

31 October 2012

Dear Christine:

You asked me to review my Note on *The Case of Franz Koenigs* of 29 August 2006 in light of the documents and reactive materials that have become available since. You will recall that at the time I set out the factual information then available in order to assess whether the Commission's assumption that the loss of the Koenigs collection to van Beuningen on 9 April 1940 was a simple consequence of financial difficulties that found their origin in the precarious financial situation Koenigs faced in 1931 as a consequence of the banking crisis. My finding was that the Commission's view was not in accord with the facts.

In brief, though the situation was difficult in 1931, Koenigs was able to enlarge Rhodius Koenigs' (the "Bank") capital, and thereby stabilize the Bank's position, without much trouble. Subsequently, the Bank's position improved steadily, so that associating the loss of the collection nine year's later with the difficulties experienced in 1931 and financial tightrope walking thereafter has no basis in fact. When put in the context of the time and the proper framework of Koenigs' behavior with regard to the collection, there can be no doubt that the sale to van Beuningen on 9 April 1940 occurred under pressure of an imminent Nazi invasion and had little, if anything, to do with acute financial pressures.

Nevertheless, the Commission in RC 1.6, at 15, dated December 10, 2003 stated:

De Commissie kan verzoekster hierin niet volgen. Zij komt tot het oordeel dat het bezitsverlies van Koenigs geen gevolg was van omstandigheden die in directe relatie stonden met het nazi-regime doch uitsluitend verband hield met de economische omstandigheden in Duitsland, die aanleiding hadden gegeven tot de zogenaamde "Stillhalte", een maatregel ten gevolge waarvan Koenigs niet vrijelijk kon beschikken over het Duitse deel van zijn vermogen. Daardoor was hij gedwongen in Nederland geld te lenen tegenover het tot zekerheid afstaan van zijn collectie. Een bezitsverlies derhalve dat uitsluitend een economische/zakelijke oorzaak had. Dat er ten tijde van de onderhandelingen over en de verkoop van de collectie sprake was van een alom aanwezige oorlogsdreiging kan aan het voorgaande geen afbreuk doen.

Documentation which became accessible after August 2006 throws further light on the who and wherefore of the fl. 1.5 million loan to Rhodius Koenigs that Lisser& Rosenkranz ("L&R") arranged in September 1931 on behalf of "a group of investors" as part of the Bank's capital expansion. In contrast with the Commission's assertion that Koenigs was forced to borrow these funds, for which he tendered his collection as security, in the Netherlands, this loan actually came in significant part from Germany. Given the capital restrictions put in place in September 1931 by the German authorities, this German participation was an underlying reason why this contribution to the Bank's capital expansion was not in the form of shares, but in the form of a loan of liquid assets.

The loan thus served two purposes, it allowed the German investors to circumvent the restrictions on financial investments outside Germany and it provided Franz Koenigs with liquidity. Currently there is no contemporaneous documentation on this transaction available other than Franz Koenigs' handwritten note setting out the basic elements of the loan. When in 1935 the loan agreement was formalized, some further information on the "group of 1931 investors" was provided. The share of two of the participants (the German bankers Altman and Tillmann) was fl. 350,000.00, leaving a remaining commitment of fl. 1,150,000 for L&R. However it is not clear how much of this L&R commitment actually came from the Dutch entity as there may have been a significant participation from the Rosenkranz owners of L&R's German parent, Lisser & Rosenkranz, Hamburg. When by 1935 the situation of Jews in Germany, and in particularly in Hamburg was becoming increasingly precarious, Altmann and Tillman took the opportunity of the June 1, 1935 formalization of the loan 1931 agreement to turn their parts of the loan over to L&R and thereby obtain liquidity outside the Reich. At the time, Nellie Rosenkranz, the widow of Walter Rosenkranz, stopped in Amsterdam on her flight from the Nazi regime to the United Kingdom, presumably to dispose over assets safeguarded at L&R from the reach of the Nazi authorities. But no further detail is available.

The bottom line is that in the 1935 loan contract L&R appears as the lender of the full amount of fl. 1,600,000 (fl 1,375,000 plus £ 17,000, equal to approx. fl. 123,600). The loan provisions stipulated a length of five years, to end May 1940; it could be abrogated at any time by Franz Koenigs electing to repay the loan or called earlier by the lender in the case L&R went into liquidation or fell into financial difficulties such as required these funds to shore up L&R's liquidity position. All this as well as the reasons why the facts in the matter do not accord with the Commission's view that Franz Koenigs' financial position did not allow him to repay the L&R loan and that thus the loss of his collection to v. Beuningen at an unrealistically low price was the simple and straight consequence of financial pressures.

The questions posed by the Commission in its interview with W.O. Koenigs of 7 February 2008 indicate to an important extent that the Commission sought to verify its view of the reasons for the loss of the collection, notwithstanding the earlier submissions to the contrary. Thus, Prof. Bank opened the interview noting that the loan agreement between Koenigs and L&R originated with the 1931 banking crisis and W.O. Koenigs concurred. However, both failed to recognize, as discussed above, that L&R at that time was not the only lender, but that it acted "on behalf of a group of investors" – a number of these investors being German. By concluding this agreement on a cash loan basis via L&R the German participants, all of whom were Jewish, were able to put funds across the border for future use, increasingly important as later events after the advent of the Nazi regime proved. Thus the agreement was a matter of "one hand washes the other" involving a number of people who had long-standing relationships, both professionally and socially, with each other. Be that as it may, as shown in the earlier submission and set out again here, the fact that Franz Koenigs, like many others suffered large liquidity problems at the time of the 1931 financial crisis, cannot of itself be taken as indicating that financial problems forced the sale of his collection almost nine years later, in 1940.

This is demonstrated inter alia by the developments between 1931 and 1935 – a period in which according to W.O. Koenigs nothing of import occurred with respect to the financial position of the Bank.

In 1935 the loan was officially taken over by L&R, with cash being drawn out by the German investors (see above). Prof. Bank asked generally whether it was imperative (noodzakelijk) for Koenigs to borrow in 1935 and specifically what his personal financial position was at the time, i.e. could he have repaid the loan? W.O. Koenigs responded that nothing material had changed in Koenigs' financial position between 1931 and 1935. However, W.O. Koenigs' opinion is at odds with the facts: according to the documentation (the Bank's annual reports and the financial press), by 1935 Franz Koenigs had repaid all the outstanding credits that had necessitated the capital enlargement of the Bank in 1931. Consequently, fl. 6 million worth of share capital was cancelled in 1935, this being the same amount that had been issued in 1931. In other words, in 1935 the Bank returned to its pre-crisis capital position. (Note that the creditors that had been repaid by that time included a number of British banks among which were also the banks which in March 1940 issued a payment demand for credits outstanding to the two German banks of which Koenigs was a partner - see below. Note also that these credits were quite separate from those occasioning the payment problems of the Bank in 1931.) Under these circumstances, the fact that Koenigs did not repay the loan to L&R's group of investors, but prolonged it for five years, indicates that he believed it prudent to do so rather than that his financial position did not allow it. As noted in the earlier submission, the Bank remained profitable in subsequent years. In contrast to W.O. Koenigs' opinion voiced at the interview, consolidation of Koenigs' personal and the Bank's balance sheets had by 1935 proceeded to the full satisfaction of his shareholders and of the Dutch regulatory authorities, including the central bank.

W.O. Koenigs further posited that his father continued to have financial obligations, or at least was liable for such obligations, to an extent that in his view might have threatened bankruptcy. In answering a question about why the collection was not shipped abroad as considered in March/April 1940, W.O. Koenigs replied that this certainly would have been stopped as "the British banks would immediately have seized the collection." By "the British banks" he meant the banks referred to above, which had their Dutch solicitors issue a payment demand against Koenigs on 9 March 1940. This demand, according to W.O. Koenigs involving approximately fl 600,000¹, concerned loans to two German banks of which Koenigs was a full partner. These loans had been frozen under the Standstill Agreement in 1931, and Koenigs, as a partner of these banks and resident outside Germany in the Netherlands, could have been held liable for the full payment of the debt. However, he was able to reach agreement in 1931 with the creditors on postponement of any payment demands. When with the outbreak of the War between Germany and the United Kingdom in September 1939 the Standstill Agreement became moot, the British banks, notwithstanding the postponement agreement, asked for immediate payment, giving Koenigs ten days, until 19 March, to comply. (Note that W.O. Koenigs proffered the decidedly odd explanation for the timing of the payment

¹ The source of this number is not given – however the number does not accord with those cited in the banks' solicitors letter, which W.O. Koenigs provided to the Commission.

demand that as long as Koenigs held German citizenship, he was protected from payment demands under the Standstill Agreement, but became liable when he became a Dutch national in 1939.) This time limit however passed without any action being taken. It appears quite clear that the banks tried to ensure that their Standstill claims after the War would not become entangled in another “reparations” freeze and, in an event, had no intention of taking possession of real assets, such as the collection, which with a German invasion of the Netherlands would have become enemy property. W.O. Koenigs’ conclusion that the collection was under threat of being seized by the British banks and that this prevented its shipment abroad makes no sense, both because Koenigs had a long-standing amicable relationship with these banks and because the banks gave no sign of wanting to follow-through on their demand with legal action - neither by taking any steps after the payment due term had passed nor by interfering with the subsequent passing of the ownership rights to L&R. Furthermore, if the banks had actually been bent upon collecting the outstanding amount, they would have lodged their demand in September 1939 rather than wait until the invasion of the Netherlands appeared imminent. Koenigs, who recognized his liability and, believing that Germany would lose the War, asked his German partners to cover two-thirds of the debt (one third being due from him) with a deposit of securities at the Bank and the two German banks acceded to his demand. After the War, these securities were frozen by the Dutch authorities as German-owned assets and eventually were returned to Koenigs’ heirs after they had already settled the British claim.

I am citing this post-war evidence of Koenig’s effort to secure his own and his family’s financial position by exacting - against all odds - a requisite amount of assets as security from his partners in Germany against a post-war settlement of the British claims because it is so starkly at odds with the picture that emerges from the Commission’s concept reportage. Surely, this is hardly an action someone who foolishly not only jeopardizes his most valuable asset – his collection – but actually cedes it for a fraction of its worth, would undertake. It is much more in line with Koenigs’ behaviour during the entire period that is relevant to this case: he not only sought to safeguard his collection – preferably at Boijmans, but he also creates the plan for safeguarding L&R by going into liquidation even though their financial situation is sound, and together with the remaining directors of L&R even obtains the Dutch authorities’ consent for what, but for the threat of invasion and L&R being Jewish-owned, would have been an absurd decision. It should be clear here, especially as the Commission seems to think that L&R’s liquidation of 2 April 1940 was *sui generis*, that the plan probably took form around the time War broke out between Britain and Germany, but at the latest around the turn of 1939 and certainly was in place by early February 1940. It contained, as Plan B for Koenigs’ own objectives with regard to his collection, the apparent ceding of the collection to L&R immediately upon liquidation – another unusual step in such proceedings as normally though announcement of collection of claims upon liquidation is immediate, payment (or taking possession of surety) takes place over an agreed reasonable period. As I noted elsewhere, L&R’s shareholders were paid out only in August 1940. The point here is that Koenigs was well aware that the Boijmans negotiators were dragging their feet, and Plan B, shipping the collection overseas, was put in place. This interpretation is supported

inter alia by the fact that throughout the period, including after 2 April 1940, Koenigs continued to act and was treated by the participants as the owner of the collection.

Given all this, it seems odd that W.O. Koenigs, who was 13 years of age at the relevant time, in retrospect associates the ceding of the collection with the letter, dated 9 March 1940, from the British banks' solicitors in the Netherlands in which they demand immediate payment from Koenigs of the banks' claim on the German partnerships. As noted above, it is quite clear that this letter was part of a safeguard of their claim for post-War purposes by the British banks. Even if a "dagvaarding" were to have followed – which it did not – it would have been more than strange if a court had allowed attachment of assets in general and even more in particular for a claim, which apparently had become collectible with the start of the War in September 1939 and for which the banks so far had failed to make any intention known of a wish to abrogate the earlier agreement with Koenigs for postponement of payment. It is evident that Koenigs, who more than most would have been aware of any threat of a real payment collection demand, would have positioned himself already at the outbreak of the War for such an eventuality. Yet more telling is, with respect to any link between the ceding of the collection on 2 April 1940 to L&R and the payment demand from the British banks' solicitors, dated 9 March 1940, the time sequence I cited above. Neither W.O. Koenigs nor the Commission pay the necessary attention to the fact that the liquidation and immediate apparent handing-over of the ownership of Koenigs' collection to L&R was put in train well before 9 March 1940!

And with the focus on these two unrelated events, sight is lost of the central date for this case, namely 9 April. The events between 2 and 9 April have been described and documented in detail by the Claimants, but apparently to little avail. Here a recap: Boijmans, after having been asked once earlier by Koenigs to ready the collection for shipment, receives dated 2 April the demand to do so and delays again; van Beuningen makes a bid on 5 April – note addressed to Koenigs not to L&R, which Koenigs, not L&R, rejects; then, in Koenigs' absence, he visits Flörsheim, the remaining Jewish managing director of L&R (the others already having fled overseas), and finally, a couple of hours after the German invasion of Norway and Denmark, he has Goudstikker convey a ridiculously low bid now not only for the collection of drawings, but also including twelve paintings, followed by a communication from Hannema, the director of Boijmans, which is delivered at 4.30 pm, in which he strongly advises acceptance of this bid "under the circumstances"² – a clearly not very veiled threat, and notes that the bid is valid only till 10.00 pm that same day. It surely is not taking any liberties to know that the message is: "take this money now, and see the collection stay at the Boijmans, or in a few days (invasion now generally believed to be imminent rather than a few weeks away) have it confiscated and disappear into the Reich." Is there any other explanation of why

² One should recall that Hannema only a few weeks earlier advised the directors of the Boijman Foundation that a price of fl 2.2 million, as demanded by Koenigs, for the drawings was a bargain and that the same Hannema, only a few months later -provided expert advice to van Beuningen regarding the sale price for only part of the drawings to Posse (who acted for Hitler), stating that fl 1.4 million for that part of the drawings was a fair, market-related price.

Flörsheim caved that day? And is there any other definition for what happened that day than undue pressure?

A final note regarding the point that, in the absence of other factors at play, Koenigs choosing to cede the collection to L&R rather than to repay the loan would have been a most unlikely behavior on his part. If the Commission's assumption that financial duress was the only reason in the chain of events that led to van Beuningen obtaining the collection of drawings and paintings at about one fourth its real value, surely the question arises why Koenigs did not sell some part of his collection himself, but in fact turned away every offer to purchase any part of his collection.