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Tribune

ABN AMRO: A TAKE-OVER BATTLE WITH FAR-REACHING IMPLICATIONS

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Last year saw the advent of a truly integrated European banking market coming one step closer with the takeover by a consortium of three banks, Banco Santander Central Hispano (BSCH) of Spain, Royal Bank of Scotland (RBS) and Belgian/Dutch Fortis, of a major European bank, ABN AMRO. This came after increased consolidation and cross-border M&A activity, such as the takeover of HypoVereinsbank by UniCredit in 2004, forming a major player in Germany, Austria and Italy, and the takeover of British mortgage lender Abbey by BSCH in 2005. ABN Amro itself had waged a major takeover battle for the Italian bank Banco Antonveneta, which it finally acquired in 2005 as a major cross-border inroad into the (then) closed Italian banking sector. The pace of market developments is so quick that, just when the takeover bid was sealed for ABN AMRO itself, new European legislation was adopted that had been inspired by ABN Amro's own adventures in Italy¹. This legislation² seeks to streamline the assessment of shareholders in financial sector entities on prudential grounds³. The EC Merger Regulation⁴ lays down the rules for a competition assessment above certain thresholds. It contains a prudential carve-out in Article 21 (4) that I consider not to be in line with the requirements of an internal market where national considerations of a prudential nature no longer hold, certainly after the Prudential Assessment of Acquisitions (Financial Sector) Directive just mentioned. The EU's supervisory arrangements, based as they are on national regulation and home State control, no longer seem to fit the emerging landscape of an integrated financial services industry either. Calls for a common European rulebook, for single addressees of reporting obligations and for national

¹ With Banca d'Italia Governor Antonio Fazio being accused of mingling in the take-over battle in favour of ABN AMRO's domestic competitor *Banca Popolare Italiana* (formerly known as: *di Lodi*) and calls by Internal Market Commissioner McCreevy to the Italian banking supervisory authority and central bank to abstain from interfering. The domestic brief of the Banca d'Italia Governor in this area, in which the European System of Central Banks (ESCB) only has auxiliary tasks, made it difficult for the European Central Bank (ECB) to intervene publicly in an area which was formally beyond its own remit.

² Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector, Official Journal, L 247/1, 21 September 2007, to which I refer as the Prudential Assessment of Acquisitions (Financial Sector) Directive.

³ The Commission closed a case against Italy concerning access to the domestic banking sector, see press release no. IP/07/83 at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/83&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal, L 24/1, 29 January 2004.

supervisors working much more closely together have become louder, also in the wake of the credit crunch which began in the summer of 2007 and its first fatality in Europe, British mortgage lender Northern Rock. Last December, Italian Minister of Finance Tomasso Padoa Schioppa rightfully asked for a single European rulebook and for integrated European supervision over cross-border market players⁵.

Returning to the ABN AMRO case, the takeover of Antonveneta by ABN Amro had, perversely, not yet benefited the Italian consumer, with ABN Amro CEO Rijkman Groenink quoted as saying that the Dutch subsidiary would not lower retail customer tariffs (notoriously high in Italy) because others would follow suit and this would "benefit no one except the consumer"⁶. Even more perversely, the inroad into the Italian banking sector was undone by BSCH selling Antonveneta to Italy's (and Europe's) oldest surviving bank, Banca dei Paschi di Siena, for € 9 billion almost immediately after taking control of Antonveneta, allegedly making a huge profit. It has to be admitted that, in the meantime, the management of Italian supervision has changed drastically with Mario Draghi taking over as Governor of the Banca d'Italia from Antonio Fazio who chaired the central bank during the takeover battles for both Antonveneta and Banca Nazionale del Lavoro, and with Italian legislation on competition in the banking sector changed.

The ABN AMRO saga contains more elements of recent global developments and is central to issues concerning Europe's position in the globalisation. The take-over battle between the consortium, on the one hand, and Barclays Bank of Britain, ABN AMRO's preferred bidder, on the other, started with an activist hedge fund. As an investor in ABN AMRO, it warned its Board that results should improve or else.... This lead Governor Nout Wellink of De Nederlandsche Bank (DNB, the central bank and banking supervisor of the Netherlands), to say that the threat of break-up was "a bridge too far"⁷, a remark which earned him the nickname Nout Fazio in the *Wall Street Journal*⁸ and a rebuke from Commissioner McCreevy. In a press release of 18 April 2007, the Dutch central bank noticed that "(f)rom a prudential point of view, an offer by a consortium would constitute a strong risk-increasing and complicating factor, both in the preparation of the transaction and in its execution and implementation"⁹. The public utterances in this battle show a remarkable resemblance with what happened in the Antonveneta take-over battle, when the *Financial Times* wrote editorials upon which Banca d'Italia officials wrote letters to the editor.

The take-over battle for ABN AMRO revealed discrepancies in rules on M&A activity between the Member States, as did other major recent takeover battles, notably in the energy sector. When Germany's E.on's made a bid for Spain's Endesa, with the Spanish energy regulator setting conditions which the European Commission challenged, the specifics of the

⁵ See: http://www.telegraph.co.uk/money/graphics/2007/12/04/italian_letter.pdf and Padoa Schioppa's contribution in the *Financial Times* of 11 December 2007, to be found at: <http://www.tesoro.it/web/apri.asp?idDoc=18402>.

⁶ *Het Financieele Dagblad*, editorial, 14 April 2006, page 9.

⁷ Mr. Wellink told Dutch newspaper *NRC Handelsblad* that the hedge fund's letter to ABN AMRO seemed to imply that it should sell assets (or put itself up for sale in its entirety) and "send the proceeds to us". This did not take into account the bank's status as a supervised credit institution.

⁸ *Wall Street Journal Europe*, Editorial of 28 February 2007, leading to a letter from the Dutch central bank Governor in the same newspaper on 7 March 2007.

⁹ Available at: <http://www.dnb.nl/dnb/home?lang=en&id=tcm:47-151323-64>.

rules applying in Madrid influenced the outcome, as did Spain's government intervention, Italy's Enel finally swooping up a stake in Endesa¹⁰.

In the banking area, public musings between Barclays and ABN AMRO about the site of the headquarters for their proposed merger and the ensuing role for either the British or the Dutch supervisory agencies (FSA or DNB) could make one think that private sector arrangements apparently determine which public sector agency takes the lead in supervising. It would seem that EU law determines this rather than agreement among the parties, or their supervisors.

Differences in corporate governance between the Member States also became apparent when the Amsterdam Appeals Court's Enterprise Chamber granted an injunction, at the request of several shareholders and the Dutch shareholders' association, prohibiting ABN AMRO from selling its American subsidiary LaSalle to Bank of America, a poison pill construction which would have made ABN AMRO less attractive for the bidders from the tripartite consortium. The Dutch Supreme Court, acting at full speed, overturned this decision and allowed the sale to go through.

The battle for ABN AMRO ultimately led to declarations of *nihil obstat* from both the European Commission under the Merger Regulation¹¹ and from the Dutch Minister of Finance under Dutch financial legislation¹², with terms and conditions to be complied with in the implementation of the merger, imposed by the Dutch central bank (in line with its previous concerns about the risks of the carve-up).

Finally, but not exhaustively, as the story unfolded, it told tales of both nationalism and the absence thereof¹³ and of the way modern capitalism deals with large entities that underperform financially. ABN AMRO shares' performance whetted the appetite from hedge funds and competitors alike. The company was sold and is being broken up against the apparent wishes of its staff. This highlights the importance of hedge funds who, together with private equity firms, have been the subject of a lot of criticism in past years¹⁴, although they have recently begun to share the limelight with Sovereign Wealth Funds, whose interest in investing in crucial sectors of the economy and notably in banks, have drawn politicians' attention. The recent wave of acquisitions by SWFs and others to shore up the capital base of

¹⁰ Here, too, the Merger Regulation was at issue, with the Commission challenging the Spanish authorities' action as being incompatible with the rules laid down therein. For this and other infringement proceedings initiated by the Commission in the area of free movement of capital, see the complete list at:

http://ec.europa.eu/internal_market/capital/analysis/index_en.htm.

¹¹ Cases M 4843, M 4844 and M 4845. See the press releases of 19 September 2007 [on Santander and RBS] (IP/07/1363) and of 3 October 2007 [on Fortis, subject to conditions relating to the concentrated Dutch banking market] (IP/07/1442). Previously, the Commission had cleared the Barclays takeover bid (Case M 4692, press release of 6 August 2007 (IP/07/1216)).

¹² Decisions of the Minister of Finance of 17 September 2007 issued in favour of Fortis, Banco Santander and Royal Bank of Scotland, available at the website of the Ministry of Finance (<http://www.minfin.nl>). A previous decision of the Minister of Finance of 13 August 2007 had been addressed to Barclays.

¹³ With the Dutch Financial daily *Het Financieele Dagblad* revealing the particulars of the developments which saw a Dutch financial champion (i.e. a merger between ING and ABN AMRO) not materialise; see its issues of 18 and 20 December 2007. In its issue of 28 December 2007, *Het Financieele Dagblad* revealed that ABN AMRO's art collection – which gives a complete picture of Dutch post-war art - has been saved from being split among the consortium by bringing it into an independent trust.

¹⁴ Notably from German politicians calling them 'locusts', a comparison which does nothing to foster open debate about their role and the kind of market economy one would wish to see develop in Europe.

major banks¹⁵ arouses sentiments of fear of foreign dominance over the financial system. Of course, concerns about influence on the banking industry can be valid¹⁶. Yet, it is to be hoped that the attraction of imposing barriers will be withstood. At the very least, any vetting of inward investment should take place at the European rather than at State level¹⁷, so as not to undermine the achievements of the internal market, including ever-increasing case law expanding the free movement of capital¹⁸.

The questions most markedly brought to the fore by the course of events surrounding ABN AMRO are how Europe wishes to organise its capital market (regulation), how it prepares for effective and efficient Europe-wide supervision of an ever more integrated financial market and how we would like our companies to be managed and valued: with shareholders ultimately determining their future or with more influence for other stakeholders?¹⁹ The challenges facing Europe concerning the environment and energy supply and conservation, world-wide development issues²⁰ and the advent of a global society consisting of people from different faiths and cultures²¹ may be expected to influence the European answers to the question of how we would like to see the future direction of a free enterprise determined: guided solely by shareholder value (and by the spin-off for board members whose bonuses upon leaving office may be difficult to explain in view of the company's underperformance or against the backdrop of average income in society²²), or by broader values and interests alike.

¹⁵ Notably the mid-January 2008 capital injections into Citigroup and Merrill Lynch from Singapore's and Kuwait's investment vehicles, following injections of cash from Asian and Arab SWFs into these two American banks and into UBS, Morgan Stanley and Barclays before. The Chinese interest in (South-)African banking market is another case in point.

¹⁶ There may be legitimate concerns over SWF transparency, ulterior political motives in their investment decisions, reciprocal access to the markets of the investors, as well as use of the stakes to influence policies in the recipient jurisdiction, especially in crucial sectors such as energy and finance.

¹⁷ Or even at a Transatlantic level, encompassing both the US and EU, as proposed by Jeffrey Garten, "The unsettling zeitgeist of state capitalism", Financial Times, 15 January 2008.

¹⁸ See the call for open markets and an open attitude towards inward investment by European Commissioner Charles McCreevy in his speech before the Council of British Chambers of Commerce in Continental Europe, London, 10 January 2008, at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/4&format=HTML&aged=0&language=EN&guiLanguage=en>. Unfortunately, underlining his correct attitude against new barriers, the Commissioner referred to the current Treaty rules which allow States to restrict the free movement of capital on the basis of security concerns (Article 58 EC). However, invoking this provision would carve up the internal market, whereas a joint approach is needed, from the EU, or from the EU and the US acting together.

¹⁹ This dilemma is summarised well in a recent article in the Financial Times, "Sold to the lowest bidder", on the sale of British software company Trace (Saturday 8/Sunday 9 December 2007, Life & Arts Supplement, p.1).

²⁰ Most relevant are the Millennium Development Goals, a globally agreed set of objectives to reduce significantly, by 2015, the poverty, hunger and disease still affecting large swathes of the world population, see: <http://www.un.org/millenniumgoals/>.

²¹ Note that 2008 is the European Year of Intercultural Dialogue; see press release IP/08/10 of 4 January 2008 and <http://www.interculturaldialogue2008.eu/>. On inter-religious and intercultural dialogue, see also: www.tv1111.eu, with further links.

²² For arguments concerning bankers' pay, with bonuses related to short-term performance incentivising excessive risk taking, see Raghuram Rajan, "Bankers' pay is deeply flawed", Financial Times, 9 January 2008, and Martin Wolf, "Why regulators should intervene in bankers' pay", Financial Times, 16 January 2008.