Final report of the Hearing Officer in Case COMP/38.606 — Groupement des cartes bancaires


(2009/C 183/06)

The draft decision submitted to the Commission gives rise to a number of comments on the right of the parties to be heard during proceedings initiated under Article 81 of the Treaty.

PROCEDURE

On 11 December 2002, the Groupement des cartes bancaires (GCB) notified the Commission of its plans (implemented on 1 January 2003) for an interbank commission system for its members whose (bank card) issuing activities were significantly less than their (merchant) acquisition activities.

Several requests for information were sent to the banks pursuant to Article 11 of Council Regulation No 17/62. Inspections were carried out in May 2003 at the premises of the GCB and a number of banks pursuant to Article 14(3) of Regulation No 17/62.

A specific feature of this case was that two Statements of Objections were issued, one on 7 July 2004 and another on 17 July 2006.

First Statement of Objections, July 2004

The first Statement of Objections was addressed to the GCB and the following banks: La Poste, BNP Paribas, Confédération Nationale du Crédit Mutuel, Crédit Industriel et Commercial, La Banque Fédérale des Banques Populaires, Natexis Banques Populaires, La Caisse Nationale des Caisses d'Epargne et De Prévoyance, Société Générale and Crédit Lyonnais SA.

Access to the File

On several occasions, the parties held lengthy discussions on the confidentiality of certain documents. I accordingly had to take two decisions under Article 9 of the Hearing Officer's terms of reference refusing the confidential treatment requested by the GCB and La Poste for some documents. After the eight-day period laid down in the terms of reference, the parties decided not to exercise their right of direct appeal to the President of the Court of First Instance, which meant that the documents concerned could be transmitted to all the undertakings involved.

Lastly, the parties all requested access to the record of a meeting held on 29 March 2004 between the Commission and the GCB as paragraph 20 of the Statement of Objections was based on that record. Paragraph 20 of the Statement of Objections states that implementation of the notified measures, if they were anticompetitive, would be likely to constitute an aggravating circumstance, especially if they had an anticompetitive object. This was one of the topics discussed at the meeting of 29 March 2004.

I took the view that this was not an objection that showed whether an offence had been committed but rather an indication that, if the notified measures were found to be anticompetitive, the fact that they had been implemented could constitute an aggravating circumstance when it came to setting any fines.

On my advice, the Directorate-General accordingly sent the parties a summary of the record of the meeting, rather than the full document. The Court has several times expressly recognised that the Commission is not bound to provide such internal records of meetings on the grounds that the institution has to be able to function normally; in other words, the Commission's internal decision-making process has to be protected. I myself verified that the summary was an accurate one.

Time allowed for replying to the Statement of Objections

All the parties made numerous requests for extensions to the deadline. I took account of the fact that there had been a delay in organising the parties' defence on account of the conditions for accessing the file by CD-ROM and the undertakings were given four months within which to submit their replies to the Statement of Objections.
Interested third parties

I received seven requests from parties wishing to be accepted as interested third parties and requests to take part in any hearing.

After examining the arguments put forward by these parties and after consulting the DG, I decided that they had all shown sufficient interest to be heard as third parties pursuant to Article 27(3) of Council Regulation (EC) No 1/2003 and I accordingly accepted their requests.

The undertakings concerned were given the opportunity to submit their arguments in writing and in person as part of a formal hearing. In accordance with the legislation, these third parties were provided in writing with an ad hoc summary of the nature and subject matter of the proceedings. The following were present at the hearing: the banks Accord and Cofidis, the companies Covefi and CDCK and the consumer associations ADEIC, UFC Que Choisir and BEUC.

Formal hearing of the undertakings

In the presence of the representatives of the national competition authorities that wished to take part, associated Commission departments and Competition DG, and interested third parties admitted to the proceedings.

The hearing took place on 16 and 17 December 2004. I agreed with the legal representatives of the GCB and the banks that they would share the task of presenting their defence against the objections applicable to them all, in order to avoid numerous repetitions and to ensure that the hearing was productive.

The hearing was conducted in an atmosphere of antagonism between the parties and Competition DG.

Following the hearing and the proposal I made to her, Ms Kroes asked that an internal panel within the DG give its opinion on the objections presented to the GCB and the banks, and in particular on the existence and secret nature of an anticompetitive agreement within the meaning of Article 81 of the Treaty, in view of the implications in terms of fines. Following this review of the case, it was decided to abandon this part of the Statement of Objections, in view of the inadequacy of the evidence provided by the DG in the light of the requirements of Community case law.

However, the case was continued with respect to the restrictive nature of the notified agreement (Article 81(1) of the Treaty) and whether it could be exempted (Article 81(3) of the Treaty).

Second Statement of Objections, 17 July 2006

The second Statement of Objections was addressed to the GCB alone. The Commission closed the case against the ‘main’ banks on 19 July 2006.

The GCB replied to this Statement of Objections on 20 October 2006.

Access to the File

The file was made accessible on CD-ROM, without any particular problems arising. However, the GCB stated that the Commission’s economic analysis contained numerous errors and that the access to the file that it had been given did not allow it to reply, as certain econometric data were missing. I accordingly decided on 24 October 2006 to provide the GCB with all the data requested.

This meant that the GCB was able to make an additional reply to the Statement of Objections.

Second formal hearing, 13 November 2006

The GCB was heard, and three ‘main’ banks, Paribas, Caisse d’Epargne and Société Générale, attended the hearing as interested third parties (Article 13 of Regulation (EC) No 773/2004). The banks Accord, Monabanq and GE Money Bank also expressed an opinion, as did the consumer association ADEIC (Association de Défense, d’Education et d’Information du Consommateurs).
In my view, the draft negative decision submitted to the Commission does not contain any objections other than those mentioned in the second Statement of Objections.

I therefore consider that the right of the undertakings and interested third parties to be heard has been respected in accordance with Articles 10 and 13 of Regulation (EC) No 773/2004.


Serge DURANDE