Raad van State

201301173/1/A3.
Date of judgment: 25 February 2013

ADMINISTRATIVE JURISDICTION DIVISION

Judgment in the action between:

the Investors Association VEB NCVB (below: VEB), which has its seat in The Hague, and the natural and legal persons listed in the annexe,
appellants,

and

the Minister of Finance,
respondent.

Course of the proceedings

By order of 1 February 2013 the minister directed the expropriation of the securities and assets of SNS REAAL N.V., a public company ('SNS REAAL'), and SNS Bank N.V., a public company ('SNS Bank'), and the taking of immediate measures at SNS REAAL ('the expropriation order').
This order is attached.

The VEB and the natural and legal persons referred to in the annexe ('the appellants') have appealed against this order.

The minister has lodged a defence to the appeal.

The appellants have lodged further documents.

On request, the minister has lodged the documents underlying the expropriation order and sought a direction, with reference to section 8:29, subsection 1 of the General Administrative Law Act, that access to certain parts of a few of the

documents relating to the case should be restricted to the Administrative Jurisdiction Division (‘the Division’).

On 12 February 2013 the Division, sitting in a different composition, held that the request for limitation of access to the documents was partially justified.

The Division dealt with the case at its hearing on 15 February 2013, at which the parties appearing included:
- the VEB and the appellants numbered 207 and 218 in the annexe, represented by P.J. van der Korst and J.H. Lemstra, lawyers in Amsterdam;
- the appellants numbered 29, 210, 238 and 593 in the annexe, represented by W.M. Schonewille and J.A.N. Baas, lawyers in The Hague;
- the appellants numbered 118 in the annexe, represented by D.J.M. Lange and M.W.E. Evers, lawyers in Amsterdam;
- the appellants numbered 100 in the annexe, represented by I.N. Tzankova, lawyer in The Hague;
- the appellant numbered 271 in the annexe, represented by F.M.A. ’t Hart, lawyer in Amsterdam;
- the appellants numbered 367 and 633 in the annexe, represented by B.T.A. Baldwin and F.M.G.M. Leyendeckers, lawyers in Amsterdam;
- the appellants numbered 14, 38, 40 and 72 in the annexe, represented by H.J. Breeman and C.W.M. Lieverse, lawyers in Rotterdam;
- the appellant numbered 187 in the annexe, represented by G.A. Smit, lawyer in Amsterdam;
- the appellants numbered 592 in the annexe, represented by M.C. van Kamp and A.P. Kranenburg, lawyers in Amsterdam;
- the appellant numbered 296 in the annexe, represented by J.A.M.A. Sluysmans and W.J. Bosma, lawyers in The Hague;
- the appellants numbered 485 in the annexe, represented by P.T. Lakeman, authorised representative;
- the appellants numbered 628 in the annexe, represented by J.M. van den Berg, lawyer in Amsterdam;
- the appellants numbered 318 in the annexe, represented by J. Wendelgelst, lawyer in Amstelveen;
- the appellants numbered 260 in the annexe, represented by J.A.M. Hendriks, authorised representative;

- the appellants numbered 627 in the annexe;
- the appellant numbered 179 in the annexe;
- the appellant numbered 17 in the annexe, represented by C.R. Zijderveld, lawyer in Amsterdam;
- the appellants numbered 409 in the annexe, represented by A. van Lokhorst, lawyer in Rotterdam;
- the appellants numbered 119 in the annexe, represented by J.A. Voerman, lawyer in Amsterdam;
- the appellant numbered 454 in the annexe;
- the appellant numbered 700 in the annexe; and
- the minister, represented by E.J. Daalder, lawyer in The Hague, and T. Stevens, lawyer in Amsterdam, assisted by W. Raab and G.J. Salden, both employed at the Ministry of Finance, and J.R. Heuvelman, employed at De Nederlandsche Bank N.V. (DNB).

Reasoning

Expropriation order

1. The expropriation order is based on sections 6:1 (1), 6:2 (1), (4) and (5) and 6:4 (1) and (2) of part 6 of the Financial Supervision Act.

2. Pursuant to section 6:1, subsection 1 of the Financial Supervision Act, if the minister considers that there is a serious and immediate threat to the stability of the financial system due to a situation in which a financial undertaking that has its seat in the Netherlands finds itself, he may take immediate measures in respect of that undertaking in order to maintain the stability of the system, if necessary in contravention of statutory provisions or provisions of articles of associations, with the exception of rules laid down by or pursuant to this part of the Financial Supervision Act.

Pursuant to section 6:2, subsection 1, if the minister considers that there is a serious and immediate threat to the stability of the financial system due to a situation in which a financial undertaking that has its seat in the Netherlands finds itself, he may expropriate assets of the undertaking concerned or expropriate securities issued with the cooperation of the undertaking in order to maintain the

stability of the system, if necessary in contravention of statutory provisions or provisions of articles of associations, with the exception of rules laid down by or pursuant to this part of the Financial Supervision Act.

Pursuant to subsection 4 it may be provided in the expropriation order that the assets or securities to be expropriated are expropriated in the name of a legal person constituted under private law which is designated in the order and has full legal capacity.

Pursuant to subsection 5 the minister regulates the consequences of the expropriation.

Pursuant to section 6:4, subsection 1 an immediate measure taken by virtue of section 6:1 may also relate to the parent company of the financial undertaking concerned if the parent company has its seat in the Netherlands.

Pursuant to subsection 2, if the financial undertaking concerned has a parent company which has its seat in the Netherlands an order made by virtue of section 6:2 may extend to expropriation of assets of the parent company or expropriation of securities issued by or with the cooperation of that company.

Pursuant to section 6:8, subsection 1, first sentence, the person entitled to an asset or security expropriated by virtue of section 6:2 has the right to compensation.

Pursuant to subsection 2, what is reimbursed is the real economic value of the expropriated asset or security or, as the case may be, the lapsed right, solely to the person entitled to it.

Pursuant to section 6:10, subsection 1 the compensation is determined by the Enterprise Division of the Court of Appeal in Amsterdam.

3. In the expropriation order the minister, with the agreement of the prime minister and after consulting DNB, expropriated in so far as relevant here:

- the securities issued by or with the cooperation of SNS REAAL or, as the case may be, SNS Bank as referred to in article 1, paragraph 1 of that order, in the name of the State of the Netherlands (‘the State’);

- the assets of SNS REAAL or, as the case may be, SNS Bank as referred to in article 1, paragraph 2 of that order in the name of the SNS REAAL Private Loans Settlement Foundation (SAOS), in such a way that all rights and obligations which SNS REAAL or SNS Bank has in respect of those assets pass to SAOS at the time of expropriation.

Publication of the expropriation order

4. Pursuant to section 6:2, subsection 3 of the Financial Supervision Act notice of the expropriation order is given by publication in the Government Gazette, without prejudice to section 3:41 of the General Administrative Law Act.

Pursuant to section 3:41, subsection 1 of the General Administrative Law Act notice of orders addressed to one or more interested parties is given by sending or issuing them to the interested parties, including the applicant.

Pursuant to subsection 2, notice of orders which cannot be notified in the manner referred to in subsection 1 will be given in another suitable manner.

4.1. The expropriation order was published on 1 February 2013 when the full text was posted on the website of the Ministry of Finance. This publication was publicised on the same day by the issuing of a press release and by the inclusion of the full text in the Government Gazette (2013, 3018). As the order is addressed to a very large number of interested parties whose identity is in many cases unknown to the minister, namely the persons entitled to the expropriated securities and assets, the minister rightly decided that publication could not occur in the manner provided for in section 3:41, subsection 1 of the General Administrative Law Act. In the special circumstances of this case, the chosen manner of publication was also a suitable manner as referred to in section 3:41, subsection 2 of the General Administrative Law Act.

Competence of the Administrative Jurisdiction Division

5. In so far as the appellants numbered 318 in the annexe have also appealed against the decision of DNB of 27 January 2013, in which DNB imposed a measure on SNS Bank under section 3.111a, subsection 2 of the Financial Supervision Act, the Division is not competent to hear that appeal. Notice of objection to this decision may be lodged with DNB pursuant to section 7:1, in conjunction with section 8:1, of the General Administrative Law Act. The Division will therefore declare that it lacks competence to hear this appeal and will forward the notice of appeal to DNB for consideration as a notice of objection.

Interested party

6. The minister has argued that some foundations which have lodged appeals are not interested parties within the meaning of section 1:2 of the General Administrative Law Act as they have been established since the date of the expropriation order. This argument is untenable.

As held previously by the Division (e.g. in its judgment of 7 December 2011 in case no. 200909566/1/R3; www.raadvanstate.nl), a legal person may be an interested party even if it has been established after the disputed decision but before the end of the appeal period.

Right to a fair hearing and procedural aspects

7. Some appellants argue that the provisions of the Financial Supervision Act and the manner in which the Division has dealt with this case violate their right to a fair hearing as safeguarded by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). They refer in this connection to the brevity of the period for lodging an appeal, to the brevity of the period between the lodging of the appeal and the appeal hearing held the Division and to the fact that in some cases they only had a few days before the hearing in which to acquaint themselves with the documents relating to the case. These appellants argue that as a result of this limited time for preparation they have been unable to defend their interests properly. More particularly, a few of these appellants argue that the Division should have held the hearing not on Friday 15 February 2013 but on Monday 18 February 2013 and that they had no

opportunity to inspect the minister's 105-page statement of defence until after 5 pm on the day before the hearing.

7.1. It is apparent from the case law of the European Court of Human Rights (ECtHR) (e.g. the case of Ashingdane v. the United Kingdom of 28 May 1985, application no. 8225/78, www.echr.coe.int) that article 6 ECHR does not confer an absolute right of access to the courts. The Contracting States enjoy a margin of appreciation in laying down regulations that entail certain limitations, provided that the very essence of the right of access to the courts is not impaired and the limitations serve a legitimate aim and are proportionate.

7.2. Pursuant to section 6:6, subsection 1 of the Financial Supervision Act an appeal against an expropriation order must be lodged within ten days, and pursuant to section 6:7, subsection 3 the Division must give judgment no later than on the fourteenth day after receipt of the last notice of appeal to be lodged. The Division acknowledges that these periods are much shorter than is customary in administrative law proceedings. However, the right of access to the courts is not in essence impaired by these limitations. Moreover, the prescribed periods serve a legitimate aim. The Division takes into account in this connection that there is an exceptionally great public interest in obtaining judgment without delay in this case. The expropriation order is intended to avert a serious and immediate threat to the stability of the Dutch financial system. As long as it is uncertain whether this order will be upheld, this aim is not fully achieved. In view of this weighty public interest the periods contained in the Financial Supervision Act do not violate article 6 ECHR and the Division has organised the proceedings in such a way as is necessary to give judgment within the statutory period. It is important to note here that the appellants had the opportunity to put their case both in writing and orally and that many of them actually made use of this opportunity. Nor, in view of the exceptional nature of this case, is this altered by the fact that an unusual degree of effort was needed on the part of the appellants too.

In so far as a few appellants complain that they did not receive an invitation to the hearing or did not receive it in time and were accordingly unable to represent their interests in person at the hearing, the Division finds that since the great majority of the appellants were able to put their case both in writing and orally

and, in the opinion of the Division, all possible relevant aspects of the case were raised, it is unlikely that the interests of the appellants concerned were disproportionately impaired.

In so far as a few appellants have invoked article 6 (3) ECHR, this argument is untenable for the simple reason that there is no basis for the view that the expropriation order constitutes a criminal charge within the meaning of that provision in relation to the holders of the expropriated securities and assets.

8. The wording of article 47 of the Charter of Fundamental Rights of the European Union ('EU Charter') is similar to that of article 6 ECHR. Quite apart from whether this action concerns the implementation of Union law within the meaning of article 51 (1) EU Charter, it is apparent that since the application of the relevant provisions of the Financial Supervision Act does not violate article 6 ECHR it also does not conflict with article 47 EU Charter (see the Division's judgment of 21 November 2012 in case no. 201110693/1/A2; www.raadvanstate.nl).

The submission on this point by a number of appellants is therefore untenable. Accordingly, the Division sees no reason to refer this matter to the Court of Justice of the European Union ('Court of Justice') for a preliminary ruling on the applicability of the EU Charter, as requested by these appellants.

9. The appellants numbered 318 in the annexe have submitted that the expropriation order is based to such an extent on the DNB decision of 27 January 2013, under which SNS Bank was ordered to supplement its core capital, that the Division cannot assess the expropriation order as long as the legality of DNB's decision has not been established. These appellants argue that the Division should therefore stay its judgment until a decision has been taken on the legality of DNB's decision.

9.1. This submission is untenable. Article 6:2, subsection 1 of the Financial Supervision Act does not make the power of expropriation dependent on the existence or otherwise of any decision of DNB. The legality or illegality of DNB's decision is therefore not decisive in answering the question before the Division in

these proceedings, namely whether the expropriation order was made in accordance with the law.

10. Various appellants have submitted that under section 4:8, subsection 1 of the General Administrative Law Act the minister should have given the holders of securities and assets expropriated under the expropriation order the opportunity to express their views on the order before it was made.

10.1. This submission is untenable. Under section 4:11, subsection 1, opening words and (a) and (c) of the General Administrative Law Act, an administrative authority may decide not to apply section 4:8 where speed is of the essence or the intended purpose of the order can be achieved only if the interested party is not informed of it in advance. In view of the nature and purpose of the expropriation order, the minister was entitled not to apply section 4:8, subsection 1 of the General Administrative Law Act since if news of a possible expropriation had become known early this could have increased the risks to the stability of the financial system.

State aid

11. A few appellants have submitted that the expropriation order is in contravention of article 108 (3) of the Treaty on the Functioning of the European Union (TFEU). They argue that the order involves the provision of state aid within the meaning of article 107 TFEU. Pursuant to article 108 (3) TFEU, the European Commission ('the Commission') must be informed of a plan to introduce a measure granting state aid and such a measure may not be put into effect until it has been approved by the Commission. According to the appellants concerned, the state aid granted by the expropriation order was not notified to – or in any event not approved by – the Commission in advance.

11.1. Pursuant to section 8:69a of the General Administrative Law Act, the administrative courts do not set aside an order made in breach of a written or unwritten legal rule or a general principle of law if this rule or principle is clearly not intended to protect the interests of those relying on it.

In this action the question arises of whether appellants can derive a right from Union law. As held by the Court of Justice in a case relating to whether individuals could rely on article 108 (3) TFEU (judgment of 13 January 2005, C-174/02, Streekgewest Westelijk Noord-Brabant v. State Secretary for Finance, paragraph 19; www.curia.europa.eu), an individual may have an interest in relying before the national court on the direct effect of the prohibition on implementation referred to in article 93 (3) of the EC Treaty (now article 108 (3) TFEU) not only in order to erase the negative effects of the distortion of competition created by the granting of unlawful aid, but also in order to obtain a refund of tax levied in breach of that provision.

The appellants' interests in relation to the expropriation order result from their position as holders of securities issued by or with the cooperation of SNS REAAL or SNS Bank, as representatives of the interests of holders of such securities or as providers of loans to SNS REAAL or SNS Bank. In view of the above, article 108 (3) TFEU is clearly not intended to protect the interests of holders of securities issued by or with the cooperation of an undertaking to which state aid has been granted or to protect the interests of providers of loans to such an undertaking. For this reason alone, this submission cannot result in the setting aside of the expropriation order. The Division therefore sees no reason to refer this matter to the Court of Justice for a preliminary ruling on the applicability of the rules on state aid, as requested by the appellants.

Concentration control

12. A few appellants have also submitted that the expropriation order is in contravention of section 34 of the Competition Act or article 7 of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24) ('the EC Merger Regulation'). They argue that the expropriation order has implemented a concentration within the meaning of section 27 of the Competition Act and article 3 of the EC Merger Regulation as the State is already the owner of ABN AMRO. They submit that the turnover of the undertakings involved in the concentration is likely to exceed the turnover thresholds laid down in section 29 of the Competition Act. It follows that section 34 of the Competition Act is applicable and hence that a concentration may not be implemented as long as it has not

been notified to and approved by the administrative board of the Netherlands Competition Authority. If the turnover of the undertakings concerned exceeds the turnover thresholds laid down in article 1 of the EC Merger Regulation, article 7 of that Regulation applies. Under that provision a concentration may not be implemented before it has been notified to and approved by the Commission. The appellants concerned argue that the concentration implemented by the expropriation order has not been notified to the Netherlands Competition Authority or to the Commission.

12.1. Pursuant to section 8:69a of the General Administrative Law Act, the administrative courts do not set aside an order made in breach of a written or unwritten legal rule or a general principle of law if this rule or principle is clearly not intended to protect the interests of those relying on it.

The provisions laid down in chapter 5 of the Competition Act concerning the supervision of concentrations of undertakings, in particular in view of section 37, subsection 2 and section 41, subsection 2, are intended to prevent a situation in which concentrations of undertakings significantly impede effective competition in the Dutch market or in a substantial part of it. The aim of the EC Merger Regulation, in particular in view of article 2 (3) and article 7 (1), is to prevent a situation in which concentrations of undertakings significantly impede effective competition in the common market of the European Union or in a substantial part of it. To achieve these aims, the Competition Act and the EC Merger Regulation give the Dutch Competition Authority and the Commission respectively the duty and power to prohibit concentrations of undertakings that significantly impede competition. Viewed in this light, section 34 of the Competition Act and article 7 of the EC Merger Regulation are intended to prevent implementation of a concentration of undertakings without the Dutch Competition Authority or the Commission, as the case may be, having the opportunity to determine whether this will significantly impede competition. These articles are therefore intended to protect the interests of those who may be adversely affected by impediments to competition as a consequence of a concentration of undertakings, such as the competitors, customers and suppliers of the undertakings concerned.

The interests of the appellants in relation to the expropriation order result from their position as holders of securities issued by or with the cooperation of SNS

REAAL or SNS Bank, as representatives of the interests of holders of such securities or as providers of loans to SNS REAAL or SNS Bank. In view of the above – and also having regard to paragraph 19 of the judgment in Streekgewest Westelijk Noord-Brabant v. the State Secretary for Finance – section 34 of the Competition Act and article 7 of the EC Merger Regulation are clearly not intended to protect the interests of holders of securities issued by or with the cooperation of an undertaking involved in a concentration or to protect the interests of providers of loans to such undertakings. For this reason alone, this submission cannot result in the setting aside of the expropriation order.

Infringement of right to property (in theory)

13. Pursuant to article 1 of Protocol No. 1 to the ECHR ('Protocol No. 1') every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one is to be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions do not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

13.1. The appellants submit that the expropriation of the securities and assets specified in the expropriation order is in contravention of the right to peaceful enjoyment of possessions as laid down in article 1 of Protocol No. 1 since the expropriation was not foreseeable. They also argue that the provisions of part 6 of the Financial Supervision Act are not consistent with this provision since responsibility for assessing the legality of the expropriation order is conferred on the Division whereas assessment of the compensation is a matter for the Enterprise Division of Amsterdam Court of Appeal. According to the appellants, this means that the compensation is not assured in advance. Moreover, the Division is said to be unable to assess whether the expropriation is proportionate to the stated aim as long as the amount of the compensation has not been determined.

13.2. The fact that the expropriation of the securities and assets specified in the expropriation order constitutes a violation of the right to peaceful enjoyment of possessions as laid down in article 1 of Protocol No. 1 is not in dispute.

13.3. According to the established case law of the ECtHR, article 1 of Protocol No. 1 requires that each infringement by the State of the peaceful enjoyment of possessions should be provided for by statute and should be in accordance with national law. This national law should be sufficiently accessible and precise and its application should be sufficiently foreseeable (judgments of 25 June 1996 in the case of Amuur v. France, no. 19776/92, para. 50 and 9 November 1999 in the case of Špaček v. the Czech Republic, no. 26449/95, para. 54; www.echr.coe.int). The infringements must also serve a legitimate aim in the public interest. Finally, a violation of the right to peaceful enjoyment of possessions is permitted only if the means used are proportionate to the intended aim. A balance must therefore be struck between the intended aim and the protection of individual rights. In assessing what is in the public interest and the means chosen to achieve this, the national legislator has a wide margin of appreciation.

13.4. The expropriation order is based on section 6:2 of the Financial Supervision Act. This provision is adequately accessible since it is contained in statute law. The criterion for proceeding with expropriation, namely that a financial undertaking established in the Netherlands finds itself in a situation in which it poses a serious and immediate threat to the stability of the financial system, is sufficiently precise. The same is true of the description of what can be expropriated, namely assets of this undertaking or securities issued by or with its cooperation. It follows that the application of section 6:2 of the Financial Supervision Act is also sufficiently foreseeable. The requirement that the infringement of the right to peaceful enjoyment of possessions should be provided for by statute has therefore been fulfilled.

13.5. Contrary to what some appellants have submitted, the requirement of a balance between the public interests served by expropriation and the individual rights concerned does not mean that the amount of the compensation should be specified in the expropriation order itself. It is sufficient if the order establishes the manner in which the compensation is to be determined. The ECtHR requires that

in cases of expropriation the compensation should be in reasonable proportion to the value of the possessions. Section 6:8 of the Financial Supervision Act gives those entitled to the expropriated securities or assets a right to compensation amounting to their real economic value. This is the price which would be achieved in the event of a voluntary sale if allowance is made pursuant to section 6:9 of the Financial Supervision Act for the prospects that the undertaking would have had without expropriation. This would, after all, have been taken into account by the parties in a voluntary sale. In the Division's opinion, this criterion meets the requirements set by the ECtHR. Nor is this altered by the fact that the minister has indicated that in his view the real economic value of the expropriated securities and assets is nil. Pursuant to section 6:10 of the Financial Supervision Act it is, after all, not the minister but the independent courts which determine the amount of compensation. For this reason, the Division is entitled to assume in assessing the proportionality of the expropriation order that suitable compensation is assured.

The submissions are untenable.

Serious and immediate threat to the stability of the financial system

14. The Financial Supervision Act gives the regulators DNB and the Netherlands Authority for the Financial Markets various instruments for use when problems arise with financial undertakings. These instruments focus on prevention or on the timely and orderly resolution of a financial undertaking that is in difficulties. The entry into force of the Financial Institutions (Special Measures) Act (Bulletin of Acts and Decrees 2012, 241) has added provisions of a different character to the Financial Supervision Act in part 6. This part confers far-reaching powers on the minister to take measures to secure the stability of the financial system as a whole. For this purpose the minister is given the power to intervene in the internal affairs of a financial undertaking (section 6:1, Financial Supervision Act) and, as an ultimate remedy, to expropriate a financial undertaking (section 6:2, Financial Supervision Act).

15. It should be noted at the outset that nothing in the text of part 6 of the Financial Supervision Act or in the history of its passage through parliament (Parliamentary Papers, House of Representatives, 2011/2012, 33 059, no. 3, pp.

29-36) suggests that, before the powers contained in sections 6:1 and 6:2 can be used, less far-reaching measures should first have been applied in vain. The submissions by some appellants to this effect are therefore untenable. A factor of importance in this connection is that the power to take less far-reaching measures of this kind belongs not to the minister but to the regulators. The minister is competent only to apply the measures described in the two provisions referred to above. To do so, he should believe that there is a serious and immediate threat to the stability of the financial system and that there is a direct connection between the situation of the undertaking concerned and the immediate threat to the financial system. The identity of those responsible for the situation in which the financial undertaking concerned finds itself is not relevant to an assessment of whether such an exceptional situation exists. Whatever the truth of the complaints expressed by many appellants about failures of management at SNS REAAL and SNS Bank, the provision of incorrect or deficient information and failures of supervision by DNB cannot therefore lead to the conclusion that the minister was not entitled to make the expropriation order.

16. To substantiate his view that the precarious financial situation of SNS Bank forms a serious and immediate threat to the stability of the financial system, the minister, like DNB, has taken the position in the expropriation order that SNB is a systemically important financial institution (SIFI). According to the minister, this is the case if the insolvency of the institution would have unacceptably large and undesirable consequences for financial stability, the Dutch economy and Dutch taxpayers.

16.1. According to the expropriation order, the minister based his decision on the following facts and circumstances. SNS Bank is the Netherlands' fourth bank. It is the holding company of ASN Bank N.V. ('ASN Bank'), RegioBank N.V. ('RegioBank'), SNS Property Finance B.V. ('Property Finance') and SNS Securities N.V. It has consolidated total assets of €82.3 billion. Almost a million payment accounts and over 1.6 million savings accounts, with an aggregate credit balance of €36.4 billion, are kept at SNS Bank and its subsidiaries. At least €500 is paid into about two thirds of the payment accounts monthly, which is indicative of the important role played by these accounts in fund transfers by individuals. According to the minister, the bankruptcy of the bank would immediately result in very great calls being made on the deposit guarantee

system. This would put a major strain on the other banks and deplete their capital buffers, thereby immediately jeopardising confidence in the banks and the financial system as a whole. This would in turn adversely affect the financing charges payable by these banks. As the minister also points out, the financial markets are still not back on a normal footing. The bankruptcy of an institution such as SNS Bank could therefore fundamentally undermine confidence in the Dutch financial system. This could result in a lowering of the creditworthiness ratings of other Dutch banks and of the Dutch State, possibly causing a sudden sharp increase in financing charges. The minister has also pointed out that in the event of a bankruptcy about one million account holders would be temporarily unable to access their payment accounts and might therefore get into financial difficulties, with all the social unrest that this might entail.

In view of these facts and circumstances, the minister has rightly taken the position that SNS Bank is a systemically important financial institution. Nor is this altered by the fact that, as some appellants maintain, SNS Bank is not comparable to the three largest Dutch banks (ING, Rabobank and ABN AMRO) in terms of savings managed and the scope of its operations abroad. The facts and circumstances mentioned by the minister in themselves warrant the conclusion that the bankruptcy of SNS Bank would threaten the stability of the financial system.

17. The minister has also taken the position in the expropriation order that the problems at SNS REAAL and SNS Bank at the time when the order was made were of such a nature as to pose a serious and immediate threat to the stability of the financial system. He bases this assertion on the following facts and circumstances.

17.1. In late 2008 DNB intensified its supervision of SNS Bank as its position had worsened due to the credit crisis and also because of the stricter capital requirements and the losses which the markets expected Property Finance to suffer. DNB accordingly requested SNS REAAL in the spring of 2011 to prepare a plan for strengthening its capital position. In the summer of 2011 DNB concluded on the basis of its assessment of the 2011 Supervisory Review and Evaluation Process (SREP) and the plan submitted by SNS REAAL, including a supplement, that SNS REAAL lacked the capacity to take the necessary

measures to strengthen its financial position on its own. DNB and the Ministry of Finance established a project group in early December 2011 to explore possible private, public or mixed public-private solutions of a lasting nature. Talks on this were under way right up to the day before the expropriation order was made, including talks with a private party.

On 29 November 2012 the external auditor of SNS REAAL revealed that in the light of information obtained from the executive board and talks with DNB there was a real possibility that when the 2012 financial statements of SNS REAAL and SNS Bank were prepared there would be a material uncertainty about the capacity of SNS Bank to fulfil the capital requirements independently. According to the external auditor, this meant that there was reasonable doubt about the continuity of SNS Bank and hence of SNS REAAL. In the absence of any change in the position this would, according to the external auditor, have important consequences for the 2012 financial statements of SNS Bank and SNS REAAL and might possibly result in a refusal to issue an unqualified opinion on the financial statements. As SNS REAAL was scheduled to publish its annual results on 14 February 2013, it would be necessary for the management to be sure by that date that the continuity of the company was guaranteed. The external auditor stated that a comprehensive solution should therefore be achieved by mid-January 2013 at the latest so that this could be incorporated in the financial statements and the annual report in good time.

By letter of 24 January 2013 DNB informed the minister that it had notified SNS Bank of the results of the 2012 SREP in a proposed decision on 18 January 2013. DNB indicated at the same time that it intended to impose a measure on SNS Bank under section 3.111a, subsection 2 of the Financial Supervision Act. In this letter DNB also stated that if it saw grounds for recording this intention in a final decision and SNS Bank was unable to comply with the measure within the prescribed period, it would not consider it appropriate for SNS Bank to carry on its banking business any longer. It is apparent from the letter that a major factor in DNB’s thinking was that in the absence of a convincing and final solution it would not be possible for SNS Bank to publish provisional annual figures as a going concern on 14 February 2013, and that postponement of publication without the announcement of a comprehensive solution would further undermine confidence in SNS REAAL. DNB also mentioned in this connection the growing

stream of reports in the media about the vulnerable position of SNS REAAL and SNS Bank. This had already led to the withdrawal of €1.4 billion net in savings from SNS Bank by 24 January 2013. As the risk of SNS Bank's insolvency would, according to DNB, pose a threat to the stability of the financial system, it advised the minister to make preparations to exercise his powers under part 6 of the Financial Supervision Act.

By decision of 27 January 2013 DNB noted that, in view of SNS Bank's opinion on the proposed decision of 18 January 2013, it had a capital shortfall of €1.84 billion, for which no solution had been found for the time being despite intensive talks between the parties concerned. DNB therefore imposed an obligation on SNS Bank to supplement its core capital by at least €1.84 billion by 6 pm on 31 January 2013 at the latest or otherwise present a final solution for eliminating the capital shortfall in the short term which would, in DNB's opinion, have a sufficient chance of success.

On 31 January 2013, at 6 pm, DNB noted that SNS Bank had not fulfilled the obligation imposed on it within the prescribed period.

17.2. It follows from these facts and circumstances that SNS REAAL was unable to strengthen its financial position on its own, that a lasting solution to the capital shortfall at SNS Bank required cooperation with the State and private parties and that there had to be a realistic prospect of such a solution by 31 January 2013 at the latest. In so far as appellants have submitted that DNB was wrong to order SNS Bank on 27 January 2013 to eliminate its capital shortfall, the Division would point out, as held above at 5, that it is not competent to assess the legality of this decision by DNB. For the purpose of its assessment of the expropriation order, the Division treats DNB's imposition of the measure on 27 January 2013 as a given. The submission of many appellants that this decision is incompatible with SNS Bank's redemption of perpetual loans totalling €241 million in 2012, including a voluntary redemption (with DNB's authorisation) of a series of participation certificates worth €116 million on 24 December 2012, will be disregarded by the Division as its remit does not extend to assessing the actions of either SNS Bank or DNB. The Division would point out here that in its statement of 29 November 2012 the external auditor of SNS REAAL explicitly confirmed the problems identified by DNB at SNS REAAL and SNS Bank and

that SNS REAAL itself also announced in its third quarterly report of 6 November 2012 that the situation could not continue as it was and that a lasting solution had to be found.

17.3. Many appellants have argued that the minister was wrong to base his decisions on a capital shortfall of €1.84 billion. They submit that the minister, like DNB, wrongly attached decisive importance to the valuation by Cushman & Wakefield (C&W) of the property portfolio of Property Finance. As the expected additional losses estimated by C&W are substantially higher than those previously estimated by Ernst & Young (E&Y), some appellants argue that the obvious course of action for the minister would have been to instruct a third expert to revalue the property portfolio of Property Finance. According to these appellants, the minister's failure to do so means that the decisions were not taken with due care.

17.3.1. In assessing possible solutions for SNS Bank the minister considered it necessary to gauge the possible losses that could still result from the property portfolio of Property Finance.

At the request of Property Finance itself E&Y had previously valued the net property portfolio on the basis of Property Finance's source data available in mid-2012 at approximately €8.3 billion and the additional expected losses at approximately €1.4 billion in a base scenario and approximately €2.1 billion in a worst-case scenario based on deteriorating macroeconomic prospects.

By way of a second opinion the minister requested C&W to prepare an independent valuation of the property portfolio of Property Finance. In its report of 14 December 2012 C&W estimated the Real Economic Value (REV) of the assets of Property Finance on the basis of the same source data used by E&Y and arrived at a valuation of approximately €5.6 billion in a base scenario and approximately €4.9 billion in a worst-case scenario. According to C&W, this meant that the expected losses over and above the provisions already made by Property Finance on the property portfolio would be approximately €2.4 billion in the base scenario and approximately €3.2 billion in the worst-case scenario.

SNS REAAL commented on C&W's valuation of the property portfolio in letters of 13 January 2013. In these letters SNS REAAL took issue with the procedure and methodology employed by C&W. It argued in particular that the different findings reached by C&W were mainly attributable to the double-counting of risk factors and to the discount rate applied by C&W. According to SNS REAAL the discount rate applied in the valuation was higher than that applied by other Dutch banks, and an extra risk factor had been taken into account in setting the discount rate. Accordingly, SNS REAAL considered that C&W had taken into account the risks in determining both the expected losses and the amount of the discount rate and that the risks had therefore been double-counted. SNS REAAL also challenged C&W's estimates of loss-given default and probability of default (PD).

In its letter of 27 January 2013 DNB gave a reasoned response to the objections raised by SNS REAAL. DNB pointed out first in a general sense that the C&W valuation, unlike the E&Y valuation, was carried out independently of SNS Bank and that C&W was a recognised expert in the field of commercial property and its valuation. DNB also pointed out that C&W had valued the entire property portfolio and, unlike E&Y, had used more recent information about expected developments in the property market and macroeconomic parameters. DNB flatly rejected the criticism by SNS REAAL that the risk had been double-counted. According to DNB, the level of the discount rate was entirely separate from the expected cash flows and was mainly determined by the return which market participants would require when purchasing a property portfolio of this kind. As regards C&W's PD estimates, DNB took the position that these were more in keeping with the default rates actually observed and with its own assessment of the quality of Property Finance's property portfolio. It followed that in DNB's opinion C&W's assessments of the PDs were more realistic than the outcomes of SNS Bank's internal PD models.

It is evident from the expropriation order that the minister's decisions are based on the assumption that C&W's assessment of the REV of Property Finance is correct, including an update by C&W of its assessment which, according to the minister, has not produced essentially different figures.

17.3.2. Pursuant to section 8:29, subsection 1 of the General Administrative Law Act, the minister requested limitation of access to the reports of E&Y and C&W.

On 12 February 2013 the Division, sitting in a different composition, held that the request for limitation of access to the documents was partially justified. Following this decision, the minister lodged the passages from the reports of E&Y and C&W that had been designated by the Division in that decision. These passages were then made available to the appellants as quickly as possible.

It emerged at the hearing that some appellants, including the VEB, had not given the Division the consent referred to in section 8:29, subsection 5 of the General Administrative Law Act, namely consent to give judgment based partly on the documents in respect of which the limitation of access was considered justified. However, some other appellants argued that pursuant to article 6 ECHR the Division could not form a proper opinion without these documents and therefore needed to have access to them and take them into account when giving judgment.

17.3.3. Without having seen the passages from the reports of E&Y and C&W which are not known to the appellants, the Division holds as follows regarding these submissions. The minister has taken the position that he was entitled to base his decision on C&W's valuation since, in his opinion, DNB had adequately refuted the objections to the valuation in its letter of 27 January 2013. Moreover, the minister has pointed out that almost every form of State participation in a possible solution for SNS Bank would constitute state aid, for which the Commission's consent is required. According to the minister, where state aid has been given to banks in connection with impaired assets, the Commission has always required the member state concerned to arrange for a valuation of the assets concerned to be made by an independent party in accordance with the REV criterion. As C&W, unlike E&Y, used this valuation method, the minister considers this to be yet another reason why he was entitled to base his decisions on C&W's valuation.

The Division acknowledges that since the appellants did not have access to the reports of E&Y and C&W until a few days before the meeting and even then were able to see only parts of them, this may have influenced how they conducted the case. However, an important consideration for the Division is that SNS REAAL had access to both reports as well as the opportunity to express its objections to the C&W valuation – something which it did in its letters of 13 January 2013

referred to above. In view of the manner in which DNB refuted these objections in its letter of 27 January 2013, the Division sees no grounds for the view that the minister had reason to doubt the correctness of C&W's valuation. As it has not been disputed that C&W also made use of more recent figures than E&Y and applied a valuation method stated by the minister to be prescribed by the Commission for the granting of state aid, there is no reason to suppose that the minister was wrong to base his decisions on C&W's valuation.

The submissions are therefore untenable.

17.3.4. Section 8:29 of the General Administrative Law Act does not make special provision for actions involving more than two parties. The Division is faced in this case with the question of whether the refusal of some appellants to give the consent referred to in section 8:29, subsection 5 means that it must give judgment without having seen the passages in respect of which limited access is considered justified, despite the fact that a number of other appellants have expressly argued that the Division should see these passages. In this exceptional case, the Division – after coming to the conclusion described above at 17.3.3. above – has nonetheless considered it necessary to see the full reports of E&Y and C&W in order to be able to carry out a full judicial review of the legality of the expropriation order as required by article 6 ECHR. However, having read the contents of these reports the Division sees no reason to change its initial conclusion.

17.4. Besides the facts and circumstances mentioned above at 17.1 and 17.2, the minister also had to assume when making his decisions that if SNS Bank failed to supplement its capital in time, DNB would be obliged to apply for use of the emergency scheme, thereby triggering the bankruptcy of the bank. In that event the minister needed to take account of the fact that the bankruptcy of SNS Bank would very probably also result in the bankruptcy of its subsidiaries ASN Bank and RegioBank, given the extent to which their financial and operational affairs are interwoven with those of SNS Bank. These bankruptcies would trigger the operation of the deposit guarantee system. According to DNB, this would mean that a sum of approximately €35 billion would have to be paid out to the account holders to reimburse deposits protected under the system. This would mean that each of the banks participating in the system would have to pay out

approximately €5.8 billion a year until the specified amount of €35 billion had been reached and that during this period the State would have to pre-finance these amounts from public funds. The minister also had to take account of the fact that the bankruptcy of SNS Bank would also mean the bankruptcy of SNS REAAL. An important factor is that SNS REAAL has issued declarations as referred to in article 403, Book 2, Civil Code under which it has assumed liability for obligations resulting from juristic acts of SNS Bank and, indirectly, of Property Finance. In its letter of 24 January 2013 DNB pointed out to the minister that SNS REAAL's capital was not sufficient – given its already vulnerable position – to cope with any loss suffered as a consequence of these declarations being invoked.

17.5. As SNS Bank failed to supplement its capital within the prescribed period and given the consequences that DNB had stated this would have, and taking into account how SNS Bank's bankruptcy might affect SNS REAAL, the subsidiaries, the banks participating in the deposit guarantee system, the State, the payment transaction system and confidence in Dutch financial institutions as well as the pressure of time caused by the scheduled presentation of the annual financial statements and the opinion of the external auditor on this subject, the Division considers that the minister was properly able to take the position that the problems at SNS REAAL and SNS Bank at the time of the expropriation order were of such a magnitude that there was a serious and immediate threat to the stability of the financial system. Contrary to what some appellants have submitted, it would not be consistent with the purpose of the powers given in sections 6:1 and 6:2 of the Financial Supervision Act for the minister to be obliged to wait for a bank run before being allowed to exercise these powers. In so far as it has been argued by a few appellants that the Ministry of Finance was still taking the position in the 'Non-paper of the Dutch Ministry of Finance about the situation of SNS REAAL' of November 2012 that the situation was not so grave that the minister would be entitled to exercise the powers laid down in sections 6:1 and 6:2 of the Financial Supervision Act, the Division holds that quite apart from the fact that this document has no official status, the events since November 2012 mean that the position can no longer be accorded any significance.

18. As the power in article 6:2, subsection 1 of the Financial Supervision Act is an ultimate remedy, as noted above at 14, the minister had a duty to check that there was no way of averting the threat to the stability of the financial system caused by the problems at SNS REAAL and SNS Bank other than through the exercise of this power. It appears from the documents that DNB and the Ministry of Finance found on the basis of the analyses of the project group referred to above at 17.1, the analyses of their advisors and the talks held with the executive board of SNS REAAL that the proceeds of the sale of SNS Bank or the insurance holding company REAAL N.V. or both would be insufficient to resolve the financial problems and that a transfer plan based on part 3.5.4A of the Financial Supervision Act was also not an option. Strengthening the share capital through a share issue was not considered feasible, and private sector involvement seemed out of the question without the far-reaching financial involvement of the State. A public-private solution on the basis of cooperation between the State and the three main Dutch banks was also impossible because of acquisition bans imposed earlier by the Commission on two of the three banks in connection with their receipt of state aid. It seems from the documents that the only remaining solution was a collaborative arrangement between SNS REAAL, a private equity party and the State. Talks about variants of this solution were held between the parties concerned up to and including 31 January 2013. On that day the private equity party concerned made a non-binding offer to the minister, which was subsequently refused by him, partly because in his view it entailed an unacceptably large financial risk for the State and also required the cooperation of other third parties who had not yet committed themselves.

18.1. In the Division’s opinion, it is sufficiently clear from the expropriation order, read in conjunction with the documents on which it is based, that the minister did check whether there were other ways of averting the threat to the stability of the financial system caused by the problems at SNS REAAL and SNS Bank. The Division considers that, given the underlying facts and circumstances, the minister’s position that these other ways did not provide an adequate solution to the problems is sufficiently clear and properly reasoned. It follows that there is no basis for holding that the minister could not properly have taken the position that the exercise of the power contained in section 6:2, subsection 1 of the Financial Supervision Act was necessary in order to avert the threat to the stability of the financial system.

Interim conclusion

19. It follows from the above that the Division considers that the minister was properly able to take the position that the stability of the financial system was in serious and immediate jeopardy as a result of the situation in which SNS REAAL and SNS Bank found themselves and that, with a view to the stability of the system, the minister was therefore competent to decide to expropriate assets of SNS REAAL and SNS Bank and to expropriate securities issued by or with the cooperation of those undertakings.

The Division will deal below with the appellants' submissions relating to the manner in which the minister exercised his power.

20. A good many appellants argue that the minister should have exercised his power of expropriation differently, in that he should have distinguished between certain categories of securities and assets or distinguished between certain parties within those categories.

20.1. Section 6:2 of the Financial Supervision Act does not require the minister in the event of expropriation to expropriate all securities and other assets of the relevant financial undertaking. The minister may therefore choose to expropriate only some of the securities and assets. In making this choice the minister has a margin of appreciation. In his statement of defence and at the hearing the minister explained that in making this choice he applied the following principles: (1) the expropriation order should adequately remove the threat to the stability of the financial system, (2) the expropriation order should put the least possible strain on public funds, and (3) the expense of the expropriation should be borne as far as possible by those who have contributed risk-bearing capital to SNS Bank or SNS REAAL. In view of the purpose for which the power of expropriation is granted, principle 1 is self-explanatory, and the other two principles are also considered by the Division to be not unreasonable. Contrary to what some appellants maintain, the minister was entitled to take into account the financial interests of the State when framing the expropriation order and there is no legal rule that obliges the minister to compensate investors from public funds even before the expropriation.

When framing the expropriation order the minister, as he explained in his statement of defence and at the hearing, also took into account that without government intervention SNS Bank and SNS REAAL would have inevitably gone bankrupt. In choosing the securities and assets to be expropriated he therefore looked at the position which the holders of the securities and assets would have had in the ranking of creditors under the Bankruptcy Act (also referred to in the documents as the 'bankruptcy ladder') in the event of a bankruptcy. This led the minister to expropriate the shares, subordinated bonds and subordinated private loans of both companies, but not, in principle, securities and assets that would have ranked as unsecured debts in the event of bankruptcy. This decision by the minister was also taken in the belief that the expropriation of unsecured debts would send a shock wave through the markets that would be much more likely to further jeopardise than to enhance the stability of the Dutch financial sector. Finally, the minister decided not to distinguish between different parties within the same categories in the expropriation of shares, subordinated bonds and subordinated private loans. These choices too by the minister are not regarded by the Division as unreasonable.

21. Many appellants have also submitted – in vain – that liabilities of an undertaking, such as debts, are intrinsically unsuitable for expropriation, or in any event that section 6:2 of the Financial Supervision Act makes no provision for this. Section 6:2 provides that what may be expropriated are 'assets (*vermogensbestanddelen)* of the undertaking concerned' and 'securities issued by or with the cooperation of that undertaking'. It is apparent from the relevant section of the explanatory memorandum (Parliamentary Papers, House of Representatives, 2011/2012, 33 059, no. 3, p. 68) that the term 'assets' in the general sense (*vermogensbestanddelen*) should for this purpose be taken to mean both balance sheet liabilities (*passiva)* and balance sheet assets (*activa)*. Elsewhere in the explanatory memorandum (p. 12) it appears that the concept of assets and liabilities must be broadly interpreted and should be deemed to include all assignable rights and obligations of the undertaking, regardless of whether they are shown on its balance sheet. Section 6:2 of the Financial Supervision Act therefore confers on the minister the power to expropriate the liabilities of a financial undertaking as well.

Subordinated bonds

22. In so far as one or two appellants have argued that section 6:2, subsection 1 of the Financial Supervision Act does not provide a basis for the expropriation of bonds, the Division holds that this submission is untenable. It is apparent from the definition of securities in section 1:1 of the Financial Supervision Act that the term covers both shares and bonds. A few appellants have also submitted that the power to bail-in the liabilities of a financial undertaking is not possible since the Financial Supervision Act does not provide instruments that would allow for the compulsory writing down of debt claims and the minister has thus wrongly anticipated a Commission proposal for a directive for the recovery and resolution of banks. This submission too cannot succeed. Since the relevant directive is still only in the draft stage, the minister's power to expropriate securities as contained in the above-mentioned provision of the Financial Supervision Act is, for this reason alone, still intact.

23. Various appellants whose subordinated bonds have been expropriated as a consequence of the expropriation order have submitted that the minister acted wrongly in expropriating these bonds. They claim that the minister should first have simply expropriated the shares and that only once it became apparent that expropriation of the shares was insufficient to avert the threat to the stability of the financial system could he have had reason to take more far-reaching measures.

23.1. The minister has taken the position that it was not sufficient to expropriate the shares since, although this meant that he would acquire full control of SNS REAAL and SNS Bank, it would not have improved the capital position of either company. As this position has not been adequately contested by the appellants concerned, their submission is untenable.

24. Various appellants have also submitted that the minister failed to recognise that although the subordinated bonds issued by SNS Bank admittedly constituted a subordinated claim against the bank, they also created an unsecured claim against SNS REAAL. They refer in this connection to the 'article 403 declarations' referred to above at 17.4, under which SNS REAAL guaranteed the obligations resulting from juristic acts of SNS Bank and Property Finance.

24.1. Quite apart from whether the subordinated claim against SNS Bank would constitute an unsecured claim against SNS REAAL by virtue of the ‘article 403 declarations’, the holders of the subordinated bonds concerned would rank in a subordinate position in the event of a bankruptcy of SNS Bank and the minister was entitled to take this into account when preparing the expropriation order.

25. Various appellants have argued that the minister was wrong to expropriate only the subordinated bonds since by treating the holders of these bonds differently from the holders of non-subordinated bonds he had treated them unequally.

25.1. The minister’s decision not to expropriate the non-subordinated bonds is a result of his choice to reflect the position which the holders of the securities would have had in the ranking of creditors in the event of a bankruptcy. As in these circumstances the position of a holder of a non-subordinated bond differs from that of a holder of a subordinated bond, these are not equal cases and the argument based on unequal treatment is therefore untenable.

26. It has also been argued by various appellants that the minister was wrong to expropriate the subordinated bonds of SNS REAAL since this company was not in the same kind of difficulties as SNS Bank.

26.1. Although the problems at SNS Bank were the main reason for the minister’s decision to exercise his power of expropriation he was nevertheless entitled when framing the order to expropriate the subordinated bonds of SNS REAAL as well. In the Division’s opinion, the minister was entitled to consider such action necessary in order to effectively avert the threat to the stability of the financial system, given the fact that the financial affairs of the two companies were very closely intertwined.

27. A few appellants have submitted that the minister was wrong not to have expropriated the subordinated bonds issued by Zwitserleven. On this point the Division holds that these bonds do not feature in the order of priority of claims in the event of bankruptcy of SNS Bank or SNS REAAL and that the decision not to

expropriate them is therefore consistent with the choices made by the minister in framing the expropriation order.

Participation certificates

28. Almost all the appellants who were holders of a participation certificate have stated that they were under the impression that these certificates were a savings product and that they were not informed at the time of purchase that the certificates were in fact a subordinated bond.

28.1. Although incorrect or incomplete information was allegedly provided by SNS Bank about the nature of the participation certificates at the time of their purchase, this does not alter the fact that these certificates are subordinated indeterminate bonds. As held above at 20.1., the Division considers that the choice made by the minister in framing the expropriation order, namely to expropriate subordinated bonds and not to make any distinction within this category between certain parties, is not unreasonable. The appellants' submissions are therefore untenable.

Subordinated private loans

29. The holders of the private loans referred to in article 1, paragraph 2 (a) of the expropriation order have argued that the minister was wrong to expropriate these debts. They maintain in this connection that 'assets' in the general sense (*vermogensbestanddelen*) consist solely of the balance sheet assets (*activa*). The Dutch Trade Union Federation (FNV) has specifically argued that the element of subordination in the agreement between SNS REAAL and the FNV was included solely in order to enable SNS REAAL to treat any outstanding instalments as part of its capital base for solvency purposes. The FNV also argues that the arrangement does not have the usual characteristics of subordination and that the loan does not have the character of a risk-bearing investment, unlike subordinated bonds. The FNV also submits that its interests have been disproportionately harmed since it should have received the penultimate instalment of the loan from SNS REAAL on 24 February 2013.

29.1. In view of what has been held above at 21, the argument that for this purpose the term ‘assets’ (*vermogensbestanddelen*) in the general sense consists solely of balance sheet assets (*activa*) is untenable. As regards the submissions by the FNV, the Division holds that, notwithstanding what has been said about the intention of the subordination provision included in the agreement with SNS REAAL, the minister was entitled to proceed on the basis of the wording of the agreement when framing the expropriation order. In view of his seemingly not unreasonable decision not to distinguish between certain parties within a given category, it was not wrong of the minister to expropriate the private loans between SNS REAAL and the FNV. The FNV’s submission is therefore also untenable.

30. Appellants also argue that the expropriation of the above-mentioned assets in the name of SAOS was an unlawful act since SAOS provides no redress whatever for the payment obligations that have been transferred.

30.1. Section 6:2, subsection 4 of the Financial Supervision Act provides that assets may be expropriated for the benefit of a legal person which is named in the expropriation order, constituted under private law and has full legal competence. Article 1, paragraph 2 of the expropriation order provides that the assets referred to in point a, including the above debts owed by SNS REAAL and SNS Bank to the holders of the private loans, are expropriated for the benefit of SAOS. A notarial declaration lodged by the minister shows that the deed of formation of SAOS was executed before the entry into force of the expropriation order. The effect of the expropriation of these assets for the benefit of the foundation is that ownership of them is separated from the resources of the State, thereby ensuring that the latter cannot be liable for any debts. Although SAOS will not provide any redress for the payment obligations, this does not mean that the expropriation of these assets for the benefit of this foundation is unlawful by virtue of the above-mentioned provision of the Financial Supervision Act. In so far as the appellants consider that their claims still had value at the time of expropriation, they can claim compensation in the proceedings before the Enterprise Division of Amsterdam Court of Appeal.

Obligations and liabilities

31. A limited number of appellants have expressly challenged article 1, paragraph 2 (b) of the expropriation order on the grounds that they believe it to be in contravention of section 6:2 of the Financial Supervision Act.

31.1. Paragraph 2 (b) provides for the expropriation of 'all obligations and liabilities of SNS REAAL N.V. or SNS Bank N.V. to parties expropriated under paragraph 1 or to former holders of securities expropriated under that paragraph, to the extent that those obligations or liabilities relate to the (former) possession of the said securities'. It is apparent from section 55 of the explanatory notes to the expropriation order that this provision is intended by the minister to cover, above all, any obligations that may result from the award of claims for compensation which former holders of expropriated securities might possibly be able to institute in the future against SNS REAAL or SNS Bank, for example in tort on the grounds that they were misled by SNS REAAL or SNS Bank when purchasing the securities. The minister points out that there is now an incentive to bring such claims since as a result of the expropriation SNS REAAL and SNS Bank are once again offering redress. He believes it would be unacceptable if investors could recover part of their losses in this way, since they would probably have been unable to do so if SNS REAAL and SNS Bank had gone bankrupt.

31.2. As held above at 20.1., the minister decided when framing the expropriation order to expropriate all subordinated claims but not, in principle, the unsecured claims, in keeping with the ranking of creditors applied in a bankruptcy. The obligations and liabilities referred to in article 1, paragraph 2 (b) of the expropriation order to expropriated shareholders and bondholders, in so far as these obligations or liabilities are connected with the possession or former possession of the expropriated securities, constitute unsecured claims in the case of a bankruptcy. This was confirmed by the minister at the hearing. By nonetheless expropriating these obligations and liabilities the minister has acted in a manner at odds with his own decision to exclude, in principle, unsecured claims from the expropriation. By expropriating these obligations and liabilities the minister has also made a distinction within the category of unsecured claims between the claims of expropriated shareholders and bondholders and those of other unsecured creditors, which is also not consistent with his decision not to distinguish between different parties within a given category. Nor does the fact that this is alleged by the minister to be necessary in order to prevent

expropriated shareholders and bondholders from passing on their capital loss and investment risk to the State or SNS REAAL warrant a different conclusion. The character of a claim on account of obligations and liabilities, for example in tort, is essentially different from that of a claim for compensation on account of expropriation of securities.

Further to the above, the Division holds that the compensation provisions of chapter 6.3 of the Financial Supervision Act are hardly compatible with the expropriation of obligations and liabilities as referred to above. Under the provisions the minister would be required to make an offer for compensation in advance or within the period of seven days referred to in section 6:10, subsection 2 of the Financial Supervision Act from the date on which the expropriation order becomes irrevocable. However, the amount of the compensation for a claim in respect of the above-mentioned obligations and liabilities would be dependent on the individual circumstances of the person making the claim. Quite apart from the question of whether the minister could even find out within the short period he is allowed what claims have been brought, it would be virtually impossible within this period to make an offer for compensation that takes account of the individual circumstances of the person concerned.

In view of the above, the Division considers that the minister could not reasonably have taken the decision to expropriate the assets referred to in article 1, paragraph 2 (b) of the expropriation order. As the appellants' submissions succeed on the basis of the above considerations, the other points need not be considered.

Restrictions on the free movement of capital

32. Various appellants have argued that the expropriation order restricts the free movement of capital in breach of article 63 TFEU.

In so far as the expropriation order itself restricts the free movement of capital, this restriction is in any event justified by a consideration of overriding public interest, namely guaranteeing the stability of the Dutch financial system (see the judgment of the EFTA Court of 28 January 2013, E-16/11, Icesave, point 227; www.eftacourt.int). As noted above, the expropriation order (with the exception of

article 1, paragraph 2 (b)) is also necessary and suitable for achieving this aim. The submission is therefore untenable. Accordingly, the Division sees no reason to refer this matter to the Court of Justice for a preliminary ruling on the applicability of article 63 TFEU, as requested by these appellants.

Infringement of right to property (in practice)

33. The appellants submit that the expropriation is not consistent with article 1 of Protocol No. 1 since it does not serve the public interest by safeguarding the stability of the financial system. They argue that the minister indicated in the expropriation order that the costs of the expropriation should be borne as far as possible by the relevant shareholders and holders of subordinated bonds and private loans. Moreover, there has been no assessment of how a fair balance can be struck between the public interest and the individual interests of the shareholders and holders of subordinated bonds and private loans, as they bear the full burden.

33.1. As held above at 13.3, the State is entitled to a wide margin of appreciation in deciding whether an expropriation of property is necessary in the public interest. The ECtHR has also emphasised that this wide margin of appreciation certainly applies to measures for monitoring the stability of the banking and financial system (see, for example, the judgment of the ECtHR of 24 November 2005 in Capital Bank AD v. Bulgaria, no. 49429/99, para. 136; www.echr.coe.int). The minister points out in his order that the measure has been taken because of the great importance of preventing a bank run, while at the same time both enabling the bank to continue providing general banking services and avoiding the risk of financial contagion. A factor taken into account was that the financial crisis and its ramifications have also resulted in the introduction of provisions comparable to section 6:2, subsection 1 of the Financial Supervision Act in other European countries (Parliamentary Papers, House of Representatives, 2011/2012, 33 059, no. 3, p. 6). The Division therefore considers that the expropriation of the securities and assets referred to in the order is intended to serve a legitimate aim that is in the public interest, namely protecting the stability of the financial system.

33.2. As regards the question of whether a fair balance has been struck between the public interest served by the expropriation and the protection of the individual

interests of the relevant shareholders and holders of subordinated bonds and private loans, the minister has taken the position that if the requirements of section 6:2, subsection 1 of the Financial Supervision Act have been fulfilled this shows that less far-reaching measures were not possible. It follows from the findings at 19 above that there is no ground for the view that these requirements were not met. The minister has thus provided sound reasons as to why it was reasonable to view the alternatives examined by him as inadequate. It should also be noted that the mere fact that less onerous alternative measures capable of achieving the same aim were conceivable does not in itself constitute a ground for concluding that a fair balance was not struck between the legitimate aim and the means chosen to achieve it (see the judgment of the ECtHR of 21 February 1986, James and Others v. the United Kingdom, no. 8793/79, para. 51; www.echr.coe.int). It can also be inferred from this judgment that those from whom shares, bonds or loans are expropriated should be offered compensation that is in reasonable proportion to the value of the property taken. The expropriation order provides for a compensation procedure before the Enterprise Division of Amsterdam Court of Appeal both for the shareholders and for the holders of subordinated bonds and private loans. As held above at 13.5, the Division sees no reason why the provision of suitable compensation cannot be said to be assured in the context of these proceedings.

In view of the above, it cannot be said that a balance has not been struck between the public interest served by the expropriation and the protection of the individual interests of the relevant shareholders and holders of subordinated bonds and private loans.

33.3. It follows from the above findings that the Division sees no grounds for holding that the expropriation of the securities and assets listed in the expropriation order infringes article 1 of Protocol No. I.

The submissions are untenable.

Other matters

34. A few appellants have submitted that section 6:2, subsection 1 of the Financial Supervision Act does not give the minister the power to expropriate

possessions of natural or legal persons resident or established outside the Netherlands or securities placed in the custody of an institution outside the Netherlands. This submission cannot succeed. The above provision gives the minister the power to decide to expropriate assets of an undertaking established in the Netherlands and securities issued by or with the cooperation of that undertaking, irrespective of whether the owners are resident or established in the Netherlands or where the relevant securities have been placed in custody.

35. Some appellants have also argued that they purchased their shares and subordinated bonds before the entry into force of the Financial Enterprises (Special Measures) Act and that for this reason alone these securities cannot be expropriated under section 6:2, subsection 1 of the Financial Supervision Act. This submission too is untenable. The above provision does not limit the power of expropriation to securities and assets acquired after the entry into force of the Act.

36. Finally, a few appellants have submitted that it is unclear how the right to compensation can be transferred within the system of the Securities (Bank Giro Transactions) Act or that there is a lack of clarity about the transfer of the securities bought by them shortly before the entry into force of the expropriation order. On this point the Division holds that these submissions relate to the transfer of securities and not to the legality of the expropriation order and therefore fall outside the scope of these proceedings.

Compensation

37. A good many appellants have argued that the minister was wrong to provide that they should receive no compensation for their expropriated shares, subordinated bonds and private loans.

37.1. Part 6 of the Financial Supervision Act introduces a dual system in which the issue of compensation for expropriation is treated separately from the basic decision on expropriation. The submissions referred to above relate to the amount of the compensation to be received or concern an independent request for compensation. Under section 6:10, subsection 1 of the Financial Supervision Act, the compensation of persons entitled to expropriated assets or securities as

referred to in section 6:8, subsection 1 of that Act is determined not by the Administrative Jurisdiction Division but by the Enterprise Division of Amsterdam Court of Appeal. The submissions about the amount of the compensation therefore fall outside the scope of these proceedings.

Decision

38. The Division will hold that it is not competent to hear the appeal referred to above at 5 against DNB's decision of 27 January 2013 and will instead forward the notice of appeal to DNB to be heard as a notice of objection.

In view of its findings at 31.2 above, the Division will declare that the appeals of the appellants who have explicitly challenged article 1, paragraph 2 (b) of the expropriation order are well founded and will to this extent quash the expropriation order.

The Division will declare the other appeals to be unfounded.

39. An order for costs will be made against the minister in the manner referred to below.

Decision

The Administrative Jurisdiction Division

Giving judgment in the name of the Queen:

I. declares that it is not competent to hear the appeal of C.D. J., G.M. G., M. J.-van den B. and Juris Holding B.V. against the decision of De Nederlandsche Bank N.V. of 27 January 2013;

II. declares that the appeals of the appellants referred to at V to IX and the appeals of S. B., R.G.M. E., C. F., J.C.P. de G., N. van der K., H. van N. and R. H., A.J.R. O. and G.H.A. S., D. de V. and R.P. van der Z. are well founded;

III. quashes the order of the Minister of Finance of 1 February 2013, reference FM/2013/213 M, in so far as it purports to expropriate all obligations and liabilities of SNS REAAL N.V. or SNS Bank N.V., as referred to in article 1, paragraph 2 (b) of that order;

IV. declares the other appeals to be unfounded;

V. orders the Minister of Finance to reimburse:

a) N.V. Amersfoortse Algemene Verzekering Maatschappij and ASR Levensverzekering N.V.,

b) Banca di Credito Cooperativo Pordenonese Società and Banca Di Credito Cooperativo Di Vignole E Della Montagna Pistoiese Società Cooperativa,

c) BNP Paribas Fund III N.V. and BNP Paribas L1,

d) Banken Fokus Basel III and Warburg Invest Kapitalanlagegesellschaft MBH,

for the legal costs incurred by them in connection with the appeal proceedings up to an aggregate sum of €2,360 (two thousand three hundred and sixty euros), these costs being entirely attributable to professional legal assistance provided by a third party;

VI. orders the Minister of Finance to reimburse:

a) Aviva Vie S.A., Aviva Epargne Retraite S.A., Antarius S.A. and Aviva Investors France S.A.,

b) Golden Babylon Ltd., Kochab Trading Ltd., Silvertown Trading Ltd., Fairvest Holding Ltd. and Gapago Trade S.A.,

c) Stichting Obligatiehouders SNS,

for the legal costs incurred by them in connection with the appeal proceedings up to an aggregate sum of €1,888 (one thousand eight hundred and eighty-eight

euros), these costs being entirely attributable to professional legal assistance provided by a third party;

VII. orders the Minister of Finance to reimburse:

a) Brigade Distressed Value Master Fund Ltd., Brigade Leveraged Capital Structures Fund Ltd., Brigade Credit Fund I Ltd. and Burlington Loan Management Limited,

b) CCP Credit Acquisition Holdings Luxco Sarl and CSCP II Acquisition Luxco Sarl,

c) Hof Hoorneman Bankiers N.V,

d) Intégrale Gemeenschappelijke Verzekeringskas,

e) C.D. J., G.M. G., M. J.-van den B. and Juris Holding B.V.;

f) A. van L., Stichting Value Partners Family Office and Vereniging Beleggingsclub ’t Stockpaert,

g) Stichting Compensatie SNS Participatie Certificaten, J.G.C.M. H., J.G.C.M. H. B.V., H.J. F., H. de H., E.G. van T., A.W. S. and J.J.M. V.,

h) Turfmij B.V. and Castrifon B.V.,

i) the Investors Association VEB NCVB, A.J.C. van G. and T.J.M. de G.,

for the legal costs incurred by them in connection with the appeal proceedings up to an aggregate sum of €944 (nine hundred and forty-four euros) payable to the appellants specified in respect of each part, these costs being entirely attributable to professional legal assistance provided by a third party;

VIII. orders the Minister of Finance to reimburse N.A. H. and P. W. for their legal costs incurred in connection with the appeal proceedings up to an amount of €472 (four hundred and seventy-two euros) payable to each of them, these costs

being entirely attributable to professional legal assistance provided by a third party;

IX. orders the Minister of Finance to reimburse W. de J.-E. for the legal costs incurred in connection with the appeal proceedings up to an amount of €472 (four hundred and seventy-two euros), these costs being entirely attributable to professional legal assistance provided by a third party;

X. directs the Minister of Finance to reimburse the appellants referred to at II. for the court fees paid by them for the hearing of the appeal, namely €160 (one hundred and sixty euros) in the case of a natural person and €318 (three hundred and eighteen euros) in the case of a legal person.

Done by T.G. Drupsteen, presiding judge, and N.S.J. Koeman and N. Verheij, state councillors, in the presence of I.S. Vreken-Westra, officer of the Council of State.

[signed: Drupsteen]	[signed: Vreken-Westra]
Presiding Judge	Officer of the Council of State

Delivered in open court on 25 February 2013

434-697.