

International Briefings

Netherlands

Entry into force of Intervention Act in the Netherlands

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INTRODUCTION

On 13 June 2012 the Financial Institutions (Special Measures) Act (*Wet bijzondere maatregelen financiële ondernemingen; Intervention Act*) entered into force with retro-active effect as of 20 January 2012. The Intervention Act includes new powers for the Netherlands Central Bank (DNB) to procure that a bank or insurer which is experiencing serious financial problems is transferred, in whole or in part, to a third party. The Minister of Finance is granted extensive powers to intervene in the affairs of financial institutions if this is necessary to safeguard the stability of the financial system. In order to increase the efficacy of these special measures the Intervention Act contains provisions restricting the contractual rights of counterparties of: (i) a bank or insurer that is or has been subject to one of those measures; or (ii) an entity that belongs to the same group as such bank or insurer. The Intervention Act precedes the envisaged introduction of an EU Directive establishing a framework for the recovery and resolution of banks and investment firms, a proposal for which was published on 6 June 2012.

The Intervention Act grants two new categories of far-reaching statutory intervention powers to DNB and the Minister of Finance with regard to financial "problem institutions" (*probleeminstellingen*):

- (i) A new chapter – Chapter 3.5.4A, "Transfer" – is added to the Act on Financial Supervision (*Wet financieel toezicht, AFS*) granting DNB powers to procure that a bank or insurance company which is experiencing serious financial problems is transferred, in whole or in part, to a third party.
- (ii) In order to safeguard the stability of the financial system, the Minister of Finance is granted extensive powers to intervene in the affairs of financial institutions, including banks or insurance companies. These powers are included in the Intervention Act as a new Pt 6 of the AFS entitled "Special measures regarding the stability of the financial system".

To increase the effectiveness of the supplementary measures set out therein, the Intervention Act also adds another new chapter to the AFS – Chapter 3.5.8 – entitled "Post-event counterparty rights".

This chapter restricts certain rights of the counterparties of a bank or insurance company (or a company belonging to the same group), after the bank or insurance company has been subjected to one or more of the measures set out in the Intervention Act.

TRANSFER REGIME: RESOLUTION OF A DISTRESSED BANK OR INSURANCE COMPANY

The Intervention Act authorises DNB to procure the transfer of a bank or insurance company experiencing serious financial problems ("problem institutions"). This applies both in the absence of emergency regulations or bankruptcy, as well as where either of these has been ordered. If DNB concludes that a bank or insurance company is a problem institution, it can initiate a transfer of all or part of that institution by preparing a transfer plan.

The Intervention Act distinguishes three types of transfer that DNB may prepare:

- (i) (in the case of a bank) a transfer of deposit agreements, in which context the explanatory memorandum notes that this would "usually" be financed with funds from the deposit guarantee scheme;
 - (ii) a transfer of other assets or liabilities; and
 - (iii) a transfer of shares in the problem institution.
- A bank or insurance company will be considered a problem institution if the following composite criterion is met:
- (i) there are signs of a dangerous development regarding the institution's equity capital, solvency, liquidity or technical provisions; and
 - (ii) there is a reasonable probability that this development cannot be sufficiently reversed or cannot be reversed in a timely manner.

This criterion is based on the benchmark presently used for applying emergency regulations to banks under the current s 3:160 of the AFS, but has a wider scope. Under the Intervention Act, the criterion will also be used for the application of emergency regulations to a bank or insurance company and for subjecting it to bankruptcy.

If DNB prepares a transfer plan, it may notify the relevant problem institution of that fact, but is not obliged to do so. In the event of notification, the relevant institution and its corporate bodies and representatives must co-operate in the preparation of the transfer plan. In addition, after the notification, DNB can require the institution to provide the necessary information to certain third parties, such as a potential acquirer or experts assisting DNB with preparing the transfer plan.

The actual implementation of a transfer plan prepared by DNB would begin by DNB submitting a request with the district court

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to approve the plan and declare that one or more of the following regimes apply: the emergency regulations; the bankruptcy regime; or the transfer regime (*overdrachtsregeling*) as provided for in the Intervention Act. In this regard, the explanatory memorandum states that if the transfer plan relates to deposit agreements or other assets or liabilities, DNB will "in most cases" request application of the emergency regulations or the bankruptcy regime, whereas the transfer regime is the obvious choice if the transfer plan relates solely to shares in the problem institution.

The district court can only withhold approval of the transfer plan if the plan fails to satisfy a number of pre-conditions regarding its contents or if the transfer price included in the plan (or the method for determining that price) is unreasonable. In the case of a transfer of assets or liabilities, the district court can also withhold its approval if the transfer would be detrimental to the problem institution's remaining creditors.

Through the judicial approval of the transfer plan and the judgment declaring the transfer regime applicable, the relevant shares, deposit agreements or other assets or liabilities will be transferred to the acquiring party, unless the transfer plan provides otherwise. In the same judgment, the district court will also appoint one or more "transferors". The judgment will, by operation of law, deprive the problem institution of its powers of disposal and management over the portion of its assets to which the transfer plan pertains. The shares, deposit agreements or other assets or liabilities covered by the transfer plan that have not already been transferred through the court's judgment will be transferred by the court-appointed transferor(s) to the acquiring party or parties.

INTERVENTIONS INTENDED TO SAFEGUARD THE STABILITY OF THE FINANCIAL SYSTEM

The Intervention Act includes a new Pt 6 of the AFS that will grant two new powers to the Minister of Finance in the interest of safeguarding the stability of the financial system. If the Minister is of the opinion that that stability would be "in serious and immediate danger as a result of the situation of a financial institution having its seat in the Netherlands", he may:

- (i) take "immediate measures" (*onmiddellijke voorzieningen*) regarding the relevant institution; or
- (ii) proceed to expropriate the assets of, or shares in, the institution.

In both cases the Minister of Finance may, if necessary, deviate from statutory provisions or provisions in the articles of association. Furthermore, the Minister must consult DNB in advance and, given the importance of the step(s) to be taken, take the decision in

agreement with the Prime Minister.

The explanatory memorandum gives the following as examples of immediate measures: the temporary suspension of shareholder voting rights, deviation from the articles of association and suspension of a management board or supervisory board member. The power of expropriation is intended to be invoked as a last resort and may only be used if immediate (or other) measures would not work, would no longer work, or would be insufficient. In accordance with s 14 of the Netherlands Constitution (*Grondwet*), expropriation under the new Pt 6 of the AFS would only be permitted in the public interest and in exchange for compensation.

POST-EVENT RESTRICTION OF COUNTERPARTY RIGHTS

Interventions by the authorities for the purpose of safeguarding the continuity of a financial institution may, in some cases, constitute an event of default, a notification event or a cross default clause under the terms of that institution's current contracts, such as a Master Agreement, and could lead to early termination of those contracts or to the counterparty's becoming aware of the preparation for or taking of such a measure.

The explanatory memorandum to the Intervention Act notes that the exercise of such acceleration and early termination rights and the notification of counterparties could have a negative impact on the effectiveness of the measures set out in the Intervention Act. The core of the proposed new Chapter 3.5.8 of the AFS is that such rights cannot be exercised, and the bank or insurance company's obligations to notify cannot be invoked, to the extent those rights and obligations are "triggered" by the taking of one of the proposed new measures or the submission of a request to that end. This also covers acts and events that are connected to such a measure or request. The question is therefore whether an event, such as a downgrade, which may be a subsequent result of the intervention measure, could constitute a trigger. In the Parliamentary History to the Intervention Act, the Minister has stated in this respect that contractual early termination rights on which a counterparty can independently rely remain unaffected. As an example the Minister states that if DNB prepares a transfer plan, and at the same time – with a view to the financial position of the financial institution – a downgrade takes place, the counterparty may use a downgrade trigger event as a default clause (without the permission of DNB). This is different according to the Minister if the downgrade is a direct consequence of the intervention by DNB or the Minister.

We note that on the basis of the Intervention Act the restriction on applicability of trigger events is irrespective of the law applicable to the agreement containing the trigger events which are affected. ■

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