## PRICING POLICY (BANKING): THE NVB (GSA) CASE

Subject: Pricing policy
Trade between Member States
Complaints

Industry: Banking
(Some implications for all industries)

Parties: Nederlandse Vereniging van Banken (NVB), the Dutch Banks Association, and its members

Source: Commission Statement IP/99/683, dated 15 September 1999
Commission Decision, dated 8 September 1999, published in the Official Journal, L.271, dated 21 October 1999

*(Note. Although this is an interesting case, the full text of the Commission decision goes into so much technical detail that the following outline is taken from the Commission Statement, while part of the main text, concerned with a useful discussion of the concept of trade between Member States, is also included. The Commission points out in effect that, unless trade between Member States is substantially affected, the argument that there has been an infringement fails in limine. But, even if the banks' conduct affected trade between Member States, it did not amount to an infringement, since the fee for interbank business, though virtually fixed and ultimately falling on the consumer, was justified by the overall efficiency of the methods of operating and of charging for the operation.)*

### Summary of the Case (Commission Statement)

The Commission has decided that an agreement between Dutch banks on the joint processing of acceptance giro forms does not fall under the competition rules of the European Union because it does not affect trade between Member States. The Commission also stated that it regards the banks' agreement on a fee for processing acceptance giro forms as restrictive of competition. However, the Commission would have taken a favourable view on this inter-bank fee had the competition rules applied.

An acceptance giro is a pre-printed credit transfer order intended for domestic payments with a recurring and obligatory character where payment is made at a distance, that is, where debtor and creditor do not meet face to face. Acceptance forms are used for instance to pay subscriptions, energy and telephone bills, insurance premiums and the like and are widely used in the Netherlands.

The Commission considers that the agreement on the processing of acceptance giro between some 60 Dutch banks does not have an appreciable effect on interstate trade. This conclusion is based on two findings. First, the acceptance giro product is clearly a domestic payment product relating to domestic economic activities. Secondly, the share of foreign banks in the Dutch acceptance giro system, although not unimportant in terms of numbers, is very limited in terms of volume.

An appreciable effect on interstate trade is one of the conditions for the competition rules to apply. Hence the Commission's conclusion that, on the basis of the facts in its possession, the competition rues do not warrant action on its part in respect of the notified agreement.

The Commission's decision states that a clause contained in the notified agreement, namely the remuneration fee for processing activities by the debtor bank of maximum € 0.14 (0.30 HFL) is restrictive of competition within the meaning of the competition rules. The clause limits the scope for a bank participating in the acceptance giro system to negotiate such a fee independently with other participating banks at a level which they see fit. Moreover, the Commission finds that the multilaterally agreed interbank fee is liable to produce restrictive effects on the relationship between banks and their clients, since banks which have to pay the fee tend to pass it on to their clients.

The Commission indicates in its decision that it intended to take a favourable position towards this restrictive interbank fee, referring to a communication, which it had earlier published in the Official Journal (C 273 of 9.9.97). However, the decision does not elaborate on this aspect since the Commission, in the absence of an appreciable effect on interstate trade, had to conclude that the competition rules did not apply to the Dutch acceptance giro system.

## Background

In 1991 the Dutch banking association NVB notified to the Commission, on behalf of its members, an agreement with regard to a joint payment and acceptance giro form procedure. The notification concerned in particular the introduction of a multilaterally set interbank fee of € 0.14 (HFL 0.30) payable by the creditor bank to the debtor bank for every payment involving an acceptance giro form. The payment is in due return for the service provided by the debtor bank of processing the acceptance giro forms, in particular for converting the information contained on it in an electronic form.

The multilateral interbank fee is a maximum fee. The introduction of this fee resulted in increased charges for creditors, as all credit banks decided to pass on the fee to their clients. This triggered a number of formal complaints against the fee by some creditors.

Initially, the Commission had objections against the multilateral set interbank fee in the Dutch acceptance giro form agreement. However, in the course of the proceedings the Commission became convinced that a multilaterally set interbank fee was more efficient than bilaterally set interbank fees. In particular, the Commission took into account that the multilaterally agreed interbank fee related to the costs of the debtor bank with the most efficient processing method; and the Dutch banks agreed to a periodical review of the amount of the fee by an independent expert.

The Commission therefore intended to take a favourable position. However, also in the light of the judgement of the European Court of Justice of 1 January 1999 in joint cases C-215/96 and C-216/96 (*Bagnasco v Banca Popolare di Novara*), which equally concerned a domestic banking product, the Commission concluded that Dutch acceptance giro form agreement lacked an appreciable effect on interstate trade. This resulted in the formal decision giving negative clearance under the competition rules.

*[The following paragraphs are extracts from the text of the Decision.]*

## Effect on interstate trade

(57) The Court of Justice has consistently held that, in order for an agreement between undertakings to affect trade between Member States. it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States (see inter alia Case 42/84, *Remia v Commission*). The effect on trade between Member States is normally the result of a combination of several factors which, taken separately, are not necessarily decisive (see inter alia Case 250/92, *Gottrup-Klim v Dansk Landbrugs Grovvareselskab*, paragraph 54).

(58) The Court has likewise consistently held that Article 81(1) of the Treaty applies only to agreements which can be shown to be capable of appreciably affecting trade between Member States (See inter alia Case 219/95, *Ferriere Nord v Commission*, paragraph 19).

(59) As to whether in the light of the case-law of the Court of Justice the GSA agreement and the provisions on the interbank commission in particular, are capable of affecting trade between Member States, the following factors should be taken into consideration.

## The agreement covers the whole territory of the Netherlands

(60) It can be accepted that the GSA agreement, and in particular the

interbank commission to which it refers, extends over the whole of the territory of the Netherlands ...

(61) The Court of Justice has ruled in a number of cases that behaviour restricting competition and extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (See inter alia the judgment of the Court of Justice in Case 8/72, *Vereeniging van Cementhandelaren v Commission*, paragraph 29, and the judgment of the Court of First Instance in Case T29/92, *SPO v Commission*, paragraph 229). However, this is not in itself sufficient to show that there is an appreciable effect on trade between Member States. Other factors also have to be taken into account. The following facts are of relevance in that connection.

## Economic activities concerned by acceptance giros

(62) Participation in the acceptance giro system is not limited to firms (payees) and individuals (originators) based in the Netherlands, but is open to anyone holding an account with a bank participating in the acceptance giro system. However, the economic activities concerned by payment by acceptance giro are largely limited to Netherlands territory, either by contractual provisions, or by their very nature, as in the case of supplies of goods and services (gas, electricity, or telephone) (See *ABI*, Commission Decision dated 13.2.1987, recital 37). As regards demand for acceptance giros (that is, customers, payees and drawees, who use acceptance giros as a payment instrument), it must accordingly be concluded that the cross-border nature of acceptance giros is very limited.

## Participation of non-Netherlands banks

63) Consideration has to be given not just to the demand for the acceptance giro product but also to supply, that is to say to the banks that offer acceptance giros. It is clear that branches and subsidiaries of non-Netherlands banks have participated in the acceptance giro system to a significant extent. (As a result of the strong financial ties between foreign parent companies and their branches in the Netherlands, branches must he seen as an extension of the relevant parent companies irrespective of their legal status. The activities of these branches must accordingly be seen as a part of the trade between Member States. See the judgment of the Court of Justice in Case 45/85, *Verband der Sachversicherer v Commission*. Subsidiaries of foreign banks based in the Netherlands are regarded as foreign banks by De Nederlandsche Bank where non-residents have a shareholding of at least 50%. The *Bagnasco* judgment demonstrates that the Court regards the participation not just of branches but also of subsidiaries of foreign banks as being relevant to the issue of whether trade between Member States has been affected.) According to the NVB, at the

end of 1997 there were 58 banks participating in the acceptance giro system, of which 27 were foreign banks. Of those foreign banks, 11 were from Member States of the Community (six subsidiaries and five branches). However, the proportion of the acceptance giro system accounted for by those foreign banks was relatively modest. of a total of almost 100 000 acceptance giro contracts in 1997, the overwhelming majority (about 91%) were conducted on behalf of the major banks (AEN AMPO, Rabo, INC Bank and Vostbank). Foreign banks accounted for less than 1% of the acceptance giro contracts concluded. They also accounted for a very modest share of the acceptance giro transactions processed: less than 1% for debits and less than 5% for credits.

## Importance of GSA agreement for non-Netherlands banks

(64) At mid-1997 a total of 115 banks were active on the Netherlands market, of which 68 were Netherlands banks and 47 foreign (19 banks from other Member States and 28 from third countries) (These were general banks, cooperative banks, savings banks and mortgage banks.) About one third of the foreign banks active in the Netherlands do not offer the acceptance giro product. As regards the 27 foreign banks which do offer the product and which have signed the GSA agreement, it can hardly be said that the opportunity to offer the product was an important factor when they decided to enter the Netherlands market, given its relatively limited importance to them (recital 63).

(65) In conclusion, in the light of the above factors, taken together, it cannot be said that the GSA agreement is capable of appreciably affecting trade between Member States. □

### Air Canada / Canadian Airlines

The Commission has opened a full investigation into the proposed acquisition by Onex Corporation, Canada, of Air Canada and Canadian Airlines Corporation. The proposed operation would bring under common control the two main Canadian airlines serving routes between Canada and London, most importantly those between London Heathrow and Toronto, Vancouver, Montreal, Ottawa, and Calgary respectively. Oneworld would become the only airline alliance serving UK-Canada direct routes. Competition Commissioner Mario Monti has said: "Alliances may well make life easier for the traveller. Yet only if alliances face full competition will their benefits come at a fair price." The Commission now has four months to reach a final conclusion on whether the planned merger may create or strengthen a dominant position. (Source: Commission Statement IP/99/763, dated 18 October 1999.)