

Summary of Commission Decision
of 2 June 2004
relating to a proceeding under Article 82 of the EC Treaty
(Case COMP/38.096 — Clearstream (Clearing and Settlement))

(notified under document number C(2004) 1958)

(Only the German text is authentic)

(2009/C 165/05)

On 2 June 2004, the Commission adopted a decision relating to a proceeding under Article 82 of the EC Treaty. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 ⁽¹⁾, the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the full text of the decision can be found in the authentic languages of the case and in the Commission's working languages at DG COMP website at:

http://ec.europa.eu/competition/index_en.html

INTRODUCTION

1. The present text is a summary of the Commission Decision of 2 June 2004 in the above-mentioned case. The decision finds that Clearstream Banking AG, also called Clearstream Banking Frankfurt (CBF) and its parent company Clearstream International (CI), jointly referred to as 'Clearstream', have infringed Article 82 of the Treaty. The case concerns a refusal by Clearstream to supply certain securities clearing and settlement services to Euroclear Bank SA (EB), and the application of discriminatory pricing to the detriment of EB.
2. This procedure emanated from an ex-officio enquiry aimed at examining if the Community's competition policy is being correctly implemented in the EU securities post-trading sector. The Commission enquired in particular on (i) access, (ii) prices, (iii) exclusive arrangements and (iv) consolidation. Subsequently, the investigation progressively focused on possible abusive behaviour by Clearstream.
3. On 28 March 2003, the Commission sent a statement of objections to Clearstream. Clearstream replied to this Statement of Objections and further expressed its views in a hearing on 24 July 2003.
4. The Report of the Hearing Officer notes that the rights of defence of Clearstream have been respected.
5. The Advisory Committee on Restrictive Practices and Dominant Positions met on 30 April 2004 and gave a favourable opinion.
6. No fines are imposed. The reasons motivating both the decision and the proposal not to impose fines are described below.

1. SUMMARY OF THE CASE

7. The Clearstream case concerns the application of EU competition law to a specific series of events at a specific moment in time and applies competition rules to them. It does not in any way prescribe a proposed regulatory environment or standards.
8. The main complexity of the case derives from the industry sector — that of securities clearing and settlement, a sector where processes are complex, industry terminology is not homogeneous, participants are numerous at different levels, and a sector which is undergoing considerable change as a result of regulatory and industry forces.
9. The characteristics of the main post-trading processes of securities can be summarised as follows:
 - *clearing* is the process that occurs between trading and settlement. Clearing ensures that the buyer and the seller have agreed on an identical transaction and that the seller is selling securities which it is entitled to sell,
 - *settlement* is the final transfer of securities from the seller to the buyer and the final transfer of funds from the buyer to the seller, as well as the relevant annotations in securities accounts.
10. In addition to the steps necessary to complete a securities transaction, securities also need to be safekept. The terms *safekeeping* and *custody* are used interchangeably to refer to the actual depositing with the entity that holds a security in physical or electronic form. This is also referred to as the 'primary deposit' or 'final custody'. Entities that do not hold securities in final custody are described as performing services in relation to securities as 'intermediaries'.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1.

11. Providers of clearing and settlement services may be Central Securities Depositories (CSDs) ⁽¹⁾, International Central Securities Depositories (ICSDs) ⁽²⁾ or other intermediaries such as banks. However, each institution may only perform the 'primary' clearing and settlement ⁽³⁾ for the securities actually deposited in its final custody. In the present case, as all securities issued under German law and kept in collective safe custody ⁽⁴⁾ are deposited with CBF (referred to as the *issuer CSD*), only CBF can conduct the primary clearing and settlement related to these securities.
12. The decision deals with the *processing* services (clearing and settlement) provided in relation to securities, and not the custody services. CBF provides these services via an IT platform referred to as CASCADE. CASCADE RS (which is the CASCADE subsystem to which EB was denied access) serves the purpose of inputting information in relation to registered shares. It need only be updated periodically (e.g. before a General Assembly) and does not intervene in the transaction processing of registered shares. However, the right to include the processing of registered shares on the CASCADE platform was refused by CBF until EB had access to CASCADE RS.

1.1. The relevant market

13. The relevant market is defined as the provision by the issuer CSD (the Central Securities Depository which is the primary deposit of securities) to CSDs in other Member States and to ICSDs of primary clearing and settlement services for securities issued according to German law. Primary clearing and settlement occurs when there is a change in the position of a securities account held with the issuer CSD (CBF for securities issued according to German law). In contrast, secondary clearing and settlement is performed downstream by intermediaries on their own books. It encompasses both mirror operations through which intermediaries reflect the result of primary clearing and settlement in the accounts of their customers and annotations in account following internalised transactions. Internalisation occurs where the intermediary is able to

settle the transaction in its own books (e.g. if the buyer and seller both hold accounts in its books).

14. The parties have argued that primary and secondary clearing and settlement are not distinct markets.
15. The decision examines in detail the views of Clearstream and of EB in connection with the definition of the relevant market. Clearstream argue that clearing and settlement by subcustodians (intermediaries) is a substitute to the clearing and settlement performed by CBF. In a similar direction, EB ⁽⁵⁾ argues that internalisation poses a competitive constraint on CSDs. In the decision, those arguments are rebutted as follows:

— there is a group of providers of clearing and settlement services for whom indirect access to the issuer CSD — CBF in the present case — through an intermediary is not a substitutable alternative for direct access (given the poorer deadlines, the greater risk and complexity, the additional costs and the potential conflict of interests resulting from the use of an intermediary),

— apart from the fact that secondary clearing and settlement is not a valid alternative for customers (intermediaries) requiring primary clearing and settlement services in order to be able to provide efficient and competitive secondary clearing and settlement services to their own clients, no intermediary is able to internalise all transactions with all potential counterparties for all securities safekept in the issuer CSD. The present case precisely relates to a situation where an intermediary (EB) required primary clearing and settlement services from the issuer CSD and could not obtain substitutable services either in-house or from another intermediary.

— the issuer CSD is not constrained by the prices applied by intermediaries when primary clearing and settlement is needed, as the present case demonstrates. During the time that EB sought unsuccessfully to obtain price reductions for primary clearing and settlement services directly from CBF and cease using Deutsche Bank as an intermediary, the Deutsche Bank prices did not constrain Clearstream in the discussions with EB.

⁽¹⁾ A CSD is an entity which holds and administers securities and enables securities transactions to be processed through book entry. In its home country, it provides processing services for trades of those securities that have been deposited with it (which it holds in final custody), and in this function the CSD is referred to as the 'issuer CSD' and is not an intermediary. A CSD can also offer processing services as an intermediary in cross-border clearing and settlement, where the primary deposit of securities is in another country.

⁽²⁾ An ICSD is an organisation whose core business is clearing and settling securities — traditionally Eurobonds — in an international (non-domestic) environment. There are at present two ICSDs in the EU: Euroclear Bank, based in Belgium, and Clearstream Banking Luxembourg (CBL), a subsidiary of Clearstream International SA and a sister company to Clearstream Banking AG. An ICSD can also provide other services such as intermediary services for equities.

⁽³⁾ See paragraph 13 for definition of primary clearing and settlement.

⁽⁴⁾ As opposed to individual safe custody, collective safe custody of fungible securities allows clearing and settlement through book entry and is the only significant form of custody in Germany today.

⁽⁵⁾ While EB's stance may at first sight appear surprising, it can be explained because it owns CSDs in various Member States (UK, FR, NL, BE). EB is therefore interested in not having a precedent that could result in a definition of the relevant market where findings of dominance in possible future cases could be made.

16. For market definition purposes, the Commission must not examine in the present case the needs of the intermediaries' clients, but rather the specific needs of the category of clients who require the product or service, that is, financial intermediaries desiring to provide economically significant, efficient and competitive secondary clearing and settlement services to their own clients. For this category of customers, primary clearing and settlement performed by the issuer CSD and secondary clearing and settlement performed downstream by intermediaries are not substitutable alternatives. As EB explains, indirect access which involves having recourse to another intermediary (often a competitor) instead of the issuer CSD is not an acceptable alternative.

17. The particular services provided to CSDs and ICSDs cannot be compared to the standard services provided to non-CSD customers (banks), which are supplied on the basis of CBF's General Terms and Conditions.

1.2. Dominance

18. CBF is dominant in the relevant market since it is the only CSD where securities issued under German law and kept in collective safe custody are deposited. It is thus the only entity able to perform primary clearing and settlement for these securities. CBF's position is not constrained by any actual competition in the market. New entry is unrealistic in the foreseeable future.

1.3. The abuse

19. The decision identifies two types of abuse:

- refusing to supply primary clearing and settlement services for registered shares by denying access to CASCADE RS, and discriminating against EB in relation to the supply of those services,
- applying discriminatory prices for the provision to EB of primary clearing and settlement services. It should be noted that this concerns the pricing for all transactions processed on CASCADE for EB and is not restricted to registered shares, unlike in the case of the previous abuse.

1.3.1. Refusing to supply primary clearing and settlement services and discriminating against EB

20. The refusal to supply took the form of denying access to CASCADE RS. Without this access EB could not receive the clearing and settlement services of registered shares on the CASCADE platform whereas it could continue to receive this service for other transactions. The refusal to supply EB with primary clearing and settlement services for registered shares follows from the combination of a number of factors: Clearstream is an unavoidable trading partner, EB

could not duplicate the services that it was requesting, and the refusal to supply harmed innovation and competition in the downstream market. In addition, the growing importance of registered shares in Germany had as an effect a reduction in the services provided to EB, an existing customer of Clearstream, and there was a breach of EB's legitimate expectations that it would be supplied by Clearstream with primary clearing and settlement services within a reasonable time.

21. There is also discrimination by Clearstream because the dilatory behaviour vis-à-vis EB contrasts with the reasonable delay within which other customers were supplied.

1.3.1.1. Refusal to supply

22. The examination of the barriers to entry for potential competition to CBF's dominant position on the relevant market indicates that CBF is a necessary trading partner who cannot be replaced by an alternative source nor duplicated by EB. By refusing to supply primary clearing and settlement services for registered shares to EB, Clearstream's behaviour had the effect of impairing EB's ability to provide a comprehensive and innovative pan-European service in the downstream market for cross-border clearing and settlement of EU securities. Registered shares are the most widely internationally traded German shares and therefore likely to be included in transactions of an ICSD's clientele.

23. There are no indications that Clearstream's behaviour was motivated by any attempt to render the provision of its own services or its own operations more efficient, nor by creating any benefit for its customers. Clearstream have not claimed any such efficiency gains or consumer benefits. Rather, the economic motivation for and the actual effects of this refusal to supply have to be assessed in the context of the overall financial group of which CBF forms part. Clearstream Banking Luxembourg (CBL), a sister company to CBF under the common holding of Clearstream International (CI), is the only other ICSD in the EU together with EB, and therefore a direct competitor to EB in the downstream market for secondary clearing and settlement of cross-border trades. Typical ICSD customers such as active institutional investors, wishing to use a one-stop shop service of an ICSD in the EU benefit from innovative services like those of EB. Therefore, Clearstream's refusal to supply hampered the delivery of innovative secondary clearing and settlement services for cross-border securities transactions.

1.3.1.2. Discrimination: the dilatory behaviour vis-à-vis EB contrasts with the treatment of comparable customers

24. EB asked for access to CASCADE RS on 3 August 1999 and Clearstream only granted access on 19 November 2001. The decision examines in detail:

- the initial refusal of access between August 1999 and November 2000, during which EB was led to believe that access would be granted (detailed questions are discussed, training is provided, a two/three-week advance warning of the transfer of the registered share account is requested...),
 - the subsequent refusal from December 2000 until 19 November 2001. During this period, CI management intervened to stall access to CASCADE RS by linking access to the re-negotiation of an overall agreement with EB. Linking the access issue to an overall re-negotiation at such late stage is not justified. Among other factors, all preparations at the technical level had been completed and access was finally granted without the re-negotiation of a new agreement.
25. The period within which Clearstream provided EB with access to CASCADE RS exceeds a reasonable period of no more than four months from the request for access. Four months after the date of the request on 3 August 1999 is 3 December 1999. To ascertain what a reasonable period would be, the decision takes into account internal preparations from both sides on two occasions (the first in the run-up to the planned launch of access to CASCADE RS on 4 December 2000 and the second in preparation of the 19 November 2001 launch date). In both cases, the internal plans were based on a time period of two to three months. In addition, CSDs that requested access to CASCADE RS were granted access either almost immediately or in a maximum of one month, and CBL received access within four months.
- 1.3.1.3. Conclusion on the refusal to supply and the discrimination regarding supply**
26. For the above reasons, the decision concludes that Clearstream, in violation of Article 82, refused to supply EB with primary clearing and settlement services for registered shares between 3 December 1999 and 19 November 2001, in an unjustified manner and for an unreasonable period of time. Insofar as Clearstream refused to supply EB but supplied comparable customers expeditiously, the refusal to supply also constitutes discrimination.
- 1.3.2. Applying discriminatory prices for the primary clearing and settlement services**
27. Between the end of 1996 and 1 January 2002, Clearstream charged EUR X per transaction to Euroclear, while it charged EUR Y to national CSDs (X being 20 % more than Y). In addition, Euroclear, unlike CSDs, also paid an annual fee covering partly settlement services.
28. On the basis of information provided by CBF, the decision considers that the content of the primary clearing and settlement services for cross-border transaction provided by Clearstream to CSDs and to ICSDs is equivalent.
29. The lack of objective justification for the difference in prices is examined in detail. It should be emphasised that Clearstream does not have customer segmented cost accounting and that, despite repeated requests, Clearstream have not supplied any acceptable cost-based justification for the price difference.
30. In conclusion, the Commission decided that by applying a higher (EUR X) per transaction price to EB for primary clearing and settlement services at a moment when CBF was charging only EUR Y per transaction to national CSDs for those services, Clearstream discriminated against EB in violation of Article 82 of the Treaty, without objective justification and without any advantages for customers.
- 2. NO FINES IMPOSED**
31. There are several reasons for not imposing a fine in this case.
- This is the first decision in a complex sector**
32. There is no Community decisional practice or case law relating to securities clearing and settlement. In particular a key element like the detailed analysis of clearing and settlement processes in the context of market definition is novel. The decision analyses the relevant market distinguishing primary and secondary clearing and settlement as well as other complex sector-specific issues, such as internalisation.
- The infringement has terminated**
33. By itself, the fact that the infringement has terminated is not a reason not to impose fines; however, this should be considered in combination with other factors such as the novelty of the issues in question.
- Cross-border clearing and settlement in the EU is at a crossroads**
34. Clearing and settlement in the EU is an evolving sector, in particular where cross-border transactions are concerned, as in the present case. Different institutions are presently debating issues related to the functions of service providers, the scope for internalisation, the role of CSDs and ICSDs and their relationship with large custodians. Although these matters are not identical to those that are the subject of the decision, they are nonetheless connected.
35. In that context, not imposing fines appears appropriate. Even if there are no fines, there is still a need for the Commission to take a decision clarifying the legal situation especially as regards Clearstream and other undertakings.

3. CONCLUSION

36. The decision finds that Clearstream has infringed Article 82 of the Treaty by refusing to supply primary clearing and settlement services for registered shares to EB in an unjustified manner and for an unreasonable period of time, and by discriminating against EB in the provision of those services. In addition, it finds that Clearstream applied discriminatory prices.
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