20 September 2010 : Collusion in the banking sector

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The Autorité de la concurrence fines 11 French banks 384.9 million euros for having charged unjustified interbank fees during the transition towards a new digital system for processing checks

> Version française

Following the opening of ex officio proceedings, the *Autorité de la concurrence* has issued today a decision in which it fines *Banque de France, BPCE*[1] *, Banque postale, BNP-Paribas, Confédération Nationale du Crédit Mutuel, Crédit Agricole, Crédit du Nord, Crédit Industriel et Commercial (CIC), LCL, HSBC* and *Société Générale* for having colluded during the transition to a new digital system for processing checks. From January 2002 to July 2007, these banks have charged an unjustified 0.043€ fee on 80% of the checks exchanged in France. For this first infringement to competition rules, the fines amount a total of € 381.1 million.

The *Autorité* has also fined these banks for having enforced two additional fees for 'related services' (*services connexes* said *AOCT*, *annulation d'opérations compensées à tort* or cancellation of cleared operations i.e reversals) that are still collected today. The Autorité ascertained that the level of those fees isn't proportionate to the costs incurred by the banks and has ordered their revision by taking as a benchmark the costs of the most efficient bank. For this second infringement to competition rules, the fines amount a total of € 3.8 million.

On the other hand, six other fees for 'related services' were deemed justified under competition rules by the *Autorité*. It assessed that they were the proper return for newly provided services by a category of banks to another (like the clearing of a blocked check) and that they compensated for cost transfers resulting from the dematerialization of the checks exchanges system (like for

example checks storage).

New interbank fees were raised during the transition towards the new digital system for processing checks

When the new digital system for processing and clearing interbank checks was set up (system called Exchanges Check-Image hereafter ECI / see background note 1 of the press pack for more details), the main French banks met and colluded so as to define together the functioning details of the new system.

Together, they decided to raise several fees - among which the Exchanges Check-Image Fee (hereafter ECIF see background note 2 of the press pack for more details). This latter fee has been charged since 2002 and should have been subject to revision after three years. It was suppressed in 2007, while the *Autorité* 's investigation had reached decisive milestone, and under the pressure of the ongoing proceedings.

The ECIF is a 0.043€ fee per check charged at each operation and paid by the remittent bank to the drawee bank. According to the banks, its aim was to offset fund losses caused by the acceleration of interbank clearing processes thanks to digitalization, to the detriment of drawee banks. Since then, drawee banks are debited earlier and don't have the possibility to invest the sums corresponding to their clients' checks as long as before. On the contrary, remittance banks are credited earlier and are therefore able to invest quicker the money of their clients.

The Autorité de la concurrence deems the exchange check-image fee to be anticompetitive

The ECIF creation, which doesn't correspond to any rendered service has artificially increased the costs for remittent banks, with the potential effect of influencing on the level of the banking service prices.

The *Autorité* considers that there is no evidence to prove that the transition to ECI (exchanges check-image) has provoked net losses to any of the banks involved.

Therefore, the justification presented by the banks of the necessity of a compensation mechanism, could not, in any event, justify the fee and this for two reasons:

- Fund losses caused by drawn checks were compensated by fund profits on the remitted checks and by costs savings gained by exchanges dematerialization;

- The fixed character of the ECIF didn't allow to really compensate drawee banks gross losses, because these latter were linked to the average amount of the exchanged checks (and not to their number).
  That is the reason why the *Autorité* didn't exempt that fee from competition rules.

Finally, the ECIF has contributed to increase the cost of banking services

Banks have passed – at least partially - that fee on to their clients, either directly by increasing checks remittance costs (this was notably the case for mass retail distribution sector's firms, remitting regularly a great number of checks), indirectly by increasing the price of other banking services (cross subsidies). The investigation has shown that banks have directly and completely passed the fee on to the French Treasury. This latter is the main client of the French central bank and the *Autorité* estimates the extra cost at €36 million.

Finally, the *Autorité* underlines that, if the digitalizing of the clearing system has allowed banks to make substantial savings, neither the firms nor the consumer have been able to take full profit from this economic progress.

These practices impact one of the most popular means of payment in France

In France, checks remain one of the most used means of payment and accounted for 26 % of bank payments in 2006 (see background note 3 of the press pack). Furthermore, these practices have occurred in a market where competition is already weak because of the banking monopoly and of tariffs opacity (see on that purpose the Constans/Pauget report delivered to the

French ministry of Economy in July 2010).

For the calculation of fines, the *Autorité* has taken into account the gravity and the duration of the practices (horizontal agreement, duration > 5 years) but also the following mitigating circumstances: the practices in question do not concern directly final prices ; they did occur during the transition to ECI (exchanges of check image), a general interest program, whose implementation had been supported by the French Central Bank ; they can't be mixed up with a secret cartel.

The *Autorité* has also taken into account the damage to the economy (size of the affected market, effects on prices). It calculated that, for each cent passed on to the consumer, the increase in prices paid by consumers amounts to €220 million for the period analyzed.

Finally, the *Autorité* has taken into account the individual situation of each bank - notably its market power on the check market and its economic power.

The *Autorité* has imposed a 10% increase of the fine of *Crédit Agricole, le Crédit Mutuel, La Poste, les Caisses d'Epargne and BNP*, because these companies have played a major role in the collusion by supporting the introduction of the fee during the pre ECI negotiations.

It has also put a 20 % increase of the fine of *Crédit Mutuel, Caisses d'Epargne, Société Générale, Crédit Agricole, BNP* and *LCL* that had already been fined for anticompetitive practices in 2000 (See Decision n° 00-D-28 relative to the competition situation in the property loans sector).

The *Autorité* has implemented national but also european competition law, considering the fact that the practices may have had an impact on the freedom of establishment of foreign banks in France.

The *Autorité* continues the investigation of another case concerning credit card interbank fees

In 2009, the *Autorité* has been referred to by the Fédération des entreprises du commerce et de la distribution concerning multilateral interbank fees. The investigation is under way and the decision is expected by 2011.

[1]*BPCE is fined for practices implemented during the period in question by Caisses d'Epargne et Banques Populaires.*

For more informations, consult background notes

Background note 1 : the set-up of the dematerialized checks processing system, known as the Exchanges Checks-Image
Background note 2 : the establishment of new interbank fees
Background note 3 : checks place in France
Background note 4 : community and national decisional practices in the banking sector
Background note 5 : a complex case
Background note 6 : the fines

> For more details, consult the full text of the decision 10-D-28 of 20 September 2010

> See decision of the cour d'appel de Paris (23 February 2012)

> See decision of the the Cour de cassation (14 April 2015)

> See decision of the cour d'appel de Paris (21 December 2017)

> The Judgement was submitted before the Cour de cassation