

We, Beatrix, by the grace of God, Queen of the Netherlands, Princess of Orange-Nassau, etc. etc. etc.

**Decree of 3 June 2008, amending the Decree on Prudential Rules for Financial Undertakings (*Besluit prudentiële regels Wft*) and the Decree on Conduct of Business Supervision of Financial Undertakings (*Besluit gedragtoezicht financiële ondernemingen Wft*) regarding covered bonds**

On the recommendation of Our Minister of Finance of 7 February 2008, No. FM 2008-0334 M, General Treasury, Financial Markets Directorate, Financial Stability Division;

Having regard to Sections 3:67 and 4:61 of the Financial Supervision Act (*Wet op het financieel toezicht*);

Having consulted the Council of State (opinion of 28 February 2008, No. W06.08.0050/III);

Having seen the more detailed report of Our Minister of Finance of 28 May 2008, No. FM 2008-01154 M;

Have approved and decreed the following:

**Section I**

The Decree on Prudential Rules for Financial Undertakings (*Besluit prudentiële regels Wft*) shall be amended as follows:

**A**

The following two definitions shall be added in alphabetical order to Article 1:

*registered covered bond:*

bond pertaining to a category which:

- (a) is included in a register which the Commission of the European Communities has made available to the general public pursuant to Article 22(4) of the UCITS Directive, or
- (b) is registered in accordance with Article 124b;

*covered bond:*

bond that complies with the following criteria:

- (a) the bond is or will be issued by a bank that has its registered office in the Netherlands;
- (b) the bond is covered by assets which, in the event of default of the issuing bank, shall be used on a priority basis for the reimbursement of the principal and the payment of accrued interest on the bond;
- (c) the assets are safeguarded on behalf of the bondholders:
  - (1<sup>o</sup>) by the transfer under universal or singular title to a legal entity whose exclusive purpose is to carry out the provision specified above under (b), and by the creation of a pledge or a security interest comparable to a pledge under foreign law on behalf of another such legal entity; or

- (2<sup>o</sup>) in another manner to be designated by Ministerial Regulation;
- (d) the assets provide sufficient cover during the life of the bond for the reimbursement of the principal and the payment of accrued interest on the bond as well as for payments in respect of the management and administration of the assets;
- (e) the assets are subject to the laws of a Member State, the United States of America, Canada, Japan, the Republic of Korea, Hong Kong, Singapore, Australia, New Zealand or Switzerland; and
- (f) the issuing bank holds no equity interest in the legal entities referred to above in subparagraph (c) under (1<sup>o</sup>), does not exercise control over these legal entities and is not entitled otherwise to any ownership interest in these legal entities.

## **B**

Three Articles shall be inserted after Article 124, and shall read as follows:

### **Article 124a**

In deviation from Article 123(3), a life insurer or a non-life insurer may invest up to forty per cent of the assets that serve as collateral for their technical reserves in registered covered bonds of a specific issuing bank.

### **Article 124b**

1. At the request of a bank that has its registered office in the Netherlands, De Nederlandsche Bank N.V. (hereafter: 'DNB') shall decide to include in a public register a category of bonds issued or to be issued by the said bank as well as to include therein the issuing bank, if the said bank demonstrates that the bonds are to be designated as covered bonds. Rules shall be imposed by Ministerial Regulation with respect to the manner in which such can be demonstrated by the bank.
2. DNB shall submit to the Commission of the European Communities a list of bonds and banks that have been registered in accordance with paragraph 1 above as well as any changes therein, such for the purposes of applying Article 22(4) of the UCITS Directive. DNB shall forthwith notify the issuing bank of any list being submitted as referred to in the previous sentence with respect to the said bank and the categories of bonds issued by it.
3. If a bonds category no longer complies with the registration requirement set out in paragraph 1 above or if the issuing bank does not or ceases to comply with the provisions of Article 124c, DNB may decide to remove the registration of the bonds category or of the issuing bank, as referred to in paragraph 1 above, from the register. In that case, DNB shall forthwith notify the Commission of the European Communication thereof and shall forthwith make the said removal public on its website.

### **Article 124c**

A bank which has issued bonds pertaining to a category that has been registered in accordance with Article 124b:

- (a) shall keep records which include:
  - (1<sup>o</sup>) the issued bonds that pertain to the said category, and

(2<sup>o</sup>) the assets that serve as collateral for those bonds; and  
(b) shall demonstrate to DNB at least annually that the relevant bonds category still meets the registration requirement as referred to in Article 124b(1).

## **Section II**

Article 135(1) of the Decree on Conduct of Business Supervision of Financial Undertakings (*Besluit gedragstoezicht financiële ondernemingen Wft*) shall read as follows:

1. In deviation from Article 134, the assets under management of an undertaking for collective investment in transferable securities (UCITS) may be invested for up to twenty-five per cent in registered covered bonds as referred to in the Decree on Prudential Rules for Financial Undertakings (*Besluit prudentiële regels Wft*) of a specific issuing bank.

## **Section III**

This Decree shall enter into force with effect from 1 July 2008.

We hereby order and command that this Decree and the accompanying Explanatory Memorandum be published in the Bulletin of Acts, Orders and Decrees (*Staatsblad*).

The Minister of Finance,

W.J. Bos

## Explanatory Memorandum

### General

#### 1. Introduction

Bonds are issued on the international capital market which, partly because they are backed by collateral, provide bondholders with a large degree of security that the obligations under the bonds will be fulfilled (i.e. covered bonds). To secure these bonds, the issuing bank, for instance, transfers receivables to a legal entity set up for this purpose. This legal entity manages and has legal ownership of the receivables, or creates a security right over these receivables. Examples are receivables from third parties in respect of mortgage loans of the issuing bank.

These bonds are favoured by banks as a financing instrument, because they allow favourable financing terms to be negotiated. One of the reasons is that credit rating agencies often assign the highest ratings to these bonds, as the collateral provided makes the bonds a low-risk investment in terms of credit risk. Most banks do themselves not have this highest rating but, through their highest-rated covered bonds, they can still benefit from the favourable credit conditions associated with this highest rating. The contracts underlying the issue must safeguard that investors obtain the required security. Such is necessary with a view to the rating assigned to the bonds. These bonds are very much in demand as an investment as they have a low credit risk.

Most European Member States such as Germany, France and Spain have enacted specific legislation for covered bonds. Specific laws do not yet exist in the United Kingdom, but these are in preparation. In the Netherlands, as is currently still the case in the United Kingdom, covered bonds are being issued but are not yet governed by specific rules and regulations.

Some specific groups of investors, and thereby indirectly the issuing institutions, may benefit from laws governing these types of bonds. Under Article 22(4) of the UCITS Directive<sup>1</sup>, Article 22(4) of the Third Non-Life Insurance Directive<sup>2</sup> and Article 24(4) of the Life Insurance Directive<sup>3</sup>, undertakings for collective investment in transferable securities (UCITS) and life insurers or non-life insurers may, in deviation from the general rule, invest an elevated percentage of their assets or technical reserves, respectively, in this type of bond issued by the same issuing bank. This is permitted under the Directives because of the secure nature of these bonds. The Directives do, however, require that the issuing bank is established in a Member State and is subject (by law) to special public supervision designed to protect bondholders. In addition, a number of other requirements have been formulated in

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<sup>1</sup> Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (UCITS Directive); paragraph 4 has been inserted in pursuance of Directive 2001/108/EEC.

<sup>2</sup> Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (OJEC L 228) (Third Non-life Insurance Directive).

<sup>3</sup> Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJEC L 345) (Life Insurance Directive).

the Directives. In accordance with the law, the bonds must be covered by assets which are capable of covering all obligations under the bonds throughout the life of the bonds and which, in the event of the issuing institution's default, will be used on a priority basis for the reimbursement of principal and the payment of accrued interest on the bonds (see the Articles referred to above in the UCITS Directive, the Third Non-Life Insurance Directive and the Life Insurance Directive).

In addition, under the recast Banking Directive<sup>4</sup> and the recast Capital Adequacy Directive<sup>5</sup>, it is possible for banks and investment firms which invest in bonds as referred to Article 22(4) of the UCITS Directive, to assign to this investment a lower risk weighting under the Standardised Approach and a lower loss-given default under the simplified internal models approach to credit risk, provided some further conditions are met. This, too, is an important benefit. Banks and investment firms which invest in these bonds need to hold less capital to protect them against the credit risk posed by the issuing bank. The rules with respect to risk weighting for Dutch banks are included in the Regulation on Solvency Requirements for Credit Risk (*Regeling solvabiliteitseisen voor het kredietrisico*) of De Nederlandsche Bank N.V. (hereafter: 'DNB').

Given their interest in the possibility of offering covered bonds, Dutch banks should be able to use them as a financing instrument. In view of the low credit risk and the demand for these bonds as an investment, banks may reach new groups of investors and may benefit from favourable credit conditions when raising capital. Banks issuing these bonds may, for instance, use them to finance their mortgage and other loans more cheaply, which may have a favourable effect on interest rates. It is expected that the present Decree on Dutch covered bonds (hereafter: 'this Decree' or 'the Decree') will be used by a great many Dutch banks. The Decree introduces a form of special public supervision, aimed, among other things, at making transparent which obligations have been entered into and the manner in which the relevant transaction has been structured. The Explanatory Notes to the individual Articles, especially those to Article 124c, describe the manner in which such public supervision has been structured.

In 2007, the credit markets saw turmoil break out, which was related in particular to structured products with exposure to the plagued US subprime mortgage market. This turmoil did, in fact, not apply to Dutch structured covered bonds, although it did adversely affect the trade in these bonds (in terms of price and liquidity).

This Decree also aims to exclude possible risks by imposing requirements, among other things, on the issue of these bonds and the assets used as collateral. It appeared that, during the turmoil, covered bonds continued to do well, unlike some other financing instruments such as bonds underlying a

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<sup>4</sup> Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) (recast Banking Directive).

<sup>5</sup> Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions (recast) (OJEC L 177) (recast Capital Adequacy Directive).

securitisation transaction. This makes it all the more desirable to facilitate the use of this financing instrument in the Netherlands.

Furthermore, the Decree may contribute to greater overall transparency and insight for the banking supervisor because the latter will become more closely involved in this important financing method for banks.

## **2. Purpose**

The purpose of this Decree is to attach the aforementioned benefits to covered bonds issued by Dutch banks, whereby a market in secure debt instruments is facilitated in conformity with Directive provisions and whereby robust conditions are imposed to protect investors. This is good from the point of view of investors who will have access to these secure debt instruments and who are subject to the provisions of this Decree and DNB's Regulation on Solvency Requirements for Credit Risk (*Regeling solvabiliteitseisen voor het kredietrisico*), as well from the point of view of the issuing banks which are interested in the possibility of issuing these types of bonds. This Decree, therefore, stipulates that UCITS and life and non-life insurers may invest a higher percentage in these bonds, provided the terms and conditions set out in this Decree are fulfilled. By enacting into national legislation Article 22(4) of the UCITS Directive, the Decree also makes it possible, pursuant to the recast Banking Directive and the recast Capital Adequacy Directive, that banks and investment firms investing in these bonds assign them a lower risk weighting under the Standardised Approach and a lower loss-given default under the simplified internal models approach to credit risk than would currently be the case. To qualify for such treatment, the bonds must meet the requirements set out in this Decree whilst, in addition, the assets that serve as security for the bonds must meet the requirements imposed by the recast Banking Directive in respect of such risk weighting. In the Netherlands, DNB has included these latter requirements in Appendix 1 to its Regulation on Solvency Requirements for Credit Risk (*Regeling solvabiliteitseisen voor het kredietrisico*). In various instances, this Regulation refers to these bonds (for instance, where such bonds may be recognised as eligible financial collateral, Article 4:29 of the Regulation). The Regulation, too, may be applicable to Dutch covered bonds.

Hence, the purpose of the Decree is that Dutch banks derive optimum benefit from this financing instrument and that UCITS, life insurers, non-life insurers and banks alike are provided with more comprehensive investment opportunities in covered bonds issued by Dutch banks. The Decree contributes to a level playing field with other Member States, where such legislation is already in place or will shortly be introduced. Also, the Decree promotes a favourable environment to attract business in the Netherlands, because institutions, too, may issue covered bonds in the Netherlands with the benefits provided by the Directives.

### 3. Principle- based approach

A principle-based approach has been chosen. This means that the Decree regulates the overall features of a legally recognised covered bond as presented in the respective Directive provisions. The focus is thereby on the underlying objective, viz. the security for the investor, and, to a lesser extent, on a detailed structure of the instrument.

Other subjects that may be included in some of the foreign legislation in this respect, such as comprehensive regulations on the assets involved, have not been included here. Furthermore, covered bonds issues are structured and governed by provisions of the Dutch Civil Code and the Bankruptcy Act. A principle-based approach gives the users of this covered bonds regulation greater flexibility than a more rigid and comprehensive legal system, which in this case is desirable as the market is strongly subject to change and innovation. It allows banks to cater more rapidly to developments in the financial markets, and to adjust the bonds to the requirements and demands of the market.

The Decree only imposes limited requirements upon the structure of a transaction. To guarantee security to the investors, typical of these types of bonds, high demands are made on the method of safeguarding the assets on behalf of the bondholders. The approach chosen is consistent with the manner in which current issues are structured in the Netherlands. This means that, as a basic principle, the assets that serve as security for the bonds must be segregated from the assets of the issuing bank by transferring them under universal or singular title to a separate legal entity. This is to prevent that, in the event of bankruptcy of the issuing bank, the assets are considered part of the bankrupt estate. In case innovation in the market would result in the introduction of an alternative secure structure, the provision has been made that it is to be determined by Ministerial Regulation in what other manner the assets can be safeguarded on behalf of the bondholders. To provide for such eventuality, a Ministerial Regulation will be drawn up after consultation with DNB. By offering such flexibility, this Decree aims to prevent that the sector, which has to cater rapidly to new market developments and innovations, must wait for the Decree to be amended. The use of the instrument of a Ministerial Regulation would save time. After the Ministerial Regulation has been adopted, the alternative structure will be included in the Prudential Rules for Financial Undertakings (*Besluit prudentiële regels Wft*), whereupon the Ministerial Regulation can be repealed.

To qualify for the benefits that may be provided by this Decree, the transaction must meet the conditions set out in the Decree. The bank may, however, structure the details of the issue at its own discretion in consultation with the contractual counterparties and credit rating agencies.

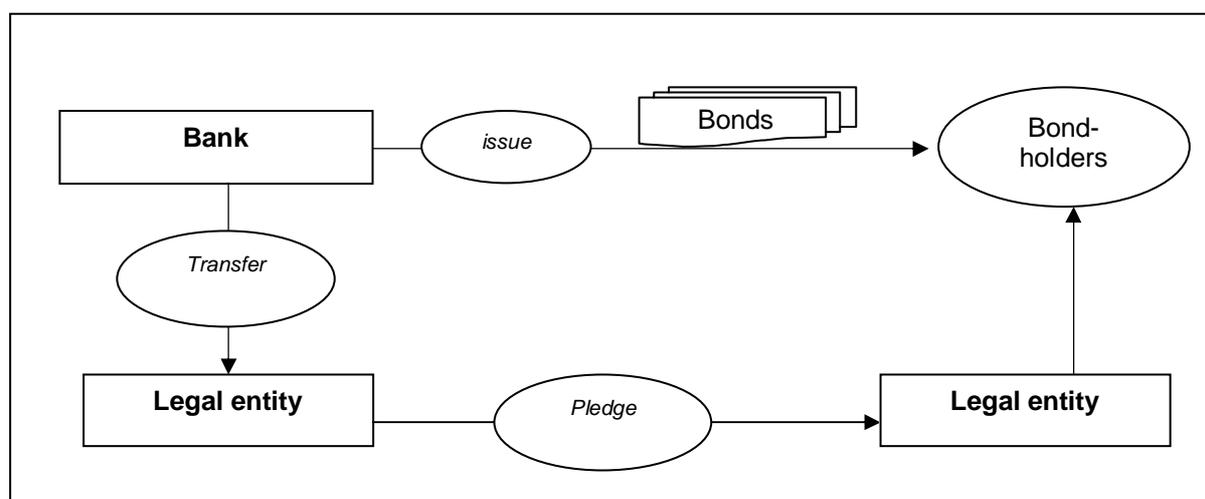
If, for instance, the issuing bank would like to issue a covered bond which, for the bank or the investment firm investing in it, would qualify for a lower risk weighting, the issuing bank may then choose to meet the relevant rules for the assets that are set out in the Regulation on Solvency Requirements for Credit Risk (*Regeling solvabiliteitseisen voor het kredietrisico*).

As stated earlier, the Decree does not prescribe that these assets, which serve as security for the bank's obligations vis-à-vis bondholders under the covered bonds, must comply with the requirements which the Regulation on Solvency Requirements for Credit Risk (*Regeling solvabiliteitseisen voor het kredietrisico*) (in accordance with the recast Banking Directive and the recast Capital Adequacy Directive) imposes on these assets to make them eligible for a low risk weighting.

#### 4. Structure

The issuing institution is a bank. The bank must ensure that the assets which serve as security for the bank's obligations vis-à-vis bondholders can at all times be used on a priority basis for the reimbursement of principal and the payment of accrued interest. The most secure manner to avoid that these assets, in the event of bankruptcy of the issuing bank, are considered part of the bankrupt estate, is to segregate them from the assets of the bank. Therefore, the Decree prescribes that the assets are transferred to an independent, separate legal entity which must ensure that the assets are used for the reimbursement of principal and the payment of accrued interest. Another institution, too, may have ownership of the assets in question (i.e., an originator) and will then transfer title to the assets to the relevant legal entity. The transfer may take place under Dutch law or under foreign law. In addition, as an additional safeguard for bondholders, the creation of a pledge (or a foreign security right, provided this offers a similar degree of security as that provided by a pledge under Dutch law) to such other legal entity is required to protect bondholders. As stated earlier, in case innovation in the market would result in the introduction of an alternative secure structure, the provision has been made that it is to be determined by Ministerial Regulation in what other manner the assets can be safeguarded on behalf of the bondholders. To provide for such eventuality, a Ministerial Regulation will be drawn up after consultation with DNB.

The structure of the issue can be outlined as follows.



## **5. Impact on the sector**

As a result of the new covered bonds regulation, the sector may be faced with compliance charges. These may comprise compliance costs and administrative charges. Compliance costs are the costs for efforts which institutions must undertake to meet regulatory obligations. Compliance costs come into play when an institution's efforts are exclusively undertaken to meet the supervisory authority's requirements. Administrative charges are incurred by institutions for meeting the information requirements arising from public laws and regulations. They comprise the costs of compiling, processing, registering and retaining information and making it available to the public authorities.

A bank may choose to issue the type of bonds referred to in this Decree. In addition, the bank is free at all times to issue similar bonds without meeting the provisions of this Decree, if it sees no need for any of the benefits associated with this covered bonds regulation (see also Sections 1 and 2). If the bank chooses to issue bonds in accordance with this Decree, the bank will be obliged to demonstrate to DNB that it complies with the relevant requirements. It must do so prior to the first issue and at least annually thereafter. The bank must keep records of the issued covered bonds and the assets that serve as security for these bonds.

If the bank chooses to issue bonds that are similar to covered bonds without meeting the requirements under this Decree, it will, for its own business operations, keep records that are similar to the records as required under this Decree. The Decree imposes no further requirements regarding these records.

Where an institution is obliged by rules and regulations to keep records, but would anyhow keep records in the context of its own business operations, it does not incur any administrative charges or compliance costs. Such records would also be needed to obtain a credit rating from a credit rating agency and so promote the marketability of the bonds. Hence, this Decree contains, in fact, an optional clause and the requirement under the Decree to keep records does not lead to the incurrence of any administrative charges or compliance costs.

An issuing bank which issues covered bonds must demonstrate to DNB that it complies with the provisions of this Decree. It seems reasonable to demonstrate this by means of the bank's records, as well as by reports and similar documents that are drafted and updated by the issuing bank in the context of its credit rating. If banks choose to issue covered bonds, it is conceivable that, in addition to the usual costs, banks incur additional costs for keeping records or for demonstrating their compliance with the provisions of the Decree to DNB. In that case, such administrative charges will, however, be limited. It is estimated that about eight of the Dutch banks that could use this Decree, will actually do so. The average time spent on possible extra efforts to keep records or to demonstrate compliance with the provisions of this Decree to DNB, could be estimated at 110 hours (of which about 30 hours for estimated legal services). At an hourly internal wage of EUR 60, and the cost of legal services of EUR 200, the administrative charges arising from this Decree will amount to around EUR 86,400.

If a bank chooses to issue bonds under the framework of this Decree, it will incur some compliance costs to meet the requirements of the Decree. These ensue from the requirements in the definition of covered bonds, which requirements have been included therein to comply with the requirements set out in the Directives regarding the security of the bonds. These requirements are the formation of legal entities, the transfer of assets and the creation of a pledge over the assets. How much this will cost the sector in terms of compliance costs cannot be properly estimated. In the Decree, these requirements show the highest possible consistency with current practice in Dutch covered bonds (that have not been issued under the framework of specific rules and regulations). Actually, with a view to safeguarding the security and marketability of the bonds, the requirements of the Directives as regards the assets – hence, also covering bonds that are not issued under the framework of the present covered bonds regulation – are being structured in virtually the same manner as the requirements of this Decree. The costs that may arise from the issue of bonds under this covered bonds regulation are therefore not really any different from the costs that are presently being incurred (without this Decree).

Banks may, however, make their own judgment as to whether they wish to issue bonds under this Decree. In addition to possible costs, a bank may also have financial benefits from the issue of covered bonds.

The additional costs of DNB's supervision by virtue of this Decree are for supervisory duties in the context of covered bonds and will be recovered from the issuing banks, such in pursuance of Section 1:40 of the Financial Supervision Act. These costs are difficult to estimate as DNB is still holding consultations with the sector as to how supervision can best be structured technically and organisationally. The ultimate supervisory costs will depend on the outcome of these consultations.

## **6. Consultations with stakeholders**

Prior to and during the consultation period, the Decree has been discussed with a working party of the Netherlands Bankers' Association specifically instituted for this purpose, in which representatives from the sector, from the Netherlands Bankers' Association and from DNB participated. Most of the wishes and requests of the sector, the Netherlands Bankers' Association and DNB have been fulfilled. It appears from the consultation document of the Netherlands Bankers' Association that Rabobank wonders whether the requirement in the Directives that the covered bonds qualifying for the benefits provided by the Directives must be issued by a credit institution, may also be interpreted as including the guaranteed subsidiary of a credit institution which is under consolidated supervision, or the issue of a subsidiary of a credit institution which guarantees the subsidiary's issue and which are jointly under consolidated supervision. Under the Decree, only banks are eligible to issue covered bonds in accordance with the provisions of the Directives while non-licensed subsidiaries are not. No further reactions have been forthcoming as a result of the consultation.

## **Explanatory Notes to the Individual Articles**

### **Section I**

#### **A**

##### **Article 1**

The definition of registered covered bond has been added to the definitions (Article 1) of the Decree on Prudential Rules for Financial Undertakings (*Besluit prudentiële regels Wft*). The definition covers (a) bonds whose data have been included in the register of the Commission of the European Communities, and (b) covered bonds that have been registered in the manner as set out below.

The Commission of the European Communities maintains a register in which all categories of bonds and issuing institutions are included that meet the provisions of Article 22(4) of the UCITS Directive. Although no such registration requirement is included in the Life Insurance Directive and the Third Non-Life Insurance Directive, these Directives refer, in fact, to the same type of bonds. It has been decided to use this public register to identify registered covered bonds.

The UCITS Directive refers to categories of bonds that are eligible to be reported to the Commission and to be included in the Commission's register. Included are, for instance, all separate bonds issued in the same issue, or a series of issues, under the same conditions and with the same cover. The bonds must be issued by a bank that has its registered office in a Member State.

In addition, the definition of registered covered bonds includes covered bonds that have been registered in accordance with Article 124b of the Decree on Prudential Rules for Financial Undertakings (*Besluit prudentiële regels Wft*). Registration takes place if it has been demonstrated to the satisfaction of DNB that the bonds are to be designated as covered bonds. This is the second definition which has been added to the above Decree.

Pursuant to subparagraph (a) of the covered bonds definition, covered bonds are issued by a bank that has its registered office in the Netherlands. The bank that issues bonds that comply with the requirements, may submit a request to DNB to have these bonds included as covered bonds in the register, such in pursuance of Article 124b.

Hence, *registered* covered bonds comprise both bonds that comply with the Dutch rules as stated in this Decree, and bonds that comply with the relevant rules and regulations of other Member States and that are included in the Commission's register. Life insurers, non-life insurers and investment firms may invest more in registered covered bonds than in other bonds, because of the low credit risk of these bonds. For further details see the notes to Articles 124a and 135(1) in these Explanatory Notes to the Individual Articles.

Covered bonds are entered into a register by DNB. This is done only if, in DNB's opinion, the bonds are to be designated as covered bonds under the definition of same. See the notes to Article 124b(1) in these Explanatory Notes to the Individual Articles.

Pursuant to subparagraph (b) of the covered bonds definition, covered bonds are secured by assets, and these assets are to be used on a priority basis for the redemption of principal and the payment of accrued interest on the bond in the event of default of the issuing bank. Pursuant to subparagraph (c) of the definition, these assets will be segregated from the assets of the issuing bank and pledged on behalf of the bondholders (or encumbered in a similar manner under foreign law) in order to safeguard that, in the event of bankruptcy of the issuing bank, the assets can be used for repayment of the obligations under the bond. The assets can be segregated from the assets of the issuing bank by transferring them under universal or singular title to a legal entity. A transfer under universal title may take place in the form of a division (Section 2:334a of the Dutch Civil Code). A transfer under singular title may take place in the form of an assignment (Section 3:84 of the Dutch Civil Code). Subsequently, the assets must be pledged, or encumbered with a security right under foreign law, on behalf of the bondholders.

Subparagraph (b) of the covered bonds definition requires that, if the bank defaults on its obligations, the assets will be used on a priority basis for the reimbursement of principal and the payment of accrued interest on the bonds. This is without prejudice to possible higher-ranking payment obligations against the assets, i.e. regarding management, administration and derivatives.

As required by subparagraph (c) under (i) of the covered bonds definition, the legal entities as referred to in that subparagraph must have the exclusive purpose to ensure that, in accordance with subparagraph (b) of the definition, the assets are used on a priority basis for the reimbursement of principal and the payment of accrued interest on the bonds, in the event that the issuing bank defaults on its obligations. The legal entity that acquires title to the assets carries out the said purpose by managing and disposing of the assets to protect the interests of bondholders. Furthermore, subparagraph (c) under (i) of the definition requires that, on behalf of the bondholders, a right of pledge is created in favour of another legal entity which also complies with the said requirement. This other legal entity which acts as pledgee on behalf of the bondholder carries out the said purpose by exercising its rights as a pledgee or security right holder and by using the proceeds to pay the amounts due, amongst others, to bondholders. The requirement that these two legal entities must have the exclusive purpose to ensure that the assets are used in the manner as referred to above, has been formulated restrictively but is without prejudice to the legal entity's objective which may leave room for limited ancillary activities. If, for instance, assets are pledged to the legal entity, it is self-evident that the legal entity in question will also act as agent of the bondholders on whose behalf the legal entity was formed, as well as of other creditors involved.

Subparagraph (c) of the covered bonds definition does not require that the transfer of assets is governed by Dutch law, that the legal entity is formed under Dutch law or that a pledge is created under Dutch law. A security right may be created that is similar to a right of pledge under Dutch law. The security right must, however, provide an equally strong position to the security right holder. The issuing bank must demonstrate to DNB that the transaction complies with the requirements before DNB will proceed to registration. In this case, a greater effort is required on the part of the issuing bank.

In case innovation in the market would result in the introduction of an alternative secure structure, the provision has been made in subparagraph (c) under (ii) of the covered bonds definition that it is to be determined by Ministerial Regulation in what other manner the assets can be safeguarded on behalf of the bondholders. To provide for such eventuality, a Ministerial Regulation will be drawn up after consultation with DNB. By offering such flexibility, this Decree aims to prevent that the sector, which has to cater rapidly to new market developments and innovations, must wait for the Decree to be amended. The use of the instrument of a Ministerial Regulation would save time. After the Ministerial Regulation has been adopted, the alternative structure will be included in the Prudential Rules for Financial Undertakings (*Besluit prudentiële regels Wft*), whereupon the Ministerial Regulation can be repealed.

The Decree does not preclude the possible substitution of the assets for other assets. There is a dynamic pool of assets. Pursuant to subparagraph (d) of the covered bonds definition, assets must be available as security for the obligations under the bonds and as security for payments in respect of the management and administration of the assets, such in order to ensure that there will always be sufficient assets available. This is an additional safeguard to secure the rights of bondholders, in the context of a changing composition of the asset pool. To meet the requirements referred to in this Article, it is usual and therefore allowed to use instruments such as, for instance, derivatives to hedge against risks such as interest rate and currency risks.

Subparagraph (e) of the definition requires that the assets are governed by the laws of a Member State or the United States of America, Canada, Japan, the Republic of Korea, Hong Kong, Singapore, Australia, New Zealand or Switzerland. This requirement that the assets, if not governed by the laws of a Member State, must be governed by the laws of one of the other jurisdictions, is based on the fact that within these other jurisdictions the position of creditors is safeguarded in a similar manner as in the European Union. This is consistent with the provisions of Appendix 2E to the Regulation on Solvency Requirements for Credit Risk (*Regeling solvabiliteitseisen voor het kredietrisico*). Within the said jurisdictions, recourse to these assets will most likely not be thwarted by any unusual impediments.

Subparagraph (f) of the covered bonds definition requires that the issuing bank holds no equity interest in the legal entities and does not exercise control over the legal entities. Neither may the issuing bank be entitled otherwise to any ownership interest in the legal entities.

## **B**

### **Article 124a**

The provisions of this Article follow from Articles 22(4) of the Third Non-Life Insurance Directive and Article 24(4) of the Life Insurance Directive (the contents of which are similar to those of Article 22(4) of the UCITS Directive). These Articles make it possible for life insurers and non-life insurers to invest 40 per cent (instead of 10 per cent in case of "ordinary bonds") of their technical reserves in bonds issued by a single bank that meet the criteria of Article 22(4) of the UCITS Directive, as such bonds constitute a low-risk investment in terms of credit risk. The bonds in question are registered covered bonds.

Covered bonds as well as the issuing bank must meet the criteria of this Decree. If these criteria are no longer met, DNB may remove the registration of the relevant category of bonds or of the relevant issuing bank.

DNB will notify the Commission of the European Communities of any such removal. In that case, the bonds in the category of bonds or the issuing bank whose registration has been removed can, of course, no longer be considered by the non-life insurer or the life insurer as qualifying for the 40 per cent criterion.

### **Article 124b**

The provisions of this Article aim to demonstrate to the investor by means of public registration that the bonds comply with the requirements of this Decree and thereby with the requirements as formulated in the Directives. For the issuing bank, registration serves to confirm that, in DNB's opinion, compliance with the requirements has been sufficiently demonstrated.

DNB's assessment and registration always refer to a category of bonds. In case of a programme under which covered bonds are issued by a bank, DNB will assess and register this programme (of this bank), and not the underlying individual issues.

DNB will only proceed to registration – at the request of the issuing bank which can only be a bank that has its registered office in the Netherlands (see also subparagraph (a) of the covered bonds definition) – if the bank has demonstrated to DNB that it complies with the definition of covered bonds. The issuing bank must provide satisfactory evidence of same to DNB. It will be clarified by Ministerial Regulation in which manner the issuing bank must demonstrate that the bonds can be designated as covered bonds. This Ministerial Regulation also sets out the manner in which, following the issue and registration of the bonds pursuant to Article 124c under (b), the issuing bank must demonstrate that

the bonds continue to be comply with the registration requirements. This will be further regulated in the Regulation Implementing the Financial Supervision Act (*Uitvoeringsregeling Wft*).

Decisions in respect of registration and removal are decisions within the meaning of the General Administrative Law Act. This means that the time limits for making administrative decisions as referred to, among other things, in Article 4:13 of the General Administrative Law Act and other provisions of this Act will be applicable to the request for registration and DNB's possible refusal or removal of such registration.

DNB will submit the list of categories of bonds and issuing institutions as well as the changes therein as referred to in Article 22(4) of the UCITS Directive, to the Commission of the European Communities for entry into the latter's register. DNB will also send a notice as referred to in Article 22(4) of the UCITS Directive to the Commission, which notice will specify the legal status of the guarantees offered by this Decree.

If a category of bonds does not or ceases to comply with the criteria for qualification as covered bonds or if the issuing bank no longer complies with the provisions regarding administration and reporting as set out in Article 124c, DNB can remove the registration as referred to in paragraph 1 of Article 124b. It seems reasonable that DNB, to protect the interests of the issuing bank and the bondholders, would observe some reticence in its use of this authority. Reference is made to the Ministerial Regulation mentioned in paragraph 1 of Article 124b. If DNB proceeds to remove a registration, it will notify the Commission thereof. The Commission will remove the relevant category of bonds or the issuing bank from its own register. As a result of the removal from the Commission's register, the bonds will no longer comply with the definition of registered covered bond.

It seems reasonable that DNB will only proceed to removal from the register if it has become clear that a serious deficiency has occurred and that DNB, in its assessment, will assign a major role to the interests of the issuing bank and the bondholders in DNB's supervisory practice. In pursuance of the General Administrative Law Act, DNB must give the issuing bank the opportunity to be heard before taking its decision. Removal from the register as referred to in paragraph 3 of Article 124b may only concern the category or categories of bonds that no longer comply with the provisions of this Decree, but may also concern the issuing bank if the issuing bank no longer meets the registration requirements. In case several categories of bonds have been issued by the bank under an offering programme and the removal only concerns a single category, the relevant category will be removed from the register, but the registration of the offering programme, i.e. the registered covered bonds issued under the programme, will not be removed and neither will that of the bank (unless the latter no longer complies with the requirements of Article 124c). Thus, removal from the register may also concern one single issue (but not, for instance, the whole programme).

#### **Article 124c**

To make clear which covered bonds have been issued and which assets serve as security for these bonds, the issuing bank keeps records of same.

A report is to be submitted to DNB at least annually. This may, for instance, cover a year starting from the date of the (first) issue. In this report, the bank must demonstrate to DNB that it meets or continues to meet the registration requirements. Under this reporting requirement, the bank must provide DNB with insight into its records as referred to in subparagraph (a) of this Article, and allow DNB to inspect, for instance, audit reports or reports associated with the credit rating of the bonds. In addition, by virtue of its overall tasks under the law, DNB may also request information at other moments than at the reporting moment (e.g. under Article 1:74 of the Financial Supervision Act). DNB holds consultations with the sector about the manner in which supervision can best be structured technically and organisationally. Reference is made to the Ministerial Regulation under Article 124b(1).

#### **Section II**

##### **Article 135(1)**

The provisions of this Article follow from Article 22(4) of the UCITS Directive. Under this Article, undertakings for collective investment in transferable securities (UCITS) may invest 25 per cent (instead of 10 per cent in case of "ordinary bonds") of their assets in the bonds of a single issuing bank that meet the criteria of Article 22(4), as such bonds constitute a low-risk investment in terms of credit risk. The bonds in question are registered covered bonds.

Covered bonds as well as the issuing bank must meet the criteria of this Decree. If these criteria are no longer met, DNB may remove the registration of the relevant category of bonds or of the relevant issuing bank. DNB will notify the Commission of the European Communities of any such removal. In that case, the UCITS may, of course, no longer consider bonds of the relevant category of bonds or of the relevant issuing bank whose registration has been removed, as qualifying for the 25 per cent criterion.

The Minister of Finance,

W.J. Bos