The ABN AMRO restructuring decision
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On 5 April 2011, the Commission took a final conditional decision approving the State aid package of the ABN AMRO Group and the restructuring of the company. This conditional decision followed the opening of a formal investigation on 8 April 2009, which, in view of additional measures announced by the Dutch State - was extended on 5 February 2010. In this article, we briefly describe the situation of the bank, the measures involved, and the assessment of the restructuring measures before drawing some summary conclusions.

1. ABN AMRO and the need for State aid.

As it is currently structured, ABN AMRO Group combines the activities of Fortis Bank Nederland ("FBN", i.e. the Dutch banking subsidiary of the financial holding company Fortis Group) and the Dutch assets of ABN AMRO Group ("ABN AMRO N"), the latter having been acquired by Fortis Group in 2007 – as part of the break-up bid made by a consortium which also included the Royal Bank of Scotland and Banco Santander. In October 2007, the Commission approved the merger of FBN and ABN AMRO N subject to implementation of a remedy (i.e. the sale of New HBU). The combined entity had pro forma total assets of EUR 360 bn in 2008 and ranks third in the Dutch banking market, with a leading position in private banking (with a share of nearly 40% of the market).

2. Description of the State aid measures.

2.1. Measures linked to the State purchase of FBN from Fortis Group.

On 3 October 2008, the difficulties of Fortis Group led the Dutch State to acquire the Dutch banking activities of Fortis Group (i.e. FBN) including ABN AMRO N for a consideration of EUR 12.8 bn. Since FBN relied heavily on Fortis Bank for its funding, the Dutch State – in order to fully separate FBN and insulate it from the funding problems of Fortis Bank – had to provide substantial liquidity support to FBN comprising a short-term credit-line of EUR 45 bn (which was repaid by FBN over the next nine months, partly by the issuance of EUR 18.8 bn of State guaranteed debt) and the purchase from Fortis Bank of outstanding medium- and long-term loans of EUR 16.1 bn granted to FBN. In addition, the Dutch State, in taking over ABN AMRO N from its parent company, also agreed to indemnify Fortis Group for all the separation obligations resulting from the consortium shareholders agreement (CSA) signed in 2007 with Royal Bank of Scotland and Banco Santander, as in October 2008 ABN Amro N had not yet been separated from the ABN Amro Group.

In December 2008, since FBN was again running the risk of falling below its regulatory capital requirement ratios, the Dutch State decided to acquire ABN AMRO N from FBN for a price of EUR 6.5 bn. The Commission decision concluded that this price was above market value and therefore involved State aid to FBN. In the course of 2010, as the DNB had requested an improvement in the Tier 1 capital position of FBN, the Dutch State helped to implement this requirement by converting EUR 1.35 bn of Tier 2 loans of FBN into Tier 1 capital.

2.2. Measures aimed at covering separation costs of ABN AMRO N.

Under the CSA, the separation of ABN AMRO N from its parent company was a contractual obligation of Fortis Group, which the Dutch State took over in October 2008, as indicated above. This separation proved to be a complex, lengthy and costly process. The State granted support measures aimed at covering direct and indirect separation costs.

For comparison, at the end of 2008, FBN’s total liabilities amounted to EUR 184 bn.
2.3. Measures aimed at covering integration costs.

As a result of the decision of the Dutch State to restore viability of FBN and ABN AMRO N by merging the two companies, a significant amount of upfront integration costs had to be incurred. First, the merger remedy had to be implemented, which resulted in a sale below book value, and therefore a loss. Second, a significant amount of cost cutting (e.g. a broad lay off scheme) and infrastructure expenses were incurred. FBN and ABN AMRO N did not have enough capital to absorb these upfront costs, and therefore the State recapitalised the banks to cover these costs. The Dutch State argued that these measures were not State aid, invoking the market economy investor principle and arguing that the merger and the associated cost savings would improve the profitability of the companies concerned.

2.4. Presence of State aid in the State measures:

Given the number of State measures and their complexity, this case raised particular challenges when it came to assessing the presence and quantity of aid. The Commission decision concluded that the State financing to FBN associated with the purchase of FBN constituted State aid, as the State did not act as a market economy investor and the same resources could not have been found on the market. It should be noted, however, that the payment of the EUR 12.8 billion purchase price to Fortis Group itself was not considered separately as being State aid, since it did not provide an advantage to FBN as such. As a result, the amount of aid calculated by the Commission is significantly lower than the cost of rescuing FBN for the Dutch taxpayer.

As regards the State financing of the integration costs, the Commission – which refused to assess these measures under the market economy investor test, since they were part of a single restructuring which had already included State aid (BP Chemical case law) - also concluded that they constituted State aid.

Conversely, the Commission considered that the State measures financing the separation costs did not constitute State aid. Indeed, strictly speaking, the separation costs resulted from the obligation of the Dutch State under the CSA to separate ABN AMRO N from its parent company. The Dutch State had taken over these obligations from Fortis Bank and they never constituted obligations of ABN AMRO N. The State intervention therefore did not relieve ABN AMRO N of costs it should normally have borne. Therefore, these measures did not involve State aid for ABN AMRO N.

Adding up the aid measures, the total recapitalisation aid amounts to between EUR 4.2 and 5.45 bn, representing between 2.75 and 3.5 % of risk-weighted assets of the merged entity. In addition, the company benefited from EUR 71.7 bn of funding and liquidity aid.

3. Assessment of the restructuring plan.

3.1. Viability considerations

The Commission observes that, after all the interventions by the State, the banks do constitute a viable entity. The decision of the Dutch State to merge FBN and ABN AMRO N helped restore viability. The deposit-rich profile of ABN AMRO N (resulting from its focus on retail and private banking) has made up for FBN's weak funding position, while FBN provided a number of international activities which ABN AMRO N lacked. Moreover, the combination of the two entities avoided the duplication of the IT-platforms and other support functions. Projections underline that the combined entity should be able to cover its costs and reach an appropriate return on equity. Even under a stress scenario, ABN AMRO Group should continue to post profits and maintain its capital adequacy ratios over and above the regulatory thresholds.

The Commission observed, however, that the projections depended to a large extent on full implementation of cost cutting measures (including synergies from the merger) and improved net interest margins. In this respect, it should be noted that, when the Commission opened proceedings, Van Lanschot Bank, a competitor of ABN AMRO Group in the Netherlands focusing on private banking, submitted a formal complaint claiming that ABN AMRO Group was using State aid to price its competitors out of the market. To ensure that ABN AMRO Group would indeed reach the projected margins and would not offer unsustainably low prices, the Commission imposed the condition that ABN AMRO Group should continue to post profits and maintain its capital adequacy ratios over and above the regulatory thresholds.

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3.2. Burden sharing, own contribution and limiting the aid to the minimum necessary.

As compatible State aid has to remain strictly limited to the minimum necessary, restructuring aid should cover only the costs necessary to restore viability. Measures may be requested to prevent abuse of restructuring aid, in particular the implementation of market-distorting strategies not linked to
the restructuring process. Against this background, the Commission imposed an acquisition ban designed as a safeguard to prevent the abuse of the aid for “nice-to-have” acquisitions that were not justified by the need to restore viability. In this regard, the Commission also noted that ABN AMRO’s financial projections in the restructuring plan proved that the company was viable without needing extra acquisitions, such that the acquisition ban does not prevent the implementation of the plan and the consolidation of viability.

In addition, the Commission has imposed a ban on serving any coupons on and calling any hybrid instruments (hybrid coupon and call bans) since State aid should not be used to remunerate capital providers; available funds should be kept in the firm until it has completed its restructuring plan and restored its viability, after which the remuneration of capital providers can resume.

3.3. Measures to limit distortions of competition.

Under the terms of the Commission’s Communication on the restructuring of banks, the depth of a restructuring should be adjusted according to the aid amount received and to the presence on the market after the restructuring. As regards the aid amount, the Commission usually requests deeper restructuring if it exceeds 2% of the risk weighted assets of the aided bank, which is the case here, as indicated above. In this case, the Commission observed that the circumstances were somewhat unusual. The need for capital and funding of FBN and ABN AMRO N did actually stem to a large extent from their separation from the Fortis Group and their consecutive merger. The need for capital did not stem primarily from risky behaviour or unsustainable strategy at the level of these two entities. Therefore, the Commission decided not to request them to divest part of their activities. In this regard, it should also be noted that the former parent company, Fortis Group, had already been dismantled into four entities and that the disappearance of that group had already largely addressed the moral hazard problems at that level (see Commission decision of 3 December 2008 (1)).

It can also be noted, in addition to the implementation of the merger remedy, which represented the sale of significant business to Deutsche Bank, the ABN AMRO Group divested a few smaller entities (Prime Fund Solutions and Intertrust).

In order to ensure that the aid was strictly being used to restore viability and not used to finance a growth strategy beyond the plan at the expense of competitors, the Commission made its approval conditional on the aid package to implement a complete set of measures, including a ban on acquisitions, a price leadership ban and a ban on advertising State support. Behavioural measures were tailored to the specific context and focused on areas where the merged entity ABN AMRO Group - partly thanks to the merger - has built up a strong market presence. Because the bank had just implemented the merger remedy in the Dutch SME banking market, allowing a strong competitor to enter that market with a significant market share, the Commission’s measures focused mainly on Dutch retail and private banking (where the combined entity has a market share of almost 40%). Therefore, to avoid mispricing, ABN AMRO Group first had to accept a price leadership ban in standardised savings and mortgage products that were representative of the market. Second, to address potential risks of distortions in the private banking segment where many products are priced on a one-to-one basis, the price leadership ban has been complemented by additional measures. First, ABN AMRO must aim to achieve the net interest revenue projections presented in the restructuring plan and take appropriate action as soon as it observes any deviation. Second, a measure has been devised which is aimed to increase awareness of account switching possibilities and to facilitate switching.

These measures should prevent the aid being used to undercut prices, as the banks did in 2009 according to Van Lanschot.

4. Conclusion

The ABN AMRO decision underlines the fact that the Commission does not adopt a “one size fits all” approach, but is constantly striving to adjust its requirements as precisely as possible not only to the amount of aid granted but also to the specific qualitative features of the case as shown by its assessment.

In view of its specific separation context of this case, the Commission did not focus its restructuring requirements on divestments. However, the Commission had to ensure, by means of a complete set of behavioural measures, that the aid would not endanger effective competition and that it would not be detrimental to non-aided competitors.

In particular, a strict acquisition ban was necessary to ensure that the aid remained limited to the strict minimum. It would indeed be a blatant misuse of aid if ABN AMRO Group were to take advantage of the situation and divert the aid received in order to make unnecessary aggressive acquisitions for viability reasons.

(1) OJ C 80, 3 April 2009, p 8 sq