On this [day] in the year two thousand and eleven, upon the request of

the foundation incorporated under the laws of the Netherlands by the name of "**STICHTING INVESTOR CLAIMS AGAINST FORTIS"** having its registered offices in Amsterdam, the Netherlands, having elected as its address for service in the matter in hand the offices of JanssenBroekhuysen Advocaten on 128 Weteringschans in NL-1017 XV Amsterdam, of which law firm mr. J.H.B. Crucq will act as attorney,

the Undersigned in his capacity of Process Server

SUBPOENAED

1. the public limited-liability company incorporated under the laws of the Netherlands going by the name of **AGEAS N.V.** (formerly named Fortis N.V.) having its registered offices on 6 Archimedeslaan in NL-3584 BA Utrecht, this being the address at which the Undersigned delivered his subpoena leaving a copy with [name];

2. the public limited-liability company incorporated under the laws of Belgium going by the name of **AGEAS S.A./N.V.** (formerly named Fortis S.A./N.V.) having its registered offices in 1 Markiesstraat in B-1000 Brussels, said company having no known Dutch domicile prompting the Undersigned to deliver his subpoena by dispatching as at today's date, by registered post, to the recipient Belgian-based institution, to wit [name], two (2) copies of the present document and of the records having been served in the present context as well as the – Dutch-language – form identified in article 4(3) of the Regulation referred to below on the strength of EC Regulation 1393/2007 of the Council dated November 13, 2007 concerning the service and notification within the Member States of judicial and extrajudicial records in civil and commercial proceedings,

   the Undersigned, (Assigned Junior) Bailiff, having requested from the recipient institution that the latter should provide for the Respondent being served or being notified in such manner as stipulated sub 5(1) of the form, to wit service or notification in accordance with the laws of the requested State;

3. the private unlimited company incorporated under the laws of the United Kingdom of Great Britain and Northern Ireland **MERRILL LYNCH INTERNATIONAL P.U.C.** having its registered offices on 2 King Edward Street in London (EC1A 1HQ), United Kingdom of Great Britain and Northern Ireland, said company having no known Dutch domicile prompting the Undersigned to deliver his subpoena by dispatching as at today's date, by registered post, to the recipient British-based institution, to wit [name], two (2) copies of the present document and of the records having been served in the present context as well as the – Dutch-language – form identified in article 4(3) of the Regulation referred to below on the strength of EC Regulation 1393/2007 of the Council dated November 13, 2007 concerning the service and notification within the Member States of judicial and extrajudicial records in civil and commercial proceedings,

   the Undersigned, (Assigned Junior) Bailiff, having requested from the recipient institution that the latter should provide for the Respondent being served or being notified in such manner as stipulated sub 5(1) of the form, to wit service or notification

in accordance with the laws of the requested State;

FOR THE PURPOSE

of appearing, on Wednesday, the [day] 2011 at 9.30 hours *ante meridiem*, represented by a local attorney rather than in person, at the open-court civil hearing of the Utrecht District Court to take place, at the relevant date and time, at the Courthouse on 1 Vrouwe Justitiaplein,

ON NOTIFICATON

that the District Court is to grant leave, in the event of the Defendants failing to appear in the lawsuit in the prescribed manner, be it on the initial docket date or on such docket date as the Court may subsequently determine, or failing to engage a (defense) attorney, to proceed against the Defendants and uphold the claims except where said Court considers said claims to be unlawful or unfounded,

that a single ruling is to be handed down involving the full complement of parties, such ruling to be regarded as a judgment in defended action, on condition that at least one of the Defendants should appear in the proceedings represented by counsel,

IN ORDER THAT

the Plaintiff should be heard to claim as follows:

1. INTRODUCTION

1. The Plaintiff, to wit the "Stichting Investor Claims Against Fortis" Foundation ("**Foundation**"), in the present proceedings will be petitioning the District Court, on the strength of Section 302 of Book 3 of the Netherlands Civil Code, with the request, first, that said Court should hand down a declaratory judgment concerning the unlawfulness of the actions having been engaged in by the Defendants sub 1 and 2 above, to wit Ageas N.V. and Ageas S.A./N.V., *vis-à-vis* the investing public and the (potential) shareholders in Fortis, *inter alia* owing to Fortis in the years 2007 and 2008 – succinctly stated – repeatedly having published inaccurate and incomplete information concerning its enterprise or having omitted in good time to release accurate information into the public domain resulting in the investing public and the (potential) shareholders in Fortis having been misled as well as injured.

2. The Foundation will furthermore be petitioning the District Court on the strength of Section 302 of Book 3 of the Netherlands Civil Code with the request that said Court should hand down a declaratory judgment concerning the unlawfulness of the actions having been engaged in by the Defendant sub 3 above, to wit Merrill Lynch International P.U.C. ("**Merrill Lynch**"), *vis-à-vis* the investing public and the (potential) shareholders in Fortis, *inter alia* owing to Merrill Lynch in its capacity of coordinating bank in the context of two share issues having been effected by Fortis in 2007 and 2008 having acted in contravention of its duty of due care by failing to stop

Fortis as the issuing institution making inaccurate and incomplete announcements either within or outside the prospectus or, alternatively, by failing to rectify such inaccurate and incomplete announcements, resulting in the investing public and the (potential) shareholders in Fortis having been misled as well as injured

3. The present Subpoena has been arranged as follows:

1. Introduction
2. Parties
3. Claim
4. Competence
5. Facts
6. Grounds Underpinning Claim
7. Defense of the Defendants
8. Tender of Evidence

2. PARTIES

2.1 Plaintiff

4. The Foundation was incorporated on October 5, 2010 and according to its constitutional object as defined in article 3 of its Byelaws fosters the interests of such persons and institutions as (i) have over the period from May 29, 2007 to October 14, 2008 inclusive purchased securities [1] and (ii) have been injured owing to the relevant securities having depreciated in value (such persons and institutions hereinafter referred to as "the **Investors**"), such fostering of interests being expressly inclusive of initiating legal proceedings with the aim of having a declaratory judgment handed down. A copy of the Foundation's Byelaws is to be submitted by way of **Exhibit 1**.

2.2 Defendants

5. The Defendant sub (1), Ageas N.V, until May 11, 2010 went by the name of Fortis N.V. whereas the Defendant sub (2), Ageas S.A./N.V., until May 11, 2010 went by the name of Fortis S.A./N.V.. Fortis N.V. and Fortis S.A./N.V., respectively were Dutch and Belgian holding companies of the former Dutch-Belgian Fortis banking and insurance conglomerate ("**Fortis Group**"). The Defendant sub (1) ("**Fortis N.V.**") and the Defendant sub (2) ("**Fortis S.A./N.V.**") in de context of the present Subpoena are jointly to be referred to as "**Fortis**". Reference is made to Chapter 5 below for a brief summary of the Fortis set-up and (corporate) bodies.

6. Defendant sub 3, Merrill Lynch, acted as coordinating bank in the context of two share issues having been effected by Fortis, in 2007 (with Merrill Lynch officiating as Joint Global Coordinator and Sole Bookrunner) and 2008 (with Merrill Lynch officiating as Joint Lead Manager and Joint Bookrunner), respectively, in addition to which Merrill Lynch was involved in both share issues as Underwriter.

2.3. The key Board Members of Fortis

[1] "Securities" being defined as "any Fortis-issued or Fortis-distributed security as defined in Section 1:1 ("Definitions") of the Netherlands Financial Supervision Act, or any other security (article 1 of Foundation's Byelaws).

7. Mr Jean-Paul Votron ("**Votron**"), from 2004 held the position of Fortis's Chief Executive Officer ("**CEO**") until he was dismissed on July 11, 2008. In his capacity of Fortis's CEO, Votron was responsible *inter alia* for the day-to-day administration of Fortis N.V., Fortis S.A./N.V., Fortis Brussels S.A./N.V. and Fortis Utrecht N.V., and as CEO also was Fortis's main spokesperson as well as presiding over the Executive Committee.

8. Mr Herman Verwilst ("**Verwilst**"), from 2004 to January 1, 2008 was a member of the Executive Committee as well as holding the position of Fortis's Chief Operating Officer ("**COO**"), in which capacity he was responsible for corporate supervision of HR policy, technological policy, 'Operations & Process Services' and 'PCA Shared Services'. Verwilst in addition to officiating as COO from 2000 doubled as Deputy CEO as well as presiding over the Management Committee of Fortis Bank S.A./N.V. since the latter's 1998 incorporation. From July 2008 onwards, in the wake of Votron's dismissal, Verwilst officiated as interim CEO, resigning from the Executive Committee as well as stepping down as executive director in December 2008.

9. Mr Maurice Lippens ("**Lippens**"), held the position of executive president of Fortis's Management Board until 2000, when he went on to become said Board's non-executive president. Having chaired Fortis since 1990, Lippens can be seen as Fortis's "co-founder". He was dismissed on September 26, 2008.

10. Mr Filip Dierckx ("**Dierckx**"), held the position of CEO for Merchant & Private Banking and regional coordinator for North America, from which vantage point he had a clear view of the rapidly deteriorating credit portfolio. He was appointed to Fortis Bank's Executive Board with particular responsibility for retail banking in 1998 and in 2000 was appointed to the Executive Committee with particular responsibility in his capacity of CEO for Merchant Banking. Dierckx was awarded the presidency of Fortis Bank S.A./N.V. on January 1, 2008 and on September 26, 2008 was appointed CEO of Fortis and as such, in charge of Fortis's day-to-day policy. Dierckx was succeeded as Fortis's CEO by Karel de Boeck on December 2, 2008.

11. Mr Gilbert Mittler ("**Mittler**"), from 2000 until January 1, 2008 held the position of Chief Financial Officer ("**CFO**"), and went on to the positions of "Chief of Finance and Risk" and "General Counsel". Mittler at one time or another has held a variety of other positions within Fortis, some of these with subsidiary companies.

3. CLAIM

12. The Foundation on the strength of Section 305(a) of Book 3 of the Netherlands Civil Code is seeking, first, a declaratory judgment to the effect that Fortis has breached the requirements of Netherlands law concerning that with which they have been charged in the context of the present Subpoena including dissemination of information both accurately and comprehensively *vis-à-vis* the market and the investing public where the state of affairs at its enterprise was concerned.

13. The Foundation on the strength of Section 305(a) of Book 3 of the Netherlands Civil Code is seeking, second, a declaratory judgment to the effect that Merrill Lynch has acted in contravention of its duty of due care concerning that which it has been charged with in the context of the present Subpoena including the failure on its part to stop Fortis systematically making inaccurate and incomplete announcements *vis-à-vis* the market and the investing public or, alternatively, the failure on its part to rectify such inaccurate and incomplete announcements.

14. The Foundation has satisfied its obligation under Section 305(a)(2) of Book 3 of the Netherlands Civil Code to try entering into consultation with the Defendants sub 1 and 2 above. In its letter dated October 8, 2010 (**Exhibit 2**) the Foundation invited Ageas N.V. and Ageas S.A./N.V. to enter into consultation with it regarding the claim. Ageas N.V. and Ageas S.A./N.V. in their letter dated October 21, 2010 (**Exhibit 3**) rejected the Foundation's request for consultation.

15. Having invited Merrill Lynch to enter into consultation with it regarding the claim by letter dated December 2, 2010 (**Exhibit 4**), the Foundation to date has received no response from Merrill Lynch.

4. COMPETENCE

16. It is on the strength of the registered seat of the Defendant sub (1), to wit Fortis N.V., that the District Court of Utrecht has competence for hearing the claim in hand.

17. As shown sub § 5.1 below, the actions having been engaged in by (the Board of) Fortis S.A./N.V. are inextricably linked with the actions having been engaged in by (the Board of) Fortis N.V. owing to the Fortis Group corporate set-up and governance. This implies that the question as to Fortis N.V.'s unlawful actions defies assessment without Fortis S.A./N.V. too being involved in the present proceedings. This confers competence upon Utrecht District Court for hearing the Foundation's claims against Fortis S.A./N.V. on the strength of Section 6(1) of the Regulation on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters[2] and Section 7 of the Netherlands Code of Civil Procedure.

18. The same applies to the assessment of Merrill Lynch's actions in the matter in hand and the ensuing liability, which cannot be evaluated independently of Fortis's own actions given that the responsibilities and liability of Merrill Lynch are considerably interwoven with the statements made by (the Board of) Fortis and the Fortis-issued documents, as it was Merrill Lynch's duty both contractually and where the community was concerned to the best of its ability to rectify instances of inaccuracy and incompleteness in Fortis's documents.

5. FACTS

19. The factual content of the present Subpoena is based *inter alia* on (i) the Report on the Investigation into Fortis N.V. dated June 15, 2010 ("**Investigative Report**") [3] excluding the Schedules which are not accessible for the general public, (ii) the Fortis Governance Statement dated January 25, 2008 ("**Fortis Governance Statement**"; **exhibit 5**), (iii) the AFM penalty rulings dated February 5, 2010 (**Exhibit 6**) and August 19, 2010 (**exhibit 7**) respectively ("**AFM Rulings**"), and (iv) other public information. As the Plaintiff has (had) no access to the Schedules to the Investigative Report, it has not for the time being been in a position to rely on said Schedules.

20. The Plaintiff appreciates that the above sources partially qualify as secondary. However, the complexity and timeframe of the facts and circumstances having

[2] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[3] The Investigative report comprises of 583 pages and shall due to its volume not be brought into the proceedings as exhibit. Link (7 january 2011):
http://www.ageas.com/Documents/NL_final_report_dutch_investigation_20100616.pdf

relevance in the matter in hand make it less than practicable to present a more detailed picture of the course of affairs than that as per the present Subpoena. Chapter 8 elaborates on the Plaintiff's insistence that Fortis should introduce certain important documents into the present proceedings as well as addressing in more detail the legal basis underpinning this request.

21. The present Chapter 5 provides an overview of such facts having relevance as the Foundation's claim is anchored in, with § 5.1 kicking off with a brief summary of the Fortis (organizational) set-up and (corporate) bodies and § 5.2 discussing in chronological terms Fortis's acquisition of ABN AMRO, from the moment the public offer for ABN AMRO was tendered until said offer was declared unconditional. It is in this context that more detailed attention will be devoted to Fortis's communications regarding the risks for Fortis Group of the sub-prime crisis in the United States and the (non) invoking of the *Material Adverse Change* clause as per the transaction documentation where the ABN AMRO acquisition has been concerned.

22. § 5.3 is devoted to developments over the first half of 2008 until the moment the accelerated implementation of the solvency plan was publicized, on June 26, 2008, with § 5.4 discussing developments over the second half of 2008 right up to the time the Fortis statements were made, on September 26, 2008. Finally, § 5.5 addresses the closing stage of Fortis Group right up to Fortis's nationalization by the Belgian and Dutch governments and the divestment of a number of Fortis S.A./N.V. components to BNP Paribas.

5.1 Brief Summary of Fortis Origin, (Organizational) Set Up and (Corporate) Bodies

23. Fortis started out as a Belgian insurance company which, having adopted a strategic growth strategy, by means of acquisitions expanded into the Dutch market from 1990 onwards as well as progressively engaging in banking operations. Fortis Group during the 1990s achieved tempestuous growth in the wake of the merger between Dutch insurance company AMEV, the Dutch VSB Group (banking operations) and Belgian insurers AG Group.

24. Having completed a series of further acquisitions, most notably that of Dutch merchant bankers MeesPierson, which it took over from ABN AMRO in 1997, and that of Belgium's Generale Bank in 1998, Fortis Group steadily expanded further into an international financial service provider in banking and insurance commanding a balance sheet total of EUR 775 billion by year-end 2006.[4]

25. Fortis operates a "dual set-up" whereby two companies head the group, one of these being the public limited-liability company incorporated under the laws of Belgium by the name of Fortis S.A./N.V. having its registered offices in Brussels, Belgium, and the other being the public limited-liability company incorporated under the laws of the Netherlands by the name of Fortis N.V. having its registered offices in Utrecht, the Netherlands. The shares in these two companies are listed on Euronext Brussels and Euronext Amsterdam, respectively. The shares are traded "in tandem", which means that a share in Fortis S.A./N.V. is available only in combination with a share in Fortis N.V. and *vice versa*. Separate as they may be, the two companies both beneficially and legally constitute a single entity owing to their shares being traded in tandem and owing to a *personal union* being entertained by the two companies' chief administrative bodies and by Fortis Group's chief intermediate holding entities, in that they share the same executive directors.

[4] Fortis Annual Report for 2006, page 13, **exhibit 8**.

26. Fortis S.A./N.V. and Fortis N.V. each hold 50% of the shares in Fortis Brussels S.A./N.V. and 50% of the shares in Fortis Utrecht N.V. Fortis Brussels S.A./N.V. in turn is the holder of the full complement of shares in Fortis Bank S.A./N.V., which latter entity heads the group of companies whose corporate focus lies on the banking operations. Fortis Utrecht N.V. in turn is the holder of the full complement of shares in Fortis Insurance N.V., which latter entity heads the group of companies whose corporate focus lies on the insurance operations. **Exhibit 9** contains an overview of the legal set-up of Fortis Group from 2007 to date.

27. Fortis S.A./N.V. and Fortis N.V. operate two constitutional bodies, to wit the General Shareholders' Meeting and the Management Board, with Fortis moreover operating an "Executive Committee" that is in charge of the day-to-day running of the business. Rather than constituting a separate constitutional body, the ExCo together with the CEO forms part of the "Executive Management". The respective roles, responsibilities and powers of the various Fortis bodies have been worked up in sets of rules and regulations that form part of the Fortis Governance Statement.[5]

General Shareholders' Meeting

28. As stated above, Fortis S.A./N.V. and Fortis N.V. operate shares "in tandem", the upshot of this principle being that the aggregate number of Fortis shares in issue will always be identical to the sum total of Fortis S.A./N.V. and Fortis N.V. shares having each been issued. The shareholders each own one Fortis S.A./N.V. for one Fortis N.V. share and *vice versa*, and as such are authorized to vote at the General Meeting of Fortis S.A./N.V. (held in Brussels, Belgium) as well as that of Fortis N.V. (held in Utrecht, the Netherlands).[6] Each shareholder has a choice per dividend payment between being paid by Fortis S.A./N.V or by Fortis N.V. (the two dividend payments obviously being identical).

Management Board

29. The Management Board is Fortis's most senior decision-making body except where it concerns issues that for reasons of corporate law or the Articles of Association are the preserve of the General Shareholders' Meeting. The Management Board is made up of at most 17 members in a "single-tier" set-up in that it comprises both executive and non-executive members. The Board's non-executive members are charged with supervisory duties that are comparable to those of a supervisory director as per Dutch corporate law. The Management Board has at least two executive members, to wit the CEO and the Deputy CEO. The majority of the Management Board is made up of non-executive members.

30. The Fortis Governance Statement defines the Management Board's chief responsibilities as "providing for Fortis's strategic direction and overseeing the course of affairs within Fortis".[7] The Management Board's rules and regulations as included in Part III of the Fortis Governance Statement provide an accurate description of the relevant duties and responsibilities.

[5] The plaintiff notes that on the front page of the Fortis Governance Statement (exhibit 5) it is noted that the document is "under revision".
[6] The Plaintiff for the sake of brevity would refer to part II of the Fortis Governance Statement for a further explanation as regards the Annual Shareholders' Meeting.
[7] See Fortis Governance Statement, p. 19.

31. The Management Board in the performance of its duties and responsibilities is assisted by three (sub) committees, to wit the Nomination and Remuneration Committee ("**NRC**"), Risk and Capital Committee ("**RCC**") and Audit Committee ("**AC**"), each of which is made up of at least three and at most five non-executive Board members. It is the Management Board which defines the role and responsibility per committee, for inclusion in the respective sets of rules and regulations forming part of Part IV of the Fortis Governance Statement.

32. In summary, the NRC's role is that of assisting the Management Board in anything relating to the appointment and remuneration of Management Board members and of the Executive Management whereas the RCC's role is that of assisting the Management Board in (i) identifying such risks as are inherent in the banking and insurance operations to which Fortis is exposed, (ii) overseeing the framework geared to the proper management of the relevant risks, and (iii) ensuring that Fortis's capital should be adequate in relation to the aforementioned risks and to such risks as are inherent in business operations as a whole and, finally, the AC's role is that of assisting the Management Board in said Board's supervisory duties pertaining to internal control within Fortis on inclusion of internal control where financial reporting is concerned.

Executive Management

33. Fortis's Executive Management is made up of the CEO and the Group Executive Committee ("**ExCo**"), and is charged with the day-to-day management of Fortis in accordance with the values, strategy, policy, planning and budgets as defined by the Management Board.[8]

34. The ExCo's powers and authority are shared by its individual members, who answer to the CEO on all matters entrusted to the ExCo, with ultimate responsibility *vis-à-vis* the Management Board for such powers and duties as the ExCo has been entrusted with resting with the CEO.[9] The ExCo in practice frequently officiated as if it were the Management Board. Neither the ExCo nor the latter's individual members – with the exception of the CEO and Deputy CEO – are constitutional directors of Fortis N.V. and Fortis N.V./S.A., albeit that the complete ExCo forms the constitutional management of Fortis Utrecht N.V. and Fortis Brussels S.A./N.V.

35. Finally, the Executive Board ("**ExBo**") is the ExCo of Fortis Bank S.A./N.V., the latter being the holding company of the group of Fortis companies that focus on the banking operations.

5.2 ABN AMRO Acquisition

Outline Chronological Overview of Public Offer for ABN AMRO

36. The possibility of taking over ABN AMRO together with Royal Bank of Scotland Plc. ("**RBS**") and Banco Santander S.A. ("**Santander**") was first broached at ExCo level on March 30, 2007. The potential acquisition of ABN AMRO was presented at the next Management Board meeting, on April 4, 2007, as a unique strategic opportunity for Fortis,[10] with the Investigators establishing on the basis of analysts' reports, *inter alia*,

[8] Reference is made to the Fortis Executive Management regulations as included in Part V of the Fortis Corporate Governance Statement.
[9] Reference is made to the Fortis Governance Statement sub V.2.2.
[10] See Investigative Report § 1315.

that the acquisition of ABN AMRO would change Fortis's relatively weak position in the private banking and retail banking market in the Netherlands into a position of strength,[11] as well as establishing that the commercial banking operations offered an attractive match for Fortis's European strategy and the transaction would significantly boost Fortis's anemic solvency (structural deficit of up to EUR 70 billion) by a sum in the amount of EUR 20 to 25 billion.[12] Lippens and Votron sought and secured from the Management Board a shared mandate for sounding out the possibilities for Fortis's participation in the consortium.

37. RBS, Santander and Fortis (these three hereinafter jointly referred to as the "**Consortium**") on April 13, 2007 in a press release announced their intention of making a public offer for ABN AMRO. The Consortium in connection with the (envisaged) offer incorporated the Dutch limited liability company RFS Holdings B.V., in which RBS, Santander and Fortis held a third participating interest each.

38. Fortis then started looking for opportunities to ensure the funding of its share of the future offer for ABN AMRO and approached Merrill Lynch, which had first suggested the transaction to Fortis as a possible option, as advising *investment banker*. On May 16, 2007 Fortis and Merrill Lynch signed a EUR 17 billion "Stand-by Underwriting Commitment" in which they agreed that Merrill Lynch was to underwrite a successful rights issue for shares to a maximum of EUR 17 billion at an issue price per share to be agreed in more detail, with the contract being replaced by an actual Underwriting Commitment on the part of Merrill Lynch in the event of the issue going ahead.[13] The Foundation does not have the "Stand-by Underwriting Commitment Agreement" document at its disposal.

39. That same day Fortis and Merrill Lynch also signed a EUR 5 billion "Stand-by Underwriting Commitment Agreement" involving Merrill Lynch underwriting the issue of a range of "tier-1 instruments",[14] with a five-strong banking consortium made up of ING, Rabobank, Mediobanca, Société Generale and Dresdner Bank additionally furnishing Fortis with a "backstop liquidity facility" to a maximum of EUR 10 billion.[15] The Foundation does not have this document at its disposal either.

40. Fortis with the aid of the above two financial documents secured (access to) financial resources to a total of EUR 32 billion, for use towards the financing of its share of the expected price to be paid for the acquisition of ABN AMRO in the event of Fortis failing to drum up sufficient resources "in the market" to fund its share of the acquisition price.

41. On May 29, 2007 the Consortium released a press communiqué containing more detailed information regarding the making of a public offer for ABN AMRO and the terms and conditions subject to which the Consortium would be doing so. The offer price had been fixed at just over EUR 38 per share in ABN AMRO. The acquisition thus involved EUR 71 billion-plus of which EUR 24 billion-plus, or 33.8 % of the acquisition price, was being furnished by Fortis. The Consortium in the wake of the acquisition was to divide the various parts of ABN AMRO, with Fortis taking delivery of ABN AMRO's Dutch operations.

[11] See Investigative Report § 152.
[12] See Investigative Report § 152.
[13] See Investigative Report § 1349.
[14] See Investigative Report §1350.
[15] See Investigative Report § 1356, no. 3.

42. RFS Holdings B.V.'s offer memorandum ("**Offer Memorandum**") was published on July 20, 2007[16]. In it attention was devoted *inter alia* to the funding plan where Fortis's share in the ABN AMRO acquisition was concerned. The Offer Memorandum provided the following information on Fortis's planned funding of its EUR 24 billion share of the ABN AMRO acquisition price[17]:

> *"Fortis intends to finance its portion of the consideration to be paid by RFS Holdings in the Offer and the US Offer, which portion Fortis expects to amount to approximately EUR 24 billion, by means of the following sources:*
>
> - *net proceeds of an equity offering by Fortis of up to EUR 13 billion, which offering will be made in the form of a non-statutory rights offering and offering of shares representing unexercised rights in accordance with applicable Belgian and Dutch and other applicable law;*
> - *net proceeds of the placement of conditional capital exchangeable notes ("CCENs), a new contingent core Tier 1 capital instrument issued on 11 July 2007, raising 2 billion; and*
> - *the remaining part from the proceeds of a combination of*
>
> *(i) the issuance of various securities;*
> *(ii) the sale of specific non-core assets of Fortis that Fortis may complete prior to the completion of the Offer; and*
> *(iii) other internal resources including but not limited to cash on Fortis's balance sheet.*
> *(…)*
>
> *Fortis intends that following the Offer it will refinance the remaining part of the consideration through a combination of the following sources:*
> - *up to EUR 5 billion to be raised by issuing other Tier 1 capital instruments, equity-linked subordinated hybrid capital securities and/or convertible debt/securities (…); and*
> - *up to EUR 8 billion through multiple other transactions, consisting of further sales of non-core assets, securitization transactions and other similar transactions.".*

43. On August 6, 2007 in the context of the Extraordinary General Shareholders' Meeting(s) held in Brussels and Utrecht the motion for Fortis to participate in the public offer was carried by the shareholders a generous margin, with the Extraordinary General Shareholders' Meeting moreover approving the issue of new shares to enable the funding of the offer for ABN AMRO.

44. On September 17, 2007 DNB, the Netherlands Central Bank, presented the Consortium with the necessary Certificates of No Objection in relation to the planned acquisition of ABN AMRO. DNB in anticipation extensively conferred with Merrill Lynch concerning the funding of the ABN AMRO acquisition, with Merrill Lynch in the context of said consultations confirming its commitment where the share issue was concerned.[18]

---

[16] The Offer Memorandum comprises 190 pages and because of its volume will not be introduced into the proceedings as an Exhibit. Link (7 January 2011): http://files.shareholder.com/downloads/RBS/1119557641x0x262634/01F747C3-EC22-467F-88E6-44D3EDC4D851/Offer_Memorandum_Preference_Shares.pdf

[17] Reference is made to Investigative Report § 1388, where PART XIII, pages 90 and 91 of the Offer Memorandum have been quoted.

[18] See Investigative Report § 1481.

45. The Management Board at its meeting on September 20, 2007 resolved to proceed with a share issue to a value of EUR 13.4 billion for an issue price of EUR 15 per share to help enable the funding of the ABN AMRO acquisition, and while still in session approved the prospectus ("Prospectus")[19] for release on September 20, 2007 in aid of the relevant share issue. Merrill Lynch as at said date confirmed that it had faith in the funding of the transaction and felt "comfortable" about the solvency and liquidity trends of Fortis.[20]

46. Fortis in a press release dated September 21, 2007 ("**Trading Update**") announced to the market the EUR 13.4 billion rights issue for shares. The text of the Trading Update was comprehensively included as part of § 5.1.4. of the Prospectus, the latter being made available on-line to a select audience on September 24, 2007 and publicized in its entirety on September 25, 2007.

47. Fortis publicly announced on October 3, 2007 that the European Commission had approved the acquisition of parts of ABN AMRO, albeit on condition that Fortis should implement measures where it concerned its competitive position in the commercial banking market segment within the Netherlands, the European Commission's provisos essentially boiling down to Fortis having to complete the hive-off, as soon as possible in the wake of the acquisition but no later than by July 3, 2008, of several parts of ABN AMRO including Hollandse Bank Unie N.V. ("**HBU**"), 13 consultancies, two Corporate Client departments and IFN Finance B.V. (the "**EC Remedies**").[21]

48. Fortis in a press communiqué released on October 11, 2007 announced that a sum in the amount of EUR 13.4 billion in new shares had been floated on October 9, 2007. Finally, October 17, 2007 witnessed RFS Holdings B.V.'s offer for ABN AMRO being rendered both unconditional and available for payment, with the Consortium acquiring some 98% of shares in ABN AMRO, with the residual ABN AMRO shares being subsequently acquired in the context of a share buy-out.

Fortis's Reporting on the Risks regarding the Sub Prime Challenge in United States

49. The global credit crunch started making itself felt from mid-2007 onwards. The Investigators in § 1.3.5. of the Investigative Report for a more detailed explanation of the credit crunch have referred to a report entitled "On the Trail of the Crisis", which DNB, the Netherlands Central Bank, issued in March 2010[22] and which summarizes the financial terminology and products used as well as featuring a chronological overview of the main events in the run-up to and breaking out of the credit crunch. The Foundation would for the sake of brevity refer to this report where the backgrounds to the credit crunch and the latter's development are concerned.

50. What triggered the credit crunch was the rapid decline in value of particular structured investment products known as *Collateralized Debt Obligations* ("CDOs"). CDOs are debentures issued and based on the value and reliability of the underlying collateral. The latter consists of "parcels" of claims such as collections of pooled mortgage loans or credit card loans. Banks split up these pooled loans into progressively risk-bearing tranches, then sell them on to investors. The lowest or "sub-prime" tranche comes in the highest risk class, in that the debtors it straddles are the most likely to default, but

[19] The Prospectus comprises no fewer than 425 pages and because of its volume will not be introduced as an Exhibit. Link (7 January 2011): http://www.afm.nl/registers/emissies_documents/4894.pdf
[20] See Investigative Report § 1522.
[21] See Investigative Report § 1556.
[22] Link (7 January 2011): http://www.dnb.nl/binaries/In%20het%20spoor%20van%20de%20crisis%20-%20DNB%20maart%202010_tcm46-230653.pdf

yields the best interest rate at the same time, whereas the most senior tranche is virtually risk-free while yielding very little by way of interest.[23] Fortis by year-end 2007 held EUR 43 billion-plus in 'Structured Credits Instruments', of which the CDOs formed part.[24]

51. The Investigative Report shows that Fortis as early as in March 2007, i.e. before the credit crunch had started to materialize, took internal stock of its potential exposure to sub-prime related investment products, sharing the relevant information on March 26, 2007 with the Commission for the Banking, Finance and Insurance Commission ("**CBFA**") as the Belgian watchdog.[25] The information is not available to the general public.

52. Three months later, on June 27, 2007, according to the ExBo's minutes the CDO exposure was first explicitly discussed. The minutes of the relevant meeting show that[26]:

> *"(…) the evolution of traded credits and Fortis' active role in CDO (Collateralized debt obligation) warehousing and Investment Portfolio could lead to Mark-to-Market losses due to a worsening of the US sub-prime mortgage market."*

53. Specific attention was devoted at the same meeting to the impact of the US sub-prime market on Fortis's CDO activities, and it was established on the basis of the relevant discussion that a USD 40 million provision was having to be set aside, with allowances having to be made for USD 27 million in "first loss protection".[27] Whether the Management Board too was notified of the problem has remained unclear.

54. The ExBo reconvened to discuss the sub-prime theme on July 31, 2007. Reference was made at this meeting to a CDO exposure in the amount of USD 736 million, although it has remained unclear what this was supposed to mean or how the calculation had been arrived at. Even the Investigative Report fails to shed light on this aspect.[28]

55. One day after the ExBo meeting, on August 1, 2007, "code orange" (implying mandatory daily liquidity reporting to the ExCo) was declared because of the pressure being brought to bear on Fortis's liquidity.[29]

56. The Management Board's AC met on August 7, 2007, with Dierckx giving a presentation on the sub-prime situation at the meeting. The question presented itself as to what to include in Fortis's interim report, which was scheduled for release on August 9, 2007, where Fortis Group's sub-prime risks were concerned. It was decided to carry on this discussion at the Management Board meeting, which was scheduled to take place the next day. Dierckx in anticipation of said discussion that same night e-mailed as follows to Verwilst, Mittler and Votron, *inter alia*:[30]

[23] Source: Credit Crunch Vocabulary (www.dnb.nl).
[24] Source: Fortis Consolidated Financial Statements 2007. Structured Credits Instruments are described as securities consisting of "repackaged" cash flows from financial contracts.
[25] See Investigative Report §§ 392 and 474.
[26] See Investigative Report § 1377.
[27] See Investigative Report § 1378.
[28] See Investigative Report §§ 386 and 1391.
[29] See Investigative Report § 1401.
[30] See Investigative Report § 1414.

"*The proposal will be to leave out the reference to the subprime market and to focus on the resilience of the trading results despite the difficult markets in structured credits and energy. We have also discussed the various issues with Karel who agrees that based on the knowledge we have now we should refrain from making additional comments*."

57. A draft press release was being considered and a range of drafts circulated, with Saevels e-mailing the changes to the draft press release to Verwilst, Mittler and Votron, *inter alia*:[31]

> "*please find below the amended paragraph of the text in the press release (2 sentences have been left out; Energy trading weaknesses has been added and "overall" added to last sentence)*
>
> *NEW:*
> *Trading revenues (adjusted for grossing up) remained stable at high level EUR 530 million. The better performance by the Forex and Rates Group and the considerable advance of the Equity Cash and Derivatives Group offset the weaker results in the Structured Finance group and Energy trading, demonstrating the diversification benefits of our portfolio of activities. Overall trading results nevertheless maintained the very high level of income of the first half of 2006 despite these adverse market conditions.*
>
> *OLD:*
> *Trading revenues (adjusted for grossing up) remained stable at high level EUR 530 million. The better performance by the Forex and Rates Group and the considerable advance of the Equity Cash and Derivatives Group offset the weaker results in the Structured Finance group, demonstrating the diversification benefits of our portfolio of activities.* ***Regarding the Structured Finance activities, the unrest in the US subprime mortgage sector significantly influenced the behavior of both investors and issuers, leading to difficult market conditions that affected our trading and origination business. Due to severe spread widening of certain asset classes in the US, Fortis' results include a negative revaluation of open positions.*** *Trading results nevertheless maintained the very high level of income of the first half of 2006 despite these adverse market conditions.*
>
> *When asked for our exposure and impact on our results we could answer:*
>
> *"Although we have some US Subprime mortgage CDO exposure, we are convinced, based on our current assessment, that this will not have a material effect on our full year 2007 results."*
> *We will redraft our Q&A accordingly and include a script to address the questions on:*
>
> *1/ why we are not more precise in our disclosure*
> *2/ why we are so confident to make this statement (qualitative answers – no figures will be mentioned).".*

58. The reference to the sub-prime situation quoted in bold print above was expressly left out of the press release on Fortis's interim results dated August 9, 2007.

[31] See Investigative Report § 1415.

59. The presentation which had been given one day earlier at the AC meeting was repeated at the Management Board meeting held on August 8, 2007, with Dierckx presenting a sub-prime exposure for Fortis in the amount of EUR 8.7 billion divided into three categories, to wit:[32] "*RMBS[33]: EUR 3,066 million, High Grade CDO: EUR 4,371 million, BS Mezzanine CDO: EUR 1,244 million*." The Investigative Report fails to clarify how these estimates have been arrived at or what the abbreviations are supposed to mean.

60. Dierckx told the Management Board that he did not expect the sub-prime exposure n question to have a material impact on the expected net earnings for the financial year 2007, with the minutes of the meeting containing the following reference to the interim result press release:[34]

> "*Exact figures will not be disclosed*".

61. An ExBo meeting took place on August 13, 2007 at which Dierckx made the following sub-prime comment:[35]

> "*Mr. F. Dierckx points out that problems in the US subprime mortgage market have quickly spread to the credit and capital markets. Market professionals in the credit market are currently on the edge as many believe it is only a matter of time before more institutions fall victim to losses on securitizations of subprime mortgages, or mark-to-market losses on asset backed securities in general. This climate has resulted in a liquidity crunch in the credit market in general and the asset-backed commercial paper market in particular. In order to ease fears of liquidity drying up in the interbank market, the European Central Bank has pumped EUR 95 billion into the market. Mr. Dierckx explains that the Bank has drawn on this facility*."

62. On 23 August 2007 Société Générale publishes an analysts' report about Fortis in which the following is mentioned with regard to the subprime exposure of Fortis:[36]

> "*What could be the exposure to sub-prime?*
> *During the 02 earnings presentation management stated that it saw no material impact on 2007 profits. However, it also stated that it expected credit losses to range between 10-15bps for the full year (just 2 bps for H1) and that this was "prudent" on the back of the volatility currently seen in the US credit markets. To date the company has been unwilling to disclose its potential exposure, but below we have summarized some of the potential areas in which there could be exposure. In order to ease concerns and keep the expected discount in the rights issues as limited as possible, we believe the company has to provide more detail on its potential exposure.*"

63. Several Board members in the course of August started to have doubts regarding the accuracy and completeness of the dissemination of information to the market where the sub-prime challenge was concerned. For example, Kloosterman on August 23, 2007 in an e-mail message to Mittler and Dierckx, *inter alia*, wondered whether the present awareness of the sub-prime challenge should not give rise to "progressive insight"[37]:

[32] See Investigative Report § 1423.
[33] Residential Mortgage Backed Securities. See Investigative Report § 1437.
[34] See Investigative Report § 1424.
[35] See Investigative Report § 1426.
[36] See AFM Ruling of 19 August 2010, p. 5.
[37] See Investigative Report § 1435.

> "*From the start I have felt that we would be best off with transparency. With the knowledge of the day we have used the wording we do not expect material impact 2 weeks ago. Question is whether our insights of today would lead us to a "voortschrijdend inzicht" (epiphany)*?".

64. One week later Moucheron too in an e-mail message to Scharfe broached the same issue[38]:

> *"For the external World, the line used when presenting the H107 results was more on subprime than on liquidity (…). It said: Although we have some US Sub-prime mortgage CDO exposure, we are convinced, based on our current assessment, that this will not have a material effect on our full year 2007 results." (…)* ***I think we should check with Filip/Karel that we can still keep this line,*** *and how we 'enrich' to address the liquidity issue (…)*". (bold print added by Investigators)

65. Van Waeyenberg too e-mailed Lippens with a copy to Hessels, announcing his wish at the Management Board meeting scheduled for August 27, 2007 (which in the end was never held) to devote extensive attention to the sub-prime challenge.[39]

66. August 27, 2007 did, however, see an AC meeting and a Fortis Bank Management Board meeting being held, at which latter meeting a exposé was presented on the theme of the sub-prime exposure. The minutes of said meeting[40] show (as do the minutes of the Management Board meeting held on August 8, 2007) that the aggregate sub-prime exposure at that particular moment in time totaled EUR 8.625 million (or, in rounded-up terms, EUR 8.7 billion) subdivided into the three categories, to wit RMBS, High Grade CDO, and Mezzanine CDO. The amounts associated with the three categories were somewhat different to those having been mentioned at the Management Board meeting held on August 8, 2007: "*RMBS: EUR 2,910 million, High Grade: EUR 4,461 million, and Mezzanine CDO: EUR 1,244 million.*" These three categories were subsequently split up into a range of sub-prime investment product sub-categories.[41]

67. The minutes moreover established that the expected adverse impact of the sub-prime exposure would not materially affect the results and that Fortis's earnings projection for 2007 was being upheld unchanged:[42]

> "*In view of these elements, it is indicated that losses on Subprime should not materially affect results and that the forecasted profit should be realized.*"

68. An ExCo meeting was held on August 28, 2007. It follows from the AFM Ruling dated August 19, 2010 that a presentation entitled "*US Subprime Update*" was staged for the ExCo at this meeting in the context of which it was announced what Fortis's aggregate sub-prime exposure was at that particular juncture and what portion of said exposure was US sub-prime related.[43] The actual amounts (in billions of euros) have been rendered illegible in the Ruling.

[38] See Investigative Report § 1441.
[39] See Investigative Report § 1432.
[40] See Investigative Report § 1437.
[41] See Investigative Report § 1437 for an overview of the various sub-categories.
[42] See Investigative Report § 1437.
[43] See AFM Ruling dated August 19, 2010, p. 18.

69. An exposé entitled "*Risk Assessment Subprime Exposure*" was moreover given in the context of the above presentation of the risks arising out of the sub-prime exposure. This exposé too has been rendered illegible. AFM has established as follows on the basis of this presentation[44]:

> "*the combination of the above facts from August 28, 2007 onwards has qualified as concrete information the public disclosure of which could significantly affect the share price, with reasonably acting investors being likely to respond*."

70. Kloosterman on September 3, 2007 reported to Mittler and De Boeck on a meeting with DNB. It follows from this report that the Consortium, Fortis in particular, still enjoyed the support of Merrill Lynch and that the latter had faith in the share issue[45]:

> *"Andrea and Jim have reconfirmed the strong commitments Merrill Lynch has towards the consortium and to Fortis specifically. They expressed their total confidence that at today's market prices there would be ample availability of liquidity. Andrea highlighted that investors will be acquiring F at a multiple of 5 times earnings."*

71. On September 4, 2007 an ExCo meeting took place, the minutes of which contain the following reference to the sub-prime challenge:[46]

> "*Based upon testing our portfolio via stringent "mark to model", projected losses are confirmed to be in range between € 350-400 million. It is expected therefore – if and when all other businesses continue to deliver - our statement that no material impact is expected on our FY 2007 results remains correct*[47]*."*

72. A Management Board meeting took place that same day at which Dierckx gave a presentation in the context of which he commented that the liquidity in the US sub-prime market had comprehensively dried up since late July 2007 while CDOs were barely if at all being traded.[48] A switch was having to be made in this context from Mark-to-Market valuation to Mark-to-Model valuation, the latter valuation method no longer involving valuation on the basis of comparable market values (as the market had evaporated) bur rather, valuation on the basis of theoretical models.[49]

73. Dierckx concluded that application of the Mark-to-Model method resulted in Fortis's sub-prime exposure boiling down to a (rounded) sum of EUR 8.7 billion – the same amount that Dierckx had referred to four weeks earlier at the Management Board meeting held on August 8, 2007 and at the Management Board meeting held on August 27, 2007. The same categories were once more mentioned at the meeting held on September 4, 2007 (albeit that the category of Mezzanine was now subdivided into "Mezzanine" and "Below Mezzanine"), in addition to which a risk indication was awarded to each of the categories, as follows: "*RMBS: minimal risk, Super Senior: low risk, Mezzanine: moderate risk and Below Mezzanine: high risk.*"[50]

---

[44] See AFM Ruling dated August 19, 2010, pages 18 and 19.
[45] See Investigative Report § 1442.
[46] See Investigative Report § 1443
[47] It remains unclear whether this means that Dierckx expected the projected losses because of the amortization in connection with sub-prime losses, in the amount of EUR 350-400 million, to be offset by the enhanced performance of the other parts of the business, so that earnings for 2007 would on balance not deteriorate.
[48] See Investigative Report 1446.
[49] See Investigative Report 1446.
[50] See Investigative Report § 428 and § 1447.

74. No mention was made, however, at the Management Board meeting (or in the minutes of same) held on September 4, 2007 of the projected loss on the sub-prime investments in the amount of EUR 350-400 million having been referred to at the ExCo's meeting held that same day.

75. The minutes of the Management Board meeting do, however, stress the need to include the right sub-prime information in the Prospectus: [51]

> "*In the ensuing discussion, it was noted that it will be made sure that the appropriate information will be included in the prospectus on the rights issue.*"

76. An e-mail message from Mittler to the Management Board sent the next day re-emphasized the need for including the right sub-prime information in the Prospectus:[52]

> "*FD and Robby Scharfe presented the liquidity and subprime file. We have to make sure that we have the right information in the prospectus.*"

77. The draft Prospectus, which was issued one week later, on September 13, 2007, did not, however, contain any information whatsoever where the sub-prime challenge of Fortis was concerned.

78. An ExBo meeting was held on September 18, 2007 at which Dierckx let it be known that the sensitivity analysis was pointing to an expected potential impact of the sub-prime portfolio on the income statement for 2007 in the amount of EUR 321 million.[53] It follows from the AFM Ruling dated August 19, 2010[54] that the sensitivity analysis calculations were pointing to the sub-prime portfolio being expected to have a substantial negative impact on the results for the third and fourth quarters and the results for the financial year 2007 as a whole, the exact amounts having been rendered illegible in the AFM Ruling.

79. As stated earlier, the (final) Prospectus dated September 20, 2007 was made available on-line to a select audience on September 24, 2007 and published on September 25, 2007. The subscription period ran from September 25, 2007 to October 9, 2007 inclusive. Only the following information regarding Fortis's sub-prime exposure was included in the Prospectus (and in the Trading Update)[55] (bold print added):

> "***Update on Fortis' well-managed risk exposure***
> *As has been well publicized recently, credit markets and subprime related mortgage markets, particularly in the US, have experienced severe dislocations and liquidity disruptions. Sub-prime mortgage loans have recently experienced increased rates of delinquency, foreclosure and loss. These and other related events have had a significant impact on the capital markets associated not only with sub-prime mortgage-backed securities, asset-backed securities and collateralized debt obligations (CDOs), but also with credit and financial markets as a whole.* ***Although Fortis does not have any direct mortgage financing activities in the US, it does have some exposure to the US sub-prime mortgage market through its ownership of mortgage-backed securities, asset-backed securities and CDOs. Approximately 95% of***

[51] See Investigative Report § 1449.
[52] See Investigative Report § 1454.
[53] See Investigative Report § 1508.
[54] See AFM Ruling dated August 19, 2010, page 27.
[55] See § 5.1.4 of Prospectus, page 258 et seq.

these MBS and ABS portfolios are AAA and AA rated. The impact on Fortis's full-year 2007 results is expected to be non-material thanks to its diversified portfolio, dynamic portfolio management and the credit risk protection purchased in 2006. Even if the current subprime severity would deteriorate with a further 20%, the additional non-linear net profit impact is estimated at EUR 20 million."

(…)
Fortis is also active in CDOs within the sub-prime market, although there is no direct risk in its exposure. To date, Fortis Investments has seen outstanding performance in its CDO Business with no single tranches downgraded. Fortis Investments does not currently foresee any negative consequences for its portfolio's due to recent market turmoil."

80. Both the Prospectus and the Trading Update thus establish that it would only be in this scenario that Fortis would make allowances for a (controlled) loss on the sub-prime portfolio in the amount of EUR 20 million based on a 20% further decline in value for the sub-prime market. It is not clear what this calculation has been based on.

81. What is missing from the Prospectus and the Trading Update, however, are details regarding Fortis's precise exposure and the expected losses in particular, which information had just previously been presented at the ExCo and Management Board meetings held on September 4, 2007 and, to a limited extent, at the Management Board meetings held on August 8 and August 27, 2007. No trace can be found either, be it in the Prospectus or in the Trading Update, of the information having become known from the internal calculations of the *base case* scenario and the solvency analysis.

82. It can be established on the basis of the know-how which (the Management Board and ExCo of) Fortis had at its disposal that the following relevant information has been missing from the Prospectus and from the Trading Update:

(i) the fact that the US sub-prime market had comprehensively dried up since late July 2007;
(ii) the need to switch from a Mark-to-Market to a Mark-to-Model valuation method in connection with the evaporation of the liquidity market;
(iii) the aggregate sub-prime exposure totaling EUR 8.7 billion (rounded up) in conjunction with a range of risk indications for the various product categories;
(iv) an expected substantial loss on the sub-prime portfolio in the amount of EUR 350-400 million as discussed at the ExCo meeting held on September 4, 2007;
(v) the sub-prime portfolio's expected a substantial negative impact on the result for the third quarter;[56] and
(vi) the sub-prime portfolio's potential impact on the income statement for 2007 in an amount of EUR 321 million.

83. The Prospectus and the Trading Update moreover make very scant mention of Fortis's cash squeeze, with the Prospectus on page 17 referring to the liquidity situation in the following sketchy terms: "*credit markets and subprime residential mortgage markets, particularly in the US but also worldwide, have experienced severe dislocations and liquidity disruptions*", even though Dierckx just previously, on September 4, 2007, at the Management Board meeting had stated that liquidity in the US sub-prime market had *comprehensively* dried up since late July 2007.

[56] The amount is rendered illegible in the AFM Ruling of August 19, 2010, page 27.

84. The *Fortis Group Committee on Impairments and Provisions* (FGCIP) over the period from the date of publication of the Prospectus, on September 25, 2007, and the closing date of the share subscription period, on October 9, 2007, on September 27, 2007 made more detailed calculations pertaining to the potential loss due to sub-prime exposure[57], with the minutes of the FGCIP meeting held on September 27, 2007 bearing out that the aggregate sub-prime loss had mounted to EUR 166.8 million at that juncture.[58]

85. However, at the next ExCo meeting of October 2, 2007 and at the ExBo meeting of October 9, 2007 the reassuring phrasing as included in the Prospectus and the Trading Update, to the effect that the potential loss was being estimated at a controlled EUR 20 million based on a progressively declining market, was reiterated where the sub-prime exposure was concerned.

86. Dierckx gave a presentation at the AC meeting held on November 6, 2007 and at the subsequent Management Board meeting of November 6, 2007 which showed that sub-prime market conditions had deteriorated even further since late September 2007 and that this had resulted in a loss in the amount of EUR 444 million being sustained.[59] A further loss in the amount of EUR 300-350 million on the sub-prime products was being expected for the fourth quarter of 2007, resulting in the expected loss on the sub-prime portfolio for the second half of 2007 totaling EUR 744-794 million.[60]

87. Dierckx at both meetings specifically indicated that the Mark-to-Model valuation had brought about a loss in the amount of EUR 324 million on the *'below super senior portfolio'*, while the *'super senior mezzanine portfolio'* from early October 2007 onwards had been facing "*serious downgrades (approx. 60%)"* and this portfolio had now "*entered the sub-investment grade area."*[61]

88. Fortis's Annual Overview for 2007 (**Exhibit 10**), which Fortis published on March 31, 2008, shows that Fortis had to write off a total of EUR 2.7 billion on its sub-prime portfolio that year owing to the deterioration in market conditions.[62]

89. According to the Investigators the minutes of the AC meeting held on November 6, 2007 and the Management Board meeting held on November 7, 2007 do not show that the know-how in question where the deteriorated sub-prime position was concerned was disclosed to the market at any time over the period between the date as at which the Prospectus was issued and the date as at which the offer gained unconditional status.[63] The legal aspects and consequences of this are being addressed in more detail in § 6.1 under (i) below.

90. The Foundation hereby notes that Merrill Lynch, acting as coordinating bank in the context of the September 2007 share issue, in its capacity of "Joint Global Coordinator" and "Sole Bookrunner" was, or should have been, conversant with the deteriorating sub-prime situation in the financial markets in general and Fortis financial exposure in that respect in particular. The Foundation will address this issue in more detail when discussing the liability of Merrill Lynch in paragraph 6.4.

[57] See Investigative Report § 455.
[58] See Investigative Report § 456.
[59] See Investigative Report § 464.
[60] See Investigative Report § 465.
[61] See Investigative Report §§ 465, 466.
[62] See Fortis Annual Report for 2007, p. 9, 16, 20.
[63] See Investigative Report § 469.

The 'Material Adverse Change' clause

91. A number of (preconditional) terms should either have been satisfied or have been waived by the Parties in anticipation of the expiration of the offer period prior to the Consortium's Offer being rendered unconditional, one of these being the '*Material Adverse Change*' clause, or "MAC clause" for short, the gist of which was that if a '*material adverse change*' – i.e., a substantial change for the worse – was to occur at ABN AMRO, RFS Holdings, Fortis, RBS or Santander, the respective Consortium party could release itself from the intended transaction.[64] The MAC clause also applied to Merrill Lynch's underwriting commitment.[65]

92. The MAC clause has been defined as follows in the Offer Memorandum[66]:

> "*any event, events or circumstance that results or could reasonably be expected to result in a material adverse effect on the business, cash flow, financial or trading position, assets, profits, operational performance, capitalization, prospects or activities of any of ABN AMRO, RFS Holdings, RBS or Santander (each, taken as a whole) as the case may be (…).*"

93. In view of the deteriorating market conditions and the turmoil in the financial markets, the board and ExCo late August-early September 2007 witnessed the call for invoking the MAC clause where appropriate or proceeding with a reduction of the offer getting increasingly stronger.

94. The minutes of the ExCo dated August 28, 2007 include the following passage[67]:

> "*Finally, G. Mittler presents the options regarding the pricing and the application of the MAC clause, outlining the practical difficulties of using the MAC clause at this stage.*"

95. The MAC clause was raised for discussion at the Management Board meeting held on September 4, 2007. The minutes include the following passage[68]:

> "*The Consortium does not intend to lower the price of the offer, also because invoking the MAC clause would lead to a legal exposure.*"

96. One day later, at the Management Board meeting of September 5, 2007 the MAC clause(s) was (were) frequently referred to, with the Investigators commenting on the Management Board's appreciation of this being a '*delicate issue*'.[69]

97. A reference is included in § 1469 of the Investigative Report to an internal Fortis memorandum dated September 6, 2007 which discussed *inter alia* the internal decision making by the Board within RFS Holdings in the event of the MAC clause being invoked:

---

[64] See Investigative Report § 1367. It should be noted in this context that § 1367 of the Investigative Report bears out that a '*material adverse change*' arising out of the divestment of La Salle did not come under this clause.
[65] See Investigative Report § 172.
[66] See pages 17 and 62 of the Offer Memorandum.
[67] See Investigative Report §1440.
[68] See Investigative Report §1462.
[69] See Investigative Report §1465.

"(…) *As provided for in the CSA [Consortium and Shareholders Agreement] and as evidenced by the offer documentation, the Consortium's offer for ABN AMRO is being made by RFS Holdings and is subject to certain conditions. The decision as to whether or not the offer conditions have been satisfied would therefore be a matter for the Board of RFS Holdings. The Board of RFS Holdings currently comprises six directors, with each Consortium member having two nominees on the Board. During the offer period, as a result of clause 7.3 of the CSA, board decisions have to have the support of each consortium member."*
Clause 7.3 of the CSA provides that:
"The parties agree that, subject always to the need to comply with all applicable legal and regulatory requirements and with the fiduciary obligations of each Director and of the Board of the Company [i.e. RFS Holdings], prior to the Offer Satisfaction Date [i.e. the date after the Offer goes unconditional and on which the consideration due to holders of ABN AMRO shares under the Offer is deposited with the exchange agent], all decisions of the Board (including all decisions relating to the conduct of the Offer and any decisions relating to the waiver of any conditions to which the Offer is subject or declaring such conditions to be satisfied) shall be taken:
7.3.1 subject to Clause 7.3.2, so as to be consistent with the provisions of this Agreement; and
7.3.2 by Super Board Majority [i.e. by a majority including at least one RBS director, one Santander director and one Fortis director]."

(…)

"*In light of the offer conditions and the unanimity required by Clause 7.3 of the CSA, if the Fortis nominee directors on the Board of RFS Holdings do not vote in favor of the offer being declared unconditional by virtue of a Material Adverse Change having occurred in respect of Fortis, the resolution to declare the offer unconditional would not be carried by the required majority and would not therefore be effective. In effect, therefore, the representatives of every Consortium member have a veto over whether or not RFS Holdings' offer will be declared unconditional. If the board of RFS Holdings does decide to declare the offer unconditional with the requisite board majority, this would in effect be confirmation by the representatives of all Consortium members that all offer conditions (including the no Material Adverse Change condition) have been satisfied or, as the case may be, waived.*
If the Material Adverse Change condition is triggered, this should not lead to litigation being initiated by any Consortium member(s) against Fortis (although third party litigation in such circumstances cannot be ruled out).
The current closing date of the Consortium's offer is 5th October 2007 (subject to extension). RFS Holdings could decide to invoke the Material Adverse Change condition and lapse the Offer before that date if the Material Adverse Change is such that it will continue to subsist at the end of the offer period. Any decision to do so would have to be supported by all three Consortium members. However, if one Consortium member reached the immutable conclusion that a Material Adverse Change had occurred and would continue until at least 5th October, RFS Holdings would then be aware that it would be unable to declare its offer unconditional. In those circumstances, in order to avoid misleading the market, RFS Holdings (and, indeed, the individual Consortium members) would have a regulatory obligation to announce publicly that the Offer would lapse on 5th October."

98. On September 11, 2007 NRC Handelsblad[70] reports that a few shareholders of RBS were objecting to the continuation of the offer as this had by now allegedly reached excessive levels. Speculation in the market was therefore rife regarding a potential reduction of the offer. According to NRC Handelsblad the turmoil in question was being powered on by the ABN AMRO share price which prevailed at the time. The Consortium was planning to make an offer of just over EUR 38 per share whereas the ABN AMRO share price in the morning of September 11, 2007 weighed in at no more than EUR 33.64 in which partial allowances may be deemed to have been made for the upward impact on the ABN AMRO share price of the announced offer.

99. It was commented in the same NRC Handelsblad article that AFM was ruling out any adjustment of the Offer Memorandum. An AFM spokesperson was quoted as follows in this context:

> "*A public coffer generally qualifies as irrevocable. The only way for an offer not to become unconditional is if no certificate of no objection is issued, for example. The certificate is expected to be issued this week. The regulations governing the offer against which AFM performs its checks and balances stipulate that renegotiating an offer may not depend on the offerer itself.*"

100. The Loyens & Loeff report dated September 1, 2008[71] (**Exhibit 11**) comments that AFM wished to stress in the context of transparent information supply that in the event of any one of the offerors having been keen to invoke a MAC clause on the basis of the credit crunch, the offeror in question could not have waited to do so until the final day of the subscription term, but should rather have invoked the MAC clause as soon as the relevant situation had occurred because this ranked as price-sensitive information for immediate publication.

101. The MAC clause was once more discussed at the ExBo meeting held on September 11, 2007. The minutes read as follows[72]:

> "***MAC Clause***
> *Mr. K. De Boeck points out that further to having secured legal advice, Fortis can still withdraw from the transaction by invoking the Material Adverse Change clause. Fortis is hence not "tied" in into this transaction from a purely legal perspective.*"

102. Merrill Lynch subsequently, on September 17, 2007, wrote a memorandum to Nicolas Martin and Mittler concerning whether or not to invoke the MAC clause. The memo indicated according to the Investigators that invoking should be possible on the basis of a further deterioration in circumstances as could possibly be evident from figures for publication by US banks over the next few days.[73]

103. A discussion took place at the RCC meeting held on September 20, 2007 concerning the question – partially in response to the EC Remedies discussion with the EC, which initially demanded that Fortis should divest all its commercial banking operations in the Netherlands, which was unacceptable as far as Fortis was concerned - as to whether

[70] 'NRC Handelsblad' newspaper dated September 11, 2007, '*Emergency Exit for Banking Consortium*', page 17.
[71] Loyens & Loeff, *Report on the Evaluation of the Role of the Finance Minister, the Netherlands Central Bank and the Authority for the Financial Markets Foundation in the Public Offers for ABN Amro Holding N.V.,* September 1, 2008, page 62.
[72] See Investigative Report § 1475.
[73] See Investigative Report § 1504.

the MAC clause was having to be invoked. The RCC eventually decided for the following considerations that this would not be prudent:[74]

> "*In light of the consensus of the consortium partners to go ahead with the set price, the inherent value of the underlying ABN AMRO assets (untouched by the daily volatility of stock markets,) and the financial merits of the transaction (thanks to the accretive nature of the funding and the acceptable ROI confirmed through Independent advice), versus the huge litigation and reputation risk that Fortis would be exposed to in case of invoking the MAC clause at this stage, the Risk and Capital Committee concluded in favor of going ahead as planned and not to recommend invoking the MAC clause.*"

104. The possibility of invoking the MAC clause was also discussed at the Management Board meeting held on September 20, 2007[75], most particularly on the initiative of Van Waeyenberge, who according to the Investigators was concerned about the scope and price of the transaction and the consequences where Fortis was concerned, and who some time previously had already suggested that ABN AMRO's asset management operations should not be taken over, except that the distribution of ABN AMRO between the three Consortium partners had by then already been finalized. Van Waeyenberge let the Investigators know that he had briefly toyed with the idea of resigning from the Management Board[76], but had decided not to in view of the forthcoming share issue. External written advice was furthermore sought from both De Brauw and Merrill Lynch where the question as to whether or not to invoke the MAC clause was concerned.

105. The Investigative Report in § 1519 stipulates that several of the people having been interviewed by Investigators (including Dierckx and Westdijk) stated that they regarded this discussion as creating an opportunity for reducing the transaction's price rather than withdrawing altogether from the transaction. Van Waeyenberge (quoting from his own notes) stated *vis-à-vis* the Investigators that Votron allegedly commented as follows in the context of the discussion in hand:

> "*Piet, if you ask the MAC clause, it's without me.*"

106. According to the Investigators the Management Board – partially on the basis of legal advice provided by the attending internal legal counsel, Quaetaert, and an external legal advisor from De Brauw – concluded that it would not be wise to invoke the MAC clause on the basis of circumstances prevailing in the financial markets.[77]

107. From the above it can be concluded that within (the board of) Fortis an extensive discussion took place regarding the question whether or not the MAC-clause should be invoked and what the consequences thereof would be for Fortis and the Consortium. Fortis has sought legal advice on this issue both internally and externally. The fact that there has been an extensive discussion on and investigation into the MAC-clause, indicates that prior to the share issue of September 2007 there were substantial concerns within Fortis on the financial capability of Fortis to finance the acquisition of ABN AMRO. These concerns – well-known to Fortis – were not disclosed to investors.

[74] See Investigative Report § 1514.
[75] See Investigative Report § 1518.
[76] See Investigative Report § 211.
[77] See Investigative Report § 1521.

108. It is clear that – legitimately – invoking the MAC-clause would have influenced the course of affairs at Fortis in a positive manner. Fortis would not have overstretched itself financially with the acquisition of ABN AMRO, but would have been able to concentrate in peace on the continuation of its existing activities.

109. One of the purposes of this procedure is to reconstruct the exact course of affairs with regard to (the discontinuation of) invoking the MAC-clause, which option was available to Fortis at the time.

5.3 Developments over the first half of 2008 up to the publication, on June 26, 2008, of the accelerated implementation of the solvency plan

110. The first ExCo meeting to be held in 2008 took place on January 16 that year. Attention was devoted at the meeting to a short-term capital shortfall at Fortis in the amount of EUR 2 to 3 billion. Votron in his capacity as CEO stated that priority had to go to boosting solvency in order to restore the market's faith in Fortis and enable the implementation of the dividend policy.[78]

111. An RCC meeting was held on January 24, 2008 at which it was suggested, as potential measures for curbing the capital shortfall,[79] that (i) no interim dividend should be paid out in August 2008; (ii) no final dividend should be paid out in respect of 2008; (iii) a share issue should be effected. This is what the minutes of the relevant meeting state on the subject:[80]

> "*this topic was dealt with in the framework of the discussion on the evolution of the subprime exposure and its anticipated impact on Fortis' solvency*."

112. CBFA's Servais in response to market rumors concerning Fortis and a strong declining share price (the Fortis share sustained a 12.25% decline in value that day)[81] on January 25, 2008 insisted with both Lippens and Votron that Fortis release a press communiqué on the theme of the sub-prime problems, "so as to bring the market up to date on the actual situation".[82] That same afternoon Fortis's internal legal counsel, Quaetaert, in response e-mailed to Dierckx (who forwarded her e-mail message to Votron, Verwilst and Mittler), establishing that Fortis had price-sensitive information at its disposal concerning the valuation of the sub-prime portfolio, which information 'in the best interests of the Company' was *not* being published:[83]

> "*The CBFA does not seem to have indicated on which law or principle it bases its demands.*
> *…*
> *Price sensitive information: I think that we can consider the information concerning the subprime as price sensitive information. We can tell the CBFA officially that the information they wish us to publish is price sensitive (no doubt it is), and that we have decided not to publish it "in the interests of the company".*

[78] See AFM Resolution dated February 5, 2010, page 3.
[79] See Investigative Report § 1620.
[80] See Investigative Report § 1621.
[81] See Investigative Report § 1635.
[82] See Investigative Report § 1630.
[83] See Investigative Report § 1634.

113. On January 27, 2008 Fortis in response to the aforementioned market rumors concerning Fortis's sub-prime problems released a press communiqué stressing, *inter alia*, its strong solvency status and announcing its unchanged dividend policy:[84]

- *"Fortis Bank end-of-year solvency well above 8%.*
- *Fortis intends to keep its dividend policy unchanged.*
- *Capital and solvency requirements will be met, even in very stringent scenarios on the impact of the subprime CDO portfolio.*
- *Fortis does not need to and is not considering to issue common stock or dilutive equity linked capital instruments."*

114. Fortis on January 30, 2008 concluded a Stand-by Underwriting Agreement with Merrill Lynch (and Morgan Stanley) regarding the issue of EUR 3 billion in Tier 1 capital.[85]

115. On March 7, 2008 Fortis in a press release announced the annual results for 2007, commenting that earnings had remained 'solid' and solvency, 'strong', and stipulating that only non-diluting capital increases were to be effected in order to continue meeting the asset targets for 2008.[86]

116. On March 31, 2008 Fortis published its Annual Overview for 2007, in which it was commented where the dividend policy was concerned that Fortis in respect of 2007 was to pay out a stable or growing dividend, with due allowances being made for Fortis's solvency, profitability and growth targets,[87] as well as showing that Fortis had had to write off a total of EUR 2.7 billion on its sub-prime portfolio.[88]

117. On April 2, 2008 Fortis in a press release announced that it had in the context of the EC Remedies concluded a "definitive" contract with Chinese insurers, Ping An, regarding the divestment of 50% of Fortis's asset management operations for a price of EUR 2.15 billion.[89] Fortis did not let on that the agreement in question contained a '*drop dead*' date of October 31, 2008, meaning that the agreement could be reversed if not all conditions resulting in the performance of the agreement had been satisfied by said date. Invoking the '*drop dead*' date did not come with a penalty clause in the agreement.

118. On April 10, 2008 an ExCo meeting was held the minutes of which show that in solvency terms there was still a need for EUR 2 to 3 billion in order that the impact of the deteriorating market and the lower proceeds from divestments should be compensated.[90]

119. Deutsche Bank (as the sole market player having expressed a interest) on April 22, 2008 in the context of the EC Remedies tendered a definitive offer for certain ABN AMRO business units including HBU.

120. On April 26, 2008 Votron gave an interview in VEB's "Effect" journal in which he commented *inter alia* on Fortis's dividend policy and balance sheet. When asked

[84] See Investigative Report § 1637.
[85] See Investigative Report §§ 242 and 1640.
[86] See AFM Ruling February 5, 2010, page 3.
[87] See Investigative Report § 1661.
[88] See Fortis Annual Report 2007, pages 9, 16, 20.
[89] See Investigative Report § 1663.
[90] See Investigative Report § 1669.

whether the reduced dividend could be restored to EUR 1.40 per share, Votron replied as follows:[91]

> "*Our dividend policy has not changed. The dividend (per share) merely appears to have been reduced as a result of the share issue; it has, however, remained stable (…)We do not indulge in dividend projections, however. Traditionally the dividend at Fortis runs parallel to earnings per share. And we have consistently paid a dividend even in disappointing years."* When asked whether the balance sheet was not in need of strengthening, Votron replied: "*No, the balance sheet is fine, I can assure you. …*"

121. General Shareholders' Meetings took place on April 29, 2008 both in Brussels and in Utrecht. Mittler confirms at these meetings that "the further financing plans for ABN AMRO concern non-diluting capital placements only, thus no new shares being issued in an indirect or direct way".[92] The intention was furthermore voiced at these meetings to pay out an interim dividend in the amount of 50% of the dividend for 2007 in September 2008, or EUR 0.59 per Fortis share.[93]

122. On April 30 , 2008 in response to the General Shareholders' Meeting a reference to Lippens's comment regarding Fortis's dividend policy was included *inter alia* in *De Tijd*:[94]

> *"Compromising the dividend policy is the last thing Fortis will do."*

123. An Executive RCC ("**ERCC**") meeting was held on May 5, 2008[95] at which it was decided that a solvency-contingency plan was having to be prepared for prompt presentation to the ERCC,[96] the reason being that based on the '*look through*' method Fortis was expecting a EUR 0.4 billion solvency shortfall in a '*base case*' scenario to a EUR 4.8 billion shortfall in a '*stress case*' [97]scenario.[98]

124. The '*look-through*' method, in the context of the solvency being computed, formed the basis for determining Fortis's (future) solvency. It involved solvency being calculated as if all business units having been taken over from ABN AMRO had transferred to, and had been consolidated into, Fortis.[99] Any reference at any time to an asset shortfall on application of the '*look through*' method did not constitute a shortfall at that particular juncture but rather, at the moment of actual integration with ABN AMRO. The '*look through*' method thus provided Fortis in good time with information in order for measures to be implemented aimed at avoiding a potential asset shortfall at the moment of integration involving ABN AMRO.[100]

---

[91] See Investigative Report § 1667.
[92] See Investigative Report § 1677.
[93] See Investigative Report § 1679.
[94] See Investigative Report § 1683.
[95] The ERCC was established on April 7, 2008 with the aim of managing the group in what were seen as turbulent times. Major decisions concerning the strategy, risk and capital were to be discussed and resolved at ERCC level. The ERCC was made up of the following members: Votron, Verwilst, Mittler, Dierckx, Van Harten, Bos, Machenil and Roosen.
[96] See Investigative Report § 1685.
[97] According to the Investigative Report (see § 287) the philosophy underpinning the 'stress case' scenario chiefly related to setbacks such as a further decline in share prices, accelerated growth of the banking operations, reduced proceeds from divestments or capital issued triggered by market circumstances. A 'worst case' scenario dealing with a reduced valuation of 'structured credits' including the CDOs was lacking, however, according to the Investigators in § 287 of the Investigative Report.
[98] See Investigative Report § 1685.
[99] See AFM Ruling of February 5, 2010, footnote 4.
[100] See Investigative Report § 236.

125. On May 7, 2008 Mittler through an e-mail message from Poswick learned that the definitive offer for particular ABN AMRO business units which Deutsche Bank in the context of the EC Remedies had tendered on April 22, 2008 was to have a negative solvency impact in an amount of EUR 1.1 billion rather than the EUR 0.3 billion having initially been expected:[101]

> "*The solvency impact would be a negative 1.1 bn instead of a negative 0.3 bn anticipated.*"

126. An RCC was held one day later, on May 8, 2008, the minutes of which show that an asset shortfall in an amount of EUR 0.8 billion was being anticipated,[102] as well as bearing out that the RCC had not been brought up to speed on the previous day's developments concerning Deutsche Bank and the impact of same on Fortis's solvency (to the tune of EUR 1.1 billion).[103] The minutes of the Management Board meeting held the next day also fail to show that the above was conveyed to the Management Board.[104]

127. Fortis Legal's Goris on May 9, 2008 e-mailed to Machenil, cautioning the latter *inter alia* that the progress in the context of the EC Remedies was having to be communicated to the investing public in order to prevent being potentially held liable both civilly and criminally at a subsequent stage for deliberate representation of misleading facts.[105] His warning was not, however, heeded.

128. Fortis on May 13, 2008 published its figures for the first quarter of 2008, with Votron confirming when elaborating on the quarterly figures that Fortis's financing policy was to remain unchanged:[106]

> "*We are nevertheless holding a steady course in achieving our asset target for 2009 by retaining future earnings, through selective divestments and by using non-diluting instruments, as indicated earlier.*"

129. Fortis in the explanatory notes to the quarterly figures once more confirmed where its solvency in the wake of the consolidation of the ABN AMRO operations was concerned that only non-diluting capital instruments were to be issued in order to comply with the asset targets:[107]

> *"The majority of evens impacting on the reported solvency are to take place between late 2008 and late 2009. The following four instruments will warrant lasting compliance with our asset targets over this period:*
> - *retained earnings*
> - *controlled expansion of capital requirements*
> - *divestment of non-strategic assets and establishment of joint ventures*
> - *non-diluting funding and capital-reducing transactions.*"

[101] See Investigative Report § 1692.
[102] See Investigative Report § 1697.
[103] See Investigative Report § 1701.
[104] See Investigative Report § 1711.
[105] See Investigative Report § 1715.
[106] See Investigative Report § 1717.
[107] See Investigative Report § 1719.

130. Machenil on May 18, 2008 let the ERCC know that Deutsche Bank's offer was of the "*take it or leave it*" variety.[108] Although the Deutsche Bank offer had come as a major disappointment, the ERCC meeting on May 19, 2008 nevertheless decided that the transaction involving Deutsche Bank should be pursued. Three steps were having to be investigated in more detail in this context: capital recruitment (share issue), divestments and tweaking of the dividend policy.[109] It was established at the May 19 meeting that the solvency shortfall based on the '*look through*' method had risen to EUR 1.1 billion ('*base case*') and EUR 6.8 billion ('*stress case*'), respectively.[110]

131. One day later, on May 20, 2008, the ExCo definitively approved the pursuit of the transaction involving Deutsche Bank in the context of the EC Remedies, with exclusive negotiations in the context of the EC Remedies taking place with Deutsche Bank from May 21, 2008 onwards. According to AFM it was from this date onwards that there was a question of price-sensitive information where the EC Remedies were concerned, as Fortis was exclusively negotiating with Deutsche Bank from this date onwards.[111] AFM's opinion in the matter is being elaborated upon in § 6.1 under (ii) below.

132. "Investor Day" took place in Brussels on May 22, 2008 featuring a variety of presentations, with Votron stating where the EC Remedies were concerned that "*solid progress*" was being achieved and the process was "*on track*" [112] and Mittler establishing that there was a "*sound solvency position despite credit and equity turmoil"* and that "*we remain firmly on track to meet our solvency targets by 2009."*[113]

133. On May 23, 2008 Fortis released a press communiqué to the effect that it had successfully issued a EUR 625 million bond loan, although approval had been granted for a sum in the amount of EUR 1 billion. Mittler in the context of the press release commented as follows in the press release:[114]

> "*Fortis is happy with this achievement. We have realized our preset target and given Fortis's asset position a further boost."*

134. On May 27, 2008 Mittler and Machenil drafted a memorandum for the ECRR on the topic of Fortis's solvency status in which it was recommended – contrary to Mittler's announcements on Investor Day – that a share issue should be effected by means of an *accelerated bookbuilding offer* in order to strengthen solvency, and that dividend measures should be implemented as well.[115]

135. Mittler in late May 2008 asked Merrill Lynch to investigate Fortis's capital position and the opportunities for enhancing same. Merrill Lynch on June 3, 2008 forwarded a report to Mittler in which it proposed a share issue and the retaining of dividends as potential options for enhancing Fortis's capital position.[116]

136. On June 5, 2008 Votron at ABN AMRO headquarters gave a presentation for FD.TV's "Financial Breakfast" show[117] in which he suggested, *inter alia*, that:[118]

---

[108] See Investigative Report § 1722.
[109] See Investigative Report § 1725.
[110] See Investigative Report § 1724.
[111] See Investigative Report § 526, where reference is made to AFM's 'definitive investigative report' dated November 4, 2009.
[112] See Investigative Report § 1740.
[113] See Investigative Report §§ 1741 and 1742.
[114] See Investigative Report § 1747.
[115] See Investigative Report § 1750.
[116] See Investigative Report § 610.
[117] http://videoplayer.neos.nl/fd/index.php?item=1055. See Investigative Report § 1764.

- "*the business was simply doing well…*
- *solvency was on track …*
- *Fortis's solvency was strong…"*

137. Votron was quoted as follows in the press that day:[119]

> "*Our numbers were strong in the first quarter, and on solvency we're on track,", Fortis Chief Executive Jean-Paul Votron said at a business conference at ABN's Amsterdam headquarters. (…) Votron reiterated that Fortis was going forward with its plan to divest assets, raise non-dilutive capital and take other steps to strengthen solvency."* (Reuters)
>
> *" Business was continuing to do well, according to the CEO. 'There is little volatility within the Benelux,' said Votron. The CEO stated that Fortis's solvency, which shows to what extent a business is capable of satisfying its financial commitments, 'was on track'."* (ANP)

138. An ERCC meeting took place that same afternoon at which shortfalls were suggested as at year-end 2008, on the basis of the '*look-through*' method, of EUR 2.5 billion and EUR 8.7 billion, respectively in the '*base case*' and '*stress case*' scenarios,[120] as well as the figures at year-end 2009 being furnished on the basis of the '*look-through*' method indicating shortfalls of EUR 3.1 billion and EUR 11.3 billion, respectively as at year-end 2009 in the '*base case*' and '*stress case*' scenarios.[121] The ERCC resolved in response to these deteriorated statistics that the following measures should be suggested to the RCC and Management Board:[122]

- *capital relief acceleration;*
- *issue of new shares (in the de context of the Delta Lloyd Acquisition and the EC Remedies);*
- *deferred payment of the interim dividend in the amount of EUR 1.3 billion.*

139. Mittler on June 6, 2008 brought Lippens and Bodson up to date on what had been discussed at the ERCC meeting. This information was not, however, imparted to the RCC and Management Board meetings held that same day,[123] so that neither the RCC nor the Management Board was informed of a possible share issue and the potential deferral of the interim dividend payment, even though these qualified as drastic measures that flew in the face of the external communications on Fortis's financing policy to date.

140. On June 7, 2008 Quaetaert e-mailed to Mittler, stating that Fortis by now was several weeks late furnishing price-sensitive information pertaining to the agreement involving Deutsche Bank.[124] In her e-mail message she objected to the internal plans of deferring the release of the relevant price-sensitive information to an even later date. Her request was not heeded, however.

---

[118] See Investigative Report § 1764.
[119] See Investigative Report §§ 1768 (Reuters) and 1769 (ANP).
[120] See Investigative Report § 1774.
[121] See Investigative Report § 1775.
[122] See Investigative Report § 1779.
[123] See Investigative Report §§ 1786 and 1788.
[124] See Investigative Report § 1792.

141. Mittler on June 9, 2008 presented the ERCC with a memorandum entitled 'Solvency Plan' in which he pointed out that Fortis's solvency had deteriorated by EUR 5.6 billion over the past three months,[125] as well as preparing a '*stress case*' scenario in which he based himself on a EUR 3 billion share issue and no cash dividend payment.[126] Mittler's findings as per his memo are not consistent with the announcement which a Fortis spokesperson made one day later in the 'Financieele Dagblad' newspaper:[127]

> "*If we are to engage once more in the marketing of capital instruments, these will not be diluting instruments.*"

142. On June 10, 2008 two analysts' reports were published, one by Merrill Lynch and the other, by Dresdner Kleinwort, which undermined the above announcement by the Fortis spokesperson further, with Merrill Lynch tentatively suggesting that Fortis's solvency shortfall might total EUR 3 billion while Dresdner Kleinwort was seeing an increased opportunity for a share issue by Fortis. Merrill Lynch lowered Fortis's status from "buy" to "neutral", with the Fortis share price sustaining a 7.6% drop in response to the above reports.[128]

143. From the AFM Ruling of 5 February 2010 it can be concluded that Votron in response to the announcement made by Merrill Lynch, sent an email to, among others, Mittler and Verwilst in which he states (the names in the email have been made illegible):[129]

> "*The pressure on solvency will not reduce. We need to devote the exco of tomorrow to this topic and not just have a ERCC. We also have to be prepared for an emergency communication today if we would feel appropriate to communicate today or in the next days. [•], please coordinate this together with [•].*"

144. On June 13, 2008 Merrill Lynch (and Morgan Stanley) upon Fortis's request participated in a pitch concerning a potential share issue to be effected by Fortis. The Investigative Report has summarized the relevant Merrill Lynch presentation in the following manner:[130]

> *"Based on the Fortis share's closing price as at June 11, 2008, at EUR 13.44, Merrill Lynch would be aiming for a EUR 3.2 billion share issue (comprising approximately 236 million shares at about EUR 13.50 each) without right of pre-emption accruing to existing shareholders, in the form of an AGT (Accelerated Global Tender), commenting that this amount could where appropriate be reduced if the payment of interim dividend were omitted or dividend payment took place in the form of shares. Subscription to take place within one day preceded by pre-marketing ahead of the official announcement.*
>
> *Merrill Lynch would recommend June 26, 2008 as the date for the share issue, pointing out at the same time that there would have to be "disclosure and capital impact" where the current state of affairs relative to the EC Remedies was concerned."*

[125] See Investigative Report § 1796.
[126] See Investigative Report § 1798.
[127] See Investigative Report § 1803.
[128] See Investigative Report § 1801
[129] See AFM Ruling of February 5, 2010, page 31.
[130] See Investigative Report § 275.

The Foundation hereby notes that this "disclosure" of the status of the EC Remedies did not take place.

145. The 'Telegraaf' newspaper on June 14, 2008 published an article ('*Fortis in trouble in hive-off of ABN business units'*) in which the transaction involving Deutsche Bank was commented on as follows:[131]

> "*Fortis's acquisition of ABN AMRO is suffering major damage, with Fortis coming up against major financial setbacks in the mandatory divestment of parts of the ABN AMRO merchant banking business. Deutsche Bank is the only prospective candidate – buyer and has put forward 'ridiculous demands'. If the sale – internally named 'Operation Denmark' – is not completed by 1 July the financial targets for Fortis Group for this year will be in danger. In addition, there will be damage threats. This has been reported by Fortis-sources during the meetings. Yesterday afternoon the supervisory board members have been informed of the threatening financial problems.*
> *[…]*
> *After a tender in the previous months among interested market parties there now remains only one bidder, Deutsche Bank according to sources. The lack of competitors is leading to an increase in price. "The buyer knows that it is the only bidder and can therefore put forward serious financial demands," according to an insider. The buyer is also putting forward strong claims specifically to limit its legal liability in the weakened capital market: future financial setbacks will be accounted to Fortis.*
> *[…]*
> *If Fortis is to accept the current, sole offer, the banking-cum-insurance group will have to invest so much cash of its own that it is bound to miss its financial targets for 2008 and subsequent years.*"

146. AFM concluded as follows in response to this article[132]:

> "*- [the] reporting in the 'Telegraaf' newspaper on June 14, 2008 has largely been accurate – at least in outline – as well as being consistent with the internally known price-sensitive information;*
>
> *- Fortis had refrained from disclosing this reporting in public, to the point where the reporting was inconsistent with the (positive) reports that Fortis had until then communicated where the EC Remedies were concerned. This has prompted AFM to establish that the market was being provided with inaccurate information, making it all the more pressing for Fortis to do the responsible thing and correct earlier reports. All in all the further deferral in publicizing the actual course of affairs involving the EC Remedies and the expected impact on the financial targets warranted fears of deception.*"

147. An RCC meeting and a Management Board meeting were held on June 18, 2008 at which it was resolved where the agreement involving Deutsche Bank was concerned that no disclosures would be made *vis-à-vis* the investing public until such time as the press release had been issued, on June 26, 2008. It was on June 18, 2008 that the Management Board approved the signature of the contract involving Deutsche Bank, as

[131] See Investigative Report § 1827 and AFM Ruling of February 5, 2010, page 33.

[132] See Investigative Report § 538, reference being made here to AFM's Definitive Investigative Report dated November 4, 2009, page 71 as included in the public version of AFM's penalty ruling dated February 5, 2010.

well as deciding to go ahead with a share issue and with scrapping the dividend, albeit that it was noted in this context that the *definitive decision making* was being deferred until June 25, 2008. The Investigative Report bears out that the minutes made no mention of any reasons for the deferral.[133]

148. It was resolved on June 25, 2008 that Merrill Lynch, JP Morgan Chase and Morgan Stanley would be officiating as Joint Lead Managers and Bookrunners and that a maximum of 200 million ordinary shares were to be issued.[134] One day later, on June 16, 2008, Fortis concluded an Underwriting Agreement with Merrill Lynch, JP Morgan Chase and Morgan Stanley for the subscription of a maximum of 200 million ordinary shares.[135]

149. Fortis on June 26, 2008 released a press communiqué headed "*Fortis accelerates solvency plan implementation*" announcing a EUR 1.5 billion share issue. It is also announced in the press release that the interim dividend over 2008 will be cancelled and that the dividend for the financial year 2008 will be paid out in shares in 2009, volunteering as a reason underpinning the above measures that:[136]

> "*the acceleration decision has been prompted by the expected outcome, over the coming weeks, of the European Commission-imposed divestment of several commercial banking operations within the Netherlands, the planned acquisition of the residual 51% participating interest in the Dutch joint venture involving Delta Lloyd, the expectation of persistently challenging market conditions and the necessity of deploying the required capital in a prudent manner in the present climate.*"

150. Fortis later that day issued a second press release announcing that the EUR 1.5 billion share issue had been subscribed for and that Fortis was issuing 150 million shares at a price of EUR 10 each.[137] The Investigators would comment in this respect that the number of shares issued was lower than Merrill Lynch and Morgan Stanley had recommended in their presentation held on June 13, 2008, and was also lower than the maximum of 200 million shares having been authorized by the Management Board on June 25, 2008.[138]

151. The June 26, 2008 press release came as a shock to the investing public as it was revealed, contrary to Fortis's own systematic communications until then to the effect that no diluting capital instruments were to be issued whereas the dividend policy would be left intact, that drastic diluting measures were most certainly having to be implemented if Fortis's asset position was to be preserved. The Fortis share price plummeted by no less than 19% that day, to close at EUR 10.26.[139] The legal aspects and consequences of the systematic deception of the investing public by Fortis and the latter's (former) directors over the first half of 2008 are being addressed in more detail in § 6.1 under (ii) below.

5.4 Developments over the second half of 2008 up to Fortis's statements of September 26, 2008

[133] See Investigative Report § 1953.
[134] See Investigative Report, §§ 665 and 1915.
[135] See Investigative Report, § 1919.
[136] See Investigative Report, § 1921.
[137] See Investigative Report, § 284.
[138] See Investigative Report, § 1929.
[139] See AFM Ruling of February 5, 2010, page 19.

152. On June 27, 2008 CBFA requested from Fortis that it should instantly be kept up to date on developments pertaining to the ABN AMRO business units for integration.

153. Fortis on July 2, 2008 announced that it had signed an agreement involving Deutsche Bank dealing with the divestment of particular operations which the European Commission had ordered it to dispose of, and which it had now sold to Deutsche Bank for a price of EUR 709 million,[140] or EUR 300 million less than the net asset value as announced by Fortis on June 26, 2008. (The aggregate negative impact of the transaction in question on the net result, it was to transpire on August 4, 2008 in the context of the interim figures being published, was to turn out at a maximum of EUR 900 million rather than EUR 300 million.)

154. A Management Board meeting was held on July 11, 2008 at which it was discussed that the expected profit for 2008 was to turn out lower than had been assumed at the Management Board Meeting held on June 18, 2008 (EUR 3.5 billion rather than EUR 4.1 billion),[141] in addition to which attention was devoted to a capital withdrawal and outflux at Fortis of no less than EUR 1.4 billion having occurred since the publication of the press release, on June 26, 2008.[142]

155. It was moreover unanimously decided at the meeting that Votron should step down,[143] to be temporarily succeeded by Verwilst, implying that there was just one executive Management Board member at this particular juncture in spite of the Fortis Governance Statement stipulating that there had to be two.[144] Mittler's position was characterized as follows at this juncture:[145]

> "*Fortis should also go looking for a new CFO. Mr. Mittler has lost credibility.*"

156. Finally, attention was devoted at length at the Management Board meeting to Fortis's adverse publicity in the media and the lack of faith in Fortis:[146]

> "*In the ensuing discussion it was mentioned that public opinion had never turned so against Fortis as in the past few weeks. Reactions from the media are furious and unanimous, focusing on the company and on the CEO/Chairman. We have to face that our reputation and credibility is severely damaged and is now at a very low level. That said, the Board expressed its strong support for the analysis and initiatives going forward.*"

157. On July 17, 2008 Fortis in a press release announced that three rating agencies (to wit, Standard & Poor's, Fitch and Moody's) had downgraded their ratings where Fortis was concerned, as well as stating in the same press release that it appreciated "*the need to step up the dialogue involving the shareholders in order to strengthen faith in the business*".[147] Fortis in this context at informal shareholders' meetings, on its web site and in the context of the publication of its interim figures on August 4, 2008 kept stressing that its asset status continued to rank as "solid" notwithstanding the turmoil in the money and capital markets.[148]

[140] See Investigative Report, § 1949.
[141] See Investigative Report § 1962.
[142] See Investigative Report § 1962.
[143] See Investigative Report § 1965.
[144] See Fortis Governance Statement, page 20.
[145] See Investigative Report § 686.
[146] See Investigative Report § 1971.
[147] See Investigative Report § 307.
[148] See Investigative Report § 308.

158. The Investigative Report stipulates that analysts' reports bore out that Fortis was increasingly finding itself in dire straits.[149] A majority of analysts' reports showed in July 2008 that doubt continued to surround the question as to whether the June 26, 2008 share issue would be sufficient in enabling Fortis's solvency to be preserved. These doubts persisted in August 2008 as well.

159. The situation deteriorated even further in September 2008, when Fortis found itself at the receiving end of particularly critical and negative market comments. According to the Investigative Report[150] it was the general perception that Fortis's solvency was poor and the divestment of its non-core assets (as its main assets) was progressing too slowly.

160. Mittler was dismissed as CFO on August 1, 2008, albeit that he continued to be associated with Fortis as advisor to the CEO. The relevant announcement was made in a press release.

161. Fortis published its interim figures on August 4, 2008, revealing a 41% drop in net earnings compared with the first half of 2007[151] and showing that the negative impact on the net result of the divestment of the ABN AMRO business units to Deutsche Bank was going to amount to EUR 900 million at the most.[152]

162. The 'Telegraaf' newspaper on August 7, 2008 published a report to the effect that the Chinese approval of the joint venture involving Ping An had suffered delay. Fortis later that day, in response to negative market comments, issued a press release in which it was stated that regular progress was being achieved where the approval process was concerned, and that it was the intention to round off the process by the second half of 2008. This report was reiterated in the 'NRC Handelsblad' newspaper on September 3, 2008.

163. An ExCo meeting was held on August 27, 2008 at which the ExCo lent its approval to a 50% price reduction for the asset management operations for divestment to Ping An and to furnishing Ping An with a preferred dividend for a three-year term. The ExCo's minutes confirm these concessions to have been related to the Chinese approval process.[153]

164. On September 7, 2008 the US government took over control of the two mortgage banks, Fannie Mae and Freddie Mac, in which it invested USD 100 billion. The subsequent weekend of September 13 and 14, 2008 saw Merrill Lynch being taken over by Bank of America and Lehman Brothers filing for bankruptcy. According to the Investigators this weekend heralded the start of unprecedented anxiety, uncertainty and lack of faith in the financial markets.[154]

165. Fortis in a press release issued on September 15, 2008 announced that its direct and indirect exposure to Lehman Brothers totaled EUR 531 million.[155] AIG as the leading US insurance company was nationalized on September 16, 2008, with Fortis releasing a press communiqué that same day in denial of rumors concerning a forthcoming rights

[149] See Investigative Report § 316.
[150] See Investigative Report § 316.
[151] See Investigative Report § 2029.
[152] See Investigative Report § 2029.
[153] See Investigative Report § 2046.
[154] See Investigative Report, § 2070.
[155] See Investigative Report § 2073.

issue[156] and Bos and Machenil dispatching a memo to Verwilst that same day in which they wrote, *inter alia*, that the solvency plan had effectively become obsolete:[157]

> "*With this note we would like to draw your attention to the fact that Fortis' solvency plan is steadily losing its momentum and might miss its objective. Moreover, it might even be too little too late. Indeed the plan is getting delayed & solvency impact is reduced. Moreover, we might need more than initially anticipated while the impact could come too late e.g. after a large part of the client franchise has left Fortis. This deterioration has been steadily building and has become more pressing given this weekend's news on Lehman and Ping An."*

166. Verwilst on September 17, 2008 received a rash of e-mail messages from concerned parties in which these stressed the urgency for Fortis to find a strategic partner to help it survive.

167. Two days later, on September 19, 2008, consultations took place between Lippens, Verwilst and Mittler at which attention was devoted to the search for a potential strategic partner for Fortis. Neither the Exco nor the Management Board were informed. Mittler notified Lippens and Verwilst of the fact that Merrill Lynch had meanwhile been engaged to discuss a potential strategic partner included in the shortlist.[158]

168. Verwilst on this day again received a series of concerned e-mail messages and went home sick at the end of the day, never to return in an active role except for a few hours on Friday, September 26, 2008. The Investigators have commented that owing to Verwilst's departure in the period from September 20 to September 25, 2008 inclusive, when the financial world was on nothing less than red alert, Fortis was no longer being presided over by an executive member of the Management Board.[159]

169. Kloosterman at the ExCo meeting held on September 24, 2008 announced that in his opinion it was highly unlikely that the deal involving Ping An would be going ahead, referring to his meeting with the Ping An president, Ma, on September 18, 2008, at which Ma had brought him up to date on the sizeable losses on Ping An's participating interest in Fortis in the amount of Ping An's annual earnings and the potential indirect consequences the loss night have where the conclusion of the joint venture involving Ping An was concerned.[160]

170. That same day it was announced at ExCo level that the bank now had "code red" status, implying that no further money may in principle be lent in the interbank market and no buffer collateral deployed for use in the necessary day-to-day business. The minutes address this as follows:[161]

> "*F. Diercks informs the ExCo that the bank is now in a "code red" situation, because of the dollar liquidity exposure. This is also the case for some competitors, but our situation is generally worse.*"

[156] See Investigative Report § 870.
[157] See Investigative Report § 873. As regards the Ping An transaction, the Foundation refers *inter alia* to the §§ 294 and 296.
[158] See Investigative Report § 893.
[159] See Investigative Report § 2110.
[160] See Investigative Report § 2103.
[161] See Investigative Report § 2134.

171. On Thursday, September 25, 2008 Dierckx received a phone call from CBFA's Servais in which the latter stressed that Fortis's liquidity was in poor condition and Fortis had no time to lose finding a strategic partner. Mittler that same evening on the telephone to Merrill Lynch discussed Fortis's possible nationalization.

172. Lippens spoke to Servais on the telephone in the morning of Friday, September 26, 2008, with Servais informing him that Fortis's liquidity problem was '*horrendous*' and its liquidity had '*completely evaporated*'.[162] Servais also stated that Fortis would no longer be alive after the weekend, and would therefore instantly have to find a strategic partner.

173. The following "comforting" report appeared on the intranet that same morning:[163]

> "*We have no liquidity problems*
>
> *Fortis has no liquidity problems, according to Fortis Bank's CEO, Filip Dierckx, to the CNBC television station on Thursday.*
>
> *The Merchant Banking CEO suggested that Fortis was in highly frequent contact with watchdog organizations, according to which Fortis was not in trouble. "We are doing well according to the watchdogs, said Dierckx."."*

174. Fortis issued the following press release that same afternoon:[164]

> "*Fortis clarifies commercial and financial position.*
>
> *Fortis presents the following update on its financial position in response to persistent market rumors and queries.*
>
> - *Development of Fortis customers' deposits.*
>
> ***We would at this juncture stress the bank's solid position in particular**. The hostile climate of international turmoil in the markets, a climate in which negative reports on the topic of Fortis are prompting customers to ask all kinds of questions, a climate beset by fierce competition, is seeing no more than a limited outflux of customers representing less than 3% of aggregate assets from retail and private banking operations in the Benelux (exclusive of market effects) in comparison with January 1, 2008.*
>
> *We owe this limited outflux to our long-standing associations with our customers, the extra efforts made by our staff in informing our customer base and answer their questions, and the positive outcome of ongoing focused commercial efforts such as the e-savings account, which was launched in Belgium in July.*
>
> - *Fortis's liquidity.*
>
> *Fortis at this moment in time has the disposal of a diversified finance basis in excess of € 300 billion (of institutional investors, retail and private deposits, central banks and major enterprises) enabling operations to be comprehensively funded, as well as having a security*

[162] See Investigative Report § 2176.
[163] See Investigative Report § 2194.
[164] See Investigative Report § 2198.

buffer.

- ***Fortis's solvency is solid, and is generously in excess of the statutory minimum requirement**. The capital plan in support of the consolidation of the full complement of operations acquired from ABN AMRO as at year-end 2009 is currently being worked up. Fortis's core capital exceeded the target by € 4 billion as at the end of June 2008. The future additional use of capital will mainly occur over the next 12 to 18 months, when the ABN AMRO operations are effectively being integrated. It has been resolved by way of support of this exercise and bearing in mind the current hostile market climate where the issue of no-diluting financial instruments is concerned that a greater number of operations and assets should be divested. Over ten businesses – both banking and insurance – have for now been selected for potential divestment. These operations, both inside and outside the Benelux, involve an estimated € 5 to 10 billion. Buyers have shown tangible interest in each of the operations and confidentiality agreements have been signed. A capital increase is not being anticipated.*

- *The integration of ABN AMRO is on track. We are currently anticipating the approval of DNB, the Netherlands Central Bank, of the integration plan and the completion of the remedying EC measures ('EC Remedies'). Preparations are under way aimed at the comprehensive integration, by late 2008/early 2009, of ABN AMRO's private banking operations outside the Netherlands, on condition that the watchdog organization should approve."*

175. Verwilst was the sole executive member of the Management Board at the time the above "comforting" press release was issued, as well as his being the only member of the Management Board by whom the press release had been approved. We would add that Verwilst went on to step down from the Management Board before the day was out.

176. Verwilst and Dierckx staged a press conference around 1.00 p.m., in the presence of Kloosterman and Machenil, in the wake of which Verwilst (largely without Dierckx) at approximately 2.00 p.m. organized a conference call for analysts and investors in response to the press release having been issued. Fortis commented as follows on its web site:[165]

> *"1. In reply to a question regarding Fortis's response to the declining market price and rumors:*
> *Reply: "Fortis's (low) share price does not reflect the business' value. There is a substantial difference between the two. Fortis, we would add, is not just a bank, but operates a solid investment am as well".*
>
> *2. In reply to a question regarding Fortis's liquidity status:*
> *Reply: "Markets are extremely tense. Also for our bank, but basically we have been able to finance ourselves".*
>
> *3. In reply to a question concerning a possible merger:*
> *Reply: "We decline to comment on rumors".*

[165] See Investigative Report § 2212.

4. In reply to a question regarding Fortis being potentially bankrupted:
Reply: "There is no question of Fortis being about to be bankrupted". It is added, on reference to the business' solidity: "There is not one single chance that we will face issues in that respect".

5. In reply to a question concerning ECB funding:
Reply: "We have substantial collateral for ECB funding." There is more than EUR 50 billion that could be used".

6. In reply to Fortis's continued ability to borrow from other banks:
Reply: "We have been relying on funding from other banks, quite clear".

7. In reply to Fortis's continued ability to borrow in the market:
Reply: "Affirmative".

177. A Management Board meeting was held in the immediate wake of the conference call the agenda for which featured just the one topic, to wit the "*actual situation*". This was the first Management Board meeting to be held in August 1, 2008, and was no longer attended by Verwilst. The minutes of the meeting include the following passage:[166]

> "*Further vigorous action is … urgently needed, because at the end of this trading day there will be no more collateral available (for the interbank market on Monday). Hence, if there will be no transaction over the weekend, and the overnight interbank market would remain closed to Fortis, then Fortis would need to obtain additional liquidity support from the Belgian Central Bank.*"

178. Notwithstanding the "comforting" words from the press release of September 26, 2008 and the ensuing press conference and conference call, the end of the day witnessed a major capital outflux. The collateral for securing loans was shown to have just about evaporated and Fortis for the first time found itself having to secure a EUR 5 billion Marginal Lending Facility from the Belgian National Bank. A second press release was issued by the end of the day in which it was announced that Verwilst was stepping down as CEO to be succeeded by Dierckx, and that Verwilst would be carrying on as a non-executive member of the Management Board.[167]

179. The above summary of facts over the period from June 26 to September 26, 2008 inclusive shows that the communication as per the press release dated September 26, 2008 and the external communications as per the press conference and conference call held that same day were inconsistent with Fortis's then acute solvency and liquidity crisis, which was known within the Fortis organization. The legal aspects and consequences of the deceptive statements made over the period from June 26 to September 26, 2008 inclusive by Fortis and by the latter's (former) directors are being addressed in more detail in § 6.1 under (iii) below.

5.5 The Final Stage

180. A data room was set up at the weekend of September 27 and 28, 2008 in support of the search for a new strategic partner for Fortis, for use by representatives from ING, BNP, Munich re, Aegon and SPFI/FIPM (the latter on behalf of the Belgian government) in examining the accounts.[168]

[166] See Investigative Report § 2217.
[167] See Investigative Report § 2228.
[168] See Investigative Report § 2234.

181. That same weekend negotiations were held between Fortis and the Belgian, Dutch and Luxembourg authorities, with the Belgian and Dutch governments staging a pres conference on Sunday evening, September 28, 2008 at which the following announcements were made:[169]

- *"The three Benelux governments are jointly making a EUR 11.2 billion investment in support of Fortis. The Dutch government is investing EUR 4 billion in Fortis Bank Nederland Holding in exchange for a 49% participating interest. The Belgian government is investing EUR 4.7 billion in Fortis Bank NV/SA in exchange for a 49% participating interest. The Luxembourg government is investing EUR 2.5 billion in Fortis Banque Luxembourg SA by way of a mandatorily convertible loan, with Luxembourg alongside other rights retaining a 49% stake in Fortis Bank Luxembourg in the wake of conversion."*
- *Fortis is to divest its stake in ABN AMRO.*
- *Maurice Lippens is stepping down as Fortis's executive president."*

182. Fortis issued a press release on Monday, September 29, 2008 in which the transaction involving the Benelux governments was elaborated upon:[170]

> *"The terms and conditions of the investment by the Belgian and Luxembourg governments are as follows:*
> - *The Belgian government has pledged a EUR 4.7 billion investment in Fortis Bank NV/SA (Belgium) in exchange for a 49% participating interest in said entity.*
> - *The Dutch government is investing EUR 4.0 billion in Fortis Bank Nederland (Holding) N.V. in exchange for a 49% participating interest in said entity.*
> - *The Luxembourg government is investing EUR 2.5 billion in Fortis Banque Luxembourg SA through a mandatorily convertible loan, with Luxembourg in the wake of conversion gaining a 49% participating interest in Fortis Banque Luxembourg SA alongside other rights.*
>
> *Fortis Bank Nederland (Holding) and Fortis Banque Luxembourg SA are both subsidiaries of Fortis Bank NV/SA. The Dutch government's investment is being made in exchange for Fortis Bank Nederland (Holding)'s issue to DNB of a new category of shares to be created in the wake of constitutional amendment. This newly created category will not be entitled to the proceeds of the sale, if any, of the FBN (H) stake in RSF Holdings B.V., neither as dividend nor in any other manner. The approval of watchdog organizations and shareholders will be secured where such is required."*

183. Fortis announced in the same press release that a sum in the amount of some EUR 5 billion was expected as having to be written off during the third quarter of 2008:[171]

> *"Aggregate value adjustments for the third quarter of 2008 will total approximately EUR 5 billion after tax due to the change in strategy, the worsening market conditions and the decision further to reduce the risk in the balance sheet. This relates* inter alia *to fiscally deferred tax contingencies,*

[169] See Investigative Report § 2294.
[170] See Investigative Report § 2320.
[171] See Investigative Report § 2328.

goodwill for the separately administered asset managers and the structured credit portfolio."

184. Fortis refrained, however, from disclosing the breakdown of the EUR 5 billion in the press release, nor did it elaborate on whether the items in question related to the transaction involving the Benelux authorities. It follows from the Investigative Report that two substantiations of the sum of EUR 5 billion existed within Fortis, albeit that the Investigators never succeeded in identifying which of the two had been the correct one.[172] It also transpires from the Investigative Report that the Investigators were able to establish that there were in any event two items, to wit that of 'value adjustments in respect of the structured credit portfolio' and that of 'additional depreciations in the value of credits', which never had anything to do with the transaction involving the Benelux authorities.[173] According to the Investigators these two items should have been common knowledge within Fortis at an earlier stage, in any event at the time the press release dated September 26, 2008 was issued, this having been released a mere half (work) day earlier.[174] This aspect is being addressed in more detail in § 6.1 under (iii) below.

185. The transactions involving the Belgian and Luxembourg governments were finalized on September 29 and 30, 2008, with the corresponding purchase prices being settled up. The Dutch transaction, however, was not finalized. It transpired that the State of Belgium had negotiated a right of pledge on Fortis's insurance arm in connection with potential losses on the CDO portfolio. No-one had realized, however, that the articles of incorporation of Fortis Insurance Netherlands prohibited the pledging of the shares in the relevant company.

186. On September 30, 2008 Fortis released a press communiqué to the effect that it expected not to be able to finalize the asset management joint venture involving Ping An.[175] Two days later, on October 2, 2008, Ping An issued a press release in which it was announced that the two parties had definitively dissolved the agreement because of "prevailing turbulence in the markets".[176]

187. Still on October 2, 2008 the Management Board organized a brief conference call in which it was *inter alia* discussed that the State of the Netherlands was keen to renegotiate the Fortis agreement. The Parliamentary papers show that Finance Minister Bos commented as follows where the reason for renegotiating was concerned:[177]

> *"The sole reason why we have embarked on renegotiation has been the fact that we have had to establish together in the course of the Tuesday that the Fortis intervention by the three governments was not having the desired result."*

188. On Friday, October 3, 2008 agreement was reached between Fortis and the State of the Netherlands involving the sale to the latter of Fortis's Dutch operations. The essence of the agreement boiled down to the Dutch government taking over, for a sum in the amount of EUR 16.8 billion, Fortis Bank Nederland (Holding) N.V. inclusive of the participating interest in RFS Holdings in representation of the interests in ABN AMRO,

[172] See Investigative Report § 785.
[173] See Investigative Report § 786.
[174] See Investigative Report § 787.
[175] See Investigative Report § 2355.
[176] See Investigative Report §§ 562 and 2355.
[177] See Investigative Report § 2378.

Fortis Verzekeringen Nederland N.V., and Fortis Corporate Insurance N.V. This transaction is to replace the previous weekend's transaction (which never came to fruition) involving the Dutch government acquiring a 49% stake in Fortis Bank Nederland (Holding) N.V.

189. Diercks commented at the Management Board meeting held that same day, at which the Management Board was to approve the fresh agreement involving the State of the Netherlands, that withdrawals had been taking place at Fortis on a massive scale early that week. Hessels suggested that the Dutch and Belgian watchdogs had found no other solution for Fortis except for Fortis's placement under conservatorship or bankruptcy. The Management Board in the end unanimously approved the fresh agreement.

190. On October 6, 2008 Fortis issued the following press release on the subject of the transaction involving the State of the Netherlands:[178]

> *"Transaction Details*
> - *The Belgian government today acquired the residual 50% + 1 share in Fortis Bank from Fortis SA/NV for a cash sum in the amount of EUR 4.7 billion.*
> - *Fortis Bank is to transfer to a separately administered entity jointly owned by Fortis Group (66%), the Belgian government (24%) and BNP Paribas (10%) a portfolio of structured products having a fair value in the amount of EUR 10.4 billion..*
> - *The Belgian government has come to an agreement with BNP Paribas regarding the disposal of 75% of Fortis Bank SA/NV; the residual 25% of the business is to continue to rest with the Belgian government.*
> - *BNP Paribas is furthermore to acquire 100% of Fortis Insurance Belgium for a total price of EUR 5.73 billion in cash, with prejudice to the possibility of adjustments being made in the wake of final closing.*
>
> *Impact of the transactions dated October 3 and 5, 2008 on Fortis Group*
> 1. *The proceeds of the sale to the State of the Netherlands – announced on October 3 last – for a sum in the amount of EUR 16.8 billion can be broken down as follows: EUR 12.8 billion received in connection with the Dutch banking operations (inclusive of ABN AMRO) to be retained within Fortis Bank; EUR 4.0 billion received in connection with the Dutch insurance operations to go to Fortis Group.*
> 2. *The cash proceeds in the amount of EUR 4.7 billion of today's divestment of the residual 50% + 1 share in Fortis Bank to the State of Belgium to go to Fortis Group.*
> 3. *The cash proceeds in the amount of EUR 5.73 billion of today's divestment of 100% of Fortis Insurance Belgium to BNP Paribas to go to Fortis Group.*
>
> *The composition of Fortis Group in the wake of the above transactions is as follows: a wholly-owned participating interest in Fortis Insurance International N.V. (net earnings for the first half of 2008 in the amount of EUR 102 billion, insurance operations: wholly-owned operations in the United Kingdom, France and Hong Kong and joint ventures in Luxembourg, Portugal, China, Malaysia and Thailand), the 66% participating interest in the entity which now accommodates the structured credit portfolio as referred to above, and cash resources."*

[178] See Investigative Report § 2480.

191. Finally, on Friday, October 10, 2008 the agreement with the State of the Netherlands was effectuated.

6. GROUNDS UNDERPINNING CLAIM

192. As set out in Chapter 3 above, the Foundation in these proceedings is firstly seeking a declaratory judgment from the Court to the effect that Fortis has breached the requirements of Netherlands law concerning that which has been held against it as per the present Subpoena including the communication, *vis-à-vis* the market and the investing public, of inaccurate and incomprehensive information concerning the status of its enterprise, as well as the non-communication thereof.

193. The Foundation is secondly seeking a declaratory judgment from the Court to the effect that Merrill Lynch has acted in breach of its duty of due care as per the present Subpoena including by failing to stop Fortis (and Fortis's directors) systematically making inaccurate and incomplete statements *vis-à-vis* the market and the investing public or, as the case may be, failing to rectify such inaccurate and incomplete statements.

194. The Foundation is first to establish Fortis's liability, showing in § 6.1 that Fortis acted in breach of Sections 193a to 193j inclusive (unfair trade practice) and 194 (misrepresentation) of Book 6 of the Netherlands Civil Code, in which respect it will distinguish between misrepresentation in the course of the following three periods:

(i) the period from the run-up to the public offer for ABN AMRO until said offer was rendered unconditional on October 17, 2007;
(ii) the period during the first half of 2008 up to and including the announcement of the accelerated implementation of the solvency plan on June 26, 2008; and
(iii) the period from publication of the press release, on June 26, 2008, up to and including the press release dated September 26, 2008.

195. The Foundation will subsequently demonstrate in § 6.2 that Fortis acted unlawfully *vis-à-vis* the Investors by failing to satisfy its obligations arising out of Section 13 of Part 5 of the Financial Supervision Act of the Netherlands (general standard governing the Prospectus), Section 20 of Part 5 of the Financial Supervision Act (misleading advertising communications), Section 25i of Part 5 of the Financial Supervision Act (price-sensitive information) and Section 58(1) sub (d) of Part 5 of the Financial Supervision Act (ban on market manipulation).

196. The Foundation will subsequently demonstrate in § 6.3 that Fortis also possibly acted unlawfully *vis-à-vis* the Investors by failing (in good time) to invoke the *Material Adverse Change* (MAC) clause in the context of the ABN AMRO acquisition.

197. The Foundation will then in § 6.4 discuss in more detail such liability as rests with Merrill Lynch on the strength of Section 162 of Book 6 of the Netherlands Civil Code. The Foundation will demonstrate that Merrill Lynch has breached its duty of due care by failing to stop Fortis (and Fortis's directors) systematically making inaccurate and incomplete statements *vis-à-vis* the market and the investing public or, as the case may be, failing to rectify such inaccurate and incomplete statements.

6.1 Fortis's liability arising out of Sections 193a to 193j inclusive and 194 of Book 6 of the Netherlands Civil Code

198. The Foundation in the context of the present lawsuit is representing private investors and institutional investors of Fortis alike. A distinction is to be made between these two categories of investor where the legal basis underpinning the claim is concerned.

Private Investors

199. The Foundation has also based its claim on Section 6:194 of the Netherlands Civil Code and on Sections 193a to 193j inclusive of Book 6 of the Netherlands Civil Code where the private investors are concerned. Although Sections 193a to 193j inclusive of Book 6 of the Civil Code came into effect on 15 October 2008, it is likely that these Sections in material sense are applicable since June 2007. These Sections derive from the implementation of the Directive on Unfair Trade Practices.[179] Sections 193a to 193j inclusive of Book 6 of the Civil Code characterize misleading (or aggressive) trade practices as unlawful and solely applies to actions performed *vis-à-vis* natural persons not officiating in the performance of a profession or business practice, i.e. *vis-à-vis* private investors.

200. According to Section 193b of Book 6 of the Netherlands Civil Code, a trader[180] can be said to be acting unlawfully *vis-à-vis* a consumer where that trader engages in performing an unfair trade practice, which he can be said to be doing where he is acting (a) in breach of the requirements of professional dedication, and (b) the average consumer's ability to make an informed decision has noticeably been compromised or may be compromised resulting in the average consumer (potentially) making a decision concerning an agreement which that consumer would not otherwise have made.

201. A trade practice is deemed to be particularly unfair where it qualifies as a misleading trade practice (Sections 193c to 193g inclusive of Book 6 of the Netherlands Civil Code) or an aggressive trade practice (Sections 193h and 193i of Book 6 of the Civil Code). There will be a question of misleading trade practice where information is being furnished that is factually inaccurate or that is, or could be, misleading to the average consumer resulting in the average consumer (potentially) making a decision concerning an agreement which that consumer would not otherwise have made. This scenario concerns that of proactively misleading dissemination of information.

202. There is also a question of misleading trade practice where essential information is being omitted which the consumer would be needing in order to arrive at an informed decision concerning a transaction which decision that consumer would not otherwise have made, or where the essential information is being kept out of sight or has been formulated in an unclear, incomprehensible or ambiguous manner. Scenarios of this kind entail misleading omission as defined in Section 193d, sub (2) and (3) of Book 6 of the Netherlands Civil Code.

203. The information referred to in Sections 20 and 73 of Part 4 and 13 of Part 5 of the Financial Supervision Act of the Netherlands in any event qualifies as essential information on the strength of Section 193f sub (f) of Book 6 of the Civil Code. This implies that the legislator has explicitly connected the essential information to be disclosed on the strength of the unfair trade practice stipulations on the one hand and

[179] Directive 2005/29/EC of the European Parliament and the Council dated May 11, 2005 concerning unfair trade practices by businesses *vis-à-vis* consumers in the internal market and in amendment of Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and of Regulation (EC) no. 2006/2004, OJEU 2005, L. 1149/22.
[180] 'Trader' is to be interpreted as 'any natural person who or legal entity which officiates in the performance of a profession or business practice, or any such party as officiates on such natural person's or legal entity's behalf' (Section 193a(1) sub (b) of Book 6 of the Netherlands Civil Code).

the information to be disclosed on the strength of the Financial Supervision Act on the other. Non-disclosure of the information required on the strength of Section 13 of Part 5 of the Financial Supervision Act discussed in § 6.2 below therefore by definition gives rise to unfair trade practice as defined in Sections 193a to 193j inclusive of Book 6 of the Netherlands Civil Code.

204. The decisive factor in determining whether a trade practice should be characterized as unfair is the impact of the relevant practice on the average consumer. It is not the characteristics and properties of the individual consumer who has allegedly been misled that are decisive in this context but rather, those of the 'fictitious' consumer who is representative of the specific group of consumers targeted by the trader in question. This ties in with European Court of Justice case law on the theme of misleading advertising, with the average consumer being defined as the 'reasonably informed, cautious and observant consumer'.[181]

Institutional Investors

205. As for the institutional investors the Foundation has anchored its claim *inter alia* in Section 194 of Book 6 of the Netherlands Civil Code, where it is stipulated that he who publicizes or sees to the publication of a communication concerning goods or services offered either him or by such party as officiates on his behalf in the performance of a profession or business practice can be said to be acting unlawfully in the performance of his business where the relevant communication is misleading in one or more respects.

206. Section 194 of Book 6 of the Civil Code (old) used to apply to consumers and businesses alike until Sections 193a to 193j inclusive of Book 6 of the Civil Code came into force on October 15, 2008. Section 194 of Book 6 of the Civil Code has merely applied to non-consumers since this date ("*he who (…) officiates in the performance of a profession or business practice*"), with Sections 193a to 193j inclusive of Book 6 of the Civil Code dealing with consumers. According to the Supreme Court of the Netherlands there is little difference substantively with the 'old' rules concerning misleading by inaccurate or incomplete communications. The Supreme Court recently deliberated in the World Online ruling that the deliberations as per the relevant judgment on the theme of application of Section 194 of Book 6 of the Civil Code (old) where misleading by inaccurate or incomplete communications were concerned would not turn out essentially different on application of the new stipulations as per Sections 193a to 193j inclusive of Book 6 of the Civil Code where consumers were concerned.[182] The argumentation hereinafter in connection with Section 194 of Book 6 of the Civil Code relative to institutional investors therefore similarly applies to the new stipulations of Sections 193a to 193j inclusive of Book 6 of the Civil Code relative to private investors.

207. The Supreme Court has ruled that Section 194 of Book 6 of the Netherlands Civil Code also applies to potential liability where a prospectus is concerned.[183] Such party as has responsibility for the information imparted in the context of the prospectus has civil liability in the event of it transpiring hat the information in question has been misleading as defined in Section 194 of Book 6 of the Civil Code. This consideration ties in with Section 13 of Part 5 of the Financial Supervision Act of the Netherlands, where it is stipulated that the prospectus should contain the full complement of details

[181] ECJ EC July 16, 1998, NJ 2000, 374 annotated by DWFV (Gut Springenheide).
[182] Supreme Court, November 27, 2009, 07/11104; LJN BH2162 (JOR 2010/43), ground for decision 4.10.2.
[183] Supreme Court, December 2, 1994, NJ 1996, 246 (ABN AMRO/Coopag Finance B.V.)

applying to the formation of a balanced view of the assets, financial status, result and outlook of the issuing institution (see sub § 6.2 below). As stated earlier, the non-disclosure of such information as required on the strength of Section 13 of Part 5 of the Financial Supervision Act by definition gives rise to unfair trade practice as defined in Section 193d sub (2) of Book 6 of the Netherlands Civil Code.

208. As outlined in chapter 5, Fortis issued a Prospectus in connection with the share issue in support of the funding for the ABN AMRO acquisition, which Prospectus on page 42 stated that the issuing institutions, Fortis S.A./N.V. and Fortis N.V., the "Issuers", were responsible for the contents of the prospectus. This has brought Fortis S.A./N.V. and Fortis N.V. under the scope of Section 194 of Book 6 of the Netherlands Civil Code, rendering them civilly liable in the event of the information having been furnished by them turning out to have been misleading.

209. The Supreme Court in its World Online ruling[184] opened out the effect of Section 194 of Book 6 of the Netherlands Civil Code by stipulating in said ruling that Section 194 of Book 6 of the Civil Code also concerned written or oral communications by the issuing institution having been made *outside* the prospectus, yet *in connection with* the offer of the securities.[185] According to the Supreme Court, this could for example involve communications containing more detailed information concerning the flotation or the issuing institution or more detailed elaboration on the prospectus, or indeed communications aimed at whetting the appetite for the envisaged flotation.[186] This opening out of the scope of Section 194 of Book 6 of the Civil Code ties in with Section 20 of Part 5 of the Financial Supervision Act, which provides for a ban on making any announcements in immediate anticipation of the flotation that are not in line with the prospectus (see sub § 6.2 below).

210. The point of departure in answering the question as to whether a prospectus is misleading as defined in Section 194 of Book 6 of the Civil Code has to be "the presumed expectation of an averagely informed, cautious and observant investor at whom the communication is aimed or whom said communication reaches."[187] Although such a "reference investor" may be expected to be prepared to study the information being made available, he cannot be expected to boast specialist know-how and experience except where the advertising in question is exclusively targeted at persons having such know-how and experience.[188] Much in the same vein, it follows from Section 194 of Book 6 of the Civil Code that announcements made outside the prospectus yet in connection with same may not be misleading either where the "reference investor" is concerned.[189]

211. In answering the question as to whether the communication is misleading and as such, unlawful, it does not matter whether the "reference investor" has effectively taken cognizance of or has been influenced by the communication; all that matters is that the inaccuracy or incompleteness of the communication should be sufficiently significant materially to have been misleading to the "reference investor".[190] What matters therefore is whether the inaccurate/incomplete communication *per se* is misleading. If this is the case, the issuing institution because of the misleading nature of the relevant

[184] Supreme Court, November 27, 2009, 07/11104; LJN BH2162 (JOR 2010/43).
[185] Supreme Court, November 27, 2009, 07/11104; LJN BH2162 (JOR 2010/43), ground for decision 4.25.1.
[186] Supreme Court, November 27, 2009, 07/11104; LJN BH2162 (JOR 2010/43), ground for decision 4.25.1.
[187] Supreme Court, May 30, 2008, no. C06/302, LJN BD 2820.
[188] Supreme Court, November 27, 2009, 07/11104; LJN BH2162 (JOR 2010/43), ground for decision 4.10.3.
[189] Supreme Court, November 27, 2009, 07/11104; LJN BH2162 (JOR 2010/43), ground for decision 4.25.1.
[190] Supreme Court, November 27, 2009, 07/11104; LJN BH2162 (JOR 2010/43), ground for decision 4.10.4.

communication should refrain from publicizing same, and would be acting unlawfully if it went ahead and publicized the communication regardless.[191]

212. Once the communication has been established as being misleading and as such, unlawful, the misrepresentation has also been established as having contributed to the investment decision.[192] In other words, the (professional or private) investor would not have bought shares, or would not have bought shares on the same terms, had the ill-fated communication not been made.

213. It is on the strength of Section 195 of Book 6 of the Netherlands Civil Code that the onus of proof is reversed where the unlawfulness on the strength of Section 194 of Book 6 of the Civil Code is concerned and *vice versa*. The same applies to Section 193j of Book 6 of the Civil Code, which reverses the onus of proof where it concerns the establishment of unlawfulness on the strength of Sections 193b to 193i inclusive of Book 6 of the Civil Code.[193] Section 193j of Book 6 of the Civil Code concurs with Section 195 of Book 6, no difference in application having been envisaged between the two according to the Parliamentary explanation of the relevant Section.[194]

214. The Foundation may thus limit itself below to arguing and rendering plausible that the communications made by Fortis over the three periods referred to in § 6.2 were indeed misleading and thus unlawful, without having to tender proof of same. It is then up to Fortis to tender proof bearing out the accuracy and completeness of the information having been imparted. Fortis's possible defense will be elaborated upon in the context of the discussion of the legal grounds below and in the chapter headed "Defense of the Defendants".

(i) misrepresentations by Fortis over the period from the run-up to the public offer for ABN AMRO until October 17, 2007, when said offer was rendered unconditional

215. As set out in Chapter 5, the credit crunch – having been triggered by the sub-prime related products – started making itself felt from mid-2007 onwards. The communications by Fortis and by the Fortis Board members on the theme of the sub-prime challenge are addressed in § 5.2, showing that Fortis and the (former) Fortis Board members systematically failed – both internally and externally – to communicate relevant information during the months of August and September 2007 in particular.

216. When the press release on the topic of Fortis's interim results was issued on August 9, 2007, relevant information pertaining to Fortis's exposure to the sub-prime market that was internally known was deliberately kept from investors, as shown *inter alia* by the fact that Dierckx in an e-mail message dated August 7, 2007 addressed to Verwilst, Mittler, Votron and others stressed the importance of leaving out any reference to the sub-prime market from the press release on the interim results and putting the focus on the trading results:[195]

[191] Supreme Court, November 27, 2009, 07/11104; LJN BH2162 (JOR 2010/43), ground for decision 4.10.4.
[192] Supreme Court, November 27, 2009, 07/11104; LJN BH2162 (JOR 2010/43), ground for decision 4.10.4.
[193] The trader ('any natural person who or legal entity which officiates in the performance of a profession or business practice or anyone acting on said party's behalf') must tender proof in corroboration of the material accuracy and completeness of such information as he has furnished in the event of a civil lawsuit being brought against him on the strength of the unfair trade practice directive.
[194] Memorandum in response to Report, Parliamentary Papers II 2006/07, 30 928, no. 8, page 5; Text & Comment Netherlands Civil Code, Books 6, 7 and 8, Section 193j of Book 6 of the Civil Code further to note 2.
[195] See Investigative Report § 1414.

"*The proposal will be to leave out the reference to the subprime market and to focus on the resilience of the trading results despite the difficult markets in structured credits and energy. We have also discussed the various issues with Karel who agrees that based on the knowledge we have now we should refrain from making additional comments.*" (underlining added)

217. The relevant information was available in detail to Fortis internally at this moment in time. Dierckx at the Management Board meeting held on August 8, 2007 presented a sub-prima exposure for Fortis in the amount of no less than EUR 8.7 billion subdivided into the three categories of *RMBS, High Grade CDO* and *Mezzanine CDO.* [196] Notwithstanding the internal awareness of Fortis's aggregate sub-prime exposure at this particular moment in time totaling no less than EUR 8.7 billion, the minutes once more explicitly stressed the importance of keeping the exact figures from the interim result press release:[197]

"*Exact figures will not be disclosed*"

218. The passage having relevance for investors – which had still been there in the draft press release – was subsequently explicitly left out of the press release dated August 9, 2007 on the topic of Fortis's interim results:[198]

"*(…) Regarding the Structured Finance activities, the unrest in the US subprime mortgage sector significantly influenced the behaviour of both investors and issuers, leading to difficult market conditions that affected our trading and origination business. Due to severe spread widening of certain asset classes in the US, Fortis' results include a negative revaluation of open positions.(…)"*

219. Once this misleading press release on Fortis's interim results had been issued, several Fortis Board members in the course of the month of August 2007 increasingly began to doubt the correctness of the reporting on the topic of the sub-prime challenge.[199] No remedial communications were made either internally or externally despite doubts having set in and despite the fact that Société Générale in its analyst report of 23 August 2007 regarding the subprime exposure of Fortis stated that:[200]

"*To date the company has been unwilling to disclose its potential exposure, but below we have summarized some of the potential areas in which there could be exposure. In order to ease concerns, we believe the company has to provide more detail on its potential exposure.*"

220. An AC meeting and a Management Board meeting were held at Fortis Bank on August 27, 2007 the minutes of which show that the aggregate sub-prime exposure totaled (a rounded) EUR 8.7 billion while the exposure was subdivided into the three aforementioned risk categories of *RMBS, High Grade CDO* and *Mezzanine CDO*.[201] Notwithstanding these findings the conclusion as per the minutes was that the losses on the sub-prime portfolio were not to have any material impact on the result, with the earnings outlook being maintained.[202]

[196] See Investigative Report § 1423.
[197] See Investigative Report § 1424.
[198] See Investigative Report § 1415.
[199] See §§ 58 to 60 inclusive.
[200] See AFM Ruling of August 19, 2010, page 5.
[201] See Investigative Report § 1437.
[202] See Investigative Report § 1437.

221. It follows from the AFM Ruling dated August 19, 2010 that a presentation was given at an ExCo meeting held on August 28, 2007 at which then Fortis's aggregate sub-prime exposure and the ensuing risks were disclosed.[203] The actual amounts (in billions of euros) have been rendered illegible in the Ruling. AFM has concluded on the basis of this information that it concerned price-sensitive information that should have been publicly disclosed:[204]

> "*the combination of the above facts from August 28, 2007 onwards has qualified as concrete information the public disclosure of which could significantly affect the share price, with reasonably acting investors being likely to respond*."

222. Another ExCo meeting was held on September 4, 2007, the minutes of which note as follows where the sub-prime challenge is concerned:[205]

> "*Based upon testing our portfolio via stringent "mark to model", projected losses are confirmed to be in range between € 350-400 million. It is expected therefore – if and when all other business continue to deliver – our statement that no material impact is expected on our FY 2007 results remains correct.*" (underlining added)

223. A Management Board meeting was held that same day at which the sub-prime portfolio loss having been established, in the amount of EUR 350 to 400 million, was *not* reported, however, albeit that Dierckx at the meeting observed that liquidity in the YS sub-prime market had *comprehensively evaporated* since July 2007 and that the valuation methods had partially switched from Mark-to-Market to Mark-to-Model for this very reason.[206] The aggregate sub-prime exposure based on the latter valuation method would run to a (rounded) total of EUR 8.7 billion, the same figure which Dierckx had already mentioned at the Management Board meeting held on August 8, 2007 and at Fortis Bank's Management Board meeting held on August 27, 2007.[207]

224. This highly relevant information, internally communicated as it had been, albeit partially only, was not subsequently shared in any manner whatsoever with the investing public even though it was expressly stressed in the minutes of the Management Board meeting held on September 4, 2007 that the appropriate information was having to be included in the Prospectus where the sub-prime situation was concerned:[208]

> "*In the ensuing discussion, it was noted that it will be made sure that the appropriate information will be included in the prospectus on the rights issue.*"

225. In fact, Mittler in his e-mail message to the Management Board reiterated the very same point one day later:[209]

> "*FD and Robby Scharfe presented the liquidity and subprime file. We have to make sure that we have the right information in the prospectus*."

[203] See AFM Ruling of August 19, 2010, page 18.
[204] See AFM Ruling dated August 19, 2010, page 19.
[205] See Investigative Report § 1443.
[206] See Investigative Report § 1446.
[207] See Investigative Report §§ 1423 and 1437.
[208] See Investigative Report § 1449.
[209] See Investigative Report § 1454.

226. However, no mention at all was made of the sub-prime challenge in the draft Prospectus issued one week later, on September 13, 2007.

227. An ExBo meeting was held on September 18, 2007, a mere few days ahead of the publication of the Trading Update and the Prospectus, at which reference was made to the sub-prime portfolio having a potential impact in the amount of EUR 321 million on the income statement for 2007:[210]

> "*Mr. F. Dierckx refers to the appended document (MPB Forecast 2007) so as to provide additional information relating to both the CDO impact and full year forecast. The sensitivity analysis on subprime reveals that total unrealized losses amount to EUR 186 million while total impairments amount to EUR 135 million for a total P&L impact amount of EUR 321 million under the sensitivity analysis.*".

228. It was therefore contrary to internal awareness where Fortis's exposure to the sub-prime investments was concerned that the (final version of the) Prospectus merely imparted the following inaccurate and incomplete information, misleadingly headed "***Update on Fortis' well managed risk exposure***":[211]

> *"The impact on Fortis's full-year 2007 results is expected to be non-material thanks to its diversified portfolio, dynamic portfolio management and the credit risk protection purchased in 2006. Even if the current subprime severity would deteriorate with a further 20%, the additional non-linear net profit impact is estimated at EUR 20 million."* (underlining added)

229. It transpires from the underlined portion of the above quote that Fortis had externally communicated an expected loss on the sub-prime portfolio in a maximum amount of EUR 20 million based on a further 20% decline in value (which was not elaborated upon in any further detail) for the sub-prime market, whereas the ExCo had already been aware a mere two weeks ahead of the date of publication of the Prospectus that the sub-prime portfolio was expected to be loss-making in a maximum of EUR 350 to 400 million, in addition to which the ExBo had been aware since September 18, 2007 that allowances were being made for the sub-prime portfolio having a potential impact on the income statement for 2007 in the amount of EUR 321 million. None of this information, highly relevant as it was for investors, was communicated anywhere else either internally or externally.

230. Neither the Prospectus nor the Trading Update contained any clarification as to the valuation method having been resorted to in arriving at the sum of EUR 20 million, as Fortis both in the Trading Update and in the Prospectus refrained from disclosing the information having great investor relevance to the effect that in view of the comprehensively evaporated liquidity market, Fortis was having to switch from the "Mark-to-Market" to the "Mark-to-Model" method, the latter involving valuation on the basis of theoretical models, as well as keeping mum about the calculation of the sum of EUR 20 million having been based on the "Mark-to-Model" method of Fortis's own design and a sensitivity analysis being unknown to investors, and about the amount in question coming on top of a substantial negative Q3 impact (which was already known at the time).[212]

[210] See Investigative Report § 1508.
[211] See § 5.1.4. of the Prospectus, also see the Trading Update.
[212] See AFM Ruling of August 19, 2010, page 27. The amount is rendered illegible in the Ruling.

231. Fortis moreover withheld the information having great investor relevance to the effect that it had been known (internally) for over a month and a half that the aggregate sub-prime exposure had risen to EUR 8.7 billion by then, and that a distinction had been made in this respect between the different risk designations for the different types of product. As stated earlier, AFM in its Ruling dated August 19, 2010 concluded from this information that the public disclosure of same could significantly affect the share price, with reasonably acting investors being likely to respond.[213] Reference is made to § 230 up to and including § 233 for a more detailed discussion of this AFM Ruling.

232. According to the Foundation the aforementioned information, which was known to Fortis internally, had relevance for investors in that it would have enabled them in arriving at their investment decision accurately to gauge the potential risks arising out of Fortis's sub-prime investments. Having accurate and complete information on Fortis at their disposal would have been essential to investors if for no reason other than the negative trends in the financial market and the launch of the EUR 13.4 billion share issue associated with the ABN AMRO acquisition. By keeping this information from the investing pubic, Fortis gave an inaccurate and incomplete representation of the state of affairs and as such misled the "reference investor".

233. The Investigators too consider the information concerning the sub-prime challenge as shown in the Prospectus to be inaccurate and incomplete, commenting in § 486 of the Investigative Report that a reasonably acting investor (the "reference investor") when reading the passage from the Prospectus quoted in § 74 would erroneously interpret said passage as comforting and considering that the points of departure underpinning the calculation of the sum of EUR 20 million are lacking whereas they should have been included in the Prospectus:

> *"However, the points of departure underpinning the calculation have not been elaborated upon. According to the Investigation Committee, Fortis has not clarified that the calculation in question merely deals with EUR 569 million (this being the Below Mezzanine category) or some 6.5% of the aggregate sub-prime exposure in the rounded amount of EUR 8.7 billion, nor has Fortis explained that the (20%) sensitivity has been applied to one of the two key assumptions only or elaborated upon the significance of the concept of "straight-line" (…). <u>According to the Investigators, the points of departure underpinning this calculation should not have been missing from the Prospectus.</u>*" (underlining added)

234. Both Votron[214] and Mittler[215] in the course of the proceedings at which both sides of the argument were heard stated that they had no idea how the calculation of the sum of EUR 20 million had been arrived at. Both Board members have taken refuge behind the fact that the calculations had been performed by the Merchant & Private Banking division (which was headed by Dierckx) and had been checked by auditors. This does not, however, exempt them from the obligation to ensure that the substance of the Prospectus should be accurate and complete, all the more so given that both Votron and Mittler were very much aware of the fact that the expected losses on the sub-prime portfolio were substantially greater than the (modest) sum of EUR 20 million as per the Prospectus.

[213] See AFM Ruling of August 19, 2010, page 18.
[214] See Investigative Report § 483.
[215] See Investigative Report § 484.

235. The Investigators go on correctly to establish, in § 482 of the Investigative Report, that Fortis's *modus operandi* where it concerns its obligation to include accurate information in the Prospectus is not defensible:

> "*Although the sub-prime portfolio at that particular juncture represented no more than a relatively minor portion of the overall Fortis exposure, the Investigators have adopted the view that given the major significance as perceived at that moment in time both by Fortis internally and by the outside world and the watchdog organizations, the above (missing) information concerning Fortis's sub-prime portfolio should indeed have been addressed in the Prospectus, the disclosure of such information as Fortis did end up including in the Prospectus not being adequate. In the opinion of the Investigators and making allowances for the arguments having been presented in the context of the proceedings at which both sides of the argument were heard, Fortis's* modus operandi *where it concerns its obligation adequately to furnish the investing public with information through the Prospectus has not been (sufficiently) defensible.*" [underlining added]

236. The '*arguments having been presented in the context of the proceedings at which both sides of the argument were heard*' to which the Investigators refer in the above quote concern the statements made by Fortis, Votron, Mittler, and Dierckx where these have argued that the information outlined in § 77 concerning the sub-prime portfolio did *not* have to be shared with the investing public as no material impact was being expected on the result for the third quarter of 2007 or the annual result for 2007 owing to the "loan-loss" provision.[216] According to Mittler[217], on September 20, 2007 (this being the date on which the Prospectus was issued):

> "*Fortis had the warranted expectation that the potential sub-prime portfolio write-downs would not impact on the expected result for 2007 (of which the market was aware) in the amount of EUR 4.2 billion. The potential sub-prime portfolio write-downs were not material and in view of the "surplus" in the general loan-loss provision had no impact on expected earnings. It was for this reason that Fortis refrained from furnishing additional information on the sub-prime portfolio such as details pertaining to the aggregate value of the portfolio, a description of the various elements, a detailed risk analysis or an elaboration of the portfolio valuation.*"

237. The Investigators rightly disagree with the above argument for two reasons:[218]

> "*First, in view of the fact that the scope of the loan-loss provision (of approximately EUR 315-475 million) was earmarked for Fortis's entire EUR 317 billion exposure rather than just for potential losses on the sub-prime portfolio in a rounded amount of EUR 8.7 billion, and second, because it is the Investigators' opinion that it is not so much the question where it concerns the disclosure in the Prospectus of relevant information whether no material impact should be expected on the result for the third quarter of 2007 or on Fortis's annual result for 2007 (which could potentially have been a proper criterion in answering the question as to whether or not a profit warning should have been issued), but rather, whether a reasonably acting investor would be likely to use such information (partially) to base his investment decision on.*"

[216] See Investigative Report § 480.
[217] See Investigative Report § 1511.
[218] See Investigative Report § 481.

238. AFM too has taken the view that the passage from the Prospectus quoted in § 74 ended up leading the investing public up the garden path, imposing administrative penalties of EUR 144,000 each on Ageas S.A./N.V. and Ageas N.V., on August 19, 2010, for breach of Section 59(1) of Part 5 of the Financial Supervision Act of the Netherlands (now Section 25i of Part 5 of said Act). AFM based its ruling on Fortis's omission to satisfy the obligation resting with it forthwith to proceed with the public disclosure of price-sensitive information as defined in the relevant Section.[219] The subprime related price-sensitive information refers according to the AFM to (i) the total subprime of Fortis, (ii) the subdivision of the total risk categories and (iii) the total US subprime exposure.[220]

239. It is AFM's opinion that Fortis's internal awareness of the sub-prime related exposure flew in the face of the soothing communications regarding Fortis's sub-prime portfolio as included in the Prospectus and the Trading Update.[221] AFM considers the fact to have been proven that Fortis was internally aware of the impact the most recent sub-prime trends were having on the results:[222]

- *"With effect from June 2007 Fortis was not only aware of the gravity of the sub-prime crisis worldwide, but was internally already implementing measures aimed at curbing to a degree Fortis's exposure to this crisis;*
- *From August 2007 onwards - one month ahead of publication of the Trading Update and the launch of the issue – Fortis's most senior echelon was aware of (i) Fortis's aggregate sub-prime exposure totaling € [•] billion;[223] (ii) the subdivision of the aggregate exposure relating to the following risk categories: RMBS, High Grade CDOs, and Mezzanine CDOs, and (iii) Fortis's aggregate US Sub Prime exposure totaling € [•] billion.*
- *From September 18, 2007 onwards – a few days ahead of the publication of the Trading Update and the Issue Prospectus - a base case scenario and sensitivity analysis were calculated internally, showing the sub-prime portfolio as having an expected negative impact on the result for the third quarter in an amount of € [•] million and a negative impact of € [•] million for the fourth quarter. Fortis in these calculations turned out at a negative impact of € [•] million in the aggregate for the whole of 2007*."

240. AFM considers it to have been misleading for Fortis, with its internal awareness of the actual level of the sub-prime exposure, merely to refer to a deterioration in the amount of EUR 20 million on the results without adding that this EUR 20 million was having to be added to a negative impact on the third quarter (which was already known at the time) of EUR [•] million,[224] and considers it also to have been misleading for Fortis to wield an internal model and sensitivity analysis in order to arrive at the above calculation of an additional deterioration in the amount of EUR 20 million without including an associated elaboration for investors in the Trading Update and the Prospectus.[225]

[219] See AFM Ruling dated August 19, 2010, page 1.
[220] See AFM Ruling dated August 19, 2010, page 19.
[221] See AFM Ruling dated August 19, 2010, page 26.
[222] See AFM Ruling dated August 19, 2010, page 26.
[223] The amounts have been rendered illegible in public version of the AFM Ruling.
[224] See AFM Ruling dated August 19, 2010, page 27. The amount is rendered illegible in the Ruling.
[225] See AFM Ruling dated August 19, 2010, page 27.

241. AFM has concluded that Fortis's non-disclosure of the above information created an inaccurate or incomplete impression with the investing public. Fortis was aware, or could have been aware, of the risk of the public being misled owing to the above information not being disclosed.[226] Fortis on or about September 21, 2007 in its press release should have provided the market with comprehensive and accurate information concerning its sub-prime related exposure in the light of the seriously deteriorating market situation and the launch of a EUR 13.4 billion share issue.[227]

242. Fortis likewise deliberately misled the investing public in the intervening period between the date as at which the Prospectus was issued, on September 25, 2007, and the closing date for subscription for shares, on October 9, 2007.

243. FGCIP made more detailed calculations for the above period where it concerns Fortis's sub-prime exposure which show that the aggregate loss on the sub-prime investments totaled EUR 166.8 million at that particular juncture.[228] This calculation was nevertheless withheld from the investing public; rather, both at the ExCo meeting on October 2, 2007 and the ExCo meeting on October 9, 2007 the same comment as was included in the Prospectus was reiterated to the effect that the loss on the sub-prime investments was being estimated at (a mere) EUR 20 million.

244. Dierckx gave a presentation at the AC meeting held on November 6, 2007 and the Management Board meeting held on November 7, 2007 showing *inter alia* that market conditions in the sub-prime market had deteriorated since late September 2007 and that this had created a loss in the amount of EUR 444 million over the third quarter.[229] According to the Investigators, the minutes of the two meetings fail to show that this relevant information was at any time disclosed to the investing public.[230] It can be established in the context of a comparative overview of the Trading Update and the figures for the third quarter that the Trading Update failed to disclose the precise sub-prime exposure:[231]

> "*Trading Update was published in the context of the rights issue. It gave some guidance on the subprime <u>but no disclosure on the precise exposure</u>.*" [underlining added]

245. Fortis by withholding from the investing public that the loss on the sub-prime investments did not 'merely' amount to EUR 20 million but had by now gone up to eight times this amount provided the investing public with inaccurate and incomplete information over the period between the date of publication of the Prospectus and the closing date for subscription for shares: after all, it was over this period too that investors in making their investment decision based themselves on the 'soothing' comments as per the Prospectus whereas the actual situation at the time was radically different.

246. The Investigators too have rightly concluded in § 490 of the Investigative Report that Fortis over the above term communicated to the investing public in a misleading manner:

[226] See AFM Ruling dated August 19, 2010, page 31.
[227] See AFM Ruling dated August 19, 2010, page 32.
[228] See Investigative Report § 456.
[229] See Investigative Report § 464.
[230] See Investigative Report § 469.
[231] See Investigative Report § 464.

> "*Although Dierckx over the period from late September to early October 2007 inclusive (this being the period during which the share issue could be subscribed for) obviously did not yet, and could not yet, have precise knowledge regarding the exact level of the sub-prime losses (as the calculation of these only occurred in the course of October 2007), it is the Investigators' conclusion that in view of Dierckx's familiarity with the day-to-day goings-on where Fortis's market affairs were concerned, Dierckx over the relevant period from late September to early October 2007 must in outline have been aware of the (potential) gravity of the sub-prime crisis where Fortis was concerned. This knowledge on the part of Dierckx in the Investigators' opinion flies in the face of the soothing words on Fortis's sub-prime portfolio as included in the Prospectus and the Trading Update. Fortis's failure belatedly to disclose this information (in the period after the Prospectus had been issued, on September 20, 2007, but before the closing date of the share subscription term, on October 9, 2007) in the Investigators' opinion has caused te investing public to gain an inaccurate or in any event incomplete picture of the state of affairs. Allowances may be made in assessing the extent to which this should be taken into consideration for the fact that not many financial institutions in the relevant period of time proceeded with publication of more detailed sub-prime exposure than Fortis, albeit that we would note that none of these other institutions were responsible for an issue prospectus.*" [underlining added]

247. It has been established in the light of the above that Fortis in the months of August and September 2007 (in particular) acted in breach of Sections 193a to 193j inclusive, and 194 of Book 6 of the Netherlands Civil Code by engaging in misrepresentations *vis-à-vis* the investing public. Fortis in (i) the press release dated August 9, 2007 on the topic of the interim results, (ii) the Trading Update and (iii) the Prospectus, and (iv) in the period between the date of issue of the Prospectus (September 25, 2007) and the closing date for subscription for shares in the context of the share issue (October 9, 2007), made structurally inaccurate and incomplete disclosures the material significance of which was enough to mislead the "reference investor". Fortis by publicly disclosing these misrepresentations or failing (in good time) to rectify same, as the case may be, acted unlawfully *vis-à-vis* the investing public.

(ii) Misrepresentations over the first half of 2008 up to and including the date of announcement of the accelerated implementation of the solvency plan on June 26, 2008

248. The first ExCo meeting to be held in 2008 took place on January 16, 2008. It was established at this meeting that Fortis had an asset shortfall in the amount of EUR 2 to 3 billion. This was reiterated at the RCC meeting held on January 24, 2008, at which meeting the following measures were mentioned aimed to curbing the asset shortfall:[232] (i) no interim dividend payment in August 2008; (ii) no final dividend for 2008; and (iii) a share issue. The minutes of the RCC meeting confirm that the above measures were discussed:[233]

> "*within the framework of the discussion on the evolution of the subprime exposure and its anticipated impact on Fortis' solvency.*"

249. Contrary to the discussions at ExCo and RCC level where it concerned the asset shortfall and the potential measures to curb same, Fortis in response to market rumors on the theme of the sub-prime challenge on January 27, 2008 in a press release

[232] See Investigative Report § 1620.
[233] See Investigative Report § 1621.

confirmed its sturdy solvency status and its decision to leave its dividend policy intact:[234]

> - *"Fortis Bank end-of-year solvency well above 8%.*
> - *Fortis intends to keep its dividend policy unchanged.*
> - *Capital and solvency requirements will be met, even in very stringent scenarios on the impact of the subprime CDO portfolio.*
> - *Fortis does not need to and is not considering to issue common stock or dilutive equity linked capital instruments."*

250. Fortis subsequently, on March 7, 2008, in a press release announced its annual results for 2007, with Votron reiterating in the accompanying press release that "*earnings had remained solid*" whereas solvency continued to be "*strong*".[235] However, in this very press release Fortis was still keeping mum about it being lumbered with a substantial asset shortfall in the amount of EUR 2 to 3 billion, with drastic measures having internally been discussed aimed at curbing the shortfall. The press release merely referred to (non-diluting) measures of a considerably less draconian nature aimed at achieving compliance with the asset targets for 2009:[236]

> "- *Retained earnings*
> - *Controlled growth in deployment of assets*
> - *Divestment of non-strategic assets and establishment of joint ventures*
> - *Non-diluting capital increase and capital relief transactions."*

251. Votron carried on the misleading communications concerning the dividend policy being left intact and the 'strong' solvency in an interview which he gave on April 26, 2008 in "Effect" magazine as the journal of the Netherlands Association of Stockholders:[237]

> "*Our dividend policy has remained unchanged. Although the dividend (per share) appears to have been reduced by the share issue, it has in fact remained stable. However, we are not issuing any dividend projections other than by saying that Fortis's dividend has always run in parallel to earnings per share, and we have consistently paid out dividends even in poor years."* Votron's response to the question as to whether the balance sheet could do with strengthening: "*No, the balance sheet is fine, believe you me. …*"

252. Mittler too at the AGM held on April 29, 2008 confirmed that no fresh share issue was to take place, as well as confirming that an interim dividend was to paid out in September 2008 in the amount of 50% of the dividend for 2007. Mittler stressed Fortis's great faith in its ability to preserve the solvency position '*both today and in the future*'.[238]

253. Lippens too stressed at the same AGM that the dividend policy was to remain unchanged:[239]

> "*Compromising the dividend policy is the last thing Fortis will do."*

[234] See Investigative Report § 1637.
[235] See AFM Ruling dated February 5, 2010, page 3.
[236] See AFM Ruling dated February 5, 2010, page 3.
[237] See Investigative Report § 1675.
[238] See Investigative Report § 1677.
[239] See Investigative Report § 1683.

254. The 'Financiële Dagblad' newspaper on August 2008 referred to Lippens having acknowledged at an informational AGM held in August that his statement concerning the dividend policy had been misleading:[240]

> "*Several weeks before the cash dividend was scrapped, I said 'scrapping dividend will only occur over my dead body', according to Management Board president, Maurice Lippens (…). 'This was misleading and I regret it.'*"

255. On May 13, 2008 Fortis went on to publish its first quarterly figures for 2008. Here too Votron confirmed in the explanatory notes to the statistics that Fortis's 'core equity' had remained generously above target as well as repeating once more the (misleading) measures already having been included in the previous 2008 press releases:[241]

> "*We are nevertheless holding a steady course in achieving our asset target for 2009 by retaining future earnings, through selective divestments and by using non-diluting instruments, as indicated earlier.*"

256. The above communications were diametrically opposed to the topic of discussion at the ERCC meeting (in which Votron too participated) a mere five days earlier, on May 8, 2008, it having been established at this meeting that based on ABN AMRO being comprehensively included in the consolidation (the "*look through*" method), Fortis by year-end 2008 would in any event have to make allowances for a EUR 0.4 billion shortfall in a '*base case*' scenario, to a EUR 4.8 billion shortfall in a '*stress case*' scenario.[242] A solvency emergency plan was drawn up on the basis of these data in order that the core equity shortfall expected by year-end 2008 should be covered. However, no information whatsoever in this respect was communicated *vis-à-vis* the investing public when the quarterly figures were published, with the Investigators rightly wondering how Fortis's internal knowledge on the one hand and its external communication on the other "*could be reconciled*".[243]

257. It furthermore transpired that in anticipation of the presentation of the quarterly figures, on May 7, 2008, certain Board members had been aware of the fact that the disposal of particular parts of the ABN AMRO organization to Deutsche Bank in the context of the EC Remedies was to have a negative impact on solvency of no less than EUR 1.1 billion.[244] This relevant information was not communicated in any manner whatsoever either internally or (much less so) externally, even though Fortis's in-house legal counsel, Goris, had pointed out on May 9, 2008 that the progress in the context of the EC Remedies was having to be communicated *vis-à-vis* the investing public in order that any subsequent liability owing to misrepresentations should be avoided.[245]

258. An ERCC meeting was held on May 19, 2008 at which it was resolved that the transaction involving Deutsche Bank should be pursued, involving the following three scenarios having to be probed: (i) drumming up capital by means of a share issue, (ii) divestments, and (iii) modification of the dividend policy, as the same three measures having previously been discussed at RCC level, but never having been communicated *vis-à-vis* the investing public.[246] It was furthermore established at this ERCC meeting

[240] See Investigative Report § 2041.
[241] See Investigative Report § 1717.
[242] See Investigative Report § 1685.
[243] See Investigative Report § 618.
[244] See Investigative Report § 1692.
[245] See Investigative Report, § 1715 where mr. Goris quote is concerned.
[246] See Investigative Report § 1725.

that the solvency shortfall had risen to EUR 1.1 billion (*base case*) and EUR 6.8 billion (*stress case*), respectively.[247]

259. Contrary to internal awareness of Fortis's deteriorating solvency status, Votron three days later, at the "Investor Day" held in Brussels on May 22, 2008, announced where the EC Remedies were concerned that "*solid progress*" was being made and the process was "*on track*",[248] with Mittler deceptively adding that Fortis boasted a "*sound solvency position despite credit and equity turmoil*" while "*we [remained] firmly on track to meet our solvency targets by 2009.*"[249]

260. It is the Investigators' opinion that given Fortis's internal awareness of the status of negotiations involving Deutsche Bank and the ensuing negative impact for Fortis on the latter's solvency, these statements made by Votron were at odds with the actual situation[250] It is moreover the Investigators' opinion that Mittler's comment quoted above reinforced this misleading image rather than remedying same given the expected solvency shortfall figures of EUR 1.1 billion (*base case*) and EUR 6.8 billion (*stress case*).[251] The Investigators have also concluded that Mittler's comment was at odds with the information having been made available to CBFA on May 21, 2008.[252]

261. Fortis went on, on May 23, 2008, to publish a press release in which Mittler announced that Fortis by means of a successful bond loan issue had strengthened its asset position:[253]

> "*Fortis is happy with this achievement. We have realized our preset target and given Fortis's asset position a further boost.*"

262. The above comment by Mittler too flies in the face of reality. The Investigators have concluded that this press release suggested that Fortis was forging ahead as planned where its solvency was concerned[254], as an impression which the Investigators consider was wrongly given as the proceeds were not as good as had been hoped for and Fortis was aware of this[255], approval having been given at the Management Board meeting held on May 9, 2008 for a sum of EUR 1 billion whereas the issue of the bond loan had grossed a mere EUR 625 million.[256]

263. The inconsistency between Fortis's communications and the actual situation was demonstrated *inter alia* in the fact that a mere four days later, on May 27, 2008, Mittler together with Machenil drafted a memorandum for the ECRR recommending a share issue being realized by means of an *accelerated bookbuilding offer* and dividend measures being implemented,[257] the issue of new shares being utterly inconsistent with Fortis's reports to date to the effect that Fortis in implementing its solvency plan would only be issuing non-diluting capital instruments.

264. The Investigators in § 622 of the Investigative Report rightly established that a trend materialized during the month of May 2008 of Fortis continuing to make soothing

[247] See Investigative Report § 1724.
[248] See Investigative Report § 1740.
[249] See Investigative Report §§ 1741 and 1742.
[250] See Investigative Report § 619.
[251] See Investigative Report § 620 and § 1736.
[252] See Investigative Report § 620 and § 1736.
[253] See Investigative Report § 1747.
[254] See Investigative Report § 622.
[255] See Investigative Report § 622.
[256] See Investigative Report § 1745.
[257] See Investigative Report § 1750.

noises on the theme of its solvency whereas the internal information on the subject was becoming increasingly alarming.

265. On June 5, 2008 Votron gave a presentation for FD.TV's Financial Breakfast show[258] in the context of which he repeated virtually the same information on the theme of solvency:[259]

- "*the business [is] simply doing well…*
- *solvency [is] on track …*
- *Fortis's solvency [is] strong …*"

266. That same day Votron was quoted in the press as having made the following observations:[260]

> "*Our numbers were strong in the first quarter, and on solvency we're on track", Fortis Chief Executive Jean-Paul Votron said at a business conference at ABN's Amsterdam headquarters. (…) Votron reiterated that Fortis was going forward with its plan to divest assets, raise non-dilutive capital and take other steps to strengthen solvency."* (Reuters)

> " *Business was continuing to do well, according to the CEO. 'There is little volatility within the Benelux,' said Votron. The CEO stated that Fortis's solvency, which shows to what extent a business is capable of satisfying its financial commitments, 'was on track'.*" (ANP)

267. The mere fact that attention was devoted that same day by the ERCC internally to an asset shortfall of EUR 2.5 billion ('*base case*') and EUR 8.7 billion ('*stress case*'), respectively[261] demonstrates how utterly misleading the above positive external communication was (the shortfall figures having risen to EUR 3.1 billion ('*base case*') and EUR 11.3 billion ('*stress case*'), respectively[262] by year-end 2009). ERCC on the basis of these poor figures discussed the following measures:[263]

- *capital relief acceleration;*
- *issue of new shares (in the de context of the Delta Lloyd Acquisition and the EC Remedies);*
- *deferred payment of the interim dividend in the amount of EUR 1.3 billion.*

268. The substance of the ERCC discussions was subsequently communicated neither with the Management Board nor with the RCC, and much less still with the investing public. Mittler only notified Lippens and Bodson accordingly. This is one of the (many) examples of how inaccurate and incomplete information was communicated internally within Fortis as well. The Investigators have moreover pointed out that there was a question that day "*of a scenario in which Management Board members were being fed crucial information at two different speeds.*"[264]

---

[258] http://videoplayer.neos.nl/fd/index.php?item=1055. See Investigative Report § 1764.
[259] See Investigative Report § 1764.
[260] See Investigative Report § 1768 (Reuters) and § 1769 (ANP).
[261] See Investigative Report § 1774.
[262] See Investigative Report § 1775.
[263] See Investigative Report § 1779.
[264] See Investigative Report § 626.

269. It is the Investigators' opinion that Votron's comments to the effect that solvency was '*on track*' as well as being '*strong*' created the wrong impression compared with Fortis's actual situation at that moment in time.[265] The Investigators would have it that these soothing comments by Votron warranted the continued assumption on the part of investors that Fortis's solvency was strong, no share issue was in the offing and the dividend policy was to remain unchanged.[266]

270. AFM too is of the opinion that Fortis on and prior to June 5, 2008 furnished the investing public with inaccurate and incomplete information, imposing EUR 144,000 penalties each, for breach of Section 58(1) sub (d) of Part 5 of the Financial Supervision Act of the Netherlands, on Fortis S.A./N.V. (now Ageas S.A./N.V.) and Fortis N.V. (now Ageas N.V.) on February 5, 2010, which ruling it based on the fact that Fortis on June 5, 2008 on the occasion of a presentation being given by Votron disseminated information (potentially) giving out an inaccurate or misleading signal where the availability of, demand for or share price of Fortis's financial instruments was concerned.[267] Reference is made to § 6.2 below for an explanation of Section 58(1) sub (d) of Part 5 of the Financial Supervision Act of the Netherlands.

271. AFM has deliberated as follows, *inter alia*, where the communications on June 5, 2008 are concerned:[268]

> "*The misleading aspect of the communications on June 5, 2008 lies in the [CEO's] comforting words where Fortis's solvency is concerned, this being referred to as 'strong' and 'on track'. The [CEO] is a reputable source of information, whose comments the average investor will therefore take into consideration in making his investment choice. Leading media sources have also reiterated the [CEO's] comments in their numbers. In view of this the average investor in response to the comments made by the [CEO] and thus, by Fortis was justified in relying on (i) there being no reasons to speak of for doubting Fortis's solvency generally, (ii) the solvency plan – inextricably associated as it was with Fortis's solvency – thus being made up of the aforementioned elements, and (iii) said solvency plan not being subject to change.*
> *(…)*
> *Fortis's earlier announcements regarding its solvency are also essential. In the opinion of AFM the fact that Fortis in the period preceding the [CEO's] presentation made virtually the same comments where its solvency status was concerned, and the solvency plan by way of implementation of this, strengthened the misleading character of the [CEO's] comments on the occasion of the presentation held on June 5, 2008, as the comments made by the [CEO] were a confirmation of Fortis's previous announcements, making it plausible for investors to have every confidence in the [CEO] accurately representing the current state of affairs.*" [underlining added]

272. An RCC meeting was subsequently held, on June 6, 2008, at which Mittler announced that the status of negotiations involving Deutsche Bank was having a negative impact on solvency. This relevant information was not, however, communicated at the Management Board meeting held that same day.[269] That evening Mittler e-mailed to Quaetaert trying to forge a plan for deferring the communication to the market of this

[265] See Investigative Report § 624.
[266] See Investigative Report § 625.
[267] See AFM Ruling dated February 5, 2010, page 1.
[268] See AFM Ruling dated February 5, 2010, pages 18 and 19.
[269] See Investigative Report §§ 1786 and 1788.

unfavorable news until August 4, 2008 as the date of publication of the interim report for 2008.[270]

273. Quaetaert on June 7, 2008 replied to Mittler, stating that Fortis was already several weeks late where it concerned its disclosure of price-sensitive information pertaining to the agreement involving Deutsche Bank in the context of the EC Remedies and stipulating that she would not be amenable to approving the plan in hand aimed at deferring the matter even further[271]:

> "*Gilbert*,
> *I fully see your point, but can hardly help.*
> *1. From a legal and compliance point of view, you cannot wait until August 4, to announce a deal, which is virtually being made these days, and of which the main terms and conditions have been known for a few weeks now. In my view, we should already have announced the downside of the price and as soon as the SPA is signed, we must announce the price and effect on our solvency.*
> *Consciously and artificially waiting until August 4, is misleading the public/the market and not disclosing price sensitive information, which is known by tens of people within Fortis and within AA (+ Denmark,* [Deutsche Bank] *of course). I dare to draw your attention to the responsibility you and the Board would incur in this respect.*
> *(…)*
> *I know this email will upset you because it does not help you solving a problem. Sorry for this, but I consider it as my duty, as general counsel, to warn you of the risks you may seem ready to take.*" [underlining added].

274. On June 9, 2008 Mittler in the ERCC presented a solvency plan based on a EUR 3 billion share issue and no cash dividend payment.[272] On June 10, 2008 Merrill Lynch downgraded its Fortis advice from 'buy' to 'neutral', with the Fortis share price plummeting by 7.5% in response.[273] Fortis in its reporting nevertheless stuck to its guns, communicating as follows *vis-à-vis* the investing public that day:[274]

> "*Any capital instruments to be freshly marketed by ourselves will be of the non-diluting variety.*"

275. According to the Investigators, Mittler's conclusion as per his solvency plan was diametrically opposed to Fortis's communications to the investing public on June 10, 2008[275], with the explanation provided by Fortis's spokesperson creating the wrong impression in the opinion of the Investigators.[276]

276. On June 14, 2008 an article was published in the 'Telegraaf' newspaper from which it transpired that Fortis was involved in exclusive negotiations with Deutsche Bank on the disposal of particular parts of the ABN AMRO organization in the context of the EC Remedies, and that the divestment of these businesses to Deutsche Bank was to result in such a major financial setback as to thwart the achievement of Fortis's financial targets for 2008.[277] AFM confirmed the outlines of this report that same day,

[270] See Investigative Report § 530.
[271] See Investigative Report § 531.
[272] See Investigative Report § 1798.
[273] See Investigative Report § 1801.
[274] See Investigative Report § 1803
[275] See Investigative Report § 627.
[276] See Investigative Report § 628.
[277] See Investigative Report § 1827.

concluding o the basis of these reports that Fortis had misinformed the market and that there could well be a question of misleading the market if Fortis were to delay its disclosure of the actual sequence of events even further.[278]

277. AFM in the context of this misleading reporting on February 5, 2010 imposed EUR 144,000 penalties each on Fortis S.A./N.V. and Fortis N.V. (now Ageas S.A./N.V. and Ageas N.V.) for breach of Section 59(1) of Part 5 of the Financial Supervision Act of the Netherlands (now Section 25i of Part 5 of said Act), its Penalty Ruling being based on Fortis's omission to satisfy the obligation resting with it forthwith to proceed with the public disclosure of price-sensitive information as defined in Section 59(1) of Part 5 of the Financial Supervision Act (old) (the current Section 25i of Part 5 of said Act).[279] Reference is made to § 6.2 below for an explanation of Section 25i of Part 5 of the Financial Supervision Act.

278. According to AFM, there was a question of price-sensitive information at Fortis from May 21, 2008 onwards, as:[280]

> "*both the terms and conditions and consequences of the negotiations involving Deutsche Bank were known to such extent as to result in a situation having arisen by May 21, 2008, or it being reasonable to assume that such situation was to arise, whereby the offer made by Deutsche Bank in the context of the EX Remedies was going to be accepted. This made the information sufficiently concrete at that particular juncture, in addition to which the consequences of the offer in terms of Fortis's solvency were also sufficiently concrete at the relevant juncture.*"

279. However, AFM resolved that the penalty should not be imposed upon Fortis until June 14, 2008, this being the date on which Fortis would no longer be able to rely upon deferral of price-sensitive information and the date as at which it should forthwith have issued a press release providing the market with accurate and comprehensive information, according to AFM.[281] Fortis by omitting to do so from this date onwards engaged in misleading communication *vis-à-vis* the investing public.

280. The Investigators have concurred with AFM in that there was a question of price-sensitive information pertaining to the EC Remedies from May 21, 2008 onwards[282], basing their conclusion on:

> " *(1) the fact that major negative solvency consequences were associated with the offer made by Deutsche Bank (see for example the e-mail messages to and from Mittler dated May 7, 2008 and Machenil's e-mail message dated May 18, 2008), (2) the fact that Deutsche Bank was given exclusive status on May 21, 2008, and (3) it concerned an offer of the take-it-or-leave-it variety.*"
> *(…)*
> *In the Investigators' opinion an inaccurate impression formed among investors owing to Fortis's non-disclosure of the large-scale negative solvency consequences associated with the Deutsche Bank offer in combination with the*

[278]See Investigative Report § 538 where reference is made to the Final Investigation Report of the AFM of 4 November 2009, page 71, as also included in the AFM Ruling of February 5, 2010.
[279] See AFM Ruling dated February 5, 2010, page 1.
[280] See AFM Ruling dated February 5, 2010, pages 38 and 39.
[281]See AFM Ruling dated February 5, 2010, page 48.
[282] See Investigative Report § 551.

exclusivity having been granted to Deutsche Bank on May 21, 2008 and the fact that it concerned a take-it-or-leave-it offer."[283]

281. It follows from the above that Fortis over the period from January 27, 2008 to June 14, 2008 inclusive consistently furnished the same misleading information concerning its solvency, the plan by way of implementation of same and the dividend policy. Fortis consistently announced that:

(i) dividend policy was to remain unchanged;
(ii) solvency was 'on track',
(iii) no further share issue was to be effected;
(iv) only non-diluting capital instruments were to be issued;
(v) only non-strategic assets were to be divested.

282. The fact that this information was misleading as well as being at odds with the actual situation is borne out by the mere consideration that Fortis had internally been aware, since January 16, 2008, of there being a substantial and consistently deteriorating asset shortfall. Contrary to Fortis's external communications, Fortis had been internally aware since January 2008 of the need to implement drastic (diluting) measures in order that the worsening asset shortfall should be curbed, as well as it having internally been aware since that date that its financial situation was getting increasingly perilous.

283. Lippens's anxious e-mail message to Votron during the night before the press release of June 26, 2008 was published reveals that some of the Board members were finally beginning to twig that Fortis was truly in dire straits:[284]

"*(…) Five, in all due respect, you and your team (and may be me too…) will have to face HUGE and EXISTENTIAL issues for the future of Fortis in the next hours.*
…
Good luck for tomorrow (today in fact), know that I totally support you and what has been decided, but know also that I have been rarely more SCARED for the future of Fortis."

284. The next morning, on June 26, 2008, Fortis in a press release headed "*Fortis accelerates implementation of solvency plan*" finally gave full disclosure,[285] announcing (i) a EUR 1.5 billion share issue, (ii) the scrapping of the interim dividend for 2008, and (iii) distribution in the form of shares where the dividend for 2008 was concerned. Later that day in a second press release Fortis confirmed the placement of the EUR 1.5 billion share issue it had previously announced.[286]

285. If anything this information came as a total surprise to the investing public, as it followed from the press release that Fortis's solvency rather than being 'on track' and 'strong' was prompting drastic (diluting) measures being implemented, contrary to how it had consistently been communicated to the outside world, in order for Fortis's asset position to be bolstered. The mere drop in the Fortis share price by 19% that day, with Fortis forfeiting in excess of EUR 5 billion in market value, confirms the sense of having been cheated which took hold of the investing public.[287]

[283] See Investigative Report § 556.
[284] See Investigative Report § 1917.
[285] See Investigative Report § 1920.
[286] See Investigative Report § 284.
[287] See AFM Ruling of February 5, 2010, page 19.

286. As stated earlier, the Management Board on June 18, 2008 had to all intents and purposes already resolved to proceed with a share issue and with scrapping the dividend. However, it was adamant that the 'final decision' in the matter should be deferred – without any reason being given – until June 25, 2008, this being one day before the press release was to be issued. It is the Investigators' opinion that Fortis should without delay have proceeded with the publication of its decisions – which in the end were not announced until June 26, 2008 – in the immediate wake of June 18 and 19, 2008. According to the Investigators Fortis, having previously made soothing noises regarding its solvency and dividend policy, withheld substantively relevant information and in doing so, misled the investing public.[288] The Investigators have held both the Management Board and the ExCo responsible in this respect.[289]

287. It has been established in the light of the above that Fortis over the period from January 27, 2008 up to and including the share issue on June 26, 2008 acted in breach of Sections 193a to 193j inclusive, and 194 of Book 6 of the Netherlands Civil Code by systematically engaging in misrepresentations *vis-à-vis* the market and the investing public where it concerned its solvency, the solvency plan by way of implementation of same and the dividend policy to be adhered to. AFM in its Ruling dated February 5, 2010 rightly stipulates that the "reference investor" – given Votron's comforting words and the repeated external communications in anticipation of same – could rely, and indeed had every reason to rely, upon there being no reason for doubting Fortis's reports where it concerned the latter's solvency and dividend policy [290] The Investigators too have concluded there to have been several instances rather than just the one over the period from May to June 2008 when Fortis's communication with the investing public was lacking.[291]

(iii) Misrepresentations over the period from June 26 up to and including September 26, 2008

288. It follows from the Investigative Report that the situation was becoming increasingly dicey for Fortis once it had issued its press release of June 26, 2008.[292] A majority of analyst reports having been published in July 2008 shows that there were doubts as to whether the share issue of June 26, 2008 would be sufficient to enable Fortis's solvency being preserved.

289. On July 17, 2008 Fortis in a press release announced that three rating agencies had downgraded their Fortis ratings. However, in the context of informal shareholders' meetings and the publication of the interim results on August 4, 2008 Fortis stressed *vis-à-vis* the investing public that its asset position was "solid" notwithstanding the turmoil in the money and capital markets.[293]

290. August 2008 saw doubt concerning the success of the share issue hold sway. The interim figures as at August 4, 2008 showed that Fortis's earnings had sustained a 41% drop[294] whereas the divestment of specific parts of the ABN AMRO organization to Deutsche Bank in the context of the EC Remedies was to have a negative impact on the net result in a maximum amount of EUR 900 million.[295]

[288] See Investigative Report § 684.
[289] See Investigative Report § 684.
[290] See AFM Ruling of February 5, 2010, page 18.
[291] See Investigative Report § 629.
[292] See Investigative Report § 316.
[293] See Investigative Report § 308.
[294] See Investigative Report § 2029.
[295] See Investigative Report § 2031.

291. September 2008 increasingly witnessed negative and critical market comments on Fortis. The Investigative Report shows that the general perception at that moment in time was that Fortis had poor solvency whereas the divestment of its non-core assets was not proceeding at the appropriately speedy pace.[296]

292. Internally too Board members were increasingly cottoning on to the fact that Fortis's solvency no longer qualified either as 'strong' or as 'on track'. On September 16, 2008 Bos and Machenil sent a memorandum to Verwilst drawing attention to (i) Fortis's deteriorating solvency, (ii) Fortis potentially suffering a loss in the amount of EUR 1 billion for the third quarter, (iii) goodwill amortization possibly having to take place during the fourth quarter, and (iv) Fortis no longer living up to the solvency standards as a result:[297]

> "*(…) Fortis' solvency plan is steadily [losing] ~~[its]~~ momentum and might miss its objective. Moreover, it might even be a little too late. Indeed the plan is getting delayed & solvency impact is reduced. Moreover we might need more than initially anticipated while the impact could come too late e.g. after a large part of the client franchise has left Fortis. This deterioration has been steadily building and has become more pressing given this weekend's news on Lehman and Ping An.*
> *(…)*
> *In Q3 we expect a EUR 1 billion loss. Moreover assuming no closure on Ping An and no EUR 0.5 billion capital raising, Q3 brings us close to a potential breach of regulatory capital targets. Leaving no buffer for further negative impacts.*
> *In Q4, a potential goodwill impairment could lead to another quarterly loss and a potential breach of core equity targets.*"

293. Consultations took place on September 19, 2008 between Lippens, Verwilst and Mittler involving the necessity being addressed of looking for a strategic partner for Fortis. Neither the ExCo nor the Management Board was notified of this search.

294. It was announced in the context of the Exco on September 24, 2008 that Fortis was in "code red" (no further loans to be extended on the interbank market). This relevant information was not communicated to the market. One day later, on September 25, 2008, Dierckx received a telephone call from CBFA's Servais in which he was told that Fortis should lose no time finding a strategic partner and that liquidity was poor. That evening, Mittler consults with Merrill Lynch the possibility of a nationalization of Fortis.[298]

295. In the morning of September 26, 2008 Lippens spoke to Servais on the telephone. Again Servais stressed that Fortis's liquidity problem was "*horrendous*" and that liquidity had "*comprehensively evaporated*".[299] According to Servais a strategic partner was instantly having to be found for Fortis, or Fortis would not survive the weekend. According to the Investigators, it was at this moment that Lippens realized that Fortis was no longer in a position independently to carry on.[300]

[296] See Investigative Report § 316.
[297] See Investigative Report §§ 704 and 705.
[298] See Investigative Report § 2174.
[299] See Investigative Report § 2176.
[300] See Investigative Report § 756.

296. Notwithstanding the fact that certain people within the organization were aware that Fortis – put succinctly – was teetering on the brink, the following misleading notice was posted on the intranet that same morning:[301]

> "*We have no liquidity problems*
>
> *Fortis has no liquidity problems, according to Fortis Bank's CEO, Filip Dierckx, to the CNBC television station on Thursday.*
>
> *The Merchant Banking CEO suggested that Fortis was in highly frequent contact with watchdog organizations, according to which Fortis was not in trouble. "<u>We are doing well according to the watchdogs, said Dierckx.</u>".*" [underlining added]

As the above report shows, this involved Dierckx engaging in misleading communications *vis-à-vis* US television network CNBC, resulting in considerable scope both internally and externally for these misleading reports.

297. That same afternoon of Friday, September 26, 2008 Fortis published a press release in which the same misleading comments were made, *inter alia*:[302]

> "*(…) We would at this juncture stress the bank's solid position in particular.(…) Fortis's solvency is solid, and is generously in excess of the statutory minimum requirement.*"

298. Verwilst and Dierckx in the immediate wake of the press release – for which Verwilst as CEO was responsible – staged a press conference followed by a conference call for analysts and investors, which drew as a comment on Fortis's web site, *inter alia*, that Fortis's (low) share price did not reflect the value of the enterprise and that there was no question of Fortis being bankrupted. Fortis furthermore stressed its continued ability to borrow money in the market and its ability to secure sufficient funding.[303]

299. The above reports are diametrically opposed to the Board establishing as follows that same afternoon at a conference call:[304]

> "*Further action is (…) urgently needed because at the end of this trading day there will be no more collateral available (for the interbank market on Monday). Hence, if there will be no transaction over the weekend, and the overnight interbank market would remain closed to Fortis, then Fortis will need to obtain additional liquidity support from the Belgian Central Bank."*

300. Fortis in the immediate wake of the conference call invoked the Marginal Lending Facility with Belgium's National Bank for an amount of EUR 5 billion as the interbank market was no longer accessible to it.

301. The Investigators rightly confirm in § 772 of the Investigative Report that the soothing noises made in the press release, the press conference and the conference call on September 26, 2008 "*were in marked contrast to the following facts (and as such resulted in or caused the situation to be misrepresented)*:

---

[301] See Investigative Report § 2194.
[302] See Investigative Report § 2198 and see § 167 for the full quote.
[303] See Investigative Report § 2212 and see § 169 for the full report.
[304] See Investigative Report § 2217.

1) the avalanche of alarming messages aimed at Verwilst concerning the situation in which Fortis was finding itself (from the collapse of Merrill Lynch and Lehman Brothers onwards);
2) the negative trends as regarded Fortis's liquidity status since approximately mid-September 2008 culminating in 'code red' status applying to Fortis from Wednesday, September 24, 2008 onwards;
3) CBFA's request on this Friday morning, September 26, 2008 to find a strategic partner as CBFA feared Fortis might have given the ghost before the weekend had started, as well as the opening up, at breakneck speed, of the associated data rooms;
4) the transaction involving Ping An, which was most likely to fall through;
5) the outlook of Fortis suffering a loss in excess of EUR 1 billion for the third quarter as indicated to CBFA by Dierckx on the theme of price-sensitive information in the letter he sent on September 23, 2008,as well as the possibility of there being no solvency buffer left by the end of the third quarter of 2008 even independently of buffers associated with the integration of parts of the ANB AMRO organization;
6) the possibility of a goodwill impartment during the fourth quarter of 2008 causing a loss being incurred over the fourth quarter potentially resulting in breach of core equity targets."

302. It is the Investigators' conclusion on the basis of the above that the facts and circumstances which Fortis was facing on Friday, September 26, 2008 qualified as price-sensitive information.[305] That day Fortis engaged in large-scale dissemination of dramatically inadequate and incomplete information, as a sequence of events under the responsibility of the ExCo which the Investigators have characterized as incomprehensible and indefensible, in addition to which the Investigators fail to understand why Lippens was not involved, or had himself involved, in the above course of action as he had picked up reports to the effect that a press release was being prepared.[306] The price-sensitive information will be addressed in more detail in § 6.2 in the context of the discussion of Section 25i of Part 5 of the Financial Supervision Act of the Netherlands.

303. Fortis subsequently waited until September 30, 2008 to announce that it expected not to be able to finalize the asset management joint venture involving Ping An even though it had in any event been aware as early as on September 24, 2008 of the fact that the likelihood of the Ping An deal succeeding was minute, so that the required solvency enhancement would remain out of reach, as reflected by how Kloosterman phrased it at the ExCo gathering on September 24, 2008:[307]

> "*…it is clear that no closing is likely to take place on the Ping An transaction*"

304. The Investigators confirm that Fortis over the period from September 24 to September 30, 2008 created the wrong impression with the investing public where the Ping An transaction was concerned:[308]

> "*According to the Investigators Fortis should forthwith have shared its knowledge of the Ping An agreement with the market no later than by September 24, 2008, given that Fortis as recently as on August 7, 2008 had*

[305] See Investigative Report § 773.
[306] See Investigative Report § 776.
[307] See Investigative Report § 570.
[308] See Investigative Report § 577.

made soothing comments on the subject. It is the Investigators' opinion that by deferring the publication of the relevant information beyond September 24, 2008 Fortis over the intervening days between September 24 and 30, 2008 created the wrong impression with the investing public It is therefore the Investigators'; conclusion that Fortis would have delayed publication of the relevant information even longer had it not been for Kloosterman's forceful intervention."

305. Verwilst's departure had over the period from September 20 to 25, 2008 inclusive resulted in there being no further executive Management Board member in office to preside over Fortis.[309] Verwilst returned for a mere few ours on Friday, September 26, 2008, and at the time the press release was issued was the sole executive Management Board member, as well as being the only Management Board member to have approved the press release. This shows that Fortis lacked a powerful leader during the most crucial period in its history, resulting in the lack of direction within the company getting increasingly worse.

306. The Investigators have commented as follows on the topic of Fortis's lack of direction over the period from September 15 to 26, 2008 inclusive:[310]

> "*Verwilst's illness and indisposition resulted in Fortis lacking direction during what has subsequently been shown to have been the (opening stage of the) most threatening period in its history. This can partly be blamed on the fact that Lippens, who was the only one who knew that Verwilst was not going to return within the next few days, did not present himself either internally or externally as a high-visibility, powerful leader over this period other than by getting to grips with Verwilst's replacement by Dierckx. Lippens moreover in the immediate wake of Verwilst having dropped out evidently saw no need for convening – either in person or via a conference call – a Management Board meeting to fill the vacuum. It is the Investigators' opinion that such a step would have been sufficiently warranted.*
> *(…)*
> *Rather than engaging in the concerted action needed to reduce the likelihood of Fortis ending up in even greater trouble, Fortis over the days leading up to September 26, 2008 and on that day itself operated with little efficacy in an essentially panicky and incohesive manner, <u>communicating with the outside world (…) in a manner which in terms of actual communicative content can only be described as inadequate.</u> As understandable as this could be referred to in the extraordinary circumstances in hand, it is still the Investigators' opinion that they really cannot in the context of the Fortis governance being assessed condone such behavior, <u>particularly in view of the fact that third parties (shareholders) have, it is assumed by the Investigators, been victimized by these developments</u>. This is not fundamentally changed in the event of CBFA having unambiguously communicated that a 'soothing' press release would be in order (the Investigators have not been able to ascertain this). An element in all this is that <u>the lack of leadership throughout the period from September 15 to 26, 2008 inclusive cannot be blamed on, or considered as being attributable to, anyone but Fortis itself.</u> The Investigators have been unable to establish that Management Board members over the relevant period of time tried to liaise with Lippens and/or Verwilst, with the exception of Hessels, who phoned up Lippens (on several occasions). According to the Investigators, this lack of*

[309] See Investigative Report § 903.
[310] See Investigative Report §§ 960 and 961.

contact between Verwilst and/or Lippens on the one hand and virtually all Management Board members on the other is incomprehensible in view of the altogether clearly threatening situation facing financial institutions in general and Fortis in particular, faith in the latter already having been eroded." [underlining added].

307. According to the Investigators the fact that the immediate crisis facing Fortis on Friday, September 26, 2008 took the full complement of Management Board members by surprise did not exempt the individual Board members from independently seeking information on Fortis's status, in view of the prevailing financial crisis:[311]

> "*The Management Board members has the (partial) excuse that Verwilst, who as CEO and then sole executive Management Board member was in charge of the dissemination of information vis-à-vis the Management Board, and Lippens as president, who in any event was generally au fait with what was going on, for their part took no initiative either to bring the Management Board up to speed and initiate an interim meeting. However, this does not in the Investigators' opinion do anything to render it more understandable in view of the raging crisis affecting the financial markets, which must have had an alarming effect, why the Management Board members (with the exception of Hessels) failed off their own bat to inquire into Fortis's position and insist on a meeting being held. The fact that the question could retrospectively be asked as to whether this would have made any difference to the course of events does not do anything to alter this.*"

308. It follows from the above that the period in anticipation of September 26, 2008 according to the Investigators was characterized by lack of decisive leadership and 'dramatically inadequate communication' *vis-à-vis* the investing public, with the Fortis shareholders of all people ending up the victims. The internal knowledge of certain people during this period where it concerned the evaporated liquidity, the fact that the Ping An transaction had failed and the impact this was having in terms of solvency, the search for a strategic partner and the fact that "code red" had been issued internally are all completely at odds with the 'calming' external communications on a 'solid position for the bank' and a 'solid solvency and liquidity'. The fact that some Management Board members were not aware of the alarming situation does not detract from the above, as it was their duty on their own initiative to seek out information. The Investigators have thus rightly concluded that the aforementioned lack of leadership is completely attributable to Fortis itself.

309. It has been established in the light of the above that Fortis over the period from June 26 to September 26, 2008 inclusive acted in breach of Sections 193a to 193j inclusive, and 194 of Book 6 of the Netherlands Civil Code by systematically engaging in misrepresentations *vis-à-vis* the market and the investing public where it concerned its dire solvency status, the negative impact in terms of solvency of the failure of the Ping An transaction, and the evaporated liquidity. Fortis while teetering on the brink systematically communicated to the outside world that its solvency continued to rank as 'solid' and that it was having no liquidity problem even though 'code red' had been issued internally. These inaccurate and incomplete communications are of sufficient material significance to have a potentially misleading effect where the "reference investor" is concerned. Fortis by publicly disclosing these misleading communications and not subsequently rectifying same over the period from June 26 to September 26, 208 inclusive too acted unlawfully *vis-à-vis* the investing public.

[311] See Investigative Report § 127.

310. Finally, the Foundation in this context would point to the fact that Fortis in the press release dated September 29, 2008, in which it announced the transaction involving the Benelux authorities (see § 175 above), also announced that it expected having to proceed with a EUR 5 billion write-down for the third quarter of 2008.[312] This information is completely contrary to Fortis's 'soothing' words as per the press release issued in September 26, 2008. As already commented in § 177, the Investigators have been able to ascertain that two items of which the sum of EUR 5 billion was composed had nothing to do with the transaction involving the Benelux authorities[313] and should in any event have been known within Fortis as early as by September 26, 2008.[314] According to the Investigators this establishment of fact strengthens the conclusion that Fortis under the immediate responsibility of the ExCo on September 26, 2008 disseminated inaccurate and incomplete information *vis-à-vis* the investing public and the market.[315]

6.2 Fortis's liability for non-compliance with the obligations arising out of Sections 13, 20, 25i and 58(1) sub (d) of Part 5 of the Financial Supervision Act of the Netherlands

Section 13 of Part 5 of the Financial Supervision Act

311. Section 13 of Part 5 of the Financial Supervision Act of the Netherlands stipulates that the prospectus should contain the full complement of details applying to the formation of a balanced view of the assets, financial status, result and outlook of the issuing institution and the guarantor if any as well as the rights vested in the relevant securities.

312. Section 193f sub (f) of Book 6 of the Netherlands Civil Code characterizes the general information to be disclosed on the strength of Section 13 of Part 5 of the Financial Supervision Act as essential information. In the event of such information not being accounted for in the prospectus, there would by definition be a question of misleading omission as defined in Section 193d(2) of Book 6 of the Civil Code. As for Section 194 of Book 6 of the Civil Code, in the event of there being a misleading prospectus as defined in said Section, this would by definition involve transgression of the standard as per Section 13(1) of Part 5 of the Financial Supervision Act.[316]

313. § 6.1 under (i) has extensively discussed and substantiated that Fortis over the months of August and September 2007 (in particular) acted in breach of Sections 193, (a) to (j) inclusive, and 194 of Book 6 of the Civil Code by engaging in misrepresentations *vis-à-vis* the market and the investing public. Fortis in its Prospectus made inaccurate and incomplete statements the material significance is sufficient to result in the "reference investor" being misled. Fortis by publicly disclosing these statements by publishing the Prospectus on September 25, 2007 or, as the case may be, by failing (in good time) to rectify the statements in question acted unlawfully *vis-à-vis* the investing public.

[312] See Investigative Report § 2328.
[313] See Investigative Report § 786.
[314] See Investigative Report § 787.
[315] See Investigative Report § 788.
[316] See K. Frielink, '*Aansprakelijkheidsvragen rond het prospectus; van Groningen tot Rome II' (Liability Issues in Connection with the Prospectus: From Groningen to Rome II'*, in: Tijdschrift voor Financieel Recht (Financial Law Journal), no. 7/8 – July-August 2009. We would add that the reverse need not be true in this particular case.

314. Now that it has been established that Fortis by engaging in misrepresentations in the Prospectus acted in breach of Sections 193, (a) to (j) inclusive and 194 of Book 6 of the Civil Code, it has also been established that Fortis failed to satisfy its obligation of including in the Prospectus the essential information as defined in Section 13 of Part 5 of the Financial Supervision Act.

315. The prospectus directive,[317] which has been implemented in the context of the Financial Supervision Act, provides detailed regulations as regards the substance and composition of the prospectus. It follows from the directive's preamble[318] that the directive and the measures providing for implementation of same serve the purpose of protecting the investors. In the event of materially lawful stipulations from the Financial Supervision Act being breached, this would thus constitute unlawful acting *vis-à-vis* the investors as defined in Section 162 of Book 6 of the Netherlands Civil Code.

316. The Supreme Court in its World Online ruling expressly considered in the light of the prospective directive's preamble that the essential information for inclusion in the prospectus on the strength of Section 13 of Part 5 of the Financial Supervision Act serves the purpose of protecting private and institutional investors alike:[319]

> "*In view of these stipulations* [clauses 4 and 8(2) of the Listing and Issuing Rules] *and the directive's preamble* [(now repealed) directive 80/390/EEC]*, it has been envisaged through these requirements,* inter alia*, to protect the position of (potential) investors without distinguishing between private and professional investors. As has subsequently been rendered explicit in the preamble to directives 2001/34/EC and 2003/71/EC, such protection gives investors greater confidence in the securities market and ensures the market's proper performance. It is for this reason that stringent rules may be imposed on compliance with the directives and the national regulations anchored in same.*
>
> *The above has similarly applied since January 1, 2007 where the regulations on the strength of Section 13 of Part 5 of the Financial Supervision Act of the Netherlands are concerned, in which Act the new prospectus directive 2003/71/EC has now been implemented.*"

317. It follows from the above that by disseminating inaccurate and incomplete information in the Prospectus, Fortis acted in breach of Section 13 of Part 5 of the Financial Supervision Act. As Section 13 of Part 5 of the Financial Supervision Act has been designed with the aim of protecting investor interests, transgression of same will constitute unlawful acting on the part of Fortis *vis-à-vis* the investors, as defined in Section 162 of book 6 of the Civil Code.

Section 20 of Part 5 of the Financial Supervision Act

318. Section 20 of Part 5 of the Financial Supervision Act provides for a ban on making any statements, in immediate anticipation of a flotation, that are not in line with the prospectus. As stated in § 201 above, the Supreme Court opened out the scope of Section 194 of Book 6 of the Civil Code to include communications by the issuing institution having been done outside the context of the prospectus but still very much

[317] Directive 2003/71/EC of the European Parliament and the Council dated November 4, 2003, OJ L 345/64.
[318] Directive 2003/71/EC of the European Parliament and the Council dated November 4, 2003, OJ L 345/64.
[319] Supreme Court, November 27, 2009, 07/11104; LJN BH2162, JOR 2010/43, ground for decision 4.10.1

in connection with the offer of securities. This opening out of the prospectus liability ties in with the text of Section 20 of Part 5 of the Financial Supervision Act.

319. Extensive quotes from press releases, minutes and other public communications by Fortis have been included in this writ of summons showing undeniably that Fortis in immediate anticipation (and in the immediate wake) of the securities being offered systematically engaged in misrepresentations *vis-à-vis* the market and the investing public that were not in line with the Prospectus. Fortis has thus been established as having flouted the ban provided for in Section 20 of Part 5 of the Financial Supervision Act.

320. The basis underpinning Section 20 of Part 5 of the Financial Supervision Act is provided for by clause 15 of the prospectus directive.[320] As stated before, the prospectus directive – and thus, Section 20 of Part 5 of the Financial Supervision Act as well – has been designed with the aim of ensuring investor protection, so that transgression of Section 20 of Part 5 of the Financial Supervision Act constitutes unlawful act *vis-à-vis* the investors as defined in Section 162 of Book 6 of the Netherlands Civil Code.[321]

Section 25i of Part 5 of the Financial Supervision Act

321. Fortis on the strength of Section 25i of Part 5 of the Financial Supervision Act is under the obligation forthwith to disclose any price-sensitive information that relates to the organization itself[322], 'price-sensitive information' being defined as "*any information which a reasonably acting investor would probably deploy for the purpose of partially basing his investment decision on*."[323] The legislator has characterized the obligation to disclose price-sensitive information as a preventive measure aimed against insider trading; it is up to the issuing institution at the earliest opportunity to bring the investing public up to date on price-sensitive information in order that insider trading should where possible be curbed.[324]

322. The basis underpinning Section 25i of Part 5 of the Financial Supervision Act is provided for in clause 6, subclauses (1) to (3) inclusive of the market abuse directive.[325] The preamble of this directive stipulates *inter alia* that investors *"[should] be offered a level of public disclosure and protection geared to their situation*."

323. As explained in § 230 and further and § 269 and further, AFM on two occasions imposed EUR 144,000 penalties each on Fortis S.A./N.V. and Fortis N.V. for non-timely disclosure of price-sensitive information as defined in Section 25i of Part 5 of the Financial Supervision Act in connection, respectively, with (i) the transaction involving

[320] Directive 2003/71/EC of the European Parliament and the Council dated November 4, 2003, OJ L 345/64.
[321] See § 307 above, also see S.E. Eisma, '*Het doel van de Wft: een juridische benadering' (The Purpose of the Financial Supervision Act: A Legal Analysis")*, in: 'Onderneming en Financieel Toezicht' (Enterprise and Financial Supervision),'Onderneming en Recht' (The Enterprise and the Law) series, part 40: "In the final analysis, virtually all materially lawful stipulations as per the Financial Supervision Act can be reduced to the wish to protect the investors (…). The implementation of investor protection is being pursued by making available information."
[322] Directive 2003/124/EC describes price-sensitive information as "[any] *information which a reasonably acting investor would probably deploy for the purpose of partially basis his investment decision on*." See clause 1(2) of directive 2003/124/EC, L 339/70 and Investigative Report § 345.
[323] See clause 1(2) of directive 2003/124/EC, L 339/70 and Investigative Report § 345.
[324] From: 'Regels ter voorkoming van marktmisbruik' (Anti Market Abuse Rules) by G.T.J. Hoff, in 'Onderneming en Financieel Toezicht' (Enterprise and Financial Supervision),'Onderneming en Recht' (The Enterprise and the Law) series, part 40, Kluwer Deventer 2007; Parliamentary Papers II, 2004/05, 29827, no. 3, page 12.
[325] Directive 2003/6/EC of the European Parliament and the Council dated January 28, 2003 on the topic of insider trading and market manipulation (market abuse).

Deutsche Bank in the context of the EC Remedies, and (ii) communications on the topic of Fortis's sub-prime related exposure in 2007. The Foundation moreover concurs with the Investigators' view that the dissemination of information regarding the (non-disclosure of the) '*drop dead*' date as per the agreement involving Ping An and the (non-disclosure of the) potential failure of the Ping An agreement have been in violation of Section 25i of Part 5 of the Financial Supervision Act:

> "*It is the Investigators' opinion that whereas there may initially have been no question of price-sensitive information where the presence of this clause* [the drop dead date, counsel's addition] *in the Ping An contract was concerned, the interest of sharing this clause with the market became greater as time progressed, from April 2, 2008 onwards.*"[326]
>
> "*It is the Investigators' opinion that by September 24, 2008 there was a question of price-sensitive information where the potential falling through of the Ping An agreement was concerned even if this may not yet have been he case on September 19, 2008, as the information had become sufficiently concrete by the former date, in addition to which it concerned a transaction which for Fortis was key in terms of solvency planning.*"[327]
>
> "*It is the Investigators' opinion that Fortis no later than by September 24, 2008 should forthwith have shared its information concerning the Ping An agreement with the market, as Fortis had referred to the matter in soothing terms as recently as on August 7, 2008. In the Investigators' opinion Fortis by deferring the publication of this information beyond September 24, 2008 in the days from September 24 to September 30, 2008 caused the wrong impression to form among the investing public. The Investigators have moreover concluded that Fortis would have deferred the publication of the relevant information to an even later date had it not been for Kloosterman's forceful intervention.*"[328]

324. The Investigators in § 4.3.4. of the Investigative Report have moreover rightly concluded that the awareness among Management Board members where it concerned the (disclosure or non-disclosure of) price-sensitive information left something to be desired, to put it mildly:

> "*It is the Investigators' opinion that the level of the knowledge which senior Fortis officials had concerning (the need for disclosing or not disclosing) price-sensitive information or, as the case may be, the requirements for proceeding with a deferral of publication of price-sensitive information was not such as could be expected from a prominent listed financial institution. Mittler,* inter alia*, in the course of the proceedings at which both sides of the argument were heard stated that the legal department served the purpose among other things of providing the Fortis directors with advice on the matter and that it was essentially acceptable for these directors to base themselves on such advice. The Investigators in this context would point to a variety of scenarios where views by Fortis lawyers having relevance in the matter(s) in hand were nevertheless departed from (…) and are of the opinion that they are at the very least justified in persisting in their views where this is concerned."*

[326] See Investigative Report § 575.
[327] See Investigative Report § 576.
[328] See Investigative Report § 577.

325. Fortis in the light of the above has been established as having acted in breach of Section 25i of Part 5 of the Financial Supervision Act. As the market abuse directive[329] and thus, Section 25i of Part 5 of the Financial Supervision Act is aimed at protecting investors, the transgression of the relevant Section constitutes unlawful acting on the part of Fortis *vis-à-vis* the investors as defined in Section 162 of Book 6 of the Netherlands Civil Code.

Section 58(1) sub (d) of Part 5 of the Financial Supervision Act

326. Section 58(1) sub (d) of Part 5 of the Financial Supervision Act provides for a ban on market manipulation, banning the dissemination of information (potentially) giving out an inaccurate or misleading signal where the availability of, demand for or share price of financial instruments is concerned where the disseminator of the information in question is aware, or should reasonably suspect, that the information is inaccurate or misleading. The basis underpinning Section 58 of the Financial Supervision Act is provided for in clause 5 of the market abuse directive.[330]

327. As explained in § 262 above, AFM imposed EUR 144,000 penalties on Fortis S.A./N.V. and Fortis N.V. each for transgression of Section 58(1) sub (d) of Part 5 of the Financial Supervision Act based on the consideration that Votron at a presentation held on June 5, 2008 engaged in misrepresentations *vis-à-vis* the market and the investing public.

328. As early as in anticipation of Votron's statements Fortis over the period from January 27, 2008 up to the share issue on June 26, 2008 systematically misled the investing public by engaging in misrepresentations where its solvency, the solvency plan in implementation of same and the dividend policy to be carried out where concerned.[331] AFM in its Ruling dated February 5, 2010 has also referred to these misleading communications, placing the penalty it imposed in this very context.[332] The Investigators too have concluded that as far as the period from May to June 2008 was concerned, "*there had been several instances rather than just the one occasion where Fortis's communication with the investing public fell short of requirements*."[333]

329. Fortis is thus established to have acted in breach of Section 58(1) sub (d) of Part 5 of the Financial Supervision Act where its (misleading) communications with the market and the investing public from January 27, 2008 to June 26, 2008 inclusive, or in any event over the period from May to June 2008, are concerned. The Foundation concurs with the Investigators[334] where these have established that the dissemination of information in anticipation of and on Friday, September 26, 2008 was in breach of Section 58(1) sub (d) of Part 5 of the Financial Supervision Act. As the market abuse directive and thus, Section 58(1) sub (d) of Part 5 of the Financial Supervision Act is designed to offer investor protection, the transgression of the relevant Section constitutes unlawful act on the part of Fortis *vis-à-vis* the investors as defined in Section 162 of Book 6 of the Netherlands Civil Code.[335]

[329] Directive 2003/6/EC of the European Parliament and the Council dated January 28, 2003 concerning insider trading and market manipulation (market abuse).
[330] Directive 2003/6/EC of the European Parliament and the Council dated January 28, 2003 concerning insider trading and market manipulation (market abuse).
[331] See § 273 above.
[332] See AFM Ruling of February 5, 2010, pages 18 and 19.
[333] See Investigative Report § 629.
[334] See Investigative Report §§ 772 and 773.
[335] See § 307 above, also see S.E. Eisma, '*Het doel van de Wft: een juridische benadering' (The Purpose of the Financial Supervision Act: A Legal Analysis)*, in: 'Onderneming en Financieel Toezicht' (Enterprise and Financial Supervision),'Onderneming en Recht' (The Enterprise and the Law) series, part 40: "In the final analysis, virtually

6.3 Fortis's Liability for Not Invoking the MAC Clause

MAC Clause

330. Prior to the Consortium's offer being rendered unconditional, several (preconditional) terms and conditions would have had to be satisfied or the parties should have waived same in anticipation of the date of expiry of the offer period (on October 5, 2007). One of these conditions concerned the MAC Clause in the CSA (Consortium and Shareholders Agreement) in respect of RFS Holdings B.V., the gist of which was that no "material adverse change" should occur at ABN AMRO, RFS Holdings, Fortis, RBS or Santander.[336] The MAC-clause also applies to the underwriting commitment of Merrill Lynch.[337]

331. The offer proposal contains the following definition of a material adverse change (MAC) scenario:[338]

> "*any event, events or circumstance that results or could reasonably be expected to result in a material adverse effect on the business, cash flow, financial or trading position, assets, profits, operational performance, capitalization, prospects or activities of any .... Fortis, (....., taken as a whole).*" [underlining added]

332. The use of the terms "any event, events or circumstance" has made the phrasing of the MAC definition quite all-embracing, bringing situations of a more general nature such as changes in generally prevailing economic, financial or market conditions under this definition as well.

333. A further aspect that is worthy of note is that the definition has expressly been based on a scenario of material adverse change occurring at Fortis or at any one of the other Consortium partners. It is not customary for a buyer to invoke a MAC Clause in the event of a MAC scenario occurring at that very buyer. The MAC scenario customarily concerns the target company – ABN AMRO in this particular case – or deploys a 'market MAC' that deals with a MAC scenario within a specific market.

Deteriorating conditions in the financial market

334. The first signs of the credit crunch started materializing from July 2007 onwards.[339] In view of the turmoil having come about and the further deterioration in conditions in the financial market, the Consortium's offer of EUR 38-plus per ABN AMRO share was shown over the next few months to be excessive. It was in this period that deliberations were under way at Fortis on whether to invoke the MAC Clause or proceed with reducing the offer. Mittler at the ExCo held on August 28, 2007 for the first time noted the option of invoking the MAC Clause or reduce the price.[340] The MAC Clause was also frequently discussed at the Management Board meeting held on

---

all materially lawful stipulations as per the Financial Supervision Act can be reduced to the wish to protect the investors (…). The implementation of investor protection is being pursued by making available information."

[336] See Investigative Report § 1367.

[337] See Investigative Report § 172.

[338] See Offer Memorandum, pages 17 and 62.

[339] De Nederlandsche Bank NV (Netherlands Central Bank), *'In het spoor van de crisis: Achtergronden bij de financiële crisis' (Tracking the Crisis: Backgrounds to the Financial Crisis),* 2010*,* page 17 et seq.

[340] See Investigative Report § 1440.

September 5, 2007, with the Board appreciating the 'delicacy' of this particular issue.[341]

335. It was thus that Fortis decided around this period to seek advice both internally and externally – from Merrill Lynch and De Brauw Blackstone Westbroek ("DBBW") - on the optional invoking of the MAC Clause and the consequences that such a step might have.

336. The Foundation hereby notes that the discussion on whether or not to invoke the MAC-clause that took place within (the board of) Fortis, was not in any way disclosed to the investing public. The (potential) shareholders and investors of Fortis where therefore not informed of the fact that internally the possibility of discontinuation of the acquisition of ABN AMRO was discussed, although this information was of importance to the investors when deciding whether to invest in Fortis or not.

337. An internal Fortis memorandum dated September 6, 2007[342] reveals that a veto right accrued to Fortis - as one of the three Consortium partners – enabling it to stop the Consortium's offer being rendered unconditional: owing to the CSA of RFS Holdings, the offer was not to be rendered unconditional until such time as a 'Super Board Majority' (as a majority involving at least one of the two directors of each Consortium partner voting in favor) resolved to confirm the offer as having been rendered unconditional. The Fortis directors had the option at the moment the Board of RFS Holdings had to make the relevant decision to refrain from participating in the vote by pointing to a MAC scenario having occurred at Fortis and invoking the MAC Clause accordingly. This would have resulted in no Super Board Majority being accounted for in support of the decision to confirm the offer as having been rendered unconditional, which in turn would have caused the Consortium's offer to lapse on October 5, 2007.

338. The 'NRC Handelsblad' newspaper on September 11, 2007 published an article on the growing turmoil surrounding the offer for ABN AMRO, reporting that the ABN AMRO share price in the morning of September 11, 2007 stood at EUR 33.64 (whereas the offer involved a price of EUR 38.00 per share).[343]

339. Signals intensified within Fortis to the effect that it was not yet bound by the transaction and had the option of invoking the MAC Clause. De Boeck suggested at the ExBo meeting held on September 11, 2007 that legally speaking Fortis still had the option of withdrawing by invoking the MAC Clause and that it was not committed to the transaction:[344]

> *"Mr. K. De Boeck points out that further to having secured legal advice, Fortis can still withdraw from the transaction by invoking the Material Adverse Change clause. Fortis is hence not "tied" in into this transaction from a purely legal perspective.*"

340. A memorandum from Merrill Lynch dated September 17, 2007 reveals that in their opinion invoking the MAC Clause should be an option for reasons of a further deterioration in conditions, as – potentially – reflected in statistics for publication by US banks over the next few days.[345]

[341] See Investigative Report § 1465.
[342] See Investigative Report § 1469 and § 92 above for the full quote.
[343] 'NRC Handelsblad' newspaper dated September 11, 2007, '*Emergency Exit for Banking Consortium*', page 17.
[344] See Investigative Report § 1475.
[345] See Investigative Report § 1504.

341. Both the RCC at its meeting of September 20, 2007 and the Management Board at its meeting that same day decided nevertheless to refrain from invoking the MAC Clause, which the RCC considered to be imprudent for the following reasons:[346]

> "*In light of the consensus of the consortium partners to go ahead with the set price, the inherent value of the underlying ABN Amro assets (untouched by the daily volatility of stock markets,) and the financial merits of the transaction (thanks to the accretive nature of the funding and the acceptable ROI confirmed through Independent advice), versus the huge litigation and reputation risk that Fortis would be exposed to in case of invoking the MAC clause at this stage, the Risk and Capital Committee concluded in favour of going ahead as planned and not to recommend invoking the MAC clause.*"

342. The Management Board (partially on the basis of legal advice provided by Quaetaert and De Brauw) unanimously concluded that conditions prevailing in the financial markets prohibited the MAC Clause being invoked.[347]

343. It is the Foundation's opinion that Fortis acted unlawfully *vis-à-vis* the Investors by refraining from invoking the MAC Clause, thus stopping the Consortium's offer being rendered unconditional at that particular juncture.

344. First, the comprehensive MAC definition offered Fortis the opportunity of invoking the MAC Clause for reasons of deteriorating conditions in the financial market. The market surrounding Fortis was moving towards crisis and the ABN AMRO share price was slipping, but the offer of EUR 38,00 per ABN AMRO was set in stone. It became clear when the offer had just been made that Fortis was biting off more than it could chew, and that this was going to affect its business.

345. Second, Fortis must have been thoroughly aware of the deteriorating conditions in the financial market and the impending crisis. Although it is not customary for a MAC scenario to apply to the buyer, Fortis together with its Consortium partners nevertheless negotiated the definition of MAC in such a manner as to include a material adverse change at Fortis (or at the other Consortium partners). Fortis thus secured a strong right for itself enabling it over the intervening period from the offer proposal, on May 29, 2007, to the moment the offer was eventually rendered unconditional, on October 5, 2007, to duck out of the transaction, and in the opinion of the Foundation would have been authorized to avail itself of this right.

346. Fortis eventually concluded that invoking the MAC Clause at this stage would spark "huge litigation and reputation risk", which several of its (legal) advisors confirmed. This shows that it was Fortis's opinion that refraining from invoking the MAC Clause for commercial reasons appeared to be inopportune. However, legally speaking Fortis had the right to invoke the MAC Clause, to the point where it was not just entitled, but also had the obligation *vis-à-vis* its shareholders to do so. Fortis's failure to proceed made it act unlawfully *vis-à-vis* its shareholders and thus, *vis-à-vis* the Foundation: had Fortis invoked the MAC Clause, the offer proposal would have lapsed and the share issue of September 25, 2007, the purpose of which had been the funding of Fortis's share of the offer, would not have proceeded, so that the Investors would not have suffered a loss owing to Fortis's actions.

[346] See Investigative Report § 1514.
[347] See Investigative Report § 1521.

347. The Foundation does not have at its disposal the records that form the basis for the decision of Fortis not to invoke the MAC Clause. Thus, it is up to Fortis to demonstrate and prove on the basis of what circumstances it came to the conclusion that the MAC Clause could not be invoked at that particular juncture, and to submit the relevant records in this respect. The Foundation requests the Court – as far as necessary – on the basis of article 22 Rv to demand the relevant records from Fortis.

6.4 Liability of Merrill Lynch on the strength of Section 162 of Book 6 of the Netherlands Civil Code

348. As indicated in § 2.2 above, Merrill Lynch officiated as coordinator in two of Fortis's share issues, in 2007 (when Merrill Lynch acted as Joint Global Coordinator and Sole Bookrunner) and 2008 (when Merrill Lynch acted as Joint Lead Manager and Joint Bookrunner), respectively, as well as underwriting both issues.[348]

349. A coordinating bank in any share issue owing to its position relative to the community has a particular duty of due care[349] to instruct and coach the issuing institution and the latter's directors in such a manner as to stop inaccurate statements being made *vis-à-vis* the market and the investing public by or on behalf of the issuing institution and the latter's directors or, in any event, to stop such statements going unrectified. The "reference investor" defined in § 6.1[350] above should in principle serve as the point of departure when working up this duty of due care in the context of a share issue.

350. The Supreme Court in its World Online ruling elaborated as follows upon this special duty of due care resting with the coordinating bank in the context of a share issue:[351]

> "*The circumstances having relevance where the elaboration of this duty of due care is concerned particularly include where appropriate that the bank should be (…) (joint) global coordinator, lead manager and bookrunner In such a scenario the bank on the instructions of the issuing institution heads the syndicate of banks that coordinates the issue and has responsibility for fixing the issue price, performing the due diligence examination and preparing the prospectus. The bank as head of the syndicate is under the obligation where such comes within its control – as it would in the performance of the due diligence examination and the preparation of the prospectus – to stop an inaccurate image of the issuing institution forming among potential investors*."

351. The Foundation intends to set out below the duties and responsibilities of Merrill Lynch in the context of Fortis's share issues from September 2007 and June 2008, to the extent that these are known to the Foundation from the Investigative Report, concluding that Merrill Lynch as the coordinating bank flouted its duty of due care in the context of said share issues and as such, acted unlawfully where the "reference investor" was concerned.

Share Issue dated September 20, 2007

[348] See Investigative Report §§ 1349 and 1919.
[349] See Supreme Court, December 23, 2005, nr. CO4/173, LJN AU3713, NJ 2006, 289.
[350] See Supreme Court, November 27, 2009, 07/11104; LJN BH2162, JOR 2010/43, ground for decision 4.31.1.
[351] See Supreme Court, November 27, 2009, 07/11104; LJN BH2162, JOR 2010/43, ground for decision 4.31.1.

352. Merrill Lynch acted as Joint Global Coordinator and as Sole Bookrunner in the context of Fortis's 2007 share issue. In that capacity Merrill Lynch was in charge, as per Fortis's instructions, of fixing the issue price, performing the due diligence investigation and preparing the prospectus.[352] It can be established on the basis of these duties and responsibilities that Merrill Lynch in anticipation and at the time of the 2007 share issue was, or should have been, conversant with the deteriorating sub-prime situation in the financial markets in general and at Fortis in particular.

353. The Foundation hereby emphasizes that Merrill Lynch when performing the due diligence investigation and preparing the prospectus for the share issue, was or should have been conversant with the fact that the following relevant information was not included in the prospectus for the share issue and in the Trading Update:

(i) the fact that the US sub-prime market had comprehensively dried up since late July 2007;
(ii) the need to switch from a Mark-to-Market to a Mark-to-Model valuation method in connection with the evaporation of the liquidity market;
(iii) the aggregate sub-prime exposure totaling EUR 8.7 billion (rounded up) in conjunction with a range of risk indications for the various product categories;
(iv) an expected loss on the sub-prime portfolio in the amount of EUR 350-400 million as discussed at the ExCo meeting held on September 4, 2007;
(v) the sub-prime portfolio's expected negative impact on the result for the third quarter in the amount of EUR [•] million;[353] and
(vi) the sub-prime portfolio's potential impact on the income statement for 2007 in an amount of EUR 321 million.

354. Confirmation that Merrill Lynch was, or should have been, conversant as described above is moreover provided by the fact that Merrill Lynch in September 2007 issued advice to Fortis concerning whether or not the MAC clause should be invoked.[354] The MAC clause was of major importance to Merrill Lynch as it also applied to its underwriting commitment. Merrill Lynch in the context of providing Fortis with the above advice must have performed an extensive survey of the actual sub-prime situation both in the financial markets and, more in particular, at Fortis, and will thus have been *au fait* with the fact that the actual sub-prime situation at Fortis departed from the relevant description as per the Prospectus and the relevant communications *vis-à-vis* the market. Given Merrill Lynch's position as a reputable investment banker, it may also be assumed that Merrill Lynch must have been aware of Fortis exposure to the subprime crisis.

355. The conclusions as per the Investigative Report[355], the AFM Ruling dated August 19, 2010[356] and what has been discussed at length in the context of the present Subpoena unmistakably bear out that Fortis (and Fortis's directors) made inaccurate and incomplete statements *vis-à-vis* the market and the investing public concerning Fortis's actual sub-prime exposure in anticipation and at the time of the September 2007 share issue.

356. Merrill Lynch in its capacity of Joint Global Coordinator and Sole Bookrunner in the context of the September 2007 share issue was under the obligation to observe due care in preventing such inaccurate and incomplete statements being made both in and

[352] See Supreme Court, November 27, 2009, 07/11104; LJN BH2162, JOR 2010/43, ground for decision 4.31.1.
[353] The amount has been rendered illegible in the AFM Ruling of August 19, 2010, page 27.
[354] See § 97 above.
[355] See Investigative Report § 4.4.12 *(inter alia)*.
[356] See AFM Ruling of August 19, 2010, page 26.

outside the Prospectus or, alternatively, as central coordinator in the context of the share issue in question had a duty of due care of intervention by rectifying the relevant inaccurate and incomplete statements, for example by publishing a press release.

357. Given the conclusions of the Investigative Report,[357] the AFM Ruling dated August 19, 2010[358] and what has been discussed in the context of the present Subpoena, it has been established that Merrill Lynch despite being aware of the actual deterioration in the sub-prime situation never stopped inaccurate and incomplete statements being made both in and outside the Prospectus. The Investigative Report moreover confirms that Merrill Lynch had every confidence in the (funding of the) 2007 share issue as well as explicitly supporting the Consortium, Fortis in particular.[359]

358. As far as the Foundation is aware Merrill Lynch refrained from rectifying these misrepresentations. The Foundation hereby invites Merrill Lynch to prove that Merrill Lynch did implement sufficient adequate measures to ensure that the misrepresentations should be rectified. Where Merrill Lynch fails to succeed, it has been established both that the failure to act at the time of Fortis's (and Fortis's directors') misrepresentations concerning the actual sub-prime situation being made and the omission to rectify the relevant misrepresentations result in liability on the part of Merrill Lynch *vis-à-vis* the "reference investor" on the strength of Section 162 of Book 6 of the Netherlands Civil Code for reason of breach of its duty of due care.

Share Issue dated June 26, 2008

359. The June 26, 2008 share issue also involved Merrill Lynch officiating as coordinating bank (both as Joint Lead Manager and as Bookrunner), as stated earlier. Merrill Lynch in this capacity was responsible for fixing the issue price and performing the due diligence investigation. No prospectus was published in the context of the Accelerated Book Offering of June 2008, as far as the Foundation is aware.

360. The Investigative Report shows that Merrill Lynch during the weeks in anticipation of the June 26, 2008 share issue extensively investigated Fortis's capital position and the possibilities for enhancing same. On June 3, 2008 Merrill Lynch published a report in which it proposed as potential options for enhancing Fortis's capital position a share issue and the retaining of dividends. One week later, on June 10, 2008, Merrill Lynch went on to publish an analysts' report in which it speculated on a potential EUR 3 billion solvency shortfall at Fortis on the basis of which it downgraded Fortis's status from "buy" to "neutral".

361. Three days later, on June 13, 2008, Merrill Lynch in preparation of the share issue gave a presentation in the context of a pitch at which it commented that it counted on a EUR 3.2 billion share issue involving a EUR13.50 issue price and noting that the relevant amount might be reduced if it was decided not to pay out an interim dividend, or if the dividend were paid out in the form of shares.[360]

362. The conclusions as per the Investigative Report[361], the AFM Ruling dated February 5, 2010[362] and what has been discussed at length in the context of the present Subpoena unmistakably bear out that Fortis (and Fortis's directors) made inaccurate and

[357] See Investigative Report § 4.4.12 *(inter alia)*.
[358] See AFM Ruling of August 19, 2010, page 26.
[359] See Investigative Report § 1442.
[360] See § 137 above for a summary of the presentation.
[361] See Investigative Report § 624 to § 628 inclusive, *inter alia*.
[362] AFM Ruling of February 5, 2010, pages 18 and 19.

incomplete statements *vis-à-vis* the market and the investing public concerning Fortis's actual solvency status, the plan by way of implementation of same and the dividend policy to be carried out by Fortis.

363. Merrill Lynch in its capacity of Joint Lead Manager and Bookrunner in the context of the June 2008 share issue was under the obligation to observe due care in preventing such inaccurate and incomplete statements being made in anticipation and at the time of the share issue or, alternatively, as central coordinator in the context of the share issue in question had a duty of due care of intervention by rectifying the relevant inaccurate and incomplete statements, for example by publishing a press release.

364. It follows unmistakably from the fact(s) that Merrill Lynch during the month of June 2008 (i) was appointed Joint Lead Manager and Bookrunner in the context of the share issue, (ii) investigated Fortis's capital position and the options for enhancing same, (iii) published an analysts' report pertaining to Fortis's solvency status, and (iv) prepared a presentation for the benefit of a pitch so as to coordinate the Fortis share issue that Merrill Lynch was, or should have been, conversant with the fact that Fortis's statements *vis-à-vis* the investing public and the market on the subject of Fortis's solvency status, the plan by way of implementation of same and dividend policy to be carried out (comments made by Votron on June 5, 2008, misrepresentations in the 'Financieele Dagblad' newspaper on June 10, 2008, et cetera) were inconsistent with the actual situation.

365. It may furthermore be noted in this context that Merrill Lynch was, or should have been, aware as well of the fact that Fortis's statements made on September 26, 2008 - to the effect that there were no liquidity problems whereas solvency was 'solid' (see § 167 above) – flew in the face of the actual situation as Merrill Lynch by that particular juncture had been engaged by Fortis for the purpose of talking to a potential strategic partner for Fortis[363] as well as knowing that Fortis because of its acute solvency and liquidity problems might end up nationalized if these talks ended up unsuccessful.[364]

366. However, although Merrill Lynch was aware (or should have been aware) of the fact that Fortis's statements regarding its own solvency, liquidity and dividend policy were diametrically opposed to the actual situation, it never stopped these statements being made *vis-à-vis* the investing public and the market or, as far as the Foundation is aware, omitted rectifying these misrepresentations. The Foundation hereby invites Merrill Lynch to prove that Merrill Lynch did implement sufficient adequate measures to ensure that the misrepresentations should be rectified.

367. Where Merrill Lynch fails to succeed in producing sufficient proof in corroboration of it having implemented adequate measures, it has been established both that the failure to act at the time of Fortis's (and Fortis's directors') misrepresentations concerning the actual sub-prime situation being made and the omission to rectify the relevant misrepresentations result in liability on the part of Merrill Lynch *vis-à-vis* the "reference investor" on the strength of Section 162 of Book 6 of the Netherlands Civil Code for reason of breach of its duty of due care.

368. Finally, the Foundation would comment that the fact that Merrill Lynch is a non-Dutch based bank does not detract from Merrill Lynch's duty of due care, the Supreme Court in its World Online ruling having resolved as follows:[365]

[363] See Investigative Report § 893.
[364] See Investigative Report § 2174.
[365] See Supreme Court, November 27, 2009, 07/11104; LJN BH2162, JOR 2010/43, ground for decision 4.31.2.

"The circumstance of a syndicate leader being a foreign-based bank cannot result in the matter being assessed differently, as a foreign-based syndicate leader in the context of any issue in the Dutch market will have to ensure its compliance, on a par with a Dutch-based syndicate leader, with such duties of due care vis-à-vis *potential investors as arise out of the relevant involvement as syndicate leader."*

7. DEFENSE OF THE DEFENDANTS

369. As set out in Chapter 3, the Foundation in its letter dated October 8, 2010 invited Ageas N.V. and Ageas S.A./N.V. to enter into consultation with it regarding its claim. Ageas N.V. and Ageas S.A./N.V. in their letter dated October 21, 2010 rejected the Foundation's request for consultation. The Foundation has no knowledge of any defense of Ageas N.V. and Ageas S.A./N.V. with regard to the claim, except for any opinion of Ageas N.V. and/or Ageas S.A./N.V. that is mentioned in the Investigative Report (see, eg, § 226 up to and including § 229, above) or the AFM Decisions. The Foundation hereby notices that the opinions of Fortis mentioned in the Investigative Report or the AFM Decisions do not relate to the question whether Fortis can be held liable on the grounds of what is claimed in this writ.

370. In the AFM Decision of 19 August 2010 whereby the AFM decides to impose a fine on Ageas N.V. and Ageas S.A./N.V. for the infringement of section 59 (old) of the Financial Supervision Act (now article 5:25(i) of the Financial Supervision Act) on the basis of the fact that Fortis, in short, has not timely disclosed price sensitive information to the investing public regarding its true subprime exposure, the opinion of Fortis is set out in § 3.2 of this Decision. The Foundation refers to § 3.2 of this Decision for a clarification of the opinion of Fortis.

371. In the AFM Decision of 5 February 2010, the AFM decides to impose a fine on Fortis N.V. and Fortis S.A./N.V. for (i) the infringement of section 58(1) sub d of Part 5 of the Financial Supervision Act on the basis of the fact that Fortis, in short, on 5 June 2008 during a presentation held by Votron disseminated information (potentially) giving out an inaccurate or misleading signal where the availability of, demand for or share price of financial instruments of Fortis is concerned, and (ii) the infringement of section 59 (old) of Part 5 of the Financial Supervision Act (now section 25(i) of Part 5 of the Financial Supervision Act) on the basis of the fact that Fortis has failed to comply with its obligation to immediately disclose price sensitive information as defined in aforementioned section of the Financial Supervision Act regarding the transaction with Deutsche Bank within the framework of the EC Remedies.

372. Fortis has given its written opinion on both infringements. With regard to the infringement of section 58(1) sub d of Part 5 of the Financial Supervision Act, the Foundation refers to paragraph B 1.3 (p. 19) and B.2 (p.22) of the AFM Decision of 5 February 2010 for a clarification of the opinion of Fortis. With regard to the infringement of section 59 (old) of the Financial Supervision Act (now section 25(i) of Part 5 of the Financial Supervision Act), the Foundation refers to paragraph B 1.3 (p.46) of the AFM Decision of 5 February 2010 for a clarification of the opinion of Fortis.

373. The Foundation has invited Merrill Lynch to enter into consultation with it regarding its claim by letter dated 2 December 2010. The Foundation has received no response from

Merrill Lynch to date. The Foundation has no knowledge of any defense raised by Merrill Lynch with regard to the claim as set out in this writ.

8. TENDER OF EVIDENCE

374. As stipulated in Chapter 5 above, the factual substance of the subpoena has solely been anchored in public information including the Investigative Report. The Foundation does not have the disposal of the Schedules to the Investigative Report, which include a large number of documents having relevance to the present proceedings. The Foundation has a vested interest in being able to inspect the relevant documents in order to enable it to substantiate its position.

375. The Foundation would therefore request from the Court that Fortis on the strength of Section 22 of the Netherlands Code of Civil Procedure should be ordered to se to the introduction by instrument into the proceedings of the following records:

i. The minutes of the Management Board, ExCo, AC and ExBo meetings held in 2007 and 2008;
ii. The reports of the discussions between the Investigators and the full complement of former Board members and other Fortis officials;
iii. The e-mail correspondence reference to which is made in the Investigative Report;
iv. The relevant documents on which Fortis based its decision of not invoking the MAC clause including in any event the advice provided by Merrill Lynch and De Brauw on the subject.

376. As stated in § 205 above, the onus of proof as regards the unlawfulness on the strength of Section 194 of Book 6 of the Netherlands Civil Code is reversed on the strength of Section 195 of Book 6 of the Civil Code. The same applies to Section 193j of Book 6 of the Civil Code, which Section reverses the onus of proof where it concerns the unlawfulness on the strength of Sections 193b to 193i inclusive of Book 6 of the Civil Code.

377. It therefore suffices for the Foundation in the context of the present proceedings where it concerns its reliance on Sections 194 and 193a to 193j inclusive of Book 6 of the Civil Code to argue and render it plausible that the communications made by Fortis as set out in the present subpoena have been misleading and as such, unlawful. It has been established in the light of the above that the Foundation has satisfied its obligation to furnish facts. The Foundation does not need to furnish any further proof underpinning this assertion; it is now up to Fortis to furnish proof of the accuracy and completeness of the information having been disseminated by it, as per Sections 195 and 193j of Book 6 of the Civil Code, respectively.

378. As for the other legal grounds (see chapter 6 above), although the Foundation would challenge its obligation to do so, it nevertheless offers to produce proof of its assertions using the full range of legal remedies including the submission of Exhibits in the context of the proceedings and the examination of witnesses, [•] in particular.

FOR WHICH REASON

The Plaintiff would request that the Utrecht District Court in its judgment to the relevant effect:

A. should rule that Fortis N.V. (now Ageas N.V., the Defendant sub 1) and Fortis S.A./N.V. (now Ageas S.A./N.V., the Defendant sub 2) have acted in breach of the requirements as set out in Netherlands law where it concerns that which is held against them in the context of the present Subpoena including the furnishing of the market and the investing public with accurate and complete information;

B. should rule that Merrill Lynch has acted in breach of its duty of due care where it concerns that which is held against it in the context of the present Subpoena including by failing to stop Fortis (and Fortis's directors) systematically making inaccurate and incomplete statements *vis-à-vis* the market and the investing public or, as the case may be, failing to rectify such inaccurate and incomplete statements,

all of this subject to the legal costs being awarded against the Defendants.

This case is being tried by J.H.B Crucq *Legum Magister* of the legal firm of JanssenBroekhuysen Advocaten: 128 Weteringschans, NL-1017 XV Amsterdam, T: +31 (0)20 52 89 529, F: +31 (0)20 42 88 259, E: janhendrik@jblaw.nl