

**AMSTERDAM COURT OF APPEAL
ENTERPRISE DIVISION
4 MARCH 2013**

**PETITION TO DETERMINE COMPENSATION UNDER
ARTICLE 6:10, FINANCIAL SUPERVISION ACT**

of

THE MINISTER OF FINANCE

Petitioner

attorneys: *mr.* T.M. Stevens and *mr.* R.G.J. de Haan

This is a translation of the original Dutch petition as filed with the Enterprise Chamber and available on its website and the website of the Ministry of Finance. In the event of any conflict, inconsistency, ambiguity or difference between the Dutch petition and this translation, the Dutch petition prevails.

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Today, the fourth of March, 2013, the **Minister of Finance** in The Hague (the **Minister**), electing address in this matter at Apollolaan 15, Amsterdam, postal code 1077 AB, at the office of Allen & Overy LLP, of which office *mr.* T.M. Stevens and *mr.* R.G.J. de Haan are appointed as attorneys), hereby requests (in so far as necessary, on behalf of the State of the Netherlands) the Enterprise Division of the Amsterdam Court of Appeal (the **Enterprise Division**) to determine the compensation with regard to the capital components and securities described in this petition, expropriated pursuant to Article 6:2 of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*, **Wft**), in accordance with the offer made by the Minister.

This petition is based on the following grounds.

1. INTRODUCTION

- 1.1 On 1 February 2013, the Minister, acting in coordination with the Prime Minister, Minister of General Affairs, after consulting De Nederlandsche Bank N.V. (**DNB**), in connection with the stability of the financial system, issued a decree (i) expropriating the securities and capital components of SNS REAAL N.V. (**SNS REAAL**) and SNS Bank N.V. (**SNS Bank**) identified in his decree, and (ii) providing immediate relief with regard to SNS REAAL (the **Decree**, hereby submitted as **Exhibit 1**).¹ In the Decree, the Minister set out that and why he is of the opinion that the situation in which the SNS REAAL group found itself leading up to 1 February 2013 put the stability of the financial system in serious and immediate danger.
- 1.2 A large number of stakeholders appealed the Decree before the Administrative Jurisdiction Division of the Council of State (the **Division**). At issue in the appeal proceedings was the question of whether the Minister reasonably (i) could have ruled that on 1 February 2013 the stability of the financial system was in serious and immediate danger; and (ii) could proceed to expropriate the securities issued by and capital components of SNS REAAL and SNS Bank as specified in the challenged decree and the immediate relief provided in it.
- 1.3 The appeals were examined by the Division on 15 February 2013 at a public hearing. On 25 February 2013, the Division rendered its judgment (the **Judgment**, hereby submitted as **Exhibit 2**). In the Judgment, the Division declared the appeals largely unfounded and upheld the Decree, avoiding the Decree only where it served to expropriate all obligations and liabilities of SNS REAAL or SNS Bank as mentioned in Article 1, paragraph 2(b) of the Decree. Briefly put, this means that the

¹ The Minister made this decision based on Articles 6:1 (paragraph 1), 6:2 (paragraphs 1, 4 and 5) and 6:4 (paragraphs 1 and 2), Wft.

Minister lawfully expropriated the capital components and securities, but not the related obligations or liabilities (read: claims for damages). The Decree became irreversible by virtue of the judgment on 25 February 2013.

- 1.4 The expropriated securities of SNS REAAL and SNS Bank were transferred to the State of the Netherlands with effect from 1 February 2013, and the expropriated capital components were transferred with effect from that date to Stichting Afwikkeling Onderhandse Schulden SNS REAAL.² Persons who, as a result of the expropriation of these securities and capital components, lose a claim against SNS REAAL or SNS Bank are entitled to compensation.³
- 1.5 Article 6:10, paragraph 2, Wft entails that the Minister is obliged to make an offer for compensation as quickly as possible, but no later than seven days after the decision for expropriation becomes irreversible, and to request the Enterprise Division to set the compensation in accordance with that offer. On 4 March 2013, the Minister made the title holders an offer for compensation in accordance with Article 6:10, paragraphs 2 and 3, Wft (the **Offer**, hereby submitted as **Exhibit 3**).
- 1.6 Pursuant to Article 6:10, paragraph 2, Wft, the Minister requests the Enterprise Division to determine the compensation with regard to the capital components and securities expropriated by virtue of Article 6:2 Wft, in accordance with the Offer. This request will be explained in further detail in this petition.
- 1.7 The stakeholders in respect of this petition are (i) the (former) title holders of the securities and capital components expropriated by the Minister by virtue of the Decree, and (ii) the persons who as a result of the expropriation of capital components lost a claim against SNS REAAL or SNS Bank and have been designated by the Minister as entitled to compensation in Article 3 of the Decree. The names and addresses of the (potential) stakeholders known to the Minister have been provided to the Enterprise Division. These are the 700 persons who lodged a notice of appeal with the Division, and Stichting Beheer SNS REAAL. In addition, there are some (potential) stakeholders who did not lodge a notice of appeal but did send a letter to the Ministry of Finance. The names and addresses of these (potential) stakeholders will also be provided to the Enterprise Division.
- 1.8 The exhibits referred to in this petition are attached. In a number of documents, the contact information of officials and other parties involved have been deleted. In addition, a small number of passages in the documents have been blotted out. In all cases, the redacted sections contain confidential business information concerning companies whose interests could be harmed if the passages in question became

² Article 1, paragraphs 1 and 2 of the Decree.

³ Article 1, paragraph 3, of the Decree, in conjunction with Article 6:8, paragraph 1, Wft.

public. This applies in particular to the reports of Cushman & Wakefield, which contain very detailed information about the real estate portfolio of Property Finance. These exhibits were submitted accordingly by the Minister in the appeal proceedings.⁴

2. FACTUAL BACKGROUND

A. SNS REAAL group and its financial problems

- 2.1 SNS REAAL is the holding company of, inter alia, the bank SNS Bank and the insurance holding company REAAL N.V. (**REAAL**). SNS Bank is the fourth-largest bank in the Netherlands, and is the holding company of, inter alia, ASN Bank N.V. (**ASN Bank**), RegioBank N.V. (**RegioBank**) and SNS Property Finance B.V. (**Property Finance**). REAAL is the third-largest life insurer and fifth-largest nonlife insurer in the Netherlands, and is the holding company of, inter alia, SRLEV N.V. (which includes the Zwitserleven label). A simplified overview of the group structure (at the time of expropriation) is hereby submitted as **Exhibit 4**.
- 2.2 SNS REAAL, SNS Bank and REAAL all have their seats in the Netherlands. Trade registry extracts for SNS REAAL, SNS Bank and REAAL are hereby submitted as **Exhibit 5**. The articles of association of SNS REAAL are hereby submitted as **Exhibit 6**.
- 2.3 The SNS REAAL group is a Dutch financial conglomerate.⁵ SNS REAAL's consolidated annual report for 2011 is submitted as **Exhibit 7** and SNS REAAL's financial report for the first half of 2012 is submitted as **Exhibit 8**. SNS REAAL's consolidated balance sheet total at the end of June 2012 is approximately €134.2 billion.⁶ SNS Bank has a consolidated balance sheet total of approximately €82.3 billion. SNS Bank and its subsidiaries hold nearly a million current accounts and over 1.6 million savings accounts, with a total balance of approximately €36.4 billion. The insurance holding company REAAL has a consolidated balance sheet total of approximately €54.3 billion. The subsidiaries of REAAL have a combined total of over 7.6 million policies, with technical provisions (the provisions covering existing insurance liabilities) of some €41.6 billion.
- 2.4 As also indicated in the Autumn Memorandum 2011 (29 November 2011), SNS Bank is deemed by both DNB and the Minister to be a systemically relevant institution.⁷ A systemically relevant institution is an institution whose bankruptcy

⁴ Exhibit 35 shows additional valuation figures that the version submitted in the appeal proceedings does not.

⁵ Article 3:290, Wft.

⁶ The figures in this paragraph date from June 2012; see exhibit 8.

⁷ See Annex 3 of the Autumn Memorandum 2011 (*Parliamentary Papers II*, 2011-2012, 33 090, no. 1), in which the Minister responds to the DNB's 'Overview of Financial Stability' and further addresses the

would have unacceptably large and undesirable repercussions on financial stability, the Dutch economy and the Dutch taxpayer. The degree to which a bank can be deemed systemically relevant is determined by a number of indicators, such as the size of the bank, its entwinement with other financial institutions, its entwinement via the financial market, its entwinement with the financial infrastructure, the degree to which the institution can be replaced, the degree to which the deposit guarantee system can be drawn on, the impact of a bankruptcy on market and public confidence, and the degree to which a bankruptcy would impact on the sector.⁸

- 2.5 In the summer of 2006, SNS REAAL acquired Bouwfonds Property Finance from ABN AMRO, after which it continued under the name SNS Property Finance. In mid-2012, the outstanding book value of this portfolio, consisting of financing of and participating interest in real estate, was €9.0 billion, excluding provisions.⁹ The size of the real estate portfolio is relatively large in comparison to SNS Bank's total balance sheet of €82.3 billion, certainly in comparison to the relative size of the real estate portfolios of other Dutch and foreign banks.¹⁰
- 2.6 During the credit crisis in 2008, SNS REAAL was forced to apply for €750 million in state capital aid.¹¹ This aid was provided at the time to enable SNS REAAL to weather the increased volatility on the stock markets, which put pressure on the insurance company's buffers, and any further unrest on the markets. However, it is the year 2013 and SNS REAAL has still been unable to repay most of this aid.¹² This is because the problems at SNS REAAL worsened as from 2009.

policy in regard to systemically relevant institutions. Among the institutions referred to by name is SNS Bank.

⁸ Based on these criteria, DNB reviews whether banks are important to the financial system of the Netherlands, and as such must maintain higher capital buffers. Maintaining higher capital buffers is a consequence of the more stringent capital requirements dictated by the Basel Committee on Banking Supervision (**Basel 3**) and the fourth capital requirements directive (**CRD IV**); see draft regulation 'Provisions concerning systemic relevance of banks and investment institutions, www.internetconsultatie.nl/systeemrelevantiebuffer.

⁹ Exhibit 1, p. 4, under point 14.

¹⁰ DNB's most recent Overview of Financial Stability (Autumn 2012) shows that the entire Dutch banking industry has some €80 billion in domestic investments in commercial real estate, and some further €20 billion in foreign investments. On a balance sheet total of approximately €2.2 trillion, this collectively represents an average exposure of approximately 4.5% of the total assets of the Dutch banking industry. Because of SNS's major position, taken on average this percentage is slightly lower than 4.5% for the other systemic banks.

¹¹ *Parliamentary Papers II*, 2008–2009, 31 371, no. 48. At that time, Stichting Beheer SNS REAAL also reinforced SNS REAAL's capital with an injection of €500 million. Alongside the capital assistance, at the time of the credit crisis SNS Bank drew on approximately €5.5 billion of the €200 billion guarantee scheme set up at that time for bank financing. At present, there is still some €2.75 billion in outstanding guarantees, which expire in 2014 (<http://www.dsta.nl/Onderwerpen/Garantieregeling>). The expropriation changed nothing in regard to the outstanding guarantees.

¹² Of this €750 million, after redemption of €185 million at the end of 2009 there remains a further €565 million outstanding. SNS could redeem this at penalty interest of 50%. This would bring the total amount received by the State to €848 million. The time frame agreed with the EC provided for repayment of this amount before the end of 2013.

- 2.7 The most significant cause of SNS Bank's poor financial position is the dramatically deteriorated national and international market for commercial real estate. Commercial real estate is traditionally sensitive to economic swings. The market for commercial real estate has deteriorated sharply in the Netherlands and in many other countries, partly as a result of the ongoing crisis. Its relatively large real estate portfolio, coupled with the problematic quality and composition of the portfolio itself, ultimately dealt SNS Bank huge losses in the Property Finance portfolio, putting pressure on SNS Bank's solvency in a time when the capital requirements for financial institutions in an international context are in fact being tightened on the back of the credit crisis.¹³
- 2.8 In addition, REAAL's (perceived) solvency deteriorated. The insurance endowments dossier (*woekerpolisdossier*) created an additional, substantial uncertainty as regards the insurer's financial strength, in addition to the already very mixed prospects in the life insurance sector.
- 2.9 Because of SNS REAAL's holding structure, the financial ties between the insurance arm and the banking arm are extremely entwined (the technical term for this type of construction is 'double leverage').¹⁴ Specifically, this means that the equity of the subsidiaries is partially funded with loan capital raised by the parent company, SNS REAAL. The total double leverage at SNS REAAL amounted to €909 million at the end of 2012.¹⁵ This means that if, for example, units of the insurer were to be sold, not all of the resources released by the sale could be used to resolve problems at the bank, because some would have to be used to repay the loans taken out by SNS REAAL. The SNS REAAL group proved to be unable to solve its problems independently through the sale of SNS Bank, REAAL, or both.¹⁶

B. Intensification of DNB supervision due to deteriorated financial situation of the SNS REAAL group

- 2.10 DNB has intensified its supervision of SNS Bank since the end of 2008. In this context, since 2009, DNB has applied the criterion that no core capital may leave the bank until such time as the risks in the commercial real estate portfolios have been

¹³ Basel 3 and the anticipation to it required by the market, and the European Banking Authority's capital test exercise of 2011, implicitly increased the capital standards, <http://www.bis.org/publ/bcbs188.pdf>, see also DNB's 27 January 2012 letter to SNS Bank, exhibit 17.

¹⁴ This type of double leverage structure is common in the bancassurance model. The rationale behind it is that banks and insurers have very different risk profiles; pooling and spreading the risk at the holding level makes the combination of bank and insurer, in theory, less risky. However, in a situation in which both the bank and the insurer encounter problems, such as in 2008, when both banks and insurers met with difficulties, the holding company has a much greater problem. The credit crisis of 2008 therefore led the supervisory authorities and investors to decide that too much double leverage is risky, and should be deleveraged.

¹⁵ See DNB's 24 January 2013 letter to the Minister, exhibit 15.

¹⁶ See Chapter 3.

significantly mitigated. Starting in the first half of 2010, DNB began requiring SNS Bank to produce 'exit plans' for the international real estate portfolio to show how, when and at what losses the loans in the portfolio could be phased out. In the periodic evaluation of the capitalisation of SNS Bank (the **SREP**, or 'Supervisory Review and Evaluation Process') pursuant to Article 3:18a Wft, DNB concluded that the bank did not meet the requirements for capitalisation after a stress scenario. In early 2011, DNB observed that despite its phasing out of the real estate portfolio, SNS Bank remained vulnerable due to the continued deterioration on the real estate markets. As a result, in mid-2011 DNB required SNS Bank to draw up new exit plans, this time for the entire real estate portfolio to be phased out. Additionally, in the spring of 2011 DNB asked SNS Bank for an action plan to strengthen the capital position, one that would address the major vulnerabilities integrally. In response, SNS REAAL submitted such an action plan to DNB in mid-2011. DNB determined that the capital reinforcements provided for in the plan (sale of subsidiary, issue of shares) were already needed as a buffer for the existing vulnerabilities, but could not be expected to be sufficient to also cover future obligations (such as the repayment of the capital support by the State of the Netherlands).

- 2.11 In August 2011, DNB asked SNS REAAL for a supplemental action plan investigating the options for balance sheet reduction through the sale of business units or assets, such as parts of the mortgage portfolio. Further, in response to a request to that effect, DNB also received from SNS REAAL an analysis of the interdependencies between SNS Bank and REAAL so as to obtain insight into the possibilities for splitting up the SNS REAAL group. Based on the evaluation of the SREP 2011, the action plan submitted by SNS REAAL and the supplemental action plan, DNB concluded that SNS REAAL was insufficiently capable of independently achieving the necessary strengthening of its financial position.

C. DNB and the Minister's intervention plans

- 2.12 In early December 2011, DNB and the Ministry of Finance jointly set up a project group with the task of analysing the potential scenarios for the SNS REAAL group. This included an analysis of the following scenarios:
- Reinforcement of the equity of SNS REAAL by private parties in combination with a restructuring of the capital of SNS REAAL, as well as a reinforcement of the equity of SNS Bank by private parties in combination with a restructuring of the capital of SNS Bank.
 - A sale of SNS Bank, REAAL or both.
 - A bankruptcy of SNS REAAL or SNS Bank.
 - Private parties and the State of the Netherlands acting jointly to stabilise the situation of the SNS REAAL group.

- A transfer under part 3.5.4A Wft: either of assets and liabilities or the deposits of SNS Bank, ASN Bank and RegioBank guaranteed under the deposit guarantee scheme, or of the shares in SNS Bank.
- Providing immediate relief under Article 6:1 Wft.
- An expropriation pursuant to Article 6:2 Wft.

In DNB's opinion, contagion effects could occur in a number of scenarios. DNB explained this in its 23 May 2012 letter to the Ministry of Finance (**Exhibit 9**).

- 2.13 On 31 July 2012, the Minister requested DNB to officially document relevant positions exchanged between personnel, and to communicate its position in regard to the situation of SNS REAAL, the impact of a bankruptcy of SNS Bank on the stability of the financial system and the conditions and structure of potential solutions (**Exhibit 10**). In its response of 2 October 2012 to this request, DNB endorsed the Ministry of Finance's position that a purely public solution under Chapter 6 of the Wft should only be considered if the public-private solution should fail to provide a resolution (**Exhibit 11**). In the same letter, DNB also provided an account of various supervisory efforts it had made in relation to the worrying situation of SNS Bank.
- 2.14 On 29 November 2012, SNS REAAL's external accounting firm, KPMG, indicated that without additional commitment from third parties for reinforcing the capital position, there was reasonable doubt as to the continuity of the enterprise (**Exhibit 12**). According to KPMG, in compiling the 2012 financial statements of SNS REAAL and SNS Bank there was cause to assume a material uncertainty with regard to SNS Bank's capacity to independently meet the capital requirements, which resulted in reasonable doubt as to the continuity of SNS Bank, and thereby of SNS REAAL.
- 2.15 As an entirely private scenario was impossible, the public-private partnership scenarios were investigated, two of them in extensive detail. The first concerned the partnership between the State of the Netherlands and the three largest Dutch banks. In this scenario, the risks inherent in the real estate portfolio would be addressed through a guarantee by the State, either with or without a transfer of the real estate portfolio to a separate vehicle (the 'real estate management organisation'), and the capital of SNS REAAL and SNS Bank would be restructured. The second scenario concerned a proposal by SNS REAAL in cooperation with a private equity party, CVC Capital Partners (**CVC**), in which this private equity party would contribute equity to SNS REAAL and the State of the Netherlands would, in addition to equity reinforcement, contribute ASR Nederland N.V. In this scenario, the real estate portfolio would be placed in a separate vehicle held by the State of the Netherlands and the three largest Dutch banks, and the State would guarantee the financing of the

Property Finance real estate loans. This solution, in a number of different variants, was the subject of intensive discussions between the relevant parties up to and including 31 January 2013.

- 2.16 The value of the real estate portfolio and the risks attached to it were a major issue in the discussions on a public-private solution. The Ministry of Finance engaged Cushman & Wakefield, an internationally operating commercial real estate expert, to independently evaluate Property Finance's real estate portfolio. The additional expected losses were determined on the basis of this evaluation. According to Cushman & Wakefield, the additional expected losses came out much higher than had been assumed up to that point. Based on the real economic value of the real estate loans and of the real estate of Property Finance by Cushman & Wakefield, the additional losses have been estimated in a basic scenario at approximately €2.4 billion, and in an adverse scenario at approximately €3.2 billion. Cushman & Wakefield conducted a supplemental analysis of the situation as at year-end 2012. This supplemental analysis confirmed the previous results and conclusions. A cleaned version of the Cushman & Wakefield report of 14 December 2012 is hereby submitted as **Exhibit 13**.
- 2.17 On 16 January 2013, it became clear that the form of public-private partnership being investigated, in which the three largest Dutch banks would be involved, was barred by a negative opinion by the European Commission, because two of the three banks were under acquisition bans imposed by the Commission as part of conditions for state aid previously received by those banks.¹⁷ It was therefore clear that another comprehensive, permanent solution had to be found quickly. Reports in the media frequently pointed out the need for a comprehensive solution that should be communicated no later than 14 February 2013, the date announced by SNS REAAL on which it would present its preliminary annual figures. This was reiterated in an SNS REAAL press release of 28 January 2013 in which it highlighted the efforts SNS REAAL was making to find a solution.¹⁸ If there was no solution in hand on 14 February 2013, the market and the clients of SNS Bank could be expected to respond very negatively. It should also be noted that the negative reports in the media led to a highly volatile share price of SNS REAAL, with a declining trend, and a steady and alarming net outflow of savings deposits at SNS Bank and its subsidiaries.
- 2.18 On 18 January 2013, DNB announced the results of the SREP 2012 to SNS Bank in the form of a proposed decision under Article 3:111a Wft (a 'SREP decision') (**Exhibit 14**). In this proposed decision, DNB pointed out an observed capital deficit of at least €1.9 billion, and stated its intention to impose a measure on SNS Bank

¹⁷ <http://nos.nl/artikel/462334-brussel-tegen-steun-aan-sns.html>, 16 January 2013.

¹⁸ <http://www.snsreaal.nl/pers/persbericht-1/market-update-sns-reaal-2.html>, 28 January 2013.

entailing that it must have supplemented its core capital by at least €1.9 billion no later than 6 pm on 31 January 2013, or else by that same date and time present a final solution that in the opinion of DNB offered a sufficient degree of certainty of success and which would de facto lead to remedying the identified capital deficit in the short term. DNB also indicated that should SNS Bank prove incapable of reinforcing its capital position in a timely and adequate manner, DNB would no longer consider it responsible for SNS Bank to carry on the banking business. In that event, continuing to solicit (savings) funds would be irresponsible due to the related uncertainties regarding whether the bank would ever be able to repay them. DNB added that it would exercise its powers; in other words, the situation would not be tolerated and DNB would intervene. These powers include requesting the emergency regulations under Article 3:160 et seq. Wft (a suspension of payments scheme specific to banks) and withdrawal of the banking licence. This would, in any event, mean that SNS Bank would be unable to continue its business and would therefore have to go into liquidation (cessation of the activities followed by phase-out/sale).

- 2.19 On 24 January 2013, DNB then informed the Minister of the current situation at the SNS REAAL group, which DNB describes in its letter as very fragile and worrisome (**Exhibit 15**). DNB also informed the Minister of the proposed SREP decision that it sent to SNS Bank on 18 January 2013, noting that if the definitive SREP decision includes the same measure as the proposed decision and SNS Bank is unable to comply within the given term, DNB will consider it irresponsible to continue to allow SNS Bank to operate its banking business. It added that absent a convincing and definitive solution it also seemed impossible to make public the preliminary annual figures on a continuity basis on 14 February 2013, and that postponement of the publication of the annual figures without an accompanying announcement of a total solution would only further undermine confidence in SNS REAAL. From the perspective of financial stability, DNB did not consider this a viable option, referring in part to all the media attention to SNS REAAL's vulnerable position and the resulting cash outflow. DNB indicated that between the media reports on 16 January concerning the European Commission's position and the date the letter was written (24 January 2013), some €1.4 billion in savings had been withdrawn. DNB also pointed out that it could not allow REAAL and SNS Bank to expand their lending to SNS REAAL to enable it to repay the external financing that would fall due at the beginning of March. Failing other financing options, DNB expected that SNS REAAL would be unable to pay its debts. DNB pointed out that if the Minister did not proceed to nationalise, DNB would no longer allow SNS Bank to carry on the banking business. Given its supervisory responsibility, DNB would be forced to proceed to request the emergency regulations for SNS Bank. This would, in effect, mean the bankruptcy of SNS Bank and the triggering of the deposit guarantee scheme, with all the consequences that entails.

- 2.20 By letter of 27 January 2013, DNB reported the results of the SREP 2012 to SNS Bank in the form of a definitive decision (**Exhibit 16**). In that decision, DNB observes a capital shortage of at least €1.84 billion (excluding the capitalisation of the real estate management organisation), and notes that despite intensive consultation between all parties involved, a solution for this capital shortage remains elusive. DNB establishes in its letter that, as far as DNB understands, SNS Bank has expressed the position that (i) there are no other potential private sector solutions available for the severely deficient capital position of SNS Bank beyond the aforementioned option of a private equity party, and (ii) in a private sector solution, every party will separate Property Finance from the other business units of the SNS REAAL group, and a solution that does not involve doing so is not realistic. SNS Bank's perspective did not lead to any change in the intended decision, at least not in material terms, and as a result DNB imposed a measure on SNS Bank entailing that by 6 pm on 31 January 2013, the bank had to present a final solution that, in the opinion of DNB, would offer a sufficient degree of assurance of success, at a minimum requiring that all parties involved demonstrably commit to the solution presented, and which would in the short term actually lead to the coverage of the specified capital shortage. Partly in view of the worrisome circumstances of SNS Bank and the rapidly growing public unrest surrounding SNS REAAL and SNS Bank, in the opinion of DNB the stability of the financial system would be severely threatened if a definitive solution could not be presented within the set term. A solution that did not offer absolute certainty on whether it could actually be implemented would not sufficiently restore confidence in SNS REAAL and SNS Bank, DNB indicated.
- 2.21 Then, on 31 January 2013, DNB, after once again consulting SNS REAAL and SNS Bank, observed after consideration that SNS Bank had not complied with the measure imposed. On 1 February (shortly after midnight), DNB then advised the Minister to exercise his powers under part 6 of the Wft as quickly as possible, because there was a situation in which the stability of the financial system was in serious and immediate danger, and none of the solutions investigated had proven feasible (**Exhibit 17**). In this communication DNB specifically referred to the severe loss of confidence due to the rapidly growing unrest surrounding SNS Bank and SNS REAAL, as a result of which SNS REAAL's ratings declined further, and since 16 January 2013 there had been a significant net cash outflow of some €2.5 billion. The increasing loss of confidence regarding a systemically relevant institution in DNB's view led to an extremely risky situation, all the more so because of potential contagion effects on other Dutch financial institutions. Further, DNB indicated that if the Minister did not proceed to expropriation, then it, based on its supervisory responsibility, would be forced to proceed to requesting the emergency regulations, which would mean application of the deposit guarantee scheme. DNB pointed out that due to the systemic relevance of SNS Bank in particular, and to some degree

also that of SNS REAAL, such a scenario would inherently present unacceptable risks to the stability of the Dutch financial sector and the financial institutions participating in it.

- 2.22 The solutions investigated by DNB and the Ministry of Finance in which private parties and the State of the Netherlands would stabilise the situation of SNS REAAL proved to be unfeasible, partly in view of the unacceptably high financial consequences for the State of the Netherlands. Due to the severe problems SNS REAAL and SNS Bank faced, their inability to obtain financing through the financial markets or otherwise, and the size of the expected losses on the real estate portfolio, there was, partly in view of the financial consequences for the State of the Netherlands, no reasonable alternative other than using the special intervention powers under Part 6 of the Wft to stave off the threat to the stability of the financial system. These special intervention powers had been introduced pursuant to the Act on Special Measures concerning Financial Institutions (the **Intervention Act**)¹⁹.

D. The Decree and the appeal proceedings

- 2.23 On 1 February 2013, the Minister issued the Decree which, pursuant to Article 4 of the Decree, went into effect on 8:30 AM on that date. A large number of stakeholders lodged appeals against the Decree with the Division. The appeal proceedings addressed the question of whether the Minister reasonably (i) could have ruled that on 1 February 2013 the stability of the financial system was in serious and immediate danger; and (ii) could proceed to expropriate the securities issued by and capital components of SNS REAAL and SNS Bank as specified in the challenged decree and the immediate relief provided in it. The appeal was examined by the Division on 15 February 2013 in a public hearing. The Division rendered its judgment on 25 February 2013.
- 2.24 In the Judgment, the Division declared the appeals largely unfounded and upheld the Decree, avoiding the Decree only where it served to expropriate all obligations and liabilities of SNS REAAL or SNS Bank as mentioned in Article 1, paragraph 2(b) of the Decree. Briefly put, this means that the Minister lawfully expropriated the capital components and securities, but not the related obligations or liabilities (read: claims for damages). The Division held that the Minister was entitled to take the position that the stability of the financial system was in serious and immediate danger because of the situation in which SNS REAAL and SNS Bank found themselves. Consequently, the Minister was authorised to decide to decree expropriation.

¹⁹ Bulletin of Acts and Decrees 2012, 241.

- 2.25 The Division based its decision on the following:
- (i) The Minister was entitled to take the position that SNS Bank is a systemically relevant institution.²⁰
 - (ii) The Division sees no grounds for the opinion that the Minister had any reason to question the accuracy of the evaluation by C&W.²¹
 - (iii) In his decision-making, the Minister also had to assume that if SNS Bank did not supplement its capital in a timely manner, DNB would have no choice but to request the emergency regulations, which would result in the bank's bankruptcy.²²
 - (iv) The Minister rightly took the position that at the time the Decree was issued, the problems at SNS REAAL and SNS Bank were of such nature as to put the stability of the financial system in serious and immediate danger.²³
 - (v) The Minister was entitled to take the position that application of the power laid down in Article 6:2, paragraph 1, Wft, was necessary to stave off the present threat to the stability of the financial system.²⁴
- 2.26 The European Commission shares the vision of the Minister and the Division that the intervention and the recapitalisation of the SNS REAAL group was necessary to protect the stability of the Dutch financial system. In its 22 February 2013 press release, the European Commission indicated that it had concluded that the recapitalisation of SNS REAAL was necessary to protect the stability of the Dutch financial system, and that this intervention was in line with the Commission's guidelines for state aid to banks during the crisis. It considered the measures necessary in order to help SNS REAAL and its subsidiaries meet the minimum capital requirements, and further considered it appropriate that the shareholders and holders of hybrid capital share a substantial part of the burden in the intervention of the Dutch State (see press release of 22 February 2013).²⁵
- 2.27 Incidentally, it must be stressed that the Minister did not make the decision to issue the Decree lightly. The Minister arrived at the decision to proceed to expropriation of the capital components and securities identified in the Decree as *ultimum remedium*. Of course, in issuing the Decree, the Minister was aware that the exercise of his authority would have major consequences for the various stakeholders, and that this power must be used with great restraint and only in exceptional circumstances.²⁶ The Minister first ascertained that there were reasonably no suitable

²⁰ Finding 16 of the Judgment, exhibit 2.

²¹ Finding 17.3 of the Judgment, exhibit 2.

²² Findings 17.4 and 17.5 of the Judgment, exhibit 2.

²³ Findings 17.1 and 17.2 of the Judgment, exhibit 2.

²⁴ Finding 18 of the Judgment, exhibit 2.

²⁵ http://europa.eu/rapid/press-release_IP-13-150_nl.htm, 22 February 2013.

²⁶ *Parliamentary Documents II*, 2011-2012, 33 059, no. 2, p. 31.

or appropriate alternatives for addressing the acute danger to the stability of the Dutch financial system. The Division also endorsed this in its Judgment.

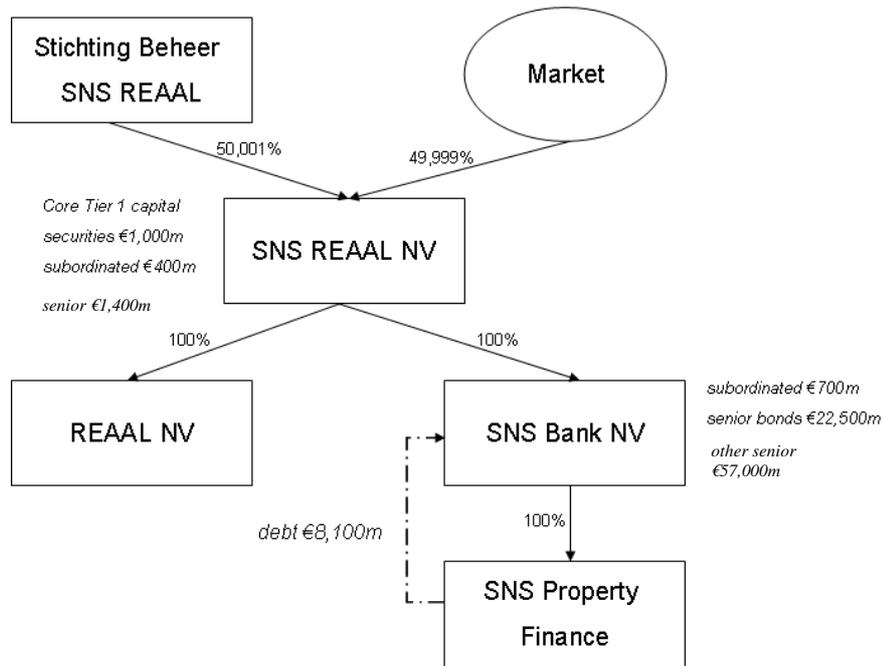
- 2.28 Further, the expropriation entails substantial burdens on the public funds:
- for the purposes of the stabilisation of SNS Bank, the State is injecting €3.7 billion into the group, consisting of (i) €2.2 billion in new capital injections, (ii) €0.8 billion in write-off of previous state aid and (iii) €0.7 billion for isolating the real estate portfolio.
 - The State is providing €1.1 billion in risk-bearing loans.
 - The State is issuing €5 billion in guarantees.
 - In addition to all this, the State carries the risk of the payment of any compensation that may be awarded by the Enterprise Division.
- 2.29 Moreover, the expropriation comes at the cost of the EMU balance. The fact that the Minister intends to pass a portion (€1 billion) of the expenses referred to above on to the banking sector in the form of a levy (to which SNS Bank must also contribute) does not change this. Of course, any expense from the national budget must be covered; by whom (whether the banks or other taxpayers) is not relevant.

3. NO SOLUTION FOR FINANCIAL PROBLEMS

- 3.1 The future prospects of SNS REAAL and SNS Bank (if the expropriation had not taken place) are relevant to the determination of the value of the expropriated securities and assets. As explained in Chapter 2 and discussed in more detail in the following, SNS REAAL and SNS Bank found themselves in major financial difficulties. From the beginning of December 2011, all relevant parties made various attempts at finding a permanent solution. This chapter discusses the solutions investigated, partly by way of substantiation of the aforementioned future prospects. The fact that a solution ultimately proved to be impossible means that the financial problems could not be remedied and, therefore, that SNS REAAL and SNS Bank had no future prospects.

A. Sale of SNS Bank, REAAL or both

3.2 A sale of SNS Bank, REAAL or both would not have allowed SNS REAAL to overcome the financial problems. Broadly, the situation was as follows:



3.3 A sale of REAAL could not solve SNS Bank's problems. SNS REAAL holds all shares in REAAL. Morgan Stanley estimated the sales revenue from REAAL to range between €1.250 and €1.500 billion.²⁷ SNS REAAL had debts of its own (as of 31 September 2012) of approximately €2.8 billion (€400 million in subordinated debt, €1 billion in Core Tier 1 capital securities from the State and Stichting Beheer SNS REAAL, plus €1.4 billion in senior debt). Above and beyond its own debt, there are the debts of SNS Bank and those of Property Finance, because by means of 403-statements, SNS REAAL made itself jointly and severally liable for the debts resulting from legal acts of SNS Bank and Property Finance. Against all this, the sale of REAAL would be a drop in the ocean, and not even enough to redeem SNS REAAL's own debts, let alone contribute in any way to the real problem, the debts of SNS Bank. The sale of REAAL would not generate sufficient proceeds to adequately capitalise the remaining enterprise. Likewise, it would not be possible to buy back the Core Tier 1 capital securities from the State of the Netherlands, as had

²⁷ Exhibit 18, pages 25 and 27.

been agreed with the European Commission in the context of the approval of the state aid provided in 2008. The sale of REAAL would not have been able to prevent the bankruptcy of SNS REAAL and SNS Bank.

- 3.4 Due to the problems of Property Finance, a sale of SNS Bank without the involvement of the State of the Netherlands, for example in the form of a guarantee on the real estate portfolio, proved impossible. A sale of SNS Bank or Property Finance would not solve the problem. The problem is and remains the partial non-recoverability of SNS Bank's outstanding loan to Property Finance. A sale of SNS Bank would only be possible if the risks on the Property Finance portfolio were addressed. As long as the partially non-recoverable loan to Property Finance remains, SNS Bank has a negative value.
- 3.5 Likewise, reinforcement of the capital by means of a share issue would not have been feasible. An issue would have to have raised several times the total market value of SNS REAAL. This meant that a rights issue to existing shareholders was equally unrealistic, even disregarding the fact that the largest shareholder, Stichting Beheer SNS REAAL, would not have been able to contribute any significant amount. Therefore, new investors had to be found willing to invest, but no such investors were found. Additionally, an issue would have resulted in an overall dilution of the existing shares, while any issue would have been subject to the approval of the existing shareholders. It is unlikely that they would have approved a rights issue with such a consequence.

B. Transfer of assets/liabilities and/or shares

- 3.6 Under Part 3.5.4A of the Wft, DNB may transfer assets or liabilities of a bank or insurer, or the shares issued by a bank or insurer, to a third party. Due to the problems with Property Finance, there were no private parties to be found who would have been interested in a takeover of the assets/liabilities of or the shares in SNS Bank without the (financial) involvement of the State. A transfer of assets/liabilities of or shares in SNS Bank would also have inevitably led to the bankruptcy of SNS REAAL. Even disregarding the fact that a takeover of SNS Bank on its own would not have been enough to supplement the capital deficit identified by DNB. Without supplementing this deficit, even after a takeover of SNS Bank it still would have been irresponsible to allow the enterprise taken over to carry on the banking business.
- 3.7 It is furthermore relevant that the powers under Part 3.5.4A may only be exercised in regard to banks and insurers, and only if they are in irreversible trouble. Part 3.5.4A does not pertain to the holding companies of those banks or insurers, so its provisions could not be applied to also remove the danger relating to a bankruptcy of

the parent company, SNS REAAL. The reason for this is that Part 3.5.4A is only intended to, where possible, facilitate the smoothest possible settlement of a bank or insurer in trouble, by transferring that bank or insurer (or elements thereof) to an interested third party. The rationale behind this is to guarantee the continuity of the services to the customers of the bank or insurer in question to the maximum possible extent. This is not, however, an absolute goal. After all, an important premise of the Intervention Act is that it must be possible for financial institutions to fail;²⁸ there is no explicit or implicit government guarantee that a financial institution will always be 'rescued'. In the context of Part 3.5.4A, this means that the emergency regulations will have to be requested whenever no buyer can be found for an ailing bank or insurer, or where the court does not approve the transfer (for example, because it does not consider the takeover price offered to be reasonable). In such cases, the affected deposit holders of a bank can seek recourse in the deposit guarantee scheme, which is intended as a safety net for just this type of situation. After the emergency regulations are declared, liquidation awaits the bank.

C. Public-private partnership

- 3.8 Reinforcement of the capital by private parties might have been possible, contingent on the risks of the real estate portfolio being covered by the State of the Netherlands. An important factor was, however, that a contribution to a public-private solution would have had a significant impact on the public funds. Morgan Stanley calculated the different scenarios for public-private solutions. The firm's 28 January 2013 analysis is hereby submitted as **Exhibit 18**. The cabinet adheres to the premise that the need for an appeal to the public funds must be avoided wherever possible, and the losses must be placed with the current financiers to the maximum possible extent.
- 3.9 In the first public-private solution, the State and the three largest Dutch banks would jointly stabilize the SNS REAAL group. In this solution, Property Finance's real estate portfolio would be separated from SNS Bank. The State and the three largest Dutch banks would jointly recapitalise the separated real estate management organisation and SNS REAAL, and the State would guarantee the financing of the property management organisation. This scenario was complicated by the fact that two of the three largest banks were subject to 'acquisition bans' and that the European Commission considered these would be violated by participation. Additionally, the Commission pointed out the negative impact on competition. As a result, two of the three major banks could not participate in a public-private solution. As a result of which this solution was not realistic.

²⁸ *Parliamentary Documents II*, 2011-2012, 33 059, no. 3, p. 6.

- 3.10 The second public-private solution was the aforementioned non-binding proposal by CVC. In its final version, the CVC proposal entailed a capital injection of approximately €900 million into SNS Bank by CVC and its consortium. Under the proposal, the State and CVC would guarantee a new SNS REAAL share issue, as a result of which the shares of the existing shareholders would be diluted by 98%, and further that the State (i) would guarantee the losses on the Property Finance real estate portfolio above a certain level, and, optionally, (ii) would contribute ASR Nederland NV to SNS REAAL. Further, the three largest Dutch banks would have to extend a risk-bearing loan of €550 million to the consortium, which could only be redeemed from the revenues of the real estate portfolio. In exchange for all this, the State would only receive a minority interest in SNS REAAL.²⁹
- 3.11 With a demonstrated capital requirement of €3.7 billion in total of SNS REAAL, SNS Bank and the real estate management organisation that was to be hived off, the consortium pledged approximately €900 million in the last version of the proposal received. Additionally, the consortium took into account a risk-bearing loan of the three largest Dutch banks in the amount of €550 million, but these banks had not committed to this.³⁰ Moreover, in this form the construction could not count on European Commission approval.³¹ If only for this reason, there was insufficient capital available in the consortium's proposal to capitalise SNS Bank and SNS REAAL to the required level and hive off the real estate portfolio. There were also other major risks and loose ends. In order to reaching the required capitalisation, tax benefits were taken into account that were by no means certain, and redemption of subordinated loans was assumed, which was equally unsure. In all cases where any of these risks materialised, the State would have to cover the resulting shortfalls. Likewise, the participation of Stichting Beheer SNS REAAL in the rights issue was not a given. And the proposal also required far-reaching guarantees and indemnities from the State. In short, in this variant the State would have to make the largest capital contribution by far, as well as carry the most significant risks. The distribution of the ownership rights, approximately 60% for the consortium as opposed to 25-35% for the State, in no way reflected the relative effort and spread of risk.³² The variant failed on the issue of the capitalisation, feasibility of implementation and risk spreading. As such, it offered no real solution for SNS REAAL's capital deficit.
- 3.12 The commitments of CVC and its co-investors in the consortium were subject to a great many conditions. It was entirely uncertain whether the subordinated bondholders would agree to the voluntary write-down of 75% of their claim. Also

²⁹ See Exhibit 18.

³⁰ See Exhibit 18.

³¹ <http://nos.nl/artikel/462334-brussel-tegen-steun-aan-sns.html>, 16 January 2013.

³² See Exhibit 18.

uncertain was whether the three major banks would indeed be willing to furnish the anticipated subordinated loan of €550 million. A further uncertainty was whether DNB would in fact approve the consortium's takeover of SNS REAAL, or whether it would set additional conditions that the consortium might not be willing to meet. The proposed involvement of the three major banks, furthermore, hinged on an interpretation of the acquisition bans that the European Commission had rejected before. Finally, there was the execution risk: the closing of the transaction was slated for June 2013, and so all these uncertainties could be expected to continue for the duration of the intervening period, four months in total.³³

- 3.13 DNB concluded that the proposal did not provide an adequate degree of certainty that the existing capital deficit would be supplemented within the short term, and communicated this to SNS Bank and SNS REAAL in its 1 February 2013 letter (**Exhibit 19**). This would result in an ongoing period of uncertainty in regard to a systemically relevant institution, and thereby represent a major risk to financial stability. Therefore, the proposal was also unacceptable from a prudential perspective.

4. LEGAL FRAMEWORK

A. Introduction

- 4.1 The Intervention Act created a new toolkit for intervening in the financial sector if it met with serious difficulties. This toolkit, on the one hand, comprises an expansion of DNB's powers to intervene in specific problem institutions, and on the other, confers new powers to the Minister in the event of serious and immediate danger to the stability of the financial system as a whole. The Intervention Act is the reflection of the legislature's view that (i) a bank's risk-bearing capital providers must contribute to the consequences when those risks materialise, and (ii) these capital providers may not profit from an intervention by the Dutch State. An element of the Intervention Act is the Minister's power to expropriate capital components of and securities issued by a financial institution. This power is set out in Article 6:2 Wft. Under Article 14 of the Constitution, this expropriation must be offset by compensation. The entitlement to, and manner of compensation for expropriation under Article 6:2 Wft, is structured in Articles 6:8 through 6:13 Wft.
- 4.2 The judicial review of expropriation under Part 6 of the Wft, as it took place with SNS REAAL, is performed in two procedures. The Division reviews whether the Minister (i) reasonably could have determined that the stability of the financial system was put in serious and immediate danger by the situation SNS Bank was in, and (ii) with a view to the stability of the financial system, was entitled to decide to

³³ See Exhibit 18.

expropriate the capital components and securities identified in the Decree. Next, at the request of the Minister, the Enterprise Chamber establishes the compensation to which the parties whose capital components and securities were expropriated are entitled. Accordingly, the present proceedings expressly do not deal with the question of whether the Minister was entitled to decide to expropriate (that decision became irrevocable with the Division's Judgment), but solely with the amount of compensation to which the expropriated parties are entitled.

B. Standard

(a) Compensation; actual value

- 4.3 Under Article 14 of the Constitution, expropriation is only allowed in the general interest and with compensation assured in advance, all according to rules set by or pursuant to the law. Article 6:8, paragraph 1, Wft, provides for the right to compensation for expropriation pursuant to Article 6:2 Wft:

“The title holder in regard to a capital component or security expropriated pursuant to Article 6:2 or a right to securities to be newly issued lost under application of the sixth paragraph of that Article is entitled to compensation. The compensation constitutes full reimbursement for the damage that he suffers directly and necessarily through the loss of his capital component or security or lost right.”

- 4.4 Compensation must therefore be paid that constitutes full reimbursement for the damage that is a direct and necessary consequence of the loss of what has been expropriated.³⁴ For capital components and securities expropriated pursuant to Article 6:2 Wft, this will be solely the value of the expropriated good.³⁵ This might be different in extremely exceptional circumstances, but no such circumstances have been demonstrated to the Minister in the present case, nor is the Minister aware of any such circumstances.³⁶

- 4.5 Pursuant to Article 6:8, paragraph 2, Wft, the expropriated party's loss must be compensated at the actual value it represented to the expropriated party at the time of expropriation. Concerning the determination of said actual value, Article 6:9, paragraph 1, Wft states:

The determination of the actual value of an expropriated capital component or security, or a right to securities to be newly issued lost under application of Article 6:2, sixth paragraph, is based on the future prospects of the financial enterprise involved to be expected in the situation in which no expropriation had taken place, and the price that,

³⁴ Parliamentary Documents II, 2011/12, 33059, no. 3, p. 73.

³⁵ Parliamentary Documents II, 2011/12, 33059, no. 3, p. 73.

³⁶ Parliamentary Documents II, 2011/12, 33059, no. 3, p. 73.

given such future prospects, would have materialised at the time of the expropriation in a presumed free open-market sale between the expropriated party as reasonable vendor and the expropriating party as reasonable buyer.

4.6 Therefore, in determining the actual value, a number of presumptions are applied. These are that:

- (i) the expropriated party and expropriating party are fully aware of, and take into account, the future prospects of the financial enterprise as they would have been if the financial enterprise had not been subject to expropriation;
 - (ii) there is a free trade;
 - (iii) this trade takes place between a reasonable seller and a reasonable buyer, both of which are willing to make the trade.
- (b) Future prospects

4.7 The criterion of consideration of the future prospects is to ensure that neither shareholders nor creditors are placed in a better position as a result of the expropriation than the situation they would have been in if the expropriation had not taken place.³⁷ The compensation for expropriation may not be higher or lower than is warranted based on the future prospects of the financial enterprise to be expected de facto in the absence of expropriation.

4.8 For this purpose the knowledge of the parties is objectified, in the sense that both are considered to have perfect knowledge of the future prospects of the financial enterprise in question to be expected in the absence of expropriation. The legislature explicitly provided for the option that, taking into consideration the future prospects of the financial enterprise to be expected, this may entail that the value of the expropriated instruments is naught.³⁸

- (c) Reasonable seller and buyer

4.9 The premise must be a “reasonable buyer and seller”. This terminology is derived from the Expropriation Act. The instrument of expropriation must be factored out in order to arrive at the assumption of this reasonable buyer and seller. Additionally, both buyer and seller must take into account all circumstances that have an influence on the pricing, including the extraordinary circumstances that characterise the expropriated good.³⁹

³⁷ *Parliamentary Documents II*, 2011/12, 33059, no. 3, p. 73, with reference to *Parliamentary Documents II*, 2011/12, 33059, no. 3, p. 55.

³⁸ *Parliamentary Documents II*, 2011/12, 33059, no. 7, p. 34.

³⁹ *Parliamentary Documents II* 1979/80, 15978, no. 3, p. 9.

4.10 The reasonable buyer and seller are therefore assumed to be:

(i) a reasonable buyer who does not threaten with the coercive measure of expropriation, but is willing to pay a price that a reasonable buyer would be willing to pay under the given circumstances, partly in consideration of his interest in the good to be acquired or already acquired;⁴⁰

(ii) a reasonable seller that does not abuse the coercive position of the counter-party, which is to acquire title to none other than his good, but that cooperates with the sale, as soon as he has stipulated a price at which a reasonable owner would be willing to sell under the given circumstances.⁴¹

4.11 The Explanatory Memorandum specifies in more detail the method of valuation of securities by a reasonable buyer. For the application of Article 6:9, paragraph 1, Wft, a reasonable buyer is assumed to determine the price he is willing to pay based on the net asset value of the securities in question, rather than on the listed price of the securities. The legislature did consider alignment with the listed price but decided against doing so for a number of reasons:

“It has been considered to stipulate in the legislative proposal that the price referred to in the first paragraph [this refers to the first paragraph of 6:9] should be established based on the most recent listed price or on a weighted average listed price over a given reference period (such as the week prior to the expropriation). This was abandoned for a number of reasons. In the first place, because the listed price is not necessarily an adequate reflection of the price that a reasonable buyer would be willing to pay for the enterprise. A reasonable buyer would look primarily at the net asset value of the share. For an enterprise in financial difficulties, that buyer would, moreover, ask what additional investments would be necessary to make the enterprise financially sound again, and take this into account in the price he would be willing to pay per share. The listed price might also paint too favourable a picture of the fair value of an enterprise, because the full extent of the problems the enterprise faces may not yet be known to the investors. Even apart from all this, there is the fact that investors may be motivated by completely different considerations that may have more to do with the concrete marketability of the share at a given moment than its net asset value.⁴²

⁴⁰ Parliamentary Documents II 1979/80, 15978, no. 3, p. 9.

⁴¹ Parliamentary Documents II 1979/80, 15978, no. 3, p. 9.

⁴² Parliamentary Documents II, 2011/12, 33059, no. 3, p. 74.

(d) Discounting of state aid

- 4.12 Moreover, in determining the actual value of the expropriated good, the state aid already extended to the enterprise must be deducted. This in order to prevent the State from paying for value that was only created as a result of state aid that the State itself previously granted, and the expropriated party from receiving higher compensation than is warranted based on that party's actual damage.⁴³

C. Relationship between 6:8 et seq. Wft and the ECHR

- 4.13 In the proceedings before the Division, a number of appellants invoked an alleged conflict between the Decree and the ECHR, and in particular Article 1 of the First Protocol and the case law developed around it by the European Court of Human Rights. This argumentation also touches on the compensation upon expropriation, and how this relates to the regulation provided in Articles 6:8 and 6:9 Wft.
- 4.14 The European Court of Human Rights' standard for compensation in the event of expropriation is that the compensation must be in reasonable proportion to the value of the property. The case law of the European Court of Human Rights does not prescribe a set standard for the determination of the amount of the compensation, but instead offers room to determine the value with due observance of the circumstances. Aligning with the actual value, including a consideration of the future prospects for SNS REAAL, lies within such room:

Article 1 of the First Protocol of the ECHR does not entail that shareholders being bought out (coercively) would be entitled to a price for their shares that would produce the highest result according to (theoretical) calculations; they are only entitled to a realistic price.⁴⁴

- 4.15 Likewise, the Division considered in its judgment of 25 February 2013 that compensation based on the actual value, including a consideration of the future prospects, meets the criteria of the ECHR. The Division considered:

The European Court of Human Rights requires that the compensation in the event of expropriation must be in reasonable proportion to the value of the property. Article 6:8 of the Wft entitles title holders to compensation in the amount of the actual value of the expropriated securities or capital components. The actual value is the price that would have been reached in the event of a voluntary sale, including, pursuant to Article 6:9 of the Wft, a consideration of the future prospects that the enterprise would have had if the expropriation had not occurred. After all, in the event of a voluntary sale the parties would also take these prospects into account. In the opinion of the

⁴³ Parliamentary Documents II, 2011/12, 33059, no. 3, p. 73.

⁴⁴ Supreme Court, 11 September 1996, NJ 1997, 176, considerations 4.6 and 4.6.1.

*Division, this standard meets the requirements set by the European Court of Human Rights.*⁴⁵

- 4.16 The compensation scheme developed in Article 6:8 et seq. Wft, which provides for reimbursement of the actual value based on future expectations in regard to an enterprise, therefore falls within the broad framework developed by the European Court of Human Rights.

5. EXPROPRIATED SECURITIES AND CAPITAL COMPONENTS

- 5.1 The actual value, in the opinion of the Minister, of the expropriated securities and capital components will be explained in Chapter 6. Prior to that, the expropriated securities and capital components will be explained below in this chapter.

A. Expropriated securities

- 5.2 Pursuant to the Decree, various securities issued by or with the cooperation of SNS REAAL and SNS Bank, respectively, have been expropriated in the name of the State of the Netherlands. All of these securities are subordinated to existing and future claims of preferred and ordinary creditors of SNS REAAL and SNS Bank, respectively.
- 5.3 The first category of securities that were expropriated pursuant to the Decree concerns all issued shares in the capital of SNS REAAL, which includes:
- (i) all two hundred and eighty-seven million six hundred nineteen thousand eight hundred and sixty-seven (287,619,867) issued shares of the class Ordinary shares in the share capital of SNS REAAL, ISIN code NL0000390706;
 - (ii) all six (6) issued shares of the class shares B in the share capital of SNS REAAL held by Stichting Beheer SNS REAAL;
 - (iii) all other issued shares in the share capital of SNS REAAL.
- 5.4 All ordinary SNS REAAL shares are listed on NYSE Euronext Amsterdam. No preferential voting rights have been attached to the ordinary SNS REAAL shares.⁴⁶ On 28 April 2008, SNS REAAL issued six B shares to Stichting Beheer SNS REAAL. The B shares were issued against a total issue price of €600 million in cash. That amount was used to acquire Zwitterleven. The B shares are not listed and no preferential voting rights have been attached to the B shares. The B shares give no entitlement to existing or future profit reserves, and the dividend yield on B shares is always lower than the dividend yield on ordinary shares.⁴⁷

⁴⁵ Finding 13.5 of the Judgment, exhibit 2.

⁴⁶ Exhibit 7, page 134.

⁴⁷ Exhibit 7, page 134.

- 5.5 All issued shares in the capital of SNS Bank that are held by parties other than SNS REAAL or its group companies were also expropriated pursuant to the Decree.⁴⁸
- 5.6 The second category of securities that were expropriated pursuant to the Decree concerns all four million three hundred and fifty thousand (4,350,000) non-voting Stichting Beheer SNS REAAL Core Tier 1 capital securities issued by SNS REAAL to Stichting Beheer SNS REAAL under and in accordance with a Placement Agreement, a Deed of Issue and Placement, an Irrevocable Undertaking and Terms and Conditions of the Stichting Securities (all of 11 December 2008 and collectively submitted as **Exhibit 20**). In accordance with the Terms and Conditions of the Stichting Beheer SNS REAAL Core Tier 1 capital securities, the claims of the holder of these securities are (i) ranked equally with claims of SNS REAAL shareholders, and (ii) subordinated to all other claims of subordinated, ordinary and preferred creditors of SNS REAAL:

"The Stichting Securities constitute direct, unsecured, subordinated liabilities of the Issuer and rank pari passu without any preference among themselves. The Stichting Securities will rank pari passu with the Ordinary Shares and the B Shares of the Issuer (except that the Stichting Securities do not carry voting rights and do not qualify as formal share capital of the Issuer) and will be subordinated to the Senior Claims [...]"⁴⁹

In which "subordinated to the Senior Claims" is understood as:

*"any claims or rights that a Holder has under the Stichting Securities against the Issuer (the "**Junior Claims**") are subordinated in right of payment (including any prepayment, repayment, distribution, set-off or recovery, whether in cash or in kind) in respect of all claims that any creditor of the Issuer has at any time against the Issuer."⁵⁰*

- 5.7 The third category of securities that were expropriated pursuant to the Decree concerns all debt instruments issued by or with the cooperation of SNS REAAL or SNS Bank that contain subordination provisions or that in some other way procure that the claims of the holders of these instruments can only be paid if and after the ordinary creditors of the issuing institution in question have been paid.
- 5.8 Included in this category are, inter alia, the subordinated bonds issued by SNS REAAL of the following series:

⁴⁸ All issued shares in the capital of SNS Bank are held by SNS REAAL; see Exhibit 5. As a result, there are no issued shares in the capital of SNS Bank that are held by parties other than SNS REAAL or its group companies.

⁴⁹ Condition 3.1 of the Terms and Conditions of the Stichting Securities, page 3, Exhibit 20.

⁵⁰ Condition 3.1 of the Terms and Conditions of the Stichting Securities, page 3, Exhibit 20.

- (i) €350 million 6.258% Fixed/Floating Rate Hybrid Capital Securities issued on 17 July 2007 under SNS REAAL's €2,000,000,000 Debt Issuance Programme, ISIN code X50310904155. Pursuant to the Final Terms of 13 July 2007 read in conjunction with the Terms and Conditions of the Capital Securities (collectively submitted as **Exhibit 21**), the claims of the holders of these securities are subordinated to the claims of SNS REAAL's preferred and ordinary creditors:

*"The Securities constitute direct, unsecured, subordinated securities of the Issuer and rank pari passu without any preference among themselves. The rights and claims of the Holders under the Securities are subordinated to the claims of Senior Creditors of the Issuer, present and future."*⁵¹

In which "Senior Creditors" is understood as:

*"present and future creditors of the Issuer (a) who are unsubordinated creditors of the Issuer, or (b) whose claims are, or are expressed to be, subordinated (whether only in the event of the winding up (faillissement of vereffening na ontbinding) of the Issuer or otherwise) to the claims of unsubordinated creditors of the Issuer other than those whose claims are, or are expressed to rank pari passu with, or junior to, the claims of the Holders"*⁵²

Condition 3 of the Terms and Conditions of the Capital Securities entails that in the event of a winding-up of SNS REAAL, the claims of the holders of these securities are paid before the SNS REAAL shareholders but after the Senior Creditors:

*"The Securities will rank on a winding-up (faillissement of vereffening na ontbinding) of the Issuer in priority to distributions on all classes of share capital of the Issuer and will rank pari passu with each other and among themselves, but will be subordinated in right of payment to the claims of Senior Creditors of the Issuer, present and future."*⁵³

- (ii) USD 100 million 8.45% Fixed Rate Subordinated Notes due August 2018, issued on 20 August 2008 under SNS REAAL's €2,000,000,000 Debt Issuance Programme, ISIN code XS0382843802. Pursuant to the Final Terms of 18 August 2008 read in conjunction with the Terms and Conditions of the Medium Term Notes (collectively submitted as **Exhibit**

⁵¹ Condition 2(a) of the Terms and Conditions of the Capital Securities, page 122, Exhibit 21.

⁵² Condition 20 of the Terms and Conditions of the Capital Securities, page 145, Exhibit 21.

⁵³ Condition 3 of the Terms and Conditions of the Capital Securities, page 123, Exhibit 21.

22), the claims of the holders of these securities are subordinated to the claims of SNS REAAL's preferred and ordinary creditors:

"The Subordinated Notes and the relative Receipts and Coupons constitute unsecured and subordinated obligations of the Issuer and rank pari passu without any preference among themselves and with all other present and future unsecured and subordinated obligations of the Issuer, save for those preferred by mandatory provisions of law."⁵⁴

Condition 3 of the Terms and Conditions of the Medium Term Notes entails that in the event that SNS REAAL is in a situation of insolvency, the claims of the holders of these securities are paid only after all unsubordinated ordinary creditors of SNS REAAL have been paid:

"The claims of the holders of the Subordinated Notes of this Series and the relative Receipts and Coupons (the "Subordinated Holders") against the Issuer are (i) in the event of the liquidation or bankruptcy of the Issuer or (ii) in the event that a competent court has declared that the Issuer is in a situation which requires emergency regulations (noodregeling) in the interests of all creditors, as referred to in Part 3.5.5. of the Wft and for so long as such situation is in force (such situation being hereinafter referred to as a Moratorium), subordinated to (a) the claims of depositors, (b) unsubordinated claims with respect to the repayment of borrowed money and (c) other unsubordinated claims. By virtue of such subordination, payments to a Subordinated Holder will, in the event of liquidation or bankruptcy of the Issuer or in the event of a Moratorium with respect to the Issuer, only be made after, and any set-off by a Subordinated Holder shall be excluded until, all obligations of the Issuer resulting from deposits, unsubordinated claims with respect to the repayment of borrowed money and other unsubordinated claims have been satisfied."⁵⁵

5.9 Included in the third category of expropriated securities are also the subordinated bonds issued by SNS Bank of the following series:

- (i) €320 million 11.25% Resettable Tier 1 Notes issued on 27 November 2009 under the Debt Issuance Programme of SNS Bank/SNS REAAL, ISIN code X50468954523. Pursuant to the Final Terms of 25 November 2009 read in conjunction with the Terms and Conditions of the Tier 1 Notes (collectively

⁵⁴ Condition 3 of the Terms and Conditions of the Medium Term Notes, page 83, Exhibit 22.

⁵⁵ Condition 3 of the Terms and Conditions of the Medium Term Notes, pages 83-84, Exhibit 22.

submitted as **Exhibit 23**), the claims of the holders of these securities are subordinated to the claims of SNS Bank's preferred and ordinary creditors:

*"The Tier 1 Notes constitute direct, unsecured, subordinated obligations of the Issuer and rank pari passu without any preference among themselves. The rights and claims of the Holders under the Tier 1 Notes are subordinated to the claims of Senior Creditors of the Issuer, present and future."*⁵⁶

In which "Senior Creditors" is understood as:

*"present and future creditors of the Issuer (a) who are unsubordinated creditors of the Issuer, or (b) whose claims are, or are expressed to be, subordinated (whether only in the event of the Winding-Up of the Issuer or otherwise), or (c) who are subordinated creditors of the Issuer other than those whose claims are, or are expressed to rank, pari passu, with, or junior to, the claims of the Holders."*⁵⁷

Condition 3 of the Terms and Conditions of the Tier 1 Notes entails that in the event of a winding-up of SNS Bank, the claims of the holders of these securities are paid before the shareholders of SNS Bank but after all preferred and ordinary creditors of SNS Bank have been paid:

*"The Tier 1 Notes will rank on a Winding-Up of the Issuer in priority to the distributions on all classes of share capital of the Issuer and will rank pari passu with each other and among themselves, but will be subordinated in right of payment to the claims of Senior Creditors of the Issuer, present and future."*⁵⁸

In which "Winding-up" is understood as:

*"a bankruptcy or winding up of the Issuer (faillissement of vereffening)"*⁵⁹

- (ii) €200 million 5.75% Subordinated Fixed changing to Floating Rate Notes issued on 22 July 2003 under de €20,000,000,000 Debt Issuance Programme, ISIN code XS0172565482. Pursuant to the Pricing Supplement of 22 July 2003 read in conjunction with the Terms and Conditions of the Notes (collectively submitted as **Exhibit 24**), the claims of the holders of

⁵⁶ Condition 2(a) of the Terms and Conditions of the Tier 1 Notes, page 11, Exhibit 23.

⁵⁷ Condition 20 of the Terms and Conditions of the Tier 1 Notes, page 38, Exhibit 23.

⁵⁸ Condition 3 of the Terms and Conditions of the Tier 1 Notes, page 12, Exhibit 23.

⁵⁹ Condition 2(c) of the Terms and Conditions of the Tier 1 Notes, page 12, Exhibit 23.

these securities are subordinated to the claims of SNS Bank's preferred and ordinary creditors:

*"The Subordinated Notes of this Series and the relative Receipts and Coupons constitute unsecured and subordinated obligations of the Issuer and rank pari passu without any preference among themselves and with all other present and future unsecured and subordinated obligations of the Issuer, save for those preferred by mandatory provisions of law."*⁶⁰

Number 13 of the Pricing Supplement entails that in the event that SNS Bank is in a situation of insolvency, the claims of the holders of these securities are paid only after all preferred and ordinary creditors of SNS Bank have been paid:

*"In the event of liquidation or bankruptcy of the Issuer or in the event that a competent court has declared that the Issuer is in a situation which requires special measures ("bijzondere voorziening") in the interest of all creditors, as referred to in Chapter X of the Dutch 1992 Act on the Supervision of the Credit System ("Wet toezicht kredietwezen 1992"), and for so long as such situation is in force (such situation being hereinafter referred to as a **Moratorium**), the claims of the holders of the Subordinated Notes of this Series and the relative Receipts and Coupons (the **Subordinated Holders**) against the Issuer are subordinated to (i) the claims of depositors, (ii) unsubordinated claims with respect to the repayment of borrowed money and (iii) other subordinated debt, including Tier 2 and 3."*⁶¹

- (iii) €500 million 6.25% Subordinated Notes issued on 26 October 2010 under the Debt Issuance Programme of SNS Bank and SNS REAAL, ISIN code XS0552743048. Pursuant to the Final Terms of 22 October 2010 read in conjunction with the Terms and Conditions of the Medium Term Notes (collectively submitted as **Exhibit 25**), the claims of the holders of these securities are subordinated to the claims of SNS Bank's preferred and ordinary creditors:

"The Subordinated Notes and the relative Receipts and Coupons constitute unsecured and subordinated obligations of the Issuer and rank pari passu without any preference among themselves and with all other present and future

⁶⁰ Condition 3 of the Terms and Conditions of the Notes, page 26, Exhibit 24.

⁶¹ Number 13 of the Pricing Supplement, page 2, Exhibit 24.

*unsecured subordinated obligations of the Issuer, save for those preferred by mandatory provisions of law.*⁶²

Condition 3 of the Terms and Conditions of the Medium Term Notes entails that in the event that SNS Bank is in a situation of insolvency, the claims of the holders of these securities are paid only after all preferred and ordinary creditors of SNS Bank have been paid:

*"The claims of the holders of the Subordinated Notes of this Series and the relative Receipts and Coupons (the "Subordinated Holders") against the Issuer are (i) in the event of the liquidation or bankruptcy of the Issuer or (ii) in the event that a competent court has declared that the Issuer is in a situation which requires emergency regulations (noodregeling) in the interests of all creditors, as referred to in Part 3.5.5. of the Wft and for so long as such situation is in force (such situation being hereinafter referred to as a Moratorium), subordinated to (a) the claims of depositors, (b) unsubordinated claims with respect to the repayment of borrowed money and (c) other unsubordinated claims. By virtue of such subordination, payments to a Subordinated Holder will, in the event of liquidation or bankruptcy of the Issuer or in the event of a Moratorium with respect to the Issuer, only be made after, and any set-off by a Subordinated Holder shall be excluded until, all obligations of the Issuer resulting from deposits, unsubordinated claims with respect to the repayment of borrowed money and other unsubordinated claims have been satisfied."*⁶³

- (iv) €200 million 6.625% Subordinated Fixed Rate Notes due 14 May 2018, issued on 14 May 2008 under SNS Bank's €25,000,000,000 Debt Issuance Programme, ISIN code XS0363514893. Pursuant to the Final Terms of 9 May 2008 read in conjunction with the Terms and Conditions of the Medium Term Notes (collectively submitted as **Exhibit 26**), the claims of the holders of these securities are subordinated to the claims of SNS Bank's preferred and ordinary creditors:

*"The Subordinated Notes and the relative Receipts and Coupons constitute unsecured and subordinated obligations of the Issuer and rank pari passu without any preference among themselves and with all other present and future unsecured subordinated obligations of the Issuer, save for those preferred by mandatory provisions of law."*⁶⁴

⁶² Condition 3 of the Terms and Conditions of the Medium Term Notes, page 89, Exhibit 25.

⁶³ Condition 3 of the Terms and Conditions of the Medium Term Notes, page 89, Exhibit 25.

⁶⁴ Condition 3 of the Terms and Conditions of the Medium Term Notes, page 65, Exhibit 26.

Number 13 of the Final Terms entails that in the event that SNS Bank is in a situation of insolvency, the claims of the holders of these securities are paid only after all preferred and ordinary creditors of SNS Bank have been paid:

*"The claims of the holders of the Subordinated Notes of this Series and the relative Receipts and Coupons (the "**Subordinated Holders**") against the Issuer are (i) in the event of the liquidation or bankruptcy of the Issuer or (ii) in the event that a competent court has declared that the Issuer is in a situation which requires emergency regulations (bijzondere voorziening) in the interests of all creditors, as referred to in Part 3.5.5. of the Dutch Financial Supervision Act (Wet op het financieel toezicht), and for so long as such situation is in force (such situation being hereinafter referred to as a "**Moratorium**"), subordinated to (a) the claims of depositors, (b) unsubordinated claims. By virtue of such subordination, payments to a Subordinated Holder will, in the event of liquidation or bankruptcy of the Issuer or in the event of a Moratorium with respect to the Issuer, only be made after, and any set-off by a Subordinated Holder shall be excluded until, all obligations of the Issuer resulting from deposits, unsubordinated claims with respect to the repayment of borrowed money and other unsubordinated claims have been satisfied."⁶⁵*

- (v) €5 million 4% Floating Rate Subordinated Securities 1999 due 2019 issued on 14 May 1999 under SNS Bank's €2,000,000,000 Debt Issuance Programme, ISIN code XS0097515307. Pursuant to the Pricing Supplement of 12 May 1999 read in conjunction with the Terms and Conditions of the Notes (collectively submitted as **Exhibit 27**), the claims of the holders of these securities are subordinated to the claims of SNS Bank's preferred and ordinary creditors, and the claims of the holders of these securities are paid only after all claims of SNS Bank's preferred and ordinary creditors have been paid:

"The Subordinated Notes of this Series and the relative Receipts and Coupons constitute unsecured obligations of the Issuer and rank pari passu without any preference among themselves and with all other present and future unsecured and subordinated obligations of the Issuer, save for those preferred by mandatory provisions of law.

⁶⁵ Number 34 of the Final Terms, page 4, Exhibit 26. This also ensues from Condition 3 of the Terms and Conditions of the Medium Term Notes.

The claims of holders of the Subordinated Notes of this Series and the relative Receipts and Coupons (the "Subordinated Holders") against the Issuer are:

(i) in the event of liquidation or bankruptcy of the Issuer, or

(ii) in the event that a competent court has declared that the Issuer is in a situation which requires special measures ("bijzondere voorziening") in the interest of all creditors, as referred to in Chapter X of the Dutch 1992 Act on the Supervision of the Credit System ("Wet toezicht kredietwezen 1992"), and for so long as such situation is in force (such situation being hereinafter referred to as a "Moratorium"),

Subordinated to (a) the claims of the depositors, (b) unsubordinated claims with respect to the repayment of borrowed money and (c) other unsubordinated claims. By virtue of such subordination, payments to a Subordinated Holder will, in the event of liquidation or bankruptcy of the Issuer or in the event of a Moratorium with respect to the Issuer, only be made after, and any set-off by a Subordinated Holder shall be excluded until, all obligations of the Issuer resulting from deposits, unsubordinated claims with respect to the repayment of borrowed money and other unsubordinated claims have been satisfied.⁶⁶

- 5.10 The last category of securities expropriated pursuant to the Decree concerns all non-listed subordinated bonds, issued by SNS Bank under the name "SNS Participatie Certificaten 3", with a nominal value of €100 each and with an interest rate (currently) of 5.16%, issued for an indefinite period of time, as described in the Prospectus of 1 May 2003. The Terms and Conditions (Chapter 4 of the Prospectus, submitted as **Exhibit 28**) entail that the claims of the holders of these securities are subordinated to the claims of SNS Bank's preferred and ordinary creditors:

"In the event of Bankruptcy or in the event that a competent court or Chamber of Commerce orders dissolution (liquidation) of SNS, all claims of Holders of Certificates against SNS for payment of any amount pursuant to Principal and/or interest, which SNS might owe at any point in time: i) are subordinated to the rights of all other subordinated and/or unsubordinated, existing and future creditors of SNS, ii) ranking pari passu between Holders of Certificates, ii) ranking pari passu with the rights of SNS shareholder(s), and iv) ranking pari passu with the rights of all existing and future creditors of SNS where such rights will have been explicitly determined in writing to rank pari passu, including all future Holders of Certificates, all future creditors with regard to Tier 1 Capital issued to SNS, and creditors of SNS

⁶⁶ Condition 3 of the Terms and Conditions of the Notes, page 23, Exhibit 27.

pursuant to the bond loans issued by SNS on 28 June 2002 and on 23 December 2002, respectively, under the name 'SNS Participatie Certificaat' and 'SNS Participatie Certificaat 2', respectively, with regard to which a prospectus has been compiled dated 13 May 2002 and 11 November 2002, respectively."⁶⁷

B. Expropriated capital components

- 5.11 Pursuant to the Decree, various capital components of SNS REAAL and SNS Bank, respectively, have been expropriated in the name of Stichting Afwikkeling Onderhandse Schulden SNS REAAL. These capital components are subordinated to existing and future claims of preferred and ordinary creditors of SNS REAAL and SNS Bank, respectively.
- 5.12 Expropriated pursuant to the Decree are the payment obligations of SNS REAAL and SNS Bank under a number of loans, such that all of the rights and obligations ensuing from those capital components for SNS REAAL or SNS Bank devolved at the time of the expropriation to Stichting Afwikkeling Onderhandse Schulden SNS REAAL. This concerns the following loans:
- (i) SNS REAAL's loan in the amount of €20 million of 9 October 2000, maturing on 23 June 2020 at 7.13%, issued by Van Doorn Securities B.V. Clause 9 of the subordinated loan agreement between SNS REAAL Groep N.V. and Van Doorn Securities B.V. of 9 October 2000 (**Exhibit 29**) entails that in the event of the bankruptcy or liquidation of SNS REAAL, the lender will only be paid after all preferred and ordinary creditors existing at that time have been paid:

*"The lender subordinates the claim against the borrower in the amount of EUR 20,000,000 in so far as repayment of the amount of the loan is concerned to all other existing and future claims against the borrower, in such a way that, in the event of the bankruptcy or liquidation of the borrower, the lender's claim in so far as repayment of the amount of the loan is concerned is ineligible for set-off, and only becomes payable and offsettable after the borrower's existing preferred and ordinary creditors at that time have been paid in full or an arrangement or compromise has been reached with them, in which they have granted the borrower discharge in full against receipt of a part of their claim."*⁶⁸

⁶⁷ Terms and Conditions, Exhibit 28.

⁶⁸ Clause 9 of the subordinated loan agreement between SNS REAAL Groep N.V. and Van Doorn Securities B.V. of 9 October 2000, Exhibit 29.

- (ii) SNS REAAL's loan in the amount of €10 million of 9 October 2000, maturing on 23 June 2020 at 7.10%, issued by Van Doorn Securities B.V. Clause 9 of the subordinated loan agreement between SNS REAAL Groep N.V. and Van Doorn Securities B.V. of 9 October 2000 (**Exhibit 30**) entails that in the event of the bankruptcy or liquidation of SNS REAAL, the lender's claim will only be paid after all preferred and ordinary creditors existing at that time have been paid:

*"The lender subordinates the claim against the borrower in the amount of EUR 10,000,000 in so far as repayment of the amount of the loan is concerned to all other existing and future claims against the borrower, in such a way that, in the event of the bankruptcy or liquidation of the borrower, the lender's claim in so far as repayment of the amount of the loan is concerned is ineligible for set-off, and only becomes payable and offsettable after the borrower's existing preferred and ordinary creditors at that time have been paid in full or an arrangement or compromise has been reached with them, in which they have granted the borrower discharge in full against receipt of a part of their claim."*⁶⁹

- (iii) SNS REAAL's loan in the amount of NLG400 million of 20 May 1997, maturing on 24 February 2014, issued by Stichting tot beheer van FNV aandelen Reaal Groep N.V. Clause 2 of the loan agreement between SNS REAAL Groep N.V. and Stichting tot beheer van FNV aandelen REAAL Groep N.V. of 20 May 1997 (**Exhibit 31**) entails that in the event of bankruptcy or liquidation of SNS REAAL, the loan is subordinated to all unsubordinated claims against SNS REAAL:

*"The Loan is subordinated exclusively and solely in the event of the bankruptcy, suspension of payments or liquidation of SNS Reaal Groep within the meaning of Article 2:19 of the Dutch Civil Code to all other unsubordinated claims expressible in monetary value against SNS Reaal Groep with regard to monetary loans or otherwise, as evidenced from the financial records of SNS Reaal Groep."*⁷⁰

- (iv) SNS Bank's loan in the amount of NLG1 million with a term from 23 February 1999 to 23 February 2019, issued by Stichting Pensioenfonds Poseidon. Clause 4 of the loan agreement between Stichting Pensioenfonds Poseidon and SNS Bank Nederland N.V. of 2 March 1999 (**Exhibit 32**)

⁶⁹ Clause 9 of the subordinated loan agreement between SNS REAAL Groep N.V. and Van Doorn Securities B.V. of 9 October 2000, Exhibit 30.

⁷⁰ Clause 2 of the loan agreement between SNS Groep N.V. and Stichting tot beheer van FNV aandelen REAAL Groep N.V. of 20 May 1997, Exhibit 31.

entails that in the event that SNS REAAL is in a situation of insolvency, the lender's claim will only be paid after all preferred and ordinary creditors existing at that time have been paid:

The lender's claim against the borrower pursuant to this agreement, in so far as the repayment of the principal is concerned, is subordinated to all other claims against the borrower, in such a way that, in the event of bankruptcy, application of special measures as referred to in Chapter X of the Dutch 1992 Act on the Supervision of the Credit System or liquidation of the borrower, the lender's claims pursuant to this agreement, in so far as repayment of the principal is concerned, are ineligible for set-off, and only become payable and offsettable after the borrower's existing preferred and ordinary creditors at that time have been paid in full or an arrangement or compromise has been reached with said creditors, in which they have granted the borrower discharge in full against receipt of a part or all of their claim."⁷¹

- (v) SNS Bank's loan in the amount of NLG25 million with a term from 27 December 1999 to 27 December 2024, issued by Stichting Bewaarder OHRA Obligatie Fonds. Clause 6.1 of the subordinated loan agreement between Stichting Bewaarder OHRA Obligatie Fonds and SNS bank Nederland N.V. (also signed by DNB) of 18 January 2000 (**Exhibit 33**) entails that the lender's claim is subordinated to all existing and future claims of SNS Bank's preferred and ordinary creditors:

*"The Lender subordinates its claims against the Borrower pursuant to this agreement to all other existing and future claims against the Borrower, provided that the Lender's claims are ineligible for set-off after the Borrower's existing preferred and ordinary creditors at that time have been paid in full or an arrangement or compromise has been reached with them, in which they have granted the borrower discharge in full against receipt of a part of their claim."*⁷²

⁷² Clause 6.1 of the subordinated loan agreement between Stichting Bewaarder OHRA Obligatie Fonds and SNS Bank Nederland N.V. (also signed by DNB) of 18 January 2000, Exhibit 33.

6. VALUATION OF EXPROPRIATED SECURITIES AND EXPROPRIATED CAPITAL COMPONENTS

A. Lack of future prospects

- 6.1 As explained in Chapter 4, the determination of the actual value of the expropriated securities and capital components must be based on the future prospects of SNS REAAL and SNS Bank to be expected in the situation in which no expropriation had taken place. Chapter 6.3 Wft requests a hypothetical exercise, namely: determining what would have happened if the Minister had not intervened in SNS REAAL. This hypothetical exercise is part of the price determination; the market parties would also have had to form a picture of the future in the supposed free sale and purchase. The market value of financial instruments is, after all, determined by the expected future cash flows generated by those instruments. In fact, Chapter 6.3 Wft requires the Minister to pay, by way of compensation, what he would have paid as purchase price in a free market trade, given the reasonable expectations with regard to the future of the financial enterprise or its parent company at that time. That SNS REAAL and SNS Bank were heading for bankruptcy was already explained in Chapter 2 of this petition. If the expropriation had not taken place, the reasonable expectation is that SNS REAAL and SNS Bank would have gone bankrupt or been liquidated.
- 6.2 In the Judgment, the Division already ruled on the Minister's reasonable expectation with regard to SNS REAAL and SNS Bank. Within the context of the assessment of the Decree, the Division ruled that the Minister was entitled to reasonably expect that, in the absence of expropriation, SNS REAAL and SNS Bank would have gone bankrupt, and that the stability of the Dutch financial system was in serious and immediate danger as a result.⁷³ The request for the emergency regulations by DNB would have led to the bankruptcy of SNS Bank and SNS REAAL in the opinion of the Division:

“In addition to the facts and circumstances mentioned above in 17.1 and 17.2, the Minister also had to presume in his decision-making that, if SNS Bank failed to supplement its capital in good time, DNB would have no choice but to proceed to request the emergency regulations, with the bankruptcy of the bank as a result. In that event, the Minister had to take into account that the bankruptcy of SNS Bank most probably also would have resulted in the bankruptcy of its subsidiaries ASN Bank and RegioBank, in light of the financial and operational entwinement of those banks with SNS Bank.”⁷⁴

⁷³ Finding 17.5 of the Judgment, Exhibit 2.

⁷⁴ Finding 17.4 of the Judgment, Exhibit 2.

6.3 With this it is already established at law that, on 1 February 2013, SNS Bank and SNS REAAL could be reasonably expected to have gone bankrupt if the Minister had not proceeded to expropriate, and that the Minister was entitled to apply this as a point of departure. A reasonable buyer with access to the same information would have arrived at the same conclusion as the Minister, and would have geared the purchase price offered by him to the scenario that SNS REAAL and SNS Bank would have gone bankrupt.

6.4 DNB held the opinion that if SNS Bank could not reinforce its capital position, it would be irresponsible for SNS Bank to carry on its banking business. DNB stated in its SREP letter to SNS Bank of 27 January 2013:

“If SNS Bank proves incapable of reinforcing its capital position timely and sufficiently, DNB no longer considers it responsible for SNS Bank to carry on the banking business and DNB will exercise its powers on the basis of the Wft.”⁷⁵

6.5 Therefore, SNS Bank could not continue its banking business. That meant that SNS Bank’s future prospects consisted of virtually immediately ceasing its business operations. After all, if the supervisor arrives at the conclusion that continuation of the banking business is irresponsible, it will either withdraw the banking license or request emergency regulations. In both instances, a reasonable buyer of financial instruments will take the position that the purchase price must be determined based on the expected distribution in the event the business operations are ceased (via emergency regulations, bankruptcy or otherwise) and thus presume valuation on a liquidation basis.

6.6 SNS REAAL supports the same conclusion. In its third-quarter press release of 6 November 2012, SNS REAAL announced that unchanged continued existence was not an option, and that a structural “comprehensive solution” had to be found:

“We are making progress with the exploration of a broad range of scenarios for both strategic restructuring and the enhancement and simplification of our capital base, which we announced earlier this year. Our aim is to find a comprehensive solution for the Property Finance portfolio and the capital position of SNS REAAL. The outcome will likely consist of a combination of several measures. No decisions have been taken yet. It is our intention to provide a further update later this year or early next year.”⁷⁶

⁷⁵ Exhibit 16.

⁷⁶ <http://www.snsreaal.nl/press/press-release-1/sns-reaal-posts-third-quarter-net-profit-of-34-million.html>, 6 November 2012.

- 6.7 As explained, based on consultation with DNB and the Ministry of Finance, SNS REAAL explored and fleshed out different alternatives. In the end only one alternative remained: CVC's non-binding proposal. There were no other options:

“Berndsen asked whether SNS considered the CVC scenario the only alternative solution or whether other solutions were at hand, as asserted in the written view.

Latenstein indicated that the CVC scenario was the only realistic alternative to nationalisation. There are no other solutions at hand.”⁷⁷

- 6.8 The CVC scenario subsequently floundered. With this last alternative off the table, SNS REAAL itself no longer had any prospect of a way out of its problems. It had reached the end of the road as regards its own future prospects as well; it was no longer possible to continue the business operations. SNS REAAL's external accountant had already voiced the same view earlier. In its letter of 29 November 2012, KPMG wrote that in compiling the 2012 financial statements of SNS REAAL and SNS Bank, there was cause to assume a material uncertainty with regard to SNS Bank's capacity to independently meet the capital requirements, which resulted in reasonable doubt as to the continuity of SNS Bank and, thereby, of SNS REAAL:⁷⁸

“Based on the information we received from the Management Board and the talks we conducted with DNB, in compiling the 2012 financial statements of SNS REAAL and SNS Bank there now seems to be cause to assume a material uncertainty with regard to SNS Bank's capacity to independently meet the capital requirements, which results in reasonable doubt as to the continuity of SNS Bank and, thereby, of SNS REAAL.”⁷⁹

- 6.9 The downward spiral in which SNS REAAL found itself was also reflected in its listed share price. Upon SNS REAAL's initial public offering in 2006, the price per share was €16.50. On the day before the expropriation, the share price was €0.841, a 95% decrease.

- 6.10 It was clear that SNS REAAL was heading towards cessation of its business operations. The Division endorsed this in the Judgment. The appellants nevertheless questioned this unanimous conclusion in the Division proceedings. That is why the grounds for that conclusion will be briefly explained below.

⁷⁷ Exhibit 16, page 22.

⁷⁸ Exhibit 12.

⁷⁹ Exhibit 12.

(a) Request for emergency regulations

6.11 As stated above, DNB imposed the following measures on SNS Bank in its SREP decision of 27 January 2013:

“SNS Bank must supplement its core capital by at least EUR 1.84 billion no later than at 6:00 p.m. on 31 January 2013; at least SNS Bank must present a final solution no later than at 6:00 p.m. on 31 January 2013 that DNB deems to have a sufficient degree of certainty of success, the minimum requirement being that all of the parties involved therein have demonstrably committed to the solution presented, and which de facto leads to the aforementioned capital deficit being supplemented in the short term.”⁸⁰

6.12 When SNS Bank failed to satisfy the measures imposed by DNB within the specified period, DNB no longer deemed it responsible for SNS Bank to carry on the banking business:

“In light of the above DNB concludes that the measure from the SREP decision has not been satisfied, and that therefore SNS Bank’s qualifying capital does not safeguard controlled and sustainable coverage of its risks. DNB therefore no longer deems it responsible for SNS Bank to carry on its banking business.”⁸¹

6.13 DNB informed the Minister of this and, also in light of the ensuing loss of trust, advised him to proceed to nationalisation of the bank as soon as possible. DNB also indicated that if the Minister did not proceed to expropriation, DNB would have no choice but to proceed to requesting the emergency regulations (Article 3:160 et seq. Wft), which would entail application of the deposit guarantee scheme:

“Should you decide not to proceed to expropriation, based on its supervision responsibility DNB will, after all, have no choice but to proceed to request the emergency regulations, which will entail application of the deposit guarantee scheme.”⁸²

6.14 If expropriation had not occurred, DNB would therefore have proceeded to request the emergency regulations. This means that, in light of SNS Bank’s financial situation as outlined in the SREP decision, the loss of trust and the lack of a solution, DNB had concluded that a situation existed in which the emergency regulations should be applied.

6.15 Based on Article 3:160(1) in conjunction with Article 3:159(c) Wft, this situation occurs when there are signs of a dangerous development regarding equity, solvency

⁸⁰ Exhibit 16, page 15.

⁸¹ Exhibit 19, page 4.

⁸² Exhibit 17, page 2.

or liquidity and it may reasonably be expected that this development will not be reversed either sufficiently or in good time. That criterion means that DNB can intervene if a financial enterprise is in trouble with no sufficient or timely chance of recovery.⁸³

- 6.16 DNB's request to apply the emergency regulations to SNS Bank would have been assessed by the Amsterdam District Court with due observance of the following:
- It is sufficient for there to be signs of a dangerous development with regard to only one of these elements.⁸⁴
 - The emergency regulations will not be declared only if it is not summarily demonstrated that there are signs of a dangerous development with regard to the solvency, liquidity, equity or technical provisions.⁸⁵
 - DNB need not arrive at the conclusion that said development actually exists; it is sufficient for DNB to conclude that signs of such a development exist. The emergency regulations may not be declared only if such signs are not summarily demonstrated to exist.⁸⁶
 - The emergency regulations are also declared if there is still a prospect of some improvement in the equity, solvency, liquidity, or the technical provisions, but this improvement is insufficient or will not occur in good time. Only if that development is sufficient and timely may the District Court deny a request. The improvement must also be structural.⁸⁷
- 6.17 That there were grounds for requesting the emergency regulations ensues inter alia from letters from DNB to SNS REAAL and the Minister of 27 January 2013 and 1 February 2013.⁸⁸ The Minister refers to those letters which demonstrate that the situation referred to in Article 3:160(1) Wft existed with regard to SNS Bank. It must therefore be assumed that if DNB had requested the emergency regulations, they would have been granted.
- 6.18 Because DNB had concluded that it was no longer responsible for SNS Bank to carry on its banking business, it also would have been able to decide - if expropriation had not occurred - to withdraw SNS Bank's banking license. DNB was authorised to withdraw SNS Bank's banking license because it no longer complied with the rules laid down by or pursuant to the law and no longer complied with the regulations attached to the license or the restrictions set.⁸⁹ In light of DNB's letter of 27 January 2013 - and as will be explained below - SNS Bank no longer

⁸³ Parliamentary Documents II, 2011-2012, 33 059, no. 3, page 22.

⁸⁴ Parliamentary Documents II, 2011-2012, 33 059, no. 3, page 22.

⁸⁵ Parliamentary Documents II, 2011-2012, 33 059, no. 3, page 24.

⁸⁶ Parliamentary Documents II, 2011-2012, 33 059, no. 3, page 25.

⁸⁷ Parliamentary Documents II, 2011-2012, 33 059, no. 3, page 23.

⁸⁸ Exhibits 16 and 17.

⁸⁹ Article 1:104(1)(d) Wft.

satisfied the requirement of the liquidity or the qualifying capital to safeguard controlled and sustainable coverage of its risks. Based on Article 3:111a(2) Wft, DNB had imposed on SNS Bank the measure of supplementing its capital deficit. SNS Bank did not comply with that measure, which in itself constituted sufficient grounds for withdrawing the banking license.

(b) Liquidity difficulties

- 6.19 Due to the financial difficulties SNS REAAL and SNS Bank have been experiencing since the credit crisis, their options for attracting funding are extremely limited. In the first half of 2012, SNS Bank was dependent for its funding on the influx of savings deposits and an ECB facility:⁹⁰

“SNS Bank’s primary sources of funding were the increase in private savings deposits and participation in the second tranche of ECB facilities (LTRO).”

- 6.20 As a result of the uncertainties regarding SNS REAAL’s capitalisation, it could no longer sufficiently raise external funding. This was related, inter alia, to the fact that SNS Bank was not expected to be able to meet its obligation at the end of 2013 to repay the state aid it had received in 2008 and that the European Commission would then impose measures that would threaten the continuity of SNS REAAL:⁹¹

“As a result, there is a large chance that if the state aid is not repaid on 31 December 2013 at the latest, the EC will impose measures that affect the viability of the group. The market is also aware of that date. As a result of these uncertainties regarding SNS REAAL’s capitalisation, it can no longer sufficiently raise external funding.”

- 6.21 Due to the developments and negative outlook of the credit ratings, the financial viability of SNS Bank and SNS REAAL had deteriorated further. In the SREP decision, DNB concluded that the issue by SNS Bank of new unsecured bonds or other debt instruments was no longer possible or only possible to an extremely limited degree:⁹²

“Due to the developments and negative outlook of the credit ratings, the financial viability of the institutions has deteriorated further. The issue by SNS Bank of new unsecured debt instruments is no longer possible or only possible to an extremely limited degree.”

⁹⁰ Exhibit 8, page 13.

⁹¹ Exhibit 18, page 6, second bullet.

⁹² Exhibit 18, page 6, third bullet.

- 6.22 As a result, SNS Bank was forced to attract private savings deposits, wholesale financing with collateral and financing via the ECB as lender of last resort. SNS Bank initially borrowed an amount of €1.5 billion from the ECB. SNS Bank once again drew funds from the ECB in the first half of 2012. SNS Bank did not disclose the scope of this second tranche.
- 6.23 In addition, for its cash position SNS Bank was largely dependent on attracting savings deposits. SNS Bank was initially relatively successful in doing so, but that trend clearly changed in December 2012 - January 2013. In its third-quarter 2012 press release, SNS REAAL announced that it was looking for a “comprehensive solution” to its problems.⁹³
- 6.24 The media ceaselessly speculated on what that solution might be from that point on, as a result of which SNS REAAL was in the news virtually every day in December 2012 and January 2013. Many retail customers decided to play it safe and withdrew their savings deposits or other balances from SNS Bank. The result was a net outflow of savings. In the period from 16 January through 1 February 2013, the total net outflow at SNS Bank was approximately €2.5 billion⁹⁴; that is an average net outflow of approximately €150 million per day. The daily net outflow of savings over the period from 16 January 2013 through 25 January 2013 is shown in the diagram included on page 4 of the SREP decision.⁹⁵
- 6.25 Such an outflow had not occurred in the previous months (only a temporary outflow occurred in June 2012 after negative reports in the press). The fact that DNB and the Minister had designated SNS Bank as a systemic bank and the savings deposits were covered by the deposit guarantee scheme apparently did not provide enough confidence to savers to leave their money with SNS Bank. That was a very worrisome fact because SNS Bank was in fact dependent on savers for the influx of liquidity. Because it had insufficient access to the wholesale market, SNS Bank had to rely on the private market as a source of liquidity.
- 6.26 SNS Bank’s cash position deteriorated rapidly in the period from 16 January through 1 February 2013; its cash position diminished by about the same amount as the net outflow of savings. If the net outflow seen in the previous weeks is extrapolated, taking other payment obligations into account cash would have run out in the near future.
- 6.27 To the extent that an outflow of this type cannot already be considered the beginning of a bank run, at the very least it represented an acute threat and therefore the

⁹³ <http://www.snsreaal.nl/press/press-release-1/sns-reaal-posts-third-quarter-net-profit-of-34-million.html>, 6 November 2012, page 1.

⁹⁴ Exhibit 17, page 1.

⁹⁵ Exhibit 16.

“danger” of a run on the bank. In that period, the public unrest with regard to SNS Bank and SNS REAAL rapidly increased, accompanied by a growing onslaught of media reports and rumours about SNS REAAL’s vulnerable position. Irrespective of what type of news the media published, the outflow continued. Even on days with more positive news, like reports on the possible solution with CVC, the outflow was still considerable.

- 6.28 It is probable that once recent developments became known - as described above, including the disappearance of the CVC option, the measure that DNB had imposed on SNS Bank and the fact that SNS Bank could not comply with that measure - the outflow of savings would only have accelerated and triggered a (further) bank run.

(c) Capital deficit

- 6.29 In addition to the regular minimum solvency requirements as laid down by virtue of Article 3:57 Wft, a bank must also have extra qualifying capital when necessary in light of the scope of its current and possible future risks. Based on Article 3:18a Wft, DNB assesses whether a bank has sufficient qualifying capital to sufficiently cover such risks: the SREP process referred to above. If such is not the case, by virtue of Article 3:111a Wft DNB can impose an obligation to increase the qualifying capital to an extent that sufficiently covers the risks as yet.
- 6.30 DNB determined late in 2011 within the context of the EBA stress test that SNS Bank had a capital deficit of €159 million. SNS Bank took a number of measures at that time, as a result of which SNS Bank satisfied the 9% threshold for its core Tier 1 ratio again at the end of June 2012.⁹⁶
- 6.31 However, things went downhill again from that point on. Starting in the third quarter of 2012, SNS Bank once again failed to meet the 9% standard. In a press release dated 6 November 2012, SNS REAAL announced a decrease in SNS Bank’s Core Tier 1 ratio to 8.8% as a result of an increase in the risk-weighted assets and the loss at Property Finance.⁹⁷
- 6.32 The fact that it was extremely uncertain whether SNS Bank would be able to meet the capital requirements in the future had also been observed by KPMG. By letter of 29 November 2012, KPMG warned SNS REAAL that if adequate measures were not taken, there would be material uncertainty with regard to SNS Bank’s independent ability to meet the capital requirements when the time came to compile the 2012 financial statements.

⁹⁶ Exhibit 8.

⁹⁷ <http://www.snsreaal.nl/press/press-release-1/sns-reaal-posts-third-quarter-net-profit-of-34-million.html>, 6 November 2012.

6.33 KPMG also pointed out that if the material uncertainties were not removed by that time, either the auditor's statement would be negative or the financial statements would have to be compiled on a liquidation basis rather than on a continuity basis. At the time KPMG also pointed out that the material uncertainties with regard to SNS Bank's independent ability to meet the capital requirements would have to be removed prior to the date on which the financial statements were to be compiled:

“Specifically, this means that the uncertainty must be formally removed on 7 March 2013 according to the existing time schedule. As SNS REAAL intends to publish its yearly results on 14 February 2013, at that time management must be sufficiently certain that the continuity is safeguarded.”⁹⁸

6.34 However, the necessary measures failed to materialise. The capital deficit continued to increase. In a new forecast of 14 January 2013, SNS Bank arrived at a ratio of 7.62% at the end of 2012, in itself already a capital deficit of €477 million as compared to the EBA standard: the standard from Basel 3 already anticipated by the European Banking Authority, to which SNS Bank had committed.⁹⁹

6.35 At that point in time, DNB was also making its own assessment of SNS Bank's capital position within the context of the SREP evaluation with regard to SNS Bank for 2012. That evaluation entailed that SNS Bank's capital deficit was much larger.

6.36 DNB used the valuation report by Cushman & Wakefield of 14 December 2012 within the context of that evaluation.¹⁰⁰ That report indicates that the value of the real estate portfolio is some €2.4 billion lower than its balance sheet value at the end of June 2012 if a basic scenario is applied. If an adverse scenario is applied, the value is even €3.2 billion lower than the balance sheet value at the end of June 2012.¹⁰¹

6.37 According to an SNS Bank forecast of 14 January 2013, the loss-buffering core capital for the entire bank balance sheet would be €1.63 billion.¹⁰² DNB ruled that this buffer capital was utterly insufficient because that amount was already needed to cover SNS Bank's exposure to the real estate portfolio, leaving little if any core capital to accommodate expected and unexpected losses in the rest of the balance sheet in the amount of €72.9 billion.

⁹⁸ Exhibit 12.

⁹⁹ Exhibit 16, page 5. See footnotes 7 and 11 above regarding Basel 3 and the EBA.

¹⁰⁰ Exhibit 13.

¹⁰¹ Exhibit 16, page 5 and footnote 6.

¹⁰² Exhibit 16, page 6.

- 6.38 Due to the extremely thin capitalisation and the negative development it showed, SNS Bank was also running the risk of losing access to the ECB's credit facility if no solution materialised.¹⁰³
- 6.39 In light of this significant risk to the continuity of SNS Bank, in its SREP decision DNB requested that the qualifying capital be increased by at least €1.84 billion, or at least a definitive solution deemed by DNB to have a sufficient chance of success and that would de facto lead to this capital deficit being supplemented in the near future. Based on the SREP decision, SNS Bank had to comply with the SREP decision by 6:00 p.m. on 31 January 2013. SNS Bank failed to comply with the measure included in the SREP decision within the assigned period.
- 6.40 As a result, there was not only the threat of a liquidity shortage but also a significant capital deficit.
- (d) No or insufficient chance of (timely) recovery
- 6.41 As explained in Chapter 3 of this petition, possibilities for resolving SNS REAAL's and SNS Bank's financial difficulties had been sought intensively starting in 2011. However, none of the possibilities explored, including the CVC proposal, offered a solution. No other developments could be foreseen that would result in solving the financial difficulties discussed above. On the contrary: all the alarms were sounding and it was to be expected that the difficulties would only get worse. Therefore, there was no chance of recovery.
- (e) Application of emergency regulations and liquidation
- 6.42 It follows in light of the contents of DNB's letter of 27 January 2013 and the above that the conditions for granting the emergency regulations were met, as a result of which the emergency regulations would have been applied to SNS Bank if the expropriation had not taken place. That would in fact have meant the end of SNS Bank, and it is unavoidable that SNS Bank's bankruptcy would also have been filed for shortly thereafter.
- 6.43 As a result of the emergency regulations, the claims of account holders against SNS Bank would have been suspended pursuant to Article 3:176 Wft, meaning that DNB would have had to decide to apply the deposit guarantee scheme pursuant to Article 3:260, paragraph 1(b), Wft.¹⁰⁴ In its letter to the Minister of 1 February 2013, DNB also already announced that the deposit guarantee scheme would be applied in that event. Application of the deposit guarantee scheme would give the account holders a

¹⁰³ Exhibit 16, page 6.

¹⁰⁴ Article 3:176 Wft.

claim against DNB¹⁰⁵, in which DNB would acquire the account holders' rights vis-à-vis SNS Bank (Article 3:261, paragraphs 3 and 4, Wft).

6.44 Application of the emergency regulations to SNS Bank would also have led to the bankruptcy of SNS REAAL. As stated, SNS REAAL issued a 403-statement on behalf of SNS Bank and Property Finance. That statement made SNS REAAL jointly and severally liable for the debts of each of these companies. SNS Bank's and Property Finance's creditors would therefore want recourse from SNS REAAL - in any event to the extent that the liquidation revenues of SNS Bank proved insufficient to satisfy all of the creditors. SNS REAAL does not have sufficient capital for this. As a result, SNS REAAL would quickly be in a situation in which it ceased making payments.

6.45 This is all the more true in light of the fact that the state aid granted to SNS REAAL in 2008 (initially €750 million, leaving €565 million after €185 million of the initial sum was repaid (and a penalty premium of €283 million) would have had to be paid back to the State at the end of 2013 based on the relevant arrangements agreed with the EC, which would have far-reaching consequences for SNS REAAL's liquidity and capital.

6.46 As a result of the financial and operational entwinement between SNS Bank and its subsidiaries ASN Bank and RegioBank, the bankruptcy of SNS Bank would have led to the bankruptcy of ASN Bank and RegioBank as well. This is particularly because the two subsidiaries are strongly entwined with SNS Bank in terms of their operations and IT: they use the same infrastructure with their own labels. Consequently, the bankruptcy of SNS Bank would mean that ASN Bank and RegioBank would no longer be able to function. The customers and depositors of these banks would probably withdraw their money from ASN Bank and RegioBank in the event that SNS Bank went bankrupt. Also relevant is the fact that ASN Bank passes some of the savings deposited with it on to SNS Bank, which SNS Bank uses in its turn to provide loans. For these reasons, ASN Bank and RegioBank would have been dragged along in the bankruptcy of SNS Bank.

(f) Another intervention by the State?

6.47 If the Minister had not expropriated, the question is whether he would have constructed another intervention for SNS REAAL. In the proceedings with the Division, various appellants argued that the Minister would indeed have done so, by providing a guarantee on the real estate portfolio, by investing in the shape of new Core Tier 1 capital securities, by investing in the shape of shares, or by accepting the

¹⁰⁵ Putting the deposit guarantee scheme into effect would mean that the other banks participating in that system would have to pre-finance DNB's distribution to account holders of approximately €35 billion.

non-binding CVC proposal. This is because, if the Minister concluded that the imminent bankruptcy posed a serious and immediate danger to the stability of the Dutch financial system, he could not afford to let SNS REAAL go bankrupt and would thus have intervened in some other way. The same reasoning is imaginable with the Enterprise Division: the reasonable future prospects of the buyer and vendor entailed that the financial instruments certainly still had value because they could legitimately count on a financial aid operation at the expense of the public funds.

- 6.48 The essence of this argument is that the State was in a bind. SNS REAAL was a systemic institution, making it too big to fail. Support would have been provided in any event, and if the Minister did not have the instrument of expropriation he would have been forced to save the institution nevertheless, and given that bind he would have provided unlimited funding at the expense of the public funds. That very bind is what the Intervention Act intends to pierce by means of the new Part 6 of the Wft. In earlier aid operations in 2008 (Fortis/ABN AMRO, ING Group, Aegon and SNS REAAL itself), the Minister indeed faced the unattractive choice between a shockwave for the financial system on the one hand or a major investment at the expense of the public funds on the other. The Intervention Act was introduced to prevent that very bind from occurring. This is worded as follows on the first page of the Explanatory Memorandum:

“The financial crisis and turbulent developments of recent years have grown awareness that the instruments available to the government for dealing with the problems in the financial sector are insufficient in a number of cases. (...) The government’s options for actively steering towards winding up companies in a timely and orderly manner or for arriving at an outcome other than bankruptcy, at a lower cost to society, are primarily non-existent.”

- 6.49 If, this notwithstanding, one now puts the Minister back into that bind with respect to the valuation, the legislature’s explicit intention is ignored and the objective of the exceptional intervening powers of Part 6 of the Wft is undermined. The text of Article 6:9, paragraph 1, Wft indicates that the following must be abstracted from a bind:

“(...) the price that, given such future prospects, would have materialised at the time of the expropriation in a presumed free open-market sale between the expropriated party as reasonable vendor and the expropriating party as reasonable buyer.”

- 6.50 This therefore involves a free sale: a sale between two parties deciding on the sale of their own free will, without either being forced into the transaction *de jure* or *de*

facto. This is also evidenced by the part of Article 6:9, paragraph 1, Wft that pertains to the future prospects to be applied:

“The determination of the fair value (...) is based on the future prospects of the financial enterprise involved to be expected in the situation in which no expropriation had taken place (...)”

- 6.51 This therefore involves the situation in which “no expropriation had taken place”, not the situation in which no expropriation could have taken place, for instance because expropriation was not an instrument that was available to the Minister. That expropriation was possible may be included in the future prospects.
- 6.52 Another argument supporting the assertion that a possible bind necessitating state aid may not be included in the valuation is provided by Article 6:9, paragraph 2, Wft. That article prescribes that any state aid provided must be deducted from the compensation. If the Minister had given state aid - whether or not he had a choice in the matter - it would have to be deducted as yet from the compensation to be paid.
- 6.53 Abstraction from any bind is also required under Article 1 of the First Protocol to the ECHR. When the English Northern Rock bank was expropriated, investors argued that the State would have paid up anyway because it could not afford to let Northern Rock go bankrupt. Both the English court and the European Court of Human Rights rejected that argument:

“A number of former Northern Rock shareholders opined that this compensation was too low and invoked Article 1 First Protocol to the ECHR (FP). According to the expropriated shareholders, the valuation had to take into account the fact that there was a legitimate expectation that the Bank of England would continue to provide financial support to Northern Rock in resolving the temporary liquidity problems. That argument was rejected by the High Court as there could be no legitimate expectation with regard to continuation by the Bank of England of financial support.”¹⁰⁶

According to the European Court:

“(...) they also sought to avoid encouraging the management boards of other financial institutions from making bad business decisions on the assumption that the State would provide a safety net. There was no obligation under domestic law for the Tripartite Authorities to provide LOLR [lender of last resort] support, and no duty owed by the State to the shareholders to protect their investments in Northern Rock. Nor does Article 1 of Protocol No. 1 impose such a positive obligation on

¹⁰⁶ A.J.P. Schild, "De Interventiewet & het EVRM: een lastig huwelijk", Tijdschrift Ondernemingsrecht 2012/3. The English judgment can be found under SRM Global Master Fund LP/HM Treasury [2009] EWHC 227 (Admin.)

the State; indeed, the Court has stressed on many occasions that this provision cannot be interpreted as imposing any general obligation on the Contracting States to cover the debts of private entities."¹⁰⁷

and

*"In the Court's view, the decision taken in the legislation that the former shareholders of Northern Rock should not be entitled to take the value which had been created by the Bank of England's loan was far from being "manifestly without reasonable foundation". Instead, it was clearly founded on the policy of avoiding "moral hazard", which is at the heart of the principles which regulate the provision of LOLR. In the Court's view, it was entirely legitimate for the State authorities to decide that, had the Northern Rock shareholders been permitted to benefit from the value which had been created and maintained only through the provision of State support, this would encourage the managers and shareholders of other banks to seek and rely on similar support, to the detriment of the United Kingdom economy."*¹⁰⁸

6.54 The Division ruled the same in the Judgment:

*"Contrary to what some appellants have argued, the Minister was free to also weigh the financial interests of the State in fleshing out the expropriation decision and there is no rule of law that obliges the Minister to compensate losses already suffered by investors before the expropriation at the expense of the public funds."*¹⁰⁹

6.55 Put differently, investors cannot pass on their investment losses to the public funds. They may not assume that the State will compensate those losses by means of voluntary intervention or the compensation to be paid.

6.56 The conclusion must therefore be that in determining the compensation, one must abstract from a possible bind in which the Minister would be placed if he had not had the option of expropriation.

B. Price determination

6.57 The second premise mentioned in the act for determining the actual value of the expropriated securities and capital components is the price that, given the future prospects, would have materialised at the time of the expropriation in a presumed

¹⁰⁷ ECHR *Grainger/United Kingdom* 10 July 2012, case no. 34930/10, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112312>.

¹⁰⁸ ECHR 10 July 2012, case no. 34930/10 (*Grainger/United Kingdom*), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112312>.

¹⁰⁹ Finding 20.1 of the Judgment, Exhibit 2.

free, open-market sale between the expropriated party as reasonable vendor and the expropriating party as reasonable buyer.¹¹⁰

- 6.58 The future prospects of SNS Bank and SNS REAAL have already been outlined above in Chapter 6A. The fact that SNS REAAL was heading for bankruptcy had already been largely discounted in its listed share price. As explained above, since SNS REAAL's initial public offering in 2006, its share price had dropped from €16.50 per share to €0.841 per share on 31 January 2013. However, the share price still did not reflect the price that would have materialised in a free, open-market sale between the State, as reasonable buyer and the expropriated parties, as reasonable vendors, given the future prospects mentioned above. That the share price may not be applied as point of departure also follows, as explained above, from the Explanatory Memorandum to the Intervention Act: in determining the price he is willing to pay, a reasonable buyer is deemed to apply the net asset value of the securities involved, not the share price.¹¹¹
- 6.59 As the expropriated shares and capital components have no value in a liquidation scenario, in the presumed free, open-market sale between the parties entitled to the expropriated securities and capital components as reasonable vendors and the Minister as reasonable buyer, the Minister (on behalf of the State) would have paid nothing for the expropriated securities and capital components. That the expropriated securities and capital components have no value in a liquidation scenario will be explained below.

C. Valuation based on liquidation scenario

(a) Liquidation scenario as point of departure

- 6.60 From the above it follows that if expropriation had not occurred, SNS Bank and SNS REAAL would have landed in a bankruptcy or liquidation scenario. When the business operations are ceased, the value of the shares and subordinated bonds and loans is determined by the expected liquidation payment. The liquidation payment is the balance of the revenues from the liquidation sale of all assets after all higher-ranking debts have been paid.
- 6.61 In determining the expected liquidation payment, therefore, the expected revenues from the sale of all assets must first be determined and then the amount of debt to be paid from it before a distribution can be made on the expropriated securities and capital components.

¹¹⁰ Article 6:9(2) Wft.

¹¹¹ Parliamentary Documents II, 2011-2012, 33 059, no. 3, pages 73 and 74. See also margin number 4.11 of this petition.

(b) Bankruptcy ladder

- 6.62 In distribution in a bankruptcy or after liquidation, the receiver/administrator would apply what is known as a bankruptcy ladder (or ‘cascade’). The bankruptcy ladder determines the sequence in which creditors have recourse on a bankrupt estate. The details of the ladder differ from one case to the next, but it roughly means that the revenues of the estate are used in the following order:
- (i) first the receiver’s salary;
 - (ii) next the tax debts;
 - (iii) then debts with a security interest, including covered bonds issued by SNS REAAL or SNS Bank, meaning bonds covered by security;
 - (iv) then the regular debts (also known as ordinary or ‘senior’ debts);
 - (v) then the subordinated debts (with banks, a distinction is also made between Tier 2 and Tier 1, in which Tier 2 precedes Tier 1);
 - (vi) then the super-subordinated debts (at SNS REAAL: “core tier 1 debt”) together (ranking equally) with the ordinary shares.

In a bankruptcy, a distribution would only be made on any instrument if and after all instruments with a higher ranking have been paid in full.

- 6.63 A shareholder is entitled to the positive balance after liquidation (Article 2:23b of the Dutch Civil Code). This implies that the holders of the shares expropriated pursuant to the Decree would have been at the very back of the queue in a bankruptcy or liquidation of SNS REAAL, thus also behind the holders of (subordinated) debt instruments.¹¹²
- 6.64 In principle, other creditors mutually have an equal entitlement to payment from the net revenues of their debtor’s goods, proportionate to each of their claims, subject to the reasons for preference recognised at law (Article 3:277(1) Dutch Civil Code).
- 6.65 Based on Article 3:277(2) of the Dutch Civil Code, however, it may be provided contractually that a creditor’s claim will rank behind all or certain other creditors than as assigned by law. In that event, the effect of subordination in the case of liquidation of the debtor’s assets (as is the case with bankruptcy) is that the subordinated creditor will only receive something after all of the other creditors have been paid in full. As a result, the subordinated claim does not encumber the debtor’s assets that are available for payment of the preferred and ordinary creditors.¹¹³ Whether these consequences are attached to a subordination agreement depends on what the parties have agreed in the specific case.¹¹⁴

¹¹² See also J.G.A. Struycken, 'Ranking and the debt', *Ondernemingsrecht*, 2013/13

¹¹³ HR 18 October 2002, *NJ* 2003/503.

¹¹⁴ HR 18 October 2002, *NJ* 2003/503, finding 3.4.2.

6.66 The expropriated securities and capital components were described in Chapter 5. It follows from this description that the expropriated securities and capital components fall in categories (v) and (vi) of the bankruptcy ladder. For the subordinated creditors of SNS Bank, this applies on the levels of both SNS Bank and SNS REAAL.

(c) 403-statement

6.67 The 403-statement issued by SNS REAAL on behalf of SNS Bank (**Exhibit 34**) does not change this. The subordinated creditors on the SNS Bank level are not promoted to a higher spot in the ladder as a consequence of SNS REAAL's 403-statement, as argued by some of the appellants in the proceedings before the Division.

6.68 In Dutch law, subordination is a purely contractual concept. There are no statutory provisions regulating the subordination. The scope of the subordination follows solely from the interpretation of the relevant contractual provisions. Although the literal wording of the various bonds and loans differ from one case to the next (for a summary see Chapter 5), the phrasing is primarily the same: the claims of the holders of the expropriated securities and capital components are subordinated to the claims of the preferred and ordinary creditors of SNS REAAL and SNS Bank, respectively, and the claims of the holders of these securities and capital components are paid only after all preferred and ordinary creditors have been paid. A reasonable interpretation of these provisions entails that the holders of these securities and capital components are only entitled to payment of their claims after the claims of ordinary and preferred creditors have been paid.

6.69 Nowhere does the wording limit the subordination to situations in which SNS Bank itself is the party paying: what matters is *whether* the senior debt has been paid, not who paid it. That is only logical because, at the time the relevant securities and capital components were issued, the 403-statement had already been issued and the drafters of the subordination provisions were aware of it. There was no intention to limit the effect of the subordination to the SNS Bank level; from a commercial perspective, doing so would also be neither logical nor justifiable.

6.70 In the event of bankruptcy, payment is only made to the subordinated creditor if and after all of SNS Bank's ordinary debts are paid in full, irrespective of whether that payment comes from the estate of SNS Bank itself or from that of SNS REAAL. The conclusion is that, in the bankruptcy ladder, the subordinated SNS Bank creditor continues to rank behind the ordinary SNS Bank creditor, irrespective of whether it is seeking recourse from SNS Bank's estate or from that of SNS REAAL. In its recourse from the estate of SNS REAAL, the subordinated creditor finds the

ordinary creditors of SNS Bank in his way: they will (continue to) assert that the subordinated creditor only has something to claim from SNS REAAL after all of SNS Bank's ordinary debts have been paid.

6.71 On the SNS REAAL level, the ordinary SNS Bank creditor ranks equally with the ordinary SNS REAAL creditor. The subordinated SNS REAAL creditor only gets a turn after SNS REAAL's ordinary debts have been paid. Why it would not be possible to pay the ordinary debts of SNS Bank and SNS REAAL in full is explained below. As a result, neither SNS REAAL's nor SNS Bank's subordinated creditors can count on any distribution.

(d) Valuation based on approximation of liquidation balance sheet

6.72 In determining the expected liquidation payment, the expected revenues from the sale of all assets must first be determined and then the amount of debt to be paid from it, so that it may be determined how much could have been distributed on the expropriated securities and capital components. According to the DNB's information, the recovery rate in Dutch bank bankruptcies ranges between 80% and 90%.¹¹⁵

6.73 There is no liquidation balance sheet for SNS REAAL, let alone a balance sheet as at the end of 2012 audited by an external accountant. A balance sheet of that type has not been drawn up for the simple reason that SNS REAAL is not winding up. Liquidation was avoided thanks to the Minister's intervention. Now the complication has arisen that the Intervention Act requires a hypothetical exercise: what would have happened if the Minister had not saved the bank? As this scenario did not actually occur, there are no factual, historical data and one must rely on an approximation: a hypothetical reconstruction of what the value probably would have been in a liquidation scenario that has not in fact occurred.

6.74 For the purposes of the present proceedings, however, there is no need for a complete, exhaustive valuation of SNS Bank and SNS REAAL: what matters is estimating whether the revenues from a liquidation sale of all assets would be sufficient to pay all ordinary debts. Only in that event could the debts and shares with a lower ranking still expect any distribution. Compiling a liquidation balance sheet is unnecessary because based on the available data and reasonable assumptions, it can be demonstrated with a sufficient degree of certainty that the holders of the expropriated securities and capital components would be 'under water' in a liquidation scenario. This is explained below.

¹¹⁵ Exhibit 11, page 8, footnote 4.

(e) Adjustments to continuity balance sheet as at 30 June 2012

- 6.75 The point of departure in this exercise are the SNS Bank's figures on a continuity basis, according to its balance sheet. The most recent balance sheet published was that as at 30 June 2012¹¹⁶. As at 30 June 2012, SNS Bank's equity (attributable to shareholders) amounted to €1.736 billion.¹¹⁷ As at the date of expropriation, the subordinated debts and bonds of SNS Bank amounted to €820 million. Put differently: if the adjustments to the balance sheet resulting from the transition to a liquidation basis amount to more than €2.556 billion, the distribution by SNS Bank on subordinated SNS Bank debts and bonds is naught.
- 6.76 Looking at SNS Bank's balance sheet it is notable that the largest share of SNS Bank's assets is found in the balance sheet item 'loans and advances to clients' (see, for example, page 56 of the half-year report as at 30 June 2012¹¹⁸). This item also includes the loans in the Property Finance real estate portfolio. Solid data are available for the liquidation balance sheet with regard to this item. Within the context of the valuation, Cushman & Wakefield drew up an appraisal from a buyer's perspective on 20 December 2012 on the instructions from the Ministry of Finance. That report is hereby submitted as **Exhibit 35**. This appraisal differs from those referred to in paragraph 2.16 because it was drawn up explicitly according to a valuation method from a "loan buyer's perspective". A buyer could be expected to estimate the risks conservatively, as those risks devolved to the buyer as a result of the sale. Valued from a loan buyer's perspective, the portfolio would yield €4.791 billion (base case) to €4.236 billion (adverse case).¹¹⁹ This therefore constitutes a downward adjustment of €3.732 billion (base case) to €4.287 billion (adverse case); the average of the two is €4.009 billion.¹²⁰ This downward adjustment solely pertains to the loans in the real estate portfolio. Cushman & Wakefield also appraised the expected losses on a sale of real estate in title. That results in a downward adjustment of €250 million (base case) to €330 million (adverse case).¹²¹ The weighted average of these two is €290 million. Of these two downward adjustments, some €700 million was already anticipated in SNS REAAL's half-year figures for 2012. As a result, the total additional downward adjustment on the real estate portfolio as compared to its book value is €3.599 billion.¹²²

¹¹⁶ A buyer of all of SNS REAAL on 1 February 2013 would have demanded access to more recent, internal, preliminary figures. Departing from the preliminary figures available internally as at 31 December 2012, however, does not result in any material differences for these purposes.

¹¹⁷ Exhibit 8, p. 56.

¹¹⁸ Exhibit 8.

¹¹⁹ Exhibit 35.

¹²⁰ Exhibit 35.

¹²¹ Exhibit 16, footnote 6.

¹²² For consistency's sake, these are the valuations as at 30 June 2012. Cushman & Wakefield later updated their estimates, with regard to developments in the portfolio until 31 December 2012. The results of that update basically do not change things.

- 6.77 Otherwise, the balance sheet item ‘loans and advances to clients’ is primarily comprised of loans (mortgages and other types of loans) to SNS Bank clients. This is the largest item by far on SNS Bank’s balance sheet. Based on the half-year results as at 30 June 2012, that item amounts to €62,764 million, of which the real estate portfolio is €4,228 million reported in the Property Finance segment and €3,566 million reported in the segment SNS SME (see pages 27, 56 and 69 of the half-year results, Exhibit 8), leaving a balance of €54,970. Of that amount of nearly €55 billion, only €250 million was anticipated, so that €54,720 million remains. The sale value of this loan portfolio in a liquidation scenario can only be approximated.
- 6.78 The best benchmark is perhaps the bankruptcy of DSB Bank: that was also a Dutch retail credit portfolio, primarily mortgages. DSB’s receivers explored a sale of the portfolio but ultimately held that holding the portfolio to maturity would render more. The liquidation revenues from that portfolio can be estimated based on the course of the provision for uncollectible debts (amounts in millions of euros)¹²³:

<i>(in millions of euros)</i>	2009	2010	2011	2012
Status of loans	4,255	3,853	3,411	3,151
Provision	384 (9.0%)	363 (9.4%)	279 (8.2%)	265 (8.4%)

- 6.79 The average provision for uncollectible debts for the years 2009 - 2012 was 8.8%. If a similar reduction were applied to SNS Bank’s portfolio, the downward adjustment for the balance sheet item would be €4.8 billion.
- 6.80 A less reliable - because older - benchmark is the sale of the loan portfolio from the Van der Hoop Bankiers N.V. bankruptcy. That sale pre-dates the credit crisis (January 2006, when the market was much more liquid than it is now), pertains to a smaller amount of loans (and therefore easier to sell), that were also of a higher quality (Van der Hoop served the top of the market: primarily high net-worth individuals). From the bankruptcy report:

“On balance, EUR 109 million was transferred to Rabobank. For this, an amount was received of EUR 103.9 million, on balance a discount of EUR 5.1 million, more than 4% of the aforementioned book value.”¹²⁴

¹²³ See the financial reports by the receivers of DSB Bank N.V., available at [http://www.dsbbank.nl/crediteuren/nl/openbare-verslagen/dsb-bank-\(financiële-verslagen\)](http://www.dsbbank.nl/crediteuren/nl/openbare-verslagen/dsb-bank-(financiële-verslagen)), especially page 13 of the report for 2012, page 11 of the report for 2011 and page 13 of the report for 2010.

¹²⁴ See annex 2 to the report from the receivers for Van der Hoop Bankiers N.V., 17 March 2006, available at http://www.houthoff.com/fileadmin/user_upload/faillissementen/VanderHoop/Bijlage2_%20bij_tweed_e_openbaar_verslag%20%28def.%20versie%29.DOC, page 2.

If a similar downgrade of more than 4% (precisely 4.7%) were to be made to SNS Bank's portfolio, the downward adjustment for the balance sheet item would be €2.6 billion.

6.81 As stated, the valuation is a hypothetical exercise. Although much speaks in favour of alignment with the DSB precedent rather than Van der Hoop, as a better comparison can be made, if the average of these two cases were to be applied, the outcome is a discount of 6.7%, i.e. €3.7 billion (precisely €3.683 billion).

6.82 SNS Bank's balance sheet furthermore contains a number of assets that cannot be sold (intangible fixed assets, primarily acquired goodwill). Off-settable tax losses capitalised by SNS Bank also have no value in a liquidation scenario because SNS Bank will no longer make any profit against which the losses might be set off.

(f) Schematic diagram

6.83 The adjustments above are schematically reflected in the table below. The most recent balance sheet figures, published as at 30 June 2012, are used in the table.¹²⁵

SNS Bank Balance sheet item <i>(in millions of euros)</i>	30 June 2012	Adjustments	Total
Property Finance (minus provisions), including real estate in title ¹²⁶	8,313	(3,599)	4,714
Other loans and advances to clients	54,720	(3,683)	51,037
Deferred tax assets	192	(192)	0
Corporate income tax	156	(156)	0
Intangible fixed assets	150	(150)	0
Other assets	19,161	-	19,161

¹²⁵ Exhibit 8.

¹²⁶ This can be found in the half-year report as at 30 June 2012 (Exhibit 8) by adding the Total Exposure of the Property Finance segment ((€4,740 million; see page 27) to the Total Exposure of the PF SME segment (€3,573 million; see page 69), thus a total of €8,313 million.

Total assets	82,692	(7,780)	74,912
Total ordinary liabilities	80,134	-	80,134

- 6.84 A deficit follows from the above for payment of SNS Bank's ordinary debts of at least €5.222 billion (the difference between 'Total ordinary liabilities' and 'Total assets'). SNS Bank's ordinary creditors would then hold SNS REAAL liable for this deficit based on the 403-statement issued by SNS REAAL.
- 6.85 SNS REAAL's assets primarily consist of shares in SNS Bank and shares in REAAL. The remainder of the assets have a total book value of about €700 million. On the liability side are SNS REAAL's own debts, to be divided into ordinary debts (about €1.4 billion) and subordinated debts (about €400 million).
- 6.86 The value of the SNS Bank shares would be naught, as SNS Bank is being wound up and nothing remains for the SNS Bank shareholders. The value of the REAAL shares is the expected sale revenue. Morgan Stanley appraised the REAAL sale revenues at €1.250 billion to €1.500 billion.¹²⁷ Downward adjustments are imaginable on the other assets with regard to potential losses as a result of derivatives positions and guarantees given by SNS REAAL, but those can be disregarded in a general calculation.
- 6.87 To be added to the liabilities side are the costs incurred by splitting off REAAL (estimated by SNS REAAL itself at €100 million) and a supplementary pension provision (estimated by DNB at €188 million). However, the largest blow comes from the 403-claims of SNS Bank creditors (€5,222 million).
- 6.88 In winding up, therefore, SNS REAAL's ordinary debts total €1.4 billion plus €5.2 billion, is €6.6 billion. On the other side are assets worth €1.4 billion plus €0.7 billion, is €2.1 billion. In winding up, therefore, there is a deficit for payment of ordinary debtors in the amount of €4.5 billion. This leaves nothing for subordinated creditors, let alone shareholders.

(g) Elimination of the state aid provided

- 6.89 What is more, pursuant to Article 6:9, paragraph 2, Wft the value represented by state aid provided earlier must be discounted in the price. As discussed above, the Explanatory Memorandum to the Intervention Act mentions that this provision is

¹²⁷ Exhibit 18, page 25.

intended to prevent shareholders from receiving higher compensation than justified on the basis of the damage they actually suffered.¹²⁸

6.90 SNS REAAL was provided with state aid in 2008 in connection with the stability of the financial system. The shareholders may not profit from that in the determination of the compensation. This must be treated as an immediately due and payable debt in determining the value. The repayment obligation is €848 million (including a 50% premium), €565 million of which must be considered state aid in any event. Consequently, if a value would have to be assigned to the subordinated debts, the state aid would have to be subtracted from that.

(h) Conclusion

6.91 Based on the above, the conclusion is that in a bankruptcy or liquidation scenario the expected distributions on the subordinated debts of SNS Bank would be naught, and likewise on the subordinated debts of SNS REAAL. As a result, no distribution would be made on the SNS REAAL shares, either.

7. THE OFFER

In light of the above, the Minister has made the following compensation offer to the title holders of the securities and capital components mentioned in the Decree:

- €0.00 per share issued by SNS REAAL and per share issued by SNS Bank held by a party other than SNS REAAL or its group companies (Article 1(1)(a) through (d) of the Decree);
- €0.00 per Stichting Beheer SNS REAAL Core Tier 1 capital security (Article 1(1)(e) of the Decree);
- €0.00 per subordinated bond issued by SNS REAAL and SNS Bank (Article 1(1)(f) through (i) of the Decree);
- €0.00 per loan concluded by SNS REAAL or SNS Bank that transferred to Stichting Afwikkeling Onderhandse Schulden SNS REAAL as a result of the expropriation (Article 1(2), preamble, at (a) and closing, of the Decree).¹²⁹

¹²⁸ *Parliamentary Documents II*, parliamentary year 2011-2012, 33 059, no. 3, page 74.
¹²⁹ See the Offer, Exhibit 3.

8. REQUEST

Based on the above, the Minister requests the Enterprise Division to determine the compensation for the title holders with regard to the securities and capital components expropriated pursuant to the Decree in accordance with the Offer, costs to be determined by the court.

Attorney

This case is being handled by *mr.* T.M. Stevens, *mr.* R.G.J. de Haan, *mr.* M.P.P. de Planque, *mr.* D.M. van der Houwen and *mr.* E.W. Stein, Allen & Overy LLP, Apollolaan 15, 1077 AB Amsterdam; telephone: 020 674 1745, fax: 020 674 1847.

EXHIBITS

- Exhibit 1: The Minister's Expropriation Decree dated 1 February 2013
- Exhibit 2: Judgment by the Administrative Jurisdiction Division of the Council of State dated 25 February 2013
- Exhibit 3: The Minister's Compensation Offer dated 4 March 2013
- Exhibit 4: Simplified overview of the SNS REAAL group structure
- Exhibit 5: Extracts from the Trade Register of SNS REAAL, SNS Bank and REAAL
- Exhibit 6: SNS REAAL's Articles of Association
- Exhibit 7: SNS REAAL Annual Report 2011
- Exhibit 8: SNS REAAL's Interim financial report for the first half of 2012
- Exhibit 9: Letter from DNB to the Ministry of Finance dated 23 May 2012 regarding risk of contamination
- Exhibit 10: Letter from the Minister to DNB dated 31 July 2012 regarding position situation SNS REAAL group
- Exhibit 11: Letter from DNB to the Ministry of Finance dated 2 October 2012 regarding situation SNS REAAL group
- Exhibit 12: Letter from KPMG to SNS REAAL dated 29 November 2012 regarding continuity
- Exhibit 13: Report by Cushman & Wakefield dated 14 December 2012
- Exhibit 14: Letter from DNB to SNS Bank dated 18 January 2013 regarding proposed SREP decision 2012
- Exhibit 15: Letter from DNB to the Minister regarding current situation SNS REAAL group dated 24 January 2013
- Exhibit 16: Letter from DNB to SNS Bank dated 27 January 2013 regarding final SREP decision
- Exhibit 17: Letter from DNB to the Minister dated 1 February 2013 regarding need to intervene
- Exhibit 18: Analysis by Morgan Stanley dated 28 January 2013
- Exhibit 19: Letter from DNB to SNS Bank and SNS REAAL dated 1 February 2013 regarding failure to satisfy measure SREP decision

- Exhibit 20: Non-voting Core Tier 1 Capital Securities - Placement Agreement, Deed of Issue and Placement, Irrevocable Undertaking and Terms and Conditions of the Stichting Securities
- Exhibit 21: €350 million 6.258% Fixed/Floating Rate Hybrid Capital Securities - Final Terms en Terms and Conditions of the Capital Securities
- Exhibit 22: \$100 million 8.45% Fixed Rate Subordinated Notes - Final Terms and Terms and Conditions of the Medium Term Notes
- Exhibit 23: €320 million 11.25% Resettable Tier 1 Notes - Final Terms and the Terms and Conditions of the Tier 1 Notes
- Exhibit 24: €200 million 5.75% Subordinated Fixed changing to Floating Rate Notes - Pricing Supplement and Terms and Conditions of the Notes
- Exhibit 25: €500 million 6.25% Subordinated Notes – Final Terms and Terms and Conditions of the Medium Term Notes
- Exhibit 26: €200 million 6.625% Subordinated Fixed Rate Notes – Final Terms and Terms and Conditions of the Medium Term Notes
- Exhibit 27: €5 million 4% Floating Rate Subordinated Securities – Pricing Supplement and Terms and Conditions of the Notes
- Exhibit 28: SNS Participatie Certificaten 3 - Terms and Conditions
- Exhibit 29: Subordinated loan agreement between SNS REAAL Groep N.V. and Van Doorn Securities B.V. dated 9 October 2000 (€20 million)
- Exhibit 30: Subordinated loan agreement between SNS REAAL Groep N.V. and Van Doorn Securities B.V. dated 9 October 2000 (€10 million)
- Exhibit 31: Loan agreement between SNS Groep N.V. and Stichting tot beheer van FNV aandelen REAAL Groep N.V. dated 20 May 1997
- Exhibit 32: Loan agreement between Stichting Pensioenfonds Poseidon and SNS Bank Nederland N.V. dated 2 March 1999
- Exhibit 33: Subordinated loan agreement between Stichting Bewaarder OHRA Obligatie Fonds and SNS Bank Nederland N.V. dated 18 January 2000
- Exhibit 34: 403 Statement by SNS REAAL on behalf of SNS Bank
- Exhibit 35: Report by Cushman & Wakefield dated 20 December 2012