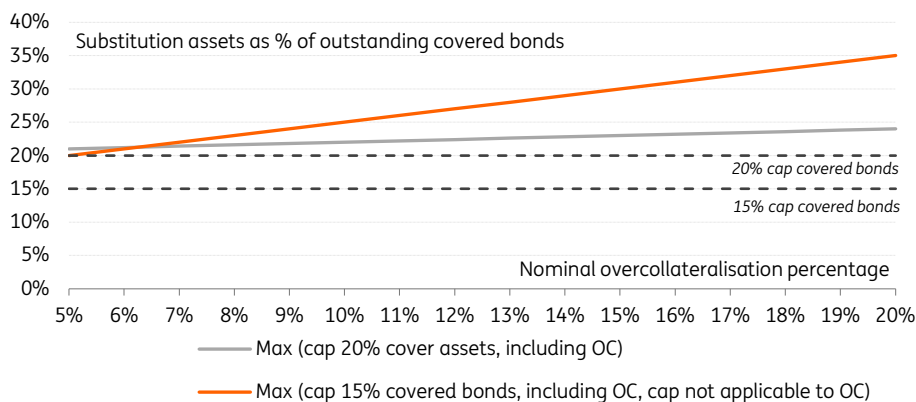
<sup>4</sup> These include public sector exposures, exposures to institutions, residential property loans, guaranteed home loans, commercial property loans or ship loans, all subject to the applicable restrictions stipulated by CRR Article 129 for these respective assets, and -as per the Dutch covered bond law- located within the EEA.

*“A 20% cap versus the total assets allows for somewhat more substitution assets compared to a 20% cap (including the OC) versus the covered bonds”*

Moreover, the Dutch 20% cap on substitution assets measured versus the nominal value of the cover assets rather than versus the outstanding covered bonds excluding the overcollateralisation prevents that, at high overcollateralisation levels, substitution assets

could potentially make up quite a substantial part in the overall coverage. The new 20% cap versus the total cover assets does allow, however, for somewhat more substitution assets in the cover pool compared to the old 20% cap applicable versus the outstanding covered bonds when not exempting the overcollateralisation from the cap.

**Fig 1 Substitution assets: cap vs cover assets stricter than vs covered bonds ex OC**



Source: ING

### A change in liquid asset eligibility requirements

*“Asset eligibility for the 180-day liquidity buffer is now based on the LCR criteria, no longer on CRR Article 129(1)(a-c)”*

The Dutch covered bond legislation already had 180-day liquidity buffer requirements in place. However, with the implementation of the Covered Bond Directive, the asset eligibility requirements for liquid assets did change

somewhat. Where under the old provisions liquid assets had to meet the CRR Article 129 eligibility criteria for public sector exposures and exposures to credit institutions, the new conditions are aligned with the LCR asset eligibility criteria and the amended CRR Article 1(c) criteria for exposures to institutions as per the Covered Bond Directive.

To our understanding, the Netherlands did not use the possibility offered by the Covered Bond Directive to further restrict the types of liquid assets. As such, the following types of liquid assets should be eligible to meet the cover pool liquidity buffer requirements:

- Assets qualifying as **level 1, level 2a or level 2b assets** under **the LCR delegated regulation**, that are valued in accordance with that regulation (ie, market value adjusted for haircuts), and are not issued by the credit institution issuing the covered bonds itself, or a related entity (ie, parent undertaking, another subsidiary entity of this parent or an SPV to which the credit institution has close links)<sup>5</sup>.

However, we do note that, as a brief explanation, the explanatory note to Article 40k Implementation Decree only refers to level 1 and 2a assets, not to level 2b assets;

<sup>5</sup> According to Article 9 of the LCR delegated act, credit institutions have to use the market value of the liquid assets for the purpose of calculating the liquidity coverage ratio. The market value of the liquid assets must be reduced by the haircuts applicable to the liquid assets under the LCR regulation. Also, the net liquidity outflows and inflows that would result in the event of an early close-out of a hedge related to the market risk associated with the liquid assets have to be taken into consideration in the valuation of the relevant liquid asset.

- **Short-term exposures to credit institutions** that qualify for credit quality step 1 or 2, or **short-term deposits to credit institutions** that qualify for credit quality step 1, 2 or 3 in accordance with CRR Article 129(1)(c).

Uncollateralised claims from exposures considered in default (pursuant CRR Article 178) cannot contribute to the cover pool liquidity buffer.

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*“The extended due for payment date remains the reference for the 180-day liquidity buffer requirements”*

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For extendable covered bonds the calculation of the liquidity outflow related to the principal amount will continue to be based on the legal final maturity date of the bond (ie, the extended due for payment date).

### **New provisions on extendable maturity structures**

The Dutch covered bond legislation still allows extendable maturity structures. However, the Implementation Decree no longer makes a distinction between regular covered bonds with a hard bullet structure or a soft bullet structure with an extension period up to 24 months, versus (conditional) pass-through covered bonds where the maturity extension period stretches beyond 24 months. The old Dutch covered legislation also specified that hard and soft bullet covered bonds could be issued under the same programme, while covered bonds with a maturity extension period of more than 24 months (ie, conditional pass-through covered bonds) could not be issued under the same programme as hard and soft bullet covered bonds. With the new provisions effective per 8 July 2022, the Dutch covered bond law no longer contains this explicit restriction.

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*“Maturity extension can take place under different conditions but never at the discretion of the covered bond issuer”*

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Under the new legislation a bank that issues covered bonds with extendable maturities should make sure that ahead of first issuance, the contractual terms of the covered bond programme provide that the maturity cannot

be extended at the bank’s discretion and can only take place in the event of:

- **An issuer event of default:** 1. There is a breach of contract or default of payment by the bank, or any act to that effect, 2. There is a liquidation, dissolution or restructuring of debts of the bank or an arrangement with creditors, or 3. A resolution measure has been applied to the bank or the bank has been declared bankrupt; and
- **A failure by the CBC to meet its obligations:** 1. The covered bond company (CBC) does not have sufficient funds on the maturity date of the covered bonds to repay the principal amount of that covered bond, 2. The CBC cannot meet any of the asset coverage requirements (ie, 100% nominal coverage of all liabilities related to the covered bond programme and 105% nominal coverage of the outstanding covered bonds), or 3. The CBC cannot meet any other contractually agreed requirement with respect to securing the coverage.

A bank that issues covered bonds with an extendable maturity provides, when issuing the covered bond, **information** on the following:

- The conditions for extending the maturity;
- The consequences for a maturity extension of the bankruptcy or resolution of the bank issuing the covered bonds;
- The role of De Nederlandsche Bank with regard to the maturity extension.

The bank that issues covered bonds must make sure that the final maturity date of the covered bond can be determined at all times.



Besides, if the bank has been subject to a resolution measure or has been declared bankrupt, a maturity extension should not affect the ranking in which covered bondholders can recover their claims and shall not reverse the sequencing of the original maturity schedule of the covered bond programme.

Moreover, the maturity extension should not affect the right of a covered bondholder to recover its claim from both the bank and the Covered Bond Company, or the exercise of the rights of the covered bondholder against any third party in relation to that covered bond in the event of a bankruptcy of the bank.

#### **The impact of maturity extension on the repayment schedule**

In line with CBD Article 17(1)(e) in the event of a resolution or a bankruptcy of the issuer a maturity extension should not affect the ranking in which covered bondholders can recover their claim, or the original maturity schedule of the covered bond programme under the Dutch covered bond law. This means that the ranking of covered bond investors or sequencing of the original maturity schedule may still change in the event that a maturity extension would take place outside a situation of resolution or bankruptcy.

The few Dutch covered bond programmes that have hard bullet and soft bullet covered bonds outstanding, do in fact require the full repayment of a hard bullet covered bond falling due during the extension period, before an extended soft bullet covered bond is repaid in part or in full. As such it could be the case that a hard bullet covered bond with a later maturity date than the intended due for payment date on a soft bullet covered bond, is repaid in full before that soft bullet covered bond in the event that the maturity of the latter covered bond was extended.

Furthermore, the pre-maturity test provisions of these covered bond programmes, cover for soft bullet covered bonds alongside hard bullet covered bonds only with reference to the extended due for payment date of the soft bullet covered bonds (similar as the 180-day liquidity rule provisions). Besides, the reference maturity for soft bullet covered bonds for the sale of selected receivables allowed in the event of a failure of the pre-maturity test, or if post issuer default the earliest maturing covered bond matures within twelve months, is the extended due for payment date for soft bullet covered bonds.

This all confirms that the sequencing of the bonds can be altered if a soft bullet covered bond is extended, and as a consequence, a hard bullet covered bond becomes next in line to be repaid ahead of the extended soft bullet covered bond.

#### **Cover pool monitor provisions remain in line with common practice**

The old Dutch covered bond law required the appointment of an external asset monitor ahead of first issuance, that at least annually would check the issuing bank's asset coverage and liquidity coverage calculations.

The Implementation Decree builds further on this, by formalising that a bank issuing covered bonds should appoint an external or an internal **cover pool monitor** before first issuance under a covered bond programme. The cover pool monitor must check at least annually that the bank meets the requirements from Article 3:33b and 3:33ba of the Implementation Act and Articles 40e to 40m of the Implementation Decree. These articles cover the legal requirements on asset segregation, dual recourse, information provisioning towards investors and the supervisor, asset eligibility, asset coverage, valuation, geographical scope, liquidity buffer, documentation, and maturity extension. At least the check of the asset coverage requirements of Article 40g and the liquidity

coverage requirements of Article 40k of the Implementation Decree should always be performed by an accountant. This means that the function of cover pool monitor can be assigned to different parties.

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*“Through the internal cover pool monitor provisions it remains possible to appoint the same accountant as cover pool monitor as the general accountant of the bank”*

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An **external cover pool monitor** has no links with and is independent from the bank that issues the covered bonds and from the external accountant of that bank. Instead, an **internal cover pool monitor** can have ties with the issuing bank, including the external

accountant of the bank. The possibility to appoint an internal cover pool monitor offers Dutch banks the opportunity to continue their current practice, of ensuring through internal processes and controls that the legal requirements are met, while an external accountant checks that the asset coverage and liquidity coverage requirements are met. The accounting firm appointed as internal cover pool monitor can still be the same accountant as the general accountant of the bank. That said, the internal cover pool monitor should be independent from the credit decision process of the bank issuing covered bonds. It can also not be removed from the function as cover pool monitor without prior approval of the supervisory board of the bank (or a comparable body) and has direct access to the bank's supervisory board (or a comparable body).

The bank must report annually to the Dutch central bank regarding the outcome of the checks on Article 40g (asset coverage) and Article 40k (liquidity coverage). It also must ensure that the cover pool monitor has access to all information necessary for the performance of its duties. Besides, the bank should ensure that the checks of the asset coverage requirements and the liquidity coverage requirements continue to take place if and after the bank has entered into resolution or has been declared bankrupt.

## Some questions remaining

The transposition of the Covered Bond Directive into Dutch law still leaves us with some questions. To name an example, the Dutch regulator decided that CBD Article 6(6) did not require additional implementation. After all, the procedures to monitor that the physical collateral assets securing the cover assets are **adequately insured** against the risk of damage, is covered by CRR Article 208(5). However, CRR Article 208(5) does not make explicit that the insurance claim is segregated in line with Article 12 of the CBD. That said, due to the asset segregation provisions of Article 3:33b of the Dutch Implementation Act and Article 40e of the Implementation Decree, the asset segregation requirements under Dutch law should hold for all cover assets, and therefore likely also for insurance claims related to the collateral securing those assets.

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*“Article 40h Implementation Decree does not clearly refer to the annual monitoring requirement from CRR Article 129(3)”*

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Regarding **property valuation and monitoring**, Article 40h(1) of the Dutch Implementation Decree solely refers to CRR Article 208, and not explicitly to the additional annual monitoring requirement from CRR Article 129(3). However,

in the explanatory note to Article 40h of the Implementation Decree, the Dutch regulator does state that compliance with the requirements of Article 208 should ensure that for all real estate and ships annual monitoring must take place, and that more frequent checks could be performed in the event that market circumstances change significantly. Besides the old covered bond legislation (Article 20d (5) of the old implementation rules) also required the valuation of properties to take place on at least an annual basis. Equally comforting that this provision should be met is the fact that the new covered bond law has been designed to only allow for the issuance of CRR compliant covered bonds in the Netherlands.

As discussed in the previous chapter, Article 40k of the Dutch Implementation Decree does not introduce restrictions to the **liquid asset eligibility criteria** of Article 16(3) of the Covered Bond Directive. As such, assets qualifying as level 1, level 2a or level 2b assets under the LCR regulation should in principle be eligible to meet the cover pool liquidity buffer requirements. However, to us, it is confusing that the explanatory note to Article 40k summarises the LCR eligible assets only as level 1 and 2a.

When it comes to the **cover pool monitoring provisions**, the Dutch regulator has strived to align the new cover pool monitor conditions as much as possible with the existing asset monitoring practice, to avoid an unnecessary extra burden for banks. As such, the cover pool monitor must check ahead of first issuance and at least annually thereafter whether the bank meets the requirements. In our view, this may raise the question whether the minimum “annual monitoring” requirement would be sufficient to live up to the CBD requirement of “ongoing monitoring”. After all, Covered Bond Directive Article 13(1) requires that the cover pool monitor appointed, performs ongoing monitoring of the cover pool with regards to the requirements of CBD Article 6-12, and Article 14-17.

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*“The cover pool monitoring provisions are not explicitly exempted from the Dutch transitional measures”*

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We are also a bit uncertain how the Dutch cover pool monitor provisions of the Implementation Decree relate to the requirements on **transitional measures** of the Covered Bond Directive. The transitional

measures of the Covered Bond Directive do not apply to all articles of the Directive, including not to the cover pool monitoring provisions. This means that, per 8 July 2022, these requirements must be met by both the old and new covered bonds in countries that use a cover pool monitor. The Netherlands has made use of the CBD Article 13 option to request banks issuing covered bonds to appoint a cover pool monitor. Article 40n of the Implementation Decree regulates the cover pool monitoring referred to in Article 3:33a(3)(d) in more detail. There is no mentioning in the Dutch transitional measures of Article III Implementation Act that these cover pool monitor provisions would have to be met by both old and new covered bonds. That said, the Dutch regulator has strived to align the new cover pool monitor conditions as much as possible with the old regulatory provisions applicable to the asset monitor and the common practice. As such, covered bonds issued before 8 July 2022 would still likely meet the cover pool monitor requirements from Article 40n Implementation Decree, even if issued under a programme that is not adapted in line with the new law. Covered bonds issued before 8 July 2022 from covered bond programmes adjusted to the new law would be subject to the new cover pool monitor provisions anyway.

# Appendix 1: Article discussion of the structural features of covered bonds

## 4. Dual recourse

Covered bond holders and derivative counterparties related to the covered bond programme, are secured a **claim against the issuing credit institution** (CBD Art 4(1)(a)) through Article 7:129 of the Dutch Civil Code (ie, via existing legislation). Namely, when one party under a loan agreement commits to lend a certain amount of money, the other party commits to repaying the sum of money.

*“Covered bondholders have dual recourse to the cover assets and the bank”*

In the case of insolvency or resolution of the credit institution issuing covered bonds, covered bond holders and derivative counterparties related to the covered bond

programme should have a **priority claim** against the principal and any accrued and future interest **on the cover assets** (CBD Art 4(1)(b)). Article 3:33b of the Dutch Implementation Act specifies, that all liabilities of the covered bonds will be secured by assets whose principal and accrued and future interest are used in priority to redeem the covered bond, should the issuing bank be declared bankrupt or if a decision has been taken with regard to its liquidation as per the Bank Recovery and Resolution Directive (BRRD). Besides, in the Netherlands, Article 57(1) of the Bankruptcy Act makes sure that pledgees and mortgage holders should be able to exercise their rights as if there were no bankruptcy. Article 3:279 of the Dutch Civil Code also ensures that pledges and mortgages take precedence over other privileges, unless otherwise provided by law.

In the case of insolvency of the credit institution issuing covered bonds, and in the event that the **priority claim cannot be fully satisfied**, investors and counterparties of derivative contracts related to the covered bond programme have a **claim** against the insolvency estate of that credit institution. This claim ranks **pari passu with** the claims of the credit institution’s **ordinary unsecured creditors** in line with the national laws covering the ranking in normal insolvency proceedings (CBD Art 4(1)(c)). Article 59 of the Dutch Bankruptcy Act ensures that if the proceeds are not sufficient to pay a pledgee or mortgagee or a person whose limited right has lapsed as a result of foreclosure, they have a claim as unsecured creditor to the remaining insolvency estate for the shortfall.

**Fig 2 Compliance with the dual recourse requirements**

Covered Bond Directive/CRR	Dutch law	Compliance
CBD Article 4(1)(a)	Civil Code (Existing regulation) Article 7:129	Full
Article 4(1)(b)	Bankruptcy Act (Existing regulation) Article 57(1)	Full
	Civil Code (Existing regulation) Article 3:279	
	Implementation Act Article 3:33b (Financial Supervision Act)	
Article 4(1)(c)	Bankruptcy Act (Existing regulation) Article 59	Full
Article 4(2)	No implementation needed	-
Article 4(3)	Member state option not used as only of relevance to specialised mortgage banks	-

\*CBD Article 6(1)(b-c), 6(2-4) and 6(8) (all on non CRR eligible assets) are not applicable at this stage  
Source: Dutch Implementation Act and Implementation Decree, ING

The Covered Bond Directive clarifies that the aforementioned claims should only be limited to the full payment obligations attached to the covered bonds (CBD Art 4(2)).

This provision was not explicitly implemented in the Netherlands. The Dutch regulator believes that even without such an explicit implementation, a claim related to a covered bond cannot exceed its full repayment.

## 5. Bankruptcy remoteness of covered bonds

Payment obligations attached to covered bonds should not be subject to automatic acceleration upon the insolvency or resolution of the credit institution issuing covered bonds as per CBD Article 5. The Dutch Implementation Act introduced amendments to both the Bankruptcy Act and Financial Supervision Act accordingly.

*“Bankruptcy or resolution will not change the rights of Dutch covered bondholders”*

As such, a bankruptcy of the bank issuing covered bonds, will not result in a change in the rights of the covered bondholders with respect to third parties related to the covered bonds. A

resolution decision with reference to a bank issuing covered bonds, also would not result in a change in the rights of the covered bondholders with respect to third parties related to the covered bonds.

**Fig 3 Compliance with bankruptcy remoteness requirements of covered bonds**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 5	Implementation Act	Article 212re (Bankruptcy Act)	Full
		Implementation Act	Article 3A:57(2) (Financial Supervision Act)	

Source: Dutch Implementation Act and Implementation Decree, ING

## 6. Eligible cover assets

*“Only CRR Article 129(1)(a-g) assets are eligible as cover pool assets”*

The Dutch covered bond legislation will continue to accept only those assets that are eligible under Article 129(1)(a-g) of the CRR, provided that for the calculation of the nominal

value of those assets also all restrictions from CRR Article(1)-(3) are considered. These cover assets do provide most security. As such, CBD Article 6(2), 6(3) and 6(4) have not been implemented. However, the Implementation Decree (Article 40q) does leave the option open to allow at a later stage by means of a separate decree, also other high-quality cover assets, or assets in the form of loans to or guaranteed by public undertakings, as eligible cover assets under the Dutch covered bond legislation.

**Fig 4 Compliance with the cover asset eligibility criteria**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 6(1)(a)	Implementation Decree	Article 40h(1)	Full
	Article 6(1)(b-c)	Implementation Decree	Article 40f(1-2)	Full
		Implementation Decree	Article 40q	
	Article 6(2)	No implementation needed		-
	Article 6(3)	No implementation needed		-
	Article 6(4)	No implementation needed		-
	Article 6(5)(a)	Implementation Decree	Article 40h(1-2)	Partial
	Article 6(5)(b-c)	Implementation Decree	Article 40h(3)	Full
	Article 6(6)	No implementation needed	Follows from CRR Article 208	Partial
	Article 6(7)	Implementation Decree	Article 40l(1)	Full
Article 6(8)	No implementation needed			

\*CBD Article 6(1)(b-c), 6(2-4) and 6(8) (all on non CRR eligible assets) are not applicable at this stage

Source: Dutch Implementation Act and Implementation Decree, ING

A bank issuing covered bonds and using physical collateral assets securing the cover assets, such as for CRR Article 129(1)(d-g) residential mortgage loans, commercial mortgage loans or ship loans, has to meet the CRR Article 208 requirements for immovable property collateral on enforceability and on the monitoring of property

values and property valuation. However, Article 40h(1) of the Dutch Implementation Decree solely refers to CRR Article 208, and not to the additional annual monitoring requirement from CRR Article 129(3).

*“Article 40h of the Dutch Implementation Decree does not refer to an annual monitoring requirement for all properties”*

The amended CRR Article 129(3) specifies that the requirements set out in CRR Article 208 should be met. However, it also states that the monitoring of property values in accordance with Article 208(3)(a) should be carried out

frequently and at least annually for all immovable property and ships. As such, CRR Article 129(3) requires the annual monitoring of residential real estate values too, whereas per Article 208(3)(a) this should only be conducted at least every three years.

That said, in the explanatory note to Article 40h of the Implementation Decree, the Dutch regulator does clarify that compliance with the requirements of Article 208 should ensure that **annual monitoring** takes place **for all real estate and ships**. More frequent checks could be performed in the event that market circumstances change significantly. The old covered bond legislation (Article 20d (5) of the old implementation rules) also required the revaluation of properties to take place on at least an annual basis.

#### **The CRR Article 208 requirements for immovable property collateral**

1. Immovable property shall qualify as eligible collateral only where all the requirements laid down in paragraphs 2 to 5 are met.
2. The following requirements on legal certainty shall be met:
  - (a) A mortgage or charge is enforceable in all jurisdictions which are relevant at the time of the conclusion of the credit agreement and shall be properly filed on a timely basis;
  - (b) All legal requirements for establishing the pledge have been fulfilled;
  - (c) The protection agreement and the legal process underpinning it enable the institution to realise the value of the protection within a reasonable timeframe.
3. The following requirements on **monitoring of property values** and on **property valuation** shall be met:
  - (a) Institutions monitor the value of the property on a frequent basis and at a minimum once every year for commercial immovable property and once every three years for residential real estate. Institutions carry out more frequent monitoring where the market is subject to significant changes in conditions;
  - (b) The property valuation is reviewed when information available to institutions indicates that the value of the property may have declined materially relative to general market prices. That review is carried out by a valuer who possesses the necessary qualifications, ability and experience to execute a valuation and who is independent from the credit decision process. For loans exceeding €3 million or 5% of the own funds of an institution, the property valuation shall be reviewed by such valuer at least every three years.

Institutions may use statistical methods to monitor the value of the property and to identify property that needs revaluation.

4. Institutions shall clearly **document** the types of residential and commercial immovable property they accept and their **lending policies** in this regard.

5. Institutions shall have in place procedures to monitor that the property taken as credit protection is **adequately insured** against the risk of damage.

The physical collateral assets are valued at or below the **market value** or **mortgage lending value**.<sup>6</sup> To this purpose the most recent valuation can be taken as a reference. This can be the initial value of the physical asset determined at the time that the mortgage loan was granted, or if applicable, a valuation or revaluation at a later stage as a consequence of the monitoring of the physical asset. Unlike the Covered Bond Directive (Article 6(5)(a)), the Dutch Implementation Decree does not explicitly state that a current valuation should exist at the moment of inclusion in the cover pool.

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*“Property valuation is carried out by a valuer that is qualified and independent from the credit decision process”*

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The valuation of the physical cover assets is carried out by a **valuer** that meets the requirements from CBD Article 6(5)(b-c). This means that the valuation is carried out by a valuer who possesses the necessary

qualifications, ability and experience. Besides, the valuer must be independent from the credit decision process, does not consider speculative elements in the assessment of the value of the physical collateral asset, and documents the value of the physical collateral asset in a transparent and clear manner.

Furthermore, in line with CRR Article 208(3) the explanatory note to Article 40h Implementation Decree clarifies that, for monitoring purposes and for keeping the initial value of the physical asset up to date, statistical methods can be used.

The Dutch regulator decided that CBD Article 6(6) didn't require additional implementation. After all, the procedures to monitor that the physical collateral assets securing the cover assets are **adequately insured** against the risk of damage, is covered by CRR Article 208(5). However, this article does not make explicit that the insurance claim is segregated in line with Article 12 of the CBD. Due to the asset segregation provisions of Article 3:33b of the Dutch Implementation Act and Article 40e of the Implementation Decree, the asset segregation requirements under Dutch law would hold for all cover assets, presumably also for insurance claims related to the physical collateral securing those assets.

As per Article 40l of the Implementation Decree a bank that issues covered bonds should **identify** the primary and substitution assets (of Article 40f of the Implementation Decree) **and document** the compliance of its lending policies with the valuation requirements of Article 40h of the Implementation Decree (ie, compliance with CRR Article 208 and CBD Article 6(5)(b-c)). The bank also registers all transactions relating to the covered bond programme and has adequate and appropriate documentation systems and processes in place to this purpose (as per CBD Article 18(4)).

## 7. Collateral assets located outside the union

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*“The cover assets should be located within the European Economic Area”*

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A bank issuing covered bonds under the Dutch covered bond legislation should ensure that the **debtor of the cover assets** is located within the European Union, or within another member

state of the European Economic Area. The bank should also ensure that, where applicable, the **physical collateral asset** is located within a member state of the European Union, or a member state of the European Economic Area (EEA).

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<sup>6</sup> **Market value** means, for the purposes of immovable property, the estimated amount for which the property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without being under compulsion (CRR Article 4(76)).

**Mortgage lending value** means the value of immovable property as determined by a prudent assessment of the future marketability of the property taking into account long-term sustainable aspects of the property, the normal and local market conditions, the current use and alternative appropriate uses of the property (CRR Article 4(74)).

The Dutch Implementation Decree does not allow covered bond issuers to include assets in the cover pool that are secured by collateral assets located outside the European Economic Area as possible under Article 7 of the Covered Bond Directive. In contrast with Article 20c of the old implementation rules, the new Article 40i of the Implementation Decree no longer refers to the possibility to include third country cover assets from countries that have in place requirements for supervision and regulation that are at least equal to those in the European Union (as per CRR Article 107).

The purpose of restricting the geographical area to the EEA is to ensure that the sale or realisation of the cover assets and associated collateral is legally enforceable. In practice, all cover assets securing Dutch covered bonds are located in the Netherlands.

**Fig 5 Compliance with requirements on collateral assets located outside the union**

Covered Bond Directive/CRR	Dutch law		Compliance
CBD Article 7	Implementation Decree (member state option not used)	Article 40i	Full

Source: Dutch Implementation Act and Implementation Decree, ING

## 8. Intragroup pooled covered bond structures

The Netherlands does not use this member state option.

## 9. Joint funding

The Netherlands does not use this member state option.

## 10. Composition of the cover pool

**Fig 6 Compliance with requirements on the composition of the cover pool**

Covered Bond Directive/CRR	Dutch law		Compliance
CBD Article 10	Implementation Decree	Article 40f	Full

Source: Dutch Implementation Act and Implementation Decree, ING

*“The cover pool consists for at least 80% of one type of eligible primary assets, while the maximum 20% substitution assets can contain more than one type of eligible assets”*

A bank issuing covered bonds includes, for at least 80% of the total nominal value of the assets in the cover pool, one type of eligible assets under CRR Article 129(1)(a-g) as **primary assets** in the cover pool.

**Substitution assets** can only be included in the cover pool for a maximum of 20% of the total

nominal value of the cover assets. These substitution assets can be comprised of one or more of the types of eligible cover assets under CRR Article 129(1)(a-g). This is broader than the old eligibility criteria for substitution assets, which only allowed CRR Article 129(1)(a-c) assets (ie, public sector exposures and exposures to institutions) as substitution assets. Substitution assets were also valued at market value before, where they have to be valued at nominal value under the new legal requirements.

For the calculation of the nominal value of the primary and substitution assets the bank will consider the restrictions of CRR Article 129(1)-(3). These include the limits on the LTVs of eg residential property loans and the limits on credit quality and exposure size applicable to exposures to institutions.



**Limits on credit quality and exposure size for exposures to institutions**

CRR Article 129(1)(c) renders the following exposures to institutions eligible:

Exposures to credit institutions that qualify for credit quality step (CQS) 1 or credit quality step 2, or exposures to credit institutions that qualify for credit quality step 3 where those exposures are in the form of:

- i. Short-term deposits with an original maturity not exceeding 100 days, where used to meet the cover pool liquidity buffer requirement of CBD Article 16;
- ii. Derivative contracts that meet the requirements of CBD Article 11(1), where permitted by the competent authority.

CRR Article 129(1a) applies the following **caps on exposures to institutions**:

- a. For exposures to credit institutions that qualify for CQS1, the exposure shall not exceed 15% of the nominal amount of outstanding covered bonds of the issuing credit institution;
- b. For exposures to credit institutions that qualify for CQS2, the exposure shall not exceed 10% of the nominal amount of outstanding covered bonds of the issuing credit institution;
- c. For exposures to credit institutions that qualify for CQS3 that take the form of short-term deposits, or the form of derivative contracts, the total exposure shall not exceed 8% of the nominal amount of outstanding covered bonds of the issuing credit institution;

The competent authority may, after consulting EBA, allow exposures to credit institutions that qualify for CQS3 in the form of derivative contracts, provided that significant potential concentration problems would arise in the member state due to the application of CQS1 and 2 requirements.

- d. The total exposure to credit institutions that qualify for CQS1, 2 or 3 shall not exceed 15% of the nominal amount of outstanding covered bonds of the issuing credit institution, and the total exposure to credit institutions that qualify for CQS2 or 3 shall not exceed 10% of the nominal amount of outstanding covered bonds of the issuing credit institution.

*“Mixed cover pools of residential and commercial real estate assets are no longer allowed”*

The Dutch covered bond law still allows covered bonds to be secured by only one type of primary cover assets. Under the old covered bond law banks could include however both residential and commercial mortgage loans as primary assets, if they would predetermine a fixed proportion or a bandwidth for the ratio between the residential and commercial mortgage loans. The Implementation Decree no longer allows for mixed cover pools comprised of both residential and commercial mortgage loans. In practice Dutch covered bonds are solely secured by residential mortgage loans anyway.

## 11. Derivative contracts in the cover pool

*“Derivative contracts can solely be included in the cover pool for risk hedging purposes for the covered bondholders”*

A bank issuing covered bonds should ensure that derivative contracts are exclusively included in the cover pool for risk hedging purposes for the covered bond holders. The volume of the derivative contract will be adjusted in the case of a reduction in the hedged risk. Besides, a derivative contract will be removed from the cover pool if the hedged risk ceases to exist.

Derivative contracts can only be included in the cover pool if they meet the following conditions:

- The derivative contract is **sufficiently documented**. This is the case if the contract is drawn up in accordance with an (internationally) accepted market standard. An example are the standards laid down in the context of the applicable ISDA Master Agreement;<sup>7</sup>
- The derivatives contract **cannot be terminated upon the insolvency or resolution** of the credit institution that issued the covered bond;
- The hedging counterparty is a financial institution subject to supervision. This includes for instance banks and investment companies;
- In case of loss of sufficient creditworthiness of the hedging counterparty, the derivatives contract should oblige the counterparty to provide adequate security or to have itself replaced as a counterparty.

*“In the case of loss of sufficient creditworthiness, the hedging counterparty should provide sufficient security or have itself replaced”*

The latter two specifications are Dutch law specific, meeting the CBD Article 11(2)(a) requirement for member states to specify the eligibility criteria for the hedging counterparties related to derivative contracts in the cover pool. The Dutch law does not explicitly define the

‘sufficient creditworthiness’ of the hedging counterparty. This is done in the programme documentation of covered bond programmes.

**Fig 7 Compliance with requirements on derivative contracts in the cover pool**

Covered Bond Directive/CRR	Dutch law		Compliance
CBD Article 11(1), 1 <sup>st</sup> sentence	Implementation Decree	Article 40j(1)	Full
Article 11(1)(a), 1 <sup>st</sup> sentence	Implementation Decree	Article 40j(1), 40j(2)	Full
Article 11(1)(a), 2 <sup>nd</sup> sentence	Implementation Decree	Article 40j(2)	Full
Article 11(1)(b)	Implementation Decree	Article 40j(3)(a)	Full
Article 11(1)(c)	Implementation Decree	Article 40e	Full
Article 11(1)(d)	Implementation Decree	Article 40j(3)(b)	Full
Article 11(1)(e)	Implementation Decree	Article 40j(3)(a-d)	Full
Article 11(2)(a)	Implementation Decree	Article 40j(3)(c)	Full
Article 11(2)(b)	Implementation Decree	Article 40j(3)(a)	Full

Source: Dutch Implementation Act and Implementation Decree, ING

There is also no explicit mentioning of the fact that derivative contracts should be segregated in accordance with CBD Article 12(1)(c). However, due to the asset segregation provisions of Article 3:33b of the Dutch Implementation Act and Article 40e of the Implementation Decree, the asset segregation requirements under Dutch law hold for all cover assets, including derivative contracts.

## 12. Segregation of the cover assets

*“Asset segregation takes place through the transfer of assets to a separate legal entity”*

A bank that issues covered bonds, ensures that the cover assets related to a covered bond programme are secured by transfer under general or special title to another legal

entity (ie, the Covered Bond Company), subject to the following conditions:

- The legal entity was, with the exclusion of any other activities, only set up to segregate the cover assets related to the covered bond programme from the assets of this bank and to do whatever is necessary or desirable for the respective covered bond programme;

<sup>7</sup> The ISDA Master Agreement is a standardised agreement drawn by the International Swaps and Derivatives Association (ISDA), an organisation for over-the-counter derivatives traders worldwide.

- The bank, including any other legal entities belonging to the same group, does not hold shares in the legal entity, has no policy-setting authority and has no ownership interest in any other way in this entity.

These requirements aim to make sure that the legal entity is fit for purpose. As such, the Covered Bond Company cannot perform any other tasks than necessary or required for the covered bond programme. This must be safeguarded through a description of its purpose in the articles of association. In practice, the description of purpose may not exclude the use of the legal entity for multiple covered bond programmes. This is only permitted though if the Covered Bond Company has committed itself in the applicable terms and conditions to exclusively facilitate one programme.

The activities that the Covered Bond Company can perform on behalf of the covered bond programme include: entering into agreements for the administration and management of the cover assets, or for liquidity and risk management purposes, as well as into other agreements on behalf of the covered bond programme and consistent with the interest of covered bondholders. These include derivative contracts, servicer agreements, cover pool monitor agreements and management agreements. As such, the Covered Bond Company is allowed to make payments related to these agreements. The Covered Bond Company is also authorised to pledge the cover assets to a third party (Security Trustee) as long as this is in the best interest of the covered bondholders.

The bank or any related group entity cannot hold shares in the Covered Bond Company, has no policy-setting authority and also has no ownership interest in any other way in this entity. This ensures that the governance of the Covered Bond Company remains intact, irrespective of a bankruptcy of the covered bond issuer.

*“The asset segregation provisions are unchanged versus the old law”*

These requirements are in line with the old Article 40e provisions on asset segregation with the difference that the new Article 40e no longer provides for the possibility to introduce

other asset segregation types by means of a separate ministerial decree. Other means of asset segregation have in practice never been used by Dutch covered bond issuers.

**Fig 8 Compliance on the segregation of the cover assets**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 12(1)(a)	Implementation Decree	Article 40e(2)	Full
	Article 12(1)(b)	Implementation Decree	Article 40e(1)	Full
	Article 12(1)(c)	Implementation Decree	Article 40e	Full
	Article 12(1), second paragraph	Implementation Decree	Article 40e	Full
	Article 12(2)	Implementation Act	Article 3:33b(1)	Full

Source: Dutch Implementation Act and Implementation Decree, ING

According to the transposition table in the appendix to the Implementation Decree, the asset segregation provisions from Article 40e should also cover for CBD Article 12(1)(c) and CBD Article 12(1) second paragraph. CBD Article 12(1)(c) requires that the cover assets are protected from any third-party claims and no cover asset should form part of the insolvency estate of the credit institution issuing covered bonds until the priority claim has been satisfied. CBD Article 12(1) second paragraph states that for the purpose of the cover asset segregation requirements, the cover assets should also include any collateral received in connection to derivative contract positions. These two requirements are not explicitly mentioned in Article 40e of the Implementation Decree.

In line with the requirements from CBD Article 12(1)(a), Article 40e(2) of the Implementation Decree does make explicit that the bank should always be able to identify the cover assets of the covered bond programme. This ensures that the bank can at any time determine which assets have been transferred to the Covered Bond

Company so that in the event of the bankruptcy of the bank that issued covered bonds, the cover assets available at that time can always be identified.

Article 33:3b(1) of the Implementation Act states that all liabilities of the covered bonds will be secured by a cover pool of assets whose principal and accrued and future interest are used in priority to redeem the covered bond, should the issuing bank be declared bankrupt or be resolved under the BRRD. According to the transposition table of the Implementation Decree, this should regulate that the segregation of cover assets also applies in the case of insolvency or resolution of the credit institution issuing covered bonds, as required per CBD Article 12(2).

### 13. Cover pool monitor

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*“The Dutch covered bond law allows for the appointment of an external cover pool monitor or an internal cover pool monitor”*

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The Netherlands has made use of the option under Article 13(1) of the Covered Bond Directive to appoint a cover pool monitor that has to perform the ongoing monitoring of the cover pool regarding the requirements set out

in CBD Articles 6-12 and 14-17. To align the new legislation as much as possible with the current practice, the Dutch regulator allows banks to appoint an internal or an external cover pool monitor. The cover pool monitor must check at least annually if the bank meets the requirements from Article 3:33b and 3:33ba of the Implementation Act and Articles 40e to 40m of the Implementation Decree.

A bank issuing covered bonds ensures that an **external cover pool monitor** is appointed ahead of first issuance under a covered bond programme, that has no links with and is independent from the bank that issues the covered bonds and from the external accountant of that bank. This cover pool monitor should check at least annually that the bank meets the requirements of Article 3:33b and 3:33ba of the Implementation Act and Articles 40e to 40m of the Implementation Decree. The check of the asset coverage requirements of Article 40g and the liquidity coverage requirements of Article 40k of the Implementation Decree should at least be performed by an accountant. As such the function of cover pool monitor can in fact be assigned to different people.

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*“The internal cover pool monitor can have ties with the bank, including with the external accountant of the bank”*

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Banks can also appoint an **internal cover pool monitor** that does have ties with the issuing bank, such as the external accountant of the bank. At least the annual check of the bank's compliance with the asset coverage

requirements (Article 40g) and the liquidity coverage requirements (Article 40k) is performed by an accountant. Hence, also the function of internal cover pool monitor can be assigned to different parties. This offers banks the opportunity to continue their current practice, of ensuring through internal processes and controls (administrative organisation and internal control (AO/IC)) that the legal requirements are met, while the external accountant of the bank checks that the asset coverage and liquidity coverage requirements are met. The internal cover pool monitor: a) should be independent from the credit decision process of the bank issuing covered bonds, b) cannot be removed from the function as cover pool monitor without prior approval of the supervisory board of the bank (or a comparable body), and c) has direct access to the bank's supervisory board (or a comparable body).

The bank ensures that the checks of the asset coverage requirements and the liquidity coverage requirements continue to take place if and after the bank has entered into resolution or has been declared bankrupt. The bank reports annually to the Dutch central bank regarding the outcome of the checks on Article 40g (asset coverage) and

Article 40k (liquidity coverage). The bank also ensures that the cover pool monitor has access to all information necessary for the performance of its duties.

**Fig 9 Compliance with the cover pool monitoring requirements**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 13(1)	Implementation Decree	Article 40n(1-2)	Full
	Article 13(2)(a)	Implementation Decree	Article 40n(1-3)	Full
	Article 13(2)(b)	Implementation Decree	Article 40n(3)	Full
	Article 13(2)(c)	Implementation Decree	Article 40n(4)	Full
	Article 13(2)(d)	Implementation Decree	Article 40n(5)	Full
	Article 13(2)(e)	Implementation Decree	Article 40n(6)	Full
	Article 13(3)	Implementation Decree	Article 40n(2)	Full
	Article 13(4)	No implementation required	(Information to EBA)	-

Source: Dutch Implementation Act and Implementation Decree, ING

## 14. Investor information

*“Banks issuing covered bonds have to provide investors with information on at least a quarterly basis”*

A bank running a covered bond programme, provides investors at least on a quarterly basis with sufficient detailed information regarding the covered bond programme. This allows investors to assess the profile and risks of that

programme and to carry out their due diligence. The information will also be published on the website of the bank issuing covered bonds.

The information to be provided includes in any event the minimum portfolio information stipulated in Article 14(2) of the Covered Bond Directive:

- The **value** of the **cover pool** and the outstanding **covered bonds**;
- A **list of the ISINs** for all covered bond issues under the programme, to which an ISIN has been attributed;
- The **geographical distribution** and **type of cover assets**, their loan size and valuation method;
- Details in relation to **market risk**, including interest rate risk and currency risk, and credit and liquidity risks;
- The **maturity structure** of the cover assets and covered bonds, including an overview of the maturity extension triggers if applicable;
- The **levels of** required and available **coverage**, and the levels of statutory, contractual and voluntary overcollateralisation;
- The percentage of **loans** where a **default** is considered to have occurred pursuant CRR Article 178 and in any case where the loans are more than 90 days past due.

**Fig 10 Compliance with investor information requirements**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 14	Implementation Act	Article 3:33ba(1)	Full

Source: Dutch Implementation Act and Implementation Decree, ING

\*) CBD information provisions on intragroup pooled covered bond structures do not apply

## 15. Coverage requirements

*“100% coverage of all liabilities and 105% coverage of the covered bonds”*

In line with the Covered Bond Directive and amended CRR, the Dutch Implementation Decree provides for two coverage requirements,

- 1) A nominal **100% coverage requirement of all liabilities** related to the covered bond programme;
- 2) A nominal **105% coverage requirement of the outstanding covered bonds**.

### 1. 100% coverage requirement related to all liabilities

Under the 100% coverage requirement related to all liabilities, the nominal value of all payment obligations related to the covered bonds are fully covered by the total nominal value of the claims for payment attached to the cover assets that are part of the cover pool. The payment obligations include at least:

- The obligations for the payment of the **principal** amount of the outstanding covered bonds;
- The obligations for the payment of any **interest** on the outstanding covered bonds;
- The payment obligations attached to **derivative contracts** in the cover pool;
- The **expected costs** related to the maintenance and administration for the winding-down of the covered bond programme.<sup>8</sup>

Unlike Article 15(4) of the Covered Bond Directive, Article 40g of the Dutch Implementation Decree and Article 3:33b of the Implementation Act do not precisely define the claims for payment attached to the cover assets contributing to the coverage requirement. However, from the Implementation Decree it becomes clear that the cover assets, which per Article 15(4) of the Covered Bond Directive can contribute to the coverage requirements, are under the Dutch law all eligible for inclusion in the cover pool. These include the eligible primary assets (Article 40f Implementation Decree), substitution assets (Article 40f Implementation Decree), liquid assets held for the 180 days liquidity buffer (Article 40k Implementation Decree) and the claims for payments attached to derivative contracts in the cover pool (Article 40j Implementation Decree).

The Dutch covered bond law also specifies that for the calculation of the interest payments due on the covered bonds, and the interest revenues to be received on the cover assets, the nominal value will be considered (40g(5) Implementation Decree).

### 2. 105% coverage requirement related to the outstanding covered bonds

Under the 105% coverage requirement related to the outstanding covered bonds, the nominal value of the (combined primary and substitution) cover assets should be at least equal to the aggregate nominal value of the outstanding covered bonds (nominal principle), plus a 5% nominal overcollateralisation requirement.

*“Loan parts above the 80% LTV can no longer count towards the 5% nominal overcollateralization requirement”*

The 105% coverage requirement should be comprised of CRR Article 129(1)(a-g) eligible cover assets at nominal value. For the calculation of the nominal value, the CRR Article 129(1)-(3) restrictions apply. These

include the applicable soft 80% LTV restriction for residential mortgage loans. Hence going forward, the 80% soft LTV restriction applicable for residential mortgage loans under CRR Article 129 will also apply towards to 5% nominal overcollateralisation requirement.

This in essence increases the collateralisation requirements for Dutch covered bonds under the new regime, particularly following an episode of house price declines when the portion of the residential mortgage loans in Dutch cover pools with LTV levels above 80% would likely increase. Under the old covered bond regime, there were also two collateralisation requirements, but only with reference to the outstanding covered bonds: 1. A 105% collateralisation requirement where the value of the cover assets should be at least 105% of the nominal value of the covered bonds issued, and 2) a 100% asset coverage requirement, which recognizes the eligible assets securing the covered bonds only up to their respective CRR LTV cut-off percentages. Hence under the

<sup>8</sup> For the calculation of the expected winding-down costs, a lump-sum calculation instead of the nominal value can be used. The lump-sum calculation is comprised of the higher of at least 4bp of the nominal value of the outstanding covered bonds, or a fixed amount of €400,000 (Article 40g(4) Implementation Decree).

old law loan parts above the 80% LTV cut-off could count towards the 5% overcollateralisation requirements.

In line with the amended CRR Article 129, the Dutch Implementation Decree does not subject assets contributing to the 5% nominal overcollateralisation requirement to the Article 129(1a) limits on exposures to credit institutions (see the box under point 10).

**Fig 11 Compliance with the coverage requirements**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 15(1)	Implementation Act	Article 3:33b(1-2)	Full
	Article 15(2)	Implementation Decree	Article 40g(1)	Full
	Article 15(3), paragraph 1	Implementation Act	Article 3:33b(2)	Full
		Implementation Decree	jo. Article 40g(4)	
	Article 15(3), paragraph 2	Implementation Decree	Article 40g(4)	Full
	Article 15(4), paragraph 1	Implementation Decree	Article 40f(1), 40f(2), 40k and 40 j	Full
			Article 40g(3)	Full
	Article 15(4), paragraph 2	Implementation Decree	Article 40g(3)	Full
	Article 15(5)	Implementation Decree	Article 40g(1)	Full
	Article 15(6), paragraph 1	Implementation Decree	Article 40g(2)	Full
Article 15(6), paragraph 2	No implementation required	(Member state option not used)		
Article 15(6), paragraph 3	Implementation Decree	Article 40g(5)	Full	
		No implementation required	(Member state option not used)	
Article 15(7)	No implementation required	(Member state option not used)		
Article 15(8)	Implementation Decree	Article 40f	Full	
CRR	Article 129(3a)	Implementation Decree	Article 40g(2)	Full

Source: Dutch Implementation Act and Implementation Decree, ING \*) Member state options CBD Article 7 (close correspondence) and CBD Article 8 (part on the use of a different calculation methodology) are not used.

In line with CBD Article 15(4) second paragraph, uncollateralised claims where a default is considered to have occurred pursuant to CRR Article 178, cannot contribute to the coverage (40g(3) Implementation Decree).<sup>9</sup> This is unchanged versus the old law.

However, the new Dutch legislation no longer requires CRR Article 129(1)(c) eligible exposures to be deducted from the value of the cover assets, if these relate to exposures to the bank issuing covered bonds or to entities belonging to the same group.

CBD Article 15(5) refers to the rules that member states should lay down on the valuation of the payment obligations and claim for payment under derivative contracts. It follows from 40g(1) Implementation Decree that this should be a nominal valuation.

## 16. Requirements for a cover pool liquidity buffer

*“The cover pool should include a liquidity buffer covering 180 days of net liquidity outflow”*

A bank that issues covered bonds should make sure that the cover pool always includes a liquidity buffer composed of liquid assets available to cover the net

liquidity outflow of the covered bond programme.<sup>10</sup> The cover pool liquidity buffer shall cover the maximum cumulative net liquidity outflow over the next 180 days.

Article 40k of the Dutch Implementation Decree does not apply restrictions to the liquid asset eligibility criteria stipulated in Article 16(3) of the Covered Bond Directive. As such,

<sup>9</sup> Per CRR Article 178, a default is considered to have occurred with regard to a particular obligor when either or both of the following have taken place: 1. The institution considers that the obligor is unlikely to pay its credit obligations to the institution, the parent undertaking or any of its subsidiaries in full, without recourse by the institution to actions such as realising the security; 2. The obligor is past due more than 90 days on any material credit obligation to the institution, the parent undertaking or any of its subsidiaries. Competent authorities may replace the 90 days with 180 days for exposures secured by residential or SME commercial real estate in the retail exposure class, as well as exposures to public sector entities). The 180 days shall not apply for the purposes of CRR Article 127.

<sup>10</sup> CBD Article 3(16) defines the ‘net liquidity outflow’ as all payment outflows falling due on one day, including principal and interest payments and payments under derivative contracts of the covered bond programme, net of all payment inflows falling due on the same day for claims related to the cover assets.

the following types of liquid assets should in principle be eligible to meet the cover pool liquidity buffer requirements:

- Assets qualifying as level 1, level 2a or level 2b assets under the LCR regulation, that are valued in accordance with that regulation and are not issued by the credit institution issuing the covered bonds itself, or a related entity (ie, parent undertaking, another subsidiary entity of this parent or an SPV to which the credit institution has close links);

However, to us it is somewhat confusing that the explanatory note to Article 40k summarises the eligible assets under the LCR regulation only as level 1 and 2a.

- Short-term exposures to credit institutions that qualify for credit quality step 1 or 2, or short-term deposits to credit institutions that qualify for credit quality step 1, 2 or 3 in accordance with CRR Article 129(1)(c).

Uncollateralised claims from exposures considered in default (pursuant CRR Article 178) cannot contribute to the cover pool liquidity buffer.

*“For extendable covered bonds, the principal outflows will be based on the final (extended) maturity date”*

For extendable covered bonds the calculation of the liquidity outflow related to the principal amount will, unchanged, be based on the legal final maturity date of the bond (extended due for payment date).

**Fig 12 Compliance with conditions for a cover pool liquidity buffer**

Covered Bond Directive/CRR	Dutch law		Compliance
CBD Article 16(1)	Implementation Decree	Article 40k(1)	Full
Article 16(2)	Implementation Decree	Article 40k(2)	Full
Article 16(3), paragraph 1	Implementation Decree	Article 40k(4)	Full
	Implementation Decree	Article 40e(1)	
Article 16(3), paragraph 2	Member state option not used	(No restrictions on liquid asset types)	-
Article 16(3), paragraph 3	Implementation Decree	Article 40k(5)	Full
Article 16(4)*	Transitional law	LCR delegated act has been amended	-
Article 16(5)	Implementation Decree	Article 40k(3)	Full
Article 16(6)*	Member state option not used		-

Source: Dutch Implementation Act and Implementation Decree, ING

\*) CBD 16(4) (overlap LCR) and 16(6) (match funding) not applicable or covered by LCR revisions

## 17. Conditions for extendable maturity structures

The Dutch Implementation Decree no longer makes a distinction between regular covered bonds with a hard bullet structure or a soft bullet structure with an extension period up to 24 months, and (conditional) pass-through covered bonds where the maturity extension period stretches beyond 24 months. The old Dutch covered legislation specified that, while hard and soft bullet covered bonds could be issued under the same programme, covered bonds with a maturity extension period of more than 24 months (ie, conditional pass-through covered bonds) could not be issued under the same programme as hard and soft bullet covered bonds.

*“Dutch banks are allowed to issue extendable covered bonds”*

That said, Dutch banks can still issue covered bonds with extendable maturities. In that case ahead of first issuance the contractual terms and conditions of the covered bond

programme should provide that the maturity cannot be extended at the bank’s discretion and can only take place if the following conditions apply:



- One or more of the following **‘issuer events of default’** have occurred: 1. There is a breach of contract or default of payment by the bank, or any act to that effect, 2. There is a liquidation, dissolution or restructuring of debts of the bank or an arrangement with creditors, or 3. A resolution measure has been applied to the bank or the bank has been declared bankrupt; and
- One or more of the following **‘failures on behalf of the covered bond company’** have occurred: 1. The covered bond company (CBC) does not have sufficient funds on the maturity date of the covered bonds to repay the principal amount of that covered bond, 2. The CBC cannot meet any of the asset coverage requirements (ie, 100% nominal coverage of all liabilities related to the covered bond programme and 105% nominal coverage of the outstanding covered bonds), or 3. The CBC cannot meet any other contractually agreed requirement with respect to securing the coverage.

It is up to the parties involved to formulate the extension contractually within the boundaries of CBD Article 17. For example, they should decide by which period the maturity can be extended, whether the holders of covered bonds have an effect on the extension, as well as whether a decision by the CBC is necessary for the extension or if the situation where the aforementioned two conditions are met results in an extension.

A bank that issues covered bonds with an extendable maturity provides, when issuing the covered bond, **information** on the following:

- The conditions for extending the maturity;
- The consequences for a maturity extension of the bankruptcy or resolution of the bank issuing the covered bonds;
- The role of De Nederlandsche Bank regarding the maturity extension.

When granting permission for a covered bond programme, DNB checks whether all the conditions of Article 40m of the Implementation Decree regarding maturity extension are met. DNB has no role as supervisor in the event that a bank would extend the term of a covered bond. However, DNB must be informed in time if a bank intends to extend the maturity of a covered bond.

The bank that issues covered bonds must make sure that the final maturity date of the covered bond can always be determined. The final maturity date refers to the contractual maturity date vis-à-vis the Covered Bond Company.

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*“Maturity extension should not invert the sequencing of the maturity schedule”*

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Besides, if the bank has been subject to a resolution measure or has been declared bankrupt, a maturity extension should not affect the ranking in which covered

bondholders can recover their claims, and should not invert the sequencing of the original maturity schedule of the covered bond programme.

Moreover, the maturity extension should not affect the right of a covered bondholder to recover its claim from both the bank and the Covered Bond Company (dual recourse), or the exercise of the rights of creditors as referred to in Article 212re of the Bankruptcy Act<sup>11</sup> (bankruptcy remoteness).

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<sup>11</sup> Article 212re of the Bankruptcy Act stipulates that a declaration of bankruptcy of a bank that has issued covered bonds shall not modify the rights of the holder of a covered bond against any third party in relation to that covered bond.

**Fig 13 Compliance with conditions for extendable maturities**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 17(1)	Implementation Decree	Article 40m(1-5)	Full
	Article 17(1)(a)	Implementation Decree	Article 40m(1)	Full
	Article 17(1)(b)	Implementation Decree	Article 40m(1)	Full
	Article 17(1)(c)	Implementation Decree	Article 40m(2)	Full
	Article 17(1)(d)	Implementation Decree	Article 40m(3)	Full
	Article 17(1)(e)	Implementation Decree	Article 40m(4)	Full
	Article 17(1)(f)	Implementation Decree	Article 40m(5)	Full
	Article 17(2)	No implementation needed		-

Source: Dutch Implementation Act and Implementation Decree, ING

# Appendix 2 Article discussion of covered bond public supervision

## 18 Covered bond public supervision

*“Dutch banks are prohibited from issuing covered bonds without the permission of De Nederlandsche Bank”*

Article 3:33a(1) of the Implementation Act implies that covered bond issuance is subject to special supervision (CBD Art 18(1)) and that, to this purpose, a competent authority has been designated (CBD Art 18(2)). This follows from

the fact that any bank located in the Netherlands is prohibited from issuing covered bonds without the permission of the Dutch central bank (De Nederlandsche Bank). The Dutch law does not explicitly mention that the European Commission and EBA should be informed of the fact that the Dutch central bank is the designated competent authority, and that any division of functions and duties should be indicated (CBD Art 18(2)).

According to the Dutch regulator, no implementation was needed for CBD Article 18(3). This article requires the designated competent authority to monitor the issue of covered bonds to assess compliance with the national provisions transposing the Covered Bond Directive. We believe this requirement is met via Article 3:33a(2), which ensures that issuance permission will only be granted if the bank proves to meet:

- The legal requirements regarding the programme of operations, the management of the covered bond programme, and the administrative structure of the cover pool and the monitoring thereof (Article 3:33a(3-4) Implementation Act);
- The legal requirements safeguarding the priority claim of the covered bond programme's liabilities to the principal amount and accrued and future interest on the assets in the cover pool (Article 3:33b Implementation Act); and
- The information requirements towards investors and De Nederlandsche Bank (Article 3:33ba Implementation Act).

Furthermore, CBD Article 18(3) should also be met through the legal provisions covering the requirements from CBD Article 22, specifically Article 22(2)(b), which grants the competent authority power to regularly review compliance with the covered bond law.

**Fig 14 Compliance with conditions covered bond public supervision**

Covered Bond Directive/CRR	Dutch law		Compliance	
CBD	Article 18(1)	Implementation Act	Article 3:33a(1)	Full
	Article 18(2)	Implementation Act	Article 3:33a(1)	Partial
	Article 18(3)	No implementation needed		Full
	Article 18(4)	Implementation Decree	Article 40(2)	Full
	Article 18(5)	Financial Supervision Act (existing regulation)	Article 1:72, 1:74, 1:75, 1:79 and 1:80	Full
		General Administrative Law Act (existing regulation)	jo. Article 5:11, 5:16 and 5:17	
Article 18(6)	No implementation needed		-	

Source: Dutch Implementation Act and Implementation Decree, ING

The bank that issues covered bonds is required to register all transactions in relation to the covered bond programme and should have adequate and appropriate documentation systems and documentation processes in place (Article 40(2) of the Implementation Decree, transposing CBD Article 18(4)).

For the purpose of Article 18(5) of the Covered Bond Directive, appropriate measures should be in place to enable the competent authority to obtain the information

necessary to assess the compliance with the Dutch requirements transposing the Covered Bond Directive, investigate possible breaches of those requirements, and impose administrative penalties and other administrative measures. Several existing regulatory provisions under both the Dutch General Administrative Law Act and the Financial Supervision Act provide the Dutch supervisor with such authority.

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*“The supervisor can request information and impose administrative penalties and other administrative measures”*

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- The Dutch General Administrative Law Act defines the term **supervisor**, as ‘a person charged by, or pursuant to, a statutory regulation with supervising compliance with the provisions of, or pursuant to, any statutory regulation’ (Article 5:11). The supervisor is authorized to request information (Article 5:16). He is also authorized to 1. demand inspection of business data and documents, 2. make copies of the data and documents, and 3. if the copies cannot be made on site, to bring the data and documents for a short period of time, against written proof given by him (Article 5:17).
- The Financial Supervision Act regulates that persons designated by a decision of the supervisory authority are responsible for the supervision of the compliance with the rules laid down in the Financial Supervision Act (Article 1:72). These rules include the regulatory provisions related to the issuance of Dutch covered bonds. The supervisor may **request information** from anyone to perform a task under the Financial Supervision Act (Article 1:74(1)), as such also for supervision of the compliance with the covered bond rules. The supervisor will exercise his powers only insofar as this can reasonably be assumed necessary for the performance of his duties. Everyone is obliged to fully cooperate with the supervisor, who would reasonably demand this in the exercise of his powers, within the reasonable time limit he may specify. Any person who is bound by a duty of secrecy by virtue of his office or profession or by statutory regulation may refuse to cooperate insofar as his duty of secrecy makes this necessary (Article 1:72(2)). The Dutch Authority Financial Markets and Dutch central bank will not request information until the other has been asked to provide this information and is unable to comply with the request (Article 1:74 (3) and (4)).
- The Dutch Financial Supervision Act specifies that the relevant supervisory authority can oblige, by means of a **designation**, a person who doesn’t fulfil the requirements from the Financial Supervision Act, to follow a certain course of action within a reasonable time regarding the points indicated in the designation (Article 1:75). The supervisor may also give a designation to the financial institution if he sees signs of developments that could endanger the equity capital, solvency or liquidity of the financing institution. A designation to a credit institution, or to an EU parent entity per BRRD Article 30 (coordination of early intervention measures and appointment of temporary administrator in relation to the group), can be an **early intervention measure** as per BRRD Article 27(1) or the **removal of senior management or the management body** per BRRD Article 28. A designation does not affect agreements between that person and third parties, unless it is remuneration policy related.
- The Dutch Financial Supervision Act (Article 1:79) also regulates that the supervisor may impose a **cease-and-desist order** in respect of a violation of a) the supervisory rules listed in the Appendix to Article 1:79, b) regulations with regards to the supervision of financial markets, or c) credit rating agencies regulation, or d) the obligation to cooperate with the supervisory authority per Article 5:20 of the General Administrative Law Act. The supervisory rules listed in the Appendix to Article 1:79 include 1. Article 3:33a(1) and (3) of the Implementation Act on the permission required for the issuance of covered bonds, and on the legal requirements regarding the programme of operations, the management of the covered bond programme,

and the administrative structure of the cover pool and the monitoring thereof; 2. Article 3:33b(1) of the Implementation Act on the legal requirements safeguarding the priority claim of the covered bond programme's liabilities to the principal amount and accrued and future interest on the assets in the cover pool in the event of a bankruptcy or resolution of the bank; and 3. Article 3:33ba of the Implementation Act on the information requirements towards investors and De Nederlandsche Bank.

- The Financial Supervision Act (Article 1:80) also gives the supervisor the opportunity to impose an **administrative fine** in respect of a violation of a) the supervisory provisions stipulated in the appendix to Article 1:80, b) regulations with regards to the supervision of financial markets, or c) credit rating agencies regulation, or d) the obligation to cooperate with the supervisory authority per Article 5:20 of the General Administrative Law Act. The supervisory rules listed in the Appendix to Article 1:80 include 1. Article 3:33a(1) and (3) of the Implementation Act on the permission required for the issuance of covered bonds, and on the legal requirements regarding the programme of operations, the management of the covered bond programme, and the administrative structure of the cover pool and the monitoring thereof; 2. Article 3:33b(1) of the Implementation Act on the legal requirements safeguarding the priority claim of the covered bond programme's liabilities to the principal amount and accrued and future interest on the assets in the cover pool in the event of a bankruptcy or resolution of the bank; and 3. Article 3:33ba of the Implementation Act on the information requirements towards investors and De Nederlandsche Bank.

#### Article 5:20 of the General Administrative Law Act

1. Everyone is obliged to provide a supervisor with all cooperation within the reasonable period set by him and that can reasonably be required in the exercise of his supervisory powers.
2. Those who are obliged to secrecy by virtue of their office, profession or legal regulation may refuse to cooperate, insofar as this results from their obligation of secrecy.
3. The administrative body under the responsibility of which the supervisor operates is authorized to impose an administrative coercion measure to enforce the first paragraph.
4. If the requested cooperation serves to enforce the provisions of, or pursuant to, a regulation referred to in Chapter 2, 3 or 4 of the Administrative Jurisdiction Competence Regulations belonging to this Act, or in the Regulation on Reduced Court Fees belonging to this Act, the administrative coercion measure for the application of the latter two regulations will be regarded as a decision taken based on the first regulation.

According to the Dutch regulator, no implementation was needed for CBD Article 18(6). This article stipulates that it should be ensured that the designated competent authority has the expertise, resources, operational capacity, powers and independence necessary to carry out the functions relating to covered bond public supervision.

## 19. Permission for covered bond programmes

*“Permission to issue covered bonds will only be granted if the applicable requirements are met”*

Banks located in the Netherlands are not allowed to issue covered bonds without the permission of De Nederlandsche Bank (DNB). Such permission will only be granted if the bank proves to meet:

- The legal requirements regarding the **programme of operations**, the management of the covered bond programme and the administrative structure of the cover pool and the monitoring thereof (Article 3:33a(3-4) Implementation Act);
- The legal requirements safeguarding the **priority claim** of the covered bond programme's liabilities to the principal amount and accrued and future interest on the assets in the cover pool (Article 3:33b Implementation Act); and
- The legal requirements on the **provision of information** to investors and De Nederlandsche Bank (Article 3:33ba Implementation Act).

Banks running a covered bond programme need to have in place:

- An adequate programme of operations setting out the issuance of covered bonds;
- Adequate policies, processes and methodologies for the approval, amendment, renewal and refinancing of loans included in the cover pool;
- Management and staff dedicated to the covered bond programme which have adequate qualifications and knowledge regarding the issuance of covered bonds and the administration of the covered bond programme;
- An adequate administrative set-up of the cover pool and the monitoring thereof.

On top of these minimum requirements from CBD Article 19(2), the Dutch Implementation Decree (Article 40p(1)) requires banks asking for permission, to provide DNB with the following information on the covered bond programme:

- A **legal opinion** from an independent legal expert, based on which DNB can judge that the **asset segregation** requirements are met, by means of a transfer of the cover assets through general or special title to a separate legal entity, ie, the Covered Bond Company;
- The **agreements** between the **Covered Bond Company** and its **manager**;
- The **agreement** with the **cover pool monitor** or accountant;
- A **written statement** from the **manager of the bank** showing that the legal requirements from Articles 3:33a(3-4), 3:33b and 3:33ba of the Implementation Act are met;
- **Other information needed** by DNB to verify that all regulatory requirements are met to grant a bank permission to issue covered bonds.

Moreover, the new Article 1:105(3) of the Financial Supervision Act (added through the Implementation Act) provides for the possibility to lay down further rules, by means of a separate decree, with respect to the manner that an application is submitted.<sup>12</sup> Furthermore, conditions may be attached to the license and restrictions may be imposed to protect the interests of the covered bondholders. The supervisor should decide or draw up a draft decision within thirteen weeks of receipt of the license application, or otherwise inform the applicant if this would take longer.

**Fig 15 Compliance with permission for covered bond programmes**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 19(1)	Implementation Act	Article 3:33a(1)	Full
	Article 19(2)	Implementation Act	Article 3:33a(2)	Full
		Implementation Decree	Article 40p(1-2, 5)	
		Implementation Act	Article 1:105(3)	

Source: Dutch Implementation Act and Implementation Decree, ING

<sup>12</sup> The new Article 1:105(3) of the Financial Supervision Act stipulates that Article 1:102(1-3, 7) of the Financial Supervision Act is also applicable with reference to Article 3:33a(2) of the implementation Act on the permission granted to a bank to issue covered bonds.

*“Banks immediately have to notify DNB if changes are made to the agreement with the CBC or the cover pool monitor”*

A bank that has been permitted to issue covered bonds will immediately notify DNB of any changes in the agreements between the Covered Bond Company and its manager or in the agreement with the cover pool monitor or

accountant. The bank will also provide, on an annual basis, a written statement by the manager of the bank showing that the legal requirements related to the covered bond programme, the safeguarding of the priority claim of the covered bond related liabilities and information provisioning are met (ie, Articles 3:33a(3-4), 3:33b and 3:33ba from the Implementation Act).

If a bank, during the term of a covered bond, intends to make significant changes to the covered bond's terms and conditions, it should notify DNB prior to making such changes.

#### **Changes to the regular supervision in light of the new legislation**

Per 8 July 2022 DNB has made some changes to the regular supervision of Dutch covered bond programmes. In contrast to the previous supervisory practice, there will no longer be a review of covered bond programmes on an annual basis. Instead, based upon the information that must be provided under the old or new legal provisions DNB will assess whether a covered bond programme is compliant with the covered bond legislation on an ongoing basis. This will be done via a risk-based approach where DNB randomly may ask questions from time to time.

## **20. Covered bond public supervision in the event of insolvency or resolution**

*“The Dutch covered bond law does not provide for the appointment of a special administrator in the event of insolvency or resolution of the covered bond issuer”*

The Dutch regulator has not made use of the member state option to provide for the appointment of a special administrator in the case of insolvency or resolution (Article 20(2) and (3) of the Covered Bond Directive). Also, no implementation was needed for Article 20(1)

and 20(4) of the Covered Bond Directive, as the cooperation between the competent authority and the resolution authority is already required by law.

#### **Article 20(1) and 20(4) CBD require cooperation between authorities**

Article 20(1) of the Covered Bond Directive, requires the designated competent authorities to cooperate with the resolution authority in the event of the resolution of a credit institution issuing covered bonds. This is to ensure that the rights and interest of covered bond investors are preserved, including at least by verifying the continuous and sound management of the covered bond programme during the period of the resolution process. Furthermore, Article 20(4) of the Covered Bond Directive requires the coordination and exchange of information for the purposes of the insolvency or resolution process among the designated competent authorities, the special administrator and, in case of resolution, the resolution authority.

In the Netherlands, Article 1:69 of the Financial Supervision Act covers the cooperation and exchange of data and intelligence with European authorities. More specifically, the Dutch supervisor cooperates with the European Commission, the European Supervisory Authorities (ie, EBA, ESMA, EIOPA), the Single Resolution Board (SRB) and the European Systemic Risk Board (ESRB) if this is necessary for the performance of its duties under the Financial Supervision Act or for the performance of the duties of those bodies. To this

purpose, the Dutch supervisory authority will provide these institutions all the data and information needed for the performance of their responsibilities.<sup>13</sup>

**Fig 16 Compliance with covered bond public supervision in insolvency/resolution**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 20(1)	No implementation needed	Art 1:69 Financial Supervision Act	Full
		Regulation on the performance of duties on cross-border cooperation financial supervisors	Article 1a and 2	
	Article 20(2)	Member state option not used		-
	Article 20(3)	Member state option not used		-
	Article 20(4)	No implementation needed	Art 1:69 Financial Supervision Act	Full
	Regulation on the performance of duties on cross-border cooperation financial supervisors	Article 1a and 2		

Source: Dutch Implementation Act and Implementation Decree, ING

Furthermore, through the separate Implementation Rule Covered Bond Directive of 6 January 2022 (published in the official gazette of 21 January 2022), the Dutch regulator has made some modest amendments to the Regulation on the Performance of Duties on Cross-border Cooperation Financial Supervisors FSA and the Implementation Regulation FSA in relation to the implementation of the Covered Bond Directive.<sup>14</sup>

These amendments ensure, that while carrying out its duties under the Financial Supervision Act, the Dutch central bank would also consider certain provisions from the Covered Bond Directive. These include:

- CBD Article 20(1) on the cooperation obligation between the competent authority and resolution authority during the period of the resolution process in the interest of covered bond investors;
- CBD Article 20(4) on the coordination and information exchange between the competent authority and the resolution authority; and
- CBD Article 25(1) on the cooperation of the competent authority with the competent authority performing the general supervision of credit institutions and the resolution authority in case of resolution.

Furthermore, when performing their duties under the Financial Supervision Act, the Dutch central bank and Authority Financial Markets (AFM) should, regarding the cooperation and information provisioning within the European system for financial supervision, also consider certain provisions from the Covered Bond Directive, including:

- CBD Article 20(1) on the cooperation obligation between the competent authority and resolution authority during the period of the resolution process in the interest of covered bond investors;
- CBD Article 20(4) on the coordination and information exchange between the competent authority and the resolution authority;
- CBD Article 24(9) on the provision of information to the EBA on administrative measures;
- CBD Article 25(1-3, 5) on the cooperation and information exchange between the competent authorities;
- CBD Article 25(4) on the cooperation between EBA and ESMA; and

<sup>13</sup> In the Netherlands, ING, Rabobank, ABN AMRO and de Volksbank are all under direct supervision of the European central bank (ECB), whereas for NN Bank, Aegon Bank, Achmea Bank, NIBC Bank and Van Lanschot, the Dutch central bank (DNB) is the direct supervisor. The Single Resolution Board (SRB) has the leading role regarding the orderly resolution process of banks under direct supervision of the ECB, and for banks with activities in multiple jurisdictions.

<sup>14</sup> Implementatieregeling richtlijn gedekte obligaties, Staatscourant Nr. 1232, 21 January 2022.



- CBD Article 26(4) on the annual provision to the EBA of the list of banks that issue covered bonds and the list of covered bonds that are allowed to use the label “European Covered Bond (Premium)”.

## 21. Reporting to the competent authorities

Banks permitted to issue covered bonds provide De Nederlandsche Bank (DNB) periodically and upon request information, allowing the supervisor to determine that the issuing bank meets all legal requirements: a) regarding the programme of operations, the management of the covered bond programme and the administrative structure of the cover pool and the monitoring thereof (Article 3:33a(3-4) Implementation Act); b) safeguarding the priority claim of the covered bond programme’s liabilities to the principal amount and accrued and future interest on the assets in the cover pool (Article 3:33b Implementation Act); and c) on the information provisioning towards investors and De Nederlandsche Bank (Article 3:33ba Implementation Act).

The Dutch Implementation Decree (Article 40p(3)) determines that banks issuing covered bonds must provide the following information to this purpose:

- Information allowing DNB to verify that the **coverage requirements** are met, including on a) the composition of the cover pool by at least 80% primary assets, and maximum 20% substitution assets, and b) the 100% nominal coverage requirement of all payment obligations and 105% nominal coverage requirement of the outstanding covered bonds (40f-g);
- Information allowing DNB to assess that the requirements with reference to the monitoring of **property values** and property valuation, property insurance and the geographical location of the debtor of the cover assets are met (40h-i);
- Information allowing DNB to judge that the requirements with reference to **derivative contracts** in the cover pool are met (40j);
- Information allowing DNB to assess that the **180-day liquidity buffer** requirements are met (40k);
- Information allowing DNB to judge that the requirements related to the **maturity extension** are met (40m);
- **Other information** required by the Dutch Central Bank to assess that the regulatory requirements for the issuance of covered bonds are met (Implementation Act Articles 3:33a(3-4), 3:33b and 3:33ba(1)).

*“Banks quarterly have to provide DNB with information on the asset coverage and liquidity coverage requirements”*

The information allowing DNB to verify that the coverage requirements (40f-g) and the liquidity buffer requirements (40k) are met, must be provided at the start of the covered bond programme and on a quarterly basis

thereafter. The other information must be provided at the start of the programme and thereafter only if the information has changed or upon request of DNB.

**Fig 17 Compliance with reporting to the competent authorities**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 21(1-3)	Implementation Act Implementation Decree	Article 3:33ba(2-3) Article 40p(3-4)	Full

Source: Dutch Implementation Act and Implementation Decree, ING

**CBD Article 21(2) on the reporting requirements to the competent authority**

The Dutch reporting requirements do broadly cover the minimum reporting provisions from CBD Article 21(2), which requires information on at least:

- The eligibility of assets and cover pool requirements (CBD Article 6-11);
- The segregation of cover assets (CBD Article 12);
- The functioning of the cover pool monitor (CBD Article 13);
- The coverage requirements (CBD Article 15);
- The cover pool liquidity buffer (CBD Article 16);
- The conditions for extendable maturity structures (CBD Article 17).

No further rules have been stipulated on the provision of information to the competent authorities in the event of an insolvency or resolution of a credit institution issuing covered bonds (as required by CBD Article 21(3)). According to the transposition table of the Implementation Decree, CBD Article 21(3) is also covered by Article 3:33ba(2-3) of the Implementation Act on the information provisioning to the competent authority.

## 22. Powers of competent authorities for the purposes of covered bond public supervision

Article 22(1) of the Covered Bond Directive stipulates that the competent authorities should be given all **supervisory, investigatory and sanctioning powers** that are necessary to perform the task of covered bond public supervision. This is covered for by Dutch law through Article 1:72, 1:74, 1:75, 1:79 and 1:80 of the Financial Supervision Act. These articles are discussed in detail under point 18 of this Appendix on covered bond special supervision. Also, certain Articles from chapter 5 of the General Administrative Law Act on enforcement are discussed under point 18.

**Fig 18 Compliance with powers of competent authorities for the purposes of covered bond public supervision**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 22(1)	Financial Supervision Act (existing legislation) General Administrative Law Act (existing regulation)	Article 1:72, 1:74, 1:75, 1:79 and 1:80 jo. Chapter 5	Full
	Article 22(2)(a)	Implementation Act	Article 3:33a(1)	Full
	Article 22(2)(b)	Financial Supervision Act (existing legislation)	Article 1:72, 1:74, 1:75	Full
	Article 22(2)(c)	General Administrative Law Act (existing regulation)	Article 5:15	Full
	Article 22(2)(d)	Financial Supervision Act (existing legislation)	1:79, 1:80, 1:105 jo. 1:104	Full
Article 22(2)(e)	General Administrative Law Act (existing regulation)	Article 5:15 and 4:81 jo. 1:3 (4)	Full	

Source: Dutch Implementation Act and Implementation Decree, ING

**CBD Article 22(2) on the supervisory powers of the competent authority**

Article 22(2) of the Covered Bond Directive states that these supervisory, investigatory and sanctioning powers should include at least the following:

- The power to **grant or refuse permission**;
- The power to **regularly review the covered bond programme** in order to assess compliance with the provisions of national law transposing the Directive;
- The power to carry out **on-site and off-site inspections**;
- The power to impose **administrative penalties** and other **administrative measures** in accordance with the provisions of national law transposing the Covered Bond Directive's requirements for administrative penalties and other administrative measures;
- The power to adopt and implement **supervisory guidelines** relating to the issue of covered bonds.

**Article 22(2)(a) – power to grant or refuse permission**

*“DNB has the power to grant or refuse permission to issue covered bonds”*

Article 3:33a(1) of the Dutch Implementation Act prohibits banks located in the Netherlands to issue covered bonds without the **permission** of the Dutch central bank. As such the Dutch

central bank has the power to grant or refuse permission.

Per Article 1:105(3) of the Financial Supervision Act further rules could be laid down by means of a separate decree on how an application for permission is submitted.<sup>15</sup>

**Conditions** may be attached to the permission and restrictions may be imposed to protect the interests of the covered bondholders. The supervisor should decide or draw up a draft decision within thirteen weeks of receipt of the application for permission. If this would take longer than thirteen weeks, the applicant must be informed.

**Article 22(2)(b) – regular review on compliance**

*“The designated supervisor is responsible for reviewing the bank’s compliance with the covered bond regulation”*

Under Article 1:72 of the Financial Supervision Act, persons designated by a decision of the supervisory authority are responsible for the **supervision of the compliance** with the rules laid down in the Financial Supervision Act. This

includes the provisions in this act related to the issuance of covered bonds.

Per Article 1:74 (1) of the Financial Supervision Act, the supervisor may **request information** from anyone to perform a task under the Financial Supervision Act. This includes the supervision on the compliance with the covered bond related provisions. Per Article 1:74 (2) the supervisory authority shall exercise his powers only in so far as this can reasonably be assumed necessary for the performance of its duties. Everyone is obliged to fully cooperate with the supervisor, who would reasonably demand this in the exercise of his powers, within the reasonable timeframe he may specify. Any person who is bound by a duty of confidentiality, by virtue of his office or profession, or by statutory regulation, may refuse to cooperate insofar as the duty of confidentiality makes this necessary. Article 1:74 (3) and (4) stipulate that the Dutch Authority Financial Markets and Dutch central bank will not request information from a financial corporation before asking the other supervisory authority that granted the license to the corporation to provide the information and this supervisor is unable to comply with the request.

<sup>15</sup> The new Article 1:105(3) of the Financial Supervision Act (FSA) specifies that Article 1:102(1-3, 7) of the FSA would also apply to the permission granted to banks to issue covered bonds under new article 3:33a(2) FSA.

Article 1:75 of the Dutch Financial Supervision Act stipulates that the relevant supervisory authority can oblige, by means of **an order**, a person who doesn't fulfil the requirements from the Financial Supervision Act, to follow a certain course of action within a reasonable time regarding the points indicated in the order. The supervisory authority may also give an order to the financial institution if it sees signs of developments that could endanger the equity capital, solvency or liquidity of the financial institution. A designation to a credit institution, or per Article 30 of the BRRD (coordination of early intervention measures and appointment of temporary administrator in relation to the group) to an EU parent entity, can be an early intervention measure as per Article 27(1) of the BRRD, or the removal of senior management or the management body per Article 28 of the BRRD. A designation does not affect the agreements between that person and third parties, unless it is remuneration policy related.

#### Article 22(2)(c) – Carrying out on-site and off-site inspections

*“The supervisor can carry out on-site and off-site inspections”*

Article 5:15 of the General Administrative Law Act authorizes the supervisor, a. by taking the necessary equipment, to **enter any place**, except for a home without the consent of the

resident, b. if necessary, to gain access with the help of the police and c. to be accompanied by persons designated by him for that purpose.

#### Article 22(2)(d) – Power to impose administrative penalties and measures

Article 1:79 of the Dutch Financial Supervision Act regulates that the supervisor may impose **a cease-and-desist order** in respect of a violation of a) the supervisory regulations listed in the Appendix to Article 1:79, b) regulations with regards to the supervision of financial markets, or c) credit rating agencies regulation, or d) the obligation to cooperate with the supervisory authority per Article 5:20 of the General Administrative Law Act. The supervisory regulations listed in the Appendix to Article 1:79 include, in the part on prudential supervision financial companies, the covered bond provisions of Articles 3:33a(1 and 3), 3:33b and 3:33ba of the Implementation Act.

*“The supervisor can impose administrative penalties in the event of a violation of the covered bond regulation”*

Article 1:80 of the Financial Supervision Act gives the supervisor the opportunity to impose an **administrative fine** in respect of a violation of a) the supervisory regulations stipulated in the Appendix to Article 1:80, b) regulations with

regards to the supervision of financial markets, or c) credit rating agencies regulation, or d) the obligation to cooperate with the supervisory authority per Article 5:20 of the General Administrative Law Act. The supervisory regulations listed in the Appendix to Article 1:80 include, in the part on prudential supervision financial companies, the covered bond provisions of Articles 3:33a(1 and 3), 3:33b and 3:33ba of the Implementation Act.

Article 1:105(3) of the Financial Supervision Act also regulates that the supervisory authority can **change, or partially or fully revoke a permission to issue covered bonds**, or attach further requirements to the permission granted.<sup>16</sup> This can be done if 1. the bank submits an application to that effect, 2. has provided incorrect or incomplete information when applying for permission, and knowledge of the correct and complete information would have led to a different decision, 3. the bank has concealed circumstances or facts on the basis of which, if they had been known, permission would

<sup>16</sup> The new Article 1:105(3) of the Financial Supervision Act (FSA) specifies that Article 1:104(1)(a-d) of the FSA would also apply to the permission granted to banks to issue covered bonds under new article 3:33a(2) FSA.

have been refused, or 4. the bank no longer complies with the covered bond rules, or the conditions or restrictions attached to the permission to issue covered bonds.

#### Article 22(2)(e) – Power to adopt and implement supervisory guidelines

Article 4:81 of the General Administrative Law Act, allows an administrative body (eg, De Nederlandsche Bank as supervisory authority), to establish **policy rules** regarding his responsibilities, or the by him delegated responsibilities. In all other cases, an administrative body may only adopt policy rules insofar as this is provided for by law.

*“The supervisory authority is allowed to adopt policy rules”*

Article 1:3(4) of the General Administrative Law Act defines a **policy rule** as a general rule established by a decree, not being a generally binding provision, regarding the consideration

of interests, the establishment of facts, or the interpretation of statutory regulations when using a power of the administrative body.

## 23. Administrative penalties and other administrative measures

### Article 23(1) – administrative penalties and situations in which they apply

#### CBD Article 23(1) situations for establishing administrative penalties

Article 23(1) of the Covered Bond Directive stipulates that member states must lay down rules establishing appropriate administrative penalties and other administrative measures that apply **at least** in the following situations:

- A credit institution has acquired permission for a covered bond programme by means of false statements or other irregular means;
- A credit institution no longer fulfils the conditions under which permission for a covered bond programme was given;
- A credit institution issues covered bonds without obtaining permission to do so;
- A credit institution issuing covered bonds fails to meet:
  - The dual recourse requirements;
  - The bankruptcy remoteness requirements;
  - The asset eligibility requirements;
  - The collateral asset eligibility criteria for assets located outside the European Union;
  - The requirements on intragroup covered bond structures;
  - The requirements for joint funding;
  - The requirements on the composition of the cover pool;
  - The requirements regarding derivative contracts in the cover pool;
  - The requirements on the segregation of cover assets;
  - The investor information requirements;
  - The cover pool liquidity buffer requirements; and
  - The conditions for extendable maturity structures.
- A credit institution issuing covered bonds fails to report information or provides incomplete or accurate information on its obligations in breach of the reporting requirements towards the competent authorities.

The Dutch supervisory authority can impose a **cease-and-desist order** (Article 1:79 Financial Supervision Act), or an **administrative fine** (Article 1:80 Financial Supervision Act) in the event of a violation of the following covered bond regulations, ie:

- The requirement to obtain permission for the issuance of covered bonds, and the proof that must be provided by the bank that it meets the legal requirements for the issuance of covered bonds (Article 3:33a(1-2) Implementation Act);
- The regulatory requirements regarding the programme of operations, the management of the covered bond programme, and the administrative structure of the cover pool and the monitoring thereof (Article 3:33a(3) Implementation Act);
- The regulatory requirements safeguarding the priority claim of the covered bond programme's liabilities to the principal amount and accrued and future interest on the assets in the cover pool (Article 3:33b Implementation Act); and
- The regulatory requirements on the provision of information towards investors and De Nederlandsche Bank (Article 3:33ba Implementation Act).

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*“The supervisor can revoke the permission if a bank provided incorrect information when applying for permission”*

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The supervisory authority may also **change, or partially or fully revoke the permission** granted to issue covered bonds (Article 1:105(3) jo Article 1:104(1)(a-d) Financial Supervision Act), or attach further requirements

to it if a) the bank provided incorrect or incomplete information when applying for permission, and knowledge of the correct and complete information would have led to a different decision, b) the bank concealed circumstances or facts on the basis of which, if they had occurred or had been known before the license was granted, the license would have been refused, or c) the bank no longer complies with the covered bond rules laid down in the Financial Supervision Act), or no longer complies with the conditions and restrictions attached to the permission.

Furthermore, by amending the Decree on Administrative Fines in the Financial sector, the Implementation Decree arranges for **financial fines** in category 2 or 3 in the event of a breach of the following provisions under the Dutch covered bond legislation<sup>17</sup>:

- A credit institution issues covered bonds without obtaining **permission** from DNB (Article 3:33a(1)) (category 3);
- A credit institution issuing covered bonds breaches the legal requirements safeguarding the priority claim of the covered bond programme's liabilities to the principal amount and accrued and future interest on the assets in the cover pool, or the additional rules regarding the cover pool, assets that can be included in the cover pool and the expected costs for the maintenance and administration for the winding-down of the covered bond programme (Article 3:33b(1) and (3)) (category 3);
- A credit institution issuing covered bonds breaches the **transparency requirements** to investors or the competent authority (Article 3:33ba(1-3)) (category 3);
- A credit institution issuing covered bonds fails to comply with the requirements of the **segregation of cover assets** (40e) (category 3);
- A credit institution issuing covered bonds fails to meet the requirements of **composition of the cover pool** (40f) (category 3);
- A credit institution issuing covered bonds fails to meet the **nominal asset coverage requirements** (40g(1-3)) (category 2 or 3), or the requirements on the calculation of the expected costs, interest payments due and to be received, and the incorporation of the restrictions of Article 129(1-3) (40g(4-5)) (category 3) ;
- A credit institution issuing covered bonds fails to meet the **asset eligibility criteria** or the asset **valuation** requirements (40h) (category 2 or 3);

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<sup>17</sup> As an indication, [financial fine amounts](#) in the categories 2 and 3 are depending on the circumstances: Category 2: basis €500,000, minimum €0, maximum €1,000,000  
Category 3: basis €2,500,000, minimum €0, maximum €5,000,000

- A credit institution issuing covered bonds fails to meet the requirements regarding the **geographical location** of the debtor of the cover assets (40i) (category 3);
- A credit institution issuing covered bonds fails to meet the requirements regarding **derivative contracts** in the cover pool (40j) (category 2 or 3);
- A credit institution issuing covered bonds repeatedly or persistently fails to maintain a **cover pool liquidity buffer** (40k) (category 3);
- A credit institution issuing covered bonds fails to meet the **documentation requirements** (credit granting process and documentation process) (40l) (category 2);
- A credit institution issuing covered bonds with extendable maturity structures fails to fulfil the conditions for **extendable maturity structures** (40m) (category 3);
- A credit institution issuing covered bonds fails to meet the **cover pool monitor requirements** (40n) (category 3);
- A credit institution issuing covered bonds breaches the **labelling requirements** (40o) (category 2).
- A credit institution issuing covered bonds reports information or provides incomplete or inaccurate **information to the Dutch Central Bank** in breach of the regulatory information requirements upon a request for permission and on a regular basis thereafter (40p) (category 2).

Hereby the Dutch covered bond law goes a bit further than the minimum circumstances identified in the Covered Bond Directive, by also submitting a breach of the cover pool monitor requirements and the labelling requirements to a financial fine.

**Fig 19 Compliance with administrative penalties and other administrative measures**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 23(1)	Implementation Decree	Article II, Art 10 (Decree on administrative fines in the financial sector)	Full
		Financial Supervision Act (existing legislation)	Article 1:79 and 1:80 and Appendices jo. Article 1:105	
	Article 23(2)(a)	Financial Supervision Act (existing legislation)	Article 1:105	Full
	Article 23(2)(b)	Financial Supervision Act	Article 1:94(1)(c)	Full
	Article 23(2)(c)	Financial Supervision Act (existing legislation)	Article 1:75	Full
	Article 23(2)(d)	Financial Supervision Act (existing legislation)	Article 1:80 and 1:97 and Appendices	Full
	Article 23(3)	No implementation		
	Article 23(4)	General Administrative Law Act (existing regulation)	Article 3:4	Full
		Decree Administrative Fines (existing regulation)	Article 1b	
	Article 23(5)	General Administrative Law Act (existing regulation)	Article 5:1(3)	Full
	Article 23(6)	General Administrative Law Act (existing regulation)	Chapter 5	Full
	Article 23(7)	General Administrative Law Act (existing regulation)	Chapter 5	Full

Source: Dutch Implementation Act and Implementation Decree, ING

## Article 23(2) – effective, proportionate and dissuasive penalties and measures

### CBD Article 23(2) on effective and proportionate penalties and measures

Article 23(2) of the Covered Bond Directive stipulates that penalties and measures shall be effective, proportionate and dissuasive and shall include at least the following:

- A **withdrawal of permission** for a covered bond programme;
- A **public statement** which indicates the identity of the natural or legal person and the nature of the breach in accordance with Article 24;
- An **order** requiring the natural or legal person to **cease** the conduct **and to desist** from a repetition of that conduct;
- **Administrative pecuniary penalties.**

#### 1. Withdrawal permission

**To the purpose of CBD 23(2)(a)** Article 1:104(1) of the Financial Supervision Act allows the supervisory authority to change, or to partially or fully **revoke licenses**, or attach further requirements to them in certain situations, of which the following are applicable to the permission granted to issue covered bonds under article 3:33a(2) Financial Supervision Act per new Article 1:105(3) of the Financial Supervision Act:

- The bank submits an application to that effect;
- The bank provided incorrect or incomplete information when applying for permission, and knowledge of the correct and complete information would have led to a different decision;
- The bank concealed circumstances or facts based on which, if they had been known, permission would have been refused; or
- The bank no longer complies with the covered bond rules in the FSA, or the conditions or restrictions attached to the permission to issue covered bonds.

#### 2. Public statement

**Article 23(2)(b)** of the Covered Bond Directive is covered through the new Article 1:94(1)(c) of the Financial Supervision Act. This article allows to supervisor to make, by means of a **public statement**, a violation and the name of the violator public in the event of a violation of a covered bond provision under Article 3:33a, 3:33b or 3:33ba.

#### 3. Order to cease the conduct

To the purpose of **Article 23(2)(c)** of the Covered Bond Directive, Article 1:75 of the Dutch Financial Supervision Act stipulates that the relevant supervisory authority can oblige, by means of a **designation**, a person who doesn't fulfil the requirements from the Financial Supervision Act, to follow a certain course of action within a reasonable time regarding the points indicated in the designation. The supervisory authority may also give a designation to the financial institution if it sees signs of developments that could endanger the equity capital, solvency or liquidity of the financial institution. A designation to a credit institution, or to an EU parent entity per Article 30 of the BRRD (coordination of early intervention measures and appointment of temporary administrator in relation to the group), can be an early intervention measure as per Article 27(1) of the BRRD or the removal of senior management or the management body per Article 28 of the BRRD. A designation does not affect the agreements between that person and third parties, unless it is remuneration policy related.

#### 4. Administrative pecuniary measures

To the purpose of **Article 23(2)(d)**, Article 1:80 of the Financial Supervision Act gives the supervisor the opportunity to impose an **administrative fine** in respect of a violation of a) the supervisory regulations stipulated in the appendix to Article 1:80, which includes the



covered bond provisions of Article 3:33a(1 and 3), 3:33b and 3:33ba of the Implementation Act, b) b) regulations with regards to the supervision of financial markets, or c) credit rating agencies regulation, or d) the obligation to cooperate with the supervisory authority per Article 5:20 of the General Administrative Law Act.

*“The supervisor may impose an administrative fine in the event of a violation of the covered bond provisions”*

As per Article 1:97 of the Financial Supervision Act, the supervisor will make a decision to impose an administrative penalty pursuant to the Financial Supervision Act public. Publication will take place as soon as the decision has

become irrevocable. If an objection or appeal has been submitted against the decision, the supervisor will publish the outcome together with the decision. An administrative penalty also includes the termination or restriction of a right or power by the supervisory authority, as well as the imposition of a ban. (See point 24 for more detail).

#### Article 23(4) – circumstances to consider when determining administrative penalties

##### **CBD Article 23(4) circumstances to consider when determining a penalty**

Article 23(4) of the Covered Bond Directive stipulates that, when determining the type of administrative penalties or other administrative measures and the amount of administrative pecuniary penalties, the competent authorities can take into account all the following **circumstances** where relevant:

- The gravity and duration of the breach;
- The degree of responsibility of the natural or legal person responsible for the breach;
- The financial strength of the natural or legal person responsible for the breach; including by reference to the total turnover of the legal person or the annual income of the natural person;
- The importance of profits gained, or losses avoided because of the breach by the natural or legal person responsible for the breach; insofar as those profits or losses can be determined;
- The losses caused to third parties by the breach insofar as these losses can be determined;
- The level of cooperation by the natural or legal person responsible for the breach with the competent authorities;
- Any previous breaches by the natural or legal person responsible of the breach;
- Any actual or potential systemic consequences of the breach.

These provisions are covered in the Dutch law through Article 3:4 of the General Administrative Law and Article 1b of the Decision on Administrative Fines.

Article 3:4 of the General Administrative Law ensures that the administrative body (eg De Nederlandsche Bank as supervisory authority) weighs the interests directly involved in the decision, insofar as there are no limitations as a result of a statutory provision or the nature of the power to be exercised. The negative consequences to one or more stakeholders from the decision should not be disproportionate in relation to the purposes to be served by the decision.

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*“When imposing an administrative fine, the supervisor will consider the seriousness of the violation and the circumstances under which it has been committed”*

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Furthermore, according to Article 5:46 of the General Administrative Law the maximum administrative fine that can be imposed for a specific violation is determined by law. Unless the amount of the administrative fine has been specified by law, the administrative body

(eg, De Nederlandsche Bank) will adjust the administrative fine to the seriousness of the violation and the extent to which the offender can be blamed for it. If necessary, the administrative body will consider the circumstances under which a violation has been committed. If the amount of the administrative fine has been determined by statutory law, the administrative authority will nevertheless impose a lower administrative fine if the offender demonstrates that the administrative fine imposed is too high due to special circumstances.

Without prejudice to these provisions of the General Administrative Law Act, Article 1b of the Decision on Administrative Fines stipulates that the supervisor will in any event consider the following **circumstances when determining an administrative fine**, insofar as they apply:

- The gravity and duration of the violation;
- The advantage gained by the offense to the offender;
- The losses incurred by third parties as a result of the violation and the damage caused to the functioning of the markets or to the wider economy;
- The consequences of the violation for the financial system;
- The extent to which the violation can be blamed on the offender;
- The offender's previous violations;
- The extent to which the offender cooperates in determining the violation;
- The measures taken by the offender after the violation to prevent the violation from happening again.

Only the last two circumstances can lead to a reduction of the administrative fine.

#### **Article 23(5) – application administrative measures to management and individuals**

Article 23(5) of the Covered Bond Directive stipulates that, where the administrative penalties and other administrative measures apply to legal persons, it should also be ensured that the competent authorities can apply these administrative penalties and other administrative measures to members of the management body and to other individuals who under national law are responsible for the breach.

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*“Administrative penalties may be imposed against legal entities and natural persons”*

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This is regulated in the Netherlands through Article 5:1(3) of the General Administrative Law, which states that violations can be committed by natural persons and legal

entities, while Articles 51(2-3) of the Dutch Criminal Code would apply accordingly. The latter articles clarify that, if a criminal offense is committed by a legal entity, criminal proceedings may be instituted, and the (appropriate) penalties and measures provided for by law may be pronounced, 1. against that legal entity, 2. against those who ordered the act or was managing the prohibited conduct, or 3. against both.

#### **Article 23(6) – the right to be heard**

Article 23(6) of the Covered Bond Directive stipulates that the competent authorities, before taking any decision imposing administrative penalties or other administrative measures, give the natural person or legal entity concerned the opportunity to be heard. Exceptions to the right to be heard may apply for the adoption of those other administrative measures where urgent action is necessary to prevent significant losses to third parties or significant damage to the financial system. In such cases, the person

concerned shall be given the opportunity to be heard as soon as possible after the adoption of the administrative measure. Where necessary, the measure shall be revised.

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*“Violators have the right to be heard”*

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The Dutch transposition table of the Implementation Decree refers to Chapter 5 of the General Administrative Law for this

purpose. Within Chapter 5, Article 50 regarding the procedure for administrative fines refers for example to the opportunity granted to the violator to put forward his point of view on the intention to impose an administrative fine. In that case the report was already sent or handed out to the violator with the invitation to put forward his view. If, after the violator has expressed his view, the administrative authority decides that no administrative fine will be imposed for the violation, or the violation will still be represented to the public prosecutor, this will be communicated to the violator in writing. Moreover, Article 5:53 refers to the fact that, if an administrative fine is more than €340, a report should always be drawn up of the violation, and the violator should always be allowed to put forward its point of view.

#### Article 23(7) – right to appeal

Under Article 23(7) of the Covered Bond Directive, a decision imposing administrative penalties or other administrative measure should be properly reasoned and be subject to a right of appeal.

Also, to this purpose, the Dutch transposition table of the Implementation Decree refers to Chapter 5 of the General Administrative Law. For example, Article 5:9 of this chapter, states that the decision to impose an administrative penalty should state a) the violation and the violated regulation, and b) if necessary, an indication of the place where, and the time at which, the violation was discovered. Per Article 5:49, the administrative body should also, upon request, give the violator the opportunity to inspect the data on which the imposition of the administrative fine is based.

Moreover, Article 5:53 refers to the fact that, if an administrative fine is more than €340, a report should always be drawn up of the violation, and the violator should always be allowed to put forward its point of view. If a report is drawn up of the violation it should state the name of the violator, the violation and violated regulation, and if necessary, an indication of the place where and the time at which the violation was discovered. The report has to be sent to the violator (Article 5:48).

Per Article 5:45, the authority to impose an administrative fine will lapse in five years after the violation has taken place for fines more than €340 (or after three years in other cases). If an objection or appeal is made against the administrative fine, the expiration period will be suspended until an irrevocable decision has been made on the appeal.

## 24. Publication of administrative penalties and other administrative measures

#### Article 24(1-3) – publication of administrative penalties without undue delay

Article 24(1) of the Covered Bond Directive requires that rules are established ensuring that administrative penalties and other administrative measures are **published without undue delay** on the official website of the competent authority. The same obligations apply where a member state provides for criminal penalties for certain breaches. Per Article 24(2) of the Covered Bond Directive, it should be at a minimum required to publish any decision which cannot or no longer be appealed, and which is imposed for a breach of the national covered bond legislation transposing the Directive. Article 24(3) of the Covered Bond Directive requires that it is ensured that a publication includes information on the type and nature of the breach and the identity of the natural or legal person on whom the penalty or measure is imposed. It should furthermore be ensured that the information is published without undue delay after the addressee has been

informed of that penalty or measure as well as of the publication of the decision imposing that penalty or measure on the official websites of the competent authority.

**Fig 20 Compliance with publication of administrative penalties and other administrative measures**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 24(1-8)	Financial Supervision Act (existing legislation)	Article 1:94, 1: 97(1, 3-5), 1:98, 1:99a	Full
	Article 24(9)	Regulation on the performance of duties on cross-border cooperation financial supervisors	Article 2	Full
	Article 24(10)	No implementation needed		-

Source: Dutch Implementation Act and Implementation Decree, ING

*“The Dutch supervisor can make a violation of the covered bond law public”*

Article 1:94(1)(c) of the Financial Supervision Act allows to supervisor to make, by means of a **public statement**, a violation and the name of the violator public in the event of a violation

of a covered bond provision under Article 3:33a, 3:33b or 3:33ba.

Article 1:97(1) of the Financial Supervision Act stipulates that the supervisor will **make a decision to impose an administrative penalty** pursuant to the Financial Supervision Act **public**. Publication will take place as soon as the decision has become irrevocable. If an objection or appeal has been submitted against the decision, the supervisor will publish the outcome together with the decision. As per Article 1:97(2) of the Financial Supervision Act, an administrative penalty also includes the termination or restriction of a right or power by the supervisory authority, as well as the imposition of a ban. The supervisor will publish a decision to impose an administrative fine as soon as possible in the event of a violation within category 3, or a category 2 violation for cases determined via a decree (Article 1:97(3)). (See point 23 for the covered bond provisions subject to these categories). The supervisor will also make a decision to impose an order subject to a penalty public as soon as possible if the penalty has been paid for (Article 1:97(4)).

#### **Article 24(4) and (7) – publication of the status of an appeal and the outcome thereof**

If the national law permits the publication of a decision imposing penalties or measures against which an appeal is pending, Article 24(4) of the Covered Bond Directive requires that the relevant competent authority would also without any undue delay publish on its website information on the status of the appeal and the outcome thereof. According to Article 24(7) of the Covered Bond Directive, it should be ensured that a final court ruling that annuls a decision imposing a penalty or measure is also published.

*“The supervisor should publish an objection or appeal against a penalty”*

In the Netherlands, Article 1:97(5) of the Financial Supervision Act requires the supervisory authority to publish as soon as possible an objection or appeal against a

decision to impose an administrative fine or an order subject to a penalty, as well as the outcome of that objection or appeal. This should be done unless the decision has not been published based on Article 1:98 Financial Supervision Act (discussed below).

#### **Article 24(5-6) – circumstances where publication occurs anonymously**

Article 24(5) of the Covered Bond Directive, it should be ensured that competent authorities publish the decision imposing penalties or measures on an anonymous basis in any of the following circumstances:

- Where the penalty or measure is imposed on a natural person and the publication of personal data is found to be disproportionate;

- Where publication would jeopardise the stability of financial markets or an ongoing criminal investigation;
- Where publication would cause, insofar as it can be determined, disproportionate damage to the credit institutions or natural persons involved.

Article 24(6) of the Covered Bond Directive states that, where a member state publishes a decision imposing a penalty or measure on an anonymous basis, it may also allow for the publication of the relevant data to be postponed.

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*“If warranted, the publication of a decision to impose a penalty can be postponed, or be done anonymously”*

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In the Netherlands, as per Article 1:98 Financials Supervision Act, publication of a decision will be postponed, or be done in such a way that it cannot be traced back to individual persons, if:

- The data can be traced back to a natural person, and disclosure of his personal data would be disproportionate;
- It would cause disproportional harm to the parties involved;
- An ongoing criminal or supervisory investigation into the possible violations would be undermined; or
- The stability of the financial system would be jeopardized.

Article 1:98(2) of the Financial Supervision Act, stipulates that the publication of a decision will not take place if publication:

- Would be disproportionate in view of the minor seriousness of the violation, unless it concerns a decision to impose an administrative fine;
- Is not in accordance with the purpose of the imposed administrative penalty, unless it concerns a decision to impose an administrative fine;
- Endangers the stability of the financial system.

Per Article 1:99 of the Financial Supervision Act the supervisor will only publish a violation of the covered bond provisions or a decision to impose an administrative penalty, five working days after the person concerned has been notified of the decision to make a public statement, or to impose an administrative fine or an order subject to a penalty. If a request for a preliminary injunction has been made to prevent disclosure, the supervisor will not proceed with disclosure until a decision has been made by the preliminary relief judge or the request has been withdrawn. The supervisor may immediately publish a warning, a statement or a decision to impose an administrative penalty, if the interests that the Financial Supervision Act aims to protect do not warrant a postponement.

#### **Article 24(8) – publication final court ruling annulling a decision to impose a penalty**

According to Article 24(8) member states must ensure that any publication of a decision to impose penalties or measures should remain on the official website of the supervisory authority for at least five years from the date of publication. Personal data contained in the publication shall only be retained on the website for the period which is necessary in accordance with the applicable personal data protection rules. Such a retention period shall be determined taking into account the limitation periods provided for in the legislation of the member state but shall in no case be longer than ten years.

None of the articles referred to in the transposition table to the Implementation Decree refers to the part of the Dutch law that covers for this requirement.

#### **Article 24(9) – inform the EBA of any administrative penalties or measures**

Through a separate Implementation Rule Covered Bond Directive of 6 January 2022 (published in the official gazette of 21 January 2022), the Dutch regulator has made some modest amendments to the Regulation on the Performance of Duties on Cross-border Cooperation Financial Supervisors FSA and the Implementation Regulation FSA in

relation to the implementation of the Covered Bond Directive.<sup>18</sup> These amendments ensure, that when performing their duties under the law, the Dutch central bank (DNB) and Authority Financial Markets (AFM) would also consider certain provisions from the Covered Bond Directive regarding the cooperation and information provisioning, with reference to Covered Bond Directive Article 24(9) on the provision of information to EBA of any administrative penalties and other administrative measures imposed.

*“The Dutch supervisor will inform the EBA of any administrative penalties”*

More specifically, Article 24(9) of the Covered Bond Directive requires that the competent authority informs EBA of any administrative penalties and other administrative measures

imposed, including, where relevant any appeal in relation thereto and the outcome thereof. It should be ensured that the competent authority receives information and details of the final judgement in relation to any criminal penalty imposed, which the competent authority should also submit to EBA.

#### Article 24(10) – maintenance of a central data base by the EBA

Regarding CBD Article 24(10) no implementation was required, as the article requires the EBA to maintain a central database of administrative penalties and other administrative measures communicated to them. The database shall only be accessible to the designated competent authorities, based on the information provided by those authorities to the EBA in accordance with CBD Article 24(9).

## 25. Cooperation obligations

In the Netherlands, Article 1:69 of the Financial Supervision Act covers the cooperation and exchange of data and intelligence with European authorities. More specifically, the Dutch supervisor cooperates with the European Commission, the European Supervisory Authorities (ie EBA, ESMA, EIOPA), the Single Resolution Board (SRB) and the European Systemic Risk Board (ESRB) if this is necessary for the performance of its duties under the Financial Supervision Act or for the performance of the duties of those bodies. To this purpose, the Dutch supervisory authority will provide these institutions all the data and information needed to perform their tasks.

**Fig 21 Compliance with publication of administrative penalties and other administrative measures**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 25(1-3)	Financial Supervision Act (existing legislation)	Article 1:69	Full
	Article 25(1)	Regulation on the performance of duties on cross-border cooperation financial supervisors	Article 1a	Full
	Article 25(1-3, 5)	Regulation on the performance of duties on cross-border cooperation financial supervisors	Article 2	Full
	Article 25(4)	Financial Supervision Act (existing legislation)	Article 1:69	Full
		Regulation on the performance of duties on cross-border cooperation financial supervisors	Article 2	Full
	Article 25(5)	Financial Supervision Act (existing legislation)	Article 1:69	Full

Source: Dutch Implementation Act and Implementation Decree, ING

<sup>18</sup> Implementatieregeling richtlijn gedekte obligaties, Staatscourant Nr. 1232, 21 January 2022.

*“The Dutch law ensures that the designated competent authority does cooperate with the general supervisory authority and the resolution authority”*

Furthermore, through a separate Implementation Rule Covered Bond Directive of 6 January 2022 (published in the official gazette of 21 January 2022), the Dutch regulator made some modest amendments to the Regulation on the Performance of Duties on

Cross-border Cooperation Financial Supervisors FSA and the Implementation Regulation FSA in relation to the implementation of the Covered Bond Directive. These amendments ensure, that while carrying out its duties, the Dutch central bank would also consider certain provisions from the Covered Bond Directive, such as CBD Article 25(1) on the general cooperation obligation between the competent authority and the resolution authority during the period of the resolution process.

Besides, when performing their duties under the law, the Dutch central bank and Authority Financial Markets (AFM) would also consider certain provisions from the Covered Bond Directive regarding cooperation and information exchange, with reference to CBD Article 25(1-3, 5) on the cooperation and information exchange between competent authorities, and CBD Article 25(4) on the cooperation with EBA and ESMA.

## 26. Disclosure requirements

The Dutch Implementation Act adds Article 1:109 to the Financial Supervision Act (FSA). In line with Article 26(1) of the Covered Bond Directive, DNB must publish on its website:

- The text of the Dutch national laws, regulations, administrative rules and general guidance adopted in relation to the issue of covered bonds;
- An up-to-date list of credit institutions permitted by DNB to issue covered bonds in relation to a covered bond programme;
- An [up-to-date list](#) of covered bonds entitled to use the label European Covered Bond, and an up-to-date list of covered bonds that are entitled to use the label ‘European Covered Bond (Premium).

*“De Nederlandsche Bank will publish, among others, a list of the credit institutions permitted to issue covered bonds”*

The Dutch law does not explicitly address the CBD Article 26(2) requirement that the information published should be sufficient to enable a meaningful comparison of approaches adopted by the different member

states’ designated competent authorities, and that information shall be updated to take account of any changes.

These disclosure requirements will replace the disclosure requirements applicable to De Nederlandsche Bank under Article 40k of the old decree amending the decree on prudential rules under the FSA. This article required De Nederlandsche Bank to draw up a list of the categories of registered covered bonds and of [banks issuing registered covered bonds](#). The central bank also had to notify the European Commission and the ESMA of any amendments to this list.

**Fig 22 Compliance with disclosure requirements**

Covered Bond Directive/CRR		Dutch law		Compliance
CBD	Article 26(1-2) Article 26(3)	Implementation Act Regulation on the performance of duties on cross-border cooperation financial supervisors	Article 1:109 Article 2	

Source: Dutch Implementation Act and Implementation Decree, ING

Furthermore, through the separate Implementation Rule Covered Bond Directive of 6 January 2022 (published in the official gazette of 21 January 2022), the Dutch regulator has made some modest amendments to the Regulation on the Performance of Duties

on Cross-border Cooperation Financial Supervisors FSA and the Implementation Regulation FSA in relation to the implementation of the Covered Bond Directive.

These amendments ensure, that while performing their duties under the law, the Dutch central bank and Authority Financial Markets (AFM) would also consider certain provisions from the Covered Bond Directive regarding cooperation and information exchange, including with reference to CBD Article 26(3) regarding the annual provision to the EBA of the list of banks that issue covered bonds and the list of covered bonds that may use the label European Covered Bond (Premium).

Per 8 July, 2022 DNB makes a [distinction between three programmes](#):

- Existing covered bond programmes that have not been adapted in line with the new covered bond legislation;
- Existing covered bond programmes that have been adapted in line with the new covered bond legislation;
- New covered bond programmes.

### **1. Existing covered bond programmes that are not adapted**

If an existing covered bond programme is not adapted in line with the new laws and regulations, the initial approval decision of De Nederlandsche Bank taken upon the registration of a covered bond programme will remain in force. The issuance caps and backbook ratios will no longer apply as the healthy ratio requirements have been removed from the covered bond legislation. However, DNB will continue to pay attention to asset encumbrance in a broader sense as part of the ongoing prudential supervision, in particular in the supervisory review and evaluation process (SREP). The transitional measures will apply to covered bonds issued before 8 July 2022 under an existing programme. However, new issuance is not allowed after 8 July 2022 under programmes that have not been converted in line with the new legal provisions. Programmes can still be changed at a later stage, in which case DNB has to be informed accordingly.

### **2. Existing covered bond programmes that are adapted**

Existing covered bond programmes that are adapted for the new laws and regulations do not have to go through a new approval process. Instead, the initial approval decision will continue to apply if the programme is registered. The issuance caps and backbook ratios (healthy ratio requirements) will no longer apply as per the new legislation. For the purpose of the ongoing special supervision, DNB will assess whether the covered bond programme does comply with the new legislation. Through a self-assessment form banks can inform DNB how the programme meets the new legal provisions and what the changes are compared to the old legislation. If the assessment proves that a programme complies with the new legal provisions, the central bank will confirm this by means of an amendment decision. DNB will then also include the programme in the list published under the new Article 1:109 of the Financial Supervision Act.

### **3. New covered bond programmes**

A bank that wishes to set up a new covered bond programme should inform DNB about its intentions on a timely basis. In the early stage, DNB will assess whether the establishment of a covered bond programme is appropriate from a prudential perspective. In the case of an official request for permission, DNB will check whether the covered bond programme complies with the regulatory requirements. In line with the already applicable practice, banks must fill out a self-assessment form to this purpose.



## Appendix 3 Article discussion of labelling and transitional measures

### 27 Labelling

Per 8 July 2022, covered bonds issued by banks located in the Netherlands will meet both the requirements from the Covered Bond Directive and the requirements from Article 129 of the amended CRR. As such, the Netherlands will only use the label 'European Covered Bond (Premium)', and not of the label 'European Covered Bond'. The use of the label 'European Covered Bond (Premium)' should make it easier for investors to assess the quality of the covered bonds and their compliance with the Covered Bond Directive and Article 129 of the CRR for the purpose of preferential treatment.

*“The Netherlands only uses the label ‘European Covered Bond (Premium)’”*

As such, the label 'European Covered Bond (Premium)' will only be used by covered bonds that meet the new regulatory requirements for permission for a covered bond programme

(Article 3:33a of Implementation Act), safeguarding the priority claim of the covered bond programme's liabilities to the principal and interest on the assets in the cover pool (Article 3:33b of the Implementation Act) and on the provision of information to investors and De Nederlandsche Bank (Article 3:33ba of the Implementation Act).

Consequently, covered bond programmes that have not been adapted to the new covered bond legislation will not be included in the list of covered bonds entitled to use the label 'European Covered Bond (Premium)' as published by De Nederlandsche Bank. However, covered bonds issued before 8 July 2022 are subject to transitional measures (see point 30). As such the old legal requirements for registration remain applicable to these covered bonds (except the healthy ratio requirements). If these provisions continue to be met, the covered bonds will remain eligible for preferential treatment under CRR Article 129. New covered bonds cannot be issued under a programme that has not been adapted in line with the new law. However, old covered bonds may still be tapped under such a programme until 8 July 2024 if they meet the CBD Article 30(2) requirements. These programmes can still be found in the [old register](#).

**Fig 23 Compliance with labelling requirements**

Covered Bond Directive/CRR	Dutch law		Compliance
CBD Article 26	Implementation Decree	Article 40o	Full

Source: Dutch Implementation Act, 20 January 2022, ING

The disclosure requirements applicable to De Nederlandsche Bank per Article 1:109 of the Implementation Act (implementing CBD Article 26), do refer to the publication of an up-to-date list of covered bonds entitled to use both the labels 'European Covered Bond' and 'European Covered Bond (Premium)'. At this stage, the Netherlands only allows for CRR Article 129(1) eligible assets to be included in the cover pool and, related to that, solely uses the label 'European Covered Bond (Premium)'. However, article 40q of the Implementation Decree leaves the option open to include at any later stage assets eligible under CBD Article 6(1)(b-c) through separate implementation rules. If this option would ever be used, the disclosure requirements applicable to De Nederlandsche Bank would already facilitate the use of the label 'European Covered Bond'.

### 30. Transitional measures

*“The Netherlands has made use of the transitional measures facilitated by CBD Article 30, including for tap issues”*

The Dutch Implementation Act provides for the transitional measures of Article 30 of the Covered Bond Directive. Namely, the amended Articles 3:33a(1-3) and 3:33b(1-2) of the Financial Supervision Act and Article 212re of

the Bankruptcy Act will not apply to UCITS 52(4) compliant covered bonds that have been issued before 8 July 2022, or to tap issues of these covered bonds printed before 8 July 2024 that meet the requirements stipulated in Article 30(2) of the Covered Bond Directive. Instead, the new Article 3:33ba and the old Article 3:33a(2-4) of the Financial Supervision Act will apply.

#### Covered Bond Directive Article 30(2) requirements to tap issues

- a) The covered bond has a maturity date before 8 July 2027;
- b) The total issue size of tap issues made after 8 July 2022 does not exceed twice the total issue size of the covered bonds outstanding on that date;
- c) The total issue size of the covered bond at maturity does not exceed €6bn or the equivalent amount in domestic currency; and
- d) Collateral assets are located in member states that apply the UCITS 52(4) requirements to the tap issues of covered bonds and where the competent authorities monitor the compliance with these requirements.

**Fig 24 Transitional measures**

Covered Bond Directive/CRR	Dutch law		Compliance
CBD Article 30	Implementation Act	Article III	Full

Source: Dutch Implementation Act, 20 January 2022, ING

The Covered Bond Directive refers to a subset of articles to which these transitional measures apply alone, namely to CBD Articles 5-12, 15-17 and 19. The provisions for dual recourse (Article 4), cover pool monitor (Article 13), investor information (Article 14) and all covered bond public supervision requirements outside Article 19 (permission for covered bond programmes) always have to be met. For this reason, Article 3:33ba of the Dutch Implementation Act, on the **information requirements** towards investors and De Nederlandsche Bank, is not within the scope of the transitional measures. These requirements must be met by covered bonds issued before and after 8 July 2022, also for programmes that have not been adapted in line with the new law. The legal provisions safeguarding **dual recourse** follow from existing regulation through the Dutch Civil Code and Bankruptcy Act, and are also not in scope of the transitional measures. Most **covered bond public supervision** requirements also follow from existing provisions in the Financial Supervision Act or General Administrative Law Act, or from amendments via the Implementation Act that are not part of the transitional measures.

We are a bit uncertain how the Dutch cover pool monitor provisions of the Implementation Decree relate to the requirements on transitional measures of the Covered Bond Directive. As said, the transitional measures of the Covered Bond Directive do not apply to all articles of the Directive, including not to the cover pool monitoring provisions. This means that, per 8 July 2022, these requirements have to be met by both the old and new covered bonds in countries that use a cover pool monitor. The Netherlands has made use of the CBD Article 13 option to request banks issuing covered bonds to appoint a cover pool monitor. Article 40n of the Implementation Decree regulates the cover pool monitoring referred to in Article 3:33a(3)(d) in more detail. There is no mentioning in Article III Implementation Act that these cover pool monitor provisions would have to be met by both old and new covered bonds. The Dutch

regulator has strived however to align the new cover pool monitor conditions as much as possible with the old regulatory provisions applicable to the asset monitor and the common practice. As such, covered bonds issued before 8 July 2022 would still likely meet the requirements from Article 40n Implementation Decree, even if issued under a programme that is not converted in line with the new law. Covered bonds issued before 8 July 2022 from covered bond programmes adapted in line with the new law would be subject to the new cover pool monitor provisions anyway.

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