

## Dutch Intervention Act In Force

### 1. Introduction

On 13 June 2012 legislation allowing the Dutch Central Bank or the Dutch Minister of Finance to intervene in respect of failing banks and insurance companies with seat in the Netherlands ("**Intervention Act**") came into force with retroactive effect from 20 January 2012. The Intervention Act mainly amends the Dutch Financial Markets Supervision Act ("**FMSA**") and the Dutch Bankruptcy Act. It is forerunning the proposal from the European Commission ("**EC**") for a Directive establishing a framework for the recovery and resolution of credit institutions and investment firms ("**Recovery and Resolution Directive**") that was published on 6 June 2012. A few provisions of the Intervention Act, such as a provision with respect to the future financing of the deposit guarantee and the investor compensation scheme, have not yet come into force.

### Highlights

The Intervention Act introduces the authority for the Dutch Central Bank to prepare a Transfer Plan, providing for the transfer of:

- deposits (only in the case of a bank),
- (other) assets and liabilities of a bank or insurance company, or
- issued shares in the capital of a bank or insurance company,

if the Dutch Central Bank is of the view that, in respect of the relevant bank or insurance company, there are signs of a dangerous development with respect to its own funds, solvency, liquidity or technical provisions and it can reasonably be foreseen that this development will not sufficiently or timely be reversed.

The Minister of Finance is given the authority to take immediate measures or proceed to

expropriation of assets of or shares in the capital of a bank, insurance company, another financial firm, or of the parent company of any one of these, if the Minister of Finance is of the view that the stability of the financial system is in serious and immediate danger because of the situation of the relevant financial firm.

The proposal for the Recovery and Resolution Directive provides for:

- the obligation for institutions to draw up a recovery plan
- the obligation for resolution authorities in the Member States to draw up a resolution plan
- a regime for intra group financial support
- early intervention measures
- resolution tools (sale of business tool, bridge institution tool, asset separation tool, bail-in tool)
- a European system of financing arrangements

This newsletter provides an:

1. Overview of the intervention tools and the emergency procedure under the FMSA before the coming into force of the Intervention Act
2. Overview of the contents of the Intervention Act
3. Analysis of the differences between the Intervention Act and the proposal for the Recovery and Resolution Directive.

For a schematic summary of the subjects discussed in this newsletter, please see the attached pages at the end of this newsletter. Any capitalised terms in the summary are defined in the remainder of this newsletter where you will find a more detailed analysis of the Intervention Act.

## **2. Measures existing before the Intervention Act came into force**

### **2.1 Intervention**

The FMSA grants the Dutch Central Bank (*De Nederlandsche Bank N.V.*; "**DCB**") the authority to instruct a financial firm to follow a certain course of action, within a reasonable term determined by the DCB, as regards certain issues specified in the instruction decision if (i) the financial firm does not comply with the FMSA or (ii) there are signs of a development which may put the own funds, solvency or liquidity of the financial firm at risk.

In addition, the FMSA provides that the DCB has the authority to appoint an undisclosed

administrator (*stille curator*) if (i) the financial firm does not comply with the FMSA or (ii) there are signs of a development which may put the own funds, solvency or liquidity of the financial firm at risk. Such appointment may only be made if certain further requirements are met, most importantly if the financial firm has not complied with an instruction, or if it is necessary to take immediate steps and the financial firm has been allowed to present its position prior to the DCB's decision. Following the appointment of an undisclosed administrator, the corporate bodies and representatives of the financial firm may act only with the approval of the administrator and in accordance with his instructions. However, the administrator does not have the power to instruct the financial firm.

### **Emergency procedure**

Under the FMSA, the DCB can request the Amsterdam District Court to declare the "**Emergency procedure**" (*noodregeling*) applicable in respect of failing banks and failing insurance companies.

The DCB has the authority to request the Emergency procedure to be declared in the interest of the combined creditors, if the solvency or the liquidity of a bank:

- (i) shows signs of a dangerous development and no improvement of that development can reasonably be foreseen, or
- (ii) is such that it can reasonably be foreseen that the bank will not or only partly be able to meet its obligations in respect of the funds it has obtained.

In the case of an insurance company, the Emergency procedure may, at the request of the DCB, be declared applicable if the winding up of the business requires special measures in the interest of the combined creditors.

If the Emergency procedure has been declared applicable, the DCB can grant the power to a court-appointed administrator to proceed to:

- reorganisation measures, by transferring all or part of the obligations which the bank assumed in obtaining (withdrawable) funds or, in the case of an insurance company, by transferring all or part of the obligations which the insurance company assumed under insurance agreements (*saneringsmaatregelen*);
- liquidation, wholly or partially, of the bank's business or of the insurance company's insurance portfolio (*liquidatieprocedure*); or
- a combination of the above measures and procedures.

### *Recognition by other states*

The above powers correspond to the powers provided for in Directive 2001/24/EC on the reorganisation and winding-up of credit institutions and Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings ("**Reorganisation and Winding-Up Directives**") which have been implemented in the FMSA. Therefore, the decision to apply the Emergency procedure should be recognised and effective, without further formality, within the territory of other European Union Member States ("**EU Member States**").

#### *Limitation of counterparty rights*

When the Emergency procedure is applied, the failing bank or insurance company can in principle no longer be required to fulfil its obligations existing prior to the Emergency procedure being declared applicable.

According to the parliamentary history of the Intervention Act, the early intervention powers and the Emergency procedure have proven inadequate during the 2008 financial crisis because *inter alia*:

- (i) the undisclosed administrator does not have the powers to enforce a course of action
- (ii) the reorganisation powers are given to a court-appointed administrator and not to the DCB or a party nominated by the DCB; this was considered inconvenient because the court-appointed administrator is possibly less familiar with the financial sector and the bank or insurance company
- (iii) the Emergency procedure is primarily directed at a moratorium and less at an orderly resolution.

## **3. The Intervention Act**

Following are the most important elements of the Intervention Act. The Intervention Act is in force with retroactive effect from 20 January 2012.

### **3.1 Early intervention**

#### *Transfer Plan*

The Intervention Act gives the DCB the authority to prepare a "**Transfer Plan**" in respect of a failing bank with seat in the Netherlands or a failing insurance company with seat in the Netherlands, if there are signs of a dangerous development regarding a bank's or an insurance company's:

- (i) own funds
- (ii) solvency
- (iii) (in the case of a bank only) liquidity, or
- (iv) (in the case of an insurance company only) technical provisions,

and if it is reasonably foreseeable that this development cannot be sufficiently reversed or cannot be reversed in a timely manner.<sup>[1]</sup>

In the case of a failing bank, the Transfer Plan can provide for the transfer in whole or in part, to a third party of:

- deposit agreements
- other assets and liabilities
- the shares issued by the failing bank.<sup>[2]</sup>

In the case of a failing insurance company, the Transfer Plan can provide for the transfer in whole or in part, to a third party of:

- assets and liabilities
- the shares issued by the failing insurance company.<sup>[3]</sup>

The Transfer Plan must at least specify which deposits, assets, liabilities and/or issued shares are transferred, and must contain the name of the purchaser, price for the transfer and a substantiation why such price is considered fair.

#### *Transfer of deposit agreements*

The Transfer Plan consisting of the transfer in whole or in part of deposit agreements must (i) contain – if applicable – the amount paid by the DCB for the financing of deposits covered by the Dutch Deposit Guarantee Scheme (*Depositogarantiestelsel*; "DDGS"), and (ii) consider the interests of the combined deposit holders. After approval of the Transfer Plan by the Amsterdam District Court, the deposit holders must be able to have their deposits at their disposal as soon as possible. The purchaser can alter conditions applicable to the deposit agreements so to bring these conditions in line with comparable deposit agreements of the purchaser, provided it is likely that the purchaser would not agree to the transfer without such alterations. However, if the deposit conditions are altered to the detriment of the deposit holders, they can dispose of their deposit agreement without being subject to any early redemption penalties during 2 months after the transfer has been published in the Government Gazette. Any such alteration of the deposit conditions must be mentioned in the Transfer Plan.

#### *Transfer of shares*

A Transfer Plan consisting of the transfer in whole or in part of the issued shares in the capital of the failing bank or insurance company must contain the name of the shareholders holding more than 5% of the shares and whether the transfer deviates from the articles of association or statutory provisions and, if so, which provisions of the articles of association or the law are deviated from and in what manner.

#### *Notification to the bank or insurance company*

The DCB may notify the bank or insurance company that it is preparing a Transfer Plan. However, the DCB is not obliged to do so. If the DCB notifies the bank or insurance company that it is in the process of preparing a Transfer Plan, the Intervention Act confers more powers to the DCB. The DCB can then oblige the bank or insurance company to provide information to third parties, such as interested purchasers and their expert advisers. Third parties receiving such confidential information are bound to the strict provisions on confidentiality set out in the FMSA. The DCB can order that such third parties are allowed to enter the premises of the bank or insurance company. The failing bank or insurance company cannot file an objection with the DCB with respect to these actions. It can only address these actions before the Amsterdam District Court when it is handling the request for approval of the Transfer Plan. It may also start summary proceedings to obtain relief prior to such proceedings before the Amsterdam District Court. (Please also refer to paragraph 3.4.)

The failing bank or insurance company and any group entity, as well as the third parties referred to above are exempt from the obligation to publish certain information until the Transfer Plan has been approved by the Amsterdam District Court.

#### *Cooperation*

After notification of the Transfer Plan, the bank or insurance company and its corporate bodies and representatives must cooperate in the preparation of the Transfer Plan (*cooperation obligation*).

#### *Undisclosed administrator*

After notification of the Transfer Plan, the DCB can appoint an undisclosed administrator<sup>[4]</sup> also if the normal requirements for such an appointment are not met (please refer to paragraph 2.1 above). If the corporate bodies and representatives of the bank or insurance company insufficiently cooperate in the execution of the Transfer Plan, the DCB can decide to grant more powers to an appointed undisclosed administrator. The undisclosed administrator can then oblige the bank or insurance company to act or refrain from acting in a certain way. The failing bank or insurance company cannot file an objection with the DCB when it takes this

step. Please see above under "Notification to the bank or insurance company" for further details.

Legal acts in contravention of an order given by the undisclosed administrator are subject to annulment if the counterparties knew of or should have known that such actions were prohibited.

### *Liability*

The members of a corporate body and representatives are jointly and severally liable towards the bank or insurance company for damages as a result of a contravention by any member of a corporate body or a representative of (i) the co-operation obligation or (ii) an order from the undisclosed administrator, unless such contravention(s) cannot be imputed to them and they have not failed in taking measures to mitigate the consequences thereof.

## **3.2 Resolution**

### *Execution of the Transfer Plan*

The DCB has the authority to submit a Transfer Plan prepared by it to the Amsterdam District Court, and request the court to approve the Transfer Plan and declare the transfer procedure (*overdrachtsregeling*) applicable. If the relevant Transfer Plan relates to the transfer of shares in the capital of the failing firm, the DCB makes the request with the agreement of the Minister of Finance. The request is dealt with, with the utmost urgency and in a hearing that is not public).

The court orders application of the transfer procedure if prima facie evidence supports that the criteria for preparing the Transfer Plan have been met. The court in principle approves the Transfer Plan unless:

- (a) it does not contain the required information;
- (b) if the price is deemed to be unfair (or if, as the case may be, the method of price determination is deemed to be unfair); and
- (c) in the case of the transfer of assets and liabilities only, the creditors would be prejudiced by the transfer.

The Amsterdam District Court must specify in its decision at what time – accurate to the minute – the decision to declare the transfer procedure applicable was taken. The assets/liabilities or shares are transferred by operation of law to the purchaser mentioned in the decision at the time set out in the decision unless the Transfer Plan states otherwise. The decision must forthwith be published in the Government Gazette. The decision has immediate effect.

Further to the court's decision (i) a transferor is appointed and (ii) the failing bank or insurance

company loses, by operation of law, the disposition of the transferred assets/liabilities or shares.

#### *Transferor*

The Dutch Central Bank can nominate transferors for appointment by the Amsterdam District Court. The transferor executes the Transfer Plan as soon as possible after it has been approved by the Court. The managing directors and members of the supervisory board and any representatives of the failing bank or insurance company must cooperate with the transferor if needed. The Intervention Act provides that the appointed transferor is considered to hold the licence of the failing bank or insurance company.

#### *Purchaser*

When preparing the Transfer Plan, the DCB searches for a private party as potential purchaser. However, if a suitable private purchaser cannot be found, the assets, liabilities, or shares of the failing bank or insurance company can be transferred to a so-called bridge institution (*overbruggingsinstelling*). The bridge institution will be established by the Dutch State or the DCB, but cannot be the Dutch State (or the DCB) itself. The bridge institution will acquire the assets, liabilities, or shares of the failing bank or insurance company until a third party purchaser is found. The Explanatory Memorandum emphasises that the bridge institution must serve to only temporarily hold the assets and liabilities or shares.

Deposits cannot be transferred to a third country purchaser if the deposits are not guaranteed by an equivalent scheme as set out in section 6 of Directive 94/19/EC.

#### *Financing*

The transfer of deposit agreements covered by the DDGS can be (partly) financed by the DCB through the operation of the DDGS.

#### *Emergency procedure*

If the DCB is of the view that resolution of the bank or the insurance company will not be effective it can always choose to instead request the Amsterdam District Court to declare the Emergency procedure (or bankruptcy) (set out in paragraph 2.2)<sup>[5]</sup> applicable.

### **3.3 Immediate measures and expropriation of assets and/or shares**



The Intervention Act also grants powers to the Minister of Finance in the interest of safeguarding the stability of the financial system. If the stability of the financial system is in serious and immediate danger as a result of the situation of a financial firm (such as a bank, insurance company or investment firm) having its seat in the Netherlands, the Minister of Finance can, notwithstanding any conflicting legal provisions (provided by law or the articles of association):

- take immediate measures (*onmiddellijke voorzieningen*) regarding the relevant financial firm, or
- proceed to expropriating assets of, or shares in, the relevant financial firm.

Before executing the above measures, the Minister of Finance must first consult the DCB and obtain the agreement of the Dutch Prime Minister.

The above measures can also be directed to a failing financial firm's holding company with its seat in the Netherlands, even though the criterion always relates to the financial firm (the subsidiary).

#### *Immediate measures*

The Explanatory Memorandum with respect to the Intervention Act gives the following 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. It is noteworthy that the Minister of Finance has confirmed that the Intervention Act does not provide for a bail-in tool.

#### *Power of expropriation*

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. The Dutch Expropriation Act is not applicable to expropriations based on the Intervention Act.

### **3.4 Safeguards**

#### *Shareholder safeguards in the event of intervention by the DCB*

Shareholders of the failing bank or insurance company who individually hold more than 5% of the shares<sup>[6]</sup> have – unless the interest of maintaining confidentiality or urgency dictates otherwise – the opportunity to be heard before the Amsterdam District Court decides upon the DCB's request to approve the Transfer Plan and declare the transfer procedure (*overdrachtsregeling*) applicable.

Such shareholders can put up a defense against:

- (i) the decision of the DCB that there are signs of a dangerous development regarding a bank's or insurance company's own funds, solvency, (in the case of a bank only) liquidity or (in the case of an insurance company only) technical provisions, and that it is reasonably foreseeable that this development cannot be sufficiently reversed or cannot be reversed in a timely manner
- (ii) the price of assets and liabilities (other than deposit agreements and shares) or price determination method as set out by the Transfer Plan.

Shareholders – excluding shareholders holding more than 5% of the shares and who have already been heard – can oppose the decision of the Amsterdam District Court to execute the Transfer Plan within eight days following the decision. The opposition cannot be directed against the price or against the price determination method. If the opposition is deemed well-founded, the transfer procedure will not be annulled if this would have disproportionately grave consequences.

Shareholders can request the Enterprise Chamber of the Amsterdam Court of Appeal for additional indemnification for damages caused by the loss of shares, which are not covered by the price paid by the purchaser. Such request should be lodged within six weeks after the decision of the Amsterdam District Court in which the price of the shares is determined has become final or within six weeks after the price has been determined according to the price determination method as decided by the Amsterdam District Court.

#### *Safeguards for the failing bank or insurance company*

The Intervention Act provides safeguards for the failing banks and insurance companies against the decisions of the DCB.

If the DCB requests the Amsterdam District Court to approve the Transfer Plan and to declare the transfer procedure (*overdrachtsregeling*) applicable, the Amsterdam District Court allows the failing bank or insurance company to be heard. The failing bank or insurance company can raise the following objections against the decision of the DCB:

- (i) that the failing bank or insurance company should provide information to third parties (among which interested purchasers and their expert advisers)
- (ii) that such third parties are allowed to enter the premises of the bank or insurance company
- (iii) to appoint an undisclosed administrator

- (iv) to grant the undisclosed administrator the power to oblige the bank or insurance company to act or refrain from acting in a certain way
- (v) that there are signs of a dangerous development regarding a bank's or insurance company's own funds, solvency, liquidity or (in the case of an insurance company only) technical provisions, and that it is reasonably foreseeable that this development cannot be sufficiently reversed or cannot be reversed in a timely manner (i.e. the criteria for setting up a Transfer Plan)
- (vi) in respect of the price of assets and liabilities (other than deposit agreements and shares) or price determination method as set out by the Transfer Plan.

The Amsterdam District Court only decides that the objections raised by the failing bank or insurance company are well-founded, if the DCB cannot be considered to have come to its decision in reasonableness.

#### *Safeguards in the event of intervention by the Minister of Finance*

Within ten days after the decision of the Minister of Finance to take immediate measures or to expropriate, interested parties can lodge an appeal with the Administrative Division of the Council of State.

Finally the Intervention Act provides for an indemnification procedure available to expropriated parties.

### **3.5 Limitation of counterparty rights**

The Intervention Act provides that counterparty rights such as the right to:

- (i) terminate an agreement with immediate effect on occurrence of a trigger event,
- (ii) require collateral on occurrence of a trigger event, and
- (iii) bring a counterclaim on occurrence of a trigger event

can be limited as a result of *inter alia* (i) the preparation of the Transfer Plan, (ii) the notification to the bank or insurance company that the DCB is preparing a Transfer Plan, (iii) approval of the Transfer Plan by the Amsterdam District Court, or (iv) any measure taken by the Minister of Finance. Counterparties can only exercise such rights after approval by the DCB.

#### *Exceptions*

The following counterparty rights are not limited by the Intervention Act:

- (i) rights of central banks or other participants to payment and security settlement systems as defined by Directive 2009/44/EC, including the right to enforce transfer orders, netting and security rights
- (ii) rights resulting from financial collateral arrangements as provided for by Directive 2002/47/EC.

#### *Advantage of financial collateral arrangements over rights in re*

The decisions of the DCB and the Minister of Finance do limit the exercise of counterparty rights *in re* but do not limit the exercise of rights resulting from financial collateral arrangements. It can therefore be advantageous for the failing bank or insurance company and/or its counterparties to use financial collateral arrangements instead of *in re* securities as collateral.

### **3.6 Recognition and implementation in other Member States**

#### *Transfer based on the Transfer Plan*

According to the Explanatory Memorandum, a transfer based on the Transfer Plan must be considered as a reorganisation measure as defined by the Reorganisation and Winding-Up Directives. Therefore, such transfer should in principle be recognised by other EU Member States also if the rules of the host Member State do not provide for such measures or make their implementation subject to conditions which are not fulfilled.

#### *Immediate measures and expropriation of assets and/or shares*

Neither the Intervention Act nor the Explanatory Memorandum provides for clear guidance whether the immediate measures and expropriation of assets and/or shares by the Minister of Finance should be recognised by other Member States. There are good arguments for the position that the measures of the Minister of Finance are not reorganisation measures as defined in the Reorganisation and Winding-Up Directives, since such measures are aimed at preserving the financial system as a whole rather than (solely) the failing bank or insurance company.

#### *Limitation of counterparty rights*

The Intervention Act provides that the provisions on the limitation of counterparty rights apply irrespective of the law applicable to the underlying agreement. The Explanatory Memorandum makes clear that these provisions are overriding mandatory provisions in the Netherlands. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a state for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their

scope, irrespective of the law otherwise applicable to the agreement.

## 4. Recovery and Resolution Directive

### 4.1 General

The EC organised a number of consultations between 2008 and 2011 on crisis management in respect of failing banks. In January 2011, the Services of DG Internal Market and Services invited views in response to its public consultation regarding the putting in place of an EU framework for crisis management in the financial sector: EC consultation on crisis management (DG Internal Market and Services WORKING DOCUMENT – Technical details of a possible EU framework for bank recovery and resolution). A proposal of the EC - the EC Directive on recovery and resolution - was published on 6 June 2012.

The proposal for the Recovery and Resolution Directive contains proposals for *inter alia*:

- (a) recovery and resolution plans
- (b) intra-group financing
- (c) early intervention
- (d) resolution tools (sale of business/ bridge institution/ asset separation)
- (e) bail-in
- (f) the setting up of European arrangements for the financing of resolution measures.

### 4.2 Differences between the Intervention Act and the Recovery and Resolution Directive

#### Re (a), (b), (c), (e) and (f)

The Intervention Act does not contain proposals for (a) recovery or resolution plans, (b) intra-group financing, (e) bail-in, or (f) arrangements for the financing of resolution measures other than the financing of the transfer of deposit agreements (through operation of the DDGS). The Intervention Act provides for fewer early intervention tools than proposed in the proposal for the Recovery and Resolution Directive (ad (c)).

Further implementation legislation is therefore to be expected in these areas before 1 January 2015.

#### Re (d)

*Sale of business*

The sale of business tool enables a sale of the bank or the whole or part of its assets and liabilities to one or more purchasers on commercial terms, without requiring the consent of the shareholders or complying with procedural requirements that would otherwise apply.

This tool corresponds to the (preparation and execution of the) Transfer Plan, *i.e.* the resolution powers conferred on the DCB and the Amsterdam District Court (please refer to paragraph 3.2).

### *Bridge bank*

The bridge bank tool enables resolution authorities to transfer all or part of the business of the failing bank to a bridge institution/bank.

This tool basically corresponds to the intended functioning of the bridge institution (*overbruggingsinstelling*) provided for by the Intervention Act (please refer to paragraph 3.2).

### *Asset separation*

The purpose of the asset separation tool is to enable resolution authorities to transfer certain assets of a bank to an asset management vehicle for the purpose of facilitating the use or ensuring the effectiveness of another resolution tool.

The Intervention Act does not explicitly provide for an asset separation tool. However, the Intervention Act does not limit the role of the bridge institution, nor does it provide a limitation as to possible purchasers. Therefore, it is possible that the bridge institution would be used for the purpose of asset separation.

### Expropriation

The Intervention Act provides for a last resort measure: the power of expropriation, which may only be used if immediate (or other) measures would not work, would no longer work, or would be insufficient. The proposal for the Recovery and Resolution Directive does not provide for such powers.

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[1] The consultation version contained a broader criterion. The DCB also had the power to prepare a Transfer Plan if there were signs of a dangerous development regarding a bank's or insurance company's sound and prudent business operations. However, further to the advice of the Council of State of the Netherlands the scope was limited to quantitative criteria such as solvency and liquidity.

[2] The proposed transfer can deviate from the articles of association or statutory provisions with the exception of the provisions of the Intervention Act.

[3] Please refer to footnote 2.

[4] The Intervention Act literally mentions an administrator. However, the Explanatory Memorandum to the legislative proposal for the Intervention Act makes clear that this must be read as the appointment of an undisclosed administrator.

[5] Please note that the Intervention Act contains a proposal for the amendment of the criterion set out in paragraph 2.2. The Intervention Act proposes the same criterion for the preparation of the Transfer Plan (as set out in paragraph 3.1) and the Emergency procedure.

[6] The consultation version limited the right to be heard to shareholders holding more than 10% of the shares.

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	Measures before Intervention Act	Intervention Act	Recovery and Resolution Directive
Measures provided for	<p><b>Intervention</b></p> <ul style="list-style-type: none"> <li>Instructions to a financial firm to meet the requirements of the FMSA</li> <li>Appointment of an undisclosed administrator</li> </ul> <p><b>Emergency procedure</b></p> <ul style="list-style-type: none"> <li>Transfer of all or part of the obligations of the bank or insurance company which it assumed in conducting its business</li> <li>Winding-up measures</li> </ul>	<p><b>Early intervention</b></p> <p>The Dutch Central Bank can prepare a Transfer Plan for the transfer in whole or in part, to a third party of:</p> <ul style="list-style-type: none"> <li>deposit agreements (only in case of a bank)</li> <li>(other) assets and liabilities</li> <li>issued shares in the capital of the bank or insurance company</li> </ul> <p>The Dutch Central Bank can appoint an undisclosed administrator if the criterion for early intervention is met and the Dutch Central Bank can grant more powers to an appointed undisclosed administrator</p> <p><b>Resolution</b></p> <p>Execution of the Transfer Plan</p> <p><b>Immediate measures and expropriation of assets and/or issued securities</b></p> <p>The Minister of Finance can:</p> <ul style="list-style-type: none"> <li>take immediate measures</li> <li>proceed to expropriate assets or issued securities (e.g. shares or (convertible) bonds)</li> </ul>	<p><b>Recovery and resolution plans</b></p> <p><b>Intra group financial support</b></p> <p><b>Early intervention measures <i>inter alia</i></b></p> <ul style="list-style-type: none"> <li>Implementation of one or more elements of the recovery plan</li> <li>Removal or replacement of board members or managing directors</li> <li>Appointment of a special manager</li> </ul> <p><b>Resolution</b></p> <ul style="list-style-type: none"> <li>Sale of business tool</li> <li>Bridge institution tool</li> <li>Asset separation tool</li> <li>Bail-in tool</li> <li>Group resolution</li> </ul> <p><b>Financing arrangements</b></p>



<b>Measures apply to</b>	<p><b><u>Intervention</u></b></p> <ul style="list-style-type: none"> <li>▪ All financial firms<sup>1</sup></li> </ul> <p><b><u>Emergency procedure</u></b></p> <ul style="list-style-type: none"> <li>▪ Banks</li> <li>▪ Insurance companies</li> <li>▪ Entities for risk acceptance</li> </ul>	<p><b><u>Early intervention</u></b></p> <ul style="list-style-type: none"> <li>▪ Banks</li> <li>▪ Insurance companies</li> </ul> <p><b>Immediate measures and expropriation of assets and/or shares</b></p> <ul style="list-style-type: none"> <li>▪ All financial firms and their parent companies with seat in the Netherlands</li> </ul>	<p><b>Recovery and resolution plans/early intervention measures</b></p> <ul style="list-style-type: none"> <li>▪ Banks</li> <li>▪ Investment firms</li> </ul> <p><b>Intra Group Financial Support provisions <i>inter alia</i> apply to a</b></p> <ul style="list-style-type: none"> <li>▪ Parent institution in a Member State</li> <li>▪ Union parent institution</li> <li>▪ Financial holding company</li> <li>▪ Mixed financial holding company</li> <li>▪ Mixed-activity holding company</li> <li>▪ Parent financial holding company in a Member State</li> <li>▪ Union parent financial holding company</li> <li>▪ Parent mixed financial holding company in a Member State</li> <li>▪ Union parent mixed financial holding company</li> </ul> <p><b>Resolution</b></p> <ul style="list-style-type: none"> <li>▪ Banks</li> <li>▪ Investment firms</li> <li>▪ Certain holding companies</li> </ul>
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<sup>1</sup> *Inter alia* banks, insurance companies, investment firms, investment funds.

<b>Competent Authority</b>	<p><b>Intervention</b></p> <ul style="list-style-type: none"> <li>Dutch Central Bank</li> </ul> <p><b>Emergency procedure</b></p> <ul style="list-style-type: none"> <li>Ordered by the Amsterdam District Court upon request of the Dutch Central Bank</li> </ul>	<p><b>Early intervention</b></p> <ul style="list-style-type: none"> <li>Dutch Central Bank</li> </ul> <p><b>Resolution</b></p> <ul style="list-style-type: none"> <li>The Transfer Plan is approved by the Amsterdam District Court upon request of the Dutch Central Bank, leading to the declaration of the Transfer procedure</li> <li>A request for approval of a Transfer Plan relating to shares requires the agreement of the Minister of Finance</li> </ul> <p><b>Immediate measures and expropriation of assets and/or shares</b></p> <ul style="list-style-type: none"> <li>Minister of Finance after consulting the Dutch Central Bank and with the agreement of the Dutch Prime Minister</li> </ul>	<p><b>Resolution</b></p> <ul style="list-style-type: none"> <li>A resolution authority is designated by the Member States to apply the resolution tools and exercise the resolution powers</li> <li>Where the resolution authority and the competent authority pursuant to Directive 2006/48/EC are separate entities, the entities are required to cooperate closely in the preparation, planning and application of resolution decisions</li> </ul>
<b>Criteria for (early) intervention and resolution</b>	<p><b>Intervention</b></p> <p>If the financial firm does not comply with the provisions of the FMSA or if there are signs of a development which may put the own funds, solvency or liquidity of the financial firm at risk</p> <p><b>Emergency procedure</b></p> <p><u>Before</u> the Intervention Act:</p> <p>If the solvency or the liquidity of a</p>	<p><b>Early intervention</b></p> <p>If there are signs of a dangerous development regarding a bank's or insurance company's own funds, solvency or liquidity (or, in respect of an insurance company, technical provisions) and if it is reasonably foreseeable that this development cannot be sufficiently reversed or cannot be reversed in a timely manner</p> <p>The Dutch Central Bank can decide to give more powers to the undisclosed administrator if the corporate bodies and representatives of</p>	<p><b>Early intervention</b></p> <p>If the bank or investment firm does not meet or is likely to breach the requirements of Directive 2006/48/EC</p> <p>A special manager can be appointed if there is a significant deterioration in the financial situation of the bank or investment firm or where there are serious violations of law, regulations or bylaws or serious administrative irregularities and other early intervention measures are not</p>

bank: (i) shows signs of a dangerous development and no improvement of that development can reasonably be foreseen, or (ii) is such that it can reasonably be foreseen that the bank will not or only partly be able to meet its obligations in respect of the funds it has obtained

If the winding up of the business of an insurance company requires special measures, and this is in the interest of the combined creditors

The Intervention Act has changed the criterion for the Dutch Central Bank to request the Emergency procedure to be applied. The same criterion as for early intervention now applies.

the bank or insurance company insufficiently cooperate in the preparation of the Transfer Plan

#### **Resolution**

If the Amsterdam District Court approves the Transfer Plan and prima facie evidence that the criteria for early intervention are met

#### **Immediate measures and expropriation of assets and/or shares**

If the stability of the financial system is in serious and immediate danger as a result of the situation of a financial firm

sufficient to reverse the deterioration

#### **Resolution**

If the resolution authority determines that:

(i) the bank or investment firm is failing or likely to fail,

(ii) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector or supervisory action, other than a resolution action taken in respect of the bank or investment firm, would prevent the failure of the institution within a reasonable timeframe, and

(iii) the resolution action is necessary in the public interest

<p><b>Recognition by other EU Member States</b></p>	<p><b>Intervention</b></p> <ul style="list-style-type: none"> <li>Intervention measures are recognised by EU Member States on the basis of "home country control"</li> </ul> <p><b>Emergency procedure</b></p> <ul style="list-style-type: none"> <li>A decision to apply the Emergency procedure must be considered as reorganisation measures provided for by the Reorganisation and Winding-Up Directives and therefore recognised and effective in EU Member States</li> </ul>	<p><b>Early Intervention and Resolution</b></p> <ul style="list-style-type: none"> <li>These measures must be considered reorganisation measures provided for by the Reorganisation and Winding-Up Directives and therefore recognised and effective in other EU Member States</li> </ul> <p><b>Immediate measures and expropriation of assets and/or shares</b></p> <ul style="list-style-type: none"> <li>There may be good arguments for the position that these measures should not be considered reorganisation measures provided for by the Reorganisation and Winding-Up Directives and, pursuant to these Directives, recognised and effective in other EU Member States</li> </ul>	<p>The Directive 2001/24/EC on the reorganisation and winding-up of credit institutions is to be amended by the Recovery and Resolution Directive. As a result the resolution tools should be recognised and effective in other EU Member States</p>
<p><b>Limitation of counterparty rights</b></p>	<p>When the Emergency procedure is applied, the failing bank or insurance company can no longer be required to fulfil its obligations existing prior to the Emergency procedure being declared</p>	<p>Counterparties' rights are limited when one of the measures provided for by the Intervention Act is applied: counterparties can only exercise their rights – such as termination of an agreement if a trigger event occurs – after prior approval by the Dutch Central Bank</p> <p>These limitations do not apply to financial collateral arrangements.</p>	<p>Resolution authorities have the power to suspend the termination rights of any party under a <i>financial contract</i> with a failing bank or investment firm that arise solely by reason of an action by the resolution authority</p> <p>The following contracts are <i>inter alia</i> financial contracts:</p> <ul style="list-style-type: none"> <li>securities contracts, including: (i) contracts for the purchase, sale or loan of a security, a group or index of securities, (ii) an option on a security or group or index of securities, (iii) a</li> </ul>

repurchase or reverse repurchase transaction on any such security, group or index

- commodities contracts
- futures and forwards contracts
- repurchase agreements relating to securities
- swap agreements, including: swaps, options, futures or forward agreements relating to interest rate/foreign exchange, total return, credit spread or credit swaps
- master agreements for a financial contract

If a resolution authority exercises the power to suspend termination rights, it must use all reasonable efforts to ensure that all margin collateral and settlement obligations of the failing institution that arise under financial contracts during the period of suspension are met.

Counterparties under a financial contract entered into originally with the bank or investment firm under resolution cannot exercise termination rights under that contract or rights under a *walk-away* clause, unless the resolution action is the sale of business tool or the bridge institution tool and the rights and liabilities

			<p>covered by the financial contract are not transferred to a third party or bridge institution, as the case may be</p> <p>A walk-away clause includes a provision in a financial contract that suspends, modifies or extinguishes an obligation of the non-defaulting party to make a payment, or prevents such an obligation from arising that would otherwise arise</p>
<b>Effective date</b>	Currently in force	Currently in force with retroactive effect from 20 January 2012	<p>Twentieth day following publication in the <i>Official Journal of the European Union</i>. Member States must adopt and publish their implementing laws, regulations and administrative provisions by 31 December 2014 and apply those provisions from 1 January 2015</p>