

COMMISSION DECISION

of 8 September 1999

relating to a proceeding under Article 81 of the EC Treaty

(IV/34.010 — Nederlandse Vereniging van Banken (1991 GSA agreement), IV/33.793 — Nederlandse Postorderbond, IV/34.234 — Verenigde Nederlandse Uitgeversbedrijven and IV/34.888 — Nederlandse Organisatie van Tijdschriften Uitgevers/Nederlandse Christelijke Radio Vereniging)

(notified under document number C(1999) 2056)

(Only the Dutch text is authentic)

(1999/687/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1216/1999 ⁽²⁾, and in particular Article 2 thereof,

Having regard to the application for negative clearance and the notification with a view to an exemption submitted on 10 July 1991 under Articles 2 and 4 of Regulation No 17,

Having regard to the complaints lodged on 21 January 1991, 7 June 1991, 13 September 1991, 10 February 1992 and 31 October 1993 under Article 3 of Regulation No 17,

Having regard to the Commission Decision of 11 June 1993 to initiate proceedings in this case,

Having given interested parties the opportunity of being heard on the matters to which the Commission has taken objection in accordance with Article 19(1) of Regulation No 17 in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 ⁽³⁾,

Having invited interested third parties ⁽⁴⁾ to submit their observations in accordance with Article 19(3) of Regulation No 17 with regard to the Commission's intention to adopt a positive standpoint on the notified agreement,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

The notification

- (1) On 10 July 1991 the Nederlandse Vereniging van Banken (Dutch Association of Banks, 'the NVB') notified, on behalf of its members, an agreement concerning the introduction of a joint payment and acceptance giro procedure ('the GSA agreement' or 'the 1991 GSA agreement') with a request for negative clearance or for

exemption under Article 81(3) of the EC Treaty ⁽⁵⁾. The acceptance giro is a payment instrument that is widely used by payees for regular payments by their customers, for example energy and telephone bills, insurance premiums and subscriptions.

- (2) The notification in fact relates to an amended version of an earlier GSA agreement, the 1985 GSA agreement. The amendment concerns in particular the introduction of an interbank commission payable for the processing of acceptance giro forms and amounting to NLG 0,30 (EUR 0,14) per processed form. Under the 1991 GSA agreement the interbank commission is to be paid by the collecting party's bank (the payee bank) to the purchaser's bank (the drawee bank). The commission is intended to cover part of the cost to the drawee bank of processing acceptance giro forms.

The complaints

- (3) Between 1991 and 1993 the Commission received several complaints from major users of the acceptance giro system, namely from the Dutch mail order association (the Nederlandse Postorderbond) ⁽⁶⁾, an organisation which promotes the interests of road users (ANWB), an umbrella organisation of mainly national charities (the Centraal Bureau Fondsenwerving), an enterprise involved in publishing periodicals and specialist journals (the Verenigde Nederlandse Uitgeversbedrijven (VNU)) ⁽⁷⁾, an organisation which promotes the interests of magazine publishers (the Nederlandse Organisatie van Tijdschriften Uitgevers (NOTU)) and a broadcasting organisation (the Nederlandse Christelijke Radio Vereniging (NCRV)) ⁽⁸⁾.

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 148, 15.6.1999, p. 5.

⁽³⁾ OJ L 127, 20.8.1963, p. 2268/63.

⁽⁴⁾ OJ C 273, 9.9.1997, p. 12.

⁽⁵⁾ The NVB notified the 1991 GSA agreement on behalf of its members, but it is not a party to the agreement. It signed the agreement to acknowledge that it had been apprised of the contents.

⁽⁶⁾ Complaint of 21 January 1991 (Case IV/33.793).

⁽⁷⁾ Complaints of 7 June 1991, 13 September 1991 and 10 February 1992 (Case IV/34.234).

⁽⁸⁾ Joint complaint of 21 October 1993 (Case IV/34.888).

- (4) The complaints are directed in particular against the restrictive effects of the interbank commission in the GSA agreement, which is fixed multilaterally and, according to the complainants, should be regarded as a price-fixing agreement between the banks within the meaning of Article 81(1). Some complainants consider that what they regard as the systematic passing-on of the interbank commission by payee banks to business customers using the acceptance giro system constitutes a concerted practice within the meaning of that Article. Some complainants also allege that the major banks have abused an individual or joint dominant position in breach of Article 82 of the Treaty by imposing unfair charges on business customers using acceptance giros.

The parties to the notified agreement

- (5) The GSA agreement was signed by ABN AMRO Bank NV, Coöperatieve Centrale Raiffeisen-Boerenleenbank BA, ING Bank NV (formerly NMB Postbank Groep NV), Postbank NV (which since 1992 has formed part of ING Bank but operates under its own name), Nederlandse Spaarbankbond and Interpay/BankGiroCentrale (formerly BankGiroCentrale). In addition, a large number of banks (58 by the end of 1997) have signed an accession declaration in which they state that they accept all the rights and obligations stemming from the GSA agreement vis-à-vis the signatories of that agreement and the other banks that have signed an accession declaration. The names of all the banks which have signed the GSA agreement are given in Annex I.
- (6) ABN AMRO Bank NV ('ABN AMRO') is a wholly owned subsidiary of ABN AMRO Holding NV, which was set up following a merger of Algemene Bank Nederland NV (ABN Bank) and Amsterdam-Rotterdam Bank NV (AMRO Bank). In 1998 the number of account holders was approximately 3,85 million, including about 270 000 business account holders. ABN AMRO's total assets amounted to NLG 836,4 billion (EUR 380,2 billion) in 1997. This means that ABN AMRO is the largest bank in the Netherlands in terms of total assets ⁽⁹⁾.
- (7) Coöperatieve Centrale Raiffeisen-Boerenleenbank BA ('Rabobank') is a cooperative in the capital of which 445 banks have stakes. Each of those banks has the legal status of a cooperative. The bank's business borrowers are automatically members of the association. Private

individuals may also join. The number of account holders with Rabobank in 1998 was some 6,1 million, including 600 000 business account holders. At the end of 1998 total assets amounted to NLG 423 billion (EUR 192,3 billion). Rabobank is the second largest bank in the Netherlands in terms of total assets ⁽¹⁰⁾.

- (8) ING Bank was created on 1 January 1992 following a merger between insurance company Nationale Nederlanden NV and the NMB-Postbank Groep. The latter was itself set up as the result of a merger three years previously between Nederlandsche Middenstandsbank NV (NMB) and the former state enterprise Postbank. In 1998 ING Bank had about 1,2 million private account holders and some 205 000 business account holders. Postbank, which forms part of the ING Bank but operates under its own name and has its own giro circuit, had 7,1 million private account holders and 560 000 business account holders in 1998. ING Bank's consolidated total assets (including BBL) amounted to approximately NLG 630 billion (EUR 286,5 billion) in 1998 ⁽¹¹⁾.
- (9) The Nederlandse Spaarbankbond is an association of savings banks. The five affiliated savings banks, namely Fortis Bank, SNS Bank Nederland, Samenwerkende Groninger Bondsspaarbanken, Stichting Nutsspaarbank and Stichting Bondsspaarbank are autonomous. The Nederlandse Spaarbankbond signed the 1991 GSA agreement on behalf of its affiliated banks. The number of account holders is about 2,5 million in total. The combined total assets of the affiliated savings banks amounted to some NLG 115 billion (EUR 52,3 billion) in 1998 ⁽¹²⁾.
- (10) Interpay Nederland (Interpay) is a facility for payment transfers between the banks and the giro establishments, including the centralised processing of transfer payments. Interpay is a joint undertaking operated by virtually all the general banks, Rabobank and the members of the Nederlandse Spaarbankbond. It was set up on 1 January 1994 following a merger between Bank Giro Centrale (BGC) (the original GSA agreement signatory, responsible for the processing of giro transactions), BeaNet (processing of transactions via automatic teller machines) and Eurocard Nederland (processing of credit card transactions). Interpay manages the payment circuit of the banks, with the exception of Postbank NV which, as mentioned above, has its own giro circuit. However, as part of moves to set up a national payment circuit, the connection between the Interpay circuit and the Postbank circuit has been significantly upgraded. In 1998 almost 2 billion giro transactions were performed via Interpay BGC involving a total amount of NLG 2 728 billion (EUR 1 240 billion). The number of acceptance giros processed in 1998 was 217 million, with a value of NLG 84,9 billion (EUR 38,6 billion). About 70 banks participate in Interpay ⁽¹³⁾.

⁽¹⁰⁾ Letter from Rabobank dated 17 February 1999.

⁽¹¹⁾ Letter from ING dated 17 February 1999.

⁽¹²⁾ Letter from the Nederlandse Spaarbankbond dated 18 February 1999.

⁽¹³⁾ Letter from the NVB's lawyer dated 27 March 1997 and letter from Interpay dated 18 February 1999.

⁽⁹⁾ Letter from the NVB dated 25 March 1997 (file 34.010, p. 711) and letter from ABN AMRO dated 11 February 1999.

- (11) The NVB was set up on 8 May 1989 with the object of promoting the interests, both national and international, of credit institutions operating in the Netherlands and of Dutch banking in general. Virtually all banks operating in the Netherlands, including establishments of foreign banks, are members of the NVB. The NVB notified the GSA agreement on behalf of its members but is not a party to it.

The acceptance giro system

General

- (12) The notification and complaints concern the Dutch acceptance giro system. This system is intended for domestic business payments, i.e. payments between drawees and (business) payees with accounts in the Netherlands, carried out on a regular, mandatory basis in situations involving companies with a relatively large and established customer base and in which the payer and the payee do not come into direct contact with each other. Examples include payment of subscriptions, energy and telephone bills, instalment payments, insurance premiums, etc. Acceptance giros are thus not used by the retail trade and hotels and restaurants, where drawees and payees are in direct contact with each other.

Operation of the acceptance giro system

- (13) The acceptance giro system, which was launched on the market at the end of the 1970s as a joint payment product of Postbank and the other banks, works as follows (see plan in Annex II). A firm which decides to make use of the acceptance giro system (the payee or creditor) concludes a contract with its bank (the payee bank). The contract specifies the conditions under which the firm can make use of the acceptance giro system. When the product or service is supplied, or immediately thereafter, the firm sends the customer (the drawee) an acceptance giro form. The acceptance giro forms, which the payee can order in standard form from the bank or direct from the printers, are, as far as possible, precoded by the firm. Most precoded forms show the account number of the firm, the account number of the customer, the amount payable and the payment details.

This information is also indicated on the acceptance giro form in numerical codes. The customer has only to add his signature and to send the signed form to his own bank.

- (14) The customer's bank (the drawee bank) converts the codes into electronic data by means of special optical readers and debits the customer's account. Automation of processing increases in proportion to the amount of additional information that is entered in coded form. Unencoded data has to be manually processed into electronic form ⁽¹⁴⁾.
- (15) The drawee bank then passes the electronic data required for crediting the firm's account on to the appropriate giro clearing institute, i.e. the giro clearing office of Postbank or Interpay (for the remaining banks). No distinction is made between intra-bank transactions (i.e. in which the payee and drawee have the same bank) and inter-bank transactions. The banks maintain that this prevents fragmentation of information. The central giro offices sort all the acceptance giro transactions received by payee account and send the information, if necessary via the corresponding giro circuit, to the relevant payee banks.

Advantages of the acceptance giro system

- (16) The advantage of the acceptance giro system over other payment instruments, such as ordinary transfers and cheques, is that forms can be processed and transfers effected on a largely automated basis. This means that processing costs less and is effected more quickly. The acceptance giro system also has significant administrative advantages for payees who operate with an automated accounting system. They can have data relating to the processed acceptance giro forms supplied by the bank by electronic medium (tape or diskette) and keep their own financial records on an automated basis. This allows substantial savings, since payments no longer have to be entered separately in the firm's own financial records. In addition, payees receive their money more quickly.

Development of the acceptance giro system

- (17) The acceptance giro is widely used as a payment medium in the Netherlands. In 1998, about 217 million acceptance giro transactions involving a total amount of approximately NLG 84,9 billion (EUR 38,9 billion) were processed by Interpay BGC ⁽¹⁵⁾. In 1998, Postbank's giro clearing office processed [...] (*) acceptance giros involving a total amount of [...] * ⁽¹⁶⁾. In the period 1985 to 1998, the number of firms that had concluded a contract for the use of acceptance giro forms rose from 54 140 to 97 676 ⁽¹⁷⁾.

⁽¹⁴⁾ Several banks are currently perfecting more advanced image technology to replace optical reading systems. Since the beginning of 1996 payees wishing to receive an acceptance giro document back after processing (users of acceptance giros with many attachments) have been sent image prints of acceptance giros converted into electronic data (Interpay 1996 annual report).

⁽¹⁵⁾ Letter from Interpay dated 18 February 1999.

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

⁽¹⁶⁾ Letter from ING Bank dated 17 February 1999.

⁽¹⁷⁾ See footnote 8, the letter from Interpay dated 18 February 1999 and the letter from ING Bank dated 17 February 1999.

- (18) The three largest banks participating in the acceptance giro system are Postbank, ABN AMRO and Rabobank. In 1998, according to their own figures, these three banks accounted for about 91 % of acceptance giro contracts, 86 % of debit transactions, 70 % of credit transactions, 87 % of the value of debit transactions and 50 % of the value of credit transactions ⁽¹⁸⁾.

The introduction of interbank commission

- (19) According to the NVB, which, as stated above, notified the GSA agreement on behalf of the banks, the upgrading of connections between the two giro payment circuits in the Netherlands, namely the Interpay circuit (originally the Bank Giro Centrale) and the Postbank circuit, as part of moves to set up a national payment circuit, led to increased use of acceptance giros (and thus also to an increase in the absolute amounts of processing costs) ⁽¹⁹⁾. The NVB argued that, in order to ensure the optimal functioning of a single circuit, the drawee bank should conduct certain services on the payee bank's behalf, i.e. the conversion of written payment orders into electronic transactions. According to the NVB, the GSA agreement (and in particular the uniform interbank commission which it provides for) is an acknowledgement that the payee bank benefits from services effected by the drawee bank and should make a proportional contribution to the costs incurred as a result of those services ⁽²⁰⁾.

The agreement originally notified

- (20) The GSA agreement, which entered into force on 1 July 1991 for an indefinite period, is in fact an amended version of the 1985 GSA agreement, which was not notified to the Commission as such. The amendment relates in particular to the introduction of a uniform commission payable by the payee bank for the processing, by the drawee bank, of acceptance giro forms and amounting to NLG 0,30 (EUR 0,14) per processed form ('the interbank commission'). It is also stipulated that the participating banks are completely free to charge banks other than the payee bank for processing acceptance giro forms.

⁽¹⁸⁾ See footnote 8.

⁽¹⁹⁾ The process of bringing the banks' payment circuits via Interpay and the Postbank circuit closer together culminated in 1997 in the setting-up of the national payment circuit (*Nationaal Betalings Circuit*) (NVB 1998 annual report).

⁽²⁰⁾ Clarifications to the notification of 10 July 1991 and supplementary clarifications of 17 September 1991.

- (21) The level of the interbank commission was established in 1991 on the basis of the actual costs of electronic conversion of the payment information by the bank which, according to the NVB, had the most efficient processing methods. Since the banks assume that the advantages of processing by the drawee bank are of equal benefit to the payee and to the drawee bank, the interbank commission is set at half of the drawee bank's processing costs.
- (22) The GSA agreement also stipulates that participants must use certain forms and specifications in the technical exchange which takes place. A number of subjects are also indicated for which further rules must be adopted. These specifications and rules do not form part of the notification and are therefore not included in these proceedings.
- (23) The version originally notified stipulated that participants should refrain from conferring particular advantages on payees in connection with credit payments to a specific account. The participants were originally prohibited from introducing their own acceptance giro procedure during the term of the agreement.
- (24) In contrast to the 1985 GSA agreement, the notified GSA agreement was signed by individual banks rather than by the NVB. A secretariat, the BGC, ensures that the agreement is complied with.

Amendments to the originally notified agreement following discussions with the Commission

- (25) At the beginning of 1992, during discussions with the banks involved in the GSA agreement, the Commission department concerned stated that it objected to three aspects of the agreement which restricted competition and which would at all events prevent the granting of exemption. First, there was the ban on granting payees particular advantages in connection with the holding of a particular credit account (Article 4); secondly, there was the ban on participants introducing their own acceptance giro procedures (Article 14); and thirdly, there was the uniform interbank commission (Article 5).
- (26) According to the banks, the first two provisions were included in the earlier GSA agreement in order to ensure that the two giro circuits, i.e. the Postbank circuit on the one hand and the BGC on the other, were linked as far as the acceptance giro integrated payment system was concerned. Both of these provisions were deemed by the parties to be no longer essential and were subsequently scrapped with effect from 26 March 1992.

- (27) The third provision (fixed interbank commission) was also amended with effect from 26 March 1992. Individual banks were in future to be allowed to agree bilaterally a lower amount than NLG 0,30 (EUR 0,14) as reimbursement for processing an acceptance giro form. The fixed interbank commission was thus made a maximum. It was stressed that both drawee and payee banks were free to charge other parties concerned costs for processing acceptance giro forms. Article 5 as amended reads as follows:

'By way of reimbursement of the costs incurred by the drawee institution in the processing, also on behalf of the payee institution, of acceptance giro forms within the framework of the GSA, an amount of NLG 0,30 shall be charged by the drawee institution per processed acceptance giro form to the payee institution, unless a lower amount is agreed bilaterally by individual banks.

This amount has been established on the basis of the costs associated with the most efficient means of processing acceptance giro forms and shall be adjusted in the event of these costs being shown to have changed. A decision on that subject can be taken on a proposal from each of the institutions participating in the GSA; this proposal should be accompanied by documentary evidence of the change in the aforementioned costs.

The reimbursement of costs pursuant to this Article shall leave the individual institutions participating in the GSA (drawee and payee institutions) free in the policy they pursue with respect to the charging to others of costs associated with the processing of acceptance giro forms under the GSA.'

Procedure

Rejection of the request for interim measures

- (28) In its decision of 7 February 1992, the Commission rejected a request by one of the complainants, the Nederlandse Postorderbond, for interim measures. The Commission held that the view that merely applying the GSA agreement caused serious prejudice to the members of the Nederlandse Postorderbond was incorrect, since the passing on of the interbank commission was left to the relevant banks to decide individually. The Commission also took the *prima facie* view that it was not plausible that the Dutch banks had agreed, or had come to a concerted practice amongst themselves, to pass on the interbank commissions in all cases to the payees. The Commission also held that there was no question of serious and irreparable damage being done, since the

members of the Nederlandse Postorderbond could pass on the charges made by the banks in whole or in part to their customers or, through proceedings before a national court, could claim them back if it was established that they were unlawful. No appeal was lodged against this decision.

Statement of objections of 14 June 1993

- (29) On 14 June 1993 the Commission sent the NVB a statement of objections in which it argued that the multilaterally fixed interbank commission in the GSA agreement constituted an infringement of Article 81(1) of the Treaty and that the conditions for exemption under Article 81(3) were not satisfied. The Commission withdrew this statement of objections on 20 June 1997.

Observations by interested third parties

- (30) In a notice, which was published on 9 September 1997, pursuant to Article 19(3) of Regulation No 17, the Commission stated that it intended to take a favourable view of the agreement notified. The Commission referred in particular in this context to the decision of the banks formally to inform business users of the default nature and the amount of the interbank fee as well as any changes to it. Moreover, the Commission referred to the decision of the banks, at the Commission's request, to review the amount of the interbank fee periodically in light of a report by an independent expert as to the cost price using the most efficient processing method.

Following this published notice the Commission has received (joint) observations from the Nederlandse Postorderbond, the ANWB, the Centraal Bureau Fondsen Werving, the Verenigde Nederlandse Uitgeversbedrijven, the Nederlandse Organisatie van Tijdschriften Uitgevers and the Nederlandse Christelijke Radio Vereniging (all complainants in this case, see recital 3, and henceforth referred to as 'the complainants')⁽²¹⁾. These observations were endorsed by the OverlegOrgaan Nutsvoorzieningen and the Gebruikersplatform Betalingsverkeer.

- (31) The complainants' observations can be summarised as follows. First, they take the view that, in principle, the interbank commission in the GSA agreement is inconsistent with Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers⁽²²⁾, which assumes that the originator bears the costs associated with a transfer unless he has agreed otherwise with his bank. The complainants also take the view that there were no legitimate grounds for introducing the interbank commission, and that, in particular, the merger of the two payment circuits operating in the Netherlands did not constitute legitimate grounds for doing so. They also deny that the payee bank benefits from services carried out by the drawee bank. In their view, the costs associated with the processing of the payment order up to the point where payment can be made should properly be borne by the drawee bank. The complainants argue that an inverse cost incentive is created because the costs that should be borne by the originator are transferred to the payee.

⁽²¹⁾ Letter of 14 October 1997 (file 33.793, p. 794).

⁽²²⁾ OJ L 43, 14.2.1997, p. 25.

II. LEGAL ASSESSMENT

Relevant market

Relevant product market

- (32) The acceptance giro system is subject to competition from other payment systems only to a very limited extent. Since the acceptance giro is designed for situations in which the creditor and drawee are not in direct contact with each other ('distance payments'), over-the-counter payments, such as notes and coins and payment cards such as the 'PINpas' national debit card and the 'chipknip' and 'chipper' national electronic purses do not provide a real alternative to the acceptance giro system. Payment instruments which in principle are suitable for distance payments are: transfer payments (simple bank credit transfer orders); cheques; electronic banking; and direct debit. However, with the exception up to a point of direct debit, none of those payment instruments can be regarded as a real alternative to the acceptance giro for the following reasons.
- (33) Transfers and cheques, in which paper orders are used, do not provide a real alternative because the associated processing costs are relatively high. It is relatively costly to convert written information into electronic data for the purposes of processing the transaction by computer. In addition, compared with acceptance giros, these two payment instruments entail significant administrative disadvantages for payees. Electronic banking is not a real option either, given that the number of private customers with the necessary equipment (PC with modem) is still relatively small.
- (34) Only the direct debit system provides any sort of viable alternative to the acceptance giro system. Like the acceptance giro, the direct debit system is ideally suited to payments that have to be made on a regular basis. Under this system, the customer authorises the payee to debit his account direct, without a prior order, for certain payments. If necessary, the customer can subsequently cancel such debit payments.
- (35) However, there are differences between the acceptance giro and the direct debit system. In general, retail banks offer both acceptance giros and direct debit. From the banks' viewpoint, however, it is considerably cheaper to process direct debit orders than acceptance giro transfers because the relevant payment data have been supplied

electronically by the payees and therefore do not have to be converted into electronic form. Direct debit transactions are effected on a fully electronic basis and no forms are involved. This explains why banks can offer direct debit more cheaply to payees than acceptance giros.

- (36) Each of the two payment instruments has other characteristics which may lead drawees to prefer to pay by acceptance giro or by direct debit. The following considerations may play a part in this. First, with the acceptance giro system, the customer must sign an acceptance giro form and send it to his bank prior to each payment. The customer may also opt to go in person with the acceptance giro form to his bank and pay the amount owed, subject to extra costs, in cash (for example, if the current account balance is insufficient). The customer thus retains more control over the time and manner of payment than in the case of direct debit, in which control is exercised purely *a posteriori*. Some customers will for that reason prefer the acceptance giro system to direct debit. An advantage of direct debiting for customers (and payees) is that payment is always made on time, thus avoiding penalties for late payment, and the customers do not have to take any action themselves.
- (37) The drawee's choice of payment system may also depend on the relationship between the customer and the company in question. In practice, customers tend to be willing to use the direct debit system where they have a longstanding relationship with the company and have a high degree of confidence in it, as in the case of the utilities. In other cases in which the relationship is more short term, as with magazine subscriptions, direct debit is far less widely used. In some situations, as in the case of monthly mortgage payments and payment of premiums to certain insurance companies, the customer does not have the choice and direct debit is mandatory.
- (38) In view of the different characteristics referred to above, direct debit cannot be regarded as a substitute for acceptance giros. However, in addition to these different characteristics, price is also a factor that needs to be taken into account⁽²³⁾. Differences in the charges made by the banks and/or payees to their customers (drawees) for the use of the two payment systems may also be a factor influencing the customer's choice between the acceptance giro system and the direct debit system. Shortly after the GSA agreement entered into force in July 1991, the banks proceeded to charge their customers (payees) for using acceptance giros. Some payees, such as many mail order companies and newspaper and magazine publishers, pass on the charges in full or in part by differentiating their prices according to whether their customers use acceptance giros or direct debit. One way of doing this is to offer a reduction to customers paying by direct debit. If it is cheaper for them to pay by direct debit than by

⁽²³⁾ Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).

acceptance giro, it may be assumed that a number of customers (drawees) will overcome their objections to the direct debit system. However, no statistics are available to illustrate this, partly because not all payees levy identifiable charges for the use of acceptance giros and because, even where they do so, these charges are mostly modest.

(39) However, it is known that the use of acceptance giros has gradually tailed off since 1992. The number of acceptance giro orders (including fund-raising acceptance orders) processed by Interpay/BGC in 1991 was approximately 237 million (with a total value of NLG 101 billion), whereas by 1998 it was about 217 million (a decline of approximately 7,6 % in four years). Over the same period the use of direct debit increased substantially. In 1991 the number of direct debit orders was approximately 227 million (with a total value of about NLG 224 billion) in 1991: by 1998 it was in the region of 534 million (an increase of approximately 135 %) ⁽²⁴⁾. The increased use of direct debit can be attributed to information campaigns conducted by banks and payees with the slogan *Betaal op maat* (made-to-measure payments) designed to promote the use of cheaper payment instruments. According to Interpay, the increase in the use of direct debit has taken place at the expense of acceptance giros, particularly in the case of private drawees, and at the expense of manual transfers ⁽²⁵⁾.

(40) In conclusion, notwithstanding the different characteristics of the acceptance giro and direct debit systems, it can be accepted that, in the event of the cost of acceptance giros increasing in relation to that of direct debit, a certain proportion of drawees will change to direct debit. The gradual decline in the number of acceptance giro transactions since 1992, shortly after acceptance giro charges were first introduced for payees (with the consequent possibility of those charges being passed on to drawees) would tend to confirm this scenario. Also relevant is the fact that the *Betaal op maat* promotional campaign conducted by banks and payees, apparently with a degree of success, led to a downturn in the number of acceptance giros and an increase in direct debit. Accordingly, direct debit should be regarded as a limited substitute for acceptance giros. **Acceptance giros and direct debit** can therefore be regarded as forming the relevant product market.

Relevant geographic market

(41) Given that the acceptance giro is a domestic payment system, i.e. designed for payments between drawees and payees with an account with a Netherlands-based bank which participates in the acceptance giro system, the relevant geographic market is the **Netherlands market**.

Article 81(1)

Agreement between undertakings

(42) The banks which have signed the GSA agreement or an accession declaration are undertakings within the meaning of Article 81(1). Accordingly, the GSA agreement is an agreement between undertakings within the meaning of Article 81(1).

Restriction of competition

Relationships within the four party agreement

(43) As in most payment systems, there are in principle four parties involved in the acceptance giro system: the drawee (the originator), the creditor (the beneficiary/payee), the drawee bank and the payee bank ⁽²⁶⁾. Each party is in direct contact with two other parties. For example, the payee bank has a direct relationship with the drawee bank, which is laid down in the GSA agreement, and, a direct relationship with the payee, which is laid down in the acceptance giro contract. The various relationships within the four-party payment system should be considered on an overall basis. Price agreements in one of these relationships can have a knock-on effect on the other relationships and thus have consequences for the use of the payment system itself.

(44) The notified agreement on the charging of processing costs for acceptance giros directly concerns the relationship between the payee and drawee banks (the interbank relationship). However, the interbank price agreement can also have repercussions on the relationship between the payee bank and the payee, and on that between the payee and the drawee, and hence on the operation of the acceptance giro system itself. The payee bank may decide to pass on the costs of the interbank commission by increasing the commission it charges to the payee. In turn, the payee may decide to pass on these extra costs to the customer who uses the acceptance giro. In that case customers may decide to switch to another payment system offered by their bank or by one of its competitors.

(45) This potential chain of actions and reactions is a characteristic of payment systems such as the acceptance giro system which should be taken into account when investigating the existence of restrictions on competition: a price restriction in one of the four relationships in a payment system, such as a multilateral interbank commission, cannot be adequately assessed merely by examining the effects on that relationship. It is also necessary to examine the effects on all the relationships and on the payment system as a whole.

⁽²⁴⁾ BGC 1993 annual report, Interpay 1996 annual report, letter from Interpay dated 18 February 1999.

⁽²⁵⁾ Interpay 1996 annual report, pp. 30-31.

⁽²⁶⁾ The drawee bank and payee bank may be one and the same, in which case the transaction is an intrabank transaction.

Multilateral interbank commission

(46) Technically speaking, a uniform acceptance giro system, i.e. a payment system which payees and drawees can use irrespective of the bank with which they have an account, can exist only on a specific multilateral basis. Accordingly, joint agreements on technical specifications and procedural aspects of transaction processing are necessary in order to ensure that the system functions properly. In practice, it is also necessary for the banks involved in the transaction to reach an agreement on the levying of charges: whether to charge or not, and, in the affirmative, how much. In view of the particular characteristics of a payment system such as the acceptance giro system, it goes without saying that such negotiations have to be conducted in advance before the payment system is actually used by the banks to process their customers' payment transactions. The nature of a payment system means that, as from the time at which the payment transaction is launched, the drawees and payees need to be certain that it will be implemented immediately by the banks concerned. Since the choice of banks implementing the transaction is determined by their respective account holders using the acceptance giro product, the banks are from that time obliged to cooperate with each other as partners. Price negotiations can therefore be effective only in so far as they take place beforehand. If the banks decide to introduce an interbank commission, agreement on the amount can in principle be reached either bilaterally or multilaterally.

(47) In the present case the banks have decided to impose a uniform multilateral charge; this charge has been a maximum since 1992. It is also possible that a number of banks might take the lead by agreeing bilateral charges, and that other banks might then seek to associate themselves with one of those banks, with the result that the bilateral charges also applied to them⁽²⁷⁾. The banks might also agree multilaterally on a formula for calculating interbank commission with varying parameters between banks⁽²⁸⁾.

(48) The Commission takes the view that an agreement on a bilateral interbank charge will normally fall outside the scope of Article 81(1). By contrast, an agreement on a multilateral interbank charge is a restriction of competition caught by Article 81(1) in so far as it significantly limits the freedom of banks to determine

their own charging policy⁽²⁹⁾. It follows that the multilaterally established interbank commission referred to in Article 5 of the GSA agreement results in competition being restricted within the meaning of Article 81(1) because it limits the freedom of the banks participating in the agreement to determine, on a bilateral basis, the amount of commission charged for processing acceptance giro forms⁽³⁰⁾.

(49) Practice shows that bilateral negotiations on interbank commission for the electronic processing of acceptance giros are technically possible. Before the GSA agreement entered into force, bilateral agreements had been concluded between some major banks on payment of these costs.

(50) Since the fixed tariff was changed to a maximum tariff on 26 March 1992, the banks participating in the GSA agreement have had the option of agreeing, on a bilateral basis, a (lower) interbank commission for processing acceptance giro forms. To date, however, none of the participating banks has taken up this option. In other words, the change in the interbank commission from a fixed charge to a maximum charge has not had any practical impact.

(51) In its notice on cross-border credit transfers the Commission states that a restriction of competition of the kind represented by the uniform interbank commission will probably also have a negative impact on the banks' behaviour vis-à-vis their customers. In the acceptance giro system, the interbank commission has a restrictive effect on the relationship between the (payee) banks and their customers in so far as it has been established that the payee banks systematically pass on the interbank commission for which they are liable to their customers (the payees). The tariffs charged to payees by the various banks for processing acceptance giro forms are not uniform, but they are structurally increased in fairly uniform fashion by virtue of the fact that the interbank commission is passed on. Thus the interbank charge operates de facto as a minimum level for customer charges.

(52) It emerges from the replies received to a request for information dated 23 December 1993 sent to the three largest banks that none of the three banks made a direct charge to its business customers for using acceptance giros, and that subsequently a charge of NLG 0,45 (notification without attachments) was introduced by ABN AMRO with effect from 1 July 1991 (the date on which the 1991 GSA agreement came into effect), by Rabobank with effect from 1 September 1991 (in this instance the charge of NLG 0,45 was a minimum, the charge depending on quantity, type and information to be provided), and by the former NMB Postbank Groep with effect from 1 January 1992⁽³¹⁾. NMB Postbank

⁽²⁷⁾ As was the case prior to the entry into force of the 1991 GSA agreement.

⁽²⁸⁾ As was the case in the Netherlands for ATMs until 1998.

⁽²⁹⁾ Commission notice on the application of the EC competition rules to cross-border credit transfers (OJ C 251, 27.9.1995, p. 3) point 40.

⁽³⁰⁾ See Nederlandse Vereniging van Banken, Commission Decision 89/512/EEC (OJ L 253, 30.8.1989, p. 1) paragraph 56. The NVB's challenge to this Decision was held inadmissible by the Court of First Instance on 17 September 1992 (Case C-138/89 [1992] ECR II-2181).

⁽³¹⁾ The replies of various banks to the request for information of 5 August 1997 and 18 January 1999 showed that, in 1997 to 1999, virtually all these banks continued to charge a standard charge of NLG 0,45 (notification without attachments), although in practice some deviation from the standard charge was possible.

explicitly stated that business clients would be charged half of the costs of processing acceptance giros electronically, i.e. the amount of the interbank commission ⁽³²⁾. Documents in the file show that Rabobank and ABN AMRO and other participants in the GSA agreement also passed on the interbank commission in full ⁽³³⁾.

- (53) There is nothing to show that the banks have concluded agreements calling for the systematic passing on of the interbank commission. The GSA agreement explicitly allows them to decide autonomously whether to pass this commission on or not. However, in so far as banks do decide on an individual basis to pass on the tariff in question, this is a direct result of the existence of the GSA agreement, since it provides the crediting bank with an economic cost item which did not previously exist. Without an interbank tariff there is nothing to pass on. To that extent the agreed interbank commission has a restrictive effect on the relationship between the crediting bank and the payee.

- (54) The restrictive effect of the multilateral interbank commission on the relationship between the payee bank and the customer is amplified by the fact that each of the participating banks in intrabank acceptance giro transactions has applied the same charge to their customers (payees) as for interbank acceptance giro transactions, even though the GSA agreement applies only to interbank transactions. This makes it impossible for business payees to avoid paying charges for using acceptance giro forms. In the event of no charges being made or of a low charge for intrabank acceptance giro transfers, they would have had the option of opening an account with several banks in order to reinforce the intrabank character of their payment flows and thus to avoid the (higher) charges for interbank acceptance giro transfers.

- (55) The restriction of competition is appreciable in so far as all the banks which participate in the acceptance giro system in the Netherlands are bound by the GSA agreement. The agreement covers the whole of the market. Sufficiently strong competition between systems can limit the consequences of an interbank tariff for customer charges, at least in so far as no comparable interbank tariffs exist in the other systems ⁽³⁴⁾. However,

the sole alternative to the acceptance giro system, namely the limited alternative of direct debit, also charges interbank commission.

- (56) Accordingly, the GSA agreement is an agreement that has as its object and effect the prevention, restriction or distortion of competition through the direct or indirect fixing of purchase and selling prices within the meaning of Article 81(1)(a).

In the notice pursuant to Article 19(3) of Regulation No 17, the Commission stated that it intended to take a favourable view of the GSA agreement. In light of the judgment of the Court of Justice of 21 January 1999 in Joined Cases C-215/96 and C-216/96 *Bagnasco v Banca Popolare di Novara* ⁽³⁵⁾, the Commission has come to the conclusion that the GSA agreement does not fall within the scope of Article 81(1), since the requirement of an appreciable effect on trade between Member States is not fulfilled. The reasons are as follows.

Effect on trade between Member States

General

- (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 ⁽³⁶⁾. The effect on trade between Member States is normally the result of a combination of several factors which, taken separately, are not necessarily decisive ⁽³⁷⁾.
- (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 ⁽³⁸⁾.
- (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.

⁽³²⁾ Enclosure 8 to the reply of the NMB Postbank Groep of 29 January 1992. See also the letter from ING Bank to a business customer dated 21 January 1993.

⁽³³⁾ See letters to business customers of ABN AMRO dated 18 October 1991 and 24 October 1991, the letter from ABN Bank Nederland dated 4 July 1991, the letter from Rabobank Heerlen dated 31 March 1992, the letter from Hollandse Koopmansbank dated 6 February 1992, the letter from Bank Mendes Gans NV dated 18 December 1991 and the letter from Commerzbank Nederland NV dated 13 November 1993.

⁽³⁴⁾ See in this connection paragraphs 41 and 42 of the notice on cross-border credit transfers (footnote 29).

⁽³⁵⁾ Not yet published in the ECR.

⁽³⁶⁾ See *inter alia* Case 42/84 *Remia v Commission* [1985] ECR 2545.

⁽³⁷⁾ See *inter alia* Case 250/92 *Gottrup-Klim v Dansk Landbrugs Grovareselskab* [1994] ECR I-5641, paragraph 54.

⁽³⁸⁾ See *inter alia* Case 219/95 *Ferriere Nord v Commission* [1997] ECR I-4411, paragraph 19.

The GSA agreement extends over the whole of the 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. All banks wishing to offer the acceptance giro in the Netherlands will be obliged in practice to sign up to the GSA agreement. Since payees and drawees do not necessarily have an account with the same bank, banks will have to be certain that the acceptance giro form used by their customer will also be accepted by the bank of their customer's counterparty.
- (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⁽³⁹⁾. 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⁽⁴⁰⁾.

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)⁽⁴¹⁾. As regards demand for acceptance giros (i.e. 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⁽⁴²⁾ and subsidiaries⁽⁴³⁾ of non-Netherlands banks have participated in the acceptance giro system to a significant extent. 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 (ABN AMRO, Rabo, ING Bank and Postbank). 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⁽⁴⁴⁾.

Importance of participation in the 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)⁽⁴⁵⁾. 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 (see 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,

⁽³⁹⁾ See *inter alia* judgment of the Court of Justice in Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, paragraph 29, judgment of the Court of First Instance in Case T-29/92 *SPO v Commission* [1995] ECR II-289, paragraph 229.

⁽⁴⁰⁾ See footnote 34.

⁽⁴¹⁾ See ABI, Commission Decision 87/103/EEC (OJ L 43, 13.2.1987, p. 51) recited 37.

⁽⁴²⁾ As a result of the strong financial ties between foreign parent companies and their branches in the Netherlands, branches must be 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 judgment of the Court of Justice in Case 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 458.

⁽⁴³⁾ 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 % (see DNB 1991 annual report and DNB's reply to the request for information dated 5 August 1997). The NVB itself also uses this definition (see NVB 1998 annual report, p. 54). The *Bagnasco* judgment (see footnote 35) 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.

⁽⁴⁴⁾ Letters from the NVB dated 25 March 1997 and 8 March 1999.

⁽⁴⁵⁾ These were general banks, cooperative banks, savings banks and mortgage banks (Annex VI to the letter from the NVB dated 18 July 1997).

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts in its possession, there are no grounds under Article 81(1) of the Treaty for action on the part of the Commission in respect of the 1991 GSA agreement notified by the Nederlandse Vereniging van Banken (NVB).

Article 2

This Decision is addressed to:

De Nederlandse Vereniging van Banken
Singel 236
NL-1016 AB Amsterdam

Done at Brussels, 8 September 1999.

For the Commission

Karel VAN MIERT

Member of the Commission

ANNEX I

Overview of banks participating in the GSA agreement

(at 31.12.1997)

- | | |
|---|--|
| 1. ABN AMRO Bank NV | 30. FGH Bank NV |
| 2. Aegon Bank NV | 31. Fortis Bank Nederland NV |
| 3. Asahi Bank (Nederland) NV | 32. Frieslandbank NV |
| 4. ASR Bank NV | 33. Fuji Bank Nederland NV |
| 5. AVCB Bank NV | 34. Generale Bank Nederland NV |
| 6. Banco di Brasil SA | 35. GWK Bank NV |
| 7. Banco do Estado de São Paulo SA | 36. Hollandse Koopmansbank NV |
| 8. Banco Exterior de España SA | 37. ING Bank NV |
| 9. Bank Bercoop NV | 38. Kas-Associatie NV |
| 10. Bank Brussel Lambert NV | 39. KBC Bank Nederland NV |
| 11. Bank Insinger de Beaufort NV | 40. Koçbank Nederland NV |
| 12. Bank Labouchere NV | 41. Korea Exchange Bank |
| 13. Bank Mendes Gans NV | 42. Lloyds Bank PLC |
| 14. NV Bank Nederlandse Gemeenten | 43. MeesPierson NV |
| 15. Bank of America NT & SA | 44. National Bank of Greece |
| 16. Bank of Tokyo-Mitsubishi (Holland) NV | 45. Nederlandse Waterschapsbank NV |
| 17. Banque Artesia Nederland NV | 46. OHRA Bank NV |
| 18. Barclays Bank PLC | 47. OV-Bank NV |
| 19. Chang Hwa Commercial Bank (Europe) NV | 48. Postbank NV |
| 20. Citibank NA | 49. Rabobank Nederland |
| 21. Commerzbank Nederland NV | 50. Roparco NV |
| 22. Crediet & Effectenbank NV | 51. San Paolo Bank |
| 23. Dai-Ichi Kangyo Bank Nederland NV | 52. SBS-Agro Bank Nederland NV |
| 24. NV De Indonesische Overzeese Bank | 53. SNS Bank Nederland NV |
| 25. De Nederlandsche Bank | 54. Staal Bankiers NV |
| 26. Delta Lloyd Bank NV | 55. Theodoor Gilissen Bankiers NV |
| 27. Demir-Halk Nederland NV | 56. Tokai Bank Nederland NV |
| 28. Deutsche Bank AG | 57. Triodosbank NV |
| 29. F. van Lanschot Bankiers NV | 58. United Garanti Bank International NV |
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ANNEX II

Joint payment and acceptance giro procedure

