Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

8 April 2014*

(State aid — Financial sector — Aid intended to remedy a serious disturbance in the economy of a Member State — Article 107(3)(b) TFEU — Decision declaring the aid compatible with the internal market — Conditions for approval of the aid — Acquisition ban — Whether consistent with the Commission communications concerning aid to the financial sector in the financial crisis — Proportionality — Equal treatment — Principle of good administration — Obligation to state reasons — Right to property)

In Case T-319/11,

ABN Amro Group NV, established in Amsterdam (Netherlands), represented by W. Knibbeler and P. van den Berg, lawyers,

applicant,

v

European Commission, represented by L. Flynn and S. Noë, acting as Agents,

defendant,

APPLICATION for the partial annulment of Commission Decision 2011/823/EU of 5 April 2011 on the measures C 11/09 (ex NN 53b/08, NN 2/10 and N 19/10) implemented by the Dutch State for ABN Amro Group NV (created following the merger between Fortis Bank Nederland and ABN Amro N) (OJ 2011 L 333, p. 1),

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and D. Gratsias, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2013,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 On 5 April 2011 the European Commission adopted Decision 2011/823/EU on the measures C 11/09 (ex NN 53b/08, NN 2/10 and N 19/10) implemented by the Dutch State for ABN Amro Group NV (created following the merger between Fortis Bank Nederland and ABN Amro N) (OJ 2011 L 333, p. 1, 'the contested decision').

2 Against a background of financial crisis, when inter-bank lending had dried up in September 2008, the Commission offered guidance in a series of communications on the development and implementation of State aid in favour of banks. In those communications the Commission recognised that the gravity of the crisis justified the granting of aid under Article 107(3)(b) TFEU, since that provision authorised State aid when necessary to remedy a serious disturbance in the economy of a Member State.

3 On 25 October 2008 there was published the Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ 2008 C 270, p. 8).

4 Further to the fact that, in the autumn of 2008, under market pressure, a growing number of Member States of the European Union found themselves obliged to undertake a 'preventive' recapitalisation of banks, in order to enable the banks to establish higher capital ratios and to ensure lending to the real economy, the Communication from the Commission — The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ 2009 C 10, p. 2; 'the Recapitalisation Communication') was published.

5 There followed the adoption, in the period preceding the adoption of the contested decision, of the Communication from the Commission on the treatment of impaired assets in the Community banking sector (OJ 2009 C 72, p. 1) and the Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (OJ 2009 C 195, p. 9; 'the Restructuring Communication'). The latter communication sets out the criteria which the Commission intends to apply to aid measures for restructuring in favour of banks against the background of the crisis. Point 5 of that communication states that the plans for the restructuring of banks concerned must rest on the three pillars referred to in the other communications: ensuring the viability in the longer term of the beneficiary without State aid, guaranteeing adequate burden sharing and, last, showing that appropriate measures are taken to limit distortions of competition.

6 For the purposes of this judgment, the communications referred to in paragraphs 3 to 5 above are hereinafter together referred to as 'the communications'.

7 ABN Amro Group NV ('the applicant' or 'ABN Amro') is a financial institution which has its registered office in Amsterdam (Netherlands) and which offers banking services to individuals, to undertakings and to institutional clients in 28 countries. The applicant holds 100% of the shares in ABN Amro Bank NV, which is organised across two client centres: (i) retail and private banking and (ii) commercial and merchant banking.

8 ABN Amro's current structure is the result of a 2007 agreement between the companies Fortis SA/NV, Royal Bank of Scotland and Banco de Santander for the acquisition and division into several parts of the former parent company ABN Amro Holding. In the context of financial crisis and uncertainty concerning the long-term viability of Fortis, in the autumn of 2008 the Dutch State acquired Fortis Bank Nederland (FBN), the Dutch banking subsidiary of Fortis, and some commercial units of ABN Amro Holding (including ABN Amro N). The Dutch State decided to merge FBN and ABN Amro N

to create a new legal entity, namely ABN Amro, following a plan envisaged by Fortis in 2007. Before that merger could be completed, the Dutch State had to ensure the sale of part of Hollandsche Bank-Unie and IFN Finance BV, in accordance with the Commission decision of 3 October 2007 declaring a concentration compatible with the common market (Case COMP/M.4844 — Fortis/ABN Amro assets) on the basis of Council Regulation (EC) No 139/2004 (OJ 2007 C 265, p. 2) (recitals 44 and 45 of the contested decision).

9 The acquisitions mentioned in the preceding paragraph and the recapitalisation measures carried out by the Dutch State for the benefit of ABN Amro gave rise to the investigation procedure C 11/2009. Since the various stages which led to that procedure, the progress of that procedure and the beneficiaries of the aid are not matters which are determinant of the outcome to these proceedings, reference is made to their detailed description in recitals 1 to 157 of the contested decision. In addition to the interim and provisional decisions taken by the Commission on the subject of the abovementioned acquisitions and measures, there can be found a description of the first version of an ABN Amro restructuring plan submitted to the Commission by the Dutch State on 4 December 2009 ('the December 2009 restructuring plan') and its updated version lodged on 8 November 2010 ('the November 2010 restructuring plan').

10 During the investigation procedure, the Dutch State, ABN Amro and the Commission variously held meetings and corresponded with each other in 2010 and 2011 on the subject of the scope and duration of a prohibition on making acquisitions (an 'acquisition ban'), a behavioural measure deemed necessary by the Commission if it was to be in a position to consider the aid granted to ABN Amro to be compatible with the internal market.

11 Having failed to obtain agreement on, inter alia, the terms of such a prohibition, the Commission adopted the contested decision, to which it attached conditions, in accordance with Article 7(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1). The Commission concludes there that ABN Amro received State aid in the form of recapitalisation aid to an estimated value of between EUR 4.2 and 5.45 billion (or between 2.75 and 3.5% of its risk-weighted assets), and liquidity aid amounting to EUR 71.7 billion (recitals 279 and 280 and Article 1 of the contested decision). The Commission considers that the December 2009 restructuring plan, updated by the November 2010 restructuring plan, provides sufficient evidence of the restoration of ABN Amro's long-term viability, provides for sufficient burden-sharing and contains adequate measures to limit undue distortions of competition. Consequently, the Commission conditionally declares the December 2009 Restructuring Plan as updated by the November 2010 Restructuring Plan to be in line with the Restructuring Communication (recital 331 of the contested decision).

12 The conditions subject to which the aid is deemed compatible with the internal market in Article 1 of the contested decision are set out in Articles 3 to 9 of that decision.

13 The acquisition ban laid down in Article 5 of the contested decision, the only provision the validity of which is contested in this action, is worded as follows:

'1. [ABN Amro] shall not acquire control of more than 5% of any undertaking.

2. By derogation from paragraph 1, [ABN Amro] may make acquisitions if the total gross cumulative purchase price (excluding the assumption or transfer of debt in relation to such acquisitions) paid by [ABN Amro] for all such acquisitions during a period of 3 years following the date of [the contested decision] is less than EUR [*confidential*] million[1].

1 — Redacted confidential data

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

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

…

3. The prohibition laid down in paragraph 1 shall apply for at least 3 years as from the date of [the contested decision] or until the date on which the [Dutch State's] shareholding stake in [ABN Amro] falls below 50%, whichever is later. That prohibition shall cease to apply at the latest 5 years as from the date of [the contested decision].

In the event that the prohibition laid down in paragraph 1 applies for more than 3 years as from the date of [the contested decision], the total gross cumulative purchase price applicable under subparagraph 1 of paragraph 2 shall be increased by EUR [*confidential*] per year.'

Procedure and forms of order sought by the parties

14 By application of 14 June 2011 ABN Amro brought this action.

15 On hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measures of organisation of procedure provided for under Article 64 of its Rules of Procedure, put to the parties written questions, to which the parties replied in the time allowed.

16 At the hearing on 4 June 2013, the parties presented oral argument and replied to oral questions put by the Court.

17 At the hearing, the Court asked ABN Amro to clarify its request for confidential treatment vis-à-vis the public of certain information contained in the procedural documents, which it did within the period allowed. The Commission was asked to submit its observations on that request, which it also did within the period allowed.

18 The oral procedure was closed on 16 July 2013.

19 ABN Amro claims that the Court should:

— annul Article 5 of the contested decision;

— order the Commission to pay the costs.

20 The Commission contends that the Court should:

— dismiss the action as inadmissible in part and as unfounded with respect to the remainder;

— order ABN Amro to pay the costs.

Law

21 In support of its action, ABN Amro relies on two pleas in law. In its first plea, it challenges the scope of the acquisition ban imposed on it. In its second plea, it contests the duration of the prohibition.

The first plea in law, concerning the scope of the acquisition ban

22 ABN Amro claims that the aid which was granted to it does not entail any distortion of competition, because the aid was not made necessary by excessive risk taking. Given that fact, the scope of the acquisition ban imposed on it, since the ban concerns the control of more than 5% of any undertaking whatsoever and since the exceptions are restrictively worded, is excessively wide and contrary to what is required by, in particular, the Restructuring Communication. Further, the prohibition at issue is wider than those imposed in other decisions adopted in the same period in relation to State aid in the financial sector. Moreover, the Commission failed to take into account, to the requisite legal standard, the alternative formulations of that prohibition, justified by the particular circumstances of the case, proposed by the Dutch State and ABN Amro during the investigation procedure.

23 Those grounds of complaint are set out in four parts, which concern, respectively, an infringement of Article 107(3)(b) TFEU and a misapplication of the communications, an infringement of the principle of proportionality, an infringement of the principle of equal treatment and an infringement of the principle of good administration, together with a failure to state reasons under Article 296 TFEU.

The first part: infringement of Article 107(3)(b) TFEU and misapplication of the communications

24 This part can be broken down into two grounds of complaint, relating to, on the one hand, an infringement of Article 107(3)(b) TFEU and, on the other, misapplication of the communications. It is appropriate to consider the second ground of complaint first.

– The second ground of complaint: misapplication of the communications

25 As a preliminary, a number of points need to be clarified in relation to how this ground of complaint is to be analysed.

26 First, the acquisition ban is one of the conditions imposed by the Commission in Articles 3 to 9 of the contested decision in order to be able to declare the State aid granted by the Dutch State to ABN Amro compatible with the internal market, in accordance with Article 7(4) of Regulation No 659/1999, which permits the Commission to close the formal investigation procedure with a positive decision to which there are attached conditions enabling it to consider the aid in question to be compatible with the internal market. The background to the condition at issue is therefore the investigation, carried out by the Commission, of the compatibility of the aid under Article 107(3) TFEU.

27 The Commission correctly states that in the application of Article 107(3) TFEU it has a wide discretion the exercise of which involves economic and social assessments which must be made in a European Union context (Case T-17/03 *Schmitz-Gotha Fahrzeugwerke* v *Commission* [2006] ECR II-1139, paragraph 41, and Joined Cases T-267/08 and T-279/08 *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission* [2011] ECR II-1999, paragraphs 129 and 132).

28 The Commission may, in order to exercise that discretion, adopt rules of guidance, such as the communications, so long as those rules do not depart from the provisions of the Treaty (see *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, paragraph 27 above, paragraph 130 and case-law cited).

29 As ABN Amro points out, the Commission, in adopting rules of conduct and announcing by publishing them that it will henceforth apply those rules to the cases to which they relate, itself imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as the principles of equal treatment or the protection of legitimate expectations (see Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 60 and case-law cited). Thus, in the specific area of State aid, the Commission is bound by the guidelines and communications that it adopts, in so far as they do not depart from the rules in the Treaty and are accepted by the Member States (see *Germany and Others* v *Kronofrance*, paragraph 61 and case-law cited). It is therefore for the Court to determine whether the Commission has observed the rules which it adopted (see *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, paragraph 27 above, paragraph 131 and case-law cited).

30 Second, within this ground of complaint, it is not the investigation of the aid's compatibility which requires review, but the question whether the Commission complied with the communications, which are binding on it, in accordance with the case-law cited in paragraph 29 above, by making the decision on compatibility conditional on a prohibition on making acquisitions of the kind defined in Article 5 of the contested decision.

31 The communications, the legality and applicability of which are not challenged by ABN Amro, describe the discretion of the Commission as regards the conditions which must be met before an aid measure which remedies a serious disturbance in the economy of a Member State can be declared to be compatible with Article 107(3)(b) TFEU, in particular, as regards the formulation of structural or behavioural measures. The existence of such a discretion, an expression of the margin of appreciation allowed to the Commission for determining the compatibility of an aid measure, must be taken into account in the analysis of grounds of complaint alleging an infringement of the communications (see, to that effect and by analogy, Case T-301/01 *Alitalia* v *Commission* [2008] ECR II-1753, paragraph 527).

32 Third, the legality of the acquisition ban cannot be assessed if that measure is isolated from its context, in respect of the objectives of bank restructuring laid down in the communications and the importance of the beneficiary bank's risk profile in the analysis of the aid's compatibility. Further, as regards the structural or behavioural measures which complement the restructuring plan proposed by the Member State to the Commission in order to enable the Commission to declare aid compatible with the internal market, the measures thus imposed were evaluated as a whole by the Commission in its analysis of the aid's compatibility. It may be added that ABN Amro does not dispute the Commission's position that the acquisition ban cannot be assessed in isolation.

33 Fourth, the parties are in agreement on the threefold objective pursued by the restructuring measures imposed on the banks which are beneficiaries of State aid in the context of the communications, and in particular, the Restructuring Communication, which is specifically referred to in the contested decision in order to justify the imposition of the acquisition ban at issue, namely to ensure the long term viability of the beneficiary body, to limit the aid to the minimum necessary and to limit distortions of competition.

34 It is in the light of those principles that the Court must examine ABN Amro's two lines of argument concerning (i) the justification of the acquisition ban and (ii) the lack of a provision in the contested decision allowing the possibility of submitting a request for approval of specific transactions.

35 As regards (i) the justification of the acquisition ban, according to ABN Amro, that prohibition is excessively strict by comparison with the principles set out in the communications in so far as, in essence, first, the prohibition applies to any type of undertaking and not simply to competing businesses or financial institutions and, secondly, it applies to any acquisition above that of a minority shareholding of 5%.

36 The Commission states the reasons for the acquisition ban in, in particular, recitals 309 to 313 of the contested decision, where the following is stated:

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

(310) The Restructuring Communication recalls that an acquisition ban is necessary to keep the aid limited to the minimum necessary. Point 23 of the Restructuring Communication mentions explicitly that "an undertaking should not be endowed with public resources which could be used to finance market-distorting activities not linked to the restructuring process. For example, acquisitions of shares in other undertakings or new investments cannot be financed through State aid unless this is essential for restoring an undertaking's viability".

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

(312) In line with point 40 of the Restructuring Communication, the aid can only be declared compatible on the condition that [ABN Amro] strictly applies an acquisition ban in the three years following the date of the present Decision. The acquisition ban should be extended if the Dutch State continues to own more than 50% of [ABN Amro] after 3 years. However, the acquisition ban should not extend beyond 5 years. While part of the aid has already been redeemed, some measures … cannot be redeemed by the bank due to the form in which they were granted (i.e. not in the form of a hybrid debt instrument). The end of the State ownership is a proxy for estimating when the advantage derived from the aid ends.

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

37 First, according to ABN Amro, in essence, as distinct from the broad prohibition imposed on it in Article 5 of the contested decision, a prohibition should only concern acquisitions which have an effect on competition. It refers, in that regard, particularly to points 39 and 40 of the Restructuring Communication and the second sentence of point 23 thereof. That is also apparent, ABN Amro

claims, from the Communication from the Commission on the treatment of impaired assets in the Community banking sector, concerning the establishing of safeguards to avoid the financing of a growth strategy on the part of beneficiary banks to the detriment of their competitors.

38 ABN Amro adds that recital 312 of the contested decision, describing in general terms the prohibition imposed on it, contains a misinterpretation of point 40 of the Restructuring Communication in so far as point 40 refers only to the acquisitions of competing businesses.

39 It is clear that the arguments of ABN Amro rest on a misreading of the contested decision and of the Restructuring Communication, which governed the formulation of the acquisition ban at issue, as is clear from the recitals 309 to 312 of the contested decision cited in paragraph 36 above.

40 Point 23 of the Restructuring Communication constitutes the principal basis for the acquisition ban imposed in this case, as is very clear from recitals 309 and 310 of the contested decision, which are to be found in Section 6.3.2 of that decision, headed 'Burden sharing/Minimum necessary'.

41 Point 23 is included within Section 3 of the Restructuring Communication, headed 'Own contribution by the beneficiary (burden sharing)' and reads, under the heading 'Limitation of restructuring costs' as follows:

'Restructuring aid should be limited to covering costs which are necessary for the restoration of viability. This means that an undertaking should not be endowed with public resources which could be used to finance market-distorting activities not linked to the restructuring process. For example, acquisitions of shares in other undertakings or new investments cannot be financed through State aid unless this is essential for restoring an undertaking's viability …'

42 Point 23 refers, by way of a footnote, to the case-law on the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12), according to which restructuring aid must be strictly necessary to restore the viability of the beneficiary, that is to say, that it must not only meet the objective pursued of restructuring the undertaking concerned, but also be proportionate to that objective, that is to say, that any aid in excess of the strict return to viability of the beneficiary cannot in principle be eligible under those guidelines (*Schmitz-Gotha Fahrzeugwerke* v *Commission*, paragraph 27 above, paragraph 47).

43 The principle that the amount of the aid should be limited to the minimum necessary is closely linked to the principle that the beneficiary must make an appropriate contribution to the restructuring costs. Point 22 of the Restructuring Communication states in that regard that the bank and its capital holders should contribute as much as possible to those costs with their own resources, such a contribution being necessary 'to ensure that rescued banks bear adequate responsibility for the consequences of their past behaviour and to create appropriate incentives for their future behaviour'.

44 Having regard to those principles, ABN Amro's argument is based on a misconception when it states that an acquisition ban, referred to in the Restructuring Communication, can concern only competing businesses. The last sentence of point 23 of that communication makes no distinction based on the business sector of the target undertakings. Further, it is indicated at the beginning of point 23 that the aim of acquisitions must be to ensure the viability of the body receiving aid, which means that any acquisition, financed by means of State aid, which is not strictly necessary to ensure the return to viability of the beneficiary company is in breach of the principle that the aid must be limited to the strict minimum.

45 As the Commission contends, the second sentence of point 23 of the Restructuring Communication, which refers to a prohibition on the financing of 'market-distorting' activities, states that any acquisition not linked to the restructuring process can as such be identified as market-distorting. The distortion of competition or the threat of such distortion is a defining constituent of State aid within

the meaning of Article 107(1) TFEU (see, to that effect, Case C-399/08 P *Commission* v *Deutsche Post* [2010] ECR I-7831, paragraph 39 and case-law cited). ABN Amro does not dispute that it is the beneficiary of State aid in this case.

46 In the light of the foregoing, the acquisition ban in Article 5 of the contested decision did not have to relate solely to shareholdings in businesses active in the financial sector or in the Netherlands, but could potentially relate to any acquisition, the objective being to ensure that the money of the bank receiving the aid should be used for the repayment of that aid prior to the bank making any acquisitions.

47 In that regard, another point of relevance, as the Commission indicates, is the fact, referred to in recitals 304 to 308 and 313 of the contested decision, that ABN Amro was a viable entity, a fact highlighted in the December 2009 and November 2010 restructuring plans which reported an expected return on equity in 2012 and 2013 of approximately [*confidential*] %, as stated in recital 83 of the contested decision. It may be added that ABN Amro itself refers to its financial well-being. As stated in recital 313 of the contested decision, in the case of ABN Amro the restoration of viability was therefore not dependent on acquisitions.

48 Consequently, an acquisition ban extending to businesses in all sectors is consistent with the principles contained in the communications and, in particular, in the Restructuring Communication.

49 That conclusion is not affected by the fact that points 39 and 40 of the Restructuring Communication, included in Section 4 of that communication, headed 'Limiting distortions of competition and ensuring a competitive banking sector', are referred to in recitals 311 and 312 of the contested decision both as a reminder that the Restructuring Communication also provides for the imposition of acquisition bans to ensure that State aid is not used to the detriment of competitors and in order to determine the duration of the prohibition. Recital 321 of the contested decision, in Section 6.3.3 of that decision, headed 'Measures to limit distortions of competition', also refers, equally briefly, to the fact that it must be ensured that the State aid is not used by ABN Amro to grow at the expense of its competitors, for instance by acquiring other financial institutions.

50 It does not follow from the existence of that secondary objective that the concern to limit the aid to the minimum necessary is not, clearly, the principal reason for the acquisition ban imposed in this case. Further, in any event, point 39 of the Restructuring Communication, which states that State aid must not be used to the detriment of competitors who do not enjoy similar public support, and point 40 of that Communication, which relates to the condition that the banks should not use State aid for the acquisition of competing businesses, cannot be considered in the abstract, but must be read together with the principle that the aid should be limited to the minimum necessary. Point 40 of the Restructuring Communication refers to a footnote where it is stated that restructuring costs have to be limited to the minimum necessary for the restoration of the beneficiary's viability and reference is made, in that regard, to point 23 of that Communication, examined above.

51 Second, ABN Amro claims that the fact that the acquisition ban concerns shareholdings above a threshold of 5% and not acquisitions conferring control within the meaning of European Union rules on mergers jeopardises its ability to participate in joint ventures, which in the financial sector are often useful for the development of new standards, guaranteeing the functioning of financial services and ensuring payment services.

52 In that regard, ABN Amro also contests the fact that the prohibition is not limited to the acquisition of shares and that the contested decision does not define what is meant by 'control of more than 5%' of any undertaking, with the consequence that the prohibition might also extend to, for example, contractual rights.

53 Those arguments also fail to demonstrate an infringement of the Restructuring Communication.

54 As the Commission observes, point 23 of the Restructuring Communication refers, broadly, to a prohibition on acquiring 'shares in other undertakings or [effecting] new investments' and is therefore not restricted to controlling shareholdings. Any other interpretation would not respect the objective of the principle of limiting the aid to the minimum necessary, recalled in paragraph 44 above. The acquisition rules referred to or the term 'undertaking', used in Article 5 of the contested decision, did not therefore require further detail and a definition of the concept of 'control of more than 5%' was equally not required.

55 Third, none of the other arguments put forward by ABN Amro is sufficient to demonstrate an infringement of the Restructuring Communication.

56 ABN Amro's argument that it should be free to make acquisitions, because its restructuring has been completed and because, given its good financial health, the additional acquisitions which it envisages making are not financed by State aid, so that point 23 of the Restructuring Communication is not applicable to it, must be rejected. As the Commission argues, given that it is as a result of the provision of State resources that ABN Amro was able to complete its restructuring, profits generated subsequently should be used to repay the Dutch State, in accordance with the exit strategy submitted to the Commission, particularly in the context of the December 2009 restructuring plan, where the Dutch State gave an undertaking that any surplus capital would give rise to dividend payments.

57 Likewise, as regards the argument that, in the case of ABN Amro, acquisitions cannot cause any delay in repayment of the aid, because the Dutch State is the owner of the bank and the aid in the form of capital cannot be redeemed, the Commission's analysis, that Article 5 of the contested decision is intended to ensure that, in the event that there is surplus capital, it is not used in order to obtain external growth greater than foreseen in the restructuring plan, is not manifestly incorrect, since such a surplus may for instance be used to pay an extraordinary dividend to the State.

58 As regards ABN Amro's argument that its dividend policy, on the basis of which it is obliged to pay to the Dutch State a dividend of 40% of the reported annual profit, would prevent it from accumulating funds which could be used for acquisitions, ABN Amro itself recognises that such a policy is the normal means of remunerating shareholders. Besides the fact that, as the Commission states without challenge by ABN Amro, that objective is non-binding, it is clear that the fact that part of the annual profit is distributed to shareholders does not eliminate any risk that the bank will have available to it sufficient resources to make acquisitions.

59 As regards ABN Amro's argument that, if additional safeguards were required other than the target dividend payout ratio, the Commission should have accepted the 'netting mechanism' proposed by it, on the basis of which acquisitions could only be made using funds which had been obtained from divestments, the Commission is correct to hold that such a mechanism is not compatible with the principle of limitation of the aid to the minimum necessary, which is intended, as stated in paragraphs 44 and 46 above, to ensure that the money of the bank receiving the aid should be used for the repayment of that aid prior to its making any acquisitions, with the exception of acquisitions which are necessary to ensure the viability of the bank. The possibility of ABN Amro having resources available to make acquisitions in the years following recapitalisation by the State would show, according to the Commission, that the aid was not limited to what was necessary to restore its viability.

60 As regards the argument that the imposition on ABN Amro of a prohibition on readjusting its portfolio through limited divestments and acquisitions leads to inefficiencies, given, inter alia, that it had to deal with the fact that the inherited assets were dispersed, it must be observed that the contested decision does not prohibit divestments and contains both a *de minimis* exception and an exception in respect of certain types of acquisitions (see also the consideration of the second part below), but that does not mean that the income from such divestments should be unaffected by the obligation to limit the aid to the minimum necessary. Further, it is clear that that argument of ABN

Amro amounts to no more than a general assertion which is not supported by any concrete evidence. For the remainder, as regards ABN Amro's argument, also put forward at the hearing, that the Commission could not prohibit it from carrying out, inter alia, transactions relating to dispersed assets of Fortis located outside the Netherlands, as necessary to ensure a minimum level of efficiency in its business in the Netherlands private banking sector, suffice it to note that the Restructuring Communication adopts as a criterion for the adoption of remedial measures not the efficiency of the beneficiary bank's business, but rather its viability. The fact that ABN Amro might have experienced practical difficulties during the administrative procedure in respect of the identification of specific transactions by reason of the fact that the process of integrating FBN and ABN Amro N was not complete does not affect the foregoing.

61 As regard's ABN Amro's argument in relation to the logic of imposing an acquisition ban when no limitation is imposed on the organic growth of the beneficiary bank, for instance in the form of a restriction on balance sheet growth, since a restriction solely on acquisitions demonstrates an arbitrary bias against growth by acquisition, the Commission contends that the principle that aid must be limited to the minimum necessary enables it to impose a limitation on the organic growth of a beneficiary bank, if it is apparent from the restructuring plan that the expected growth is manifestly out of proportion to what is necessary to ensure the bank's long term viability, which did not apply in this case. In that regard, suffice it to observe that ABN Amro does not contradict the Commission's statement that the Dutch State guaranteed during the investigation procedure that ABN Amro's organic growth would not be abnormal. That being the case, it cannot be held that the Commission committed a manifest error by focusing solely on acquisitions.

62 Last, as regards ABN Amro's complaint that the Commission's analysis amounts to taking the view that the fact that a beneficiary makes acquisitions demonstrates by definition that the aid is not limited to the minimum necessary and that, accordingly, the Commission disregards the causal link required in the Restructuring Communication between the State aid and the way in which an acquisition is financed, ABN Amro's argument cannot be accepted. As the Commission correctly maintains, since money is fungible, a source of financing an acquisition has no direct and necessary link with a specific asset of a bank. The use of funds which are not obtained from the State for undertaking acquisitions may be an indication that the need for aid was overestimated.

63 It follows from the foregoing that ABN Amro has not demonstrated that the Commission infringed the Restructuring Communication by holding that the principle of limiting the aid to the minimum necessary enables it to impose an acquisition ban of such a wide scope. That holds true a fortiori when account is taken both of the discretion available to the Commission in accordance with the communication at issue in respect of the definition of the structural and behavioural measures to be imposed on a beneficiary and of the fact that, although the financial aid granted was very substantial, no structural measures were imposed on ABN Amro in this case, as will be further examined in relation to the other parts of the first plea in law.

64 As regards (ii) the lack of provision in the contested decision for the possibility of submitting specific transactions for approval, according to ABN Amro, the Commission was in breach of the Restructuring Communication by refusing to include in the contested decision a provision enabling approval to be sought from the Commission on notification of specific acquisitions, although a request to that effect was made during the investigation procedure.

65 In that regard, it must be recalled that the exceptional authorisation of acquisitions is addressed in point 41 of the Restructuring Communication, included in Section 4 of that communication, headed 'Limiting distortions of competition and ensuring a competitive banking sector', which follows point 40 on the prohibition on acquiring competing businesses. Point 41 reads as follows:

'In exceptional circumstances and upon notification, acquisitions may be authorised by the Commission where they are part of a consolidation process necessary to restore financial stability or to ensure effective competition. The acquisition process should respect the principles of equal opportunity for all potential acquirers and the outcome should ensure conditions of effective competition in the relevant markets.'

66 It follows from that provision that, as the Commission contends, its power to authorise acquisitions, subsequent to a decision to approve aid which includes an acquisition ban, does not derive from a specific provision to that effect in the contested decision, but stems from its general powers as an administrative authority which, as the author of the contested decision, has the power to revoke it or modify it. The lack of a specific mention of that power in the contested decision cannot therefore be categorised as an infringement of the Restructuring Communication. The ground of complaint must therefore be rejected.

67 It follows from the foregoing that the ground of complaint alleging infringement of the communications must be rejected.

– The first ground of complaint: infringement of Article 107(3)(b) TFEU

68 The Commission claims that, since the application contains no argument in support of an alleged infringement of Article 107(3)(b) TFEU, the ground of complaint is inadmissible.

69 In that regard, it is clear that ABN Amro claims that, by reason of the fact that the communications contain guidelines on the application of Article 107(3)(b) TFEU, it proves an infringement of that provision by establishing that the Commission departed from those communications. Contrary to the contention of the Commission, that ground of complaint meets the requirements of Article 44(1)(c) of the Rules of Procedure, which requires that the application contains the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.

70 However, as regards the substance, that ground of complaint cannot be upheld. Given that the ground of complaint alleging an infringement of the communications has been rejected and that no argument other than those concerning the failure to comply with them has been advanced by ABN Amro in support of the complaint alleging an infringement of Article 107(3)(b) TFEU, the latter ground of complaint must be rejected for the same reasons.

71 It follows that the first part of the first plea in law must be rejected in its entirety.

The second part: infringement of the principle of proportionality

72 ABN Amro claims that the Commission infringed the principle of proportionality by failing to examine whether a less onerous measure than an acquisition ban of a scope as wide as that defined in Article 5 of the contested decision might have been imposed on it. ABN Amro states that, during the administrative procedure, it proposed various alternative formulations, which would have been sufficient to meet its main concerns while still fully addressing the interests of the Commission. Further, as regards the principle that State aid must not be used for making acquisitions, ABN Amro maintains that it would have provided guarantees that that would not be the case. ABN Amro also claims that the *de minimis* exception provided in the contested decision does not address its concerns. Last, ABN Amro states that the Commission itself recognises that the situation in which

ABN Amro finds itself is unique and confirms that the need for State measures is not a consequence of the business of FBN and ABN Amro N. Given that the aid granted in this case created fewer distortions than aid granted to other financial institutions, and approved, the Commission was, according to ABN Amro, under a duty to investigate the least restrictive behavioural remedies to address the distortions identified.

73 The Commission contends that the definition of the scope of the acquisition ban in the contested decision is compatible with the principle of proportionality. It states that it examined all the options submitted to it by the Dutch State and by ABN Amro, but, faced with the latter's intransigence in relation to the scope of that prohibition, it imposed a condition which made it possible to achieve the objectives of the Restructuring Communication while being limited to the least restrictive form that would attain those objectives.

74 The principle of proportionality requires that measures adopted by European Union institutions should not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see Case C-283/11 *Sky Österreich* [2013] ECR, paragraph 50 and case-law cited).

75 As a general principle of European Union law, the principle of proportionality is a criterion for the lawfulness of any act of the institutions of the European Union, including decisions taken by the Commission in its capacity of competition authority (Case C-441/07 P *Commission* v *Alrosa* [2010] ECR I-5949, paragraph 36).

76 The communications also refer to the Commission's duty to respect the principle of proportionality. The Restructuring Communication, in particular, contains in Section 4, headed 'Limiting distortions of competition and ensuring a competitive banking sector', a subsection headed 'Applying effective and proportionate measures limiting distortions of competition', where it is stated that measures intended to limit distortion of competition should be 'tailor-made' to address the distortions on the markets where the beneficiary bank operates following its return to viability after restructuring, while adhering to a common policy and principles. It is also stated that the nature and form of such measures will depend on two criteria: first, the amount of the aid and the conditions and circumstances under which it was granted and, second, the characteristics of the market or markets on which the beneficiary bank will operate.

77 There remains however the question of the scope and exact limit of the obligations on the Commission which stem from respect for that principle and the question of the limits of judicial review to be carried out in a case such as this.

78 In that regard, the Court must take into consideration the specific context of the contested decision and, in particular, of the acquisition ban which is challenged in this action. As stated in paragraph 10 above, on many occasions during the investigation procedure the Dutch State, ABN Amro and the Commission expressed their views to each other on, inter alia, the scope of the acquisition ban and its duration, which were the subject of various alternative formulations proposed by the Dutch State with the assistance of ABN Amro. Since the Commission regarded none of those proposals as satisfactory, it imposed a prohibition as defined in Article 5 of the contested decision, on the basis of Article 7(4) of Regulation No 659/1999. That prohibition was therefore at no time approved by the Dutch State, and consequently it cannot he held that it was an integral part of the restructuring plan submitted by the Dutch State or of its commitments.

79 In a case such as this, it cannot therefore be held that the Commission's obligation to examine the proportionality of the condition at issue is diminished by the role played by the Member State concerned, since that State neither proposed nor accepted that commitment.

80 However, as stated in connection with the first part of this plea in law (paragraph 32 above), the acquisition ban is not an isolated measure, but must necessarily be assessed in the context of the restructuring plans submitted by the Dutch State. Even though that prohibition is not formally part of that plan, those measures taken as a whole enabled the Commission to hold that the aid was compatible with the internal market.

81 Further, it has also been stated, in the examination of the first part of this plea in law (paragraph 31 above), that, having regard to the nature of the compatibility investigation, the Commission enjoyed a wide discretion in respect of its assessment of, inter alia, the question whether a combination of measures enabled it to hold that aid was compatible with the internal market, and consequently review by the Court in that regard was necessarily limited.

82 In the circumstances of this case, it is however unnecessary to decide whether, taking into account that limited review, the Court may examine whether the Commission checked the proportionality of individual measures, since, in any event, in this case, the Commission was not in breach of the principle of proportionality by imposing an acquisition ban in Article 5 of the contested decision.

83 It is necessary, first, to recall the objectives pursued by the acquisition ban. As was stated in paragraph 33 above, the restructuring measures imposed in accordance with the Restructuring Communication reflect a threefold objective of ensuring the long-term viability of the beneficiary, limiting the aid to the minimum necessary and limiting distortions of competition. It is clear from paragraphs 309 to 313 of the contested decision, quoted in paragraph 36 above, that the Commission imposed that prohibition in order to prevent distortions of competition, but primarily with the objective of limiting the aid to the minimum necessary, in accordance with that communication.

84 It is apparent from the examination of the second ground of complaint in the first part of this plea in law, set out above, that the acquisition ban laid down in Article 5 of the contested decision is manifestly capable of meeting those objectives. Since it is broadly defined, referring to the acquisition of shareholdings of more than 5% in any type of undertaking (paragraph 1), while providing for exceptions for acquisitions of a *de minimis* amount and for certain specific types of acquisitions (paragraph 2), it ensures that ABN Amro, having received substantial State resources, partly in a form which was not redeemable, will not use those resources to finance activities which are market-distorting or which are not linked to the restructuring process.

85 As regards ABN Amro's argument that the prohibition at issue is in breach of the principle of proportionality because the Commission rejected formulations of a prohibition of more limited scope, proposed by the Dutch State and itself, which would have achieved the same objectives, having regard to the importance legitimately accorded by the Commission to the principle that the aid should be limited to the minimum necessary, that argument cannot be accepted.

86 It has been observed in connection with the first part of this plea that ABN Amro's dividends policy offers no guarantees as regards the use of surplus capital (paragraph 58 above). Likewise, the option of restricting the prohibition to acquisitions of shareholdings greater than 5% in other undertakings or the approach of offsetting divestments and potential acquisitions do not satisfy the criterion that the aid should be limited to the minimum necessary, which rules out any acquisition financed by means of State aid which is not strictly necessary to ensure the return to viability of the beneficiary company (see, inter alia, paragraphs 47, 54 and 59 above). Further, it is obvious that the 'netting mechanism' proposed by ABN Amro, whereby, in essence, the Commission would accept new acquisitions provided that their value was the same as that of a divestment by the bank, would be more complicated to implement and easier to circumvent. It has therefore not been established that these are appropriate alternative approaches for the purposes of the case-law cited in paragraph 74 above.

87 As regards the alternative wording of the exception to the acquisition ban proposed by the Dutch State and ABN Amro, concerning the exclusion of acquisitions 'related to administration, service or IT companies with the objective to increase process efficiency of the current activities', it must be borne in mind that, at ABN Amro's request, Article 5(2) of the contested decision provides, in addition to an exception for *de minimis* acquisitions, the exclusion of private equity acquisitions which fit with its business plan and with the budget of its 'Private Equity' division, and also certain equity acquisitions by ABN Amro's 'Energy, Commodities and Transportation' division which support its normal financing business and which fit with ABN Amro's business plan and the planned budget of the latter division.

88 Admittedly, at a certain stage in the administrative procedure, the Dutch State and ABN Amro proposed that the exception should include the wording mentioned in paragraph 87 above. In response to that proposal, the Commission indicated that it was open to an examination of additional exceptions to the acquisition ban if it was shown that such acquisitions were necessary to ensure the viability of the undertaking. ABN Amro replied that it could not identify specific transactions, because that would depend on the availability of attractive targets that fitted with its portfolio in the private banking sector and that it was currently undertaking a strategic review of its portfolio. However, in the same way as it was recognised in connection with the first part of this plea in law that the Commission did not infringe the communications or commit a manifest error of assessment by requiring a link between the possibility of making acquisitions and ensuring the viability of the bank, that approach by the Commission cannot be categorised as an infringement of the principle of proportionality, since the exception proposed does not clearly enable the Commission to ensure that the amount of aid was limited to the minimum necessary.

89 In general, with regard to the fact that the exceptions to the prohibition, as laid down in the contested decision, do not, according to ABN Amro, make it possible to achieve the required rebalancing of its portfolio of assets and therefore prevent it from functioning in a way it considers satisfactory, although a number of formulations proposed by it would have allowed that balancing, since the efficiency of the beneficiary undertaking is not, as was stated in paragraph 60 above, a criterion which is adopted in the Restructuring Communication, nor does that fact demonstrate an infringement of the principle of proportionality.

90 Further, as regards whether the Commission might have envisaged imposing a restriction on ABN Amro's balance sheet growth in place of the acquisition ban imposed in the contested decision, ABN Amro stated, in reply to a written question from the Court, that that measure had not been proposed as an alternative approach in the course of the investigation procedure.

91 Last, in relation to ABN Amro's argument that the Commission failed to take sufficient account of the low risk to competition presented by the State aid granted to it as compared with aid to other banks, given that it is common ground that, in its case, the need for aid was not a consequence of the business of FBN and ABN Amro N in the past, regardless of whether such an argument concerns an obligation incumbent on the Commission because it must respect the principle of proportionality and accordingly cannot be validly relied upon in order to challenge the appropriateness of the acquisition ban, that argument cannot be accepted.

92 Although the Commission recognises, in particular in recital 320 of the contested decision, that the need of FBN and ABN Amro N for the aid granted in this case does not arise because they took flawed management decisions and that, accordingly, the aid granted in this case is clearly less distortive than aid granted to other financial institutions which accumulated excessive risks, the Commission is correct to argue that the fact that the aid does not create moral hazard does not thereby mean that it does not distort or threaten to distort competition, as stated in paragraph 45 above.

93 Moreover, it is apparent from the communications that, while the beneficiary bank's risk profile is an important factor in the assessment of the need for behavioural measures, it is necessary to take into consideration other factors, such as whether there are structural measures involved, as ABN Amro does not dispute.

94 Point 38 of the Recapitalisation Communication, which is quoted by ABN Amro itself, is clear in that regard:

'The extent of behavioural safeguards will be based on a proportionality assessment, taking into account all relevant factors and, in particular, the risk profile of the beneficiary bank.'

95 It follows that, in the assessment of the raison d'être of behavioural measures, account must be taken not only of the bank's risk profile, but also of other factors and, for example, whether there are structural measures.

96 Further, the annex to the Recapitalisation Communication sets out a list of indicators for the assessment of a bank's risk profile. As the Commission points out, the criterion of the size of the recapitalisation required, whether or not it is more than 2% of the bank's risk weighted assets, is an important indicator.

97 However, as regards the aid granted to ABN Amro, it is apparent from recitals 279 and 280 of the contested decision that ABN Amro received recapitalisation aid to an amount significantly higher than the threshold of 2% of risk weighted assets, as well as liquidity aid amounting to EUR 71.7 billion.

98 Next, as the Commission cannot but point out, it is apparent from recital 320 of the contested decision that the Commission held that the need to receive State aid in this case did not stem 'primarily' from flawed management decisions in the past. The Commission therefore held that the aid was less market-distortive than aid to banks which had accumulated excessive risks. For that reason, divestments of businesses, other than those of Hollandsche Bank-Unie and IFN Finance, which ABN Amro had carried out in the context of the authorisation of the merger between ABN Amro N and FBN (see paragraph 8 above), were not held to be necessary.

99 For the sake of completeness, it may be added that, as regards the other divestments of businesses undertaken by ABN Amro before the adoption of the contested decision, recital 316 of that decision refers to the sale of the companies Prime Fund Solutions (PFS) and Intertrust. Those sales are also mentioned in recital 330 of the contested decision, which is part of Section 6.3.3, which relates to measures adopted to limit distortions of competition. The Commission is correct to argue that the divestment of PFS may be regarded as a measure which was taken by ABN Amro in order to ensure its viability. That is clear from recital 308 of the contested decision, where reference is made to the fact that PFS constituted a threat to viability, because of its substantial 'Madoff-related' losses in 2008, a matter which ABN Amro does not dispute. As regards Intertrust, that divestment was on the initiative of ABN Amro and, even though the Commission held that the result was positive for competition, was of small scale (recital 72 of the contested decision). Further, in response to ABN Amro's argument, presented in the application and underlining the importance of the divestment of Intertrust, given the scale of its business in global trust and corporate management, the Commission added that Intertrust had issues in respect of its reputation and that other banks had divested themselves of their businesses in that area, as is not contradicted by ABN Amro. It has not therefore been clearly established that those divestments of business are to be regarded as structural remedies which must call into question the severity of, or the need for, the acquisition ban decided on by the Commission.

100 Consequently, ABN Amro's argument that a behavioural measure less severe than the acquisition ban at issue should have been imposed on it, given the circumstances of this case with regard to its risk profile and the claim that the aid was not harmful, or that the Commission failed to take sufficient account of those particular features, must be rejected.

101 The applicant has therefore failed to demonstrate that, by defining the scope of the acquisition ban as laid down in Article 5 of the contested decision, the Commission was in breach of the principle of proportionality. The second part of the first plea in law must, accordingly, also be rejected.

The third part: an infringement of the principle of equal treatment

102 ABN Amro claims that the Commission infringed the principle of equal treatment by imposing in this case an acquisition ban which is significantly more strict than in other decisions.

103 ABN Amro argues, first, that the vast majority of relevant decisions adopted at the same time do no more than prohibit the acquisition of financial institutions or competing businesses or restrict acquisitions which do not correspond to the business model of the bank concerned. That applies to, inter alia, the following Commission decisions: Decision C(2009) 3708 final of 5 May 2009 on State aid N 244/09 to Commerzbank ('the Commerzbank decision'); Decision C(2009) 9087 final of 18 November 2009 on State aid N 428/09 by the United Kingdom to Lloyds Banking Group ('the Lloyds decision'); Decision C(2009) 8980 final of 18 November 2009 on State aid C 18/09 (ex N 360/09) by Belgium to KBC ('the KBC decision'), Decision C(2009) 2585 final corr. of 31 March 2009 on aid C 10/09 (ex N 138/09) by the Netherlands to ING ('the ING decision'), Decision C(2009) 1012 final of 14 December 2009 on State aid N 422/09 and N 621/09 by the United Kingdom to Royal Bank of Scotland ('the RBS decision'), Decision C(2009) 5260 final of 30 June 2009 on State aid C 17/09 (ex N 265/09) by Germany to LBBW ('the LBBW decision'), Decision C(2008) 7388 final of 19 November 2008 on State aid C 9/09 (ex NN 49/08, NN 50/08 and NN 45/08) to Dexia ('the Dexia decision') and Decision C(2009) 8558 final of 4 November 2009 on State aid C 32/09 (ex NN 50/09) by Germany to Sparkasse Köln/Bonn ('the Sparkasse Köln/Bonn decision').

104 Second, according to ABN Amro, most of the relevant decisions, including the Lloyds, ING, RBS and LBBW decisions, prohibit only the full acquisition of companies or the acquisition of control of them. Other decisions, including Commission Decision C(2010) 5740 final of 17 August 2010 on restructuring aid N 372/09 granted by the Dutch State to Aegon ('the Aegon decision') and the Sparkasse Köln/Bonn decision prohibit only acquisitions of stakes which are significantly larger than 5%. There is no relevant decision which prohibits the acquisition of more than 5% of any undertaking, even though almost all the other financial institutions concerned received a significantly higher amount of aid.

105 ABN Amro argues, further, that the exceptions provided to the prohibition at issue have no effect on whether an infringement of the principle of equal treatment should be identified, since decisions containing a prohibition of a more limited scope contain similar exceptions, while other decisions contain additional exceptions, some of which were also requested by ABN Amro but refused by the Commission.

106 Moreover, ABN Amro states that the strictness of the prohibition imposed on it is all the more surprising considering that almost all the other financial institutions on whom there was imposed a comparable, but less strict, prohibition received a significantly higher amount of aid, both in absolute as well as in relative terms.

107 In addition, ABN Amro rejects the Commission's argument that its situation cannot be compared with that of other banks which were also compelled to adopt structural measures. According to ABN Amro, those structural measures were imposed on those other banks in the interests of long-term viability. ABN Amro states, further, that it also divested itself of a number of assets.

108 Last, ABN Amro states that the possibility of submitting a reasoned request in order to obtain approval of a specific transaction was provided for in many other decisions, but, in this case, the Commission refused to include such a possibility in the contested decision notwithstanding an express request to that effect.

109 The Commission contends that this part of the plea in law is manifestly unfounded, since each case of State aid must be assessed separately and aid such as that at issue can be approved only if the three essential conditions of the Restructuring Communication are satisfied, which requires an assessment based on the restructuring plan and on the commitments and conditions concerned, and consequently a single measure cannot be analysed in isolation.

110 The general principle of equal treatment, as a general principle of European Union law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23 and case-law cited).

111 Further, the Restructuring Communication states, in point 38, that in assessing the scope of 'structural remedies' required to overcome distortions of competition in a given case, the Commission will take into account, with due regard to the principle of equal treatment, the measures provided for at the same time in cases relating to the same markets or market segments. Admittedly, 'structural remedies' generally have more significant effects on competition in a sector than other types of measures. There is however no reason not also to extend the analysis required by point 38 of the Restructuring Communication to the imposition by the Commission of behavioural measures with potentially significant economic effects, such as an acquisition ban. Having regard to, inter alia, the foregoing parts of the Restructuring Communication, the ground of complaint alleging an infringement of the principle of equal treatment cannot be rejected out of hand as being ineffective.

112 However, the difficulty resides in the question of whether decisions authorising State aid in the banking sector on the basis of a restructuring plan and subject to different conditions are comparable or not, within the meaning of the case-law cited in paragraph 110 above.

113 As the Commission correctly maintains, aid such as that at issue in this case can be approved only if the essential conditions laid down in the Restructuring Communication are satisfied, which requires an overall analysis of the Commission's decisions, based on a restructuring plan and on appropriate commitments and conditions, with the result that a comparison of the individual measures imposed in different decisions is particularly dangerous. Even if the possibility of comparing specific restructuring measures and conditions laid down by different decisions *in abstracto* is not inconceivable, it remains the case that the restructuring of an undertaking and the conditions subject to which aid is granted must be targeted on the specific problems which are characteristic of that undertaking and that the experience of other undertakings, in different contexts, may be irrelevant (see, to that effect and by analogy, *Alitalia* v *Commission*, paragraph 31 above, paragraph 478 and case-law cited).

114 In any event, if the Court were to be called upon to examine the comparability, with the applicant's situation, of situations at issue in the other Commission decisions referred to by ABN Amro, the burden of proof of whether they are comparable or not would fall on ABN Amro.

115 The decisions referred to by ABN Amro are, first, those in which an acquisition ban related only to undertakings in the same sector, in particular the Commerzbank, Lloyds, KBC, ING, RBS, LBBW, Dexia and Sparkasse Köln/Bonn decisions.

116 In that regard, it must be noted, in the first place, that, even though those banks are in the same business sector as ABN Amro, they all display particular characteristics and operate in a specific environment. With regard to those banks, a restructuring plan was submitted to the Commission, the characteristics of which have not been established to be the same as that of ABN Amro, together with specific commitments, circumstances which call into question the comparability of the situations at issue.

117 Further, as contended by the Commission, all those banks were compelled to undergo balance sheet reductions and also, for the most part, to divest themselves of certain businesses, a fact which may clearly have an effect on the degree of severity of the behavioural measures accepted, which may again call into question their comparability with this case.

118 Admittedly, as argued by ABN Amro, some of the structural measures imposed on those other banks were imposed in the interests of ensuring the viability of the bank. Nonetheless, it is obvious that, at least in some cases, the divestments were also imposed in the interests of offsetting or limiting distortions of competition. In that regard, as stated by the Commission, the Commerzbank, Lloyds, KBC, ING, RBS, LBBW, Dexia, Sparkasse Köln/Bonn and Aegon decisions are examples of decisions in which, unlike the ABN Amro decision, structural measures were imposed, with the aim of, inter alia, limiting the risks of distortion of competition.

119 Further, it must be observed that the scope of the prohibitions as it was accepted in respect of those other banks is not always as limited as is claimed by ABN Amro. In respect of certain banks, the prohibition is limited to the acquisition of shareholdings in companies active in the same sector. However, in the Lloyds and RBS decisions, referred to by ABN Amro, the beneficiary banks may not acquire shareholdings in financial institutions, nor make any acquisitions outside of their business model. Likewise, in the Aegon decision, the prohibition concerns 'business entities', a term which includes companies outside the financial sector.

120 Further, in response to ABN Amro's argument, the Commission refers to its Decision C(2010) 6202 final corr. of 15 September 2010 on State aid C 26/09 (ex N 289/09) by Latvia to AS Parex banka, and its Decision C(2011) 2262 final of 31 March 2011 on State aid SA.32745 (2011/NN) by Austria to Kommunalkredit Austria AG, which offer other instances of acquisition bans extending to undertakings outside the financial sector.

121 As regards the fact that the Lloyds, KBC, ING, RBS and LBBW decisions concern the full acquisition of companies or of a shareholding which is markedly higher than 5%, it is certainly true that the subject of the prohibitions contained in those decisions is the acquisition per se of companies and not only of a part of their share capital. That is equally true of the Commerzbank decision. Further, the Aegon decision refers to acquisitions of shareholdings of 20% or more in other business entities. However, it is clear that in the Decisions C(2010) 6202 final corr. and C(2011) 2262 final the prohibition extends to any shareholding acquisition. There are therefore at least two decisions which call into question ABN Amro's argument that an equally strict prohibition was not imposed on any other bank.

122 In the second place, as regards decisions containing exceptions over and above those granted to ABN Amro, the applicant refers, in particular, to the Aegon decision. That decision contains an exception to a prohibition on making 'acquisitions related to administration, service or IT companies with the objective to increase process efficiency of the current activities', which had been requested by ABN Amro but which was not granted, since the Commission insisted on the need to demonstrate that acquisitions were necessary to ensure the undertaking's viability. As regards the extent of the exception in the case of Aegon, the Commission refers to the fact that Aegon underwent a balance

sheet reduction of approximately 6% and had to divest itself of certain businesses. In response to a question from the Court on whether the exception for 'acquisitions related to administration, service or IT companies with the objective to increase process efficiency of the current activities' had been granted to Aegon subject to evidence that such acquisitions were necessary for the viability of that undertaking, the Commission explained that Aegon's restructuring plan mentioned efficiency-related improvements of current activities and that was the context in which its staff envisaged that exception, as is apparent from recital 119 of the decision concerned. The Commission added that Aegon did not have the benefit of a general *de minimis* clause such as that provided for in Article 5(2) of the contested decision. Those factors are sufficient ground for the Court to hold that Aegon's case and that of ABN Amro are not comparable.

123 Last, as regards the non-inclusion in the contested decision of an explicit provision on the possibility of seeking approval of specific acquisitions notified to the Commission, reference must be made to the analysis undertaken in paragraphs 64 to 67 above in the examination of the first part of this plea in law, from which it follows that this ground of complaint must, in any event, be rejected.

124 Consequently, the third part of the first plea in law must be rejected.

The fourth part: an infringement of the principle of good administration and a failure to state reasons under Article 296 TFEU

125 ABN Amro claims, in essence, that the Commission was in breach of the principle of good administration and the obligation to state reasons in the contested decision to the requisite legal standard because it did no more than refer to the principles set out in the Restructuring Communication in its examination of the need for an acquisition ban in the contested decision.

126 ABN Amro claims that (i) a reference to the Restructuring Communication, which concerns only acquisition bans where there is a risk of distortions of competition, cannot justify the strict prohibition imposed on it; (ii) the Commission should have examined and explained why such a strict prohibition was necessary and why less strict alternative approaches were not envisaged; (iii) since the adoption of the communications and, in particular, the Restructuring Communication leads to the presentation of a new policy, the Commission was subject to an enhanced obligation to state reasons as regards its implementation; (iv) the Commission failed to take into account ABN Amro's particular situation; (v) the reasons provided in relation to the need for the acquisition ban were inadequate and did not disclose in a clear and unequivocal fashion the grounds for and the necessity of that measure, and (vi) the Commission should have carried out an analysis of the market and of competition concerns in order to justify the imposition of the acquisition ban.

127 The Commission contends that due regard was had to the principle of good administration and that the statement of reasons in the contested decision meets the requisite legal standard.

128 First, as regards an alleged infringement of the principle of good administration, it must be recalled that the principle of good administration is one of the guarantees conferred by the European Union legal order in administrative proceedings, that principle entailing the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (see, to that effect, Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14).

129 In this case, having regard to the exchanges of views on many occasions between the Commission, the Dutch State and ABN Amro on the acquisition ban, amply documented in the file before the Court, it is clear that the Commission examined carefully and impartially all the relevant aspects of the individual case.

130 Admittedly, the Commission, while accepting some exceptions to the acquisition ban at the request of the Dutch State and ABN Amro, remained inflexible on the fact that that prohibition had to cover any type of undertaking and also acquisitions of shareholdings of more than 5% in companies. However, it is apparent from, inter alia, the examination of the first part above that that position is based on the Commission's analysis that the principle of limiting the State aid to the strict minimum did not allow it to adopt a more flexible position or, in particular, to accept the proposed exceptions as formulated by ABN Amro. It must be added that the Commission proposed to ABN Amro that it should indicate more precisely what types of acquisitions it deemed necessary to ensure its viability, something ABN Amro was unable to do, as is clear from documents in the Court file.

131 Second, with regard to the alleged infringement of the obligation to state reasons, it must be recalled that, in accordance with settled case-law, the scope of the obligation to state reasons laid down in Article 296 TFEU depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure so as to enable the Courts of the European Union to review the legality of the measure and allow the persons concerned to ascertain the reasons for the measure, so that they can defend their rights and ascertain whether or not the decision is well founded. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and judgment of 30 November 2011 in Case T-238/09 *Sniace* v *Commissio*n, not published in the ECR, paragraph 37).

132 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned. It is sufficient if it sets out the facts and the legal considerations having decisive importance in the structure of the decision (Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 96, and Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen and Others* v *Commission* [2010] ECR II-585, paragraph 180).

133 As regards the nature of the measure at issue and the context in which it was adopted in this case, it has been discussed above in the examination of the first, second and third parts of this plea that a behavioural measure cannot be examined in isolation, since all the conditions imposed on the bank together with the restructuring plan enabled the Commission to hold that that aid complies with the conditions set out in the communications and is in conformity with Article 107(3)(b) TFEU and, accordingly, compatible with the internal market.

134 Without there being any need to examine the question of what specific consequences flow from that context with respect to the Commission's duty to state individual reasons for the imposition of specific measures or conditions, it must be observed that the Commission stated reasons to the requisite legal standard for the need for the acquisition ban, inter alia in paragraphs 309 to 314 of the contested decision, the content of which is reproduced in paragraph 36 above.

135 Admittedly, as claimed by ABN Amro, that statement of reasons is relatively succinct and consists, largely, in a restatement of the principles of the Restructuring Communication. However, contrary to what is claimed by ABN Amro, that statement of reasons discloses in a clear and unequivocal fashion the Commission's reasoning, in accordance with the case-law cited in paragraph 131 above, in particular because the Commission applied a principle set out in that communication.

136 As regards the alternative measures proposed by ABN Amro, even if the contested decision does not examine them, it follows from the reasons advanced that a strict application of the principles referred to was necessary, which therefore ruled out the possibility of more flexible alternative approaches. Further, in addition to the fact that it is clear from the case-law mentioned in paragraph 132 above

that the Commission is not, in any event, obliged to take a position on all arguments, there must be taken into consideration the exchanges of views between the Commission, the Dutch State and ABN Amro where the Commission clearly indicated why certain proposed approaches were not acceptable.

137 Reference may be made, for example, to the response of the Commission case team to the formulation of the measures as proposed by ABN Amro in their version of 6 September 2010. It is there explained, first, that a restriction on the prohibition to acquisitions of a controlling interest in other undertakings would make it possible to achieve 'nice-to-have' acquisitions, but that the Commission can only accept acquisitions which are necessary to ensure the viability of the undertaking and, secondly, the system of offsetting the income from the sale of assets and acquisitions is not acceptable because the funds generated by sales should be used to reduce the amount of the aid as far as possible. Likewise, it is apparent from a number of e-mails lodged in the Court file that the Commission rejected ABN Amro's proposals to restrict, in essence, the prohibition to acquisitions of more than 20%, on certain conditions, in so far as they related to credit institutions outside the Netherlands and to except from the prohibition acquisitions relating to administration, service or IT companies with the objective of increasing the efficiency of current activities, repeating its argument that it could only accept acquisitions where there was evidence that they were necessary to ensure the undertaking's viability and that it was either waiting for such evidence or had not received such evidence.

138 Consequently, referring, by analogy, to the case-law according to which the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him (see Case C-417/11 P *Council* v *Bamba* [2012] ECR, paragraph 54 and case-law cited), it cannot be accepted in this case that the reasons stated in the contested decision do not meet the requisite legal standard because the decision does not discuss the alternative measures proposed by ABN Amro during the investigation procedure and rejected by the Commission.

139 As regards whether the Commission was subject to an enhanced obligation to state reasons because the communications led to the formulation of a new policy, ABN Amro seems to refer to the case-law to the effect that although a decision of the Commission which fits into a well-established decision making practice may be reasoned in a summary manner (for example by a reference to that practice), the Commission must, if a decision goes appreciably further than the previous decisions, provide a fuller account of its reasoning (see, inter alia, Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31; Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraph 44; and Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 155). That case-law cannot however apply in a case such as this where the Commission, far from departing from a well-established practice, states that it is strictly applying the principles in the communications.

140 Further, where ABN Amro refers to the fact that the reasoning based on the Restructuring Communication cannot justify the prohibition imposed, because that communication concerns only acquisitions which are likely to affect competition, that amounts to a challenge to the validity of the substance of the reasons, a matter which was examined in connection with the first part of the plea in law.

141 For the remainder, the fact that the Commission justifies the acquisition ban primarily as a measure required by the principle of limiting the aid to the minimum necessary explains the absence of a detailed study on the effects of the restructuring on the banking market. As regards further, in that regard, the comparison of the contested decision with the Lloyds decision, which ABN Amro refers to in claiming that the statement of reasons in the Lloyds decision is much more detailed and in line with the communications, besides the fact that the Commission's analysis is not substantially more elaborate in the Lloyds decision than in the contested decision, in any event, the extent to which reasons are stated in another decision is of little relevance to the Court's being in a position to assess whether the statement of reasons in the contested decision meets the requisite legal standard.

142 The fourth part of the first plea in law must therefore be rejected, as must the first plea in its entirety.

The second plea in law, concerning the duration of the acquisition ban

143 This plea in law concerns paragraph 3 of Article 5 of the contested decision (paragraph 13 above), according to which the acquisition ban is to remain in force for at least three years from the date of adoption of the contested decision or until the date on which the Dutch State's shareholding stake falls below 50%, but ceases to apply at the latest five years after the date of adoption of the contested decision.

144 This plea consists of five parts. The first part is a claim of infringement of Article 345 TFEU, in that the duration of the acquisition ban is dependent on the shareholding held by the State. The second part concerns an infringement of Article 107(3)(b) TFEU and a misapplication of the communications. The third part claims breach of the principle of equal treatment. The fourth part concerns an infringement of the principle of proportionality, while the fifth part relates to an infringement of the principle of good administration and a failure to state reasons under Article 296 TFEU.

The first part: infringement of Article 345 TFEU, in that the duration of the acquisition ban is dependent on the shareholding held by the State

145 ABN Amro claims that Article 345 TFEU was infringed in that Article 5 of the contested decision established a link between the State ownership of at least 50% of ABN Amro's shares and the applicability of the acquisition ban for a maximum of two years following the initial period of three years. ABN Amro argues, in particular, that Article 345 TFEU prohibits the Commission from taking a decision which involves making a distinction based on whether an undertaking is in private or public ownership. ABN Amro emphasises that State ownership does not as such constitute State aid and claims that, by virtue of Article 345 TFEU, to hold that State ownership in itself results in an advantage equivalent to State aid is unlawful.

146 The Commission rejects those arguments. According to the Commission, Article 345 TFEU requires that it be neutral as regards whether an undertaking is in public or private ownership, but does not prohibit any dissimilar treatment.

147 Article 345 TFEU provides that the Treaties are in no way to prejudice the rules in Member States governing the system of property ownership.

148 According to the case-law, Article 345 TFEU does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty (Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 37). Further, the competition rules in the Treaty, which are fundamental rules, are applicable indiscriminately to public and private undertakings and it cannot therefore be held that Article 345 TFEU restricts the scope of the concept of State aid within the meaning of Article 107(1) TFEU (see Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraphs 193 and 194 and case-law cited).

149 According to ABN Amro, the fact that the end of the acquisition ban is contingent on the supposed time of its (partial) privatisation constitutes an infringement of Article 345 TFEU because the Commission thereby attaches consequences to the mere fact that the majority shareholding in ABN Amro is State owned. ABN Amro does not claim that the rules on State aid should be applied differently because it is State owned, but that that fact cannot penalise it.

150 That argument cannot be accepted.

151 As is apparent from recital 312 of the contested decision (see paragraph 36 above), the Commission does not hold that the fact an undertaking continues to be State owned constitutes State aid. It is stated in that recital that the end of the State ownership is a proxy for estimating when the advantage deriving from the aid ends. It is apparent that the Commission considers that it has a duty to minimise the effects of the aid granted by the Dutch State by means of the nationalisation of FBN and the subsequent recapitalisation measures which continue to have effects, according to the Commission, when the State owns a majority shareholding in ABN Amro.

152 Further, the acquisition ban will cease to apply after five years, even if, as may be the case, the Dutch State were not to have reduced its shareholding to less than 50% by that stage.

153 However, as the Commission correctly maintains, it does not follow from Article 345 TFEU that the Commission may not attach consequences to the fact that the State is the majority shareholder in an undertaking if the Commission considers that there are objective reasons for doing so. That was the reasoning which was followed in this case. Its validity will be examined further in relation to the other parts of the second plea in law.

154 It follows from the foregoing that the contested decision does not treat State ownership as the equivalent of State aid and identifies an objective reason why the State's majority shareholding in the bank is used as a point of reference in that context, and consequently there can be no question of discrimination against State ownership.

155 The first part of the second plea in law must therefore be rejected.

The second part: infringement of Article 107(3)(b) TFEU and misapplication of the communications

156 This part can be broken down into two grounds of complaint, relating to (i) an infringement of Article 107(3)(b) TFEU and (ii) misapplication of the communications. It is appropriate to consider the second ground of complaint first.

– The second ground of complaint: misapplication of the communications

157 According to ABN Amro, given that the need for aid in this case does not stem from an accumulation of excessive risks and having regard to its very low risk profile, only limited behavioural measures were justified in this case. ABN Amro argues that, since point 40 of the Restructuring Communication envisages an extension of the acquisition ban until the end of the restructuring period, any prohibition in excess of three years is, in its case, unacceptable, since it has always been profitable and is recognised, in the contested decision, to be a viable entity. Further, it is not affected by any restructuring after that three-year period, since its restructuring was completed when the contested decision was adopted and the 2009 restructuring plan applied only until 2013. The Commission's argument that it is necessary to apply the prohibition at issue for as long as the State's majority shareholding may provide comfort to creditors and investors is not, moreover, a justification which is compatible with the Restructuring Communication.

158 ABN Amro adds that point 40 of the Restructuring Communication provides that a behavioural measure may continue, depending on the scope, size and duration of the aid, but, although it received significantly less aid than that granted in other relevant cases, in none of those other cases did the acquisition ban exceed five years.

159 ABN Amro also states that the Restructuring Communication itself recognises, in point 14 thereof, that the FEU Treaty is neutral as to the public or private ownership of property, and consequently to attach legal consequences to the continuing public ownership of a bank's share capital constitutes an infringement of point 14.

160 Last, ABN Amro maintains that the Commission's plea of inadmissibility is unfounded.

161 The Commission asserts that, as in connection with the first plea in law, this element of the second part of this plea in law, claiming an infringement of Article 107(3)(b) TFEU is not supported by any argument and must, therefore, be declared to be inadmissible. Moreover, ABN Amro's arguments are unfounded, in essence, because the duration of behavioural conditions must also be assessed in the light of the principle that the aid must be limited to the minimum necessary.

162 First, it must be observed that a number of ABN Amro's arguments have been examined above and must be rejected. That applies to the argument that its risk profile meant that the behavioural measures imposed on it should be limited, both in terms of their scope and their duration. The argument has already been examined in paragraphs 91 to 100 above, where it was concluded that ABN Amro's analysis requires some qualification. It has, in particular, not been established that the Commission failed to take into consideration the particular features of this case, since ABN Amro received a very substantial amount of aid and no structural measure was imposed in its case. Further, the argument based on a comparison with acquisition bans imposed at the same time in other cases will be examined in connection with the third part of this plea in law.

163 As regards ABN Amro's argument concerning compliance with point 14 of the Restructuring Communication, that the Treaty is neutral with regard to property ownership and that the rules relating to State aid apply irrespective of whether a bank is private or public, point 14 does no more than restate the principle laid down in Article 345 TFEU, and consequently the argument must be rejected for the same reasons as those which required the rejection of the first part of the second plea in law.

164 As regards the examination of ABN Amro's principal ground of complaint, specifically relating to non-compliance with the communications, it must be recalled that, as stated in paragraph 31 above, the communications refer to the Commission's discretion in relation to the conditions which must be satisfied before an aid measure which remedies a serious disturbance in the economy of a Member State can be declared to be compatible with Article 107(3)(b) TFEU, inter alia, when it comes to formulating structural or behavioural measures. The existence of such discretion must be taken into consideration when analysing grounds of complaint based on an infringement of the communications, since the Commission must decide on the compatibility of an aid measure on the basis of a body of measures and conditions according to the particular characteristics of each individual case.

165 On the subject of the duration of the acquisition ban, the contested decision refers, in recital 311 thereof (see paragraph 36 above), to point 40 of the Restructuring Communication.

166 According to that provision, an acquisition ban, imposed with the aim of limiting distortions of competition, should apply for three years and may continue to apply until the end of the restructuring period, depending on the scope, size and duration of the aid.

167 Further, in recital 312 of the contested decision (see paragraph 36 above), the Commission adds however that extension of the duration of the prohibition beyond three years is justified by the fact that, while part of the aid has already been redeemed, some measures cannot be redeemed by ABN Amro due to the form in which they were granted. Moreover, as was stated in relation to the first part of this plea, the Commission also adds that the end of the State's majority shareholding is a proxy for estimating when the advantage derived from the aid ends, but the duration of the prohibition will not in any circumstances extend beyond five years.

168 In its arguments, ABN Amro, in essence, does not dispute that an acquisition ban may be imposed for a period of three years, in accordance with the abovementioned provision, but claims that that period should have been the maximum duration of the prohibition, in particular because it was no longer undergoing restructuring after that date.

169 In that regard, as the Commission observed at the hearing, it is clear that the Restructuring Communication does not define a specific duration for the acquisition bans which are to be imposed with the aim of ensuring that the aid is limited to the minimum necessary. However, since point 23 of the Restructuring Communication refers to the restructuring of the beneficiary, it can be inferred that such a measure may be regarded as well founded for as long as that remains the context. The rule laid down in point 23 of the Restructuring Communication is therefore analogous to that set out in point 40 of that communication (paragraph 166 above), to which reference is made in recitals 311 and 312 of the contested decision, and in which it is stated that some acquisition bans may continue 'until the end of the restructuring period depending on the scope, size, and duration of the aid'. It is necessary therefore to examine whether, in this case, the duration of the prohibition laid down in Article 5 of the contested decision satisfies the rule defined in point 23 of the Restructuring Communication, as interpreted above.

170 In that regard, in recitals 76 to 92 of the contested decision, the Commission describes the content of the December 2009 restructuring plan and the November 2010 updated version of that plan. ABN Amro is correct that the financial projections in that restructuring plan do not extend beyond 2013.

171 Nonetheless, it is apparent from recital 312 of the contested decision and Article 5 thereof that, in this case, it is not the bank's restructuring period per se, as defined in the various versions of the restructuring plan, which determines when the application of the contested measure is to come to an end, but the reduction of the shareholding of the Dutch State below a threshold of 50%.

172 Nor does the contested decision link the end of application of the prohibition at issue directly to the end of the aid. As was explained in recital 312 of the contested decision, the nature of the aid granted, namely recapitalisation aid, is such that part of it cannot be redeemed, as is not disputed by ABN Amro. In this case, it is therefore not possible to establish a direct link between the duration of the acquisition ban, on the one hand, and a possible date of repayment of the aid which could be regarded as marking the endpoint of the duration of the aid, on the other.

173 In that context, it may be observed that, before the Court, the Commission also refers to recital 139 of Commission Decision C(2010) 726 final of 5 February 2010, referred to in recital 23 of the contested decision. By that decision, the Commission extended the formal investigation procedure initiated by its decision of 8 April 2009, extending its scope to include a number of new measures. Recital 139, which follows recital 138 of that decision, where mention is made of the need for an acquisition ban in order to limit distortions of competition, states that, given the repeated and massive intervention of the Dutch State in favour of FBN and ABN Amro N, the public, and depositors in particular, might consider that the State would intervene again if difficulties were to occur. The Commission adds in that recital that consumers might believe that the new entity ABN Amro is a very safe bank, which might make it easier for the group to collect deposits.

174 Similar considerations feature in footnote No 89 of the contested decision, which is part of the discussion on the existence of State aid. Reference is made there to the marketing materials used by FBN in 2009 for foreign investors, which state that State ownership is a favourable element which provides confidence to depositors and creditors.

175 Consequently, contrary to what is claimed by ABN Amro, it was relevant, in the particular circumstances of this case, for the Commission to hold that the point in time when the Dutch State no longer retained control of ABN Amro should be regarded as a proxy for the date on which the advantage derived from the aid, which was justified by a restructuring context, would come to an end. In the light of what has been said in paragraph 169 above, the Commission was therefore entitled to refer to the Dutch State's majority shareholding in ABN Amro in Article 5 of the contested decision. It may be added, for the sake of completeness, that it is clear from the correspondence lodged in the

Court file that ABN Amro itself used on several occasions, during the investigation period, the point in time when the State's majority shareholding came to an end as pivotal to determining the end of other behavioural measures, such as the ban on advertising or the dividends policy.

176 As regards the fact that the duration of the acquisition ban was fixed at five years, having regard to the importance accorded to the consequences of the State's involvement, it is clearly relevant to take into consideration the Dutch State's strategy to exit from ABN Amro's capital. The Commission describes it in recitals 87 and 88 of the contested decision. It is stated there that the Dutch State explained in various letters that it was considering a placement in the form of an initial public offering as the principal ABN Amro exit strategy, that the placement of the first tranche of its shares, between a range of [*confidential*] to [*confidential*] %, might thus be envisaged [*confidential*] at the earliest, while an offer on the market of a second tranche of [*confidential*] to [*confidential*] % might follow in 2015. It is also stated that the Dutch State intends to reduce its shareholding to a maximum of [*confidential*] % before the end of [*confidential*] and that, ultimately, it expects to exit completely from ABN Amro's capital, always dependent, finally, on market circumstances and the readiness of ABN Amro for an initial public offering. The projected exit strategy therefore clearly refers to a duration of at least four years following the date of the contested decision in April 2011.

177 Moreover, as the Commission correctly points out, the duration of five years is to be found in the Restructuring Communication, which serves as a frame of reference for establishing the outlines of the acquisition ban in the contested decision, as is apparent, for example, from Section 6.3, headed 'Assessment of the aid and of the December 2009 restructuring plan and the updated November 2010 restructuring under the Restructuring Communication'. Thus, a period of a maximum five years can be found, inter alia, in point 37 of that communication in relation to the maximum period which can be allowed in some cases to banks for the implementation of certain structural measures for the divestment and scaling-down of businesses.

178 Further, even though ABN Amro firmly denies that it could have given its agreement to a maximum duration of five years for the acquisition ban, that same maximum duration of application is found elsewhere in the contested decision. Thus Article 6 thereof concerns a prohibition on ABN Amro making reference to its being State-owned for advertising purposes or referring to that fact in communications with existing or potential customers or investors. The duration of its application is defined as extending for a period of 'at least 3 years as from the date of this Decision or until the date on which the Netherlands' shareholding stake in ABN Amro Group falls below 50%, whichever is later'. It is added that that prohibition is to 'cease to apply at the latest 5 years as from the date of this Decision'.

179 In those circumstances, it must be concluded that it cannot be held that the Commission infringed the communications, and in particular the Restructuring Communication, by applying to the contested prohibition a maximum duration of five years.

– The first ground of complaint: infringement of Article 107(3)(b) TFEU

180 For the same reasons as stated in paragraphs 68 to 70 above in relation to examination of the first part of the first plea in law, this ground of complaint is admissible, but unfounded.

181 It follows from the foregoing that the second part of the second plea must be rejected.

The third part: infringement of the principle of equal treatment

182 ABN Amro claims that the Commission, by fixing the duration of the prohibition as laid down in Article 5 of the contested decision, infringes the principle of equal treatment. ABN Amro claims in particular that, while some acquisition bans in other Commission decisions are shorter, most have a

duration of three years, with no extension. Further, the exceptionally long duration of the prohibition imposed on it is not consistent with the fact that the aid granted to it is considerably less than that granted to the majority of other banks which were beneficiaries of aid. Moreover, according to ABN Amro, in the Lloyds and RBS decisions cited by the Commission before the Court, in addition to the fact that the extent of the restriction imposed was more limited, the restriction was linked to the completion of measures imposed as part of their restructuring.

183 The Commission does not accept ABN Amro's arguments and states, inter alia, that ABN Amro's situation cannot be mechanically matched up with the situation of other banks which must undertake structural measures or must pay higher remuneration, or both.

184 In that regard, as previously examined in relation to the first plea in law, it is difficult to establish that situations are actually comparable when dealing with decisions authorising State aid to banks at the time of the financial crisis, and consequently a comparison, as argued by ABN Amro, with respect to the duration of the acquisition ban, is of little relevance, since the Commission undertakes an overall analysis on a case-by-case basis (see, inter alia, paragraph 113 above).

185 It has also been stated, in paragraph 114 above, that, in any event, in so far as the Court was able to undertake a comparative examination of conditions imposed in different decisions, the burden of proving that the situations at issue are comparable, or that there are different factual backgrounds to which the same solution was applied, would fall on ABN Amro.

186 As regards other decisions adopted at the same time, it is clear that, as contended by the Commission, the Lloyds and RBS decisions also contain an acquisition ban the duration of application of which extends beyond the 'standard' duration of three years, mentioned in point 40 of the Restructuring Communication, which contradicts ABN Amro's argument that a prohibition of a maximum three years was imposed on the other banks.

187 The RBS decision refers, in recital 108 thereof, to a date of expiry after three years or the date on which the last of its operating businesses has been divested, whichever date is the later. The Lloyds decision contains analogous wording, but the exact wording as to the determining event which is the alternative to the minimum duration of three years is redacted for reasons of confidentiality. It can however be understood from the Commission's argument that in that case also the point in time concerned is when certain structural measures are effected.

188 ABN Amro claims, inter alia, that the fact that those two decisions refer to a duration linked to the implementation of structural measures highlights the discrimination against it even more plainly because it was required only to accept behavioural measures.

189 However, as the Commission explains, the two banks concerned were compelled to effect divestments, and that in connection with a commitment designed to reduce the impact of the aid on competition and not as measures to restore them to viability. To claim, as ABN Amro does, that it follows that it should receive more favourable treatment, in relation to the formulation of the behavioural measures imposed on it, is an argument which cannot be accepted. Besides, contrary to what is claimed by ABN Amro, it is of even greater relevance to ensure the effectiveness of behavioural measures when there are no structural measures.

190 It has therefore not been established that a comparison with other State aid decisions adopted at the same time can call into question the legality of Article 5 of the contested decision with regard to the duration of the prohibition therein.

191 The third part of the second plea in law must, accordingly, also be rejected.

The fourth part: infringement of the principle of proportionality

192 ABN Amro claims that the duration of the acquisition ban is disproportionate. In its opinion, the Commission has not provided any convincing argument to support the extension of the acquisition ban beyond three years and it has certainly not established that that extension is necessary.

193 ABN Amro states that, since the Dutch State intends to divest itself of its shares in phases, the prohibition thus worded will not make the offer of those shares more attractive to investors, who will be less willing to invest or willing to invest only at a lower price. According to ABN Amro, it is in the public interest that the Dutch State should obtain a high return and that the Commission should favour early privatisation. ABN Amro claims that, for that reason, it was proposed by the Dutch State and itself that the duration of the acquisition ban should be linked to ownership by the Dutch State of more than 80% of its shares, but the Commission ignored that proposal.

194 Further, ABN Amro wonders why a prohibition period of less than five years could not have achieved the objective pursued by the prohibition.

195 ABN Amro adds that, if the Commission's argument that the reduction of State ownership to 50% would have meant that the confidence of creditors and depositors would return to the same level as that preceding October 2008 is to be accepted, the Commission has to take the view that State ownership amounts to State aid, which is contrary to Article 345 TFEU. ABN Amro considers that the Commission's reasoning is intrinsically unsound because the confidence inspired by State ownership could very well continue to exist beyond that threshold, given the fact that it is linked to ABN Amro's status as a bank of systemic importance and the probability, because of that status, that the Dutch State would intervene in a crisis situation.

196 Last, ABN Amro states that it fails to understand on what basis the Commission can hold that the confidence of the public falls where the State has sold 50% of its shares. That it was, allegedly, impossible for the Commission to establish suitable conditions for the end of the prohibition cannot justify the imposition of arbitrary conditions.

197 The Commission considers that due regard was had to the principle of proportionality.

198 It is necessary, first, to bear in mind the characteristics of an examination of the proportionality of a measure such as that at issue in the particular context of a decision on the compatibility of State aid subject to conditions which are not first accepted by the Member State concerned. In that regard, reference is made to paragraphs 74 to 82 above. In any event, again, there is no need to take a definitive position on the limits of the Court's examination as noted in those paragraphs because, in any event, ABN Amro has failed to demonstrate that the extension of the prohibition beyond the period of three years, on the terms laid down in Article 5 of the contested decision, is contrary to the principle of proportionality.

199 As regards the objective pursued by the prohibition at issue, it must be recalled that the basis for its imposition is primarily the principle that the aid must be limited to the minimum necessary, which is the justification for the view that funds allegedly available for making acquisitions should rather be paid to the State, for example by means of supplementary dividends.

200 It follows from the examination of the second ground of complaint in the second part of this plea in law that the acquisition ban at issue can clearly meet that objective in that it is to apply for a maximum duration of five years, in particular because the end of that period is a proxy for the point in time at which the aid comes to an end, after which point the logic of the beneficiary contributing to the limitation of the aid to the minimum necessary ceases to hold good. The same is true with regard to the subsidiary ground of limiting distortions of competition (see, inter alia, paragraphs 173 to 175 above).

201 As regards the specific arguments put forward by ABN Amro, first, its argument on the need to take into account the bank's loss of value in the eyes of potential investors as a result of the prohibition at issue, thereby preventing, according to ABN Amro, the Dutch State's early exit from share ownership in ABN Amro, cannot be accepted taking into account the objective of limiting the aid to the minimum necessary. Not to impose as restrictive an acquisition ban in order to enable the State to obtain a better price in an initial public offering is clearly a measure which is a less direct and therefore less effective means of achieving the same objective.

202 Secondly, ABN Amro provides no concrete evidence in support of its argument that the duration of the acquisition ban would have a negative impact on the price of shares offered for sale to private investors. Admittedly, private investors would take account of the restrictions imposed on the bank, but it has not been established that they would be incapable of understanding that the prohibition would lapse in the event of partial privatisation. That argument is therefore unpersuasive.

203 Third, it is clear from the Court file that the Commission's initial proposal was to link the end of the acquisition ban to the point in time when ABN Amro was fully privatised. ABN Amro cannot therefore claim that the Commission's reasoning is not coherent when the Commission holds that the confidence of third parties would be affected at a threshold other than full privatisation, because, in the course of negotiations concerning a limitation on the prohibition, that position was altered to become an approach which was less restrictive for ABN Amro.

204 Further, the Dutch State and ABN Amro accepted, and indeed proposed, the loss of control within the meaning of European Union law in relation to mergers as the reference point for the end of the behavioural measures in the course of negotiations, as is apparent in particular from the measures proposed on 30 July and 6 September 2010. Only at a more advanced stage of the discussions did the limit of 80% share ownership appear, with the explanation linked to the need for the Dutch State to be able to obtain a good price in the event of an initial public offering. However, having regard to the analysis undertaken in relation to the second part of this plea in law above, it has not been established that the divestiture by the State of a 20% share in the bank's share capital is an appropriate point of reference to determine the end of the advantages flowing from the aid.

205 Fourth, as regards whether the Commission could hold that the confidence of creditors and depositors was an advantage resulting from State ownership as a consequence of the aid, in addition to the reply already given in relation to the examination of the second part of the second plea in law, the documents issued by credit rating agencies, which the Commission refers to in these proceedings, support its argument. It follows that it is not only the position of ABN Amro as a bank having a systemic importance or as being 'too big to fail' which inspires confidence, but also the fact that the Dutch State is an actual shareholder. The passage in a credit rating agency report of 6 January 2011 quoted by the Commission is enlightening, in that it is stated there that the agency concerned 'views the current, but temporary ownership by the Dutch State and the support of its owners as a key strength underpinning the ratings for [ABN Amro]'.

206 Last, as regards the fact that, if the Dutch State has not lost control before that date, the acquisition ban will come to an end automatically after five years, in addition to the analogy already drawn, in connection with the second part, that point 37 of the Restructuring Communication concerning structural measures also refers to a maximum duration of five years for the implementation of such measures, it must be recalled that the duration of the prohibition is linked, after the initial duration of three years, which is not contested by ABN Amro, primarily to the point in time at which the Dutch State ceases to have control. The legality of that approach could not be called into question in the second part of this plea in law.

207 Further, it is apparent from the exit strategy proposed by the Dutch State (see also the discussion of the second part of this plea in law above) that it envisages the placement of a second tranche of [*confidential*] to [*confidential*] % of the shares only in 2015, in other words four years after the adoption of the contested decision, and depending on market circumstances.

208 That being the case, the possibility that the maximum duration of five years may even be to the advantage of the Dutch State, in other words the prohibition may lapse before it has been able to sell its majority shareholding, cannot be ruled out.

209 It has therefore not been demonstrated that the Commission was in breach of the principle of proportionality by defining the duration of the acquisition ban in Article 5 of the contested decision. Consequently, the fourth part of the second plea in law must be rejected.

The fifth part: infringement of the principle of good administration and a failure to state reasons under Article 296 TFEU

210 ABN Amro claims that the Commission failed to take into account all the facts relevant to the duration of the acquisition ban, including the need for the measure, the possibility of accepting less restrictive measures and the objections submitted in the course of the investigation procedure, and consequently the Commission was in breach of the principle of good administration by adopting Article 5 of the contested decision.

211 ABN Amro further argues that the contested decision is vitiated by a failure to state adequate reasons. ABN Amro considers that the explanation that the end of State ownership makes possible an estimation of when the advantage deriving from the aid ceases is neither clear nor correct. Similarly, the reasons stated in the contested decision are deficient in that the Commission does not explain why a 50% shareholding threshold in the bank is a relevant criterion (and not, for example, a 20% threshold) or why the duration had to be longer than the duration of the prohibitions imposed on other banks.

212 The Commission considers that, having regard to the extensive exchanges of views with the Dutch State and ABN Amro on the subject of the acquisition ban during the investigation procedure, and the alteration of its position during that period, it did not infringe the principle of good administration. Further, the contested decision clearly sets out the reasons which underlie the duration of the acquisition ban.

213 In that regard, reference is made to paragraphs 128 and 131 to 133 above in relation to the examination of the fourth part of the first plea in law for a statement of the relevant case-law.

214 First, as regards an alleged infringement of the duty of good administration, it is clear that the Commission examined the relevant facts with the care required. It is apparent from the Court file that the Commission's position altered, moving from taking into account a link between the end of the prohibition at issue and the full privatisation of ABN Amro to the acceptance that the end of the prohibition should be linked to the point in time when the Dutch State would cease to be the majority shareholder of ABN Amro. Admittedly, the Commission rejected the proposals of that State and ABN Amro referring to divestments of less significant portions, but a substantive disagreement cannot justify a conclusion that there was an infringement of the principle of good administration.

215 Second, without there being any need to decide on the actual extent of the obligation to state reasons which is incumbent on the Commission, with respect to a specific measure which is one of a body of measures on the basis of which the Commission was able to hold that, taking into account also the

restructuring plan submitted to it, aid to a bank was compatible with the internal market, it is clear that the Commission's statement of reasons for the duration of the acquisition ban met the requisite legal standard.

216 Admittedly, the contested decision contains but little detail on the subject of the duration of the acquisition ban and does not contain, in particular, any detail on either the subject of the alternative approaches referred to during the investigation procedure or in relation to approaches adopted in other decisions.

217 The decision is not however thereby vitiated by a failure to state reasons.

218 Recital 311 of the contested decision refers to point 40 of the Restructuring Communication in respect of the minimum duration of three years. Recital 312 of that decision, by referring to the threshold of 50%, to the fact that the aid cannot be redeemed and to the fact that that threshold is a proxy for estimating the date when the advantage derived from the aid will cease to produce its effects, explains the link between State ownership and the duration of the acquisition ban.

219 As regards the alternative, subsequent time-limit of five years as the point at which the acquisition ban ceases to apply, that can be implicitly understood in the light of the timetable proposed by the Dutch State for its exit strategy. Further, if a minimum duration for the application of the prohibition is to be taken into account, it follows that a maximum duration ought also to be defined. The period of five years is therefore, having regard to the circumstances of this case, logical.

220 Last, as regards the argument that the Commission should have explained why the duration of the prohibition imposed on ABN Amro was longer than that laid down in other decisions, the Commission is correct to state that it is under an obligation to justify its analysis of the compatibility of the aid solely by reference to the guidelines for the sector contained in the communications and not by reference to any other decision.

221 It follows from the foregoing that that the fifth part of the second plea must be rejected.

222 Accordingly, in any event, and, in particular, there being no need for the Court to rule on the argument advanced by the Commission at the hearing that the Court cannot uphold ABN Amro's claims concerning solely the annulment of Article 5 of the contested decision, since Article 5 cannot be detached from Article 1 thereof and the Court cannot substitute its analysis of the compatibility of the aid for that of the Commission, the action must be dismissed in its entirety.

Costs

223 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since ABN Amro has been unsuccessful, it must be ordered to pay the costs, including those incurred in the proceedings for interim measures, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders ABN Amro Group NV to pay the costs.

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 8 April 2014.

[Signatures]

Table of contents