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Titel article	Application and Scope of CDD Regulations in Practice

Teaser

The Court of Appeal of Den Bosch has rendered a judgment in a dispute between Van Lanschot Bankiers N.V. (**‘Van Lanschot’**) and JEM Horeca (**‘JEM’**) concerning the termination of the banking relationship on the basis of integrity risks. In its considerations the Court of Appeal clarified the background and objective of (public-law) financial supervisory legislation and explains subtly how these regulations should be applied by banks in practice. Has the smoke concerning this topic finally been lifted with this judgment?

Court of Appeal of Den Bosch, 10 May 2011, LJN BQ 4142

The Facts

JEM is exploiting a *coffee shop* in Maastricht and has a payment account with Van Lanschot. JEM is using the payment account for the monthly deposit of part of its cash turnover. These monthly deposits amount to €50,000 to €70,000 and are always made in denominations of €50.

In a letter of 2 November 2009, Van Lanschot terminated the relationship with JEM as per 2 January 2010. Van Lanschot indicated that it ‘had insufficient insight into the unusual deposits, which implies risks’. As a result, Van Lanschot ‘is not able to establish whether it is collaborating in improper practices and/or is facilitating punishable acts, like money laundering’. This constitutes an unacceptable integrity risk, according to Van Lanschot.

Next, JEM took Van Lanschot to court and claimed the continuation of the banking relationship, on pain of a penalty. The court in preliminary relief proceedings of Den Bosch awarded this claim on 8 February 2010, considering that the termination by Van Lanschot was in conflict with the requirements of reasonableness and fairness. Van Lanschot appealed against this judgment of the court in preliminary relief proceedings.

Legal Question

The present dispute is not an isolated case. In the past years, the Court of Appeal of Arnhem and the Court of Appeal of Leeuwarden have examined similar matters. The Court of Appeal of Den Bosch also dealt with a similar case before. This justifies the conclusion that in practice banks are struggling with the application of (public-law) financial supervisory legislation in the civil-law relationship with their clients. Concretely, the question arises whether on the basis of this public-law legislation they can unilaterally terminate relationships from a civil-law perspective. This matter illustrates the field of tension between (i) the interest of the bank in guaranteeing its integrity and reputation, and (ii) the interest of clients in being able to have the disposal of a payment account.

Legal Framework

Pursuant to (public-law) financial supervisory legislation, banks are obliged to carry out a Customer Due Diligence (**CDD**) and to conduct a CDD policy, in order to determine the integrity risk that is involved in (the entering into) the banking relationship concerned. The purpose of this is to ensure that the integrity of the bank concerned (and the integrity of the financial markets as a whole) is not damaged. The standard intended to oblige the bank to conduct a CDD policy is mentioned in Section 3:10 (1) under c of the Dutch Financial Supervision Act (*Wet op het financieel toezicht* (**Wft**)) and is further elaborated in (*inter alia*) the Dutch Act on the Prevention of Money Laundering and Financing of Terrorism (*Wet ter voorkoming van witwassen en financieren van terrorisme* (**Wwft**)).

The legislator has not expressed an opinion as to how this open standard should be applied in practice. However, within the framework of the Wwft, in 2010 DNB (the Dutch National Bank) developed a guidance (in the form of questions and answers) with a non-binding explanation about the application of the Wwft. In this guidance it is recognized that certain types of clients (such as coffee shops or ‘relax businesses’) carry a higher money-laundering risk because of the great extent of incoming cash payments. However, it is not the intention of the Wwft categorically to refuse this type of clients a simple payment account, according to DNB.

Banks are authorized under civil law to refuse potential clients and to terminate relationships with existing clients unilaterally. The agreement between bank and client is a continuing performance agreement for an indefinite period of time. There is no general arrangement with regard to continuing performance agreements in the Dutch Civil Code. This lacuna has been contractually provided for; the relationship between the bank and its clients is governed by the General Banking Conditions (**GBC**). It is stipulated in the GBC that both the client and the bank may wholly or partially terminate the relationship in writing, while, if requested, the bank must communicate the reason for the termination to the client. However, the fact that the bank has a contractual option of termination does not mean that the bank may use this option just like that, which is emphasized in the present judgment.

Considerations of the Court of Appeal of Den Bosch

The Court of Appeal has considered that if a bank wants to terminate an account of a coffee shop, it will have to assess whether the risks described actually occur in the concrete circumstances of the case. Therefore, the general opinion on policy of the bank that the exploitation of a coffee shop already leads to an impairment of the bank's integrity or reputation, does not suffice. According to the Court of Appeal, it is true that in the sector in which JEM is operating higher integrity risks and money-laundering risks may occur than in other sectors, but this does not imply that these risks actually occur with respect to every individual coffee shop owner.

It cannot be derived from the mere observation that JEM is depositing substantial cash amounts in denominations of €50, that this money does not originate from the sale of soft drugs in its coffee shop. Van Lanschot has not made it plausible that the risks described actually occur in the concrete circumstances of the case. On the basis of these considerations, the Court of Appeal has upheld the judgment of the court in preliminary relief proceedings of 8 February 2010.

Conclusion

In the event of the termination of a banking relationship, banks cannot simply refer to their general policy and the dubious reputation of the sector in which the client at issue is operating. For each individual termination, the bank has to prove a concrete, real and sufficiently serious integrity risk with regard to that specific case. The great importance of being able to have the disposal of a payment account is the starting point, and it is up to the bank to prove why this interest has to give way in a specific case.