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DEPOSIT GUARANTEE SCHEMES IN A EUROPEAN PERSPECTIVE

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INTRODUCTION

Since 1994, pursuant to the Directive 1994/19 regarding deposit guarantee schemes (the "Directive") [1994] OJ L135/5, each of the Member States of the European Union is obliged to have one or more deposit guarantee schemes and, save as otherwise provided, no credit institution (i.e. a bank), in a Member State is authorised to receive deposits unless it is a member of a deposit guarantee scheme. This Directive and the obligation to have a deposit guarantee scheme have been adopted and introduced in view of the Treaty Establishing the European Economic Community adopted on March 25, 1957 (now called the Treaty Establishing the European Community, hereinafter the "Treaty").

In this article, we will first set out the reasoning and the main provisions of the Directive and address the recent developments and studies to further improve the Directive. Subsequently, we will describe the two most frequently used schemes by Member States, i.e. the "fund scheme" and the "apportionment scheme", and briefly describe the Dutch deposit guarantee scheme, including some recent proposals to improve this scheme.

THE EUROPEAN DEPOSIT GUARANTEE SCHEME

BACKGROUND AND REASONING

One of the objectives of the Treaty is the harmonious development of activities of credit institutions throughout the European Union by means of the elimination of restrictions on the right of establishment and the freedom to provide services. However, it should be noted that the stability of the banking system and the rights of holders of deposits in the European Union may be infringed by the elimination of restrictions on the right of establishment and the freedom to provide services in the European Union. The situation in which deposits of a credit institution with a branch

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in another Member State become unavailable should be considered.

Pursuant to the preamble to the Directive, the Directive has been adopted to deal with this possible infringement and to safeguard the stability of the banking system and the rights of holders of deposits throughout the European Union. The preamble to the Directive emphasises that there is a need for a minimum level of deposit protection in the European Union and that deposit protection is as essential as the prudential rules for the completion of the single banking market. Deposits which are maintained by a branch of the relevant credit institution in a Member State other than the Member State in which the credit institution has its head office should be protected by the guarantee scheme applicable to such institution.

As a basic principle of the Directive, the costs of financing the deposit guarantee schemes are born by the credit institutions themselves. The Directive does not entail a system pursuant to which financing of the deposit guarantee scheme should take place. As we will see, funding of the deposit guarantee scheme will take place either upfront (as is the case in the "fund scheme") or afterwards (in case of the "apportionment scheme").

MAIN PROVISIONS

The Directive sets forth obligations in respect of credit institutions. According to the Directive a credit institution is an institution which business is to receive deposits or other repayable funds from the public and to grant credits for its own account.

The principal obligations for Member States of the European Union are laid down in arts 3 and 7 of the Directive. Pursuant to these articles, each of the Member States of the European Union is obliged to have at least one deposit guarantee scheme which provides for a minimum guarantee of €20,000. A credit institution of a Member State may not receive deposits unless it is a member of the deposit guarantee scheme of such Member State. An exemption may apply if a credit institution already falls under a deposit guarantee scheme of another Member State.

Pursuant to art.4 of the Directive a deposit guarantee scheme introduced and officially recognised in one Member State shall also cover the deposits which are maintained with branches set up by credit institutions in other Member States. Further, each Member State shall ensure that a branch of a credit institution within its territory can voluntarily join its deposit guarantee scheme to the extent it exceeds the level and/or scope of the deposit guarantee scheme of the Member State in which it is located. This obligation ensures that branches are authorised to join their host Member State's deposit guarantee scheme in order for them to offer their holders of deposit the same guarantee as is offered by other credit institutions in that host Member State. This is to avoid any market disturbances and competition between national institutions and branches of institutions from other Member States. This is also referred to as "topping-up".

In accordance with art.10 of the Directive, the deposit guarantee scheme in a Member State of the European Union shall pay duly verified claims by deposit holders within three months following the date on which the relevant credit institution appears to be unable to repay such deposits in the near future. The competent authorities may extent this period twice, neither of which shall exceed three months. When calculating the amount of the deposit, the deposit guarantee scheme shall apply the rules and regulations relating to set-off and counterclaims according to the legal and contractual conditions applicable to such deposit.

The deposit guarantee scheme which makes the payments under the guarantee shall have the right of subrogation to the rights of the deposit holders in liquidation proceedings for an amount equal to their payments. This right is set forth in art.11 of the Directive.

DEVELOPMENTS

As of March 11, 2009 the Directive 2009/14 regarding deposit guarantee schemes has been adopted (the "2009 Directive") [2009] OJ L68/3. This Directive has resulted in certain important changes to some clauses of the Directive. One of the main changes is that the Member States should make sure that the minimum guaranteed amount is amended from €20,000 to €50,000. Since this amount is a guaranteed minimum, Member States may also decide that a higher amount will be guaranteed. Currently, for example in the Netherlands, Belgium, Bulgaria, Cyprus, Greece, Malta, Spain and Italy the guaranteed amount is €100,000.

Further, on the basis of the 2009 Directive as of December 31, 2010, the guaranteed amount should in all Member States be €100,000, unless further investigation by the European Commission turns out that such amount would be inappropriate and not financially viable.

Another important change in the Directive as a result of the 2009 Directive relates to the term in which the deposits should be repaid by the deposit guarantee scheme in a Member State of the European Union. On the basis of the Directive this term was three months, which term could be extended up to a maximum of nine months. Currently, the term in which the deposits should be repaid is 20 days. This period can only be extended with a maximum of 10 working days in exceptional circumstances. This period of 20 days will commence once it has been determined that a credit institution appears to be unable to repay the deposits or a judicial authority has ruled that the claims of depositors are suspended.

EUROPEAN COMMISSION

The European Commission has investigated how the Directive has been implemented in the Member States of the European Union and the effectiveness of the deposit guarantee schemes. Further, the Commission has investigated whether the deposit guarantee schemes in the European

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Union are able to pay to the deposit holders in case of serious financial turmoil. In respect of those investigations the European Commission has published several reports (e.g. European Commission, JRC, Unit G09, Ispra (Italy), *Investigating the efficiency of EU Deposit Guarantee Schemes;* May 2008).

Currently, the European Commission is further investigating the effectiveness of the deposit guarantee schemes in the European Union and investigates whether any (further) changes in the European rules are necessary. Concerning the researches of the European Commission, the Commission has requested the High-level Group on financial supervision in the European Union (the Larosière Group) to provide them with advice. The report of the Larosière Group states that the Larosière Group has a preference for prefunded deposit guarantee schemes, also referred to as "fund scheme", which we will describe hereinafter. In the view of the Larosière Group a fund scheme would support the trust in banks and would avoid the situation that banks should contribute to the deposit guarantee scheme in times they may already face difficulties. A fund scheme on a European level, composed of the national deposit guarantee funds, which has been discussed by the Larosière Group, has not been supported, mainly because of the fact that the setting-up and management of such a fund could raise political and practical problems.

Furthermore, the European Commission has organised an Experts Roundtable to gather information from several experts and has published a consultation for the review of the 2009 Directive in view of the report to be provided by the European Commission to the European Parliament and the European Council. The report (and if necessary legislative proposals) of the European Commission is expected soon.

TWO MOST FREQUENTLY USED SCHEMES IN THE EUROPEAN UNION

The Directive does not prescribe the manner in which the deposit guarantee scheme of a Member State should be financed. Member States are free to choose their own system. Although the deposit guarantee scheme should be funded by the members of the relevant deposit guarantee scheme (the credit institutions), the Member States can decide whether the members should pay a contribution in advance or only if a member is unable to fulfil its obligations in respect of its deposit holders.

THE FUND SCHEME

The most frequently used deposit guarantee scheme is a "fund scheme" or "ex ante scheme". Around 80 percent of the Member States have a fund scheme, such as France, Belgium and the United Kingdom. A fund scheme is pre-funded to which the members (the credit institutions) of the deposit guarantee scheme should pay a contribution regularly. This means that a reserve will be maintained and if the respective deposit guarantee scheme becomes applicable, the deposit holders will be paid out of the reserve. An advantage of the fund scheme can be that the reserve may give some certainty that the deposit holders will be paid and since there is a continuing obligation to contribute to the deposit guarantee scheme, this would avoid the situation that banks should contribute a large amount at once. If, however, the reserve is not enough a solution must be found. In one of the reports of the European Commission it is for example stated that the reserve of the scheme in Slovakia is negative, because of the fact that the deposit guarantee scheme has been applied in respect of several banks and appeared not to be sufficient.

THE APPORTIONMENT SCHEME

The "apportionment scheme" or the "ex post scheme" is a less frequently used funding mechanism. Apportionment schemes are schemes on the basis of which contributions should (only) be paid if a credit institution cannot fulfil its obligations toward its deposit holders and as a consequence thereof the scheme is being applied. An advantage of the appointment scheme is that, since there are no funds which should be managed (the reserve based on the contributions), the costs of the schemes are usually lower than the costs in respect of fund schemes. However, since there is no contribution to be paid (upfront) to the deposit guarantee scheme, the banks should create a reserve themselves to ensure that they can fulfil their obligations in case the deposit guarantee scheme is being applied.

THE DUTCH DEPOSIT GUARANTEE SCHEME

BACKGROUND

The deposit guarantee scheme in the Netherlands (the "Dutch deposit guarantee scheme") has entered into force in 1978 and has been amended in 1995 as a result of the implementation of the Directive into the Dutch legislation. Currently the Dutch deposit guarantee scheme is included in the Financial Supervision Act (*Wet op het financieel toezicht,* "AFS"), which came into effect on January 1, 2007, and brings together practically all the rules and conditions that apply to the financial markets and their supervision. The Dutch deposit guarantee scheme can be declared applicable in case a bank is not able to repay the deposits maintained with it. The definition of credit institution included in the Directive is almost identical to the definition of bank in the AFS.

From the date of its origination, the Dutch deposit guarantee scheme has been declared applicable several times. In the early 1980s two Dutch credit institutions, the Tilburgse Hypotheekbank and the Amsterdam-American Bank, became subject to the scheme. More recently, payments under the Dutch deposit guarantee scheme took place to reimburse holders of deposits maintained with Van der Hoop Bankiers (2005), Icesave (Landsbanki) (2008), De Indonesische Overzeese Bank (Indover) (2008) and DSB Bank (2009).

Because of the recent credit crisis and the fact that the Dutch deposit guarantee scheme has been applied three times in two

years, the Dutch deposit guarantee scheme is currently subject to discussions.

MAIN PROVISIONS

The funding mechanism of the Dutch deposit guarantee scheme is based on apportionment. The banks are not obliged to pay a regular contribution. If a bank cannot fulfil its obligations in respect of its deposit holders, the Dutch Central Bank (*De Nederlandsche Bank N.V.*) will make sure that deposit holders of that bank will receive their deposits up to an amount of €100,000. After that, the Dutch Central Bank will recover the paid amounts from the members of the Dutch deposit guarantee scheme, i.e. the participating banks. The amount which should be paid by a participating bank to the Dutch Central Bank depends on the amount of deposits held by such bank which is subject to the Dutch deposit guarantee scheme. As a consequence of the apportionment, the participating banks will pay for all costs of the deposit guarantee scheme. However, if the deposit guarantee scheme is not applied, there are no amounts due to the deposit guarantee scheme.

The Dutch deposit guarantee scheme applies to all banks with their statutory seat in the Netherlands. The Dutch deposit guarantee scheme may also apply to branches of banks with their statutory seat in another Member State if and insofar as the level or the scope of the deposit guarantee scheme of the home Member State of the respective bank is more restrictive than the Dutch deposit guarantee scheme. The Dutch Central Bank may, however, impose certain conditions to the participation of the respective branch to the Dutch deposit guarantee scheme. Further, the Dutch Central Bank may decide that the Dutch deposit guarantee scheme applies to banks with their statutory seat in a state which is not a Member State.

In the Netherlands, the deposits of natural persons and small companies are covered by the deposit guarantee scheme. Certain deposits are, however, not covered by the deposit guarantee scheme such as deposits of professional investors and professional market parties. Further, for example deposits of directors, administrators, or jointly and severally liable partners of the bank that is unable to pay are not covered by the scheme.

As stated above, the Dutch Central Bank has the responsibility to carry out the deposit guarantee scheme. Currently, under Dutch law the period in which the Dutch Central Bank is obliged to reimburse the deposit holders is three months and can be extended three times with three months. In respect of the European Directive in which it is included that the extension can only take place two times, this seems to be implemented incorrectly. Further, on the basis of the 2009 Directive, this term should already be 20 days. However, this has not been changed yet.

Until January 1, 2007, the maximum guaranteed amount under the Dutch deposit guarantee scheme was €20,000 for each person. As of January 1, 2007 this amount has been increased to €40,000 for each person (with 10 per cent as of €20,000 on one's own account). The maximum payment under the deposit guarantee scheme therefore was €38,000. As of October 7, 2008 the amount has been increased to €100,000.

PROPOSALS

The Dutch deposit guarantee scheme is currently subject to discussions. It has been concluded by several institutions that the current Dutch deposit guarantee scheme is not able to function properly in case of economic disturbances. As a result of the credit crisis, certain proposals have been published to revise the Dutch deposit guarantee scheme. Below, we will describe two of these suggestions.

(A) INSURANCE

One of the suggestions is to remodel the deposit guarantee scheme into a scheme which is insured by the Dutch state. Under this system, the members of the deposit guarantee scheme should pay a periodical premium to the state. If the deposit guarantee scheme would become applicable, the Dutch state would pay the amounts due to the deposit holders, irrespective of whether the premiums paid by the banks would have been sufficient. Under this insurance system the Dutch state would bare the risk of the system instead of the banks. However, it should be noted that Banks with a certain risk profile would be excluded from this insurance system. The Dutch minister of finance has rejected this suggestion on the basis that this would not be in accordance with European rules and the general rule that banks should finance the deposit guarantee scheme and not a Member State.

(B) EUROPEAN DEPOSIT GUARANTEE SCHEME

Another idea is to introduce a European deposit guarantee scheme. In a report which is published by the Dutch Ministry of Finance, the Dutch Association of Banks and the Dutch Central Bank it is concluded that on a long term a European deposit guarantee scheme could be an alternative for national deposit guarantee schemes. In the analyses it is being assumed that a European deposit guarantee scheme should be a fund scheme. According to the published report the analysis was made on the assumption that this European fund should comprise about 1 per cent of the total amounts covered, which should be around €167 billion. An advantage of a European deposit guarantee scheme would be that such a scheme should be able to take care of bankruptcies of large banks, which is currently not the case in most European countries. Another advantage of a European deposit guarantee scheme could be the international spreading of risks. To create a European deposit guarantee scheme, it would be necessary to confer certain (European) institutions with certain authorities. The Dutch Ministry of Finance, the Dutch Association of Banks and the Dutch Central Bank have concluded that the financial supervision in European should be

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reorganised if a European deposit guarantee would be introduced.

CONCLUSION

As a result of the credit crisis it has become clear that under specific economical circumstances certain deposit guarantee schemes in the European Union cannot function properly, or at least cannot give the certainty what is expected from the deposit guarantee schemes.

It is doubtful whether the European regulatory basis can still safeguard the stability of the banking system and the rights of holders of deposits throughout the European Union, which is the reasoning behind the European rules and regulations. The revision of the Directive in 2009, pursuant to which the minimum guaranteed amount is amended from €20,000 to €50,000 and the term in which the deposits should be repaid has been decreased from three months to 20 days, can be regarded as a good step towards the future. This revision can however also endanger the system on a short term. For example, since the guaranteed amount has been raised and the reserves under the fund schemes have probably not been changed accordingly, certain deposit guarantee schemes may encounter difficulties.

In the Netherlands, it has been concluded by several institutions that the current Dutch deposit guarantee scheme may not be able to provide enough comfort and, as such, may not able to function properly in case of economic disturbances. Therefore, the Dutch deposit guarantee scheme will need to be revised. It is not clear in which way the Dutch deposit guarantee scheme will be amended. Future amendments are, inter alia, highly depended on future developments of the European rules.

AMENDMENTS TO TAKEOVER BIDS RULES IN ITALY

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Legislative Decree No.146 of September 25, 2009 (the "Decree") has amended the takeover bids provisions set out in the Legislative Decree No.58 of February 24, 1998, (the "Consolidated Law on Finance") introducing notable changes in the approach the Italian legislator adopted in the Legislative Decree No.229 of November 19, 2007, when implementing Directive 2004/25 of April 21, 2004 on takeover bids (the "Takeovers Directive") [2004] OJ L142/12 in Italy.

As market practice has highlighted the opportunity of a limited review of certain provisions, the Decree also introduces adjustments of a technical nature to provisions substantively implementing the Takeovers Directive in Italy.

The Decree has been drafted on the basis of proposals put forward by the *Commissione Nazionale per le Società e la Borsa* ("CONSOB"), and by the involved stakeholders during an informal consultation exercise, and has subsequently been modified taking into account the comments received by the Technical Parliamentary Committees.

DEFENSIVE MEASURES IN TAKEOVER BIDS

Rules on defensive measures (under art.104 of the Consolidated Law on Finance) have already been substantially amended by Decree Law No.185 of November 29, 2008. While Legislative Decree No.229/2007 had firmly confirmed the restriction for the management of an offeree company from taking action to frustrate a bid (i.e. with the intention of delaying or stopping a bid) without the prior authorisation of shareholders at a general meeting given for this purpose (thus basically replicating those provisions already contained in the Consolidated Law on Finance), pursuant to Decree Law No.185/2008 Italian listed companies were instead able to decide themselves whether or not to introduce in the by-laws the passivity and the breakthrough rules.

At the relevant time the decision of the Italian legislator was notably prompted by the market crisis and the low capitalisation of listed companies and thus widely regarded as a protectionist measure, thereby granting listed companies the possibility to decide whether or not to defend themselves from hostile takeovers.

The amended regulation now establishes that the by-laws of Italian listed companies may derogate, wholly or partly, from the application of the passivity rule by means of a specific by-laws provision (pursuant to art.104, para.1-*ter* of the Consolidated Law on Finance). In case the by-laws of the company do not expressly contain any provision, the passivity rule will then apply by default. The breakthrough rule (or neutralisation rule) has not been amended by the Decree, and thus it remains applicable only for companies that choose to introduce it in their by-laws.