Bank restructuring: What can we learn from the ABN AMRO case?

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EXECUTIVE SUMMARY

ISSUE

This thesis seeks an answer to the following question: Does it make sense for the revision of the Swiss Banking Law not to include the provision – currently contained in Article 29 - which explicitly sets value maximisation for all owners and creditors as a goal of bank restructuring plans? The answer to this question will be answered by looking at the 2007 takeover of ABN AMRO by the Consortium, focussing on Fortis.

METHODOLOGY

Extensive literature research was carried out to answer this question. This included books, governmental evaluations and researches, public releases and articles from the press. One of the commissions that were initiated by the parliament interviewed a large number of people who played a role during the takeover process and many of these interviews were also used. In addition former ABN AMRO shareholders were interviewed as was an account advisor, who had already held that position before 2007.

In addition, three economic papers were used to help to analyse what happened from an economic theoretical point of view.

Seeing that Article 29 of the Swiss Banking Law talks about shareholders and creditors, the ABN AMRO case was analysed according to these two stakeholders. The creditors who, in the case of a bank are the depositors did not have the option to play an active role. The only option that the depositors had to show their dissatisfaction was to leave the bank. Therefore three other stakeholders were chosen to represent them. These were the following: the Dutch National Bank, the Ministry of Finance and the management.

RESULTS

DUTCH NATIONAL BANK

The Dutch National Bank played a major role in the decision on whether or not to give the Declaration of no Objection. This declaration was needed by the buyers, as it is the formal OK that allows the bidder to take over its target. There are three criteria

two are decided on solely by the Dutch National Bank; the third criterion is decided on by the Ministry of Finance, which is advised on this issue by the DNB.

The DNB found that none of the criteria for not granting a Declaration of no Objection was fulfilled and thus concluded that a declaration should be issued. They came to this conclusion because Dutch law provisions state that Declarations of no Objection should be given by default and only not granted as an exception if there are clear reasons not to do so. Under these circumstances the DNB had no option other than to advise the Ministry of Finance to find in favour of granting a Declaration of no Objection to the Consortium. The DNB were, however, greatly concerned about the situation and expressed their worries by making the Declaration of no Objection conditional on the fulfilment of a long list of conditions and requirements to be met as the plans for the takeover were progressing and during the takeover itself.

The President of the Dutch National Bank, Mr. A. Wellink, was very concerned about the plans of the Consortium to split up ABN AMRO. When he publicly announced his concern, the European Committee stopped Mr. Wellink, as they were of the opinion that this would have an influence on the competitive balance between the bidders.

The DNB focused at all times on the continuation of ABN AMRO and its function in the Dutch financial system and not on maximizing the firm's value.

SHAREHOLDERS

During the whole takeover process, the shareholders fought to obtain the highest price for their shares. The first big step that was taken by the shareholder side was to add points to the agenda of the Annual General Meeting of Shareholders. A letter to this effect was written by TCI, a hedge fund which owned more than one percent of the shares and was therefore allowed to add items to the agenda. The five points that TCI raised were accepted at the meeting, despite the advice that the Managing Board of ABN AMRO had given to their shareholders, as they wished to be acquired by Barclays.

Subsequent to this, the shareholders summoned ABN AMRO to the Commercial Chambers. They took this step through the Association of Securities (hereafter referred to as VEB) which represents the rights of shareholders. The reason for taking this step was that the ABN AMRO management had announced that they were

selling LaSalle without consulting the shareholders. The VEB was of the opinion that it was against the law to conduct a sale of such great proportions - $21 billion - without shareholder approval. The Commercial Chambers judged in favour of the VEB. However, the Supreme Court subsequently overruled this and judged in favour of ABN AMRO. Thus, ABN AMRO was not required to retract as the VEB had hoped and therefore the sale of LaSalle went forward.

Both Barclays and the Consortium made an official offer to the shareholders, but the Barclays bid was not accepted and the bid of the Consortium was, which implied that the shareholders were aiming for the highest price for their shares. According to Aghion and Bolton it is not good if all capital is equity capital. In this ABN AMRO case, there was not only voting capital, but the character of the debt capital was such that the shareholders had the strongest influence, and this was not necessarily a good thing.

As explained, ex ante the shareholders did everything they could to obtain the highest value for their shares. Ex post, for those who had invested in Fortis, it would have been in their favour if the focus would have been on the 'going concern' and on its continuing as a Public Limited Liability Company.

MANAGEMENT

The Supervisory Board saw that the greatest problem that ABN AMRO had was a cost problem. However despite the Supervisory Board's efforts, the Managing Board did not do much with this information. This failure to act on such information illustrates one of the other major problems that ABN AMRO faced.

The Chairman, Mr. Groenink, acknowledged himself that he made a crucial mistake at the very beginning of his chairmanship. He put the bank in a difficult position by setting too ambitious targets for the medium and long term. By setting such high targets, analysts concluded that the bank was underperforming, as the targets were not met. Till the year 2005 the bank actually did perform in line with the industry, but this message did not reach the public.

Ex ante the management tried to maximise the value of ABN AMRO, but was unsuccessful in this matter. During the takeover the Managing Board tried to ensure that the bank would not be split up, by advising the shareholders not to accept the TCI proposals. According to the theory of U. Birchler & D. Egli this strategy should

have worked. However, in this case the shareholders ignored the information that splitting up the bank would endanger the continuation of the activities of the bank.

MINISTRY OF FINANCE

The Ministry of Finance worked together with the DNB in the procedure around the Declaration of no Objection. The Ministry had one criterion to examine – that of whether the acquisition might lead to an undesired development in the financial sector. Apart from his formal duty as the Minister responsible for granting the Declaration of no Objection as described in the Financial Supervision Act, Minister Bos also tried to play an informal role. In this informal role he was concerned, for example, about the potential loss of Dutch employment. However, according to the law, such concerns and findings were not allowed to influence the Minister's decision.

Just under a year after the shareholders confirmed the deal with the Consortium, the Dutch government together with the Belgian and Luxembourgian governments had to bail out Fortis. At first the three governments tried to bail out only a part of Fortis, but within a week it became obvious that a full bailout was needed. To ensure the Dutch part of the 'old' Fortis and of the former ABN AMRO, the Dutch government had to pay €16.8 billion.

Ex ante to the takeover, the Ministry did not mind that the focus had been on maximising the value of the company. But after the takeover had taken place and help was needed, the Finance Ministry focused on not losing the role that the former ABN AMRO had played in the Dutch financial system. At the time that the bailout took place, the value maximisation was fully ignored.

Conclusion

From the ABN AMRO case study, one sees that the creditors had mixed interests ex ante the takeover and the shareholders focused fully on maximising their value, which did not lead to a very good outcome. Therefore ex ante it would appear that, in order to avoid similar scenarios, the new law should include value maximisation only for the creditors and not for the shareholders.

Ex post the focus of the creditors was totally on the 'going concern' of the old ABN AMRO and the shareholders were set aside. If the value maximisation of the shareholders value would have been of greater importance at this stage, the parts of Fortis that were now nationalised by the Dutch government might have been able to become a new Public Limited Liability Company and thus the company would not have lost its shareholders value. Therefore ex post the suggested changes do not seem to be the correct option.