EUROPEAN COMMISSION

Brussels, 05.04.2011

C(2011)2114 final

In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […].	PUBLIC VERSION This document is made available for information purposes only.

COMMISSION DECISION

of 05.04.2011

ON THE MEASURES
No C 11/2009 (ex NN 53b/2008, NN 2/2010 and N 19/2010)

implemented by Dutch State

for ABN AMRO Group NV (created following the merger between Fortis Bank Nederland and ABN AMRO N)

(Only the English version is authentic)

(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having called on interested parties to submit their comments[1] pursuant to Article 108(2) of the Treaty and having regard to their comments,

Whereas:

1. Procedure

(1) On 3 October 2008, the Dutch State acquired Fortis Bank Nederland ("FBN") (namely the Dutch banking subsidiary of the financial holding company Fortis SA/NV[2]) including ABN AMRO Holding assets owned by FBN ("ABN AMRO N") for an amount of EUR 12,8 billion. In the same transaction, the Dutch State also replaced Fortis Bank SA/NV, the Belgian banking subsidiary of Fortis SA/NV, as obligee in loans to FBN with a nominal value of EUR 16,1 billion[3]. The Dutch State also granted FBN a short-term liquidity facility of EUR 45 billion and agreed to indemnify Fortis SA/NV for costs and obligations which stemmed from the consortium shareholders agreement ("CSA"). The CSA described the rights and obligations of the three financial institutions (Fortis SA/NV, Banco Santander and Royal Bank of Scotland ("RBS") or the three "consortium members") which had jointly bid for ABN AMRO Holding via the newly created legal entity "RFS Holdings". On 7 October 2008, the Dutch State notified the Commission of its measures of 3 October 2008 (namely the

1 OJ C 124, 4.6.2009, p. 19 and OJ C 95, 15.4.2010, p. 10.

2 Fortis SA/NV is also known as Fortis Holding. The pre-financial crisis structure of Fortis SA/NV – which is relatively complex - is described in point (6) of the Decision of 3 December 2008. The holding company Fortis SA/NV had grouped its banking activities in the legal entity Fortis Bank SA/NV. Fortis Bank SA/NV on its turn was the owner of inter alia FBN.

3 A so-called "novation", a legal transaction whereby a party to an agreement is replaced with a new party leaving all other terms of the agreement unchanged.

acquisition of FBN for EUR 12,8 billion, the novation of long-term loans with a nominal value of EUR 16,1 billion and the short-term liquidity facility of EUR 45 billion, hereafter "the integrated transactions of 3 October 2008") as measures not constituting State aid in order to get legal certainty on those measures. Since the measures had already been implemented, the Commission registered the case as an NN-case (that is, NN53b/2008).

(2) During the negotiations leading to the acquisition of FBN on 3 October 2008, the Dutch State relied on an external valuation report by […][*] , a copy of which was sent to the Commission on 15 October 2008.

(3) By letter dated 30 October 2008, the Commission informed the Dutch Ministry of Finance of its preliminary opinion that the measures of 3 October 2008 seemed to constitute State aid to FBN. On 20 November 2008, a meeting took place between the services of the Commission and the Dutch State.

(4) On 21 November 2008, the Dutch State officially decided that it would not keep FBN and ABN AMRO N apart, but instead would pursue a merger of the two companies ("the merger"), in line with the earlier plans of Fortis SA/NV.

(5) On 3 December 2008, the Commission took a Decision[4] ("the Decision of 3 December 2008") declaring the measures by the Dutch State of 3 October 2008 in favour of Fortis Bank SA/NV as State aid compatible with the common market. However, recital (4) of that Decision stated explicitly that the Commission would judge in a separate procedure whether the measures implemented on 3 October 2008 also contained aid to FBN.

(6) On 17 December 2008, the Dutch State informed the Commission of its intention to acquire ABN AMRO N from FBN for EUR 6,5 billion. The acquisition took place on 24 December 2008. On 2 February 2009, the Dutch authorities notified that acquisition to the Commission as a measure not constituting State aid for reasons of legal certainty.

(7) On 24 December 2008, RBS, Banco Santander and the Dutch State signed an amendment to the CSA by which the Dutch State replaced Fortis SA/NV in the CSA.

(8) On 6 March 2009, the Dutch State sent to the Commission a due diligence report[5] of the acquired businesses which had been prepared by […] at the request of the Dutch State.

(9) By Decision of 8 April 2009 ("the Decision of 8 April 2009"), the Commission initiated the procedure laid down in Article 108(2) of the Treaty under case number C11/2009 (ex-NN53b/2008), with respect to alleged aid granted to FBN and ABN AMRO N.

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[*] […] Covered by the obligation of professional secrecy

[4] State aid case NN42/2008 (Be), NN46/2008 (Lux), NN53a/2008 (NL), OJ C 80, 3.4.2009, p 8.

[5] The due diligence report consists of five volumes: 1. ABN AMRO, 2. Fortis Bank Netherlands, 3. Fortis Insurance Netherlands, 4. Fortis Corporate Insurance, 5. Subject Matter Memos.

(10) On 6 May 2009, the Commission received a letter of complaint from Van Lanschot Bank ("the complainant"), a Dutch competitor of FBN and ABN AMRO N. That letter was forwarded by the Commission to the Dutch State on 22 July 2009, asking for comments. The Dutch State asked for a deadline extension on 20 August 2009 and sent a detailed answer to the complaint on 22 September 2009. The complainant provided further information by letters of 21 August 2009 and 28 August 2009. These letters were forwarded to the Dutch State on 23 September 2009 and the Dutch State replied on 29 October 2009.

(11) On 15 May 2009, the Dutch State sent a letter to the Commission answering a number of questions raised in the Decision of 8 April 2009. A detailed reply on substance – for which the Dutch State had asked more time – was sent to the Commission on 11 August 2009.

(12) In a non-paper sent on 15 June 2009 and during a follow-up meeting with the Commission on 16 June 2009, the Dutch State informed the Commission of its intention to implement a EUR 2,5 billion recapitalisation plan enabling ABN AMRO N to separate from its parent company ABN AMRO Bank[6]. During that meeting, the Dutch State indicated that, after the first injection of EUR 2,5 billion, additional but not yet quantifiable measures would be necessary.

(13) In the Decision of 8 April 2009, the Commission had invited the Dutch financial supervisor ("DNB") to comment on the soundness of FBN and ABN AMRO N respectively. The Commission received the requested information on FBN by letter of 18 June 2009 and an update on 5 January 2010. The Dutch State also forwarded a letter from DNB on ABN AMRO N on 20 January 2010.

(14) On 6 July 2009, ABN AMRO Bank - the parent company of ABN AMRO N - sent a letter to the Commission commenting on the Decision of 8 April 2009. That letter was forwarded to the Dutch State on 22 July 2009 and the Dutch State replied on 22 September 2009.

(15) On 9 July 2009, the Dutch State informed the Commission that FBN had redeemed all the short-term funding it had received from the Dutch State under the 3 October 2008 liquidity facility of EUR 45 billion.

(16) On 15 July 2009, the Dutch State informed the Commission of plans by FBN to acquire Fortis Clearing Americas ("FCA") from Fortis Bank SA/NV.

(17) On 17 July 2009, the Dutch State formally notified a plan with recapitalisation measures worth EUR 2,5 billion[7] consisting of a credit default swap ("CDS") with a capital relief effect of EUR 1,7 billion ("the capital relief instrument" or "CRI") and a Mandatory Convertible Security ("MCS") of EUR 800 million. The measures were initially recorded under case number N429/2009, but since the measures were implemented before the Commission had taken a decision on

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6 The financial holding company ABN AMRO Holding conducted its business almost entirely through its wholly owned subsidiary ABN AMRO Bank or that company's own subsidiaries. For a detailed chart describing the corporate situation at the time of the acquisition by RFS Holdings, see chart 1 in recital (41).

7 Announced informally already in mid-June as described in recital (12).

them, the case was moved from the register of notified aid to the non-notified aid register (under number NN 2/2010).

(18) On 10 September 2009, the Dutch State sent a non-paper to the Commission with an update of the separation process and indications that additional (unquantified) State aid measures would be unavoidable.

(19) During a meeting with the Commission on 9 November 2009, the Dutch State indicated that FBN and ABN AMRO N would need additional measures worth EUR 4,39 billion, thereby bringing the total amount of measures (including the measures notified on 17 July 2009) to EUR 6,89 billion. The measures were further detailed in an addendum of 10 November 2009 to the non-paper of 10 September 2009, and in an additional explanatory note of 13 November 2009.

(20) On 26 November 2009, the Dutch State provided the Commission with a report of […] commenting on the transaction of 24 December 2008. The submission also contained some background material explaining […].

(21) On 4 December 2009, the Dutch State submitted to the Commission a first version[8] of a restructuring plan for ABN AMRO Group (the "December 2009 Restructuring Plan"), the new entity resulting from the merger between FBN and ABN AMRO N. That plan described the new entity's strategy and also contained financial projections for a base case scenario.

(22) On 14 January 2010, the Dutch State formally notified the new State aid measures of EUR 4.39 billion in addition to the measures already notified in July 2009. The Commission registered the new measures under number N19/2010.

(23) By Decision of 5 February 2010 ("the Decision of 5 February 2010"), the Commission decided to extend the investigation procedure C11/2009 to include the measures registered under NN2/2010 and N19/2010. In that Decision, the Commission temporarily approved those measures as rescue aid measures until 31 July 2010. The Dutch State sent the Commission a letter with a price leadership ban commitment applicable until the end of 2010.

(24) On 23 March 2010, the Commission received a reply by the Dutch State - which had asked for a deadline extension - to the Decision of 5 February 2010. The Dutch State also provided extra information on the December 2009 Restructuring Plan of the new ABN AMRO Group with inter alia financial projections for a worst case scenario.

(25) The Commission asked additional questions on 8 April 2010, which were answered on 7 May 2010. The Dutch State also provided the Commission with extra information on cross liabilities resulting from the implementation of the

[8] An updated version was provided on 8 November 2010 as is described in recital (31).

Merger Remedy[9] on 26 May 2010. On the same day, the Commission sent an electronic mail with follow-up questions, which were answered on 9 June 2010.

(26) On 20 July 2010, the Dutch State asked the Commission to extend the temporary approval of the rescue aid measures registered under NN2/2010 and N19/2010. The Dutch State also sent a letter extending the price leadership ban commitment until the earlier of 30 June 2011 or until the adoption date of the final Decision of the Commission.

(27) On 30 July 2010, the Commission decided to extend the temporary approval of the rescue aid measures registered under case numbers NN2/2010 and N19/2010 until the Commission had finalised its investigation C11/2009.

(28) On 20 August 2010, the Dutch State sent to the Commission a document explaining in detail its exit strategy.

(29) On 5 October 2010, the Dutch State provided a business plan for the private equity division of ABN AMRO Group. A similar plan for the division "Energy, Commodities and Transportation" of ABN AMRO Group was sent to the Commission on 10 January 2010.

(30) On 15 October 2010, ABN AMRO Group announced that it would exercise its call option to terminate the capital relief instrument as of 31 October 2010.

(31) On 8 November 2010, the Dutch State sent an update ("the November 2010 Restructuring Plan") - dated 29 October 2010 - of ABN AMRO Group's restructuring plan of 4 December 2009. On 10 January 2011, the Dutch State sent a document explaining how the ABN AMRO Group updated forecasts of 8 November 2010 compared to the original forecasts of 4 December 2009.

(32) During the procedure, numerous information exchanges, teleconferences and meetings between representatives of the Dutch State, ABN AMRO N and FBN and the European Commission took place.

2. Detailed description of the beneficiaries and the measures

2.1. The creation of ABN AMRO Group

(33) In spring 2007, the consortium members created a new legal entity "RFS Holdings" to acquire ABN AMRO Holding.

(34) The consortium members intended to separate ABN AMRO Holding into three parts and the arrangements for that separation process were set out in the "CSA".

(35) In order to facilitate the break-up, the consortium members created so-called "tracking shares" representing the economic ownership of the businesses

[9] ABN AMRO N sold two entities (namely New HBU and IFN) to Deutsche Bank in order to sort out the concentration issues on the Dutch banking market resulting from the merger between ABN AMRO N and FBN. Further information on this can be found in recitals (44) and (45).

attributed to each consortium member. As a result, RBS, Banco Santander and Fortis SA/NV became the economic[10] owners of respectively the so-called R-share, S-share and N-share ("ABN AMRO R", "ABN AMRO S" and "ABN AMRO N").

(36) ABN AMRO R comprised *inter alia* the business unit ("BU") Global Business & Markets, BU Asia, BU Global Transaction Services and the international network, while ABN AMRO S comprised *inter alia* BU Latin America and BU Antonveneta (Italy).

(37) ABN AMRO N comprised the BUs Netherlands and Private Banking and also the International Diamond and Jewelry Group.

(38) Items that were not allocated to the individual consortium members were brought together in the so-called ABN AMRO Z-share ("ABN AMRO Z"), which remained responsible for head office functions for instance. Each consortium member held a pro-rata stake[11] in ABN AMRO Z.

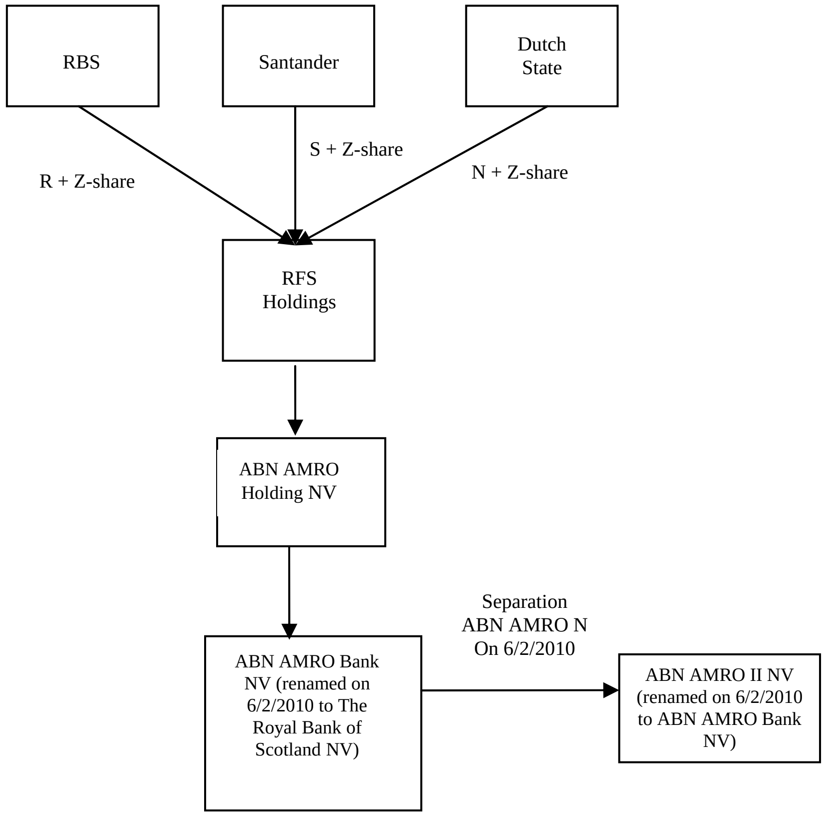
(39) On 3 October 2008, the Dutch State acquired FBN from Fortis Bank SA/NV for EUR 12,8 billion. As a result of that acquistion, the Dutch State also became the indirect owner of ABN AMRO N, since FBN was - within Fortis Bank SA/NV - the legal owner of ABN AMRO N. On 3 October 2008, the Dutch State also committed itself to indemnify Fortis SA/NV for any charge Fortis SA/NV would face as a consequence of its continued presence in the CSA. On 24 December 2008, RBS, Banco Santander and the Dutch State signed an amendment to the CSA, by which the Dutch State replaced Fortis SA/NV in the CSA.

(40) On 24 December 2008, the Dutch State acquired ABN AMRO N from FBN for EUR 6,5 billion, thereby becoming the direct owner of ABN AMRO N. Prior to that acquistion, the Dutch State controlled ABN AMRO N indirectly via FBN.

(41) Chart 1:

[10] The so-called tracking shares had no legal status.
[11] RBS (38,28%), Santander (27,91%) and Fortis SA/NV (33,81%).

Separation of ABN AMRO N



(42) On 21 November 2008, the Dutch State decided that it would merge ABN AMRO N with FBN (which had been the unimplemented intention of Fortis SA/NV). The merger could only be implemented once ABN AMRO N was separated from ABN AMRO Bank, its parent company. As a first step, the activities of ABN AMRO N were transferred to a new legal entity within ABN AMRO Bank which was named ABN AMRO II.

(43) On 6 February 2010, ABN AMRO II was separated as described in recital (41) and renamed ABN AMRO Bank. At the same time, the legal entity formerly known as ABN AMRO Bank was renamed 'The Royal Bank of Scotland NV' ("RBS NV") (see chart above).

(44) Before the new entity, ABN AMRO Bank, could merge with FBN, it first had to implement a merger remedy. When Fortis SA/NV acquired ABN AMRO N in 2007, the Commission had concluded[12] (the "Merger Decision") that a merger between ABN AMRO N and FBN would lead to concentration problems in the Dutch banking market, especially in the segments of commercial banking and factoring.

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[12] For more details, see Commission Decision of 3 October 2007 in Case No M/4844 - Fortis/ABN AMRO Assets - OJ C 265, 7.11.2007, p. 2.

(45) To remedy those concentration problems, Fortis SA/NV committed to sell a number of activities (that is, the factoring division IFN and the commercial banking activities of "New HBU") to Deutsche Bank. When the Dutch State acquired FBN and ABN AMRO N on 3 October 2008, Fortis SA/NV had not yet completed the intended sale of New HBU and IFN to Deutsche Bank. Once the Dutch State had decided to proceed with the merger between FBN and ABN AMRO N, it resumed negotiations with Deutsche Bank[13]. The sale of New HBU and IFN to Deutsche Bank was closed on 1 April 2010.

(46) New HBU had total assets of EUR [10-20] billion and employed around [1000-1500] full time equivalents ("FTEs"). New HBU included Hollandsche Bank Unie ("HBU") (a commercial bank owned by ABN AMRO N), some ABN AMRO sales offices (13 out of a total of 78) and some ABN AMRO Corporate Client Units (2 out of a total of 5).

(47) ABN AMRO Bank and FBN officially merged to form ABN AMRO Group on 1 July 2010, as is described in the Chart 2 in recital (49).

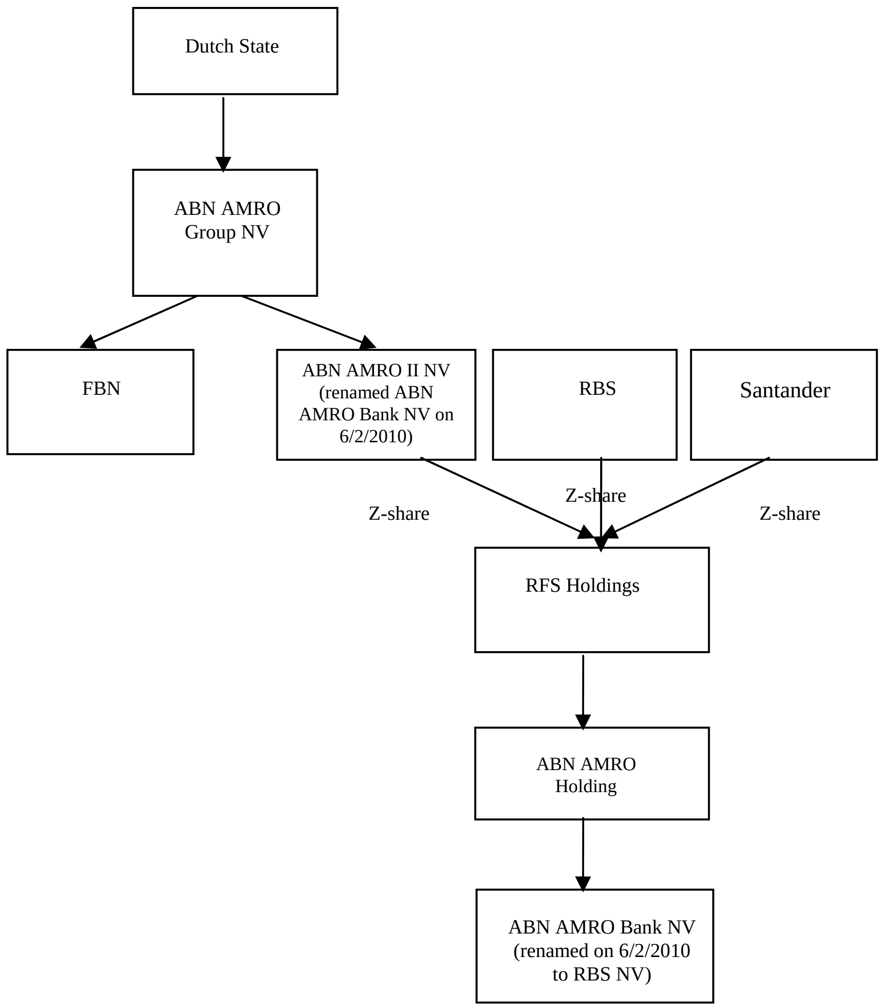
(48) The Dutch State transferred the management of its stake in ABN AMRO Z to the new ABN AMRO Bank as it did not want to dedicate resources to the day-to-day management of that participation. Nevertheless, the Dutch State has remained the legal owner of ABN AMRO Z and is entitled to all potential gains and liable for all potential losses of ABN AMRO Z.[14]

(49) Chart 2:

[13] On 23 December 2009, ABN AMRO Bank and Deutsche Bank signed a share purchase agreement for New HBU and IFN. The transaction price amounted to EUR 700 million and the transaction also included a guarantee provided for 75 % of the credit losses of New HBU ("credit umbrella") up to a maximum of EUR 1,6 billion.

[14] By letter of 26 May 2010 to the Commission, the Dutch State described the corporate governance situation of ABN AMRO Z as follows: "This means for example, that if an asset is sold and the sale creates a surplus of regulatory capital, RFS Holdings would then be obliged … to repatriate the capital surplus to the consortium members. In the case of a loss on an asset or the recognition of a new or increased liability, the consortium members would be obliged to remediate any deficiency in regulatory capital. The economics of the Z-share are therefore owned directly by the consortium members."

Creation of ABN AMRO Group



2.2. Beneficiaries

2.2.1. Economic activities of ABN AMRO N and ABN AMRO Z

(50) ABN AMRO N – on a stand-alone basis the third largest bank in the Netherlands behind Rabobank and ING - consisted of BU Netherlands and BU Private Banking.

(51) The first business unit, BU Netherlands offered retail and commercial banking services via a branch network of 510 bank shops and 78 advisory branches and also through alternative channels such as the internet, ATMs[15] and call centres. BU Netherlands employed roughly 19 000 FTEs.

(52) In retail banking, BU Netherlands had a strong customer franchise segmented in "mass retail" (more than [3,5-5] million customers) and "preferred banking"

15 Automated Teller Machine.

(more than [250 000 – 420 000] customers)[16], which it offered a wide range of products (such as savings, investments, mortgages, insurance, credit card loans and payments).

(53) In commercial banking, ABN AMRO N serviced [300 000 – 400 000] SME[17] customers and [9 000 – 21 000] larger corporate customers (though under the terms of the CSA, ABN AMRO Bank's larger customers were attributed to RBS) with a broad range of products (such as credits, payment & cash management, savings, treasury, risk and insurance management, complex financial solutions & products, leasing and factoring).

(54) The second business unit, BU Private Banking targeted individuals with net investable assets of more than EUR 1 million with various asset management and estate planning products. BU Private Banking had built up a well-developed network, through organic growth in the Netherlands and France and through acquisitions in Germany (Delbrück Bethmann Maffei) and Belgium (Bank Corluy). BU Private Banking also included the French insurance joint venture Neuflize Vie.

(55) The businesses acquired on 3 October 2008 by the Dutch State also included the International Diamond and Jewelry Group, which is a division dedicated to companies involved in jewellery manufacturing and the trading of diamonds.

(56) ABN AMRO Z did not contain operational assets but included *inter alia* tax assets, a number of participations (amongst others in the Saudi Hollandi Bank) and the remaining private equity portfolio. In terms of liabilities, there was a provision to settle obligations in respect of the United States Department of Justice, other provisions (partly personnel-related) and inter-company financing of company assets. As stated in footnote (11), the stake owned by the Dutch State represents 33,81 % of ABN AMRO Z.

(57) A number of pro-forma key financial data of ABN AMRO N are summarised in Table 1 below:

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[16] ABN AMRO's "preferred banking" unit targeted the mass affluent segment and included customers with liquid assets of more than EUR 50 000 and net monthly income of more than EUR 5000.

[17] Small-and-medium-sized enterprises

Table 1:

Key financial data ABN AMRO N (in million EUR)	**2008**	**2009**
Total operating income[18]	5 189	4 899
Net profit	471	(117)
Return on equity	6,7%	-2,7%
Cost-income ratio	73%	77,5%
Total assets	183 539	202 084
Total equity	7 044	4 278[19]
RWA[20]	91 700	74 973[21]
Tier 1 ratio	9,4%	10,2%[22]
Total capital ratio or BIS-ratio	12,6%	14,8%
Stable funding/non liquid assets	107%	110%
Source: ABN AMRO Bank NV, Annual Review 2009, ex ABN AMRO Z and private equity consolidation, but including New HBU		

(58) For the financial year 2009, ABN AMRO N reported a loss of EUR 117 million. The loss was due to higher loan impairments, pressure on interest margins, higher charges related to the Dutch deposit guarantee scheme and separation and integration costs[23]. Excluding separation and integration costs, ABN AMRO N would have recorded a small net profit for 2009 of EUR 52 million.

2.2.2 Fortis Bank Nederland (FBN)

(59) On a stand-alone basis, FBN was the fourth largest bank on the Dutch market (after Rabobank, ING and ABN AMRO N, but before SNS REAAL).

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18 Mainly "Net interest income" and "Net commission and fee income".

19 ABN AMRO's press release on the 2009 results, dated 26 March 2010, explained that equity in 2009 declined by EUR 2,7 billion to EUR 4,3 billion, compared to 31 December 2008, mainly due to a reallocation of capital within ABN AMRO Holding to cover the capital requirements for the Dutch State's interest in ABN AMRO Z (see later Measure A).

20 Risk-weighted assets.

21 That figure already includes the reduction of RWA as a result of the capital relief instrument.

22 The press release on the 2009 results, dated 26 March 2010, explained that the increase of capital ratios (2009 compared to 2008) was mainly due to the following capital actions: "On 31 August 2009 the Ministry of Finance acquired a EUR 800 million Mandatory Convertible Tier-1 Security issued by ABN AMRO Bank. Also on that date a credit default swap agreement was signed with the Ministry of Finance through which ABN AMRO Bank purchased credit protection on a EUR 34,5 billion portfolio of residential mortgages. On 23 December 2009, the Dutch State acquired two Mandatory Convertible Securities. A EUR 967 million Mandatory Convertible Security was issued in December 2009 for the benefit of the former ABN AMRO Bank. An EUR 833 million Mandatory Convertible Security was issued directly by the then ABN AMRO II N.V., now ABN AMRO Bank N.V., to cover the expected losses in respect of the EC Remedy business disposal. This instrument classifies as regulatory capital as of January 2010. Conversion of the three Mandatory Convertible Securities after legal separation will result in an increase of share capital in the amount of EUR 2,6 billion."

23 Net interest income fell from EUR 3 223 million (2008) to EUR 2 994 million (2009) due mainly to interest margin pressure in the first half of 2009. Non-interest income decreased by EUR 61 million or 3 % to EUR 1 905 million and loan impairments increased from EUR 776 million in 2008 to EUR 1 172 million in 2009 (source: FY 2009 result press release of 26 March 2010).

(60) The Dutch State (and previously Fortis SA/NV) held directly 92,6 % of FBN, with the investment vehicle Fortis FBN(H) Preferred Investments BV owning the remaining stake of 7,4 % in the form of preferred shares. The Dutch State owned 70 % of the shares in that investment vehicle, with the remaining 30 % in the hands of a number of private investors[24]. The privately-owned preferred shares had a nominal value of EUR 210 million and a (non-cumulative) dividend of 5,85 %[25].

(61) FBN's activities were subdivided in three segments - Retail banking, Private banking and Merchant banking.

(62) Retail Banking activities included the traditional retail banking activities (with a network of 157 branches, [2-3] million individual customers and [20 000 – 60 000] SME customers) but also Directbank (which offered mortgage solutions via intermediaries) and the consumer finance and payment card products of respectively Alfam and ICS.

(63) Private Banking was mainly developed under the Fortis Mees Pierson brand name and offered wealth management services (estate planning, investing, lending and insurance) on a segmented basis to [15 000 – 40 000] customers throughout the Netherlands.

(64) In Merchant Banking, FBN distinguished seven different sub-divisions. In the division "*Commercial Banking*" (1), FBN had 23 business centres offering multiple products to companies with a turnover of up to EUR 250 million. Companies with a turnover of more than EUR 250 million as well as the public sector were serviced by another subdivision, "*Corporate & Public Banking*" (2). There were also "*Investment banking*" (3)[26], "*Specialised Financial Services"* (4)[27], "*Energy, Commodities & Transportation*" (5), "*Global Markets & Institutional Banking*" (6)[28] and "*Clearing Funds & Custody*" (7)[29] sub-divisions.

(65) A number of FBN's key financial data are summarised in Table 2 below:

Table 2:

[24] […].

[25] As of 1 January 2013 and every five years thereafter, the dividend will be recalculated and reset as: benchmark interest rate + a spread, with the benchmark interest rate equal to the 5 year Euro denominated interest rate swap + a spread reflecting the then prevailing market conditions.

[26] Investment banking included *inter alia* business lending, real estate finance, acquisition & leverage finance, advisory, structured finance and equity.

[27] Specialised financial services included *inter alia* factoring, trade services and cashflow & working capital management.

[28] Global Markets & Institutional Banking included *inter alia* forex, money markets, equity, fixed income and securities finance.

[29] Clearing Funds & Custody included *inter alia* brokerage, clearing and custody and also Prime Fund Solutions ("PFS") (fund administration, bridge/leverage financing and banking to hedge funds).

Key financial data FBN (in million EUR)	2006	2007	2008[30]	2009
Total operating income	3 473	3 553	3 096	2 171
Net profit	1 157	1 296	-18 486	406
Return on equity (norm.)[31]	20,1%	8,9%	4,9%	0,7%
Cost-income ratio	50,5%	54,2%	64,9%	84,2%
Total assets	209 749	272 378	184 203	189 785
Total equity	5 910	21 763	2 944	4 716
RWA	66 995	75 850	70 932	53 730[32]
Tier 1 ratio	8,6%	11,2%	7,4%	12,5%
Total capital ratio	10,5%	11,2%	11,2%	16,7%
Loan-to-deposit ratio		167%	237%	208%
Source: FBN annual reports 2008/2009				

(66) In 2008, FBN made a loss of EUR 18,5 billion, but that loss was to a large extent linked to exceptional items. The company was obliged to report a net loss of EUR 16,8 billion on its stake in RFS Holdings and the sale thereof and it also incurred an impairment of EUR 922 million (net of taxes) in its division Prime Fund Solutions due to the Madoff fraud[33]. Net underlying profit, excluding those elements, came in to EUR 604 million, almost exclusively realised in the first half of 2008.

(67) In 2009, FBN realised a net profit of EUR 406 million, helped by two exceptional gains (a EUR 362,5 million cash settlement with Fortis Capital Company) and a Madoff-related recovery of provisions of EUR 16 million. Net underlying profit decreased to EUR 27 million[34] (from EUR 604 million in 2008).

2.2.3 ABN AMRO Group

(68) ABN AMRO Group, which was created following the merger between FBN and ABN AMRO Bank (that is to say ABN AMRO N activities) on 1 July 2010 groups all the activities of FBN and ABN AMRO N in two separate BUs, "Retail and Private banking" and "Commercial and Merchant banking". The group had a 2008 pro forma operating income of EUR 7,15 billion and pro

30 The 2008 accounts took already into account the sale of ABN AMRO N to the Dutch State.

31 Normalised return on equity excludes the exceptional items.

32 Basel II with Basel I floor of 80%.

33 FBN had no direct exposure to the Madoff fraud but it was exposed to collateralised leverage financing provided to certain hedge funds which had invested in Madoff-managed accounts.

34 Net interest income fell from EUR 1 584 million in 2008 to EUR 1 150 million in 2009 on the back of higher funding costs for savings and issued debt, while net commissions and fee income also fell (EUR 724 million in 2009 down from EUR 823 million in 2008). While total expenses decreased from EUR 2 010 million in 2008 to EUR 1 827 million in 2009, impairments increased from EUR 331 million in 2008 to EUR 412 million in 2009. Other elements influencing the results were the profit on the sale of Intertrust (EUR 81 million), provisions related to the bankruptcy of the Dutch bank DSB (EUR 15 million) and separation and integration costs (EUR 66 million).

forma total assets of EUR 360 billion. According to the latest figures[35], ABN AMRO Group has total IFRS[36] equity of EUR 11,7 billion.

(69) ABN AMRO Group is well diversified with EUR 4,2 billion operating income in "Retail and Private banking" and EUR 2,8 billion operating income in "Commercial and Merchant banking". Geographically, the bulk of ABN AMRO Group's revenues (namely [65-95] % of the total) originates in the Netherlands.

(70) In "Retail and Private banking", the integrated ABN AMRO Group has market shares of [15-20] % and [15-20] %[37] in respectively "mass retail" and "preferred banking"[38], which makes it third-largest on the Dutch banking market in terms of market share. In private banking (branded ABN AMRO Mees Pierson), ABN AMRO Group is by far the largest in the Dutch market with a market share of approximately [30-40] %[39]. In "Commercial and Merchant banking", the market share of ABN AMRO Group is around [15-25] %.[40]

(71) ABN AMRO Group no longer includes New HBU and the factoring activities of IFN which were divested in the framework of the Merger Remedy on 1 April 2010.

(72) As part of the restructuring process, two small divisions of FBN (namely Intertrust and Prime Fund Solutions ("PFS")) were also divested and are no longer part of the ABN AMRO Group.

(73) In September 2009, FBN (and its partner Banque Générale du Luxembourg ("BGL")[41] sold Intertrust to private equity specialist Waterland. Intertrust is one of the largest players in global trust and corporate management. It employs 1000 experts in 19 countries and has operating income and RWA of respectively EUR […] million and EUR […] million.

(74) In May 2010, FBN also announced the sale of PFS to Credit Suisse. PFS provides fund services to the alternative asset management industry including, for example, administration, banking, custody and financing. Its customers range from boutique asset managers to large global institutions such as pension funds and sovereign wealth funds. PFS was responsible for the EUR 922 million post-tax provision related to the Madoff-fraud which FBN registered in 2008. PFS has income of EUR […] million and RWA of EUR […] million.

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35 Status at the end of 3Q 2010 (source: press release of 19 November 2010).

36 International Financial Reporting Standards.

37 See page 14 of the Restructuring plan of 4 December 2009, based on figures of Milward Brown/Teletrack.

38 "Preferred banking" targets the mass affluent segment including households with annual income higher than EUR 50 000 and/or disposable assets between EUR 50 000 and EUR 1 million.

39 See page 15 of the Restructuring plan of 4 December 2009, based on assets under management ("AUM") figures from *inter alia* BCG Wealth Management Database 2007.

40 That market share figure already takes into account the divestments of New HBU and IFN; see page 16 of the Restructuring Plan of 4 December 2009, based on TNS/NIPO / Financial Monitor for Commercial Banking and Corporate Clients.

41 BGL is one of the largest banks in Luxembourg and was a sister company of FBN in Fortis SA/NV. BGL became a member of the BNP Paribas Group in May 2009.

(75) On 4 March 2011, ABN AMRO Group published its results for the fiscal year 2010, showing a net loss of EUR 414 million. Excluding separation and integration costs, ABN AMRO Group reported an underlying profit of EUR 1 077 million. As at 31 December 2010, ABN AMRO Group's Core Tier 1, Tier 1 and total capital ratio were 10,4 %, 12,8 % and 16,6 % respectively. In consultation with the Dutch State, ABN AMRO Group established a dividend policy targeting a dividend payout of 40 % of the reported annual profit.

2.3 Description of the Restructuring Plan of December 2009 and the updated Restructuring Plan of November 2010

(76) The Dutch State provided the Commission with the December 2009 Restructuring Plan on 4 December 2009. Further information was provided in March 2010[42]. A merger between FBN and ABN AMRO N is central to the business concept developed in the December 2009 Restructuring Plan. ABN AMRO Group, the new bank emerging from the December 2009 Restructuring Plan, will focus on the mid-market segment in the Netherlands[43] and will be active in "Retail and Private Banking" and "Commercial and Merchant Banking".

(77) The December 2009 Restructuring Plan starts from the diagnosis that the capital needs were not related to the underlying performance of FBN and ABN AMRO N, but rather to the need to finance their respective separation from their parent companies and the up-front integration costs of the merger.

(78) In a counterfactual scenario without State aid, the December 2009 Restructuring Plan acknowledges that, without the coordinated effort of the Benelux governments, Fortis SA/NV would have collapsed, which would also have dragged down FBN and ABN AMRO N.

(79) The December 2009 Restructuring Plan contains financial projections for the period 2009-2012 with a divisional breakdown into Retail Banking, Private Banking NL, Private Banking International and Commercial & Merchant Banking. Specifically for 2012, ABN AMRO Group has also calculated a "run-rate" profit, which excludes transition costs and assumes that cost synergies were already accounted for the full year. Those projections were provided for a base case scenario and a worst case scenario.

(80) On 8 November 2010 in, the Dutch State updated the December 2009 Restructuring Plan's financial projections for the period until 2012, including additional projections for 2013 in the November 2010 Restructuring Plan.

Base case scenario

(81) In the base case scenario, the Dutch State starts from the assumption that business volumes will grow in line with inflation. Personnel costs are assumed to rise by [1-6] % *per annum* and other costs by a more moderate [1-5] % *per*

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42 The 2009 Restructuring Plan lacked essential information such as financial projections for a worst case scenario. The missing information was provided on 23 March 2010.

43 Roughly [65-95] % of operating income will come from the Netherlands.

annum The Dutch State also anticipates that ABN AMRO Group's loan loss provisions will start to decrease from the high level reported in 2009.

(82) In the base case scenario in the November 2010 Restructuring Plan, ABN AMRO Group realises a negative net result of EUR […] million in 2010 before returning to profits from 2011 on (that is, EUR […] million profit in 2011).

(83) In 2012 and 2013, it is expected that ABN AMRO Group's net profits increase to respectively EUR […] million and EUR […] million, translating in a Return on Equity[44] ("RoE") of around […] %. The improvement of the ABN AMRO Group's profitability is driven by better operating income (which should recover after the weak 2009 figure), the cost-cutting programme which at cruise speed should lower costs by EUR 1,1 billion pre-tax *per annum* and a normalisation of loan loss provisions after a peak in 2009. In 2013, ABN AMRO Group's cost-income ratio is projected to be […] %.

(84) Base case scenario

Table 3:

	2009 (Actual)	2010 (E[45])	2011 (E)	2012 (E)	2012 run rate (E)	2013 (E)
Operating income	**7 039**	[…]	[…]	[…]	[…]	[…]
Net interest income	4 528	[…]	[…]	[…]	[…]	[…]
Net fee & comm. income	1 933	[…]	[…]	[…]	[…]	[…]
Other income	849	[…]	[…]	[…]	[…]	[…]
Operating expenses	**- 5 568**	[…]	[…]	[…]	[…]	[…]
Op. exp. – business as usual	- 5 258	[…]	[…]	[…]	[…]	[…]
Op exp. - transition	- 310	[…]	[…]	[…]		
Operating result	1 471	[…]	[…]	[…]	[…]	[…]
Loan impairments	**- 1 585**	[…]	[…]	[…]	[...]	[…]
Profit before taxes	- 114	[…]	[…]	[…]	[…]	[…]
Taxes and minorities	45	[…]	[…]	[…]	[…]	[…]
Net profit	**-68**	[…]	[…]	[…]	[…]	[…]
Underlying net profit (ex transition costs)	**163**	[…]	[…]	[…]	[…]	[…]

Worst case scenario

(85) Under the worst case scenario in the November 2010 Restructuring Plan, the Dutch State started from more conservative assumptions than under the base case scenario. It used interest margins which were 7,5 % lower than in the base case, more cautious forecasts for commissions & fees (growth of 4 % *per annum* as opposed to 7 % in the base case), lower synergies (impact of - EUR […] million on 2013 profit) and 15 % lower recovery rate of loan loss provisions (impact of - EUR […] million on 2013 profit).

(86) While, those more conservative figures would lead to lower results, ABN AMRO Group would still be able to post a profit. The worst case scenario

44 The Return on Equity is the amount of net income returned as a percentage of shareholders equity.
45 "E" stands for "Estimate".

foresees an underlying net profit of EUR […] million and EUR […] million in respectively 2012 and 2013 (which compares to respectively EUR […] million and EUR […] million in the base case scenario).

Exit

(87) In its December 2009 Restructuring Plan, the Dutch State also touched upon its exit strategy, underlining that it does not have the intention to remain a long-term investor in ABN AMRO Group.

(88) By letter of 20 August 2010, the Dutch State provided the Commission with more details on its exit strategy. The Dutch State explained that it is contemplating a placement in the form of an IPO[46] , but is keeping open other options such as a private sale to an investor or market participant. In its letter of 20 August 2010, the Dutch State indicates that a first stake of between [0-50]-[10-60] % might be made available for an IPO in […] at the earliest, followed by a secondary offering of another [0-50]-[10-60] % in 2015. The Dutch State wants to earn back its initial investment increased by its cost of funding of [2-5] %. It is the Dutch State's intention to reduce its stake in ABN AMRO Group up to a maximum of [25-65] %, preferably before the end of [2014-2018]. Ultimately, the Dutch State is fully committed to a complete exit. The final decision on the IPO rests with the Dutch Minister of Finance and will depend on market circumstances, the "IPO readiness" of ABN AMRO Group and the expected proceeds. On 24 January 2011, the Dutch government also publicly set out its exit strategy[47].

Capital Adequacy

(89) The December 2009 Restructuring Plan (and also the updated November 2010 Restructuring Plan) show that - after implementation of all the State aid measures- ABN AMRO Group is sufficiently capitalised. During the restructuring period, the projected Tier 1 ratios should stay comfortably above […] % between 2009 and 2012, to increase further to […] % in 2013.

Divestments

(90) In its December 2009 Restructuring Plan, the Dutch State explains that ABN AMRO Group has already divested a number of businesses. Apart from the sale of New HBU and IFN during the Merger Remedy process, ABN AMRO N and FBN also divested Intertrust and PFS.

(91) Compared to ABN AMRO Group, Intertrust and PFS jointly represent [0-5] %, [0-5] % and [0-5] % in terms of its projected total operating income, costs and RWA respectively.

(92) During the restructuring process, FBN also made an acquisition to correct a misalignment resulting from the break-up of Fortis SA/NV. FBN was the legal

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[46] Initial Public Offering or the first sale of a company to the public. After an IPO, a company's shares will be listed on a public stock exchange.

[47] http://www.rijksoverheid.nl/nieuws/2011/01/24/exitbeleid-financiele-deelnemingen.html

owner of the BU Brokerage, Clearing and Custody and all the offices related to that business except for the Chicago office, which had remained part of Fortis Bank SA/NV. To correct that separation-linked misalignment, FBN acquired the Chicago branch of Fortis Clearing Americas from Fortis Bank SA/NV on 31 July 2009 for a price of approximately USD […] million.

2.4 Description of the measures

(93) To identify the individual State aid measures, the Commission uses in this Decision the same letter codes as in its Decision of 5 February 2010.

2.4.1 Measures covered by the Decision of 8 April 2009

(94) On 3 October 2008, the Dutch State acquired FBN (including ABN AMRO N) from Fortis SA/NV for EUR 12,8 billion ("Measure X"). The Commission did not open the procedure in respect of that measure, which as such did not provide State aid to FBN, even if it was part of a transaction providing State aid to FBN (see recital (32) of the Decision of 8 April 2009).

(95) At the time of the FBN's acquisition by the Dutch State, FBN depended heavily on Fortis Bank SA/NV for its funding. To ensure full separation of FBN from Fortis Bank SA/NV, it was necessary for the Dutch State to end the funding relationship between FBN and Fortis Bank SA/NV. To cut the existing links, the Dutch State granted FBN a short-term liquidity facility of EUR 45 billion ("Measure Y1") on 3 October 2008. That liquidity facility allowed FBN to repay to Fortis Bank SA/NV short-term loans of EUR 34 billion. The Dutch State also replaced Fortis Bank SA/NV as a lender of long-term loans to FBN for a nominal amount of EUR 16.1 billion in a so-called "novation" ("Measure Y2")[48].

(96) The short-term liquidity facility covered by Measure Y1 remained in place until the end of June 2009. While that measure was in place the remuneration changed a number of times. In the period between 6 October 2008 and 23 October 2008, the Dutch State provided FBN short-term funding at EONIA[49] (for overnight lending with a maximum amount of EUR 5 billion) or EURIBOR[50] (for longer-term liquidity with a maximum amount of EUR 40 billion) without any extra spread. After 23 October 2008, there was a short period (until 5 November 2008) during which the Dutch State applied EONIA + 50 basis points and EURIBOR + 50 basis points. During that second period, that arrangement was still for maximum amounts of EUR 5 billion for overnight liquidity and EUR 40 billion for longer-term liquidity. In the period between 5 November 2008 and 1 March 2009, the Dutch State changed the remuneration to EONIA + 25 basis points for overnight loans, EURIBOR + 25 basis points

48 All contractual features of the existing loan contracts remained unchanged, except the name of the lender.

49 Eonia® (Euro OverNight Index Average) is an effective overnight rate computed as a weighted average of all overnight unsecured lending transactions in the interbank market, initiated within the euro area by the contributing panel banks.

50 Euribor® (Euro Interbank Offered Rate) is the rate at which euro interbank term deposits are being offered by one prime bank to another within the European Monetary Union zone.

for loans with a maturity[51] of less than 3 months and EURIBOR + 50 basis points for loans with a maturity of more than three months[52]. After 1 March 2009, the Dutch State developed a two-step system encouraging FBN to reduce its reliance on the State. A first tranche of funding (irrespective of the maturity) was made available at EURIBOR + 25 basis points but once that threshold was exceeded, FBN could only get extra liquidity at EURIBOR + 50 basis points[53]. The amount of the total liquidity facility and the amount of the first threshold were gradually lowered. On 9 July 2009, the Dutch State informed the Commission that FBN had repaid all its short-term loans to the State.

(97) The long-term loans novated to the Dutch State (Measure Y2) amounted to EUR 16,1 billion, including EUR 8,15 billion of Tier 2 capital (of which EUR 3 billion upper Tier 2) and EUR 7,95 billion of senior loans.

(98) On 24 December 2008, the Dutch State acquired ABN AMRO N from FBN for EUR 6,5 billion ("Measure Z"). The Dutch State did not pay in cash but paid for the purchase by cancelling EUR 6,5 billion of long-term debt it had obtained in the integrated transactions of 3 October 2008 as part of Measure Y2. In other words, the Dutch State waived EUR 6,5 billion of claims towards FBN to pay for ABN AMRO N[54].

2.4.2 Measures covered by the Decision of 5 February 2010

(99) Some of the measures covered by the Decision of 5 February 2010[55] were notified to the Commission in July 2009 and the remainder in January 2010. In July 2009, the Dutch State notified a capital relief instrument or "CRI" ("Measure A" with a capital relief effect of EUR 1,7 billion), a Mandatory Convertible Security ("MCS") of EUR 500 million ("Measure B1") and a second MCS-tranche of EUR 300 million ("Measure B2").

(100) In January 2010, the Dutch State notified additional capital measures worth EUR 4,39 billion. The Dutch State subscribed to additional MCS-instruments of EUR 2,28 billion to cover additional separation costs (EUR 780 million, "Measure B3"), the capital shortfall resulting from the sale of New HBU (EUR 300 million, "Measure B4") and integration costs (EUR 1,2 billion, "Measure B5"). To bring FBN's Tier 1 capital in line with regulatory requirements, the Dutch State also converted EUR 1,35 billion of FBN-Tier 2 capital it already owned into Tier 1 capital ("Measure C"). The Dutch State also paid the other consortium members EUR 740 million in cash ("Measure D") as was foreseen in the CSA to settle issues that only emerged in the course of the separation

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[51] The date on which a debt comes due for payment.

[52] Early November 2009, the liquidity facility still amounted to EUR 45 billion (EUR 5 billion overnight and EUR 40 billion longer-term liquidity). But from 14 November 2008 on, the facility was reduced to EUR 39 billion (still EUR 5 billion overnight but only EUR 34 billion longer-term liquidity).

[53] For example, in March 2009, the maximum liquidity facility amounted to EUR 34 billion with the first 24 billion made available at EURIBOR + 25 bp and the remaining EUR 10 billion at EURIBOR + 50 bp.

[54] That amount included EUR 4,9 billion of Tier 2 loans (of which EUR 3 billion upper Tier 2) and EUR 1,6 billion of senior loans.

[55] OJ C 95, 15.4.2010, p. 10

process. Finally, the Dutch State also provided a guarantee on cross liabilities resulting from the sale of New HBU ("Measure E").

Capital relief instrument ***(Measure A, capital equivalent of*** *EUR* ***1,7 billion)***

(101) The Dutch State sold credit protection via a CDS on a Dutch mortgage portfolio of ABN AMRO N, representing around [30-80] % of ABN AMRO N's total home loan portfolio. That measure had the effect of reducing the risk weighted assets of ABN AMRO N.

(102) To remunerate the credit protection, the Dutch State received an annual fee of 51,5 basis points (calculated as a percentage of the portfolio value in the beginning of each reference period).

(103) That fee was calculated using the capital equivalent cost methodology. The Dutch State determined how much capital ABN AMRO N could free up due to the capital relief instrument (namely EUR 1,7 billion, based on Basel I requirements which were still applied at the time the CRI agreement was implemented) and then it calculated a return of 10 % on that capital relief (namely 10% on EUR 1,7 billion), which was equivalent to 51,5 basis points of the initial portfolio value of EUR 34,5 billion.

(104) Each year, ABN AMRO N kept a first loss tranche of 20 basis points (calculated as a percentage of the initial portfolio value).

(105) ABN AMRO N kept a vertical slice of 5 % of the remaining risk.

(106) The pricing of the credit protection instrument would not be adjusted once ABN AMRO N fully adopted Basel II capital requirments, even though the capital relief effect of the CRI would then be substantially smaller.

(107) In principle, the CDS-contract had a maturity of seven years, but ABN AMRO N had call options enabling it to terminate the contract on a number of pre-determined reference dates (for example October 2010, January 2011 and January 2012).[56]

(108) Under the CSA, the three consortium partners had to ensure that ABN AMRO Z remained sufficiently capitalised. In that context, the Dutch State had to contribute EUR 2,2 billion to the ABN AMRO Z capital shortfall. The aim of the CRI was to allow ABN AMRO N to make part of that EUR 2,2 billion contribution to ABN AMRO Z.

(109) The Dutch State preferred the unconventional CRI-solution over a traditional capital increase since, prior to the separation, it could not ring-fence capital contributions in ABN AMRO Bank. In other words, since ABN AMRO N was not a separate legal entity, a capital injection in ABN AMRO Bank could also have benefited the other two consortium members. That course of action could have had severe implications especially in scenarios of increased distress.

[56] More details on that measure can be found in section 2.2.1 of the Decision of 5 February 2010, OJ C 95, 15.4.2010, p. 10.

(110) When the separation took place, ABN AMRO N became a separate legal entity (the new ABN AMRO Bank). The Dutch State continued to bear the responsibility under the CSA to fill the EUR 2,2 billion capital shortage of ABN AMRO Z. The Dutch State decided that ABN AMRO N should use cash from MCS-instruments (namely Measure B3 insofar as it related to the prudential margin of EUR 500 million and EUR 1,2 billion of Measure B5) to inject EUR 1,7 billion in ABN AMRO Z, while it kept the CRI in place in the new ABN AMRO Bank to cover the prudential margin of EUR 500 million and the integration costs of EUR 1,2 billion.

(111) On 15 October 2010, ABN AMRO Bank and the Dutch State announced that the CRI would be terminated as of 30 October 2010. Indeed, as ABN AMRO Bank had in the meantime implemented the Basel II requirements, the CRI had become less interesting and less necessary[57].

*Mandatory Convertible Security to cover part of the of ABN AMRO Z capital shortfall (**Measure B1, EUR 500 million**)*

(112) Since the CRI did not suffice to cover the entire EUR 2.2 billion capital shortfall of ABN AMRO Z, the Dutch State provided extra capital to ABN AMRO Bank via an MCS.

(113) That MCS was categorised as hybrid Tier 1 capital, it carried a coupon of 10% and automatically converted into shares of ABN AMRO II at the time of the separation of ABN AMRO N from ABN AMRO Bank. From that moment on, it qualified as core Tier 1 capital. The conversion took place at nominal value[58]. The measure allowed ABN AMRO II (renamed ABN AMRO Bank) to contribute EUR 500 million to ABN AMRO Z.

*Mandatory Convertible Security to cover separation costs **(Measures B2 and B3,** EUR **1.08 billion in total)***

(114) In order to cover costs related to the separation of ABN AMRO N from ABN AMRO Bank, the Dutch State subscribed to additional MCS. A first tranche of roughly EUR 300 million (Measure B2) was notified in July 2009, with the remainder (namely EUR 780 million) notified in January 2010 (Measure B3).

(115) The full amount of EUR 1.08 billion (namely Measures B2 and B3 together) was needed to cover the following costs:

- EUR 480 million of well-defined separation costs;

- EUR 90 million to set up a money market desk; and

- EUR 500 million to provide for a prudential margin.

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[57] As was also indicated on 15 October 2010 in the official letter of the Dutch Minister of Finance to the Dutch Parliament : https://zoek.officielebekendmakingen.nl/kst-31789-40.html .

[58] The contractual features of the MCS implied that if capital problems had surfaced before the separation, the MCS would have converted into Non-Cumulative Modified Securities, the only difference with the original securities being that the coupon payments would have been no longer cumulative. Under IFRS, the Non-Cumulative Modified Securities would have qualified as equity.

(116) The Dutch State provided a further breakdown of the separation costs of EUR 480 million. They related to cross liabilities exposure (EUR [0-200] million), unwinding of risk allocation letters (EUR [0-200] million), repurchase of securitisation notes (EUR [0-200] million), the transfer from ABN AMRO R of trading-related market risk of ABN AMRO N customers (EUR [0-200] million), discontinuation of capital relief instruments (EUR [0-200] million) and sundry separation and unwinding costs (EUR [0-300] million).

(117) After the separation from its parent company ABN AMRO Bank, ABN AMRO II needed to set up a money market desk on its own, which cost EUR 90 million.

(118) Finally, the Dutch State injected another EUR 500 million in capital to ensure that ABN AMRO N could operate with some margin above the minimum regulatory requirements.

Mandatory Convertible Security to cover capital shortfall due to sale of New HBU ***(Measure B4,*** *EUR* ***300 million)***

(119) FBN and ABN AMRO N could only merge once the concentration issues identified in the Merger Decision were resolved. Therefore, the Dutch State decided to sell New HBU and IFN to Deutsche Bank. That transaction resulted however in an additional capital need of EUR 470 million, which ABN AMRO N could not deal with entirely on its own. The Dutch State decided to help and injected EUR 300 million in the form of MCS[59].

Mandatory Convertible Security to cover integration costs ***(Measure B5,*** EUR ***1,2 billion)***

(120) To implement the merger, ABN AMRO N and FBN (and after the merger ABN AMRO Group) had to pay for upfront integration costs of EUR 1,2 billion (after tax), related to redundancy costs, the integration of ICT platforms and the restructuring of the branch network. Since ABN AMRO N and FBN were not able to finance those costs themselves, the Dutch State decided to inject capital in the form of MCS[60].

[59] The Dutch State indicated in its Communication to Parliament of 19 November 2009 (page 10 of http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2009/11/20/ec-remedy-en-herkapitalisatie-abn-amro-en-fortis-bank-nederland.html) that the total negative capital impact of EUR 470 million was the result of the negative difference between the transaction price and the book value (i.e. 180 million EUR) and the costs of a credit umbrella granted to Deutsche Bank (i.e. 740 million EUR), partly compensated by the capital relief of the transferred RWA (i.e. 450 million EUR). The Dutch State explained in that document that the total capital impact would gradually decrease (mainly because the loan portfolio protected by the credit umbrella will mature). The capital impact after one year would be only EUR 180 million (rather than EUR 470 million at the time of the transaction).

[60] When the Dutch State provided capital in the form of MCS (Measures B1 to B5) after the separation of ABN AMRO II, it immediately converted the MCS into shares, which made it *de facto* a capital contribution in cash.

Conversion of FBN Tier 2 hybrid capital into core Tier 1 capital ***(Measure C, EUR 1,35 billion)***

(121) FBN was obliged to increase its Tier 1 capital after the DNB[61] had indicated that there was a Tier 1 capital shortage of approximately EUR 1,26 billion. After the separation from its parent company Fortis SA/NV, FBN also had to spend EUR 90 million to cover costs related to the set up of a treasury desk, Basel-related models, licenses and consultancy services.

(122) The Dutch State provided that extra capital by converting Tier 2 debt with a nominal value of EUR 1,35 billion into Tier 1 capital. Consequently, the transaction did not involve any new cash[62].

Payment obligations towards other consortium members ***(Measure D, EUR 740 million)***

(123) When the consortium members negotiated the acquisition of ABN AMRO Holding in 2007, they realised that not all facts were already known at the time. Therefore, the CSA contained a number of general principles to settle certain payment obligations, which would only become apparent during the separation process. The exact amounts result from a negotiating process in which the Dutch State (and Fortis SA/NV before it) participated.

(124) The total amount of EUR 740 million relates to:

[…]

Those cash outflows are partly compensated by the fact that the Dutch State received […] from the other consortium members related to stranded costs.

(125) The balance of the payment obligations in respect of other consortium members (namely EUR 740 million) was paid in cash, in part directly to the other consortium members and in part to ABN AMRO Bank (now RBS NV).

*Cross liabilities (**Measure E,** EUR **950 million**)*

(126) Even after the divestment of New HBU, ABN AMRO Bank (now RBS NV) and ABN AMRO II (or its legal successors) will remain liable towards creditors of New HBU if New HBU is unable to meet its obligations towards its own creditors. Likewise New HBU will face cross liabilities towards creditors of ABN AMRO Bank and ABN AMRO II. Since the cross liabilities were rooted in the sale of New HBU which resulted from a decision of ABN AMRO II and

61 In a letter dated 17 December 2009 and registered on 5 January 2010, the DNB wrote to the Commission that it had informed FBN on 3 September 2009 on the results of its "Supervisory Review and Evaluation Process 2009". The DNB decided […] - that FBN had a Tier 1 capital shortage of 1,26 billion EUR as of 31 December 2008. Simultaneously, the DNB also set FBN's minimum Tier 1 ratio at […] %.

62 On 3 October 2008, the Dutch State took over EUR 16,1 billion of long-term FBN debt (Measure Y2). The Tier 2 loans came down from initially 8,15 billion EUR to 1,9 billion EUR (minus EUR 4,9 billion because of Measure Z and minus 1,35 billion because of Measure C). The senior loans were reduced from EUR 7,95 billion to EUR 5,95 billion because of Measure Z (minus EUR 1,6 billion) and also because loans of EUR 0,4 billion reached maturity (status as at 4 May 2010).

its shareholders, it was also their responsibility to find a solution. The proposed solution implied that the Dutch State and Deutsche Bank (namely the purchaser of New HBU) agreed that new HBU and ABN AMRO II would indemnify each other for those cross liabilities by providing each other collateral, so as to reduce the induced regulatory capital requirements to a desired 20 %. As a result of that agreement, ABN AMRO II had to provide collateral to New HBU for an amount up to EUR 950 million (declining over time as underlying liabilities mature) for the liabilities of New HBU towards ABN AMRO II and towards ABN AMRO Bank (now RBS NV). Since ABN AMRO II did not have the means to provide the collateral needed in respect of the liability towards ABN AMRO Bank (now RBS NV), the State provided a counter-indemnity in the form of a guarantee on the debt of ABN AMRO Bank (now RBS NV).

(127) The Dutch State priced that risk as if it was a State guarantee on ABN AMRO Bank (now RBS NV) subordinated debt. The pricing - based on the European Central Bank ("ECB") Recapitalisation Recommendation[63]– was set at 200 basis points plus the median CDS-spread[64].

(128) Table 4 summarises the measures assessed in this Decision. The column 'Reason' is the same as that in Table 1 at point (57) of the Decision of 5 February 2010. As indicated in recital (110), following the separation of ABN AMRO N with ABN AMRO Bank on 6 February 2010, the measures and the objectives of the measures were reshuffled. More specifically, Measure A was used from that date on for the objectives of Measure B3 (insofar as it concerns the prudential margin) and Measure B5 and *vice versa*.

Table 4

State support measures	**Description**	**Size (in EUR billion)**	**Reason**	**Legal entity to which the measure is granted**
Measures covered by the Decision of 8 April 2009				
Y1	ST funding	45		FBN
Y2	LT funding	16,1		FBN (to allow repayment to Fortis Bank SA/NV)
Z	Acquisition of ABN AMRO N	6,5		FBN (purchase price paid by waiving debt)
Capital measures notified in July 2009 and implemented in July/August 2009				
Measure A	Capital relief instrument	CDS-protection on a EUR 34,5 billion portfolio (having a capital	Filling the capital shortage of ABN AMRO Z	ABN AMRO Bank (now RBS NV) and moved to ABN AMRO

[63] Pricing based on European Central Bank Recapitalisation Recommendation, which can be found on the following weblink : www.ecb.eu/pub/pdf/other/recommendations_on_pricing_for_recapitalisationsen.pdf

[64] The CDS reference period is January 2007 – August 2008.

		relief effect of EUR 1,7 billion)		II (now ABN AMRO Bank) on separation date
Measure B1	MCS	0,5		
Measure B2	MCS	0,3	First tranche of separation costs	ABN AMRO Bank NV (now RBS NV) and moved to ABN AMRO II (now ABN AMRO Bank on separation)
<u>Additional capital measures notified in January 2010</u>				
Measure B3	MCS	0,78	Second tranche of separation costs and prudential margin of EUR 0,5 billion	EUR 967 million paid to ABN AMRO Bank (now RBS NV) and then moved to ABN AMRO II (now ABN AMRO Bank) on separation, the remainder directly paid to ABN AMRO II
Measure B4	MCS	0,3	Capital impact from sale of new HBU	
Measure B5	MCS	1,2	Integration costs	
Measure C	Exchange Tier 2 into common equity	1,35	Tier 1 shortage at the level of FBN	FBN
Measure D	Cash payment to consortium partners	0,74	Payment obligations resulting from the CSA	Other consortium partners / ABN AMRO Bank (now RBS NV)
Measure E	Guarantee on liabilities of EUR 950 million	0,95	Cross liabilities resulting from sale of new HBU	ABN AMRO II (now ABN AMRO Bank)

3. Grounds to open

3.1 Grounds to open in the Decision of 8 April 2009

(129) In the Decision of 8 April 2009, the Commission opened proceedings because it had grounds to believe that Measures Y1, Y2 and Z[65] represented State aid in favour of FBN and ABN AMRO N. The Commission believed that those measures allowed FBN and ABN AMRO N to stay on the market and pursue their activities. It had reasons to believe that those measures were selectively advantageous to FBN and ABN AMRO N.

[65] In respect of Measure X, the Commission in recital (32) of the Decision of 8 April 2009 indicated that while Measure X did not provide State aid as such to those banks, it was nevertheless part of a set of integrated transactions containing State aid to those banks.

(130) In recitals (29) and (30) of the Decision of 8 April 2009, the Commission noted that Measures X, Y1 and Y2 were part of the same sale contract, which aimed at separating FBN from the rest of the Fortis SA/NV. The Decision of 3 December 2008 already concluded that by entering in that contract on 3 October 2008, the Dutch State had not acted as a normal investor in a market economy.

(131) In recital (33) of the Decision of 8 April 2009, the Commission argued that Measure Y1 was apparently advantageous to FBN as it had received an amount of funding, which it could not have found on the markets, the markets being at the time in complete disarray. Keeping in mind those extreme market circumstances, the Commission also doubted that the interest rates required by the Dutch State would have been acceptable to a private investor. The Commission also noted that the solidity of its new funding provider seemed advantageous to FBN. FBN was no longer dependent on a liquidity-constrained company in distress like Fortis SA/NV but received its funding from the Dutch State.

(132) The Commission doubted that Measure Y1 was compatible with the Communication from the Commission - The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (the "Banking Communication")[66] as it was neither proportional nor limited to the minimum necessary. More specific concerns were raised in recital (52) of the Decision of 8 April 2009 on the compatibility of the following elements: (1) the remuneration that FBN paid, (2) the maximum period during which FBN could benefit from funding, (3) the maximum maturity of instruments concerned and (4) the volume of the liquidity facility.

(133) The Commission also indicated that Measure Y2 could contain elements of State aid if Fortis Bank SA/NV was at the time of the acquisition in a position to request the immediate redemption of the long-term loans should the ownership of FBN change. If there was indeed an ownership-related redemption clause, Measure Y2 allowed FBN to benefit from long-term loans at pre-crisis interest rates. Measure Y2 implied that FBN was not obliged to find alternative funding at the prevailing market conditions at that time. Moreover, since Fortis Bank SA/NV had the right to ask for redemption, the Dutch State choice to provide of long-term loans rather than short-term loans could be questioned. Therefore, in the Decision of 8 April 2009, the Commission voiced concerns that Measure Y2 contained State aid for a longer-term period than was strictly necessary. To be in a position to evaluate the State aid implications of Measure Y2, the Commission requested the Dutch State to provide more information on the contractual early redemption terms of the long-term loan contracts.

(134) In recital (54) of the Decision of 8 April 2009, the Commission also doubted whether the Dutch State had taken sufficient measures to limit undue distortions of competition, in line with point (27) of the Banking Communication.

[66] OJ C 270, 25.10.2008, p 8.

(135) The Commission was also concerned that ABN AMRO N had – potentially indirectly - benefited from the liquidity measures provided to FBN. Therefore, it asked the Dutch State to provide more information on ABN AMRO N's funding position and funding strategy.

(136) With respect to Measure Z, the Commission doubted that the Dutch State paid FBN the market price for the acquisition of ABN AMRO N. The Commission observed that the Dutch State paid more than the 3 October 2008 'current market conditions' valuation of the Dutch State's own valuation expert […] in its report which was mentioned in recital (2). Moreover, the Commission observed that the Dutch State had not applied a correction factor to reflect the stock market decline that occurred between October and December 2008 and which was especially pronounced for bank stocks. If the Dutch State overpaid when buying ABN AMRO N, Measure Z was equivalent to State aid helping to recapitalise FBN.

(137) In general, the Commission also observed in the Decision of 8 April 2009 that the Dutch State had not yet submitted an evaluation of FBN and ABN AMRO N by the DNB. Nor had the Dutch State provided a viability plan or a restructuring plan with detailed financial projections. Because neither a viability plan nor a restructuring plan were available, the Commission was unable to determine whether, as a result of Measures X, Y1, Y2 and Z, ABN AMRO N and FBN had sufficient capital and were able to realise an acceptable level of profitability.

3.2 Grounds to extend the proceedings in the Decision of 5 February 2010

Existence of State aid in accordance with Article 107(1) of the Treaty

(138) When on 17 July 2009 and on 15 January 2010, the Dutch State notified extra measures in favour of FBN and ABN AMRO N as measures not constituting State aid, the Commission was concerned that some of these additional measures represented extra State aid to FBN and ABN AMRO N.

(139) In the Decision of 5 February 2010, the Commission observed that under the CSA the Dutch State had a number of obligations, which were not obligations of ABN AMRO N. Measures taken by the Dutch State to comply with its obligations under the CSA (and in particular the obligation to bear the cost of ABN AMRO Z and the obligation to separate ABN AMRO N from ABN AMRO Bank) would at first sight not qualify as State aid to ABN AMRO N.

(140) The Commission indicated that the Measures A and B1 seemed primarily designed to cover the capital shortage of ABN AMRO Z, but at the same time it was not clear to the Commission whether there was not also an indirect benefit to the economic activities of ABN AMRO N. In that regard, the Commission wanted to know whether ABN AMRO N and ABN AMRO Z – with no separate legal status – were sufficiently ring-fenced vis-à-vis one another. The Commission also wanted to receive more information on the reasons behind the capital shortfall of ABN AMRO Z and for instance on the transfer of Unicredito shares from ABN AMRO Z to ABN AMRO N. The Commission also had questions as to the remuneration by ABN AMRO N to ABN AMRO Z for the

performance of head office functions. The Commission suspected that – at least part of – the undercapitalisation of ABN AMRO Z was linked to the fact that ABN AMRO N did not pay a market price for the head office services of ABN AMRO Z.

(141) Even though the separation of ABN AMRO N from ABN AMRO Bank is an obligation of the Dutch State under the CSA, the Commission could not exclude that the State recapitalisation financing the separation costs could be State aid. The Commission observed that not all costs categorised as separation costs were *strictu senso* linked to the separation obligations as described in the CSA. The Commission noticed that the category 'separation costs' included an amount of EUR 500 million which was needed to provide ABN AMRO Group with a prudential margin over minimum prudential requirements.

(142) The Commission observed that the Dutch State helped FBN and ABN AMRO N to pay the costs related to the merger. To resolve concentration problems created by the merger, ABN AMRO N decided to sell IFN and New HBU, which led to a new capital shortfall. The Commission observed that FBN and ABN AMRO N were able to profit from the benefits of the merger (for example merger synergies, the advantages of being a stronger company with higher market shares on the Dutch market, …), while the Dutch State financed the upfront costs. In that regard, the Commission observed that there was no legal obligation for the Dutch State to pay those costs since they originated in the decision of the Dutch State of 21 November 2008 to merge FBN and ABN AMRO N and not in the CSA.

(143) The Commission took note of the fact that the merger and the specific conditions surrounding the separation resulted in cross liabilities (Measure E). Dutch corporate law implied that ABN AMRO Bank (now RBS NV) and ABN AMRO II remained liable for the debt-holders of New HBU should New HBU (or its new owner Deutsche Bank) fail to fulfil its payment obligations. New HBU had similar obligations vis-à-vis debt-holders of ABN AMRO Bank (now RBS NV) and ABN AMRO II). The Commission could not exclude that the indemnification solution, which implied that the Dutch State guaranteed the debt-holders of ABN Amro Bank (now RBS NV) at a premium of 200 basis points plus the median CDS-spread, implied State aid.

Compatibility with the Impaired Asset Communication

(144) The Commission also raised concerns about the design of the capital relief instrument (Measure A). The Commission acknowledged that Measure A was fundamentally different from other impaired asset measures as it was not put in place to protect ABN AMRO N against further declines in toxic assets with a highly uncertain valuation. Nevertheless, the Commission considered that to be compatible with the internal market, Measure A should comply with the general principles of the Communication from the Commission on the treatment of impaired assets in the Community banking sector[67] (the "Impaired Asset Communication"). More specifically, there should be sufficient evidence of

[67] OJ C 72, 26.3.2009, p. 1.

appropriate pricing, meaning that the bank should not transfer expected losses to the State. In that regard, the Commission also wanted to understand what impact a number of specific contractual features (for example. the clawback mechanism and the vertical slice) would have on the actual cashflows and pricing. Finally, the Commission also doubted that there were insufficient incentives ensuring that ABN AMRO N would terminate the instrument as soon as it was no longer strictly necessary.

Compatibility with the Restructuring Communication

(145) The Commission doubted whether the December 2009 Restructuring Plan fulfilled the criteria set forward in the Communication for the Commission on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules[68] (the "Restructuring Communication") in terms of viability, burden-sharing and undue distortions of competition.

Restoration of long-term viability

(146) The Commission acknowledged that ABN AMRO Group would at first sight realise sufficient revenues to cover all its operational costs (including impairments) and earn an acceptable return on equity. However, the Commission also noted that the return on equity of ABN AMRO Group depended to a large extent on the realisation of a number of key assumptions. First, if ABN AMRO Group wants to become cost-efficient with an acceptable cost-income ratio, it is crucial that ABN AMRO Group implements the projected synergies (namely EUR 1,1 billion pre-tax which compares to a 2013 net profit of […] billion EUR). Second, as indicated in recital (118) of the Decision of 5 February 2010, it was also of crucial importance for the viability of ABN AMRO Group that it would be able to improve its net interest margin from the low levels of FBN and ABN AMRO N in the second half of 2008 and the first half of 2009. In its Decision of 5 February 2010, the Commission indicated that it needed more details on those issues, so as to evaluate whether long-term viability had truly been restored.

(147) The Commission also noted that the December 2009 Restructuring Plan did not yet include financial projections for a worst case scenario as required by point (13) of the Restructuring Communication. Therefore, the Commission asked for such worst case financial projections, allowing it to verify how ABN AMRO Group would perform in more stressful market conditions.

(148) The Commission also observed that the December 2009 Restructuring Plan contained little information on smaller sub-divisions, so that the Commission could not judge whether all viability issues at that level had been sufficiently addressed. More specifically, the Commission doubted whether viability of PFS, a division of FBN, which reported major Madoff-related losses in 2008, was sufficiently guaranteed.

Aid limited to the minimum necessary/own contribution

[68] OJ C 195, 19.8.2009, p.9.

(149) The Commission questioned whether the State aid was limited to the minimum necessary to restore the viability of ABN AMRO Group. In that respect, it noted that ABN AMRO Group had indicated that it wished to make small add-on acquisitions, which it deemed necessary to rebuild product competences lost during the separation processes from Fortis SA/NV and ABN AMRO Holding. In the Decision of 5 February 2010, the Commission argued that State aid should not be used to finance acquisitions or new investments unless essential for restoring the viability of an undertaking. The Commission asked the Dutch State to shed more light on the acquisition policy of ABN AMRO Group and to provide it with *inter alia* a detailed list of activities that ABN AMRO Group needed to rebuild for viability reasons.

(150) The Commission also doubted whether all hybrid capital providers of FBN and ABN AMRO N had paid their share of the restructuring. The Commission was concerned that, for instance, the preferred shareholders of FBN[69] had not sufficiently contributed to ensure that the intervention of the Dutch State was not limited to the minimum necessary.

(151) Also in terms of duration, the State aid should be limited to the minimum necessary. In that regard, the Commission observed that a number of measures were needed to address temporary problems, but the Commission doubted whether the Dutch State had taken sufficient steps ensuring that the measures would be unwound once they were no longer necessary.

(152) With regard to Measure A, the Commission observed that the CRI would become unattractive once ABN AMRO N was allowed to implement Basel II requirements. Although the CRI contained call features allowing for an early termination of the contract, the Commission observed that there was no clear timetable for the Dutch State's exit.

(153) Also with regard to the prudential margin of EUR 500 million, the Commission noted that the intention was that ABN AMRO Group replaced that amount by self-financed capital. Again the Commission observed that there was no indication whatsoever on timing.

(154) With respect to the integration costs of EUR 1,2 billion (namely Measure B5), the Commission observed that the Dutch State claimed that these would lead to important synergies of EUR 1,1 billion (pre-tax) per year, which could in principle be used to repay the State aid. Yet, the Commission observed that the Dutch State had not put in place a mechanism ensuring such a repayment. On the capital needs related to the sale of New HBU, the Commission concluded that the capital requirements related to the credit umbrella would decline rapidly as loans would gradually mature. Again, the Commission underlined that the State aid should be repaid once it was no longer necessary.

Limitation of distortions of competition

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69 For more information see recital (60).

(155) In terms of distortion of competition, the Commission noted that the capital needs of FBN and ABN AMRO N stemmed to a certain extent from their separation of their former parent companies and from upfront integration costs, and not from excessive risk-taking or mismanagement within FBN and ABN AMRO N themselves. Against that background, the Commission concluded that further divestments were unlikely to be necessary.

(156) At the same time however, the Commission expressed doubts that the December 2009 Restructuring Plan contained sufficient behavioural measures to ensure that FBN and ABN AMRO N would not use the State aid to grow at the expense of their competitors, for example by implementing an unsustainable pricing policy or acquiring other financial institutions, which could weaken the incentives of non-beneficiaries to compete, invest and innovate and could discourage entry in the Dutch banking market.

(157) In terms of exit, the Commission argued that it would be helpful if the Dutch State developed and clearly communicated an exit strategy. Indeed, the repeated and massive interventions of the Dutch State could be perceived by depositors as a sign of its permanent support.

4. Comments from interested parties

4.1 First set of comments from Van Lanschot (letter of 6 May 2009)

(158) The complainant argued that thanks to the State aid and State ownership, FBN and ABN AMRO N (including their subsidiaries such as MoneYou and Mees Pierson) offered unsustainably high interest rates on individual savings and deposit accounts, thereby destabilising the Dutch banking market.

(159) The complainant believed that interest rates offered by FBN and ABN AMRO N were loss-making. In that regard, it referred to the fact that EURIBOR rates declined from 5 % in September 2008 to less than 2 % in January/February 2009, while interest rates offered by FBN and ABN AMRO N on savings accounts actually rose.

(160) The complainant also points at the specificities in the Dutch private banking market when compared to the retail banking market, which tend to increase the distortive effect of the measures taken. Saving amounts in private banking are on average larger than in retail banking. For low savings amounts, customers care less about their bank's risk profile as they are protected by the Dutch Deposit Guarantee Scheme (up to an amount of EUR 100 000). Risk awareness increases however once that threshold is passed, which is rather common in private banking.

(161) The complainant also argued that FBN and ABN AMRO N benefit from an implicit State guarantee. It argued that customers of FBN and ABN AMRO N are convinced that the Dutch State will not allow State-owned banks to go bankrupt.

(162) The complainant – which weathered the crisis without State aid – underlined that it was severely affected by FBN and ABN AMRO N distortive behaviour as

it relied traditionally to an important extent on the Dutch savings market to fund its assets[70]. In absolute figures, the complainant had savings & deposits of EUR 15 billion, which implied that a 1% increase in interest rates could cost the company approximately EUR 150 million per year[71]. In addition to that cost increase, there was also a volume effect as Van Lanschot lost customers.

4.2 Follow-up comments of Van Lanschot (letters of 21 and 28 August 2009)

(163) According to the complainant, the unusual behaviour of FBN and ABN AMRO N persisted over the summer months of 2009.

(164) As an additional argument, the complainant referred to unusually large volume and market share changes in the traditionally stable Dutch savings market. In that regard, the complainant pointed to FBN and ABN AMRO N press releases which reported deposit inflows of respectively EUR 9 billion and EUR 21 billion in the first half of 2009[72]. The complainant deemed those figures to be sizeable given the fact that the total Dutch savings market is worth approximately EUR 287 billion.

(165) As another illustration of unusual pricing, the complainant referred to the fact that savings interest rates in neighbouring countries such as Belgium, France and Germany had followed the decline in EURIBOR rates, while Dutch savings interest rates had remained stubbornly high.

4.3 Comments from ABN AMRO Bank (letter of 6 July 2009)

(166) Commenting on the Decision of 8 April 2009 launching the formal investigation procedure, ABN AMRO Bank (i.e. the parent company of ABN AMRO N) provided more information on its funding position and funding strategy. ABN AMRO Bank denied it had benefitted - directly or indirectly - from any funding aid given to FBN (Measures Y1 and Y2). ABN AMRO Bank pointed out that it had not needed help to fund itself throughout the crisis thanks to its diversified funding strategy. It also underlined that its liquidity statistics remained well within regulatory limits and within its own internal limits as well.

5. Comments from the Dutch State

5.1 Comments from the Dutch State on the Decision of 8 April 2009

(167) The Dutch State acknowledged that FBN had been able to pursue its activities because of its acquisition by the State[73], but it argued that the acquisition was in line with the so-called "market economy investor principle" (MEIP). As a result, according to the Dutch State there was no selective advantage and

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70 This is also illustrated by the complainant's low loan-to-deposit ratio, which was at the time of the complaint approximately 110%.

71 Van Lanschot's net profit figures were EUR 215,4 million, EUR 30,1 million and EUR 14,8 million in respectively 2007, 2008 and 2009. In the first half of 2010, the company reported a net profit of EUR 20,3 million.

72 ABN AMRO press releases of 25 May 2009 and 26 August 2009 on 1Q09 and 2Q09 results and FBN press release of 20 August 2009 on 1H09 results.

73 Reply of the Dutch State on Decision of 8 April 2009, 11 August 2009, page 6.

consequently no State aid. The Dutch State claimed that - even though the integrated transactions of 3 October 2008 were primarily meant to prevent the destabilisation of FBN and ABN AMRO N and the Dutch banking system in general - by purchasing participations in FBN and ABN AMRO N it aimed to make a positive long-term return. The Dutch State underlined that the price for FBN (including ABN AMRO N) was within the valuation range of its external valuation expert.

(168) The Dutch State claimed that it had paid a fair market price for FBN but it pointed out that even if it overpaid, that payment would have been State aid to Fortis SA/NV (which was the selling company) and not State aid to FBN.

(169) With respect to Measure Y1, the Dutch State claimed that it provided short-term funding to FBN at market conditions. It argued that before the crisis FBN received funding from its parent company at EONIA or EURIBOR rates without any extra spread. The Dutch State argued that the pricing it applied (as described in recital (96)) was in line with market practice. More specifically, it also argued that its pricing system used for the period after 5 November 2008 (with a 50 basis points spread for loans of more than three months) was aligned with the Dutch Guarantee Scheme[74].

(170) With respect to the period during which FBN's liquidity facility was made available, the Dutch State explained that it started negotiations on ending the liquidity facility in January 2009 with the aim of ending the liquidity facility as fast as possible. With that objective in mind, the Dutch State introduced in March 2009 a new two-step pricing system, which made funding more expensive if it exceeded a pre-defined threshold. The Dutch State assumed that FBN could repay the liquidity facility at a rate of EUR 4 to 5 billion a month and intended to end the liquidity facility by the end of 2009. In reality, FBN repaid the liquidity facility faster than anticipated. The liquidity facility was already ended on 1 July 2009.

(171) The Dutch State argued that the maximum maturity of the liquidity provided under the liquidity facility was proportional. In that regard, the Dutch State explained that in the first period (i.e. from 6 to 23 October 2008), it had granted liquidity with a maturity of not more than a few weeks. When the liquidity facility was subsequently adjusted, the maximum maturity was prolonged to nine months to avoid redemption peaks.

(172) The Dutch State explained that the total volume of the liquidity facility (namely EUR 5 billion overnight and EUR 40 billion longer-term funding) was based on FBN's real financing needs and was therefore the minimum necessary. The short-term liquidity facility of EUR 45 billion took into account the normal volatility of FBN's cash position and it also allowed FBN to immediately repay approximately EUR 34 billion to Fortis SA/NV.

[74] In its letter of 15 May 2009, the Dutch State indicated that its pricing system meant "to prevent excessive divergence between the prices for the loans to FBN and prices charged to banks for providing a guarantee under the Guarantee Scheme".

(173) With respect to the long-term loans (namely Measure Y2), the Dutch State acknowledged that Fortis Bank SA/NV could have requested the repayment of the fixed-interest rate loans (but not of the variable-rate loans)[75]. The Dutch State argued however that it had only replaced Fortis Bank SA/NV leaving all the conditions of the existing contracts unchanged. According to the Dutch State, the contract between Fortis Bank SA/NV and FBN was a normal market contract between private market actors. The Dutch State argued that – because it had replaced a market economy investor – its behaviour was automatically in line with the MEIP. As such, the Dutch State considered it did not have to justify why rates could have been higher or why it should have replaced those long-term loans by shorter-term loans[76].

(174) The Dutch State also argued that it was quite common for companies, when pursuing acquisitions, to simultaneously provide liquidity to newly-acquired subsidiaries.

(175) As to whether direct or indirect State aid had been provided to ABN AMRO N, the Dutch State denied that ABN AMRO N received funding from the Dutch State or FBN. The Dutch State explained that ABN AMRO N, with its large retail and private banking franchise, had sufficient funding of its own.

(176) With respect to Measure Z, the Dutch State claimed that the transaction price of EUR 6,5 billion was a fair market price. It underlined that the price was between the 'current market conditions' valuation of EUR [4-6,5] billion and the 'through the cycle' valuation of EUR [6,5-9] billion as calculated by its external valuation expert at the beginning of October 2008 (prior to the 3 October 2008 transaction). As regards to the fact that the acquisition (Measure Z) took place two and a half months after that valuation was made, the Dutch State believed that no corrections were necessary since uncertainties were already reflected in the early October 2008 valuation[77]. The Dutch State also argued that investment banking and toxic assets were usually at the basis of confidence problems in other banks, translating into important share price declines for those banks. ABN AMRO N, by contrast, with its stable retail and commercial bank profile, was fundamentally different to other banks. Given that context, the Dutch State argued that a price correction by analogy to other banks made no sense.

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75 The relevant prospectus extracts of the fixed-interest loans reads as follows: "The total outstanding amount of the loans …. shall be due and payable at once on First demand ….if any of the following events should occur: d) if a petition is filed or an order is made or an effective resolution is passed for the winding up of the borrower,… or if the borrower cease to carry on its business, or the shares in the borrower are transferred or delivered to any third party or the control over the borrower shall otherwise have been passed to any third party;" (source: letter of Dutch authorities of 15 May 2009 page 4) (emphasis by the Commission). There were EUR 7,9 billion fixed-interest loans, out of the total amount of long-term loans of EUR 16,1 billion.

76 Page 7 of the Dutch reply of 11 August 2009 on the Decision of 8 April 2009 reads as follows: "The Dutch State has only taken the place of Fortis Bank SA/NV in a contract which (as already said) was concluded between two market parties. Thus the tariffs of the contract are in conformity with market rates. It is unclear why it should be demonstrated that these tariffs could have been even higher or that the maturities could have been shorter, as the current conditions are already in conformity with market practice." (original text in Dutch, translation by the Commission).

77 In the valuation exercise of 3 October 2008, the State's external valuation expert applied a discount on annualised earnings of the companies concerned of 20 %.

(177) The Dutch State also underlined that the other consortium members, and in particular RBS, had to approve the transaction and that […]. The Dutch State also refers to points (166) and (177) of the preliminary report of experts to the General Shareholders' Meeting of Fortis SA/NV on 11 February 2009 in Brussels[78], claiming that those points support the Dutch State's argument that it paid a fair price for FBN, ABN AMRO N, Fortis Insurance and Fortis Corporate Insurance on 3 October 2008, which constitutes therefore a valid reference price for the sale of December 2008.

(178) The Dutch State implemented Measure Z by waiving claims it had towards FBN. Furthermore, the Dutch State claimed that the Commission – if it were to come to the conclusion that Measure Z implied State aid - should apply a correction. Since similar instruments of other banks were trading at a substantial discount to par[79], it was logical that the market value of the debt instruments waived by the Dutch State was also below par. In other words, the prevailing market circumstances suggested that the Dutch State was not entitled to par value but to a lower market value. The Dutch State argued that, taking into account the then prevailing market circumstances, it was only entitled to a market value of EUR [4,55-5,85] billion (so the par value of the loans of EUR 6,5 billion corrected for a market discount of EUR [0,65-1,95] billion).

(179) On 18 June 2009, the Dutch Ministry of Finance forwarded to the Commission the evaluation of FBN by DNB as requested in the Decision of 8 April 2009. […][80,81,82]

(180) DNB also informed the Commission on […] ABN AMRO N by letter of 20 January 2010. […]

5.2 Comments from the Dutch State on the Decision of 5 February 2010

(181) In general, the Dutch State argued that the measures taken did not constitute State aid because the measures:

(i) did not benefit ABN AMRO N nor FBN,

(ii) were necessary to separate ABN AMRO N and FBN from their respective former parent companies and followed from contractual obligations of the Dutch State as successor to Fortis SA/NV in the CSA, or

(iii) were economically rational from the viewpoint of a private investor.

(182) The Dutch State argued that the Commission should apply the MEIP to every individual measure that the Dutch State had taken. Particularly concerning the merger-related measures (namely Measures B4 and B5), the Dutch State

78 http://www.ageas.com/Documents/FR_ER_27012009.pdf.
79 Par value is equal to the nominal or face value of a security. A bond selling at par is worth an amount equivalent to its value upon redemption at maturity-typically EUR 1000 per bond.
80 […]
81 […]
82 See also recitals (121) and (122) and footnote (61).

underlined that the merger was an investment with a positive net present value ("NPV") and therefore compatible with the MEIP.

(183) In other words, the Dutch State did not accept the Commission's preliminary position, as developed in recital (96) of the Decision of 5 February 2010, that the MEIP did not apply to the measures following the integrated transactions of 3 October 2008 State, since those measures were part of a larger rescue and restructuring operation.

(184) The Dutch State acknowledged that the State aid rules imply that the MEIP does not apply when several interconnected capital injections are made in a short time period. Nevertheless it argued that this analysis did not hold true for FBN and ABN AMRO N as the integrated transactions of 3 October 2008 – in its view – did not contain State aid measures and, in addition, the follow-up measures were not connected to the initial transaction.

(185) The Dutch State argued that the Commission should take into account the very specific circumstances under which the Dutch State was obliged to buy FBN. The Dutch State also pointed out that the sale of New HBU had been very burdensome for the Dutch State and for ABN AMRO N with a negative capital impact of EUR 470 million.

(186) The Dutch State claimed to have based all its measures on the principles set forward in the Banking Communication[83] and the Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition[84] (the "Recapitalisation Communication"). In general, the Dutch State argued that its measures were well-targeted, proportionate to the challenges faced and designed so as to minimise negative spill-over effects to competitors.

(187) The Dutch State argued Measure A and Measure B1 did not qualify as State aid, since the State was contractually obliged to resolve capital problems faced by ABN AMRO Z. The Dutch State was contractually obliged under the CSA to implement the separation of ABN AMRO Holding. DNB only allowed the separation of ABN AMRO II to start if all the consortium members had paid their share in the capital shortage of ABN AMRO Z. The Dutch State admitted that it had provided capital to ABN AMRO Z via ABN AMRO N but it underlined that ABN AMRO N only acted as an intermediate vehicle. Ultimately, ABN AMRO N had only passed capital through to ABN AMRO Z and Measure A did not selectively advantage ABN AMRO N.

(188) As to whether the capital shortage of ABN AMRO Z was the result of selective advantages granted to ABN AMRO N, the Dutch State stated that the consortium members had already ensured at the time of the acquisition of ABN AMRO Holdings by the consortium (see recital (33)) that the activities of the different tracking shares (as defined in recital (35)) were sufficiently ring-fenced vis-à-vis one another. That arrangement meant that there was also a clear

83 OJ C 270, 25.10.2008, p. 8.
84 OJ C 10, 15.1.2009, p.2.

distinction between the activities of ABN AMRO N and ABN AMRO Z. It meant for instance that ABN AMRO N had its own corporate governance structure and its own reporting. The Dutch State also drew the Commission's attention to the fact that ABN AMRO N had separate legal status as of 6 February 2010[85].

(189) The Dutch State also provided evidence that the ABN AMRO Z capital shortfall already existed at the time of the acquisition of 3 October 2008. The opening balance of ABN AMRO Z was already a negative EUR 7,4 billion on 3 October 2008 and the share of Fortis SA/NV therein was approximately EUR 2,5 billion. With respect to the sources of the capital shortfall, the Dutch State admitted that there had been a transfer of EUR 1 billion worth of Unicredito shares from ABN AMRO Z to the operational tracking shares (including approximately EUR 300 million to ABN AMRO N), but it provided information showing that the Unicredito share transfer took place in February 2008, well before the Dutch State intervened. Therefore the Unicredito share transfer could not be considered as State aid.

(190) With respect to the costs borne by ABN AMRO Z related to head office functions, the Dutch State underlined that those costs decreased dramatically after the acquisition of ABN AMRO Holding by the consortium members described in recital (33). Since the consortium members had no interest in maintaining a large integrated head office, it was logical to keep those costs as low as possible. Figures provided by the Dutch State showed that group function costs borne by ABN AMRO Z were EUR [0-0,5] billion in 2008 and EUR [0-0,2] billion in 2009, which the Dutch State considered to be negligible. The Dutch State also underlined that it incurred the obligation to absorb those costs when it replaced Fortis SA/NV as a party to the CSA, following the acquisition of FBN (including ABN AMRO N) on 3 October 2008.

(191) Should the Commission consider Measure A as State aid, the Dutch State argued that the Impaired Asset Communication[86] should not apply. According to the Dutch State, there was no uncertainty on the valuation of the protected assets, which therefore could not be considered 'impaired' in the sense used in the Communication. Should the Commission not share its point of view, the Dutch government contended that ABN AMRO N's CDS still complied with the general principles of that Communication. Moreover, it argued that the credit protection instrument was necessary and proportional, while keeping competition distortions to the minimum.

(192) The Dutch State asserted that the remuneration of the CRI – a 10 % return of the freed up capital – was sufficiently high. It also provided evidence that the first loss tranche of 20 basis points was substantially higher than the expected loss. The Dutch State contended that historical losses (namely [0-15] basis points) and 2010 projected losses (namely [0-30] basis points) on the mortgage portfolio of ABN AMRO N provided a good forecast for a range of future

[85] One day after the Decision of 5 February 2010.
[86] OJ C 72, 26.3.2009, p. 1.

expected losses. Also market information from rating reports[87] confirmed that the first tranche loss exceeded expected losses. The Dutch State also referred to a document of the investment bank […], which simulated how the Dutch State cashflows could evolve under different stress scenarios.

(193) The Dutch State also believed that the CRI contained sufficient exit incentives. The Dutch State drew the Commission's attention to the calls included in the CRI and to the fact that the CRI would become rather unattractive once ABN AMRO Group was allowed to operate under Basel II requirements. Against that background, the Dutch State believed that ABN AMRO N would probably call the CRI in January 2011, when the transition to Basel II requirements was expected to result in a reduction of the freed up capital.

(194) The Dutch State explained that the separation costs (namely Measures B2 and B3) were the result of the CSA, to which the Dutch State was *de facto* a party since 3 October 2008. According to the terms of the CSA, the State –as opposed to ABN AMRO N – was obliged to split ABN AMRO Holding in three parts. The Dutch State denied that those costs provided ABN AMRO N with a benefit and it also explained that it paid for the separation costs as it was the State's contractual obligation to implement the separation.

(195) With respect to the prudential margin of EUR 500 million – also categorised under separation costs -, the Dutch State argued it was common banking practice. Banks cannot operate with only the minimum required capital but need an additional comfort margin. Otherwise, should banks face – even a small – setback, they would immediately run into financial trouble. The Dutch State indicated, however, that its contribution to the prudential margin should be temporary and that, in the longer-term, ABN AMRO N should generate the prudential margin itself without any help by the Dutch State.

(196) With respect to Measure B4, the Dutch State argued that the measure did not constitute State aid. The Dutch State argued that the decision to merge both banks was already taken and partly implemented when it acquired FBN. The Dutch State supported its claim by referring to the fact that ABN AMRO Asset Management had already been separated and integrated within Fortis SA/NV at the time of the integrated transactions of 3 October 2008. The Dutch State also underlined that the Commission had obliged it to implement a merger remedy to resolve outstanding concentration problems and that it inherited from Fortis SA/NV the New HBU Merger Remedy. The Dutch State also indicated that ultimately ABN AMRO N's financial means would not increase and therefore it defended the position that Measure B4 did not constitute State aid.

(197) The Dutch State indicated that the State funds granted to finance integration costs (Measure B5) should be seen as a rational investment, leading to healthy returns in the form of synergies. The Dutch government estimated those synergies at around EUR 1,1 billion a year (pre-tax), while the upfront

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[87] The Fitch report of 2 February 2010 on Dutch mortgages indicates that "Mortgage portfolios in the Netherlands have experienced negligible losses and low delinquency levels compared with most other European countries. At present the Netherlands has one of the lowest foreclosure and loss rates in Europe".

integration costs amount to EUR 1,2 billion (after-tax). According to the Dutch State, the total NPV of the merger (taking into account synergies, integration costs and the cost of the Merger Remedy) should amount to a positive EUR 2,88 billion[88].

(198) According to the Dutch State, the conversion of Tier 2 into Tier 1 capital (Measure C) did not selectively advantage FBN. The Dutch State claimed that the conversion was in the Dutch State's interest as it was able to convert loans with an average coupon of 2.976% into equity that, in its view, had an attractive remuneration. In that regard, the Dutch State referred to ABN AMRO Group's projected normalised 2012 RoE of approximately […] % as put forward in the December 2009 Restructuring Plan.

(199) Should the Commission consider Measure C to be State aid, the Dutch State argued that the Commission should not consider all loans waived as State aid. It explained that the conversion could be broken down in a repayment of Tier 2 capital at par in combination with a core Tier 1 capital injection (with no net cash implications). According to the Dutch State, it could not have reasonably expected repayment of Tier 2 capital at par at that time, since comparable instruments of other banks were trading at a substantial discount to par reflecting fragile market circumstances. The Dutch State indicated that a discount of EUR [135-405] million was justified, based on comparable figures.

(200) The Dutch State indicated that the payment of EUR 740 million (Measure D) was one of its obligations stemming from the CSA. Moreover, the Dutch State underlined that there were only payments to the other consortium members and not to ABN AMRO N, so that there was also no State aid provided to ABN AMRO N.

(201) Regarding Measure E, the Dutch State argued that ABN AMRO II did not benefit from the counter-indemnity (described in recital (126)), but that Measure E merely put ABN AMRO II in a position to provide a counter-indemnity to Deutsche Bank. It claimed that the counter-indemnity could not be used by the bank for development of new business and would therefore not give rise to any distortion of competition.

(202) The Dutch State considered the counter-indemnity to be in line with the Commission's Recapitalisation Communication. The Dutch State underlined that it had based its pricing on the ECB Recapitalisation Recommendation.

(203) The Dutch State also commented on the Commission's suspicion that the preferred shareholders of FBN[89] had not sufficiently contributed in terms of burden-sharing. The Dutch State explained that the investors in preferred shares had not received dividends in 2008 (neither in cash nor in accrual) and that preferred shares were trading below par. The Dutch State added that FBN's

88 According to the Dutch State, the NPV of the net synergies (namely gross synergies of EUR 1,1 billion *per annum* before taxes minus integration costs of EUR 1,2 billion after tax) will amount to EUR 4 billion, while the Merger Remedy costs around 1,12 billion EUR. As a result, the Dutch State estimates that the merger would have a positive NPV of approximately EUR 2,88 billion.

89 See also recital (60).

ability to pay or reserve fixed dividends in the future depended on FBN having sufficient IFRS profits. The Dutch State noted that the dividend clause governing the FBN preferred shares included so-called dividend stopper/pusher language[90] and that the uncertainty around the dividend policy of the ABN AMRO Group reduced the comfort that the investors in preferred shares could derive from the dividend stopper/pusher language.

(204) As to whether capital would be repaid once the (temporary) capital needs disappear, the Dutch State argued that it intended to use the dividend policy of ABN AMRO Group in such a way that ABN AMRO Group would not have any excess capital which could result in a distortion of competition[91].

(205) Concerning distortions of competition, the Dutch State indicated that it did not agree with the Commission's position that ABN AMRO N and FBN were reinforced in the Netherlands as a result of the merger nor that such a development threatened to create undue distortions of competition. It rather believed the contrary and pointed in that regard to the fact that the separation of FBN and ABN AMRO N from their respective parent companies and the subsequent merger were very labour-intensive and implied that the management of FBN and ABN AMRO N could dedicate less time to the day-to-day commercial business and therefore it argued that the separation and the subsequent merger had a negative impact on the competitive position of FBN and ABN AMRO N (or ABN AMRO Group post-merger).

5.3 Comments from the Dutch State on the comments of interested parties

5.3.1 Comments from the Dutch State on the complainant's letter of 6 May 2009

(206) In general, the Dutch State underlined that in its view the measures in favour of FBN and ABN AMRO N did not meet the Union definition of State aid and therefore did not have distortive effects. It considered the market behaviour of FBN and ABN AMRO N on the savings and deposit market to be in line with that of a rational market player protecting its commercial interests. The Dutch State believed that the interest rates offered by FBN and ABN AMRO N were not distortive. As a result, it argued that there was no infringement of Union competition law.

(207) The Dutch State presented a number of comparative tables with interest rates offered on specific deposit and savings products. The Dutch State denied that FBN and ABN AMRO N were consistently offering the highest interest rates, especially when compared to smaller Dutch banks like SNS, NIBC and DSB. The Dutch State also pointed out that interest rates on savings accounts were already high in the Netherlands before the financial crisis, partly due to the behaviour of smaller banks with an aggressive pricing policy. The Dutch State

[90] A dividend pusher requires the issuer to pay its coupons on hybrids if it has paid dividends on its ordinary shares, in line with the rank of subordination of its capital structure. A dividend stopper prevents the issuer from paying dividends in any period in which the issuer omits payment to hybrid holders.

[91] Later, ABN AMRO Group and the Dutch State agreed that ABN AMRO Group's dividend policy would be based on a dividend payout ratio of 40% as described in recital (75).

believed that during the financial crisis banks tried to protect their savings franchises by offering relatively high interest rates on savings products for customers.

(208) The Dutch State also commented on the pricing strategy of MoneYou, the internet brand of ABN AMRO N, which was introduced in the market in September 2008. The Dutch State argued that MoneYou is a dedicated internet product, which differed considerably from more traditional products in terms of cost base and service level. The Dutch State indicated that MoneYou had to build up brand recognition in the first six months of its existence and therefore had to offer interest rates which were mostly slightly lower or equal than those offered by similar internet-banking marketplayers[92]. From the second quarter of 2009 onwards, the interest rates offered by MoneYou were lowered and MoneYou positioned itself within the so-called mid-tier segment[93]. With respect to MoneYou, the Dutch State added that it only raised limited volumes of funds (namely EUR [0-5] billion), representing roughly [0-5] % of total volume on the Dutch savings market. The Dutch State added that ex-Van Lanschot customers only represented a small part of MoneYou's business (namely [0-5000] accounts or [0-5] % of MoneYou's accounts).

(209) The Dutch State also denied that ABN AMRO N and FBN were solely relying on the Dutch savings market to fund themselves. The Dutch State provided new information showing that ABN AMRO N had issued a covered bond of EUR 2 billion on 6 July 2009 and that FBN had issued EUR 15,5 billion of State-guaranteed debt instruments. According to the Dutch State, the complainant's allegations were incorrect and premature. It indicated that FBN just needed some time to set up treasury operations and issue State-guaranteed debt instruments. The Dutch State also indicated that deposits and saving products are also important to establish a customer relationship and have a different and broader purpose than that of other funding instruments. In that regard, the Dutch State pointed out that a loss in a bank's savings and deposits market share could lead to market share losses in other banking products.

(210) The Dutch State also denied that the consumers and market participants perceived ABN AMRO N and FBN as safer banks than competitors. It referred to the ratings of FBN and ABN AMRO N at rating agencies, which were below the AAA-rating of Rabobank for example. Its relative CDS-spreads told a similar story. The Dutch State also believed that the State-ownership did not make ABN AMRO N or FBN more secure in the eyes of consumers and market participants. In that regard, it pointed out that the many *ad-hoc* State interventions had shown that the Dutch State would, if possible, intervene with respect to any privately-owned bank. Consequently, it believed that *de facto* there was no perceived difference between the security offered by Dutch privately-owned banks compared with that of Dutch State-owned banks.

(211) To calculate whether interest rates offered on savings products were loss-making, the Dutch State argued that they should not be compared with

92 The Dutch State and ABN AMRO N include in their peer list of 1 September 2008: […].

93 The Dutch State and ABN AMRO N refer in that regard to SNS, DSB and insurers such as Aegon.

EURIBOR rates but rather with rates resulting from the so-called "replicating portfolio methodology"[94]. Using that methodology, the Dutch State acknowledged that for some products, there was a temporary negative margin. However, it argued that it was rational market behaviour and in line with market behaviour of (privately-owned) competitors at that precise point in time.

5.3.2 Comments from the Dutch State on the complainant's arguments of 21 and 28 August 2009

(212) The Dutch argued that its earlier comments summarized in recitals (206) to (211) concerning the complainant were still valid.

(213) In addition, the Dutch State noted that the complainant's claim that ABN AMRO N and FBN market share had increased was based on flawed statistics. With respect to the alleged EUR 21 billion increase in deposits collected by ABN AMRO N, the Dutch State argued that only EUR 5,1 billion was due to Dutch retail savings with the rest mainly due to corporate customer savings and foreign deposits. The Dutch State also provided data, showing that a large part of FBN's volume increase of deposits and savings stemmed from corporate banking as opposed to retail and private banking.

(214) The Dutch State observed that that Dutch customers had invested more into their savings because of the uncertain macro-economic environment. It pointed to data of the Central Bureau of Statistics ("CBS") which indicated that savings increased by 7,7 % year-on-year in the first half of 2009. ABN AMRO N's customer savings increased by 7,5 % year-on-year, which indicated that the ABN AMRO N's market share rather declined. FBN also presented evidence showing that its customer savings had evoled in line with the market.

5.3.3 Comments from the Dutch State on the comments of ABN AMRO Bank

(215) The Dutch State confirmed that it had not provided a liquidity facility to ABN AMRO N, thereby broadly confirming ABN AMRO Bank's arguments.

6. Assessment

6.1 Existence of aid

(216) Article 107(1) of the Treaty provides that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of

94 The replicating portfolio methodology is based upon a model reflecting how long deposits and savings are on average kept at the bank. The methodology is based on the historical pattern of deposits and withdrawals and is continuously updated. Application of that methodology assumes short-term deposits and savings to be invested by the bank in a virtual portfolio consisting of short-term deposits but also longer-term investments. The method results in a savings' margin which is not solely dependant on EURIBOR rates but also on yields of longer-term investments on a longer-term basis.

certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market. It follows that a State measure qualifies as State aid if it meets the following four (cumulative) criteria:

- State resources;
- selective advantage;
- distortive impact on competition; and
- impact on trade between Member States.

(217) The first criterion is met for Measures (Y1) to (E) in Table 4 in recital (128) as all those Measures are directly financed from the Dutch State's resources.

(218) Whether a measure constitutes a selective advantage to FBN, ABN AMRO N or ABN AMRO Group post-merger (the second criterion) is analysed in the recitals (220) to (278), examining each measure separately.

(219) If a selective advantage exists in this case, the third and fourth criteria would also be fulfilled. All the measures distort or threaten to distort competition as they place FBN, ABN AMRO N or ABN AMRO Group after the merger in a beneficial position vis-à-vis other competing banks (third criterion). Moreover, the measures also have an impact on trade between Member States. FBN, ABN AMRO N and ABN AMRO Group post-merger are internationally-oriented banks with activities outside the Netherlands while also competing in their home market with subsidiaries of foreign banks (fourth criterion).

6.1.1. Measures Y1 and Y2 of 3 October 2008

(220) It is appropriate to recall that this Decision assesses only potential aid to FBN, ABN AMRO N or ABN AMRO Group post-merger. Potential aid to Fortis Bank SA/NV arising out of Measures Y1 and Y2 was assessed in the Decision of 3 December 2008.

(221) As indicated in recital (52) of the Decision of 3 December 2008[95] and in the initial aid assessment of those measures in the Decision of 8 April 2009, the measures taken on 3 October 2008 (namely Measures X, Y1 and Y2) are inextricably linked. The Dutch State separated FBN and ABN AMRO N from their liquidity-constrained parent by means of the acquisition of FBN but, in order to fully insulate FBN from its parent's liquidity problems, the Dutch State also had to assume the role of funding provider of FBN. That goal translated into Measures Y1 and Y2. In addition, on 3 October 2008 the Dutch State took over Fortis SA/NV's CSA-obligations.

(222) As indicated in recital (50) of the Decision of 3 December 2008, the Commission cannot accept that the MEIP is satisfied for the integrated transactions of 3 October 2008 by which the Dutch State acquired FBN (including ABN AMRO N) for EUR 12.8 billion and also provided FBN with a very large amount of funding. Given the then prevailing market circumstances,

95 OJ C 80, 3.4.2009, p 8.

no buyer would have been able and willing to offer as much to save FBN[96]. Moreover, additional information submitted by the Dutch State confirmed that, on 3 October 2008, the Dutch State also agreed to indemnify Fortis SA/NV for its CSA-obligations. That CSA-agreement would have rendered the integrated transactions of 3 October 2008 even less acceptable to a market economy investor. Without appropriate due diligence, no investor would have taken over the obligations of Fortis SA/NV under the CSA, which resulted in major liabilities at a later stage (of which the Dutch State was already partially aware on 3 October 2008).

(223) For the Dutch State, the integrated transactions of 3 October 2008 were necessary to avoid large negative spill-over effects into the Dutch banking system and economy[97]. A market economy investor typically does not take such spill-over effects into account.

(224) The willingness to avoid a serious disruption of the Dutch banking system and economy also explains why the Dutch State took its decisions so rapidly. A market economy investor would have taken much more time to evaluate the potential need for additional capital injections and would also have investigated the financials of the companies in more detail. As a result, a market economy investor – with sufficient time to carry out a proper due diligence - would have had a better view on follow-up investments and would have taken that information into account in its valuation. The Dutch State having to act swiftly to preserve financial stability in the Netherlands, could not behave like a market economy investor and take more time to consider the integrated transactions of 3 October 2008 and the CSA-related obligations in further depth.

(225) Therefore, the Commission confirms its assessment that the integrated transactions of 3 October 2008 were not in line with the MEIP (that conclusion was already made in the Decision of 3 December 2008, which considered those transactions to be State aid to Fortis Bank SA/NV).

(226) As regards the existence of an advantage, the measures of 3 October 2008 taken together allowed the separation of FBN and ABN AMRO N from Fortis SA/NV and therefore conferred an important selective advantage on FBN, which was highly integrated in Fortis Bank SA/NV and in particular relied heavily on the latter for funding. In the December 2009 Restructuring Plan (see also recital (78)), the Dutch State admitted that, had it not intervened, FBN would have been dragged down by Fortis SA/NV. Without the State aid measures, FBN would have remained exposed to the liabilities of Fortis SA/NV, which was on the verge of bankruptcy, and that exposure would have substantially hindered

96 In its Communication to the Dutch Parliament of 6 October 2008, the Dutch State indicated itself that it had evaluated other options such as a sale of FBN and/or ABN AMRO N – or parts of those companies – to a solid buyer, but it had concluded that given the market circumstances and the short notice, these options were not feasible and not sufficient to preserve stability of FBN and ABN AMRO N.
See full text on: http://www.rijksoverheid.nl/onderwerpen/kredietcrisis/documenten-en-publicaties/kamerstukken/2009/03/10/staatsdeelnemingen-fortis-en-abn-amro.html .

97 That evaluation is confirmed by comments of the Dutch Minister of Finance who has consistently argued that the Dutch State primarily intervened for financial stability reasons. He added that it was not the first goal of the Dutch State to earn its investment back, but only its ambition.

FBN's activities. By ring-fencing its activities from Fortis SA/NV, FBN was able to avoid to a large extent the problems and costs typical of a (financial) company in distress (for example higher funding costs, worse payment conditions from suppliers and counterparties, higher personnel costs to retain staff, reduction of activities and risk-weighted assets to preserve capital)[98]. Although ABN AMRO N remained on an operational level a separate company, the Dutch State feared contamination resulting from the fact that markets might associate ABN AMRO N with its future owner Fortis SA/NV.

(227) Measure Y1 – an important component of the integrated transactions of 3 October 2008 – also provided a major advantage to FBN, especially given the size of the transaction and the then prevailing market circumstances.

(228) The large liquidity facility of EUR 45 billion[99] was provided when wholesale markets were virtually closed, particularly for large amounts and for companies with a relatively high loan-to-deposit ratio such as FBN. The fact that such a high amount of liquidity was not readily available on the market is confirmed by the fact that FBN needed several quarters to replace the short-term liquidity facility by other sources of funding. In the end, FBN repaid all the short-term funding from the Dutch State in June 2009, nine months after the liquidity aid was granted. The refinancing was partly done via State-guaranteed debt issues[100].

(229) Therefore, it should be concluded that Measure Y1 constitutes State aid as it provided FBN with an advantage in the form of funding which it could not have found on the market in the then prevailing market circumstances.

(230) With respect to Measure Y2, the novation of long-term loans made by Fortis Bank SA/NV, the Commission considers that measure provides a selective advantage to FBN. The information submitted by the Dutch State shows that Fortis Bank SA/NV was entitled to immediate repayment of the fixed-rate long-term loans (with a nominal value of EUR 7,9 billion) because of the ownership change at the level of FBN. Thanks to Measure Y2, FBN did not have to find new funding on the market in order to repay those long-term loans. It could continue to benefit from the existing loans at pre-crisis rates.

(231) By accepting the novation, the Dutch State provided FBN with long-term debt at pre-crisis interest rates. A market economy investor would not have provided these loans at pre-crisis interest rates but would have negotiated interest rates which would better reflect the then prevailing market circumstances, especially since it concerned loans for a sizeable amount.

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98 Also FBN indicated in its marketing material for debt investors, that the State ownership was a favourable element "providing confidence to depositors and creditors"; Roadshow presentation April 2009 page 3, penultimate bullet point; Roadshow presentation June 2009 (Paris), page 3, penultimate bullet point; Roadshow presentation July 2009 (Madrid), page 3, penultimate bullet point (all publicly available on the company's website: http://www.abnAMRO.com/en/investor-relations/latest-presentations/index.html).

99 For comparison, at the end of 2008 FBN's total assets amounted to EUR 185 billion, so the liquidity facility represented roughly 25 % of the total balance sheet.

100 FBN issued State-guaranteed instruments for a total amount of EUR 18,8 billion.

(232) Therefore, it should be concluded that Measure Y2 constitutes State aid to FBN as it provided a selective advantage to FBN in the form of a loan at pre-crisis rates. The Dutch State did not try to bring the interest rates of the redeemable loans in line with post-crisis interest rates, thereby not behaving like a market economy investor.

(233) The Commission has received sufficient information to conclude that ABN AMRO N did not receive funding through Measures Y1 and Y2. It therefore did not draw an advantage from those measures.

Conclusion

(234) Thus, the integrated transactions of 3 October 2008 are not in line with the MEIP and provide FBN with a selective advantage. Those measures allowed FBN to stay on the market and to pursue its activities, without further contamination from the problems of its parent company. FBN also received a very large amount of funding aid which was not available on the market on such a short notice. Measures Y1 and Y2 therefore do constitute State aid while, as laid down in recital (32) of the Decision of 8 April 2009, Measure X as such does not constitute State aid to FBN but is part of a wider transaction – the separation of FBN from Fortis Bank SA/NV – which involved State aid to FBN.

6.1.2. Applicability of the MEIP for the measures implemented after the initial aid of 3 October 2008

(235) The Dutch State has taken a large number of measures in favour of FBN and ABN AMRO N, spread out over a period of roughly 18 months. The Dutch State claims that that the MEIP-test should be applied to each of those measures individually (and especially to the merger-related Measures B4 and B5). However, based on the chronology of the measures (I), the common purpose of the measures (II) and the situation of the companies at the time of each measure (III), the Commission concludes that they are not sufficiently distinct to be judged against the MEIP independently. The Commission considers all measures to be part of one lengthy restructuring process[101,102].

(236) The chronology of measures (I) described earlier in section 2.1 and section 2.4 in this Decision shows that all measures are interrelated and were taken in a short period of time.

(237) In addition, the merger-related measures are clearly linked to the preceding interventions. When the Dutch State decided on 21 November 2008 - slightly more than six weeks after the rescue intervention of 3 October 2008 – to merge FBN and ABN AMRO N, it could only do so because it had just rescued the two companies from bankruptcy. In other words, in a counterfactual scenario without the 3 October 2008 intervention, implementing the merger would not have been an option as either the two companies would no longer have existed or they would have been present only in a substantially reduced form which

[101] Case T-11/95 *BP Chemicals Ltd* v *Commission* [1998] ECR II-3235.

[102] See also other banking cases such as Northern Rock, OJ L 112, 5.5.2010, p. 38 and Bank of Ireland, JOCE C 40, 9.2.2011, p. 9.

would have lead to a much smaller and less attractive merged entity, which the Dutch State also admits in its December 2009 Restructuring Plan (see recital (78)).

(238) All the measures had the common objective (II) of fully restoring the viability of FBN and ABN AMRO N. Immediately after the integrated transactions of 3 October 2008, it was clear that the Dutch State had merely stabilised the situation, with important operational problems still awaiting resolution, notably because of the separation of each entity from its former parent.

(239) Moreover, the merger was a measure needed to achieve that common goal, to fully restore viability. On a stand-alone basis, FBN's funding position was weak as it had a relatively small retail franchise and depended to a large extent on wholesale funding[103]. ABN AMRO N had lost important product competences and a large part of its international network. Both companies faced operational issues related to, for example IT, tax and risk management and it was also uncertain whether they had sufficient scale in all the businesses in which they were active. The Dutch State looked at a number of alternatives and quickly decided that a merger in combination with additional capital increases was the best way to fully restore viability. In a merger scenario, the deposit-rich retail activities of ABN AMRO N compensated for the weak funding position of FBN, while FBN could bring larger size and international branches to ABN AMRO N. Moreover, the combined entity was in a better position to tackle practical problems and could also benefit from additional economies of scale. The merger avoided having to rebuild each entity separately.

(240) With respect to the situation of the companies at the time of each measure (III), the Commission notes that the viability of the companies was only fully restored once all the measures were implemented. They were not viable at an intermediate stage, such as on 21 November 2008 when the decision to merge was taken. In that regard, the Commission underlines that at the end of December 2008, and so after the decision to merge, FBN threatened to fall below the minimum capital requirements of the DNB, because it had to take a write-down on ABN AMRO N. ABN AMRO N was still in the books of FBN for a valuation which was no longer realistic[104] after the valuation used in Measure X and therefore a write-down had become inevitable. In order to sort out FBN's capital problem, the Dutch State acquired ABN AMRO N from FBN for EUR 6,5 billion and took further corrective capital action at the end of 2009 with the conversion of Tier 2 capital into Tier 1 capital (see recital (121) and footnote (61) of this Decision). Declarations of the Dutch State, […] and […] confirm that FBN and ABN AMRO N still faced important viability-related issues after the 3 October 2008 integrated transactions[105].

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103 At the end of 2008, FBN's loan-to-deposit ratio stood at 237 %.

104 The participation was still accounted for some EUR 24 billion.

105 See for instance […] comments and also comments from the Minister of Finance in a letter to the Dutch Parliament dated 19 November 2009: "A standalone scenario would create little value. FBN has been able to show good profit figures in the past years but is considered to be too small to grow in the long term and to remain competitive. ABN AMRO II has a sufficiently large market share in retail banking but misses commercial customers after the separation." (original

(241) The Commission also observes that the Dutch State only submitted a full-fledged restructuring plan once all the measures were decided, which indicates that viability was only then fully restored. During the procedure, the Commission asked repeatedly for a detailed restructuring plan (see for instance recital (137)), which was indispensable to evaluate whether the viability of an aided company has been fully restored.

(242) The Dutch State submitted on 4 December 2009 the December 2009 Restructuring Plan but that first plan still lacked important elements mentioned in the Restructuring Communication such as financial projections for a worst case scenario. The necessary completions arrived on 23 March 2010. The Dutch State replied to earlier requests made by the Commission for a restructuring plan that the merger between FBN and ABN AMRO N played a crucial role in the restructuring of those companies. According to it the transition management team of ABN AMRO Group needed time to prepare a plan and could not have a complete view on the future shape of the group before the merger was implemented.

6.1.3. Existence of an advantage and conclusion on the existence of aid for the measures implemented after integrated transactions of 3 October 2008.

Measure of 24 December 2008 (Measure Z)

(243) Measure Z was necessary to avoid FBN's capital ratios falling below the minimum regulatory capital requirements.

(244) FBN's capital problem was due to the high valuation of ABN AMRO N in its accounts. Simulations in […]'s due diligence report show that bringing the book value of ABN AMRO N down to EUR 6,5 billion would lead to Tier 1 and total capital ratios of 3,8 % and 7,6 % respectively for FBN[106]. In other words, there was a risk that FBN would fall below the minimum regulatory ratios requiring a minimum total capital ratio of 8% (with maximum half of it Tier 2). According to the […]-report, selling ABN AMRO N to the Dutch State for a price of EUR 6,5 billion lifted the Tier 1 and total capital ratios of FBN to respectively 7,8 % and 15,7 %, thereby sorting out FBN's capital problem and allowing the company to stay on the market.

(245) The measure provided FBN with an advantage in the form of capital it could not have found on the markets. The company was also unable to use internally

text in Dutch, translated by the Commission) The full text is available on the following internet link :
http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2009/11/20/ec-remedy-en-herkapitalisatie-abn-amro-en-fortis-bank-nederland.html) .

106 See […] due diligence report: Volume 2 Fortis Bank Netherlands page 44 and volume 5 on Subject Matter Memos page 65 and following. Since FBN had booked ABN AMRO N under "equity accounted participations" prudential filter rules required that FBN had to deduct the value of ABN AMRO N from its capital, 50 % from its Tier 2 capital (if sufficient Tier 2 capital was available) and 50 % (or more in case of insufficient Tier 2 capital) of its Tier 1 capital. The write-down of ABN AMRO N had to be taken from available reserves thus reducing Tier 1 capital. By taking a write-down and immediately selling the stake, FBN had no longer to apply the prudential filter to equity accounted stakes to its Tier 1 and Tier 2 capital.

generated underlying profits to sort out (part of) the problem, partly because it incurred losses of EUR 922 million in 2008 related to the Madoff fraud. Since FBN ran the risk of falling below minimum capital requirements, the measure allowed the company to comply with regulatory requirements and to pursue its activities.

(246) The Commission has come to the conclusion that the purchase of ABN AMRO N by the Dutch State did not take place at market conditions for the reasons which follow.

(247) A market economy investor[107] with an interest in acquiring ABN AMRO N in December 2008 would have used a market price, taking into account the market conditions at that particular point in time. In the […] report, the Dutch State had two valuations: a "through the cycle" valuation of EUR [5-9] billion which assumed a normalisation of the markets and a "current market conditions" valuation of EUR [4-6,5] billion which was based on the market conditions in the first days of October 2008[108]. A market economy investor would have used the "current market conditions" valuation as a starting point.

(248) A correction to the "current conditions" market valuation would be needed in any event to take into account the deterioration of the market conditions between 3 October 2008 (namely the date of the […] valuation report) and the actual date when the acquisition of ABN AMRO N by the Dutch State was decided upon. In that period, the Euro Stoxx 50 index fell by 22,2 % while the Euro Stoxx Banks index fell by 45,3 %.

(249) The Dutch State's argument that no correction is needed given ABN AMRO N's conservative risk profile (namely no toxic assets, good funding position, etc) cannot be accepted. The market decline was widespread, and especially so amongst banking stocks, indicating that it was not so much linked to stock-specifics but rather to worsened economic and financial market conditions and the associated increase in required risk premiums. Given that background, it is necessary to adjust the 3 October 2008 "current market conditions" valuation downwards to obtain a reasonable estimate of the value of ABN AMRO N on 14 December 2008. Applying the observed percentage declines of the Euro Stoxx 50 index and the Euro Stoxx Banks index (22,2 % and 45,3 %) leads to a market price range for December 2008 of between EUR [2,2-3,6] billion and EUR [3,1-5,1] billion (namely [4-6,5] billion EUR decreased by 22,2 % and by 45,3 %)[109].

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[107] The Commission observes that no private investor made a bid for ABN AMRO N. The Commission learnt that ING looked into the file but decided after careful consideration that a transaction would not meet its financial requirements. The company underlined that its ultimate responsibility is to its shareholders (which is obviously an important difference compared with the Dutch State, which also has to take into account the public interest). See press release of 29 September 2008: http://www.ing.com/group/showdoc.jsp?docid=343126_EN&menopt=prm|pre .

[108] The current market conditions valuation was based on two valuation approaches: a price/earnings peer analysis and a discounted dividend approach. Both valuation approaches led to a valuation of EUR [4-6,5] billion (see page 7 of the […] valuation report).

[109] There is no reason whatsoever to increase the value of ABN AMRO N by the synergies of a potential merger which the Dutch State already owned since the 3 October 2008 transaction.

(250) The Commission can accept that, as claimed by the Dutch authorities, a correction should be made to take account of the fact that the Dutch State did not pay the transaction in cash. As a result of Measure Y2, the Dutch State owned debt issued by FBN and it then paid FBN for ABN AMRO N by waiving part of that debt with a nominal value of EUR 6,5 billion. Since debt issued by other banks traded at the time at a discount to par, the Commission can accept that the value of the debt instruments waived was below par value. Based on available market information, the Commission could accept a correction of [10-30] % or EUR [0,65-1,95] billion. That would imply an actual transaction price of EUR [4,55-5,85] billion (EUR 6,5 billion minus EUR [0,65-1,95] billion), rather than EUR 6,5 billion[110].

(251) The aid amount in Measure Z would then be the difference between the price paid and the market value of ABN AMRO N. It would then be between EUR [0-2,75] billion (EUR [4,55-5,85] billion minus EUR [3,1-5,1] billion) and EUR [0,95-3,65]-billion (EUR [4,55-5,85] billion minus EUR [2,2-3,6] billion).

(252) The Commission sees no basis to the claims of the Dutch State that its EUR 6.5 billion valuation was convincingly corroborated by the approval of the other consortium members and by a report of […]. Overpaying for ABN AMRO N did not affect the other consortium members, which means that their approval of the sale was not an approval of the valuation itself. There is also no indication that the consortium members made a new valuation themselves. The […] letter also does not support the claim of the Dutch State. […] merely verified the methodology and the process, and its short report cannot be seen as a credible valuation exercise. The […] report also used as a basis the price paid by the Dutch State for FBN and ABN AMRO N on 3 October 2008. As set out above, the transaction of 3 October 2008 is not a market-based transaction. A transaction containing aid cannot be used to derive a market price.

(253) The report of the experts working for the shareholders of Fortis SA/NV also does not support the hypothesis that the Dutch State did not overpay. The report is only a secondary analysis of the valuations and valuation methods that were used during the process and is not a new valuation exercise. Moreover, the report should be seen in its context. The shareholders of Fortis SA/NV were worried that they received a too low price for the assets acquired by the Dutch State and the report mainly addresses that claim i.e. that the Dutch State paid a too low price. Finally it should also be mentioned that the paragraphs to which

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Measure Z removed ABN AMRO N from the balance sheet of FBN and there was no other potential investor who could realise the same amount of synergies and would be willing to incorporate such synergies in its bid price either. Therefore, the Dutch State as a market economy investor trying to make acquisition at the lowest possible price would not include those synergies in its bid price. Moreover, as a subsidiary argument, it should be underlined that the transaction mainly meant to keep FBN's capital ratios above the minimum required levels. FBN's capital position was indeed very vulnerable and the company was not in a position to pre-finance the merger itself. In a scenario without Measure Z, FBN would have run in financial difficulties and it would have been impossible to realise the merger and the associated synergies itself.

110 Several banks have bought back their own subordinated debt at a significant discount during the current financial crisis (so-called "liabilities management"), thereby being able to create core Tier 1 proportionate to the discount.

the Dutch State refers say nothing on ABN AMRO N in isolation, but only refer to the full package of assets acquired by the Dutch State.

(254) Therefore, it should be concluded that Measure Z is a State aid measure in favour of FBN as it provides FBN with capital enabling it to remain on the market. The identified amount of aid is situated in a range between EUR [0-2,75] billion and EUR [0,95-3,65] billion.

Measure A to cover EUR 1,7 billion of the capital shortfall of ABN AMRO Z

(255) The Commission has concluded that it was the Dutch State's responsibility – and not that of ABN AMRO N – to cover the capital shortfall of ABN AMRO Z. Since 3 October 2008, the Dutch State was bound by the terms of the CSA. Consequently, it was obliged to implement the separation of ABN AMRO Holding under the terms described in the CSA. Since the financial supervisor only allowed the separation process to start once the ABN AMRO Z capital problem was settled, the Dutch State and the other consortium members had no other choice than to fill the capital gap of ABN AMRO Z.

(256) ABN AMRO N merely acted as an intermediary in a construction to provide ABN AMRO Z, which has no operational activities, with the necessary capital.

(257) The Commission has not found evidence of indirect aid to ABN AMRO N. The clarifications provided by the Dutch State confirmed that all meaningful financial transactions between ABN AMRO Z and ABN AMRO N took place at market conditions or before the State intervention of 3 October 2008.

(258) As mentioned in recital (110), the CRI was kept in place after the separation of ABN AMRO II from ABN AMRO Bank to cover the prudential margin of EUR 500 million and the integration costs of EUR 1,2 billion, while cash coming from MCS instruments was injected in ABN AMRO Z. Thus from the date of the separation of ABN AMRO II from ABN AMRO Bank (namely 6 February 2010) (until the end of the CRI in October 2010), the CRI constituted State aid to ABN AMRO II, while the amount of EUR 1,7 billion of MCS the proceeds of which were transferred to ABN AMRO Z ceased to be aid to ABN AMRO N/ABN AMRO II on the same date. Those changes therefore do not change the quantity of aid but only the instruments by which the aid was provided and its duration. That change of form does not raise any issues which need to be considered in the remainder of this Decision.

(259) Therefore, it should be concluded that Measure A does not constitute State aid. Under the CSA, it was a contractual obligation of the Dutch State as a successor of Fortis SA/NV to resolve ABN AMRO Z's capital shortages. Therefore, the measure does not represent a selective advantage to ABN AMRO N and does not relieve it of costs it would normally have borne.

Measure B1 providing EUR 500 million worth of ABN AMRO Z's capital shortage

(260) Since the CRI did not suffice to cover ABN AMRO Z's capital shortfall, the Dutch State had to inject extra capital via a MCS. The rationale developed in respect of Measure A also applies for Measure B1.

(261) Therefore, it should be concluded that Measure B1 does not constitute State aid, as funding ABN AMRO Z's capital shortage was an obligation of the Dutch State under the CSA and does not selectively advantage ABN AMRO N.

Measures B2 and B3: Recapitalisation to finance separation costs

(262) The full amount of EUR 1,08 billion (namely Measures B2 and B3 together) includes general separation costs of EUR 480 million, EUR 90 million of costs related to the set-up of a money market desk and a prudential buffer of EUR 500 million. It is important to distinguish between the prudential buffer of EUR 500 million and the other separation costs of EUR 580 million.

(263) With respect to the other separation costs, the Commission accepts that the CSA obliged the Dutch State to pursue the split of ABN AMRO Holding in three separate parts, following the CSA guidelines. In other words, the separation costs are the consequence of the contractual CSA-obligations of the Dutch State as successor of Fortis SA/NV. On a net basis, ABN AMRO N will not have a better capital position because of that measure, since the Dutch State injects capital which is immediately consumed by separation costs.

(264) That reasoning does not however hold good for the prudential margin of EUR 500 million as there was no contractual obligation of the State to provide it. If the Dutch State had not provided that assistance, ABN AMRO N would have been in a worse financial position and it would have been obliged for instance to reduce its RWA to free up capital. In other words, the prudential margin is a selective advantage which improved ABN AMRO N's competitive position when compared to a scenario in which the measure had not been implemented.

(265) Therefore, it should be concluded that, while the general separation costs do not constitute State aid, the prudential margin of EUR 500 million (namely part of Measure B3) does. It provides ABN AMRO N with extra capital and represents a selective advantage.

Measure B4: Recapitalisation to cover capital shortage related to divestment of New HBU and Measure B5: Recapitalisation to cover integration costs

(266) The Commission observes that there was no contractual or economic obligation to merge FBN and ABN AMRO N when the Dutch State acquired those companies. The asset management division of ABN AMRO N had indeed been integrated within Fortis Bank SA/NV, but that division is not a must-have business for banks as many other banks source their asset management products from specialised external providers. It was the Dutch State itself which decided on 21 November 2008 to merge ABN AMRO N and FBN as it preferred that option over other restructuring alternatives such as a standalone strategy for the two banks, the rapid sale of one or both of the companies or the rapid sale of major subsidiaries.

(267) FBN and ABN AMRO N could not pay the upfront integration costs of the merger themselves. The Commission observes that the Dutch State has defended the merger in public saying that "the two banks together are stronger than alone"[111]. The merger should indeed lead to major advantages in the form of synergies (estimated at EUR 1,1 billion pre-tax per year) and a stronger competitive position (for example higher market shares, better funding base etc.).

(268) To get the benefits of the merger, FBN and ABN AMRO N had to incur a variety of costs (namely costs related to the merger remedy, integration costs). The Dutch State paid those costs via a recapitalisation (at a time when capital was still available only with difficulty), while FBN and ABN AMRO N got all the benefits. It therefore provides a clear advantage to FBN and ABN AMRO N.

(269) According to the Dutch State, the merger has a positive net present value[112]. However, as is already developed extensively in recitals (235) to (242), the Measures B4 and B5 follow other State aid measures and are part of a larger restructuring plan, so that the MEIP does not apply.

(270) Therefore, it should be concluded that Measures B4 and B5 do constitute State aid of respectively EUR 300 million and EUR 1,2 billion. They provide FBN and ABN AMRO N with a selective advantage by providing them capital.

Measure C: recapitalisation of FBN

(271) Measure C provides FBN with capital, which allowed it to comply with the minimum regulatory requirements of the financial supervisor. If the Dutch State had not converted its Tier 2 capital into Tier 1 capital, FBN would have had to discontinue its operations or would have been obliged to look for alternative solutions, such as reducing its RWA to free up Tier 1 capital. Thanks to the measure, FBN ended up with more capital and in a stronger competitive position than in a "no aid" scenario.

(272) The Dutch State converted Tier 2 debt instruments with a nominal value of EUR 1,35 billion into an equivalent amount of Tier 1 capital. That conversion leads to the same cash flows as a scenario in which FBN had repurchased the Tier 2 instruments owned by the State at par, followed by capital increase of the same amount. By analogy with recital (250), the Commission could accept that the market value of the debt instruments waived by the Dutch State was below par.

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111 "The banks together are stronger than alone. The banks have qualities which are very complementary. ABN AMRO has good retail and SME services and Fortis has good internal merchant qualities. Because Fortis SA/NV disappeared, both banks had to do new investments. These investments can better be done once than twice." (original text in Dutch, translation by Commission) (source: "Vragen over de ingeslagen richting voor de bedrijven en de besluitvorming daartoe, het beloningsbeleid en de toekomstige rol van de Staat in deze bedrijven", press release explaining the decision of the Dutch State of 21 November 2008 to merge FBN and ABN AMRO N).

112 A report of the Dutch Court of Auditors makes some remarks on the calculations of the State (see weblink: http://www.rekenkamer.nl/Actueel/Onderzoeksrapporten/Bronnen/2009/12/Verkoop_onderdelen_ABN_AMRO_als_EC_remedy/Rapport_Verkoop_onderdelen_ABN_AMRO_als_EC_remedy) .

Taking into account discounts of similar instruments of peer banks, a discount of EUR [135-405] million (or [10-30] %) is justified. In other words, FBN indirectly paid EUR [135-405] million too much to the Dutch State by implicitly buying back the instruments at par. The aid amount would therefore be EUR [0,945-1,215] billion, rather than EUR 1,35 billion.

(273) The Dutch State's claim that the measure is in line with the MEIP cannot be accepted. The measure follows other measures contaminated by State aid as explained in recitals (235) to (242), so that the MEIP does not apply.

(274) Therefore, it should be concluded that Measure C constitutes State aid for an amount of EUR [0,945-1,215] billion as it provides FBN with an advantage in the form of extra capital.

Measure D: Cash Payments to other consortium memberss

(275) With respect to the payments to the other consortium members, the Commission has concluded that the payments are indeed part of CSA-related obligations. The consortium members had anticipated that some unexpected issues would show up during the separation process and the CSA describes the procedures to be used to settle those issues. The Commission has found no evidence that the payments of the Dutch State to the other consortium members led to an extra transfer of net assets to ABN AMRO N or to any other advantage for the company.

(276) Therefore, it should be concluded that Measure D does not constitute State aid as Measure D was a CSA-obligation of the State and not of ABN AMRO N. The Measure implied no selective advantage to ABN AMRO N.

Measure E: State guarantee on debt to sort out cross liabilities

(277) The Commission has come to the conclusion that the cross liabilities are to a large extent linked to the specific separation context of ABN AMRO N from its parent company ABN AMRO Bank (now RBS NV). Under Dutch company law, Deutsche Bank as the purchaser of New HBU remains liable for debts of ABN AMRO Bank if the latter does not meet its obligations. Therefore Deutsche Bank wants to be indemnified for the risk it runs towards ABN AMRO Bank. If ABN AMRO N had not been separated from ABN AMRO Bank, those cross liabilities between New HBU and ABN AMRO Bank would not have existed. The Dutch State therefore provides a guarantee on a cross liability which exists exclusively because of the separation of ABN AMRO N. The Dutch State does not provide a guarantee on the cross liability between New HBU and ABN AMRO N.

(278) Therefore, it should be concluded that it can be accepted that Measure E does not constitute State aid as the separation of ABN AMRO N from ABN AMRO Bank is an obligation of the Dutch State under the CSA.

6.1.4. Quantification of the State aid

(279) ABN AMRO Group (or FBN and ABN AMRO N before the merger) have benefitted from recapitalisation aid, which is situated in a range between EUR 4,2 billion and EUR 5,45 billion. That amount translates into a range of 2,75 %-3,5 % when compared to ABN AMRO Group's risk-weighted assets.

(280) The Commission observes that FBN also benefited from a very sizeable amount of liquidity aid, both in relative and in absolute terms.

Table 5:

State aid: Summary table of recapitalisation aid and liquidity aid					
Recapitalisation aid					
(all figures in EUR billion)	State aid min	State aid max	RWA of the combined entity FBN-ABN AMRO N	min % of RWA	max % of RWA
Measure Z : Dutch State acquires AA from FBN	[0-2,75]	[0,95-3,65]	162,6[113]	[0-1,7] %	[0,6-2,25] %
Measure B3 : Separation costs (prudential margin)	0,5	0,5	149,5[114]	0,33 %	0,33 %
Measure B4: Capital shortage related to HBU sale	0,3	0,3	149,5	0,20 %	0,20 %
Measure B5: Integration costs	1,2	1,2	149,5	0,80 %	0,80 %
Measure C: Tier 2 ==> Tier 1 conversion	[0,945-1,215]	[0,945-1,215]	149,5	[0,63-0,82]%	[0,63-0,82%
Total recapitalisation aid	**4,2**	**5,45**		**2,75 %**	**3,5 %**
Funding/Liquidity aid					
Measure Y1: Short-term liquidity facility	45				
Measure Y2: Long-term loans	7,9				
Issue of new debt instrument guaranteed under the Dutch guarantee scheme	18,8				
Total funding/liquidity aid	71,7 (or 52,9 when corrected for double counting)[115]				

6.2 Compatibility of the different aid measures

(281) Article 107(3)(b) of the Treaty empowers the Commission to declare aid compatible with the internal market if it is intended “to remedy a serious disturbance in the economy of a Member State”. In respect of the Dutch economy the risk for serious disturbance was confirmed in the Commission's

[113] Combined RWA of the two entities (namely FBN and ABN AMRO N) at the end of 2008.
[114] Combined RWA of the two entities (namely FBN and ABN AMRO N) at the end of 2009.
[115] The State-guaranteed debt was used to repay the funding drawn under the short-term liquidity facility of EUR 45 billion. In other words, those two measures were not in place at the same time, but followed one after the other. The correction for double-counting takes that into account.

various approvals of the measures undertaken by the Dutch authorities to combat the financial crisis such as the Guarantee Scheme.

(282) In this regard, it is however important to underline that the Court of First Instance has emphasised that Article 107(3)(b) of the Treaty should be applied restrictively[116], so that the economic disturbance should affect the entire Member State and not just be of a regional dimension. The Commission notes that ABN AMRO N and FBN are leading Dutch banks with a nation-wide branch network and top market positions in a wide range of segments on the Dutch retail and SME banking market. In the context of the various uncertainties surrounding the recovery from the global financial and economic crisis, the discontinuity of those banks would create a serious disturbance for the Dutch economy and therefore State aid from the Dutch government can be assessed under Article 107(3)(b) of the Treaty.

(283) The Commission set out more details on the compatibility of specific measures in its Banking Communication, Recapitalisation Communication and Impaired Asset Communication, and on the required restructuring in its Restructuring Communication.

(284) The individual measures should be tested against the relevant Communications of the Commission. The capital relief instrument does not cover impaired assets and is *de facto* a proxy for a recapitalisation measure. The general principles behind the Impaired Asset Communication should however hold also for the capital relief instrument to be in line with the internal market. In order to maintain a level playing field, the Commission had to check whether the CRI was not used to shift expected losses on the portfolio to the State. Measure A should also contain sufficient exit incentives and in case the economic situation would deteriorate, ABN AMRO N still had to take some losses via a vertical slice. The liquidity measures (Measures Y1 and Y2) should be judged against the Banking Communication and the recapitalisation measures (and more specifically Measures Z, B4 and B5 as well as the prudential margin of EUR 500 million which was part of Measures B3 and C) against the Recapitalisation Communication.

6.2.1 Compatibility of Measures Y1 and Y2 under the Banking Communication

(285) In order to comply with the Banking Communication, Measures Y1 and Y2 should be well-targeted, proportionate and designed to avoid undue distortions of competition.

(286) The Commission repeats the conclusion of recital (51) of the Decision of 8 April 2009 that the measure to cut all the links between FBN and its liquidity-constrained parent Fortis SA/NV was necessary to shelter FBN from the then acute difficulties of its parent company. Therefore, the measures can be considered well-targeted in order to achieve the rescue of FBN.

116 See Joined Cases T-132/96 and T-143/96 *Freistaat Sachsen and Volkswagen AG* v *Commission* [1999] ECR II-3663, paragraph 167.

(287) The measures Y1 and Y2 should also be proportionate and not unnecessarily distort competition. In that regard, the Commission looks favourably at the pricing system developed by the Dutch State, which aimed to create a level playing field with the Guarantee Scheme (see recital (169)). In respect of guarantee schemes, the Commission has consistently requested Member States to charge a premium of at least 50 basis points for guarantees longer than three months (and not longer than 12 months). The Commission found that the Dutch State did not consistently ask EURIBOR + 50 basis points for loans of longer than three months. Therefore, the Commission can only declare Measure Y1 compatible with the internal market on the condition that a corrective payment of EUR 18.2 million is made to ensure that loans with a maturity of more than three months are effectively remunerated at EURIBOR + 50 basis points. The Commission notes positively that all the liquidity facilities were repaid and ended in June 2009.

(288) With respect to Measure Y2, the Commission observes that since the Dutch State did not change the interest rate and maturity of the loans, FBN benefitted from relatively cheap loans, which could distort competition. Therefore, the Commission can only declare the measure compatible with the Banking Communication if all the conditions set out later in this Decision and more specifically the measures to limit distortions of competition are correctly implemented.

6.2.2 Compatibility of Measures Z, B3 (namely EUR 500 million), B4 and B5 and C under the Recapitalisation Communication

(289) The Commission has concluded that the measures concerned were put in place to sort out a genuine need and represented the minimum necessary to fully restore the viability of the companies concerned.

(290) With respect to remuneration, the Commission observed that the State was already the owner of 100 % of the ordinary shares of FBN (and indirectly of 100 % of ABN AMRO N). All those measures were indispensable to preserve the value of that shareholding.

(291) ABN AMRO Group will realise a RoE of approximately […] % in 2013, which indicates that thanks to all the State interventions, a viable and profitable entity has been created.

(292) All the available valuations of ABN AMRO Group are well above the sum of the aid in measures Z, B3, B4, B5 and C (namely between EUR 4,2 billion and EUR 5,45 billion). Thus the State will receive an appropriate remuneration on the aid granted to ABN AMRO N and FBN[117].

(293) In view of the above, the Commission has concluded that Measures Z, B3, B4, B5 and C are compatible with the Recapitalisation Communication if the conditions set out later in this Decision are correctly implemented.

[117] That evaluation does not entail that the State will also earn a remuneration on the sums paid on 3 October 2008 to acquire FBN and ABN AMRO N, which are not counted as aid in this Decision.

6.2.3 Compatibility of the capital relief instrument with the principles set forward in the Impaired Asset Communication

(294) The Commission acknowledges that the capital relief instrument put in place by the Dutch State differs from the traditional impaired asset measures evaluated in other cases. While other impaired asset measures sought to relieve banks from impaired assets, the portfolio protected by the CRI is a traditional Dutch mortgage portfolio of which neither ABN AMRO N nor external experts expected the performance to deteriorate to a significant extent.

(295) The Commission observes that a traditional recapitalisation at the level of ABN AMRO N was not opportune for the Dutch State, because it was not a separate legal entity at the relevant moment and the Dutch State would not have been in a position to ring-fence its capital contribution, which could have had negative consequences especially in distress scenarios. Moreover, private capital relief instruments were not feasible given the size of the transaction and the complexities related to the separation of ABN AMRO Bank NV, the parent company of ABN AMRO N and ABN AMRO Z.

(296) Given that particular background, the Commission can accept that the CRI is an alternative to a traditional capital increase rather than a protection against toxic assets and is therefore a necessary and appropriately targeted measure to sort out the specific capital problem of ABN AMRO Z.

(297) In spite of the fact that the measure is mainly a proxy measure for a recapitalisation, the measure should be consistent with other capital relief schemes, thereby protecting the internal market as explained in recital (284).

(298) The Commission has concluded that the Dutch State has provided sufficient evidence to show that the valuation was such that ABN AMRO N or its legal successor will bear the expected losses. Market data (in particular rating reports), historical data and recent evidence from ABN AMRO N show that the yearly first loss tranche of 20 basis points should suffice to cover expected losses.

(299) The remuneration that ABN AMRO N pays is not lower than that requested in the Impaired Asset Communication and the Recapitalisation Communication. The remuneration implies that ABN AMRO N will pay 10 % on the capital that is relieved by the transaction as a result of the reduction of RWA. That rate compares favourably to the minimum rates set out in point (27) of the Recapitalisation Communication. Given the relatively high remuneration, the vertical slice of 5% and the claw-back mechanisms can be considered to be in line with point (24) and footnote (15) of the Impaired Asset Communication.

(300) Measure A also contains sufficient incentives to exit. The call options described in recital (107) indicate that it is easy for ABN AMRO N (or now ABN AMRO Group) to terminate the measure. Moreover, the pricing is such that the measure becomes more expensive as time goes by. The contractual terms imply that the pricing will not be adjusted when ABN AMRO Group started to calculate its capital requirements based on Basel II. That lack of adjustment will reduce the

capital relief effect of the measure while the guarantee fee will not fall. Moreover, the first loss tranche is calculated as a percentage of the initial portfolio value, so that the first loss tranche as a percentage of the outstanding portfolio (namely initial portfolio corrected for inter alia repayments) will gradually increase over time.

(301) In view of the characteristics of the CRI and in view of the December 2009 Restructuring Plan and the updated November 2010 Restructuring Plan as described under heading 2.3 of this Decision, the Commission considers Measure A to be compatible with the general principles of the Impaired Asset Measure and with the principles of the internal market as explained in recital (284).

(302) The fact that the CRI was called by ABN AMRO Group soon after it implemented Basel II requirments confirms *ex-post* the analysis made in recitals (294) to (301).

6.3 Assessment of the aid and of the December 2009 Restructuring Plan and the updated November 2010 Restructuring Plan under the Restructuring Communication

(303) Given the amount and the scope of the aid as described in the preceding paragraphs and in particular the fact that the recapitalisation aid exceeds 2% of RWA, the Commission believes that in-depth restructuring is required, in line with point (4) of the Restructuring Communication.

6.3.1 Viability

(304) A restructuring plan should demonstrate that the bank's strategy is based on a coherent concept and show that the bank has restored long-term viability without reliance on State support.

(305) As already concluded in the Decision of 5 February 2010, the business models of FBN and ABN AMRO N did not rely on excessive risk taking and unsustainable lending practices. The two entities were, however, left vulnerable and unequipped in certain core fields as a consequence of the separation from their respective parent groups. After its parent company was broken up, ABN AMRO N had poor access to larger companies, no longer had an international network and lacked a number of product and IT capabilities. FBN was also heavily affected by the separation from its parent company and its funding relied heavily on wholesale markets. ABN AMRO Group's December 2009 Restructuring Plan (and also the updated November 2010 Restructuring Plan) shows that the integration of ABN AMRO N and FBN substantially reduces the weaknesses of each of the individual entities. The combination of FBN and ABN AMRO N helped to allay some of those concerns. The large retail and private banking franchise of ABN AMRO N was deposit-rich which created a better funding profile for the integrated group, FBN sorted out part of the international network problem of ABN AMRO N and the two groups together were better able to sort out, for example IT-related problems (namely they did not each have to rebuild separately an IT-platform and other support tools).

(306) The financial projections show that at the end of the restructuring period the combined entity should be able to cover its costs and realise an appropriate return on equity of approximately […] %. Even in a stress scenario, the company will continue to make profits, while its capital adequacy ratios remain above the minimum regulatory thresholds. Thus the company's capital buffer seems sufficiently high – after the repeated interventions of the State – to weather future adverse circumstances without having to return to the State again.

(307) As the figures of the second half of 2008 and the first half of 2009 showed, it is of crucial importance to realise sufficiently high net interest revenues to create a fully viable company. Therefore, the December 2009 Restructuring Plan and the updated November 2010 Restructuring Plan can only be declared compatible with the viability requirements of the Restructuring Communication on the condition that ABN AMRO Group will strive to realise the updated net interest revenues set out in the November 2010 Restructuring Plan. ABN AMRO Group should report on its progress to the Commission on a regular basis – at least every quarter. If ABN AMRO Group observes divergences compared with those projections, it should immediately undertake corrective action.

(308) A restructuring plan should contain projections with the necessary breakdown and restructuring also requires a withdrawal from activities which would remain structurally loss-making in the medium-term[118]. In recital (120) of the Decision of 5 February 2010, the Commission doubted whether the viability issues of the Prime Fund Solutions division – which reported an important Madoff-related loss in 2008 – had been adequately tackled. By selling PFS to Credit Suisse (see also recital (74)), that issue has been resolved. The detailed projections at divisional level show that both in a base case and a stress case all divisions contribute positively to results. Therefore, the Commission can conclude that there are no other divisions with structural profitability problems and, in light of that conclusion, no further divestments are needed to improve the viability of the company.

6.3.2 Burden-sharing/Minimum necessary

(309) A restructuring plan should clearly show that the aid has remained limited to the minimum necessary. Costs associated with the restructuring should not only be borne by the State but to a maximum extent also by those who invested in the bank. In other words, the bank and its capital holders should contribute to the restructuring as much as possible with their own resources. Restructuring aid should be limited to covering costs which are necessary for the restoration of viability. Accordingly, an undertaking should not be endowed with public resources which could be used to finance market distorting activities not linked to the restructuring process like, for example, acquisitions[119].

(310) The Restructuring Communication recalls that an acquisition ban is necessary to keep the aid limited to the minimum necessary. Point (23) of the Restructuring Communication mentions explicitly that "an undertaking should not be

118 See also point (12) of the Restructuring Communication.
119 See Case T-17/03 Schmitz-Gotha Fahrzeugwerke GmbH v Commission [2006] ECR II-1139.

endowed with public resources which could be used to finance market-distorting activities not linked to the restructuring process. For example, acquisitions of shares in other undertakings or new investments cannot be financed through State aid unless this is essential for restoring an undertaking's viability".

(311) The Restructuring Communication also links an acquisition ban to distortions of competition. In points (39) and (40), the Communication explains that "State aid must not be used to the detriment of competitors, which do not enjoy similar public support", and that "Banks should not use State aid for the acquisition of competing businesses. This condition should apply for at least three years and may continue until the end of the restructuring period, depending on the scope, size and duration of the aid".

(312) In line with point (40) of the Restructuring Communication, the aid can only be declared compatible on the condition that ABN AMRO Group strictly applies an acquisition ban[120] in the three years following the date of the present Decision. The acquisition ban should be extended if the Dutch State continues to own more than 50 % of ABN AMRO Group after three years. However, the acquisition ban should not extend beyond five years. While part of the aid has already been redeemed, some measures (in particular measures Z and C) cannot be redeemed by the bank due to the form in which they were granted (i.e. not in the form of a hybrid debt instrument). The end of the State ownership is a proxy for estimating when the advantage derived from the aid ends.

(313) The Commission observes that the December 2009 Restructuring Plan (completed with worst case financial projections on 23 March 2010) indicated already that ABN AMRO Group has become a viable entity that should realise a decent return on equity and is even expected to realise decent profits in worse economic conditions. The updated November 2010 Restructuring Plan confirmed this analysis. That return to viability does not hinge on acquisitions. An acquisition ban therefore does not go against the return to viability.

(314) The Commission considers that, pursuant to point (26) of the Restructuring Communication, a hybrid coupon ban and a hybrid call ban are unavoidable[121]. In a restructuring context, measures which reduce the total amount of own funds

[120] When banks are faced with bad loans in their loan portfolio, the restructuring of those loans sometimes requires solutions such as converting debt into equity. Those situations are considered to be normal banking practice and are not covered by the acquisition ban.

[121] The Commission has accepted one exception. One of the hybrid instruments of FBN, the so-called FCC-instrument (FCC instrument: EUR 87,5 million, 6,25 % non-cumulative non-voting perpetual class A series I preference shares issued by Fortis Capital Company Ltd), was issued at the time when Fortis SA/NV was still one integrated group and the prospectus clearly stipulated that coupons on the instruments were also triggered by dividends paid by Fortis SA/NV (now renamed Ageas). When the financial supervisor learnt about this situation, he concluded that FBN had lost discretion over its coupon payments on the instrument and that therefore the instrument would no longer qualify as Tier 1. The financial supervisor argued that also another Tier 1 instrument of ABN AMRO Group – whose coupons after the merger were pushed by the FCC-instrument, so that de facto ABN AMRO Group had lost discretion also over the coupons of that instrument – would no longer qualify as Tier 1.Based on viability arguments stemming from the potential loss of Tier 1 capital and the specific separation context, the Commission can accept the FCC-instrument to be exempted from the hybrid call ban.

are not compatible with the objective of burden-sharing and the minimum necessary requirement.

(315) As stated in point (26) of the Restructuring Communication, "banks should not use State aid to remunerate own funds (equity and subordinated debt) when its activities do not generate sufficient profits". A detailed assessment of ABN AMRO Group's December 2009 Restructuring Plan (and the updated November 2010 Restructuring Plan) allows the Commission to conclude that in approximately two years' time, ABN AMRO Group should have restored its viability as is illustrated by an acceptable RoE of approximately […] % in respectively 2012 and 2013. Against that background, a hybrid coupon and hybrid call ban of 2 years[122] seems to provide appropriate burden-sharing from the company's capital holders[123]. Thus the aid can only be declared compatible on the condition of a two-year hybrid coupon and call ban as described in detail in Article 8 of the operational part of the Decision. That coupon and call ban should also apply to the holders of FBNH Preferred Shares to remove the doubt expressed by the Commission in recital (130) of the Decision of 5 February 2010.

(316) In other cases, burden-sharing measures are also necessary to make sure that rescued banks bear adequate responsibility for the consequences of their past behaviour so as to create appropriate incentives for the future behaviour of themselves and others. That factor is less relevant in this case as the problems of the company were to a large extent linked to the former parent company Fortis SA/NV (see section 6.3.3 "Measures to limit distortions of competition"). Therefore it can also be accepted, from a burden-sharing perspective, that there are no major divestments apart from the disposal of PFS and Intertrust which jointly accounted for […] % of total operating income and […] % of RWA.

6.3.3 Measures to limit distortions of competition

(317) With respect to the measures needed to limit distortion of competition, the present case presents some atypical features.

(318) Point (28) of the Restructuring Communication indicates the type of distortion of competition which may occur when State aid is provided in order to support financial stability in times of systemic crisis: "*Where banks compete on the merits of their products and services, those which accumulate excessive risk and/or rely on unsustainable business models will ultimately lose market share and, possibly, exit the market while more efficient competitors expand on or enter the markets concerned. State aid prolongs past distortions of competition*

[122] For practical reasons, the Commission can accept the hybrid coupon and call ban to start on 10 March 2011 (i.e. after the last forced coupon) to last up to and including 10 March 2013.

[123] The Commission is aware of the fact that dividends paid by ABN AMRO Group to the State – its sole shareholder – could trigger hybrid coupons. The Commission wants to avoid a situation in which ABN AMRO Group would pay marginal dividends to the State in order to circumvent the hybrid coupon ban. The Commission does not object to the payment of a sizeable dividend to the State of at least EUR 100 million even if that payment has certain consequences on hybrid coupons because a large dividend hints at restored viability and also helps to keep potential excess capital in check, which helps to limit undue distortions of competition.

created by excessive risk-taking and unsustainable business models by artificially supporting the market power of beneficiaries. In this way it may create a moral hazard for the beneficiaries, while weakening the incentives for non-beneficiaries to compete, invest and innovate".

(319) As explained in the Decision of 3 December 2008, the difficulties of Fortis SA/NV and Fortis Bank SA/NV followed from excessive risk: (i) Fortis Bank SA/NV invested a large amount of money in structured credit and (ii) Fortis SA/NV decided to purchase ABN AMRO N at a very high price. In order to authorize aid to such banks, the Commission requires a significant reduction of the market presence of the beneficiary. In this respect, the Commission observes that Fortis SA/NV has been cut into four: the Belgian and international insurance assets are still part of the listed Fortis SA/NV (which after the collapse of Fortis SA/NV was renamed Ageas); Fortis Bank SA/NV and BGL have been acquired by BNP Paribas; the Dutch State acquired FBN (including ABN AMRO N); and the Dutch State also acquired the Dutch insurance activities[124]. In other words, Fortis SA/NV has been split in smaller entities and Fortis Bank SA/NV itself has been cut into two parts[125].

(320) The Commission observes that the measures in favour of FBN and ABN AMRO N assessed in this Decision have specific features which differ from other restructuring cases it had to deal with during the current crisis, including those of Fortis Bank SA/NV and Fortis SA/NV. In this case, FBN and ABN AMRO N do not primarily need State aid because they took flawed management decisions. The need for State aid does not stem for instance from the accumulation of excessive risks in their investments or in their lending policy, or because they had undertaken an unsustainable pricing policy. Equally, the difficulty of Fortis SA/NV and Fortis Bank SA/NV did not stem from risky lending or pricing policies in the retail banking, private banking or commercial banking activities, which were on the contrary profitable. Consequently, the Commission considers that the aid to FBN and ABN AMRO N is significantly less distortive than the aid approved in favour of financial institutions which had accumulated excessive risks. Therefore, the Commission considers that further divestments are not necessary.

(321) However, it should to be ensured that the State aid is not used by FBN and ABN AMRO N to grow at the expense of competitors, for instance by implementing an unsustainable pricing policy or by acquiring other financial institutions. If that were to happen, the aid would "*weaken the incentives for non-beneficiaries to compete, invest and innovate*" and could undermine "*incentives for cross-border activities*" by discouraging entry in the Dutch market.

(322) The State aid can therefore only be declared compatible if there are sufficient measures in place ensuring that the State aid is not used to the detriment of competitors, some of which did not receive similar public support. A level

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124 Those last two businesses are managed as separate entities and the Dutch authorities announced in November 2008 that they will not integrate them.

125 In its decisions of 3 December 2008 and 12 May 2009, the Commission observed on that basis and on the basis of other commitments that sufficient measures had been implemented to limit the distortion of competition created by the aid to Fortis SA/NV and Fortis Bank SA/NV.

playing-field should remain in place between banks which received public support and those which did not. It should also be avoided that the State aid weakens incentives for non-beneficiaries to compete, invest and innovate and that entry barriers are created which could undermine cross-border activity.

(323) The Restructuring Communication provides that the nature and form of such caps will depend on the amount of aid and the conditions and circumstances under which it was granted and also on the characteristics of the market(s) on which the beneficiary bank will operate. The amount of aid has been described in section 6.1.3 Quantification of Aid. The specific conditions and circumstances under which it was granted have been discussed at the beginning of the present section. As mentioned in point (32) of the Restructuring Communication, the size and relative importance of the bank on its market(s) play also a role. If the restructured bank has limited remaining market presence, additional measures are less likely to be needed. Therefore, the conditions necessary to declare the aid compatible mainly relate to retail and private banking as the company has already substantially reduced its presence in commercial banking via the divestment of New HBU.

(324) The aid can be declared compatible with the Restructuring Communication on the condition that ABN AMRO Group implements the measures described in points (325) to (329).

(325) In retail and private banking, the aid can be declared compatible on the condition that ABN AMRO Group will not be the price leader for standardized savings and mortgage products. In line with point (44) of the Restructuring Communication, ABN AMRO Group should not offer price conditions which cannot be matched by non-aided competitors.

(326) Since a price leadership ban might be less effective in segments with many non-standardised products such as private banking in the Netherlands where there was a specific complaint, an additional condition is needed in line with point (44) of the Restructuring Communication to declare the aid compatible. ABN AMRO Group must aim to achieve the net interest revenues as presented to the Commission on 8 November 2010. ABN AMRO Group should therefore take appropriate action as soon as it observes that it undershoots its projections, especially when the latter is due to low interest margins.

(327) Since a price leadership ban is difficult to implement and monitor in private banking, it is necessary to implement other suitable remedies to ensure effective competition, such as measures that favour entry, as described in point (44) of the Restructuring Communication. In that regard, a necessary condition to declare the aid compatible is that ABN AMRO Group will implement a measure that facilitates switching. Concretely, ABN AMRO Group should cover its own administrative and transfer and transaction costs for its customers of Private Banking NL, which are the direct consequence of the ending of the private banking relationship and the transferring of portfolios[126]. That measure should

[126] ABN AMRO Group shall not be obliged to cover other financial consequences for the customer, such as for instance costs or damages associated with the (early) liquidation or ending of positions, mortgages, savings deposits, security rights or holdings of the customer and any costs

apply during a period of two consecutive months, starting as soon as possible and within a year after the date of the Decision at the latest. As soon as the two-month period starts, the Bank will inform all its private banking customers in an unambiguous way of the possibility offered to them. ABN AMRO Group should also provide evidence to the Commission that the customer transfers are executed following the normal proceedings and that there were no delays in the customer transfer process.

(328) If the measures to limit undue distortions of competition and more particularly the specific measures in retail and private banking are correctly implemented, they would also sufficiently addresses the issues raised by the complainant. When investigating those issues, the Commission found that ABN AMRO has been pricing some products temporarily at a loss but that pricing policy took place in a liquidity-constrained environment where all banks were competing aggressively for savings, while there was also the specific start-up context of MoneYou (whose launch was decided before the Fortis SA/NV collapse).

(329) Point (44) of the Restructuring Communication also mentions that banks should not invoke State support as a competitive advantage when marketing their financial offers. Therefore, a condition to declare the aid compatible is that ABN AMRO Group will not use State aid in its marketing campaigns and communication to investors, for a period of three years. Those prohibitions should extend to up to a period of five years as long as the Dutch State holds a shareholding of at least 50 % in ABN AMRO Group.

(330) From the perspective of undue distortions of competition, the Commission regards positively the divestments of PFS and Intertrust. The disposal of PFS reduces the company's attractiveness towards institutional customers, while Intertrust provided inter alia services which could make the private banking franchise stronger. As a result, its sale might make it easier for competitors to improve their competitive position as against that of ABN AMRO Mees Pierson. The Commission also considers that the fact that part of the aid has been repaid contributes to limit the distortions of competition. The Commission also takes a favourable view on the dividend policy as described in recital (75).

6.3.4 Conclusion

(331) Thus, if all the conditions described in sections 6.2 and 6.3 are correctly implemented, the December 2009 Restructuring Plan updated by the November 2010 Restructuring Plan provides sufficient evidence that the long-term viability of ABN AMRO Group has been restored. The December 2009 Restructuring Plan updated by the November 2010 Restructuring Plan provides sufficient burden-sharing and contains adequate measures to limit undue distortions of competition. Therefore, the Commission can conditionally declare the December 2009 Restructuring Plan as updated by the November 2010 Restructuring Plan in line with the Restructuring Communication.

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incurred by another financial institution and/or costs incurred by the customer in relation to the entering into of new positions and/or contracts and other financial consequences related to the termination of any and all products and services by the customer.

7. Conclusion

The Commission finds that the Netherlands has unlawfully implemented the State aid listed in section 6.1.3 "Quantification of the State aid" in breach of Article 108(3) of the Treaty. However, that aid can be found compatible if the conditions set out in sections 6.2 and 6.3 and described more in detail in the operative part of this Decision are implemented.

The Commission notes that the Dutch State has exceptionally accepted to receive the text of this Decision only in English.

HAS ADOPTED THIS DECISION:

Article 1

The State aid provided by the Netherlands to ABN AMRO Group is compatible with the internal market, subject to the conditions set out in Articles 3 to 9.

That State aid was provided as follows:

- recapitalisation aid worth between EUR 4.2 billion and EUR 5.45 billion respectively in favour of FBN and ABN AMRO N, and

- EUR 71.7 billion of liquidity aid.

Article 2

For the purposes of this Decision, the following definitions apply:

(a) "ABN AMRO Group" means ABN AMRO Group and its wholly owned direct or indirect subsidiaries, including the entities in which ABN AMRO Group has sole control within the meaning of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("Merger Regulation")[127].

(b) "rank first" means to offer the most attractive price.

(c) "retail customers" means all individual customers (as opposed to corporate customers).

(d) "standardised retail savings and deposit products" means all standardised retail and deposit products covering at any point in time at least 85 % in volume of the products of ABN AMRO Group in the retail savings and deposit market.

(e) "standardised mortgage products" means all standardised retail and deposit products covering at any point in time at least 85 % in volume of the products of ABN AMRO Group in mortgages.

[127] OJ L 24, 29.01.04, p.1

(f) Private Banking NL means all clients of BU Private Banking except those that are part of Private Banking International[128]

Article 3

1. In the absence of the Commission's prior authorisation, ABN AMRO Group shall not rank first with respect to standardised retail savings and deposit products for retail customers among the […] financial institutions having the largest market share in volume on the Dutch retail savings market in any of the following segments:

- savings accounts;

- fixed term deposits with a period of 1 year;

- fixed term deposits with a period of 2 years;

- fixed term deposits with a period of 3 years;

- fixed term deposits with a period of 4 years; and

- fixed term deposits with a period of 5 years.

Notwithstanding the first subparagraph, where three financial institutions jointly rank first among the […] financial institutions having the largest market share in a segment of the Dutch retail savings and deposit market, ABN AMRO Group may match the rate of those three financial institutions with respect to standardised products in the corresponding segment.

2. In the absence of the Commission's prior authorisation, ABN AMRO Group shall not rank first with respect to any standardised type of mortgage among the […] financial institutions having the largest market share on the Dutch retail mortgage market.

Notwithstanding the first subparagraph, where three financial institutions jointly rank first among the […] financial institutions having the largest market share in the Dutch retail mortgage market, ABN AMRO Group may match the rate of those three financial institutions with respect to the corresponding standardised type of mortgage.

3. To ensure compliance with paragraphs 1 and 2, ABN AMRO Group shall on a permanent basis, and at least every week, monitor the conditions offered by the […] other financial institutions having the largest market share in volume on the respective Dutch savings markets, to the extent these conditions are available in the public domain. If the figures of any of those […] other financial institutions are not publicly available, they will be replaced by the figures of next largest financial institutions from the market share ranking.

As soon as ABN AMRO Group detects that it offers a more favourable price for any of its products than that price which it is allowed to offer on the basis of paragraph 1 and paragraph 2 of this article ABN AMRO Group shall immediately inform the Commission. It shall immediately adjust the products price and implement the price adjustment as soon as possible".

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[128] This refers to the segmental breakdown used in the December 2009 Restructuring Plan (see recital (79)).

With respect to retail savings and deposit products, ABN AMRO Group shall implement the adjustment no later than ten working days from the date on which it noticed the condition variation. However, if the variation concerns products for which the price can only be amended at the end of a month and there are less than ten working days between the time when the variation was noticed and the end of a month, ABN AMRO Group shall implement the adjustment at the first opportunity from the end of the subsequent month.

With respect to mortgages, ABN AMRO Group shall adjust its pricing within ten working days from the date on which it noticed the condition variation and the adjustment shall be implemented no later than fifteen working days from the date on which the variation from the condition was noticed.

4. The condition as laid down in paragraphs 1 and 2 shall apply for three years as from the date of this Decision. ABN AMRO Group shall submit to the Commission a compliance report with this condition on a quarterly basis and at the latest within two weeks of publication of ABN AMRO Group's quarterly financial results.

Article 4

1. ABN AMRO Group shall use its best efforts to achieve the projections (including net interest revenues) submitted to the Commission in the December 2009 Restructuring Plan, as updated by the November 2010 Restructuring Plan. The November 2010 projections shall be achieved, at ABN AMRO Group's consolidated level.

ABN AMRO Group shall report to the Commission on a quarterly basis setting out a breakdown of the projections and the actual figures (including net interest revenues) at the level of the four segments defined in the December 2009 Restructuring Plan and the November 2010 Restructuring Plan : namely, Retail Banking, Private Banking NL, Private Banking International, Commercial & Merchant Banking.

ABN AMRO Group may submit a reasoned request to the Commission to revise its projections (including net interest revenues) to take into account external developments.

2. ABN AMRO Group shall provide a breakdown of net interest revenue projections into volumes and margins on a consolidated level and at the level of private banking.

ABN AMRO Group shall report to the Commission on a quarterly basis, and at the latest within two weeks after the publication of its quarterly financial results, setting out whether the net interest revenues achieved at the consolidated level are in line with the projections referred to in paragraph 1. That report shall also set out a comparison of projected margins and actual margins at the consolidated level and at the level of private banking.

If the net interest revenues achieved at the consolidated level are not in line with those projections, ABN AMRO Group shall set out in that report the measures taken to achieve those projections.

3. The obligations laid down in paragraphs 1 and 2 shall apply for three years as from the date of this Decision.

Article 5

1. ABN AMRO Group shall not acquire control of more than [0-7] % of any undertaking.

2. By derogation from paragraph 1, ABN AMRO Group may make acquisitions if the total gross cumulative purchase price (excluding the assumption or transfer of debt in relation to such acquisitions) paid by ABN AMRO Group for all such acquisitions during a period of three years following the date of this Decision is less than EUR [0-600] million.

The prohibition laid down in paragraph 1 shall not apply to private equity acquisitions by ABN AMRO Group if they fit within its business plan and the planned budget of its "Private Equity" division as submitted to the Commission on 5 October 2010.

The prohibition laid down in paragraph 1 shall also not apply to […] equity stakes taken by ABN AMRO Group's division "Energy, Commodities and Transportation" in support of its normal financing business if they fit within ABN AMRO Group's business plan and the planned budget of that division as submitted to the Commission on 10 January 2010.

ABN AMRO Group shall report to the Commission on a quarterly basis and at the latest within two weeks after the publication of its quarterly financial results. That report shall list actual acquisitions by the "Private Equity" and "Energy, Commodities and Transportation" divisions. The report shall also provide detailed information on ABN AMRO Group's other acquisitions which it is allowed to make on the basis of the first subparagraph.

3. The prohibition laid down in paragraph 1 shall apply for at least three years as from the date of this Decision or until the date on which the Netherlands' shareholding stake in ABN AMRO Group falls below 50 %, whichever is later. That prohibition shall cease to apply at the latest five years as from the date of this Decision.

In the event that the prohibition laid down in paragraph 1 applies for more than three years as from the date of this Decision, the total gross cumulative purchase price applicable under subparagraph 1 of paragraph 2 shall be increased by EUR [0-200] million per year.

Article 6

ABN AMRO Group shall not advertise the fact that it is State-owned nor make any reference to any State support received in its communications with existing or potential customers and or investors for a period of at least three years as from the date of this Decision or until the date on which the Netherlands' stake falls below 50 % of the shares in ABN AMRO Group, whichever is later. That prohibition shall cease to apply at the latest five years as from the date of this Decision.

Notwithstanding that prohibition, ABN AMRO Group may refer to the fact that it is State-owned and to any other State support it received whenever such reference is required under applicable legislative or regulatory provisions.

Article 7

1. ABN AMRO Group shall offer customers of Private Banking NL the option to end their private banking relationship with ABN AMRO Group and to transfer their investment portfolios to other banks. That offer shall hold for a period of two consecutive months ("the relevant period").

The relevant period shall start as soon as possible after the date of this Decision allowing for (if required) a reasonable period for preparation, and within a year after the date of this Decision at the latest. ABN AMRO Group shall submit for approval to the Commission a start date for the relevant period at least four weeks before the relevant period is supposed to start.

2. ABN AMRO Group shall provide to all its Private Banking NL customers the terms of the offer, described in paragraph 1, in an unambiguous way on the first day of the relevant period at the latest. The information to be sent by ABN AMRO Group to its customers shall first be provided to the Commission at least four weeks before that information is sent to its customers.

3. ABN AMRO Group shall facilitate the closure of private banking relationships where so requested by customers, using the ordinary procedures at the lowest cost possible. If the customer decides to transfer its position and/or (related) security rights, and if that transfer is possible from the perspective of the transferee bank, ABN AMRO shall facilitate such a transfer. Customers shall be informed of the option to transfer positions rather than liquidating them and will be informed of the costs of the two options.

ABN AMRO Group shall cover its own administrative, transfer and transaction costs which are the direct consequence of the ending of the private banking relationship and the transfer of portfolios[129].

ABN AMRO Group shall not be obliged to cover other financial consequences for the customer.

[129] In line with the numerical examples that ABN AMRO Group provided to the Commission on 18 November 2010.

Article 8

ABN AMRO Group shall not pay any coupon on core Tier 1, Tier-1 and Tier-2 capital instruments (including hybrid capital instruments and preference shares) issued before the date of this Decision or exercise any call option rights in relation to such capital instruments until 10 March 2013 included, unless there is legal obligation to do so.

ABN AMRO Group may issue new capital instruments after the date of this Decision or pay coupons on such new capital instruments, unless such issues or payments result in an obligation to pay coupons on its own existing capital instruments

By derogation from the first subparagraph, ABN AMRO Group may call FCC instrument (namely EUR 87,5 million, 6,25 % non-cumulative non-voting perpetual class A series I preference shares issued by Fortis Capital Company Ltd).

Until 10 March 2013 included, ABN AMRO Group shall only pay a dividend on its ordinary shares if that dividend exceeds EUR 100 million[130].

Article 9

By 30 June 2011 at the latest, ABN AMRO Group shall pay to the Netherlands an adjusted interest rate on the loans identified in the electronic mail from the Commission to the Dutch State dated 24 June 2010. The amounts adjusted with interest come to EUR 18.152.722.

Article 10

Within two months of notification of this Decision, the Netherlands shall inform the Commission of the measures it has taken to comply with this Decision.

Article 11

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 05.04.2011

[130] On an annual basis, namely intermediary dividend and final dividend.

For the Commission

Joaquín ALMUNIA
Vice-President

Notice
If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State aid Greffe
Rue Joseph II 70
B-1049 Brussels

Fax No: +32-2-296.1242

* **Always refer to the notification**.