ruling

AMSTERDAM COURT OF APPEAL

civil law and tax law section, team I

case number: 200.191.713/01

ruling of the three-judge civil division of 13 July 2018

regarding the request for an order to declare an agreement binding as referred to in Article 7:907(1) of the Dutch Civil Code (DCC) of:

1. **AGEAS S.A./N.V.,**
registered in Brussels, Belgium,
attorney: H.J. de Kluiver in Amsterdam,
2. **VERENIGING VAN EFFECTENBEZITTERS**,
registered in The Hague,
attorney: P.W.J. Coenen in The Hague,
3. **DRS BELGIUM C.V.B.A.,**
registered in Brussels, Belgium,
attorney: K. Rutten in Utrecht,
4. **STICHTING INVESTOR CLAIMS AGAINST FORTIS**,
registered in Amsterdam,
attorney: J.H.B. Crucq in Amsterdam,
5. **STICHTING FORTISEFFECT**,
registered in Utrecht,
attorney: A.J. de Gier in Utrecht,
6. **STICHTING FORSETTLEMENT**,
registered in Amsterdam,
attorney: M.H. de Boer in Amsterdam,
petitioners,

versus

1. **[H],**
residing in [place of residence 1],

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2. **[D],**
residing in [place of residence 2],
3. **[L],**
residing in [place of residence 3],
4. **defendants**, as included on a list received on 10 February 2017, choosing
their address for service in Bleiswijk,
attorney: J.B. Maliepaard in Bleiswijk,

5. **[A],**
residing in [place of residence 4], [country],
6. **defendants**, as included on a list received on 10 February 2017, choosing
their address for service in Bleiswijk,
attorney: E. Sonneveld in Bleiswijk,
defendants.

In the following, the petitioners are referred to individually as: Ageas, VEB, Deminor, SICAF, Fortis and the Foundation. Petitioners 2 to 5 are referred to jointly as the interest organisations.

The defendants 1 to 4 will be referred to below as: [H] et al., the defendants 5 and 6 as: [A] et al.

1. The further course of the proceedings

On 5 February 2018, the Court rendered a second interim judgment in this case. For the course of the proceedings until that date the Court refers to that interim judgment.

On 6 February 2018, [H] et al. submitted a statement of reply following the oral hearing.

By letter of 6 February 2018, [A] et al. submitted a statement of defence against the petition submitted on 20 May 2016 and the new petition submitted on 12 December 2017 regarding the binding declaration of the Fortis Settlement, including annexes.

On 9 February 2018, Ageas submitted a supplementary annex (numbered 32).

On 6 March 2018, the following documents were submitted:

- submission after interim judgment of Ageas;
- submission regarding costs and compensation of VEB in connection with the Fortis WCAM request, with annexes, of VEB;
- submission after interim judgment of 5 February 2018, with annexes, of Deminor;
- submission explanation of financial aspects collective action Stichting FortisEffect, with annexes, of FortisEffect;
- submission after interim judgment, with annexes, of SICAF.

On 14 March 2018, Ageas submitted an annex (numbered 33) supplementary to its submission of 6 March 2018.

The following documents were submitted in response to the general invitation issued by the Court in the second interim judgment to third parties to provide written comments and information on the financing of collective actions and interest organisations:

- response from Mr *drs.* [G];
- response from Mr *drs.* [F];
- response from Mrs. *drs.* [T] RA, with an annex.

On 16 March 2018, a second oral hearing took place. On that occasion, the petitioners' positions were presented on the basis of written summaries of oral arguments, on behalf of Ageas, by *mr.* De Kluiver, as aforementioned, and by *mr.* D. Horeman and *mr.* J.W.M.K. Meijer, attorneys in Amsterdam, and on behalf of the interest organisations and the Foundation by their aforementioned attorneys. *Mr.* Maliepaard, as aforementioned, spoke on behalf of [H] et al., and *mr.* Modrikamen, attorney in Brussels, spoke on behalf of [A] et al., without any of them having made use of written pleading notes.
Furthermore, Mr [V] spoke on behalf of de Flemish Federation of Investors (VFB).

Subsequently the hearing of the case was stayed with a view to its continuation on 27 March 2018.

A record was made of the oral hearing of 16 March 2018.

By letter of 21 March 2018, Ageas submitted a supplementary annex (numbered 34).

By letter of 21 March 2018, the Foundation sent supplementary documents to the Court of Appeal (numbered 35 to 42).

At the request of the Court, Ageas provided, by letter of 26 March 2018, a further explanation of the manner in which the petitioners wish to give effect to the publication of the binding declaration of the agreement.

The oral hearing was continued on 27 March 2018. On that occasion, the positions of the petitioners were presented on the basis of written pleading notes, on behalf of Ageas, by *mr.* De Kluiver, as aforementioned, by *mr.* D. Horeman and *mr.* J.W.M.K. Meijer, attorneys in Amsterdam, and by *mr.* F. Lefèvre, attorney in Brussels, and, on behalf of the interest organisations and the Foundation, by their attorneys, as aforementioned. *Mr.* Coenen also gave a separate response to his statements as laid down in the record of the hearing of 16 March 2018, which response was submitted to the Court. *Mr.* Maliepaard, as aforementioned, spoke on behalf of [H] et al., without having made use of written pleading notes. *Mr.* M. Modrikamen, attorney in Brussels, spoke on behalf of [A] et al. and explained his clients' position at the hearing by means of a presentation, a copy of the sheets of which was provided to the Court.

In addition, *mr.* S.C.M. van Thiel, attorney in Amsterdam, on behalf of Patrinvest S.C.A., registered in Luxemburg, Mr [V], on behalf of the Flemish Federation of Investors, and Mr [M] spoke as interested parties. The latter two spoke on the basis of notes provided to the Court.

The hearing of the case was then closed. A decision has been set for the present day.

A record was made of the oral hearing.

After the oral hearing, the petitioners sent further documents to the Court, numbered 43 and 44, as allowed by the Court at the hearing of 27 March 2018.

After the oral hearing, as agreed with the parties at the hearing of 27 March 2018, the petitioners sent an amended Settlement Agreement dated 13 April 2018 to the Court (annex 45). Furthermore, a separate version of the Settlement Agreement has been provided in which the textual changes are reflected. Lastly, a Dutch translation of the amended Settlement Agreement dated 13 April 2018 has been submitted.

2. The further assessment

In the interim judgment of 16 June 2017, the Court briefly and essentially held that:
- the Court has jurisdiction to take cognisance of the request;
- the formal requirements of Article 1013(1) and (2) DCCP have been met;
- the notice to appear and announcement have taken place correctly.

The amendments made to the agreement after the second and third oral hearings do not give cause to decide differently on these points, so the Court maintains its finding. Furthermore, the Court is of the opinion that the amended agreement dated 13 April 2018 and the parties comply with the requirements of Article 7:907(1) DCC.

3. Amendment of the agreement

3.1. In the first interim judgment of 16 June 2017, the Court of Appeal came to the conclusion that the agreement concluded by the petitioners on 14 March 2016 did not comply with Article 7:907 DCC in several respects, for which reason it could not be declared binding. The petitioners were given the opportunity, on the basis of the considerations set out in the first interim judgment, to consult with one another with a view to examining whether, in the light of these considerations, it was possible to arrive at a new scheme. The petitioners subsequently concluded an amended agreement on 12 December 2017 and submitted it to the Court.

3.2. [H] et al. have declared that they agree with the amended agreement. In the submission of 6 February 2018, [H] et al. explained, *inter alia* based on calculation examples, that the new settlement is much more favourable for those who are mainly non-active shareholders with limited numbers of shares. [H] et al. ceased to put up a defence.

3.3. [A] et al. consider that their objections have not, at least not adequately, been met. They maintained their defence and elaborated on and explained it in more detail.

3.4. During the oral hearing of 27 March 2018, the Court discussed with the parties that the scheme first included in the agreement dated 12 December 2017, which relates to the early payment of compensation under certain circumstances, may have an adverse effect on a certain group of entitled parties. At the hearing, the applicants expressed their willingness to make a limited amendment to the agreement in order to prevent it from having these adverse effects. The defendants agreed to this amendment, which was proposed at the hearing. The second amended settlement agreement concluded by the petitioners on 13 April 2018 differs in this respect from the agreement dated 12 December 2017. This latest version of 13 April 2018 is currently before the Court (hereinafter: the agreement) for assessment. The limited change made to the agreement dated 12 December 2017 is in line with what was discussed at the hearing of 27 March 2018.

4. The compensation scheme provided for in the agreement

4.1. For the background of the compensation scheme, reference is made to the first interim judgment paragraphs 6.1 through 6.13. For the sake of comprehensibility, the Court will repeat or briefly summarise that interim judgment on a number of essential elements below. The agreement focuses on three periods that are distinguished by different trading dates, starting with the opening of the stock exchange (o.o.b.) or its closing (c.o.b.). These periods are in line with the various accusations made against Fortis in and out of court, which have been addressed in the context of the background of the compensation scheme as described above. These periods are defined in the agreement and described in the petition as follows:

Period 1

21 September 2007 o.o.b. up to and including 7 November 2007 c.o.b.

Period 1 relates to the alleged unlawful conduct by Fortis with regard to the information provided by Fortis in September and October 2007 regarding its exposure to subprime. Period 1 starts on the date of publication of the Trading Update (21 September 2007 o.o.b.) and ends on the date prior to publication of the third-quarter figures on 8 November 2007 before trading (7 November 2007 c.o.b.).

Period 2

13 May 2008 o.o.b. up to and including 25 June 2008 c.o.b.

Period 2 relates to the alleged unlawful conduct with regard to the communications policy and the statements by Fortis in May and June 2008 with regard to the EC Remedies, its solvency and its policy in this respect. Period 2 starts on the date of publication of the first-quarter figures (13

May 2008 o.o.b.) and ends on the date preceding the publication of the press release on the accelerated implementation of the solvency plan on 26 June 2008 (25 June 2008 c.o.b.).

Period 3

29 September 2008 o.o.b. up to and including 3 November 2008 c.o.b.

Period 3 relates to the alleged unlawful conduct in relation to the statements by Fortis in the period from the end of September to the beginning of October 2008. Period 3 starts on the date of the announcement of the participation of the public authorities in Fortis (29 September 2008 o.o.b.) and ends on the date on which it became known that the Dutch banking activities of Fortis were taken over by the Dutch State (3 October 2008 c.o.b.).

4.2. The agreement applies to 'Eligible Shareholders'. These are defined in the agreement as all those who held one or more Fortis ordinary shares at any time during the period from 28 February 2007 c.o.b. to 14 October 2008 c.o.b. Within the group of Eligible Shareholders, two separate categories of former shareholders are distinguished:

a) Active Claimants are the Eligible Shareholders who - in brief - initiated proceedings against Ageas, its subsidiaries and/or individuals involved before 24 March 2017 in the Netherlands or Belgium and/or before 31 December 2014 joined an organisation that has initiated such proceedings before 24 March 2017.

b) Excluded Persons are the Eligible Shareholders who are excluded from any compensation under the agreement. Excluded Persons are those persons who, as defendants, are involved in one or more of the proceedings described in Recital D of the agreement and annex 8 to the petition and are to be released under the agreement. This also includes the Underwriting Banks, on the understanding that it is provided that the exclusion of compensation only applies to Fortis shares that they held for their own account and risk.

Eligible Shareholders who are entitled to compensation under the agreement are hereinafter jointly also referred to as the entitled parties and an individual shareholder belonging to this group as an entitled party.

4.3. The agreement provides compensation for every Fortis share an entitled party bought in one or more of the three periods referred to above (a ‘Buyer Share’). The number of Buyer Shares is defined as the number of shares held by an entitled party on the last day of a period less the number of shares held by that party on the first day of the period in question, in so far as the difference is positive. It follows from the definition, and this has also been confirmed by the petitioners, that those who acquired shares by exercising their pre-emptive rights at the time of the issue in September 2007 (see the first interim judgment, *inter alia*, in 6.4 and 8.9) are to that

extent regarded as entitled parties with Buyer Shares. The compensation per Buyer Share is EUR 0.47 (period 1), EUR 1.07 (period 2) and EUR 0.31 (period 3).

4.4. Entitled parties may also receive compensation per Fortis share for the Fortis shares held by them during the said three periods (the 'Holder Shares'). The number of Holder Shares is defined as the number of shares held by the entitled party on the first day of a period and, if that number is lower on the last day of that period, that lower number. The compensation per Holder Share is EUR 0.23 (period 1), EUR 0.51 (period 2) and EUR 0.15 (period 3).

4.5. The total compensation for all the Buyer Shares together amounts to a maximum of EUR 507,700,000 and for all the Holder Shares EUR 572,600,000. If the entitled parties together claim an amount in excess of the maximum amount for Buyer Shares and Holder Shares respectively, the compensation for each entitled party will be adjusted downwards proportionally within the category in question. If the total amount of the claims in respect of the one category of shares (Buyer Shares or Holder Shares) is lower than the applicable maximum amount, while the maximum amount for the other category of shares has been exceeded, the remainder will be used to increase the compensation for the other category of shares proportionally up to a maximum of 100% of the above-mentioned amounts per share.

4.6. In addition to the compensation that the entitled parties receive per Buyer Share or Holder Share described above in 4.3 through 4.5, all the entitled parties may claim a supplementary compensation (Compensation Add-On) for the highest number of Fortis shares they held at any time in the period between 28 February 2007 c.o.b. and 14 October 2008 c.o.b. The supplementary compensation amounts to EUR 0.50 per Fortis share held, with a maximum of EUR 950 per entitled party, regardless of whether the relevant shareholder is entitled to other compensation. The total maximum amount that the entitled parties may receive jointly in supplementary compensation has been limited to an amount of EUR 76,200,000. If the entitled parties jointly claim a higher total amount than this maximum, the compensation per shareholder is adjusted downwards proportionally. If in total less than this maximum is claimed, the surplus will benefit the compensation per share, in so far as this compensation has been adjusted downwards as a result of the applicable maximum (as described in 4.5).

4.7. In addition to the supplementary compensation referred to above, Active Claimants may also claim additional compensation (Cost Addition). This compensation amounts to 25% calculated on the amount of compensation per Buyer and Holder Share the shareholder in question is entitled to, without taking into account a possible upward or downward adjustment

of the compensation per share, as discussed above in 4.5. The additional compensation for all Active Claimants is jointly subjected to a maximum of EUR 152,000,000. If more than this maximum amount is claimed, the compensation is adjusted downwards proportionally.

4.8. The agreement is based on a total settlement amount of EUR 1,308,500,000 available to all entitled parties together. This settlement amount - which is EUR 104,800,000 higher than the amount that could be obtained under the agreement dated 14 March 2016 - consists of the maximum amount of EUR 1,156,500,000 composed of the maximum compensation for the two categories of shares and the maximum supplementary compensation (EUR 507,700,000 for Buyer Shares + EUR 572,600,000 for Holder Shares + EUR 76,200,000 Compensation Add-On), increased by the maximum additional compensation of EUR 152,000,000 for the Active Claimants.

4.9. The agreement includes an arrangement (Early Distributions) under which the entitled parties may already be paid an amount of 70% of their entitlement under the agreement before the opt-out period has expired. After the expiry of the period for submitting the entitlements, the final compensation for each entitled party is established with due observance of the maximum amounts included in the agreement. If such final compensation is higher than the amount of the early payment, the remainder of the compensation is paid out. If the final compensation is lower than the amount an entitled party has received as early payment, the difference is for the account of Ageas. In that case, the relevant entitled parties do not have to repay or remimburse the difference between both amounts to Ageas.

4.10. The agreement provides that Ageas has the right to terminate the agreement entirely at its sole discretion if the total opt-out amount exceeds 5% of the total settlement amount of EUR 1,308,500,000. Such termination does not affect payments already made by way of Early Distributions (see 4.9), provided that the entitled parties have signed the release form.

5. Assessment of the agreement

The changes to the compensation scheme carried through in the agreement

5.1. In the agreement concluded between the petitioners on 14 March 2016, a distinction was made between Active Claimants and Non-Active Claimants. In sum, Non-Active Claimants were those who are not or were not involved in any proceedings against Ageas or who did not before

31 December 2014 join an organisation that has initiated legal proceedings against Ageas. The way in which the distinction between these two groups of shareholders was elaborated in the compensation scheme was, in the opinion of the Court, objectionable and stood in the way of granting the request for a binding declaration. In addition, comments were made about the compensation made available to the interest organisations. These topics are partly interrelated. In summary, the Court, *inter alia* in the first interim judgment, considered the following circumstances.

5.1.1. In their petition, the petitioners explained that in the agreement the compensation per share is related to the loss as a result of (allegedly) incurred price drop and price inflation incurred. For shares that were allegedly obtained at an inflated price (Buyer Shares) as well as for shares that were held in such a period (Holder Shares) a certain allocation is being granted per share, with the compensation varying according to the specific period in which the shares are acquired or held. If compensation per share thus is related to (allegedly) incurred price loss or price drop incurred, according to the Court it is not relevant in connection with the amount of the compensation for this loss what the role has been of the two groups of shareholders in the realisation of the settlement (Active Claimants or Non-Active Claimants). As a result, while making available compensation per share, a distinction had been made between two groups of entitled parties that was not objectively justifiable.

5.1.2. The way in which the agreement dated 14 March 2016 set the maximum compensation for the Active Claimants and the Non-Active Claimants respectively (the system of the ‘boxes’), meant that the shareholders from the constituents of the interest organisations were certain that they would receive the compensation allocated to them, whereas for the Non-Active Claimants this was (highly) uncertain. The limitation of the sum of the compensation per group of shareholders to a certain maximum amount results in the individual compensation being proportionally adjusted downwards if the claim exceeds this maximum (hereinafter also: the dilution risk). It followed from the petitioners’ most favourable example calculation that at a 30% take-up rate of the Non-Active Claimants, they would not be compensated the full amounts per Fortis share such as stated in the agreement dated 14 March 2016, but only approximately 85.2% thereof. The size of the ‘box’ for the Active Claimants, on the other hand, was such that they did not run a dilution risk. In that regard, too, a distinction between two groups of entitled parties was not objectively justifiable.

5.1.3. One of the purposes of the distinction between Active Claimants and Non-Active Claimants was to prevent or impede a so-called freerider situation. This refers to the situation in

which disadvantaged parties await the outcome of collective proceedings and ultimately reap its benefits, without having to share the costs incurred by the interest organisations and their constituents in this context. The intention was to reward the Active Claimants by providing them with a higher compensation in comparison with the Non-Active Claimants. The Court has taken into account that both with regard to collective actions within the meaning of Article 3:305a DCC and the WCAM procedure it applies that these are to a large extent intended to prevent the disadvantaged parties of large-scale loss from instituting or having to institute separate legal proceedings. The aim of these schemes is to ensure that large-scale loss is settled collectively as far as possible. The case law of the Supreme Court also aims to facilitate the possibility for the disadvantaged parties to await the outcome of a collective settlement, because it is possible to prevent in a fairly unencumbering manner that they lose their rights. On this basis, the starting point is that the disadvantaged parties are or must be free to await collective proceedings. If they exercise that freedom, that should not have the effect that they are discriminated against, as was the case, *inter alia*, because the Non-Active Claimants would receive less compensation per share for the same loss suffered and because they would run a dilution risk. If the Active Claimants in connection with their active role have incurred more costs than the Non-Active Claimants, it may be justified, in the context of the agreement, to provide them with a separate compensation for that. These costs should then be substantiated, so that the level of the compensation for this loss can be taken into account in assessing the reasonableness of the compensation under the agreement. In the case under consideration the Active Claimants were held out the prospect of reimbursements of costs. These were higher than those for the Non-Active Claimants. The Court has established that the petitioners have not stated or explained at all - for example by means of concrete examples - that the Active Claimants have individually or on average incurred costs in connection with the conduct Fortis is accused of that exceed the supplementary and additional compensation provided to them. On this basis, there was already no reason to grant Active Claimants higher compensation per share or to treat Non-Active Claimants less favourably in other respects.

5.1.4. More generally, the Court has explicitly acknowledged that collective proceedings can be expensive and that it is of social importance that collective proceedings can be conducted, so that financing should be found for them. In this respect, if, in the context of the agreement, adequate compensation is provided to the interest organisations and their constituents in connection with the costs of the collective proceedings or risks run, in principle no relevant freerider problem arises.

5.1.5. The ‘boxes’ were composed in such a way that the shareholders from the constituents of

the interest organisations did not run any dilution risk. The interest organisations could also benefit from this, namely in so far as they have negotiated a percentage of the compensation of their constituents for themselves. The interest organisations did not run the risk that the compensation they would receive from their constituents would be reduced as a result of a proportional downward adjustment of the compensation for their constituents. To that extent the system of the boxes that was chosen also served the interest organisations' own interests.

5.1.6. In the statement made on behalf of VEB at the first oral hearing, a direct link was made between the coming about of the settlement and the compensation paid to VEB. It was argued, among other things, that, in view of its position, constituents and experience, it is virtually impossible to reach a settlement for investors in the Netherlands without VEB. VEB's view was that it should be adequately compensated for its cooperation.

5.1.7. The Court noted that the Non-Active Claimants were discussed in a negative sense (they were classified as undesirable freeriders), while it is in particular for this group of entitled parties that a binding declaration is requested.

5.1.8. The level of the compensation for the interest organisations in relation to the costs incurred and to be incurred by them raised questions with the Court. In addition, insufficient transparency had been provided about the total income of the interest organisations in relation to their costs, at any rate the arguments put forward by the interest organisations had not been substantiated with documents. In particular, it was unclear from which other sources the interest organisations would receive further compensation, i.e. in addition to the compensation held out to them by Ageas.

5.2. The foregoing has raised the question with the Court whether the interests of the Non-Active Claimants on whose behalf the binding declaration is requested, have been adequately represented in a material sense. The impression has been created that these interests are

subordinate to those of the constituents of the interest organisations and those of the interest organisations themselves.

5.3. The agreement currently under assessment allows all entitled parties to receive the same compensation per share in respect of any price drop and/or price inflation that may arise. Also with regard to the supplementary compensation, all entitled parties are treated equally. The system of 'boxes' has been abandoned, so that Active Claimants share in the aforementioned dilution risk in the same way as the other entitled parties with regard to the compensation per share and the supplementary compensation, meaning that the distributions will be reduced if the claims of shareholders together exceed an applicable maximum amount (in itself permissible) in the agreement. The petitioners have therefore met the objections of the Court in this respect. The system of the additional compensation for Active Claimants has also been changed. This no longer amounts to a fixed amount per share, with a maximum of EUR 550, but a 25% surcharge is applied on the compensation received for Buyer or Holder Shares (see 4.7).

The changes to the release clause carried through in the agreement

5.4. In the first interim judgment paragraphs 9.4 through 9.8 the scope of the release clause was also discussed. There also, [A] et al.'s defence against this clause was summarised. In the first interim judgment, the Court arrived at the view that the way in which the release was structured in the agreement dated 14 March 2016, might cause a lack of clarity and misunderstanding. The description of the events and the release clause in the agreement dated 14 March 2016 made it insufficiently clear to which the events the settlement pertained exactly and what - in line with this - the release was requested for. This circumstance precluded the request for the order to declare the agreement binding.

5.5. The petitioners included in the agreement (Recital C) a more specific description of the events to which the settlement relates. Reference is made to these events in the release clause, and release is also requested for the persons involved at Fortis, as mentioned in clause 5.1.1 of the agreement.

5.6. In sum, [A] et al. have brought forward the following objections against the release now included in the agreement:

- Calculations from Analysis Group and the way in which the compensation for the shares has been structured, show that the agreement relates to the allegedly misleading communication by Fortis and its provision of incomplete information to the market. The release clause is not in line with this, because it also pertains to other accusations that were and are still made at the address of Fortis, such as accusations relating to Fortis' policy in the three specific periods of the agreement.
- The release clause has been amended in the course of these proceedings. Because the settlement was made broader in terms of effect and the scope of the release clause was also made broader than in the originally submitted agreement, the changes carried through are not allowable.
- The third period to which the settlement relates ends on 3 October 2008, while release is also requested for events after this date, such as the intention to transfer parts of Fortis to BNP Paribas, as formulated in the weekend of 4 and 5 October 2008.
- The description of the events to which the agreement relates, is incorrect and misleading. The transfer of parts of Fortis to BNP Paribas is not the implementation of the break-up of Fortis, but the result of intensive negotiations following the rejection on 11 February 2009 by the general meeting of shareholders of the proposed transfer. The ultimate share transfer is the result of a new agreement that was approved on 26 April 2009 at an extraordinary general meeting of shareholders.
- If the compensation as stated in the agreement relates to the allegedly misleading communication by Fortis, the amounts offered are reasonable, but they are not if release is also requested for other events, such as the transfer of the Fortis shares to BNP Paribas, among others.

5.7. Following the defence on the part of [A] et al., the petitioners have explained that the events in the periods described above were central in the coming about of the settlement. In the petitioners' assessment, the reasonable expectation is that the other accusations made at the address of Fortis will not be successful in any way whatsoever. The compensation in the agreement granted per share, is therefore limited to compensation on account of a price drop or price inflation as explained above, and only for those who purchased or held Fortis shares in these three periods. Added to that, the supplementary compensation relates to an allocation for the entire period between 28 February 2007 c.o.b. and 14 October 2008 c.o.b. The petitioners have explicitly concluded a settlement agreement in respect of all accusations that the Fortis shareholders have made in this entire period. The settlement is consequently, according to the petitioners, indeed not limited to solely the events named in the three specific periods.

5.8. In the Court's view, it could be inferred from the petition and the agreement dated 14 March 2016 that the settlement not only related to the loss these former Fortis shareholders allege to have suffered as a result of the specifically mentioned events in the three periods mentioned. [A] et al. also inferred this from the petition and the agreement. That, after all, was the main reason they put up a defence. It is sufficiently clear from the petition for a binding declaration that it is Ageas' purpose to reach a settlement with all former shareholders for the entire period from September 2007 up to and including the nationalisation of Fortis by the Dutch and Belgian governments, including also the subsequent sale of parts of Fortis to BNP Paribas (see chapter 5.1 of the petition). Furthermore, it concerns not only the accusations at the address of Fortis on the point of the communication with the market, but also the accusations that relate to the policy conducted by Fortis. In the first interim judgment, the Court arrived at the conclusion that this intention had not been expressed sufficiently clearly in the agreement dated 14 March 2016. It had been expressed indirectly and consequently insufficiently knowable, namely by including the words "including but not limited to" in the definition of "Events". The petitioners included in Recital C of the agreement a more specific description of the events to which the settlement relates. The release clause is in line with this as it refers to these events. The petitioners have thus met the Court's objections.

5.9. The foregoing means that it cannot be argued that the scope of the settlement (and the release) were made broader in an impermissible way in the course of these proceedings. The purpose of the settlement has now been expressed more clearly. This also applies more specifically for the petitioners' intention to bring the sale of parts of Fortis to BNP Paribas (Recital C, under xi) within the scope of the settlement. In that regard the petitioners have explained sufficiently clearly that the dismantling of Fortis and the ultimate sale of its parts has been the explicit subject of the settlement negotiations between Ageas and the interest organisations, because Ageas, in the context of the settlement, requires release for these events. All this means that [A] et al.'s objections as represented above in 5.6 at the first four indents, need to be dismissed. The latter part of [A] et al.'s defence relates to the reasonableness of the level of the compensation and will be discussed below in 5.23 et seq.

5.10. Since the description of the events to which the agreement relates has now been adequately structured, the relevant requirement of Article 907(2), opening sentence and under a DCC, has been met. The other conditions of paragraph 2 had already been met, for which reason the agreement now fully meets the requirements of Article 7:907(2) DCC. Consequently, the ground for dismissal of Article 7:907(3), opening sentence and under a DCC is not involved.

The compensation relating to the interest organisations

5.11. In the first interim judgment, the compensation the interest organisations will receive if the agreement is declared binding was discussed. More specifically, the compensation that Ageas will then pay them was discussed. With regard to the position taken by the various interest organisations, the first interim judgment stated that VEB has declared that it will abide by the Claim Code in every respect. Deminor, FortisEffect and SICAF are considered by the Court as commercial claim organisations that do not meet the Claim Code in every respect. FortisEffect did amend its articles of association in the course of the proceedings to bring these in line with the Claim Code, but as evidenced by what was brought forward on FortisEffect's behalf at the most recent oral hearing of 27 March 2018, the transition set in train to result in an independent organisation, had not yet been completed. The supervisory board of FortisEffect for example is not yet complete and it is still unclear how its financial position is actually warranted.

5.12. In the first interim judgment, the starting point for the assessment was that if an interest organisation asks for compensation for costs incurred or for running a litigation risk, this is not yet reason to assume that the interests of disadvantaged parties have been or will be insufficiently represented. The mere fact that an interest organisation either fully or partly operates on a commercial basis also does not mean that it cannot be a petitioner in a WCAM procedure. Each financing model - with or without a profit motive - has advantages as well as disadvantages. It was considered in the first interim judgment that any decisions to be taken require that interest organisations are transparent about their income and expenditure. Only if adequate information is provided on these subjects, will the Court be sufficiently able to test whether the interests of the entitled parties have been sufficiently promoted and whether any conflicts of interests have been avoided as much as possible. The same goals are sought by the Claim Code, albeit that its main emphasis is on the governance structure of a claim organisation.

5.13. The disclosure of the state of affairs required by the Court was not yet provided when the amended agreement dated 12 December 2017 was filed. This was reason for the Court to determine in the interim decision of 5 February 2018 that the interest organisations must each individually allow access to and account for the costs and fees relating to the WCAM request. Also, each of them was asked to explain the revenue model as concretely as possible. Furthermore the Court considered that the case law and literature have not yet sufficiently clarified which compensation is reasonable in relation to the costs incurred by the interest organisations and the risks they run. In the context of the assertion of petitioners that the compensation to the interest organisations are customary and in line with the market, the Court requested, more generally,

information from the parties about the different revenue models used in the market by interest organisations and whether these are customary, the advantages and disadvantages of these, as well as the fees and profit surcharges that are customary in the market, substantiated as far as possible with documents and, if possible, publications. Third parties, too, were given the opportunity to provide information on this. The oral hearing of 16 March 2018 was used to discuss all aspects related to the compensation for the interest organisations.

5.14. The first interim judgment (paragraph 8.32) states that according to Ageas' petition to the interest organisations, fixed amounts are paid out if the requested binding declaration of the agreement is awarded. VEB will get EUR 25,000,000, Deminor EUR 10,500,000, Fortis EUR 7,000,000 and SICAF EUR 2,500,000. It turned out at the hearing of 16 March 2018 that these amounts had not been changed.

5.15. It follows from the statement of fees and costs provided by the interest organisations made after the first interim judgment that VEB will not receive any other compensation besides the aforementioned amount it will receive from Ageas. Of the result the institutional investors that have registered with it receive, Deminor will receive a success fee of 21%. For the moment it estimates that it will receive an amount of EUR 35,000,000. FortisEffect is expected to receive a result-dependent compensation of approximately EUR 3,500,000. During the oral hearing of 16 March 2018, it was announced on behalf of SICAF that the result-dependent compensation is estimated to be EUR 40,000,000 - EUR 45,000,000.
The costs incurred by VEB and which it is still expected to incur amount to approximately EUR 7,000,000; Deminor has calculated its total external costs at approximately EUR 12,900,000, FortisEffect starts from well over EUR 5,700,000 in total costs and SICAF from approximately EUR 4,000,000.

5.16. Following the interim judgment of 16 June 2017 Consumentenclaim and Stichting Fortisclaim, represented by *mr*. Maliepaard, aforementioned, have reached a settlement with Ageas. The following was stated in this context at the hearing of 6 March 2018. First, the compensation for the Fortis shareholders was negotiated and subsequently, separately, the compensation for these two claim organisations. A large proportion of their constituents are entitled parties who are not regarded as Active Claimants under the settlement system. The revenue model of Consumentenclaim and Stichting Fortisclaim consists of a 20% success fee over the compensation received by their constituents. In the context of the settlement with Ageas, Consumentenclaim and Stichting Fortisclaim have each waived these respective constituents' contributions and instead a payment is made to these claim organisations by Ageas for costs

incurred. Consumentenclaim was no longer able to break down their costs for the Fortis dossier, because several dossiers were being worked on simultaneously during the relevant period. An arrangement has been made whereby 25% of the difference is paid between the payment to the constituents under the old agreement and that which will be obtained under the more favourable terms of the new agreement. This concerns an amount of EUR 3,600,000. That is much less than 20% compensation over the compensation for the constituents, according to *mr*. Maliepaard.

5.17. The petitioners have argued, among other things, that the compensation that Ageas will pay to the interest organisations does not form part of the agreement and should not be approved by the Court nor can be reviewed by the Court on the basis of the law. This because the request for a binding declaration does not relate to the amounts Ageas will pay to the interest organisations. To this was added that the law or case law does not provide a criterion against which the compensation of interest organisations can be assessed. It was also brought forward that, if the Court could already include the compensation for the interest organisations in the assessment, this should be limited to a marginal test. In addition, it was pointed out that during the settlement negotiations the compensation for the shareholders was determined first and then a separate discussion was held on the compensation for the interest organisations. The compensation relating to the interest organisations thus came about outside the scope of the settlement and did not affect the budget for the shareholders.

5.18. The following is considered in response to these assertions. It is a given that conducting collective proceedings and bringing about a collective settlement costs money. The interest organisations obviously do not do this work for free, nor are they obliged to do so, and - as noted before - it is important that their activities can be financed. Ageas can only spend its money once. The amounts paid to the interest organisations do not accrue to the entitled parties, and vice versa. In this context Ageas, further to questions from the Court, stated that it makes no difference for its tax and accounting purposes whether or not the compensation to the interest organisations forms part of the total settlement amount that will be paid out under the agreement. Against this background, the Court has no doubt that the compensation that the interest organisations will receive played a role in the coming about of the settlement, even if this was only negotiated after agreement had been reached on the compensation scheme for the entitled parties. If this compensation had not been provided for in one way or another, the settlement would not have come about, at any rate not in its present form, and no request would have been made for the agreement to be declared binding. This concerns not only the amounts that the interest organisations will receive directly from Ageas as their counterparty, but also the compensation otherwise received and to be received, such as a deposit from the constituents or other investors

and/or success fees, in particular in the form of the percentage obtained over the compensation to be received by the constituents. Since this compensation played a role in the coming about of the agreement, the reasonableness of which the Court must assess and in respect of which the interests of the entitled parties are central, it must be included in the assessment. This is also implied in a number of grounds for rejection of Article 7:907(3) DCC, which will be discussed below. It is noted in that regard that the information submitted by the petitioners shows that the compensation for claim organisations is also assessed by the courts in other jurisdictions, albeit that the legal framework may be different elsewhere. Therefore the Court maintains its opinion that the petitioners are obliged to disclose the revenues and costs. It is emphasised once again that in assessing a WCAM request the interests of the entitled parties are central, in particular the interests of those who were not involved in the negotiations or were not represented. After all, they are bound to a negotiating result on which they have not had any influence. Therefore, in considering the question whether the requested binding declaration can be awarded, the Court monitors their interests in particular. In the present case, the majority of that group is made up of entitled parties who do not qualify as Active Claimants.

5.19. With regard to the way in which the compensation for the interest organisations is assessed, a number of related elements in the statutory scheme already referred to in the first interim judgment (paragraph 8.1) is linked up with. This concerns several grounds for rejection of a WCAM request as referred to in paragraph 3 of Article 7:907 DCC. The request is to be rejected among other things if the foundations or associations referred to in paragraph 1 of this provision are not sufficiently representative with regard to the interests of those on whose behalf the agreement was concluded (Article 7:907(3), opening sentence and under f DCC). It was considered in this context (first interim judgment paragraph 8.13) that with regard to the petitioners this requirement has been met, in the way this provision is formally understood by this Court in WCAM procedures. However, it was also considered (first interim judgment paragraph 8.14) that the assessment of a request for a binding declaration also concerns the question whether the interest organisations have represented the interests of all Fortis shareholders in a material sense, and in particular the interests of those who do not belong to their constituents and who are not considered Active Claimants. Furthermore, the Court must reject the request if the level of the compensation awarded is not reasonable (Article 7:907(3), opening sentence and under b DCC). It is also determined that the request must be rejected if the interests of those on whose behalf the agreement was concluded are insufficiently safeguarded in other ways (Article 7:907(3), opening sentence and under e DCC). On this basis, the Court, when assessing the compensation for the interest organisations, asks itself, among other things, whether and to what extent this leads to a conflict of interests, for example whether the compensation to

the interest organisations is too much to the detriment of the budget for the entitled parties. It is also important whether and to what extent this compensation gives rise to an undesirable incentive for the interest organisations. In addition, taking all circumstances into account, no usurious profits should be made. There must be a sufficient connection between the level of the compensation on the one hand and the costs incurred and/or the risk run on the other. In its assessment, the Court observes some restraint, because the petitioners have to a certain extent the freedom to make their own considerations and choices when reaching a settlement.

5.20. The foregoing means that the Court does not follow the petitioners' argument that the specific compensation that Ageas will pay to the interest organisations has been excluded from the assessment in these proceedings because these allegedly do not form part of the agreement and have allegedly been negotiated separately. Because this payment obligation came about within the context of the agreement and is thus inextricably linked to it, this agreement must be included in the assessment. Moreover, following the petitioners' disclosure, it turned out that the specific compensation to be paid by Ageas is not unrelated to the content of the agreement the binding declaration of which is requested and that these in turn are related to other financing agreements made. It follows from the petitioners' submissions that, in determining Ageas's compensation for the various interest organisations, the amounts they will receive on other grounds played an important role. For example, VEB does not require a contribution from its constituents (it only receives a fixed membership fee from its members for their membership) and will therefore receive a much higher amount from Ageas than the other interest organisations. For the other interest organisations, the agreement takes account of the compensation scheme they have agreed with their constituents and/or financiers. With a view to this the 25% additional compensation for the Active Claimants has been included in the agreement. The agreement also is in the interests of Deminor, SICAF and FortisEffect in that the additional compensation facilitates the payment of a percentage on the compensation for their constituents.

5.21. The conclusion based on the foregoing is that all the compensation that the interest organisations will receive from Ageas and constituents, has been reflected in the agreement. The assessment of this compensation will be involved in the assessment that will be made in the context of the WCAM request.

The reasonableness of the compensation to which the agreement relates

5.22. The test of reasonableness required of the Court makes it necessary for the Court to form an opinion on the basis of the liability and the nature and extent of the loss that the shareholders

of Fortis state to have suffered. In answering the question whether the compensation is reasonable, besides the extent of the loss also the simplicity and speed with which the compensation can be obtained, are relevant. Without a binding agreement further litigation will need to take place or a new action brought, with all the costs and litigation risks involved. That the interest organisations, and by now [H] et al. as defendants too, consider the agreement to be reasonable and acceptable, is not decisive. Contrary to ordinary settlement agreements, in which it is entirely up to the parties to determine what they are satisfied with (where applicable on behalf of their constituents), the Court must, within the context of the binding declaration, form its own opinion on the reasonableness of (the amount of) the compensation awarded. This is justified in particular by the fact that, unlike in the case of an ordinary settlement agreement, the binding declaration will in principle also bind those entitled parties who were not involved in the negotiations and who therefore had no influence on them. It can be noted in this context that it is in the interests of all parties involved and also in accordance with the statutory scheme that the number of shareholders who opt for an opt-out statement, is as small as possible. This aspect is also relevant in the Court's opinion on the reasonableness of the compensation granted.

1. The compensation relating to the shares: compensation for three periods and the additional compensation

5.23. The compensation per share purchased or held in the three periods mentioned in the agreement will be assessed in conjunction with the supplementary compensation. The supplementary compensation relates to the highest number of shares that a shareholder has held in the period between 28 February 2007 c.o.b. and 14 October 2008 c.o.b. In their petition, the petitioners stated and explained in more detail during the oral hearings that the events on which the settlement is based cover this entire period, including three periods mentioned in particular. To that extent, therefore, the additional compensation relates to the compensation for the specific periods.

5.24. In the first interim judgment (paragraphs 8.2 through 8.10) the basis for the alleged liability under civil law of Ageas as legal successor to Fortis, vis-à-vis its (former) shareholders was discussed. As for the allegedly suffered price loss reference is made to the inquiry proceedings conducted up to the Supreme Court (ECLI:NL:HR:2013:1586) in which it was irrevocably decided that Fortis - in sum - had not, or not timely, provided certain price sensitive information on its financial position and the measures to be taken in that context but had disclosed certain information favourable to it, by which it had raised an incorrect impression of its financial position, misleading the investing public. On that basis in particular, the Court - with due

observance of the necessary caution appropriate in the context of the present petition proceedings - considered, for the time being, to assume that Ageas will be found liable vis-à-vis investors in civil-law proceedings in the Netherlands, as this Court had also done by judgment of 29 July 2014 (ECLI:NL:GHAMS:2014:3005) in line with the decision of the Enterprise Chamber of 5 April 2012 (ECLI:NL:GHAMS:2012:BW0991) with regard to the period from 28 September through 1 October 2008.

5.25. Presumptively assuming that an unlawful act will be assumed on the part of Ageas in court, it has been considered that any civil-law follow-up proceedings would relate in particular to whether or not the price loss suffered by shareholders could be attributed to the aforementioned misrepresentation by Fortis, and to what extent. The mere fact that a price loss has occurred does not constitute an obligation for Ageas to pay compensation to the investing public. For example, as part of its defence, Ageas took the view that the global crisis had caused the share prices of all banks worldwide to fall sharply in 2007 and 2008. On the basis of indices of the largest European and American banks and the share prices of ING and Barclays, Ageas has argued in its petition that the Fortis share price has to a large extent developed similarly to the share price of other worldwide operating banks, which all suffered considerable general price drops. In the first interim judgment, the Court considered that in possible follow-up proceedings in individual cases, it will be decisive whether a concrete price drop is related to unlawful conduct by Fortis in such a way that also in view of the nature of the liability and of the loss, it can consequently be attributed to Fortis. Based on the parties' submissions in this respect, this involves the assertions that at certain points in time in 2007 and 2008, the price of the Fortis shares was too high. If Fortis had disclosed relevant information in time, or had not disclosed incorrect or incomplete information, the price of the Fortis shares would at certain points in time have fallen earlier than actually happened.

5.26. If it is assumed that the aforementioned assertion is correct and therefore that price inflation has occurred at certain points in time as a result of Fortis' actions, it is possible that shareholders with Buyer Shares may have suffered loss eligible for compensation. This is the case if they had purchased shares at a time when price inflation was occurring (the price was artificially too high) and the price was subsequently adjusted downwards by the market after less positive or negative information about Fortis' financial situation became known. In that case, the investors concerned - in retrospect - paid too high a price for the shares.

5.27. The first interim judgment it was considered that it was highly uncertain whether the shareholders who had held their shares only during a period of price inflation (Holder Shares)

could legally obtain compensation. If the accusation against Fortis means that the price of the shares at certain times was too high, but after the ultimate correction of the price by the market the price did not drop further than it would have done had Fortis not acted unlawfully, the shareholder who held the shares during this entire period will in principle not suffer any loss. There has been a price loss for this investor, but that loss would also have occurred in the hypothetical situation where Fortis had not misled the investing public; however, that price loss would have occurred at an earlier point in time. In principle, a shareholder who buys and sells shares during the period in which the price has been too high to the same extent, does not suffer any loss either. In that case the shareholder may have purchased the shares at too high a price, but these have also been sold at a correspondingly high price, so that no price loss has consequently been suffered by the investor.

5.28. On behalf of Deminor, the tenet of lost opportunity was raised at the oral hearing of 27 March 2018 in connection with the position of investors with Holder Shares. According to Deminor, the unlawful conduct of Fortis during the relevant periods has deprived investors with Holder Shares of the opportunity to sell their shares at a different price and/or at a different time. Deminor has in particularly in mind the situation in which investors have held shares on the basis of inaccurate, unclear or misleading information. They were deprived of the possibility to take a different investment decision, for example, in the hypothetical situation without error, by selling the shares earlier.

5.29. For the application of the tenet of lost opportunity in a case like the one at hand, it will first need to be assessed whether a *condicio-sine-qua-non* relationship is involved between the alleged unlawful conduct by Fortis and the loss of an opportunity of a better investment result. To this end, an investor with Holder Shares will have to make it sufficiently plausible that, in the hypothetical situation without errors, a different investment decision would have been taken, for which reason he has been deprived of a chance of achieving a better investment result. In addition, once the *condicio-sine-qua-non* link between the violation of the norm and the loss of the chance of a better investment result has been established, there is only room for determining the loss on the basis of an estimate of the good and bad chances that the disadvantaged party would have had if he had not been deprived of this chance, if it concerns a realistic (i.e. not very small) chance of a better result (Supreme Court 21 December 2012, ECLI:NL:HR:2012:BX7491).

5.30. Against this background, all things considered, the Court considers the compensation granted to the shareholders with regard to the compensation for the Buyer Shares, Holder Shares

and the supplementary compensation to be reasonable. In considering this, the following circumstances have been taken into account.

5.31. There is still little or no guiding case law on how to assess the loss suffered by individual shareholders of a company that has misled the investing public. The reasoned estimate commissioned by the petitioners of the price drop that could be attributed to Fortis' conduct is based on certain models. Whether this calculation method and the assumptions used will be legally accepted for the purpose of determining the compensation for shareholders, is not yet clear. For investors - certainly those with a limited number of shares - the costs involved in legal proceedings to determine their individual loss, will often not outweigh the expected compensation. In collective proceedings, such costs may be spread and shared, but collective proceedings are not, in principle, suitable for determining the concrete loss of individual investors. In view of this, it is much more attractive for Fortis shareholders to obtain compensation under a settlement than to have to litigate about it. Also in view of the supporting figures given for the price drop in the various periods to which the settlement relates, the agreement broadly follows an adequate approach. Added to that, in addition to the compensation for the three periods mentioned in the agreement, supplementary compensation is offered for the relatively long period between 28 February 2007 c.o.b. and 14 October 2008 c.o.b. This compensation is a general allowance for the entitled parties and is also related to the release Ageas requires for events other than those mentioned in the context of the three specific periods in the agreement. Investors are provided with an allocation in a relatively simple, quick and inexpensive way to compensate for any disadvantage they possibly may have suffered as a result of Fortis' negligent conduct.

5.32. If it is assumed that Fortis may be accused of unlawful actions consisting of misleading the investing public resulting in price inflation, the shareholders with Buyer Shares - as previously considered - are for the time being likely to have suffered some loss eligible for compensation and it is therefore appropriate that a compensation per share is made available to them in the context of the settlement. In respect of the price drop investors allege to have suffered as a result of the policy decisions made by Fortis, this is different. In principle, it is not possible for an investor to hold the company of which he holds shares liable for an unlawful act for any loss of price suffered as a result of the policy decisions made by that company, at any rate to the extent that there is no guiding case law available which assumes such a form of liability. As a rule, an investor will choose to invest in companies which he expects to create this financial added value, in order to share in this profit and value development as a shareholder. The downside is, of course, that a shareholder also shares in a negative value creation, also if it is the result of

the policy decisions made by the company in question. The possibility that a company suffers a loss of value as a result of the policy pursued, causing a price drop, is pre-eminently a risk that an investor in shares runs as (the most) subordinated creditor of a company. In principle, shareholders cannot recover such a loss from the company. This is at odds with the order in which creditors rank among themselves in relation to the company. Shareholders are otherwise protected because they have legal means at their disposal to influence the policy of the company or to submit this policy to the court for possible review. Furthermore, for the officers who determine the policy of the company there is a high threshold for their personal liability vis-à-vis third parties, including the shareholders. On this basis, the Court considers it justifiable that the petitioners, in structuring the compensation scheme, placed particular emphasis on the three periods during which misleading communication to the market was involved.

5.33. For investors with Holder Shares, the starting point is also that any price drop suffered as a result of policy decisions is, in principle, an investor risk. With regard to the price loss that investors claim to have suffered with Holder Shares as a result of misleading communication by Fortis, the Court is of the opinion that for the time being it is highly uncertain whether they will ultimately be able to obtain compensation in connection therewith (see 5.27). The route of lost opportunity mentioned by Deminor can only be followed by those who can make it plausible that, if the errors had not been made, they would have taken other investment decisions (see 5.29). This will be difficult, especially for loyal Fortis investors who have held Fortis shares for a very long time while the portfolio remained unchanged, especially if it is taken into account that in individual cases only a realistic chance of a different investment result may be taken into account. In any event, these investors will have to make an effort, and thus incur costs, to make a plausible case that there exists a causal link between the alleged loss (irrespective of how it was estimated) as a result of the missed opportunity and the unlawful conduct of Fortis. Given this uncertainty, the compensation offered by Ageas to investors with Holder Shares can safely be described as generous. The Court has therefore asked whether the compensation for the Holder Shares is not too high in comparison with the compensation for the shareholders with Buyer Shares, also in view of the fact that the number of Holder Shares is estimated to be much higher than the number of Buyer Shares, as a result of which the payments for the Holder Shares may have been at the expense of the budget available for the shareholders with Buyer Shares. All things considered, especially in view of the explanation given by Ageas, the Court considers the compensation for the Holder Shares to be justifiable compared to the compensation for the Buyer Shares. First of all, the compensation per Holder Share is approximately 50% lower than that per Buyer Share, which means that the higher litigation risk has more or less been factored in in this. Furthermore, Ageas has extensively stressed that it offers a broad compensation because it is very

keen to be able to close the Fortis file, which has been dragging on for too many years, with a settlement. The compensation for Holder Shares also provides that (a) Fortis' loyal shareholders can look forward to compensation and (b) the attractiveness of the agreement for the entitled parties with Buyer Shares is further enhanced, because in addition to compensation for those shares they also receive compensation for their Holder Shares, if and to the extent that they have them, while outside the context of the settlement, as mentioned above, there is considerable uncertainty as to whether a right to compensation exists for those shares.

5.34. In the foregoing, the Court has assumed that the compensation as mentioned in the agreement not only relates to the alleged misleading communication by Fortis and to the policy pursued by Fortis, but also, more specifically, to the dismantling of Fortis and the transfer of the Fortis shares to, among others, BNP Paribas, which also affects the investors with Holder Shares. It has been acknowledged that at this stage it is not at all clear that the proceedings that are being conducted - particularly in Belgium - with regard to the dismantling of Fortis offer a realistic prospect of compensation for the shareholders of Fortis. In its opinion that even if these events are taken into account the compensation is reasonable, the Court has further taken into consideration that not only compensation is given for the events in the three to be distinguished periods, the first period starting on 21 September 2007 o.o.b. and the third period ending on 3 October 2008 c.o.b., but also that the supplementary compensation is provided as an allowance for events in the - longer - period between 28 February 2007 c.o.b. and 14 October 14 2008 c.o.b. The connection between all events, including the accusations related to the policy pursued by Fortis and the dismantling and sale of parts of Fortis for which Ageas requests release and to which the compensation offered in its entirety relates, has been made sufficiently plausible and has been explained by the petitioners. The objections related to the clarity with regard to the scope of the release clause have been met. Also, the aforementioned circumstance that the agreement provides for substantial compensation for Holder Shares, has also been taken into account. Against this background, the compensation provided for in the Agreement in respect of the shares as a whole, is not unreasonable. Based on the foregoing, [A] et al.'s defence as stated in 5.6, last indent, fails. It cannot be argued that the compensation offered is only reasonable if it is based on misleading communication by Fortis. Even if the accusations in connection with the policy pursued and the eventual dismantling of Fortis are taken into account, the compensation is not unreasonable.

The Court notes in this respect that at the hearing of 27 March 2018 the representative of the VFB, who represents constituents consisting (almost) entirely of Non-Active Claimants, has explicitly expressed the VFB's support for the agreement.

2. *The compensation for the interest organisations*

5.35. The interest organisations have stated the following in respect of their revenue models.

5.36. FortisEffect was established specifically for the Fortis case. It cooperates with JUST Legal Finance (hereinafter: 'JUST') as an external litigation funder. JUST is involved in various collective proceedings. JUST finances the costs of FortisEffect and provides operational services related to case management, back-office activities, administration, helpdesk, communication and file management. JUST bears the risk that the Fortis case will not be successful and that the costs incurred cannot be recovered. The claimants who have registered with FortisEffect paid an annual contribution of EUR 39 until 2014 and EUR 24.50 since then. The constituents have also undertaken to pay a result-dependent fee of 22.5%, but this contribution has been reduced to 10% due to the amount to be received from Ageas. With regard to the compensation it obtains, FortisEffect has a withholding obligation vis-à-vis its litigation funder.

5.37. SICAF considers itself as a special purpose claim foundation, set up specifically in connection with the Fortis case. It operates in a manner similar to that of FortisEffect. Two undisclosed U.S. litigation funders pay the costs of SICAF. These litigation funders have concluded a funding agreement with the institutional investors who are the constituents of SICAF. The constituents pay 25% of the proceeds to the litigation funders. SICAF itself is a foundation without a profit motive. The costs of the collective proceedings and the internal costs of the foundation are compensated, but it does not receive any profit or other gain.

5.38. Deminor is a commercial claim organisation that has been involved in various collective actions for 25 years. It strives to ensure the continuation of its business. It pays for the entire collective action it has been conducting since 2008, in cooperation with an external litigation funder. Deminor owes (financing) costs to this litigation funder. It has its own organisation, office space and employs 9 to 10 staff on average. Deminor has asked for a contribution from the private shareholders of Fortis who have registered with Deminor which is calculated on the basis of the number of shares they have. The amount of this contribution varied from EUR 50 to EUR 1,000 depending on the shareholding. These shareholders have also undertaken to pay a success fee consisting of a 10% fee on the ultimately received compensation. Because of the compensation that Deminor will receive from Ageas, this fee was waived vis-à-vis the non-professional investors (record of the oral hearing of 24 March 2017, p. 4 and submission after interim judgment paragraph 6.5). For the institutional investors who have registered with Deminor, this is different. They remain due a success fee to Deminor of 21% on average.

5.39. Like Deminor, VEB is conducting various collective actions. VEB has no external litigation funders. It finances the collective actions out of its own funds. The membership fee of the VEB amounts to EUR 60 or EUR 75 for natural persons. The total income per year with regard to membership fees amounts to approximately EUR 3,000,000, while its operational costs amount to approximately EUR 5,000,000 per year. Because the membership fees do not cover costs, VEB, in the context of the settlements it reaches with its counterparties, agrees fees that exceed the actual accounting cost level. The promotion of interests is carried out by VEB itself, in principle with its own attorneys, but also with the assistance of external attorneys.

5.40. It follows from the amounts stated by the interest organisations that the compensation they will receive is several times higher than the costs they state to have incurred in the Fortis case (for the specific amounts, see 5.14 and 5.15).

5.41. In light of the assessment framework mentioned above in 5.19, the following is considered with regard to the compensation for the interest organisations. The public interest that collective proceedings can be conducted is once again considered. Adequate compensation needs to be found for this. FortisEffect and SICAF were established especially for the Fortis case. They have obtained litigation funding from third parties who have taken over the full risk that no compensation will be obtained. The compensation to be obtained is therefore in fact in the interest of these litigation funders, who demand a commercial reward for the considerable risk they run on their financing.
Deminor strives to ensure the continuation of its business. It has spread its risks by asking a contribution from its constituents, stipulating a success fee and working together with an external litigation funder who shares in the risks and profit. Additionally, Deminor is engaged in ‘cross-financing’. The compensation obtained in a certain case, also serves to finance other, less successful actions.
VEB also strives to ensure the continuation of its activities. It does not work with an external financier, but in effect its position is not very different from that of Deminor. Its membership fees are heavily loss-making, so that its continued existence depends on successful collective proceedings to obtain compensation. VEB does not have a profit motive, but it does use cross-financing, which means that the fees it charges must, on average, cover its costs in the long term.

5.42. Prior to the conclusion of the settlement, the interest organisations were involved in various proceedings against Fortis/Ageas, with varying success. Whether and to what extent Fortis/Ageas could be held liable by investors was still entirely open, at any rate in the early years. It was also clear that if liability on Fortis’ part were to be established, the determination of

the compensation for the individual shareholders would not be an easy task. The litigation risks were considerable. In the end, a settlement was reached in which the remaining litigation risks between Ageas and the entitled parties were sufficiently factored in. Although it was considered above (see 5.18) that the compensation for the interest organisations played a role in the coming about of the agreement, the Court has no indication that, if the interest organisations had been satisfied with less, Ageas would have been prepared to provide the entitled parties with higher compensation. Nor has there been any other evidence to suggest that the compensation paid to the interest organisations has actually been at the expense of the compensation paid to the entitled parties. The fact that the compensation is high in relation to the costs is largely explained by the fact that cross-financing is involved. In parts, the agreement provides a generous compensation to the entitled parties in respect of the Fortis shares purchased and held. In view of the major procedural risks that the interest organisations and their litigation funders have taken on for a long time in the present case and considering that the financing costs for such a risky investment are high, the Court does not consider the large compensation that the interest organisations will obtain, taking all circumstances into account, unreasonable. This judgment can now be given because of the disclosure now provided with regard to the costs, fees and revenue models of the interest organisations and the way in which the settlement was reached.

5.43. It should be noted that the Court, in light of the circumstances referred to above, sees insufficient reason in this specific case to require further information about the external litigation funders. This could be different in other WCAM procedures. For these proceedings, the following is relevant. It has already been recalled that FortisEffect and SICAF themselves do not run any litigation risks and the compensation to be obtained is in effect in the interests of their litigation funders who require a reward for the risk they have run on the financing they provided. As for Deminor, the Court assumes that it has partly shifted the risk to its litigation funder, but this is unclear, because it was unwilling to provide disclosure on the precise financial relationship between itself and its litigation funder. More generally, the test the Court is required to apply entails that there are limits to the possibility of acting in a WCAM procedure with special purpose claim foundations or external financiers or otherwise keeping out of sight those who ultimately have a financial interest in the outcome of the case. In view of the interests of the entitled parties it may be appropriate that, with regard to the identity of the litigation funders and the (financial) agreements made, disclosure is provided in order for the Court to form an opinion on the solvency, reputation and revenue models of those financiers, in particular with a view to possible conflicts of interest.

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3. The additional compensation

5.44. The agreement provides that the Active Claimants may also claim additional compensation (Cost Addition). This compensation amounts to 25% calculated on the amount of compensation per Fortis share to which the shareholder in question is entitled. In the submission after interim judgment of 12 December 2017, by which the amended agreement dated 12 December 2017 was submitted, it is brought forward that this additional compensation only serves to compensate the costs and efforts of the Active Claimants. This compensation, according to the petitioners, is justified on objective grounds.

5.45. The additional compensation will be made available to the Active Claimants to reimburse the costs incurred and the time and effort invested in supporting the (collective) actions and the associated costs (submission after interim judgment of 12 December 2017, paragraph 10):

“The Cost Addition is a one-off payment that partly came about in view of the obligation that applies to a substantial number of Active Claimants to pay a fee to the interest groups which they have joined that is equal to 20 percent or more of the compensation received by them. This will not apply to all Active Claimants, but for a settlement of this nature and size it is impracticable to determine the exact position, rights and obligations of each individual entitled party.”

More specifically, it has been argued (submission after interim judgment of 12 December 2017, paragraph 33):

“In determining the Cost Addition, the starting point was that a significant number of Active Claimants had joined a collective interest organisation and, if a settlement is reached, have to pay part of the compensation to be received to that organisation as a fee. In addition, a fee of 20 percent falls well within the range used in the market. In light of the above, it is not justified that Active Claimants should end up in a less favourable position than non-active claimants. When individuals themselves have conducted proceedings, no fee is of course due to the organisation, also the costs that have then been incurred can easily be in the order of magnitude mentioned above. Since the scale and nature of the present settlement makes it impossible to assess the exact amount of costs incurred on a case-by-case basis, it is necessary to follow a more general rule. Now that the 20 percent referred to has also been acknowledged and recognised in the WCAM case law, the Cost Addition has been adjusted to that percentage. In order to compensate this 20

percent, the Cost Addition must be 25 percent."

An example calculation was then used to explain that, assuming a deduction percentage of 20%, the amount to be received must be increased by 25%.

5.46. With regard to Active Claimants who have not registered with an interest organisation and who have themselves initiated proceedings against Fortis/Ageas, the Court considers that the method of determining the additional compensation advocated by the petitioners is well-founded. It is indeed not possible in individual cases to determine what constitutes a reasonable reimbursement of costs for each individual entitled party. A percentage of the compensation to be received is then a workable solution. The percentage chosen by the petitioners is not unreasonable, given the generally known costs of litigation (court fees, lawyers, experts and advisers).

5.47. It was discussed above (see 5.37), that SICAF requires its constituents to pay a result-dependent fee of 25%. The additional fee makes a deduction percentage of 20% possible, which is not sufficient to be able to pay the success fee owed of 25%. In the opinion of the Court, a reimbursement of costs for the constituents of SICAF is justified on objective grounds.

5.48. FortisEffect has reduced the annual contribution members have to pay. In addition, the success fee was reduced from 22.5% to 10% (see 5.36). It is thus certain that the FortisEffect constituents have incurred costs (the annual contribution) and will have to incur costs as yet (the success fee). FortisEffect has not made it clear that, apart from these contributions to be paid, the shareholders who have registered with FortisEffect have incurred or will have to incur other costs. Because of the reduction in these contributions, the additional compensation in individual cases may be higher than the costs incurred and to be incurred. Even taking this as starting point, the Court considers the additional compensation to be sufficiently defensible. In doing so, it takes into account that the constituents in effect benefit not so much from too high an additional compensation, but from FortisEffect's now proven willingness to allow its constituents to share in the compensation that it will itself receive from Ageas. There is no reason to allow Ageas to benefit from this and/or to use this non-compulsory gesture to consider the additional compensation unreasonable.

5.49. Professional investors owe Deminor an average success fee of 21% (see 5.38). The additional compensation for these investors is justified on objective grounds, in the same way as this applies to SICAF's constituents.

Deminor will repay the deposit to the non-professional investors and waive the agreed result-dependent fee. As a result, they are now no longer liable for any costs at all to Deminor. Deminor has, however, argued that a large number of non-professional investors from among its constituents are involved in the proceedings conducted against Fortis/Ageas in Belgium. In Belgium, it was required at that time that the claimants be named in the procedural documents and they had to substantiate the claim, submit documentation and a bank certificate (for a minimum amount of EUR 50). These shareholders have had to make efforts in connection with the collective actions, and that has cost time, effort and money.
In a similar way to the FortisEffect constituents, the Court considers that the additional compensation can be justified for non-professional investors from Deminor's constituents. When these investors joined Deminor, this was not without obligation or free of charge. They had to pay a deposit (from EUR 50 to EUR 1,000) and undertake to pay a result-dependent fee of 10%. They were partly involved in proceedings and had to invest time and incur costs in this context. It is thanks to Deminor's willingness to allow its constituents to share in Ageas's compensation that they do not have to pay the deposit and the success fee. As a result, the reimbursement of costs has not become undue or superfluous. Ageas as counterparty should not benefit from this choice made by Deminor and there is no reason to use this non-compulsory choice to consider the additional compensation unreasonable.

5.50. In a similar way to Deminor, Consumentenclaim and Stichting Fortisclaim have achieved a result whereby the private investors who have registered with them do not owe any costs in connection with the collective settlement. The result-dependent fee of 20% was waived with regard to these investors and these claim organisations receive compensation from Ageas instead. On behalf of Consumentenclaim and Stichting Fortisclaim it has been stated that this choice is not in their favour. The result-dependent compensation would have been higher. This choice was made in order to prevent their constituents from finding themselves in a worse position than the other entitled parties who do not receive any additional compensation. This is because the investors from the constituents of these claim organisations are not regarded as Active Claimants. Therefore they do not receive any additional compensation, but would have to pay a result-dependent fee. The agreement reached with Ageas means that the constituents of Consumentenclaim and Stichting Fortisclaim will be treated in the same way as the entitled parties who have not joined a claim organisation.

5.51. VEB does not require any financial contribution from its members, except for the membership fee due (see 5.39). VEB takes the position that the membership fee paid by its members is in effect a 'premium' for the representation of interests that VEB takes on for its

members as a kind of 'insurance'. According to VEB, the membership fee paid by the members over the years justifies the additional compensation of 25% on top of the compensation for the shares.

5.52. The Court does not follow the VEB in this respect. To this end, the following is considered.

5.52.1. According to the document submitted by VEB after the second interim judgment, VEB maintains a website and produces a monthly magazine for its members. It is involved in consultations, legislative processes and incurs costs for lobbying activities, public affairs, investor services, economic research, its legal experts, support staff and management. The Fortis case is not the only case in which VEB is involved. The membership fee of EUR 60 or EUR 75 per year paid by members to VEB cannot reasonably be regarded as costs incurred in connection with the Fortis case. A sufficient link between the two cannot be established. The membership fees have been paid for membership of VEB and the activities of VEB as a whole and cannot reasonably be attributed (entirely or in part) to this settlement.

5.52.2. Furthermore, on the basis of the membership fees income, VEB has an annual operating deficit of EUR 2,000,000. It must be assumed that not the membership fees, but the EUR 25,000,000 compensation that VEB will receive from Ageas covers the costs that VEB incurred and will incur in connection with the Fortis case. This includes the costs that VEB incurs and has incurred in order to protect the individual interests of the Active Claimants affiliated with it. VEB mentions an amount of EUR 7,000,000 in costs. The fact that Ageas' compensation relates to this follows from the explanation given by VEB to justify the amount of EUR 25,000,000 to be received from Ageas. It has not been made plausible that Active Claimants from VEB's constituents, in addition to their costs which VEB has borne and for which VEB receives compensation from Ageas, have also incurred or will have to incur costs to any relevant extent.

5.52.3. As an annex to the written summary of oral arguments for the hearing of 27 March 2018, VEB submitted an email from *mr.* T.M.C. Arons, an adviser to the VEB, which was drawn up following the record of the hearing of 16 March 2018. He writes that in the Fortis case VEB should generate approximately EUR 31,000,000 in revenues "in order to from an economic perspective cover the risk and time factor of the investments made". This is based on what the VEB refers to as the accounting costs of EUR 6,923,378 and interest costs over 12 years of EUR 24,288,626, as follows from Annex 4 to the VEB's document of 6 March 2018. VEB uses interest rates that are used in the market in connection with the funding of collective actions. The Court is of the opinion that these considerations are insufficiently substantiated. A characteristic of

VEB is that it finances collective actions from its own resources and works with its own organisation and attorneys. It is not dependent on litigation funders who demand high rewards. These rewards are high not only because the risks are high, but also because these are commercial organisations that want to make a profit. VEB does not have a profit motive, has equity capital and does not pay high (interest) compensation to financiers, so that the interest rates referred to by VEB cannot be used as a basis. Nor has VEB otherwise explained in concrete figures that the costs it incurs in building up equity come to a comparable amount to that normally charged by litigation financiers for their financing. Rather, from the data provided by VEB and what [H] et al. have argued about the annual figures of VEB, which was not contradicted (see first interim judgment paragraphs 8.36 and 8.37), it follows that VEB is perfectly capable of coping with the relatively high contributions it demands in proceedings such as the present one.

5.52.4. It is also important to note that VEB has calculated that its constituents held a total of approximately 140,000,000 Fortis shares in the periods relevant to the agreement. VEB estimates the total compensation for its constituents (shareholders who are members of VEB or who have registered with VEB as interested or disadvantaged parties) at EUR 607,000,000 (submission of VEB of 6 March 2018 under 4.50). The petition mentions a number of members of VEB of more than 43,000, 21,913 of whom can be qualified as Active Claimants. A substantial part of the total amount of EUR 607,000,000 referred to above therefore consists of the additional compensation of 25% that is intended for Active Claimants from VEB's constituents (hereinafter also referred to as: VEB Members). Even if part of the membership fees were to be regarded as costs, they would still not realistically be proportionate to the amount of additional compensation that could be claimed.

5.53. The above means that in the absence of realistic costs or expenses in return for the additional compensation, no objective justification can be found for granting it to the VEB members.

5.54. During the oral hearing of 16 March 2018, the Court discussed the nature and scope of the additional compensation with the petitioners. The objection to the compensation for the VEB members set out above was also discussed. The petitioners were not prepared to amend the settlement on this point. VEB has set the relevant compensation for its members as a condition for the coming about of the settlement. On behalf of VEB, during the oral hearing on 16 March 2018, *mr.* Coenen responded as follows to questions from the Court: "If the Cost Addition is omitted, there will be no settlement as far as VEB is concerned."

5.55. As stated above, the Court is of the opinion that no objective justification can be found for the additional compensation for the members, at least the Active Claimants among VEB's constituents. It has not been made plausible that this compensation is in return for realistic costs for the Active Claimants in question. The compensation of the VEB members is therefore at odds with the petitioners' own arguments in support of that compensation (see 5.45). According to the petitioners, the additional compensation is intended to compensate for the costs incurred, the time invested and the efforts made and to prevent Active Claimants from being in a less favourable position than the other entitled parties. However, VEB's revenue model clearly differs from that of the other interest organisations. When investors joined SICAF, FortisEffect and Deminor for the purpose of representing interests in the Fortis case - and the same applies to Consumentenclaim and Stiching Fortisclaim - this was not without obligation or free of charge. They had to commit to a result-dependent compensation and/or pay an (annual) contribution. The fact that these fees are ultimately not all or not fully due is solely attributable to FortisEffect and Deminor - and the same applies to Consumentenclaim and Stichting Fortisclaim - who (partially) waived these contributions, as a result of which they themselves had to accept a lower fee. On the other hand, it was clear to the VEB members that they would not have to incur any costs for the promotion of interests by VEB. The promotion of interests is part of the membership and VEB is quite able to handle the relatively high contributions it manages to negotiate in proceedings such as the one at hand. Moreover, VEB members benefit directly from these contributions, because they do not have to pay a cost-effective contribution. As a result, the VEB members are no less well placed than the other entitled parties. There is no disadvantage on their part that needs to be compensated. To the extent that VEB has invested time and effort, this is not further explained and it is also not obvious that VEB members have made, to any relevant extent, efforts in relation to the Fortis case.

5.56. It was also put forward in justification of the choice of the details of the additional compensation that, given the scale and nature of the settlement at hand, it is impossible to determine the exact costs incurred on a case-by-case basis, and it is therefore necessary to apply a more general rule. The same applies, according to the petitioners, to the supporters of the various interest organisations. The interest organisations all give different specific details as far as their revenue model is concerned. It is therefore justified, according to the petitioners, that all Active Claimants are equally entitled to additional compensation. This argument is rejected, at least with regard to the VEB members. The VEB members, also those who qualify as Active Claimants, are in fact in no different position with regard to their costs and efforts from the non-active entitled parties. The petitioners' arguments in support of the additional compensation are therefore not applicable to them, so that this particular group could simply have been excluded

from the right to additional compensation.

5.57. The additional compensation for the VEB members cannot therefore be explained and cannot be considered reasonable. The question then arises as to whether the inclusion of this compensation in the agreement prevents the request for an order to declare the agreement binding from being granted. The Court must reject the request if the level of compensation granted is not reasonable (Article 7:907(3), opening words and under b DCC). This test shall cover the total compensation provided for in the agreement. The Court is authorised to declare the agreement as a whole binding, or to reject the request. The Court cannot declare the agreement to be partially binding. On that basis, the question arises as to whether the granting of the additional compensation to the VEB members exceeded a limit that could justify a general rejection of the request. The Court is of the opinion that this consequence is too far-reaching. The compensation provided for in the agreement for those entitled to it is reasonable. The Court does not find it acceptable, all things considered, to let the collective settlement of the large-scale loss in the Fortis case fail on this one point. This means that the Court will not reject the request on the basis of Article 7:907(3), opening words and under b DCC.

5.58. The above does not alter the fact that the Court does not find the additional compensation for the VEB members justifiable. The amounts involved are substantial. It is important to note that in this way the VEB members are given an advantage over all other entitled parties. The investors who are VEB members are in fact in the same position as the non-active investors who have not incurred any concrete costs either. The VEB members who qualify as Active Claimants only receive a 25% higher compensation because VEB has stipulated this for them. By granting VEB members compensation without any real costs or expenses being incurred in return, the agreement makes an objectively unjustifiable distinction in this respect between the VEB members concerned and the other entitled parties. In addition, it is also objectionable that VEB rewards its members by stipulating the additional compensation. First of all, the VEB members already benefit from the compensation received by VEB from other parties, including Ageas, in view of the membership fees charged that are not self-financing. In addition, the additional compensation provides an improper incentive in favour of VEB. A reward for the members serves the VEB's own interests; VEB wants to attract and retain members. The WCAM is not intended to serve or facilitate such interests. All this is at odds with an efficient functioning of the WCAM and the public interest that the costs of collective proceedings should be kept as low as possible.

5.59. According to Article 3.1 of its articles of association, VEB looks after the interests of securities holders in the broadest sense of the word. VEB represents three distinct groups, namely the members who qualify as Active Claimants, Non-Active Claimants and the non-members, i.e. the Fortis investors who are not known by name: "All three groups belong to the constituents of VEB in this action" (document of VEB of 6 March 2018 under 1.5). Because VEB has stipulated additional compensation for its members who are also Active Claimants that cannot be objectively justified and is not reasonable, while it has presented this compensation as a condition for the coming about of the settlement, the Court concludes that it cannot be established that VEB has represented the interests of all its constituents in a material sense within the meaning referred to above. Nor can it be established that the interests of the persons for whom the agreement has been concluded are otherwise sufficiently safeguarded by its actions. Furthermore, VEB's actions in favour of those members who qualify as Active Claimants, with subordination to others who are in effect in a similar position, are not compatible with the Claim Code, which aims to ensure that a claim organisation represents collective interests without profit motive, operates independently and avoids conflicts of interest. This means that with regard to the VEB, the grounds for rejection of Article 7:907(3) opening words and under e and f DCC apply. The request for an order to declare the agreement binding will therefore be rejected with regard to VEB.

5.60. This raises the question of whether the request can be granted in respect of the other interest organisations. The Court has considered in previous rulings and reiterates here that it is not required that each applicant individually is representative with regard to the interests of the entire group of persons for whose benefit the agreement has been concluded or is sufficiently representative for a group of sufficient size. It is sufficient that, together, they are sufficiently representative. This is the case with regard to Deminor, FortisEffect and SICAF. There are no grounds for rejection in respect of these parties.

6. Other points

Money flows via the interest organisations

6.1. In the first interim judgment, the Court considered (paragraph 9.3) that it is advisable to amend Article 7.3 of the Settlement Distribution Plan (schedule 2 to the agreement) in such a way that if the interest organisations are involved in the payment of the compensation to their constituents, a third party account or clients' account of an independent third party will be used and that these payments will be supervised by an independent third party (attorney, accountant

or civil-law notary). All this serves to safeguard the interests of the constituents of the interest organisations with regard to the settlement of the payments. The Settlement Distribution Plan has been adjusted in such a way (article 8.3 thereof) that the payments are transferred to the bank account of an independent third party. In addition, it is laid down that the payments made from the bank account of this independent third party are supervised by an independent third party (e.g. an attorney, accountant or civil-law notary). This amendment meets the concerns expressed by the Court.

6.2. In response to questions from *mr.* Crucq during the oral hearing of 27 March 2018, the Court announced that in the first interim judgment the Court gave an exhaustive list of the independent third parties referred to, because of the social position of these third parties and the disciplinary and insurance guarantees associated with this.

Objections by third parties against the binding declaration

6.3. During the first oral hearing, Mrs [S] spoke, also on behalf of a number of others who had presented themselves to the Court as interested parties. In summary, they assert that AG Insurance N.V. (a 75% participation of Ageas) does not have sufficient capital to properly handle personal injury claims. The settlement amount made available by Ageas under the agreement is essentially the reserve to be used for the benefit of victims of an accident, medical error or illness. The interested parties concerned ask the Court to ask Ageas to demonstrate that they have the necessary capital to be able to compensate its past, present and future insured parties for their loss. The Fortis settlement should be suspended until such evidence is available, or the compensation for personal injury still to be paid out should be placed in a blocked account. The interested parties acknowledge that the affected Fortis shareholders are not responsible for the shortcomings of AG Insurance N.V. and should not be confronted with a further delay of their compensation, but on the other hand, insured persons, often severely disabled, who have been waiting for years for the necessary compensation for third party assistance, treatment and compensation for loss of income, and who often have to live in a frankly degrading situation, should not suffer the consequences of the Fortis settlement. According to Mrs [S], the interests of these personal injury victims weighs at least as heavily, if not even more, than the interests of the affected Fortis shareholders.

6.4. The Court cannot grant the application of the interested parties, because the Court is not competent to do so. If an application is submitted to declare a settlement binding, the Court will test various aspects of this settlement. The testing focuses on the interests of those who are bound

to the settlement agreement by the binding declaration (the entitled parties). The Court cannot make decisions in view of the interests of those who are not entitled parties, but are involved on Ageas's side, as the party who undertakes to pay damages, such as the insured parties of AG Insurance N.V., a participation of Ageas. The Court considers it sufficiently demonstrated, in particular on the basis of the annual report and accounts, that Ageas has sufficient means to be able to comply with the settlement (see below, paragraph 7.2), without collapsing.

7. Formal requirements: the grounds for refusal of Article 7:907(3) DCC

7.1. In Article 7:907(3) DCC a number of grounds for rejection of a WCAM request are listed. The requirements under a. (the agreement must comply with Article 7:907(2) DCC), b. (the reasonableness of the compensation), e. (the interests of those on whose behalf the agreement was concluded must be sufficiently safeguarded in other ways) and f. (Deminor, SICAF and FortisEffect are sufficiently representative with regard to the interests of those on whose behalf the agreement was concluded) have already been discussed above.

7.2. Article 7:907(3)(c) DCC provides that the request must be rejected if it is not sufficiently certain that the rights under the agreement of those on whose behalf the agreement was concluded can be fulfilled. It has been stated on behalf of the Foundation and substantiated with documents that Ageas has already paid EUR 240,740,000 to the Foundation. Ageas has also stated - and a document has been submitted in this respect - that at the end of the 2017 financial year it had EUR 1,900,000,000 at its disposal in cash, of which EUR 900,000,000 is reserved for the settlement. Lastly, a settlement was reached between Ageas, eleven co-insured parties and fourteen insurers for an amount of EUR 290,000,000. This amount has been paid to and placed with Stichting FORclaims, seated in Amsterdam, which was established for this purpose on 13 May 2016. According to the submitted statement of the board of Stichting FORclaims, this full amount is available for the settlement once it is declared binding. Following a binding declaration of the agreement, Stichting FORclaims will pay the amount (or part of it) to Ageas or to the Foundation at Ageas's written request, subject to the condition that the payment is forwarded to the entitled parties. In the opinion of the Court, sufficient provisions have been made with all this to ensure that the settlement amount is and remains available for payment to the entitled parties. The requirement laid down in Article 7:907(3), opening words and under c DCC, has therefore been met.

7.3. The agreement provides for the possibility of an independent settlement of disputes which

may arise from the agreement by another than the court which would have jurisdiction according to the law. This complies with Article 7:907(3)(d) DCC.

7.4. The requirement of Article 7:907(3), opening words and under g DCC, has been met. The group of persons on whose behalf the agreement was concluded is of a size sufficient to justify a binding declaration.

7.5. The compensation is paid on behalf of the Foundation and under its supervision by the Claims Administrator, Computershare Investor Services Plc. The Foundation is a party to the agreement, so that the requirement laid down in Article 7:907(3), opening words and under h DCC has been met.

8. Conclusion

8.1. The request for an order to declare the agreement binding satisfies the requirements that are set for it. There is no ground for rejection capable of justifying a total rejection of the request for an order to declare the agreement binding. The Court will grant the request for an order to declare the agreement binding, but this will only be pronounced with regard to petitioners 1 and 3 up to and including 6.

8.2. The other points raised no longer need to be discussed separately. Several interested parties exercised their right to speak and spoke at the hearing. Their objections relate in particular to the compensation to be obtained in relation to the price drop suffered in individual cases. It should also be noted in this respect that the nature of a WCAM agreement such as the one at issue here means that it is inevitable that a satisfactory result will not be achieved in each individual case. The alternative to the settlement, the conducting of court proceedings, is generally costly, whereas such proceedings are often lengthy and the outcome uncertain. The agreement as currently amended, taken as a whole, offers former shareholders of Fortis a relatively simple, fast, inexpensive and risk-free way of obtaining reasonable compensation.

8.3. In order to avoid misunderstandings, the following is considered. The rejection of the request for an order to declare the agreement binding in respect of VEB and its granting in respect of the other petitioners, implies that the agreement as a whole will be declared binding. This means that the additional compensation for the Active Claimants, which is included in the agreement, also falls within the scope of the binding declaration. The fact that the request for an order to declare the agreement binding with regard to VEB is rejected also has no consequences

for the validity of the agreement between VEB and the other petitioners, nor for the practical details, performance and execution of the agreement after the binding declaration has become irrevocable.

9. Opt out

9.1. The Court shall set the period referred to in Article 7:908(2) DCC within which a party entitled to compensation may withdraw from the binding declaration by means of a written notification (the opt-out period) at five months after the announcement of this decision referred to in Article 1017 paragraph 2 DCCP. In determining this period, the Court has taken into account the period of a maximum of two months to be mentioned below, which is necessary for the announcement of the binding declaration to be issued.

10. Filing for inspection and notification of the binding declaration

10.1. The decision and the agreement declared binding must be published on the *www.forsettlement.com* website as soon as possible, but no later than ten working days after the binding declaration has become irrevocable, in such a way that it can be stored by the entitled parties for the purpose of future inspection (Article 1017(2) DCCP), with French and English translation. The decision with the agreement will also be published on the website of the Amsterdam Court of Appeal (*www.rechtspraak.nl* under judgments and news, known cases).

10.2. The binding declaration must be announced in a number of newspapers (Article 1017(3) DCCP). The notification may be given using the text in Annex 3 (Draft Binding Declaration) or a translation thereof into the eligible language of the country in which the announcement is made. This announcement must be made within ten working days after the request for an order to declare the agreement binding has become irrevocable in *De Telegraaf*, *NRC Handelsblad*, *Het Financieele Dagblad*, *Het Laatste Nieuws*, *De Tijd*, *De Standaard*, *Le Soir*, *L'Echo* and *La Demière Heure*. The text of the announcement must also be published on the website *www.forsettlement.com* and on the Ageas website.

10.3. The petition (in paragraph 84) states that the written announcement of the binding declaration can be made to the known entitled parties within two months after the request for an order to declare the agreement binding is irrevocably granted. Starting from this, the Court shall determine that the announcement of the binding declaration to the known entitled parties must

be made as soon as possible, but no later than within two months after the decision to declare the agreement binding has become irrevocable. The manner of announcement must be similar to the manner determined by the Court for the notice to appear for the oral hearing of the petition (see the first interim judgment paragraph 5). The announcement of the binding declaration in the newspapers other than those referred to above, as mentioned in the revised notification plan in paragraph 33, must be made as soon as possible, but no later than within one month after the binding declaration has become irrevocable.

11. Decision

The Court:

declares the agreement attached to this decision, the Second Amended and Restated Settlement Agreement dated 13 April 2018, the accompanying schedules, including the Settlement Distribution Plan, binding with respect to the petitioners 1 and 3 up to and including 6 on the entitled parties as defined in the agreement (the Eligible Shareholders, from whom are excluded the Excluded Persons);

orders that, as soon as possible after this decision has become irrevocable, the petitioners 1 and 3 up to and including 6 are to make the notifications and announcements referred to in paragraph 10 as indicated therein;

orders that the period within which the entitled parties can give written notice of their wish not to be bound by the agreement (the opt-out period as referred to in Article 7:908(2) DCC) shall be five months, ending on the last day of the fifth month following the calendar month in which the announcement that this decision has become irrevocable has been made in the newspapers referred to in paragraph 10.2 of this decision, on the website www.forsettlement.com and on the Ageas website;

dismisses all other applications.

This decision was rendered by *mr.* J.W. Hoekzema, *mr.* M.P. van Achterberg and *mr.* P.F.G.T. Hofmeijer-Rutten and pronounced in open court in the presence of S.A.W.M. Rodrigues Parreira as clerk of the court on 13 July 2018.