COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2 June 2004
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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)
(Only the German text is authentic)

COMMISSION DECISION RELATING TO A PROCEEDING UNDER ARTICLE 82 OF THE EC TREATY

(CASE COMP/38.096 –CLEARSTREAM)

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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, First Regulation implementing Articles 85 and 86 of the Treaty[1] ,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, and in particular: Article 7(1) and Article 23(2) thereof[2] ,

Having regard to the Commission decision of 27 March 2003 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission in accordance with Article 19(1) of Regulation No 17 and with Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty,[3]

Having regard to the final report of the Hearing Officer in this case,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions[4],

Whereas:

1. THE PARTIES CONCERNED BY THE DECISION

1.1. Clearstream International SA and Clearstream Banking AG

(1) Clearstream International SA ('CI') is a holding company based in Luxembourg. It holds Clearstream Banking AG ('CBF') established in

1 OJ 13, 21.2.1962, p.204. Regulation as last amended by Regulation (EC) No 1216/99 (OJ L148, 15.6.1999,p.5)

2 OJ L1, 4.1.2003,p.1. Regulation as last amended by Regulamin (EC) N° 411/2004 (OJ L68, 06.03.2004, p. 1)

3 OJ L354, 30.12.1998, p.18.

4 Meeting of the Advisory Committee of 30 April 2004.

Frankfurt, Germany and Clearstream Banking Luxembourg SA ('CBL') established in Luxembourg.

(2) 'CBF'is a "Central Securities Depository" ('CSD', see paragraph (18) below) in Germany. According to the European Central Bank report on "Payment and securities settlement systems in the European Union" of June 2001[5], *"Clearstream Banking AG Frankfurt is Germany's Wertpapiersammelbank (known informally as the CSD)."*

(3) At present, CBF is the only bank which has the status of a *Wertpapiersammelbank*[6], that is, a bank that can keep securities (equities and bonds) in collective safe custody (see further below, section 3.2).

(4) CBF's legal predecessor was Deutsche Börse Clearing AG ('DBC'), which was 100% owned by Deutsche Börse[7]. On 1 July 1999, Deutsche Börse and Cedel International created Clearstream International SA, of which each partner held 50%. On 1 July 2002, the Deutsche Börse group acquired the 50% of CI held by Cedel International and gained full control of CI (and therefore of CBF and CBL). Deutsche Börse is a private company whose shares are listed on the Frankfurt Stock Exchange. CBL is, together with Euroclear Bank SA, one of only two International Central Securities Depositories ('ICSDs', see paragraph (19) below) operating in the EU at present. The Frankfurt stock exchange is fully owned by the Deutsche Boerse Group, owner of Clearstream International.

(5) The Clearstream group ('Clearstream') provides clearing, settlement and custody services for securities. The value of securities CBF and CBL hold in custody amounted to €6.9 trillion in 2002[8].

1.2. Euroclear Bank SA

(6) Euroclear Bank SA ('EB') is an International Central Securities Depository ('ICSD', see paragraph (19) below), established in Brussels, Belgium.

(7) Euroclear was set up in 1968 by a group of banks and securities houses under the patronage of Morgan Guarantee Trust Company of New York. The Euroclear clearing and settlement system, owned by Euroclear Clearance System plc., was licensed to Euroclear Clearance System Société Coopérative in 1987. It was operated under contract by Morgan Guarantee. In 2000, the link with Morgan was terminated and Euroclear Clearance System plc. was converted into Euroclear Bank SA/NV ('EB'), a limited liability company established in Belgium under Belgian law with a limited banking licence. EB has merged with Sicovam, the French CSD in January 2001 (now Euroclear France), the Dutch CSD AEX-Necigef in February 2002 (now Euroclear Netherlands), and the British CSD Crest in July 2002. It is also in the process of integrating BXS-CIK, the Belgian CSD.

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5 Section 4.3.2, "Germany's central securities depository" of the section on Germany of the report which has come to be known as the "Blue Book".

6 CI reply of 16 November 2001, question 3.

7 In turn, the Deutsche Kassenverein was DBC's legal predecessor.

8 Deutsche Börse Group Annual Report (2002).

(8) The value of the securities held in custody by EB was € 10.6 trillion in 2002[9].

(9) In the present decision, the term EB is also used to refer to the Euroclear Operations Centre (EOC) which is the unit of EB dedicated to operational activities, such as clearing and settlement services.

2. THE PROCEDURE

(10) On 22 March 2001, the Commission launched an ex-officio investigation into clearing and settlement services by sending a first round of requests for information to a number of clearing and settlement agencies, trading platforms and banks. The replies to that first request prompted the Commission to send additional requests for information and focus progressively its investigation on CI's and CBF's possible abusive behaviour vis-à-vis EB.

(11) A Statement of Objections was sent to CI and CBF on 28 March 2003. CI and CBF had access to the Commission's file on 14 April 2003 and additional access to the file was provided on 3 November 2003.

(12) The parties responded to the Statements of Objections by letter of 30 May 2003 from their legal representative.

(13) An oral hearing was held on 24 July 2003.

(14) As a third interested party in the proceedings, EB explained its views on market definition on the occasion of the oral hearing and in reply to a request for information from the Commission.[10]

(15) By letter of 17 November 2003, the Commission services called CI/CBF's attention on how the Commission intended to use certain elements inserted into the Commission file after the access to file on 14 April 2003, as well as the cost information provided by CI/CBF after the oral hearing, and gave CI/CBF the opportunity to comment. CI/CBF replied to the 17 November 2003 letter by letter of 1 December 2003.

3. BACKGROUND ON THE CLEARING AND SETTLEMENT OF SECURITIES TRANSACTIONS

3.1. Clearing and Settlement of securities transactions

(16) The processes involved in the buying and selling of securities differ from those of cash because there is a need for monitoring the ownership of a security. Such monitoring is necessary to ensure a clear legal situation concerning transfer of ownership in the case of a buy/sale as well as the on-going service of the instrument, such as payment of dividend.

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9 EB Annual Report (2002).

10 Commission request for information of 29 July 2003 and EB reply of 28 October 2003.

(17) Consequently, once a security has been traded, a number of additional steps have to be completed. Relevant trades include stock exchange trades as well as 'over the counter' (OTC) trades. Although the Commission notes that there is no completely uniform usage of terms throughout the industry, the characteristics of each of these services are as follows:

- Clearing is the process that occurs between trading and settlement. For each trade it ensures that the seller and buyer have agreed on an identical transaction and that the seller is selling securities which it is entitled to sell, prior to the establishment of final positions for settlement.

- Settlement ["Abrechnung"] 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. In their Reply to the Commission's Statement of Objections, CI/CBF in describing the post-trading steps relating to securities refer often to the "processing" ["Abwicklung"] of securities trades or transactions. CI/CBF apparently use the term "processing" interchangeably for "clearing and settlement"[11]. However the Commission uses the term clearing and settlement to refer to the steps that occur post-trading to complete a securities transaction. It consists of the processing and registration of the transfer of securities, as well as the relevant annotations in its customers' securities accounts and reporting on transactions.

- In addition to the steps necessary to complete a particular securities transaction, securities need to be physically or electronically deposited with an entity and kept there. For the purpose of this decision, the terms "safekeeping" and "custody" are used interchangeably, in the sense of the actual physical or electronic holding of the securities, as is the phrase keeping/ holding "in final custody" ["Endverwahrung"], used by CI/CBF in their Reply to the Commission's Statement of Objections. This depositing with the entity that holds a security in physical or electronic form is also referred to as the "primary deposit". Entities that do not hold securities in final custody are described as performing services in relation to securities as "intermediaries". In this sense, CI/CBF also distinguish between "final custody" and "intermediary custody" ["Zwischenverwahrung"], which is done through book-entry by custodians that do not keep securities directly. At the oral hearing of 24 July 2003 CI/CBF also referred to this as "virtual" custody.

- Final safekeeping/custody differ from securities clearing and settlement services, since the need for the latter only arises where there is a securities transaction, whereas every owner of securities needs to have them physically or electronically kept in safe custody and managed or administered even in the absence of transactions (for example, in

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11 See CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.I.2.

relation to the processing of corporate actions, income collection or proxy voting). In examining CI/CBF's behaviour in this decision, the Commission is concerned with the clearing and settlement services provided in relation to securities transactions, and not with the custody services.

3.1.1. Providers of clearing and settlement services

3.1.1.1. CSDs

(18) Generally, a Central Securities Depository (CSD) is an entity which holds and administers securities and enables securities transactions - such as the transfer of securities between two parties - to be processed through book entry. In its home country, it provides clearing and settlement services for trades of those securities that have been deposited with it (which it holds in final custody). It can also offer services as an intermediary in *cross-border* clearing and settlement, where the primary deposit of securities is in another country. A cross-border transaction takes place when an intermediary acts on behalf of or vis-à-vis non-German parties. By definition, as the non-German CSD or ICSD is not a domestic party, the transaction will therefore always be cross-border. The European Central Securities Depositories Association (ECSDA) agreed in 1998 that each of the 15 members[12] would supply each other CSD which requested it, a single point of entry to its CSD. The aim of this was to contribute to the improvement of efficient and secure cross-border securities settlement. In the case of CBF, seven CSDs (see list in paragraph (126)) had access to its primary clearing and settlement services (as defined in section 3.3. below). Two of these [redacted] also have access to CASCADE RS (see paragraph (46) below).

3.1.1.2. International Central Securities Depositories (ICSDs)

(19) An International Central Securities Depository (ICSD) is an organisation whose core business is clearing and settling securities in an international (non-domestic) environment [13]. As already explained, there are at present only two ICSDs in the EU: Euroclear Bank (EB), and Clearstream Banking Luxembourg (CBL). For the two ISCDs, clearing and settling of purely domestic transactions (transactions between Belgian counterparties in the case of EB and between Luxembourg counterparties in the case of CBL) is a non-significant part of their business. While traditionally focused in Eurobonds[14],

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12 Members are the CSDs of the 15 EU Member States, except Luxembourg, plus Switzerland and Norway. Source: www.ecsda.com

13 The Group of Thirty (a private, non-profit international body comprised of governors of central banks and CEOs of private banks as well as very high ranking academics which meets to discuss and publish reports on important international economic and financial issues) defines an ICSD as "A central securities depository that clears and settles international securities or cross-border transactions in domestic securities, usually through local agents or direct links to local CSDs. The distinction between ICSDs and local CSDs is blurring as ICSDs merge with local CSDs... and local CSDs offer cross-border settlement" ("Global Clearing and Settlement: A Plan of Action", 2003)

14 The term Eurobonds is often used to refer to bonds underwritten by an international syndicate, issued under a different set of laws than the relevant domestic law (i.e., a law other than the law of the State that issues the bonds in the case of Government bonds or other than the law of

ICSDs have expanded into providing other services such as intermediary services for equities.

3.1.1.3. Banks

(20) As intermediaries, banks provide services for securities trades to their customers. Throughout the EU most securities trades by banks are domestic. Consequently clearing and settlement is mainly domestic with only a fraction being cross-border[15].

3.2. Collective safe custody and the post-trading processing of securities transactions in Germany - The legal context and the position of CBF

(21) In Germany, the *Depotgesetz*[16] (Securities Deposit Act) provides for two types of final custody of securities: collective safe custody and individual safekeeping.

(22) In collective safe custody, fungible and technically suitable securities of the same type deposited by several depositing parties and/or several owners are kept in a single collective holding. The customer acquires fractional co-ownership in the CSD's collective holdings in securities of the same type (§ 6(1) of the *Depotgesetz*). The CSD's collective holdings constitute the basis for the settlement of transactions by book entry, without physical movement of the securities.

(23) As a rule, in Germany, securities are kept in *"Girosammelverwahrung"* (collective safe custody). This type of safekeeping is regarded by market participants as the most efficient basis for safekeeping, administration and settlement of traded securities, because it is just as secure as individual safekeeping on a segregated basis, but much more cost-effective and simpler in terms of settlement[17]. According to the the European Central Bank report on Payment and Securities Settlement Systems in the European Union of June 2001, only collective custody of immobilised or dematerialised securities is of significance in Germany today[18]. According to the Clearstream group, the vast majority of securities are kept in collective safe custody: *"All German fungible*

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the country where the issuing company is domiciled in the case of corporate bonds) and offered simultaneously to investors in various countries.

15 This fact is widely acknowledged. For example, the foreword to the Giovannini's Group Second Report of April 2003 on EU Clearing and Settlement Arrangements states: "*Clearing and settlement are at the core of any financial system; inefficiencies in these processes have serious consequences. When clearing and settlement are too costly or complex, financial transactions are discouraged.* ***In the context of the EU, the result is that national markets have remained isolated*** *[*emphasis added*]... The analysis in the Group's first report provided ample evidence of inefficiencies in EU clearing and settlement arrangements and identified 15 barriers as the source of those inefficiencies. The main conclusion of the first report was that the EU financial market cannot be considered to be an integrated entity, but remains a juxtaposition of domestic markets. A financial market so fragmented not only does not perform its functions effectively, but also fails to attract investments from overseas."*

16 Gesetz ueber die Verwahrung und Anschaffung von Wertpapieren vom 4.2.1937, in der Fassung vom 11.1.1995 (BGBl 1995 I 34).

17 CI's reply of 16 November 2001, question 3.

18 European Central Bank report on Payment Securities Settlement systems in the EU, June 2001, page 151.

securities -representing more than 90% of existing German securities - are deposited in the vaults of CBF, allowing prompt and secure book-entry settlement"[19]. CI also states that *"market participants prefer to safekeep their holdings in collective safe custody"*[20]. This was confirmed in CI/CBF's Reply to the Commission's Statement of Objections, according to which: *"... the statement that, in practice, collective safe custody is the most widely used form of custody in Germany, is correct"*[21].

(24) According to Art. 5 of the *Depotgesetz*, all securities held in collective safe custody in Germany have to be held in a recognised *Wertpapiersammelbank* (CSD). This is a bank with a limited banking licence according to the *Kreditwesengesetz*[22] (German Banking Law) and appointed by the Federal State in whose territorial area the institution has its legal seat.

(25) At present, CBF is the only such recognised CSD in Germany[23]. It is the legal successor of all former *Wertpapiersammelbanken*, as its former name (*Deutsche Kassenverein*) indicates. CBF was formed through the union of eight regional depositories. According to Deutsche Börse, market participants realised that the settlement of securities transactions via eight different *Wertpapiersammelbanken* caused numerous practical difficulties, and that the creation of a large single pool was the best manner to facilitate transactions relating to the securities held in the pool: *"The big advantage of this merger* (of the 8 different Wertpapiersammelbanken*) was that a central infrastructure for settlement was made possible, providing direct or indirect connections to all participants."*[24]. Other entities can apply to become a *Wertpapiersammelbank*, or national CSD. However, as mentioned above, since its creation up to date CBF is the only such CSD in Germany.

(26) CI/CBF state in their Reply to the Commission's Statement of Objections: *"The only consideration of importance for the significance of CBF as CSD is the fact that securities, for economic reasons, are issued overwhelmingly as certificates for collective safe custody and that, because of the Depotgesetz, these can only be kept in final custody through an issuer CSD [Wertpapiersammelbank]".*[25]

(27) Securities safekept in individual safe custody may be safekept in a CSD or in another entity. Securities safekept in individual safe custody in a CSD may be traded, albeit less actively than in the case of securities kept in collective safe custody, given the much more complicated processes involved[26]. The owner

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19 Chapter on General information on Clearstream Banking Frankfurt of the June 2000 Domestic Links Guide published by Clearstream Banking Luxembourg.

20 CI's reply of 16 November 2001, question 4.

21 See CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, section B.I.2.a)bb).

22 Gesetz ueber das Kreditwesen vom 10. Juli 1961, BGBl I 1961, 881; neugefasst durch Bekanntmachung vom 9.9. 1998 I 2776; zuletzt geaendert durch Gesetz vom 31.10.2003 I 2146.

23 CI reply of 16 November 2001, page 6.

24 Letter of Deutsche Börse of 19 August 2002, reply to question 5.

25 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.I.2.a)bb).

26 See CI reply of 16 November 2001, question 3.

of securities which issues individual certificates and deposits them in an entity other than a CSD, normally does not issue those securities with a view to have them traded. In the absence of transactions regarding those securities, clearing and settlement will not occur either. CI/CBF state in their Reply to the Commission's Statement of Objections that this form of custody has to a large extent lost its significance[27].

Exchange rules contributed to reinforce CBF's position in relation to stock exchange transactions. For example, pursuant to paragraph 16(2) of the Frankfurt Exchange Rules (*Börsenordnung*), the condition of orderly settlement[28] set by the *Börsengesetz*[29] (Exchange Act) is fulfilled if the applicant for admission to trading on the Frankfurt Exchange[30] conducts the settlement of its exchange transactions through CBF (securities leg, i.e. the transfer of the securities) and a state central bank (cash leg, i.e. the payment of the cash). Similar provisions apply in other stock exchanges in Germany. In Germany shares are traded on 7 stock exchanges located in Berlin, (which merged with Bremen in 2003), Dusseldorf, Frankfurt, Hamburg, Hanover, Munich and Stuttgart. The Frankfurt stock exchange generates the highest turnover (around 85% of total). The Frankfurt stock exchange is fully owned by Deutsche Boerse Group, owner of Clearstream International.

(28) According to the explanation of the settlement procedures of CBF provided by the European Central Bank report on Payments and Securities Settlement Systems in the European Union of June 2001, *"[a]ll business transacted on [German] stock exchanges, whether on the floor or via the electronic trading system of Deutsche Börse AG, XETRA, is automatically forwarded for processing to Clearstream Banking AG Frankfurt via appropriate IT facilities...."*

3.3. The primary clearing and settlement performed by the issuer CSD (CBF) and the secondary clearing and settlement performed by financial intermediaries

(29) For the purposes of the present decision, and in particular the market definition (see further below, section 5.1), the Commission considers it useful to distinguish between "primary" and "secondary" clearing and settlement.

(30) Clearing and settlement within the entity with which securities have been deposited occurs whenever there is a change in the position of the securities accounts held with this entity. This is referred to in this decision as "primary" clearing and settlement. Primary clearing and settlement is therefore carried out by the same entity with which securities are kept in final custody. In

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27 See CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.I.2.a)bb).

28 The condition of orderly settlement means that for securities to be accepted for trading on the exchanges, provisions must be made for ensuring that orderly settlement of transactions will be concluded.

29 Boersengesetz (BoesenG) vom 21. Juni 2002, BGBl I 2002, 2010

30 For regulation and supervision purposes, the exchange has been incorporated as a public law body and is subject to state supervision (See Deutsche Börse's reply of 16 November 2001, question 6).

addition, for securities issued under German law and kept in collective safe custody, CI/CBF states that transfer of securities occurs through a transfer of a fraction of the collective ownership[31] which can only be performed by CBF: *"Only the CSD which is the final custodian of the securities can affect this transfer of title. Hence the mere possession for third parties is therefore not sufficient; the cooperation of a CSD as final custodian in the clearing and settlement by a subcustodian of instruments eligible for central custody goes beyond this"*[32].

(31) As explained above, CBF is currently the only authorised *Wertpapiersammelbank*, or CSD, for securities kept in collective safe custody in Germany. The vast majority of securities issued under German law are kept in collective safe custody (see above, section 3.2).[33] For the purpose of this decision, the recognised German *Wertpapiersammelbank* in this sense will be referred to as "issuer CSD", that is, the entity with which the primary deposit of the vast majority of securities issued under German law is made and which holds those securities in final custody[34].

(32) CBF as issuer CSD provides primary clearing and settlement of transactions for the securities which it safekeeps, whenever there is a change in the position of the securities accounts held with CBF. As described in par. 30, in the case of securities issued and held in collective safe custody under German law, the final custody of the issuer CSD provides the basis for the settlement of transactions by book entry without physical movement of the securities.

(33) "Secondary clearing and settlement" is performed by intermediaries -that is, market players other than the entity where securities are safekept- and takes place at a downstream level. The term "secondary" in the context of this decision refers to the fact that the activity is performed at a different level to the primary activity. It is not intended to imply, as suggested by CI/CBF in their reply to the Commission's Statement of Objections[35] and at the oral hearing of 24 July 2003, that there is repetition of a primary activity, nor that

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31 This is described as "the conveyance is made by transferring the joint title in undivided interests". CI's and CBF's Reply of 30 May 2003 to the Commission's Statement of Objections, section B.I.2.b.cc)

32 CI's and CBF's Reply of 30 May 2003 to the Commission's Statement of Objections, section B.I.2.b.cc)

33 Issues in non-German securities (i.e. securities not issued in accordance with German law) are in principle not deposited with a CSD, but kept by other institutions outside Germany (CI reply of 16 November, page 5). Conversely, according to CI/CBF, for securities issued under German law, in practice only final custodians in Germany will be chosen. Securities issued under the national law of another country will in practice not be kept in final custody in Germany, but with the relevant national CSD (CI's and CBF's Reply of 30 May 2003 to the Commission's Statement of Objections, section B.I.2.a)aa)(2).).

34 The term "issuer CSD" –which for the purposes of this decision is defined for the specific circumstances of Germany– is also used by ECSDA, the European Common Securities Depository Association. ECSDA defines Issuer-CSD as "CSD which holds a security with a registrar or in a vault", i.e. a CSD which holds a security electronically or physically (cf. ECSDA's Working Group 3 Report on cross-border settlement, Annex A (Glossary) (see www.ecsda.comwww.ecsda.com).

35 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.I.2.b).

for any one individual transaction both primary and secondary clearing and settlement must necessarily occur.

(34) Intermediaries (such as banks, ICSDs and CSDs other than the issuer CSD) hold securities with the issuer CSD in their name and on behalf of their customers, either via segregated accounts – (i.e., a separate account for each of the intermediary's customers) - or using a so-called "omnibus" account reflecting all the positions of the intermediary with the issuer CSD.

(35) As it is explained below, secondary clearing and settlement encompasses either (a) internalised transactions or (b) mirror operations through which financial intermediaries make appropriate book entries to reflect the result of primary clearing and settlement in the accounts of their customers:

- Internalisation occurs when a transaction takes place between two customers of the same intermediary. In this case, it is possible for the transaction to be cleared and settled in the books of that intermediary without any corresponding entries being made at the CSD level. As indicated in the Second Giovannini report on EU Clearing and Settlement arrangements:

  "In-house settlement is only possible when customer securities are held in an omnibus account at the CSD and when both counterparties to a trade are customers of the relevant custodian bank[36]*"*

- Financial intermediaries may therefore clear and settle transactions between their clients (so-called "internalised transactions") if they are authorised to do so (for example using an omnibus account), if among the clients of the same financial intermediary there is a buyer and a seller for that given security and for the volume concerned, and if both customers' positions are held in the same account of the intermediary with the issuer CSD. Since the position of the intermediary will not have globally changed after that internalised transaction -that is, since there is no change in the intermediary's accounts held with the issuer CSD- clearing and settlement does not occur within the issuer CSD. In other words, where transactions are internalised and processed at the secondary level, no "primary" clearing and settlement occurs.

- By contrast, as indicated above, whenever any position with the issuer CSD changes as part of a transaction, primary clearing and settlement within the issuer CSD is necessary. This will happen when, for any reason[37], financial intermediaries are not able to clear and settle a transaction internally. In this case there will be a mirror operation, at secondary level, of the primary clearing and settlement performed by the issuer CSD. Once transactions have been settled within the issuer

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36 Second Giovannini report on EU Clearing and Settlement arrangements, p. 25.

37 Such as in case of an initial public offering (IPO), in cases where the positions of the intermediary's clients are held in segregated accounts with the issuer CSD, where the intermediary is not authorised to internalise, or where the intermediary lacks matching buyer and seller clients for the security concerned, or the necessary volume for the completion of the intended trade internally.

CSD - i.e., once positions within the issuer CSD have changed- the primary clearing and settlement is reflected through the appropriate book entries in the intermediary's books (that is, in the accounts that the intermediary's customers hold with the intermediary).

(36) CI/CBF do not dispute that *« where intermediary custodians – e.g. financial intermediaries, but also ICSDs, custodians etc. – cannot carry out clearing and settlement, such clearing and settlement has to be performed by the final custodian* [38]*»*, that is the issuer CSD. They further explain under the heading *« necessary participation of the final custodian »* that, in order for intermediaries to provide clearing and settlement services to their customers, a contractual link to the final custodian is necessary. *« This legal relationship, which in any case every intermediary custodian needs to have with the final custodian of the securities in question, ensures the necessary participation*[39] *»*. Further, as set out in paragraph (30) above, CI/CBF state that for securities held in collective safe custody, that is by far the vast majority of securities issued under German law, the issuer CSD's participation consists, in particular, in ensuring the transfer of fractional ownership, something that only the final issuer CSD can do. The issuer CSD's function in transferring the root title is not disputed by market participants.

(37) CI/CBF further illustrated at the oral hearing specifically for cross-border clearing and settlement [« internationale Abwicklung »], how primary clearing and settlement may need to be performed « at the level of the CSD », where not both counterparties hold an account with the same ICSD[40].

(38) Likewise, EB has confirmed the reliance of providers of secondary clearing and settlement services on issuer CSDs :

> *« Financial intermediaries do need access to a CSD for secondary clearing and settlement to take place. We agree with the Commission that intermediaries are not normally in a position whereby they can settle trades with all potential counterparties. Intermediaries thus need access to the CSD in order to clear and settle the transactions they cannot internalise*[41] *».*

3.4. The links between CBF and banks, CSDs and ICSDs

(39) The communication between the CBF settlement system -formed by CASCADE and CASCADE RS (see below, section 3.6)- and its users (intermediaries) is frequently referred to as a link. The term "link" encompasses the physical communications channel through which the instructions and information relating to the transactions are exchanged and the

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38 CBF's and CI's reply of 30 May 2003 to the Commission's Statement of Objections, (page 23).

39 CBF's and CI's reply of 30 May 2003 to the Commission's Statement of Objections (page 24; see also pages 26 and 27),

40 (slide 19 of their presentation at the oral hearing ; see also reply to the SO, page 31)

41 Euroclear Group reply to the Commission's 6th request for information, 28 October 2003 , p4

rules and procedures which govern this communication. CBF has links with banks, as well as with non-German CSDs and ICSDs.

(40) The link with the CBF system allows intermediaries – banks and non-German CSDs and ICSDs - to benefit from the primary clearing and settlement services offered by CBF for the securities which are issued and kept in collective safe custody in accordance with German law, when they are unable to internalise a particular transaction.

(41) Banks traditionally account for the bulk of the CBF volume of transactions. Many of the transactions carried out by banks are between two domestic parties, but they also act on behalf of or vis-à-vis non-German buyers and sellers. The form of the link evolves over time in line with technical, regulatory and business developments. The communication and transaction processing in the case of links with banks is highly automated.

(42) To benefit from the primary clearing and settlement services offered by CBF, non-German CSDs or ICSDs also need a link between their own system and the CBF system. The communication and transaction processing is less automated in the case of CSDs and ICSDs than in the case of banks[42]. By definition, as the non-German CSD or ICSD is not a domestic party, the transaction will therefore always be cross-border. This is in contrast to primary clearing and settlement normally performed for banks that hold accounts in CBF, since for the largest part their transactions are domestic.

(43) In their relationship with CBF, ICSDs have similarities with CSDs in that they are always conducting cross-border transactions, typically on behalf of their customers. Due to the nature of their business, however, the operations of ICSDs will tend to be more automated compared to the operations of CSDs (see further below, section 4.3.3).

3.5. Direct and indirect access to primary clearing and settlement

(44) As will be explained in more detail below (section 5.1), access to the issuer CSD (CBF in the case of Germany) can be direct, as a member or customer, or indirect, through an intermediary[43]. Providers of secondary clearing and settlement (intermediaries) will choose direct or indirect access to the issuer CSD depending on their requirements as a user, such as the volumes to be processed or the level of service they offer to their customers.

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42 See, inter alia, CI's reply of 16 November 2001, question 20.

43 Indirect access can take various forms:
- through a local bank that is a member of the CSD;
- through a global custodian that employs a local agent;
- through an ICSD that has a direct or indirect access (e.g., via a local agent) to the CSD;
- through a CSD that has established a link with the CSD in the country of issue (CBF).

3.6. "CASCADE" and "CASCADE RS"

3.6.1. The CBF CASCADE system

(45) CASCADE is a computerised CBF system that allows for the entry and matching of settlement instructions for both stock exchange ("SE") and over-the-counter ("OTC") transactions. It is also the settlement platform for such instructions.

3.6.2. CASCADE RS

(46) CASCADE RS is a subsystem to CASCADE. "RS" stands for "Registered Shares" (that is, shares registered in the shareholders' register held by the issuer, as opposed to bearer shares). The main function of CASCADE RS is to allow CBF's customers to input the specific information that the registration and deregistration processes require[44]. The actual settlement of registered shares takes place on the CASCADE platform, but the necessary functions for the registration and deregistration processes are only available by providing instructions through CASCADE RS[45]. Although the registration and deregistration processes do not take place with each settlement of a respective transaction, but at certain intervals[46], the settlement of registered shares on CASCADE is not authorised unless access to the CASCADE RS subsystem has been granted.

(47) In 1997, the introduction of collective safe custody for registered shares brought the settlement of these shares in line with the procedures then applied to bearer shares. Registered shares have taken on a growing importance in Germany, particularly since the introduction of the fiduciary euro in 1999. An increasing number of shares in Germany are issued as registered shares, and some shares that were originally bearer shares have been converted into registered shares[47]. This is true particularly for those shares which are widely traded internationally, among which the shares of Daimler-Chrysler, Allianz, Deutsche Post, Deutsche Telekom, Siemens, and Lufthansa[48].

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44 CI/CBF letter of 24 May 2002.

45 CBF's and CI's reply of 30 May 2003 to the Commission's Statement of Objections, section B.II.2.b.bb.

46 Such as prior to general assemblies of companies or before payment of dividend by companies. According to CI/CBF, *"[a]ll core settlement functions (e.g. instruction input, matching, reporting, disposition, cash settlement, booking) for German registered shares are operated through CASCADE"* (CI/CBF letter of 24 May 2002, reply to question 8). Similarly, in its e-mail to the Commission services of 17 July 2003, EB explains that *"the settlement itself is the regular automated CASCADE settlement, and is not affected in any way by the registration functions"*. CI/CBF explain in their Reply to the Statement of Objections (same section as in the above footnote) that *"[a]s long as entry of the change of title has not been made in the share register, the shareholder rights cannot be fully exercised. In particular, the still-unentered shareholder cannot attend the general meeting of the company's shareholders or exercise voting rights"*

47 EB's reply of 16 November 2001, question 29 (f).

48 See CI/CBF Presentation slides, slide 22.

3.6.3. *Types of access to CASCADE and CASCADE RS*

(48) There are two different types of access to CASCADE as well as CASCADE RS[49]. The first type of access, called "manual" or "online" requires manual input of the relevant instructions by the user, by means of either CASCADE-Host or CASCADE-PC. The second type of access is completely automated (through technical means as Lima File Transfer or SWIFT ISO 15022). Establishing fully automated access involves significantly more effort than installing online access. According to CI/CBF, file transfer is particularly interesting for increasing volumes of transactions, as online access requires a higher manual workaround per transaction. CI/CBF also explain[50] that commercial banks, CSDs and ICSDs use different forms of access to CASCADE RS depending on their specific needs. According to CI/CBF, commercial banks with low transaction volumes in registered shares usually use online access to CASCADE RS. CSDs use only online access due to the low number of transactions with registered shares. CI/CBF explain that parallel use of online access and file transfer access is always possible. As it will be explained below, EB asked for manual (on line) access initially. According to CI/CBF, both ICSDs now have access through file transfer. However, when EB was granted access to CASCADE RS as from 19 November 2001, access was manual and it continued to be manual until the end of 2002, when it was automated on CBF's initiative.[51]

4. THE BEHAVIOUR OF CLEARSTREAM INTERNATIONAL AND OF CLEARSTREAM BANKING AG

4.1. Access to CASCADE RS

(49) Until EB obtained access to CASCADE RS on 19 November 2001, it only had indirect access to the CBF clearing and settlement services for registered shares through a German commercial bank, the [redacted].

(50) Contacts between EB and CBF concerning access to CASCADE VNA, the predecessor to CASCADE RS, date back to (at least) 1997. In a letter of 5 September 1997 from [redacted] of the Euroclear Operations Centre (EOC) to [redacted] of Deutsche Kassenverein (the legal predecessor of DBC and of CBF), [redacted] writes: "*We would now like to know when we will be able to access CASCADE VNA*"[52] CBF responded by letter of 11 September 1997 as follows: *"Participation in the CASCADE VNA System has been – as far as we know – rejected by Euroclear because EB does not want to have it's shares registered in the name of the beneficial owner but to keep them still in*

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49 CBF's and CI's reply of 30 May 2003 to the Commission's Statement of Objections, section B.II.2.c).

50 CBF's and CI's reply of 30 May 2003 to the Commission's Statement of Objections, section B.II.2.g).

51 EB mail to DG Competition of 17 July 2003.

52 EB's reply of 27/05/02, question 7.

deposit with [redacted]. *Insofar we also cannot see a disadvantage for Euroclear compared with other participants."*[53]

4.1.1. The EB request for access to CASCADE RS and negotiations at operational level

(51) An e-mail of 3 August 1999 from [redacted] of EOC to [redacted] of DBC states *inter alia* that:

> *"You told us last year that EOC could now have a direct access to CASCADE RS. Given the increasing number of securities handled through this system, I would like to assess how we could practically implement this direct access. If my understanding of this system is correct:*
>
> *(i) EOC could instruct DBC for the settlement of registered shares in exactly the same way as for bearer shares;*
>
> *(ii) EOC would only have to take care of the transfer of securities to the dispo account (for deliveries) and of the registration of the shares (for receipt of securities): this could be done either manually in Cascade RS or electronically. Results of those transfers will be given in Cascade and electronically (only if instructed by file transfers).*
>
> *=> Could you please confirm that my understanding under points (i) and (ii) hereabove is correct and give me more details on what has been done for EOC:*
>
> *(iii) to have a settlement access to DBC for registered shares (via file transfers);*
>
> *(iv) to have an access via file-transfer for transmitting registration instructions or transfer orders to the dispo account;*
>
> *(v) to have an access to Cascade RS?"*[54].

(52) [redacted] of DBC replied to this e-mail by an e-mail of 18 August 1999 in which he stated that [redacted] (Head of clearing and settlement of CBF) would contact [redacted] regarding access to CASCADE RS[55]. [redacted] of EB sent an e-mail to [redacted] of CBF on 24 September 1999 stating again *"we would like to determine how we could access the Cascade RS system directly ... and how to automate our link to RTS"*, and repeating the same questions as in her e-mail of 3 August 1999 (see above). [redacted], in an e-mail of 19 October 1999[56], explains that *"For a direct access to the system, Euroclear will have to be prepared to enter all [personal data] for each beneficial owner and/ or investor ... for the re-registration process."* She further states that *"Nevertheless a manual (online) access can be arranged*

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53 cf. Annex 5 to CBF's and CI's reply of 30 May 2003 to the Commission's Statement of Objections.

54 EB's reply of 16 November 2001, Annex 11.

55 EB's reply of 16 November 2001, Annex 11.

56 EB's reply of 27 May 2002, Annex 6; CI/CBF's reply of 28 February 2003. Annex 9 to CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections contains the same e-mail, dated apparently 27 October 1999.

quite easily, after the end of the frozen zone[57]*. For an automated link some major system changes will have to be made, and because of the complexity of the processes we have to analyse the workflows a bit further, before we can agree on a definite starting date".* [redacted] also suggests a meeting to discuss these matters and expressly apologises for the *"delayed reply"*.

(53) The issue of direct access to CASCADE RS was also brought up in a letter of 20 September 1999 from [redacted], Chief Executive Officer of EOC to [redacted] Managing Director of DBC. While this letter focuses on the pricing issue (see under Section 4.2 below), it also states that: *"there have been a series of circumstances in the last months where Euroclear requests to avail itself of services offered by DBC to other customers have been denied or unanswered, including among others: .....- direct link to CASCADE RS"*[58].

(54) In its reaction to this letter, DBC replies on the issue at stake, in a letter of 1 October 1999 from [redacted], that: *"[w]ith regard to the further wishes you have mentioned concerning an improvement in our business relationship, we would like to draw your attention to the fact that detailed discussions are conducted from both parts at individual department levels and this effort will be continued on our part"*[59].

(55) On 29 October 1999, [redacted] wrote in an e-mail to [redacted][60], in relation to access to CASCADE RS, that *"it is still not yet clear to me whether settlement instructions in registered shares (in freien Meldenbestand) could be included in our regular file transfers ie without system update. I, of course, understand that it is quite different for the registration process. ... I propose that we wait for a first analysis of the impact of the RTS specifications*[61] *as well as for your clarification on the above mentioned point before we fix a meeting date."*

(56) The request for direct access to CASCADE RS was once more conveyed in a letter of 21 December 1999 from [redacted] (Managing Director and General Manager of EOC) to [redacted] (Chairman of the Board and CEO of Deutsche Boerse) and [redacted] of DBC, according to which: *"Moreover, Euroclear still does not have access to services that are offered to other DBC clients, including communication by SWIFT, physical settlement, direct access to OLGA sub-system, direct link to Cascade RS, automated communication for settlement in RTS and custody settlement".*[62]

(57) A meeting took place on 28 January 2000 between representatives of EB and CBF to discuss a range of issues including further steps in relation to access to

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57 According to CI/CBF (Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.c)), this "frozen zone" refers to the preparations for Y2K during which lesser priority projects would be delayed.

58 EB's reply of 16 November 2001, Annex 11.

59 EB's reply of 16 November 2001, Annex 11.

60 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Annex 10.

61 The "RTS" or "Real Time Settlement" specifications was a separate matter to the access to CASCADE RS, but was being discussed around the same time and in parallel between CBF and EB.

62 EB's reply of 16 November 2001, Annex 11.

CASCADE RS. The minutes of the meeting are recorded in an e-mail of 31 January 2000 by [redacted], Vice-president of EB, to [redacted] and [redacted] of CBF[63]. In relation to the issue of automation of the link to real-time settlement (RTS), the e-mail states: *"Launching would be for April 17"*. Further down the e-mail reads:

> *"EOC can have an automated access to CASCADE RS.*
>
> *From a pure 'settlement operational' point of view, settlement is identical to instructions for bearer instruments in Cascade.*
>
> *Each account has 3 'sections': a 'free holding' section, a 'to be registered' section and a 'registered' section. Settlement occurs out of the 'free holding' section...*
>
> *EOC is currently not in a position to divulge the name of Beneficial Owners. The idea is to have a direct access to Cascade RS, to have part of the position in the free holding account and the other part registered under a Euroclear nominee name.*
>
> *Compared to today, the situation is better for companies as currently, our holdings are registered under [redacted] name whereas in the future, would be clearly labelled under a Euroclear name.*
>
> *Clearstream Banking Frankfurt (CBF) thinks that issuers would like more information.*
>
> *EOC to revert how far it could go on the disclosure (07 February). CBF to check if disclosure of our clients' names upon request from the company and upon approval of our clients can be used as a solution (end of February).*
>
> *EOC would like to implement this link at the same time as the automation of RTS (April). This implies some internal testing at CBF in March.*
>
> *Next possible launching date for CBF is only September 2000.*
>
> *(In a first stage, we would organise the above mentioned registration (i.e. in a nominee name) on a manual basis. In the future, depending on the SWIFT availability and volumes increase, we would like to analyse how we could use the new SWIFT or eventually the current format)".*

(58) In a letter of 3 February 2000, from [redacted] of EB to [redacted] of CBF, it is stated that: "*We feel that our last meeting has allowed us to start moving on the latter point [access to certain services]. We have indeed discussed specifically about the access to CASCADE RS and the automation of our link with RTS [real-time settlement]. Persons on both sides are now looking closer into these matters and we hope to finalise these developments along the timings that were discussed.*"[64]

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63 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Annex 11.

64 EB's reply of 16 November 2001, Annex 11.

(59) By e-mail of 31 March 2000[65], [redacted] of EB writes to [redacted] of CBF, stating in relation to the RTS system mentioned above: *"Unfortunately, we are not able at this stage to launch for April."* In a separate paragraph, headed *"Direct access for Registered shares"*, the e-mail reads: *"Our Legal department should finalise in the coming weeks our position on this. As discussed in January, our intention is to hold them directly and registered in our nominee name."*

(60) The agreement with EB to postpone the use of RTS is recorded in an internal CBF e-mail by [redacted] of 3 April 2000[66]. The e-mail ends with a "P.S.": *"[W/ Direktzulassung zu CASCADE-RS bleibt unsere Zusage für 4. Release Sep. 2000 bestehen??] [Re direct access to CASCADE RS, does our commitment to the 4th release Sept. 2000 remain?]"*.

4.1.2. Preparations for access by CBF and EB at operational level and further negotiations

(61) [redacted] (Training Officer of CBF) gave a training programme to EB personnel in Brussels on 11 September 2000[67]. The training dealt with the technical details of the post-trading operations for registered shares within the CBF system.

(62) Following the training, [redacted] of CBF sent the following mail on 12 September 2000 to [redacted] (Network Management of EB):

> *"...We enjoyed having the opportunity to present CASCADE-RS to Euroclear and thank you and your colleagues for your interest...We hope that Euroclear is going to benefit from the new application. In case of any further questions, please kindly contact us on ++ 49 (0) ....*
>
> *Besides, there is still one open issue: A few days before Euroclear is starting to use CASCADE-RS, we would like to inform our clients about the new handling. Therefore, we would appreciate to receive the following information:*
>
> > *which kinds of registered shares are not to be transferred to Euroclear account [redacted]? (from our conversation, I understood that registered shares with limited transferability must not be held by EOC-clients?)*
> >
> > *at which date will EOC start to use CASCADE-RS and at which date will EOC account [redacted] be available for registered shares?*

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65 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Annex 6. This e-mail seems to have been forwarded by [redacted] to [redacted] on 3 April 2000.

66 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Annex 12.

67 CI/CBF's reply of 10 February 2003.

In our customer information, we will inform expressively about the fact that shares held in registered position must not be transferred to EOC account [redacted].

As soon as we receive your information, we will let you have the draft of our client information."

(63) In reply to that e-mail, EB wrote (by mail of 15 September 2000 from [redacted] of EB to [redacted] of CBF[68]):

"Indeed the registered shares with limited transferability (Vinkulierte Namensaktien) are currently not EOC-eligible. In principle the parties concluding the trade are aware which securities can be accepted in EOC. In any case even if the counterparty sends the instruction to deliver vinkulierte shares, the instruction will be rejected by us, as the security code will not be eligible.

Anyway, if you think this info should be mentioned in your announcement, we do not see any objections.

As to the date of the transfer [of the EB registered shares accounted for in [redacted] account to EB's direct account with CBF], *we are not 100 pct sure yet. The earliest target date is October 30 but it might be postponed. We will advise you of the exact date asap."*

(64) The CASCADE RS system was opened to EB for non-active access on 18 September 2000, at a moment when EB's registered shares were accounted for in EB's [redacted] account. This resulted in live transactions erroneously being routed to inoperative EB accounts with CBF. This opening of access was subsequently reversed.[69] According to an internal mail of 19 September 2000 from [redacted] of EB to other EB staff : *"...as a result [of opening access] the registered shares delivered by CBF counterparties in our favour were routed into our direct account instead of* [redacted]. *Since there is no possibility to separate the non-active access from the production, CBF informed us that until the actual launching date they are obliged to close the access, not to cause any further confusion...".*[70] An internal CBF e-mail by [redacted] of 19 September 2000[71] describes the position as follows: *"tut mir leid, aber wir müssen die Freischaltung für Euroclear für die RS-Wertpapiere wieder zurücknehmen. Laut Aussage von* [redacted] *von Euroclear wird EOC die RS-Aktien nicht vor Ende Oktober verarbeiten. Wir können aber nun unsere Kunden nicht 6 Wochen lang in die Irre führen und Instruktionen annehmen, die nicht verarbeitet werden können. Dazu ist das Volumen zu groß.* [redacted]*: Bitte gebt EOC etwas Druck, dass die uns rechtzeitig mitteilen, ab wann*

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68 EB's reply of 27 May 2002, Annex 8.

69 According to EB, technical access was opened for one day (see EB's reply of 27 May 2002, question 11. According to CI/CBF in their Reply to the Commission's Statement of Objections, the opening of access was fully reversed on 26 September 2000 (see Section B.II.2.d)).

70 EB's reply of 27 May 2002, Annex 8.

71 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Annex 13.

sie unser RS-Feature nutzen wollen. Das muss dann pünktlich wieder freigeschaltet werden." [I'm sorry, but we have to reverse the opening of access for Euroclear for the registered shares. According to [redacted] *of Euroclear EOC will not process the registered shares before the end of October. However, we can't mislead our clients for 6 weeks. The volume is too large.* [redacted]*: Please put some pressure on EOC, so they inform us in good time from when they want to use our RS-feature. This will then have to be opened on time."]*

(65) According to an e-mail of 30 September 2000 from [redacted] of CBF to [redacted] of EB:

> *"In order to publish our client information about Euroclear's account being open for registered shares and to arrange for the technical set up of our IT, please make sure that we will receive the information about the date at least 3 weeks in advance. ...".*

(66) On 10 October 2000, EB established an internal action plan[72] for the launch of the transfer of registered shares and access to CASCADE RS on 4 December 2000. The first step of the preparations in this internal action plan is the training provided by CBF on 11 September 2000.

(67) An e-mail of 13 October 2000 from [redacted] of CBF to [redacted] of EB regarding EB's access to CASCADE RS, states, inter alia, *"Now, as we are approaching mid of October, it may be helpful for us to learn about the decision regarding Euroclear's access to CASCADE RS. Please be so kind as to let us know if Euroclear is holding on the date by the end of October"*[73]. It is also stated that CBF will need *"at least 15 days notice before access can be installed".*

(68) In EB's reply of 16 October 2000, [redacted] of EB states that *"As for the launching date, unfortunately due to some outstanding operational and legal issues, we will not be able to transfer the securities to yourselves on October 30. We should be ready by December 2000. We will take into account the minimum 15 days notice period and we will advise you in the due time."*[74]

(69) On 15 November 2000, through an e-mail from [redacted] of EB to [redacted] of CBF, EB gave notice to CBF that the transfer of registered shares from its [redacted] account to its CBF account would take place on 1 December 2000 (Friday), so that settlement via the EB account with CBF would start on 4 December 2000 (Monday):

> *"We are very pleased to inform you that the transfer of domestic registered shares from* [redacted] *account to Euroclear account with yourselves will take place during the second same-day cycle on December 1, 2000. That means that effective December 4, 2000 (i.e. as from STD on December 1 for value December 4) the settlement in*

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72 EB's reply of 27 May 2002, answer to question 8 and Annex 4.

73 EB's reply of 16 November 2001, Annex 11.

74 EB's reply of 27/05/02, Annex 8.

domestic registered shares will take place directly via our account [redacted] *and no longer via account of* [redacted] *.....*

With regards to the transfer, I have a couple of additional questions and would appreciate your feedback at your earliest convenience:

1. When can we have the access to CASCADE RS?

2. Whom should we call, shall we encounter any access problems with CASCADE RS?...."[75]

(70) The date of 4 December 2000 is acknowledged by CBF in an e-mail of [redacted] of 16 November 2000, in response to the above e-mail. In this e-mail [redacted] thanks [redacted] of EB *"for your information regarding the date of opening CASCADE RS for Euroclear."*[76] However, [redacted] raises one technical issue upon which Clearstream would like some more information:

> *"Before we could definitely come to the conclusion as to which date to open the application, we would like to know better about the reasons why 'vinkulierte' shares should not be Euroclear-eligible. In our understanding and as already explained during our training in Brussels back in September, the fact of an issue being 'vinkuliert' would not affect the liquidity in trading and settling the item. Besides, we feel that not allowing 'vinkulierte' shares to be transferred to EOC-account might lead to a considerable amount of misunderstandings in the banking market as most banks would be facing serious problems in creating an IT-based method to differ between 'vinkulierte' and 'normal' registered shares. We therefore highly recommend to accept "vikulierte" shares, too."*

(71) [redacted] of EB responded to [redacted] of CBF by e-mail of 17 November 2000[77], explaining: *"With regards to the acceptance of "vinkulierte" shares in Euroclear, basically there are two main eligibility criteria that would have to be met...* [approval by the issuer and no restriction vis-à-vis the final beneficial owner.] *Should German issuers agree with those two principles, we will be most happy to accept the securities in our system. The counterparties of Euroclear clients are usually aware of the issue and try to deliver "vinkulierte" shares only on very rare occasions. I hope that answers your question...*

Ps. [redacted]*, could you, please, contact me for the final confirmation of the transfer date, before making any announcement to your clients?"*

(72) It appears subsequently from the exchange of correspondence and e-mails between EB and CBF during November and December 2000 that CBF was

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75 EB's reply of 16 November 2001, Annex 11.

76 EB's reply of 27 May 2002, Annex 8.

77 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Annex 14.

postponing access to CASCADE RS and that this was for issues other than the technical questions related to the "vinkulierte" shares.

4.1.3. Failure to grant access on agreed date and link to negotiation of wider new agreement by management of Clearstream International

(73) An e-mail of 17 November 2000 from [redacted] of EB to [redacted] (CSD Links of CBF) states that:

> *"I am writing to you with regards to my today's conversation with [redacted] concerning Euroclear's access to CASCADE RS in the view of the transfer of registered shares to our direct account with yourselves, scheduled for 4 December 2000.*
>
> *We were very surprised to learn this morning that the access cannot be granted on time, although we observed requested by you the two-week notice period (the advice was sent on 15/11/2000). We are deeply distressed by this news. The fact of not having the access to the application, crucial for the day-to-day operations, forces us to freeze the transfer and postpone the launching date. I would very much appreciate if you could provide me with more details why the access could not be granted on time and when it can be given to us. [redacted] informed me that we can expect some news from you on this matter on Monday, November 20."*[78]

(74) On 1 December 2000, [redacted] (Head of the Office of the President and CEO) of CI sent a fax to [redacted] of EB, with the following content:

> *"I refer to our current discussions and negotiations on your request to adjust the fees applicable to settlement services provided by Clearstream Banking Frankfurt to Euroclear.*
>
> *I regret that it has taken longer than expected to conduct a detailed and careful analysis of all relevant elements of our current settlement processes. I believe it has been very beneficial to be able to move forward in a sound and constructive manner.*
>
> *I have also taken into consideration our recent mutual commitment to collaborate more closely on developments that will add value to the market in general and to customers in particular.*
>
> *In view of these circumstances, I am glad to inform you that we are prepared in principle to sign an agreement with EB that not only addresses the issue of our analysis of the current settlement processes, but also takes into consideration your request for a reduction in fees and for additional services. Consequently, we must negotiate a new agreement. We should also seize the opportunity to discuss the requests and new services required by us from Euroclear.*

78 EB's reply of 27 May 2002, Annex 8.

The negotiations should commence as early as feasible and should be successfully finalised by mid of next year.

.....I will call you on Monday afternoon to agree on a meeting at which we will determine the schedule for the negotiations."[79]

(75) CBF did not grant EB access to CASCADE RS as from 4 December 2000, as EB had expected following the two-week notice given by it on 15 November 2000. The following e-mail of [redacted] of EB to [redacted] of CBF of 4 December 2000 enquires about the causes for the delay:

"We have been trying for two weeks now to get a status on our access to Cascade RS. Despite several phone calls and mails, we did not receive any information as to the cause of the delay of our access nor as to the estimated date on which we could access Cascade RS.

As indicated in my previous note of November 24, we want to advise our clients at sufficient notice. Given the end-of-year freezes, it might be that we are now forced to postpone this launch to early next year due to CBF's decision to postpone suddenly our access.

We were surprised by the decision of CBF to postpone our access to Cascade RS despite us giving CBF the required two weeks notice and giving us a first greenlight. We are now concerned by the lack of feedback we get as to the reason of the delay and the estimated resolution time to the 'technical problems' you encounter.

I would appreciate your feedback in order to deblock the situation."[80]

(76) An internal EB e-mail of 4 December 2000 from [redacted] to [redacted] and others states the following:

"Surprise, surprise,

Following a last note to [redacted], she just called me back. She finally told me that the launch was on hold and that they were linked to the discussions we had with [redacted]. It seems that RS development is on the long road as well.....".[81]

(77) A meeting scheduled for 12 January 2001 between EB and CI was cancelled by CI at short notice on 8 January 2001. This is reflected in a letter from [redacted] of CI to [redacted] of EB:

"I would like to inform you that we have to postpone our meeting scheduled for Friday 12, January 2001, at short notice.

However, you will no doubt be aware of the plans of Deutsche Börse AG to launch an IPO in which we are indirectly involved due to the 50% holding of DBAG in Clearstream International. Taking into account the potential financial impact of our forthcoming discussions, we are not in a position to enter into financially relevant negotiations at this time.

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79 EB's reply of 16 November 2001, Annex 11.

80 EB's reply of 27 May 2002, Annex 8.

81 EB's reply of 27 May 2002, Annex 8.

We are committed as ever to negotiate with you solutions for the requests of both of us and we trust that you will understand the rationale for having to postpone the start of our discussions. On this background I will therefore liaise with you as soon as possible to agree on a new meeting date".[82]

(78) According to a letter of 22 January 2001 from [redacted] of EB to [redacted] of CI:

"...we have also been told late December that Clearstream Frankfurt had changed its mind and would not after all give Euroclear access to its registered share system, which is however available to other clients of Clearstream Frankfurt. After months of asking to be given the same access as other clients, agreement had been reached, and the necessary systems changes had been implemented on both sides, to allow access as from early January. However, Clearstream informed us, only one week before the scheduled launch, that access was being denied. This is once again a form of discrimination that affects our ability to provide services to our clients". [83]

(79) On 24 January 2001, [redacted] of CI wrote the following to [redacted] of EB:

"Thank you for your letter of 22 January 2001 on our forthcoming negotiations regarding the link between Clearstream Banking Frankfurt (CBF) and Euroclear.

During the first meeting between Clearstream International and Euroclear on this subject which took place in your office in Brussels on 23 October 2000, the issue of comparing your fees with the fees paid by German banks was discussed. At that time we offered Euroclear the possibility to receive the same services at the same prices as CBF's regular customers. We immediately sent to you by courier the complete documentation for you to apply for such services. Contrary to what is implied in your letter, this is full proof of our commitment to equal treatment and non-discrimination.

In spite of our offer, you insisted on continuing to be provided with the tailor made set of services contained in the individual service level agreement between the former DBC and Euroclear, concluded in 1997. You also added new requirements to the list of existing special services rendered to Euroclear. At that time, we explained to you that there were serious issues of concern regarding the way Euroclear operates its account with CBF. We explained in detail the need to review and revise many of these special services before entering into the development of new and additional services tailored especially for Euroclear. Please note that Clearstream Banking Luxembourg pays the same settlement fees as Euroclear. Your argument of discrimination is without merit.

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82 EB's reply of 16 November 2001, Annex 11.

83 EB's reply of 27 May 2002, Annex 9.

With respect to CBF's registered share system we are willing to include this in our forthcoming negotiations. However, we must point out that the registered share service is available from several providers and therefore CBF has no exclusive position in the German market. Again, please note that Clearstream Banking Luxembourg does not have direct access to CBF's registered shares system either. Again, your argument of discrimination is without merit.

....

With regard to your specific request to solve the fee reduction issue and the registered share service issue, we are pleased to start the overall re-negotiation of the contract (including your request for fee reductions and additional services) at the beginning of March.....".[84]

4.1.4. Renewed discussions and preparations for access to CASCADE RS by CBF

(80) No further action on the issue of access to CASCADE RS appears to have occurred until after the launching of the Commission's investigation in March 2001.

(81) At a meeting of 21 March 2001 between CBF and EB[85] the re-negotiation of the overall contract was discussed, including in particular the pricing of services and *"pending issues with EB's affiliates (e.g. EB France)"*. Access to CASCADE RS was not mentioned expressly. It was agreed that *"the whole package will be presented at the next meeting including a proposal for a new fee schedule and other services requested by EB"*, at a meeting scheduled for 26 April 2001. This meeting did not finally take place for reasons relating to disputes over a confidentiality agreement (see recital (118) below).

(82) On 10 July 2001, CBF ([redacted]) communicated to EB ([redacted]), through a telephone conversation, that "*we do not have a problem* (in relation to direct access to registered shares settlement) *when on the other side SICOVAM will open the link to CBF for more French equities*"[86].

(83) A series of internal CBF e-mails[87] took place between 10 August 2001 and 7 September 2001. These e-mails relate to the setting-up of a test phase during

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84 EB's reply of 16 November 2001, Annex 11.

85 See minutes of the meeting, EB's reply of 27 May 2002, Annex 11.

86 See e-mail of 10 July 2001 from [redacted] of CBF to [redacted] of CI reporting on the telephone conversation (Annex 17 to CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections), where it is stated that: "..."[please cite the relevant passage in full].

87 These are all contained in CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Annex 18. An internal CBF e-mail by [redacted] to [redacted] of 10 August 2001 states: *"pls find below some information relating to EOC's request to make them eligible for german RS-securities: ... As of today, test will take place in between 1st October until 26th of October."* [redacted] of CBF forwards this e-mail to [redacted] of CBF on 10 August 2001, stating that [redacted] will inform EOC and adding: *"Bitte informier doch [redacted], das EOC sie möglicherweise in dieser Sache ansprechen wird." [Please inform [redacted] that EOC might contact her about this.]* [redacted] of CBF replies by e-mail of 16

the period 1-26 October 2001 and to the obtention of CBF's management's [redacted] internal agreement to open Euroclear account [redacted] with CBF to CASCADE RS via online connection. This internal agreement was given on 6 September 2001 .

(84) On 17 September 2001, apparently following a phone discussion the previous week, [redacted] of EB sent an e-mail to [redacted] of CBF[88], setting out the details for the proposed test runs: *"As per our phone discussion of last week, please find below some details on how we would like to proceed with the testing of instructions in registered shares, in anticipation of Euroclear access to Cascade RS..."*. Test runs for the preparation of the actual access to CASCADE RS indeed took place in October 2001. On 4 October 2001, [redacted] of EB sent an e-mail to [redacted] of CBF, forwarding the e-mail of 17 September 2001 and enclosing a test file. On 8 October 2001, [redacted] of CBF replied to [redacted] of EB with the results of the first test run. On 11 October 2001 [redacted] of EB sent an e-mail to [redacted] of CBF asking for confirmation of certain issues related the test results. [redacted] of CBF replied on 12 October 2001, answering the queries and concluding: *"I will inform my colleagues from the business department that the test with you has been finished successfully and that we can open registered shares in production as of 19th November, 2001."*[89]

(85) In its second request for information of 9 October 2001, the Commission asked CBF the following (question 32):

> *"Did CBF and /or CBL during the last 5 years ever refuse to create a (certain type of) link or to change/upgrade a link with another EU-*

August 2001 to [redacted] of CBF as follows: *"wir haben den CR in den Leistungsumfang aufgenommen. [redacted] bitte um eine schriftliche Bestätigung der Anforderung durch [redacted] oder [redacted]. Möglicherweise hast du bereits einen Auftrag, der dann den Unterlagen zugefügt werden kann." [We have included CR in the services. [redacted] requests a written confirmation of [redacted] and [redacted] request. You may already have an instruction which could then be added to the documentation.]* By e-mail of 6 September 2001, [redacted] of CBF then writes to [redacted], stating: *„wir haben den Auftrag von [redacted] erhalten, für die nachstehende funktionale Erweiterung Ihr schriftliches Einverständnis zu erfragen. ... Auszug aus dem CR 252375: Das Konto „[redacted]" der Euroclear soll für die Online-Anbindung „CASCADE RS" geöffnet werden, damit EOC nicht mehr die Abwicklung und Bestandsführung über die [redacted] vornehmen muss. Bitte lassen Sie uns wissen, ob die Anforderung im Rahmen des Release 6 implementiert werden kann." ["we have received instructions from [redacted] to request your written agreement to the extension of functionality below. ...Extract from the CR 252375: The account "[redacted]" of Euroclear shall be opened for the online-connection "CASCADE RS", so that EOC no longer has to undertake the processing and portfolio management/ record keeping through [redacted]. Please let me know if the instruction can be implemented in the framework of the Release 6."]* [redacted] of CBF replies by e-mail on 6 September 2001: *"Einverstanden". ["Agreed."]* [redacted] of CBF then forwards this e-mail on 7 September 2001 to [redacted], stating: *"anbei das okay von [redacted] zum Change Request „EOC". Bitte lass mich wissen, wenn [redacted] noch Bedenken hat, damit wir diese umgehend klären können." [below is [redacted] agreement to the Change Request "EOC". Please let me know if [redacted] still has concerns, so we can resolve these immediately."]*

88 EB's reply of 27 May 2002, question 8, Annex 5.

89 EB's reply of 27 May 2002, Annex 5.

based CSD and /or trading platform on which no formal decision has so far been taken?"

(86) By internal e-mail of 10 October 2001[90], [redacted] of EB wrote to [redacted] of EB, stating: *"I just received a call from [redacted] (head of settlement at CBF) telling me there is a political decision at this moment not to grant the access to Cascade RS. For info, scheduled launch date is November 19, testing is being finalized and publication to clients is due on Monday (or the week after at the latest). The decision comes from the fact that CBF did not receive a positive response to their request to have access to all French securities to their link with EF* [Euroclear France, the French CSD]. ... *For CBF, the access to the Registered Shares is at this stage conditional to granting CBF access to all French securities to their account in EF.*[91]*"*

(87) A letter of 26 October 2001 from [redacted] of EB to [redacted] of CI confirming the understanding of an earlier telephone conversation states that:

> *"As you know, Euroclear Bank has been requesting CBF for over two years to give it access to CASCADE RS, a registered share service offered to CBF members. I am very pleased that you confirmed CBF's agreement to give Euroclear Bank access to CASCADE RS and that the definitive launch for access to this service will take place November 19. Our newsletter announcing access to this service will be issued on October 31."*[92]

4.1.5. The granting to EB of access to CASCADE RS

(88) On 16 November 2001, CI replied as follows to the Commission's request for information of 9 October 2001:

> *"As for CBF, the answer is no. CBF was, and continues to be, strongly interested in setting up more links to CSDs or in improving existing links. This is conform with the demands and needs of our customers.*
>
> *CBL never refused to open a link for another CSD in its system during the last 5 years".*

(89) Direct access to CASCADE RS was given by CBF to EB from 19 November 2001 onwards[93].

4.1.6. The granting to CBL of access to CASCADE RS

(90) Also in November 2001, Clearstream Banking Luxembourg S.A., an ICSD and a sister company to CBF under the common holding of Clearstream

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90 EB's reply of 27 May 2002, Annex 12.
91 Note: EB had merged with Sicovam in January 2001
92 EB's reply of 16 November 2001, Annex 11.
93 EB's reply of 27 May 2002, question 5.

International, requested access to CASCADE RS. Access was granted by CBF in March 2002.[94]

4.2. The fees charged by CBF to EB and the negotiations towards their reduction

(91) On 11 July 1997, the predecessors of CBF and EB agreed that CBF would charge Euroclear a tariff of DM XX (approximately EUR X) for transactions in German securities, that is, for each single debit and credit to the EOC Deposit Account[95]. According to the information obtained by the Commission, EB repeatedly tried to lower this fee from at least 18 September 1998. CBF applied a 50% reduction in the fee as from 1 January 2002. The paragraphs below show how events during that period evolved.

(92) During a meeting between CBF and EB held in Brussels on 18 September 1998, the two companies discussed a possible review of the fees charged to EB. According to the minutes of that meeting[96]:

> *"EOC stressed that its activity fees were a multiple of the fees that "normal" DBC participants pay. DBC explained that a higher tariff could be justified by the complexity of the link as well as by the contingency procedures put in place but confirmed that the pricing difference could be lowered. DBC will prepare a description of the special features of the EOC link which will serve as a base to determine the new tariff.* [Emphasis added].
>
> *EOC also proposed to review the flat custody fee and suggested to have it replaced by a fee per service effectively delivered. DBC mentioned that they could have technical problems to charge per service but agreed that a review of the flat fee could be considered. It was decided that DBC would review the list of services that are currently used or offered to EOC. This reviewed list will serve as a base for further discussions on the services to be maintained and on their pricing."*

(93) In an e-mail from [redacted] of EOC to [redacted] of DBC of 2 April 1999 with the heading *"Follow-up to our meeting of September 18, 1998"* it is stated that *"[i]n September 98, DBC agreed to a revision of the activity fees and of the flat custody fee. In order to determine the new tariffs, it was agreed that DBC would draw up a list of special services or link features that could*

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94 CI/CBF's reply of 10 February 2003, question 2. In their Reply of 30 May 2003 to the Commission's Statement of Objections, CI/CBF contradict this statement by arguing that CBL requested direct access to CASCADE RS in October 2001, not November (see Section B.II.4). The information in the Reply is however not substantiated by any documentary evidence.

95 Cf. Exhibit F to the 11 July 1997 agreement between DKV and Morgan Guarantee Trust Company of New York, Brussels Office. (EB's reply of 27 May 2002, Annex 13).

96 Point VI of the minutes. The minutes were produced by EOC and faxed to DBC, which agreed (cf. e-mail from [redacted] of DBC to [redacted] of EB of 20 October 1998, reproduced as an annex to CI/CBF's reply of 28 February 2003).

justify a "higher than normal" pricing. To this date, we have not seen such list.....Could you please make a follow-up on the fees revision.....".[97]

(94) In an e-mail from [redacted] of DBC to [redacted] of EOC of 8 April 1999 with the heading *"Antwort: Follow-up to our meeting of September 18, 1998"* it is stated: *"We are just in the process of defining the additional services we provide to the ICSDs in order to determine the tariff. I will be on vacation the next two weeks and come back to you after that".*[98]

(95) [redacted] of EOC sent three e-mails to [redacted] of DBC between May and August 1999, with the following content[99]:

> *"Do you have any news for me on the following pending issues: - review of activity and custody fees..."* (e-mail of 6 May 1999);
>
> *"Back in May, you told me you should have some time to work on the review of the activity and custody fees applied to EOC: would you have some news for me? If not, could you give me an ultimate date for which I can expect an answer?"* (e-mail of 28 July 1999);
>
> *"You will find herewith a list of items I note as pending with DBC: 1) Review of activity and custody fees;..."..... You will note that most items have been pending for several months. May I ask you for a status on the first 3 items as well as for tentative resolution dates?"* (e-mail of 3 August 1999).

(96) In reaction to this last e-mail of 3 August 1999, [redacted] of DBC stated the following in an e-mail to [redacted] of 18 August 1999: *"Thank you for your e-mail of 3rd August 1999. Because of the high workload with respect to the preparation of our merger with Cedel Intl we are presently not able to review any fees. We ask for your understanding and would like to come back to you as soon as possible".*[100]

(97) Given the lack of progress in solving the pricing issue (defining the services or link features justifying a higher than normal pricing) at the operational level, [redacted] of EOC wrote to [redacted] of DBC on 20 September 1999:

> *"I am writing to raise directly with you our grave and urgent concern regarding the issue of the tariff for settlement transactions and the flat custody fee that DBC is applying to the Euroclear Operator (Euroclear).*
>
> *DBC charges Euroclear a tariff of EUR X for transactions in German securities. This is ZZ times (for against payment transactions) to ZZ times (for free of payment transactions) more than the official tariff for transactions charged by DBC to its other customers. As a result, Euroclear has paid in the last 12 months at least EUR 2,500,000 more than it would have to pay under the standard tariff (this includes communication fees that EOC currently does not pay). In addition,*

97 EB's reply of 16 November 2001, Annex 11.
98 EB's reply of 16 November 2001, Annex 11.
99 EB's reply of 16 November 2001, Annex 11.
100 EB's reply of 16 November 2001, Annex 11.

DBC charges Euroclear with a custody flat fee of EUR [redacted] per year which is not applicable to other DBC clients.

We expressed formally our concern about this situation already one year ago, as is reflected in the attached copy of the minutes of a meeting of senior representatives of our organizations held on September 18, 1998 (see Annex I). At that time, the DBC representatives agreed that the tariff should be adjusted and they promised to make a proposal accordingly. It was also agreed that, insofar as a special tariff was prompted by special services that would be provided exclusively to Euroclear and not to other clients, DBC would clearly identify those special services so that Euroclear could decide whether it needed them or not.

One year later, we still have not received either the price reduction proposal that had been promised or any clarification on these alleged "special services". We have sent numerous reminders and have been promised feedback a number of times, but to no avail. Finally, in August 1999, we were advised that DBC simply did not have the time to focus on this issue considering its impending merger and that DBC "will come back as soon as possible" on the subject ....

It is clearly unacceptable that DBC, especially considering its role as central securities depository for German securities, charge Euroclear such a disproportionately high pricing and decline to pursue discussions about it for over one year. The importance of the matter is heightened by the European Central Bank's requirement, as a condition for its approval for TARGET collateralization purposes, that the Euroclear direct link with DBC be used.

As Euroclear must provide the European Central Bank with a response on the use of its direct link to DBC by the end of September, we ask that you provide as soon as possible, and in any event before the end of September, a proposal for pricing reduction that would treat Euroclear in the same fashion as other DBC clients, and, in case there are any special services provided to Euroclear, the list of such services and the tariff that DBC proposes to charge for those services." [101]

(98) In an e-mail of [redacted] of EOC to [redacted] of DBC of 28 September 1999, regarding fees review and other servicing issues, reference is made to the above letter to [redacted] and the question is asked whether some news could still be expected from DBC in the next two days.[102]

(99) In reaction to [redacted] letter of 20 September 1999, [redacted] of DBC reply in a letter of 1 October 1999 addressed to [redacted] of EB that:

"We must nevertheless inform you that a price reduction due to the special services which we offer Euroclear for many years, and in the light of current business policy considerations, is not possible.

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101 EB's reply of 16 November 2001, Annex 11.

102 EB's reply of 16 November 2001, Annex 11.

We would like to firstly indicate once again that our price structure is subject to the fundamental of equal treatment. This means that customers which exclusively draw usual services on the basis of our price schedule are charged according to the price schedule applicable to such customers. Other customers, to which the price schedule cannot apply (specific services), such as Central Securities Depositories or International Central Securities Depositories, for example, are also treated equally within their respective customer groups on principle, unless special services are demanded.

Due to the fact that Euroclear draws various special services from our firm (for example, separate File Transfers, Corporate Actions, Reconversion of Partial rights in Shares according to Instruction, several services in connection with General Meetings, Issue of Tax Declarations, Contingency Rules with higher information requirement, money transfer to cash correspondents for income proceeds in foreign currencies, etc.) the present price structure is appropriate. Against this background, we ask for your understanding that a price reduction is not possible at this point in time, for reasons of equal treatment and with a view to the market conformity of our prices. In view of our long standing business relationship, we will, nevertheless, take up the matter of your wish for a price reduction at a suitable point in time and will approach you on our own initiative in this matter." [103]

(100) [redacted] of EB subsequently sent a letter to [redacted], Chairman of the Supervisory Board of DBC of 12 October 1999 to indicate that "*we had grave concerns about the discriminatory pricing that DBC applies to Euroclear compared to other DBC clients*" and that "*[w]e have now received his [redacted] response. I am afraid it is totally inadequate and leaves us no choice but to consider all possible options to obtain non-discriminatory treatment from DBC. However, as suggested, I am first raising the issue with you to see whether, through your good offices, an amiable solution can still be found without delay.*"[104]

(101) An internal CBF note from [redacted] to [redacted] of 25 October 1999[105] lists observations in reaction to [redacted] letter, including:

"In relation to custody fees Euroclear and CEDEL are treated the same as all other customers since the merger of DKV and AKV. In addition Euroclear pays a flat fee of [redacted] p.a. for additional special services.

It is different for transactions. Whilst data exchange with non-CSD customers is carried out in a standardised procedure, for Euroclear and other clearing institutions special and therefore differing procedures are used. These special data exchange procedures require separate maintenance and care, further development and a separate Second-Level-Support.

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103 EB's reply of 16 November 2001, Annex 11.

104 EB's reply of 16 November 2001, Annex 11.

105 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Annex 23.

Moreover, in contrast to other customers, we have in place liability arrangements with Euroclear and Cedel for late data transfer, which in the case of late transfers can lead to significant liability for damages for DBC. There is also a supplement included in the service fees for this element."

(102) The outcome of the high level contacts was a proposition from DBC to reduce the transaction fee of € X per item charged to EOC by 50%, as can be seen from a letter of 11 November 1999 from [redacted] of Deutsche Börse (DBAG) and DBC[106] to [redacted] of EB:

"... we would like to outline in more detail what should be subject of a new arrangement.

Today, we charge a transaction fee of € X per item with volume-based rebates. This is contractually agreed with EOC since 11th July 1997. Our network and online communication costs are included in that fee.

Concerning the overnight-bridge between Cedel and EOC and the link between DBC and EOC, the market participants strongly expect major improvements, i.e. a sequence of intraday final settlements resulting to significant risk and liquidity cost reduction. Realtime settlement respectively continuous settlement functionality has been brought to the market by EOC and Cedel within this year. So, the new capabilities should now enable us to deliver the right product to the market.

In that context a new price structure has to be worked out for the future bridge/link solution up to mid next year. In anticipation of this, we would be happy to reduce our transaction fee as per 1 January 2000, by 50%, limited until June 30, 2000.

On the basis of our proposal we are looking forward to having a first meeting soonest."[107]

(103) EB reacted to this letter in a letter sent by [redacted] of EB to [redacted] of DBAG/DBC[108] of 21 December 1999, according to which:

"While this is a significant step in the right direction, I would like to stress that it is not sufficient in order to eliminate all discrimination vis-à-vis Euroclear. Even after a 50% reduction, the transaction fees charged to us would still be ZZ times (for against payment transactions) and ZZ times (for free of payment transactions) higher than DBC's official tariff. Also, there is no indication in your letter about the removal of the flat custody fee of EUR [redacted]/year that you charge us and that is not applicable to other DBC clients. Moreover, Euroclear still does not have access to services that are offered to other DBC clients, including communication by SWIFT, physical settlement, direct access to OLGA sub-system, direct link to Cascade RS, automated communication for settlement in RTS and custody

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106 At that moment, [redacted] was the CEO of Deutsche Börse AG and Chairman of the Supervisory Board of DBC. [redacted] was a member of the board of Deutsche Börse AG and CEO of DBC.

107 EB's reply of 16 November 2001, Annex 11.

108 See footnote 55.

services. Therefore, without prejudice to the immediate reduction of 50% of transaction fees mentioned, we continue to ask that a satisfactory solution be agreed without delay for the resolution of these various issues. [Emphasis added.]

You also seek in your letter the initiation of discussions on possible improvements in the DBC-Euroclear link, as well as in Euroclear/Cedel bridge following the platform improvements launched in both situations in 1999. This is obviously a separate issue from the DBC tariff issue and we believe that these two issues may not be linked. Nevertheless, I can confirm that Euroclear is prepared, and is indeed keen, to start discussions with Cedelbank on possible improvements of the bridge."[109]

(104) In a letter of 2 February 2000 from [redacted] of CI to [redacted] of EB, [redacted] asks for "*understanding that talks on bridge/link matters remain on hold for a couple of weeks more*".[110] This because of the fact that CI, in the light of their merger, have been working on a new settlement model.

(105) A letter from [redacted] of EB to [redacted] of CBF of 3 February 2000 states that "*[a]s far as the reduction in fees is concerned, we were surprised to notice on your billing invoice for the month of January that no reduction has been applied. We had expected to see a reduction of the transaction fees of 50% as of January 1, 2000, as mentioned in your letter dated 11 November*".[111]

(106) In a letter of 16 February 2000 from [redacted] of EB to [redacted] of CI, EB states that :

"As regards the pricing relating to the Clearstream Banking Frankfurt (DBC) link, you may be aware that an agreement was already reached last year between [redacted]*, on behalf of DBC, and* [redacted]*, on behalf of the Euroclear operator, on a reduction by 50% as from January 1, 2000 on the transaction fees charged to Euroclear. This agreement was formally reflected in an exchange of letters....., thereby amending our previous contractual arrangements effective January 1. In this connection, we have noted that Clearstream Banking Frankfurt has erroneously charged us for January at the old tariff.....*

As already stressed by [redacted] *in his previous letters to* [redacted] *and* [redacted]*, I would also like to reiterate that we consider this 50% reduction as a first step only, and that we continue to insist that Clearstream Banking Frankfurt discontinue altogether applying a discriminatory tariff vis-à-vis Euroclear. You will appreciate that it is not acceptable to us to be charged, even after such a 50% reduction, up to ZZ times the fee charged by Clearstream Banking Frankfurt to its other clients."*[112]

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109 EB's reply of 16 November 2001, Annex 11.

110 EB's reply of 16 November 2001, Annex 11.

111 EB's reply of 16 November 2001, Annex 11.

112 EB's reply of 16 November 2001, Annex 11.

(107) In a letter of 21 April 2000 of [redacted] of EB to [redacted] of CI the issue was raised again. EB writes that *"an agreement was reached last year between [redacted] and [redacted], as an interim solution, for a 50% reduction as from January 1, 2000. To our dismay, Clearstream Frankfurt has still not implemented this agreement and has continued to have our account debited automatically at the old tariff.*[113]*"* EB indicates that it has contacted CI several times since early February 2000 to discuss this issue. EB makes it clear that it is extremely concerned both about the discriminatory tariff (even after the 50% reduction, it would be charged up to ZZ times the tariff applicable to other clients) and about the delays in implementing the agreement of a 50% reduction of the tariff by 1 January 2000, as a first step. EB also asked CI *"to make one more attempt to resolve this matter between us and I would therefore like to ask your confirmation that the 50% tariff reduction will be reflected in the billing at the end of this month, with reimbursement of the excess charges retroactive to January 1, as agreed."*[114] EB indicated that it would be grateful for CI's feedback by 25 April 2000.

(108) CI reacted to this letter by a letter of 23 May 2000 from [redacted] to [redacted] of EB. CI referred to the letter of 11 November 1999 in which [redacted] and [redacted] wrote that they would be happy to reduce the EB transaction fee for a 6 months' period by 50%. CI considers that:

> *"...EOC has obviously not considered this as an offer, within the legal meaning of this word, as the 21 December 1999 reply from [redacted] to Deutsche Börse AG expresses happiness about the willingness to negotiate a significant reduction in fees, but the remainder of the letter constitutes a rejection of the percentage contemplated.*
>
> *My view is that (i) the price issue should not be separated from the other more significant topics covered in the correspondence, and (ii) we are not faced here with an offer and even less with an acceptance thereof. Any alternative interpretation amounts to a kind of cherry picking and our discussions have always been meaningful because the whole picture was being considered.*
>
> *My suggestion is therefore to stick to the contractually agreed tarification and to resume talks on bridge/link matters in due course."*[115]

(109) In the fax of 1 December 2000 from [redacted] of CI to [redacted] of EB (see recital (74) above) reference is made to current discussions and negotiations on EB's request to adjust the fees applicable to settlement services provided by CBF to Euroclear. It also states that CI is *"prepared in principle to sign an agreement with Euroclear Bank that, not only addresses the issues of our analysis of the current settlement processes, but also takes*

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113 EB's reply of 16 November 2001, Annex 11.

114 EB's reply of 16 November 2001, Annex 11.

115 EB's reply of 16 November 2001, Annex 11.

into consideration your request for a reduction in fees and for additional services. Consequently, we must negotiate a new agreement."[116]

(110) In a letter from [redacted] of EB to [redacted] of CI of 8 January 2001, EB asks CI, referring to the discussions on the agreement between Euroclear Bank and CBF, to send the items that Clearstream wants to put on the agenda. EB also states that the fee reduction is more than ever the critical agenda point. EB writes that more than two years have passed since Clearstream Banking Frankfurt (then DBC) agreed to the principle that the transaction fees should be reduced. EB is unable to agree that any fee reduction be further postponed. It added that "*We had been promised a proposal for last year and it is only on the strength of this promise that we agreed to wait until December 2000 for your proposal. Accordingly, we insist that a fee reduction proposal be made without further delay by early next week: otherwise you will leave us no choice but to seek redress in all appropriate legal means, with applicable retroactive effect*".[117]

(111) In a fax of 8 January 2001 from [redacted] of CI to [redacted] of EB, CI postpones the meeting scheduled for 12 January 2001 (see recital 72 above). It refers to the plans of Deutsche Börse to launch an IPO in which CI is indirectly involved due to the 50% holding of DB in CI. CI states: "*Taking into account the potential financial impact on our forthcoming discussions, we are not in a position to enter into financially relevant negotiations at this time*".[118] In his fax, [redacted] tells EB that "*we are committed as ever to negotiate with you solutions for the requests of both of us and we trust that you will understand the rationale for having to postpone the start of our discussions. On this background I will therefore liaise with you as soon as possible to agree on a new meeting date*".

(112) In the letter by [redacted] of EB to [redacted] of CI of 22 January 2001 referred to at recital 73 above[119], EB writes:

> "*After repeated demands in 1998 and in the course of 1999, at long last an interim agreement had been reached at the end of 1999 between* [redacted] *on the one hand and* [redacted] *on the other, for a 50% reduction of the fees, starting January 1, 2000. However, following the Clearstream merger, you wrote in February to inform us that you did not consider that a legally binding agreement had been reached and asked for a few weeks to make a new proposal. When I called you in April, you asked for further time, and assured me that the reduction that would be agreed would be made retroactive to January 1, 2000. However, no proposal followed. In September, when you and I met, you agreed to reopen the file and appointed* [redacted] *to negotiate the reduction.*
>
> *Several meetings took place to discuss the appropriate level of fee reduction, but in December,* [redacted]*, rather than submit a concrete proposal as had been discussed, informed us that any*

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116 EB's reply of 16 November 2001, Annex 11.
117 EB's reply of 16 November 2001, Annex 11.
118 EB's reply of 16 November 2001, Annex 11.
119 EB's reply of 27 May 2002, Annex 9.

reduction would have to be part of a broader re-negotiation of the link agreement between Clearstream Frankfurt and Euroclear Bank. He indicated that he anticipated that these negotiations could be completed by mid-2001 and offered to kick off the negotiations at a meeting scheduled for January 12, 2001. However, when we reiterated our will to have the fee reduction issue handled without further delay, [redacted] *advised us on January 8 that, in view of the forthcoming IPO of Deutsche Börse, all discussions should be put on hold sine die, and that the meeting of January 12 was cancelled."*

(113) In a fax from [redacted] of CI to [redacted] of EB of 24 January 2001, CI refers to a meeting on 23 October 2000 between the two where the issue of comparing EB's fees with the fees paid by German banks was discussed. CI writes that "*At that time we offered Euroclear the opportunity to receive the same services at the same prices as CBF's regular customers. We immediately sent to you by courier the complete documentation for you to apply for such services. Contrary to what is implied in your letter, this is full proof of our commitment to equal treatment and non-discrimination.*" CI states that EB insisted on continuing to be provided with the tailor made set of services contained in the individual service level agreement of 1997 and that it had added new requirements to the list of existing special services rendered to Euroclear. CI points out that "*At that time, we explained to you that there were serious issues of concern regarding the way Euroclear operates its account with CBF. We explained in detail the need to review and revise many of these special services before entering into the development of new and additional services tailored especially for Euroclear. Please note that CBL pays the same settlement fees as Euroclear. Your argument of discrimination is without merit.*" CI states that "*During that first meeting on 23 October 2000, we committed to work together in renegotiating a new link contract that will resolve the outstanding issues in the current contract, as well as addressing your request for lower commission and transaction fees to the extent appropriate. Euroclear's commitment to enter into negotiations was ratified by you in your letters of 7 and 8 December 2000. These two letters..... confirmed your understanding that the issue of fee reductions was part of the overall negotiation of the new contract and that there were no other conditions attached to either of your two letters".*[120] As to the discount on transaction fees proposed by Deutsche Börse in their letter of 11 November 1999, CI states that "*In a letter dated 21 December 1999, Euroclear rejected the overall proposal".* As to EB's specific request to solve the fee reduction issue, CI indicates that "*...we are pleased to start the overall re-negotiation of the contract (including your request for fee reductions and additional services) at the beginning of March, at which time the IPO of DBAG will have been completed".*

(114) An e-mail of [redacted] of CI to [redacted] of EB (indicated by hand as being of 20 March 2001) proposes the agenda for a meeting for negotiations

120 EB's reply of 16 November 2001, Annex 11.

and encloses a first draft of a confidentiality agreement, signed on behalf of CBF.[121]

(115) The minutes of the meeting of 21 March 2001, which were sent to the representatives of both parties, make it clear that EB had comments on that first draft of the confidentiality agreement and submitted a new draft confidentiality agreement to CBF, which CBF agreed to review. EB also states that in terms of the revision of the arrangements between CBF and EB, the focus will be kept on the link agreement of 1997 with the fee schedule as one of its exhibits. For EB pricing is the fundamental issue to be negotiated. According to EB, all issues should be negotiated within the scope of the current link agreement. CBF made it clear that it *"wants to negotiate the whole package rather than individual services, as the pricing is always related to the bundle of services provided to EB i.e. the pricing cannot be negotiated separately from the related services. ...Finally, the attendants agreed that the whole package will be presented at the next meeting including a proposal for a new fee schedule and other services requested by EB".*[122]

(116) The minutes also record that the parties agreed that in a future meeting to be held on 26 April 2001, CBF would provide EB a draft of a new contract to include the pricing proposal, as well as the related services.

(117) In a fax of 6 April 2001 from EB ([redacted], Director and Assistant General Counsel) to CI ([redacted], Managing Director and General Counsel), EB raises the issue that no comments had been received from CBF on the amended draft of the confidentiality agreement received by CBF at the beginning of the 21 March 2001 meeting[123]. Also, a fax of 25 April 2001 from EB ([redacted]) to CI ([redacted]), refers again to the fact that no comments had been received on the confidentiality agreement. EB therefore assumes that the only objective of the 26 April meeting is to get CI's explanation on CBF's proposal for a revised depository agreement with a focus on the revised fee structure.[124]

(118) In a reaction to this last fax of EB, [redacted] of CI states in a fax of 25 April 2001 that there are two items outstanding on the confidentiality undertaking that are of utmost importance to CI[125] and they cannot envisage to sign the agreement without agreement or sufficient clarification on these two points. Therefore, CI postpones the meeting of 26 April 2001, while trusting that a common agreement on these issues will be found: *"Considering the absence of agreement or understanding between you and us on the above matter, I do unfortunately feel obliged to postpone the tomorrow's meeting*

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121 EB's reply of 16 November 2001, Annex 11.

122 EB's reply of 16 November 2001, Annex 11.

123 EB's reply of 16 November 2001, Annex 11.

124 EB's reply of 16 November 2001, Annex 11.

125 The two issues in question are "(i) the confidential character of the existence, nature or terms of the proposed negotiation and therefrom the resulting requirement of a prior written consent of each party for any kind of announcement on the subject and (ii) the absence of explanation on your side [EB] as to why Euroclear Clearance System PLC should not be party to the confidentiality undertaking."

until a further date. I trust that we will be able to find a common agreement on these issues to ensure that the negotiations can start as soon as possible."[126]

(119) In a letter of 26 April 2001 from [redacted] of EB to [redacted] of CI, surprise and disappointment is expressed as to the decision to cancel the meeting. EB also questions CBF's commitment to promptly resolve the issue. In the same letter, reference is made to a conversation where [redacted] confirmed CBF's commitment to meet with Euroclear to discuss its proposal for a revised depository agreement with a focus on the revised fee structure. In the letter, EB argues that no obstacles that would prevent them from starting the business discussions were mentioned. EB replies to the two points on confidentiality raised by CBF and states that it wishes to resolve this confidentiality discussion promptly.[127]

(120) There appear to have been no further developments on settlement of the fee issue until after the Commission had sent a request for information covering pricing issues on 9 October 2001. In the second half of October 2001 CBF finally agreed to implement its offer of a 50% reduction of the settlement transaction fee and to delink this offer from other issues. In a letter of [redacted] of EB to [redacted] of CBF of 26 October 2001 it is stated that "*I am writing to confirm my understanding of our telephone conversation of the end of last week on a number of subjects.....2. I am also thankful for your confirmation of CBF's agreement to reduce the Euroclear Bank invoice of CBF transaction fees by 50% as of 1 January 2002.*"[128]

(121) CBF reduced the transaction fees charged to EB by 50% (to [redacted]) as of 1 January 2002[129]. This is over two years and one month after the initial 50% reduction offer[130] and over three years and three months since the 18 September 1998 meeting where CBF had confirmed to EB the principle that the price could be lowered.

4.3. Elements of the services provided by CBF to their different customer groups

(122) According to the information provided by CI/CBF[131], there exist three different customer classes of CBF regarding settlement services, non-CSD customers (mainly banks in Germany), (non-German) CSDs and ICSDs. Non-German CSDs as customers of CBF in Germany perform a role as intermediary (see recital 16 above) and can be conceptually distinguished from their role as national CSD in their respective home countries. The details of the settlement services provided to each of the customer groups are as follows.

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126 EB's reply of 16 November 2001, Annex 11.

127 EB's reply of 16 November 2001, Annex 11.

128 EB's reply of 16 November 2001, Annex 11.

129 EB's reply of 27 May 2002, question 35.

130 cf. letter of 11 November 1999 from Deutsche Börse to EOC.

131 CI/CBF reply of 9 October 2002 to the Commission's request for information of 12 September 2002.

4.3.1. Non-CSD customers (Credit institutions and financial service institutions).

(123) To these customers, CBF offers *"standard services based on CBF's AGB (Allgemeine Geschäftsbedingungen / General Terms and Conditions)"*.

(124) All non-CSDs customers are charged according to CBF's published tariff. For these customers, CBF's total average price per transaction is of approximately €0.20 [132].

4.3.2. Non-German Central Securities Depositories (CSDs)

(125) According to CBF/ CI, *"In addition to "standard services", the following settlement services are provided in response to specific needs of CSDs (with respect to cross-border transactions) based on individual Depository Agreements and Service Level Agreements:*

- *Specific and individual communication schedule elaborated in close co-ordination with each CSD and prepared according to the needs of each individual CSD, e.g. deadlines regarding instructions for same-day settlement or delivery of securities FoP or DvP.*
- *Monitoring of specific and individual communication schedule on each business day.*
- *Set-up, administration and maintenance of the participant data of each CSD (e.g. data of all participants of SIS) in order to allow cross-border settlement.*
- *Admission of securities to be settled within CBF-CSD-links on request of the CSD.*
- *Communication costs (costs of use, administration, maintenance of CBF settlement systems and interface-charges etc.) are included in the settlement fees.*
- *A separate Unit in our Network Management Department (currently 3 employees) is responsible for the co-ordination of all internal and external activities with respect to CSD-links. This unit is mainly responsible for the relationship management between CBF and CSDs (that includes regularly external visits, enhancement of CSD-links, e.g. improvement of IT communication, service levels).*
- *8 employees are working in a separate and special settlement unit in CBF monitoring the daily cross-border business with each CSD, acting as the direct contact for each CSD (by contrast, the* [redacted] *non CSD-customer's day-to-day business is handled directly via our Customer Service Unit consisting of 9 employees).*

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[132] CI/CBF's letter of 9 October 2002, point 5. The reference period for the calculation of the total average price per transaction was January-August 2002.

On a per transaction basis the following figures are to be taken into account:

- 8 employees of the CSD Settlement Unit handle approx. [redacted] transactions per month, i.e. [redacted] transactions per employee.

- The Customer Service Unit (9 employees) handles the day-to-day business for non-CSD customers, which are approximately [redacted] [twenty times more] transactions per month, i.e. over [redacted] transactions per employee.

These figures reflect the complexity of the customised cross-border services provided to CSDs as compared to standardised non CSD-customer business.

- *Less scope for STP-treatment of settlement carried out for CSDs (STP-rate cross-border CSD-links: 80% compared to STP-rate domestic OTC business non-CSD-links: 99%). This is due to a high level of manual workaround.*

- *Special contingency procedures (e.g. extension of settlement deadlines in case of late delivery from CSD, maintenance of back-up facilities etc).*

- *According to German Safe Custody Law, CBF has to procure, at its expense, legal opinions prepared by external law firms or external University Law Professors on the legal status of each CSD prior to the establishment of a CBF-CSD-link. Costs are Euro [redacted] at least per legal opinion. In addition, existing legal opinions have to be updated regularly, which causes additional costs of approximately Euro [redacted] per opinion."*[133]

(126) According to the information provided by CI/CBF[134], the CSDs which receive the services described above are seven. These are: [redacted]. In each case, the individual Service Level Agreements have the same content. All CSDs are charged € Y per transaction [X is 20% more than Y][135]. The dates from which the € Y tariff (or the rough DM equivalent prior to 1999) applies are as follows[136]:

CSD 1	Since September 1996 (DM YY)

133 CI/CBF reply of 9 October 2002.

134 CI/CBF letters of 24 May 2002 (point 6) and of 8 October 2002 (point 2.a). In their 1 September letter relating to costs, CI/CBF provided a table that included 10 CSDs. [redacted]. All CSDs [redacted] were allocated the same costs.

135 CI/CBF letters of 24 May 2002 (point 6) and of 8 October 2002 (point 2.a)

136 CI/CBF letter of 27 November 2002, point 1.a)

CSD 2	Since December 1996 (DM YY)
CSD 3	Since April 1998
CSD 4	Since November 1998 (DM YY)
CSD 5	Since September 1999
CSD 6	Since September 2000
CSD 7	Since the end of February 2001

(127) The application of the € Y tariff is linked to the abandonment of completely manual handling (instructions via fax and manual input into the CBF system). For example, in the case of [redacted], the fee that applied from the beginning of 1998 until the date mentioned in the above table was € YY. The fees were reduced in the three cases due to the change in the technical communication structure between CBF and these three CSDs, from completely manual handling into completely automated procedures (instructions via file transfer and automated input into the CBF system). In other cases, there was no change in the € Y fee because the initial link with CBF was already automatic.

4.3.3. International Central Securities Depositories (ICSDs)

(128) According to CBF/ CI, *"The third customer class consists of ICSDs (currently CBL and EB). ICSDs receive both standard services as well as special services comparable to the above listed services offered to CSDs.* [Emphasis added]

> *Compared to CSDs, the following special services are not required by ICSDs:*
>
> – *Admission of securities for the CBF-ICSD-link.*
>
> – *Provision of legal opinions prior to the establishment of a CBF-ICSD-link.*
>
> *Apart from these differences the volume of transactions settled for ICSDs is significantly higher compared with those settled for CSDs. As a consequence the level of automation (STP) is higher, too.* [Emphasis added].
>
> *Therefore ICSDs are charged in accordance with specific service levels (quantity, quality) they require"*[137].

(129) The settlement services provided by CBF to EB are more standardized and relate to much higher volumes than the services provided by CBF to CSDs. According to the information provided by CBF[138] :

> *"...it has to be noticed that the services CBF provides to EB mainly relate to the clearance of Eurobonds, and that this work can be*

137 CI/CBF letter of 9 October 2002, reply to question 1.

138 CI/CBF letter of 9 October 2002, reply to question 7.

standardised to an important degree. By contrast, services CBF provides to CSDs relate in large part to national equity or debt instruments, which require special procedures (e.g. payment and voting procedures) as well as compliance with diverging national rules. Therefore the workaround cannot be standardised to the same degree as the services CBF provides to EB." [Emphasis added].

(130) According to the information provided by CBF and CI [139], the per transaction fee covers settlement, and does not concern any special services provided to EB other than settlement.

(131) The safekeeping fee foreseen by CBF's price list applies to safekeeping. In addition, CBF charges EB € [redacted] per year for a number of services which CBF qualifies as special services other than settlement. According to CI/CBF[140], these are:

- availability of cash clearing statements at request
- availability of settlement confirmations of CBF at request
- deposit confirmations
- reconciliation with paying agents at payment refusals on deposit confirmations
- information about all drawings
- capital increases and/or reductions; communication of subscription rights' accounting
- re-conversion of partial rights according to instruction
- delivery of partial rights according to instruction
- general meetings: blocking of shares and communication to lead manager for voting rights exercise; release of shares
- issue of tax declarations.

(132) The original link between EB and CBF was established in 1989 and was upgraded on a number of occasions. On 11 July 1997, EB and CBF concluded a "Link Agreement", which included the specifications for the processing of messages on the so-called DKV/EOC "bridge" [141].

4.3.4. Conclusions regarding the services provided by CBF

(133) The Commission concludes that there are no clearing and settlement services that CBF provided to ICSDs that it did not provide to CSDs.

(134) The lists of services provided by CI/CBF are inconsistent and contradictory. The Commission bases this position on the overall assessment of the following elements:

a) CBF had difficulties in identifying precisely the services concerned at various moments in time. CBF committed itself vis-à-vis EB, on 18

139 CI/CBF letters of 9 October 2002 (point 6) and 24 May 2002 (point 5).

140 CI/CBF letters of 9 October 2002 (point 6) and 24 May 2002 (point 5).

141 Cf. Link Agreement of 11 July 1997 (provided as an attachment to the EB letter of 27 May 2002) and in particular Exhibit D to that agreement ("Bridge Specifications"). Exhibit D is attached as Annex 2 to EB's letter of 2 December 2002.

September 1998, to prepare a "*reviewed list*" of services that would serve as a base for further discussions with EB on the services to be maintained and on their pricing[142] . In April 1999 CBF was still *"in the process of defining the additional services we provide to the ICSDs..."*. The list of services was still not prepared one year after the 18 September 1998 meeting. The first occasion on which CBF provided to EB a description of the "special services" provided to it was through a letter of 1 October 1999 addressed to [redacted] of EB, according to which: *"[d]ue to the fact that Euroclear draws various special services from our firm (for example, separate File Transfers, Corporate Actions, Reconversion of Partial rights in Shares according to Instruction, several services in connection with General Meetings, Issue of Tax Declarations, Contingency Rules with higher information requirement, money transfer to cash correspondents for income proceeds in foreign currencies, etc.) the present price structure is appropriate.* Most of the services described in DBC's letter of 1 October 1999 are however related to safekeeping and not to primary clearing and settlement, such as corporate actions and services in connection with general meetings. Also, according to the explanations provided by CBF and CI, the reconversion of partial rights in shares and the issue of tax declarations are not related to settlement (see list in letter b) below). These services are therefore more properly described as custody.

b) CI/CBF also provided a following list regarding what it called special services provided to EB "other than settlement" (see recital (131) above). The comparative examination of the lists of settlement services in sections 4.3.2 and 4.3.3 on the one hand and the list of special services other than settlement on the other hand leads the Commission to conclude that there is no justification for such a separation. For example, the provision of legal opinions, which is included in the list of settlement services provided to CSDs is not, properly speaking, a settlement service, but rather a pre-requisite for operating. On the contrary, the "availability of settlement confirmations of CBF at request" and the "deposit confirmations", which are listed under the list for services other than settlement, are services related to settlement.

5. THE RELEVANT MARKET

5.1. The relevant product market

(135) In the Commission's practice, a relevant product market comprises all those products or services which are regarded as interchangeable or substitutable by the customer, by reason of the product's characteristics, their prices and their intended use[143].

(136) The behaviour of CBF under examination concerns the post-trading clearing and settlement of transactions relating to securities issued according to

142 Cf. last paragraph of agreed minutes of that day's meeting between CBF and EB (attached as an annex to the CI/CBF letter of 28 February 2003).

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

German law, in particular in relation to cross-border transactions (see also paragraph 9).

(137) As explained in section 3.1 above, the post-trading processing of transactions includes clearing and settlement following a transaction, but does not cover safekeeping or custody services. All securities are safekept in final custody, regardless of whether they have been subject to a transaction or not, and custody services relating to such safekeeping and also including administration services, are distinct from transaction clearing and settlement services. While there is a conceptual distinction between clearing and settlement on the one side and safekeeping or custody on the other side, clearing and settlement cannot be considered entirely separately from safekeeping, as clearing and settlement can only take place in relation to those securities that are kept in custody. This relationship is emphasized both by Clearstream (*"companies which carry out clearing and settlement must have the relevant securities in custody"*[144]) and by Euroclear (*"Clearing and settlement cannot be considered separately from safekeeping"*[145]).

5.1.1. For customers (intermediaries) requiring direct access to the issuer CSD (CBF), indirect access is not a valid alternative

(138) Access to CBF can be direct or indirect (see above, section 3.5). If it is direct, the intermediary will have an account with CBF. If it is indirect, the intermediary will have an account with a customer of CBF - a local agent - that has, in turn, an account with CBF[146].

(139) Whether indirect access is or not a suitable substitute to direct access to CBF depends on the type of customer and on its requirements as a user, such as the need for the shortest possible time span for clearing and settlement. For intermediaries wishing to provide to their own customers efficient and timely settlement, indirect access is not a suitable substitute. This is because indirect access imposes a number of disadvantages, since (a) deadlines will be poorer[147], (b) risk will be greater, (c) costs will be higher, given that the intermediary will charge a mark-up for its involvement, (d) using an intermediary creates potential conflicts of interest, and (e) for CSDs and ICSDs to be able to deliver collateral in TARGET, direct access to the issuer CSD (CBF in the present case) is a requirement of the European Central Bank ("ECB").

5.1.1.1. Poorer Deadlines

(140) As a rule, every intermediary will necessarily require time for its own post-trading transaction processing, as not all processes at intermediaries are completely automated. In addition, each operator may normally take a "buffer" time to ensure that it can meet its contractual deadlines even in unusual circumstances. Intermediation will consequently result in earlier

144 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.I.2.c), "Relation between custody and clearing and settlement".

145 EB's letter of 28 October 2003, reply to question 1.

146 See CI/CBF's presentation at the oral hearing of 24 July 2003, slide 19, left hand picture.

147 Cf. EB's reply of 16 November 2001, question 29 (e).

deadlines for providers of secondary clearing and settlement vis-à-vis their clients, thus leaving less time to collect and process information for customers' instructions by cutting off the business day at an earlier time. In addition, the receipt of settlement results in return from the issuer CSD is less efficient, as results will pass through the intermediary and arrive at the customer (in turn a provider of secondary clearing and settlement) only later, leaving less time for processing. In conclusion, a supply chain involving indirect access is invariably less efficient than one involving direct access. In the specific case of EB, the Commission has obtained information comparing the CBF deadlines with the deadlines required by [redacted] (an intermediary) [148]. It results from that information that indirect access can result in substantial delays, of up to 11 hours in the time to receive feedback of the settlement. The time at which feedback of the settlement is received is crucial, as further trades can only take place on the basis of settled transactions. For a provider of competitive secondary clearing and settlement services such as an ICSD, the delay in processing resulting from intermediation means too large a time gap between delivering the security and receiving the payment. This implies too high a risk (individual and systemic), insufficient liquidity and inefficient cross-border collateral management. Indirect settlement channels do not therefore allow ICSDs to provide an efficient service to their clients.

5.1.1.2. Greater risk and complexity

(141) In terms of service it should also be noted that a main concern in the post-transaction processing industry is to reduce risk of errors in the transmission of information and of securities and cash. If there is direct access, there is one less layer where operational or technical errors can occur. Especially if the intermediary requires manual intervention, which is always more error-prone due to the human factor, there is a great benefit of being able to process without such intermediary.

5.1.1.3. Additional costs

(142) Settlement costs associated with indirect access are often higher than costs of direct access, since the intermediary must make a profit in the transaction.

(143) At the oral hearing of 24 July 2003, CI/CBF stated that the costs of indirect links are significant and that direct links are the most efficient.

5.1.1.4. Potential conflict of interests resulting from the use of an intermediary

(144) For large intermediaries wishing to obtain primary clearing and settlement services directly from the issuer CSD, the use of a local agent bank as an intermediary may create conflicts of interest, as evidenced by the present case in which EB had to use [redacted], a competitor in the downstream market, as intermediary. The intermediation of an actual or potential competitor has as a consequence that the intermediary is informed of the operations of the customer against which it is competing in the downstream

148 EB's reply of 27 May 2002.

market. In the case of low-volume intermediaries who make the choice of using the administration services of another intermediary, the potential conflict of interest does not arise (if the two intermediaries are not actual or potential competitors in the downstream market) or is reduced to a level acceptable to the customer, that is, to the relatively few transactions of the customer that are cleared and settled through the intermediary.

5.1.1.5. ECB requirements

(145) For certain customers such as CSDs and ICSDs, direct access to CBF is a requirement in order for the link to be accepted by ECB as authorised for the delivery of collateral in TARGET[149]. This refers essentially to the delivery of government bonds and does not concern shares.

(146) Market participants have confirmed that for intermediaries wishing to provide efficient and competitive clearing and settlement services to their clients, indirect access to the CSD is not a suitable alternative to direct access. EB stressed that *"Financial intermediaries do need access to a CSD for secondary clearing and settlement to take place ...Euroclear also agrees with the Commission that indirect access is not a satisfactory substitute for direct access and that direct access is a necessary condition for providers of secondary clearing and settlement services."*[150]. Other intermediaries confirm this assessment. For instance, BNP Paribas states that *"Custodian banks facilitate the access to the securities markets, they serve clients ... on a contractual basis in a highly competitive environment ... In order to compete, they depend on their capacity to access a CSD. ... They are members of the post-trade infrastructures [the CSDs] and provide their clients with indirect access to the CSD infrastructure ..."*[151].

(147) CI/CBF themselves confirm[152] that *"it is correct that direct access to the underwriter's final custodian [the CSD] offers advantages over indirect access"*. CI/CBF add that, *"However, indirect access may offer the advantage e.g. that intermediary custodian banks may offer extensive capital services, which exceed the capabilities of the final custodian.* CI/CBF go on to say that "*The mode of access is ultimately a competitive parameter, not a market delineation."* The first sentence quoted appears to confirm the Commission's assessment as set out above. The Commission does not dispute that certain customers might be interested in other, non-settlement services, offered by a local custodian bank but not by a CSD, rather than direct access to CBF. For

149 Links between CSDs and ICSDs have been established to facilitate cross-border transfers of securities, particularly those used as collateral against central bank credit facilities for banks participating in TARGET. The securities include government bonds of the type that are cleared and settled in CBF. These links have to be assessed against the Eurosystem standards to be qualified as eligible for providing this service. Clearstream International and Euroclear are the most used links of the 62 eligible links. ECB, *Assessment of EU Securities Settlement systems against the standards for their use in ESCB credit operation*, June 2001.

150 Letter to the Commission of 28 October 2003, page 4.

151 BNP Paribas contribution to the ECB-CESR Consultative Report, October 2003, pages 8 and 17.

152 Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.I.1)b).

these customers, the administration and capital services provided by another intermediary may be more interesting than efficiency in post-trading transaction processing. While this might be the case for less sophisticated customers, intermediaries (be it banks, CSDs or ICSDs) desiring to provide genuinely economically significant, efficient and competitive clearing and settlement services to their own clients, will require direct access to primary clearing and settlement. Indirect access to the CSD is not sufficient for an intermediary to provide such settlement services in a competitive environment, as described by market participants such as EB and BNP Paribas. This is the case in particular for intermediaries dealing in high volumes or aspiring to compete with other efficient intermediaries. Indeed, for the purpose of deciding demand substitution, the specificities of the customers' demand is a relevant factor to be taken into account. The Commission cannot therefore agree with CI/CBF's statement that the mode of access (direct or indirect) required by a customer cannot be used to delineate markets. On the contrary, as the Court of Justice established in its *Hugin* judgment[153], to determine whether a given type of supply constitutes a specific market or whether it forms part of a wider market, it is necessary to determine the category of clients who require the product or service. There is a group of financial intermediaries desiring to provide efficient and competitive settlement services (including custodian banks, CSDs acting as intermediaries in cross-border transactions and ICSDs) for whom having recourse to another intermediary is not a suitable and effective alternative, due to the negative consequences in terms of additional time, costs and complexity that the involvement of a further intermediary entails.

(148) It is apparent from the above that there is a group of providers of clearing and settlement services for whom indirect access to the issuer CSD (CBF in the present case) is not a substitutable alternative for direct access, and that this lack of substitutability is a relevant factor for market definition purposes.

5.1.2. The provision by the issuer CSD (CBF) of primary clearing and settlement to CSDs and ICSDs is in a separate market to the provision of primary clearing and settlement to "General Terms and Conditions (GTC) customers" (also called by CI/CBF "non-CSD customers")

(149) According to the information provided by CI/CBF, GTC or "non-CSD" customers obtain a different type of service from CBF than CSDs and ICSDs (see the different lists of service elements in section 4.3). CI/CBF). In contrast with the General Terms and Conditions applicable to non-CSD clients, CSDs and ICSDs are provided by services based on individually negotiated agreements. CI/CBF affirm that *"....CSDs require a different type of service provided by CBF and usually need a modified technical infrastructure differing from country to country. For example, for each of the CSDs a*

153 Judgment of the Court of 31 May 1979, Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities. Case 22/78 (European Court reports 1979 Page 1869).

detailed communication (file transfer and S.W.I.F.T.) schedule exists and is closely monitored by CBF on each business day. This service is provided for CSD/ICSDs....."[154][Emphasis added]. The means of communication and the format of data transfer between the two categories are also different.

(150) There are large price differences for the services provided to non-CSD customers on the one hand and to CSDs and ICSDs on the other hand. Non-CSD customers pay an average price per transaction of approximately €0.20; CSDs and ICSDs pay substantially higher prices than in the case of non-CSD customers. Excluding those cases where a link had not been established (that is, where instructions were transmitted via fax and required manual input into the CBF system), CSDs are charged € Y per transaction. EB was charged € X until 1 January 2002. The existence of large price differences is an indication of the existence of separate markets.

(151) CI/CBF confirm that the different services and prices for CSDs and ICSDs reflect a different demand as compared to non-CSD customers: *"Different price-service packages arise from different customer requirements. In this regard, CBF differenciates between customers subject to its General Terms and Conditions of Business ("GTC customers")..., CSDs and ICSDs."*[155]. This is further confirmed by CI/CBF's statement (see section 4.3.3. above) that ICSDs receive *"special services comparable to the above listed services offered to CSDs"*.

(152) CI/CBF state that *"[I]n principle, different groups of customers can be assigned to different markets. However, this is only the case when the respective other price/services package is unattainable for them. This is not true in this case for CSDs and ICSDs, since both of those institutions can assume the status of GTC customers at any time. That they do not do so in practice is...because they pose higher requirements for CBF than commercial banks"*[156] . This statement confirms that the standard services provided to GTC clients are not a valid alternative for CSDs/ICSDs. It is however erroneous for CI/CBF to affirm that such different services can only constitute a separate market if another price/ other services are not available to the customer group in question. The criterium for market definition is not whether other services are available at all or not, but whether those services constitute a genuine alternative from the demand-side point of view. The fact that *"in practice"* there is no substitution also confirms the existence of separate markets.

(153) It appears that prices charged to "GTC" or "non-CSD" customers do not act as a competitive constraint on the prices charged to CSDs and ICSDs. If the services provided to non-CSD customers were substitutable to the services provided to those CSDs and ICSDs which have requested CBF's services,

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154 CBF reply of 24 May 2002, question 6.

155 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.I.2.d)bb).

156 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.I.1.b).

these would normally switch to these services, given the much higher price that they pay as compared to non-CSD customers. However, this does not seem to happen in practice. As the facts in the present case show, EB insisted on a price reduction for the services provided to it but did not switch to the standard services despite of the lower price, and neither did any threat to switch seem to have constrained CBF's pricing behaviour. Specifically, the price reduction that CBF granted EB as from 1 January 2002 was not linked to any competitive constraint arising from the prices charged to GTC customers.

(154) In addition, the services required from CBF by CSDs and by ICSDs always relate to cross-border clearing and settlement, given that ICSDs and other CSDs are located outside Germany. In contrast, many of CBF's non-CSD customers are banks located in Germany dealing with domestic transactions.

(155) The primary clearing and settlement services provided by the issuer CSD (CBF) to "GTC" or "non-CSD" clients (banks) do not therefore present a substitutable alternative to services provided to CSDs/ICSDs, and do not act as a competitive constraint. The provision by the issuer CSD of primary clearing and settlement to "GTC" or "non-CSD" clients is consequently in a separate market to the provision of primary clearing and settlement to CSDs and ICSDs.

5.1.3. Secondary clearing and settlement services are not a valid alternative for certain customers (intermediaries) requiring primary clearing and settlement services in order to perform their services efficiently

(156) Generally speaking and as described in section 3.3 above, clearing and settlement can be performed by the entity where securities that have been issued are deposited ("primary clearing and settlement") or by intermediary market players downstream ("secondary clearing and settlement"). Primary and secondary clearing and settlement take place at two different levels.

(157) "Primary" clearing and settlement within the entity with which securities have been deposited occurs whenever there is a change in the position of the securities accounts held with this entity. Primary clearing and settlement is therefore carried out by the same entity with which securities are kept in final custody.

(158) CBF is currently the only authorised *Wertpapiersammelbank*, or CSD, for securities kept in collective safe custody in Germany. The vast majority of securities issued under German law[157] are kept in collective safe custody. Therefore, primary clearing and settlement of securities issued (and held in collective safe custody) in accordance with German law is carried out by CBF, the issuer CSD (see further above, section 3.3).

[157] Issues in non-German securities (i.e. securities not issued in accordance with German law) will in practice not be kept in final custody in Germany (CI's and CBF's Reply of 30 May 2003 to the Commission's Statement of Objections, section B.I.2.a)aa)(2).).

(159) The customers of primary clearing and settlement are generally intermediary market players who offer securities clearing and settlement services to their customers (although they can also act as end customers themselves).

(160) "Secondary clearing and settlement" is performed by market players other than the entity where securities that have been issued are safekept, i.e. by intermediary market players, and takes place at a downstream level. The term "secondary" in the context of this decision, therefore, refers to the fact that the activity is performed at a different level to the primary activity. As described above (section 3.3), it is not intended to imply that there is repetition of the primary activity, nor that for any one individual transaction both primary and secondary clearing and settlement must occur.

(161) As explained at section 3.3 above, secondary clearing and settlement, or clearing and settlement at the secondary level, can be considered to take place either (a) in the case of internalised transactions, where these are allowed and feasible, or (b) as a mirror operation through which financial intermediaries make appropriate book entries in the customers' accounts on whose behalf the transaction is conducted. Such book entries reflect transactions that have been subject to primary clearing and settlement in the financial intermediary's account with the entity where the relevant securities have been issued and are safekept.

(162) Where transactions can be internalised[158] and processed at the secondary level, no "primary" clearing and settlement occurs. However, whenever any position with the issuer CSD (CBF) changes following a transaction, primary clearing and settlement within CBF is necessary. In this situation, the secondary clearing and settlement that the intermediary carries in its books is a mere mirror operation through which the intermediary reflects the result of primary clearing and settlement in the accounts of it customers.

(163) It should be noted in this context that CBF offers the single largest pool of securities issued according to German law, since *« [a]ll German fungible securities – representing more than 90% of existing German securities – are deposited in the vaults of CBF, allowing prompt and secure book-entry settlement*[159] *»*. The total quoted value of the securities held by CBF in collective safe custody was approximately [redacted] Euro at the end of 2002[160].

(164) None of the providers of secondary clearing and settlement is in a position to settle on their own books transactions with all potential counterparties. The ability to offer and provide settlement of transactions with <u>all</u> potential counterparties, i.e. to offer and provide a complete portfolio or package of clearing and settlement services for securities issued under German law requires access to the services of CBF, which is the only common pool of all potential counterparties for transactions of securities issued according to German law. Also, in certain circumstances (for example, when securities are

158 See also paragraph 14 for clarifications on internalisation

159 Chapter on General information on Clearstream Banking Frankfurt of the June 2000 Domestic Links Guide published by Clearstream Banking Luxembourg.

160 CI/CBF's statement at the oral hearing.

first issued within the issuer entity), all transactions will require primary clearing and settlement services, as a prerequisite for secondary clearing and settlement in the financial intermediaries' own books.

(165) It follows that whenever secondary clearing and settlement cannot take place in order to complete a particular securities trade, notably because the seller and buyer do not happen to be customers of one and the same intermediary, primary clearing and settlement by CBF is needed to complete the trade. Indeed, Clearstream itself confirms that: *"Where intermediary custodians – e.g. financial intermediaries, but also ICSDs, custodian banks etc. – are unable to perform clearing and settlement, it must indeed be performed by the final custodian [the CSD]"*[161].

(166) It should be furthermore noted that market participants regard "internalised" clearing and settlement within the books of an intermediary as occurring on a purely incidental basis, arising out of circumstances over which an intermediary would have no control. An investor cannot "choose" to settle across the books of a custodian instead of using a CSD and does not determine what products or with whom he trades depending on whether his counterparty happens to be a client of his intermediary[162].

(167) It follows from the above that secondary clearing and settlement services for securities issued under German law and safekept by CBF is not in general a valid substitute for primary clearing and settlement services for such securities.

(168) The present case concerns the demand for clearing and settlement services by a distinct group of customers, that is intermediaries such as ICSDs and CSDs (see section 5.1.2 above). Therefore, it is not necessary to consider further to what extent, if at all, primary and secondary clearing and settlement could be alternatives for <u>any</u> investor participating in trades of securities issued according to German law. It is sufficient to state that for intermediaries such as ICSDs and CSDs, when they are in competition with other intermediaries, access to CBF is indispensable to provide their own secondary clearing and settlement services to their clients. This is because, as set out above, CBF represents the only pool in which transactions with all potential counterparties can be settled. Given that intermediaries are not in a position to settle trades with <u>all</u> potential counterparties, they need direct access to primary clearing and settlement by CBF in order to clear and settle the transactions that they cannot internalise. This has been confirmed by market participants[163].

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161 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.I.2 b) bb).

162 See Citigroup's response of October 2003 to the ECB-CESR Consultative Report, pages 4 and 8, and the BNP Paribas contribution of October 2003 to the same Consultative Report, page 17).

163 See for instance Euroclear Bank, letter to the Commission of 28 October 2003, page 4.

(169) In their reply to the Statement of Objections[164], **CI/CBF** argue that the Commission's assessment takes an inadequately narrow perspective of the facts, and that the Commission misunderstands the relationship between custody and clearing and settlement: *"CBF merely possesses in Germany a de facto monopoly for the final custody of instruments eligible for central custody..."* but *"[e]ach instrument capable of central custody which is kept physically or electronically by CBF...can be kept in accounting-related custody"* by subcustodians (intermediaries). CI/CBF then criticise the Commission for allegedly *"inferring from the undisputed fact that CBF has a de facto monopoly for the final custody of securities kept in collective safe custody under German law the conclusion that CBF has a monopoly also for certain settlement services"*. CI/CBF also argue that both final custodians and subcustodians can offer their customers clearing and settlement services and that *"[t]he fundamental error in the Objections consists in the fact that its perspective is based on CBF's range of services and not on customers' requirements"*. In CI/CBF's view, *"the quality of the clearing and settlement by subcustodians does not differ from the quality of clearing and settlement by final custodians. Hence, subcustodians and final custodians indeed compete for clearing and settlement services"*. CI/CBF conclude that, *"from the customer's viewpoint, clearing and settlement is a process which both final custodians and subcustodians can offer and carry out, for indirect possession of the securities is sufficient for this purpose"* and that *"[e]ach subcustodian represents a substitute to the underwriter's final custodian for consumers of clearing and settlement services"*[165].

(170) The Commission, first of all, does not agree with CI/CBF's assertion that the Commission misunderstands the relationship between custody on the one hand and clearing and settlement on the other[166]. It is undisputed that (a) all securities held in collective safe custody are safekept with CBF[167] ; in other words, CBF has a "*de facto* monopoly" in the provision of collective safe custody in Germany[168], and (b) the vast majority of securities issued under German law are held in collective safe custody (see above, section 3.2). Clearstream itself stresses, in a publication, that *« [a]ll German fungible securities – representing more than 90% of existing German securities – are deposited in the vaults of CBF, allowing prompt and secure book-entry settlement*[169] *»* (emphasis added). Thus Clearstream itself confirms the link between its predominant position as safekeeper of German securities in collective safe custody and "prompt and secure book-entry settlement". It is equally incorrect to state that CBF's "de facto monopoly" for custody leads the Commission to infer a "monopoly for certain settlement services". Rather, the Commission analyses whether, for a distinct customer group, namely

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164 See CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.I.2.

165 Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.I.1.b).

166 See CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Sections B.I.2.c) and C.I.1.b) and C.II.

167 CI reply of 16 November 2001, reply to question 3.

168 Reply of 30 May 2003 to the Commission's Statement of Objections, Sections B.I.2.c) and C.I.1.b).

169 Chapter on General information on Clearstream Banking Frankfurt of the June 2000 Domestic Links Guide published by Clearstream Banking Luxembourg.

intermediaries such as CSDs and ICSDs, substitutable alternatives exist for primary clearing and settlement or not.

(171) Furthermore, in portraying clearing and settlement by "final custodians" (CSDs) and "subcustodians" (custodian banks) as completely interchangeable services for "customers of settlement services", defined by CI/CBF as any "party to a securities transaction"[170], CI/CBF ignore distinctions that are recognised by other market participants and fail to take into account the specific demand requirements of distinct customer groups. CI/CBF's presentation of clearing and settlement by "final custodians" and "intermediary custodians" as complete substitutes is therefore misleading in the context of the present case.

(172) Firstly, CI/CBF acknowledge that only settlement by the CSD, that is CBF, but not settlement by any "intermediary custodian", can effect the transfer of fractional ownership in a security kept in collective safe custody, and that settlement by an "intermediary custodian" is not sufficient to confer such ownership rights (see section 3.3 above). This specific function of primary settlement by the issuer CSD is recognised by other market participants [171].

(173) It must also be noted that CI/CBF themselves, in their reply to the statement of objections[172], confirm that any intermediary wishing to provide clearing and settlement services to its customers needs a contractual link to the "final custodian" (the issuer CSD, CBF in this case) in order to obtain the latter's "necessary collaboration" (see also section 3.3 above).

(174) Secondly, the present proceedings do not concern the possibilities of obtaining clearing and settlement services that any customer at large – that is any party to a securities transaction - may have, contrary to what CI/CBF are suggesting in their reply to the statement of objections. The present decision concerns the services provided to a distinct customer group, that is intermediaries such as ICSDs and CSDs which receive, in CI/CBF's own description, distinct settlement services. Following for instance the *Hugin* jurisprudence, referred to in recital (147) above, the analysis of possible alternative sources of supply must take into account, for market definition purposes, the specific needs of this customer group. As has been set out in sections 5.1.1 and 5.1.2 above, such intermediaries have no suitable alternative to the direct provision of primary clearing and settlement by the issuer CSD, that is CBF.

(175) Annotations in account will indeed allow a subcustodian to be in "indirect possession" of the securities, as CI/CBF affirm. However, as explained in recital (162) above, the subcustodian will be able to perform clearing and settlement vis-à-vis their clients in certain cases, but there will be situations where this is not possible. Even where an intermediary or subcustodian is in a

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170 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.I.1.b).

171 Citigroup, Response to ECB-CESR Consultative Report, Suporting Document, October 2003, page 4; BNP Paribas, Contribution to ESCB-CESR Consultative Report, October 2003, page 8.

172 Section B.I.2.b) cc).

position to offer clearing and settlement services to customers in general, this is not an offer suitable to all types of customers. Contrary to CI/CBF's assertion, the Commission considers that specific customer needs are critical for market definition purposes and has accordingly evaluated these needs.

(176) In its letter of 28 October 2003, **EB** takes the view that *"different markets for different types of customer do not exist"*, and that *"primary and secondary clearing and settlement overlap"*, insofar as the use by the intermediary of the CSD account is normally only required when the buyer and the seller are not using the same intermediary. Therefore, other than in the case of first trades following a new issuance, a large degree of internalisation might pose a competitive constraint on CSDs and if the price of primary clearing and settlement increases, customers will "move" from a provider of primary clearing and settlement to a provider of secondary clearing and settlement. EB also states that, since access is a necessary condition for competition to take place, "*the Commission ought to assume that access is granted in order to determine whether providers of secondary clearing and settlement compete with providers of primary clearing and settlement. Assuming that access is granted, the relevant question is whether providers of secondary clearing and settlement can (actually or potentially) settle enough trade on their books in order to pose a competitive threat and thus a competitive constraint on the CSDs pricing*"[173] [Emphasis added]. The Commission should therefore, in EB's views, consider internalisation by intermediaries as a source of potential competition for CSDs, and examine to what extent internalisation takes place in a specific local market environment.

(177) The Commission understands EB's position to be more nuanced than CI/CBF's description of the market. Rather than generally equating primary clearing and settlement by a CSD and secondary clearing and settlement by intermediaries, as CI/CBF do, EB recognises that primary and secondary clearing and settlement are different, but advances the theory that intermediaries might constrain CSDs in the provision of services to customers in general, provided they achieve a large degree of internalisation.

(178) The Commission has considered EB's views but does not share them, for the following reasons.

(179) First, as EB itself states, "indirect *access is not a satisfactory substitute for direct access"* to the issuer CSD and *"financial intermediaries need access to a CSD for secondary clearing and settlement to take place"*[174]. The present case precisely relates to a situation where an intermediary (EB) required primary clearing and settlement directly from the issuer CSD and was not obtaining it. In those cases like in the present case where primary clearing and settlement is required, secondary clearing and settlement by an intermediary is not an alternative.

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173 EB Reply of 28 October 2003.

174 EB letter of 28 October 2003.

(180) Second, in its assessment the Commission may not legitimately assume that access is granted. As the present case shows, there are situations were the issuer CSD does not grant direct access to an intermediary.

(181) Third, EB, like CI/CBF, fail to recognize the relevance of the needs of specific customer groups for market definition purposes, as explained in recital (174) above. Certain EB customers may indeed have the choice of having an account with an intermediary (EB) or of having an account with the issuer CSD. However, for other customers -like EB itself- using another intermediary -which may even happen to be a competitor in the provision of secondary clearing and settlement services- instead of the issuer CSD, is not an acceptable substitute. It is clear from the well-documented exchange of correspondence between CBF and EB in section 4.1 above that using [redacted] as an intermediary for registered shares was not an economically efficient and acceptable alternative for EB, which required direct access to CASCADE RS in order to be able to provide secondary clearing and settlement services efficiently. In other words, for market definition purposes in the present case, the Commission does not have to examine the needs of the intermediaries' clients, but rather the specific needs of the category of undertakings which require the product or service in question. As using indirect access through other intermediaries instead of direct access to the issuer CSD is not an acceptable alternative for an intermediary like EB, EB's suggestion that the Commission should analyse the extent of internalisation by agent banks is inadequate.

(182) Fourth, 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 primary clearing and settlement services directly from CBF and cease using [redacted] as an intermediary, the [redacted] prices did not constrain CI/CBF in the discussions with EB. Furthermore, Euroclear continued to seek primary clearing and settlement services from CI/CBF in spite of what it expressly perceived as excessive prices.

(183) EB also considers that customers are mainly interested in **liquidity**. According to EB's letter of 28 October 2003, "*Competition can be described as competition for liquidity...More liquidity means more internalisation, which in turn means more efficiency in clearing and settlement. For investors, it does not matter whether liquidity is concentrated at the level of providers of secondary clearing and settlement or at the level of providers of primary clearing and settlement. They have an interest in liquidity being concentrated somewhere...*"

(184) EB however affirms that "*because of the costs associated with spreading liquidity, custodians will like to concentrate relations and are not likely for example to have several agent banks to deal with one particular market, nor to have to deal with a CSD and an agent bank at the same time*". EB provides an example in relation to the UK, an "*important financial centre*" where a large number of international banks have subsidiaries. EB states that "*direct membership in the local UK CSD is more prevalent than the use of an intermediary agent bank or custodian*". These statements speak against the

theory that "internalisation" by other intermediaries is a real substitute for using the common pool of all securities, the issuer CSD.

(185) According to EB, there is fierce competition in the UK between agent banks and custodians to attract customers, including in direct competition with CREST, the UK issuer CSD. However, the only example that EB provides points in the opposite direction: "*there are several examples where these international banks have disintermediated and have exchanged their relation with an agent bank for a relation with CREST*". That is, Euroclear's response of 28 October 2003 illustrates substitution away from intermediaries (customers of CSDs) towards the CSD as the most liquid pool of securities, not the other way round.

(186) In the case of securities issued in accordance to German law, the largest pool of securities is in the issuer CSD (CBF), as explained in recital (163) above. Consequently, as far as securities issued in accordance with German law are concerned, there are no reasons related to liquidity that would lead an intermediary such as EB wishing to provide secondary clearing and settlement services to its clients to use the services of another intermediary instead of the primary clearing and settlement services offered by CBF. This is consistent both with EB's affirmation that "*indirect access is not a satisfactory substitute to direct access*" and with the fact that no intermediary is in a position to internalise all transactions with all potential counterparties for all securities safekept in the issuer CSD.

(187) For the sake of completeness, the Commission notes that neither the arguments advanced by EB, nor any other submission made during the present procedure, suggest any degree of "internalisation" of the clearing and settlement of trades in securities issued according to German law that might call into question the Commission's assessment. Having made claims about the degree of "internalisation" in the French market, a market that is not at stake in the present proceedings[175], Euroclear goes on to state with respect to the German market merely that: *"Euroclear internalises an important part of the trade in German bonds ('bunds'). The trades of Euroclear customers with counterparties that are not in Euroclear books are settled in CBF"* [176]. The Commission assumes that this statement refers to German government bonds, so-called "Bunds", as one specific type of German securities.

(188) EB's statement fails to explain how "internalisation", only of certain significance as regards German government bonds, can relieve market

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175 EB claims that in the French market, *"close to 30% of all transactions are settled and matched internally by BNP Paribas"* (cf. letter of 28 October 2003, page 8). This claim, which appears to based on Euroclear's reading of an article in a publication called "Euromoney.com", is refuted by BNP Paribas itself as a mere "misconception", the actual rate being much lower (see for instance BNP Paribas, Contribution to ECB-CESR Consultative Report, October 2003, pages 8 and 18).

176 EB's letter to the Commission of 28 October 2003, page 8. In a statement at the oral hearing, made on behalf of Clearstream, [redacted] of the German Bundesbank said in the same vein: *"Natürlich haben Banken, deutsche Banken, Alternativen im Settlement. Sie können sowohl bei Clearstream settlen als auch bei Euroclear, und sie nutzen dies Möglichkeit, diese Wahlmöglichkeit, sehr intensiv. Es sind hohe Umsätze in deutschen Bundeswertpapieren bei Euroclear ..."*

participants of the need to seek clearing and settlement services from CBF for all securities issued in accordance with German law and kept in collective safe custody. Indeed, by stating that *"The trades of Euroclear with counterparties that are not in Euroclear books are settled in CBF"*, EB appears to confirm that even an "important" degree of internalisation with respect to one specific type of security, that is German government bonds, could not substitute the need to have access to the issuer CSD (CBF) or enable it to provide autonomously settlement for all possible counterparties. This would seem all the more the case for an intermediary like EB itself, which forms part of the relevant customer group in this case and relies on being able to settle trades for all of its customers. Furthermore, as set out above, it appears that the possibility of "internalisation" was not a constraint on prices charged by CBF to the relevant customer group in this case, that is ICSDs and CSDs. In particular, throughout the period concerned by these proceedings, EB tried but failed to obtain lower settlement prices from CBF. It is obvious that its ability to "internalise" the settlement of German government bonds did not affect CBF's pricing behaviour and EB provides no explanation on how it could have.

(189) Therefore, EB's conjecture, while more nuanced than CI/CBF's presentation (which generally equates primary clearing and settlement by a CSD and secondary clearing and settlement by intermediaries), appears theoretical and not borne out by the facts of the present case.

(190) EB refers also in its 28 October 2003 letter to the **July 2003 ECB/CESR Consultative Report"** [177]. In particular, EB calls the Commission's attention to a passage from the Report stating that some global custodians *"have their own settlement infrastructure for their clients..., allowing them to clear and settle transactions in-house (internal settlement)...Some of them have clearing and settlement activities comparable to those of national CSDs in terms of volume and value. Consequently, the level of systemic risk triggered by the largest custodians may affect the entire financial market of the European Union. For this reason several standards are also relevant for custodians that operate systemically important systems... "*.

(191) In connection with this argument, the Commission notes the following. First, the ECB/CESR Consultative Report is a document that discusses clearing and settlement activities primarily in the context of regulation of risk and therefore considers the size of custodian's operations to determine the relevance of risk-related standards. It is clear from the text that the ECB/CESR Consultative Report does not intend to analyse in any way whether different settlement providers satisfy demand-side requirements or whether they compete with each other: *"the [ECB/CESR Working] Group would like to point out that issues related to competition do not fall within its mandate as they would be better dealt with by the relevant national and European authorities"*. It therefore remains unclear what the reference to the Report can prove in the context of a competition policy analysis. Second, the ECB/CESR Consultative Report is,

177 Consultative Report on Standards for Securities Clearing and Settlement Systems in the European Union produced by the European Central Bank and the Committee of European Securities Regulators.

as its name indicates, a consultative document, and the consultation process has shown that EB's view (that coincides largely with the view of CBF on this point) is not shared by other market participants. Several of the contributions made to the consultation highlight the difference between the infrastructure role of the issuer CSDs and the role of intermediaries. For example:

- the public comments to the ECB/CESR Consultative Report by the European Banking Federation state that "*the key functional difference between CSDs and custodian banks is that a CSD is created to serve as an infrastructure for the entire market, whereas custodians...serve as intermediaries providing investors access to that infrastructure and competing fiercely with each other. The relevant functions from regulatory policy and public interest perspectives should be (1) infrastructures and (2) intermediaries....*"[178]

- the October 2003 Citigroup Response to the ECB/CESR Consultative Report states: "*Since the immobilisation or dematerialization of securities in CSDs, a large number of custodians in each market compete to provide clients access to these market infrastructures, because clients either do not qualify or choose not to be direct members of the CSDs...CSDs in almost all countries operate the definitive record of legal ownership of securities, whereas custodians merely hold the title for customers...*"; and that "*'Internalised settlement' is not a special service offered by the custodian...When it is possible, 'internalised' book-entry settlement occurs only on an incidental basis; arising out of circumstances over which a custodian would have no control. An investor does not determine what products or with whom he trades depending on whether his counterparty happens to also be a client of his custodian bank.*"

- according to the October 2003 BNP Paribas Securities Services contribution to the ECB/CESR Consultative Report:

  - "*CSDs are essential facilities which serve the entire market with the objective of avoiding systemic risk and delivering scale economies. CSDs perform two interrelated functions which are essential for the market: as notary, they guarantee the existence of securities and as operator of securities settlement system, they provide the finality to the settlement of trades. ...*

  - *Custodian banks facilitate the access to the securities markets...in a highly competitive environment, and manage risks within their capacity as banks. In order to compete, they depend on their capacity to access the CSDs [emphasis added]. It is a misconception to believe that a significant part of the EU settlement market is "internalised" on the books of custodian banks...*"

(192) The above quotes illustrate the on-going policy discussion about the future regulation of the European clearing and settlement industry. It must be stressed that the present decision is not about the regulatory issues raised in

178 FBE Comments of 31 October 2003 to the CESR/ECB Consultative Report.

this policy debate. On the contrary, it is limited to the competition assessment of the specific events described in this decision and to the market circumstances in which these events occurred. The Commission notes, nonetheless, that Euroclear, like Clearstream, are advocating a regulatory policy option which is contested by many other market participants and that Euroclear's and Clearstream's description of the market, in the context of that debate, is far from being generally accepted.

(193) Having regard to the above considerations, the Commission takes the view that for customers (intermediaries) requiring primary clearing and settlement services in order to be able to provide efficiently secondary clearing and settlement services, secondary clearing and settlement is not an economically valid alternative.

5.1.4. The primary clearing and settlement services provided by entities other than CBF are not a substitutable alternative to the primary clearing and settlement services provided by CBF

(194) As explained above (section 3.2), all securities issued under German law and held in collective safe custody in Germany have to be held in a recognised *Wertpapiersammelbank*, the 'issuer CSD' (CBF), and the vast majority of securities issued under German law are kept in collective safe custody. The issuer of German securities who chooses to keep the securities in final custody in the form of individual certificates in an entity other than CBF does not seek that such securities be traded. In the absence of transactions regarding those securities, clearing and settlement will not occur either.

(195) On certain occasions (for example in case of change of ownership in a family-owned company) there will be transactions concerning securities safekept outside CBF in the form of individual certificates. When such a transaction occurs, primary clearing and settlement within the entity where securities are kept in final custody will also occur. However, for the customers of primary clearing and settlement services offered by CBF (i.e. the intermediaries wishing to offer a portfolio of services in securities to their own customers), the primary clearing and settlement services offered in certain occasions by entities other than CBF do not constitute a substitutable alternative to the clearing and settlement services provided by CBF for securities safekept by it.

5.2. The relevant geographic market

(196) The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas.

(197) The present case concerns the primary clearing and settlement of securities issued according to German law. Such securities are at present ultimately safekept in Germany. According to CI/CBF, securities issued according to German law are in practice kept in final custody (i.e. are deposited) in Germany. Securities issued in accordance with the law of other Member

States are in practice kept in final custody with the respective CSD (e.g., French securities are kept in final custody with Euroclear France, the French CSD). Therefore, there is practically no competition between different national CSDs for the deposit and final custody or safekeeping of securities. [179]

(198) While there is no legal obstacle to safekeep securities issued according to German law outside Germany, in practice any new entrant wishing to do so would face the high entry barriers described in section 6 below, regardless of the territorial location of the safekeeping operations. For this reason, the safekeeping of securities issued according to German law is most likely to continue to take place in Germany for the foreseeable future. Consequently, the primary clearing and settlement pertaining to those securities, which is performed by the safekeeping entity, also takes place in Germany.

5.3. Conclusion on the relevant market

(199) It follows from the above that:

- there is a group of providers of clearing and settlement services for whom indirect access to the issuer CSD (CBF in the present case) is not a substitutable alternative for direct access;
- the provision by the issuer CSD (CBF) of primary clearing and settlement to "GTC" or "non-CSD" clients (banks) is in a separate market to the provision of primary clearing and settlement to CSDs and ICSDs;
- for customers (intermediaries) requiring primary clearing and settlement services in order to be able to provide efficiently secondary clearing and settlement services, secondary clearing and settlement is not an economically valid alternative;
- the primary clearing and settlement services performed by entities other than CBF are not a valid alternative for certain customers (intermediaries like CSDs and ICSDs) to the primary clearing and settlement services offered performed by CBF.

(200) Both demand-side and supply-side substitutability are non-existent in so far as:

- from the demand side, intermediaries that provide a package of cross-border processing of securities services cannot readily use other suppliers of primary clearing and settlement services as a substitute for the services provided by the issuer CSD, nor can CSDs and ICSDs dealing with significant transaction volumes use as a substitue the services available to non-CSD customers or indirect access to the issuer CSD;
- from the supply side, no other company than CBF is in a position to offer in the foreseeable future primary clearing and settlement services

[179] CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, section B.I.2.a)aa)(2).

of the kind required by intermediaries like CSDs and ICSDs for trade in securities issued according to German law and safekept by it[180].

(201) The Commission, therefore, takes the view that the relevant market in this case is the provision by the issuer CSD (CBF) to intermediaries like CSDs and ICSDs of primary clearing and settlement services for securities issued according to German law.

6. DOMINANT POSITION

(202) Article 82 of the EC Treaty prohibits the abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it in so far as it may affect trade between Member States.

(203) CBF is an undertaking carrying out an economic activity, namely the provision of safekeeping, clearing, and settlement services in securities safekept by it and is, thus, subject to Article 82 of the EC Treaty.

(204) In the *United Brands* case[181], the European Court of Justice defined a dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers".

(205) In the Commission's view, CBF has a dominant position on the relevant market, as defined in section 5 of this decision, for the following reasons.

(206) As described in section 3.2 above, the vast majority of securities issued under German law are kept in collective safe custody, and only a *Wertpapiersammelbank* is authorised to keep securities in collective safe custody in Germany. CBF is at present the only *Wertpapiersammelbank* in Germany. Therefore, primary clearing and settlement of securities issued and held in collective safe custody in accordance with German law is carried out by CBF.

(207) The Clearstream group writes that "*[a]ll German fungible securities - representing more than 90% of existing German securities- are deposited in the vaults of CBF, allowing prompt and secure book-entry settlement*"[182].

(208) CBF's position is not constrained by any actual competition in the German market at present. As described above, CI/CBF have called CBF's position in relation to collective safe custody a "de facto monopoly". The fact that CBF is not "responsible" for the legislative provisions allowing only recognised issuer CSDs to hold securities in collective safe custody, or for the fact that no other

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180 See section 6 below regarding the high entry barriers facing new entrants.

181 Case 27/76 United Brands v Commission [1978] ECR 207.

182 Chapter on General information on Clearstream Banking Frankfurt of the June 2000 Domestic Links Guide published by Clearstream Banking Luxembourg.

entity has applied to become such an issuer CSD[183], does not alter the existence of the "de facto monopoly", as CI/CBF calls it.

(209) Furthermore, the evidence shows that potential competition is not expected to arise in the foreseeable future and, therefore, it does not act as a constraint on CBF's position. While the Commission does not dispute CBF's contention that it is, in theory at least, possible to set up another CSD in Germany subject to the provisions of the Depotgesetz in conjunction with the Kreditwesengesetz[184], the setting up of such an undertaking is not a realistic possibility within a reasonably short period of time for the following reasons.

(210) Firstly, in order to achieve economic viability, the new entrant would need to become the issuer CSD for a large number of German securities, in order to allow the post-trading processing of transactions. This would have as a consequence that CBF would no longer be the issuer CSD for the securities for which the new entrant would be the issuer CSD, as the possibility does not exist for there being two issuer CSDs for the same security. In other words, the present common pool of securities safekept in CBF would have to be split into two. Apart from the difficulty for the new entrant of eroding CBF's dominant position and maintaining its viability during a possibly very long start-up time, Deutsche Börse considers that it is unlikely that market participants would be interested in such a development insofar as it would render the post-trading processing of transactions more complex and costly. In particular, in its letter of 19 August 2002 to the Commission, Deutsche Börse states that market participants have *"built up their back office infrastructures over a long time, incurring substantial costs, and made them to a significant degree compliant with CBF's systems... Changing these structures would create very substantial costs, something that market participants have little incentive to do*[185]*"*. Economic reality also shows that the position of an issuer CSD in any Member State has never been challenged by a new CSD, and that there is no Member State with more than one CSD for a given instrument.

(211) Secondly, the rules of the German exchanges[186] stipulate that the condition of orderly settlement set by the Borsengesetz (Exchange Act) is fulfilled, if an applicant for admission to trading in the exchange concerned conducts the settlement of its exchange transactions through Clearstream Banking AG (for the transfer of securities) and a state central bank (for the payment of the cash). Although the wording of the rules do not explicitly exclude other possibilities for orderly settlement, the fact is that any new entrant would have to obtain recognition by the Frankfurt Exchange and other exchanges. In any case, Deutsche Börse indicated in its letter of 19 August 2002 that it *"is not*

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183 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.I.2.c).

184 CI's reply of 16 November 2001, question 18.

185 Pages 10-11 of the letter.

186 § 16 (2) of the *Börsenordnung für die Frankfurter Wertpapierbörse* and similar provisions of other exchanges.

aware of applications of other service providers for approval or any interest in settling transactions made on the Frankfurt exchange"[187].

(212) Thirdly, Deutsche Börse has stressed in the same letter that if one considers the chain of processing exchange transactions, commencing with the trade and ending with settlement, *"it has to be stated that offering the exchange platform and offering settlement services is functionally connected. Consequently, also the majority of customers is interested in these services being provided by one source"*. This *"also follows from usage in the market"*[188]. Therefore, it appears that neither Deutsche Börse itself nor market participants would support market entry.

(213) Fourthly, Deutsche Börse has also stated[189] that *"in order to ensure the orderly settlement of transactions at the Frankfurt exchange, a uniform clearing infrastructure that is mandatory for all market participants must be set up ... This uniform infrastructure can either consist of a single clearing system or of a network of infrastructure systems. The latter solution requires a very efficient and safe connection among the systems of the network. The requirements for such a connection are so high that in many cases either the economically achievable solution does not comply with the requirements or the fulfilment of the requirements is not economically achievable...If there is no confidence in the provided structures and their safety, there is reason to fear that liquidity will be withdrawn because the functionality of the capital market will be put in question even if it is provided for a sufficient degree of security."* In other words, a potential new entrant would have to set up complex and costly systems, without having an assurance that it could provide orderly or economically viable services.

(214) Fifthly, establishing an alternative CSD would require substantial investment in IT development and human resources. In response to the Commission's inquiries, CREST estimated that, in order to establish a new CSD, it would be necessary to budget for building and running costs. In CREST's estimation, to build an equivalently capable system to support a large active and sophisticated market could cost approximately GBP 100 (€ 156) million.[190] There is no evidence that, under those conditions, another undertaking would be likely to undertake the necessary investments so that it could enter the relevant market and challenge CBF's position in the foreseeable future.

(215) In conclusion, a number of obstacles to market entry exist, no market entry has taken place in the recent past (on the contrary, German clearing and settlement structures have consolidated), and no interest in market entry is currently apparent. For the purpose of the present decision, it suffices to conclude that the barriers to entry, in terms of regulations, technical requirements, interest by market participants, cost of entry, cost for customers and likelihood to provide competitive products, are so significant that the possibility of potential

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187 Page 11 of the letter.

188 Page 11 of the letter.

189 Page 12 of the 19 August 2002 letter.

190 Crest's reply of 7 November 2001, question 7.

market entry exercising competitive constraints on CBF can be excluded in the foreseeable future.

7. THE ABUSE

(216) CBF's behaviour consisted of the following:

- refusing to supply primary clearing and settlement services for registered shares by denying direct access to CASCADE RS, and discriminating against EB in relation the supply of those services. The refusal to supply and the unjustified discrimination in relation to direct access to CASCADE RS are not two separate infringements, but rather two manifestations of the same behaviour, as the unjustified discrimination exists because CBF refused to supply EB with the same or similar services it was supplying to other comparable customers (section 7.1).

- applying discriminatory prices for the primary clearing and settlement services compared to such services it was providing to other comparable customers (section 7.2).

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

(217) The system established by Community competition law recognises the principle of free enterprise and the freedom of undertakings to deal with other companies. The right to choose one's trading partners and freely to dispose of one's property are also generally recognised principles in the laws of the Member States. According to established case law, however, an undertaking holding a dominant position bears a special responsibility with regard to the objectives pursued by the EC Treaty, in particular those of Article 82 and Article 3 (g). They must not allow their conduct to impair genuine undistorted competition on the common market.[191]

(218) The European Court of Justice has ruled several times that the concept of abuse is an objective concept relating to the behaviour of a dominant company which is such as to influence the structure of and affect competition in the relevant market.[192] The "intention" of the dominant company is not as such a prerequisite to establish abuse. However, if such an intention is found, the demonstration of the existence of an objectively abusive behaviour is made easier.

(219) The European Court of Justice acknowledged the importance of safeguarding free enterprise when it held that even an undertaking in a dominant position may, in certain cases, refuse to sell or change its supply or delivery policy without necessarily falling under the prohibition laid down in Article 82 EC.[193]

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191 See Case 322/81, *Michelin v. Commission* [1983] ECR 3461, paragraph 57.

192 See, for instance, Case 85/76, *Hoffmann LaRoche v Commission*, [1979] ECR 461, paragraph 91.

193 See, e.g., Case 27/76 *United Brands v Commission* [1978] ECR 207, paragraphs 182 to 191; and Case T-41/96, Bayer AG v. Commission [2000] ECR II-3383, paragraph 80.

Accordingly, refusal to supply has been held abusive only in specific circumstances.[194]

(220) Whilst a dominant undertaking may take reasonable steps to defend its commercial interests, such measures should be reasonable and proportional to the threat they might pose to customers and competition.[195] The dominant company is of course allowed to demonstrate that the prohibition of Article 82 EC is not applicable, if it establishes that objective justifications exist, account being taken of the important objectives pursued by the Community competition rules.

(221) The Commission has also held, for instance in the *British Midland vs. Aer Lingus* case,[196] that a dominant undertaking's unjustified refusal to supply can constitute an abuse contrary to Article 82 of the EC Treaty.

(222) Refusal to sell by a dominant undertaking, within the meaning of Article 82 of the EC Treaty, has been held to be inconsistent with the objective laid down by Article 3(g) of the Treaty, as explained in particular in Article 82 (b) and (c) , respectively, when:

- limiting production, markets or technical development;
- applying dissimilar trading conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

(223) A refusal to supply or deal can take the form both of a refusal to start supplying[197], as well as a withdrawal of supply in the context of an existing business relationship[198]. The concept of refusal to deal covers not only outright and final refusal (as CI/CBF seem to suggest[199]) but also protracted and dilatory tactics by a dominant company amounting in effect to a refusal to

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194 See, e.g., the recent judgment of the Court of Justice in Cases C-147/97 and C-148/97, *Deutsche Post AG vs. GZS and Citicorp Kartenservice GmbH* [2000] ECR I-825, paragraphs 60-61.

195 See, e.g., *United Brands v Commission*, supra, paragraph 190. Commission Decision No 87/500/CEE, *BBI/Boosey and Hawkes: Interim Measures,* OJ L 286, 9.10.1987, p. 36, paragraph 19.

196 Commission Decision of 26 February 1992, OJ L 96 of 10.4.1992, p. 34. The Commission found that "[t]he refusal to interline in this case essentially consists in the imposition, contrary to normal industry practice, of a significant handicap on a competitor by raising its costs ..." (recital 30). See also the recent judgment of the Court of Justice in the *Deutsche Post AG vs. GZS and Citicorp Kartenservice GmbH* cases, C-147/97 and C-148/97, ECR 2000, p. I-825.

197 See, for example, *London European – Sabena* (Commission decision of 4 November 1988 in case IV/32.318, *London European – Sabena*, 88/589/EEC, OJ L 317, 24/11/1988, p. 47). The Commission concluded that Sabena had infringed Article 82 of the Treaty in that, holding a dominant position on the market for the supply of computerized reservation services in Belgium, it abused that dominant position on that market by refusing to grant London European access to a computerized reservation system on the grounds that the latter's fares were too low and that London European had entrusted the handling of its aircraft to a company other than Sabena.

198 See, e.g., the *United Brands* case, paragraph 182, and joined Cases 6/73 and 7/73, Commercial Solvents [1974] ECR 223.

199 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.III.1.

supply or deal within a reasonable period of time, without valid justification. Where there are such tactical delays and dilatory behaviour in supplying certain services, it is appropriate to examine whether the commercial conduct of the dominant firm forms part of a pattern of behaviour that is unreasonable, in the specific circumstances of the case under examination, and has the potential of producing or has already produced anticompetitive effects of the kind prohibited by Article 82 of the Treaty [200].

7.1.1. Elements in the present case leading to the finding of a violation of Article 82 EC

(224) The following factual elements and legal considerations, which will be developed in more detail below, demonstrate the existence of a breach of Article 82 of the Treaty in the present case:

- As a dominant undertaking, CI/CBF refused to supply within a reasonable period of time EB with direct access for primary clearing and settlement services for registered shares issued in Germany and safekept by it. The qualification of CI/CBF's behaviour as contrary to Article 82 of the Treaty follows, among other considerations, from the fact that there were no valid alternative providers of the services provided to EB by CBF, as the latter is a de facto monopolist in the provision of primary clearing and settlement services in the relevant market. In view of the nature of the relevant market and the high barriers to entry referred to in section 6, EB could not duplicate the services it was requesting from CBF, an unavoidable trading partner. Also, CI/CBF's refusal to supply harmed innovation and competition in the downstream market and ultimately the consumers in the common market (section 7.1.1.1 (i) and (ii)).

- The behaviour of CI/CBF in the supply of primary clearing and settlement services (section 7.1.1.2) constitutes discrimination vis-à-vis EB because it contrasts with the reasonable delay within which CI/CBF supplied all other comparable customers that requested equivalent services from CI/CBF (section 7.1.1.3).

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200 See, e.g., the *Deutsche Post AG* Decision of 25 July 2001, OJ L331 of 15.12.2001, p.40, paragraph 103 et seq. The Commission found that: *"DPAG's treatment of incoming cross-border letter mail does not constitute an outright and final refusal to supply its forwarding and delivery service. However, DPAG refuses to deliver the mail on conditions that are acceptable to the sender... ."* In that case, *Deutsche Post AG* argued that refusal to supply could not occur if delivery took place. The Commission however found that *"[t]he concept of refusal to supply covers not only outright refusal but also situations where dominant firms make supply subject to objectively unreasonable conditions. Such conditions may be a refusal to supply otherwise than on terms which the supplier, for objective reasons, knows to be unacceptable"*. The Commission found that the refusal on *Deutsche Post AG*'s part to supply its forwarding and delivery services on terms that were acceptable to the sender and/or the sending postal operator was tantamount to a constructive refusal to sell, and that as a consequence of these refusals, mailings had been delayed for an extensive period of time. It found the anti-competitive effects of a constructive refusal to sell were reinforced substantially by such lengthy delays (ibid., at para. 143).

(225) To set the proper context within which to examine the abuse, it should be noted, in addition, that the growing importance of registered shares in Germany had as an effect a reduction in the services provided to EB, an existing customer, breaching thus its legitimate expectations to be able to continue to provide effectively its own secondary clearing and settlement services to its customers (section 7.1.1.1 (iii) and (iv)).

7.1.1.1. The refusal to supply

(226) The qualification of CI/CBF's refusal to supply as contrary to Article 82 of the Treaty follows from the combination of a number of factors, notably: (i) the fact that CI/CBF is a de facto monopolist and thus an unavoidable trading partner in the provision of primary clearing and settlement services in the relevant market, together with the existence of high barriers to entry, which do not make it possible for EB to replicate CBF's functions as a *Wertpapiersammelbank* (issuer CSD) and (ii), the fact that not supplying EB with direct access for primary clearing and settlement services for registered shares harms innovation and competition in the provision of cross-border secondary clearing and settlement services and ultimately the consumers within the single market. Also, to set the proper context within which to examine the abuse in the present case, it must be considered that (iii) the growing importance of registered shares in Germany had as an effect a reduction in the services provided to EB, an existing customer of CI/CBF, and (iv) that there is a breach of EB's legitimate expectations that it would be supplied by CI/CBF with primary clearing and settlement services within a reasonable time.

(i) CI/CBF as a de facto monopolist is an unavoidable trading partner and EB could not replicate the services it was requesting

(227) As explained in detail when examining barriers to entry in the section on dominance (section 6 above), CBF's position as the only *Wertpapiersammelbank* (and, therefore, the only final custodian of securities kept in collective safe custody according to German law and the only provider of primary clearing and settlement services for those securities) is not expected to be challenged in the foreseeable future. Potential competition is not a realistic possibility, because it is not feasible - for EB or for any other undertaking - to replicate the function presently carried out by CBF within a reasonable period of time. The very nature of a Central Securities Depository, as a common pool of securities issued under German law, has as a consequence that splitting the common pool of securities is not commercially viable at present, among other reasons because - as Deutsche Börse acknowledges - market participants would not be interested in such a development that would render the post-trading processing of transactions more complex and costly. As Deutsche Börse has also stressed, the reason for the emergence of a Central Securities Depository in Germany was precisely to create a "central settlement infrastructure", the aim of which is to safekeep securities in collective safe custody and provide primary clearing and

settlement services[201], that is, in other words, to serve all market participants that require it through a single infrastructure.

(ii) Not supplying EB with direct access for primary clearing and settlement services for registered shares harms innovation and competition in the provision of cross-border secondary clearing and settlement services and ultimately the consumers within the single market.

(228) The European Court of Justice has qualified Article 82 of the Treaty as an application of the general objective of the activities of the Community laid down by Article 3(f) of the Treaty: the institution of a system ensuring that competition in the common market is not distorted[202].

In the Commission's view, undertakings that hold a dominant position in the provision of primary clearing and settlement services are under an obligation, by virtue of Article 82 of the Treaty, to avoid behaviour that impairs competition in clearing and settlement and, thus, in securities trading in the common market. By refusing to provide within a reasonable period of time direct access to CASCADE RS, CI/CBF's behaviour had the effect of impairing EB's ability to provide innovative secondary clearing and settlement services in a downstream market, by obliging EB to use the services of another intermediary prior to 19 November 2001.

(229) The lack of supply by CI/CBF of primary clearing and settlement services to EB for registered shares, quite apart from affecting a specific customer-supplier relationship, had the effect of actually or potentially limiting the services provided by EB, as a pan-European provider of secondary clearing and settlement, and had also the effect of restraining cross-border trade in such securities within the common market.

(230) The provision of primary clearing and settlement services by CI/CBF, a de facto monopolist in the relevant market, as defined in the present decision, is a pre-requisite for the secondary clearing and settlement of cross-border trades of securities in the common market. The development of efficient cross-border trade in such securities is in turn indispensable if a single capital market within the Community is to be created.

(231) In the market for secondary clearing and settlement, ICSDs (like EB) provide their customers - usually active institutional investors - with a single point of access to a large number of securities markets without having a local presence in the various Member States concerned. They offer a one-stop shop to their clients in the form of a single operational securities account. Many of the transactions they process are internalised[203], and for the remainder they avoid having recourse to a physical presence in each Member State. ICSDs therefore offer an innovative pan-European service for the secondary clearing

201 Deutsche Börse letter of 19 August 2002, p. 10.

202 See for instance Case 27/76, United Brands v Commission [1978] ECR 207.

203 Up to 90%, according to some estimates (see for example "Clearing and Settlement in the European Union: Main Policy Issues and Future Challenges", Contribution to the Communication from the Commission to the Council and the European Parliament by BNP Paribas Securities Services).

and settlement of cross-border securities transactions within the common market.

(232) As long as EB could not benefit from direct access to primary clearing and settlement services provided by CBF, EB could not provide efficiently secondary clearing and settlement services for registered shares issued according to German law at a level of risk and liquidity which would be satisfactory to the requirements of the large volume wholesale market it was serving. As explained in section 5.1.4, it is not efficient for certain intermediaries, like an ICSD, to use local agent banks to provide such services.

(233) There are no indications that CI/CBF's behaviour was motivated by any attempt to render the provision of its own services or its own operations more efficient, nor by the need of creating any benefit for its customers or consumers. CI/CBF have not claimed any such efficiency gains or consumer benefits.

(234) Rather, the motivation for and the actual effects of this unjustified refusal to supply have to be assessed in the context of the overall financial group of which CBF forms part. As already explained, 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 securities in cross-border trades. Active institutional investors wishing to use the one-stop shop services of an ICSD in the EU have basically the choice of using either CBL or EB. Competition on the merits between EB and CBL is, therefore, expected to enhance the efficiency of cross-border processing of securities trades.

(235) In its business publications, Clearstream presents itself as a single entity, without differentiating between CBF and CBL. For example, in two brochures aimed at professional investors,[204] the section entitled "About Clearstream Banking" mentions that: *"Clearstream Banking is the premier international clearing and settlement organisation offering a comprehensive service covering both domestic and internationally traded bonds and equities. We have over 2500 customers in 80 locations worldwide..."*. In the contacts section, CBF and CBL are mentioned as "business centres", while CI is identified as the "head office".

(236) It is reasonable, therefore, to assume that CBF had the incentive to limit competition by EB in the downstream market for secondary clearing and settlement to the advantage of its sister company CBL. The following additional elements in the Commission's file are illustrative and supportive in this respect:

- Firstly, as set out above, in December 2000 and January 2001, after CBF appeared to undertake certain preparations at technical level to provide access to CASCADE RS and once such access could indeed

[204] "Global Securities Financing - Collateral for growth" and "Securities Lending Services - A suite of lending opportunities".

technically be granted, CI itself intervened to stall the activation of access by raising additional and unjustified conditions. This is explicitly admitted by CI/CBF in the reply to the statements of objections.[205] In the absence of any objective justification offered, it is reasonable to infer that CI's intervention was also motivated by the desire to prevent a competitor to its subsidiary CBL from offering an efficient service in the market for secondary clearing and settlement, in which CBL would also compete.

– Secondly, once EB had finally obtained access to CASCADE RS in November 2001, CBL immediately asked for, in the same month of November 2001, and obtained in a few months (by March 2002) such access[206]. It is, therefore, reasonable to infer from the timing of these events, from the difference in the delays imposed on both companies and from the discrimination involved, that CBF's and CI's behaviour was also motivated by and, in any case, had the actual effect of denying EB the opportunity of providing efficient and innovative services in the downstream market.

(237) The Commission, therefore, takes the view that CI's and CBF's behaviour hampered the provision of innovative services in the downstream market for secondary clearing and settlement through competition on the merits, and therefore created obstacles to market efficiency and innovation.

(iii) The growing importance of registered shares in Germany had as an effect a reduction in the services provided to EB

(238) Another characteristic of the present case is the context within which CI/CBF's refusal to supply within a reasonable period of time took place. Indeed, until the moment CI/CBF granted access to CASCADE RS, there is here a disruption of an already existing business relationship between CBF and EB, in the course of which CBF had been providing EB with primary clearing and settlement services.

(239) The well-established business relationship between CBF and EB dates back at least to 1989, when an electronic link between the two companies was established (see recital (132) above). In the course of that relationship, CBF provided EB with primary clearing and settlement services for German securities safekept in collective safe custody, including widely traded securities.

(240) As explained at recital (47) above, registered shares have taken a growing importance in Germany, particularly since the introduction of the euro in 1999. An increasing number of newly issued shares were issued as registered shares (as opposed to bearer shares) and shares that were originally bearer shares were converted into registered shares.

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205 Section B. II. 3. d) and e) of CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections.

206 CI/CBF letter of 10 February 2003, reply to question 2.

(241) The provision of primary clearing and settlement services to EB for all securities kept in collective safe custody (including both bearer and registered shares) takes place following settlement in CASCADE[207]. However, as CI/CBF did not allow the settlement of registered shares in CASCADE unless direct access to the CASCADE RS subsystem had been granted[208], and at the same time refused to grant to EB access to CASCADE RS, the actual scope of the services provided by CI/CBF to EB was progressively reduced from the moment that bearer shares kept in collective safe custody were converted into registered shares and that newly issued shares kept in collective safe custody were no longer being issued as bearer shares. As explained at recital (285), the shares of key companies are registered shares and can be qualified of "must have" products for financial intermediaries serving an international market.

(iv) The breach by CI/CBF of EB's legitimate expectations that it would be supplied with primary clearing and settlement services for registered shares within a reasonable period of time

(242) As explained in section 7.1.1.3 below, the normal CI/CBF practice regarding its customers consisted in supplying primary clearing and settlement services for registered shares (which presupposed access to CASCADE RS) within short delays. In CI's own terms: *"CBF was, and continues to be, strongly interested in setting up more links to CSDs or in improving existing links. This is conform with the demands and needs of our customers"*[209].

(243) The above sets the proper context within which the behaviour of CI/CBF in the light of Article 82 EC Treaty is to be examined. The facts of the present case demonstrate that EB was counting on that normal practice since before the beginning of their negotiations and that, on the basis of CBF's statements, it had built reasonable expectations that access to CASCADE RS would be granted. In particular:

- Following the initial contacts in 1997 between EB and CBF, the 3 August 1999 request of EB for access to CBF recalls that: "*You told us last year* [1998] *that EOC could now have a direct access to CASCADE RS*".

- In contacts with EB before the CI management intervened in December 2000, by linking direct access to CASCADE RS to other issues, CBF's staff raised EB's expectations, implying that access would be imminent. For example, on 12 September 2000, [redacted] of CBF wrote to EB that: "*[a] few days before Euroclear is starting to use CASCADE-RS, we would like to inform our clients about the new handling*" (see recital (62) above). Nevertheless, direct access would not be granted for more than a year and two months after that announcement.

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207 As explained in section 3.6.2 above, CASCADE is the CBF settlement platform for German shares, and that the settlement of both bearer and registered shares takes place in CASCADE. CASCADE RS, a subsystem to CASCADE, is used in certain occasions, such as in advance of general assemblies or before payment of dividend, to input information about shareholders. CASCADE RS is not transaction-based, and transactions in both registered and bearer shares are cleared and settled by CBF in its CASCADE system.

208 See CI/CBF letter of 24 May 2002

209 CI letter of 16 November 2001 in reply to the Commission's request for information of 9 October 2001.

7.1.1.2. Dilatory behaviour in the supply of services

(i) The **initial** refusal of access to CASCADE RS (August 1999 to November 2000)

(244) The evidence available in this case demonstrates that CBF exhibited dilatory behaviour in dealing with EB's request for access to CASCADE RS for the period between 3 August 1999 and December 2000.

- Repeated EB requests for access to CASCADE RS

(245) First, a number of repeated requests for access to CASCADE RS were made by EB. The Commission considers that the first request for access to Cascade RS at operational level was made by e-mail of 3 August 1999 by [redacted] (Vice-President, Product Management) of EB. Following a holding reply on 18 August 1999, this request was repeated on 24 September 1999.

(246) The original request was confirmed at management level by e-mail of 20 September 1999 by the CEO of EB and operational negotiations acknowledged by the reply of 1 October 1999 of the Managing Director of CBF. The request was repeated by the CEO of EB on 21 December 1999.

(247) EB's request was repeated again at a meeting with CBF on 28 January 2000, confirmed by letter by EB to CBF of 3 February 2000, and notice of a starting date for access was given by EB on 15 November 2000. On 17 November 2000 EB asked for an explanation as to why access could not be granted in time, and EB enquired again about the cause for delay on 4 December 2000. The concern about the delay in granting access was conveyed again at management level to CI on 22 January 2001.

- Dilatory behaviour of CI/CBF from 3 August 1999 to November 2000

Commission assessment of the facts

(248) The evidence shows that, following EB's first request on 3 August 1999 for access to CASCADE RS, CI/CBF exhibited unjustified and unreasonable dilatory behaviour in dealing with this request. The first substantive response by CBF came on 19 October 1999, two months and 16 days after the original request, in which CBF expressly apologised for the "delayed reply". In this response CBF claims that *"manual (online) access can be arranged quite easily"*, but that for an automated link major system changes would need to be made and, because of the complexity of the processes, CBF would have to analyse the workflows further before agreeing on a definite starting date. In a reply of 29 October 1999, 10 days later, EB asks for clarification of settlement instructions in registered shares and suggests waiting for a first analysis of the impact of RTS specifications (a separate issue) and the requested clarification before fixing a meeting date. According to the Commission's file, CBF did not respond to this request for clarification until a meeting was held between CBF and EB on 28 January 2000.

(249) At the meeting of 28 January 2000 between CBF and EB, both sides agreed to take certain actions, CBF by the end of February 2000. The minutes of the meeting also show that EB wished to implement access to CASCADE RS in April 2000, and that this implied internal testing in March 2000. It also appears from the minutes that if access was not implemented in April 2000, CBF's next possible date for granting access would be September 2000. Whilst there is an indication in the letter of 3 February 2000 by EB that *"persons on both sides are now looking closer into these matters"*, the Commission has not seen any further evidence to suggest that any testing or other preparations were carried out by CBF between the meeting of 28 January 2000 and the 11 September 2000 training of EB personnel.

(250) CBF's internal e-mail of 3 April 2000 (see above, recital (60) indicates that CBF had committed itself vis-à-vis EB to grant access to CASCADE RS during the *"4th release Sept. 2000"*. Even if such a commitment was construed as an agreement with EB at the operational level for access in September 2000, the fact that EB might have agreed to that date after CBF made it clear that September 2000 would be its next possible date for granting access, if access did not happen in April 2000, does not alter the fact that EB had been seeking such access to CASCADE RS since August 1999 and did not obtain it until 19 November 2001.

(251) Following the meeting between CBF and EB of 28 January 2000, CBF provided training to EB staff on 11 September 2000. On 12 September 2000 CBF asked EB for information as to which shares were not to be transferred to EB's account, indicating that these were understood to be shares with limited transferability (*"vinkulierte Aktien"*). On 15 September 2000 EB replied, confirming the position on shares with limited transferability and explaining that this was not an issue, and clearly informing CBF that its earliest target date for access to CASCADE RS would be 30 October 2000, but that this might be postponed. Prior to that "earliest target date", non-active access was granted unexpectedly on 18 September 2000 and, according to CI/CBF, withdrawn again on 26 September 2000. On 30 September 2000 and 13 October 2000, CBF wrote to EB asking to be informed of when EB would be ready for access to CASCADE RS and asking for, respectively, three weeks' and 15 days' notice from EB. On 16 October 2000 EB informed CBF that it would not be ready for the end of October due to some *"outstanding operational and legal issues"*, but that it expected to be ready by December 2000. Indeed, on 15 November 2000 EB gave CBF the notice in accordance with CBF's request that transfer of registered shares to its CBF account would occur on 1 December 2000 (a Friday) so that settlement would start effectively on 4 December 2000 (a Monday). Despite this clear notice, that conformed to CBF's deadline requirements and EB's earlier assurances regarding shares with limited transferability, on 16 November 2000 CBF asked for further information regarding the shares with limited transferability, before it could come to a conclusion as to which date to open access to CASCADE RS. On 17 November 2000 EB provided again the requested explanation.

(252) The Commission concludes that the preparations undertaken by CBF at operational level with a view to granting access, quite apart from the

substantial delay that CBF incurred, had the effect of leading EB to believe that access would indeed be obtained by a certain date (4 December 2000). But the sequence of events and subsequent developments demonstrate that CI/CBF had decided, prior to the planned date, not to grant EB access to CASCADE RS. In assessing all the evidence, CI/CBF's actions must therefore be characterised as dilatory and at the same time as misleading.

CI/CBF arguments as to possible justifications

(253) CI/CBF argue that the e-mail of 3 August 1999 by EB did not constitute a request for access to CASCADE RS, but merely an inquiry about which possibilities existed for direct access to settlement of registered share transactions with CBF[210]. The Commission considers, however, that the words *"You told us last year that EOC could now have a direct access to CASCADE RS. Given the increasing number of securities handled through this system, I would like to assess how we could practically implement this direct access"* and *"Could you please ... give me more details on what has to be done for EOC ... to have an access to Cascade RS?"*, point clearly to a request by EB for access to CASCADE RS. This is particularly the case when combined with previous EB requests, the first of which appears to date back to 1997[211].

(254) CI/CBF also claim that EB rejected the suggestion of a meeting in its e-mail of 29 October 1999 (see recital (55) above)[212]. The Commission disagrees with this interpretation. It is apparent from the text of the e-mail that EB merely wished to have some clarification before committing itself to a particular date for a meeting, not that the meeting should not take place. But CI/CBF did not provide any response to that EB request until the meeting between CBF and EB on 28 January 2000.

(255) CI/CBF argue that the minutes of the meeting of 28 January 2000 show that EB still had open questions as to the registration process for registered shares under German law[213]. In the Commission's view, CI/CBF have not shown how EB's comments in relation to their preferred registration mechanism[214] should have prevented or delayed direct access to CASCADE RS from being granted by CI/CBF. It should be noted that CBF has since developed a service

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210 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.c).

211 In a letter of 5 September 1997 from [redacted] of the Euroclear Operations Centre (EOC) to [redacted] of Deutsche Kassenverein (the legal predecessor of DBC and of CBF), [redacted] wrote: *"We would now like to know when we will be able to access CASCADE VNA"*. CASCADE VNA was the predecessor to CASCADE RS (EB's Reply of 27 May 2002, question 7)..

212 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.c).

213 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.c).

214 *"The idea is to have a direct access to CASCADE RS, to have part of the position in the free holding account and the other part registered under a Euroclear nominee name. Compared to today, the situation is better for companies as currently, our holdings are registered under* [redacted] *names whereas in the future, they would be clearly labelled under a Euroclear name"* (cf. e-mail of 31 January 2000 from [redacted] of EB to [redacted] of CBF and others, Annex 11 to CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections).

in relation to registered shares which appears to comply with EB's requirements on this issue.

(256) CI/CBF claim further that in the e-mail of 3 August 1999 EB differentiate between manual access to CASCADE RS or electronic (automated) access, and also expressly refer to settlement access via file transfers[215]. CI/CBF conclude that EB already had online access "*to CASCADE*" in August 1999, which it used. CI/CBF conclude further that opening of online access to CASCADE RS would therefore have been sufficient to put EB in the position of being able to process registered shares directly through CBF. This Commission agrees with this conclusion, but the fact is that CI/CBF did not provide even this online direct access to CASCADE RS, which EB had been requesting.

(257) CI/CBF also argue that EB knew access through file transfer would only be possible in the framework of the September 2000 "release" in the event that EB's own preparations were not advanced enough for the April 2000 date[216]. According to CI/CBF, as a rule the opening of access for CSDs and ICSDs occurred only on certain release dates in the spring and autumn, together with other service changes, so that all activities relating to the processing systems could be combined in one project. CI/CBF argue that, exceptionally, changes are also possible outside the release if no significant system changes and test runs are required. They state that, for example, online access to CASCADE RS is possible outside the release dates, whereas file transfer access requires substantial system changes and tests[217]. CI/CBF claim that the release system was known to EB as it was to all other customers.

(258) In relation to CI/CBF's argument that EB was not only seeking manual access but automated access through file transfer, and the connected argument that access through file transfer could only occur in specific release dates, the Commission notes that :

> - First, it is clear from the various exchanges of e-mails and correspondence between EB and CI/CBF that EB merely wished to obtain "access" to CASCADE RS, not a particular type of access as opposed to other types of access. When EB asked in point (v) of its e-mail of 3 August 1999 what had CBF done so that EOC could have *"an access to CASCADE RS"*, EB was not requiring an specific type of access as opposed to others. The reference to "access" in general is repeated in many occasions. One example is the 20 September 1999 letter from EB where [redacted] states that *"there have been a series of circumstances in the last months where Euroclear requests to avail itself of services offered by DBC to other customers have been denied or unanswered, including among others:.....-direct link to CASCADE RS"*. Another example is the 15 November 2000 e-mail

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215 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.c).

216 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.c).

217 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.b)aa).

from EB to CBF asking "*when can we have the access to CASCADE RS*". In contrast, there is no exchange of correspondence between the two companies showing that CBF would be offering manual (online) access and that EB would be refusing any such access and insisting in obtaining automated access instead.

- Second, the minutes of the meeting of 28 January 2000 between CBF and EB clearly state, referring to EB's request for access to CASCADE RS: *"In a first stage, we would organise the above mentioned registration (i.e. in a nominee name) on a manual basis."*

- Third, when CI/CBF were approving internally the granting of access to CASCADE RS, it was manual (online) access that was being considered, as can be seen from the e-mail of 6 September 2001 in which [redacted] of CBF writes to [redacted]: *"we have received instructions from* [redacted] *to request your written agreement to the extension of functionality below...: The account "*[redacted]*" of Euroclear shall be opened for the online-connection* (emphasis added) *"CASCADE RS", so that EOC no longer has to undertake the processing and portfolio management/ record keeping through* [redacted]*."*

- Fourth, despite the fact that CBF wrote on to EB on 19 October 1999 that "a manual (online) access can be arranged quite easily", CI/CBF did not grant that access until two years later: when access was finally granted on 19 November 2001, the access was manual (online). This is confirmed both by Euroclear (*"EB used the manual CASCADE RS registration from November 19, 2001, until sometime around the end of 2002, when it was automated on CBF's initiative. CBF made the necessary development to automate"*)[218], and by CI/CBF ("*...direct access to CASCADE RS, which is required to transfer registration data, was only possible manually at that time, for technical reasons. EB was granted manual access in November 2001....In March 2002 CBF offered the ICSDs the ability to register shares automatically...But EB did not make use of this option until 16 December 2002"*[219]). This last CI/CBF statement confirms another important point, namely that prior to the granting of manual access to CASCADE RS on 19 November 2001 there was in fact no technical possibility to grant any other type of access to CASCADE RS for CSDs and ICSDs.

- Fifth, CI/CBF gave the wrong impression to EB that automated access to CASCADE RS would be possible. For example, the minutes of the 28 January 2000 meeting between EB and CBF state that EB *"can have an automated access to CASCADE RS"*. As explained in the previous indent, according to CI/CBF this was however technically not possible at that time. This is evidence of misleading behaviour on the part of CI/CBF.

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218 E-mail from EB to the Commission services of 17 July 2003.

219 Letter of 1 December 2003 from the CI/CBF lawyers.

(259) It follows, therefore, that any kind of access to CASCADE RS, including manual access, was acceptable to EB as a starting basis. Indeed, as already explained, opening manual (or online) access to CASCADE RS would have been sufficient to avoid an abusive behaviour in a context where EB merely asked for access to CASCADE RS.

(260) Further, CI/CBF argue[220] that EB was itself not ready for access to be granted on the April 2000 release date, referring to EB's e-mail of 31 March 2000 (erroneously as e-mail of 3 April 2000). This e-mail states, regarding *"RTS settlement"*, that EB is *"not able at this stage to launch for April"*. In the Commission's view, not being able to introduce real time settlement (RTS) in CASCADE at the same time as access to CASCADE RS cannot be interpreted as meaning that EB is not ready for starting using CASCADE RS, if the opportunity had been given to it. Real time settlement in CASCADE must, therefore, be considered as a separate matter to the access to CASCADE RS that EB was asking, although that separate matter was being discussed at the same time between EB and CBF. The same e-mail states, as regards the holding of registered shares (EB's intention was *"to hold them directly and registered in our nominee name"*), that *"[o]ur legal department should finalise in the coming weeks our position on this"*. The Commission considers that this statement by EB does not lead to the conclusion that EB would not have been ready for access in April 2000, if a credible offer to grant direct access had indeed been made to it . As EB said during the meeting with CBF of 28 January 2000 (see recital (57) above), at that moment EB's holdings were registered under [redacted] name, and having them under a Euroclear name would in any case have constituted an improvement.

(261) CI/CBF claim that **the opening of access to CASCADE RS on 18 September 2000** failed because of EB's lack of preparedness[221]. The Commission has considered whether the opening of access on 18 September 2000 was in fact appropriate and sufficient for CBF to fulfil its obligations.

(262) As described above, EB was unexpectedly granted non-active on-line access to CASCADE RS on 18 September 2000, at a time when EB's domestic registered shares were accounted for in EB's [redacted] account. The day after that access was opened, CBF had already announced to EB that access would be closed[222]. According to CI/CBF such access was effectively withdrawn on 26 September 2000[223]. The Commission considers that the evidence shows that the unplanned access on 18 September 2000 cannot be compared to active and, therefore, operational on-line access to CASCADE RS because:

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220 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.c).

221 CI/CBF's letter of 10 February 2003, reply 5 and CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.d).

222 "*Since there is not possibility to separate non-active access from production, CBF informed us that until the actual launching date they are obliged to close the access...*" (internal message by [redacted] of EB of 19 September 2000).

223 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.d).

- first (as described above), the fact that CBF asked EB on 12 September 2000 *"at which date will EOC start to use CASCADE-RS and at which date will EOC account* [redacted] *be available for registered shares"*, and that EB replied on 15 September 2000 that *"[t]he earliest target date is October 30 but it might be postponed. We will advise you of the exact date asap."* indicates that the access opened on 18 September 2000, unplanned as it was for EB, could not have been in any case intended to be active and operational.

- second, the e-mail from [redacted] of CBF to [redacted] of EB dated 30 September 2000 - twelve days after non-active access was granted - makes it clear that the launch date for the active access was dependent on a number of pre-requisites that were not fulfilled when the unplanned non-active access was granted, including:

– the publication of information to CBF's clients about EB's account being open for registered shares;

– the arranging for the technical set up of CBF's IT system;

– prior information from EB three weeks in advance of the effective starting date.

(263) In addition to not being comparable to active access, the unannounced opening of on-line access on 18 September 2000 had undesired effects. As CI/CBF acknowledge, *"some orders by other participants*[224] *were mistakenly directed to EB's account on 18 September 2000"* [225]. In a situation where EB's registered shares positions were still accounted for in [redacted] and not in EB's account with CBF, changing accounts is a complex process where the cooperation of CBF and EB was required. Opening access unexpectedly on 18 September 2000, routing other participants' orders to EB's direct account with CBF rather than to the [redacted] account, and ignoring EB's message that the earliest target date for the transfer was 30 October, is not appropriate conduct on CBF's side. This is corroborated by the 19 September 2000 internal CBF e-mail cited in recital (64) above, which explains the "reversal of the opening of access to Euroclear" on the ground that EB "will not process the registered shares before the end of October". As explained in recital 262, this information was not new and had been transmitted by EB to CBF three days before, on 15 September 2000.

(264) The Commission has considered also the **relevance of a one month postponement at the request of EB** and how this might have influenced the behaviour of CI/CBF. The postponement in question starts on 16 October 2000, when EB wrote to CBF that the 30 October target date would not be feasible, and finished on 15 November 2000, when EB gave the two-week notice requested by CBF so that the effective starting date for the settlement of domestic registered shares was fixed on 4 December 2000. As is explained

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224 It is apparent from the information transmitted by CI/CBF that only other participants (i.e., not EB) made use of EB's direct account with CBF as far as registered shares were concerned.

225 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.d).

below (see recitals (289)-(292)), a certain delay of no more than four months seems to be necessary for both parties to prepare access. The fact that EB needed a month to organise the transfer of its registered shares positions from its [redacted] account to its direct account with CBF can be considered to be part of that normal preparatory process EB had to go through once CBF made to it a credible offer to provide the requested access. However, that one month postponement at the request of EB to complete the necessary preparations does not interrupt the pattern of dilatory behaviour of CBF because, once EB complied with the instructions and requirements of CBF concerning the time-limits of the notice, the latter again refused to provide access on other unjustified grounds until 19 November 2001.

(265) In relation to the **issue concerning shares with limited transferability**, the Commission has examined whether the exclusion from CASCADE RS of shares with limited transferability ("vinkulierte" shares) could constitute a reason for CBF to deny access altogether. This question should be answered in the negative.

(a) By asking on 12 September 2000 which kind of registered shares are not to be transferred to EB account [redacted] - and indicating that CBF had understood that "vinkulierte" shares must not be held by EB clients -, CBF acknowledged that the direct EB account holding registered shares (and therefore access to CASCADE RS) could become operational without all kinds of registered shares being transferred to the direct account.

(b) Both the 12 September 2000 and the 30 September 2000 e-mails from CBF indicate that CBF was willing to accept that "vinkulierte" shares will not be processed through CASCADE RS, provided that CBF informs its clients to this effect. The two e-mails therefore acknowledge that not accepting "vinkulierte" shares in the CASCADE RS link with EB is feasible.

(c) The fact that CBF indicated in the 12 September 2000 e-mail that *"[a]s soon as we receive your information, we will let you have the draft of our client information"* and that client information would be issued *"[a] few days before Euroclear is starting to use CASCADE-RS"* demonstrates that on 12 September 2000 CBF was merely asking EB for confirmation about the treatment of "vinkulierte shares" and that this issue would not be a cause of delay for access to be opened.

(266) In addition, according to the information available to the Commission, the "vinkulierte" shares issue had not been raised prior to September 2000 and was therefore short-lived. It consequently appears that the "vinkulierte" shares question was not of such a nature as to block on-line access to CASCADE RS altogether. More specifically, there is no basis to defend any argument that the "vinkulierte" shares question was a cause to delay access to CASCADE RS until 19 November 2001. Furthermore, while the 12 September 2000 e-mail from CBF, in which CBF expressly mentions that it will inform its clients on this aspect, would not even require a reply from EB, EB had already provided a response on 15 September 2000, to the effect that: (i) in principle, the parties concluding the trade are aware which securities can be accepted in EB; (ii) even if the counterparty sends the instruction to deliver "vinkulierte"

shares, the instruction will be rejected by EB, as the security code will not be eligible; and (iii) *"Anyway, if you think this info should be mentioned in your announcement, we do not see any objections"*.

(267) In any case, as is explained above, it is clear from the exchange of correspondence and e-mails between EB and CI/CBF during November and December 2000 that CBF was postponing access to CASCADE RS for issues other than the technical questions related to the "vinkulierte" shares.

(268) Also, CI/CBF state themselves that access could have been opened without clarification of the issue[226].

(269) In the Commission's view, therefore, the "vinkulierte" shares question was not an impediment for CBF to grant access to CASCADE RS. It could even be added that raising the issue of "vinkulierte" shares for a second time on 16 November 2000 - as an alleged justification as to why CBF was suddenly no longer in a position to come to a conclusion regarding the date on which to grant access – constitutes additional evidence of CBF's dilatory tactics and refusal to supply.

(ii) The **subsequent** refusal to provide access to CASCADE RS from December 2000 until 19 November 2001

Commission assessment of the facts

(270) An e-mail of 17 November 2000 from EB to CBF records a conversation with CBF, in which EB was informed that - despite the two-week notice that EB gave CBF on 15 November 2000 - access to CASCADE RS could not be granted on 4 December 2000.

(271) On 1 December 2000, [redacted] of CI[227] wrote to EB announcing the need for new negotiations. He wrote that CI/CBF were prepared to sign an agreement which addressed both the issue of CI's analysis of the current settlement processes and EB's request for a reduction in fees and for additional services. He concluded: *"Consequently, we must negotiate a new agreement"*. On 4 December 2000, the day access was planned, EB wrote to CBF inquiring about the cause for the delay of access to CASCADE RS. An internal EB e-mail of the same date records a conversation with CBF, which

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226 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.d).

227 The underlying reasons for the intervention of CI to block access to CBF's CASCADE RS are explained in section 7.1.1.1.(ii). As explained in section 1 above, Clearstream International is the holding company of both CBF and CBL. While in the CI/CBF's reply to the Statement of Objections, CI/CBF appears to indicate, without going into any additional details, that each entity may have had differing priorities in their relations with EB[227], that statement is not supported by any other evidence or explanation. On the contrary, evidence indicates that CI and CBF act as a vertically integrated entity with common interests. For example, the Deutsche Boerse Annual Report 2002 (p.75) refers to *"a fully integrated Clearstream"*. Also, as explained in recital (235) above, Clearstream presents itself as a single entity to its clients and in its publications, it refers to CI as the "head office" and to CBF and CBL as "business centres".

explains that the launch was on hold for reasons linked to the discussions with CI ([redacted]). CI wrote to EB on 8 January 2001, postponing a meeting scheduled for 12 January 2001, because of the Deutsche Börse IPO. On 22 January 2001, EB wrote to CI summing up EB's concerns about fees and the denial of access to CBF's registered share system and claiming this was a form of discrimination. CI replied on 24 January 2001, stating that CI were willing to include the issue of access to the registered share system in the forthcoming negotiations, pointing out that the registered share service was available from other providers and that CLB had no direct access and, therefore, the claim of discrimination was without merit. CI state that it is pleased to start the overall re-negotiation of the contract at the beginning of March. At the subsequent meeting of 21 March 2001 (see recital (81) above), in the context of the re-negotiation of the overall contract, pricing issues and *"pending issues with EB's affiliates (e.g. EB France)"* were mentioned for the first time[228]. It was agreed that *"the whole package will be presented at the next meeting including a proposal for a new fee schedule and other services requested by EB"*. On 10 July 2001, CBF let EB know, through a telephone conversation, that *"we do not have a problem* (in relation to direct access to registered shares settlement) *when on the other side SICOVAM will open the link to CBF for more French equities"*[229]. Finally, in the run-up to the actual launch date of access to CASCADE RS of 19 November 2001, an internal EB e-mail on 10 October 2001 (see recital (86) above) records: *"there is a political decision at this moment not to grant the access to Cascade RS. For info, scheduled launch date is November 19 .... The decision comes from the fact that CBF did not receive a positive response to their request to have access to all French securities to their link with EF. For CBF, the access to the Registered Shares is at this stage conditional on granting CBF access to all French securities to their account in EF."*

(272) The report on the telephone conversation with CBF in the internal EB e-mail of 4 December 2000 in recital (76) above shows CI/CBF's decision not to grant access to CASCADE RS, even though at technical level work to prepare such access had been undertaken. In assessing the probative value of this message, the Commission takes into account that it was written at the time of the events and with the intention of purely informing colleagues in the workplace. It therefore represents a genuine assessment by a person directly involved, without connection to a possible procedure against CBF.

(273) The subsequent exchange of correspondence described above shows that, as from December 2000, CI/CBF linked access to CASCADE RS to (and made it conditional upon) the overall negotiations of a new contract or "package", including in particular the pricing negotiations, and, as from October 2001, to matters related to CBF's access to Euroclear France. CI/CBF's behaviour

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228 *"Regarding any pending issues with EB's affiliates (e.g., EB France) the teams agreed that [redacted] tries to reach a bilateral agreement between [redacted] and [redacted]. If this works, the pending issues regarding EB France will not be brought into the current discussion with EB. Euroclear France seemed to be quite busy due to the merger and therefore might not have been able to respond to CBF's requests yet. This might have changed by now...."*

229 E-mail from [redacted] of CBF to [redacted] of CI of 10 July 2001, Annex 17 to CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections.

demonstrates that linking the access issue as from December 2000 to an overall re-negotiation is not justified, because:

- all preparations at technical level for access to CASCADE RS had in fact been concluded by November 2000;
- the expectation had been given to EB that access would be granted on 4 December 2000;
- there had been no linking of the access question to other issues since the first request for access on 3 August 1999; the link between access to CASCADE RS and the negotiation of a new framework agreement was made by the CI and CBF management only in December 2000, more than one year and three months after EB made its request for access on 3 August 1999, and more than one year after actual discussions on access had commenced;
- there was a longstanding business relationship between EB and CBF under which CBF provided primary clearing and settlement services for securities;
- CI/CBF considered normal commercial practice the granting of access to CASCADE RS to customers, that requested it in a timely manner, and without connection to other issues, as evidenced by the granting of direct access to non-German CSDs and non-CSDs, and by CBF's reply of 16 November 2001 to the Commission's request for information of 9 October 2001 (see above, recital (88));
- access was finally granted without the re-negotiation of a new agreement between them;

(274) Furthermore, CBF's response to the Commission's request of information of 9 October 2001 demonstrates that no other reasonable explanation concerning the possible motivations for delaying and refusing access to EB existed. In its request for information, the Commission asked: *"Did CBF and/or CBL during the last 5 years ever refuse to create a (certain type of) link or to change/upgrade a link with another EU-based CSD and/or trading platform ...?"*. Having confirmed to EB on 26 October 2001 that access would be granted on 19 November 2001, CI replied to the Commission on 16 November 2001: *"As for CBF, the answer is no. CBF was, and continues to be, strongly interested in setting up more links to CSDs or improving existing links."* This statement was in contradiction to the facts established by this investigation. Had CI/CBF had a legitimate reason for denying access to EB, one could have expected to set out such a motive in its response to the Commission of 16 November 2001, at the time of the events.

(275) No further discussions appear to have taken place regarding access to CASCADE RS until the series of internal CBF e-mails between 10 August 2001 and 7 September 2001. It appears from the correspondence that an agreement was reached between CBF and EB to start preparations for on-line access (with a view to a 19 November 2001 target date) sometime around 10 September 2001. However, even after the 19 November target date had been fixed, and as late as 10 October 2001, CI/CBF were still conveying to EB the message that there was a political decision not to grant EB access to

CASCADE RS until matters related to CBF's access to Euroclear France (formerly Sicovam) had been solved. Following the Commission's request for information to CI of 9 October 2001, CBF finally granted EB access to CASCADE RS on 19 November 2001.

(276) In the Commission's assessment the intervention of CI/CBF's management in December 2000 to the effect that negotiating a new agreement would be necessary before access to CASCADE RS would be granted must, therefore, be interpreted as a "constructive" refusal to supply the access. This assessment is confirmed by CI/CBF's explanation in their Reply to the Commission's Statement of Objections,[230] that the planned access date of 4 December 2000 could not be adhered to because of an intervention by CI[231]. CI/CBF refer also to other unconnected matters, such as the fact that talks between EB and CI that had taken place since August 2000 about changes to the "Bridge" agreement which related to a link between the two ICSDs, EB and CBL.[232]

(277) The Commission notes that in their reply to the Commission's Statement of Objections, CI/CBF do not contest that – either at working or management level - the negotiations between them and EB concerning access to CASCADE RS were conducted by the appropriate persons and at the appropriate level from the two sides.

CI/CBF arguments as to possible justifications

(278) The Commission has examined whether the **pending bilateral access issues between CBF and the French CSD regarding French securities,** that were first mentioned in March 2001, would be a justification for not supplying EB with primary clearing and settlement services for registered shares.

(279) As a starting point, it should be emphasized that, as a matter of principle, an abuse of a dominant position under Article 82 of the Treaty does not cease to exist if the party committing the abuse may in turn itself be the subject of another potentially anticompetitive behaviour. In such a situation, there could exist two separate violations of Article 82, if the conditions for the existence of an abuse were met in each of the two cases, but in principle one anticompetitive behaviour would not negate the other.

(280) Beyond this general legal consideration, the question arises in this case whether in the context of developing commercial negotiations there might be a valid reason justifying a *quid pro quo* stance by CI/CBF, in the sense that the

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230 See CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.d). See also Section C.III.1.b)bb).

231 In his fax of 1 December 2000, [redacted] (Head of the Office of the President and CEO) of CI writes: "*...I am glad to inform you that we are prepared in principle to sign an agreement with CB ...*". On 4 December 2000, a telephone call from [redacted] of CBF to [redacted] of EB confirmed that the reason why the launch of access was on hold was linked to the discussions with [redacted].

232 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.e).

issue of CBF's access to Sicovam/Euroclear France would serve as a valid justification for CBF not granting to EB access to CASCADE RS. In this context, the Commission notes that:

- EB was not responsible for the French CSD's behaviour during the negotiations with CI/CBF during the second half of 1999 or the whole of 2000, since the acquisition by Euroclear of the French CSD (Sicovam, subsequently renamed Euroclear France) took place in January 2001.

- The *"[p]ending issues with EB's affiliates (e.g. EB France)"* are mentioned by CI/CBF for the first time during a bilateral meeting on 21 March 2001, in general terms[233].

- The fact that EB's access to CASCADE RS was made conditional on solving such issues only becomes apparent to EB on 10 July 2001, through a telephone conversation between CBF ([redacted]) and EB ([redacted])[234].

(281) The Commission considers that the issue of CBF's access to Sicovam/Euroclear France was not a matter that could justify – as a quid pro quo consideration in commercial negotiations – CBF not granting to EB access to CASCADE RS. As explained at recital (289) below, the Commission takes the view that CBF should have provided EB with access to CASCADE RS no later than four months after EB's request of 3 August 1999. This means that access should have been provided at the latest by 3 December 1999. CBF's special responsibility as a dominant company towards EB does not stop because more than a year after access should have been granted EB acquired Sicovam, particularly if any pending issues between CI/CBF and Sicovam are only raised for the first time on 21 March 2001, and if it only becomes clear to EB that access to Sicovam/Euroclear France was a precondition for CI/CBF to grant access to CASCADE RS on 10 July 2001, that is nearly two years after EB's request of 3 August 1999 to obtain access to CASCADE RS.

(282) In relation to CI's assertion that the registered share service is available from other providers, the Commission does not agree with this statement. As explained above (recitals (25) and (200)), there are no alternative providers to the primary clearing and settlement of securities provided by CBF (the issuer CSD), and new entry is not a realistic possibility (see section 6 above). Also, indirect access is not a suitable alternative for intermediaries like CSDs and ICSDs wishing to provide efficient secondary clearing and settlement services to their clients (see section 5.1.1 above).This assertion of CBF does not provide any valid ground to justify its delaying and dilatory tactics that led to its refusal to provide to EB the requested access within a reasonable period of time in order to enable it to provide its secondary clearing and settlement services efficiently.

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233 See minutes of the meeting in Annex 11 to EB's reply of 27 May 2002.

234 See recital (82) above.

(283) Further, CI's statement that CBL does not have direct access to CBF's registered shares system is misleading, or at least of limited relevance, as CBL does not seem to have requested such access at the material time[235]. Moreover, CBF had granted access to all the other CSDs that had requested it[236], within short deadlines and without linking such access to any other issues.

(284) CI/CBF claim that further discussions with EB took place in March 2001, during which access to CASCADE RS was also discussed[237]. The Commission has not seen any evidence to support this assertion. CI/CBF also describe that access via file transfer required extensive tests, and that agreement from the Board of CBF was sought to these tests and the start date. The internal CBF e-mail exchange of August and September 2001 shows that the request to the Board was only made on 6 September 2001. The e-mail exchange does not, however, mention an agreed start date. Moreover, the e-mail of 6 September 2001 by [redacted] (of CBF) refers expressly to "online connection", not file transfer[238].

(285) More generally, in their Reply to the Commission's Statement of Objections, and at the oral hearing of 24 July 2003, **CI/CBF suggested that registered**

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235 CBL only requested access to CASCADE RS in November 2001, and obtained access within four months (cf. CI/CBF letter of 10 February 2003, reply to question 2).

236 CI letter of 16 November 2001, reply to question 32.

237 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.3.f).

238 An internal CBF e-mail by [redacted] to [redacted] of 10 August 2001 states: *"pls find below some information relating to EOC's request to make them eligible for german RS-securities: ... As of today, test will take place in between 1st October until 26th of October."* [redacted] of CBF forwards this e-mail to [redacted] of CBF on 10 August 2001, stating that [redacted] will inform EOC and adding: *"Bitte informier doch* [redacted]*, das EOC sie möglicherweise in dieser Sache ansprechen wird." [Please inform* [redacted] *that EOC might contact her about this.]* [redacted] of CBF replies by e-mail of 16 August 2001 to [redacted] of CBF as follows: *"wir haben den CR in den Leistungsumfang aufgenommen.* [redacted] *bitte um eine schriftliche Bestätigung der Anforderung durch* [redacted] *oder* [redacted]*. Möglicherweise hast du bereits einen Auftrag, der dann den Unterlagen zugefügt werden kann." [We have included CR in the services.* [redacted] *requests a written confirmation of* [redacted] *and* [redacted] *request. You may already have an instruction which could then be added to the documentation.]* By e-mail of 6 September 2001, [redacted] of CBF then writes to [redacted], stating: *„wir haben den Auftrag von* [redacted] *erhalten, für die nachstehende funktionale Erweiterung Ihr schriftliches Einverständnis zu erfragen. ... Auszug aus dem CR 252375: Das Konto „*[redacted]*" der Euroclear soll für die Online-Anbindung „CASCADE RS" geöffnet werden, damit EOC nicht mehr die Abwicklung und Bestandsführung über die* [redacted] *vornehmen muss. Bitte lassen Sie uns wissen, ob die Anforderung im Rahmen des Release 6 implementiert werden kann." ["we have received instructions from* [redacted] *to request your written agreement to the extension of functionality below. ...Extract from the CR 252375: The account "*[redacted]*" of Euroclear shall be opened for the online-connection "CASCADE RS", so that EOC no longer has to undertake the processing and portfolio management/ record keeping through* [redacted]*. Please let me know if the instruction can be implemented in the framework of the Release 6."]* [redacted] of CBF replies by e-mail on 6 September 2001: *"Einverstanden". ["Agreed."]* [redacted] of CBF then forwards this e-mail on 7 September 2001 to [redacted], stating: *"anbei das okay von* [redacted] *zum Change Request „EOC". Bitte lass mich wissen, wenn* [redacted] *noch Bedenken hat, damit wir diese umgehend klären können." [below is* [redacted] *agreement to the Change Request "EOC". Please let me know if* [redacted] *still has concerns, so we can resolve these immediately."]*

shares are of relatively small importance. [239] They argued that registered shares merely represent [redacted]% of the value and [redacted]% of the number of shares kept in collective safe custody in CBF, and that only [redacted]% of the number of shares traded at the Frankfurt Stock Exchange are registered. CASCADE RS would only be of significance for about [redacted]% of all securities issued in accordance to German law in terms of value.

(286) The Commission notes that CI/CBF's figures relate to the value of registered shares as compared to shares *safekept*, or as compared to securities *issued* according to German law. The Commission considers that the relevant percentage should relate, however, to the value of shares *traded,* because only then will the clearing and settlement services at issue here be provided. When CI/CBF estimate the importance of registered shares in relation to shares traded in Frankfurt, the [redacted]% indicated does not represent value but number of listings. It appears, therefore, that CI/CBF give the same weighting to a large number of transactions in one of the most traded shares and to the occasional trade in a share that is rarely traded.

(287) Registered shares issued under German law are economically important and any restriction of competition concerning them is undoubtedly significant. The most traded German shares (of the companies DaimlerChrysler, Allianz, Siemens, Deutsche Telekom, Deutsche Bank, Deutsche Post, Lufthansa...) are registered shares[240]. They are considered to be "must have" products for financial intermediaries serving an international market. To be able to offer a full service in secondary clearing and settlement for cross-border transactions of securities issued under German law, financial intermediaries cannot afford not to offer services related to registered shares.

(288) CI/CBF also argues in connection with the relevance of registered shares[241] that EB itself stated in an internal memorandum of 15 March 2001, prepared for the 21 March 2001 bilateral meeting, that, in light of the marginal significance of registered shares for EB's business, the access question was merely to be used as an argument in connection with price negotiations. The Commission cannot accept this argument. While it is true that EB wrote that *"[t]he original objective of starting discussions with CBF was (and still is) to renegotiate the fees"* and that *"[a] second objective is to gain access to Cascade RS"*, it cannot be interpreted from this order of presentation of the EB objectives that access to CASCADE RS was of "marginal" significance to EB, like CBF does. On the contrary, when in the same internal memorandum EB ascertained the *"value"* it attributed to each objective in advance of the 21 March 2001 meeting, EB wrote that a reduction in fees would result in savings of € [redacted], while at that moment it valued getting access to CASCADE RS at € [redacted]. EB's own evaluations in the 15 March 2001 internal

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239 See CBF's and CI's Reply to the Commission's Statement of Objections, Section B.II.2.a.bb, and arguments made at the oral hearing of 24 July 2003.

240 See CI/CBF presentation at the oral hearing of 24 July 2003 (slide

241 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.II.1.b).

memorandum, therefore, disallow any interpretation that access to CASCADE RS would be of marginal importance to EB.

(iii) The period within which CI/CBF provided EB with access to CASCADE RS exceeds a reasonable period of time

(289) The Commission's investigation has shown that granting access to CASCADE RS should normally not take more than four months at most, although access can be provided in a substantially shorter delay. The four-month period allows the customer to prepare itself internally and to transfer its account with an intermediary to a direct account with CBF. After the customer has communicated to CBF the date for the transfer, CBF seems to need a maximum of three weeks' prior notice to inform clients (if it so wishes) that the new customer's account is open for registered shares, and to arrange for a possible IT adaptation[242]. The four-month period also allows for tests to be carried out in advance of actual access.

(290) To ascertain what a reasonable maximum period for CBF to grant direct access to CASCADE RS would be, the Commission took into account the following considerations:

- First, the Commission examined the correspondence between EB and CBF in the run up to the planned launch of access to CASCADE RS for 4 December 2000, together with EB's internal action plan of 10 October 2000 for accessing CASCADE RS on 4 December 2000 (see above, recital (66)), which started with training provided by CBF on 11 September 2000. On this basis, the Commission considers that it is reasonable to conclude that up to about four months would have been a reasonable time period for providing access to CASCADE RS, taking into account preparations on both sides. The Commission notes that during this period, EB postponed access which it intended for 30 October 2000, to 4 December 2000. The Commission has taken this fact into account in an appropriate way, by including the postponement in the period which it considers as reasonable for conducting the necessary preparations by both sides.

- Secondly, the Commission took into account the e-mail exchange between CBF and EB which started on 17 September 2001, after CBF had decided internally that access could be granted (see above, recitals (83) and (84). This exchange details the testing that was finally done by EB with CBF for the actual launch that took place on 19 November 2001. A test file was sent from EB to CBF on 4 October 2001 and on 12 October 2001 CBF confirmed that the test had been carried out successfully. The e-mail by EB of 17 September 2001 refers to a *"phone discussion of last week"*. On this basis the Commission considers it reasonable to assume a start date for preparations of around 10 September 2001, for a launch date of 19 November 2001, and consequently a reasonable period for preparations for access of around two months and nine days.

242 Cf. e-mail of 30 September 2000 from [redacted] of EB to [redacted] of EB.

– Thirdly, as explained in section 7.1.1.3 below, the other CSDs that requested access to CBF's CASCADE RS subsystem were granted the access in a maximum of one month, and CBL was granted access in four months.

(291) As CBF's and CI's policy was that of a strong interest in setting up more links to CSDs or in improving existing links (see recitals (85) and (88) above), normal commercial practice would have therefore consisted in granting EB access to CASCADE RS in a short time span, not exceeding four months.

(292) In their Reply to the Commission's Statement of Objections[243], CI/CBF argue that the Commission's assessment of a reasonable period (two and a half months in the Objections) is founded on the wrong basis, because the access granted to CSDs was online access which is easier and quicker than automated file-transfer access[244]. They argue further that EB always insisted on automated access through file transfer. As explained in recital (258) above, the Commission considers that the evidence clearly shows otherwise.

7.1.1.3. CI/CBF discrimination regarding the provision to EB of direct access to CASCADE RS for primary clearing and settlement services for registered shares

(293) CBF's dilatory behaviour with regard to EB contrasts sharply with the short delay within which the other comparable customers, that requested access to CASCADE RS, received such access. As explained above, CBF has made access to CASCADE RS a pre-condition for the settlement of registered shares transactions in its CASCADE system.

(294) It results from the information gathered by the Commission that the Austrian CSD (OeKB) requested access to CASCADE RS in September 1998 and obtained it in the same month[245]. Similarly, the May 1998 request from the French CSD (Sicovam, today Euroclear France) to access CASCADE RS was satisfied almost immediately[246].

(295) CBL requested access to CASCADE RS in November 2001 and obtained it in March 2002 (see recital (90) above). In relation to CBL, CI/CBF argue, firstly, that there was no discrimination because CBL received access after EB and, secondly, that the time period between the first discussions with CBL and the granting of access was twelve months. They further argue that the process of installing the file transfer and the necessary preparations took four to five

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243 See CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.III.1.b).

244 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.III.1.b).

245 Cf. OeKB letter of 29 January 2003: "We requested and obtained access to CASCADE RS in September of 1998 in connection with the merger of Daimler and Chrysler".

246 Cf. EB letter of 31 January 2003 . In connection with the dates of the Euroclear France (formerly Sicovam) request for access to CASCADE RS, EB writes: "*We have not been able to determine the exact dates. There was a first meeting with Deutsche Kassenverein (DKV) on that topic on the 15 May 1998 and the request of Sicovam was satisfied almost immediately*".

months[247]. Regarding the first argument, the Commission takes the view that the fact that CBL received access after EB does not mean that it cannot serve as a basis for comparison in assessing discriminatory behaviour. Regarding the second argument, the Commission notes: (a) that the reference to four to five months is not substantiated by any evidence. According to the information provided by CI/CBF to the Commission, CBL requested access to CASCADE RS in November 2001 and obtained it in March 2002, which is four months; (b) that the twelve month period is not substantiated by evidence either; and (c) that, in any case, that period is still less than half the period between the initial discussions and the granting of access in the case of EB.

(296) Since CI/CBF provided primary clearing and settlement services for registered shares expeditiously to the CSDs of the other Member states that requested those services, the Commission investigated the content of the services provided by CBF to those CSDs and to the ICSDs, with the aim of ascertaining whether there would be services that CBF provided to the ICSDs that it did not provide to the CSDs. It results from the Commission's investigation that this is not the case. This is confirmed by the comparison made by CI/CBF between the services provided to CSDs and to ICSDs (see section 4.3 above). In particular, CI/CBF did not identify any service that would be provided to ICSDs that was not provided to CSDs.

(297) Also, the fact that CBL obtained access to CASCADE RS four months after having requested it, is evidence of discrimination against EB. CI/CBF do not identify any difference in the services CBF provided to the two ICSDs in this context to justify the difference in their treatment.

(298) CI/CBF argue that the different forms of access to CASCADE RS have to be distinguished, and that online access was always offered to EB, but that EB insisted on file transfer access[248]. As explained at recital (258) above, the Commission does not agree with this assessment. The distinction between online access and file transfer does, therefore, not constitute a valid justification for not granting access to CASCADE RS at all, and comparison with the access granted to other comparable customers (like CSDs and ICSDs) that requested such access is appropriate in the circumstances of this case.

(299) The difference in treating requests for access to CASCADE RS - and therefore for primary clearing and settlement services for registered shares -, not justified by valid and objective reasons, constitutes discriminatory behaviour by CI/CBF and is as such in violation of Article 82 (c) of the EC Treaty.

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247 See Section 4.1.6 above and CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.III.1.b)bb).

248 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.III.1.b)bb).

7.1.1.4. Conclusion on the refusal to supply and on the discrimination by CI/CBF in relation to the provision to EB of primary clearing and settlement services for registered shares

(300) After assessing all the available facts in their proper context, the Commission takes the view that:

- First, CI/CBF is a de facto monopolist in the provision of primary clearing and settlement services in the relevant market, as defined in this decision, and is therefore an unavoidable trading partner to EB. In view of the nature of the relevant market and the high barriers to entry, EB could not replicate the services it had been requesting from CI/CBF in order to provide efficiently its secondary clearing and settlement services (see recital (227)).

- Second, not supplying EB with primary clearing and settlement services for registered shares harms innovation and competition in the provision of cross-border clearing and settlement within the single market. In particular, EB (and the other CSDs and ICSDs) can offer a one-stop shop to their clients without having to have recourse to local agents in the various Member States. EB is at present the only ICSD in the EU apart from CBL, which is a sister company to CBF and a subsidiary of CI. The facts and other elements of the case considered in context, including Clearstream's interests as a group, the sequence of events and the intervention of CI to stall access to CASCADE RS, once CBF agreed that it could technically be granted to EB, provide a sufficiently clear basis to conclude that CI/CBF indeed intended that their abusive behaviour had the effect on EB described in this decision (see recitals (229)-(236)).

- Third, the growing importance of registered shares in Germany had as an effect a progressive reduction in the actual scope of the service provided by CI/CBF to EB, from the moment that bearer shares kept in collective safe custody were converted into registered shares and that newly issued shares kept in collective safe custody were registered shares. This is because CBF did not allow EB to settle in CASCADE registered shares kept in collective safe custody unless access to CASCADE RS was granted, while at the same time it refused to grant such access (see recitals (238)-(241)).

- Fourth, viewed in the proper context, there was a breach by CI/CBF of EB's legitimate expectations - created as early as 1998 - that EB would be supplied with primary clearing and settlement services for registered shares within a reasonable time (see recitals (242)-(243)). This demonstrates also the unjustified and discriminatory nature of CI/CBF's refusal to provide access to CASCADE RS within a reasonable period of time.

- Fifth, CI/CBF behaved in a dilatory manner (see section 7.1.1.2). They repeatedly refused to provide to EB primary clearing and settlement services for registered shares by not granting access to CASCADE RS for a period of nearly two years, between 3 December 1999 and 19 November 2001, including, for part of that period (between 1 December 2000 and October 2001), a refusal to provide primary clearing and settlement services by unreasonably linking access to unconnected issues. The Commission has reviewed in detail and dismissed the CI/CBF's arguments as to possible justifications of the delay.

- Sixth, while CBF appeared to undertake certain preparations at technical level, albeit much later than reasonable, the responsible management (of CI) raised additional and unjustified reasons for not granting access, once such access could technically be granted (see recitals (270)-(276)). CI/CBF's actions had, therefore, the effect of misleading its customer about the possibility of obtaining access. The intervention by the responsible management constituted an unreasonable and unjustified linking of the request for access to other unconnected issues. It amounted to a refusal to supply access to CASCADE RS and, therefore, primary clearing and services connected to registered shares.

- Seventh, CI/CBF are both responsible for refusing to supply EB with primary clearing and settlement services for registered shares during a delay that exceeds substantially and without justification the period that can be considered reasonable, that is at most four months (see recitals (289)-(292)). Four months after 3 August 1999, the date of the EB request, is 3 December 1999. Nevertheless, CBF only supplied EB with primary clearing and settlement for registered shares on 19 November 2001.

- Eighth, the fact that CBF ultimately granted access to CASCADE RS does not contradict the Commission's view that CI/CBF refused to supply it without valid justification during the period under examination[249]. In the present case, the significant delay, which went far beyond any period that can be considered reasonable and justified, combined with the unreasonable linking of access to unconnected issues, amounted to an abusive refusal to supply in the sense of Article 82 (c) and the established case law.

- Ninth, in effect obliging EB to use an intermediary for registered shares is contrary to normal industry practice in the relevant market, as can be inferred from: (a) CI/CBF's negative reply to the Commission's question whether CBF and/or CBL had refused, in the last five years, to create a link or to change/upgrade a link with another EU-based CSD and/or trading platform; and (b) the fact that CBF granted access to CASCADE RS expeditiously to other comparable customers (such as CSDs and ICSD) that asked for it (see section 7.1.1.3). This is clear evidence of discrimination against EB.

- Tenth, an undertaking in a dominant position (in this case also a de facto monopolist) has a special responsibility not to allow its conduct to stifle the smooth operation of competition within the common market. The Court of First Instance and the Court of Justice have ruled, for instance in the "*Tetra Pak II*" case,[250] that the actual scope of the dominant firm's special responsibility must be considered in relation to the degree of dominance held by that firm and to the special characteristics of the market which may affect the competitive situation. In the present case, both the degree of dominance enjoyed by CBF and the

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249 In its decisional practice (for instance the *London European/Sabena* decision Commission Decision of 4 November 1988, OJ L 317 of 24.11.1988, p.47), the Commission found a refusal to supply even in cases where that refusal was of relatively short duration (less than two months in the example mentioned).

250 Judgement of 6 October 1994 in the case T-83/91, Tetra Pak International S.A/Commission, [1994] ECR p. II-755, paras 114, 115 and 155, as confirmed by the Court of Justice in the Judgement of 14 November 1996 in the case C-333/94 P, [1996] ECR p. I-5951.

special characteristics of the market, lead the Commission to consider that CBF should have treated EB's request for direct access to CASCADE RS expeditiously, in the absence of objective reasons to the contrary. As regards the degree of dominance, CBF's position, as the only *Wertpapiersammelbank* in Germany and the existence of high barriers to entry, is unlikely to be challenged in the foreseeable future. CBF's dominant position was not built through commercial growth in competition with other CSDs, but mainly through concentration in combination with a number of regulatory and quasi-regulatory measures (see section 3.2 above). In addition, the special characteristics of the clearing and settlement business make it indispensable for certain providers of secondary clearing and settlement, such as EB, to have direct supply of the primary clearing and settlement services provided by the issuer-CSDs (such as CBF), in order to be able to compete efficiently in the supply of innovative cross-border trade in securities.

(301) Finally, the Commission notes that access was granted on 19 November 2001, after the Commission had sent two requests for information in the present case, the first in March 2001 and the second, more focused one, on 9 October 2001. It is not unreasonable to assume, from the sequence of events - and in particular from the fact that the 19 November 2001 target date was respected by CI/CBF after it had made it clear to EB, on 10 October 2001, that access to CASCADE RS would not be effective on the target date of 19 November 2001 unless CBF obtained access to Euroclear France - that access was granted not because of a unilateral change in CBF's strategy of refusal but rather because CI had received the Commission's request for information on 9 October 2001.

For the above reasons, the Commission concludes that CI/CBF, by failing to provide without justification access to CASCADE RS within a reasonable period of time, refused to supply to EB, between 3 December 1999 and 19 November 2001, with primary clearing and settlement services for registered shares issued under German law and safekept by CBF. Because CI/CBF refused to supply such services to EB but supplied them expeditiously to other comparable customers in equivalent situations, thus placing EB in a competitive disadvantage, their behaviour amounts to abusive discrimination, in violation of Article 82 of the EC Treaty.

7.2. Applying discriminatory prices to EB for primary clearing and settlement services

7.2.1. Legal criteria for assessment of discrimination

(302) Article 82 of the Treaty prohibits discrimination by a dominant undertaking. In particular, the abusive conduct may consist in *"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*. The existence of discrimination therefore presupposes that the conditions applied be dissimilar, that transactions -in this case, the services provided- be equivalent, and that through its behaviour the dominant undertaking places trading parties at a competitive disadvantage.

7.2.2. Assessment of CI/CBF's behaviour

7.2.2.1. Dissimilar prices

(303) The price charged to non-CSD customers (mainly banks), which is an average of € 0.20 per transaction, cannot serve as a basis for assessing possible discrimination within the meaning of Article 82 (c) of the Treaty. This is because, as explained in section 5.1.3 above, the Commission takes the view that the provision by CBF of primary clearing and settlement services to CSDs and ICSDs is in a separate market to the provision of primary clearing and settlement services to non-CSD customers. CBF provides non-CSD customers with what it describes as "standard services", while it provides CSDs and ICSDs with non-standard services[251]. A proper comparison can therefore only be established where as regards the services provided to CSDs and ICSDs.

(304) Until CBF reduced its price to € X/2 on 1 January 2002, CBF charged EB € X per transaction, while it was charging € Y (or a similar amount in national currency) to a number of CSDs that had eliminated manual handling (which was done via fax and manual input into the CBF system) and had established a link with CBF. As explained at recital (132) above, EB already had a link with CBF since 1989.

(305) While the dates from which CBF charged € Y to CSDs vary, the fact is that CBF applied the € Y tariff at least from September 1996 as regards the French CSD Sicovam and December 1996 in the case of OeKB[252], the Austrian CSD. During more than 5 years, CBF therefore applied a per transaction tariff of € X to EB for primary clearing and settlement services while it was charging at least two other CSDs € Y per transaction for equivalent services.

(306) As explained at recital (131) above, in addition to the per transaction fee at stake, EB pays the regular safekeeping fee according to CBF's price list, plus an annual € [redacted] fee[253]. The fact that EB was charged an annual flat fee and that the flat fee also covered settlement services (see section 4.3.4 above) means that the per transaction price effectively paid by EB is higher than the nominal per transaction fee of € X. Because CSDs did not pay the annual flat fee[254], the discrimination therefore exceeds the 20% price difference between the € X that CBF charged EB and the € Y that CBF charged CSDs.

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251 While CI/CBF refer to the services provided to CSDs and ICSDs as individually agreed, they nevertheless have provided a common list of services supplied to CSDs and ICSDs (see above, section 4.3), as well as cost information attached to their 1 September 2003 letter, according to which the cost of providing services to all CSD clients of CBF is the same, and the cost of providing services to the two ICSDs is also the same.

252 CI/CBF letter of 27 November 2002, point 1.a).

253 CI/CBF reply of 9 October 2002, (point 6).

254 See for example point 3 of the internal CI memorandum from [redacted] to [redacted] of 25 October 1999 attached as Exhibit 23 to the CI/CBF's Reply to the Commission's Statement of Objections. More generally, CI/CBF never contested EB's assertion (see for example the letter from [redacted] of EB to [redacted]) that it was the only CBF client to pay the yearly € [redacted] flat fee.

7.2.2.2. Equivalent services

(307) In the Commission's view, the content of the primary clearing and settlement services for cross-border transactions provided by CBF both to CSDs and ICSDs is equivalent. It consists of the processing and registration of the transfer of securities, as well as the relevant annotations in its customers' securities accounts and reporting on transactions.

(308) CI/CBF have argued in their Reply to the Commission's Statement of Objections that CSDs and ICSDs form separate customer groups, based firstly on the different service packages they obtain from CBF and, secondly, on their respective market positions and functions or areas of activity.

(309) The Commission has investigated in detail the content of the services provided by CBF to CSDs and ICSDs. As explained in section 4.3.4 above, the lists of services provided by CI/CBF are incoherent and contradictory. As stated in recital (296) above, the Commission has in particular investigated whether there would be services that CBF provided to ICSDs that it did not provide to CSDs. In the Commission's view, this is not the case, as is confirmed by the comparison made by CI/CBF between the services provided to CSDs and to ICSDs (see section 4.3 above), in which CI/CBF did not identify at that time any service that would be provided to ICSDs that was not provided to CSDs. The alleged different service packages or service levels to EB and to CSDs that CBF refers to in the Reply to the Statement of Objections and in the oral hearing do not, therefore, alter the Commission's view, based on the information provided by CI/CBF, that the services provided to CSDs and ICSDs are equivalent.

(310) In relation to the alleged different functions performed by ICSDs and CSDs respectively, CI/CBF argue firstly that looking at cost structures of respective services is not sufficient to show price discrimination, referring to the European Court of Justice's judgement in the case *Akzo*[255]. They state that for the question of discrimination of trading partners, the relevant basis for comparison is not simply the ratio between price and service, but that all circumstances which shape the business relationship, including the different functions, are relevant. They argue that there can only be discrimination if differing conditions are applied between correctly identified customer groups.[256]

(311) In response to these arguments, the Commission believes that ICSDs and CSDs do form comparable customer groups in that they provide secondary clearing and settlement services for cross-border transactions in securities issued under German law. Moreover, ICSDs and CSDs demand comparable services from CBF at the primary level, in order to be able to provide their services at the secondary level.

(312) The Commission has also considered CI/CBF's more detailed arguments regarding the functions of ICSDs and CSDs in the market.

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255 Case C-62/86 *AKZO v. Commission*, [1991] ECR I-3359.

256 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.III.2.b) and B.III.1.b).

- First, CI/CBF argue that CSDs are central depositories for the final custody of securities, while ICSDs are not final custodians, which increases risk.[257] The Commission takes the view that CI/CBF's argument ignores the fact that CSDs are not final custodians as regards securities issued in accordance with a set of laws that is not the law of their home country. In that case, CSDs operate as intermediaries who will need primary clearing and settlement services, in order to provide clearing and settlement services at the secondary level. As a consequence, as regards securities issued in accordance with German law, non-German CSDs and ICSDs operate at the same level providing secondary clearing and settlement services.

- Second, CI/CBF argue that the creation of ICSDs is historically based on the need to find suppliers of clearing and settlement services for trade with eurobonds.[258] Therefore, the business of ICSDs remains mainly processing of debt securities outside an exchange. By contrast, CSDs are mainly active in exchange-related clearing and settlement[259]. The Commission does not consider the historical origins of the creation of ICSDs to be of relevance for the purposes of comparison, insofar as at present, as explained in recital 311, ICSDs and CSDs provide secondary clearing and settlement for cross-border transactions.

7.2.2.3. The lack of objective justification for the difference in prices

(313) The present section summarises the results of the Commission's detailed enquiry with CI/CBF regarding possible objective justifications for the difference in prices. In order to investigate whether CBF's actual costs might provide any cost justification for the different treatment, the Commission addressed a number of requests for information to CI and CBF. In particular, the Commission asked CBF on 8 May 2002 and on 12 September 2002[260] to justify the difference in the prices it charges to its customers and to provide details of the cost elements in each case, breaking down cost elements on a per transaction basis. In reply to those requests for information, CI/CBF did not provide the required cost breakdown. The Commission further asked CI/CBF for cost details on 25 July 2003 (see recitals (321) and (322) below) and on that occasion CI/CBF provided a table that had been used as a basis for their reply of 9 October 2002 but that, despite an explicit request to provide details of the cost elements, did not accompany that reply. CI/CBF provided further explanations on costs during a meeting with the Commission services on 3 November 2003. By letter of 17 November 2003, the Commission services called CI/CBF's attention on how the Commission intended to use the cost information provided, and gave CI/CBF the opportunity to comment. CI/CBF provided their comments by letter of 1 December 2003. In their 1 December 2003 letter, CI/CBF state that: *"it is not critical to the allegation of improper discrimination... whether every penny of price differencials can be attributed*

257 CBF's and CI's Reply to the Commission's Statement of Objections, Section B.IV.2.b.aa.

258 CBF's and CI's Reply to the Commission's Statement of Objections, Section C.III.2.b.

259 CBF's and CI's Reply to the Commission's Statement of Objections, Section C.III.2.b. See also B.III.2.b.aa

260 Question 7 of the Commission's request for information of 8 May 2002 and question 1 of the Commission's request for information of 12 September 2002.

accurately to differences in cost. For in competitive markets...prices are set by supply and demand, and not by the principle of covering costs."[261] The Commission agrees that in competitive markets costs and prices must not always keep the same proportional relationship as prices are determined by supply and demand. However, the Commission's objective in examining costs in the present case is merely to ascertain whether a difference in price applied by CBF for equivalent services might possibly be justified by a difference in costs, or whether CBF has, for equivalent services, abused its market power to charge higher prices.

(a) No individual admission of securities to the CBF-EB link and no need for legal opinions

(314) In their reply of 9 October 2002 to the Commission's request for information of 12 September 2002, CI/CBF explain that *"[c]ompared to CSDs, the following special services are not required by ICSDs:*

Admission of securities for the CBF-CSD link.[262]

Provision of legal opinions prior to the establishment of a CBF-ICSD-link."

(315) The information provided later[263] by CBF and CI shows that admission of securities to the CBF-CSD link requires individual input, with *"specific manual workaround of both CSDs regarding each security"* admitted to the CBF-CSD link. By contrast, as regards the link between CBF and ICSDs, *"all German securities are automatically admitted"*. As regards the provision of legal opinions in relation to CSDs, these cost at least € [redacted] per opinion and updates, costing approximately € [redacted] each, are made three to five years after the initial legal opinion was provided.

(316) Given that ICSDs do not require legal opinions or manual admission of each individual security to the link, while CSDs do, CI/CBF's explanation to the Commission cannot by itself justify a difference in prices to the disadvantage of ICSDs.

(b) Higher degree of standardisation in the CBF-EB relationship than in the CBF-CSDs relationship

(317) CBF's degree of standardisation in its relationship with CSDs is less than in its relationship with EB: *"...the services CBF provides to EB mainly relate to the clearance of Eurobonds, and...this work can be standardised to an important degree. By contrast, services CBF provides to CSDs relate in large part to national equity or debt instruments, which require special procedures (e.g., payment and voting procedures) as well as compliance with diverging*

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261 See CI/CBF letter of 1 December 2003, section II. 1. a) and the references to other CI/CBF submissions made in that letter.

262 The 9 October 2002 letter actually referred to "[a]dmission of securities for the CBF-ICSD link". This was however a typing error, as is apparent from CI/CBF's answer of 10 february 2003 (point 7)

263 CI/CBF letter of 10 February 2003, reply to question 7. See also CI/CBF letter of 9 October 2002, reply to question 1.

national rules. Therefore the workaround cannot be standardised to the same degree as the services CBF provides to EB."[264]

(318) Given that CBF justifies the level of the price charged mainly by citing staff cost ("workaround"), the more standardised work required by EB should normally command a lower level of prices than the prices applied to national CSDs. This was not the case during the time that CBF charged one or more national CSDs € Y and EB € X per transaction.

(c) Higher volumes and higher automation in the case of EB than in the case of national CSDs

(319) The transaction volumes are much higher for EB than for the national CSDs. Between 1998 and 2002, the transaction volume of EB was over [redacted] times the transaction volumes of seven national CSDs combined:

[redacted]

(320) According to CI/CBF, the higher volume of transactions has *"as a consequence [that] the level of automation (STP) is higher too."* [265] A higher level of STP (straight-through processing) normally implies a lower level of "manual workaround". Therefore, less manual workaround should warrant lower per transaction costs for EB than for CSDs.

(d) The alleged higher costs for EB resulting from higher automation, higher liability requirements, data center services and a dedicated night shift

(321) In their reply to the Commission's Statement of Objections and in the oral hearing of 24 July 2003, CI/CBF argued that the higher automation in processing the higher volumes of transactions with EB results in higher costs. This would be due to additional services provided to EB regarding *"higher level of automation, special communication transmission (kind, number, timing), administration, custody and contingency measures"*[266]. In addition, CI/CBF say that there exists a special liability of CBF for the services offered to EB. The Commission notes that:

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264 CBF letter of 8 October 2002, reply to question 7

265 CI/CBF letter of 9 October 2002, reply to question 1.

266 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.III.2.b)bb), and CI/CBF's slides for the oral hearing of 24 July 2003, p. 32.

- This list of services includes administration and custody services that are different from the transaction processing services the price of which is at stake.

- CI/CBF do not explain in their Reply in what those services differ from the services also provided to CSDs. According to the information previously provided to the Commission by CI/CBF (see above, section 4.3), ICSDs and CSDs do receive comparable services, with CSDs receiving two additional service elements.

- The existence of volume rebates (recitals 328, 329 and 330) does not support the argument that higher volumes involve greater costs. On the contrary, it suggests that greater volumes mean fewer costs. CI/CBF have not explained this inconsistency, arguing on the one hand that EB actually paid lower prices because of volume rebates, and on the other hand that they ought to pay higher prices because of the additional services linked to the increased volumes.

(322) In view of the arguments presented by CI/CBF in their Reply to the Commission's Statement of Objections and at the hearing, and despite the fact that the Commission had unsucessfully questioned CI/CBF on their costs prior to the Statement of Objections (see recital (313) above), the Commission asked CI/CBF, by a further request for information of 25 July 2003, to describe the cost breakdown for the above alleged supplementary services and the possible changes since 1997, with emphasis on the specific cost elements of the respective services. The Commission also asked CI/CBF to provide it with written evidence and documents on which the cost breakdown would be based, and in particular year-end reports, management documents, accounting documents, etc.

(323) CI/CBF replied to the additional request for information on 1 September 2003. In their reply, CI/CBF did still not provide a cost breakdown for the relevant period, but simply a half-page calculation on which, according to CI/CBF, the reply to the Commission of 9 October 2002 was based. That calculation didn't however accompany the 9 October 2002 reply. During a meeting held on 3 November 2003 between CI/CBF and the Commission services with the aim of explaining CI/CBF's cost estimates, CI/CBF said that the calculation was not based on CI/CBF's cost accounting, but had been specifically made to reply to the Commission's request. The CI/CBF cost calculation results in a higher cost per transaction for ICSDs (€ [redacted]) than for CSDs (€ [redacted]).

The reasons invoked by CI/CBF as justifying higher costs for ICSDs and for EB in particular

(324) In their replies of 1 September 2003 and 1 December 2003, CI/CBF identify the following reasons as justifying higher costs for EB:

- *Special liability.* CI/CBF explain that, in accordance with the 11 July 1997 Agreement between the predecessors of CBF and EB, CBF is required to indemnify EB for claims by EB for losses arising from failures and mistakes by CBF specified in detail in the agreement, such as the failure to

transmit on an intra-night/intra-day basis settlement results by the deadline set. To avoid triggering that liability, CBF takes precautionary safety measures and has contracted general liability insurance:

- The *precautionary measures* are related to three main cost areas, according to the CI/CBF letter of 1 December 2003: (i) additional programme runs implemented solely for ICSDs during overnight clearing and settlement; (ii) special supervision of programme runs during overnight clearing and settlement by staff with suitable training and (iii) the costs which the service provider DBS ("Deutsche Börse Systems") passes on to CBF as a result of also having to provide specialists, to ensure the maintenance of system runs during the night shift. All three precautionary safety measures are therefore related to the needs of overnight processing and the costs of the night shift, and CI/CBF has not provided separate costs of these measures.

- The annual *cost of the insurance* is of € [redacted], and it follows from the reply of 1 September 2003 that an unquantified part of insurance costs is allocated to the special liability towards EB. Pursuant to CI/CBF's information, the cost of the insurance is accounted for under the "overhead corporate" concept. Both CSDs and ICSDs are charged the same unit costs for corporate overhead.

- *Night shift.* According CI/CBF, overnight clearing and settlement is only of importance for ICSDs[267], and the transmissions for ICSDs are monitored by "Deutsche Börse Systems" at night. CI/CBF estimate that the night shift represents one employee (full-time equivalent).

- *Data Center Services.* CI/CBF argue that since the IT systems for ICSDs need to process more tasks than those for CSDs, the programmes are more complex.

The Commission's evaluation of the CI/CBF cost estimate

(325) In connection with the CI/CBF cost estimate, the Commission notes that:

- The CI/CBF cost estimate contains certain cost items that lead CI/CBF to conclude that there are higher per transaction costs for EB than for CSDs. However, other cost items pointing in the opposite direction are missing. For example, the cost estimate does not account for the lower costs derived from the higher level of straight-though processing in the case of EB as opposed to CSDs, who require more manual "workaround". The cost estimate does not identify separately the cost of legal opinions and updates in the case of CSDs as opposed to the absence of that cost for EB. The costs represented by the individual admission of each security to the CBF-CSD link, as opposed to the savings derived from the automatic admission of all German securities to the CBF-EB link, are also not reflected.

- The cost estimate supplied by CI/CBF on 1 September 2003 results in a cost per transaction of € [redacted] for the two ICSDs, and in an identical cost

267 Letter from CI/CBF of of 1 December 2003.

per transaction of € [redacted] for each of the ten CSDs covered (in other words, CI/CBF estimate that the costs per transaction of, for example, the Japanese and the Austrian CSDs are identical, despite the fact that there exists a "*[s]pecific and individual communication schedule elaborated in close co-ordination with each CSD and prepared according to the needs of each individual CSD*"[268]).

- The *special liability* vis-à-vis ICSDs was already mentioned in an internal DBC memorandum from [redacted] to [redacted] of 25 October 1999[269], according to which "*at variance from other customers, we have agreed with Euroclear and Cedel on the liability provisions for untimely data deliveries, where late transfers can lead to substantial damage compensation payments by DBC. A surcharge is integrated in the service prices for this purpose as well ... For the above-mentioned reasons, no claim to the service prices of GTC customers* [General Terms and Conditions customers, i.e., banks] *can arise.*" This memorandum was written in connection with the preparation of a reply from DBC to the 20 September 1999 letter from EB where EB claimed that it was paying ZZ to ZZ times more than the official tariff that DBC charged banks. CI/CBF explain that the risk of such liability being triggered is insured, which creates additional costs. However, the insurance does not apply specifically to the risk of having to provide indemnity to EB or to ICSDs but, in general, to major risks and major liability occurrences. CI/CBF explain in the 1 September 2003 letter that the annual cost of insurance is € [redacted]. Given that those major liability occurrences may also arise regarding CSDs and non-CSD customers, the Commission takes the view that insurance costs covering major CBF risks in general can only be correctly allocated if shared among ICSDs, CSDs and banks. CI/CBF does not explain the basis on which any such allocation might have been done. A higher contractual liability level for ICSDs cannot therefore be accounted for as a cost exclusively for ICSDs if it is insured together with major risks and major liability occurrences that can arise in connection with liability that CBF might incur in connection with CSDs and non-CSD customers. In any case, CI/CBF did not provide information on the repercussion of the premium on a per transaction basis and on which criteria would the premium be allocated to the different customer categories. The CI/CBF cost estimate takes into account the same unit costs for both CSDs and ICSDs under "overhead corporate", which contradicts the statement in the 1 September 2003 letter that there are additional insurance costs for EB. Also, if (as CI/CBF explain) ICSD transactions are inherently more standardised than transactions conducted by CSDs -which require special procedures and higher workaround - it would appear that transactions for ICSDs are less risk-prone. CI/CBF do not take this aspect into account in their cost estimate.

- The information in the CI/CBF replies of 1 September 2003 and 1 December 2003 concerning the existence of a *night shift* devoted to

268 CI/CBF reply of 9 October 2002.

269 Annex 23 to CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections.

monitoring ICSD transactions contradicts the information they provided on 9 October 2002 (see above, section 4.3), where CI/CBF describe staff composition in detail,[270] and where no mention is made of personnel specifically devoted to ICSDs, be it during normal working hours or in a night shift. Even assuming, in CI/CBF's favour, that the information in the 1 September 2003 and 1 December 2003 replies corrects information provided on 9 October 2002, CI/CBF estimate that the cost of the single night shift (full-time equivalent) employee is about four times the cost of a (full-time equivalent) employee working during normal hours, which appears questionable even taking into account the cost of working during unsociable hours and possible higher qualifications. There are also direct contradictions in the information provided by CI/CBF in their reply of 1 December 2003. On the one hand, CI/CBF affirm that "*overnight clearing and settlement is actually only of importance for ICSDs*". On the other hand, CI/CBF enclose a table showing that there is also overnight clearing and settlement for CSDs. Furthermore, the proportion of overnight clearing and settlement in the total volume processed is smaller for EB ([redacted]%) than for certain CSDs ([redacted]% in the case of the Austrian CSD and [redacted]% in the case of the Italian CSD).

- The additional costs allocated to ICSDs for the *Data Center Services* represent some [redacted]% [approximately ¾] of the total of this cost centre. However, as explained in the first bullet point of this recital, CI/CBF omit to take into account the lower costs resulting from the lower manual intervention and higher straight-through processing in the case of ICSDs. CI/CBF consider that even if straight-through processing is taken into account, this will not lead to a substantial difference. This view seems to be incorrect. On the contrary, according to the Commission's estimate, taking into account this aspect could result in lower per transaction costs for EB than for CSDs. In connection with the night shift and data center services, the methodology used by CI/CBF consists in allocating a basic unit cost to each CSD and ICSD transaction, and then surcharging all ICSD transactions with a supplementary night cost. This would be correct if all ICSD transactions were cleared and settled exclusively at night, but according to the information provided by CI/CBF to the Commission services during a meeting on 3 November 2003, an unquantified part of the ICSD transactions are cleared and settled before the beginning of the night shift. Consequently, CI/CBF are apparently attributing night shift costs to ICSD transactions cleared and settled during the day.

(326) In addition, the Commission notes that:

- CI/CBF mention in their 1 September 2003 letter specific contingency deadlines and procedures as an advantage recognized by EB. In the Commission's view, there is nothing in the information provided by CI/CBF showing that there are more onerous contingency requirements in case of failures for EB than for CSDs. On the contrary, the information

[270] The description includes: (a) 3 employees responsible for CSD links, (b) 8 employees working in a settlement unit monitoring cross-border business with each CSD and (c) 9 employees in the general Customer Service Unit dealing with 400 non-CSD customers.

submitted by CI/CBF refers to the higher manual workaround and lesser degree of standardisation and straight-through processing in the case of cross-border transactions involving non-German CSDs.

- The per transaction fee to CSDs was reduced by CBF from € YY to € Y from the moment that manual handling (including transmission by fax) was abandoned and replaced by automated procedures. Therefore, it is inconsistent for CI/CBF to explain the higher price to EB on the grounds of a higher level of automation when the per transaction fee of € Y which was charged to CSDs was linked to increased automation.

- Even if the Commission accepted all the CI/CBF assumptions at the basis of the cost estimate attached to their 1 September 2003 letter, the cost difference of € [redacted] between CSDs and ICSDs does still not justify the difference in price.

- The calculation of costs per transaction that accompanies the CI/CBF reply of 1 September 2003 does not relate to the relevant period (as from 1997) on which CI/CBF were explicitly questioned by the Commission, but to eight months between January and August 2002. Moreover, during the period covered by the cost estimate, Clearstream was not charging EB more than CSDs, as would be coherent with its estimate of higher costs for ICSDs; at that moment, Clearstream had reduced the per transaction price to EB by 50% and it was charging EB € X/2 while it was charging CSDs € Y. This is evidence of the lack of relation between CBF's estimates of costs per transaction and the price charged to customers.

(327) For the above reasons, the Commission concludes that the alleged higher costs for EB than for CSDs are not substantiated by the record and do not explain the difference in the prices actually charged. Consequently, they do not constitute an objective justification. The evidence clearly undermines the probative value of CBF's claims in this regard. It shows the conclusion which the Commission draws on the existence of discriminatory pricing is the only reasonable one it could draw from the entire body of evidence available to it after a detailed enquiry.

(e) Other arguments put forward by CI/CBF

(328) CI/CBF argue in their Reply to the Commission's Statement of Objections that the comparison with CSDs on prices ignores a volume rebate that was applied from 1 January 1997, meaning that in reality price difference was only of 2-5%[271]. They argue the price per transaction was effectively € [redacted] to € [redacted] [two figures > Y]. In relation to this argument, the Commission notes that:

- It appears from the information in the Commission file (see for example recitals (318) and (320) above) that, irrespective of the volumes concerned, the costs for providing primary clearing and settlement services to EB are actually lower than the costs of providing the same services to CSDs. The fact that EB paid € X/2 per transaction as from 1 January 2002 without any objective (cost-based) justification

[271] CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section B.III.2.b.bb and C.III.2.b.

for the change supports this view. This leads the Commission to consider that a volume rebate applied to a basic price higher for EB (€ X) than for CSDs (€ Y) does not remove the discrimination, particularly insofar as the price after the rebate is still higher than € Y. To remove the discrimination, the volume rebate to EB should have been applied, as a minimum, to a € Y basic price.

- The € [redacted] flat fee for what CI/CBF describes as services other than settlement comprises settlement services. Therefore, the actual per transaction price for comparison purposes should include part of the flat fee. However, when referring to the EB per transaction price (with or without rebates), CI/CBF omit to take the flat fee into account.

(329) CI/CBF also argue in their Reply to the Commission's Statement of Objections that, since December 2002, EB receives further services relating to the re-registration of registered shares, which are charged for in addition. The Commission does not consider this argument (which relates to a moment when CI/CBF had already reduced the price to EB by half) of any relevance for the purpose of assessing the discriminatory pricing during the period under question, which is the period prior to 1 January 2002.

(330) CI/CBF further argue that EB's allegations of discrimination are without merit insofar as CBF also applied the same tariffs to CBL[272]. The Commission cannot accept this argument. First, since 1 July 1999, CBL and CBF have structural links (50% common ownership) and therefore the conditions applied by CBF to CBL cannot provide a valid basis for comparison to ascertain whether the conditions applied to EB were discriminatory or not. Second, discrimination exists from the moment that CBF applied more unfavourable conditions for comparable cross-border settlement services to EB than to one or more CSDs, in principle regardless of the fact that CBF may also have applied those unfavourable conditions to other companies and may also have discriminated against them. This last reason is also valid for the period of time, prior to 1 July 1999, when CBL did not have structural links with DBC.

(f) Additional evidence of the lack of objective justification for the difference in prices

(331) CBF's behaviour regarding its pricing policy vis-à-vis EB is also incoherent. CBF changed its position regarding pricing at least three times between September 1998 and November 1999:

- On 18 September 1998, CBF confirmed to EB in a bilateral meeting *"that the pricing difference [between the rate charged to EB and the rate charged to non-CSD customers, such as banks] could be lowered"*.
- Approximately one year afterwards, on 1 October 1999, CBF informed EB that a price reduction was not possible, *"in light of business policy considerations"*. This announcement prompted [redacted] of EB to

272 CBF's and CI's Reply of 30 May 2003 to the Commission's Statement of Objections, Section C.III.2.a).

write to [redacted], Chairman of the Supervisory Board of DBC, on 12 October 1999.

– On 11 November 1999, less than one month and a half after CBF had maintained that a price reduction was not possible, CBF offered a 50% reduction of the per transaction fee. Furthermore, when CBF offered EB the 50% reduction, there do not appear to have been any objective reasons in terms of lower costs.

(332) Section 7.2.2.3 above, which explains in relation with the discrimination regarding the provision of primary clearing and settlement services for registered shared why CI/CBF's behaviour vis-à-vis EB had the effect of placing this company at a competitive disadvantage, is also applicable at this stage. In the present case price discrimination resulted in concrete measurable effects to the detriment of EB.

7.2.3. Conclusion on the discriminatory pricing

(333) Regarding the provision of primary clearing and settlement services, CI/CBF provide to EB equivalent services to the services provided to CSDs. Compared to CSDs, the establishment and maintenance of a link with EB does not, however, need a legal opinion and periodical updates to the legal opinion, as is required for the CBF link with each of the CSDs. Also, each security needs to be individually admitted to the CBF-CSD link, while all German securities are automatically admitted to the CBF-EB link.

(334) EB has much larger transaction volumes than CSDs, and the level of automation (straight-through processing) is higher. The services provided by CBF to CSDs cannot be standardised to the same degree as the services provided to EB. It follows from CI/CBF's submissions that lower staff costs are incurred for EB transactions.

(335) CI and CBF have not provided any adequate, objective and cost-based justification for the difference in the prices it charged to EB in the period under investigation capable of undermining the conclusion which the Commission is drawing from the entire body of evidence available in this case, and in particular no conclusive and coherent information derived from reliable cost accounting, despite repeated and detailed requests for such information.

(336) Similarly to what was the case with the refusal to grant access to CASCADE RS, the actual reduction in the tariff CBF applied to EB took place after the Commission had launched its enquiry in the present case in March 2001; more precisely, it occurred immediately following the Commission's second request for information of 9 October 2001, which covered pricing issues. In the second half of October 2001, CBF finally agreed to implement its offer of a 50% reduction of the settlement transaction fee and to delink this offer from other issues. As with the granting of access, the fee reduction was communicated through a telephone conversation on 18 or 19 October 2001, the content of which is confirmed in a letter of [redacted] of EB to [redacted] of CBF of 26 October 2001. This letter states: "*I am writing to confirm my understanding of our telephone conversation of the end of last week on a number of*

subjects.....2. I am also thankful for your confirmation of CBF's agreement to reduce the Euroclear Bank invoice of CBF transaction fees by 50% as of 1 January 2002."[273]. There is no indication that CBF's pricing, as far as it is at stake here, is motivated by any efficiency consideration or by a benefit to customers or ultimate consumers.

(337) For the above reasons, the Commission takes the view that, by applying a € X per transaction tariff for the provision of primary clearing and settlement services to EB, at a moment when CBF was charging only € Y per transaction to certain national CSDs for those services, CBF abused its dominant position in violation of Article 82 of the Treaty.

8. SUBSTANTIAL PART OF THE COMMON MARKET - EFFECT ON TRADE BETWEEN MEMBER STATES

(338) Germany is a substantial part of the Community[274].

(339) Trade between Member States is effected due to the cross-border nature of the provision of primary clearing and settlement services for securities held in collective safe custody in Germany, by CBF (based in Germany) to EB (based in Belgium). The large volumes of EB transactions in German securities demonstrate that the effect on trade between Member States is substantial. The fact that the services in question are transmitted mainly by electronic data transfer does not affect this conclusion.

9. ARTICLE 7(1) OF REGULATION (EC) NO. 1/2003

(340) Pursuant to Article 7(1) of Regulation (EC) No.1/2003, where the Commission, acting on a complaint or on its own initiative finds that there is an infringement of Article 82 of the Treaty, it may by decision require the undertakings concerned to bring such infringement to an end. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

(341) In the present case, the infringements were terminated as of 1 January 2002, after the Commission had started enquiring into this case. More specifically, the duration of the abusive behaviour described above was as follows:

- Between 1 January 1997 and 1 January 2002 as regards price discrimination. From 1 January 1997 (at the latest), CBF applied to certain CSDs a € Y tariff for the cross-border primary clearing and settlement of securities held in collective safe custody in Germany, but CI/CBF only reduced the price applied to EB from € X to € X/2 as from 1 January 2002. Prior to 1 July 1999, DBC (CBF's former name) took decisions autonomously from Cedel International (the predecessor of Clearstream

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273 EB's reply of 16 November 2001, Annex 11.

274 Judgement of 9 November 1983 in the case 322/81, Michelin, ECR 1983, p. 3461, paras 102-104.

International). Clearstream International only came into existence on 1 July 1999.

- Between 3 December 1999 and 19 November 2001 as regards the refusal to provide access to CASCADE RS and therefore primary clearing and settlement services for registered shares, and the corresponding discrimination vis-à-vis national CSDs. The reference for the starting point of the infringement is four months after the beginning of the active exchange of correspondence as of 3 August 1999, which allows for the maximum reasonable period that, in the Commission's view, granting access would normally require involving preparations from both sides.

(342) While the infringements that the present decision relates to are terminated, the Commission finds it necessary to adopt a decision for the following reasons:

- It should be noted that CI/CBF continue to deny that their behaviour is contrary to the Treaty. The Commission must ensure with certainty that CI and CBF will genuinely and permanently refrain for the future from any action which may have the same or similar object or effect as the abuses described in the present decision.
- It is important for the proper functioning of a single European capital market that anti-competitive practices committed by market players in the area of cross-border clearing and settlement area are eliminated. As affirmed by the first Giovannini Report[275]: *"[i]t is perhaps no exaggeration to conclude...that inefficiencies in clearing and settlement represent the most primitive and thus most important barrier to integrated financial markets in Europe. The removal of these inefficiencies is a necessary condition for the development of a large and efficient financial infrastructure in Europe".*
- There is no Community decisional practice concerning the provision of cross-border clearing and settlement services within the common market. At a moment when post-trading infrastructures within the Community are consolidating, there is a need for the Commission to clarify the legal situation and provide guidance, both as regards the addressees of the present decision and other undertakings active in this area, with the aim of clarifying and maintaining the application of the EC Treaty's competition rules to the European single capital market.

10. ARTICLE 23(2) OF REGULATION (EC) NO. 1/2003

(343) According to Art 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings or associations of undertakings.

(344) There is no Community decisional practice or case law relating to the complex area of clearing and settlement services. The present decision analyses for the first time the complex clearing and settlement processes in the context of market definition, as well as other sector-specific issues such as

275 The Giovannini Group – Cross-Border Clearing and Settlement Arrangements in the European Union. Brussels, November 2001. The quote is taken from the foreword.

internalisation, and this analysis has a direct bearing on the legal analysis of the case. In light of existing case law at the moment of the infringement, it could reasonably be argued that it was not sufficiently clear to CI/CBF that its behaviour would constitute an infringement of the competition rules of the Treaty. Also, clearing and settlement services in the Community is an evolving sector, in particular when cross-border transactions are concerned, as is the case in the relation between CI/CBF and EB. Different institutions and fora (including the European Central Bank, the Committee of European Securities Regulators and private organizations) have been for some time discussing issues connected with the functions of the various actors in the industry. The scope for internalisation, the role of CSDs and ICSDs and their relationship with large custodian banks are all being actively debated and that are connected to the subject matter of the present decision.

(345) For the above reasons, the Commission takes the view that no fines should be imposed on CI or CBF in the specific circumstances of the present case.

HAS ADOPTED THIS DECISION:

Article 1

Clearstream Banking AG and Clearstream International SA have infringed Article 82 of the Treaty by:

(a) refusing to supply primary clearing and settlement services for registered shares to Euroclear Bank SA and its predecessor from 3 December 1999 to 19 November 2001, in an unjustified manner and for an unreasonable period of time, and by discriminating against Euroclear Bank SA and its predecessor during the same period of time regarding the provision of primary clearing and settlement services for registered shares;

(b) applying discriminatory prices to Euroclear Bank SA and its predecessor for the primary clearing and settlement services provided to it, between 1 January 1997 and 1 July 1999 in the case of Clearstream Banking Frankfurt, and between 1 July 1999 and 1 January 2002 in the case of Clearstream International and Clearstream Banking Frankfurt.

Article 2

Clearstream Banking AG and Clearstream International SA shall refrain in future from repeating any act or conduct contrary to Article 82 of the EC Treaty, as described in Article 1 of this decision.

Article 3

This Decision is addressed to:

1. Clearstream Banking AG
   Neue Boersenstrasse 1, D-60487 Frankfurt/Main, Germany

2. Clearstream International SA
   3-5 Place Winston Churchill, L-2964 Luxembourg

Article 4

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 2 June 2004

For the Commission
Mario MONTI
Member of the Commission