10 SUMMARY AND CONCLUSIONS

10.1 Introduction

10.1.1 The Executive and Supervisory Boards of a company have a duty to put the interests of the company and its related business first and to take account of the interests of all stakeholders. Where a bank performs a public function, the stakeholders explicitly also include those who have entrusted their interests to the bank, such as savers, depositors, policyholders and borrowers. These interests partly determine the freedom of a bank's Executive Board in assessing and weighing the risks which are inherent in the business in which the bank engages. The Executive Board of a bank has *'a special duty of care which requires it to monitor and assess those risks carefully and effectively and to take them into account in its policy deliberations, decision-making and actions'*.[1] This duty of care is made more onerous by the fact that banks in particular are dependent on the confidence which those stakeholders and the general public place in them. The existence of this duty of care is also reflected in various codes and principles, the (current) supervision rules under the Financial Transactions Act (Wft) and the jurisprudence of both the administrative and civil courts. The public function which banks also perform is therefore a major factor in the organisation and operation of banking business. Partly for that reason, high standards are demanded of the expertise, reliability and integrity (section 3.3.2 of Wft) of those who determine a bank's policy and its operations must be organised so as to ensure controlled and sound operational management of the business. The external auditors and the regulators, the Authority for the Financial Markets (AFM) and the Dutch central bank (DNB), play a key role in ensuring that these values are applied in practice.

10.1.2 The external auditors therefore have to establish whether the consolidated financial statements of DSB Bank give a true and fair view of the financial position, results and cash flows in accordance with the IFRS provisions and the provisions of Title 9, Book 2, of the Netherlands Civil Code. In practice this means *inter alia* establishing whether the financial statements comply with the above regulations and whether, in so far as the auditors are able to determine, the annual report has been prepared in accordance with the statutory provisions and is compatible with the financial statements. They must also establish that the other information required by law has been provided. Taking all these aspects into account, the external auditors are also required to assess the acceptability of the accounting principles under which the financial statements have been prepared, the reasonableness of estimates made by DSB Bank's Executive Board and the general picture presented by the financial statements. In the case of financial institutions such as DSB Bank, the Wft imposes a number of special obligations on the auditors. Section 3:88, subsections 1 and 2, of the Wft requires the auditors to inform DNB as soon as possible of any circumstance that has come to their notice in the course of the audit which:

- breaches the prudential obligations imposed on the bank by Part 3 of the Wft;

[1] Amsterdam Court of Appeal (Enterprise Section), 5 March 2012, (Fortis decision)

- jeopardises the bank's continued existence, or
- causes them to decline to issue an auditors' report or to issue a qualified auditors' report.

Section 4:27 of the Wft also requires the auditors to inform the AFM as soon as possible of any circumstance that has come to their notice in the course of the audit which contravenes the provisions of Part 4 of the Wft, which regulates conduct supervision.

10.1.3 Independent *market conduct supervision* by the AFM focuses on the saving, lending, investment and insurance markets and orderly and transparent financial processes on those markets, with a view to promoting honest relationships between market parties and due care in the provision of services to customers. Consumers must be able to have confidence that due care is taken in providing services relating to financial products (such as savings products, payment products, consumer loans, mortgages and insurance). While banks are not in principle subject to the AFM's market conduct supervision, those which qualify as a financial services provider or investment firm, such as DSB Bank, are subject to its provisions. The AFM has powers to monitor and enforce compliance with the regulations. It may, for example, demand information to enable it to perform its supervisory tasks. To maintain compliance with certain standards and promote the controlled and sound operational management of the business, the AFM may issue binding instructions and impose a periodic penalty (until its requirements are met) or a fine.

10.1.4 *Prudential supervision* by DNB focuses on the soundness of banks and other institutions and the contributions they make to the stability of the financial sector. In that context, DNB must decide whether to admit a financial institution such as DSB Bank to the financial markets (by granting a licence). A declaration of no objection by DNB is also required if a party wishes to own a qualifying holding in a bank or exercise control of a qualifying holding. With a view to the stability and continuity of the financial institution, DNB also supervises the institution's solvency and liquidity positions and its governance. DNB has powers to monitor and enforce compliance with the regulations. It may, for example, demand information to enable it to perform its supervisory tasks and, if it discovers an infringement, it may issue a binding instruction (*aanwijzing*) or impose a periodic penalty (payable until its requirements are met) or a fine. In exceptional circumstances, DNB may appoint a 'silent administrator' or apply for an emergency court ruling.

10.1.5 The investigation into the causes of DSB Bank's insolvency was carried out by the Administrators against the above background.

10.2 Summary of the chronology

10.2.1 DSB Bank had its origins in Buro Frisia, which was founded in 1975 by Scheringa and his wife. Buro Frisia was a brokerage which acted as an intermediary in the sale of insurance and consumer loan products. In 1978, it was subsumed into Buro Frisia BV, which later became DSB Beheer. The company grew strongly through acquisition. Van Goor was recruited in October 1994 as assistant to the Executive Board.

10.2.2 In the early 1990s, Scheringa expanded the activities of 'DSB'. DSB Groep, the intermediate holding company under which the financial activities were organised,

offered consumer loans via its own credit loan banks (*voorschotbanken*), which raised the necessary finance on the interbank market. From 1995, DSB Groep also sold insurance via its subsidiaries DSB Leven and DSB Schade.

10.2.3 In this way, a business model evolved in which customers were granted loans at low interest in combination with certain types of insurance, such as term life insurance and occupational disability insurance, generally sold by or via DSB Groep. In the majority of cases, the customer paid the premium for the insurance products not in monthly instalments, but as a lump sum. The lump-sum was added to the loan, which increased the amount of the advance. In many cases, DSB Groep also advised on and acted as intermediary in the sale of investment-linked insurance: instead of repaying the loan in monthly instalments, the customer paid a monthly sum, part of which was used to pay the costs. The remainder was invested in shares and/or bonds, building up capital which could later be used to pay off the loan. DSB's profit relied heavily on the results (commission and premiums) generated by insurance and insurance intermediation activities.

10.2.4 In the early 1990s, Scheringa started building an art collection through DSB Art, a separate DSB Beheer subsidiary. In 1993, DSB became principal sponsor and Scheringa became chairman of Alkmaar football club AZ. DSB Beheer also became active in real estate, buying the office premises used by the various DSB entities.

10.2.5 There was a restructuring in 1998 which resulted in the banking and insurance activities being placed with DSB Groep and separated from the art and sport activities. The (small) DSB Bank set up by DSB Groep was granted a banking licence by DNB on 30 March 2000, enabling it also to accept savings deposits. The business model – intermediation in the sale of and advice on consumer and mortgage loans and intermediation in the sale of insurance, activities in which the result is heavily dependent on commission income – was applied until 2009.

10.2.6 DSB Bank had its own Executive Board, consisting of two relatively independent directors. Scheringa was a member of the Supervisory Board. DSB Bank had a small staff of 20, but services such as marketing, sales, accounts and internal control were provided by other companies within the DSB Groep, such as the credit loan banks. The credit loan banks continued to be active in lending after the creation of DSB Bank. It was common for a loan application that had been rejected by DSB Bank to be accepted by one of the credit loan banks.

10.2.7 It was announced in 2000 that DSB Groep was going public. Although there was ample interest on the part of investors (the proposed issue was oversubscribed several times), Scheringa abandoned the flotation at the last moment. The sale of parts of DSB Groep was considered in 2002. Potential buyers showed interest in the banking activities, but not in the insurance companies, and ultimately no deals were signed. In early 2002, Van Dijk joined DSB Groep as CFO. DSB Groep sold its shares in DSB Schade and DSB Leven to DSB Beheer, Scheringa's personal holding companies under which the art and sports activities were organised.

10.2.8 DNB considered DSB Beheer to be a financial holding company in the period 2000–2005 and therefore required it to submit half-year reports. At the end of 2002, DNB conducted an investigation into DSB's mortgage lending and consumer lending. DNB

was highly critical in its report on this investigation; it found that risk management needed substantial improvement, customers were given loans too readily and in excessive amounts (with the potential consequence of excessive credit risk) and sales managers – wrongly – carried too much weight on the Credit Committee. With regard to corporate governance, DNB was critical *inter alia* of the functioning of the Executive Board and Supervisory Board and the provision of information to the Supervisory Board. DNB also questioned whether DSB Bank needed to hold more capital than was required to meet the minimum solvency ratio. DNB said that it would closely follow DSB Bank and take 'appropriate action' if there were any risk of organisational development and risk management structurally failing to keep pace with DSB Bank's growth.

10.2.9 At the end of 2003, the Executive Board of DSB Groep prepared an application for a banking licence, with a view to merging DSB Groep's banking and intermediary businesses with DSB Bank. In March 2004, DSB Bank Executive Board members Cornet and El Sayed notified DNB of their concern that, after the proposed merger, commercial gain would be the objective, at the expense of risk management, because the merger plans envisaged Scheringa and Van Goor – at that time responsible for sales – having seats on the Executive Board of the merged DSB Bank. As background, Cornet told the Administrators that Van Goor was a '*real selling machine'*, who in some cases approved loan applications that had been rejected by DSB Bank '*because there was a nice insurance policy attached.'*

10.2.10 From 2002 onwards, the AFM was critical of the advertising messages used by DSB Groep. In 2004, the AFM's investigation of the Hollands Welvaren Select II (HWS) securities-backed lending products found deficiencies in the gathering of information from and provision of information to customers and imposed administrative fines on DSB Bank accordingly. There were also concerns about the HWS loans at the end of 2005. E&Y reported in November 2005 that, based on DSB Bank's in-house estimate, a settlement based on the Duisenberg rules would cost DSB Groep about €40 million.

10.2.11 In February 2005, DSB Beheer became sole shareholder in Alkmaar football club AZ via its subsidiary DS Sport. In March 2005, DSB Groep submitted a draft application for a banking licence for the merged bank, in which the activities of DSB Groep and DSB Bank were integrated into one business specialising in providing loans and savings products and acting as intermediary in insurance contracts. The application was out of the ordinary because it related to an existing organisation that already held a banking licence. Attached to the application was the **ROB** (Regulation on Organisation and Control) file, listing numerous points where improvement was needed. It referred in this context *inter alia* to the 'lightweight' accounting organisation, the open vacancies for heads of Internal Audit (IAD) and Risk Management and deficiencies in the staffing of the ICT department. Also attached to the application was a list of 'residual risks'. In the context of the licence application, DNB's Integrity department issued a negative assessment of the reliability of Scheringa and intended CFO Van Dijk. According to that department's report, there was a pattern of unsound operational management. However, DNB's Governing Board did not take this negative assessment on board, on the grounds *inter alia* that the observed breaches of the Securities Transactions Supervision Act (Wte) and the Consumer Credit Act (Wck)

were due in part to the active supervision by the AFM and in part to the fact that the DSB Groep organisation was not compliant with the Regulation on Organisation and Control (ROB) set bij DNB and applicable at that time. The Administrators were unable to verify that, at the time of granting the licence, DNB had investigated and established whether the list of residual risks had been reduced. Nor were the Administrators able to verify whether, and if so on what grounds, DNB had checked and found adequate the expertise required of Scheringa and Van Goor, neither of whom had a banking background. At the end of December 2005, DNB granted the licence to the merged DSB Bank. According to the licence, the day-to-day policy of this bank would be determined by Scheringa, Van Dijk and Van Goor as executive directors and Bonnier, Neelissen, Nijpels and Ariëns as supervisory directors.

10.2.12 On 6 January 2006, DNB called the entire Executive Board of DSB Bank to a meeting to discuss a number of criticisms. The executive directors were exhorted to behave properly. DNB's critical view of DSB Bank's conduct was also reflected in a written report of 19 May 2006 on DNB's investigation into DSB Bank's lending activities. According to that report, DNB considered that DSB Bank had not taken adequate measures to prevent the interests of the customer being subordinated to DSB Bank's commercial interests and the credit policy had not been defined in sufficient detail. DNB was not sufficiently confident that DSB Bank would be able to comply with the Financial Services Act (Wfd) in time, the customer profiles used by DSB Bank were unsuitable, DSB Bank's inadequate fulfilment of its duty of care exposed it to prudential risks etcetera. DSB Bank's response to this report was a combination of denial ('We do business with reputable insurance companies') and vague promises ('policy will be better documented in future' and 'commission income on insurance products will gradually be reduced.'). It was argued that the current rules left a great deal of room for interpretation. Only one of DNB's comments was refuted.

10.2.13 In the period June–August 2006, DSB Bank's Executive Board reviewed the bank's strategy on the basis of a discussion paper. The conclusion reached in that paper was that, partly in the light of new legislation in the form of the Financial Supervision Act (Wft), the business model pursued by DSB Bank, which was built on '*a modest positive interest margin coupled with high income from insurance commission'*, needed to be changed soon to make the result less dependent on non-recurring insurance commission. The Executive Board decided *inter alia* to wind down the commission business and focus the bank's activities more on consumer credit.

10.2.14 Under pressure from Scheringa, Ariëns stepped down from DSB Bank's Supervisory Board on 1 September 2006. Ariëns stated in writing that he had resigned because he did not agree with the way the Supervisory Board was performing its duties. Ariëns said that with the newly created merged bank had come more extensive supervisory responsibilities – a view shared by DNB – but Scheringa had disregarded virtually all aspects of supervision. Ariëns said that too many matters were dealt with by the Audit & Compliance Committee (ACC) rather than the full Supervisory Board.

10.2.15 At the end of November 2006, the Supervisory Board decided that the Executive Board would no longer require the Supervisory Board's approval for acquisitions costing less than €17.5 million. Scheringa was the Executive Board member with

responsibility for acquisitions and frequently undertook acquisitions without consulting the Executive Board.

10.2.16 In December 2006, E&Y reported the findings of its interim audit in the context of the audit of the financial statements. Lending and IT were classed as 'high risk' processes. E&Y referred to an analysis by the Risk Management department which found that the credit risk had increased and the interest margin had narrowed. It was not possible at the time to identify the reason for this.

10.2.17 The results for the 2006 financial year were ultimately disappointing. On the basis of Dutch GAAP, the 2006 result was €28 million, compared with around €45 million in 2005. The explanation which DSB Bank gave the AFM for the disappointing result referred to a combination of factors including the resignation of the sales manager, the poor interest margin and the high marketing costs. E&Y's audit report noted improvements in credit risk, but found that acceptance reporting and duty-of-care aspects required further development.

10.2.18 During the first half of 2007, the AFM focused mainly on the advisory process associated with DSB Bank's lending activities which, according to a report by PwC to DSB Bank, exhibited a number of shortcomings. In its report of July 2007 entitled 'Avoiding excessive lending', the AFM found that DSB Bank was not doing enough to avoid excessive lending. DSB Bank disagreed with the AFM's view.

10.2.19 The Executive Board held another strategy session in 2007, during which the need for changes in the business model was again discussed. According to CFO Van Dijk, the results for the second half of 2006 and the first half of 2007 had been lower because, while the effect of the wider interest margin on the result had been gradual, the direct impact of the decline in cross-selling had been immediate.

10.2.20 In 2007, the Executive Board decided – contrary to what had been stipulated when the banking licence was granted – to continue the tax group for corporation tax purposes with DSB Beheer and other group companies. DSB Bank's Executive Board said that it had based its decision on tax advice from external sources and notified DNB accordingly. DNB did not oppose that decision. One of the consequences of continuing the tax group was that DSB Bank was not able independently to obtain relief from the Dutch Tax Administration for its tax assets arising while the tax group existed. DSB Beheer, as head of the tax group, would utilise those tax assets and DSB Bank would have a receivable from DSB Beheer in respect of the tax assets.

10.2.21 In June 2007, DSB Bank applied to DNB for declarations of no objection to acquisitions of a number of companies. The acquisition prices included substantial sums in goodwill. According to the current accounting standards, the amount paid in goodwill had to be charged to DSB Bank's shareholders' equity, which was a factor in the calculation of the solvency ratio. There was a danger that these proposed acquisitions would reduce DSB Bank's solvency to below the level required by DNB. The applications for declarations of no objection were therefore rejected by DNB for most of those acquisitions. Ultimately, DSB Bank opted for a solution whereby the companies were acquired by DSB Beheer but the entire purchase price was financed by DSB Bank. In early 2007, DSB Bank's receivable from DSB Beheer of €22 million

was increased by €14 million as a consequence of these transactions. At the end of 2007, DSB Bank's total receivable from DSB Beheer stood at €41 million.

10.2.22 DSB Bank's results for the first half of 2007 were disappointing. Solvency was tight, which restricted its ability to lend. Scheringa therefore decided that DSB Bank could not distribute a dividend, but its shareholder DSB Ficoholding would make a capital contribution of €6 million. This intermediate holding company, which also held the shares of insurers DSB Leven and DSB Schade, was able to pay a dividend of 'only' €3.7 million to its shareholder DSB Beheer[2] in 2007. The reduction in dividends from DSB Ficoholding had a serious impact on DSB Beheer's liquidity.

10.2.23 The securitisation market dried up in 2007. DSB Bank also found it more difficult to raise finance by selling loan portfolios via securitisations. In September 2007, there was a run on Northern Rock, a UK bank. The first signs of the credit crisis were emerging.

10.2.24 In the light of the poor results in the first half of 2007 and Scheringa's acquisition policy, DNB convened an extra policy meeting with DSB Bank's Executive Board at the end of August 2007. At that meeting, DNB imposed a more onerous solvency requirement. To improve its solvency position, DSB Bank would sell cycle insurer ENRA. Van Dijk conducted the negotiations initially, but Scheringa thought the price he had agreed was too low and set a new purchase price himself. ENRA was eventually sold at the end of the year, generating a book profit.

10.2.25 On 27 September 2007, DNB decided to place DSB Bank under enhanced supervision. From that date, the solvency ratio had to be at least 10%, rising to 12%. DSB Bank's liquidity buffer had to be increased from €600 million to €1 billion. In its response, DSB Bank accepted the 12% solvency requirement. Instead of proposing a time scale, it asked DNB to set the time scale, but it was never agreed. DSB Bank also indicated that it believed a liquidity buffer of €750 million to be adequate. In a meeting with Zalm in early December 2007, DNB replied that '*a liquidity buffer of around € 1 billion is required*'.

10.2.26 Cornet, at that time the Compliance Officer, resigned on 11 November 2007 and CFO Van Dijk – who had been told by Scheringa that he should look for another job – resigned on 12 November 2007 with immediate effect. Both were dissatisfied with the policy. In Cornet's case, that dissatisfaction was due to the delay in making the changes at the bank which he considered necessary, including the adoption of a new business model. Van Dijk gave as the reasons for his resignation what he regarded as the unjustifiable reversal of provisions for loan arrears in cases where the customer had assigned part of his pay, the events surrounding the sale of ENRA and Scheringa's decisions to have Risk Management, Compliance and Internal Audit ("**IAD**") report to him in future and to liaise with DNB himself. Scheringa had taken these decisions without consulting the Executive Board. DNB expressed concern, because Van Dijk and Cornet had played an important role in monitoring the balance between the bank's commercial aspirations on the one hand and the prudent conduct of banking business on the other. On 3 December 2007, DNB decided to appoint a

[2] For comparison, the following sums had been distributed to DSB Beheer as dividend in previous years: €72.9 million (2002); €74.9 million (2003); €46.9 million (2004); €30.5 million (2005) and €29.3 million (2006).

‘silent administrator’, but this was never put into effect because DSB Bank notified DNB on the same day that Zalm had been appointed interim CFO and the vacancies in Risk Management and Compliance had been filled. The next day, DNB discussed its concerns with Zalm and Offringa. These concerns included governance, the balance between commercial aspirations and prudence and the absence of adequate action on solvency and liquidity.

10.2.27 In December 2007, Zalm was appointed (interim) CFO of DSB Bank, having been appointed in July 2007 as an adviser to the Executive Board with the title of Chief Economist. Two months after his appointment, Zalm produced a memo making some positive observations and noting some points where improvement was needed. He expressed concerns about what he described as the ‘*cross-subsidisation that occurs with the combined sale of loans and insurance products’* and about personnel policy, the management model, solvency ‘*as a constraint on expansion’* and DSB Bank’s image and reputation in political circles in The Hague. According to Zalm, DSB Bank was seen in The Hague as a ‘*symbol of aggressive credit selling*’. Zalm also made a number of suggestions for improvements in his memo, which was discussed by the Executive Board, but not by the Supervisory Board.

10.2.28 On 27 December 2007, the AFM presented the draft findings of its investigation into investment-linked insurance. DSB Bank scored below average on aspects such as the customer profiling, the gathering of information when giving advice and the appropriateness of that advice. Zalm was in favour of withdrawing from intermediation in investment-linked insurance.

In the 2008 annual plan which Zalm presented in January 2008, he focused on the solvency ratio (to be 12% by the end of 2008), the liquidity position and the need to reduce costs.

10.2.29 DNB welcomed Zalm’s arrival. In February 2008, DNB reported some improvements but was concerned about governance, because Scheringa was both CEO and major shareholder. DNB also expressed concern about the viability of the current business model. In March and April 2008, both the AFM and DNB were critical of DSB Bank’s advisory process and acceptance policy. The AFM referred to the absence of records of discussions. It also said that the Compliance department was too weak, the system of checks was not sufficiently coherent and the complaints settlement procedure was unclear. Concerns were expressed about compliance in the course of a meeting between the AFM and DNB in April 2008. DNB felt it was too early to reconsider the expertise and reliability of either Scheringa or the Executive Board. The AFM’s preference was to issue a binding instruction.

10.2.30 On 10 April 2008, Zalm sent an e-mail to Scheringa and Van Goor in which he dealt with DSB Bank’s problems at length. One question Zalm asked was whether the business model was sustainable ‘*in the light of the wave of ‘scandalous’ earnings and underperformance*.’ He referred to Vie d’Or, share-lease contracts and the ‘rip-off policies’ (*woekerpolissen*) scandal. *‘It’s not going to stop. The next wave could hit DSB products as well.’*

10.2.31 De Jong resigned from the Executive Board and the head of Risk Management and the recently appointed Compliance Officer left in April 2008. The explanation given by

De Jong to the Administrators was that, in its present composition, the incumbent Executive Board was not able to make DSB Bank a sound bank. De Jong's departure further exacerbated the fears of the regulators, which informed DSB of their concerns in a draft letter at the end of May 2008. In that letter, they directly criticised Scheringa's performance, implying that, as chairman of the Executive Board, he was not adequately discharging his responsibility for balanced decision-making. They took the view that an independent external investigation of corporate governance was needed and that the lending policy should be measured against the codes of conduct for mortgage lending and consumer credit. DSB Bank reacted strongly, opposing the regulators' contentions. In the definitive letter of 10 July 2008, the regulators dropped this requirement for an external investigation. The threat of formal measures was also omitted from the definitive letter. In a letter of 3 July 2008, the AFM highlighted a large number of shortcomings on the part of DSB Bank with regard to mortgage lending.

10.2.32 The number of investment-linked insurance policies sold via the intermediary of DSB Bank declined sharply from May 2008 onwards. DSB Bank acted as insurance intermediary in these products for the last time in November 2008.

10.2.33 After adoption of the 2007 financial statements, DNB's annual meeting with E&Y was held on 23 June 2008 and was attended by the Executive Board. DNB found no mention in the auditors' report of the fact that DSB Bank had had a difficult year or of the problems that had not yet been resolved. According to E&Y, the organisation had been less well balanced in 2007 compared with 2006, owing to staff turnover. Other issues mentioned by E&Y included the dependence of DSB Bank's results on commission income, incorrect advice given to customers in the past, compliance and cost control.

10.2.34 DSB Bank's receivable from DSB Beheer increased sharply in the first half of 2008 because DSB Bank had sold several companies to DSB Beheer and DSB Beheer had borrowed the purchase price and the required working capital from DSB Bank, totalling €32 million. DSB Bank had also temporarily financed DSB Beheer's purchase of a private aircraft. On 29 July 2008, DSB Bank notified DNB that, owing to loans advanced by DSB Beheer, the maximum of 25% of its shareholders' equity that a bank was allowed to lend to any one third party under the large-exposures regime had been exceeded. DNB responded by asking for details of the policy framework under which loans had been advanced to DSB Beheer. It transpired that the loans that had previously been advanced had not been measured against any such framework. Within the Executive Board, Zalm would henceforth be responsible for all matters relating to DSB Beheer.

10.2.35 In September 2008, in response to the letter of 10 July 2008 from the two regulators on the subject of corporate governance, DSB Bank took action on several fronts, including filling a large number of staff-level vacancies (Risk Management, Compliance, Head of IAD), announcing a new structure and procedures for the Executive Board (new Executive Board by-laws, new procedure for Executive Board meetings), improving management information, increasing the frequency of Audit & Compliance Committee meetings and undertaking to develop a policy framework for the financial relationship with DSB Beheer. There was also mention of an investigation

of the structure and functioning of corporate governance in due course. At an internal meeting, DNB was moderately positive, but felt that DSB Bank needed to be more specific. The AFM was less positive.

10.2.36 There was a major shock to the financial markets on 15 September 2008, when Lehman Brothers filed for Chapter 11 protection under the US Bankruptcy Code. The credit crisis will in part have prompted Zalm's memo of 3 October 2008 to Scheringa and Van Goor, which began: '*2009 promises to be a difficult year in all respects … if commissions are made more transparent and if commission income is reduced, it will place added pressure on revenue …*' He foresaw a liquidity shortfall at DSB Beheer of €40 million in 2009 and referred to the tensions between DSB Bank's ambition level and that of DSB Beheer, between which the shareholder would have to make choices.

10.2.37 In 2008, DSB Bank placed part of its portfolio in internal securitisation vehicles, so that it could use the AAA notes it received as security for borrowing from the ECB. Liquidity was improved by this action. At the end of 2008, DSB Bank made the first drawdown under this facility and also purchased notes in its external securitisations, at below the issue price. Although these transactions adversely affected its liquidity position, DSB Bank made a profit of €37.4 million on the purchase, which improved its solvency position.

10.2.38 In October 2008, DSB Bank asked the AFM's permission to postpone the planned payment of compensation to 4,000 customers with investment-linked insurance, but promised that it would do so. In November 2008, the AFM decided that DSB Bank needed to change its acceptance criteria for first mortgages and to gather more information when considering applications. The AFM issued a binding instruction to DSB Bank on 10 December 2008 to comply with the procedures prescribed by the AFM.

10.2.39 On 17 November 2008, Zalm presented an annual plan for 2009 to the Supervisory Board. It envisaged a 'reasonable profit' in 2009 and distribution of a dividend of €5 million per quarter.

10.2.40 In October 2008, Zalm was asked if he would be interested in becoming CEO of ABN AMRO and it was officially announced on 21 November 2008 that he had been appointed to that position. Zalm would spend little time at DSB Bank from December 2008 onwards. He was appointed to the Executive Board of ABN AMRO on 23 December 2008, but (formally) remained a member of DSB Bank's Executive Board until 1 February 2009.

10.2.41 At the end of November 2008, DNB talked to Offringa, who thought that some progress had been made in financial control, but less so in the areas of compliance and governance. Subjects discussed included the decline in the solvency ratio to 10.5% at a time when it was not possible to issue a perpetual loan and DSB Beheer's need for dividend income to improve its liquidity. DNB took the view that the exposure to DSB Beheer should be reduced 'because it is unsecured'. DNB voiced concern at the vulnerability of the current commission structure and the impact of potential tax assets and DSB Bank becoming increasingly dependent on the ECB facility. Offringa regretted Zalm's departure and said it was important to choose a successor with extensive experience.

10.2.42 On 1 December 2008, the Executive Board agreed the policy framework for the loans to DSB Beheer that had been drawn up by Zalm. On 10 December 2008, DSB Beheer's auditors E&Y submitted a report on their audit of DSB Beheer's 2007 financial statements. The auditors found that, at the time of reporting, DSB Beheer was not sufficiently liquid to meet its own liabilities and those of its subsidiaries (where guaranteed by DSB Beheer), but that DSB Beheer's Executive Board was considering a number of ways of raising finance. DSB Beheer's financial manager warned about DSB Beheer's tight liquidity position in a strongly worded memo to Scheringa.

10.2.43 In a meeting on 11 December 2008, the regulators decided to increase the pressure in order to hasten Scheringa's resignation and the appointment of an external CEO. The AFM proposed issuing a binding instruction on the grounds of unsatisfactory compliance, but DNB did not consider there was sufficient justification for such action. The regulators formed the Hector project group.

10.2.44 There was much discussion between DNB and DSB Bank in the early months of 2009 on the value of the shares in the capital of DSB Beheer's (in)direct subsidiaries which were to be pledged as security for DSB Bank's receivable. The Executive Board and Supervisory Board ultimately agreed with the proposed 2009 credit limit for DSB Beheer, after considering an assessment by Internal Audit of the collateral value of the security to be furnished. The Administrators found, however, that the shares in a number of subsidiaries had not been pledged.

10.2.45 On 12 February 2009, DSB Ficoholding decided to pay a monthly dividend of €1.7 million if and to the extent that the cumulative monthly profit permitted. The lower limit was set at a solvency ratio of 10.5%, above which dividend was payable. This dividend resolution was not brought to the attention of the Supervisory Board. DNB was given a copy of the resolution but lodged no objection. Accordingly, dividend amounting to €11.3 million was distributed in the period February–May 2009, including a payment of €4.5 million in March which was not based on any dividend resolution.

10.2.46 Contrary to the procedure agreed by the Supervisory Board, Scheringa asked De Grave to become CFO and De Grave took up that post on 15 March 2009. For over three months, therefore, DSB Bank was effectively functioning without a CFO. The Supervisory Board doubted whether De Grave had enough experience, but decided not to oppose his appointment at that time. On taking up the position, De Grave observed that little progress had been made with the development of the new business model. The 2009 annual plan currently being followed was based on *'business as usual'*.

10.2.47 In March 2009, DSB Bank made several payments on DSB Beheer's behalf because the latter was again short of cash.

10.2.48 From the end of March onwards, DSB Bank was the subject of extremely negative publicity in the TV and radio news, in the *Telegraaf* newspaper and in TV programmes such as *Kassa, Tros Radar* and *Pauw & Witteman*. Customers complained about DSB Bank's selling method and high charges. Stichting Hypotheekleed spoke out on behalf of customers. The AFM publicly confirmed that it had received complaints about DSB Bank and was currently conducting investigations. Scheringa's response was to trivialise the issue. On 20 April 2009, he said there had been 19 complaints, when in

fact several hundred had been received. The publicity turned the flow of complaints into a flood.

10.2.49 In response to the negative publicity, DSB Bank decided to withdraw completely from intermediation in and provision of advice on single-premium insurance in April 2009. Sales of loans and other types of insurance declined sharply in the second quarter.

10.2.50 In May 2009, De Grave presented a new business plan in which the (indirect) dividend payments to DSB Beheer were discontinued. This created tensions in the Executive Board, resulting in De Grave's resignation in mid-May 2009. DNB expressed great concern, taking the view that the Supervisory Board should play a stronger role and that the composition of the Executive Board was unbalanced. It did not agree with the functions of CEO and major shareholder being combined and was critical of the relationship between DSB Bank and DSB Beheer, which was dominated by DSB Beheer's need for €20 million a year in dividend.

10.2.51 In May 2009, the AFM imposed three fines as a result of its investigation into DSB Bank's lending practices and the criteria applied. DSB Bank's loan to DSB Beheer increased again in May 2009 to €72 million, not counting advance payments. The loan was recorded in a loan contract.

10.2.52 In June 2009, the alleged actual own funds (solvency) dropped to 10.5%.[3] No dividends could be paid. On 24 June 2009, Douma gave a presentation to Scheringa and Neelissen, predicting a liquidity shortage at DSB Beheer: DSB Beheer's loan facility had been maxed-out, DSB Beheer's 'family silver' had been sold to DSB Bank, external financing was not possible and DSB Beheer relied on DSB and DSB Ficoholding Bank for its liquidity and was expecting to obtain €24 million. Douma had learned, however, that only between €0 and €10 millon would be available. On 25 June 2009, Neelissen sent this presentation to Bonnier. They decided to discuss the presentation after the Supervisory Board meeting on 29 June 2009, at which the 2008 financial statements would be considered.

10.2.53 On 5 June 2009, the Supreme Court gave its decisions on a number of securities-lease cases. The consequences of the decision for DSB Bank's HWS portfolio were not discussed in the Executive Board.

10.2.54 On 22 June 2009, Lakeman said on the TV programme *Nova* that he estimated the compensation claims from customers against DSB Bank in respect of numerous breaches of its duty of care at €1–2 billion.

10.2.55 On 29 June 2009, after complaints about the late submission of the 2008 financial statements, the Supervisory Board decided to propose to the AGM that they be adopted. A provision of €0.5 million was formed for potential duty-of-care claims. No provision was formed for the receivable from DSB Beheer. Net profit was €46 million (2007: €55 million). Most of the profit was due to the book profit on repurchased notes and a lower appropriation to the provision for receivables from customers.

[3] If the subordinated deposits were recognised correctly, in accordance with the decision of the Dutch Trade and Industry Appeals Tribunal (CBB), the actual own funds amounted to 7.94%.

10.2.56 On 23 July 2009, the Executive Board gave a press conference at which the full-year figures for 2008 and the half-year figures for 2009 were announced. The alarming position in which DSB Bank and DSB Beheer found themselves was not mentioned. Scheringa opened with the words: *'Everything is going well with DSB Bank: good profit figures last year and we are in the black in the first half of this year.'* Scheringa said he was hopeful DSB Bank would also end 2009 in the black.

10.2.57 Koeman, who joined the Supervisory Board on 1 January 2009, wanted to resign immediately after the meeting on 29 June 2009 because of several issues, including the secrecy surrounding the dividend resolution and the problems with the financial statements. Bonnier persuaded him not to resign immediately.

10.2.58 In response to the decline in commission income, Van Goor and a number of managers formulated a reorganisation plan which envisaged compulsory redundancies. While Van Goor was on holiday, in early July 2009, Scheringa visited the offices to tell employees that he would not be firing anyone. This caused a rift between Scheringa and Van Goor.

10.2.59 The following months saw little change. No agreement was reached on a new earnings model, a related reorganisation plan and the financial consequences. The negative publicity continued. The number of complaints mentioned by Scheringa and Van Goor in public statements was less than the actual number. Concerns about DSB Beheer continued to grow. In the summer of 2009, the realisation dawned on the Supervisory Board and on DNB that DSB Bank was not able to resolve its problems by itself and that the sale of DSB Bank should be considered. The Homerus project group was formed by DNB and the AFM. At the end of September 2009, DSB Beheer called in Catalyst Advisors, principally to find a solution for its liquidity problems.

10.2.60 On 28 September 2009, former DSB Bank sales staff appeared on the *Nova* TV programme to talk about the policy on selling products that were not needed. On 1 October, on the *Goedemorgen Nederland* programme, Lakeman called upon DSB Bank customers to withdraw their account balances, causing a run on the bank. At 16:30 that day, DNB issued a statement that DSB Bank satisfied the solvency and liquidity requirements. Catalyst Advisors reported on 1 October 2009 that no external sources of finance were available to DSB Beheer and that the only solution was the sale of DSB Leven, DSB Schade and DSB Bank.

10.2.61 Discussions at DNB during the weekend resulted in the early morning of 5 October 2009 in a covenant between DNB and DSB Bank that was signed by the whole Executive Board and Supervisory Board. The covenant began by referring to a possible reduction in the collateral value of the security for the ECB borrowing facility (of €1,875 million), under which some €561 millionwas drawn down on the morning of 5 October 2009. The covenant then referred to the need for a liquidity safety net and Scheringa's willingness to stand down and hand over his responsibilities as CEO to Kuiper, a newly appointed delegated supervisory director. Later that day, DNB was told by E&Y of a circumstance which threatened DSB Bank's existence, namely DSB Bank's ability to call in the receivable from DSB Beheer (section 3:88, subsection 1, of Wft). The same day, Catalyst Advisors reported that it saw no possibility of selling the bank, at least not in the short term. The first discussions with the five largest banks in

the Netherlands took place that evening, and at 23:45 DNB informed the treasurer of DSB Bank that the maximum size of the ECB facility had been reduced from €1,875 million to €1,000 million. As a result of considerable withdrawals from savings accounts on Monday, 5 October 2009, the debt to DNB increased to €256 million. This debt was converted into an additional drawdown under the ECB facility, taking the total drawdown at that time to €796 million, from a maximum facility of €1,000 million. One of the reasons DNB gave for reducing the facility was its concern at the extent of the duty-of-care claims which, according to DNB figures, were estimated at €35 million at that time.

10.2.62 On 8 October 2009, on the *Nova* TV programme, Scheringa signed a covenant with Stichting Steunfonds Probleemhypotheken which would resolve part of the claims. Scheringa used the term ‘victims’ for the first time and said that the cost of this covenant was €28 million.

10.2.63 Following the haircut imposed on the ECB loan, DSB Bank was given an emergency loan by DNB for a term of one week. This facility, with a maximum of €200 million, was secured on virtually all the assets that had not already been pledged as collateral.

10.2.64 In further discussions, the banks consented to talk about a liquidity safety net, but insisted on the government taking a 30% share. Later that week, this was raised to 40%. The government was not prepared to accept that arrangement and, on Sunday, 11 October 2009, DNB had no option but to apply for the emergency court ruling. That application was initially rejected by the court at 01:00 on Monday, 12 October 2009. When the media learned of the application, early in the morning of 12 October 2009, the outflow of funds started to grow again, and the emergency court ruling was issued. The next week, in the absence of a prospective buyer of the entire bank, the administrators applied to have DSB Bank declared insolvent. Having held the requisite sessions, the court declared DSB Bank insolvent on 19 October 2009.

10.3 Corporate governance

Implementation of corporate governance within DSB Bank

10.3.1 Standards have been set at national and international level, governing the functioning of the various corporate bodies and the performance of duties and exercise of powers within a company. Decision-making within the company must be transparent and balanced. These requirements are, if possible, even stricter in the case of banking institutions. To maintain the public’s trust in the banking sector, banks must have a robust corporate governance structure and their executive and supervisory directors must be reliable and possess the necessary expertise.

10.3.2 Little attention was paid to those standards at DSB Bank. Among other factors, DSB Bank’s corporate governance structure was *de facto* deficient owing to:

a. the composition and functioning of the Executive Board;
b. the undermanning of various staff departments;
c. the absence of transparent and balanced decision-making; and
d. the imbalance in the relationship between the Supervisory Board and the Executive Board.

(a) Composition and functioning of the Executive Board

10.3.3 There were several periods when the Executive Board was undermanned or overloaded, both quantitatively and qualitatively. Throughout the entire period from the granting of the banking licence in December 2005 until the date of the declaration of insolvency, Scheringa and Van Goor held the position of CEO and COO, respectively, on the Executive Board. During that period, the position of CFO was held by four individuals, namely Van Dijk, Zalm, De Grave and Buwalda. Whether the last two individuals possessed sufficient expertise and experience to be an effective CFO was the subject of discussion in the Supervisory Board. The post of CFO was vacant (but filled by an interim CFO) for three separate periods.

10.3.4 DNB even described the period between the departure of Van Dijk (on 12 November 2007) and the appointment of Zalm (on 3 December 2007) as a ‘period of management crisis’. The Executive Board was unbalanced and did not possess sufficient banking expertise and there was conflict between its commercial aspirations and prudent banking practice. At the meeting on 27 November 2007, DNB therefore decided to appoint a ‘silent administrator’. Due to the arrival of Zalm, however, a ‘silent administrator’ was not formally appointed.

10.3.5 In mid-2008, DNB (again) and the AFM jointly expressed their concern at the many and varied responsibilities that Van Goor had taken over on the departure of CIO De Jong, a situation that had been exacerbated by Zalm’s resignation. As a result of this quantitative and qualitative undermanning, a number of important matters had been left in abeyance in this period. These included the revised 2009 business plan, the framing of the financial relationship between DSB Bank and DSB Beheer (the policy framework was discussed by the Supervisory Board but not approved and it took the Supervisory Board until March 2009 to approve the revised credit proposal for DSB Beheer, which basically limited the further increase in credit and provided for gradual lowering of the limit in the coming years) and the preparation of the 2008 financial statements.

10.3.6 Even in the period when the Executive Board was quantitatively better staffed, important matters were still not adequately discussed. That the allocation of tasks within the Executive Board was subject to change and, as the Administrators learned, was not sufficiently clear within the Executive Board or outside was also a factor in this lack of discussion. A clear example of this was the contradictory statements made by Zalm and Scheringa on responsibility for the compliance portfolio. Scheringa said this was a joint responsibility of the Executive Board, while Zalm asserted that, according to the minutes of the 20 June 2008 meeting, this portfolio was Scheringa’s responsibility.

(b) Undermanning of various staff departments

10.3.7 As well as the changing composition of the Executive Board, the undermanning of a number of staff departments was also seen as a problem. Several former Executive Board and Supervisory Board members referred to inadequate manning, both quantitatively and qualitatively, of various staff departments. E&Y drew a similar conclusion in August 2009 from a ‘baseline measurement’ initiated by De Grave. The

deficiencies in the composition of the Executive Board were therefore not compensated by good staff departments.

10.3.8 As also noted by the regulators and by Zalm, the Executive Board did not pay sufficient systematic attention to the reports by the various support departments and committees, such as ALCO, CORC and the Credit Committee. These reports were included in the agenda of Executive Board meetings on a more systematic basis after 13 September 2008.

(c) Absence of transparent and balanced decision-making

10.3.9 To ensure the effective control and sound operational management which is expected of banks, decision-making must be transparent and traceable. Both the Supervisory Board and the regulator must have adequate information on the factors on which a decision is based. Some decisions cannot be taken until the Works Council has been consulted.

10.3.10 Judging by the minutes of the Executive Board meetings, decisions were barely documented, if at all. The minutes reveal that a number of important matters were not discussed, or discussed only briefly, at the meetings. For instance, there is hardly any mention in the minutes of DSB Bank being placed under enhanced supervision by DNB, or of the appointment or departure of the various Executive Board members. The Administrators found no evidence that the Supervisory Board or the regulators were informed by any other route of the motivation for decisions taken by the Executive Board.

10.3.11 Decision-making was not balanced, because Scheringa held too much influence over DSB Bank's policy. This influence was due *inter alia* to his dual role as CEO and (indirect) major shareholder. As shareholder, he was able to appoint and dismiss members of the Executive Board and Supervisory Board. The other Executive Board members were unwilling or unable to provide an adequate countervailing force against Scheringa, who took decisions that cut across earlier decisions or did not have the consent of the other Executive Board members. The Supervisory Board was also by-passed on several occasions when these decisions were taken.

10.3.12 Scheringa's interests as CEO of DSB Bank often conflicted, actually or potentially, with his interests as shareholder in DSB Beheer. Despite this danger, the minimal rules on conflicts of interest at Executive Board level related only to representation of DSB Bank. Examples of the conflicts of interest that existed at that time – with Scheringa effectively dominating the decision-making – include DSB Bank's sponsorship of DS Sport and Art, the loans advanced to DSB Beheer, the dividend distributions by DSB Bank which benefited DSB Beheer via DSB Ficoholding and the various acquisitions by DSB Beheer that were funded by DSB Bank. Scheringa's dual role gave rise to tensions within the Executive Board on various occasions.

10.3.13 It is also noted that, although it was a statutory obligation, DSB Bank did not have a Works Council until April 2009.

(d) Imbalance in the relationship between the Supervisory Board and Executive Board

10.3.14 The provision of information by the Executive Board to the Supervisory Board left much to be desired. For example, a number of major acquisitions which adversely affected DSB Bank's solvency ratio were presented by Scheringa to the Supervisory Board as *faits accomplis*. The appointment and dismissal of De Grave were announced to the Supervisory Board in the same way. These decisions did not, however, encounter strong opposition. It was not until June 2009, when the 2008 financial statements were presented to the Supervisory Board, that serious tensions arose. The Supervisory Board was highly critical of the delay in delivering the financial statements. The dividend decision, which had already been made, DSB Beheer's assignment of a tax asset to DSB Bank and the financial relationship between DSB Bank and DSB Beheer also came in for strong criticism from the Supervisory Board.

10.4 Services and duty of care

10.4.1 DSB Bank presented itself as a 'marketing-driven financial services provider focusing on the market for flexible and attractive mortgage and consumer loans, savings and insurance products'.

Marketing & Sales

10.4.2 Although there was no documented overall business strategy, DSB Bank's operations throughout its existence bore all the characteristics of a sales-driven intermediary business, focused on generating (non-recurring) commission income from brokering insurance sold with loans, if necessary with a negative interest margin (cross-selling). From 2006 until April 2009, cross-selling percentages were reported weekly to the management. New policy was developed as late as August 2008 to increase the cross-selling percentage. The commission income generated by cross-selling could be recognised immediately as revenue when the contract was signed. Loans were often sold as a vehicle for selling insurance. During 2006 and 2007, loans were marketed at 'special-offer' interest rates in pursuit of this policy, which was strongly focused on cross-selling, but also resulted in the acceptance criteria being applied too loosely or the limits being exceeded. The remuneration structure for (some of) the staff ('salesmen') was also designed to serve this purpose, because a substantial portion of their pay (an average of 40%) was variable remuneration, to drive and incentivise cross-selling to achieve targets in terms of numbers and revenue. Offices could also earn bonuses by achieving set targets. Office staff were given 'performance snacks' to encourage them to reach targets. It was not until early 2008 that variable remuneration was also made partially dependent on the quality of the production, such as the quality of the customer profile.

10.4.3 As with the sales strategy, the marketing policy was only defined briefly, if at all, in policy documents, even though very large sums (€44–55 million a year in the period 2005–2008) were being spent on sales (marketing) costs (print advertising, internet costs, mail shots, radio and TV advertising, sponsorship etc.). Scheringa effectively dictated the marketing policy. Only the 2009-2010 policy plan presented a clear marketing vision, one objective of which was to increase cross-selling to existing customers (by doubling the number purchasing three products) by 31 December 2010.

10.4.4 From 2006, there was a drive to increase the number of bank shops and mini-branches in order to boost revenue. The original target was to open 20 bank shops, but in August 2006 this was raised to 100. The pace of expansion slowed in October 2006 and the plans to increase the number of branches were abandoned in March 2007. The reasons given were that it was difficult to find good branch managers and DSB Bank could achieve faster growth via the internet. In May 2007, there was another change of course, with the decision to set up 'profit centres'. The changeover to this structure was in the final phase in August 2008.

Financial Services Act (Wfd), complaints and complaints processing

10.4.5 The strongly sales-driven policy resulted repeatedly in conflicts at many points with the controlled and sound operational management of the business as prescribed by law and demanded by the regulators. The Executive Board was aware that the organisation was not (yet) Wfd-compliant and in 2005 DSB Bank initially adopted the position that it would only broker and sell, but would not advise on, loans and insurance. In the light of the opposing view taken by the AFM, the Executive Board decided to reconsider its position. According to DNB, DSB Bank was not Wfd-compliant in January and March 2006 and an internal investigation by the Internal Audit department in June 2006 found that the advisory process (such as compilation of a customer profile) could not be adequately verified and reconstructed. To avoid an investigation by the AFM on the basis of the Internal Audit department's report, DSB Bank instructed PwC to investigate compliance with Wfd. PwC's investigation revealed serious deficiencies in the advisory process. The critical PwC report entitled 'Wfd scan of the advisory process at DSB Bank N.V.', which appeared in January 2007, was poorly received by the Executive Board, which instructed Internal Audit to conduct a follow-up investigation. The AFM, however, was shocked by PwC's findings and demanded changes to the rules governing the administrative organisation and internal control, to ensure that internal control measures were demonstrably in place which guaranteed the quality of the advice. The AFM considered the findings so serious that it ordered DSB Bank to give redress in cases where inappropriate advice had been given. Following an internal investigation by DSB Bank of the 82 files examined by PwC, the Executive Board concluded that lending may have been inappropriate in only 16 cases and Van Goor considered giving redress in only three of those cases. There is no evidence that this was done. DSB Bank informed the AFM that it did not share PwC's conclusions. After investigating these files, however, the AFM took the view that the requirements had not been met in any of these 16 cases and all scored significantly below average for the advisory process. This protracted discussion ultimately resulted in changes to the decision tree used by sales personnel when giving advice.

10.4.6 The complaints procedure and complaints registration, which was required by law, failed to meet the required standard during the entire period investigated by the Administrators. The subject was given only scant attention by the Executive Board, despite the fact that it was suggested to the AFM that the matter had been considered, even after the AFM had been extremely critical of this lack of attention in April 2008. This did not change until 2009, in the face of the growing adverse publicity, but it was initially seen by the Executive Board as largely a communication issue. Complaints

were recorded in Excel throughout the period under investigation. For a long time there was neither a centrally numbered complaints recording system nor information about the time taken to process complaints, which meant that the Executive Board did not have adequate information on the total number of unresolved complaints and it was unclear who was dealing with which complaints. Although these shortcomings were repeatedly noted, both internally and by the external regulators, only very minor improvements were made to the complaints procedure and complaints registration in the period investigated. The complaints reports, where they were received by the Executive Board, were generally treated as being for information only. These reports did not analyse the nature of or reasons for developments relating to complaints and the potential exposure this created for DSB Bank. The information which was provided gave a distorted picture, because complaints for which a resolution had been proposed by DSB Bank but had not been accepted by the customer were marked as settled in the complaints register. There was no clear framework of standards for dealing with complaints and, furthermore, the Complaints department was until the end of 2008 part of the Sales division, which meant that it was unclear whether complaints were considered with an appropriate degree of independence, and the Compliance department's activities remained dependent on staff who also worked for the business units. The Executive Board paid little or no heed to criticisms made by DNB and the AFM of the (organisation of) complaints processing. In interviews in the media in 2009, Scheringa seriously understated the number of current complaints, giving a number far lower than the actual number of reported complaints. Complaints and claims were dealt with on an individual basis and DSB Bank was unwilling to make collective settlements. DSB Bank explained to customers that settlements were often made out of altruism, when in fact it was done to avoid negative publicity or an adverse decision by the court. Firm plans to substantially improve the complaints function and complaints recording and processing were not developed until early 2009. Owing to the events of that year, these plans were not implemented.

Lending

10.4.7 A not insubstantial number of the complaints received by DSB Bank related to lending. During the period under review, implementation of and compliance with the applicable acceptance standards were the subject of virtually constant discussion between DSB Bank and the regulators. DSB Bank's internal acceptance standards – which were not always consistent with the relevant codes of conduct – were applied too loosely in many cases. Changes to those criteria were not implemented in a structured manner and, from the commercial perspective, the acceptance procedures were applied too flexibly, to such an extent that credit applications which had been rejected by the Acceptance department on commercial grounds were frequently given approval at Executive Board level. Broad use was made of the scope for departing from the standards prescribed by the Code of Conduct for Mortgage Finance (GHF), in the name of 'custom tailoring'. The refinancing of existing loans was often taken by the Executive Board as justification for 'custom tailoring' to enable the customer to obtain more favourable terms. Some rejected loan applications could subsequently be converted into loans via the intermediary channel (Kredietgroep Nederland).

10.4.8 The Executive Board was regularly warned of the risk of excessive lending and was told, via internal channels and by external agencies, that the acceptance process was non-compliant (no reasons were given in many cases for departures from the acceptance criteria, the advice provided was inconsistent with the customer profile etc.). In March 2006, DNB warned that excessive lending might pose a danger to DSB Bank. In May 2006, DNB noted that DSB Bank's lending policy was not sufficiently developed, that acceptance criteria were not adequately defined in writing and that DSB Bank fell short of the required standard in respect of excessive lending and customer profiles. DNB warned that deficiencies in discharging the duty of care, inadequate management information and Internal Audit's lack of attention to the lending process posed prudential risks. DNB's investigation confirmed E&Y's findings. In response, DSB Bank drafted a memo entitled 'Good lending practice' and took a number of measures, which satisfied DNB for the time being. In October 2006, however, DNB complained that it was dissatisfied with the progress made that year. In December 2006, E&Y judged the lending process to be below standard and rated it as high-risk. In its report entitled 'Responsible lending', the Executive Board rejected the AFM's highly critical findings following its investigation of consumer lending by DSB Bank and others.

10.4.9 The Executive Board similarly contested the criticisms made by the AFM in its report 'Avoiding excessive lending', which was issued in February 2007. It also disagreed with the Dutch Banking Association's finding in April that DSB Bank was failing in its compliance with the Code of Conduct for Mortgage Finance (GHF). Nor did it agree with the AFM's highly critical definitive findings, which were published in July 2007 and resulted in a meeting to discuss standards. The Executive Board also resisted any further tightening of the lending criteria set out in the code of conduct of the Association of Financing Organisations in the Netherlands (VFN) and was highly critical of the provisions of the Code of Conduct for Consumer Credit of the Dutch Banking Association (NVB). Meanwhile, the Executive Board developed a policy to enable a mortgage of more than 130% of the foreclosure value to be granted, by dividing the loan into a first mortgage and a second mortgage ('combi-mortgage').

10.4.10 In January 2008, the acceptance criteria were tightened so that applications for loans in excess of 6.5 times annual income would be rejected. In December 2008, however, the Compliance Officer found that a second mortgage of up to 7.5 times the gross annual income had been granted. In February 2008, DNB was again highly critical of the very loose acceptance policy and the risks this posed for the credit portfolio. DNB disagreed with DSB Bank's reaction to these findings in March 2008, in which it considered that it had responded adequately to the objections raised by DNB. In March and April 2008, however, a very sharp increase in the infected debtor position was observed both internally and by the AFM, prompting the proposal to tighten the acceptance policy. In a joint letter of May 2008, the AFM and DNB again expressed concern at DSB Bank's failure to comply with the rules of conduct set forth in the Financial Transactions Act (Wft). In June, DSB Bank revealed that 30% of consumer loans exceeded the limits set by the VFN code of conduct and the limits had also been exceeded by a large margin in the case of second mortgages. Although the Executive Board decided in July to bring the acceptance criteria into line with a number of

guidelines set by the AFM, it was reported in September 2008 that the recorded departures from the acceptance criteria were increasing. In November 2008, the AFM issued its definitive report entitled ‘Responsible housing costs’, in which it noted that excessive lending had been found in all files it had examined at DSB Bank. On the basis of this report, three administrative fines were imposed and a binding instruction was issued. The acceptance conditions for first and second mortgages were revised in December 2008. In the following months, DSB Bank worked on improving the acceptance process and, in the summer of 2009, a Credit Committee was formed to assess applications for loans exceeding the income limit and mortgage loans exceeding the loan-to-value limit. Doubts were also expressed about the sale of combi-mortgages.

Insurance and single-premium policies

10.4.11 Intermediation in the cross-selling of insurance in the form of single-premium policies attracted growing criticism in the period under review. In May 2006, DNB criticised this practice and the revenue it generated which, due to the generous commissions paid, could be very high. DNB considered that insufficient action had been taken to prevent the customer’s interests being subordinated to commercial interests. DSB Bank refuted this criticism, but announced that it was working on a model in which commission percentages for certain categories of insurance would level off. The Executive Board acknowledged in June 2006 that new regulations would force DSB Bank to revise its earnings model in the near future. The focus in the following months was on revising the insurance offering. The PwC report entitled ‘Wfd scan of the advisory process at DSB Bank N.V.’, which was presented in December 2006, was highly critical of the advisory process and the creation of customer profiles. The AFM was shocked by PwC’s findings, which ultimately led to modifications to the advisory process. The Executive Board reaffirmed in May 2007 that changes to the regulations would make cross-selling more difficult and sales of single-premium policies declined. However, commission income rose again in September 2007 and Scheringa announced the acquisition of GEMA.

10.4.12 Although the AFM issued a public warning about single-premium insurance sold with loans in January 2008 and the sale of single-premium policies continued to decline in the course of that year, DSB Bank was still optimistic on this point in its 2008 annual plan and predicted revenue from non-recurring commission of €130 million. In response to this annual plan, DNB expressed concern at DSB Bank’s dependence on this income given that, as noted above, the life expectancy of the commission structure was limited. Six weeks later, the 2008 annual plan had to be revised in the light of very disappointing results. Higher finance income and interest results were not sufficient to offset the fall in commission income. In June 2008, there was a sharp decrease in the flow of insurance applications, a process that was expected to accelerate as from 1 July 2008 when statutory exemption from the obligation to provide advice on payment protection insurance would expire. In the autumn of 2008, the AFM launched an investigation into providers of single-premium policies and, in its findings which were communicated to DSB Bank in August 2009, the AFM concluded that customers had paid commissions in the period under review which probably bore no relation to the work performed.

10.4.13 Prompted by these developments, DSB Bank formulated a policy which provided for progress towards a fixed advice fee and this was announced to the AFM in March 2009. The sale of single-premium policies continued to fall in January and February 2009 and 'collapsed' in April. The Executive Board announced in April 2009 that *'social developments force us to adopt a new business model'.*

Investment plans

10.4.14 During the period under investigation, DSB Bank sold investment plans which were taken out with Reaal. DSB Bank recommended these plans and acted as agent for them in combination with the granting of mortgages. Around May 2008, DSB Bank ceased selling Reaal investment plans. DSB Bank had been developing its own unit-linked product from 2006 onwards to replace the Reaal policy and began marketing this product in 2008, although, in the end, only 117 policies were ever sold.

10.4.15 The public debate surrounding investment plans intensified, following the investigation conducted by the AFM into these products, as offered by a representative cross-section of life insurers. This investigation resulted in a report in June 2006, in which the AFM concluded that the insurance companies should probably compensate customers. In December 2006, the De Ruiter Committee found that there was a lack of transparency in the investment plan market. With regard to DSB Bank specifically, the AFM advised DSB Bank of the findings to come out of its investigation in a letter dated 27 December 2006. The AFM found that DSB Bank scored below average with respect to the duty-of-care aspects investigated as well as the bank's cooperation with the investigation, and made various recommendations.

10.4.16 In the course of 2008, DSB Bank promised the AFM a comprehensive compensation scheme for unsuitable recommendations. A few months later, DSB Bank revised its promise, saying the compensation scheme would only apply to a limited group of 'clear-cut cases'. At the same time, an Investment Plan Task Force was set up, tasked with coordinating all activities and external communication concerned with investment plans. The Investment Plan Task Force – as recommended by Spigthoff – launched a procedure for looking into and settling complaints based on Investment Plans sold as "Hollands Welvaren" ("**HW**"), commencing in July 2009. It was also noted at the time that the number of HW complaints was on the increase (again).

10.4.17 DSB Bank argued that the bank had not been guilty of selling 'rip-off policies', in view of its transparency regarding costs/deductions, arguing instead that Reaal was the main culprit. However, in a meeting with Zalm in November 2008, DNB expressed doubt as to whether the DSB Bank's transparency had been sufficient to avert claims, given that HW, according to DNB, was the only product in the sector with high costs, dividends withheld by DSB and low investment results.

Securities-backed lending

10.4.18 The securities-backed lending products offered by DSB Bank up to the end of May 2002 also gave rise to duty-of-care complaints in the period under investigation. However, DSB Bank argued that there were considerable differences between the HWS products it was selling and the securities leasing products (to which the

Duisenberg scheme announced in April related). In June 2005, it was decided to settle the HWS complaints, taking account of the identified differences. Consideration was also given to transferring to DSB Bank the 50,000 Dexia customers qualifying for the Duisenberg scheme. According to an internal calculation in November 2005, settlements with HWS customers based on the Duisenberg scheme would cost DSB Bank around €40 million.

10.4.19 In January 2006, the Executive Board decided not to offer HWS II customers the option of renewing residual debt guarantee contracts and instead to send them a letter three months before the maturity date setting forth all the various options. The Executive Board did not think it was necessary to recognise a provision. However, it was decided to waive entirely the residual debt of the AZ players that had lent very substantial sums. The costs of this exercise – totalling in excess of €9 million – were charged to DSB Beheer, which accordingly saw its debt to DSB Bank increase by that amount.

10.4.20 In January 2007, Mr Silvertand put in a claim on behalf of 20 or so customers. Mr Silvertand was contacted with a view to settling matters individually with the customers. In the ensuing months, it transpired that legal proceedings had also been announced or instituted by Stichting Stapelkrediet, Leaseproces B.V. and Beursklacht B.V., acting on behalf of groups of customers. In February 2008, the Executive Board was still saying that cases would be reviewed on an individual basis to see if the residual debt should be waived. Then, in August 2008, the Executive Board decided to form a provision of approximately €1.4 million to cover a settlement with Leaseproces B.V. and, in March 2009, a settlement was reached with Stichting Stapelkrediet amounting to €490,000.

10.5 Auditing

10.5.1 During the entire period covered by the inquiry, from 2005 to 2009, E&Y acted as external auditors of all Ficoholding's operating companies. And, as from 2006, E&Y were also DSB Beheer's auditors. The audit of the financial statements of Ficoholding and its subsidiaries/associates, which included DSB Bank, was always finalised well before the audit of DSB Beheer's financial statements was complete. The auditors tasked with conducting the audit of DSB Ficoholding were therefore only able to use information and findings emanating from the audit of DSB Beheer to a limited extent.

10.5.2 As part of the audit of the 2007 and 2008 financial statements, E&Y had to assess the amount recognised in respect of DSB Bank's growing receivable from DSB Beheer. In 2008, this receivable had grown from €41 million as at year-end 2007 to approximately €75 million as at year-end 2008, excluding a tax asset of approximately €20 million which was only realisable via DSB Beheer.

10.5.3 The total receivable from DSB Beheer had become quite substantial in 2008 in relation to DSB Bank's equity. In the 2008 financial statements, a loan to DSB Beheer was still recognised at the full amount despite the many uncertainties surrounding its repayment.

10.5.4 The information available to E&Y showed that the size of the loan had reached the limits under the large item rule. It was therefore not possible to increase the amount of the loan any more without first obtaining DNB's approval.

10.5.5 DSB Beheer's liquidity position was largely dependent on the 2009 dividends from investees, which were uncertain. In addition, the budget included an uncertain inward cash flow from sales of players of AZ.

10.5.6 The 2008 financial statements disclose a receivable from DSB Beheer of €75 million. No separate disclosure was made of the amount of the tax asset (of approximately €20 million) that was only realisable via DSB Beheer.

The E&Y auditors' report dated 10 December 2008, submitted on conclusion of the firm's audit of DSB Beheer's financial statements for 2007, states that DSB Beheer did not have sufficient liquidity by itself to meet its existing short-term obligations. This was because DSB Beheer had given guarantees for the liabilities of a number of investees that where in turn unable to meet their obligations independently. E&Y noted in their report that measures were being considered or had been taken in order to improve the liquidity position. Given the scope within the DSB Group for improving the liquidity, E&Y (as auditors of DSB Beheer) took the view that it was justifiable for the financial statements to have been drawn up on a going-concern basis. In a statement to the Administrators in June 2009, DSB Bank's auditors said that they had not been aware of the aforementioned report by the DSB Beheer auditors at the time they were examining the 2008 financial statements. The DSB Beheer auditors assumed in December 2008 that DSB Bank would be able to live up to the considerable expectations as regards dividends and cash flow support in 2009 but did not advise colleagues at DSB Bank of the contents of their report. Presumably they did not see the need to require DSB Bank to allow them to enter into direct communication on this matter.

10.5.7 On conclusion of the audit of the DSB Bank financial statements for 2008, E&Y admit to having had available DSB Beheer's financial projections and cash flow budget. In the version consulted by E&Y (dated 24 March 2009), inward cash flow was estimated at €53 million for 2009, with a liquidity deficit of €4 million. The budgeted inward cash flow totalling approximately €53 million included €30 million in respect of interim and final dividends from DSB Ficoholding (DSB Bank, DSB Insurers) and DSB Participaties. Receipt of these dividends was still uncertain, since the necessary profits still had to be generated, largely by DSB Ficoholding. And Ficoholding's results were falling sharply. Moreover, it was still unclear how a new business model was going to affect the results. In addition to the interim dividends from DSB Ficoholding, the budget included an inward cash flow of €10 million from the transfer of AZ players. This income had not been realised at the time of concluding the DSB Bank audit in June 2009, it was uncertain whether it would be realised at all and, as it turned out, it would in fact not be realised.

10.5.8 In assessing the receivable from DSB Beheer, E&Y considered amongst other things the assets offered as security, as had also been assessed by the IAD. Collateral had been taken into account in the form of the shares of a number of DSB Beheer subsidiairies involved in the Ficoholding banking and insurance activities. Not all of

these assets were in fact pledged, however. And as the minutes of the annual meeting with DNB on 2 July 2009 reveal, E&Y did not evaluate what the consequences for DSB Bank's profitability might be of ever having to recover the amount owed from the assets put up as security.

10.5.9 Internal reports on the nature of the complaints and the manner in which they were settled were looked at by E&Y. Based on a limited, partial observation, an assessment was made of whether the internal procedures for complaint handling were adhered to. E&Y did not undertake a specific examination of the DSB Bank complaints system.

10.5.10 The complaints from customers concerning dereliction of the duty of care increased sharply from the beginning of 2009 onwards, particularly after the ruling by the Supreme Court on 5 June 2009 that 60% of the residual debt in respect of equity lease products should in any case be waived. According to the report from the auditors dated 3 July 2009 following their audit of the DSB Bank financial statements for 2008, the securities-backed lending portfolio had fallen as a result of redemptions to €11 million, backed by underlying securities covering approximately 20% of the value. A provision of €1.8 million was accordingly recognised in the 2008 financial statements.

10.5.11 In addition to the securities-backed lending complaints, negative publicity surrounding the products also led to a growing number of complaints in early 2009 regarding loans coupled with single-premium payment protection insurance. In May 2009, E&Y received reports from the AFM following an investigation that had been carried out in the period April-June 2008. Prompted by the AFM reports and the negative publicity, DSB Bank conducted a review of the entire lending portfolio to identify indications of excessive lending/payment protection insurance coupled with payment arrears. The investigation revealed that only a limited number of the selected customers had arrears of more than three months. Even so, based on an analysis of the complaints received up to that date, a specific provision of €500,000 was recognised at the time of preparing the 2008 financial statements.

10.5.12 In the light of the warning signs identified in connection with the audit of the DSB Bank 2008 financial statements, such as the deteriorating financial position in 2009, the duty-of-care claims that were in the pipeline and the departure of key staff, E&Y were duty-bound to test the acceptability of the going-concern assumption on which the preparation of the financial statements had been based. This E&Y duly did, according to them. But despite the points mentioned above, such as DSB Beheer's cash flow problems, the limitations as regards repayment capacity in relation to the very large loan to DSB Beheer, DSB Bank's deteriorating financial position coupled with DSB Beheer's urgent need for dividends, the lack of an effective business model and business plan, a very sharp rise in the number of complaints and a serious decline in profitability in 2009, E&Y's assessment led to the conclusion that they could agree to financial statements drawn up on a going-concern basis without adding any supplementary disclosures or qualifications to the auditors' report.

10.5.13 E&Y, DSB Bank's external auditors, refused to allow the Administrators to inspect their audit files. The manner in which E&Y arrived at their opinion requires closer scrutiny in the Administrators' view. This necessitates being able to look at the audit files for 2008. The judgement given in the case brought before the Chamber of Accountants of

the Court of Appeal by the AFM concerning the audit of the DSB Bank 2008 financial statements may well provide a closer insight into the way in which E&Y arrived at their opinion regarding the recognised amount of the receivable from DSB Beheer.

10.6 Regulators

Prudential supervision: DNB

10.6.1 Right from the time of being granted a banking licence at the end of 2005, DSB Bank was seen by DNB as an institution with a high risk profile and was accordingly put into the 'intensive monitoring' supervisory regime, the highest risk category bar one, from the outset. DNB had particular concerns about the governance of DSB Bank and its management functions from the beginning. In fact, DSB Bank had the lowest possible score in DNB's internal risk analysis for strategic risk, management, organisation, auditing and compliance. And from 2008 onwards, solvency and liquidity were formally noted as increased risks as well. In August 2007, DSB Bank was placed under enhanced supervision by DNB.

10.6.2 Over the years, DNB also included DSB Bank's direct and indirect shareholders DSB Ficoholding and DSB Beheer in its supervision in some way or other, formally or informally. Prior to the granting of a licence in 2005, DNB reached agreement with DSB that the tax group comprising DSB Beheer and DSB Bank (new) would be broken up. This was never actually done. In 2008, DNB decided to treat DSB Ficoholding as a financial holding company, meaning that this company came within the scope of the prudential supervision. DSB Beheer consequently remained outside the prudential supervision and therefore did not have to satisfy all the prudential supervision requirements. DNB received only a limited amount of financial information from DSB Beheer. It was not until July 2008, when the large item rule was exceeded, that DSB Beheer's financial position – especially the growing debt situation – became a specific concern for DNB.

10.6.3 Within DNB, numerous individuals have been involved in the supervision of DSB Bank over the years. Since the granting of a licence to DSB Bank (old) in 2000, however, the same supervisory officer (Holthuizen) has been in charge of overseeing DSB Bank. He has had monthly or weekly contact, even several times a week, with both members of the Executive Board and individual members of staff at DSB Bank. And at least once a year there was also a meeting with the Supervisory Board and E&Y. DNB took cognisance of the minutes of the Executive Board and Supervisory Board meetings and received weekly liquidity and solvency reports, full-year financial statements, interim reports etc.

10.6.4 As well as discussing concerns with DSB Bank, DNB also recorded its findings regarding DSB Bank in writing in various letters and reports. On a number of occasions, DNB also threatened to take formal action to enforce compliance without being specific as to what this might entail. Prior to the emergency ruling, however, things never got that far.

10.6.5 DSB Bank's response to the prudential supervision efforts was by no means always what DNB intended. It is striking how many letters and meetings dealt with the same matters. Some members of the Executive Board and Supervisory Board mention that it

was not always clear what DNB actually expected of DSB Bank or wanted to do with the bank.

Supervision of governance

10.6.6 Even before the issue of the banking licence in 2005, DNB expressed criticism of the governance of DSB Bank (old). DNB had particular concerns regarding the independence of the Executive Board and Supervisory Board of DSB Bank (old) vis-à-vis the other group companies and Scheringa as (indirect) shareholder, regarding the provision of information to the Supervisory Board and its involvement in important decisions and regarding the emphasis on selling loans and not on the prudential conduct of a banking business. These concerns recur in the ensuing years, right up to the date of the collapse.

10.6.7 The Administrators have not been able to establish whether the earlier criticisms concerning governance were taken into account in arriving at the decision to provide with the bank with a licence in 2005. In view of the concerns about the independence of the Executive Board and Supervisory Board of DSB Bank (old) vis-à-vis the other group companies and Scheringa as (indirect) shareholder, it is remarkable that DNB was quite happy to issue declarations of no objection to the qualified involvement of Scheringa in DSB Bank. If these concerns were real when Scheringa was not a director of DSB Bank (old), there would appear to have been all the more reason to voice them when it was proposed that Scheringa should sit on the Executive Board of the new bank.

10.6.8 The Administrators have also not been able to establish whether the expertise of the members of the Executive Board was in fact examined by DNB in 2005. Out of the initial Executive Board members of DSB Bank (new), only Van Dijk had reasonably extensive financial experience. The reliability of the Executive Board and Supervisory Board was put beyond doubt by DNB, despite the negative assessment of DNB's Expertise Centrum for Integrity (ECI) regarding two out of the three intended directors. And the expertise and reliability of the members of the Executive Board was never raised as an issue by DNB in subsequent years, even with fairly drastic changes in the composition of the Executive Board.

10.6.9 Although the file compiled pursuant to the Regulation on Organisation and Control (ROB) in connection with the licence application identified various governance-related risks, this did not affect the granting of a licence. This is surprising in that many of these issues were mentioned by DNB as shortcomings soon after the licence was issued. For instance, DNB expressed concern that the accounting organisation was not all it should be, the IAD was still being set up and the situation with respect to compliance was a 'mess'. The Administrators have accordingly also been unable to establish whether the ROB file and potential shortcomings identified therein were properly taken into account.

10.6.10 The governance issue only really came to the fore again at DNB late in 2007, following the departure of Van Dijk. At that time, the governance of DSB Bank was seen by DNB largely as a matter of striking a balance between commercial pressures and the prudent conduct of a banking business. Restoring the balance in the Executive Board following the departure of Van Dijk was an important reason for the decision by DNB

to appoint a 'silent administrator' in December 2007. With the arrival of Zalm, this decision was revoked. DNB expected Zalm to provide a counterweight to the largely sales-driven Scheringa and Van Goor. The Administrators have not been able to establish whether DNB ever considered appointing a 'silent administrator' again after Zalm's departure, although, for a period of three months after Zalm actually left, there was no CFO at all. Moreover, Zalm's successor, De Grave, was felt by DNB to be too lightweight. No action was taken either to bring about the departure of Scheringa as DNB wished.

Supervision of lending operations

10.6.11 As early as 2003, DNB was critical of the lending operations of DSB Bank (old). DSB Bank (old) did not comply with the Regulation on Organisation and Control (ROB). Even at the time of making the licence application in 2005, the ROB file shows that there were considerable credit risks still.

10.6.12 In the report on its investigation published in May 2006, DNB criticises DSB Bank's lending operations. Insufficient measures were in place for preventing customers' interests from being subordinated to the commercial interests of DSB Bank. DNB made explicit note of the fact that, by insufficiently observing its duty of care towards customers, DSB Bank was incurring prudential risks. Later, the credit risks were in fact raised by DNB but, even then, the possible consequences were ignored, even when E&Y and the AFM expressed criticism of the lending operations. The Administrators have also been unable to establish whether DNB took any real notice of the critical PwC report concerning DSB Bank's customer advice practices and the fact that the findings were largely ignored by DSB Bank.

10.6.13 The increasing size of the loan from DSB Bank to DSB Beheer initially did not give DNB cause for concern. The fact that the debt increased was largely connected with several acquisitions which it was originally intended DSB Bank should make but for which the declarations of no objection were refused by DNB on the grounds that, in DNB's opinion, they involved an excessive solvency risk. As a consequence, the acquisitions were made by DSB Beheer, funded by DSB Bank. DNB could have taken the view that a consumer bank is not able to grant a business loan or that such lending effectively amounted to channelling share capital back to the shareholder, but did not do so. Not until the summer of 2008 did DNB take greater interest in this loan, when the exceeding of the large item rule was reported to DNB. In 2009, DNB made critical comments regarding DSB Bank's observance of the standards of prudent credit management, specifically as regards the credit assessment of the exposure to DSB Beheer. DNB challenged the value of the collateral security provided. DSB Beheer's growing debt to DSB Bank continued to be an important issue for DNB, to which no solution was found, right up to the date of the collapse.

Comment [A1]: dit is geen vertalings issue, maar een omissie in de Nederlandse tekst.

Solvency supervision

10.6.14 DSB Bank's BIS ratio gradually deteriorated from 13.5% in 2005 to 10.5% in September 2009. These were the BIS ratios in which the subordinated deposits were counted as part of the existing capital. Also, at the end of December 2007, the figure is the BIS ratio calculated according to Basel I capital adequacy standards, with the figure after that date calculated according to Basel II.

10.6.15 From October 2007 onwards, DNB repeatedly expressed concern regarding the expected trend in DSB Bank's capital ratio, drawing attention to disappointing results, the acquisition of other companies, the lending production added to the balance sheet, developments on the financial markets and the dependence on securitisations. At the end of 2007, DNB endorsed DSB Bank's target capital ratio of 12%, which was above the DNB minimum of 10%, but no formal agreement was reached on the action required or the timeline for achieving the target.

10.6.16 Commencing in 2001, DSB Bank offered subordinated deposits. The construction of the subordinated loan contract that lay behind the subordinated deposits was agreed with DNB. Prior to 2006, DNB was party to each subordinated loan contract and was co-signatory to the contracts accordingly. Under certain conditions and up to a certain maximum amount, subordinated deposits can be counted as own funds in the calculation of the capital ratio. DSB Bank had attracted such large amounts in subordinated deposits as to make use of this facility up to the maximum permitted limit.

10.6.17 According to a ruling of the Trade and Industry Appeals Tribunal (CBb) given on 30 June 2011, it since transpires that the loans contracted by DSB Bank were not sufficiently subordinated to count as own funds. As a consequence, it must be concluded that the calculated capital ratio reported by DSB Bank was higher than would have been the case with correct application of the rules. Furthermore, the corrected capital ratio is found to have been consistently below the minimum DNB standard of 10%.

10.6.18 DSB Bank's receivable from DSB Beheer became an increasing risk over the years. Due to the funding of acquisitions in 2007 and 2008, the asset grew to more than €77 million. And this figure does not include the amount of around €20 million receivable by DSB Bank from DSB Beheer in connection with the tax group formed with DSB Beheer. If the calculation of the amount of the receivable from DSB Beheer were to take account of the corporation tax position to be settled via DSB Beheer, and this asset were then to be compared with the actual own funds adjusted on the basis of the CBb ruling, the maximum limit of 25% of the actual own funds for the receivable from DSB Beheer would have been reached much earlier.

Supervision of the liquidity of DSB Bank

10.6.19 DNB emphasised over the years that DSB Bank needed to have ample liquidity. In 2007, DNB increased the amount of the liquidity buffer from €600 million to €1 billion, to be made up of cash and cash equivalents. It was also permissible to include the facility to borrow from the ECB. No specific agreements were reached between DNB and DSB Bank concerning the composition of the liquidity buffer.

10.6.20 The nature and composition of the liquidity buffer changed over the years. Whereas the buffer as at year-end 2007 was made up predominantly of cash, demand deposits and easily liquefiable assets, increasing reliance was placed on the borrowing facility created by the ECB backed by issued debt instruments in 2008 and ensuing years. By year-end 2008, external securitisations and credit lines with banks were no longer possible at commercially acceptable rates. In 2009, calls on the ECB facility became ever greater, following the repurchase of notes by DSB Bank and production of new

loans. It should, however, be noted that DSB Bank continued to satisfy the liquidity requirements imposed by DNB right up to the end of September 2009.

10.6.21 The amount of the ECB borrowing facility depended on the value of the collateral offered to and accepted by the ECB. As usual, DNB applied a haircut to the gross value of the assets pledged by DSB Bank, totalling €2,065 million, initially making the collateral value in October 2009 €1,851 million. When the trouble surrounding DSB Bank increased, after Lakeman had called on customers to take their money out of the bank, DNB did, however, ask itself whether a further increase in lending to DSB Bank under the ECB facility was still the right thing to do. Additionally, according to DNB, there were also legal uncertainties surrounding the claims against the bank (relating to the duty of care) and the impact they had on the value of the collateral. On 5 October 2009, the DNB Governing Board decided to impose a lower ceiling on the total amount of monetary lending to DSB Bank by limiting the collateral value of the deposited securities to €1 billion. DNB did not provide DSB Bank with any further information or calculations in support of the amount of the additional haircut.

The additional haircut meant that the remaining liquidity buffer was almost nil. As a very temporary measure, DNB therefore made available Emergency Liquidity Assistance (ELA), demanding all of DSB Bank’s assets as security. As a consequence of the additional haircut, DSB Bank became highly dependent on DNB for its liquidity since the decision to provide the ELA was entirely at DNB’s discretion.

Supervision of conduct: AFM

10.6.22 As regulator overseeing banking behaviour, the AFM conducted several investigations over the period 2002–2009 looking into various aspects of the services provided by DSB Bank and devoting considerable attention to the bank’s activities. Relations between DSB Bank and the AFM – especially in the early years – were tense and of a legal nature. The AFM proved to hold little sway with DSB Bank; findings and comments by the AFM were consistently met with criticism and frequently denied. DSB Bank tended to mount a legal defence rather than indulge in critical self-reflection. Promises made to the AFM – such as the announcement of compensation for customers following the PwC report – were only partially kept or were slow to materialise.

10.6.23 Two main themes running through the supervision by the AFM were (i) the AFM’s focus on DSB Bank’s advertising and the associated dialogue with the bank and (ii) an approach which involved looking into the services concerned with specific financial products, based on or as a consequence of an investigation (either market-wide or directed at a specific entity).

10.6.24 For almost the entire period covered by the present inquiry, the AFM has been either critical or highly critical of the advertising published by the various DSB Bank labels. The fact that DSB Bank was a marketing-driven company and did a relatively large amount of advertising may explain why the AFM and DSB Bank had so much contact on this matter. The AFM’s supervisory efforts do not appear to have brought about much lasting change in DSB Bank’s advertising policy, however.

10.6.25 The AFM conducted various investigations in relation to the securities-backed lending products, the customer advice process, the lending operations, investment plans and single-premium policies. These investigations were of a critical nature. It was repeatedly found that DSB Bank had not gathered sufficient information and/or, based on the information obtained, should not have recommended or sold a particular product. Several months frequently elapsed between the announcement of an impending investigation and the communication of the draft findings and, during this period, DSB Bank generally failed to amend its actions (in other words, the bank's services commonly continued to exhibit the identified shortcomings throughout the entire period for which the investigation lasted). An investigation announced in 2008 into the complaint recording and handling system was not begun until mid-2009 – on a remote basis – and was never concluded.

10.7 Causes of the collapse of DSB Bank

General

10.7.1 It is usually a combination of internal and external factors that causes a business to fail. In establishing what caused the collapse of DSB Bank, it is necessary to answer questions such as: how did the DSB Bank internal organisation function, including the separate bodies of the company, comprising the Executive Board, the Supervisory Board and the (indirect) shareholder; what was the role of the auditors and of the regulators DNB and the AFM and what impact did their actions have on the developments within the bank; how did the various bodies within DSB Bank respond to the actions of these regulators; how did DSB Bank anticipate and/or respond to external circumstances such as market developments? The Administrators consider these various factors in greater detail below.

The licensing process in 2000 and 2005

10.7.2 Scheringa started his company Buro Frisia, which was to become DSB Beheer, in 1975 as an intermediary business for financial services focused on generating commission income (usually single payments) that was immediately recognised as income. This continued to be the nature of the business, even after the establishment and acquisition of credit loan banks (*voorschotbanken*), insurance companies and a bank.

10.7.3 In 2000, DNB issued a licence for the establishment of DSB Bank (old). This bank had a small managing board of two persons who possessed the expertise required to carry on a banking business. DSB Bank (old) had a staff of just 20. Scheringa was supervisory board chairman. DSB Bank (old) was in fact encapsulated within a conglomerate of financial companies coming under the intermediate holding company DSB Groep. Most of the activities of DSB Bank (old), such as sales and marketing, accounts and internal audit, were performed DSB Groep. This led to friction between Scheringa and Van Goor, who were very much sales-driven, on the one hand and the management of DSB Bank (old) on the other. So it was, for example, that loan applications previously rejected by DSB Bank were approved by DSB Groep. In the

period between 2000 and the end of 2005, DNB and the AFM were quite concerned about the functioning of DSB Bank (old), not least in connection with its lending activities, risk management and corporate governance. The business model of DSB Bank (old) during that period was based on providing loans at a relatively low interest rate. The revenues for DSB Groep were made up of generally one-off commission charges earned by selling insurance products to borrowers under a policy of active cross-selling, with the bank recommending and arranging such insurance for customers.

10.7.4 It was basically a good thing that an attempt was made at the end of 2005 to bring about a merger of the companies within DSB Groep with the DSB Bank business because that meant that DNB could then extend its oversight to the entire activities of DSB Groep. DSB Groep's plan was for Scheringa and Van Goor, who did not have any banking experience, to be appointed directors of the bank, along with Van Dijk, who had gained fairly extensive financial experience elsewhere and, since 2002, had been CFO at DSB Groep. Whereas the two directors of DSB Bank (old), in that capacity, had been able to provide some countervailing force in the face of the very much sales-focused Scheringa and Van Goor, it was predictable that, with the appointment of the latter two gentlemen to the Executive Board of DSB Bank (new), the balance between a sales and marketing operation and a more moderate business model would be upset, following the merger. Cornet, one of the two directors of DSB Bank (old), specifically warned DNB of this risk. However, DNB failed to heed this warning and its other negative experience with DSB Bank (old) in the licensing process.

10.7.5 The Supervisory Board of DSB Bank (new), despite being more balanced in composition, would not be able to provide the necessary counterweight because it was not involved in day-to-day management decisions and because Scheringa, as controlling shareholder, was all-powerful and could hire and fire the members of the Supervisory Board and Executive Board at will. If DSB Bank had accepted the full large-company two-tier structure (pursuant to Section 2:154 of the Netherlands Civil Code), Scheringa would not have had this power. It was a missed opportunity that DNB, when granting the banking licence at the end of 2005, did not make acceptance of the formal two-tier structure a condition of the licence or at the very least attach certain requirements to the licences and the declarations of no objection in order to guarantee the controlled and sound operational management of the business.

10.7.6 Another important point is that the DNB Governing Board ignored the doubts raised by the AFM and DNB's own Expertise Centre for Integrity concerning Scheringa's reliability. Moreover, there is no evidence to show on what grounds DNB believed that Scheringa and Van Goor possessed sufficient expertise and that there was sufficient assurance of the existence of the required expertise within the Executive Board as a whole.

10.7.7 Added to that, the organisation of the companies which were to merge to form DSB Bank (new) had not yet been set up or staffed with a sufficiently expert workforce to make it suitably equipped to function properly as a bank. Nor was DSB Bank ROB-compliant yet; the list of residual risks still contained gaps of material importance.

10.7.8 Finally, it is important to note that DNB had concerns about the financial soundness of DSB Bank (old) even before 2005 and knew or should have known that the shareholder DSB Beheer and the ultimate shareholder Scheringa did not have the assets or the earning capacity to make capital available to DSB Bank if needed. Back at the time of the merger in 2005, DNB had the opportunity to lay down strict conditions, including, for example, requiring a minimum capital ratio, prohibiting the channelling of capital to DSB Beheer and extending regulatory oversight to DSB Beheer. Again, DNB was not really on the ball.

10.7.9 **The first finding** of the Administrators, therefore, is that DSB Bank was not ready for the merger in 2005 and that DNB should not have granted the banking licence – at least, not without strict conditions. If, in DNB's opinion, DSB Bank did satisfy the requirements, then DNB should have ensured that the necessary expertise was genuinely represented on the Executive Board and that there was no possibility of doubt concerning the reliability and expertise of the bank's directors, particularly with respect to Scheringa and Van Goor. DNB should have required DSB Bank to accept the complete large-company two-tier structure. DNB should also have attached conditions to the licences and the declarations of no objection in order to guarantee the controlled and sound operational management of the business. DNB could have got better control of the relationship with DSB Beheer. Although the issuing of the licence for DSB Bank (old) in 2000 was not a specific part of their investigation, the Administrators question the adopted construction, whereby the bank was entirely encapsulated within DSB Groep and reliant on DSB Groep for its functioning – not least in view of the corporate governance concerns expressed by DNB in the period 2000–2005. The fact that DSB Bank received a licence to operate as a bank with the Executive Board as constituted at the end of 2005 – without the imposition of strict conditions – opened the door to the developments described below.

Governance and organisation

10.7.10 For an institution like a bank, it is imperative in view of the public function performed that high standards are applied with respect to governance and organisation in order to guarantee the controlled and sound operational management of the business. DSB Bank did not meet such standards. The defective governance and organisational weakness of DSB Bank remained after the licence was issued. This was reflected, for example, in the composition of the Executive Board and the weakness of the Supervisory Board. For several periods, the Executive Board was undermanned or overloaded, both quantitatively and qualitatively. In the period 2006 up to the announcement of the emergency ruling (October 2009), four different persons occupied the position of CFO and, for three separate periods, the post of CFO was either vacant or held on an interim basis. Not only was the composition of the Executive Board inadequate but the segregation of duties within the Executive Board was in many ways also unclear: after the departure of Van Dijk in November 2007, for example, it was not clear which member of the Executive Board was responsible for compliance and acted as contact for the AFM.

10.7.11 There was also a lack of banking expertise on the Executive Board and an imbalance when it came to weighing the commercial interests of DSB Bank against prudential

aspects such as risk management and compliance. *'DSB Bank is a financial services provider with a strong marketing focus,'* ran the DSB Bank tagline back in 2007. On the operations front, the organisation was indeed very much sales-driven. A great deal of attention and financial resources were devoted to marketing and sales. By contrast, ensuring the careful provision of services received insufficient attention and showed only limited improvement if any, despite a lot of critical comments from DNB, the AFM, the IAD and E&Y.

10.7.12 The undermining/overloading was felt not only at Executive Board level but also in certain corporate staff departments. Key positions in the Internal Audit, Compliance and Risk Management Departments were inadequately filled. In addition, the support committees (ALCO, CORC and Credit Committee) did not report to the Executive Board on a structured basis. This, too, did nothing to guarantee the controlled and sound operational management of the business. DSB Bank was accordingly incapable of implementing new rules governing the provision of financial services (in good time) and making the necessary organisational changes. The repeatedly identified shortcomings with respect to customer advice only resulted in the occasional change being made – particularly towards the end.

10.7.13 Awareness of the duty of care and of compliance within DSB Bank was too limited. Compliance was too closely mixed up with the commercial imperatives. The consequent prudential risks were not sufficiently recognised by the Executive Board. The complaint recording and handling system did not satisfy the required standards either. Complaints were not properly recorded or reported and the Executive Board did not pay sufficient attention to this matter. In fact, the Executive Board usually treated complaints – unjustifiably – as incidental and later as a communication problem. When it became unavoidable, complaints were dealt with or claims settled on an individual basis. This was allegedly done as a gesture of goodwill but in reality settlements were mainly agreed to avoid negative publicity or unfavourable reviews.

10.7.14 In the period 2008–2009, the weakness of the organisation led to failure to attend to important matters. Examples of this are the development of a new business model, identified by DSB Bank – as early as 2006 – as a necessity and the establishment of a policy framework for the relationship with DSB Beheer. In addition, there was an extremely long wait for the preparation and auditing of the 2008 financial statements. DNB identified these and other problems and their causes early on after the issue of the licence but failed to take effective action. DNB backtracked on the appointment of a 'silent administrator' at the last moment because Zalm had been appointed CFO. However, when Zalm left at the beginning of December 2008 just as DSB Bank was fundamentally weakened, DNB failed to ensure that a strong CFO was speedily appointed. At that stage, too, DNB could still have appointed a 'silent administrator'. And, although there were plenty of grounds for doing so, DNB failed to take formal measures to strengthen the corporate governance. This was threatened on a number of occasions, but formal action was repeatedly presented to DSB Bank in general terms as a possibility, without actual measures ever being specified let alone carried out. There was even no action when the Executive Board and the Supervisory Board let it be known that, in part, they found the criticism of the corporate governance not to be specific enough and, in part, they did not subscribe to the criticism.

10.7.15 **The second finding** of the Administrators is that the influence of Scheringa within DSB Bank was increased by the issue of the licence in 2005. Scheringa, who was always pushing the boundaries and showed little restraint when it came to maximising the sales generated by his business – often at the expense of the customers, as described below – was able to act in this way because of the defective corporate governance and organisational weakness of DSB Bank. Although this was recognised by DNB, the regulator failed to take effective and timely action. The Administrators see the behaviour of Scheringa, the defective corporate governance and the failure to interfere on the part of DNB, at least with sufficient force, as an important cause of the collapse.

Customers' interests

10.7.16 The instances where DSB Bank failed in its duty of care as a bank were structural in nature. The AFM – often after lengthy investigations – repeatedly drew DSB Bank's attention to shortcomings in the standard of its services. In some cases, the AFM even decided action was needed to enforce compliance. The AFM was seen by the Executive Board as a nuisance and its findings were frequently denied or not taken very seriously. The AFM's critical stance coupled with its lack of persistence, did not lead to any lasting improvement in the standard of the bank's services.

10.7.17 The existence of the instances of dereliction of the duty of care and the associated complaints were not taken seriously enough by DSB Bank. The complaint handling system did not meet the applicable standards. There was no proper risk analysis – to identify the causes of these complaints etc. Hardly any provisions were recognised for the purposes of settling complaints. In 2009, Scheringa gave the impression in a public statement that the number of complaints was lower than it was in reality. Only after the massive publicity concerning the complaints did DSB Bank, in the summer of 2009, a law firm was commissioned to conduct a duty-of-care audit. The subsequent failure of the bank meant that this was never completed.

10.7.18 In an investigation conducted in May 2006, DNB found that the problems concerned with the duty of care represented a prudential risk for DSB Bank. DNB did not take the matter further, however.

10.7.19 **The third finding** of the Administrators is that the cases of dereliction of the duty of care by DSB Bank, which went back to before 2005 and occurred with increasing frequency after that date, where of a structural nature and that DSB Bank never took the matter sufficiently seriously. This was a major cause of the collapse. The Administrators had come to this conclusion on a previous occasion, namely before reaching an agreement with stakeholder organisations concerning the duty-of-care complaints in September 2011. DNB failed to take sufficient account of the risk represented by the duty-of-care problems in its supervisory activities.

The business model

10.7.20 DSB Bank's profitability fell because it failed to abandon an increasingly outdated business model. The business model went wrong because it was based on cross-selling of loans and insurance products, with the results mainly driven by the commission income (usually single payments). The further tightening of capital

adequacy standards and the restrictions on the amount of available capital – partly because of DSB Beheer's liquidity requirements – made it difficult to achieve the necessary growth in the lending business. The forthcoming changes in the rules governing financial advice and the selling of financial products plus the growing public anger at the amounts charged for the single-premium insurance protection and the revenues they must be generating, as acknowledged by the Executive Board, had a serious negative impact on the commission income from arranging the single-premium insurance and sales ultimately dried up completely. The cost base, which in comparison with other banks was too high, became unsustainable in those circumstances. The Executive Board waited too long before cutting costs and switching to a new business model.

10.7.21 The management of DSB Bank had realised as early as 2006 (Noordwijk) and 2007 (Texel) that the business model would become unsustainable before too long. This message was repeated in 2008 by Zalm. Despite this, insufficient action was taken in the period 2006–2008 to implement a different business model. On the contrary, the emphasis continued to be placed on cross-selling – partly because of DSB Beheer's strong liquidity requirement. Even in 2008, the focus was still on growing sales in the lucrative market for single-premium insurance protection, which, in the long run was no longer viable. By the time a switch was actually made to a different policy of generating revenue from selling insurance with monthly premiums, confidence in DSB Bank was too badly damaged and there was insufficient financial leeway to absorb the temporary drop in profits coupled with the changeover.

10.7.22 **The fourth finding** of the Administrators is that changes in regulations, complaints and public criticism of the products and services of DSB Bank made it vital to adopt a new business model. This need was acknowledged as early as 2006. The failure to take action to implement a new business model in good time was an important cause of the collapse.

Relationship with DSB Beheer

10.7.23 The defective governance and the organisational weakness of DSB Bank were strongly reflected in the relationship between DSB Bank and DSB Beheer. The activities of DSB Beheer were largely reliant on cash flows (in the form of dividend distributions and loans) from DSB Bank. The very substantial loans to DSB Bank coupled with being in a tax group with DSB Beheer exposed DSB Bank to risks that were unsuitable for a banking business and, moreover, that were outside DSB Bank's control.

10.7.24 Although there was an ongoing risk of actual or potential conflicts of interest in the relationship between DSB Bank and DSB Beheer, prior to August 2009 there were hardly any formal guarantees for DSB Bank concerning proper decision making and action in DSB Bank's interests. In practice therefore, the conflicts of interest were not carefully handled. Scheringa did not distance himself from discussions and decisions on matters or transactions in connection with which he was involved both as CEO of DSB Bank and at the same time as director and shareholder of DSB Beheer. An additional problem was that the supervision exercised by the Supervisory Board and DNB in principle did not extend to the activities of DSB Beheer, resulting in the fact

that the insight obtained by the Supervisory Board and DNB into DSB Beheer's financial situation was restricted. Neither the Executive Board nor the Supervisory Board had access to important information, particularly in relation to decisions affecting DSB Beheer's financial position, such as the funding of acquisitions. Indeed, it is not certain whether even Scheringa and Neelissen had a sufficiently full picture when taking important decisions. It has to be noted that the DSB Beheer financial statements were very late in being prepared, so that this source of information was not available at the time of preparing the DSB Bank financial statements. Scheringa did however get regular updates from Douma, DSB Beheer's CFO, regarding DSB Beheer's increasingly worrying cash flow projections. However, this information was generally not shared by Scheringa with the members of the Executive Board or Supervisory Board.

10.7.25 In mid-2008, DNB did ask for information on DSB Beheer's financial position. There was, however, no structured reporting of information of the standard required by DNB, but DNB did not do anything about this. And DNB's response to the information received was hardly decisive: the loan relationship with DSB Beheer had been the subject of meetings and correspondence since the summer of 2008 without DNB having done anything to address the unhealthy relationship between the two companies.

10.7.26 Ultimately, the involvement with DSB Beheer led to an excessive concentration of credit risks for a retail bank like DSB Bank with this one debtor. DNB took no action or was too late in acting to prevent a situation from arising in which DSB Bank was in fact held hostage to DSB Beheer's financial position. DSB Beheer's ability to repay the debt and the value of the security provided proved too limited and it was impossible to recover the amount owed by selling the assets concerned without having a serious negative impact on all the affected companies owned by Scheringa. By the time of the preparation and adoption of the 2008 financial statements at the latest, there were plenty of indications which should have resulted in a careful reassessment of the credit risk to DSB Bank represented by DSB Beheer.

10.7.27 **The fifth finding** of the Administrators is that the loan relationship and the involvement between DSB Bank and DSB Beheer became completely out of hand. In the end, including the tax asset, the receivable from DSB Beheer was well over a quarter of the bank's equity capital. DSB Beheer found itself in serious cash flow difficulties when it could no longer obtain dividends or loans from DSB Bank. It was this situation which prompted the DSB Bank auditors in the final phase leading up to the collapse to report a dangerous development at DSB Bank to DNB. The loan relationship with DSB Beheer was as such another important cause of the failure of DSB Bank. And DNB failed in its response when it first learnt of DSB Bank's mounting exposure to DSB Beheer.

<u>Financial statements</u>

10.7.28 Financial statements are required – in their entirety – to present a true and fair view of the balance sheet and the income statement for a particular reporting period. This is primarily the responsibility of the management since it is the management that prepares the financial statements. The Administrators doubt whether the 2008

financial statements satisfy the above requirement, having regard to such matters as the questionable amount of the provisions for receivables from consumers, the almost total absence of provisions for complaints concerning dereliction of the duty of care, the absence of any provision for the receivable from DSB Beheer and the decidedly rosy view presented of the likely outcome of several tax issues. The quality of the profit for 2008 also raises questions, being largely made up of non-recurring book profits on repurchased notes.

10.7.29 Was it therefore not incumbent on the Executive Board to say something in the 2008 financial statements (either in the notes or in the off-balance-sheet commitments and obligations) and in the press conference on 23 July 2009 at which they were presented about the risks and problems with which DSB Bank was undeniably struggling? In addition to professing confidence in the future, should the Executive Board not also have mentioned the fact that a number of matters and developments – including the lack of clarity regarding the future business model – might have a significant impact on the company's results and financial position?

10.7.30 **The sixth finding** of the Administrators is that, although each of the above treatments in the financial statements was probably permissible, there is certainly doubt as to whether the 2008 financial statements as a whole presented a true and fair picture. This in itself was not an important cause of the collapse but does call into question the actions of the Executive Board, the Supervisory Board and the Meeting of Shareholders. The position of Ernst & Young as external auditors in that context is deserving of closer scrutiny.

Solvency and liquidity

10.7.31 Having regard to the increasingly weak financial position of DSB Beheer, DSB Bank's reserves in the period 2006–2009 were too thin. There was no way that DSB Beheer could increase DSB Bank's capital. The level of DSB Bank's own funds was maintained by retaining profits from exceptional and non-recurring results in 2007 and 2008.

10.7.32 The concentration of credit risk exposure to DSB Beheer created by DSB Bank itself as a consequence of acquisitions and associated lending was unusual in nature, too great, too risky and therefore irresponsible. DSB Bank was only geared to providing consumer credit. There were no guidelines for business lending. DSB Bank did not lend to other companies, or only to a very modest extent, except where it benefited DSB Beheer, for example to finance the buyer of DSB Beheer's aircraft that was surplus to requirements. The lending to DSB Beheer, which in effect amounted to channelling capital back to the shareholder, and the uncollectible tax asset – effectively another receivable from DSB Beheer – ultimately amounted to well in excess of a quarter of DSB Bank's equity capital.

10.7.33 The amount of the equity capital, moreover, remained consistently below the target ratio of 12% set by the Executive Board in 2007, which, according to internal documents, should have been reached by year-end 2008. It is incomprehensible that DNB agreed to DSB Bank's paying out an interim dividend in 2009, provided that the equity capital worked out at more than 10.5%, especially when it is realised that DSB Bank's solvency was identified by DNB as an increased risk as early as 2008. The

quality of the actual own funds was low and included the maximum permitted proportion of subordinated loans. As follows from the ruling given by the Trade and Industry Appeals Tribunal (CBb) on June 2011, the subordinated loans should not have been counted as Tier II capital. The actual own funds remained consistently below the ratio stipulated by DNB and, in 2009, even fell below the statutory minimum.

10.7.34 In this context it should be remembered that DSB Bank was constantly pushing the boundaries in an effort to maximise profits. By recognising very low provisions, if any, for tax liabilities and duty-of-care claims and by pursuing a very active payment collection policy involving direct deductions from pay packets of debtors, the provisions for losses on loans were kept down. Although each of these actions may have been admissible in strict accounting terms, the conclusion that has to be drawn from the combination of these actions is that DSB Bank was aggressive in its attempts to present the highest profit possible. In assessing the amount of the equity capital, therefore, it should be remembered that DSB Bank had little in the way of reserves to fall back on.

10.7.35 Initially, DSB Bank's liquidity was adequate but it came under growing strain from 2007 onwards. Instead of long-term funding by means of external securitisations, DSB Bank became increasingly dependent on savings and on the ECB borrowing facility that was basically intended to meet temporary cash shortfalls. This form of liquidity is less suitable for meeting a structural drop in savings account balances. DSB Bank refused government-guaranteed loans of a more long-term nature.

10.7.36 **The seventh finding** of the Administrators is that DSB Bank sailed too close to the wind as far as solvency was concerned by presenting the maximum possible profit and not putting all its efforts into reaching the 12% target ratio but instead paying out all the capital in excess of 10.5% to DSB Beheer. This exposed the bank to unwarranted risks. The loan to DSB Beheer and the quality of the actual own funds further undermined the financial position. The weak capital ratio was a major cause of the collapse. DNB was not sufficiently alert to this risk. There appeared to be ample liquidity but even that situation began to be squeezed in 2009.

External factors

10.7.37 A significant market development for DSB Bank was the credit crunch, first seen in 2007 and intensifying in 2008 after the collapse of Lehman Brothers sent major shock waves through the markets. In 2008 and 2009, Scheringa made repeated public statements to the effect that DSB Bank was not troubled by the credit crunch. That was only partially true. Negative impacts of the crisis were the losses suffered by DSB Leven and DSB Schade on structured loans, which fell in value as certain triggers were reached. The two insurance companies were accordingly unable to pay out as much in dividends to DSB Beheer in 2008 and 2009, intensifying DSB Beheer's liquidity problems. Another negative impact was the fact that DSB Bank ceased to be able to securitise loans on sufficiently attractive terms. Instead, the bank pledged internal securitisation notes to the ECB in return for access to a monetary facility. Whereas DSB Bank had received the purchase price from a securitisation, it now received a loan, in principle of a short-term nature. The positive effect of the crisis was that notes which DSB Bank had issued in connection with previous securitisations

dropped in value and the bank was able to repurchase them at a discount, recognising the difference as book profit, even in the case of the more risky junior notes. If it had not been able to do this, DSB Bank would have made much less profit in 2008 and none at all in the first half of 2009. DSB Bank was also relatively unaffected by the crisis in that it was able to attract considerable savings deposits in 2008 and 2009. All banks became more cautious about granting consumer credit at that time and that was also the case with DSB Bank.

10.7.38 **The eighth finding** of the Administrators is that the credit crunch had both positive and negative impacts for DSB Bank. It cannot be said that the crisis was a major cause of the collapse. The credit crunch did, however, make an already weak bank like DSB Bank extra vulnerable.

Publicity

10.7.39 DSB Bank was always highly sensitive to publicity. Apart from interest income DSB Bank had little in the way of continuous revenues. As late as 2009, it was still highly dependent on commission income from selling single-premium policies, received upfront, and, apart from a small provision, recognised immediately as income. Negative publicity would have a strong negative impact on the sales of financial products. If that happened, there would be a sharp decline in commission income. Zalm warned of that. And from March 2009 onwards, commission income did indeed drop off.

10.7.40 Negative publicity would also lead to a sharp rise in withdrawals of savings. That is what happened after Lakeman urged just that an 1 October 2009.

10.7.41 **The ninth finding** of the Administrators is that the negative publicity and the run on DSB Bank were not a cause of the collapse. They were, however, brought about by a lack of confidence in DSB Bank following cases of the bank’s failure in its duty of care which were of a structural nature and its failure to deal with the consequent complaints satisfactorily.

The haircut and a liquidity safety net

10.7.42 By the time DNB decided on the haircut on 5 October 2009, DSB Bank was in a very bad way. Indeed, it is questionable whether DSB Bank was rescuable at all by that point. In the early morning of 5 October 2009, DNB had, however, signed a covenant with Scheringa, under the terms of which he would step down. There appeared to be hope of a solution. DNB subsequently stated that fears of the effects of the duty-of-care claims were the main reason for the haircut. However, the amount of the haircut compared with the amounts estimated to be needed at the time to settle existing and conceivable duty-of-care claims was disproportionate.

10.7.43 **The tenth finding** of the Administrators is that the haircut decided on by DNB continues to raise questions. On 5 October 2009, however, DSB Bank was played out as a business. It no longer had the capacity to resolve the duty-of-care issues by itself and to make the transition to a new business model. At best, it might still have been possible to run down the business but that would have needed a liquidity safety net. The haircut meant that the safety net would have had to be much larger, making it more difficult to put in place. In the days following 5 October 2009, it proved

impossible to reach agreement with the major Dutch banks and the government on a safety net of the necessary magnitude. The haircut, however, was not a cause of the collapse but a consequence of the uncertain situation in which DSB Bank found itself.

Soft landing

10.7.44 A number of the findings of this report should not be considered either direct or indirect causes of the collapse. That said, some factors did affect the events leading up to the collapse and the subsequent liquidation process, and even have a major impact on them. Other circumstances impeded or even precluded a soft landing for the bank, for example a controlled rundown scenario with a liquidity safety net. A soft landing of this kind would have reduced or even avoided the losses for the creditors. The factors concerned include the absence of sufficient insight into the duty-of-care issues and the associated risks. In June 2009, those risks were estimated at several million euros. By October 2009, however, they were estimated at amounts ranging from €26 million to €400 million. The lack of clarty regarding DSB Beheer's financial situation also created great uncertainty. In June 2009, it was not considered necessary to make any provision whatsoever for the associated risk but, by 5 October 2009, the auditors of DSB Bank saw this as representing a threat to DSB Bank's continuity. A consideration of a different kind is the negative publicity and the call by Lakeman for a run on the bank, which duly ensued. The time which was then left in which to develop alternative scenarios was consequently curtailed.

10.7.45 **The eleventh finding** of the Administrators is that it was in particular the confusion surrounding the financial situation of DSB Beheer and the confusion surrounding the volume and the financial implications of the duty-of-care risks against a background of the shortage of time caused by the bad press and the run on DSB Bank that seriously impeded finding an alternative to going into liquidation.