

banks. The fact that technical accounting solutions affect the risk calculation of the operations of a bank was also seen not to support the purpose of the bank tax. It was further noted that the effect of differences in bank group structures on the calculation basis of the bank tax could distort competition.

One major Finnish bank, Nordea Bank Finland Plc, has already taken measures to reduce its exposure to the new bank tax by having Nordea Bank AB (publ) in Sweden secure part of the Finnish bank's receivables. As a result of this, part of the risk relating to the receivables was transferred to Nordea Sweden and, thus, the amount of risk-weighted assets of Nordea Finland was significantly reduced. As a result of this, Nordea is said to have reduced its bank tax burden by €35-40m. According to Nordea, its actions were justified as Nordea's balance sheet in Finland is substantially larger than its actual business operations here. It remains to be seen whether other banks will undertake similar measures and how these arrangements will affect the targeted annual bank tax revenue.

## Netherlands

### SNS REAAL nationalised: first-time application of the Dutch Intervention Act

#### *Consequences for counterparties*

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#### INTRODUCTION: SNS REAAL EXPROPRIATION

On Friday 1 February 2013 the Dutch State nationalised the SNS REAAL bank and insurance group. By nationalising the SNS REAAL group, the Dutch Minister of Finance has for the first time used its powers under the Dutch Intervention Act (*Wet bijzondere maatregelen financiële ondernemingen*, also known as *Interventiewet*). In our July/August 2012 International Briefing on the Netherlands in this journal ([2012]7 JIBFL 455), we discussed the entry into force of the Intervention Act and its contents.

In the SNS REAAL nationalisation, the Dutch State expropriated shares, core tier 1 securities and other subordinated debts issued by SNS Bank N.V. and its holding company, SNS REAAL N.V. (some of which are listed on Euronext Amsterdam). This nationalisation is combined with additional capital injections and write-offs on earlier capital injections from the Dutch State. The aim of the expropriation is to save the SNS REAAL group from insolvency and thus safeguard the stability of the Dutch

financial system. According to the Dutch Minister of Finance, the measures taken are required to resolve the capital deficiencies caused by losses on SNS Property Finance's real estate portfolio. SNS Bank is the fourth largest bank of the Netherlands.

The investors in the expropriated loans and shares lodged an appeal against the expropriation. On 25 February 2013, the Administrative Jurisdiction Division of the Dutch Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) dismissed all appeals against the expropriation of the shares and subordinated loans.

The Dutch Intervention Act introduced far-reaching intervention powers for both the Dutch Central Bank (*De Nederlandsche Bank*, "DNB") and the Dutch Minister of Finance with respect to financial institutions. In short, these intervention powers comprise of the following (for a more detailed explanation, we refer you to our abovementioned article):

- DNB can procure the transfer of (all or part of) a bank or insurance company experiencing serious financial problems to a third party. Such transfer plan can include (in the case of a bank): (i) a transfer of deposit agreements; (ii) a transfer of other assets or liabilities; and (iii) a transfer of shares in the problem institution.
- The Minister of Finance can: (i) take "immediate measures" (*onmiddellijke voorzieningen*) regarding a financial institution; or (ii) proceed to expropriate the assets and liabilities of, or shares in, the financial institution or its holding company. The Minister of Finance has done the latter in respect of the SNS REAAL group.

On top of that, the act contains statutory restrictions for counterparties on exercising contractual rights triggered by such intervention measures or related events (such as close-out following an event of default triggered by intervention measures). These restrictions apply to counterparties of the financial institution's affiliates as well. The restrictions (as well as the other intervention powers) have been laid down in the Dutch Act on Financial Supervision (*Wet financieel toezicht*, "Wft"). Below we will describe the position of counterparties of an institution which is subject to an intervention measure.

#### RESTRICTIONS ON RIGHTS OF COUNTERPARTIES

Dutch financial institutions have entered into many international financial agreements such as ISDA Master Agreements (for OTC derivatives), Global Master Repurchase Agreements (for repo's), Global Master Securities Lending Agreements (for securities lending transactions), loan agreements (under LMA standards) or prime brokerage agreements.

Chapter 3.5.8 Wft aims to neutralise any contractual effects of the new intervention measures. The reason for this is that such contractual consequences may have a negative impact on the effectiveness of those measures<sup>1</sup>. Interventions by the authorities at a bank or an insurance company may constitute an event of default, termination event or similar event under their contracts

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with counterparties, giving rise to termination or other rights of these counterparties. The unrestricted exercise of such rights by a counterparty of the institution is considered undesirable in the event of intervention, the goal of which is keeping an institution going concern.

The core provisions of Chapter 3.5.8 Wft, ss 3:267f(1)–(2) Wft, stipulate that:

- counterparty rights against a bank or an insurance company<sup>2</sup> cannot be exercised, to the extent those rights are triggered by an intervention measure being taken or requested (Intervention Event)<sup>3</sup>; and
- a counterparty of a bank or an insurance company<sup>4</sup> cannot invoke a “circumstance” resulting from an Intervention Event.

Section 3:267g Wft stipulates that provisions obliging a bank or insurance company<sup>5</sup> to notify a counterparty of an Intervention Event or to provide information with regard to such an event cannot be invoked. There are no explicit exceptions to this rule.

It is primarily a determination to be made under the law governing the relevant agreements, whether on the face of the agreements, an Intervention Event or a “circumstance” resulting therefrom would trigger a contractual right (to, for instance, terminate the agreement). However, it will eventually depend on the factual situation and precise content of the Intervention Event or the resulting circumstance whether this will actually be the case.

Most international financial contracts are subject to another law than Dutch law. Section 3:267d Wft therefore provides that Chapter 3.5.8 Wft applies to all contracts, *irrespective of the law governing the contract*. According to the explanatory memorandum to the Intervention Act, this section thus “provides” that Chapter 3.5.8 WFT constitutes overriding mandatory rules within the meaning of the Rome I Regulation<sup>6</sup>. A Dutch court would likely apply this rule, under Dutch private international law. It is uncertain, however, whether a foreign court would also regard the restrictions as mandatory rules, under its own private international law. This is relevant as most international financial contracts to which Dutch financial institutions are a party will not confer jurisdiction upon the Dutch court, but upon the court of the country of the counterparty.

## EXCEPTIONS

There are two exceptions to the general restrictions on the exercise of contractual rights set out above. These restrictions do not apply:

- where the counterparty is a central bank or a participant in a payment or settlement system under the Settlement Finality Directive (98/26/EC), but only in connection with its participation in that system; and
- to rights arising under a financial collateral arrangement under the Collateral Directive (2002/47/EC) with the relevant bank or insurance company.

These exceptions reflect the requirements imposed by the Settlement Finality Directive and the Collateral Directive. Whether or not the agreements should be characterised as financial collateral arrangements should in our view be primarily determined by the law governing such agreement.

## OTHER COUNTERPARTY ISSUES

Finally, it should be noted that the Dutch Intervention Act may have a potential adverse effect on the enforceability of the netting and collateral provisions in international financial contracts. This is due to the fact that the Intervention Act does not preclude the possibility of transactions entered into and/or collateral granted under a single agreement being transferred separately – and thus may allow for “cherry picking” – in case of a transfer in accordance with the Intervention Act. The Intervention Act does not provide that transactions must be transferred in their entirety to the same acquirer under the transfer plan, even if the relevant transactions have been entered into under a single agreement.

With a view to this, there is legal uncertainty as to whether a counterparty of a Dutch financial institution would be able to net out all transactions under an agreement in case of a transfer of assets/liabilities under the Intervention Act.

## CONCLUSION

With a view to the above, our take-aways are as follows:

- Measures under the Dutch Intervention Act may have adverse consequences for counterparties of an institution subject to such measures. This is, however, not necessarily the case.
- The Intervention Act does not preclude the possibility of transactions entered into and/or collateral granted under a single agreement being transferred separately.
- The Intervention Act restricts contractual rights of counterparties upon an intervention.
- We recommend counterparties to check whether their positions would be affected as a result of a possible intervention.
- To avoid counterparty restrictions it may be advisable to opt for a financial collateral arrangement (as opposed to a ‘traditional’ security right) when dealing with a Dutch financial institution.

<sup>1</sup> *Parliamentary Documents II* 2011–2012, 33 059, no. 3, pp 36–37 and pp 64–65.

<sup>2</sup> Or against an entity belonging to the same group as a bank or insurance company.

<sup>3</sup> Such rights may be exercised with the consent of DNB.

<sup>4</sup> Or a counterparty of an entity belonging to the same group as a bank or insurance company.

<sup>5</sup> Or an entity belonging to the same group.

<sup>6</sup> *Parliamentary Documents II* 2011–2012, 33 059, no. 3, p 64.