ABUSE OF DOMINANT POSITION (BANKING): THE CLEARSTREAM CASE

Subject: Abuse of dominant position
Complaint
Statement of objections
Discrimination

Industry: Banking

Parties: Clearstream Banking AG

Source: Commission Statement IP/03/462, dated 31 March 2003

(Note. The Commission is continuing its attack on suspected contraventions of the rules on competition in the banking sector; and, this time, it has based its action on the provisions of the EC Treaty prohibiting the abuse of a dominant position, with particular reference to allegations of discrimination by Clearstream at the expense of a party making a complaint to the Commission.)

As part of its ongoing enquiry into cross-border clearing and settlement within the internal market, the Commission has informed Clearstream Banking AG, as well as its parent company Clearstream International SA, of its preliminary competition concerns. The Commission's objections relate to Clearstream Banking AG's refusal to supply certain cross-border clearing and settlement services as well as its discriminatory manner in relation to one of its clients. Clearstream now has two months to reply to the Commission's objections. It may also request an oral hearing. The Commission's statement of objections initiates proceedings under Article 82 of the EC Treaty on the abuse of a dominant position. It does not prejudge the outcome of these proceedings.

Clearing and settlement are the processes by which securities market transactions are finalised. The proper functioning of these processes across the European Union is essential for the development of a European Union capital market. The processing of cross-border securities trades within the European Union (as opposed to trades conducted within a single Member State) has traditionally been costly and inefficient. The introduction of the fiduciary European Union in 1999 was one of the catalysts for significant growth in cross-border trading. It is a priority objective of the Community to ensure that cross-border trade in securities can take place without obstacles.

In its Communication of 28 May 2002 to the Council and the European Parliament on clearing and settlement, the Commission announced that its services had launched an in-depth own-initiative antitrust enquiry into clearing and settlement. Among the issues investigated were access and pricing. The Commission sent requests for information in March 2001 to a number of clearing and settlement agencies, trading platforms and banks. The replies to those

requests prompted the Commission to focus its investigation on Clearstream's behaviour.

The Clearstream group provides clearing, settlement and custody services for securities. Clearstream International SA is the group's holding company, based in Luxembourg. It holds Clearstream Banking AG (usually referred to as Clearstream Banking Frankfurt) and Clearstream Banking Luxembourg SA. Clearstream Banking AG is the German Central Securities Depository. Clearstream Banking Luxembourg is, together with Euroclear Bank SA, one of the two International Central Securities Depositories in the European Union.

The Commission takes the view that Clearstream Banking AG is the dominant supplier of clearing and settlement services for securities issued according to German law. This dominance stems from the fact that securities issued in accordance with German law in order to have those securities traded are issued in Clearstream Banking AG, the German Central Securities Depository. The clearing and settlement services provided by the issuer Central Securities Depository for the securities that it has in its safekeeping must be distinguished from the processing of securities trades by financial intermediaries, such as banks. Intermediaries rely on being able to settle their trades with the Depository where the securities have been issued.

The Commission's objections relate to Clearstream Banking AG's refusal to supply clearing and settlement services and to discriminatory behaviour. In pursuing these possible infringements of the competition rules, the Commission aims at ensuring cross-border competition in European Union capital markets. The events under investigation concern clearing and settlement for registered shares, which have taken a growing importance in Germany since 1997. There is evidence that Clearstream refused Euroclear Bank SA access to the settlement platform for registered shares in Germany for more than two years. In the Commission's view, there is no justification for such a long period between the request for access and the actual granting of this access. The Commission considers that Clearstream's behaviour had the effect of limiting cross-border trade in such securities, while Clearstream was at the same time establishing a competing cross-border operation. Further evidence suggests that Clearstream Banking AG's dilatory behaviour contrasts with the short delay within which other customers received access to the same application. In the Commission's view, such short delays constitute the normal industry practice. This discrimination also extended to pricing. Until January 2002 Clearstream Banking AG charged a higher per transaction price to Euroclear than to national Central Securities Depositories outside Germany. In the Commission's view, there is no justification for the difference in treatment. Among other factors, the transaction volumes and the level of automation are higher for Euroclear than for national Central Security Depositories.

The Commission's statement of objections opens the infringement procedure and gives the right to Clearstream to defend itself by replying to the objections within a period of two months. Clearstream can also request an oral hearing. The Commission's objections do not prejudge the outcome of the procedure. ■

British Airways / SN Brussels Airlines

The Commission has approved for a period of six years a co-operation agreement between British Airways and SN Brussels Airlines. The agreement will be beneficial for consumers by, in particular, giving SN's passengers access to BA's long-haul network. On the only route, Brussels-Manchester, where the alliance would have eliminated competition, the airlines have submitted undertakings that safeguard consumer choice. On 25 July 2002, British Airways (BA) and SN Brussels Airlines (SN) notified to the Commission a number of co-operation agreements requesting an exemption under Article 81(3) of the Treaty. Airline alliances generally present benefits for the consumer but regulators must ensure that they do not result in the elimination of competition on certain routes. The BA-SN agreement will enable the parties to co-operate across their respective networks in terms of pricing, scheduling and capacity. The Commission's analysis has shown that the parties' networks are largely complementary and that their network co-operation will bring benefits for consumers. In particular, the agreement will allow SN's passengers to have access to a long-haul network, while BA's passengers will benefit from an easier access to SN's African destinations.

The Commission looked closely at the impact of the alliance on travel between Brussels and London, on the one hand, and Brussels-Manchester, on the other hand, where both BA and SN have operations. As far as Brussels-London is concerned, although the alliance will have an appreciable impact on this route, it will not eliminate competition as BA and SN will continue facing bmi and Eurostar, two powerful competitors. Bmi operates seven daily frequencies from London Heathrow. Eurostar operates eight daily frequencies between Brussels and London Waterloo and is a competitive alternative for both business and leisure passengers. The Commission also considered that the five daily frequencies on weekdays operated by VLM - between Brussels-National and London-City were also likely to exercise a competitive constraint on the parties.

The examination of the alliance revealed that Brussels-Manchester was the route where it would have the most restrictive effect as the parties' cumulative market share would be close to 100%. Furthermore, there are capacity constraints at Brussels National airport at peak-time periods, which could prejudice a new entrant's ability to enter this market. To remedy the concerns raised by the Commission during the initial review, the carriers undertook to release enough landing and take-off slots at Brussels National for a new entrant to operate three daily services to Manchester, in case these slots were not available through the normal slot allocation procedure. Together the parties operate seven daily services on the route and the Commission considers that the three daily services provided by a competitor should exercise sufficient constraint on their behaviour.

Source: Commission Statement IP/03/350, dated 10 March 2003