STUDY

Requested by the ECON committee

Compensation of Investors in Belgium

Mis-selling of Financial Products

Policy Department for Economic, Scientific and Quality of Life Policies
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Directorate-General for Internal Policies
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DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

Mis-selling of Financial Products: Compensation of Investors in Belgium

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Abstract

This paper is part of a series of five studies on mis-selling of financial products in the EU. The paper analyses three important and highly publicised cases of mis-selling of investment products to retail clients, featuring interesting legal particularities: the Citibank case, the Dexia case and the Fortis case. On the basis of this analysis, the paper draws a number of conclusions on the national and EU regulatory framework in respect of investor compensation. This document was provided by Policy Department A at the request of the ECON Committee.

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LIST OF ABBREVIATIONS

ACV Algemeen Christelijk Vakverbond (Belgian Confederation of Christian Trade Unions)

ACW Algemeen Christelijk Werknemersverbond (Flemish General Christian Employees Association), later renamed Beweging.net

ADCB Algemene Directie Controle en Bemiddeling / Direction Générale Contrôle et Médiation (Directorate-General for Enforcement and Mediation), responsible for the inspection of firms' compliance with economic laws.

AFM Autoriteit Financiële Markten (Dutch Authority for the Financial Markets)

Beweging.net New name of the General Christian Employees Association in Belgium, formerly ACW

CBFA Commissie voor het Bank-, Financie- en Assurantiewezen (Belgian Banking, Finance and Insurance Commission), former supervisory authority in Belgium, replaced in 2011 with the FSMA

CD&V Christen-Democratisch en Vlaams (Flemish Christian democratic party 'Christian Democratic and Flemish')

CM Christelijke Mutualiteit (Belgian Christian Health Insurance Fund)

FPIM Federale Participatie- en Investeringsmaatschappij (Belgian Federal Holding and Investment Company)

FSMA Autoriteit voor Financiële Diensten en Markten (Belgian Financial Services and Markets Authority)

ISD Investment Services Directive (Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field) [no longer in force]

MiFID I First Markets in Financial Instruments Directive (Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC) [no longer in force]

MiFID II Second Markets in Financial Instruments Directive (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU)

NBB Nationale Bank van België (National Bank of Belgium)

NV/SA Naamloze Vennootschap / Société Anonyme (Belgian limited liability company)

SICAF Stichting Investor Claims Against Fortis (Foundation Investor Claims Against Fortis)

TFEU Treaty on the Functioning of the European Union

UCPD Unfair Commercial Practices Directive (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council)

VEB Vereniging van Effectenbezitters (Dutch Shareholders' Association)

WCAM Wet Collectieve Afwikkeling Massaschade (Dutch Law of 23 June 2005 on the Collective Settlement of Mass Claims)

WHPC Wet betreffende de Handelspraktijken en de Voorlichting en Bescherming van de Consument (Belgian Law of 14 July 1991 on Commercial Practices, Consumer Information and Consumer Protection)

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EXECUTIVE SUMMARY

This paper deals with investor compensation in the aftermath of mis-selling cases in Belgium. It has been drafted upon request of the European Parliament and is part of a series of five papers on mis-selling of financial products in the EU.

Background: three Belgian cases

The financial crisis not only made clear that systemic risk is a real threat to the stability of the financial markets. It also showed that retail customers suffered huge losses, a plethora of EU financial regulation for the protection of those retail customers notwithstanding. In Belgium, as in other Member States, this had led to a number of court proceedings dealing with investor compensation. For the purposes of this report three cases have been selected on the basis of (i) their importance on the national and the EU scene; (ii) the relevance of the problems they deal with; (iii) the legal approach to the case; and (iv) the potential for interesting conclusions in the context of this report.

The first important case which went to court after the start of the crisis was the **Citibank** case. In view of massive consumer complaints of misleading information on complex products, the public prosecutor brought criminal proceedings against Citibank on the basis of, inter alia, a breach of the rules on unfair commercial practices. Although the claim was eventually dismissed, the case raises a number of interesting legal questions in respect of investor compensation.

In a second case, ARCO investors claimed that ARCO shares had been sold as safe alternatives to a savings account, while the ARCO companies had, over the years, invested the majority of their shareholders' funds in **Dexia**, which collapsed in 2011. Because of the large number of small investors involved and the political sensitivity of the case, the Belgian government created a compensation mechanism for the ARCO investors under the Belgian deposit guarantee scheme[1]. The courts have, however, declared this compensation mechanism unlawful. Several groups of investors have therefore initiated claims for damages before the civil courts. These procedures are still pending.

Finally, Belgian and Dutch investors in **Fortis** have also initiated court proceedings, claiming that Fortis had provided misleading, incomplete and untimely information in regard of the takeover of ABN Amro, which ultimately led to a government bailout of Fortis and heavy losses for the Fortis shareholders. On the basis of the Dutch collective action procedure, a collective settlement has been reached for harmed investors in this case. The settlement has not yet been approved by the competent court.

Aim of the report

The aim of this report is to analyse the causes of the complaints and petitions in these cases in order to draw conclusions on the national and EU regulatory framework in respect of investor compensation. The European Parliament's Committee on Economic and Monetary Affairs specifically requested an examination of the Fortis and Dexia cases in order to gain a better understanding of the ways in which the alleged mis-selling had happened, and of the reasons for the different judicial treatment of these cases. A third case, Citibank, was included in the report, since it also concerned a major mis-selling case, and presents a number of legal features which are particularly interesting from an investor compensation point of view.

[1] Directive 97/9/EC on investor-compensation schemes is not discussed in this context as it covers only the repayment of "*money owed to or belonging to investors and held on their behalf in connection with investment business*" or the return of instruments belonging to investors "*and held, administered or managed on their behalf in connection with investment business*" (Article 2). It does not cover, as was the case with ARCO, the decrease in value of shares because of market circumstances or because of the insolvency of the issuer.

Main findings

Since the crisis, EU financial regulation for the protection of retail customers has been heavily reviewed and a range of measures have been taken to improve the protection of retail customers[2]. The investor compensation cases discussed in this report have shown, however, that even those enhanced measures still cannot solve all investor protection concerns.

First, many investor compensation cases only go to court years, and sometimes decades after the alleged mis-selling took place. The alleged Dexia mis-selling took place as from the 1980s, but investors only suffered damages in 2011, when Dexia collapsed. Court procedures in respect of claims for damages are still pending and final judgements are not expected for several years. It goes to show that even if MiFID II will hold financial institutions to higher standards, **many cases will**, also in the future, **still be judged on the basis of MiFID I, or even pre-MiFID national standards**.

Second, MiFID II deals with substantive rules of investor protection, but leaves a number of related issues unresolved.

- There is a most interesting discussion in the Member States in regard of the **question whether MiFID** is merely supervisory public law, which harmonises supervisory standards for financial institutions, or **also harmonises civil law duties of care for investment firms**. The answer to this question is important to assess, on the one hand, whether civil law duties of care can go beyond the MiFID standards, and, on the other hand, whether civil law courts have to take into account the regulatory standards when assessing the civil law duty of care. Scholars disagree on this issue, and an EU position would therefore be useful.
- If a court comes to the conclusion that a bank or investment firm has breached a MiFID conduct of business rule and has therefore also breached a civil law duty of care, the claimant still has to prove that he or she has suffered damages and that those damages were actually caused by the breach of the MiFID rules (causal link). MiFID II does not harmonise those elements at all. Member States' rules on **how to prove fault, damages and causal link** differ a lot. Whether an investor succeeds in a claim for damages for breach of a rule of financial regulation will to a large extent depend on those elements.
- In the same vein, the actual level of investor protection will also depend on **rules of civil procedure**, which influence the ease with which investors can obtain compensation. For instance, the **availability of a collective action procedure** may facilitate the actual obtainment of compensation by a large group of investors, including (financially) less capable investors. In the Fortis Bank case, use was made of the Dutch collective action system to facilitate a settlement. The Dexia case shows that investors do gather in interest groups even without the initiation of a collective action. However, this leads to a duplication of procedures initiated by different (groups of) investors, and does not provide a solution for the many small investors who do not join any interest group. It therefore seems very useful to further explore the need for an EU collective action system, especially in investor protection cases.

Third, MiFID should not be seen in isolation from **consumer law**. The rules on unfair commercial practices have been maximally harmonised by the Unfair Commercial Practices Directive 2005/29/EC (UCPD) and **overlap** to a certain extent with the MiFID rules. As the Citibank case exemplified, this opens opportunities. Certain sanctioning mechanisms linked to consumer law are not available in respect of the national implementation of the MiFID conduct of business rules (e.g. criminal sanctions, injunction proceedings, collective

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[2] For an overview, see V. Colaert, 'Building Blocks of Investor Protection: Ever expanding regulation tightens its grip' (2017) *Journal of European Consumer and Market Law*, 229-244.

actions,...). In certain circumstances, it may therefore be more effective to file a claim on the basis of consumer law, rather than on the basis of financial regulation. This report has argued that when the national UCPD implementation is applied to an investment services case, the courts should interpret the concepts of '*unfair*' and '*misleading*' commercial practices not only in accordance with the UCPD framework, but also in accordance with the relevant MiFID II conduct of business rules. Vice versa, if a regulator or a court needs to deal with an investment services case on the basis of MiFID II, it also needs to take into account the UCPD rules in order to decide whether an investment firm has acted honestly, fairly and professionally in accordance with Article 24(1) of MiFID II.

Finally, the Dexia case raises the question **whether and to what extent the deposit guarantee system should be open to products other than bank deposits**. Although a number of Member States had done so before, Directive 2014/49/EU has harmonised the funding and scope of coverage of deposit guarantee schemes, precluding the option to cover other products than bank deposit under the deposit guarantee system since. The only remaining option for Member States who wish to have other products covered, is to create fully separated guarantee funds for those products. The normative question whether the limitation of Deposit Guarantee Directive 2014/49/EC to bank deposits should be maintained, should be answered on the basis of (i) what the goals and rationale of a deposit guarantee system are, and (ii) whether the same goals and rationale apply to other products than bank deposits. Although there do not seem to be any strong indications in favour of an extension of the scope of the Deposit Guarantee Directive to other financial products, further research should be conducted to establish this in a more definite manner.

INTRODUCTION

Like other Member States, Belgium has seen a number of mis-selling cases in the run-up to and during the crisis. We have selected the following three cases for this research paper: the **Citibank** case, the **Dexia** case and the **Fortis** case.

The cases have been selected on the basis of the following criteria: (i) their importance on the national and the EU scene; (ii) the relevance of the problems they deal with; (iii) the legal approach to the case; and (iv) the potential for interesting conclusions in the context of this study.

1. CITIBANK

1.1. Background and facts[3]

The Citibank case was the first important post-crisis mis-selling case in Belgium. Citibank Belgium NV/SA (currently known as '*Beobank NV/SA*'[4]) operated via the '*open structure*' model, meaning that it offered its clients the possibility to acquire not only financial products issued by Citibank, but also financial products issued by third parties but distributed by Citibank. Citibank had thus sold its retail clients structured bonds[5] that were issued by Lehman Brothers Treasury Co BV and guaranteed by Lehman Brothers Holding Inc. Approximately 4 000 of Citibank's clients invested (often significant sums) in these **complex products**, which Citibank Belgium NV/SA **allegedly promoted as safe alternatives with a better return on investment than**, for instance, **a savings account**.

On 2 June 2008, the rating agency Standard & Poor's decided to downgrade the rating of Lehman Brothers Holdings Inc. from A+ to A because of the increased volatility of bonds issued by that type of commercial bank compared to bonds issued by other financial institutions.

On 6 June 2008, Mr D., an employee of Citibank Belgium's SBU Wealth department sent a message to all Belgian agencies of Citibank stating the following:

> *'Given the fact that Lehman Brothers is the issuer of the Inflation Protected Note[6], we have requested a declaration on behalf of Lehman Brothers regarding their liquidity position and their stability. You can find this declaration, as well as some recent news reports dealing with the same subject, below. Some facts summarized:*
>
> - *The liquidity position of Lehman Brothers remains strong, despite the situation on the markets (see attached an in-house presentation regarding the evolution of the liquidity position of Lehman Brothers).*
> - *External analysts, for instance Merrill Lynch, argue that the speculation on the liquidity of Lehman is not justified.*

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3 See Brussels Criminal Court of First Instance, 1 December 2010, (2011) *Bank- en financieel recht*, 127.

4 On 25 April 2013 it was announced that '*Citibank Belgium NV*' would be renamed '*Beobank NV*' ('Citibank wordt Beobank', *De Standaard*, 25 April 2013).

5 A structured bond is a bond the value of which is linked to an underlying index or instrument, so that the bond would pay a coupon in the same way as an ordinary bond, but the actual value of the bond to be repaid would depend on the underlying performance that it is linked to (see European Commission, 'Glossary of Useful Terms Linked to Markets in Financial Instruments', https://ec.europa.eu/info/system/files/glossary_en.pdf, at 15).

6 *Footnote added by the authors of this report:* The buyer of an '*inflation protected note*' receives interest payments at regular intervals, and a return of principal when the security matures, but unlike regular notes, the interest and principal of an inflation protected note are adjusted for inflation. The note was issued and the amount in principal was therefore to be repaid by Lehman Brothers.

- *So far, Lehman has not had to seek the assistance of loan facilities established by the Federal [Bank] to avoid the financial crisis.*
- *An opinion on the "purchase" of the Lehman Brothers shares by, for instance, Deutsche Bank AG underlines the conviction of its stability.*

Consequently, this in no way changes the current conditions of issuing the Inflation Protected Note. If necessary, you can use the arguments mentioned above to reassure clients and potential clients.'[7]

A copy of this message was sent to Mr R., head of the Sales & Distribution department, to Mr D.B., head of the Marketing department and to Mr V., head of the SBU Wealth department.

On 17 June 2008, Mr V. sent to the staff of Citibank an analysis of Citibank's Global Structured Product Committee (GSPC) according to which the situation of Lehman Brothers remained solid. Mr V., on the other hand, also communicated the decision of Citibank Belgium NV/SA to reduce its activities with Lehman Brothers and to look for other issuers:

> '*We have to provide our clients with the appropriate information regarding the Inflation Protected Note, as mentioned above. For the month of June, we also have two other products not issued by Lehman that we can offer our clients if they are, despite the information, still reluctant. Moreover, we are in contact with another issuer for the new version of the Inflation Protected Note which will be issued next month. In Belgium, we have proactively reduced the activities with Lehman in order to limit the exposure to all non-group counterparties, and we have thus maintained a different exposure for each issuer. Unlike the previous month, the Double Opportunity Note[8] of this month has been issued by Merrill Lynch and we expect to have another issuer than Lehman for the Inflation Note next month*.'[9]

On 15 September 2008, Lehman Brothers (USA) filed for bankruptcy protection in accordance with Chapter 11 of the US Bankruptcy Code. In a message sent on 22 September 2008, Citibank Belgium NV/SA informed all its clients who held structured products guaranteed by Lehman Brothers about this.

On 8 October 2008, the company Lehman Brothers Treasury was declared bankrupt. As a consequence of the collapse of Lehman Brothers, numerous clients of Citibank who had invested in the Inflation Protected Note lost large parts of their investment. Therefore, from the beginning of October onwards, many of them turned to the Belgian Federal Public Service for Economy (*Federale Overheidsdienst Economie / Service Public Fédérale Economie*) and, in particular, to the Directorate General for Enforcement and Mediation (ADCB[10]) in order to express their dissatisfaction. The investors mainly argued that Citibank had insufficiently informed them about the risks of the financial products issued by Lehman Brothers. Because of the large number of complaints and because the complaints pointed to a potential criminal offence, the ADCB reported the facts to the Public Prosecutor of Brussels on 3 December 2008.

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[7] Free translation of the French original.

[8] *Footnote added by the authors of this report:* The Double Opportunity Note is not explained in the judgement. It seems to concern a security for which the buyer receives a fixed interest on half of the investment, whereas the return on the other half of the investment depends on the evolution of a stock index.

[9] Free translation of the French original.

[10] Algemene Directie Controle en Bemiddeling / Direction Générale Contrôle et Médiation.

1.2. Legal procedure

1.2.1. First instance

On 11 June 2009, the Public Prosecutor brought a range of **criminal charges** against Citibank Belgium NV/SA as well as against a number of its directors. In the months of December 2009 and January 2010, a total of **886 persons joined their civil claim for damages to the criminal proceedings**. In January 2010, Citibank Belgium NV/SA proposed a **settlement** to those clients, which was eventually **accepted by a large majority** (97 to 98 %) of them. The criminal proceedings were, however, pursued[11].

The case was heard by the Brussels Criminal Court of First Instance of Brussels[12]. The Public Prosecutor brought six different charges against Citibank and three of its directors:

- abuse of confidence[13] (A);
- the laundering of material benefits of the other offences[14] (B);
- **violations of the Belgian '*Prospectus*' Law**[15] (C);
- violations of the so-called '*Willems*' Law on Intermediation in Banking and Investment Services and the Distribution of Financial Instruments[16] (D); and
- **violations of the Belgian Law on Commercial Practices, Consumer Information and Consumer Protection**[17] (E and F).

One of the civil parties claimed that an '*ad hoc*' agent had to be appointed by the Court in order to represent Citibank Belgium NV/SA. The Court rejected this claim on 2 December 2009[18]. The civil party appealed against this decision, but the procedure before the Criminal Court of First Instance was nevertheless continued.

On 1 December 2010, the Court decided that charges A, B and D were unfounded. With respect to charges C, E and F, however, the Court found that they were well-founded[19].

Charge C[20] concerned violations of Articles 60 and 69, 2°, 4°, 5° and 8° of the Belgian Prospectus Law. Those provisions contain criminal sanctions for the distribution of communications of a promotional nature without the authorisation of the Belgian financial supervisor – at the time the Banking, Finance and Insurance Commission (CBFA) – or the distribution of versions different from those approved by the CBFA. The defendants argued that these provisions impose a prior approval by the CBFA, which is more restrictive than

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[11] Brussels Criminal Court of First Instance, 1 December 2010, (2011) *Bank- en financieel recht*, 127.

[12] Brussels Criminal Court of First Instance, 1 December 2010, (2011) *Bank- en financieel recht*, 127.

[13] Article 491 of the Belgian Criminal Code (art. 491 Sw.).

[14] Article 505, clause 1, 2° of the Belgian Criminal Code (art. 505, eerste lid, 2° Sw.).

[15] Law of 16 June 2006 on the public offering of investment instruments and and admissions of investment instruments to trading on regulated markets (Wet 16 juni 2006 op de openbare aanbieding van beleggingsinstrumenten en de toelating van beleggingsinstrumenten tot de verhandelingen op een gereglementeerde markt, *BS* 21 juni 2006, 31 352).

[16] Law of 22 March 2006 on intermediation in banking and investment services and the distribution of financial instruments (Wet 22 maart 2006 betreffende de bemiddeling in bank- en beleggingsdiensten en de distributie van financiële instrumenten, *BS* 28 april 2006, 22 598).

[17] Law of 14 July 1991 on commercial practices, consumer information and consumer protection (Wet 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument, *BS* 29 augustus 1991, 18 712).

[18] Brussels Criminal Court of First Instance, 2 December 2009, cited by Brussels Court of Appeal, 21 May 2012, (2012) *Rechtspraak Antwerpen Brussel Gent* and (2012) *Droit penal de l'entreprise*, 143, with case note by A. Lecocq, P. Proesmans and N. Van der Eecken.

[19] Brussels Criminal Court of First Instance, 1 December 2010, (2011) *Bank- en financieel recht*, 127.

[20] *Ibid.*

what the Prospectus Directive[21] required. The defendants therefore requested the Court to seek a preliminary ruling from the European Court of Justice to verify the compatibility of the Belgian provisions with the Prospectus Directive. After examining the Directive and the parliamentary documents of the Belgian Law, the Court, however, concluded that the Belgian provisions were compatible with the Directive and rejected the request for a preliminary ruling.

On the merits of the case, the Court noted that fourteen communications of a promotional nature (eleven flyers and three letters) had been used in the context of the marketing of Lehman Brothers structured bonds without having been submitted to the CBFA prior to distribution. The arguments raised by the defendants (1) that these communications were copies of fact sheets approved by the CBFA, (2) that the CBFA had not imposed any administrative sanctions and had not raised any objections or comments regarding the content or format of the documents that had been submitted, and (3) that none of the 116 persons heard by the ADCB indicated that they had been misled by reading the flyers/letters, could not convince the Court. Therefore, the Court found Citibank Belgium NV/SA guilty of violating Articles 60 and 69, 2° of the Prospectus Law, but acquitted the three directors of this charge.

Article 69 of the Belgian Prospectus Law imposes criminal sanctions on the intentional publication of a prospectus (4°) or communications of a promotional nature (5°) which contain incomplete or inaccurate information that can mislead the public regarding the assets and liabilities, the financial position, the profits and losses or the prospects of the issuers of an investment instrument, or the rights attached to that financial product.

Article 69, 4° applies to those responsible for the publication of the prospectus, for instance the issuer or the offeror (Article 20 of the Prospectus Law). The Court found that Citibank Belgium NV/SA, because it distributed structured bonds from Lehman Brothers, should be considered an offeror of these products and was, as such, responsible for publishing the prospectus. In particular, Citibank should have mentioned the downgrading of Lehman Brothers (from A+ to A) in their prospectus related to the Inflation Protected Note (Citibank still referred to the A+ rating in that prospectus). As they did not do so and published communications of a promotional nature that did not mention the downgrading, both types of documents contained inaccurate information. As a result, the Court found Citibank Belgium NV/SA and the three directors (the latter only in relation to the distribution of the Inflation Protected Note) **guilty of violating** Article 69, 4° and 5° of the **Prospectus Law**.

Charges E and F[22] concerned alleged violations of the Belgian Law on Commercial Practices, Consumer Information and Consumer Protection (WHPC), which was applicable at the time. The defendants argued that this Law was not applicable since it did not apply to financial instruments. This argument was rejected. After a factual analysis, the Court decided that the relationship between Citibank and its clients had to be qualified as an investment advice agreement combined with a mandate to execute orders. Therefore, Citibank NV/SA provided these clients with financial (investment) services, which are not excluded from the scope of the WHPC. Moreover, the Court continued, the existence of more specific rules on investment services or on the publication of a prospectus does not preclude the application of more general rules such as the WHPC. Thus, the Court concluded that the WHPC was applicable.

For charge F, the relevant provisions of the WHPC, applicable at the time, were Articles 22 and 23, which prohibit advertisements that could mislead consumers as to the identity,

[21] Directive (EC) 2003/71 of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJ L345/64.

[22] Brussels Criminal Court of First Instance, 1 December 2010, (2011) *Bank- en financieel recht*, 127.

nature, composition, origin or characteristics of a product, and Article 94, which prohibits any act contrary to fair practices in commercial matters. For charge E, the relevant provisions of the WHPC were paragraphs 1 and 3 of Article 94/5 of the WHPC, which define unfair commercial practices and refer to misleading and aggressive practices covered by Articles 94/6 to 94-11. Especially relevant in that regard were Articles 94/6, paragraphs 1 to 3 and 94/7 paragraphs 1 to 2 which deal, inter alia, with **misleading omissions** which are likely to cause consumers to take a commercial decision that they would otherwise not have taken, and Article 94/8, 17° which deals with **misleading commercial practices** the purpose of which is to communicate factually inaccurate information on the conditions of the market or on the possibilities of finding a product or service, with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions. Charges E and F were addressed together by the Court.

After examining the advertising documents submitted (fact sheets, flyers, hearings), the Court concluded that these either constituted misleading practices or contained misleading omissions, especially in view of the fact that Citibank used a bold font and first listed the advantages of the product while the risks (‘*disclaimer*’), if mentioned at all, were listed at the end of the document in small print. Furthermore, the Court held that the communications to clients did not allow them to clearly identify the issuer and the guarantor (Lehman Brothers) of the structured bonds. Clients (laymen in financial investments) had acquired structured bonds issued by Lehman Brothers without even knowing that financial institution or because they were misled into thinking, in good faith, either that this was just an extension of their term account, or that these structured bonds did not pose any risk of losing the capital invested. Taking into consideration all circumstances, and the large number of victims, **the Court decided that there had indeed been misleading advertisement** (before 2007) **or a misleading commercial practice** (after 2007)[23].

For charge E, no bad faith was required to conclude that there had been a violation. For charge F, however, it had to be demonstrated that the defendants had acted in bad faith (Article 103 of the WHPC). The defendants’ argument that the approval of the promotional documents by the CBFA acquitted them of this charge, was rejected by the Court, since the CBFA does not verify whether documents submitted are compatible with the WHPC. The Court was also not persuaded by the defendants’ arguments that the offences had been committed by their agents. According to the Court, these agents were insufficiently educated and monitored by Citibank and that, as a result, the clients had been misled regarding the risks and the identity of issuer and guarantor of the structured bonds. The Court concluded that **Citibank Belgium NV/SA had acted in bad faith**.

As a consequence of the foregoing, the Court found **Citibank Belgium NV/SA guilty of charges E and F**. The three directors were acquitted of these charges.

Eventually, the Court **convicted Citibank Belgium NV/SA** for charges C, E and F and ordered the **payment of a fine of EUR 165 000**[24]. The three directors were convicted for charge C, but their sentence was suspended[25].

[23] This distinction was made since the facts of the case took place both before and after the entry into force, on 1 December 2007, of the Belgian implementation of Unfair Commercial Practices Directive 2005/29/EC. Facts which had taken place before 1 December 2007 had to be tested against the rules on misleading advertisement applicable until that date, whereas facts which had taken place after that date, had to be tested against the – at the time – new, rules on unfair commercial practices (including misleading practices).

[24] Brussels Criminal Court of First Instance, 1 December 2010, (2011) *Bank- en financieel recht*, 127.

[25] *Ibid.*

On 15 December 2010, Citibank and one of the directors lodged an appeal against this decision with the Court of Appeal of Brussels. The next day, the Public Prosecutor and the civil parties appealed as well[26].

1.2.2. Appeal

Already in December 2009 one of the civil parties had appealed against the Criminal Court of First Instance's preliminary judgement of 2 December 2009 not to appoint an '*ad hoc*' agent to represent Citibank NV/SA. On 9 November 2011, the Court of Appeal of Brussels overturned this preliminary ruling, since no contradictory debate had been held on this issue.

The procedure before the Criminal Court of First Instance had in the meanwhile, however, continued, and on 15 and 16 December 2010 a range of parties appealed against the final decision of the Criminal Court of First Instance of 1 December 2010.

On 21 May 2012, the Court of Appeal **declared the first judgement null and void, because the Court of First Instance had violated the suspensive effect of the appeal procedure against the preliminary judgement of 2 December 2009**[27]. The Court of Appeal therefore had to start the procedure all over again.

The Court of Appeal nevertheless came to the same conclusion in respect of the defendants' acquittal of charges A, B and D[28]. With regard to charges C, E and F on the other hand, the Court of Appeal came to a different conclusion. **Regarding charge C the Court of Appeal found that it was based on evidence the gathering of which violated the defendants' right to remain silent and had to be declared void**[29]. In particular, the threat to impose criminal sentences was found to be a serious violation of the right not to cooperate with the investigation.

Furthermore, the Court of Appeal reconsidered the position of the first court regarding charges E and F[30]. The Court of Appeal agreed that the relationship between Citibank and its clients was based on an investment advice contract, and that such financial services fall within the scope of the WHPC. In respect of the imputability of the facts covered by **charges E and F**, however, the Court of Appeal reached the conclusion that, regarding all circumstances, there was no evidence of direct accountability of the defendants. The Court held that **some of the bank's agents might have been held responsible for charges E and F, but that their faults could not be imputed to Citibank Belgium NV/SA**. As a consequence, the Court of Appeal **acquitted** all defendants.

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26 A. Lecocq, P. Proesmans and N. Van der Eecken, 'Arrêt Citibank: la protection du consommateur par le biais du droit pénal' (case note on Brussels Court of Appeal of 21 May 2012) (2012) *Droit pénal de l'entreprise*, at 169.

27 On 2 December 2009, the Brussels Criminal Court of First instance had declined, by way of an interim order, the request to appoint an '*ad hoc*' administrator to represent Citibank Belgium NV. Both the public prosecutor and one of the civil parties appealed against that decision. On 9 November 2011, the Court of Appeal overturned the first judgement. In the judgement of 1 December 2010, the first judge, however, continued to rule on the merits of the case, thereby disregarding 1) the suspensive effect of the procedure due to the first appeal and, consequently, 2) the so-called '*devolutive effect*' (which means the Court of Appeal was the court competent to examine the entire case since it overturned the interim order of the Correctional Court).

28 Brussels Court of Appeal, 21 May 2012, (2012) *Rechtspraak Antwerpen Brussel Gent* and (2012) *Droit penal de l'entreprise*, 143, with case note by A. Lecocq, P. Proesmans and N. Van der Eecken.

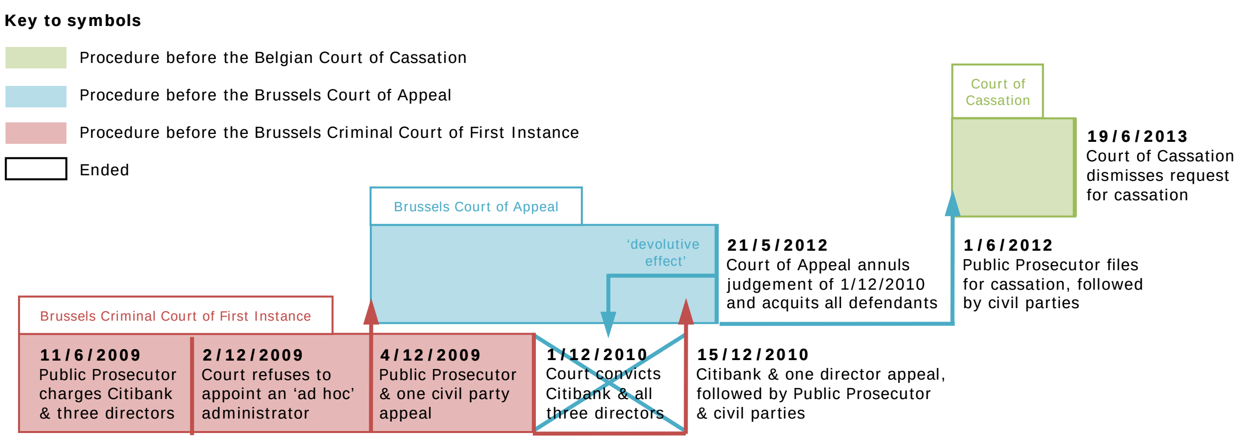
29 Brussels Court of Appeal, 21 May 2012, (2012) *Rechtspraak Antwerpen Brussel Gent,* 1200 and (2012) *Droit penal de l'entreprise,* at 150-153.

30 *Ibid.*, at 153-165.

1.2.3. Court of Cassation

The Public Prosecutor and some civil parties appealed to the Court of Cassation against the acquittal. The civil parties who had entered into a settlement with the defendant later withdrew their appeal. Central to this procedure[31] was the issue of the inadmissibility of evidence as a consequence of the violation of the right to remain silent. The Court of Cassation, however, **dismissed the request for cassation** after concluding that the decision of the Court of Appeal was consistent with the law.

Figure 1: Timeline of proceedings in the Citibank case



1.3. Evaluation

The case is interesting from a legal perspective since:

- the case was filed as a **criminal** charge instead of a civil procedure; and
- the case not only involved a breach of financial regulation (the Belgian Prospectus Law), but also a breach of the *rules on unfair commercial practices* (misleading advertising). It is particularly significant that although the courts, in first instance and on appeal, **qualified the relationship between Citibank and its clients as investment advice**, they **did not examine the MiFID rules**. The reason was that the Belgian law implementing the MiFID rules at the time did not provide for criminal sanctions for violation of the MiFID conduct of business rules. The Public Prosecutor therefore chose to **base this part of the charges on the Belgian rules prohibiting unfair trade practices, the breach of which is** indeed **criminally sanctioned**. It is particularly interesting that the arguments in respect of the violation of the prohibition of misleading trade practices, drew almost literally from the MiFID rules applicable at the time. The (old) MiFID Implementing Directive, for instance, required that information provided to (potential) clients '*shall be accurate and in particular shall not emphasise any potential benefits of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risks*'[32]. The Court of First Instance found, in very similar terms, that Citibank had violated the rules on unfair commercial practices.

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[31] Belgian Court of Cassation, 19 June 2013, (2013) *Arresten van het Hof van Cassatie*, 1551.

[32] Article 27 (2), second paragraph of Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2006] OJ L241/26.

This case therefore raises the following **questions** (i) whether it would be useful to have criminal sanctions for investor protection purposes, and (ii) how MiFID investor protection rules co-exist with general rules on consumer protection and the opportunities and challenges this presents.

Regarding the first question, the present report does not allow definite conclusions to be drawn on whether there is a need to require all Member States to introduce specific **criminal sanctions for violation of the MiFID conduct of business rules**. Prima facie, there do **not** seem to be **strong arguments** to do so. One of the reasons for introducing criminal proceedings against Citibank was, according to the Belgian Minister of Economics at the time, that it would facilitate a claim for damages by the duped investors, who would be able to join their civil claim to the criminal proceedings[33]. This should, however, not be taken as a policy argument for criminal sanctions for the violation of the MiFID conduct of business rules. The primary goal of criminal prosecution is, obviously, to punish the defendant whereas compensating the injured party is the objective of civil litigation[34]. When the main purpose is to facilitate a claim for damages by the duped investors, the introduction of an efficient collective action procedure – which did not exist at the time in Belgium – seems the more effective technique in this type of cases. When introducing new crimes one should, moreover, always consider the limited means of the prosecutorial authorities who inevitably need to prioritise between cases due to budgetary constraints[35].

The second question, **how MiFID investor protection rules co-exist with general rules on consumer protection**, has been the subject of in-depth research already[36].

In this context, it should first be noted that important MiFID II rules have an equivalent in the Unfair Commercial Practices Directive 2005/29/EC (UCPD). Article 5 of the UCPD considers that a '*commercial practice shall be unfair if (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers*.' Article 24(1) of MiFID II provides that '*Member States shall require that, when providing investment services or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients and comply, in particular, with the principles set out in this Article and in Article 25*'. Although the two provisions have very different wordings, they also share important similarities. They both make use of rather vague terms, such as '*fair*' and '*professional*'. They both set a general standard of behaviour for professional parties; they both set fiduciary duties of care. Similarly, Article 5(4) of the UCPD provides that '*commercial practices shall be unfair which … are misleading as set out in Articles 6 and 7*'. Article 6(1) of the UCPD provides that '*a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case*

[33] See 'Van Quickenborne verhoogt druk op Citibank. Minister van Economie Vincent Van Quickenborne ziet "aanwijzingen" van misleidende reclame', *De Standaard*, 18 October 2008: '*He warns that if the examination of the case by the Economic Inspection would turn out negatively for Citibank, he will bring the case to court, so that all duped investors – about 4000 – can join their civil claim to the criminal proceedings. The government is worried and will take action if needed*' (free translation from Dutch). In reality the Minister of Economics cannot himself initiate criminal proceedings or even order to do so.

[34] S. Sarnoff, *Paying for Crime: The Policies and Possibilities of Crime Victim Reimbursement* (Greenwood, Westport 1996) at 17-18.

[35] See e.g. C. Fijnaut, D. Van Daele and S. Parmentier, *Een openbaar ministerie voor de 21ste eeuw* (Leuven University Press, Leuven 2000) at 111.

[36] V. Colaert, *De rechtsverhouding financiële dienstverlener – belegger* (Die Keure, Brugge 2011) at 280-310 and 499-501.

causes or is likely to cause him to take a transactional decision that he would not have taken otherwise'. Article 24(2) of MiFID II provides that '*[a]ll information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading*'. Again, although the wording differs, both the UCPD and MiFID II feature a general prohibition on misleading practices / misleading information (whereas providing misleading information would be a misleading practice under the UCPD).

It should further be noted that the UCPD is a horizontal directive ('*lex generalis*'), applicable to all sectors, including the financial sector[37]. MiFID II is a sectoral directive, only applicable to the investment services sector ('*lex specialis*'). In principle the general adagium '*lex specialis derogat legi generali*', explicitly confirmed in the UCPD[38], should apply in such a situation. However, in this case it could be argued that the UCPD is also a lex specialis, since it deals specifically with unfair commercial practices. It has therefore been argued that to the extent the UCPD and the MiFID II framework do not contradict, they should be applied cumulatively[39]. This means, in practice, that when the national UCPD implementation is applied to an investment services case, the courts should interpret the concepts of '*unfair*' and '*misleading*' commercial practices not only in accordance with the UCPD framework (e.g. the blacklist of misleading and aggressive commercial practices[40]), but also in accordance with the relevant MiFID II conduct of business rules[41]. Vice versa, if a regulator or a court needs to deal with an investment services case on the basis of MiFID II, it also needs to take into account the UCPD rules, including the blacklist, in order to decide whether an investment firm has acted honestly, fairly and professionally in accordance with Article 24(1) of MiFID II or has provided misleading information within the meaning of Article 24(2) of MiFID II[42].

In the Citibank case, the courts have indeed interpreted the Belgian UCPD implementation in accordance with the relevant MiFID rules.

[37] See recital (9) of the UCPD.

[38] Article 3(4) of the UCPD.

[39] V. Colaert, *De rechtsverhouding financiële dienstverlener – belegger* (Die Keure, Brugge 2011) at 280-289. The author did not find any contradictions.

[40] Annex II to the UCPD.

[41] The UCPD indeed refers to Article 19 of MiFID I for information obligations which are to be considered as material information, the omission of which can be considered a misleading practice (see Article 7(1) and (5) and Annex II of the UCPD). This confirms that the MiFID conduct of business rules are to be taken into account when deciding whether a practice is to be considered misleading.

[42] A complicating factor in this respect is that the scope of protection of the UCPD differs from the scope of protection of the MiFID II conduct of business rules. Whereas the UCPD is applicable to consumers, i.e. '*any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession*' (Article 2(a) UCPD), the MiFID II rules are applicable to a much wider range of retail and professional clients (see Annex II to MiFID II).

2. DEXIA

2.1. Background and facts

The Dexia case concerned the **mis-selling of shares in ARCO investment companies to retail investors, while the ARCO funds had invested the majority of their funds in Dexia**. Most of the mis-selling occurred long before the 2007 financial crisis. With the collapse of Dexia in 2011, however, the ARCO companies also collapsed and the ARCO investors suffered huge losses on their investment.

The case is **politically sensitive**, among other reasons because the General Christian Employees Association, ACW (*Algemeen Christelijk Werknemersverbond*) was involved in this case. The ACW, succeeded by Beweging.net, was a Christian umbrella organisation founded by a number of social organisations, including the Christian trade union, ACV (*Algemeen Christelijk Vakverbond*) and the Christian health insurance fund (CM). The ACW had close ties with the Flemish Christian democratic party CD&V, due to the historical '*pillarisation*' (*verzuiling*) of Belgian public life[43].

ARCO was a Belgian cooperative holding company, with the social organisations tied to the ACW as reference shareholders. The following investment companies were, amongst others, subsidiaries of ARCO: Arcopar, Arcoplus and Arcofin. ARCO and the legal predecessors of Dexia sold shares in those investment companies to some 800 000 small investors (hereinafter: '*the ARCO investors*').

The goal of ARCO was to invest in economically interesting projects, as well as in third and fourth world projects. In fact, however, ARCO had over time invested, via its subsidiaries, more than 90 % of its shareholders' money in Dexia shares.

In October 2011, Dexia became the first major casualty of the European sovereign debt crisis[44]. Its acute liquidity loss led to the implementation of an orderly resolution plan with the support of the Belgian, French and Luxembourg states[45]. As part of the plan, Dexia Bank Belgium was acquired from the Dexia Group ('Dexia SA') and nationalised by the Belgian State. Its French counterpart, Dexia Crédit Local, received several funding guarantees and is currently the largest subsidiary of the Dexia Group. In order to avoid confusion between the now nationalised 'Dexia Bank Belgium' and the listed residual bank '*Dexia SA*' a rebranding was deemed necessary. On 1 March 2012, Dexia Bank Belgium unveiled its new name and logo: Belfius Bank & Insurance[46].

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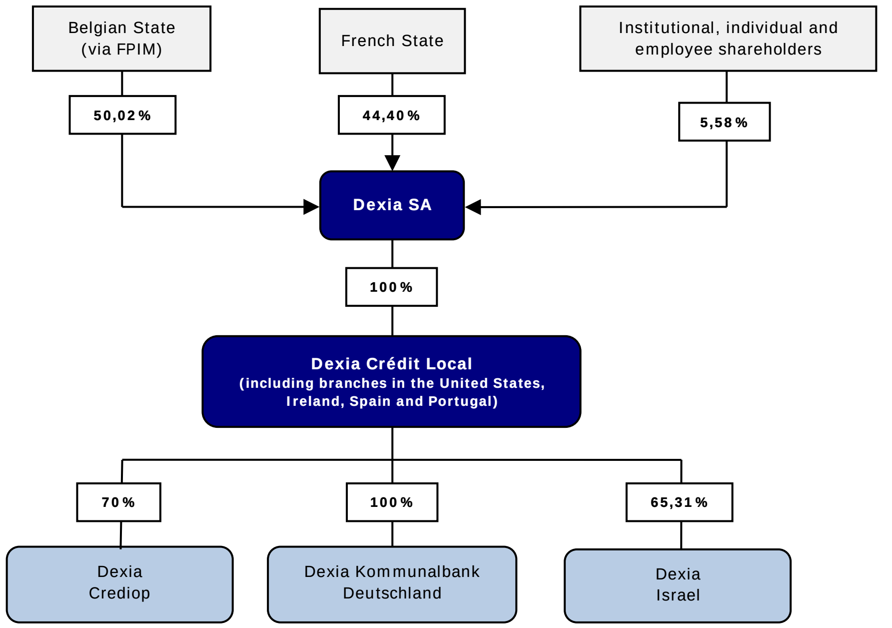
[43] The term '*pillarisation*' or '*compartmentalisation*' is a metaphor introduced by Dutch political scientists to describe a society segmented into different organisational networks along religious or ideological lines. These networks are called '*pillars*' or '*columns*' because they are comprised of function-specific but vertically integrated organisations extending into the '*profane*' spheres of life (e.g. labour representation, social security, education, etc.), and capped by a political party (see V. Viaene, *Belgium and the Holy See from Gregory XVI to Pius IX (1831-1859)* (Universitaire Pers, Leuven 2001) at 14). As a result, the Christian employee organisation ACW traditionally has ties with the Christian political party CD&V, and the liberal and socialist organisations in Belgium are closely linked to the liberal and socialist political parties (see E. Gerard, *De christelijke arbeidersbeweging in België: Deel 2* (Universitaire Pers, Leuven 1991) at 51-55 and 580-583).

[44] R. Goyal, P. Koeva Brooks, M. Pradhan, T. Tressel, G. Dell'Ariccia and C. Pazarbasioglu, *A Banking Union for the Euro Area (*IMF, 2013) at 16.

[45] Euronext, 'Dexia: European Commission approval of the revised Dexia orderly resolution plan', Press release, Brussels/Paris, 31 December 2012, https://www.euronext.com/en/node/376503.

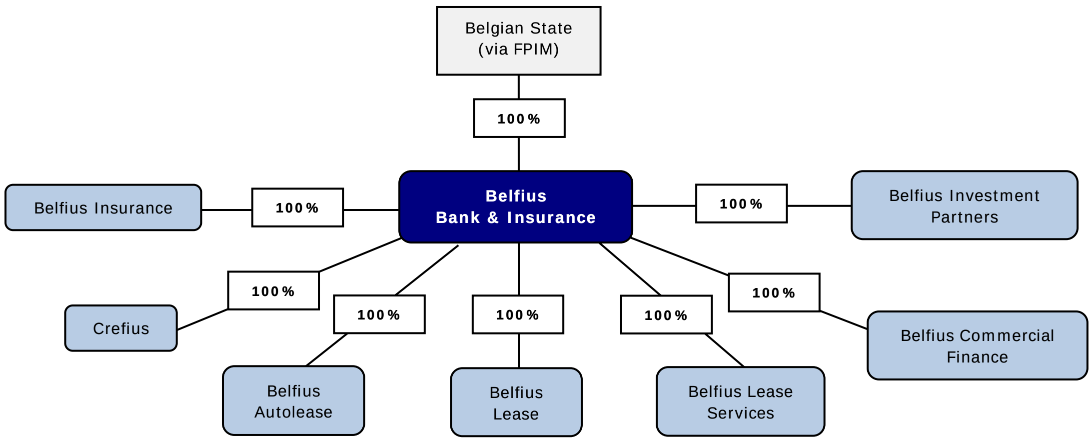
[46] Dexia Bank Belgium, 'Dexia Bank Belgium becomes Belfius Bank & Insurance', Press release, Brussels, 1 March 2012, https://www.belfius.com/EN/Media/FY%202011%20results_tcm_35-44190_tcm_77-93317.pdf.

Figure 2: Dexia's current group structure (simplified)



Source: Dexia, Annual Report 2016, http://www.dexia.com/EN/journalist/publications/annual_reports/Documents/RA_2016_EN.pdf, p. 7.

Figure 3: Belfius's current group structure (simplified)



Source: Belfius, Annual Report 2016, https://www.belfius.com/EN/Media/bel_RA2016_eng_tcm_77-134471.pdf, p. 2.

Since ARCO had invested more than 90 % of its shareholders' money in Dexia, ARCO and its investment companies also went bankrupt. This meant that their 800 000 shareholders would not get back their initial contribution, let alone any return on investment. Many of these investors would later **claim that those shares had been promoted as risk-free alternatives to a savings account**.

Because of the politically sensitive nature of the case, the government has attempted to come up with a number of solutions for the ARCO investors, who had suffered damages as a result of the collapse of Dexia.

In November 2011, the **Belgian government developed a solution** for the 800 000 ARCO investors[47]. The situation of the **ARCO shareholders would be covered by the deposit guarantee system**. The possibility to implement such a solution had been created a couple of years earlier. In light of the financial crisis, parliament had decided, on 15 October 2008, to give the government a special mandate in the event of a sudden crisis on the financial markets or in case of a serious threat of a systemic crisis, (i) to take additional or derogatory measures to limit the scope or consequences of such a crisis, or (ii) to create a state guarantee for commitments of financial institutions[48]. On 10 October 2011, the government used this mandate to extend the deposit guarantee system to shares of shareholders in '*recognised financial cooperatives*'[49]. The coverage of such shares was, however, optional and could only be granted after a request by the recognised financial cooperatives to the government. Arcofin, Arcopar and Arcoplus applied for the protection of the deposit guarantee system on 13 October 2011, which was granted by the government under certain conditions[50]. This deposit guarantee meant that the state would guarantee ARCO's obligations up to EUR 100 000 for each ARCO investor who was a natural person[51].

This solution was challenged before the courts, and eventually had to be repealed (see in more detail the legal procedures set out below).

Politically there is, however, still a strong will to find a solution for the duped ARCO investors. The government is discussing its options in this respect. In the summer of 2016, the Belgian federal government agreed to create a fund of EUR 600 million to partially compensate the ARCO investors[52]. The establishment of that fund would possibly be linked to Belfius going public. Belfius would then pay an extraordinary dividend of EUR 400 million to its only shareholder, the Belgian State, just before going public[53]. It remains to be seen whether and

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[47] Royal Decree of 7 November 2011 granting a guarantee to protect the capital of recognised cooperatives (KB 7 november 2011 tot toekenning van een garantie tot bescherming van het kapitaal van erkende coöperatieve vennootschappen, *BS* 18 november 2011, 68 640).

[48] Article 117bis of the Law of 2 August 2002 on the Supervision of the Financial Sector and Financial Services, inserted by the Law of 15 October 2008 on measures to promote financial stability and introducing in particular a State guarantee on credits granted and other operations conducted in the context of financial stability (art. 117bis wet 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten, *BS* 4 augustus 2002, 39 121). This mandate was later specified in regard of the extension of the scope of the deposit guarantee system by Article 36/24 of the Law of 22 February 1998 establishing the organic statute of the National Bank of Belgium (art. 36/24 wet 22 februari 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België, *BS* 28 maart 1998, 9 377).

[49] Royal Decree of 10 October 2011 (KB 10 oktober 2011, *BS* 12 October 2011, 62 641).

[50] Granted by Royal Decree of 7 November 2011 granting a guarantee to protect the capital of recognised cooperatives (KB 7 november 2011 tot toekenning van een garantie tot bescherming van het kapitaal van erkende coöperatieve vennootschappen, *BS* 18 november 2011, 68 640). The conditions are provided in the second paragraph of Article 1, which states that, for the duration of the protection scheme:

- the companies (Arcopar, Arcofin and Arcoplus) will refrain from public offers of capital shares to other than institutional shareholders.
- the companies will limit the interest rate on the shares of the company's capital to three quarters of the interest rate stated in the Royal Decree of 8 January 1962.
- the institutional shareholders (within the meaning of Article 4, paragraph 3, fifth clause of the Royal Decree of 14 November 2008) are prohibited from taking back shares or deposited funds, or to resign (as a shareholder), unless in the context of a transfer of shares.

[51] For an overview of the legislative process: K.J. Vandormael and A. Van Impe, 'De Arco-waarborg. Over het Arco-arrest, overheidswaarborgen en het depositogarantiesysteem' (2013) *Tijdschrift voor rechtspersoon en vennootschap*, 288-290.

[52] 'CD&V krijgt zuurtje toegeworpen met Arco', *De Standaard*, 10 January 2018; 'Lijdensweg Arco nog lang niet voorbij', *De Standaard,* 12 January 2018.

[53] Critics already claim that such measure would still violate State aid rules. They argue that the new solution would involve the sale of Belfius shares and, since Belfius is a subsidiary of the Belgian State, the revenues from that sale would be considered State resources ('Europa zal Arco-regeling niet aanvaarden', *De Standaard*, 1 August 2017). Some have added, however, that from an EU perspective, it is also important for a privatisation to happen under market conditions, which would require a solution for the ARCO problem before going public (see 'Dit kán opnieuw verboden staatssteun zijn', *De Standaard*, 28 July 2017).

how this measure would be implemented in practice. Only then will it be possible to assess whether any new arrangement will be compatible with EU law.

2.2. Legal procedure

2.2.1. Introduction

The political solution has been challenged both internally and before the European Court of Justice. **Three types of legal procedures** have been initiated in regard of the Dexia-ARCO case.

Since the government had developed the state guarantee solution soon after Dexia's acute liquidity loss, the ARCO investors initially had no incentive to go to court. The first legal proceedings which were brought to court in this case, were indeed initiated by other interest groups and individual non-ARCO-investors, who felt that the ARCO guarantee unfairly favoured ARCO investors over other investors who had suffered losses in the Dexia failure and other financial debacles without benefiting from a state guarantee. Two different legal procedures have challenged the laws allowing coverage of the ARCO investors under the deposit guarantee system (i.e. the '*ARCO guarantee*').

First, the **European Commission challenged the ARCO guarantee as unlawful State aid** and reached a decision to that effect on 3 July 2014. The Belgian State and the ARCO companies challenged this decision before the General Court of the European Union. The proceedings before the General Court, however, were stayed until the European Court of Justice would have given a preliminary ruling in the context of the second procedure (see next paragraph). One of the questions was indeed whether the Commission's State aid decision could be upheld. The European Court of Justice confirmed that the Commission's decision was valid. On 8 February 2018 the General Court rejected ARCO's request to annul the decision. The annulment procedure initiated by the Belgian State before the same court is however still pending.

Second, the case was brought before the **Belgian Council of State** (the highest administrative court in Belgium), in order to **assess the legality of the legislation implementing the ARCO guarantee**. The Council of State requested a preliminary ruling from the Belgian Constitutional Court, which, in turn, referred a number of questions to the European Court of Justice for a preliminary ruling. On the basis of the judgement of the European Court of Justice, the Belgian Constitutional Court ruled that the legislation implementing the ARCO guarantee is unconstitutional. On 6 March 2018, the Council of State subsequently annulled the two Royal Decrees establishing the ARCO guarantee considering they were adopted on an unconstitutional basis.

Finally, when it became clear that the ARCO guarantee would not provide the solution the ARCO investors had hoped for, ARCO investors summoned the Belgian State, Dexia, ARCO and one of the former Dexia directors in a range of **court** proceedings in order to **claim damages on the basis of civil law**. Those cases are still pending.

Those three types of procedures are set out in more detail below.

2.2.2. Commission Decision: State Aid?

First, the ARCO guarantee was challenged at EU level.

On 7 November 2011, the Belgian government had notified the Commission that it had put in place a guarantee scheme to protect the shares of individual members (shareholders) of financial cooperatives. The Commission reacted quickly and on 6 December 2011 it sent a warning to the Belgian State that this measure could qualify as unlawful State aid and that the Belgian government should refrain from implementing it. On 3 April 2012, the

Commission informed Belgium of its decision to initiate the procedure set forth in Article 108(2) of the TFEU regarding the cooperative guarantee scheme. Both the Belgian State and the ARCO Group submitted reactions in the context of this procedure.

By its Decision of 3 July 2014, the **European Commission found that the ARCO guarantee qualified as State aid**, since it met the four cumulative requirements stated in Article 107(1) of the TFEU[54]. Furthermore, the Commission held that the State aid was unlawful because it had not been notified to the Commission in a timely manner. Moreover, according to the Commission, the measure could not be considered compatible with the internal market, since it was neither appropriate, nor necessary, nor proportionate for the purpose of remedying a serious disturbance in the economy of Belgium as a Member State (Article 107(3)(b) of the TFEU)[55]. The Commission concluded that the Belgian State should withdraw the legislation underlying this measure and recover the advantages granted to Arcopar, Arcofin and Arcoplus[56].

Subsequently, on 15 September 2014, the Belgian State brought an action before the General Court seeking the annulment of the Commission's Decision[57]. On 7 October 2014, Arcopar, Arcofin and Arcoplus brought a similar action before the same court[58]. These proceedings were stayed until the European Court of Justice would have ruled on the questions submitted by the Belgian Constitutional Court (see below). Since the European Court of Justice has given its preliminary ruling on 21 December 2016, the General Court, on 8 February 2018, has rejected the request made by Arcopar, Arcofin and Arcoplus as it found their application to be partly manifestly inadmissible and partly manifestly unfounded[59]. It has still to rule, however, on the request for annulment made by the Belgian State.

2.2.3. Procedure before the Belgian Council of State

In December 2011, the first solution (coverage by the deposit guarantee system) was challenged before the Belgian Council of State by the Flemish Federation of Investment Clubs and Investors (VFB) and some individual investors. They sought the annulment of the two Royal Decrees regarding the ARCO guarantee on the basis of (i) formal validity arguments and (ii) violation of the constitutional principles of equal treatment and non-discrimination.

In regard of the first issue, the Council of State **did not find any formal validity issues** in respect of the Royal Decrees: the requirements of Article 36/24 of the NBB Law[60] had been met, the government was competent to take the decision and it was allowed to refrain from the compulsory consultation of the Legislative Section of the Council of State in the light of the urgency of the matter[61].

With respect to the second question – whether there was an **unjustified differentiation between individual shareholders in recognised financial cooperatives**, who can benefit from the guarantee system, **and other shareholders-natural persons**, who cannot

54 Commission Decision 2014/686/EU of 3 July 2014 on State aid SA.33927 (12/C) (ex 11/NN), no. 2014/686/EU, [2014] OJ L284/67, recitals (94) to (110).

55 *Ibid*., recitals (111) to (129).

56 *Ibid*., recital (143).

57 Case T-664/14 *Belgium v Commission*, Action brought on 15 September 2014, no. 2014/C 380/31 [2014] OJ L380/24.

58 Case T-711/14 *Arcofin and Others v Commission*, Action brought on 7 October 2014, no. 2014/C 409/84 [2014] OJ C409/63.

59 Case T-711/14 *Arcofin and Others v Commission*, Judgement of 9 February 2018, ECLI:EU:T:2018:80.

60 Article 36/24 of the Law of 22 February 1998 establishing the organic statute of the National Bank of Belgium (art. 36/24 wet 22 februari 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België, *BS* 28 maart 1998, 9 377).

61 Belgian Council of State, 25 March 2013, no. 222.969.

benefit from such a system – the Council of State referred the case to the **Constitutional Court** for a **preliminary ruling**.

Question of the Council of State to the Belgian Constitutional Court: violation of principles of equal treatment and non-discrimination (Articles 10 and 11 of the Belgian Constitution)?

Upon referral by the Belgian Council of State, the Belgian Constitutional Court had to decide on the compatibility of the ARCO guarantee with the principles of equal treatment and non-discrimination (Articles 10 and 11 of the Belgian Constitution). In its judgement of 5 February 2015[62], the Constitutional Court, confronted with the Commission's Decision of 3 July 2014 (above) and with questions in two other cases referred by the Council of State[63], noted that **these questions essentially concerned** the application of EU law, more in particular **the Belgian implementation of Deposit Guarantee Directive 94/19/EC**[64] **and the Treaty provisions on State aid**. Therefore, the Constitutional Court decided to **refer the case to the European Court of Justice**, submitting the following questions **for a preliminary ruling**:

> *'(1) Must Articles 2 and 3 of Directive 94/19 ..., where appropriate read in conjunction with Articles 20 and 21 of the Charter ... and with the general principle of equality, be interpreted as meaning that:*
>
> > *(a) they impose an obligation on the Member States to guarantee the shares of recognised cooperatives operating in the financial sector in the same way as deposits;*
> >
> > *(b) they preclude a Member State from entrusting to the body which is partially responsible for guaranteeing the deposits referred to in that directive the task of also guaranteeing, in an amount up to EUR 100 000, the value of the shares of the members, being natural persons, of a recognised cooperative operating in the financial sector?*
>
> *(2) Is [the Commission decision of 3 July 2014] compatible with Articles 107 and 296 TFEU in so far as it classifies the guarantee scheme which forms the subject of that decision as new State aid?*
>
> *(3) In the event of a negative answer to the second question, must Article 107 TFEU be interpreted as meaning that a scheme concerning the State guarantee granted to the members, being natural persons, of recognised cooperatives operating in the financial sector, within the meaning of the first subparagraph of Article 36/24(1), point 3, of the Law of 22 February 1998, constitutes new State aid which must be notified to the ... Commission?*
>
> *(4) In the event of an affirmative answer to the second question, is Decision 2014/686 compatible with Article 108(3) TFEU if it is interpreted as holding that the State aid at issue was put into effect before 3 March 2011 or 1 April 2011 or on one or other of those dates, or, conversely, if it is interpreted as holding that the State aid at issue was put into effect at a later date?*
>
> *(5) Must Article 108(3) TFEU be interpreted as precluding a Member State from adopting a measure, such as that contained in Article 36/24(1), point 3, of the Law of 22 February 1998, if that measure puts State aid into effect or constitutes State aid*

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[62] Belgian Constitutional Court, 5 February 2015, no. 15/2015.

[63] Belgian Council of State, 25 March 2013, no. 222.969 and the joined cases before the Belgian Council of State, 15 January 2014, no. 226.095 and no. 226.096.

[64] Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes [1994] OJ L135/5.

which has already been put into effect and that State aid has not yet been notified to the … Commission?

(6) Must Article 108(3) TFEU be interpreted as precluding a Member State from adopting, without prior notification to the European Commission, a measure, such as that contained in Article 36/24(1), point 3, of the Law of 22 February 1998, if that measure constitutes State aid which has not yet been put into effect?[65]*'.*

Questions submitted by the Constitutional Court to the European Court of Justice

In its judgement of 21 December 2016, the European Court of Justice gave an answer to these questions and confirmed the Commission's Decision.

With regard to the first question, the Court held that **Directive 94/19/EC does not impose on the Belgian State the obligation to adopt a scheme to guarantee shares in recognised financial cooperatives** (such as ARCO) since those shares come within neither the material, nor the personal scope of Directive 94/19/EC[66]. From the point of view of EU law, the principle of equal treatment (as enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union) is not violated in that regard either since shares of recognised financial cooperatives are different from deposits made with credit institutions[67].

Furthermore, the Court of Justice held that **Directive 94/19/EC does not preclude Member States from extending the deposit guarantee scheme to shares in recognised financial cooperatives**[68]. **However**, such an extension must **not undermine the practical effectiveness of the guarantee scheme** required by the Directive, **nor infringe the EU provisions on State aid**[69]. The assessment whether the adoption of the financial cooperatives guarantee scheme is liable to undermine the practical effectiveness of the scheme required by the Directive, was left to the Constitutional Court to decide[70]. The European Court stressed that when evaluating such practical effectiveness the national court should take into consideration '*the fact that the adoption of such a scheme concerning shares in recognised cooperatives operating in the financial sector, such as those at issue in the main proceedings, benefit, in this case, a large number of small investors of the Belgian deposit guarantee scheme, and the fact that the ARCO Group cooperatives, which were admitted to that guarantee scheme a short time before the guarantee provided for by that scheme was invoked, did not make any contribution in the past towards the financing of the scheme*'[71].

Regarding the second preliminary question, the Court of Justice verified whether the requirements of State aid were satisfied in this case. For a measure to be classified as State aid, four cumulative conditions need to be fulfilled. First, there should be an intervention by the state or through state resources. The fact that the scheme is the responsibility of the Belgian State and that it involves state resources was not contested by any party before the Court[72]. Second, the measure should confer an advantage on the recipient. The Court considers that ARCO Group (as the only real beneficiary) clearly benefitted from the scheme since it prevented the flight of private investors in their group and it allowed ARCO Group to

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65 Belgian Constitutional Court, 5 February 2015, no. 15/2015, at 67-68; Case C-76/15 *Vervloet and Others v Ministerraad*, 21 December 2016, ECLI:EU:C:2016:975, recital (54).

66 Case C-76/15 *Vervloet and Others v Ministerraad*, 21 December 2016, ECLI:EU:C:2016:975, recital (72).

67 *Ibid*., recitals (73) to (75).

68 *Ibid*., recital (83).

69 *Ibid*.

70 *Ibid*., recital (85).

71 *Ibid*., recital (86).

72 *Ibid*., recital (90).

participate in the recapitalisation of Dexia Bank[73]. The Court moreover found that the Belgian measure had '*the effect of conferring an economic advantage on those [financial] cooperatives in relation to other economic operators which are, in the light of the objective pursued by that scheme, in a factual and legal situation comparable to that of those cooperatives and, therefore, has a selective character*'[74]. Third, the intervention should be liable to affect trade between Member States, and fourth, it should distort competition. The Court held that the Commission rightfully considered that the measure affected trade between Member States and distorted competition[75]. Therefore, the European Court of Justice agreed with the Commission's Decision and also dismissed the arguments against its validity; the **classification as State aid** in the Decision of 3 July 2014 was **sufficiently reasoned** in accordance with Article 296 of the TFEU[76].

After answering the first two questions, the Court considered that there is no need to answer the third question and that the fourth to sixth questions should be dealt with together[77]. These three questions concern in essence whether the Belgian measure was unlawful because it was put into effect in violation of the State aid obligations set forth in Article 108(3) of the TFEU. In that regard, the Court considered that the Belgian guarantee scheme was only notified to the Commission on 7 November 2011, on the same day that the ARCO cooperatives' application for that scheme was accepted by Royal Decree[78]. The Court held that '*a notification made at such late stage cannot be regarded as being "in sufficient time" within the meaning of Article 108(3) TFEU*'[79]. According to the Court, the **principle of preliminary examination by the Commission was** thus **infringed** and the **measure was rightfully labelled as '*unlawful State aid*'**[80].

Decision of the Belgian Constitutional Court

With these preliminary questions answered, the case was again referred to the Belgian Constitutional Court. Despite the fact that there were still actions pending before the General Court seeking the annulment of the Commission's Decision, the Court did not consider it necessary to wait for the outcome of these procedures, since the Court of Justice already explicitly stated in its preliminary ruling that it did not find any facts or circumstances which would impair the validity of the Commission Decision[81].

Thus, in its judgement of 15 June 2017, the Constitutional Court found that the Belgian guarantee for financial cooperatives was taken in favour of a certain category of persons and, as a measure of State aid, should have been notified in a timely manner to the Commission[82]. Since this measure was contrary to the provisions on State aid, the Constitutional Court did

[73] *Ibid*., recitals (91) to (95).

[74] *Ibid*., recital (101).

[75] *Ibid*., recital (108).

[76] *Ibid*., recitals (109) to (117).

[77] *Ibid*., recitals (118) to (119).

[78] *Ibid*., recital (123).

[79] Belgian Constitutional Court, 5 February 2015, no. 05/2015, at 67-68; Case C-76/15 *Vervloet and Others v Ministerraad*, 21 December 2016, ECLI:EU:C:2016:975, recital (124).

[80] Belgian Constitutional Court, 5 February 2015, no. 05/2015, at 67-68; Case C-76/15 *Vervloet and Others v Ministerraad*, 21 December 2016, ECLI:EU:C:2016:975, recitals (126) to (128).

[81] Belgian Constitutional Court, 15 June 2017, no. 70/2017, at B.13-14. On 9 February 2018, the General Court indeed confirmed this assessment (Case T-711/14 *Arcofin and Others v Commission*, Judgement of 9 February 2018, ECLI:EU:T:2018:80). See e.g. B. Lebrun and L. Bersou, 'Arrêt "Vervloet": la garantie accordée par l'État belge aux sociétés coopératives financières, une aide d'État illégale?' (2017) *Journal de Droit Européen*, at 143.

[82] Belgian Constitutional Court 15 June 2017, no. 70/2017, at B.14.

not deem it necessary to verify whether or not it undermined the practical effectiveness of the guarantee scheme required by the Belgian deposit guarantee scheme[83].

The Court concluded that the Belgian guarantee scheme for financial cooperatives had created, without reasonable justification, a distinction in favour of a certain category of persons. In doing so, it had disregarded EU law on State aid, which might have justified such distinction. Therefore, **the guarantee scheme for financial cooperatives was found to be contrary to the principles of equal treatment and non-discrimination** as enshrined in Articles 10 and 11 of the Belgian Constitution[84].

Decision of the Belgian Council of State

The case was finally referred back to the Belgian Council of State which had to decide whether or not to uphold the guarantee scheme taking into the account the violation found by the Constitutional Court. On 6 March 2018, the Council annulled the two Royal Decrees establishing the ARCO guarantee considering they were adopted on an unconstitutional basis[85].

2.2.4. Civil claims for damages

Because these procedures made clear that the political solution to compensate the ARCO investors would most likely not hold, **three cases for compensation** have been initiated, largely based on of the typical legal basis in investor compensation cases: Article 1382 of the Belgian Civil Code and violation of the consumer protection rules of the WHPC. The investors attempt to prove that the defendants have committed a fault (consisting of misleading information) when selling the ARCO shares, causing damages to the plaintiffs which the defendants should compensate.

A **first** interest group, '*Arcopar Actieteam*' ('*Arcopar Action Team*'), assembled more than 2 000 ARCO investors to summon Dexia and ARCO before the Brussels Commercial Court in September and December 2014. On 10 March 2015 Ms Francine Swiggers, former chair of the Management Committee of ARCO, former member of the Board of Dexia and one of the liquidators of ARCO, was summoned to become a defendant in the same procedure. On 17 December 2015, the plaintiffs issued a writ to the Belgian State as well, in which they demanded compensation based on the alleged illegality of the guarantee scheme the Belgian State enacted[86]. This case is still pending. **Pleadings are only scheduled for June 2021**[87].

A **second** interest group, '*Geld terug van Arco*' ('*Money back from Arco*'), representing another 1 000 ARCO investors, summoned Belfius as the legal successor of Dexia Bank Belgium in a separate procedure before the Turnhout Court of First Instance on 24 October 2016, with a view to obtaining full compensation for one family that had invested in ARCO after their bank had allegedly advised them that it would be a risk-free investment. According to the media, this should serve as a '*test case*' (and possibly a precedent[88]) for others to come[89]. Belfius summoned Arcopar to also be involved in this procedure, arguing that if the Court were to hold that a number of investors had received misleading information, this was

[83] *Ibid*., at B.12.

[84] *Ibid*, at B.14.

[85] Belgian Council of State, 6 March 2018, no. 240.896.

[86] Belfius Bank SA, *Base Prospectus*, 18 May 2017, https://www.belfius.com/EN/Media/EMTN%20programme%20d.d%3B%2018.05.17_tcm_77-135619.pdf, 114.

[87] 'Dossier rond Arco belandt juridisch op de lange baan', *De Standaard*, 22 November 2017.

[88] It should be noted that in Belgium case law does not formally have precedence value. The hope of the interest group is, however, that very similar cases which would be brought to court afterwards would nevertheless have a significant chance of being judged in the same way.

[89] 'Arco komt voor rechtbank in Turnhout', *De Tijd*, 9 November 2018.

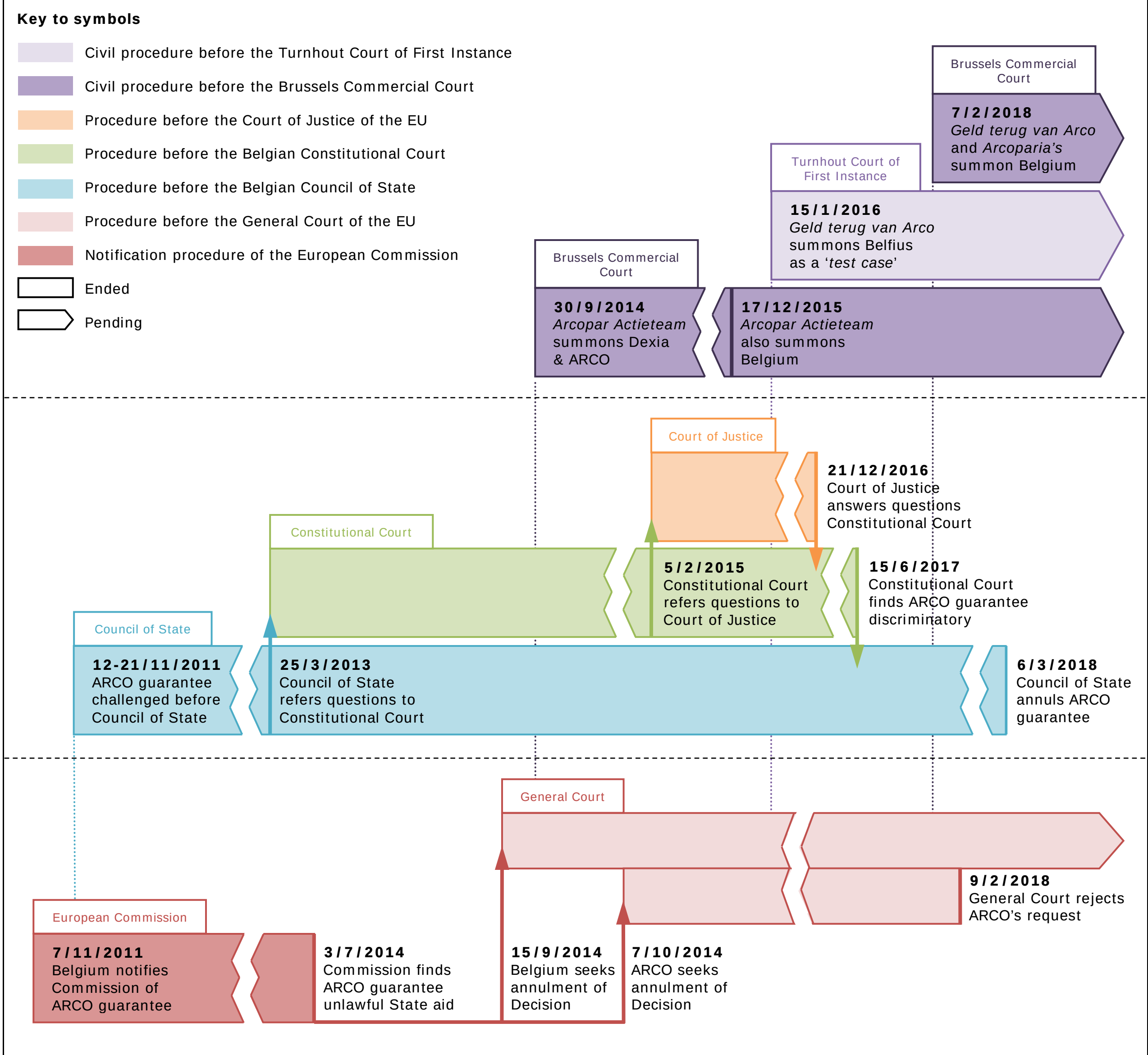
at least in part Arcopar's fault, as it had provided Belfius with this information[90]. This **case is also still pending**.

Finally, on 7 February 2018, two interest groups – '*Geld terug van Arco*' ('*Money back from Arco*') and '*Arcoparia's*' ('*Arco pariahs*') – reportedly representing a total of 3 300 ARCO investors, also summoned the Belgian State before the Brussels Commercial Court[91]. They argue that both the aforementioned preliminary ruling by the European Court of Justice and the judgement of the Constitutional Court show that the Belgian State has violated EU State aid rules as well as its own constitutional principles. According to the plaintiffs, this constitutes a wrongful act for which they seek full compensation. Belfius, the legal successor of Dexia Bank Belgium, has been summoned in this procedure as well[92].

It is uncertain whether the ARCO investors will succeed in recovering any damages through these procedures. The press recently reported that Belfius has claimed that the case has passed the limitation period[93]. All interest groups would in any event prefer a settlement in this case, resulting in ARCO, Beweging.net (the new name of ACW[94]) and the Belgian State paying damages to the ARCO investors.

[90] 'Belfius pleit verjaring in Arco-dossier', *De Tijd*, 20 January 2018.
[91] 'Arco-gedupeerden dagvaarden Belgische Staat', *De Standaard*, 7 February 2018.
[92] 'Ook Belfius gedagvaard in nieuwe Arco-zaak', *De Standaard*, 8 February 2018.
[93] 'Belfius pleit verjaring in Arco-dossier', *De Tijd*, 20 January 2018.
[94] 'ACW wordt omgevormd tot beweging.net', *De Standaard*, 14 June 2014.

Figure 4: Timeline of proceedings in the Dexia case



2.3. Evaluation

This case is **atypical** because of its highly politicised nature and the creation of the ARCO guarantee. It nevertheless raises a number of interesting issues and questions.

First, many investor compensation cases only go to court **years, and sometimes decades after the alleged mis-selling took place**. The alleged Dexia mis-selling took place as from the 1980s, but investors only suffered damages in 2011, when Dexia collapsed. Court procedures in respect of claims for damages are still pending and final judgements are not expected to come about for several years. This goes to show that even if MiFID II will hold financial institutions to higher standards, many cases will, also in the future, still be judged on the basis of MiFID I, or even pre-MiFID national standards.

Second, the case grants interesting insights into the difficulties encountered when attempting to develop public compensation schemes for private investors: it is clear that State aid rules are not to be taken lightly in this context. It moreover opens the debate about the **scope of protection of deposit guarantee schemes**. Before the crisis deposit guarantee systems were only minimally harmonised. Member States had to implement the minimum standards of Directive 94/19/EC, but could go beyond them. Certain aspects, for instance, how and to what extent the deposit guarantee scheme had to be funded[95], had not been harmonised at all.

With the crisis the flaws of Directive 94/19/EC became very clear. Member States attempted to reassure depositors by increasing the coverage of their deposit guarantee fund far beyond the minimum of, at the time, EUR 20 000[96]. As a side effect depositors started to move their deposits to credit institutions covered by deposit guarantee schemes with a higher coverage. Moreover, certain Member States opened up their deposit guarantee systems for other products than bank deposits[97]. As the funding of the deposit guarantee funds was not harmonised, many Member States' funds already were underfunded before these changes[98]. Increasing the amount of coverage and widening the scope of products covered by the fund further exacerbated the problem. Directive 2009/14/EC therefore harmonised the coverage level of Member States' deposit guarantee schemes, setting the coverage level at EUR 100 000[99]. Directive 2014/49/EU finally also harmonised the funding and scope of coverage of deposit guarantee schemes[100]. Today it is therefore **no longer possible for Member States to open up their deposit guarantee system to products other than bank deposits**. The only remaining option for Member States who wish to have other products covered by a guarantee fund, is to create fully separated guarantee funds.

The normative question, whether the limitation of the scope of coverage of the Deposit Guarantee Directive 2014/49/EC to bank deposits only should be sustained, must be answered on the basis of (i) what the goals of and rationale behind a deposit guarantee system are, and (ii) whether the same goals and rationale apply for products other than bank deposits. In respect of the first question, it is widely agreed that the goals of the deposit guarantee system are banking stability and depositor protection, with the former, banking

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95 Recital (23) of Directive 94/19/EC only mentions with respect to funding '*that the cost of financing such schemes must be borne, in principle, by credit institutions themselves and … that the financing capacity of such schemes must be in proportion to their liabilities; … this must not, however, jeopardize the stability of the banking system of the Member State concerned*'.

96 Article 7 of Directive 94/19/EC. During the crisis several Member States drastically increased the coverage level of their deposit guarantee funds. Austria, Ireland, Slovenia and Slovakia even introduced an unlimited deposit coverage. European Commission, *Commission Staff Working Document: Impact assessment*, SEC(2010) 834/2, Annex I, http://ec.europa.eu/internal_market/bank/docs/guarantee/20100712_ia_en.pdf, at 101-102.

97 In Belgium, for instance, the scope of coverage of the deposit guarantee fund was extended to also cover life insurances with a guaranteed return (the so-called '*Branch 21 insurances*') by Article 5, 3° of the Royal Decree of 14 November 2008 implementing the crisis measures provided in the NBB law concerning the establishment of a guarantee fund for financial services (art. 5, 3° KB 14 november 2008 tot uitvoering van de crisismaatregelen voorzien in de wet van 22 februari 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België, voor wat betreft de oprichting van het Garantiefonds voor financiële diensten, *BS* 12 May 2016, 61 285). In the Netherlands life annuity saving products and registered bonds were included in the coverage of the Dutch deposit guarantee scheme (Consumentenbond, *Checklist producten depositogarantiestelsel*, https://www.consumentenbond.nl/sparen-en-beleggen/welke-producten-vallen-wel-niet-onder-het-depositogarantiestelsel). In France cash accounts associated with an equity saving scheme, a pension saving scheme or a company savings scheme held at an FGDR (*Fonds de Garantie des Dépôts et de Résolution*) affiliated banking institution were covered (Fonds de Garantie des Dépôts et de Résolution, *Protecting your accounts in the event that your bank fails*, https://www.ca-cib.com/sites/default/files/2017-06/Plaquette%20FGDR%20-%20Anglais.pdf, at 2). In Ireland share accounts in a building society or credit union were covered (Deposit Guarantee Scheme, *Protected deposits*, https://www.depositguarantee.ie/en/what-we-cover/protected-deposits). In Austria securities settlement accounts and payment transaction accounts were covered (Erste Group, *Safeguard for your money. Deposit protection new*, https://www.erstegroup.com/en/deposit-guarantee).

98 Already in 2005 the European Commission found that at EU level 80 % of depositors were covered by low or unfunded schemes. See European Commission, *Review of the Deposit Guarantee Schemes Directive (94/19/EC)*, 14 July 2005, 5 (http://ec.europa.eu/internal_market/bank/docs/guarantee/consultationpaper_en.pdf).

99 Article 1(3) of Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay [2009] OJ L68/3.

100 Article 5 of Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes [2014] OJ L173/149.

stability, being the most important one[101]. Indeed, rumours that a credit institution is in financial trouble, easily become a self-fulfilling prophecy when these rumours trigger a bank run. A run leads to liquidity problems, because of which the financial situation of the bank may deteriorate so severely that it can rapidly fall into bankruptcy. Due to direct and indirect spill-over effects, this could, in an extreme case, affect the whole financial market and lead to a systemic financial crisis[102]. **For financial products other than bank deposits**, such as life insurance products, units in an investment fund or shares in a company, this **stability risk (systemic risk) is, at first sight, not an equally big concern**, which pleads against the coverage of such products under deposit guarantee schemes. Further research should, however, be conducted to establish this in a more definite manner[103].

Third, the civil claims for damages before the Commercial Court and the Court of First Instance, raise a number of interesting issues. **MiFID II** (as well as its predecessors MiFID I and ISD) indeed **only deals with substantive rules of investor protection** and leaves a number of other important issues unresolved.

First, there is a most interesting discussion in the Member States in regard of the **question whether MiFID is merely supervisory public law, which harmonises supervisory standards for investment firms, or also harmonises civil law duties of care for investment firms**. The answer to this question is important to assess whether, on the one hand, civil law duties of care can go beyond the MiFID standards, and to what extent, on the other hand, civil law courts have to take into account the regulatory standards when assessing the civil law duty of care. Different positions have been taken in this respect[104]. Some argue that MiFID harmonises public law standards so that supervisors will use the same set of standards when monitoring the behaviour of investment firms. MiFID would, in this line of argument, not deal with civil law. The civil law duty of care will, according to this view, be influenced but not maximally harmonised by the MiFID standards[105].

Other authors have argued that the MiFID conduct of business rules aim at maximum harmonisation, and that EU law does not distinguish between public law and private law in this respect. They claim that the MiFID conduct of business rules also maximally harmonise

[101] V. Colaert, 'Deposit Guarantee Schemes in Europe: Is the Banking Union in need of a third pillar' (2015) *European Company and Financial Law Review*, at 373; B. Bernet and S. Walter, *Design, Structure and implementation of a modern deposit insurance scheme* (SUERF, Vienna 2009), at 8; European Commission, *Commission Staff Working Document: Impact assessment*, SEC(2010) 834/2, Annex I, http://ec.europa.eu/internal_market/bank/docs/guarantee/20100712_ia_en.pdf, at 27, where the goals of the Directive are described as: '*maintaining financial stability by strengthening depositor confidence and protecting their wealth*'.

[102] V. Colaert, 'Deposit Guarantee Schemes in Europe: Is the Banking Union in need of a third pillar' (2015) *European Company and Financial Law Review*, at 373.

[103] During the crisis money market funds, for instance, have played an important role for certain companies as alternatives to bank deposits. When the crisis hit, bank run-like phenomena have been described with respect to such money market funds. They were therefore considered to be part of the '*shadow banking system*'. See L. Schmidt, A. Timmermann and R. Wermers, 'Runs on Money Market Mutual Funds' (2016) *American Economic Review*, at 2625-2657; Financial Stability Board, 'Shadow Banking: Scoping the Issues' (12 April 2011); Financial Stability Board, 'Shadow Banking: Strengthening Oversight and Regulation. Recommendations of the Financial Stability Board' (27 October 2011); Communication from the Commission to the Council and the European Parliament, *Shadow Banking – Addressing new sources of risk in the Financial Sector* (COM/2013/0614 final).

[104] For an overview of views on this issue in different EU Member States in the context of portfolio management: D. Busch and D.A. DeMott (eds.), *Liability of Asset Managers* (Oxford University Press, Oxford 2012), and more in particular the conclusions from the editors: 'Comparative Analysis of the Jurisdictions – The Impact of Regulatory frameworks on an Asset Manager's Private Law Duties and Liability' at 537-544.

[105] See, among others, O. Cherednychenko, 'European Securities Regulation, Private Law and the Investment Firm-Client Relationship' (2009) *ERPL*, at 925; D. Busch, 'De invloed van MiFID op aansprakelijkheid in de Europese financiële sector', in D. Busch, C.J.M. Klaassen and T.M.C. Arons (eds.), *Aansprakelijkheid in de financiële sector* (Kluwer, Deventer 2013) 11-70; and more recently, moving in the direction of the second position, D. Busch, 'The private law effect of MiFID: the Genil case and beyond' (2017) *European Review of Contract Law*, 70-93.

private law[106]. Although this position may at first seem to have a major impact on the civil law of Member States, the actual consequences of this position are not that far-reaching. The first MiFID conduct of business rule is in itself an open duty of care, providing that '*when providing investment services or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients*' (Article 24 (1) of MiFID II). This is an umbrella principle (all other conduct of business rules are specific instances of what it means to act honestly, fairly and professionally), but it is also a catch-all principle, which goes beyond the requirements of the other conduct of business rules: even if a firm correctly applies all other conduct of business rules, it is still possible that it breaches its duty to act honestly, fairly and professionally. Since this first conduct of business rule is an open norm, it does not limit civil judges in their appreciation of an investment firm's duty of care. The fact that MiFID maximally harmonises this conduct of business rule mainly means that the European Court of Justice has the competence to give a preliminary ruling on questions regarding this provision. The second position thus implies that the concept of '*honest, fair and professional*' behaviour is maximally harmonised, both for supervisory purposes and for purposes of private law claims for damages.

In this debate, the lead author of this report has taken a position in favour of the second opinion. Nevertheless, in view of the scholarly disagreement on this point, a clear EU position on this question would be useful.

Second, if a court comes to the conclusion that a MiFID rule has been breached, and such a breach is considered a breach of a civil law duty of care as well, **in order to obtain a remedy the claimant still has to prove** that he or she has suffered **damages**, **and** that those damages were actually caused by the breach of the MiFID rules (**causal link**). MiFID does not harmonise those elements at all. Member States' rules on how to prove damages and a causal link between damages and breach of duty of care, differ a lot[107]. Some Member States make use of presumptions to the benefit of investors[108], whereas others leave the burden of proof fully with the investor. Whether investors succeed in a claim for damages for breach of MiFID rules, will depend very much on those elements.

Finally, the Dexia case shows that in cases with large groups of investors suffering damages from very similar behaviour, claimants tend to gather in interest groups, even if a collective action is not initiated. The Dexia case, however, also shows the inefficiency of the introduction of a range of procedures before different courts, and the risk that many small investors, who do not actively join an interest group, will not obtain damages at all. It raises the **question whether a collective action procedure should be available for such claims**, and, if so, what such a procedure should look like (see also section 3.3 below).

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[106] P.O. Mülbert, 'Auswirkungen der MiFID-Rechtsakte für Vertriebsvergütungen im Effektengeschäft der Kreditinstitute' (2008) *ZHR*, 172; V. Colaert, *De rechtsverhouding financiële dienstverlener – belegger* (Die Keure, Brugge 2011) at 136-146, 205-206 and 576, no. 1312; V. Colaert, 'Les règles de conduite MiFID, le droit de la consommation et le droit civil: une relation complexe' (2012) *RPS*, at 271-310; I. Riassetto and J.F. Richard, 'Luxembourg' in D. Busch and D.A. DeMott (eds.), *Liability of Asset Managers* (Oxford University Press, Oxford 2012), 178, no. 6.63. In the Genil case the European Court of Justice seems to confirm that the EU does not consider the MiFID conduct of business rules as merely public law. The European Court of Justice provides that '*[i]n the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of noncompliance with those obligations, subject to observance of the principles of equivalence and effectiveness*'. See Case C-604/11, *Genil 48 SL and Comercial Hostelera de Grandes Vinos SL v Bankinter SA and Banco Bilbao Vizcaya Argentaria SA*, 30 May 2013, ECLI:EU:C:2013:344, recital (57).

[107] P. Giliker, *Research Handbook on EU Tort Law* (Edward Elgar Publishing, Cheltenham 2017) at 162.

[108] E.g. Belgium: Article 30ter of the Law of 2 August 2002 on the Supervision of the Financial Sector and the Financial Services (art. 30ter wet 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten, *BS* 4 augustus 2002, 39 121).

3. FORTIS

3.1. Background and facts

The Fortis case deals with **misleading information provided by the issuing company to the market**, rather than mis-selling by an intermediary.

Fortis Group with, among others, the Dutch Fortis Bank NV and the Belgian Fortis NV/SA was one of the largest financial groups in the EU. Its shares were traded on Euronext Amsterdam and Euronext Brussels, respectively.

Fortis Group was part of a consortium with Royal Bank of Scotland Group PLC and the Spanish Banco Santander SA. In April 2007, the consortium launched a public bid on the shares of the Dutch ABN Amro NV. On 6 August 2007, the General Meeting of Shareholders of Fortis Group, almost unanimously, voted for participation in the public bid and agreed on the method of financing. This acquisition was approved by the Belgian and Dutch authorities and by the European Commission. The Fortis Group would have to pay approximately EUR 24 billion for its part of ABN Amro NV, which represented approximately 50 % of its market capitalisation at the time. The part of ABN Amro NV that Fortis would take over, consisted of ABN Amro Nederland (except for some activities), ABN Amro Private Clients and ABN Amro Asset Management.

In order to finance the takeover of ABN Amro NV, Fortis raised EUR 13.4 billion by issuing new shares in September 2007. In the context of this share issue, a press release (hereinafter: the Trading Update) and a prospectus were published, respectively on 21 and on 25 September 2007. Both the prospectus and the Trading Update contain, inter alia, information on Fortis's exposure to subprime mortgages[109], specifically with regard to the size of Fortis's subprime portfolio and the debts suffered in relation thereto. In the Trading Update, the following was stated:

> '*Although Fortis does not have any direct mortgage financing activities in the US, it does have some exposure to the US sub-prime mortgage market through its ownership of mortgage-backed securities (MBSs), asset-backed securities (ABSs) and [collateralised debt obligations (CDOs). Approximately 95 % of these MBS and ABS portfolios are AAA and AA rated. The impact on Fortis's full-year 2007 results is expected to be non-material thanks to its diversified portfolio, dynamic portfolio management and the credit risk protection purchased in 2006. Even if the current subprime severity would deteriorate with a further 20 %, the additional non-linear net profit impact is estimated at EUR 20 million*.'[110]

On 10 October 2007, the consortium's bid on the shares of ABN Amro NV succeeded. On 8 November 2007 (before start of trading), Fortis published the figures of the third quarter of 2007 providing further information on its exposure to subprime assets.

Fortis also regularly shared solvency figures and the progress of its solvency plan with its investors. The payment of the takeover price for ABN Amro NV would indeed have consequences for the solvency of Fortis. Therefore, Fortis announced, already on 20 July 2007, several measures intended to be taken by the end of 2009 to reinforce its solvency (hereafter: the solvency plan) including a capital increase, an issuance of financial instruments, a sale of assets, the group leverage and the operational results of 2008 & 2009. As a follow-up to the solvency plan, Fortis periodically calculated its actual solvency and its hypothetical solvency taking into account the integration and consolidation of ABN Amro NV and the intended solvency measures. The internally calculated solvency figures and the

[109] Subprime mortgages are mortgages which serve as a security for loans with a high credit risk.
[110] Ageas, 'Fortis trading update', 21 September 2007, https://www.ageas.com/newsroom/fortis-trading-update.

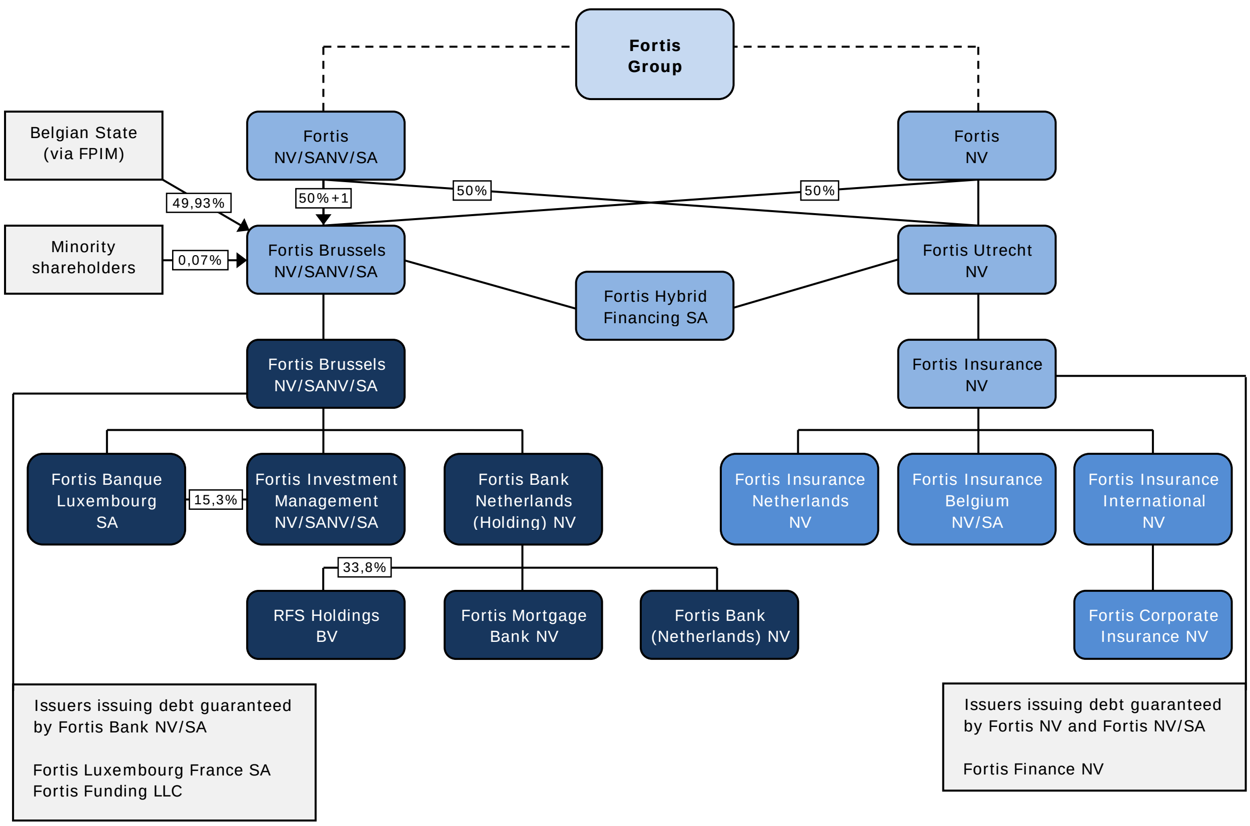
progress of the solvency plan were shared with the investing public. In addition, Fortis stated that it expected to meet the solvency objective by the end of 2009.

However, the market situation in general became more and more critical, which hampered the implementation of the solvency plan. Consequentially, on 26 June 2008, Fortis made three announcements. First, it announced further measures to reinforce its solvency: a) a decision not to pay out an interim-dividend and only distribute stock dividends in 2008, b) an immediate issue of new shares in the form of an '*Accelerated Book-Building Offer*' worth EUR 1.5 billion, c) sale-and-leaseback operations, a '*capital-relief*' and a disinvestment programme of EUR 3.5 billion, and d) an intended issue of non-diluted capital instruments with a maximum value of EUR 2 billion. Second, it communicated that it would probably have to sell at a loss certain parts of the group as a condition for Commission approval of the takeover of ABN Amro NV. Third, Fortis announced that these sales would have a negative impact on the future solvency of Fortis. After these announcements, Fortis's share price fell by approximately 20 % on one day and continued to decrease.

In September 2008, the situation became increasingly problematic. The financial markets were paralysed due to the bankruptcy of Lehman Brothers on 15 September 2008. On 26 September 2008, it became clear that the financial markets no longer had confidence in Fortis. Not only had its share price dropped 20 % in two days, the cost price of a CDS (credit default swap) which covered against a cessation of payment of Fortis had more than doubled that day to approximately 6.5 times as much as it was in the first semester of 2008. Moreover, institutional clients started to withdrawal significant amounts of deposits and several private clients started to withdraw their savings.

During the weekend of 27 and 28 September 2008, it became clear that Fortis would have to suspend its payments on Monday 29 September 2008 if it did not receive State aid. On 28 September 2008, the Belgian, Luxembourg and Dutch governments therefore committed to make a capital injection of EUR 11.2 billion in exchange for an interest of 49 % each in Fortis Group's bank subsidiaries in each of those three countries. Fortis informed the market about this transaction and its consequences via a press release on the morning of Monday, 29 September 2008 (before start of trading).

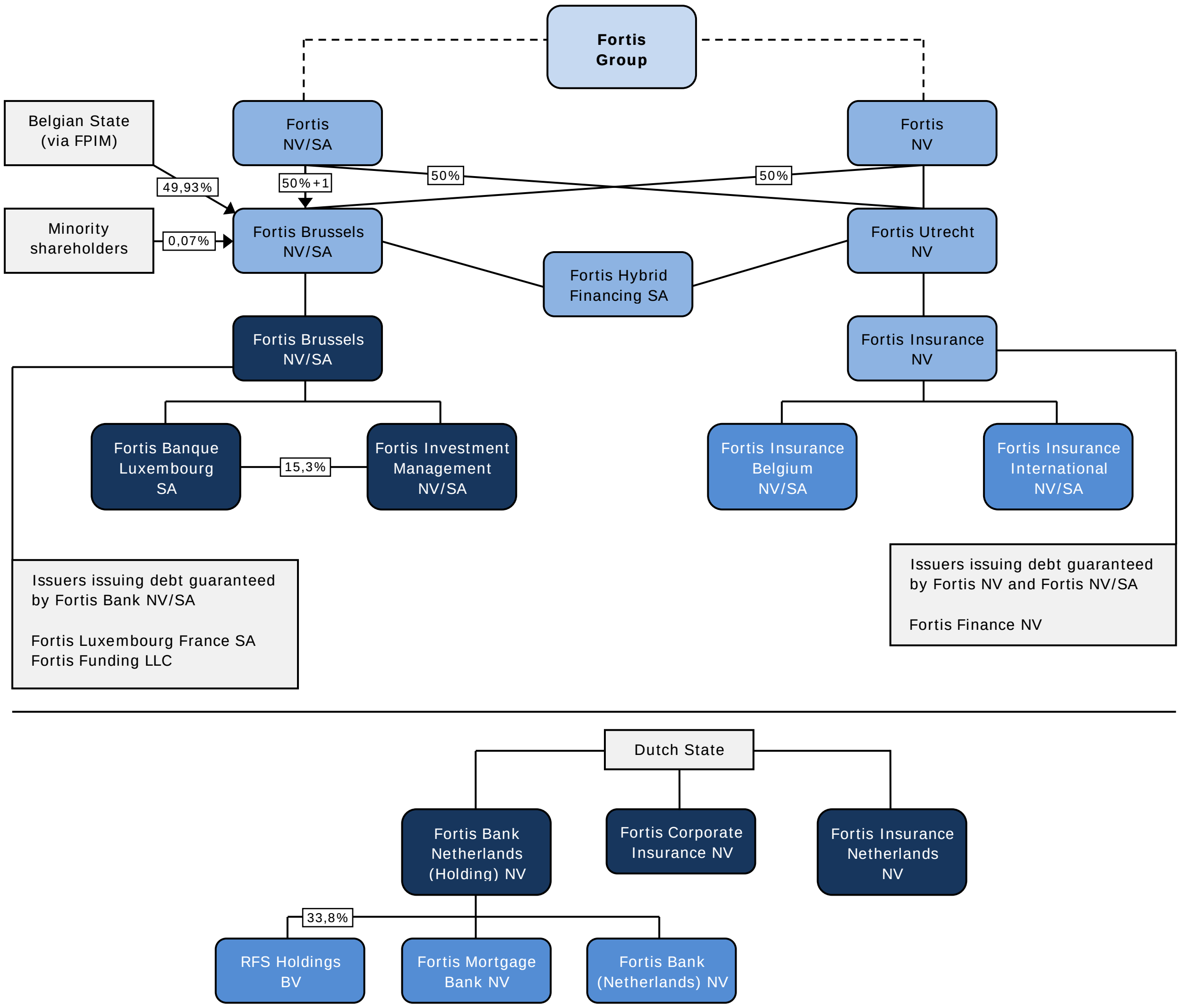
Figure 5: Fortis's group structure after the capital injection (29 September 2008)



Source: Fortis, 'Circulaire voor aandeelhouders', *Tijdschrift voor rechtspersoon en vennootschap* 2009, 208 (free translation from Dutch).

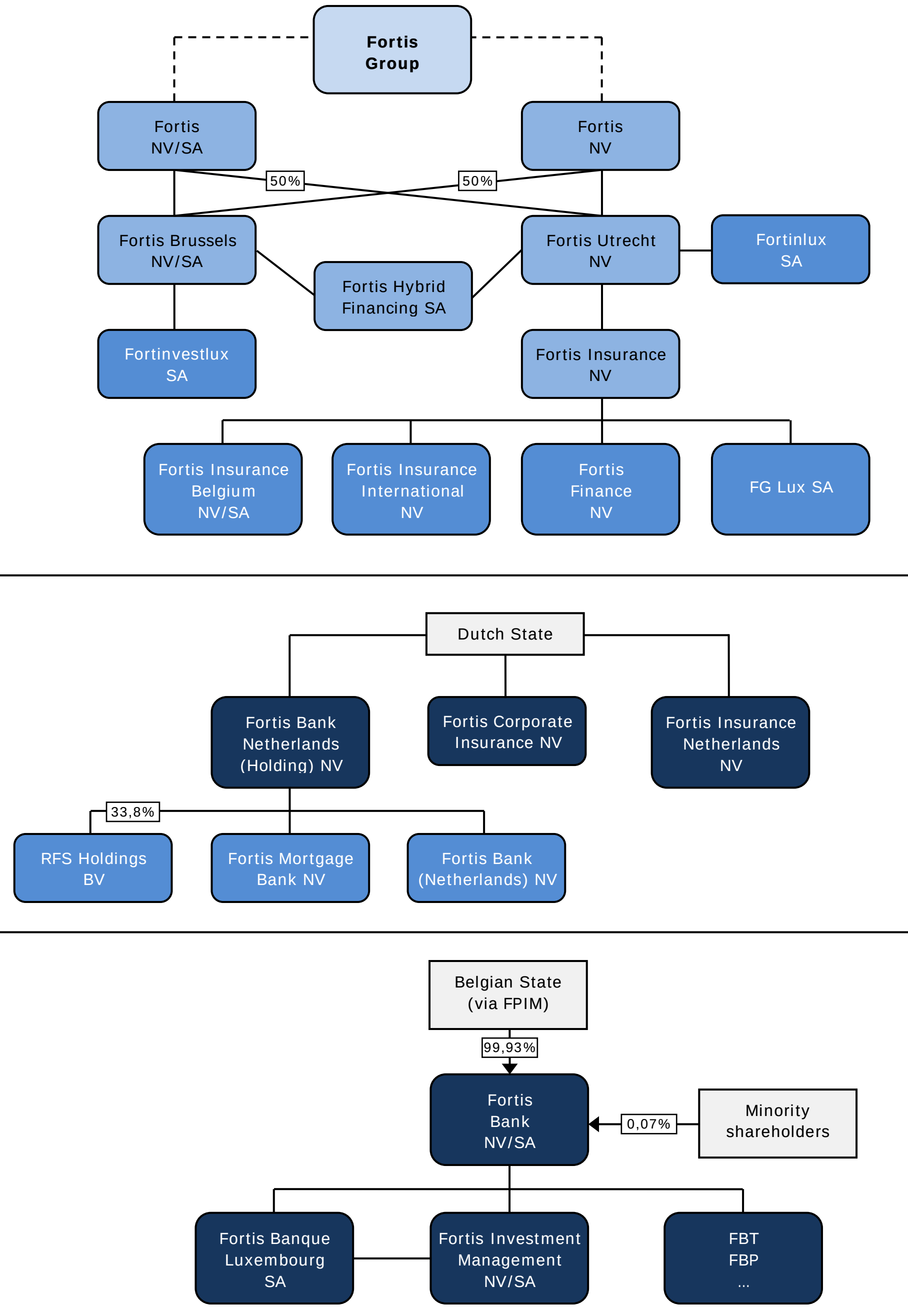
However, confidence of the markets in Fortis was not restored and the governments felt that this transaction did not achieve the intended effect. On 3 October 2008, it was announced that the Dutch government would take over all of Fortis's Dutch activities (including ABN Amro and Fortis Insurances) for the price of EUR 16.8 billion instead of the EUR 4 billion it had previously intended to pay for an interest of 49 % in Fortis Bank Netherlands (Holding). The trade in Fortis Group shares was suspended. On 6 October 2008, Fortis Group announced that Fortis Bank Belgium NV/SA would be taken over by the Belgian State, who would transfer in two phases 75 % of those shares to the French bank BNP Paribas and in exchange the Belgian State would receive shares of BNP Paribas. The Luxembourg State would keep 33 % in the Luxembourg subsidiary of Fortis Bank NV.

Figure 6: Fortis's group structure after the acquisition of the Dutch activities by the Dutch State (3 October 2008)



Source: Fortis, 'Circulaire voor aandeelhouders', *Tijdschrift voor rechtspersoon en vennootschap* 2009, 209 (free translation from Dutch).

Figure 7: Fortis's group structure after the acquisition of Fortis Bank Belgium by the Belgian State (10 October 2008)



Source: Fortis, 'Circulaire voor aandeelhouders', *Tijdschrift voor rechtspersoon en vennootschap* 2009, 211 (free translation from Dutch).

As a consequence, Fortis Group collapsed in October 2008 and its shareholders suffered heavy losses on their shares. Most of the individual shareholders joined an interest group (Deminor, Stichting FortisEffect, Stichting FORsettlement, SICAF or VEB) in order to claim for compensation. They argued that public announcements made by Fortis after the announcement of the takeover had been overly optimistic, misrepresenting the actual state of affairs of Fortis Group. In particular, the following issues were raised:

- Whether the information provided by Fortis (*inter alia*, through the prospectus and the Trading Update) was (un)lawful and, consequently, whether the shareholders at that time had suffered damages;
- Whether the measures that were announced on 26 June 2008 should have been announced earlier and, consequently, whether the shareholders at that time had suffered damages;
- Whether the communications by Fortis between 28 September and 3 October 2008 were incorrect or incomplete and, consequently, whether the shareholders at that time had suffered damages.

Fortis NV (incorporated under Dutch law – after 30 April 2010 renamed Ageas NV) and Fortis NV/SA (incorporated under Belgian law – after 30 April 2010 renamed Ageas NV/SA) merged on 7 August 2012. Ageas NV/SA (the Belgian holding) was the acquiring party; therefore Ageas NV/SA can be considered the legal successor of both Fortis NV and Fortis NV/SA.

3.2. Legal procedure

Relating to this case two administrative procedures, a criminal procedure and a civil procedure have been initiated.

The Belgian Financial Services and Markets Authority (FSMA) and the Dutch Financial Markets Authority (*Autoriteit Financiële Markten* – AFM) have both imposed **administrative fines** on the Ageas companies and their former directors for distributing misleading information[111].

Furthermore, in Belgium, a **criminal procedure** was initiated against seven former directors of Fortis[112].

Finally, both in Belgium and the Netherlands, individual investors and investor groups have launched **civil proceedings** against Ageas, BNP Paribas Fortis, the Belgian and Dutch governments and some of Fortis's former directors. In what follows, we will focus on the latter procedures, which are indeed the only ones **aiming at investor compensation**.

Some investors tried to hold the Belgian government responsible for the decrease in value of their shares. These claims were however dismissed by the Brussels Court of First Instance[113].

A group of 5 000 retail and 500 institutional investors (represented by Deminor) filed a court action before the Brussels Commercial Court in January 2010. They have claimed damages from Ageas (the legal successor of Fortis) and from the banks BNP Paribas Fortis and Merrill Lynch[114] [115].

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[111] Two decisions of the FSMA Sanctions Commission of 17 June 2013 (available via https://www.fsma.be/nl/administratieve-sancties) imposed a fine of EUR 500 000 on Ageas, EUR 400 000 on two of its directors and EUR 250 000 on a third director. The Brussels Court of Appeal has reduced those fines to EUR 250 000 for Ageas and EUR 200 000 for the first two directors (Brussels Court of Appeal, 24 September 2015, (2015) *Le droit des affaires – Het ondernemingsrecht*, 101). The AFM imposed sanctions in two administrative decisions of 5 February 2010 and 19 August 2010. Two of those fines (for market manipulation) were confirmed on appeal, whereas the two other fines (for late publication of sensitive information) were annulled (College van Beroep voor het bedrijfsleven (CBb), 14 February 2014, available via https://uitspraken.rechtspraak.nl).

[112] E. De Baere, 'Ageasschikking: naar een mogelijke vergoeding voor Fortis-aandeelhouders' (2016) *Juristenkrant*, at 3.

[113] Brussels Court of First Instance, 3 February 2011, (2011) *Tijdschrift voor rechtspersoon en vennootschap*, 199.

[114] 'Proces tegen Fortis van start (Brussel)', *De Standaard*, 10 February 2014.

[115] It should be noted that Patripant NV (a former Fortis shareholder) and its parent company, Patrinvest SCA had also filed a claim for damages before the Brussels Commercial Court in September 2012. They argued that the information in Fortis's prospectus regarding the increase in capital of September 2007 was inaccurate and/or misleading. The Court, however, decided in its judgement of 1 February 2016 that the prospectus was an accurate representation of the risks and state of affairs of Fortis and rejected the claim. See Brussels Commercial Court, 1 February 2016, (2016) *Bank- en Financieel Recht*, 24; 'Aegeas gaat vrijuit in Fortis-Zaak', *De Standaard*,

Also in the Netherlands, groups of investors brought claims before the courts. Most relevant are the proceedings initiated by VEB NCVB and others against Ageas NV. Shortly after the Dutch Fortis's nationalisation, the VEB submitted to the business division of the Amsterdam Court of Appeal a request for an investigation report concerning Fortis's policy and its state of affairs from 29 May 2007 onwards. This request for an investigation was granted by a judgement of 24 November 2008[116]. The results of the investigation were published on 16 June 2010[117].

Meanwhile, a group of Dutch investors also initiated proceedings against the Dutch Fortis NV and some of its former officials. By a judgement of 15 February 2012, the Utrecht Court of First Instance held (based on the investigation report published in June 2010) that the Dutch Fortis NV had acted contrary to the (old) Articles 5:58 (prohibition on the distribution of misleading information) and 5:59 (obligation to publish price-sensitive information) of the Dutch Financial Supervision Law from 22 May to 26 June 2008[118]. Two of the three officials (Mr V. and Mr M.) were held responsible for violating Article 5:58 of the Dutch Financial Supervision Law as well[119]. Since these violations (by Mr V., Mr M. and Fortis NV) can be considered to be wrongful acts, and since the damages and causality were established, the plaintiffs were entitled to compensation based on Article 6:162 of the Civil Code[120]. An appeal was launched against this decision by Fortis NV, Mr V. and Mr M.

After studying the report, the VEB submitted another request to the Amsterdam Court of Appeal, this time in order to have the mismanagement by the Dutch Fortis NV established[121]. On 5 April 2012, based on the same report, the Amsterdam Court of Appeal held that there had been mismanagement by the Dutch Fortis NV from September 2007 up to 1 October 2008, regarding i) the implementation of the solvency plan in 2008, ii) the provision of information on its subprime portfolio in the prospectus of 20 September 2007 and in the Trading Update of 25 September 2007, and iii) its communication policy during that period[122]. Furthermore, the Court partly nullified the decision of the General Meeting of Fortis's shareholders to discharge the Board of Directors' liability for 2007. Ageas NV appealed to the Dutch High Council against that decision, but this appeal has been rejected on 6 December 2013[123].

This High Council's judgement had an impact on the claims for damages to be or already filed by affected investors. On 5 August 2009, the Court of Amsterdam had rejected the claim of *Stichting FortisEffect* for an advance payment of damages[124] and in a judgement of 18 May 2011, the Court considered, on the merits of the case, that the claim was unfounded[125]. *Stichting FortisEffect* lodged an appeal, however, and on 29 July 2014, the

1 February 2016; E. De Baere, 'Ageasschikking: naar een mogelijke vergoeding voor Fortis-aandeelhouders' (2016) *Juristenkrant*, at 3, no. 326.

116 Amsterdam Court of Appeal, 24 November 2008, no. 200.015.810/1 OK, ECLI:NL:GHAMS:2008:BG5150, (2009) *Tijdschrift voor rechtspersoon en vennootschap*, 91.

117 Amsterdam Court of Appeal, 16 June 2010, no. 200.015.810 OK, ECLI:NL:GHAMS:2010:BM8183, (2010) *Actuele rechtspraak ondernemingspraktijk*, 97.

118 Utrecht Court of First Instance, 15 February 2012, (2012) *Tijdschrift voor rechtspersoon en vennootschap*, at 356-360 and 367.

119 *Ibid.,* at 360-366; P. Haas, 'Het drama Fortis: de belegger op jacht naar compensatie' (case note on Utrecht Court of First Instance, 15 February 2012) (2012) *Le droit des affaires*, 534.

120 *Ibid.,* at 366.

121 P. Haas, 'Het drama Fortis: de belegger op jacht naar compensatie' (case note on Utrecht Court of First Instance, 15 February 2012) (2012) *Le droit des affaires*, at 532-533.

122 Amsterdam Court of Appeal, 5 April 2012, no. 200.071.997/01, ECLI:NL:GHAMS:2012:BW0991, (2013) *Journaal ondernemingsrecht*, 41.

123 Dutch High Council, 6 December 2013, no. 12/03302, (2014) *Journaal ondernemingsrecht*, 23.

124 Amsterdam Court of First Instance, 5 August 2009, no. 426224 / HA ZA 09-1362, ECLI:NL:RBAMS:2009:BJ4746.

125 Amsterdam Court of First Instance, 18 May 2011, no. 426224 / HA ZA 09-1362, ECLI:NL:RBAMS:2011:BQ4815.

Amsterdam Court of Appeal partially overturned the judgement of the Court of First Instance[126]. The Court confirmed that the Dutch State had not acted in an unlawful way. Nevertheless, in line with the reasoning of the High Council's judgement, the Court held that Ageas NV (as the legal successor of the Dutch Fortis NV) had acted unlawfully from 29 September 2008 up to 1 October 2008 by violating to the (old) Articles 5:58 (prohibition on the distribution of misleading information) and 5:59 (obligation to publish price-sensitive information) of the Dutch Financial Supervision Law. Thus, the **Court ordered Ageas NV to compensate the appellants for the damages caused by this unlawful behaviour**[127].

After these judgements, several interest groups (also representing Belgian investors) initiated proceedings (or intended to launch proceedings) against Ageas NV by way of collective action. This was necessary because the previous judgements had established that Fortis had acted unlawfully, but investors still had to prove that they themselves had suffered damages caused by the unlawful behaviour of Fortis[128]. Ageas NV intended to settle all claims with any person who had held Fortis shares at any time between 28 February 2007 and 14 October 2008. On **14 March 2016**, such a **settlement** was reached between Ageas NV and large groups of investors (represented by *Deminor*, *Stichting FortisEffect*, *Stichting FOR settlement*, *SICAF* and *VEB*). This settlement was later also accepted by other groups.

The settlement has been **submitted to the Amsterdam Court of Appeal with the request to declare it generally binding for all eligible shareholders in accordance with the Dutch Law on collective settlements of mass claims**. On 16 June 2017, the Court of Amsterdam[129], however, ruled that the settlement was '*unreasonable*' because it would award more compensation to the shareholders who were considered as constituencies (so-called active shareholders) of the interest groups. Furthermore, the interest groups would also receive compensation by Ageas NV. The Court held that those elements gave the impression that the interests of the investors in whose interest the settlement had been concluded, were not sufficiently safeguarded. Moreover, the Court found that the scope of the discharge provision[130] was too broad. This discharge provision made reference to '*the events*' which were too vaguely defined: '*In 2007 and 2008, certain events took place in respect of Fortis (the "Events"), including but not limited to (i) Fortis's communication or lack thereof to the market in September and October 2007 regarding its exposure to subprime, in May and June 2008 regarding its solvency and liquidity position and the remedies required in order to complete the takeover of ABN AMRO, and in September and October 2008 regarding (the run up to) the break-up of Fortis; and (ii) its policy with respect to its solvency position and generally its policy with regard to the takeover of ABN AMRO.*' This was deemed objectionable by the Court since the discharge provision would then cover all events that occurred in 2007 and 2008.

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[126] Amsterdam Court of Appeal, 29 July 2014, no. 200.095.240/01, ECLI:NL:GHAMS:2014:3005, (2014) *Journaal ondernemingsrecht*, 103 and (2015) *Tijdschrift voor rechtspersoon en vennootschap*, 41.

[127] *Stichting FortisEffect* and the other appellants appealed to the Dutch High Council against the decision in so far as it concerned the Dutch State. The Dutch High Council, however, dismissed the request for cassation (Dutch High Council, 30 September 2016, no. 14/05660, ECLI:NL:HR:2016:2213, (2016) *Nederlands tijdschrift voor handelsrecht*, 318).

[128] S. De Geyter, 'Een nieuwe stap in de richting van schadevergoeding voor de Fortis-beleggers?' (case note on Amsterdam Court of Appeal, 29 July 2014, no. 200.095.240/01, ECLI:NL:GHAMS:2014:3005) (2015) *Tijdschrift voor rechtspersoon en vennootschap*, 78.

[129] Amsterdam Court of Appeal, 16 June 2017, no. 200.191.713/01, ECLI:NL:GHAMS:2017:2257, (2017) *Nederlands tijdschrift voor handelsrecht*, 302.

[130] '*As of the Exclusion Date, each Eligible Shareholder who has not delivered an Opt-Out Notice will be deemed to have, by operation of law as a result of the Binding Declaration, fully, finally, and forever released, under any Law, each Releasee from any and all claims, actions, charges, and damages that such Eligible Shareholder has had, now has or may in the future have against any Releasee in relation to the Events and waived, under any Law, any and all of his rights in connection thereto*.' (Article 5.1.2 of the settlement).

Initially, the Court allowed four months to renegotiate the settlement. However, on 16 October 2017, no agreement had been reached yet. An extension of the filing period by eight weeks was requested and this was granted by the Court. On 12 December 2017, a **settlement agreement, amended to meet the objections of the Court** was submitted.

On 5 February 2018, the Court ruled that the amended settlement agreement **still did not provide sufficient clarity** as to the financial compensation the interest groups themselves would receive in case of a final court approval. The interest groups should therefore provide access to and account for all costs and fees involved. In order to assess the market conformity of said financial compensation, the Court ordered a hearing to be held on 16 March 2018. A second, public hearing was held on 27 March 2018, after which the Court announced that it will issue a final ruling regarding the request to declare the settlement binding on 13 July 2018[131].

Awaiting the final approval of the settlement, proceedings before the Commercial Court of Brussels have been stayed.

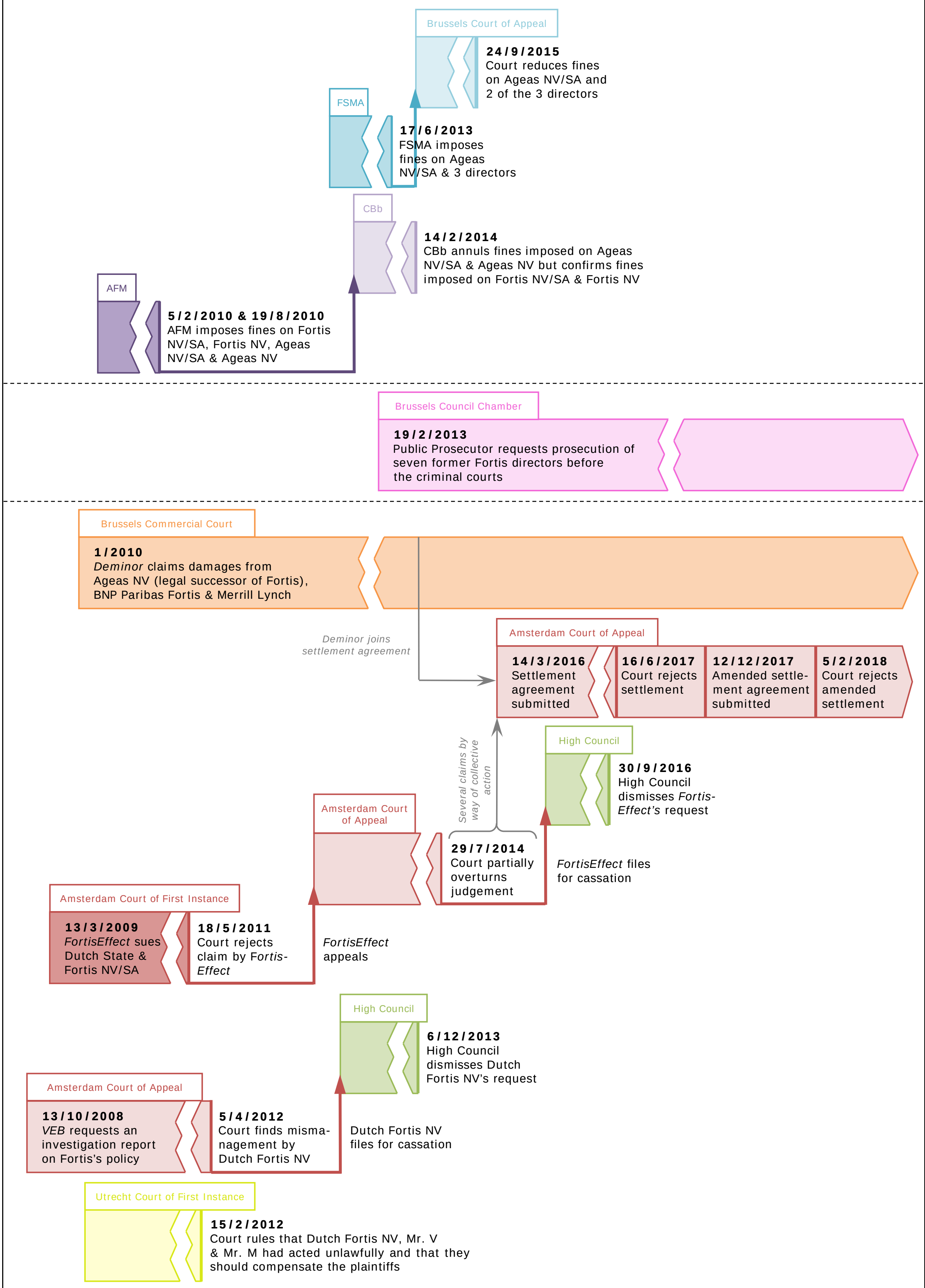
Figure 8: Timeline of proceedings in the Fortis case **(continued on next page)**

Key to symbols

- Criminal procedure before the Brussels Council Chamber
- Procedure before the Brussels Commercial Court
- Procedure before the Dutch High Council
- Procedure before the Amsterdam Court of Appeal
- Procedure before the Amsterdam Court of First Instance
- Procedure before the Utrecht Court of First Instance
- Procedure before the Brussels Court of Appeal
- Administrative procedure of the Belgian financial supervisor (FSMA)
- Procedure before the Dutch *College van Beroep voor het bedrijfsleven (CBb)*
- Administrative procedure of the Dutch financial supervisor (AFM)
- Ended
- Pending

[131] Ageas, 'Court decision Fortis settlement scheduled for 13 July 2018', 27 March 2018, https://www.ageas.com/newsroom/court-decision-fortis-settlement-scheduled-13-july-2018; 'Pas deze zomer helderheid over Fortis-schikking', *De Tijd*, 27 March 2018.

Figure 8: Timeline of proceedings in the Fortis case



3.3. Evaluation

The Fortis case is particularly interesting because (i) it has a clear **cross-border reach**; and (ii) it made use of the **Dutch collective action system** (WCAM)[132], which begs the question whether there is a need for EU harmonisation of collective action procedures for investor compensation cases.

Even if the EU has introduced a high level of investor protection with MiFID II, the actual level of investor protection also depends to a large extent on rules of civil procedure, which influence the question how easily investors can obtain a remedy. The Fortis case shows that the **availability of a collective action procedure** may facilitate the actual obtainment of compensation by a large group of investors, including (financially) less capable investors. In the Fortis case, use was made of the Dutch collective action system to **facilitate a settlement**, and this was probably one of the reasons why the procedure was largely moved to the Netherlands[133]. It therefore seems useful to further explore the need for and ideal features of an EU collective action system, especially in investor compensation cases[134].

The high prevalence of collective redress actions in the financial sector is not a temporary anomaly linked to the 2007 credit crisis. On the contrary, according to a 2008 evaluation study ordered by the European Commission[135], financial services were already the main economic sector in which collective redress mechanisms were used. Out of the 136 cases, 53 (or 39 %) concerned financial services, followed by the telecommunications sector with a mere 16 cases (or 12 %) as a distant second. Given that this study included all publicly available data since the introduction of collective redress mechanisms in a number of Member States in the late 1990s and early 2000s, the demand for collective redress mechanisms in the financial sector is clearly a lasting phenomenon.

Today there are no EU instruments regulating the right to seek collective redress for breach of EU law, neither in general nor in the financial sector specifically. The 2009 Injunctions Directive[136] does allow for so-called 'qualified entities' to file for an injunction order requiring the cessation or prohibition of any further infringement of EU consumer law, but it does not contain the right to obtain collective redress in the form of financial compensation.

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[132] Articles 7:907-910 of the Dutch Civil Code and Articles 1013 to 1018 of the Dutch Code of Civil Procedure, introduced by the Law of 23 June 2005 on the Collective Settlement of Mass Claims (wet 23 juni 2005 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de collectieve afwikkeling van massaschades te vergemakkelijken, *Stb*. 5 July 2005).

[133] The Dutch WCAM system has prompted some commentators to express their concern about what they consider to be 'class action tourism'. Indeed, ever since the 2009 Shell case (Amsterdam Court of Appeal, 29 May 2009, no. 106.010.887, ECLI:NL:GHAMS:2009:BI5744) and the 2012 Converium case (Amsterdam Court of Appeal, 17 January 2012, no. 200.070.039/01, ECLI:NL:GHAMS:2010:BO3908), the Amsterdam Court of Appeal has assumed international jurisdiction over claimants residing outside the Netherlands. This has given rise to a debate among legal scholars on the question whether the extraterritorial application of the WCAM is in accordance with the rules of International Private Law and, more particularly, Articles 4 and 8(1) of the Brussels Ibis Regulation. See E. De Baere, 'De Nederlandse class settlement: over de wet collectieve afwikkeling massaschade en haar internationale impact' (2013) *TPR*, 2614; I. Benöhr, 'Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures' (2013) *J Consum Policy*, 92; T. Bosters, *Collective Redress and Private International Law in the EU* (Springer, The Hague 2017) at 134.

[134] A lot of research has been done already in this regard. See for instance J. Stuyck, E. Terryn, V. Colaert, T. Van dyck, N. Peretz, N. Hoekx and P. Tereszkiewicz, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings*, Study for the European Commission, 2007, 415 p.; S. Voet, '"Where the Wild Things Are". Reflections on the State and Future of European Collective Redress' in A.L.M. Keirse and A.B.M. Loos (eds.), *Waves in Contract and Liability Law in Three Decades of Ius Commune* (Intersentia, Cambridge 2017) at 105-140; S. Voet, "European Collective Redress: A Status Quaestionis", (2014) *International Journal of Procedural Law*, at 121-123.

[135] European Commission, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union*, Final Report, 26 August 2008, http://www.civic-consulting.de/reports/collective%20redress_study.pdf, at 41.

[136] Directive (EC) 2009/22 of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/30.

In this regard, it should be noted that on 11 June 2013 the European Commission issued a recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law[137]. According to recital (7) '*investor protection*' is one of the '*areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value'*. In January 2018, an evaluation report on the implementation of this recommendation concluded that compensatory collective redress procedures are available in 19 Member States, but that over half of them are limited to specific sectors, mainly consumer claims[138]. A number of Member States have collective action schemes to deal with mass investor claims specifically[139].

Since delivering the draft of this paper in March 2018, the European Commission has issued, on 11 April 2018, a proposal for a new Directive on representative actions for the protection of the collective interests of consumers[140]. The proposal builds on the aforementioned Injunctions Directive, which it repeals, by guaranteeing the possibility of not only injunctive collective action, but also compensatory collective redress by the qualified entities designated by the Member States. The scope of the Directive will be broader than the Injunctions Directive, to cover other horizontal and sector-specific EU instruments relevant for the protection of collective interests of consumers in different economic sectors. Recital (6) of the proposed Directive explicitly mentions that it aims to protect the interests of consumers, '*regardless of whether they are referred to as consumers or as travellers, users, customers, retail investors, retail clients or other in the relevant Union law*'. Article 3(1) of the proposed Directive defines the term '*consumer*' as '*any natural person who is acting for purposes which are outside their trade, business, craft or profession*'. However, it should be noted that the '*retail investor*' concept under MiFID II is broader and also covers small and medium enterprises, as well as natural persons acting in the context of their trade business, craft or profession[141].

A specific study would be necessary to draw conclusions on the question whether the Commission's proposal indeed provides an effective tool for investors seeking compensation for their losses.

[137] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60.

[138] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU), (COM(2018) 40 final, 25 January 2018) at 3.

[139] Such as Denmark (see Report from the Commission on the implementation of the Commission Recommendation of 11 June 2013, (COM(2018) 40 final, 25 January 2018) at 3) and Germany (Capital Markets Model Case Act (KapMuG) of 19 October 2012, Federal Law Gazette I, 2 182).

[140] European Commission, *Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC*, Brussels, 11 April 2018, COM(2018) 184 final, 2018/0089 (COD).

[141] See art. 4(1) 11° and Annex II to MiFID II; see also footnote 42

4. CONCLUSIONS

The MiFID II rules have entered into force on 3 January 2018. They have further elaborated and fine-tuned a number of important investor protection rules[142]. The Belgian (-Dutch) investor compensation cases discussed in this report, however, show that MiFID II will not solve all investor protection concerns.

4.1. Assessment on the basis of laws applicable at the time of mis-selling

First, many investor compensation cases only go to court years, and sometimes decades after the alleged mis-selling took place. The alleged Dexia mis-selling took place as from the 1980s, but investors only suffered damages in 2011, when Dexia collapsed. Court procedures in respect of claims for damages are still pending and final judgements are not expected to come about for several years. It goes to show that even if MiFID II will hold financial institutions to higher standards, **many cases will**, also in the future, **still be judged on the basis of MiFID I, or even pre-MiFID national standards**.

4.2. MiFID II only harmonises substantive rules on investor protection

Second, MiFID II deals with substantive rules of investor protection, but leaves a number of important issues unresolved.

4.2.1. Relationship between MiFID II and civil law duty of care?

There is a most interesting discussion in the Member States in regard of the **question whether MiFID** is merely supervisory, public law, which harmonises supervisory standards for financial institutions, or **also harmonises civil law duties of care for investment firms**. The answer to this question is important to assess whether, on the one hand, civil law duties of care can go beyond the MiFID standards, and whether, on the other hand, civil law courts have to take into account the regulatory standards when assessing the civil law duty of care. Scholars disagree on this issue, and an EU position would therefore be useful.

4.2.2. Evidence

If a court comes to the conclusion that a MiFID rule has been breached, and has therefore also breached a civil law duty of care, the claimant still has to prove that he or she has suffered damages, and that those damages were actually caused by the breach of the MiFID rules (causal link). MiFID II does not harmonise those elements at all. Member States rules on **how to prove fault, damages and causal link** differ a lot. Whether an investor succeeds in a claim for damages for breach of a rule of financial regulation will to a large extent depend on those elements.

4.2.3. Importance of rules on civil procedure

In the same vein, the actual level of investor protection will also to a large extent depend on **rules of civil procedure**, which influence the question how easily investors can obtain compensation. For instance, the **availability of a collective action procedure** may facilitate the actual obtainment of compensation by a large group of investors, including (financially) less capable investors. In the Fortis case use was made of the Dutch collective action system to facilitate a settlement. The Dexia case shows that investors do gather in interest groups even without the actual initiation of a collective action. However, this leads to a duplication of procedures initiated by different (groups of) investors and does not provide a solution for the many small investors who do not join an interest group.

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[142] See for a detailed assessment of the new rules: D. Busch and G. Ferrarini, *Regulation of the EU Financial Markets: MiFID II and MiFIR* (Oxford University Press, Oxford 2017), 768 p.

It therefore seems very useful to further explore the need for an EU collective action system, especially in investor protection cases.

4.3. Relationship between MiFID and consumer law

Third, MiFID should not be seen in isolation from consumer law. The rules on unfair commercial practices have been maximally harmonised by the Unfair Commercial Practices Directive 2005/29/EC (UCPD) and **overlap** to a certain extent with the MiFID rules. As the Citibank case exemplified, this opens opportunities. Certain sanctioning mechanisms linked to consumer law are not available in the national legislation implementing the MiFID conduct of business rules (e.g. criminal sanctions, injunction proceedings, collective actions, …). In certain circumstances, it may therefore be preferable to file a claim on the basis of consumer law, rather than on the basis of financial regulation.

This report has argued that when the national UCPD implementation is applied to an investment services case, the courts should interpret the concepts of '*unfair*' and '*misleading*' commercial practice not only in accordance with the UCPD framework, but also in accordance with the relevant MiFID II conduct of business rules. Vice versa, if a regulator or a court needs to deal with an investment services case on the basis of MiFID II, it also needs to take into account the UCPD rules in order to decide whether an investment firm has acted honestly, fairly and professionally in accordance with Article 24 (1) of MiFID II.

4.4. Scope of deposit guarantee schemes?

Finally, the Dexia case raises the question **whether and to what extent the deposit guarantee system should be open to products other than bank deposits**.

Although a number of Member States had done so before, Directive 2014/49/EU has harmonised the funding and scope of coverage of deposit guarantee schemes, precluding the option to cover other products than bank deposits under the deposit guarantee system. The only remaining option for Member States who wish to have other products covered, is to create fully separated guarantee funds for those products. The normative question whether the limitation of Deposit Guarantee Directive 2014/49/EC to bank deposits should be maintained, should be answered on the basis of (i) what the goals and rationale of a deposit guarantee system are, and (ii) whether the same goals and rationale apply to other products than bank deposits. Although there do not seem to be any strong indications in favour of an extension of the scope of the Deposit Guarantee Directive to other financial products, further research should be conducted to establish this in a more definite manner.

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This paper is part of a series of five studies on mis-selling of financial products in the EU. The paper analyses three important and highly publicised cases of mis-selling of investment products to retail clients, featuring interesting legal particularities: the Citibank case, the Dexia case and the Fortis case. On the basis of this analysis, the paper draws a number of conclusions on the national and EU regulatory framework in respect of investor compensation. This document was provided by Policy Department A at the request of the ECON Committee.

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