RÉPUBLIQUE FRANÇAISE

Autorité de la concurrence

Decision No 10-D-28 of 20 September 2010 on prices and associated conditions applied by banks and financial institutions for processing cheques submitted for encashment purposes

English version

of the *Décision n° 10-D-28 du 20 septembre 2010 relative aux tarifs et aux conditions liées appliquées par les banques et les établissements financiers pour le traitement des chèques remis aux fins d'encaissement*

The Autorité de la concurrence (section I A),

Considering Decision No. 03-SO-01 of 29 April 2003 (registered under number 03/0037 F) whereby the Conseil de la concurrence opened ex officio proceedings into the competitive situation concerning the prices and associated conditions applied by banks and financial institutions for processing cheques submitted for encashment purposes;

Considering Article 81 of the Treaty Establishing the European Community, now article 101 of the Treaty on the Functioning of the European Union;

Considering Book IV of the Commercial Code in its version before the entry into force of law No. 2008-776 of 4 August 2008;

Considering Law No. 2008-776 of 4 August 2008 on modernisation of the economy;

Considering Ordinance No. 2008-1161 of 13 November 2008 on modernisation of the competition regulations, particularly its article 5;

Considering the decisions on business secrecy No. 08-DSA-39 of 10 March 2008, Nos. 08-DSA-192 to 08-DSA-200 of 3 December 2008, Nos. 09-DSA-147 and 09-DSA-149 of 4 August 2009, Nos. 09-DSADEC-32 and 09-DSADEC-33 of 7 August 2009, Nos. 09-DSADEC-34 and 09-DSADEC-35 of 10 August 2009, and decisions No. 08-DEC-12 of 2 October 2008, No. 09-DEC-01 of 17 February 2009, No. 09-DEC-22 of 20 October 2009 authorising access, under specific conditions, to certain classified documents in confidential annexes;

Considering the decisions of 16 December 2008 and 17 February 2009 whereby the General Rapporteur appointed an expert, on the basis of the provisions of articles L 463-8 and R 463-16 of the Commercial Code;

Considering Decision No. 09-S-04 of 11 December 2009, whereby the Autorité de la concurrence sent the case back to the investigation services to enable the parties, on the one hand, to access all the data covered by decisions Nos. 08-DEC-12, 09-DEC-01 and 09-DEC-22 and, on the other, to produce any final written comments;

Considering the comments submitted by the *Banque de France* (French central bank), Banques Populaires Participations (formerly Banque Fédérale des Banques Populaires), La Banque Postale, BNP Paribas, the Caisse Nationale des Caisses d'Épargne, the

Confédération Nationale du Crédit Mutuel, Crédit Agricole SA, Crédit du Nord, Crédit Industriel et Commercial (CIC), LCL, HSBC, Société Générale and the Government Commissioner;

Considering the other documents in the case;

The Case Officers, the General Rapporteur, the Government Commissioner and the representatives of the *Banque de France* (French central bank), Banques Populaires Participations (formerly Banque Fédérale des Banques Populaires), La Banque Postale, BNP Paribas, the Caisse Nationale des Caisses d'Épargne, the Confédération Nationale du Crédit Mutuel, Crédit Agricole SA, Crédit du Nord, Crédit Industriel et Commercial (CIC), LCL, HSBC and Société Générale, heard at the meetings held on 24 November 2009 and 13 April 2010, and the representatives of the European Commission, Carrefour and EDF, heard at the meetings held on 24 November 2009, on the basis of the provisions of article L 463-7, paragraph 2, of the Commercial Code;

Adopts the following decision:

Disclaimer

The Autorité de la concurrence provides the present translation into English of its ***Décision n° 10-D-28 du 20 septembre 2010 relative aux tarifs et aux conditions liées appliquées par les banques et les établissements financiers pour le traitement des chèques remis aux fins d'encaissement*** to enhance public access to information about its advisory and decision-making practices.

Only the French version is deemed authentic. The Autorité de la concurrence accepts no responsibility or liability whatsoever with regard to this translated document.

I. Findings

A. THE PROCEDURE

1. By decision No. 03-SO-01 of 29 April 2003, the Conseil de la concurrence opened ex officio proceedings into the competitive situation concerning the prices and associated conditions applied by banks and financial institutions for processing cheques submitted for encashment purposes.

2. By letter of 26 November 2004, the General Rapporteur of the Conseil referred the matter, for enquiry, to the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), which submitted its report on 7 October 2005.

3. The Case Officer, appointed on 1 February 2006 by the General Rapporteur to investigate the matter, sent a questionnaire to 700 undertakings on their banking conditions concerning remittance of cheques both in terms of volumes and in terms of amounts, over the period covering the years 2000 to 2006, with a view to establishing general statistics (hereinafter 'pricing survey'). The data that resulted from this survey was the subject of decision No. 08-DSA-39 of 10 March 2008, whereby the President of the Conseil de la concurrence classified the responses of the undertakings surveyed in confidential annexes.

4. A statement of objections was sent to the offending banks and financial institutions on 14 March 2008. The referral and the statement of objections were sent to the *Commission bancaire* (Banking Commission), which issued its opinion on 22 May 2008.

5. A second Case Officer was appointed to jointly conduct an investigation into the matter, by decision of the General Rapporteur of 11 June 2008.

6. Following receipt of the parties' comments, a report was sent to them on 14 August 2008.

7. In September 2008 the parties made requests for access to the pricing survey's data on the basis of article R 463-15 of the Commercial Code. Some of them requested complete access to this data, while others only requested communication of data concerning them.

8. Each financial institution's access to data concerning it was granted by decision No. 08-DEC-12 of 2 October 2008. By decisions Nos. 08-DSA-192 to 08-DSA-200 of 3 December 2008, the President of the Conseil upheld the requests for protection of business secrecy submitted by the parties regarding data thus communicated.

9. Furthermore, the parties' access to the pricing survey's data concerning competing banks and financial institutions was arranged in accordance with specific modalities aimed at preserving the protection of business secrecy and observing the rights of defence.

10. To take account of the fact that each party, although having access to all its own customers' data, was not aware of the data of interest to the other parties and was thus unable to control the aggregation of the data assembled by the Case Officer, the General Rapporteur appointed, by decisions of 16 December 2008 and 17 February 2009, an expert on the basis of the provisions in articles L 463-8 and R 463-16 of the Commercial Code, responsible, after accessing all the responses received, for preparing a spreadsheet listing the survey's data deemed exploitable, if necessary including the corrections that might be

provided by each party following verification of their own data. The expert delivered a pre-report on 20 February 2009 and a final report on 11 August 2009. The spreadsheet was added to the case in a form preserving the anonymity of the undertakings surveyed.

11. By letter of 12 January 2009, Banque Fédérale des Banques Populaires made a further request for the pricing survey's data to be fully declassified. Likewise, the Caisse Nationale des Caisses d'Épargne requested full declassification, except for the names of the undertakings concerned. By letters of 20, 21 and 22 January 2009, BNP Paribas, Crédit Lyonnais, Crédit Industriel et Commercial (CIC), Confédération Nationale du Crédit Mutuel, Crédit du Nord, HSBC, the *Banque de France* (French central bank), the Caisse Nationale des Caisses d'Épargne and Société Générale notified their opposition to full data declassification.

12. To respond to these irreconcilable requests, the President of the Conseil de la concurrence, by decision No. 09-DEC-01 of 17 February 2009, authorised the counsels representing the parties to consult, at the premises of the Conseil, all the aforesaid data, in its confidential form, in accordance with modalities that excluded taking copies of it, and subject to an undertaking not to reveal, including to their customers, the names of banks' customers of which they might become aware.[1] These consultations took place on two occasions, from 2 to 24 April 2009 and from 13 to 20 July 2009.

13. A report taking account of the results of the expert assessment was sent to the parties on 19 August 2009 to supplement the report of 14 August 2008 concerning the assessment of the effect of the practices complained of on the economy.

14. Access to the data concerning the volumes and amounts of cheques issued and remitted by each of the banks was granted by decision No. 09-DEC-22 of 20 October 2009, in accordance with modalities similar to those laid down by decision No. 09-DEC-01 regarding the results of the pricing survey.

15. The *Commission bancaire* (Banking Commission) issued two supplementary opinions on 4 November 2008 and 23 October 2009.

16. A meeting before the Autorité de la concurrence was held on 24 November 2009, during which the counsel of Banques Populaires, speaking on behalf of all the parties, asked for unrestricted access to the data covered by decisions Nos. 08-DEC-12, 09-DEC-01 and 09-DEC-22.

17. By decision No. 09-S-04 of 11 December 2009, the Autorité de la concurrence sent the case back to the investigation services to enable the parties, on the one hand, to access all the data in question and, on the other, to produce any final written comments.

18. This decision states that:

> *'25. It follows, from the very terms of the provisions [articles L 463-2 and L 463-4 of the Commercial Code], that the right for undertakings and associations of undertakings to access the case must be weighed up against the protection of their business secrets, and that this weighing up calls for assessment case by case.*
>
> *26. Article L 463-4 of the Commercial Code, in its version prior to that resulting from the order No. 2008-1161 of 13 November 2008, implements this reconciliation by providing that, at the request of one party, the protection of another*

[1] The modalities of access to the pricing survey's data are inspired by EU practice in UK International Roaming, COMP/38.097, which was the subject of a decision of the European mediator of 30 September 2008, who took the view that the adversarial principle had been respected in the case in point.

party's business secrets may be lifted if communication or consultation of the documents referred to is necessary for it to exercise its rights of defence. Pursuant to paragraph 2 of article R 463-15 of the Commercial Code, the President of the Conseil de la concurrence arbitrates, in the event of opposition from the party that requested classification of the documents concerned, between these opposed interests, taking account of the concrete situation of the parties, the type of information concerned and the necessity for the requesting party to have access to them to defend itself, this being associated with the type of objection notified and the context of the market examined. Thus, in the presence of particularly sensitive data, which an undertaking may understandably not want its competitor to know about, the parties' access must be limited solely to data strictly necessary to the exercise of their rights of defence, which implies that the parties engaged in the procedure agree to limit their request to access to this data alone.

27. The questionnaire mentioned in paragraph 5 [the pricing survey] was sent at the end of 2007 to seven hundred undertakings chosen for their importance in the market. Their responses unveiled their banking conditions regarding their processing of cheque remittances, in terms of both volumes and amounts, over a wide period of time (covering the years 2001 to 2006). Their disclosure to all the banks, competing among each other in this market for the processing of cheques, could not be contemplated lightly.

28. Decisions Nos. 08-DEC-12, 09-DEC-01 and 09-DEC-22, by ordering, on the one hand, that each party would have access to the data concerning it and that full access to data of interest to the other parties would be provided solely through the parties' lawyers and economists, at the premises of the Conseil de la concurrence, and in accordance with modalities making it impossible to take copies of hidden data, and by providing, on the other hand, that a trusted third party would have access to all the documents before preparing an anonymised spreadsheet listing the survey's data and available for consultation to the parties, attempted to reconcile the widest possible access to the documents in the case with legitimate protection of business secrets.

29. The assent of the great majority of the parties, expressed in their written submissions, was an important element of the balance thus struck.

30. At the meeting held on 24 November 2009 during which the offending banks, as had been agreed with the chairman of the meeting, shared the oral interventions, the counsel of Banques Populaires Participations (formerly Banque Fédérale des Banques Populaires) maintained that decisions Nos. 08-DEC-12, 09-DEC-01 and 09-DEC-22 were not in keeping with the letter of the provisions of articles L 463-4 and R 463-13 to R 463-15 of the Commercial Code. He stressed in particular that these provisions did not authorise any adjustment of the access right to the case, which does not distinguish between consultation and communication and does not make it possible to treat the parties differently from their counsels. He inferred from this that this lack of knowledge of the legal provisions and, accordingly, of the contradictory nature of the procedure tainted them with unlawfulness.

31. To the question from the chairman of the meeting asking him whether this defence was presented solely on behalf of Banques Populaires Participations, whose position during the investigation was related earlier, or on behalf of all the banks at issue, almost all of which had opposed the declassification and therefore access by

competitors to data concerning them, the counsel of Banques Populaires Participations declared that he was intervening 'on behalf of all the banks at issue'. He was not contested by the representatives of the other banks or financial institutions present at the meeting.

32. It must be inferred from this that all the parties henceforth take the view that, contrary to the positions previously expressed, only full declassification of the documents covered by decisions Nos. 08-DEC-12, 09-DEC-01 and 09-DEC-22 would be liable to ensure compliance with the adversarial principle and the effective exercise of their rights of defence.

33. This new position makes it necessary to reconsider the balance sought in the three aforesaid decisions.

34. As a result, the Autorité, in accordance with the provisions of article R 463-7 of the Commercial Code, sends the case back to the investigation services to enable the parties, on the one hand, to have access, under conditions to be determined by the General Rapporteur, to all the data covered by decisions Nos. 08-DEC-12, 09-DEC-01 and 09-DEC-22 and, on the other hand, to produce final written comments within a time likewise to be determined by the General Rapporteur.'

19. It was decided as follows:

'*Single article: The case registered under number 03/0037 F is sent back to the investigation services to enable the parties, on the one hand, to have access, under conditions to be determined by the General Rapporteur, to all the data covered by decisions Nos. 08-DEC-12, 09-DEC-01 and 09-DEC-22 and, on the other hand, to produce final written comments, within a time likewise to be determined by the General Rapporteur*.'

20. In a letter dated 5 January 2010, the General Rapporteur sent the parties data related to the pricing survey and the volumes and amounts of cheques issued, covered by decisions Nos. 08-DEC-12, 09-DEC-01 and 09-DEC-22. The parties filed their comments within two months of this dispatch.

21. Another meeting before the Autorité de la concurrence was held on 13 April 2010.

B. THE SECTOR CONCERNED

1. CHEQUES

a) Use of cheques in France

22. Book I of the Monetary and Financial Code, devoted to money, distinguishes between fiduciary money – made up of coinage system and banknotes – and scriptural money, whose main instruments are cheques, payment cards, transfers, bills of exchange and promissory notes.

23. The cheque is a widely used means of payment in France: in 2007, more than 3.6 billion cheques changed hands, representing 23.6% in terms of volume of scriptural payments made in France. In this respect, France is a European exception and alone accounted for 78% of all cheques that changed hands in 2006 in the euro zone.[2]

Table 1: Statistics on the use of cheques in European countries, average for the period 2000–2006

Country	Number of transactions by cheque per year per inhabitant	Share of transactions by cheque among cashless transactions	Ratio of the number of transactions by cheque to the number of transactions by card	Average amount of transaction by cheque
France	68	31%	95%	539
United Kingdom	38	18%	42%	1,255
Ireland	24	26%	68%	3,757
Portugal	23	22%	36%	1,609
Italy	8	18%	53%	2,316
Denmark	7	4%	6%	2,391
Spain	4	6%	19%	4,774
Belgium	3	2%	5%	3,293
Germany	2	1%	9%	4,422
Greece	2	22%	40%	14,625

Source: European Central Bank

24. Use of cheques is in continuous decline in France, mainly in favour of bank cards: while cheques accounted for 70% of payments in 1984, this figure was no more than 50% in 1996, 37% in 2000 and 26% in 2006. But their disappearance in the medium term is not taken for granted, since users continue to prefer them to cards for large-value payments: according to data from the *Banque de France* (French central bank), the average amount of each cheque was €555 in 2005, more than 10 times greater than the average amount of each purchase by bank card, which was €50.

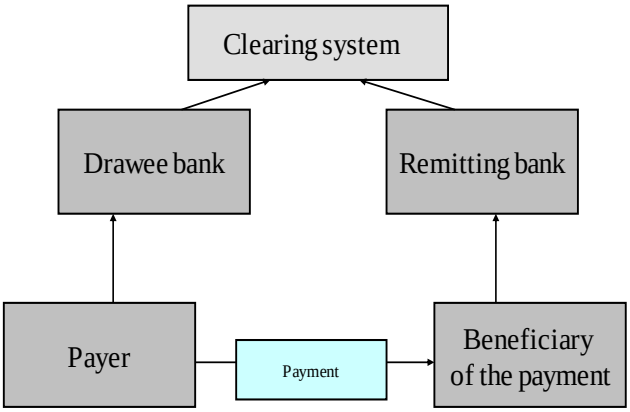
b) Issuing and remittance of cheques in France

25. Scriptural means of payments such as cheques enable the transfer of funds held in accounts by credit or assimilated institutions following remittance of a payment order.

26. This four-party system specific to cheques connects four players in accordance with the diagram below:

[2] Source: The *Banque de France* (French central bank)

Cheques: a four-party payment system



27. In France, the provision and management of means of payment come under the banking monopoly and are in principle reserved for credit institutions, pursuant to the provisions of articles L 311-1 and L 511-5 of the Monetary and Financial Code. The credit institution status is subject to approval by the *Comité des établissements de crédit et des entreprises d'investissement* (CECEI) – which was merged into the *Autorité de contrôle prudentiel* (ACP, French prudential supervisory authority) on 9 March 2010 – and requires compliance with restrictive regulations, under the control of the *Commission bancaire* (Banking Commission).

28. There were 775 approved credit institutions in France at 31 December 2007.[3] However, these credit institutions are not all active in the means of payment market, which is occupied mainly by the large banking groups with branch networks.

29. Issuing cheques is regulated mainly to protect consumers with respect to credit institutions. Article L 131-71 of the Monetary and Financial Code thus requires banks to 'make cheques available to the accountholder free of charge'. As part of the right to an account, credit institutions must provide their customers with two bank cheques a month (article D 312-5 of the Monetary and Financial Code). Finally, bank charges are restricted in the event of defaults in payment.

30. On the other hand, remittance of cheques is not, apart from the constraint of the banking monopoly, subject to specific regulatory constraints. Banks make a distinction within the category of remitters, depending on whether they remit cheques regularly and in large numbers or on an occasional basis and in small quantities. This is because, while consumers are not billed directly, 'large remitters' are charged directly, either on the basis of an overall price (cases of small and medium-sized merchants) or of a price per unit (cases of very large remitters like supermarkets, which handle, at national level, volumes of cheques ranging from a few million to almost 100 million cheques a year).

[3] CECEI 2007 annual report

c) Modalities of remunerating the services related to using and remitting cheques

31. Generally speaking, banks seek overall profitability from the services that they offer at the level of each customer, rather than service by service. In this overall relationship, all payment flows (bank cards, cheques, cash, etc.), loans, investments or even account management can be taken into account by the bank to determine the price of the bank services that will actually be billed to a given customer. A service can therefore be offered at a price involving a loss if another item makes it possible to cover this loss.

32. Furthermore, the methods for remunerating services, associated with the use of means of payment such as cheques, are varied and can be combined together:

- direct charging of the cheque remittance service, for example by fees applied to each remitted cheque, or by inclusive fees;
- the float, which corresponds to the income from investments made by the bank, for its own account, of the available sums to the credit of current accounts, which are not normally remunerated; the system of value dates may if applicable increase this remuneration;[4]
- fees on debit operations, applied to business customers, which correspond to a percentage of every debit transaction made by the undertaking or, more rarely, fees on credit operation, which consist of a percentage on each credit transaction.

33. The speed of a payment system influences the level of banks' remuneration by the float: a slow system, characterised by a significant delay between the payment order being issued and the customer's account being debited, favours the payer's bank, which benefits for a longer time from the sums available to the credit of its customer's account in order to invest them for its own benefit. Conversely, a fast payment system favours the bank of the payment's beneficiary.

d) The interbank cheque clearing system

34. Since the bank of the issuer (the 'drawer') of the cheque is not necessarily the same as the bank of the beneficiary (the 'remitter'),[5] an interbank payment system enables daily clearing of the banks' respective receivables claims which arise from these payments.

35. This procedure is governed by article L 330-1 of the Monetary and Financial Code, which provides that: *An interbank settlement (…) shall be defined as a national or international procedure organising relations between at least two parties, allowing the execution on a habitual basis, with or without compensation, of payments (…) / This procedure must either have been established by a public authority, or it must be governed by a framework agreement which complies with the general provisions of national or international master agreements , or by a standard contract.* ' In the case of cheques, Regulation No. 2001-04 of 29 October 2001 of the *Comité de la réglementation bancaire et financière* (CRBF) on the clearing of cheques states that '*any reporting institution on which cheques are drawn is required to participate, directly or through an agent, in cheque clearing operations in the*

[4] The practice of value days consists in bringing forward the debit entry date or putting back the credit entry date of the customer's current account in relation to the transaction date in order to factor in technical encashment times and thus the actual date on which the bank is itself debited or paid. When the timing difference is greater than the technical encashment time, this constitutes a method of indirect remuneration for the bank, which can invest the corresponding sums to its profit in the meantime.

[5] If the issuing bank is not the remitting bank, the cheque is 'interbank'; otherwise it is 'intrabank'.

framework of an interbank settlement system within the meaning of Article L. 330-1 of the Monetary and Financial Code.'

36. There are three interbank payment systems in France: two systems reserved for large amounts, *TBF* and *PNS*, and a system dedicated to retail payments, the *Système Interbancaire de Télécompensation* (SIT, Interbank teleclearing system). In 2007 the SIT exchanged and cleared 12,439 billion interbank transactions, of which 24% were payments by cheque, for an amount of €5,206.95 billion.[6]

37. Questioned by the investigation services, the director of GSIT, the *Groupement d'intérêt économique* (GIE, economic interest grouping) formed by the banks to operate the SIT, estimated the share of cheques not passing in transit through the SIT, namely intrabank cheques (see also the website of the *Banque de France*), at 18% of the total number of cheques in France (i.e. 720 million cheques out of the 4.1 billion cheques issued in 2004).

e) Subcontracting the remittance of cheques

38. Subcontracting the cheques' presentation for payment procedures, although it is in theory ruled out by the principle of the banking monopoly, is nonetheless authorised by an industry agreement signed on 9 July 2003 in accordance with the provisions of article 7 of CRBF Regulation No. 2001-04. The agreement provides that subcontractors must be approved by the banks and act under the full and entire responsibility of these institutions.

39. In its opinion No. 03-A-15 of 25 July 2003 on the acquisition of Atos Investissement by Experian Holding France, the Conseil de la concurrence took the view that in 2002, subcontracting represented a volume of 3.3 billion cheques out of the 4.5 billion cheques issued. In this market, worth €221 million, the five largest undertakings held 85% of market shares, as the two largest had decided to merge (which gave rise to the opinion of the Conseil). The cheque subcontracting market is subject to two contrasting influences: the declining use of cheques and the growing outsourcing by banks of cheque processing activities.

2. THE OFFENDING PARTIES

a) Presentation of the parties

BNP Paribas

40. BNP Paribas was formed through the merger of BNP and Paribas in May 2000. In May 2009, it acquired the activities of Fortis in Belgium and Luxembourg, thus becoming a leading European player in banking and financial services. It is also the largest French bank in terms of net banking income. In 2009, it generated 45% of its revenue in retail banking.

Société Générale

41. Founded in 1864, Société Générale is the third largest French bank in terms of net banking income. In France, the group relies on two complementary distribution networks, the branches of Société Générale and those of Crédit du Nord, whose entire capital it has owned since 2009. While Société Générale is present in the main banking business lines,

[6] Source: GSIT

retail banking represents its most important activity and accounts for some 50% of its net banking income.

Crédit du Nord

42. Crédit du Nord is a federation of seven regional banks, an asset management company and a stock broking firm. Société Générale has held its entire capital since 11 December 2009.

Crédit Agricole

43. Crédit Agricole SA is a *société anonyme* (limited company) providing the functions of central administrative body of the Crédit Agricole network. It is majority held by Caisses Régionales du Crédit Agricole.

44. The group is active in the sectors of retail banking, in France and at international level, specialised financial services (asset management, insurance, private banking, consumer credit, leasing, factoring) as well as corporate and investment banking.

45. Crédit Agricole SA acquired Crédit Lyonnais on 19 June 2003.

LCL – Crédit Lyonnais

46. On 4 August 2003 Crédit Lyonnais (which became LCL in 2005) became a subsidiary of Crédit Agricole SA, which now holds more than 99% of its capital. Operating under its own name, LCL is a retail bank in France for individuals, professionals and undertakings, with a substantial urban presence. It offers the entire range of banking products and services, asset management and insurance products, and wealth management.

Banques Populaires

47. Banque Fédérale des Banques Populaires ('BFBP') is a *société anonyme* (limited company) is a credit institution approved in its capacity as a bank ; it provides the functions of central administrative body of the Banques Populaires network.

48. It is held by the various institutions affiliated to it, namely 18 regional Banques Populaires, CASDEN Banque Populaire and, since the acquisition in 2002 of Crédit Coopératif, Crédit Coopératif Banque Populaire. These institutions have the legal status of cooperative people's bank *sociétés anonymes* (limited companies) with variable capital.

49. BFBP, as a central administrative body, carries out within the Banques Populaires Group the tasks of defining strategy and coordinating and driving all the entities over which it exercises administrative, technical and financial control. It implements the group's financial solidarity, defines the policy and main strategic directions, and negotiates and concludes national and international agreements on behalf of its network.

50. On 31 July 2009 BFBP merged with Caisse Nationale des Caisses d'Épargne to form BPCE (see Autorité de la concurrence's decision No. 09-DCC-016 of 22 June 2009 on the merger between the Caisse d'Épargne and Banque Populaire groups). On this occasion, the company changed its name to Banques Populaires Participations ('BP Participations').

51. The group is active mainly in the banking, property and insurance sectors.

Caisses d'Épargne

52. Caisse Nationale des Caisses d'Épargne (hereinafter 'CNCE'), a *société anonyme* (limited company), is a credit institution approved in its capacity as a bank, combining the

functions of central administrative body for the institutions affiliated to it, and network leader.

53. Groupe Caisse d'Épargne is made up of 17 regional Caisses d'Épargne et de Prévoyance (bringing together 287 local savings societies and 3.7 million members), which hold the capital of CNCE. The CNCE's co-operation and representation body is the Fédération Nationale des Caisses d'Épargne.

54. On 31 July 2009, CNCE merged with Banque Fédérale des Banques Populaires to form BPCE. On that occasion, the company changed its name to Caisses d'Épargne Participations ('CE Participations').

55. The group is active in retail and commercial banking via the Caisses d'Épargne, Crédit Foncier and Banque Palatine, in property services via a group of companies and in insurance.

HSBC (Hongkong and Shanghai Banking Corporation)

56. An English-law company whose registered office is in London, HSBC is one of the largest banking and financial services groups in the world. Its international network has some 8,000 branches in 88 countries.

57. Since 2000, HSBC France brings together all the banks of the old Crédit Commercial de France (CCF): UBP, Banque Hervet, Banque de Picardie, Banque de Baecque-Beau. Its activity lies in retail banking, wholesale banking, asset management, insurance and private banking.

La Banque Postale

58. La Banque Postale is a banking subsidiary of La Poste, which holds all of its capital. It was formed in accordance with an agreement concluded between La Poste and the State on 13 January 2004, by changing the name of Efiposte, a subsidiary of La Poste that received, transmitted and executed financial orders, and by widening its company objects to banking transactions. From 1 March 2010, La Banque Postale became a *société anonyme* (limited company).

59. La Poste is active in the fields of mail, parcels and express, and in financial services.

Crédit Mutuel

60. Crédit Mutuel is a French cooperative bank. The Confédération Nationale du Crédit Mutuel, an association founded under the law of 1 July 1901, constitutes the network's central administrative body.

61. Groupe Crédit Mutuel is made up of 18 regional offices (bringing together 287 regional offices and 1,890 local offices), which hold the capital of the Confédération Nationale du Crédit Mutuel.

62. With its subsidiary, Crédit Industriel et Commercial, Crédit Mutuel is France's second largest retail bank and is active in banking and insurance.

Crédit Industriel et Commercial (CIC)

63. Founded in 1859, Crédit Industriel et Commercial ('CIC') is a grouping of seven regional banks. Crédit Mutuel, which had acquired 67% of the capital of CIC in 1998, became its sole shareholder in 2001.

The Banque de France *(French central bank)*

64. The *Banque de France* (French central bank) was founded in 1800. It is wholly owned by the State pursuant to article L 142-1 of the Monetary and Financial Code. A member of the Eurosystem since 1999, it contributes to the preparation and implementation of the euro zone's single monetary policy. As a central bank, it is responsible for fluidity in the circulation of money, oversight of markets, supervision of means and systems of payment and more generally financial stability.

65. The *Banque de France* (French central bank) also carries out banking business of a commercial nature. While it no longer has private customers except for its staff, it remains the bank of the French Treasury and a number of historical operators such as SNCF and France Telecom.

b) Volumes of interbank cheques issued and remitted by the parties

66. The table below shows the number of interbank cheques issued (corresponding to the right-hand column 'Volumes of cheque images received') and interbank cheques remitted (corresponding to the left-hand column 'Volumes of cheque images issued') of the main banking networks active in France in 2002, the first year of implementation of the dematerialisation of interbank cheque clearing:

2002	Volumes of cheque images issued	Volumes of cheque images received
***Banque de France* (French central bank)**	**235,985,053**	**20,934,317**
BNP Paribas	**445,901,529**	**264,783,966**
Caisses d'Épargne	**161,628,457**	**393,331,319**
Crédit Agricole	**579,516,106**	**812,001,861**
HSBC France	**112,635,320**	**56,412,533**
Groupe CIC	**259,852,893**	**142,683,794**
Crédit Lyonnais	**336,170,390**	**239,879,098**
Crédit Mutuel	**266,295,547**	**292,030,324**
Crédit du Nord	**119,674,885**	**63,167,826**
La Poste	**110,365,098**	**558,886,061**
NBP	**453,307,143**	**295,561,495**
Société Générale	**351,829,427**	**297,479,076**
CDC	**13,697,884**	**18,158,782**
Banque Palatine/SanPaolo	**5,511,367**	**4,164,763**
LeaseGroup	**2,950,140**	**4,696,610**
Worms	**8,817,684**	**5,700,721**
Crédit Coopératif	**23,362,385**	**17,617,761**
Relief		**11,001**
2002 total	**3,487,501,308**	**3,487,501,308**

Source: GSIT, classification mark 4076

C. PRACTICES OBSERVED

1. THE INTERBANK CHEQUE EXCHANGE SYSTEM PRIOR TO 2002

67. Until 2002, the banks' respective claims arising from payments by cheque were cleared manually on a daily basis, in one of the 104 clearing houses provided by the *Banque de France* (French central bank) in its branches. Banks under the jurisdiction of each clearing

house would physically convey the cheque forms that they had received from their remitting customers so that they could be exchanged.

68. Regarded as outdated by all the banks questioned during the investigation, the manual clearing system entailed sizeable administrative costs for them. This is what explains the plan to dematerialise the exchange of receivables claims arising from payments by cheque, which could be achieved by creating an 'image' of the cheque, either by the merchant benefiting from the payment or by the remitting bank at the time of its remittance. Dematerialisation had already been implemented as regards automated credit transfers, truncated bills of exchange, payments by card and electronic payments. At the end of the 1990s, the cheque remained the only French payment instrument not to be integrated into the SIT because of its absence of dematerialisation at national level.

69. A first attempt at dematerialising cheques took place with the creation of nine *Centres régionaux d'échange d'images chèques* (CREIC, regional centres for exchanging cheque images), but the regional dimension of the plan along with the low number of cheques processed (less than 10% of the cheques issued in France, according to the *Banque de France* (French central bank)) failed to meet the demand for dematerialisation of the billions of cheques that changed hands each year at national level. This large-scale reform was contemplated on two occasions, in 1988 and 1991, but came up against a number of obstacles: technical, employment-related (the loss of jobs associated with manual clearing of cheques) and financial (acceleration of exchanges modifying the fund balances between banks).

2. SWITCH TO THE *ECHANGE IMAGE CHÈQUES* (EIC, EXCHANGE OF CHEQUE IMAGES) SYSTEM

a) Conditions favourable to the switch to the EIC in 1999

70. In 1999, a third opportunity to bring about the dematerialisation of cheques arose in a more favourable context. The arrival of the Euro on 1 January 2002 was regarded as both an opportunity and one of the last openings to modernise the French system. The temporary coexistence of two currencies called for the creation of a specific clearing system for cheques in Euros alongside the clearing system for cheques in francs. It would then be possible either to maintain a physical clearing system, which would have entailed additional administrative costs, or to create a dematerialised clearing system, letting paper exchange disappear at the same time as cheques in francs disappeared.

71. Furthermore, the *Banque de France* (French central bank) wished to reduce its costs by ceasing to provide its network of branches for the operating of the 104 clearing houses.[7] It also states in its comments that the employment-related obstacles had become surmountable on this date (comments of 27 May 2008, classification marks 6756 et seq., §40).

72. Finally, the SIT system for clearing electronic claims had been designed from the outset to eventually handle flows of cheques. The GSIT administrator stated at the time of his hearing on 9 March 2007: '*for GSIT, implementation of the EIC was fully absorbed at no additional cost, fixed costs not depending on volumes and the SIT network having been designed from the outset to support 100% dematerialisation of interbank means of*

[7] See minutes of the hearing of the President of GSIT

payment'. Integration of the flows of cheques into the dematerialised payment systems also had the effect of consolidating the advance of the SIT in relation to its European competitors, which conferred an advantage on French banks when the Single Euro Payments Area (SEPA) was set up.

73. An internal document from Crédit Mutuel states that in 1999, banks used to assess the administrative gains associated with the switch to a dematerialised clearing system at 600 million francs (€91 million) a year for the entire profession (classification mark 1901). This is confirmed by the report of the 'evolution of exchanges of cheques' working group, made up of nine banking institutions processing the largest volumes of cheques, of 6 May 1999: 'compared with the solution of physical exchange in clearing systems, this EIC solution would represent an overall saving for the profession in administrative processing costs' (classification mark 895).

b) Meetings with the *Commission Inter-Réseaux*

74. The negotiations that led to the adoption of the *Echange Image Chèque* (EIC) clearing system were conducted by two commissions bringing together the main banking institutions.

75. Based on consensus, the technical details of the reform were defined by the C*omité français d'organisation et de normalisation bancaire* (CFONB, French committee for banking organisation and standards). A decision was made to eliminate 98% of physical circulation of cheques, physical exchange being maintained for cheques of susbtantial amounts (over €5,000), non-standard cheques and cheques randomly selected for control purposes (see the summary of the report of 6 May 1999, op. cit., and the report to the CFONB of 22 October 1999 on updating the standards related to the EIC, classification marks 1403 et seq.). As a result, almost all cheques are now held at the remitting bank, which is responsible for their administrative processing.

76. The challenges associated with defining the new system's interbank conditions were the subject of negotiations with the *Commission Inter-Réseaux* (hereinafter 'CIR'), which brought together Crédit Mutuel, Crédit Agricole, the *Banque de France* (French central bank), BNP Paribas, Société Générale, Banques Populaires, La Poste, the Caisses d'Épargne, Crédit Lyonnais, Crédit Commercial de France, CIC and Crédit du Nord. GSIT, the *Office de coordination bancaire et financière* (OCBF) and the *Association française des banques* (AFB) also followed the progress of the negotiations. These negotiations covered four points:

- the time of exchange of cheques (exchange time limit);
- the gap between the date of exchange of cheques and the interbank payment date[8];
- the direction, amount and methods of calculating an interbank fee,
- and the conditions applicable to related operations.

77. A select working group was set up,[9] responsible for preparing a report to '*present solutions regarding conditions between banks liable to gain acceptance within the profession*'.

[8] The CIR distinguishes the purchase date: the date on which the drawer remits the cheque to the payee; the remittance date: the date on which the payee remits the cheque to his bank; the exchange date: the date of presentation of the cheque for clearing; and the interbank payment date.

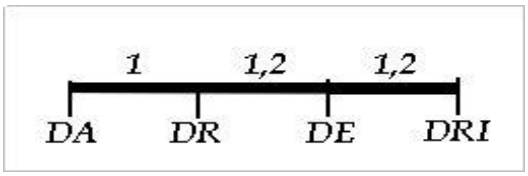
78. On 22 June 1999, the working group submitted a report on the first three questions identified above (classification marks 914 et seq.). It issued various proposals for the attention of the CIR concerning the two main challenges of the EIC identified by the banks: modification of the fund balances between banks on account of the acceleration of the clearing of cheques, and the question of the cohesion of the means of payment.

Alteration of the fund balances between banks

Choosing the interbank payment date and acceleration of exchanges of cheques

79. Dematerialisation of exchanges enabled shorter processing times for interbank clearing operations, since this system provided for a computerised clearing in place of a manual processing which implied transportation to the clearing house.

80. According to the report of 22 June 1999 (classification mark 917), the average time between purchase date and interbank payment date in the old manual cheque clearing system was estimated at 3.4 days, broken down as follows:



1	1.2	1.2	
Purchase date	**Remittance date**	**Exchange date**	**Interbank payment date**

81. The time between exchange date and interbank payment date was known: it was one day (D+1) for cheques drawn on a bank branch falling under the same clearing house as the remitting bank ('local' cheques, corresponding to 88% of funds, according to the report), and three days (D+3) for cheques drawn on a bank branch falling under a different clearing house than that of the remitting bank ('non-local' cheques; 12% of funds, according to the report), i.e. 1.2 days on average.

82. The time between purchase date and exchange date was unknown and was estimated on the basis of assumptions issued by the working group. The report assumes a one-day average time between purchase date and remittance date, and a one-day average time between remittance date and exchange date for 82% of funds and two days for 18% of funds ('returned non-local' cheques[10]), i.e. 1.2 days on average.

83. The report of 22 June 1999 proposes an assessment of the acceleration of exchanges of cheques permitted by the future EIC system.

84. It takes account of three acceleration factors:

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[9] Participants in this group were representatives of the Caisses d'Épargne, Banques Populaires, Crédit Agricole, Crédit Lyonnais, Crédit Mutuel, La Poste, Société Générale, the *Banque de France* (French central bank), CCF and BNP Paribas (classification mark 929).

[10] These are 'non-local' cheques for which the remitting bank decides, in view, for instance, of their large amount, to transport them to the clearing house of the drawer's bank branch; the cheque is then identified there as a 'local' cheque, whose payment takes place one business day after the exchange. Thus, if the time of transport of the cheque between the two clearing houses is, for example, one business day, interbank payment will take place one day earlier than if it had been processed 'non-locally'.

- the possibility for customers to remit cheque images to their bank (reduction in the gap between the purchase date and the remittance date);
- the fact that an electronic claim is exchanged more quickly than a paper claim (reduction in the gap between the remittance date and the exchange date);
- the disappearance of physical clearing houses and thus of the distinction between 'non-local' and 'local' cheques (reduction in the gap between exchange date and interbank payment date).

85. Furthermore, the report states that the acceleration of exchanges is based on two factors to be decided on by the CIR:

- selecting the exchange time limit, i.e. the time limit for the exchange of cheque images presented during a day, which influences the time between purchase date and exchange date;
- defining the time between exchange date and interbank payment date, henceforth identical for all cheques.

86. The report thus contemplates the expected acceleration of exchanges depending on various assumptions (exchange time limit at 9 a.m. or 6 p.m.; the time between exchange date and interbank payment date of zero to two business days). In the words of the report: '*it is with a two business days-gap between exchange and payment that we move the least away from the current average interbank payment date of 3.4 days. (…) But the view can rightly be held that it is not a good solution to substitute, for times that were based on the transport and processing of papers, conventional times between exchange and payment applied to magnetic recordings. In this case, it would be legitimate to study solutions where the time between exchange and payment is one day, or even zero days with the exchange time limit at 9 a.m., for which that would be technically possible. And, since such solutions modify interbank payment dates, the question must arise of a fee between banks to maintain the balances between banks on the one hand, and between means of payment on the other*' (classification mark 922).

87. In choosing an exchange time limit at 6 p.m., and a gap between exchange date and interbank payment date of one business day, which corresponds to the selection finally adopted by the CIR, the working group takes the view that the gap between purchase date and interbank payment date will be between 1.8 and 2.3 business days in the new EIC system (classification mark 922). Compared with the old system, this therefore corresponds to an acceleration of exchanges of between 1.1 and 1.6 business days.

88. The report thus analyses the consequences of the acceleration of exchanges for the banking sector in its entirety, and for each institution in particular: ' *To sum up, looking at matters solely from the standpoint of interbank exchanges, any modification of the interbank payment date ends up in a zero-sum game for the profession. Each institution wins or loses depending on the average balance in funds of its exchanges and its ability to profit, better or worse than the others, from the rapid encashment possibilities offered by the new system (…) [L]ooking at matters solely from the standpoint of each institution, each must add to the above elements concerning it:*

- administrative savings and additional costs of processing transactions both as remitting banker and as drawee banker,

- the consequences that the new rules might have on potential transfers of customers' flows. (…)

These calculations, bearing in mind their inherent uncertainty, must be made under prevailing conditions by including the amortisation of the additional costs associated with the switch from one system to the other' (classification mark 915).

Establishment of an interbank fee

89. The acceleration of the time for processing cheques modifies the cash flow balances between banks, since the banks on which cheques are predominantly drawn lose sooner the availability of the idle balances of cheque issuers and thus the possibility of obtaining remuneration by the float by investing the corresponding sums to their benefit; the predominantly remitting banks benefiting on the other hand from the possibility of investing the corresponding sums encashed by the beneficiaries of the cheques more rapidly.

90. To offset this modification, the report of 22 June 1999 proposes to the CIR the application of a fee per transaction, paid by the remitter's bank to the drawee's bank.

91. The report proposes retaining the principle of a fee in a fixed amount per cheque drawn. It stipulates that '*if this fee was proportionate to the amount of the cheques, it would not contribute anything, in relation to the gaps between exchange and payment, other than the inconvenience of being subject to VAT, a sizeable share of which is not recoverable by the banks. If this fee was of a fixed amount per cheque, it would fall under the nature of remuneration for services rendered by fixed fees between banks for the automated means of payment used for collection by the creditor. This is because, for the other means of payment of this type – drawdown notices, titres interbancaires de paiement (TIP, interbank payment orders), truncated bill of exchange and payment by card –, the creditor's banker already pays a fee to the debtor's banker*' (classification mark 922).

92. The report calculates the fee likely to offset on average the 'interbank treasury interval', under various assumptions for selecting the exchange time limit/exchange date and interbank payment date. This amount is calculated as the product of the average amount of a cheque (3,000 francs), the predicted acceleration of the interbank settlement time (1.1 to 1.6 business days) and the interest rate at which the bank can invest the sums at its disposal (3%).

Assumptions		Interbank payment date – purchase date (days)	Current interbank payment date – EIC interbank payment date (days)	Equivalent fee (francs) (1)
Exchange time limit at 6 p.m.:				
- D+1	**from**	**1.8**	**1.6**	**0.58**
	to	**2.3**	**1.1**	**0.40**
- D+2	**from**	**2.8**	**0.6**	**0.22**
	to	**3.3**	**0.1**	**0.04**
Exchange time limit at 9 a.m. :				
- D	**from**	**1.5**	**1.9**	**0.68**
	to	**2.0**	**1.4**	**0.50**
- D+1	**from**	**2.5**	**0.9**	**0.32**
	to	**3.0**	**0.4**	**0.14**
- D+2	**from**	**3.5**	**-0.1**	**-0.04**
	to	**4.0**	**-0.6**	**-0.22**
Current		**3.4**		
(1) A positive amount indicates a fee to be paid by the remitting bank. A negative amount indicates a fee to be paid by the drawee bank.				

Classification mark 924

'Cohesion between the various means of payment'

93. The preoccupation of not making the cheque more attractive than any other less expensive automated means of payments is also put forward by the select working group of the CIR in support of the principle of establishing an interbank fee.

94. Under the terms of the report of 22 June 1999: *'Beyond the assessment specific to the switch to the EIC, one should not lose sight of the fact that the cheque will remain a means of payments the major part of whose processing will remain in paper form. Its overall cost for the profession will therefore remain higher than that of automated means of payment. It would not be necessary for some players to be forced to prefer the cheque with EIC to automated means of payment solely because the conditions to be retained between banks make it more attractive than these other means, either for the creditor/creditor's bank pair or for the debtor/debtor's bank pair*' (classification mark 916).

95. The report compares the interbank conditions related to the cheque with those of the other means of payment, all characterised by the payment of interbank fees (classification marks 925 and 926)[11]:

3.3 Summary of times and fees

The table below provides a summary:

	Conditions between banks		**Consequences for the interbank payment date**	
	Exchange time limit	**Gap between exchange and payment**	**Fee excluding taxes (in francs) paid to the debtor's bank**	
Debit notice at 4 days	**19.00**	**D+4**	**0.80**	**Due date**
Debit notice at 2 days	**19.00**	**D+2**	**1.20**	**Due date**
Truncated bill of exchange	**17.30**	**D+5**	**0.80**	**Due date**
***Titre interbancaire de paiement* (TIP)**	**17.30**	**D+1**	**0.50**	**Debtor agreement + 3 of which 2 days for transport and processing of paper**
Online payment	**17.30**	**D+1**	**0.90**	**Debtor agreement + 1**
Payment by card	**13.30**	**D**	**0.70 + 0.21% + *TICO***	**Debtor agreement + 1**
Referenced transfer	**21.50**	**D+1**	**0.80**	**Debtor agreement + 1**
Ordinary transfer	**13.30**	**D**	**none**	**As per the procedures used by the order giver**

96. Under the terms of the same report: '*The cheque with EIC will be as effective as the means of payment with which it is in competition as regards the time till the interbank exchange. Provided creditors and their banks do not prefer it to other means of payment, it is necessary for the totality – fee paid by the remitter's banker, gap between exchange and payment – not to be more favourable to the remitter's banker for the cheque with EIC. The cheque's main competitors are the titre interbancaire de paiement (TIP) for remote payment, which is settled at D+1 with a fee of 0.50 francs and the card for local payment, which is settled at D with a fixed fee of 0.70 francs plus a proportionate fee corresponding to the guarantee*' (classification mark 912).

97. The conclusion of the report of 22 June 1999 summarises the questions submitted to the participants for decision: '*the analyses made by the working group lead it to ask the decision-making bodies the following questions:*

- *is it desirable for the solution retained to maintain the balances between banks?*

[11] Debit advice; Electronic bill of exchange

- *is it possible and desirable to create for the EIC a fixed interbank fee in line with what is being done for the other means of payment presented for collection?*
- *is it preferable to maintain a remuneration between banks through delays between exchange of cheque images and interbank payment? And in that case, should this be done by maintaining the current paper exchanges? Can it be done with the EIC and a gap between exchange and payment of two days?*
- *is it necessary to use the EIC under conditions that have remitters benefit from an improvement in collection delays?*'

The respective positions of the banks on these points

98. It emerges from the report of 22 June 1999 and the report of the meeting of the CIR on 1 July 1999 that the banks initially defended divergent positions during the negotiations:

> A significant number of institutions within the working group reached the following analysis:
>
> - global maintenance of the current interbank balances is justified to prevent the EIC being a reform benefiting only the remitters to the detriment of the entire profession;
> - payment at D+2, which would make it possible to maintain these balances, would not hold up faced with pressures based on the argument that the switch from paper exchanges to remote transmission must not have the effect of lengthening the time between exchange and payment;
> - the combination of a fixed fee paid by the remitter's bank and a shortening of the times makes it possible to maintain the global balances but modifies the individual balance of each institution. However, this is a solution that is in the nature of the remuneration of services by fixed fees and not by floats, as applied to competing means of payment.
>
> These institutions agree on the solution of an exchange time limit at 6pm, payment at D+1 and a fee of around 0.50 francs paid by the remitter's bank to the drawee's bank.
>
> The other institutions altogether take the view that a fixed fee paid by the remitting bank to the drawee bank is a solution that is neither desirable in principle nor applicable at the time of the EIC reform. In particular, they believe that there is a low risk that cheques with EIC will encroach on to *titres interbancaires de paiement* (TIP) or on payments by card for which there is a fee between banks.
>
> As regards the exchange time limit and the gap between exchange and payment, these institutions are divided between:
>
> - exchange time limit at 6pm and payment at D+2, a solution that maintain each bank's interbank balance;
> - exchange time limit at 9am and payment at D+1;
> - exchange time limit at 6pm and payment at D+1;
> - exchange time limit at 9am and payment at D.
>
> The advocates of these last three solutions consider that maintenance of interbank balances is not an objective in itself and that anticipation of the interbank payment that benefits the remitter's bank must be weighed up against the new fees that the EIC brings to it and the reduction that it brings to the drawee bank.

(Summary of the report on the conditions between banks of the EIC, classification mark 913)

99. The representatives of the various banking institutions expressed their viewpoints at the meeting of the CIR of 1 July 1999.

100. The minutes of this meeting (classification marks 930 et seq.) show that some banks are critical of the proposal of a fixed interbank fee, either for reasons of principle or for reasons related to the modalities envisaged by the working group:

- the representative of Société Générale '*wants to know whether it is timely to link the establishment of the EIC and (...) the establishment of a fixed fee per cheque*' and '*asks whether this fee should not be paid by the drawee banker to the remitting banker*';
- the representative of Crédit du Nord '*insists on the fact that the equivalences between fixed fees paid and gain in encashment time, even if they are correct at global level, cease to be correct for each institution depending on the average amount of cheques that they present and receive*';
- the representative of Paribas stated that he '*was not favourable to a fixed fee whose economic justification he could not clearly see*';
- the representative of Crédit Lyonnais '*found that the arguments in favour of the cohesion of means of payment were attractive, but is not sure that this is the right time to profoundly modify conditions between cheque's banks*' and '*enquires as to the economic justification of such a fee*';
- the representative of Banques Populaires stated that he '*does not know whether it is certain that conditions between banks of the EIC make it possible to maintain the interbank balances that currently exist with paper exchanges*' and that he '*considers that the fixed fee approach does not enable such maintenance because of the different average amounts of cheques of the various institutions*';
- the representative of CIC stated that he was '*against fixed fees paid by the remitting banker to the drawee banker*'.

101. The *Banque de France* was also opposed to the creation of an interbank fee, but is disposed to accepting a compromise so that agreement can be found on the plan of the EIC. Its representative thus stated during the meeting of 1 July 1999 that the *Banque de France* '*considers that the fixed fee is not desirable but that a possible compromise would be either to reduce the planned amount of 0.50 francs or to reduce the lifespan of this fee*'. It also stated that '*a time of D+2 between exchange and interbank payment would, in his opinion, be difficult to accept*'.

102. Other banks support the principle of establishing an interbank fee as envisaged by the working group:
- the representative of the Caisses d'Épargne stated that they '*are favourable to the first solution presented by the working group based on an exchange time limit at 6pm, payment at D+1 and a fixed fee of 0.50 francs paid by the remitting bank to the drawee bank*';
- the representative of Crédit Agricole was also favourable to this first solution;
- the representative of La Poste was also in favour of this solution, stating that, failing that, '*maintenance of the balances by keeping the current average encashment time could be contemplated*';
- the representative of Crédit Mutuel *'is favourable to payment at D+1 and would be open to the suggestion of the Banque de France to moderate the amount of the fee'*;
- the representative of BNP stated that he was *'resolutely for the EIC and the fixed fee paid by the remitting bank, even though it was itself much more a remitting bank than a drawee bank'* and that the bank *'emphasises in its analysis the cohesion of means of payment in their totality'*.

103. Finally, the representative of CCF felt dematerialisation would bring about profound changes in the cheque sector, and that it would be appropriate to 'wait before deciding on the question of a reduction in encashment times and any fixed fee'.

Processing of related operations

104. Related operations cover the transportation of circulating forms, rejections, preparation of rejection or non-payment confirmation notices, requests for and provision of information, request and supply of copies of cheque forms, cancellations of incorrectly cleared operations[12] with their potential releases and archiving or copying of cheque forms.

105. Under the terms of the report of 22 June 1999: *'Each time that the number of operations in any category is at the discretion of an institution and that the processing charge falls to another institution, it is necessary to provide for a fee covering at least the cost price of the requested operation in order to encourage restriction to what is strictly necessary in operations representing an administrative charge. Furthermore, the consequence of the EIC is that the functions previously carried out by one banker will be provided by another. This is the case with the archiving and preparation of rejection or non-payment confirmation notices*.'

106. The report contemplates two solutions: *'to consider that this is part of the assessment that each institution must make of the pros and cons brought to it by the EIC, and to consider that these transfers of expenditure must result in specific remuneration'*.

107. The establishment of eight interbank fees is proposed by the select working group of the CIR within the framework of the report on the related operations of the EIC of 28 December 1999 (classification marks 1429 et seq.). The proposed amounts correspond to those ultimately retained by the CIR at its meeting of 3 February 2000.

c) The forecast assessment of the switch to the EIC carried out by Crédit Agricole, Crédit Mutuel and CIC

108. Forecast assessments of the switch to the EIC were carried out internally by Crédit Agricole, Crédit Mutuel and CIC at the time of the negotiations that took place within the CIR.

Crédit Agricole

109. The internal assessment of Crédit Agricole emerges from a document of the management committee of CEDICAM[13] of 8 December 1999 and covers both the consequences associated with interbank conditions (treasury transfers and administrative gains) and the consequences, if any, that the EIC might have for the bank's customers (classification marks 1519 et seq.).

110. The bank predicts a net treasury loss associated with the acceleration of interbank payment of 50 million francs in the case of an exchange time limit at the end of the day and administrative gains of 155 million francs, that is, a net gain of 105 million francs. The document concludes thus: '*the consequences of the organisation of cheque images under*

[12] Which also corresponds to the operations called 'cancellation of cheque image' and 'cancellation of rejection of cheque image'.

[13] CEDICAM, now Crédit Agricole Cards & Payments, is a subsidiary of Crédit Agricole specialised in payment processes.

interbank conditions remain moderate and are covered by the gains that can be expected from processing' (classification mark 1523).

111. The document also predicts a negative effect of the EIC on the conditions proposed to customers, assuming the total disappearance of the practice of value dates. The bank estimates that such a disappearance would result in a loss of 150 million francs on the remitter's side and 250 million francs of the drawee's side in the case of an exchange time limit at the end of the day.

112. As regards the interbank fee envisaged in respect to the modification of treasury balances, it is stipulated that '*this practice entails (...) the possibility of passing on to the remitter all or part of this fee and thus on billing them for their remittances, depending on the number of cheques issued*' (classification mark 1524).

Crédit Mutuel

113. On 27 September 1999, Crédit Mutuel carried out an assessment of the consequences of the switch to the EIC by assuming an acceleration of the time for exchanging cheques (delay between purchase date and interbank payment date) of 1.6 business days (classification marks 2520 and 2521).

114. Crédit Mutuel estimates that the switch to the EIC will entail, excluding the clearing mechanism, a net treasury loss of 23.8 million francs and administrative gains of 42.1 million francs, i.e. a net gain of 18.3 million francs (€2.8 million). Crédit Mutuel estimates that an interbank fee of 0.34 francs would enable it to keep the same treasury balances as before the switch to the EIC, not taking account of the administrative gains expected from the system.

CIC

115. An assessment of the consequences of the switch to the EIC was carried out by Crédit Mutuel on behalf of its subsidiary, CIC (classification mark 1867).

116. This document puts at 27 million francs the annual amount of administrative gains derived from the new system. The assessment of the switch to the EIC with the establishment of an interbank fee is made using various assumptions:

- a fee of €0.025, i.e. 0.1639 franc, would result in a global net gain of 4.87 million francs;
- a fee of €0.030, i.e. 0.1967 franc, would result in a global net gain of 4.5 million francs;
- a fee of €0.035, i.e. 0.2295 franc, would result in a global net loss of 3.98 million francs;
- a fee of €0.040, i.e. 0.2632 franc, would result in a global net loss of 8.53 million francs.

d) Agreement on the interbank conditions of implementing the EIC

117. An agreement on the interbank conditions of the switch to the EIC was concluded at the meeting of the CIR of 3 February 2000 (see the report of this meeting, classification marks 941 et seq.).

The interbank conditions retained

118. The following interbank modalities are determined:

- gap between exchange date and interbank payment date of one day for all cheques;
- exchange time limit at 6pm;
- establishment of the *commission d'échange image-chèque* (CEIC, fee for the exchange of cheque images), an interbank fee paid by the remitter's bank to the drawer's bank in a maximum amount of €0.043;
- establishment of eight interbank fees paid at the time of related operations (fees for related services).

EIC: Summary table of the decisions taken on 3 February 2000 by the CIR responsible for conditions between banks

The amount of the fee stated is always a maximum. An institution may bill lower amounts to certain associates.

These fees will apply from 1 January 2002.

Operation	Exchange time limit (1)	Payment time	Fee paid by	Amount excluding taxes in Euros (2)	Amount excluding taxes in francs (2)
Cheque image such that the form does not circulate or circulates with a circulation index = 5	**6pm (exchange time limit 2)**	**D+1**	**remitter**	**0.04***	**0.26**
Cheque image such that the form circulates (with circulation index = 1, 2, 3 or 4)			**drawee**	**0.15***	**0.96**
Rejection of cheque image	**exchange time limit 1**	**D**	**drawee**	**3.00***	**19.68**
Cancellation of cheque image	**exchange time limit 1**	**D**	**remitter**	**0.61**	**4.00***
Rejection of cancellation of cheque image	**exchange time limit 1**	**D**	**none**		
Cancellation of rejection of cheque image	**exchange time limit 1**	**D**	**drawee**	**0.61**	**4.00***
Rejection of cancellation of rejection of cheque image	**exchange time limit 1**	**D**	**none**		
Request for information on cheque					
- front	**finishing time**	**none**	**drawee**	**2.70***	**17.71**
- both sides	**finishing time**	**none**	**drawee**	**3.00***	**19.68**
- front + original	**finishing time**	**none**	**drawee**	**7.00***	**45.92**
Adjustment debit operation	**exchange time limit 1**	**D**	**none**		
Adjustment credit operation	**exchange time limit 1**	**D**	**none**		
Non-accounting operation	**finishing time**	**none**	**none**		

Classification mark 947[14]

Period of application

119. It follows from the report of the meeting of the CIR of 3 February 2000 that the interbank conditions of the switch to the EIC are determined for a period of three years:

> '*Mr S.* [President of the CIR] *stipulated that the conditions proposed to the Commission would be applicable from 1 January 2002, valid for three years, i.e. until 31 December 2004, and proposed a meeting in the autumn of 2004 to determine the conditions to be applicable from 1 January 2005 on the basis of an assessment of the three years that will have passed and on the change noted in balances compared to the current balances.*

[14] The archiving fee of €0.03 does not appear in this table since it is deducted from the amount of the CEIC (classification mark 943).

To Mr S. [representative of La Poste], *who was surprised at the necessity of re-examining conditions in 2004, Mr S replied that it was usual to review conditions at the end of three years: this is a general rule of interbanking; these conditions cannot be set for all time. Furthermore, this review is part of the necessary conditions for obtaining consensus.*'

120. In addition, the representative of Crédit Lyonnais stressed that the fees on circulating cheques and the fees for requests for information by fax appeared underestimated to him. At the end of these discussions, the CIR agreed '*to determine, for three years as of 1 January 2002, the exchange conditions of the EIC'* as proposed by the working group*, 'on the stipulation that the fees on requests for information by fax will be re-examined on the basis of the first year's statistics once they are known. They would be reviewed if they departed from the working assumptions made at this stage*' (classification mark 943).

121. It is established that the parties to the agreement did not meet to reassess, as they had planned, the principle and level of interbank fees before 2007.

e) CBRF Regulation No. 2001-04 and professional agreement on the EIC

122. CRBF Regulation No. 2001-04 of 29 October 2001 on the clearing of cheques, approved by order of 17 December 2001 (Official Journal of 20 December 2001), sets out the modalities for dematerialised exchanges within the framework of the new system of the EIC.

123. It provides for the signing of a professional agreement to define, in particular, the procedures for executing cheque clearing operations in dematerialised form (article 2). This agreement was concluded on 9 July 2003 between the *Association Française des Etablissements de Crédit et des Entreprises d'Investissement* (AFECEI, French Association of Credit institutions and Investment Companies), the *Banque de France*, the Caisse des Dépôts et Consignations, the minister in charge of public finances, the Institut d'Émission des Départements d'Outre-Mer and La Poste (classification marks 948 et seq.).

124. Under the terms of article 4.5 of this agreement: '*The remitting institution that has established the cheque image is obliged to provide for the archiving of the forms defined as non-circulating. This function is exercised on behalf of the drawee institution with no possibility for substitution.*'

125. Under the terms of its article 4.6: *'(…) the drawee institution is entitled to claim and obtain from the remitting institution the original or copy of the cheque, either for its own account, for audit purposes, or to respond to the request of a customer or authorised third party. (…) Whether or not in an interbank context, transmission of the form or its copy may give way to defrayal, by the drawee institution, of the administrative burden incurred on this occasion by the remitting institution, to the exclusion of any other payment. The maximum amount of this defrayal is determined under the following conditions:*

> - *within the framework of its duties, as described in article L 511-29 of the Monetary and Financial Code, the* Association française des établissements de crédit et des entreprises d'investissement *(AFECEI, French Association of Credit Institutions and Investment Firms) organises, at least every three years, a consultation on this subject, (…); for the first time, this consultation will be conducted in the quarter following the adoption of this agreement;*
>
> - *the defrayal is assessed on the basis of the costs estimated by a sample of contracting institutions regarded as representative by the signatories;*

The circulation a priori of part of the forms presented for payment in the form of cheque images takes place under the time and defrayal conditions which meet the same requirements as those described above for communication a posteriori.'

3. AMOUNT OF INTERBANK FEES COLLECTED

Name	2002 (€)	2003 (€)	2004 (€)	2005 (€)	2006 (€)
CEIC (estimated)*	**147,420,380**	**146,585,462**	**142,476,313**	**136,716,644**	**131,018,862**
Archiving (estimated)*	**10,285,143**	**10,226,893**	**9,940,208**	**9,538,370**	**9,140,851**
Circulating cheque fee	**8,868,057**	**8,437,015**	**8,331,168**	**8,096,340**	**8,057,379**
Information request front page	**904,127**	**916,645**	**1,099,883**	**1,068,871**	**1,186,358**
Information request both sides	**5,030,787**	**6,004,263**	**5,478,648**	**5,506,863**	**5,637,324**
Information request front + original	**110,516**	**44,905**	**16,926**	**15,407**	**15,365**
Cancellation of cheque image	**605,346**	**331,926**	**279,553**	**150,913**	**123,196**
Cancellation of rejection of cheque image	**358,284**	**18,803**	**6,456**	**4,983**	**54,151**
Rejection of cheque image	**35,824,716**	**30,055,335**	**27,329,754**	**24,271,107**	**23,396,919**

Source: GSIT, MAPP calculations

Classification mark 6014

4. REVIEW OF THE INTERBANK CONDITIONS OF THE EIC IN 2007

126. The interbank conditions of the EIC were reviewed in 2007, while the investigation of this matter before the services of the Conseil de la concurrence was under way.

127. On 20 July 2007 the Governor of the *Banque de France* sent a letter to the President of the *Fédération bancaire française* (FBF, French Banking Federation) on the subject of the temporary fees applied to the exchange of cheque images, stating that he *'considers that these fees are no longer justified and that he must therefore end their billing as soon as possible'* (classification mark 3698).

128. The CEIC was abolished with retroactive effect from 1 July 2007 by a decision of 4 October 2007, signed by the *Banque de France*, Banque Fédérale des Banques Populaires, BNP Paribas, Caisse Nationale des Caisses d'Épargne, Confédération Nationale du Crédit Mutuel, Crédit Agricole SA, HSBC France, La Banque Postale and Société Générale, under the terms of which: *'In reply to the letter from the Banque de France of 20 July 2007 received by GSIT and sent to the participating members, the duly authorised representatives of the institutions below that participated in the CIR of 3 February 2000 and who are involved in the exchange of cheque images, agreed that the [CEIC] is abolished from 1 July 2007*' (classification mark 4098).

129. Furthermore, the institutions that participate in the CIR set up a working group on the same day to enforce, in accordance with the modalities provided by the EIC professional agreement of 9 July 2003, the examination of the Commissions pour services connexes (CSC, fees on related services) implemented at the time of the switch to the EIC, with the exception of fees for cancellation of cleared operations. For this purpose, a statement of costs is prepared with the main banking institutions, whose processing is entrusted to the law firm Latham & Watkins so as to respect the confidentiality of the data transmitted (classification mark 4109).

130. At the meeting of the working group's Committee as a Whole, on 27 November 2007, the participants decided to review the fees for related services in accordance with the following modalities:

- the fee for a circulating cheque image is lowered from €0.15 to €0.12;
- the fee for rejected cheque images is maintained at €3;

- fees for requests for information by fax, of €2.70 for the front page and €3 for both sides, are combined into a single fee of €1 and the amount of the fee for requests for information by fax on the original is lowered from €7 to €4.12 (see the record of the meeting's conclusions, classification mark 4102).

131. The participants agree on a periodic review of the CSCs in accordance with the following modalities (classification mark 4102):

4 OTHER DIRECTIONS ADOPTED BY THE PLENARY SESSION

- *The level of fees will be periodically reviewed, every three years, as stipulated in the EIC professional agreement and for the first time in the autumn of 2010.*
- *Concerning subsequent assessment exercises, the basis of the estimated costs will be re-examined in early 2010, on the basis of ad hoc terms of reference, in order to take account of the changes that will have occurred, not only in the Institutions but also in the infrastructures (STET) as well as the on-site practices concerning cheque images.*

D. THE STATEMENT OF OBJECTIONS

132. On the basis of the foregoing findings, by letter of 14 March 2008, the General Rapporteur notified the Confédération Nationale du Crédit Mutuel, Crédit Agricole SA, the *Banque de France* (French central bank), BNP Paribas, Société Générale, Banque Fédérale des Banques Populaires, La Banque Postale, Caisse Nationale des Caisses d'Épargne, LCL (Le Crédit Lyonnais), HSBC, Crédit Industriel et Commercial - CIC and Crédit du Nord of the following objections:

'*A first objection for agreeing within the framework of the CIR to create a CEIC and jointly determine its amount at €0.043 per non-circulating cheque';*

'A second objection for agreeing within the framework of the CIR to create interbank fees representative of services rendered and determining their amount, under the following conditions':

- *a fee of €0.15 per circulating cheque;*
- *a fee of €3 for rejection of cheque image;*
- *a fee of €0.61 for cancellation of cheque image;*
- *a fee of €0.61 for cancellation of rejection of cheque image;*
- *a fee of €2.70 for request of a fax copy (front page);*
- *a fee of €3 for request of a fax copy (both sides);*
- *a fee of €7 for request of a fax copy (front page + original);*
- *a fee for cheque archiving applied by deducting the fee for a non-circulating cheque (unknown amount as things stand but which should be of €0.003).'*

II. Discussion

A. ON THE PROCEDURE

1. ON THE DURATION OF THE PROCEDURE

a) Arguments of the parties

133. Société Générale, Crédit Mutuel, CIC, CE Participations, the *Banque de France*, Banques Populaires and BNP Paribas complain of the excessive duration of the procedure.

134. The parties assert that the procedure in its entirety has lasted six years, from the ex officio proceedings to the meeting before the Autorité de la concurrence of 24 November 2009. Furthermore, they argue that six years have elapsed between the date of the facts criticised, which go back to 1999, and the date on which the banks concerned knew that they would have to answer for these facts, in 2005. In comparison, the parties feel that they benefited from very short times to respond to the requests for information, the statement of objections and the two reports drawn up by the investigation services.

135. These time frames, which they argue were exclusively imputable to the enquiry and investigation services, would have deprived the parties of the opportunity to defend themselves effectively, given staff changes and the difficulty in collecting the old archived documents. The difficulties put forward concern mainly the search for exculpatory elements to reply to the pricing survey conducted by the Case Officers, which was known to the parties only at the time of the statement of objections in 2008, and for which data, initially filed in confidential annexes, was not given to them until 2009.

b) Applicable law

136. Under the terms of consistent case law, the reasonable time limit prescribed by article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter CPHRFF) must be assessed in light of the scope and complexity of the procedure, this circumstance having to be assessed in concrete terms (see for example the decisions of the Paris Court of Appeal of 29 January 2008, Le Goff Confort SAS; of 8 April 2008, GlaxoSmithKline; of 6 May 2008, Lafarge Ciments; of 24 November 2009, Chevron Products; and 24 June 2008, France Travaux).

137. EU case law takes the same view, the Court of Justice of the European Communities considering that '*the reasonableness of the duration must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity as well as the conduct of the applicant and the competent authorities'* (judgment of 17 December 1998, Baustahlgewebe v. Commission, C-185/95 P, ECR I-8417, point 29). The Court of Justice has stated that *'this list of criteria is not exhaustive and the assessment of the reasonableness of a time limit does not require a systematic examination of the circumstances of the case in the light of each of them when the duration of the procedure appears justified in the light of one of them. (…) Thus the complexity of the case may be accepted to justify a duration which is prima facie too long.*

(…) Where appropriate, the duration of a procedural stage may be categorised as reasonable from the outset if it appears to be consistent with the average time taken in handling a case like the one at issue (judgment of 15 October 2002, Limburgse Vinyl Maatschappij and others v. Commission, C‑238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C‑254/99 P, ECR I-8375, points 187 and 188). Finally, the European Court of Justice stated that '*the reasonableness of a time limit should not be examined by reference to a precise maximum limit, determined in an abstract way , but must be assessed in each case on the basis of the circumstances of the case*' (same judgment, point 192).

138. Furthermore, the financial penalty for the breach, by the competition authorities, of their obligation to deliver a verdict within a reasonable period, is not the cancellation of the procedure or their reform, but redress of the loss potentially resulting from the delay experienced (see the judgments of the *Cour de Cassation* (French Supreme Court) of 28 January 2003, Domoservices; and 6 March 2007, Demathieu et Bard) provided, however, that the conduct of the procedure has not irremediably deprived the offending undertakings of means to defend themselves (see in particular the judgment of the Paris Court of Appeal, Le Goff Confort SAS, op. cit., and the CJEC judgment of 21 September 2006, Nederlandse Federatieve Verninging voor de Groothandel op Elektrotechnisch Gebied (NFVG), C-105/04, ECR I-8725, point 42).

139. In this respect, the Paris Court of Appeal states that '*as respect for the rights of defence assumes vital importance in the procedures [followed before the Autorité* de la concurrence*], it is important to prevent these rights being irremediably compromised, particularly as a result of an excessive duration of the enquiry phase and to prevent this period being liable to obstruct the establishment of evidence aimed at refuting the existence of conduct liable to incur the responsibility of the undertakings concerned; it is important, for this reason, that the examination of any hindrance to the exercise of the rights of defence not be limited to the very phase in which these rights apply fully, namely the second phase of the administrative procedure; it is important that the assessment of the source of any weakening of the effectiveness of the rights of defence be extend to this entire procedure by referring to their total duration, including the enquiry*' (see the judgments of 10 November 2009, Beauté Prestige International SA, and 23 March 2010, Gaz et électricité de Grenoble, reproducing the grounds of the CJEC judgments of 9 November 1983, Michelin v. Commission, 322/81, ECR 3461, point 7, and NFVG, op. cit., point 50).

140. National and EU courts have held that it is up to the undertakings concerned to establish that, on the date of statement of the objections, the opportunities to refute them were limited because of the excessive duration of the earlier enquiry procedure (see Paris Court of Appeal, judgments cited in point 139, and CJEC, NFVG, point 56).

141. To assess whether the principle of reasonable time was respected in the case in point, it is therefore appropriate to examine, first, whether the duration of the procedure was excessive given the circumstances of the case and, in the affirmative, to examine, and second, whether the excessive duration of the procedure deprived the banks of the opportunity to defend themselves effectively against the objections directed at them.

c) Appraisal in the case in point

Regarding the duration of the procedure

142. The case concerns all interbank fees received as a result of payments made by cheques on the national territory. The objections were notified to twelve credit institutions and the case

comprises more than 40,000 documents. The DGCCRF, referred to for enquiry by the General Rapporteur of the Conseil de la concurrence in 2004, conducted many investigations with the banking institutions and with customer companies remitting cheques. Following submission of the enquiry report in 2005, the investigation services of the Conseil conducted, as the report 14 August 2008 points out (§225), more than 40 hearings and carried out a survey of unprecedented scope with 700 undertakings in order to take note of the banking conditions applied to their cheque remittance operations for the period covering the years 2000 to 2006 (direct price, all-inclusive price, subcontracting, value dates, movement fee, etc.). Furthermore, assessment of the practices necessitated extensive economic studies, for appraisal in particular of the exemptability of the practices at issue.

143. The parties were able to benefit from the periods provided for by article L 463-2 of the Monetary and Financial Code to make their comments. Furthermore, the investigation acts that resulted in the extension of the adversarial part of the procedure (designation of an expert, dispatch of an additional report) were hastened in order to best respect the rights of the parties both for the establishment of the facts and for the implementation of the adversarial principle. The same goes for decision No. 09-S-04 of 11 December 2009, which enabled the parties to access all the data of the pricing survey and to produce any final written comments.

144. By way of comparison, the duration of the present procedure is less than the average time observed for the handling of such cases by the European Commission. Thus, the enquiry and investigation procedures undertaken by the Commission to assess the compliance of the multilateral interchange charges applied to cross-border payments by card in the European Economic Area lasted more than 10 years in the Visa case (decision of 24 July 2002, COMP/29.373, rendered following the referral of 30 March 1992) and more than 15 years in the MasterCard case (decision of 19 December 2007, COMP/34.579, rendered following the referral of 30 March 1992).

145. The duration of the present procedure, including the enquiry, is not therefore excessive having regard to the nature, scope and complexity of the case.

Regarding the parties' opportunity to defend themselves against the objections notified

146. Whatever the case, the opportunity for the offending undertakings to defend themselves against the facts alleged against them has not been affected by the duration of the procedure.

147. This is because prudence required the banks to preserve all evidence liable to establish the lawfulness of their practices until the end of the prescription fixed by article L 462-7 of the Commercial Code, the period of which was increased from three to five years by the ordinance of 4 November 2004, all the more so since they became aware of the enquiry concerning them when the practices at issue had not yet ceased.

148. First, it should be pointed out that the majority of the offending banks knew that they would have to respond to the practices at issue by July 2005, time of their formal hearing by the enquirers.[15] On this date, the CEIC and the CSCs were still applied to all interbank transactions by cheque, at the level that had been set within the CIR in 2000. The Statement of objections, of 14 March 2008, appeared just a few months after the abolition

[15] See annexes 12 et seq. of the RAE

of the CEIC, decided on 4 October 2007 with retroactive effect from 1 July 2007, and the review of the amount of the CSCs which took place in the autumn of 2007.

149. The circumstances of the present case thus considerably differ from those of the 'luxury perfumes' case that gave rise to the judgment of the Paris Court of Appeal of 10 November 2009, op. cit., put forward by the parties. In this latter case, the practices penalised had ceased for five years at the time of the first formal hearings of the investigation services of the Conseil de la concurrence in 2005.

150. Second, the *Cour de Cassation* considers that the undertakings incriminated by the Autorité de la concurrence '*are responsible for any possible loss of evidence that they intended to assert as long as the prescription (…) had not taken effect*' (*Cour de Cassation*, commercial division, 12 January 1999, Bulletin IV No. 9). In this respect, the grounds internal to the incriminated undertaking are irrelevant. The *Cour de Cassation* has stipulated that no breach of the rights of defence was shown when '*the difficulties alleged* [related to the conservation of evidence], *due to causes internal to the two companies owing to changes that had occurred in their respective managements following their merger, are unconnected with the progress of the investigation and the procedure followed before the Conseil*' (*Cour de Cassation*, commercial division, 28 January 2003, Bulletin IV No. 12).

151. It follows from the foregoing that the banks cannot usefully invoke the circumstance that the representatives that have sat on their behalf in the CIR were no longer present in the undertaking at the time when the objections were notified to them, thereby making the possibility of obtaining their evidence more difficult.

152. Finally, the prescription of the commercial action was of 10 years at the time of the facts at issue, pursuant to the provisions of article L 110-4 of the Commercial Code. The banks covered by the objections should therefore, pursuant to the general need for caution, preserve their commercial documents so that they may present their defence in the case of a possible action before the Commercial Court (see in this respect the judgment of the Paris Court of Appeal of 29 January 2008, Le Goff Confort SAS, op. cit.). Similarly, they were subject to the general obligation to preserve accounting records and evidentiary documents for 10 years imposed by article L 123-22 of the Commercial Code.

153. In the case in point, the parties do not contest the existence of an agreement within the CIR for the purposes of establishing interbank fees and determining their amounts, but they do contest the anti-competitive nature of this agreement and its effect on the economy. Any evidence for the defence is therefore, as the parties themselves maintain, essentially elements that would be liable to call into question the quantitative appraisal of the damage to the economy carried out by the investigation services for the years 2000 to 2006.

154. In this respect, the Case Officers used the data used from the pricing survey, which results from implementation of the contracts concluded by the banks with customer undertakings on the one hand, and the pricing conditions applicable to customers notified by the banks at the request of the Case Officers on the other. This data corresponds to contractual or commercial documents, whose conservation is imposed on banks pursuant to the aforesaid provisions of the Commercial Code.

155. It follows from all the foregoing that a defence based on a breach of the principle of reasonable time must be set aside.

2. ON RESPECT OF THE ADVERSARIAL PRINCIPLE

a) On the preciseness of the objections notified

156. La Banque Postale maintains that the Statement of objections should have stated precisely whether the collusion was criticised on account of its anti-competitive nature, its effects, whether potential or real; or both these elements. It asserts that the investigation services made clear that the collusion was taken to court solely on account of its nature, only at the stage of the additional report of 19 August 2009. On this classification would depend the orientations of the defence as regards demonstrating the existence of a practice, a possible exemption and the appraisal of the seriousness of the damage to the economy.

157. An objection is a group of legally categorised facts imputed to one or more undertakings. In a judgment of 23 February 2010, Expedia Inc., the Paris Court of Appeal recalled that the Statement of objections must '*contain an account of the objections worded in sufficiently clear terms, even if they are brief, to enable the people concerned to fully acquaint themselves with the conducts alleged (...); the adversarial principle and the rights of defence are respected when the decision does not make the people concerned responsible for the various breaches of those referred to in the Statements of Objections and only retains facts on which they have had the opportunity to explain themselves'*. The precision of a Statement of objections must be verified '*as regards not only to the final expression of the indictment but also the very body of the Statement of objections*' (judgment of 24 June 2008, France Travaux).

158. In the case in point, the Statement of objections expressly covers in its grounds both the object and the anti-competitive effect of the collusive practices criticised. As regards CSCs, while, following a development oriented towards an anti-competitive object (§§136–138), the Statement of objections recalls the general rule whereby it is not necessary to examine the effect of a practice when its anti-competitive object is not it doubt, it specifies immediately after that *'the first price records indicate that the CSCs are used as a basis for the pricing of these same services to consumers (...), which could have as an anti-competitive effect the fixing of a minimum price for merchants'* (§139). As regards the CEIC, the notification sanctions a development intended to emphasise the anti-competitive object of the practice (§§153 and 154), followed by a specific analysis devoted to the effects of the practices, categorised as *'many and certain'* (§§155–160).

159. The Statement of objections therefore relied on both the nature and effects of the practices at issue in order to categorise it.

160. While the investigation services then concentrated their arguments on the anti-competitive nature of the practices, at the stage of the report of 14 August 2008, this circumstance did not have an undermining effect on the offending parties' rights of defence. It follows in fact, from the adversarial nature of the procedure, that the analysis made in the report may evolve in relation to that developed in the Statement of objections (see in this respect decision of the Conseil de la concurrence No. 07-D-23 of 12 July 2007, point 52). By analogy, the Paris Court of Appeal accepts the use of any element of proof that had been the subject of an adversarial debate, including when it is presented after the Statement of objections (judgment of 13 September 2005, OGF). It has also held that an undertaking could be penalised on account of an objection which the Case Officer proposed be partially abandoned at the stage of the report, without the rights of defence being disregarded (see the judgment of 19 June 2007, Philips France). The parties were able to

contest in detail the facts established by the investigation services, the categorisation attributed to them and the imputation done with them.

161. It follows from the foregoing that a defence based on the impreciseness of the objections notified is lacking in fact and must be set aside.

b) On access to the case

Regarding communication of the pricing survey

Arguments of the parties

162. Banques Populaires, Société Générale, BNP Paribas, the *Banque de France*, Crédit Mutuel, CIC, CE Participations, LCL and Crédit Agricole take the view that the documents of the pricing survey and 'the 104 conditions' on which the Case Officer relied to draw up the objections should have been communicated at the time of their notification.

163. The parties assert that this situation deprived them of the opportunity to benefit from the two adversarial rounds provided for by the law regarding the categorisation of the practices criticised. The pricing survey was , they argue, in fact designed to assess the effects of the CEIC, or the possibility of exempting practices that are, according to them, an element of legal classification as regards the competition rules. In any case, they argue, case law imposed access to the entire case at the time of the Statement of objections.

164. Crédit Mutuel, CIC, Société Générale, the *Banque de France* , BNP Paribas, LCL and Crédit Agricole further maintain that late communication of the pricing survey prevented them from fully exploring the path of settlement procedure, which they were tempted to follow.

Applicable law

165. Under the terms of article L 463-2 of the Commercial Code: '[…] *the General Rapporteur […] sends the objections to the parties involved and the Government Commissioner, who may all consult the case, subject to the provisions of article L 463-4, and present their comments within two months.*' In accordance with a consistent case law, the principle of an adversarial process is respected when the parties have, as of the Statement of objections, the power to consult all the documents used to draw up the objections notified (see in this respect the judgment of the Paris Court of Appeal of 24 January 2006, Marseille Bar Association).

166. This case law is inspired by that of the European Court of Human Rights, which considers that the principle of equality of arms, which consists in the reasonable opportunity for each party to present their case under conditions that do not place them in a situation of net disadvantage in relation to their adversary, implies that the parties are entitled to the same means to assert their arguments (see the judgment in Dombo Beheer B.V. v. Netherlands of 27 October 1993).

167. In order to verify respect of these principles, the *Cour de Cassation* carried out an assessment *in concreto* of the consequences of the failure to communicate documents on the validity of a procedure (see the judgments of 2 February 2010, a case related to the distribution of pharmaceutical products, and 4 November 2008, Les Indépendants *Groupement d'intérêt économique* (GIE, economic interest grouping)). While the cases at issue before the *Cour de Cassation* concerned procedures of commitments, the requirement for a concrete assessment of the consequences of a restriction of the right of

access to the case on the exercise of the rights of defence must *a fortiori* also apply to the financial penalty procedures followed before the Autorité de la concurrence.

168. National case law agrees with EU law, which stipulates, regarding the right of access to the file in competition cases: '*argumentation of a general nature is not liable to establish the reality of a breach of the rights of defence, which must be examined on the basis of the specific circumstances of each case*' (see in particular the judgment of the Court of First Instance of the European Communities of 30 September 2003, Atlantic Container Lines, T-191/98, 2003 ECR II-3275, point 354). The European judge did not define any deadline regarding access to the case, provided the offending parties are given the opportunity, during the procedure, to '*take note of the evidence appearing in the Commission's case so that they can express their opinion usefully on the conclusions it has reached, in its Statement of objections, on the basis of these elements*' (see in this respect the judgment in Baustahlgewebe v. Commission, op. cit., point 89).

169. The European Court of Human Rights has specifically pronounced on the case of the defendant's late access to the documents in the indictment case within the framework of a criminal trial. It thus held that '*the modalities of application of articles 6(1) and 6(3)(c) during the investigation depend on the specifics of the procedure and the circumstances of the case*', and that no undermining of the principle of equality of arms can be found when the elements of proof have been submitted to the offending parties prior to the debates before the formation of the court and that he had enough time to formulate comments on them, notably through his lawyer (see in this respect the judgment of 21 September 1993, Kremzow v. Austria, §§45 et seq., and, *a contrario*, the judgment of 12 May 2005, Öcalan v. Turkey, §§138 et seq.). The requirement for a concrete appraisal of the existence of an undermining of the rights of defence, developed in the area of classic criminal law, applies *a fortiori* to the examination of the procedures of financial penalties inflicted by the administrative authorities.

Appraisal in the case in point

170. In the case in point, it is undeniable that the Statement of objections analysed the results of the pricing survey carried out by the investigation services (§181 and §§209–217 of the Statement of objections), at the very moment when this enquiry's data was classified in confidential annexes and the parties did not therefore immediately have access to it. This analysis is made with the support of the development devoted to possible exemptability of the CEIC (§§161 et seq. of the Statement of objections).

171. However, this circumstance should not result in the invalidation of the followed procedure since it has not, in practice, undermined the rights of defence, the data in question having been the subject of declassifications at subsequent stages of the procedure, and having thus been offered for consultation and subject to the counter-arguments of the parties pursued.

172. First of all, it is appropriate to recall that the survey's data gathers the prices charged by the banks to their customer undertakings during the years 2000 to 2006. As for the list of 'the 104 conditions', it represents a sample of responses to the pricing survey, deemed exploitable by the Case Officer at the beginning of the investigation, to observe the change in pricing on the cheque remittance market. This list subsequently changed to take account of information transmitted by the parties within the framework of the adversarial debate and the results of the expertise.

173. The banks were therefore necessarily aware of the data concerning them appearing in the survey, regarding prices and pricing conditions that they themselves had negotiated. They were all the more aware of it since, when the objections were notified, the Case Officer

had sent them the list of the undertakings questioned and a copy of the questionnaire sent to them. The banks were thus able to identify their customers in this list and hence determine what the data at issue was. In addition, by decision No. 08-DEC-12 of 2 October 2008, the President of the Conseil de la concurrence decided to send each banking institution a copy of the replies to the questionnaire concerning them, thereby enabling the parties to verify the accuracy of the data appearing in it and to submit their comments on this subject.

174. Regarding the data of competing institutions, whose access was claimed by several parties under a form preventing the identification of the customers and the banks concerned, the General Rapporteur appointed, by decision of 16 December 2008, an expert with access to all the documents and charged with preparing anonymous spreadsheets setting out the survey's data, consultable by the parties, with the aim of reconciling access to the case's documents with the protection of business secrets. Furthermore, the list of 'the 104 conditions' was also notified to the parties on 15 July 2009.[16]

175. Full access to the data concerning the competing banks was then granted in accordance with the modalities arranged by decision of the President of the Conseil de la concurrence No. 09-DEC-01 of 17 February 2009. Under the terms of this decision: '*Article 1 – The detailed facts and figures of the pricing survey included between 2001 and 2006 are made accessible to the parties by means of a spreadsheet prepared by the expert appointed in the present case. The names of the undertakings that replied to the survey are not mentioned in this spreadsheet. Article 2 – The counsels representing the parties may consult, in the premises of the Conseil de la concurrence, all the data directly concerning the pricing survey, in accordance with the modalities set out in paragraph 8 of this decision.*' This arranged consultation took place on two occasions, in April and July 2009.

176. In order to enable the parties to take notice of the documents needed for the exercise of their rights of defence, the period of two months they had, to their comments on the report of 14 August 2008, was successively extended by two months from receipt of the declassified documents, in accordance with decision No. 08-DEC-12, op. cit., and then by two months from the date when the expert's report was added to the case (see the letter of the General Rapporteur dated 15 October 2008, classification marks 18357 to 18382).

177. The counsels of the parties concerned, lawyers and economists, therefore had access to the data of the pricing survey before preparation of the additional report of 19 August 2009, thus enabling them to present the means useful to their defence in their comments in reply to the report.

178. Finally, by decision No. 09-S-04 of 11 December 2009, the Autorité de la concurrence sent the case back to the investigation services to enable the parties, on the one hand, to access all the data covered by decisions Nos. 08-DSA-39 and 09-DEC-01 and, on the other, to produce any final written comments.

179. It follows from the foregoing that the banks were able to access the data of the pricing survey, the first time through their counsels and the second time without restrictions, and thus benefited on two occasions from the period of two months provided by article L 463-2 of the Commercial Code to make their comments.

180. Furthermore, the parties do not establish how the late communication of the data of the pricing survey deprived them of the opportunity to request the benefits of the settlement

[16] Letter from the General Rapporteur of 15 July 2009, classification marks 29.149 et seq.

procedure, whereas they were aware of the data of this survey that personally concerned them and whereas they had all the useful background elements related to the type of practices in respect of which they were criticised, their legal classification and their conditions of imputation as of the stage of the Statement of objections. Within the framework of this procedure, the General Rapporteur proposes a percentage reduction in the financial penalty incurred, without prejudice to the debate, open to the parties and related to the extent of the damage to the economy. The investigation services were not obliged, at the stage of the Statement of objections, to make a quantified appraisal of the damage to the economy for the sole purpose of enabling the parties to assess the amount of the financial penalty incurred and hence of giving them the opportunity to request the benefit of the settlement procedure.

181. Whatever the case, it follows from the provisions of III of article L 464-2 of the Commercial Code that committing to a settlement procedure comes under the power of appraisal of the General Rapporteur, subject to control of a manifest error by the Autorité (see in this respect the decision of the Conseil de la concurrence No. 06-D-09 of 11 April 2006 related to practices implemented in the door manufacturing sector). The parties were not therefore entitled to implementation of this procedure.

182. It follows from all the foregoing that, in the precise circumstances recalled above, the defence based on an undermining of the adversarial principle and the principle of equality of arms is in fact lacking and may only be set aside.

Regarding access to the other documents in the case

183. First, Banques Populaires and Société Générale assert that the parties did not have access to the entire case at the time of the Statement of objections. The arranged consultation of April 2009, they argue, made it possible to show the existence of investigation acts that had not been added to the case.

184. The absence of some documents in the case is in no way established however, the allegations of Banques Populaires being based on the sole mention, in an email, that an undertaking was replying 'to questions still pending'. Whatever the case, it is in no way demonstrated that the documents put forward and the emails added to the case in April 2009 were used as the basis of the objections notified.

185. Second, the *Banque de France* claims that some emails between the French Treasury, its main customer, and the Case Officers are still missing from the case to this day. However, it does not provide any element making it possible to support these allegations and does not in any case prove that these documents had been used by the Case Officer for establishing the allegations.

186. Third, the *Banque de France*, LCL, Crédit Agricole and CE Participations maintain that certain documents referred to in annexes to the additional report of 19 August 2009 did not appear in the CD-ROM covering said annexes. CE Participations adds that the report of 14 August 2008 failed, in certain cases, to state the classification marks of the documents on which the Case Officers based their findings.

187. In this respect, it emerges from a letter from the General Rapporteur of 28 September 2009 (classification marks 33637 et seq.) that the majority of the documents concerned had already been submitted to the consultation of the parties, either through individual communication of the data related to each of the banks, or through the opportunity for the banks' counsels to consult all the data in the premises of the Autorité. The lack of communication denounced therefore concerned only one annex (classification marks

29172 to 29180), missing on account of a material error, and communicated to the parties in support of the letter of 28 September 2009. This letter also stipulates the classification marks of the documents cited in the report of 14 August 2008, in accordance with the request of the parties.

188. CE Participations, LCL, Crédit Agricole and Crédit du Nord take the view that the period of two months provided by article L 463-2 of the Commercial Code for submitting comments, was meant to start only as of the communication of all the documents on which the Case Officers based their findings in the additional report of 19 August 2009. In addition, LCL, Crédit Agricole and CE Participations consider that, because of the exceptional circumstances related in particular to the lack of communication of certain documents when the report was notified, an additional period of one month should have been granted to them, on the basis of article L 462-2, paragraph 4, of the Commercial Code, for them to submit their comments. In fact, late communication of the document at issue, namely a nine-page annex whose content only confirms the position of the Case Officers described in the Statement of objections, did not justify postponement of the starting point of the period of reply nor characterised the existence of *'exceptional circumstances'* within the meaning of the provisions of article L 463-2, paragraph 4, of the Commercial Code, likely to justify an additional delay being granted to them to file their comments.[17] Whatever the case, the parties benefited from a new period of two months to submit their defence following decision No. 09-S-04, op. cit., whereby the Autorité sent the case back to the investigation services to enable the parties to access the data of the pricing survey and file any final written comments.

189. Fourth, CE Participations asserts that it did not have access to the data related to the volumes and amounts of cheques issued and remitted, used by the Case Officers in the additional report of 19 August 2009 to assess the impact of the practices on the economy from the analysis of the bank's standard pricing conditions.

190. In this respect, access to the data concerned was granted to the parties by decision of the President of the Conseil de la concurrence No. 09-DEC-22 of 20 October 2009, which provided for an arranged consultation, in accordance with modalities identical to those provided for by decision No. 09-DEC-01, op. cit., regarding data related to the pricing survey. The counsels of the parties concerned, lawyers and economists, therefore had access to the relevant data , enabling them to submit the means useful to their defence in reply to the additional report. For this purpose, an additional period of three days was granted to the banks by decision No. 09-DEC-22 to submit their written comments.

191. Furthermore, by decision No. 09-S-04, op. cit., the Autorité de la concurrence sent the case back to the investigation services, in particular with a view to enable the parties to access all the data covered by decision No. 09-DEC-22. The parties then benefited from a new period of two months to make their comments, in accordance with the provisions of article L 463-2 of the Commercial Code.

192. Lastly, CE Participations asserts that certain documents were declassified belatedly, one or two weeks before the expiry of the period granted to make comments. In this respect, it should be pointed out that no party requested any extension of the period of reply on account of the late declassification of certain documents. Whatever the case, the parties benefited from a further two months to file their comments following decision No. 09-S-04, op. cit.

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[17] See the request of the parties (classification marks 33613 to 33615) and the reply of the President of the Autorité (classification mark 33701).

c) On the conduct of the investigation

Regarding the gathering of information

193. The *Banque de France* , Crédit Mutuel, CIC, Société Générale, LCL and Crédit Agricole criticise the Case Officers for having gathered information by means of telephone conversations, whose content was reported, without transcribing the questions asked, in an email sent to registrants, in disregard of the provisions of article R 463-6 of the Commercial Code, which provide that '*the hearings with which the Case Officer proceeds give rise to minutes, signed by the persons heard*'.

194. While articles L 450-2 and R 463-6 of the Commercial Code provide that the information gathered within the framework of an enquiry gives rise to the preparation of reports, they do not lay down any particular formal requirement for their presentation, provided that the lawfulness of communication, to the investigation services, of the information at issue can be established and that this information is subject to adversarial debate.

195. In this respect the *Cour de Cassation* held that: '*in the absence of preparation, by the authorised official, of minutes confirming the breach under the conditions provided for in article 46 of the ordinance of 1 December 1986 [*now article L 450-2 of the Commercial Code*], the judges may base their decision on the elements of the case submitted to adversarial debate, such as the letters exchanged between the authorities and the defendant (...)*' (*Cour de Cassation*, criminal division, 19 January 2000, appeal No. 99-83045).

196. The Autorité recently stipulated that 'the regime concerning proof before the Autorité de la concurrence does not involve formal requirements' (decision No. 09-D-28 of 31 July 2009 on practices of Janssen-Cilag France in the pharmaceutical sector, §65). It thus considered that the inclusion of the names, addresses and telephone numbers of the undertakings questioned made it possible to verify the accuracy of their testimonies.

197. In the case in point, the information gathered by the Case Officers of the Conseil de la concurrence was transcribed and transmitted to the undertakings questioned in the form of emails. These emails make it possible to establish the date of the meeting and the identity of the undertakings concerned. The accuracy of the information transmitted was confirmed by return email, on many occasions on the same day as the declarations were communicated (see, for example, classification marks 27832, 27833, 27861 and 32854). Under these conditions, the electronic medium used by the Case Officers to gather such information and for their confirmation by the persons heard makes it possible to effectively establish the source, accuracy and lawfulness of the communications in dispute.

198. Furthermore, the absence of reproduction of the questions asked in the emails sent to the undertakings has no effect on the validity of these documents, since no texts require transcription of the questions asked at the time of the hearings conducted within the framework of the investigations of the Autorité de la concurrence (see in this respect the judgment of the Paris Court of Appeal of 19 June 2007, Phillips France).

Regarding the impartiality of the investigation

199. BNP Paribas, the *Banque de France* , Crédit Mutuel, CIC, Société Générale, LCL and Crédit Agricole take the view that the Case Officers presented certain documents in a biased manner, like the economic study communicated to the parties, with a distorted presentation of the facts, using non-declassified documents, truncated quotations from the European Commission's Visa International decision of 24 July 2002 and unidentifiable

declarations from undertakings or by guiding the responses of the undertakings questioned. The elements of the defence case, aimed at showing that the CEIC was not passed on or estimating the average of the prices of the remittance of cheques downwards, had allegedly been systematically set aside, whereas on the contrary the accusatory elements were favoured. In this respect, Crédit Mutuel, CIC, Crédit Agricole, LCL and Société Générale assert that the Case Officers failed to take account of the opinions rendered by the *Commission bancaire*, in accordance with which the EIC was a reform in the general interest and the CEIC was necessary for the switch to the EIC.

200. It follows from established case law that the investigation's impartiality cannot be questioned when the procedural rules guaranteeing the adversarial principle have been respected. Thus, the Paris Court of Appeal held, in a judgment of 24 November 2009, Chevron Products Company, that '*the applicant is not entitled to complain of shortcomings in the impartiality of the investigatory services, since as of the Statement of objections, it had the right to consult the case, to request hearings of witnesses, to submit its comments and then, after the Case Officer, to express itself orally before the Conseil*' (see in this respect the judgments of 12 April 2005, France Telecom, and 2 October 2007, ETF, and the judgment of the *Cour de Cassation* of 15 June 1999, Lilly France).

201. In the case in point, the parties concerned had the opportunity to consult the case, to request hearings of witnesses from the Autorité and to submit comments, including in a meeting, in order to contest the interpretations of the Case Officers and provide alternative explanations. It is then for the Autorité, within the framework of the present decision, to determine among these various interpretations that which it appears should be retained.

202. It should also be pointed out that in order to eliminate any bias resulting from the privileged exploitation of the banking conditions granted to retail chains, the Case Officer supplemented the results of the administrative report of the DGCCRF with a pricing survey conducted with 700 undertakings, then with alternative methods to assess the damage to the economy (see the Statement of objections, §209, and the report of 19 August 2009).

203. Regarding the quotations from documents not fully declassified, the paragraphs of the documents to which reference is made show that only data accessible to all the parties was used (§§190–191 of the Statement of objections and §314 of the report of 14 August 2008). Concealment of the names of the addressees of the letters used has no effect in this respect, since it was only the content of the letters sent by the banks to large remitters that was put against them.

204. Finally, the Case Officers were not obliged to reply to the arguments developed by the *Commission bancaire* in its advisory opinions. While article L 511-4 of the Monetary and Financial Code provides that '*the Statement of objections provided for in article L 463-2 of the same code is communicated to the* Autorité de contrôle prudentiel *(ACP, French prudential supervisory authority)* [formerly the *Commission bancaire*], *which renders its opinion within a period of two months'* and that *'[i]n the assumption that the Autorité de la concurrence should impose a financial penalty at the end of the procedure provided for in articles L 463-2, L 463-3 and L 463-5 of the Commercial Code, it would state, if applicable, the reason why it deviates from the opinion of the* Autorité de contrôle prudentiel (ACP, French prudential supervisory authority)'; the obligation to state reasons that results from these provisions is imposed on the Autorité, not on the investigation services.

Regarding the burden of proof

205. Société Générale and the *Banque de France* assert that the Case Officers regularly proceeded with simple statements, which had the effect of shifting the burden of proof on to the offending parties. They contest in particular the probative value of the declarations of the undertakings surveyed in relation to that of the proofs provided by the parties (agreements, invoices or debit notices) and take the view that the request of the investigation services to provide any elements likely to rectify the data supplied by the undertakings surveyed shifted the burden of proof on to the offending parties.

206. However, the elements retained by the enquiry and investigation services do not constitute simple presumptions. When they are gathered by the enquiry or investigation services in minutes, the declarations ' *are prima facie evidence'*, in accordance with the provisions of article L 450-2 of the Commercial Code. In the case in point, the elements stated in the declarations of the undertakings questioned by the Case Officers could easily be verified by the parties, since they concerned the prices granted by the banks to their customer undertakings in accordance with the contracts signed with them. Moreover, copies of many invoices from remitters, and of pricing proposals and conventions between the banks and their customers, are attached in the annexes of the administrative report of enquiry (classification marks 315 et seq.). As for the Statement of objections, it is based on the minutes of the meetings organised by the CIR (§91 et seq. of the Statement of objections).

207. Consequently, the request from the Case Officers and the expert asking the parties to formulate their comments on the data at issue did not have the effect of reversing the burden of proof of the anti-competitive nature of the practices, which falls to the Autorité de la concurrence, but had the sole object of submitting the documents held by the investigation services to counter-arguments so that the offending parties could effectively criticise the forms of evidence presented against them.

Regarding the evolution of the analysis of the Case Officers during the procedure

208. BNP Paribas, Société Générale and Banques Populaires take the view that the investigation was conducted in a progressive and contradictory manner, notably as regards the question of the treasury earnings of the remitting party. The method of the Case Officers was, they argue, modified depending on the arguments of the parties. CE Participations asserts that the Case Officers carried out for the first time, at the stage of the additional report of 19 August 2009, a statistical analysis aimed at establishing the existence of an increase in the prices of the remittance of cheques, using two new methods, based on the study of the banks' standard pricing conditions on the one hand, and on the principles adopted by the European Commission in its decision of 19 December 2007, MasterCard, on the other, thereby depriving the parties of a second adversarial round on this point.

209. As was recalled in point 160 above, it follows from the adversarial nature of the procedure that the analysis made in the report can evolve in relation to that developed in the Statement of objections (see in this respect decision of the Conseil de la concurrence No. 07-D-23 of 12 July 2007, point 52; see also the judgments of the Paris Court of Appeal cited at point 158 above). The Conseil thus stipulated that the provisions of article R 463-11 of the Commercial Code '*are in no way an obstacle to the adversarial debate that opens up as from the communication of the objections to the parties and that is continued throughout the procedure, not only on the materiality of the facts but also on their analysis by the investigation services*' (decision No. 08-D-12 of 21 May 2008 on practices implemented in the plywood production sector, point 118, confirmed on this point by the judgment of the Paris Court of Appeal of 29 September 2009, Ets. A. Mathé). Hence, the

fact that the method used by the Case Officers could evolve during the procedure to take account of the arguments advanced by the offending parties could not have the effect of undermining their rights of defence. Likewise, implementation of methods of quantitative assessment of the damage to the economy at the stage of the additional report, whose object was to verify the results that came from the analysis of the pricing survey, mentioned in the Statement of objections (§§209 et seq.), did not undermine the adversarial principle, since no new objection was notified to the parties and since the parties benefited from the period of two months provided by article L 463-2 of the Monetary and Financial Code to submit their comments on the analyses of the investigation services.

Regarding the dispatch of an additional report

210. According to Société Générale, the investigation services acted *ultra vires* by deciding on the 'reopening *of the investigation*' (as stated by an email from the Case Officer), whereas the Autorité alone can decide to send the case back to the investigation services, in accordance with article R 463-7 of the Commercial Code.

211. The email from the Case Officers of 29 October 2008 that mentions a '*reopening of the investigation*' uses an improper term, since the investigation was not closed on the date when the additional report was notified to the parties. On the contrary, on 16 December 2008, an expert was appointed by the General Rapporteur, on the basis of the provisions of article L 463-8 of the Commercial Code, to verify the validity of the calculations made from the confidential data supplied by the banks' customers at the time of the pricing survey. Following the postponement, decided by the General Rapporteur to enable the parties to take note of the declassified documents and the expert's report (see the letter from the General Rapporteur of 15 October 2008, classification marks 18357 to 18382), the period of two months provided for in article L 463-2 of the Commercial Code that the parties had to submit their comments began to run only from the notification of the additional report of 19 August 2009. The means are therefore lacking in fact and must be set aside.

d) On the meetings of 24 November 2009 and 13 April 2010

212. The parties maintain that the Case Officers based their findings, in their oral report before the Autorité at the time of the meeting of 24 November 2009, on statistical assumptions and calculations related to the assessment of the switch to the EIC that were not previously communicated to them, in disregard of the rights of defence. In support of their allegations, they produce an economic study by the LECG and MAPP consulting firms of 9 March 2010. They also asserted, at the time of the meeting of 13 April 2010, that in their oral presentation, the Case Officers used new statistical assumptions, different from those presented at the time of the meeting of 24 November 2009.

213. The calculations to which reference is made concern the assessments of the banks' treasury earnings and losses following the switch to the EIC. They were submitted in reply to the comments and the economic study of 30 October 2009, produced by the parties in reply to the report of 19 August 2009, and in particular used the calculation assumptions proposed by the banks. An undermining of the rights of defence could be characterised only if the Autorité de la concurrence took over a new analysis presented by the Case Officers at the time of the meeting.

214. Whatever the case, the parties were at liberty to submit oral comments in reply to the presentation of the Case Officers at the time of the meeting. They are not therefore entitled to complain of any ignorance of their rights of defence on this point.

215. Second, Banques Populaires cannot effectively assert that the presentation media of the Case Officers were not annexed to the minutes of the meeting of 24 November 2009 in disregard of article 50 of the bylaws of the Autorité, since the media were directly communicated by the Case Officers to the parties at the time of the meeting.

216. Third, Société Générale, Crédit du Nord, Crédit Agricole and LCL maintain that the meeting of 24 November 2009 was not conducted in an adversarial manner, since they were unable to assert their opposition to sending back of the case to the investigation services. Crédit Agricole and LCL add that this decision deprived them of the opportunities to express their views on the substance of the matter following the intervention of the Case Officers, in disregard of the principle of equality of arms.

217. However, article R 463-7 of the Commercial Code does not set any conditions for deciding to send the case back to the investigation services (see the judgment of the Paris Court of Appeal of 8 April 2008, GlaxoSmithKline). The Autorité, whose decision, which is not appealable, constitutes an internal order measure not liable to be held against the parties (see the judgment of the Paris Court of Appeal of 6 April 2010, France Telecom), is not obliged to gather the parties' oral comments on the principle of sending the case back to the investigation services.

218. Furthermore, the principle of equality of arms was not disregarded, since the decision to send the case back, whose purpose was to safeguard the rights of defence, enabled the parties to submit new written comments, related mainly to the oral intervention of the Case Officers during the meeting of 24 November 2009, and since the parties had the opportunity to submit oral comments on the substance of the case at the meeting of 13 April 2010.

219. Lastly, Société Générale asserts that the Autorité is not competent, within the framework of a decision to send the case back to the investigation services, to limit the investigation's object. However, in its decision No. 09-SO-04, op. cit., the Autorité did not disregard the extent of its competences, stating that sending back the case was meant to enable the parties to access all the data of the pricing survey and to produce any final written comments.

3. ON BUSINESS SECRECY

220. Banques Populaires, LCL and Crédit Agricole criticise the President of the Autorité for having, by its decision No. 08-DSA-39, classified in confidential annexes the data of the pricing survey conducted by the investigation services, without having replied to a formal request from the undertakings concerned. All the parties criticise the Autorité for having then ordered, without their agreement, the full declassification of this data by its decision No. 09-SO-04, op. cit. They maintain that they claimed access solely to the statistical data of the survey in a version guaranteeing the anonymity of the undertakings surveyed.

221. The financial penalty attached to breach of business secrecy is not the nullity of the procedure, but the possibility of granting compensatory payments , if the disclosure of such information is liable to create direct and certain damage to the undertakings concerned (see in particular decisions of the Conseil de la concurrence No. 07-D-50 of 20 December 2007 on practices implemented in the toy distribution sector, §470, and No. 09-D-36 on

practices implemented by Orange Caribbean and France Telecom in various electronic communication services markets in the departments of Martinique, Guadeloupe and French Guyana, §157).

222. In the case in point, the parties in no way say how the alleged breach of their right to protection of business secrecy undermined their rights of defence by preventing them from replying effectively to the objections notified to them. On the contrary, the purpose of decision No. 09-SO-04 was precisely to ensure effective exercise of the rights of defence by giving the parties full access to the data used by the investigation services to assess the effect of the denounced practices on the economy.

223. Furthermore, Banques Populaires, Société Générale, the *Banque de France* and Crédit du Nord maintain that the procedure followed disregarded the rules of article R 463-15 of the Commercial Code. However, this means is ineffective, since, as has been explained above, these decisions do not have the effect of depriving the parties of a normal exercise of their rights of defence and since their unlawfulness, assuming it is established, is not therefore liable to bring about the cancellation of the procedure.

224. It follows from the foregoing that the defence based on the alleged failure to ensure business secrecy must be set aside.

4. ON THE LAWFULNESS OF THE EXPERTISE

225. According to CE Participations, Crédit du Nord, Crédit Mutuel, CIC, Banques Populaires Participation, LCL, Crédit Agricole, BNP Paribas, the *Banque de France* and Société Générale, the expertise procedure was exploited, in disregard of the provisions of article L 463-8 of the Commercial Code.

a) On the definition of the expert's assignment and its fulfilment

226. According to the parties, the expert's assignment was redefined during the procedure without their knowing it, three days before issue of the expertise pre-report, with the sole aim of amending the expert findings.

227. Article L 463-8 of the Commercial Code provides that: '*The General Rapporteur may decide to turn to experts in the event of a request made at any time of the investigation by the Case Officer or a party. The assignment and the time granted to the expert are stipulated in the decision that appoints him.*' Article R 463-16 of the same code adds that the decision of the General Rapporteur '*defines the subject of the expertise*'. These provisions do not provide for the parties to be consulted on the definition of the expert's assignment. In fact, under the terms of article L 463-8, only the '*expertise progress*' is conducted in an adversarial manner. In the case in point, the amendment of the definition of the subject of the expertise without consulting the parties in advance thus has no effect on its lawfulness.

228. Furthermore, it should be pointed out that the procedure followed in this particular case offered the parties guarantees exceeding the requirements of the Commercial Code, by enabling them to submit their comments on the subject of the expertise. By letter of 15 October 2008 (classification marks 18358 to 18382), the General Rapporteur announced the appointment of an expert to certify the fairness of the aggregation of confidential data by the investigation services, and invited the parties to set out comments on the content of the assignment entrusted to the expert. By a decision of 16 December 2008, he appointed

an expert and determined the general framework of his assignment, taking account of the first comments received (classification marks 22164 and 22165). Finally, at the end of two adversarial rounds, the General Rapporteur determined the definitive methodology of the expertise by decision of 17 February 2009. The parties are not therefore entitled to maintain that the procedure followed, which is particularly favourable, had put their rights of defence at risk.

229. Lastly, while the parties maintain that the expert has not fulfilled his entire assignment, this circumstance is not liable to annul the expertise report. This is because the Paris Court of Appeal has held that '*the grievance made against* [the expert] *of not having fully fulfilled his assignment is not liable to bring about the nullity of the report that he has filed, the parties, like the Case Officer, retaining the right to petition the General Rapporteur for a new expertise in accordance with article L 463-8 of the Commercial Code*' (judgment of 28 June 2005, Société Vedettes Inter-Iles Vendéennes, not quashed on this point).

b) On the relationship between the expert and the Case Officers

230. The parties complain of the contacts between the expert and the Case Officers allegedly reflected in verification and amendments of the results of the expertise, whereas the expert's assignment consisted, on the contrary, in verifying the work of the Case Officers.

231. Article R 463-16 of the Commercial Code provides that '*the expert or experts inform the Case Officer responsible for the investigation of the matter of the progress of the expertise work*'. The relations between the Case Officer and the expert were stipulated by the aforementioned Court of Appeal judgment of 28 June 2005, under the terms of which '*the Case Officer is not (...) taken off the case in the course of the expertise w; (...) if he encounters difficulties in the fulfilment of his assignment, the expert has the right to express his concerns to the Case Officer, who is authorised to give him an opinion on the direction of his work; (...) but this opinion does not bind the expert*'. In the case in point, the court confirmed the validity of the expertise stating that the opinion given by the Case Officer '*was not liable to amend the assignment given [to the expert] by the General Rapporteur as the latter had defined it*' and that it had been '*brought to the attention of the parties, who could, in good time, discuss it adversarially before the expert'*.

232. In this particular case, the Case Officers supplied the expert with all the data resulting from the pricing survey conducted with 700 undertakings, in accordance with the wish expressed by the parties in their comments of 12 January 2009 (classification marks 33316 and 33318). They also submitted summary documents adding up to an organised transcription of this data to facilitate its exploitation. Transmission of these spreadsheets, which merely reproduce the data needed for the expert's work without giving him an opinion as to the direction of his work, did not therefore alter the fulfilment of his assignment.

233. Furthermore, within the framework of the adversarial debate, the Case Officers replied to the expertise pre-report by making a number of remarks that were send to the expert and all the parties concerned (email of 13 July 2009, classification mark 29059). Finally, the Case Officers replied to certain questions from the expert on the data transmitted. The replies of the Case Officers were clearly identified in the documents transmitted by the expert to the parties on 14 July (classification marks 29079 to 29129). The parties were thus able to debate them, notably with their additional statements sent to the expert on 4 August 2009.

234. Under these conditions, the relations between the expert and the Case Officers are not liable to call into question the validity of the expertise.

c) On the defences available to the parties to respond to the expertise work

235. The parties assert that they did not have enough time to reply to the expert's reports, particularly given the late communication of certain documents, including the list of the 104 banking conditions. They maintain that they should have been summoned by the expert prior to the communication of his pre-report, pursuant to the case law of the *Cour de Cassation* established in accordance with article 160 with the Civil Procedure Code and the adversarial rules applicable in this matter (Cass., second civil chamber, 20 December 2001).

236. The expertise ordered within the framework of an investigation conducted by the services of the Autorité de la concurrence is regulated, however, by the special provisions of articles L 463-8 and R 463-16 of the Commercial Code. The Paris Court of Appeal has held that '*the provisions of the Civil Procedure Code, whose main object is to define the conditions under which a party may obtain a decision from the judge on the merits of a claim directed against another party and based on recognition of a subjective right, do not apply to the procedure followed before the Conseil de la concurrence, which, within the framework of its assignment of protection of the economic public order, conducts proceedings for repressive purposes leading it to pronounce punitive financial penalties*' (judgement of 29 April 2009, Philips France). The parties are therefore unnecessarily claiming a disregard of the provisions of article 160 of the Civil Procedure Code.

237. Article R 463-16 of the Commercial Code provides that '*the expert or experts must take into consideration the comments of the parties, which may be sent in writing or gathered orally, and must attached the to their report if they are written and if the party concerned so requests. They must mention, in their report, the follow-up that they have given them.*' It follows from these provisions that, contrary to what is maintained, the summoning of the parties in the present matter was not mandatory. Whatever the case, the parties were summoned by the expert so that they could present their comments orally.

238. Furthermore, the parties were in a position to reply to the expert's first written comments, formalised in a 'pre-report' transmitted to them on 20 February 2009, i.e. more than five months before dispatch of the definitive report. The parties were thus able to submit statements in May 2009, to which the expert replied in July, summary statements in July and additional statements following their summons by the expert in August. The defence based on the lack of time left to the parties to present their comments is therefore lacking in practice and must be set aside.

239. Finally, the document entitled 'the 104 conditions' is not part of the documents coming under the expertise work, as is explained by the expert to the parties in a message of 9 July 2009 (classification mark 36429). The parties cannot therefore effectively complain of their alleged late communication within the framework of the expertise.

240. It follows from all the foregoing that the parties are not entitled to question the validity of the expertise. Whatever the case, it should be pointed out that the parties had access to all the data concerned by the expertise procedure, following the sending back of the matter to the investigation services ordered by decision No. 09-S-04, op. cit.

5. ON COMMUNICATION OF THE REFERRAL TO THE *COMMISSION BANCAIRE*

241. BNP Paribas, LCL and Crédit Agricole criticise the investigation services for having belatedly informed the *Commission bancaire* of the dispute under way and for having

given it the Statement of objections, and not, as provided by article R 463-9 of the Commercial Code, the court referral itself. As a result, the parties take the view that they were unable to refer to the opinion of the *Commission bancaire* in their comments, which, they argue, constituted a breach of the adversarial principle.

242. First, the notice of ex officio proceedings was communicated to the *Commission bancaire*, in accordance with the provisions of article R 463-9 of the Commercial Code. This is because this document appears in the first annex of the Statement of objections, communicated to the *Commission bancaire* on 18 March 2008 (classification mark 4462).

243. Second, as regards the lateness of the information of the *Commission Bancaire*, the *Cour de Cassation* held, in the matter giving rise to decision No. 00-D-28 on the competitive situation in the real estate credit sector, that '*article 16 of the decree of 29 December 1986* [now article R 463-9 of the Commercial Code] *does not stipulate the time at which the referral must be communicated to the administrative authority concerned, does not require that the latter's opinion be solicited as from the stage of the referral from the Conseil and that it suffices that this provision be implemented under conditions compatible with respect for the adversarial nature of the procedure before the Conseil, the Court of Appeal, which observes that the Conseil took the view, in the case in point, that it was appropriate to transmit, in addition to the act of referral for which it had taken the initiative, the Statement of objections, a document likely to favour the issuing of an enlightened opinion by this authority, and that it did not undermine the rights of defence by proceeding with this formality on 27 November 1998, since this formality was fulfilled before notification of the report, ruled justly*' (*Cour de Cassation*, commercial chamber, 23 June 2004, appeal No. 01-17896 02-10066). In the case in point, with regard to ex officio proceedings, communication of the Statement of objections allowed the *Commission bancaire* to use the information liable to enable it to issue an enlightened opinion. In addition, the opinion of the *Commission bancaire* was submitted for adversarial debate and the parties were able to take it into account to produce their written comments within the statutory period of two months.

244. It follows from the foregoing that the defence based on a disregard of the provisions of article R 463-9 of the Commercial Code is lacking in practice and must be set aside.

6. ON RESPECT OF THE PRESUMPTION OF INNOCENCE AND OF THE CONFIDENTIALITY OF INVESTIGATIONS

245. First, Crédit Mutuel, CIC, LCL, Crédit Agricole, BNP Paribas and Société Générale criticised the Autorité for having alluded to this matter in its opinion No. 09-A-35 of 26 June 2009 about the draft legislation on conditions regulating the supply of payment services and the establishment of payment institutions, while this case was still under investigation when the opinion was published.

246. Some passages of the notice pointed out by the parties do not, however, refer to the present matter, but summarise the European Commission's position on matters related to collusions on interchange fees of which it had been aware (§15 of the opinion) or set out some economic analyses of interbank fees, without categorising the conduct at issue as regards the rules of competition law (§106 of the opinion). While the opinion mentions that '*the Autorité de la concurrence will pronounce on the lawfulness of the interbank fees related to the bank cheque at the end of 2009'* (§22), this reference, which does not contain any information on the outcome of the dispute, the classification of the facts or the identity of the offending parties, does not constitute a breach of the confidentiality of investigations

and cannot be likened to a pre-judgment that would breach the rights of the parties stemming from the presumption of innocence principle.

247. Second, Crédit Mutuel and CIC take the view that their rights of defence were undermined by evoking, in the reports notified by the investigation services, preliminary discussions conducted with the undertakings party to the procedure with a view to envisaging a settlement procedure, this evocation risking being perceived by the Board of the Autorité as an admission of guilt undermining any defence on the substance.

248. In this respect it should be pointed out that the settlement procedure, which is an integral part of the procedure followed before the Autorité, does not in itself constitute an admission or acknowledgment of responsibility (see in particular the judgment of the Paris Court of Appeal of 29 January 2008, Le Goff Confort SAS, op. cit.). Moreover, the report of 14 August 2008 (§230) and the additional report of 19 August 2009 (§82 et seq.) evoked the preliminary discussions with the parties, for the sole purpose of explaining the reason why the Statement of objections included elements intended to assess the seriousness of the practices and the way in which the parties attempted to use to their advantage these discussions within the framework of the procedure. Under these conditions, the aforesaid defence is lacking in practice and must be set aside.

B. ON THE APPLICABLE LAW

1. ON THE APPLICABILITY OF COMPETITION LAW

249. The parties maintain that competition law is not applicable in the case in point. This is because they take the view that the nine interbank fees at issue cannot be anti-competitive and assert in this respect the absence of an interbank market. They add that, given the universality of means of payment, any bank must accept the payment orders given by the customers of any other bank and therefore cannot choose its partner. Since connecting the drawee banks with the remitting banks is constrained by a third party, there was – they argued – neither supply nor demand and therefore no market. According to certain parties, it follows from this that only an interbank fee that covered the pricing conditions applied to end customers could be the subject of an examination as regards competition rules.

250. La Banque Postale considers that the Autorité de la concurrence is not competent to assess '*the principle and amount of interbank fees'* or to thus substitute itself to the sector regulator, which is the *Banque de France*.

251. It should first of all be recalled that, in the Züchner judgment of 14 July 1981, the Court of Justice of the European Communities held that banking activities did not escape the application of competition law (172/80, 1981 ECR 2021, point 8). The European Court of Justice added that fund transfers made by banking institutions in favour of their customers, if they came under their own mission as banks, did not constitute 'general economic interest services' within the meaning of the Treaty (point 7 of the judgment).

252. The same rule is stated in domestic law by article L 511-4 of the Monetary and Financial Code, which provides that: '*Articles L 420-1 to L 420-4 of the Commercial Code apply to credit institutions for their banking transactions and their related transactions related in article L 311-2 and to payment institutions for their payment services and their related services defined in article L 522-2.*'

253. While the parties assert that there is no '*interbank market*' for cheques, the interbank cheque clearing system comes within the global system of payment by cheque, of a four-party nature. This system connects, for each transaction linked to a payment by cheque (the payment itself or related transactions such as rejection of a payment), two end customers – the payer (or drawee) and the beneficiary (or remitter) – and two intermediaries – the drawee bank and the remitting bank. The drawee bank and the remitting bank may be the same person (the cheque is then known as intrabank) or two distinct persons (the cheque is referred to as interbank).

254. In this latter hypothesis, the relationship between the intermediaries comes under the interbank sphere and the relationship between each end customer and their intermediary comes within the bank/customer relationship. Thus, two sides of the market are distinguished as regards the services linked to payment by cheques: a market for issuing cheques that connects the drawee banks and the payers and a market for remitting cheques that connects the beneficiaries and the remitting banks.

255. When a given transaction realised between the end customers of two banks does not include interbank aspects other than technical agreements ensuring the interoperability of the system, each of the two banks determines with its customer the balance specific to the bank-customer relationship. On the other hand, when the banks decide that a payment transaction realised between two of their end customers will generate interbank effects, like the payment of a fee by the remitting bank to the drawee bank, such an agreement is liable to influence their costs and, consequently, the policy of pricing the services that they render to their customers.

256. The interbank sphere and the bank/customer sphere are therefore two distinct but interdependent spheres, since interbank agreements are liable to produce effects outside the interbank sphere and to affect the formation of prices in the bank/customer relationship.

257. The Commission thus had the opportunity to examine the legality of several types of interbank fees as regards the rules of competition law (see, for example, the decisions of 30 March 2002, Visa, and 19 December 2007, MasterCard, op. cit., or the decisions of 17 October 2007, Groupement des Cartes Bancaires 'CB', case COMP/D1/38606 and 8 September 1999, GSA, case IV/34.010).

258. Likewise, the Court of First Instance of the European Communities had to study interbank prices within the framework of the 'Club Lombard' case, without the application of competition law being questioned (judgment of 14 December 2006, Raiffeisen Zentralbank Österreich and others v. Commission, T-259/02 to T-264/02 and T-271/02, ECR II-5169, point 176).

259. In domestic law, the Conseil de la concurrence examined, in its decision No. 88-D-37 of 11 October 1988 on Groupement des Cartes Bancaires 'CB', the compliance with competition law of interbank fees, called interchange fees, applied by the merchants' banks to the cardholders' banks.

260. Consequently, contrary to what the parties maintain, the nine interbank fees at issue clearly come within the scope of article L 420-1 of the Commercial Code and article 81 EC (now article 101 of the Treaty on the Functioning of the European Union). They therefore come within the scope of competence of the Autorité de la concurrence, as defined in I of article L 462-5 of the same code.

2. ON THE APPLICABILITY OF EU LAW

261. The *Banque de France*, LCL and Crédit Agricole maintain that article 81 EC is inapplicable in the case in point. According to CE Participations, the CEIC alone is excluded from the scope of this article, unlike fees for related services.

262. Articles 81 and 82 EC (now articles 101 and 102 of the Treaty on the Functioning of the European Union), in the version applicable when the practices were committed, apply to the horizontal and vertical agreements and the abusive practices of undertakings liable to affect trade between Member States. Taking as its basis the Commission's Treaty and the Guidelines on the notion of affect on trade appearing in articles 81 and 82 of the Treaty (OJ 2004 C 101, p. 81), the Autorité de la concurrence considers that three elements must be demonstrated to establish that practices are liable to have appreciably affected trade between Member States: the existence of exchanges between Member States related to products or services that are the subject of the practice, the existence of practices liable to affect these exchange, and the sensitive nature of the possible effects (see decision of the Conseil de la concurrence No. 08-D-30 of 4 December 2008 on practices implemented by the oil companies Shell, Esso SAF, Chevron Global Aviation, Total Outre Mer and Total Réunion, confirmed by the judgment of the Paris Court of Appeal of 24 November 2009).

a) On the existence of exchanges between Member States

263. The *Banque de France* asserts that a cheque is not a cross-border means of payment.

264. The Commission's Guidelines stipulate, however, that '*the notion of "trade" is not limited to traditional cross-border exchanges of products and services, but has a wider scope that covers any international economic activity, including establishment*' (point 19). Thus '*trade between Member States may also be affected in cases where the relevant market is national or subnational*' (point 22).

265. In this respect, the present matter must be assessed taking account of the deregulation of banking services, brought about in particular by the Second Council Directive 89/646/EEC, of 15 December 1989, on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 386, p. 1), which sets out the principle of a single EU patent. Granted by a Member State to a credit institution, this patent enables it to carry out all its basic banking activities in the entire Community, either by creating secondary institutions or by supplying its services directly from the country where it is established. The home Member State is responsible for the overall control of the banking institution, and the host Member State supervises the branches established on its territory.

266. A recent Senate report states that: '*as regards banking offices of foreign origin, France is among the European countries most open to the presence, on its territory, of institutions under foreign control*' (report of December 2009, '*La régulation bancaire à l'épreuve de la crise financière*', ('Banking regulation tested by the financial crisis')). Furthermore, it follows from the above findings (point 24) that cheques represented 37% of payments made in France in 2000 and 26% in 2006. It is thus essential for a foreign bank wishing to tackle the entire French market, beyond niche customers, to provide its customers with cheques and a cheque remittance service.

267. The conditions, particularly concerning costs, to which cheque remittance is subject throughout the national territory are therefore liable to influence the concrete implementation of the freedom of establishment and the free provision of banking services,

thereby making it possible to characterise the existence of exchanges between Member States.

b) On the existence of practices liable to appreciably affect exchanges between Member States

268. The parties assert, on the one hand, that the cost price of the cheque for remitting banks, liable to be influenced by the interbank fees in dispute, does not constitute a barrier to entering the national market. The sole barrier to entering the retail bank's market is, they argue, the formation of a network of local branches essential for local relationships with customers. They assert, on the other hand, that the increase in the cost price of the cheque has an effect on the cheque remittance market and not on the issuing market.

269. It follows from EU case law that for an agreement between undertakings to be liable to affect trade between Member States, it '*must be possible to envisage with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States*' (see the judgment of 11 July 1985, Remia and others v. Commission, 42/84, ECR 2545, point 22). In this respect, the European Court of Justice has held that '*a concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about*' (see, for example, the judgment of 19 February 2002, Wouters and Others, C-309/99, ECR I-1577, point 95). The Court of First Instance of the European Communities, in its judgment Raiffeisen Zentralbank Österreich v. Commission, op. cit., deduced that it follows from this case law '*that there is, at least, a strong presumption that a restrictive practice of competition applied throughout the territory of a Member State is liable to contribute to a compartmentalisation of the markets and to affect intra-Community trade. That presumption can only be rebutted if an analysis of the characteristics of the agreement and its economic context demonstrates the contrary*' (point 181). This analysis was confirmed by the European Court of Justice in its judgment of 24 September 2009, Erste Group Bank v. Commission (C‑125/07 P, C‑133/07 P, C‑135/07 P and C‑137/07 P, not yet published in ECR, point 39).

270. But this circumstance is not enough in itself to conclude that intra-Community trade would be appreciably affected. This is because it depends on the circumstances of each case, and particularly on the nature of the agreement or practice, on the type of products or services concerned and on the market position of the undertakings concerned (point 45 of the Guidelines).

271. In the present case, the practices at issue concern a horizontal agreement covering the whole of French territory. While, as the parties state, the difficulty for foreign banks to enter the national market of banking services for private individuals relates mainly to the absence of local branches networks, this barrier to entry is not as great for the access to the market of banking services for undertakings, which constitute the main prospective customers of foreign banks. The practices at issue are therefore clearly liable to affect the free establishment of foreign banks, since the application of interbank fees has the effect of raising the cost of processing cheques remitted to banks by their business customers. The reality of such strains is illustrated by the case of HSBC, which states that it was forced to increase the prices billed to the Carrefour undertaking in July 2003, on account of the sharp rise in the unit costs of cheque processing, even though it stipulates that this increase is

neither necessarily nor exclusively linked to the implementation of the CEIC (classification mark 5507). Thus, the agreement in dispute may have contributed to the strengthening of the barriers to entry into the banking services market in France.

272. The case in point differs from the circumstances of the matter that gave rise to the judgment of the European Court of Justice of 21 January 1999, Bagnasco and Others, (C-215/96 and C-216/96, 1999 ECR I-135), put forward by the parties. Approached for a preliminary ruling on the compatibility with EU law of uniform banking conditions related to the general guarantee needed to open a current-account credit facility and derogating from the ordinary law of guarantee in Italy, the European Court of Justice had stipulated, to conclude that intra-Community trade was not affected, that the participation of subsidiaries or branches of non-Italian financial institutions in the banking service concerned was limited, and that '*potential recourse to the [*contracts concerned*] by the main customers of foreign banks, that is to say large undertakings and foreign operators, is not of high importance and, in any event, is not decisive in the choice made by foreign banks as to whether or not to establish themselves in Italy, insofar as contracts such as the one concerned in the main proceedings are only rarely used by such customers* (points 51 and 52 of the judgment). It was similar reasoning, based on the limited interest of the product at issue for foreign banks, that had led the Commission to conclude that trade between Member States was not appreciably affected by the interbank fee imposed on acceptance giros in the Netherlands in its decision of 8 September 1999, GSA, op. cit.

273. In the 'Club Lombard' case, the Court of First Instance of the European Communities stipulated that: '*it is clear from Bagnasco and Others (...) that there may be agreements covering the entire territory of a Member State which do not have an appreciable effect on trade between Member States. Moreover, the Commission took a similar approach in the Netherlands Banks decision II (...). The complex infringement at issue in the present case differs, however, from the agreements covered by the judgment and the decision mentioned in the foregoing paragraph (...). This is because the concerted practices within the Lombard network involved not only almost all the credit institutions in Austria but also a wide range of banking products and services, in particular deposits and loans and, therefore, they were capable of changing the conditions of competition throughout that Member State'* (points 182 and 183 of the judgment in Raiffeisen Zentralbank Österreich v. Commission, op. cit., confirmed by the judgment of the European Court of Justice, Erste Group Bank v. Commission, op. cit., point 40).

274. In the case in point, the concerted practices within the CIR involved the 12 main credit institutions established in France. Because of the massive use of cheques as a means of payment in France during the period concerned, pricing conditions regulating the remittance of cheques, particularly by undertakings, being potential customers of foreign banks, were liable to become really important when these banks chose whether or not to establish themselves in France. Since the offering of a cheque service to customers requires participating to the interbank cheque clearing system, foreign banking institutions wishing to settle in France were necessarily affected by the denounced practice, namely the establishment of fees for interbank cheques processing. Under these conditions, the appreciable effect on intra-Community trade is established.

275. It follows from all the foregoing that the practices implemented may be categorised as regards article 81 EC.

C. ON THE PRACTICES

276. On an introductory note, when the practices that have been the subject of the Statement of objections are investigated in respect of the prohibition of collusion, it is not necessary to define the market precisely, as in the case of abuse of a dominant position, since the sector and markets have been sufficiently identified to make it possible to categorise the practices observed and to impute them to the economic operators that have implemented them (decision of the Conseil de la concurrence No. 05-D-27 of 15 June 2005 on practices found in the long fin tuna sector, point 28; see in this respect the judgment of the Court of First Instance of the European Communities of 8 July 2004, Mannesmannröhren-Werke AG, T-44/00, p. II-2223, point 132). In the case in point, as the sector and markets concerned, namely the cheque issuing and remittance markets, have been sufficiently identified, there is no need to pronounce on the argument presented by Crédit du Nord whereby the large remitters constitute a specific demand within the beneficiaries of cheques on account of the overall relationship between the banks and these undertakings.

1. ON THE EXISTENCE OF COLLUSION

a) On the agreement of the parties

277. For there to be an agreement within the meaning of article 81 EC and article L 420-1 of the Commercial Code, it suffices that at least two undertakings have expressed their joint desire to behave in a determined manner on the market (see in particular the judgments of the European Court of Justice of 15 July 1970, ACF Chemiefarma v. Commission, 41/69, ECR 661, point 112, and 8 July 1999, Commission v. Anic Partecipazioni, C‑49/92 P, ECR I‑4125, point 130, and the judgment of the Court of First Instance of the European Communities of 27 September 2006, GlaxoSmithKline Services v. Commission, T-168/01, ECR II-2969, point 76; see also the 1980 annual report of the *Commission de la concurrence*, p. 223).

278. In the case in point, the 12 offending banks do not contest that they have participated in meetings of the CIR during which they agreed to establish the CEIC and fees for related services and to fix their amounts. It is also common grounds that they then implemented the contentious agreement, as emerges from the report of the meeting of the CIR of 3 February 2000.

b) On the individual participation of the offending undertakings in the collusion

On the participation of the Banque de France *in the collusion*

279. The *Banque de France* alleges that it participated in the meetings of the CIR as a central bank responsible for overseeing the proper functioning and security of the payment systems. It therefore considers that it cannot be categorised as an undertaking within the meaning of article L 420(1) of the Commercial Code as regards its participation in these meetings.

280. The *Banque de France* is both an institution whose capital belongs to the State, responsible for public service missions and endowed with public authority prerogatives, notably in the means of payment sector – but it does not, as it itself acknowledges, have

regulatory authority to organise payment systems – and a bank carrying out a commercial banking activity, coming in this respect under article L 410(1) of the Commercial Code.

281. In the case in point, it should be pointed out that the *Banque de France* participated in meetings of the CIR during which the financial consequences of the switch to the EIC for banks, including itself as remitting bank, particularly of the French Treasury, were examined. Furthermore, following the example of the other 11 banks, the *Banque de France* paid the CEIC €0.043 per cheque remitted until 2007.

282. Consequently, the *Banque de France* must be categorised as an undertaking within the meaning of competition law as regards its participation in meetings of the CIR.

On the participation of Crédit du Nord in the collusion

283. Crédit du Nord takes the view that, insofar as it was present at only one meeting of the CIR, whose anti-competitive object it could not know, its participation in the collusion cannot be established.

284. In this respect, it is first of all appropriate to recall the decisional practice of the Conseil de la concurrence regarding the standard of proof of the participation of an undertaking in a horizontal collusion. The Conseil has distinguished situations in which anti-competitive collusion is agreed on during meetings within the statutory framework of a professional organisation and those in which the collusion is developed during informal meetings, most often of hidden and secret nature, in which competing undertakings participate on their own initiative (decision No. 07-D-48 of 18 December 2007 on practices implemented in the national and international removal sector, points 178 et seq., confirmed by the judgments of the Paris Court of Appeal of 25 February 2009, Transeuro Desbordes Worldwide Relocations SAS, and the *Cour de Cassation* of 7 April 2010).

285. In the first case, to which the case in point pertains, it is considered that the sole fact of having participated in a meeting held within the statutory framework of a professional organisation whose agenda would have effectively evolved towards an anti-competitive object is not enough to characterise the involvement of undertakings in the collusion, since the duly convened undertaking is not in a position to know the anti-competitive object of this meeting. Proof of involvement in the collusion then necessitates additional proof, like the distribution of information prepared at the time of the meeting, the application of concrete measures decided at the meeting or the participation in a subsequent meeting having the same anti-competitive object (same decision, point 179).

286. In the case in point, contrary to what Crédit du Nord maintains, its participation in the practices at issue does not result solely from its presence at one of the meetings of the CIR. Indeed, it appears notably that Crédit du Nord was the recipient of documents concerning the meetings in which it did not participate, that it did not oppose the decision of the other members of the CIR to institute the nine interbank fees at issue and that it implemented the contentious agreements for almost six years.

287. It follows from the foregoing that the participation of Crédit du Nord in the collusion is established.

On the participation of the non-offending undertakings in the collusion

288. LCL, Crédit Agricole and La Banque Postale criticise the investigation services for not having accused certain undertakings that participated directly in the decisions of the CIR or indirectly through a member agent of the CIR. Several hundred credit institutions had thus

allegedly been represented within the CIR and then applied the contentious agreement, whereas the Statement of objections was sent to only 12 of them.

289. La Banque Postale adds that the decision of the Case Officers to restrict the number of offending credit institutions constitutes a breach of equality, the financial penalty incurred by each of them being proportionate to the total damage to the economy and not to the damage for which they are individually responsible.

290. In this respect it should be recalled that the *Cour de Cassation* has acknowledged that the Case Officer possesses a power of assessment as regards the conduct of his investigations (judgment of 15 June 1999, Lilly France). He may notably institute proceedings only against the undertakings that took an active part in the organisation and implementation of the collusion (judgment of the Paris Court of Appeal of 17 October 1991, Salomon).

291. In the case in point, the objections were notified to undertakings which were members of the CIR and which then applied the contentious agreement. In fact, the undertakings mentioned by the parties do not fulfil this dual condition. This is because they are either professional associations that were not invited to personally apply the agreement, or undertakings that actually applied the agreement but that were not members of the CIR.

292. Furthermore, the Paris Court of Appeal has held that '*a penalised company is not entitled to criticise the decision, in that it does not penalise other undertakings, this circumstance not being held against it*' (judgment of 28 January 2009, Epsé Joué Club, definitive judgment).

293. Finally, contrary to what La Banque Postale maintains, the financial penalty imposed is not intended to redress the sole damage for which the undertaking was responsible. While the assessment of the damage to the economy proceeds from an overall appraisal of the practices, this appraisal 'constitutes only a reference to which each individualised financial penalty must be related, taking account of the situation specific to each undertaking' (same judgment).

c) On the absence of constraint

294. The parties assert, in substance, that they had acted under pressure from the public authorities and the *Banque de France*, which would allegedly exempt them from all responsibility as regards the practices at issue.

295. The public authorities, by implicitly delegating their regulatory power to the banks, strongly incited them, they argue, and even constrained them to consult each other on the principle and the pricing of interbank fees for cheque processing.

296. As for the *Banque de France*, it had allegedly exercised a power of real influence within the framework of the negotiations of the CIR: it was, they argued, behind the compromise that led to the creation of nine interbank fees in February 2002 and played a decisive role as regards the abolition of the CEIC and the reduction in fees for related services in October 2007.

297. In both EU and national law, anti-competitive behaviour is reprehensible only if it is adopted by the undertakings that have freedom of choice (see in particular the judgment of the European Court of Justice of 11 November 1997, Commission and France v. Ladbroke Racing, C‑ 359/95 P and C‑ 379/95 P, ECR I‑ 6265, point 33). The EU judge has stipulated that, in the absence of a constraining legal provision requiring anti-competitive conduct and leaving undertakings no room for independent conduct, the absence of autonomy of undertakings may be concluded '*only if it appears on the basis of objective,*

relevant and consistent evidence that this conduct was unilaterally imposed upon them by the national authorities through the exertion of inexorable pressures, such as, for example, the threat to adopt State measures likely to cause them to sustain substantial losses' (judgment of the Court of First Instance of the European Communities of 18 September 1996, Asia Motor France and others v. Commission, T-387/94, ECR II-961, point 65).

298. In the judgment of 13 December 2006, FNCBV and others v. Commission (T-217/03 and T-245/03, ECR II-4987, point 92), rendered in the 'Beef meat' case, the Court of First Instance of the European Communities stated, as regards the role played by the French Minister of Agriculture in the conclusion of the contentious agreement, that, according to consistent case law, the fact that the behaviour of the undertakings was known, authorised or even encouraged by the national authorities had no effect on the applicability of article 81 EC.

299. In accordance with EU case law, the Autorité de la concurrence considers that the fact that anti-competitive practices had been approved and encouraged by the national authorities is not sufficient to release the offending undertakings from their responsibility. Public intervention may constitute such a case of exemption only if the legal framework that it fixes is constraining (see in this respect decision of the Conseil de la concurrence No. 05-D-10 of 15 March 2005 on practices implemented in the cauliflower market in Brittany).

300. As the *Commission bancaire* stated in its opinion of 22 May 2008, the implementation of the EIC constituted '*a major political challenge, actively supported by all the public authorities within the framework of the euro changeover*'. While, in the case in point, the incitement of the public authorities was real, this fact does not make it possible, however, to establish that the fixing of the nine interbank fees was imposed by the public authorities at the time of the switch to the EIC.

301. Likewise, it does not emerge from the reports of the meetings of the CIR that the *Banque de France* had exerted any pressure on the other banks regarding the establishment of said fees, notably of the CEIC. On the contrary, the *Banque de France* was clearly opposed to the creation of such a fee, as it stated at the time of the meeting of 1 July 1999 : 'the fixed fee is not desirable' (see point - above – Findings). While the *Banque de France* actually exercised an intermediation role within the framework of the negotiations of the CIR, by proposing to reduce the level of the CEIC or to limit it in time, it was solely a question for it of finding a compromise in order to enable the switch to the EIC.

302. Finally, as has been recalled earlier, the *Banque de France* does not have any regulatory power as regards the organisation of payment systems.

303. Whatever the case, supposing even that the banks had suffered pressure on the part of the public authorities and the *Banque de France*, such pressure should not be considered to be categorised as irresistible within the meaning of the case law described above. At the most, this circumstance could be examined in respect of mitigating facts within the framework of the appraisal of the financial penalty applied to the undertakings.

304. Hence, this defence must therefore be set aside.

2. ON THE QUESTION OF ANCILLARY RESTRICTIONS

305. The parties assert that the CEIC and the fees for related services constitute ancillary restrictions to the switch to the EIC. They take the view that the dematerialisation of cheque exchanges, a general interest project, does not in itself comprise any competitive

restriction and that the interbank fees are directly linked to it since they were created in order to offset the financial charges incurred by the banks on account of the switch to this system.

306. As regards the CEIC, they maintain that it was objectively necessary for the switch to the EIC, since no agreement would have been concluded in the absence of this fee. In this respect, Banques Populaires state that the CEIC was not created with the aim of ensuring greater profitability of the switch to the EIC for the banks, but for the sole purpose of obtaining the agreement of all the parties to the negotiation. The institution stipulates that, in the absence of establishing the CEIC, the only alternative open to the banks was to keep the interbank payment period that applied before the switch to the EIC. The Banques Populaires asserts that the role played by the *Banque de France*, the regulatory authority of the banking sector, in adopting this compromise demonstrated its essential nature. Furthermore, the *Banque de France* stresses that the abolition of the CEIC in 2007 is not liable to demonstrate the absence of its objective necessity, since any ancillary restriction must be proportionate and thus limited in its duration. In addition, Crédit Mutuel and CIC take the view that the proportionality of the CEIC is established since its level is lower than what would have been necessary to offset the losses of predominantly drawee banks, like Crédit Agricole.

307. As regards fees for related services, the parties assert that they were objectively necessary to enable the conclusion of the agreement on the switch to the EIC, since this entailed a delinking between the banks on which the responsibility of a service rests and the bank that actually incurs its cost.

a) Applicable law

308. In its judgment M6 and others v. Commission of 18 September 2001, the Court of First Instance of the European Communities clarified the scope of the notion of ancillary restriction in competition law, which '*covers any restriction which is directly related and necessary to the implementation of a main operation*' (T-112/99, ECR II-2459, points 104 et seq.). Ancillary restrictions are not the subject of an examination distinct from that of the main operation as regards competition law. Thus, while the main operation does not restrict competition, ancillary restrictions to this agreement are compatible with article 81(1) EC.

309. As regards the condition concerning the direct link with the main operation, the court states that it corresponds to '*any restriction which is subordinate to the implementation of that operation and which has an evident link with it*' (same judgment, point 105). As regards the condition concerning the necessary nature of a restriction, the EU judge states that it is necessary '*to establish, first, whether the restriction is objectively necessary to implement the main operation and, second, whether it is proportionate to it*' (point 106). In this respect, the court adds that '*examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation, but indeed of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation turns out to be difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation*' (point 109).

310. Finally, the court considers that '[w]*here a restriction is objectively necessary to implement a main operation, there is still a need to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement said operation. If the duration or the scope of the restriction exceed what is necessary in order to implement the operation, it must be assessed separately under article 85(3) of the Treaty*' (same judgment, point 113; see also on this point the judgment of the European Court of Justice of 11 July 1985, Remia and others v. Commission, 42/84, ECR 2545, point 20, and the judgment of the Court of First Instance of the European Communities of 2 July 1992, Dansk Pelsdyravlerforening v. Commission, T-61/89, ECR II-1931, point 78).

311. Furthermore, the EU judge added that it is only within the precise framework of article 81(3) EC, which provides for the possibility of exempting restrictive competition agreements when they answer a certain number of conditions, that a balancing of the pro- and anti-competitive aspects of any restriction can take place and states that article 81(3) EC '*would lose much of its effectiveness if such an examination had already to be carried out under article 85(1)* [now article 81(1)] *of the Treaty*' (judgment of the Court of First Instance of the European Communities of 23 October 2003, Van den Bergh Foods, T-65/98, ECR II-2641, point 107).

312. At the stage of the application of article 81(1) EC, it is the responsibility of the offending undertakings to demonstrate that any restriction is directly linked and objectively necessary to the implementation of a main operation (judgment in M6 and others v. Commission, op. cit., point 122).

b) Appraisal in the case in point

313. While it is undeniable that the CEIC was directly linked to the implementation of the EIC, the dematerialised system for exchanging cheques, itself neutral as regards competition law, the parties do not demonstrate that this fee was objectively necessary for the adoption of the new system, within the meaning of the aforesaid European case law.

314. Indeed, the main operation that it is necessary to appraise in the case in point in order to examine the ancillary nature of the CEIC is the dematerialisation of interbank cheque clearing. As it happens, the EIC could be implemented without acceleration of interbank exchanges and hence, without modification of treasury balance for banks, since the interbank payment date was left to the banks' to freely decide on. The gap between the date of cheque exchange and the interbank payment date was determined jointly by the banks within the framework of the agreement of 3 February 2000, when the exchange time limit was chosen. The adopted solution, of an exchange time limit at 6pm and a lead time for interbank payment of D+1, was not imposed technically by the dematerialisation of exchanges.

315. The select working group of the CIR thus stipulates that the CEIC was proposed with the objective of '*offsetting the interbank treasury modifications that might result from the choice of the exchange time limit and the gap between exchange and payment*' (summary of the report of 8 June 1999, classification mark 1374). It follows from the various working documents of the CIR that, as stated by Banques Populaires, the banks envisaged an extended lead time for interbank payment as an alternative solution to establishing the CEIC (see point -).

316. While the parties maintain that a lead time for interbank payment of D+2 was hardly acceptable, particularly with regards to their customers insofar as, unlike the chosen solution providing for the creation of the CEIC, it would have deprived the users of the

cheque system of the acceleration technically enabled by the dematerialisation of exchanges, such an argument must be examined with regard to the provisions of article 81(3) EC. This is because, in accordance with the aforesaid EU case law, it is within the framework of these provisions that the balancing of efficiency gains must be made, such as, in the case in point, the acceleration of the interbank exchanges and of the restrictive effects of a practice to determine whether such acceleration may benefit from an exemption.

317. Under these conditions, the CEIC was not objectively necessary for the implementation of the main operation, which was the dematerialisation of interbank cheque clearing. It may not therefore be considered as an ancillary restriction to this operation and must be the subject of a separate analysis within the framework of article 81(3) EC.

318. Likewise, as regards fees for related services, the parties do not demonstrate that these fees were clearly necessary for the adoption of the new system, within the meaning of the aforesaid EU case law.

319. In its GSA decision of 21 October 1999, op. cit., the European Commission studied the compliance of multilateral interchange fees intended to remunerate the services rendered by the drawee bank for the payee bank within the framework of the Dutch acceptance giro system as regards the provisions of 81(1) EC: '*In practice, it is also necessary for the banks involved in the transaction to reach an agreement on the levying of charges: whether to charge or not, and, in the affirmative, how much. In view of the particular characteristics of a payment system such as the acceptance giro system, it goes without saying that such negotiations have to be conducted in advance before the payment system is actually used by the banks to process their customers*' *payment transactions. (...) If the banks decide to introduce an interbank commission, agreement on the amount can in principle be reached either bilaterally or multilaterally. In the present case the banks have decided to impose a uniform multilateral charge; this charge has been a maximum since 1992. It is also possible that a number of banks might take the lead by agreeing bilateral charges, and that other banks might then seek to associate themselves with one of those banks, with the result that the bilateral charges also applied to them. The banks might also agree multilaterally on a formula for calculating interbank commission with varying parameters between banks. (...) Practice shows that bilateral negotiations on interbank commission for the electronic processing of acceptance giros are technically possible. Before the GSA agreement entered into force, bilateral agreements had been concluded between some major banks on payment of these costs*' (points 47 to 49).

320. A similar analysis may be followed in the case in point as regards the fees for related services adopted by the banks. Remuneration of the services rendered by the remitting banks to the drawee banks within the framework of a dematerialised clearing system, comprising physical 'blocking' of cheques at the level of the remitting bank followed by the exchange of cheque images, could in principle be the subject of bilateral negotiations. Indeed, nothing indicates that bilateral negotiations on interbank fees for the processing of transactions related to the EIC would be technically impossible. Furthermore, while the parties assert that the principle of bilateral negotiations came up against the high number of players involved, and that such negotiations would therefore have been reflected in high transaction costs, such an argument must be examined with regard to the provisions of article 81(3) EC. Indeed, the balancing of the pro-competitive effects – such as the saving of transaction costs – and of the anti-competitive effects of a restrictive practice must be achieved within the framework of the provisions of article 81(3) to determine whether such a practice may benefit from an exemption.

321. The banks were also able to agree on the modalities for calculating each fee based on parameters varying from one bank to the other. While the parties assert that such an agreement was impossible without the exchange of sensitive information between banks, in disregard of the rules of competition law, this argument must be set aside since the creation of a theoretical calculation formula did not necessitate the exchange of individual data between the banks.

322. Under these conditions, fees for related services were objectively necessary for the implementation of the main operation, which was the dematerialisation of interbank cheque clearing. They may not therefore be considered as ancillary restrictions to this operation and must be the subject of a separate analysis within the framework of article 81(3) EC.

3. ON THE OBJECT OF THE PRACTICES

a) The parties' arguments

Regarding the CEIC

323. First of all, the parties recall that it follows from the decisional practice of the national and EU competition authorities that multilateral interbank fees are not necessarily and automatically categorised as restrictions of competition by object. Banques Populaires, Société Générale, Crédit Agricole and LCL thus consider that the CEIC does not have, by nature, an anti-competitive object since it does not constitute an agreement on prices, the simple fact that it can have the effect of modifying the banks' competitive situation being insufficient to characterise its anti-competitive nature. Crédit du Nord stresses that the anti-competitive object of an interbank fee was never formally recognised by the EU authorities.

324. The *Banque de France* considers that, given the decision-making practice, it is not possible to consider that the CEIC has an anti-competitive object by nature, unless it can be shown that it presents a particular dangerousness.

325. The parties then assert that the CEIC is a purely interbank fee, not intended to impact the prices billed to remitting customers. Banques Populaires and Crédit du Nord stress in this respect that the creation of the CEIC did not have any automatic effect on fixing the prices billed to remitting customers, each bank continuing to autonomously determine the overall level of profitability desired in their relationships with customers.

326. The parties thus maintain that they did not pursue any anti-competitive objective and stipulate in this respect that the aim of the CEIC was not to remunerate a service rendered by the drawee banks to the remitting banks, but to offset the sudden loss of the main resources of predominantly cheque issuing banks by covering the costs of making cheques available, whereas the EIC resulted in the transfer of the float in favour of predominantly remitting banks. La Banque Postale thus considers that the banks' competitive situation was not modified by the CEIC, since instituting this fee offset a transfer of revenues from predominantly drawee banks in favour of predominantly remitting banks. Crédit Agricole and LCL stress that this offsetting was to be partial and temporary.

327. Some parties, and particularly La Banque Postale, more specifically criticise the Case Officers for not having taken account of the fact that cheques are free of charge, thus incurring a particularly large financial charge for banks with modest customers, or of the partial offsetting that these banks legitimately derived from the availability of the sums

appearing in current deposit accounts. The CEIC therefore made it possible to ensure that the switch to the EIC did not have the effect of increasing the burden of having free of charge cheques weighing on banks with modest customers.

328. The parties also assert that the object of an agreement must be analysed in respect of the economic and legal context in which it operates. They take the view that, in the case in point, the particular context of the banking sector and the constraints weighing on its members when they have to put in place and manage payment systems, should have been taken into account. The *Banque de France* stresses in this respect that any modification of the cheque clearing system required the agreement of all the banks, an agreement that necessarily had to come within a multilateral framework, the establishing of bilateral relationships between hundreds of banks operating in France being materially unmanageable and difficult to reconcile with the very notion of a payment system.

329. Finally, the parties stress that the objective also pursued by the establishment of the CEIC was not to regulate use of the various means of payment, but only to prevent the new system of cheque processing from favouring a means of payment regarded as more expensive and less secure in relation to other more modern means of payment such as the *titre interbancaire de paiement* (TIP, interbank payment orders), transfer or bank card. They therefore consider that such an objective cannot be categorised as anti-competitive.

Regarding the fees for related services

330. The parties assert that the fees for related services were created with the sole aim of remunerating the services rendered by remitting banks to drawee banks on account of the implementation of the EIC. They take the view that the fees for related services do not by nature have an anti-competitive object, since no element makes it possible to establish that they were intended to be passed on to customers.

331. Furthermore, the parties maintain that only the conclusion of a multilateral agreement was conceivable, the establishing of bilateral relationships between the hundreds of banks operating in France being in practice unmanageable.

b) Applicable law

332. Under the terms of article L 420-1 of the Commercial Code, when they have the object or may have the effect of preventing, restricting or distorting competition in a market, explicit collusions are prohibited, particularly when they are intended to '*prevent price fixing by the market forces, by artificially encouraging the increase or reduction of such prices*'. Pursuant to article 81(1) EC, agreements between undertakings which may affect trade between Member States and which have as object or effect the prevention, restriction or distortion of competition within the common market are incompatible with the common market and prohibited, notably those which '*directly or indirectly fix purchase or selling prices or any other trading conditions*'.

Anti-competitive practices by object

333. It follows from the very terms of article L 420-1 of the Commercial Code and article 81 EC that the anti-competitive object and effect of a practice are alternative conditions for assessing whether it may be penalised in accordance with these provisions. It is thus not necessary to examine the effects of an agreement where its anti-competitive object is established (see the judgments of the European Court of Justice of 4 June 2009, T-Mobile Netherlands and Others, C-8/08, points 28 and 30, and 6 October 2009, GlaxoSmithKline

Services v. Commission, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, not yet published in ECR, hereafter the 'GlaxoSmithKline judgment', point 55; see also the judgment of the Paris Court of Appeal of 15 June 2010, Veolia Transports).

334. Furthermore, under the terms of established EU case law, to assess the anti-competitive nature of an agreement, it is necessary to examine the scope of its stipulations, the objectives that it aims to achieve and the economic and legal context in which it operates (see, for example, the GlaxoSmithKline judgment, op. cit., point 58, and the judgment of the European Court of Justice of 20 November 2008, Beef Industry Development Society and Barry Brothers, C-209/07, hereinafter the 'BIDS judgment', points 16 and 21). The subjective intentions of the parties may be taken into account additionally, but they should not be decisive (see the judgments of the European Court of Justice, IAZ International Belgium and others v. Commission, 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, ECR 3,369, points 23 to 25; General Motors v. Commission, C-551/03 P, ECR I-3173, points 77 and 78, and T-Mobile, op. cit., point 27).

Decisional practice as regards multilateral interbank fees (hereinafter MIFs)

335. In its communication related to the application of the European Community's competition rules to cross-border transfer systems (OJEC 1995, C 251, p. 3), the Commission addresses the question of pricing competition and more specifically that of MIFs. It thus considers '*that an agreement on a bilateral interbank fee will normally fall outside the scope of article 85(1)*' [now article 81(1) EC]. On the other hand, it takes the view that '*a multilateral interchange fee agreement is a restriction of competition falling under article 85(1) because it substantially restricts the freedom of banks individually to decide their own pricing policies.*' Moreover, the Commission stresses that this restriction is also likely distort the behaviour of banks with respect to their customers (point 40).

336. It is in respect of this criterion of the restriction of the banks' freedom to set charges that MIFs of varying nature were described as restrictions of competition by the European Commission and the Conseil de la concurrence within the framework of their decisional practice.

337. This concerns, first of all, interbank fees aiming to spread the joint costs of running a payment system.

338. In its decision No. 88-D-37 of 15 October 1988, GIE CB, the Conseil de la concurrence thus analysed the interbank fee, fixed by the 'CB' *Groupement d'intérêt économique* (GIE, economic interest grouping) of bank cards formed in 1984 between French institutions issuing bank cards, paid by the merchants' banks to the cardholders' banks at the time of each payment made by bank card. This fee was intended to remunerate the risk related to the payment guarantee ensured by the cardholder's bank and to cover the cost of collective security measures and the charges inherent in processing the transaction.

339. The Conseil took the view that 'the *determination, by the grouping, of the interchange fee, which was supposed to cover in particular the cost of the payment guarantee provided by the holders' banks restricts the negotiating ability of members of the grouping with regards to their business customers; that indeed, the merchants' banks are encouraged to apply, with regards to their customers, commission rates determined on the basis of the amounts that they will have to pay to the holders' banks, amounts themselves determined by the grouping and applicable uniformly to all these banks regardless of the particular situation of each of them*'.

340. This interchange fee was therefore regarded as being likely to distort free competition. While the decision does not stipulate it, the reasoning followed indicates that the practice was described as anti-competitive on account of its object, since the effects of the interbank fee were not analysed.

341. In its decision of 8 September 1999, GSA, op. cit., the European Commission examined a fee paid by the beneficiary's bank (payee bank) to the customer's bank (drawee bank), to partially cover the expenses associated with the processing of giro forms by the drawee bank.

342. The Commission made use of the principles set out in its 1995 communication by considering that the object of the MIFs at issue was to restrict competition within the meaning of article 81(1) EC, since it restricted the freedom of the banks party to the agreement to fix the level of a possible fee for the processing of acceptance giros within the framework of bilateral negotiations. The Commission stressed that the practice showed that bilateral negotiations on interbank fees for the electronic processing of acceptance giros were technically possible and had been implemented in the past. Furthermore, it considered that the MIFs had a restrictive effect on competition, since it served in fact as a 'floor' for establishing prices applicable to customers.

343. It then moves on to MIFs aiming to optimise the running of different payment card systems.

344. In its decision of 24 July 2002, Visa, op. cit., the Commission thus examined a fee paid in the absence of any bilateral agreement by the acquiring bank to the issuing bank for each transaction by Visa payment card, whose objective was to optimise the running of the Visa payment card system by correcting the imbalance between the issuing and acquiring costs, and the revenues procured respectively by the cardholders and the merchants.

345. The Commission considered that the agreement on the MIFs was not *'a restriction of competition by object, since a MIF agreement in a four-party payment system such as that of Visa has as its objective to increase the stability and efficiency of operation of that system (...), and indirectly to strengthen competition between payment systems by thus allowing four-party systems to compete more effectively with three-party systems*' (point 69). On the other hand, the Commission retained the existence of two types of restriction by effect: a restriction of competition between payment systems (Visa, MasterCard, etc.) and a restriction of competition exercised among issuing and acquiring banks.

346. In its decision of 19 December 2007, MasterCard, op. cit., the Commission failed to settle the question of whether the multilateral interchange fees at issue were restrictive of competition by object, since it was clearly established that they had anti-competitive effects. However, the Commission has not ruled out the existence of a restriction by object, since MIFs resulted in fixing prices: '*The fact that MIFs generally determine a bottom-price that merchants must pay for the acceptance of payment cards, is (...) an indication that MasterCard's MIFs probably have, by their nature, the ability to fix prices*' (point 405). The existence of a bottom-price was not contested in the case in point by MasterCard, who declared that MIFs '*constituted a means of "correcting" prices, which would otherwise be fixed on each side of its system by 'independent competitive relationships between issuers and between acquirers*' (point 406).

347. Finally, with the prospect of the implementation of the Single Euro Payments Area (SEPA), the Commission analysed multilateral interchange fees in withdrawal markets. It stated that they were similar to the fees deducted in payment card markets such as the MIFs that gave rise to the MasterCard decision. Without prejudice to any future assessment

case by case of the multilateral interchange fees applied within the framework of the SEPA withdrawal, the Commission stated: '*As MIFs typically fix a floor under the prices charged by banks to companies, they constitute a restriction of competition by object as, by their very nature, they are likely to restrict competition. They can also constitute a restriction by effect'* (point 12). It also stressed that: *'in terms of evaluation within the framework of competition law, the relevant issue is then whether or not a particular multilateral interchange fee can qualify for an exemption according to article 81(3) EC*' (point 14).

348. It follows from the foregoing that, on the one hand, national and EU competition authorities have never yet given a verdict on a multilateral interbank fee which would allegedly be 'offsetting' in nature (as the parties maintain with respect of the CEIC) or on fees intended to remunerate a service rendered by a category of banks to another, even though such fees can, as regards some of their characteristics, be likened to fees aiming to apportion the costs of running payment systems, and, on the other hand, that, while the Commission did not base itself specifically on the anti-competitive object of a multilateral interbank fee to declare it contrary to the stipulations of the EC Treaty, the reasoning it followed in some of the aforesaid cases is in no case exclusive of such a description.

c) The economic and legal context

349. As regards the necessity of taking into account the economic and legal context within which the agreements come, the Advocate-General Mrs Trstenjak stated, in her opinion in the aforesaid BIDS judgment: '*This requirement must be taken seriously. However, it is not to be seen as a gateway for any factor which suggests that an agreement is compatible with the common market. Rather, it follows from the scheme of article 81 EC that account is to be taken under article 81(1) EC only of the elements of the legal and economic context which could cast doubt on the existence of a restriction of competition*' (point 50). The European Court of Justice thus examines whether the legal or economic context is likely to exclude any possibility of efficient competition (see in this respect the judgments of 8 July 1999, Montecatini v. Commission, C-235/92 P, point 127, Van Landewyck and others v. Commission, 209/78 to 215/78 et 218/78, ECR 3125, point 153, and Stichting Sigarettenindustrie and others v. Commission, 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82, ECR 3831, points 24 to 29).

The necessary coordination of banks for organising payment systems

350. A payment system necessitates a certain form of coordination between its members. Indeed, creditors and debtors must be able to use a payment system regardless of the bank with which they have an account, which means that any bank must accept payment orders given by customers of any other bank. Thus, the conclusion of certain agreements by all the banks may prove indispensable to the establishment and running of a payment system. They particularly concern technical agreements aiming to ensure the interoperability of the system by defining standardised operations common to all the participating banks as well as agreements on the procedural aspects of processing the operations.

351. Such agreements are most often concluded within a multilateral framework, as the European Commission pointed out in its aforesaid GSA decision: '*Technically speaking, a uniform acceptance giro system, i.e. a payment system which payees and drawees can use irrespective of the bank with which they have an account, can exist only on a specific multilateral basis. Accordingly, joint agreements on technical specifications and procedural aspects of transaction processing are necessary in order to ensure that the system functions properly*' (point 46).

352. While they restrict the freedom of each of the players taken individually, these agreements in principle do not come within article 81(1) EC and article L 420-1 of the Commercial Code (see in this respect point 32 of the Commission's aforesaid 1995 communication on cross-border payment systems). Such is not the case, on the other hand, for agreements on multilateral interbank fees, as the Commission has mentioned on several occasions (see in particular point 40 of the 1995 communication and point 48 of the GSA decision, op. cit.). Indeed, the universality of a means of payment does not mean that all the banks conclude pricing agreements: each bank may in fact remain free to individually define its pricing policy for the side of the market in which it operates. As regards the cheque sector, it ran until 2002 following a pure pattern of interoperability, with no direct pricing relations between banks.

Provision of cheques free of charge

353. Article L 131-71 of the Monetary and Financial Code provides that '*[w]hen they are issued, cheques are made available to the accountholder free of charge*'. Providing this service free of charge to issuers represents a cost for issuing banks particularly in terms of printing, pre-delivery controls cheque delivery and pre-payment controls. However, as article L 312-2 of the Monetary and Financial Code authorises banks to invest the deposits on current accounts made by their customers that could not be remunerated until 2004, the investment of these sums enables the banks to offset, at least partially, the costs resulting from providing cheques free of charge.

354. Moreover, it is possible that cheque issuing be financed, indirectly, thanks to the remuneration paid when cheques are remitted (billing per unit or depending on the value of the cheques remitted, float and/or fees on debits/credits paid by the undertakings). Therefore, via the mutualisation of the costs of cheques and, more widely, via the overall banking package whose financing relies partly on a system of cross-subsidies, the view may be taken that in practice, customers pay for the cheques they are given and for their use, even though not in the form of a unit payment.

355. Furthermore, it should be stated that the switch to the EIC has also made it possible to reduce certain administrative charges weighing on drawee banks, with the abolition, for most cheques exchanged, of the costs of transporting cheques drawn on them from the clearing house, and with the simplification of the processing by the issuing bank (end of the cheque's proofreading by the drawee bank, for example). These administrative savings therefore offset, at least partly, the treasury losses suffered by drawee banks as a result from the acceleration of exchanges of interbank cheques.

356. Finally, it should be stated issuing cheques free of charge and the resulting financial cost for drawee banks (particularly the banks of modest customers) were not mentioned as such in the reports of the CIR to justify the establishment of the CEIC. Indeed, it emerges from these documents that the discussions of the CIR members focused on the cost of cheque processing and not on their provision free of charge to current account holders.

357. In conclusion, banks were in no way compelled, because cheques were provided free of charge, to implement interbank fees to remunerate the services associated with issuing cheques.

d) The CEIC

358. The CEIC is a MIF of an amount of €0.043 paid by the remitting bank to the drawee bank each time an interbank cheque is remitted.

359. Although the report of the meeting of the CIR of 3 February 2000 stated that the amount of the CEIC was a maximum amount and that lower amounts could be applied,[18] it does not however emerge from the evidence in the case files that banks used this possibility of billing the CEIC at a lower amount.[19] As the maximum amount determined by the CIR has thus been systematically applied, the CEIC must be regarded as a fixed (or uniform) interbank fee.[20]

360. The CEIC was created, according to the parties to the agreement, to offset the alleged treasury losses suffered by the predominantly cheque-issuing banks on account of the acceleration of the interbank payment of cheques resulting from the switch to the EIC. As the parties themselves stress, the CEIC does not therefore constitute a remuneration that the remitting banks pay to the drawee banks in consideration of a service rendered, but a transfer of revenues from one bank to another in order to share the financial consequences of the acceleration of the exchange of cheques permitted by the dematerialisation of the system.

361. As regards, first of all, the parties' argument according to which they did not pursue any anti-competitive objective, it should be stated that, supposing even that it was established that the parties had acted without intending to restrict competition, but with the aim of remedying the effects of the switch to the EIC on the treasury of the predominantly cheque-issuing banks, such considerations are not relevant for the purposes of the application of article 81 EC and article L 420-1 of the Commercial Code. Indeed, the notion of anti-competitive agreement by object applies independently of any possibility that the parties to the agreement did not have the intention, or even the awareness, of breaching the rules of competition. In fact, the proof of an intention to restrict competition is not a necessary element to determine whether an agreement has such a restriction as its object (judgment of the European Court of Justice of 1 February 1978, Miller International Schallplatten v. Commission, 19/77, ECR 131, point 18; judgment of the Court of First Instance of the European Communities of 9 July 2009, Peugeot and Peugeot Nederland v. Commission, T-450/05, ECR II-2533, point 55 and aforesaid case law, point 334).

362. It should also be recalled that an agreement may be regarded as having a restrictive object even if it does not have as its sole objective the restriction of competition, but also pursues other legitimate objectives (BIDS judgment, op. cit., point 21, and judgment of the European Court of Justice of 6 April 2006, General Motors v. Commission, op. cit., point 64). In the BIDS judgment, the European Court of Justice thus held that objectives of rationalisation of the beef industry and of remedying the effect of the sectional crisis pursued by an agreement on the reduction of the capacities of meat processing undertakings were not relevant when assessing this agreement's compliance with the provisions of article 81(1) EC. The European Court of Justice stipulated that such

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[18] Under the terms of annex 2 of the report of the meeting of the CIR of 3 February 2000, *'[a]n institution may bill lower amounts than its associates'*.

[19] The SIT deducts the nine interbank fees owed by the banks at the level fixed by the CIR and the banks may bill lower amounts only provided that bilateral agreements are reached among them and that the excess amount collected by the SIT is reimbursed a posteriori.

[20] See in this respect the GSA decision, op. cit., in which the European Commission considered that *'the change in the interbank commission from a fixed fee to a maximum fee has not had any practical impact'*, since no bilateral agreement fixing a lower interbank fee has been concluded by the participating banks.

objectives could, if the need arises, be taken into consideration only for the purpose of obtaining an exemption in accordance with the provisions of article 81(3) EC.

363. Consequently, since the agreement at issue comprised an restrictive object of competition as is demonstrated here below, the arguments aiming to demonstrate that it pursued a pro-competitive object will not be examined as regards to article 81(1) EC and article L 420-1 of the Commercial Code, but in light of article 81(3) EC and article L 420-4 of the Commercial Code.

364. As regards, then, the argument advanced by the *Banque de France*, according to which it cannot be held that the CEIC has, by its nature, an anti-competitive object, except to demonstrate that it has a particular dangerousness, it should be recalled that examination of the anti-competitive character of an agreement is carried out in a concrete manner, taking account of the economic and legal context in which it comes (see point 334 here above). To constitute a violation by object, the practice at issue must make it possible, on the basis of all the de jure and de facto objective elements, to envisage with a sufficient degree of probability that it could have a direct or indirect, actual or potential, influence on competition (see decision of the Conseil de la concurrence No. 09-D-10 of 27 February 2009 on practices implemented in the sector of maritime transport between Corsica and the continent, point 172). Thus, to be categorised as a restriction of competition by object, it suffices for an agreement to be likely to have negative effects on competition. Such is the case with an agreement that has the evident consequence of fixing prices (MasterCard decision, op. cit., point 403). The question of knowing whether and to what extent such effects can really occur can be taken into account only when determining the amount of the fine (see, by analogy, the judgment in T-Mobile Netherlands and Others, op. cit., point 31, and decision of the Autorité de la concurrence No. 09-D-31 of 30 September 2009 on practices implemented in the sector of managing and marketing sports rights of the *Fédération française de football*, point 335).

365. Having recalled these points, it is necessary to determine whether the CEIC comprises an anti-competitive object. For this purpose, the competitive analysis will first of all relate to the cheque remittance market, then to the cheque issuing market. Finally, the objective of regulating the use of the various means of payment as it appears in the discussions preceding the agreement will be examined.

Restrictions of competition in the cheque remittance market

The artificial increase in the cost price of processing cheque deposits for remitting banks

366. In the cheque remittance market, the creation of the CEIC introduced an element of uniform cost for remitting banks that did not exist in the previous interbank cheque clearing system. Remitting banks thus suffered an artificial increase in their operating costs affecting the result of each remittance operation.

367. As banks, like any undertaking, necessarily have to cover their costs, it is reasonable to assume that such an increase was liable to have two types of effects: limiting the supply of cheque remittance on the one hand and increasing end prices on the other.

Potential limitation of supply on the cheque remittance market

368. Assuming an absence of total or partial passing of the CEIC on the prices charged by remitting banks to their customers, the resulting increase in the unit cost of processing cheques for these banks and, consequently, the lower profitability or even a deficit for

cheque remittance are liable to have brought about a reduction in supply in the cheque remittance market. In fact, it is perfectly conceivable for a bank to prefer to give up providing a service if, at the very least, the price charged to customers does not cover the amount of the interbank fee applied to this service and if this service becomes loss-making.

The potential influence on end prices

369. On an introductory note, it should be stated that the wording of article 81(1) EC does not make it possible to consider that only agreements having a direct effect on final prices would be prohibited. On the contrary, it is clear from article 81(1) (a) EC that an agreement may have an anti-competitive object if it consists in '*directly or indirectly fix[ing] purchase or selling prices or any other trading conditions*'. As the European Court of Justice has pointed out, article 81 EC aims to protect not only the direct interests of competitors or consumers, but also the structure of the market and, in the process, competition as such. Hence, the finding of the anti-competitive object of an agreement should not be subordinated to the proof that the agreement contains disadvantages for end consumers (GlaxoSmithKline judgment, op. cit., points 63 and 64; see also, by analogy, the judgment in T-Mobile Netherlands and Others, op. cit., points 37 to 39).

370. Unlike in the MasterCard case, in which MasterCard did not contest the fact that multilateral interbank fees generally determined a floor level for the costs charged to merchants (see point 346 here above), the offending parties in this specific case contest the likelihood of the passing on to payees of the CEIC in the cheque remittance market. Admittedly, it does not follow from the reports of the CIR that remitting banks had agreed to pass the CEIC on to their customers. However, as has been pointed out above, interbank agreements such as interbank fees may have effects outside the interbank sphere, notably on the formation of end prices. Thus, in the 1999 GSA decision, the Commission stated that '[t]*here is nothing to show that the banks have concluded agreements calling for the systematic passing on of the interbank commission. The GSA agreement explicitly allows them to decide autonomously whether to pass this commission on or not. However, insofar as banks do decide on an individual basis to pass on the tariff in question, this is a direct result of the existence of the GSA agreement, since it provides the crediting bank with an economic cost item which did not previously exist. Without an interbank tariff there is nothing to pass on (...)*' (point 53).

371. In the case in point, insofar as the CEIC increases the supply cost of the cheque remittance service, it is likely to have an impact on the bank/customer relationship and lead to an increase in the prices charged by remitting banks to their customers. The magnitude of this possible passing on depends on many factors, including the commercial policy of each remitting bank, the bargaining power of customers and the intensity of the competition. The CEIC is therefore likely to be passed on partially, or even totally, to end prices.

372. A number of documents added to the case also attest that some of the banks considered that the CEIC was meant to be passed on to remitting customers. It is first mentioned in a note on '*cheque images: arguments, questions and answers*' submitted to the members of the select working group of the CIR following the meeting of 10 May 2000, stating in respect of the additional costs resulting for the banking sector from implementing the CEIC: '*passing on to the remitting customer*…' (classification mark 4264) as well as the report of an internal meeting at Crédit Mutuel of 10 January 2001 in which it is stated that *'[a]lthough intended to be passed on to the remittent, it weighs on the operating account of the remitting bank*' (classification mark 4263). Finally, at its hearing by the investigators on 12 July 2005, Crédit Agricole declared: '*CA's position towards passing on the* [CEIC] *consists in stating that since customers benefit from shorter processing times and CA*

incurs an additional expense, it is normal for this expense to be passed on, but it is for regional offices to decide whether or not to pass on the interbank fee' (classification mark 4264).

373. It should also be pointed out that the remitting bank may bill remitted cheques per unit or according to their value. But it may also decide not to bill them directly and to remunerate its cheque remittance service within the framework of its overall banking services package via a system of cross-subsidies. Given this mutualisation of the costs of all banking services, partial or total passing of the CEIC on to the end prices seems like a potential consequence of the creation of a new expense that did not previously exist for the banks.

374. Consequently, it must be considered that, by reason of its potential influence on the level of end prices, the CEIC has, by its nature, the capacity to restrict pricing competition, even in the absence of a floor price in the cheque remittance market.

Restrictions of competition in the cheque issuing market

375. In the cheque issuing market, the CEIC has generated an artificial increase in revenue for drawee banks, since they have received revenue that was not allotted to them by the market, but by an interbank agreement, with the aim to offset the treasury losses that they felt they would suffer because of the acceleration of the interbank cheque payments.

376. In this respect, the parties maintain that the CEIC is liable to have been passed on by the drawee banks in the form of a reduction in the prices of banking services other than that of cheque issuing. However, such an affirmation contradicts the objective pursued by the members of the CIR as mentioned by the parties in the preceding point. Whatever the case, this potential effect of the CEIC demonstrates its influence on the formation of end prices, in breach of the principle of competitive price formation by market forces.

377. The capacity of the CEIC to influence the conditions of competition on both sides of the market, and particularly on end prices, is also confirmed by the analyses presented by the counsels of the parties themselves: '*such a fee alters the marginal cost of the activity of cheque issuance and remittance: all other things being equal, a fee paid by the remitting banks to the drawee banks increases the provision cost of the cheque remittance service and reduces the provision cost of the issuance service. An interbank fee, insofar as it increases one side's costs and reduces the other side's, is therefore liable to bring about at the same time an increase in prices on one side of the market and a reduction in prices on the other side*' (study by the LECG and MAPP consultancy firms of 26 May 2008, produced by the parties in reply to the Statement of objections, §2.7, classification mark 5988).

378. As regards the parties' argument according to which the CEIC did not have the object of modifying but precisely of preserving the existing treasury balances and, consequently, their competitive situation prevailing before 2002, it should be considered that such an objective contributes in reality to 'freezing' the cheque market. On the cheque issuance side, such an objective aims to perpetuate, by means of a uniform fee artificially created outside the mechanisms of market forces, part of the revenue streams that the banks previously derived from the float, i.e. to guarantee drawee banks a minimum level of remuneration per cheque drawn. Symmetrically, on the cheque remittance side, this objective has the consequence of neutralising the benefits expected from the acceleration of exchanges for remitting banks. Such an objective is therefore restrictive of competition. However, this argument may be examined in respect of the possible exemption of practices, since it deals with the incentives that the banks had for accepting the migration from one system to another.

379. It follows from the foregoing that the CEIC was created in order to restrict each bank's freedom to individually define its pricing policy and hinders the free fixing of prices in the cheque market, by artificially favouring their increase on the remittance side and their reduction on the issuance side. and yet, the main objective of competition law consists in any economic player autonomously determining the policy that it intends to follow in the market (judgments of the European Court of Justice of 14 July 1981, Züchner, 172/80, ECR 2021, point 13, and 28 May 1998, Deere v. Commission, C-7/95P, ECR I-3111, point 86). The CEIC must therefore be categorised as a restriction of competition by object within the meaning of article L 420-1 of the Commercial Code and article 81(1) EC.

Regulating the use of the various means of payment

380. It follows from the reports of the CIR and the working documents of the select working group of the CIR that the objective of regulating the use of the various means of payment was mentioned on many occasions within the framework of the discussions that led to the creation of the CEIC.

381. Thus, it is stated, in the working document of 22 June 1999: '*It should be avoided that some players be forced to prefer the cheque with EIC to automated means of payment solely because the conditions between banks that would be retained make it more attractive than those either for the creditor/creditor's bank pair or for the debtor/debtor's bank pair.*' This document's summary is also particularly explicit: '*Finally, fees between banks must be studied with a threefold objective*', one of which is to '*ensure cohesion of the cheque with EIC and of other means of payments*.' '*For creditors and their banks not to prefer it to other means of payment, it is necessary for the totality – fee paid by the remitter's banker, gap between exchange and payment – not to be more favourable to the remitter's banker as regards the cheque with EIC*' (see points 93 et seq. above).

382. It is therefore obvious that the members of the CIR intended to prevent the switch to the EIC from favouring the use of cheques to the detriment of other means of payment that are less expensive in terms of processing cost for the banking sector and more secure; they did so by introducing an artificial cost element for each cheque remittance operation.

383. While the objective of optimising the use of the various means of payment, i.e. the creation of the necessary incentives for economic players to use the most efficient means of payment (like the bank card or *titre interbancaire de paiement* (TIP)), appears legitimate, banks could not, however, get together for this purpose in a multilateral framework in order to establish a uniform interbank fee without restricting competition. The principle of joint regulation being based on the conclusion of a multilateral pricing agreement in fact comprises a restriction whose object presents an anti-competitive nature (see in this respect point 377 above). On the other hand, each bank was free to choose instruments to individually regulate the use of various means of payment by their customers via pricing reflecting the real costs of using the cheque service.

384. It follows from all the foregoing that the anti-competitive object of the CEIC is established.

e) Fees for related services

385. These concern eight multilateral fees created to remunerate the services newly rendered by one category of banks to another and to offset the cost transfers resulting from the dematerialisation of the cheque exchange system.

386. The amount of each of these fees was fixed by a joint agreement at a single level,[21] identical from one bank to another, thus without taking account of the costs specific to each bank, except to consider that all the banks had the same cost profile, which is neither established nor maintained by the parties. It follows in fact from the costs study ordered from Latham & Watkins that, regarding related services, major differences in costs existed between banks in 2007. It may be presumed that such differences also existed in 1999–2000 at the time of the negotiations within the CIR, as emerges in particular from the report of the meeting of 3 February 2000 in which it is stated that the representative of Crédit Lyonnais considered that the amounts finally retained for two fees for related services (the fee on a circulating cheque and the fee for requests for information by fax) appeared underestimated to him.

387. Thus the creation of eight fees for related services substituted to diversified cost profiles a uniform financial expense, common to all banks, for each related service. The multilateral agreement at issue therefore restricted the freedom of banks to independently and individually determine the level of fees for related services depending on their costs and, indirectly, the prices and other conditions of the services provided to their customers.

388. In its GSA decision, op. cit., the Commission considered that the object of the multilateral interbank fee at issue was to restrict competition within the meaning of article 81(1) EC, in that '*it limits the freedom of the banks participating in the agreement to determine, on a bilateral basis, the amount of commission charged for processing of acceptance giros forms*' (point 48). Likewise, in its decision of 19 July 1989, Dutch banks, the Commission had taken the view that the agreement establishing a uniform interbank fee, payable by the encashing bank to the drawee bank for certain types of transfers made by using a specific form was restrictive of competition, since it '*restricts the scope for the relevant banks to agree bilaterally on reimbursements of costs in a way that is more favourable and thus similarly to make optimum use of all resources which would have been available to them without the agreement for obtaining as favourable conditions as possible in their bilateral relations with certain other banks, and passing these on to their customers. Competition between the relevant banks for customers is thus indirectly restricted for the services relating to the relevant transfers*' (point 56).

389. It follows from the foregoing that the agreement having consisted in fixing the fees for related services at a uniform level comprises an object restrictive of competition. It is only at the stage of a possible exemption from this agreement that the argument may be taken into account whereby a multilateral framework was necessary to prevent difficulties leading to bilateral negotiations on each fee.

4. ON THE EXEMPTION OF THE PRACTICES

390. Under the terms of article L 420-4 of the Commercial Code: '*The following practices are not subject to the provisions of articles L 420-1 and L 420-2: (…) 2° Those whose perpetrators can prove that they have the effect of ensuring economic progress, (…) and that they reserve for users a fair share in the resulting profit, without giving the*

[21] It does not emerge from the elements appearing in the case files that the banks used the possibility of billing fees for related services at a lower level. As the maximum amount determined by the CIR was thus systematically applied, fees for related services must be regarded as fixed interbank fees, after the fashion of the CEIC (see in this respect point d) above).

undertakings involved the opportunity to eliminate competition for a substantial part of the products concerned.'

391. Under the terms of paragraph 3 of article 81 EC: *'[t]he provisions of paragraph 1 may, however, be declared inapplicable in the case of:*

> *– any agreement or category of agreements between undertakings,*
>
> *– any decision or category of decisions by associations of undertakings, and*
>
> *– any concerted practice or category of concerted practices,*
>
> *which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*
>
> *(a) impose on the undertakings concerned restrictions which are not indispensable to achieving these objectives;*
>
> *(b) offer such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*'

392. To assess whether it may be exempted on the basis of these provisions, the competition authorities balance the pro- and anti-competitive effects of a restriction of competition.

393. It follows from EU case law that the person who takes advantage of the provisions of article 81(3) EC must demonstrate, by means of convincing arguments and evidence, that the conditions required to benefit from an exemption are met (see the judgment in GlaxoSmithKline, op. cit., point 82, and the judgment of 11 July 1985, Remia and others v. Commission, 42/84, ECR 2545, point 45). The Court of Justice has stipulated that the factual elements put forward by the undertaking '*may be such as to oblige the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged*' (GlaxoSmithKline judgment, op. cit., point 83; judgment of 7 January 2004, Aalborg Portland and others v. Commission, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECR I-123, point 279).

394. It is therefore for the parties to establish that the CEIC and the fees for related services fulfilled the conditions stipulated by the internal and EU provisions in order to be able to benefit from an exemption.

395. Even though the CEIC and the fees for related services have been established by the joint agreement of 3 February 2000, on the interbank conditions of the switch to the EIC, it is necessary to separately analyse the possibility of exempting them, given their difference in nature, a fee for the purposes of compensation as regards the CEIC, and fees for services rendered as regards the fees for related services.

a) As regards the CEIC

396. The exemptability of the CEIC will be examined below as regards the first two conditions provided for by article L 420-4 of the Commercial Code and article 81 EC: while the banks' agreement that enabled the switch to the EIC contributed to the achievement of economic progress, i.e. the implementation of a dematerialised system for exchanging cheques, the parties do not demonstrate, however, that the establishment of a fee such as the CEIC was necessary to bring about these efficiency gains.

On economic progress

397. It follows from EU case law that '[i]*n order to be capable of being exempted under Article 81(3) EC, an agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. That contribution is not identified with all the advantages which the undertakings participating in the agreement derive from it as regards their activities, but with appreciable objective advantages, of such a kind as to offset the resulting disadvantages for competition*' (GlaxoSmithKline judgment, op. cit., point 92; judgment of 13 July 1966, Consten and Grundig v. Commission, 56/64 and 58/64, ECR 429, points 502 and 503).

398. The Commission stipulated, in point 51 of its Guidelines of 27 April 2004 on the application of article 81(3) of the Treaty (OJ 2004, C 101, p. 97):

> '*Any efficiency claims must therefore be substantiated so that the following can be verified:*
>
> *(a) the nature of the claimed efficiencies;*
>
> *(b) the link between the agreement and the efficiencies;*
>
> *(c) the likelihood and magnitude of each claimed efficiency; and*
>
> *(d) how and when each claimed efficiency would be achieved.*'

399. In the case in point, it is undeniable that the switch to the EIC constituted technical and economic progress, as the parties and the *Commission bancaire* maintain.

400. The adoption of a dematerialised clearing system has in fact reflected in an improvement in the efficiency of collection circuits and acceleration in cheque encashment times. The *Commission bancaire* stresses that this acceleration, '*sought and obtained by the EIC implementation, goes hand in hand with an improved overall efficiency in the encashment function and a reduction in its costs due to the reduction in necessary handlings, from which all the banking system's customers benefit, and the faster clearing of suspense accounts. That is a source of major savings for all the economic players and it enables more active management of the undertakings' treasury*' (opinion of 22 May 2008, classification marks 13239 et seq.).

401. Acceleration of cheque encashment times results, on the one hand, in the establishment of a single dematerialised clearing house and thus the disappearance of the 'non-local' category of cheques, whose lead time for interbank payment was three business days after the exchange date, i.e. two more days than that of 'local' cheques, and, on the other hand, in the banks' option to set the exchange time limit at 6pm with an interbank payment date at D+1, which made it possible to reduce the gap between the date of remittance of cheques to the bank and the date of their exchange. At the time of the negotiations of the CIR, the banks considered that the acceleration of the lead time for interbank payment would be between 1.1 and 1.6 business days, and agreed on an average estimate of 1.4 business days (see point 92). The economic study of 30 October 2009, produced by the banks in response to the additional report of 19 August 2009, states an acceleration of 1.2 business day, 85 to 100% of which would have been passed on to customers (point 41 of the study, classification mark 34944).

402. The EIC has enabled the banks to reduce the cost of processing cheques thanks to the abolition, for 98% of cheques processed, of the transport of forms from the remitter's bank to the clearing house and from the clearing house to the drawee's bank; the switch from manual clearing to automated clearing within the framework of the SIT; and the

disappearance of the 'return' processing by the drawee bank (sorting and entering operations). While these elements were not the subject of any individual valuation, the administrative gains for the sector as a whole had been valued at 600 million francs a year, or €91 million (see point 713). The EIC is also reflected in savings for the *Banque de France* with the end of the provision free of charge of the 104 for the physical cheque clearing houses in its branches. Remitting customers have also been able to benefit from a cost saving on account of the simplification of the cheque remittance operation.

403. The switch to the EIC went hand in hand with an improvement in services for customers. Dematerialisation in fact brought about the emergence of new services, such as automatic representation of unpaid cheques for insufficient funds, making it possible to accelerate collection, or digital storage, making possible the online consultation of cheque images and accelerated notification to customers concerning the amount of the cheques remitted for encashment. The dematerialisation of exchanges also makes it possible to accelerate the notification given to merchants in the event of fraud or default.

404. Furthermore, as the *Commission bancaire* stresses in its aforesaid opinion, the development of the EIC has made it possible to provide greater security for credit institutions and their customers, with the ending of the circulation of cheques doing away with a large part of the risks of loss or theft, and greater efficiency in the fight against money laundering, their digitisation having facilitated *a posteriori* checking of cheques.

405. It follows from the foregoing that the banks' agreement enabling the switch to the EIC incontestably contributed to the achievement of economic progress. This progress was recorded as from the deployment of the new EIC system on 1 January 2002.

406. The agreement on the interbank conditions of the switch to the EIC, concluded within the CIR on 3 February 2000, is a component of the whole agreement on the switch to the EIC, which also includes an agreement on the technical modalities of the reform, negotiated within the CFONB (see point 75).

407. The question therefore arises of whether the CEIC specifically contributed to all the efficiency gains recorded with the switch to the EIC. It will be examined within the framework of the study of the indispensability of this restriction, carried out here below.

On the need

408. The restriction on competition resulting from the introduction of the CEIC could only be exempted inasmuch as the CEIC could demonstrate that it was necessary and proportionate to the efficiency gains referred to above.

The parties' arguments

409. All the parties assert that the acceleration of interbank clearing mechanisms stemming from the establishment of the EIC would entail changes in treasury balances between the remitting banks and the issuing banks, to the detriment of the latter. The introduction of an interbank fee, that would offset the treasury losses generated by accelerated cheque processing, was in their view necessary in order to secure the agreement of the predominantly issuing banks, which were losing out due to the acceleration of interbank exchanges, since a unanimous agreement of the banks concerned was required to implement the EIC.

410. BNP-Paribas and the Caisses d'Epargne underscore the great divergences between the banks observed during the negotiations of the CIR, and maintain that the modernisation of the cheque exchange system would risk being halted in the absence of a fee setting off

treasury transfers, as had happened twice in the past. BNP-Paribas and the Banques Populaires take the view that a predominantly remitting bank, as they themselves are, would not have had any reason to agree to pay the CEIC had this trade-off not been necessary to implement the EIC, a general interest project.

411. The Banque Postale also contends that the CEIC gave the banks that bore the bulk of the costs of issuing cheques free of charge (due to a small customer base), the assurance that the offsetting of this cost would not disappear.

412. The parties claim that the CEIC was not regarded as a final solution, but rather as a transitional system, which was necessary to overcome the misgivings of the issuing banks and which could gradually absorb the cash imbalance created by the EIC. The fact that the CEIC is now no longer essential to the operation of the EIC would not for all that prove that it was not necessary to the conclusion of the agreement that enabled the modernisation of the cheque exchange system.

413. Two economic studies were submitted by the parties, in response to the Statement of objections (the study dated 26 May 2008, classification marks 5996 et seq.), and in response to the follow-up report of 19 August 2009 (the study dated 30 October 2009, classification marks 34925 et seq.). These studies provide statistical estimates on the average loss incurred by the banks on account of accelerated interbank exchanges, disregarding the clearing mechanism. This loss, according to various assumptions, amounted to 5 cents per cheque drawn, not counting administrative gains, and 2.3 cents per cheque drawn, if the latter are factored in. The net balance sheet of the switch to the EIC for the banking sector as a whole was estimated at a loss of 76 million euros per annum (points 33 et seq. of the study dated 30 October 2009). In addition, the study of 30 October 2009 includes an individual assessment of the switch to the EIC for the Caisses d'Epargne and Crédit Agricole, and concludes that each of these banks would incur a net loss without a clearing mechanism (points 45 et seq.).

414. The Banques Populaires assert that the analysis of the exemption criteria should not confine itself solely to the elements the parties had at the time the agreement was concluded, such as the internal memoranda of Crédit Agricole and Crédit Mutuel, but should factor in the figures revealed during the procedure, in particular the two economic studies submitted by the parties, which would show that the losses incurred in the switch to the EIC were real. The Banque de France moreover asserts that these internal figures were unknown to the other banks during the CIR negotiations.

415. Société Générale, the Caisses d'Epargne, Crédit Mutuel, CIC, Crédit Agricole and LCL assert that the purpose of the CEIC was solely to compensate the issuing banks for the *float* transfer resulting from the switch to the EIC. The effects of the reform at internal level in each bank, such as the productivity gains enabled by the system, were not part of the CIR's remit, and could not be taken into account without competitors exchanging sensitive information. Crédit Agricole and LCL hold the view that, if the internal effects of the switch to the EIC were taken into account for each bank, one would then have to factor in the early disappearance of value dates for customers.

416. Moreover, the parties emphasize the fact that the switch to the EIC required a great deal of investment in setting up the requisite computer systems and equipment for the creation and processing of cheque images, and to the retraining of staff previously assigned the task of manual cheque processing. These investments should have been taken into account by the case officers in respect of the charges incurred by the banks to assess the economic cost of the switch to the EIC, clearing system excluded. The parties maintain that the CEIC was

necessary in the launch phase of the CEIC, since the banks only made real administrative gains after having written off the cost of their investments.

417. Furthermore, the parties maintain that the amount of the CEIC (set at €0.043) was not disproportionate to the financial losses incurred by certain predominantly issuing banks. The economic study of 30 October 2009 estimates the minimum fee needed to offset Crédit Agricole's losses should be at €0.048. In addition, the parties assert that the compensatory and temporary nature of the CEIC explains the fixed fee, the fruit of a compromise rather than of an arithmetical calculation.

418. Lastly, the Banque de France, Société Générale, Crédit Agricole and LCL maintain that no alternative less restrictive on competition could be considered, since setting these compensatory fees came up against the impossibility to negotiate a multitude of bilateral agreements. Moreover, it was not possible to limit the agreement to the fee-setting methods without the parties exchanging sensitive information. Finally, the CEIC maintained accelerated exchanges for the benefit of remitting customers, a feature of economic progress offered by the EIC, which would not have been possible with longer conventional interbank settlement periods.

Appraisal in the case in point

419. In its guidelines on the application of article 81(3) of the aforesaid treaty, the Commission stipulates that the essential nature of the restrictions on competition must be analysed according to a twofold criterion: '[*f]irst, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions on competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies*' (point 73). It states that: '*The assessment of indispensability is made within the actual context in which the agreement operates and must in particular take account of the structure of the market, the economic risks related to the agreement, and the incentives facing the parties . (...)Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement'* (point 80).

420. The examination of an agreement in connection with a request for exemption under article 81(3) EC may need to factor in the characteristics and possible distinctive features of the sector affected by the agreement, if these are decisive for the result of the examination (in this respect, see the GlaxoSmithKline judgment, op.cit. point 103).

421. The analysis of the arguments put forward by the parties to demonstrate the necessity of the CEIC will be conducted into five stages. In the first instance, the context of the agreement will be examined, indicating that the individual incentives of the parties to accept the switch to the EIC, with or without a clearing mechanism, must be taken into account to assess the need for the fee. Secondly, the lack of demonstration by the parties that, at the time of the CIR negotiations, at least one of them predicted a net loss due to the switch to the EIC will be explained. Thirdly, it will be established that the introduction of a fixed fee per transaction was not in any event liable to offset the treasury losses claimed. Fourthly, an economic assessment of the switch to the EIC will be presented for each of the banks, confirming the analysis previously developed. Fifthly, it will be pointed out that the CEIC was not adjusted at the end of the three-year period stipulated in the agreement of 3 February 2000.

The framework of the agreement

♦ The context of the euro changeover

422. On an introductory note, the context in which the EIC system was launched should be recalled. As stated in point 69 above, two attempts to dematerialise the interbank cheque clearing system had already failed, one in 1988 and the other in 1991. While there is no doubt that the resistance of certain banks at the prospect of treasury losses contributed to the failure of these projects, their lack of success can also be explained by technical and social obstacles. The cost of setting up a dematerialised clearing system was thus probably higher in the early 1990s than in the early 2000s.

423. In 1999, the prospect of the changeover from the franc to the euro, which involved the creation of a euro cheque clearing system temporarily coexisting with the former franc cheque clearing system, appeared as an opportunity to overcome the remaining obstacles and disagreements and to modernise the cheque exchange system. In their hearing of 1 July 2008, the Banque de France's representatives state that, in the absence of a dematerialised clearing system, one would have had to '*duplicate the paper exchange system for cheques in euros, which would have been both costly and complex*' (classification marks 8998 et seq.).

424. The *Commission bancaire*, in its opinion of 22 May 2008, mentions the opportunity that the euro changeover represented: '*The* Commission bancaire *first and foremost wishes to recall the background to the implementation of the cheque image exchanges. This was a major political issue, actively supported by all the public authorities within the framework of the euro changeover. As pointed out in the Statement of objections (point 60), several attempts to dematerialise cheques had already failed in the past. The euro changeover was thus an opportunity to make a success of this plan while also rendering it even more necessary*' (classification mark 13240).

♦ The required consensus for establishing a new interbank payment system

425. As with any new interbank payment system, a new interbank cheque exchange system like EIC could only be '*instituted by a public authority or (…) be governed by a framework agreement complying with the general principles of a market framework agreement or by a standard agreement*' in pursuance of article L.330-1 of the French Monetary and Financial Code (see point 35). The Banque de France states in its observations that all French payment systems have a contractual basis and that it has no regulatory powers in this respect (classification mark 37319). Now the switch to the EIC within the framework of an interbank framework agreement could only be decided on unanimously by the banks participating in the dematerialised cheque processing system. In this respect, the *Commission bancaire* points out, in its opinion of 22 May 2008: '[s]*uch a plan, necessarily an interbank one, had to secure the agreement of the whole marketplace for it to succeed*'.

426. While a dematerialised clearing system involving only part of the banking institutions was theoretically conceivable, the coexistence of such a system with the old manual clearing system would probably have generated very high operating costs, so there was little prospect of reaching an agreement to implement this solution.

427. It follows from the foregoing that at the time of the CIR negotiations, the banks were strongly encouraged to agree on the conditions for introducing a dematerialised interbank cheque clearing system.

428. It should be stressed that the possibility of instituting the EIC by means of a governmental statutory instrument, in case negotiations broke down, was not ruled out by the Monetary and Financial Code. However, nothing in the case files leads one to conclude that this option was under consideration. Indeed, the public authorities had opted not to implement it when the two previous attempts to dematerialise the cheque clearing system failed.

- ♦ Factoring in the individual incentives of the banks to agree to dematerialised cheque exchanges

429. Although the economic and legal background to the agreement explains that the banks actively sought a compromise to enable the switch to the EIC, imperfect though it was, it does not, for all that, automatically justify the terms of the agreement the banks reached, in particular the introduction of a new interbank fee for cheque clearing.

430. In its aforesaid opinion of 22 May 2008, the *Commission bancaire* states that: '*the introduction of various interbank fees, including a cheque image exchange charge for a transitional period, was a decisive factor in the success of this national interest project. In this respect, the Commission takes the view that this was not merely a subjective feeling that could not be grounds for an exemption (…) but that the corroborating testimonies, including those of the public authorities that supported this change, can be taken into account to establish objectively the effective character of this necessity*' (classification mark 13240).

431. However, the antagonisms that were voiced in the CIR, as they emerge from the report of its select working group and the minutes of its meetings, and the part the Banque de France played in reaching a compromise, cannot alone establish the necessity of the CEIC. Only a study of the parties' individual incentives, rather than their bargaining positions, is likely to demonstrate the necessity of a clearing mechanism, if it can be established, on the one hand, that some of them could rationally object to the reform because of the foreseeable losses they would incur, and on the other, that the CEIC was, in view of its characteristics, likely to offset these losses and thereby remove the cause of the banks' misgivings.

432. Indeed, as the parties point out, it was rational of all the banks taking part in the CIR negotiations only to agree to switch to the EIC on condition that they did not incur losses as a result of the change. Failing which, a mechanism for offsetting the losses could be acceptable, on a provisional basis, in order to give the institutions that were at a disadvantage an incentive to accept the transition to the new cheque clearing system, and thereby enable them to achieve the efficiencies expected of it.

433. A similar reasoning was followed by the EU authorities when regulation (EC) 924/2009 of the European Parliament and Council dated 16 September 2009 on cross-border payments in the Community and repealing regulation (EC) 2560/2001 (JO L 266, p. 11), was adopted. In connection with the examination of the applicability of article 81 EC to multilateral interbank-payments in the Single Euro Payments Area (SEPA) Direct Debit, the view was taken that maintaining or creating per transaction MIFs would give the banks the necessary incentives to migrate from the former national systems to the unified Pan-European SEPA debit system[22]. It should be pointed out however that provisional maintenance of the interbank fees at issue was authorised by a Community regulation, and not within the framework of an intercompany agreement that would have been the subject of an exemption by the Commission on the grounds of article 81(3) EC.

[22] See the Commission's working document of 30 October 2009 entitled "Applicability of article 81 of the EC treaty to multilateral interbank-payments in SEPA Direct Debit", points 24 et seq.

434. Furthermore, since the assessment focuses on each institution's individual incentives, it is important to analyse the expected consequences of the switch to the EIC at the level of each bank, not at the level of the banking sector as a whole.

435. In view of the need for the banks to reach a consensus, as all the parties emphasised, in order to enable economic progress with the EIC, one could contend that the fact that at least one bank took the sufficiently realistic view (at the time the CIR negotiations took place) that it would incur losses on account of the accelerated exchanges in itself sufficed to justify the creation of a compensatory mechanism.

436. The CIR select working group report of 22 June 1999 likewise stated that: '*For a consensus to be reached on the decision to switch to the EIC and on a corresponding proposal of terms between banks, there must not be a critical mass of institutions that consider it would be in their interest to maintain the status quo rather than endorse this proposal*' (classification mark 916).

437. Furthermore, contrary to what the Banques Populaires state, the parties' incentives to agree to switch to the EIC must be examined not in relation to the data covering the entire period from 2002 to 2006, but to the data the banks had at the time they attended the CIR meetings, since by definition no subsequent events could be taken into account in formulating their respective positions during the negotiations of the agreement, which was concluded on 3 February 2000.

♦ Conclusion on the framework of the agreement

438. It follows from the foregoing that it is up to the parties to prove that the introduction of the CEIC, that is to say a fixed interbank fee, paid by the remitting bank to the issuing bank, would indeed be likely to offset any expected losses, and thereby create the necessary incentives for all the banks to agree to switch to the EIC and adopt measures to accelerate interbank exchanges.

The parties do not demonstrate that, at the time of the CIR negotiations, any of the banks forecasted a net loss due to the switch to the EIC

♦ The analyses conducted by the CIR

439. During the CIR meetings, the banks carried out an analysis of the economic assessment of the switch to the EIC.

440. The CIR select working group report defined the elements that should be taken into account to carry out this assessment, both at the level of the banking sector as a whole and at the level of each institution: '*In terms of assessment, if one views the situation solely from the point of view of interbank exchanges, any modification in the interbank settlement date results in a zero-sum game for the profession. Each institution wins or loses depending on the average capital balance of its exchanges and its capacity to take advantage, better or worse than the others, of the possibility of rapid encashment offered by the new system. (...) If one views things from the point of view of each institution, they must each add to the above factors affecting them:*

- administrative savings and additional costs of processing transactions both as remitting banker and as drawn banker;

- the consequences that the new interbank rules might have on potential transfers of customers' flow (...).

These calculations, bearing in mind their inherent uncertainty, must be made under prevailing conditions by including the write-off of the additional costs associated with the switch from one system to the other' (classification mark 868).

441. Nevertheless, the working group did not apply the method thus recommended to assess the amount of the interbank fee that would have offset the possible losses incurred by certain banking institutions in switching to the EIC. The working group calculates this amount as the product of the average cheque amount (3,000 francs, or 457 euros), the planned acceleration in the interbank settlement period (1.1 to 1.6 business days) and the rate of interest at which the bank can invest the sums at its disposal (3%). This calculation only factor in the treasury losses on the banks' drawn portion, not adjusted for the treasury gains on the banks' remitted portion or for the administrative gains derived from the dematerialised exchanges. They thus advance the figures of €0.088 (0.58 francs) for an acceleration of 1.6 business days and €0.06 (0.40 francs) for an acceleration of 1.1 business days (classification mark 924).

442. The method adopted by the CIR's select working group, which confines itself to studying the treasury loss incurred for each cheque drawn without comparing it with the treasury gains recorded for each cheque remitted and the efficiencies the banks achieved by switching to the EIC, does not relevantly assess the participants' incentives to agree to the new system. If the incurred loss is fully offset by the gains, the institution concerned has a rational incentive to accept the change.

443. To assess the banks' incentives to agree to switch to the EIC, one thus needs to factor in all the individual gains and losses that would ensue from the new system, including the gains or any additional administrative expenses expected there from. On the other hand, there is no need to factor in changes that are not a direct consequence of the agreement on the EIC. For instance, any loss arising from the disappearance of value dates as called for by Crédit Agricole and CIC should not be taken into account, as this practice, which is the free commercial choice of banks, is unconnected to the speed of interbank exchanges. In contrast to the administrative gains, a direct result of the dematerialised cheque clearing system, the disappearance of value dates was not a consequence of the agreement to switch to the EIC. The hypothesis of a disappearance of value date was indeed not taken into consideration by the CIR and was never carried out after the EIC was set up.

444. While the CIR's select working group offered the banks an analytical grid for an individual assessment of the switch to the EIC, the preparatory documents to the agreement do not show that the reality of the net losses incurred by certain predominantly issuing banks due to the switch to the EIC was discussed during the negotiations on the introduction of the CEIC, whereas the CIR contented itself, to justify the introduction an interbank fee, with factoring in the gross treasury loss on the banks' drawee portion.

♦ The assessments of the switch to the EIC made internally by the banks

445. The economic assessments of the switch to the EIC in the absence of an interbank clearing mechanism, conducted internally by three banks at the time of the CIR negotiations, are revealing, since none of these three institutions predicted any losses linked to the switch to the EIC (see points 1089 et seq.). In accordance with the method recommended by the CIR, these assessments take into account, in addition to the treasury losses per cheque drawn, the treasury gains per cheque remitted as well as the administrative gains derived from the new system.

446. Crédit Agricole, a predominantly issuing bank, holds the view that by switching to the EIC without a clearing mechanism, it would make annual gains of 15.7 million euros (103

million francs). The forecasted assessment of the switch to the EIC made by Crédit Mutuel, a predominantly issuing bank, was also positive, with annual gains estimated at 2.77 million euros (18.2 million francs). Lastly, the assessment made by CIC, a predominantly remitting bank, shows that it forecasted net gains from the switch to the EIC without a CEIC, but losses of 1.3 million euros (8.53 million francs) with a CEIC of €0.04.

447. During the procedure before the Autorité de la concurrence, the other banks did not produce any internal documents providing an overall assessment of the expected consequences of switching to the EIC in 1999-2000. There is thus no evidence that any of them had, at the time the CIR negotiations were held, predicted that the switch to the EIC would incur a net loss for them, the compensation of which would require the introduction of a per-transaction fee paid by the remitting banks to the issuing banks.

448. In this respect, it should be stated that, in the period in question, Crédit Agricole was the second largest predominantly issuing bank in terms of volume (with a positive difference between the number of cheques issued and the number of cheques remitted), after La Poste (point 656). Now, as has been stated here above, Crédit Agricole predicted a net gain out of the EIC of 15.7 million euros, clearing mechanism excluded.

The introduction of a fixed fee per transaction was in any event unlikely to offset the expected treasury losses

- The treasury gain or loss depended solely on the overall value of the cheques issued and remitted by each institution, not on their number

449. All the parties assert that no rational economic agent would agree to a system incurring a cost for them, and an equivalent gain for their direct competitors, without securing compensation for this added cost. Now, in the case in point, the introduction of a fixed fee like the CEIC was not likely to offset the cost of transfer of the *float* of predominantly issuing banks in favour of predominantly remitting banks since this cost depended solely on the overall value of cheques issued and remitted by each institution and not the number of cheque transactions involved.

450. This point was for that matter raised in the report of the select working group dated 22 June 1999, which noted that the treasury loss of each bank is linked to the '*average capital balance of exchanges*' (excerpt from op.cit., point 868). Furthermore, at the CIR meeting of 1 July 1999, the representatives of Crédit du Nord and the Banques Populaires pointed out that a fixed fee would not redress the treasury imbalances incurred as a result of different average cheque amounts varying upon the institutions. On a more general level, the representatives of Paribas and Crédit Lyonnais questioned the economic justification of a fixed fee (see point 100).

451. A predominantly issuing institution in terms of volume (with a positive difference between the number of cheques drawn and the number of cheques remitted), does not incur any cash losses from switching to the EIC if it is predominantly remitting in terms of value (with a positive difference between the total amount of cheques remitted and the total amount of cheques drawn). In this case, it is rational for the institution to agree to switch to the EIC without a clearing mechanism. The introduction of a fixed fee per cheque processed in favour of the issuing bank is wholly favourable to the institution, because it increases the net cash gain due to the switch to the EIC.

452. Conversely, a predominantly remitting institution in terms of volume (with a positive difference between the number of cheques drawn and the number of cheques remitted), incurs a net cash loss when switching to the EIC if it is predominantly issuing in terms of

value (with a negative difference between the total amount of cheques remitted and the total amount of cheques drawn). In that case, it is not rational for the institution to agree to switch to the EIC without a clearing mechanism in its favour, unless this loss is offset by other types of gains derived from the reform. Now, the introduction of a fee per cheque remitted deteriorates even more the assessment of the switch to the EIC for this type of institution.

453. This is not just a theoretical hypothesis, as shown by the case of HSBC, a predominantly remitting bank in terms of volume, which in its memorandum of 2 November 2009 contends that the treasury losses arising from its issuing bank activities, namely 18.4 to 22 million euros between 2002 and 2007, are not fully offset by the gains from its remitting activities, namely 8.5 to 9.6 million euros for the same period (classification marks 38198 et seq.). This can be explained by the very high average amount of the cheques issued by HSBC customers. Thus it emerges from the Mircoéconomix study submitted by HSBC to back up its claims that the bank was predominantly remitting in terms of volume, and predominantly issuing in terms of value in 2005 and 2006 (classification marks 5562 and 5563).

454. This situation can also explain the fact that during the CIR negotiations, the representative of Société Générale, a predominantly remitting bank in terms of volume, wondered whether the fee «*should not be paid by the drawn banker to the remitting banker*" (point 100).

455. It follows from the foregoing that the establishment of a fixed fee like the CEIC was not liable to remedy the lack of incentive of certain banks to agree to the EIC on account of the net cash losses arising from accelerated interbank exchanges.

- ♦ The introduction of a proportional fee was ruled out by the banks during the CIR negotiations

456. In this respect, while the banks assert that the CEIC is the fruit of a trade-off between banks, and that its amount is not the result of an arithmetical calculation, the fact remains that a fixed fee could only have a compensatory effect if the volumes and the amounts of the cheques, both issued and remitted, tallied for all the institutions concerned, which, as many banks pointed out during the CIR negotiations, was not the case for most of them.

457. The banks ruled out the introduction of a fee proportional to the amount of the cheques issued, even, though unlike a fixed fee, it would have effectively offset the actual cash losses of predominantly issuing institutions in terms of value. The reason put forward by the CIR's select working group report is that a proportional fee '*would add nothing more with respect to the differences between exchange and settlement* [that is, contractually maintaining longer interbank settlement periods than would be allowed by faster dematerialised cheque processing] *than the drawback of being subject to VAT, a large proportion of which cannot be reclaimed by the banks*' (see point 91). However, maintaining artificially long payment periods was difficult for customers to accept, since it deprived remitting customers of the benefit of the accelerated exchanges enabled by the EIC in the form of a shorter cheque encashment time, as the Banque de France among others pointed out during the CIR negotiations (point 101). Furthermore, the VAT liability issue is unrelated to whether the deducted fee is proportional or fixed.

- ♦ The incentives of predominantly remitting institutions in terms of volume

458. In this context, the predominantly remitting institutions in terms of volume were all the more disadvantaged by the introduction of the CEIC, and thus all the less inclined to accept

its principle, as the total value of cheques issued by their customers was higher. It is thus hard to explain that this type of institution accepted the introduction of the CEIC, which weighed down their balance sheet, unless one assumes that the administrative gains made from switching to the EIC at least covered the cost incurred, or that they planned to pass all or part of the fee on to their customers directly, or indirectly within the framework of their customer relationship as a whole, so as to offset the incurred loss.

459. It emerges from the CIR negotiations that certain predominantly remitting banks in terms of volume, like BNP and LCL, justified the principle of an interbank fee not as a mechanism for offsetting losses incurred by predominantly issuing institutions, but as a way of ensuring the cohesion of means of payment as a whole (points 93 et seq.).

460. In this respect, it should be recalled that, even if the banks do not put forward this argument in defence to justify the exemptability of the CEIC, the reason behind the introduction of this fee (at the time of the CIR negotiations) was to avoid making the cheque a more attractive means of payment than automated ones (such as bank card payments or transfers), whereas its processing cost is higher (see point 94).

461. In this respect, even assuming that the banks could demonstrate that the '*cohesion of means of payment*' (as understood by the CIR) is a source of efficiency, it would be impossible to contend that the introduction of the CEIC were necessary and proportionate to achieve this objective, especially if its amount were set without any regard for the actual cost of the cheque issuing or remitting service, be it the individual cost of each bank or the average cost of the banking industry as a whole. The amount of the CEIC was indeed set solely with regard to the gross treasury losses incurred per average cheque drawn, the amount initially considered then being reduced on an inclusive basis by way of compromise.

The economic assessment of the switch to the EIC for each of the banks concerned bears out this analysis

462. The economic assessment of the switch to the EIC submitted by the parties will now be examined. Although the burden of proof rests with the parties as far as exemption from practices restricting competition is concerned, the Autorité will then set out the methodology that should be adopted to analyse the switch to the EIC, since simulations performed on the basis of various assumptions confirm that a fixed fee per transaction such as the CEIC was not likely to create the necessary incentives to switch to the EIC.

- The analyses submitted by the parties

463. At the stage of the Statement of objections (on 14 March 2008) and of the report of 14 August 2008, the investigation services offered to carry out a more accurate economic assessment of the foreseeable consequences of the switch to the EIC for each of the offending banks. They offered to take various other factors into account, some of which had not been examined by the CIR.

464. In their response memoranda and in their observations in the sessions, the parties based themselves on the method proposed by the investigation services to try and establish the necessity of the CEIC in order to offset treasury losses incurred by certain banks, while contesting the relevance of certain assumptions made by the investigation services. They did not propose any alternative method for assessing the consequences for each bank of switching to the EIC with or without a clearing mechanism, apart from the one adopted by the CIR, which, as was just demonstrated, did not establish the necessity of the CEIC.

- The arguments relating to the overall assessment of the impact of the EIC

465. First, the economic study of 30 October 2009, submitted by the parties to support their observations in response to the report, provides an overall assessment of the impact of the EIC without a compensatory mechanism on the banking sector as a whole (points 33 et seq.). It concludes that the banks would, on account of accelerated interbank exchanges, have incurred an average loss of €0.05 per cheque drawn, not counting administrative gains, and €0.023 if the latter were factored in. The net outcome of the switch to the EIC for the banking sector as a whole would represent a loss of 76 million euros per annum, and 417 million euros for the period from 1 January 2002 to 1 July 2007, during which the CEIC was in force. The study adds that, if the banks had passed 85% of the benefit of accelerated interbank payments on to their customers, they would have recorded a cash gain of €0.011 per cheque remitted. Had that been the case, the net outcome of switching to the EIC would have been a net loss of €0.012 per interbank cheque, namely an annual loss of 39.6 million euros, and 218 million euros for the period from 1 January 2002 to 1 July 2007 (point 42).

466. However, these estimates, like the one made by the CIR's select working group during the negotiations, are based on mean data (or assumptions) common to the banking sector as a whole, and more particularly on the average amount of a cheque issued in France in 2002. Since the average amount of cheques, both issued or remitted, varies greatly , depending on the banks concerned, such a method does not allow for a study of the individual incentives of the banks to agree to switch to the EIC, these alone being relevant to assess the necessity of the CEIC, as explained here above, and indeed as stressed by the economic study of 26 May 2008 submitted by the parties to support their observations in response to the Statement of objections (§ 2.30 et seq.).

467. Moreover, the analysis developed by the study of 30 October 2009 relies on the false premise that the banks would have benefited from accelerated interbank exchanges only on the share of the remitting portion that was not passed on to customers (point 27 et seq. of the study).

468. Now, if the beneficiary of the cheque does not immediately invest the encashed sums on its own account, that is, if the customer does not optimise its cash management, the remitting bank can invest these sums for its own benefit and generate revenue as long as they are still in credit on the customer's current account. Accelerated interbank payments thus allow the remitting bank to invest encashed sums earlier, and thereby boost its cash gains.

469. The importance of the repercussions of accelerated interbank payments, through faster cheque encashment , impacts on the amount of the remitting bank's cash gains only on sums encashed by customers who optimise their cash management. If accelerated interbank payments are equivalent to accelerated encashment times, the bank does not benefit from any *float* transfer on account of the switch to the EIC if the customer immediately debits the encashed sum. For this type of customer, the bank only records cash gain if it does not pass, or only partially so, the acceleration afforded by the EIC on to its customer. The bank can achieve this for instance by means of value dates, whereby it credits its customer's account on a later date than that on which it was paid (see point 32).

470. Furthermore, the argument whereby the banking sector as a whole lost out in the switch to the EIC without the CEIC, which would demonstrate that at least one of the banks had also lost out (point 37 of the study), does not justify the need for the CEIC: since this is an interbank fee, its creation represents a zero-sum game for banks and does not improve the results of the banking industry as a whole. Were this the case, the CEIC would only transfer the losses of one institution to another, and would thus not create any more

necessary incentives to secure the agreement of all the parties to the CIR negotiations. So, assuming that the banking sector as a whole lost out in the switch to the EIC – a highly improbable assumption put forward by the parties, in view of the efficiencies it brought –, the only effective clearing mechanism would have been to increase the charges imposed on customers. In this respect, the banks were free to determine individually the pricing policy applied to their customers. Despite the free cheque issuing imposed by French legislation, they could indirectly compensate for this by raising the prices of other bank services, if – as has been explained (see point 301) – the banks based their remuneration of the totality of their customer relationship, all services combined.

- The study of the individual incentives of the Caisses d'Epargne and Crédit Agricole

471. Secondly, the economic study of 30 October 2009 provides an assessment of the individual results of the switch to the EIC for the Caisses d'Epargne and Crédit Agricole (points 44 et seq. and annex A of the study). Through certain data (or assumptions) specific to each of the banks concerned[23], it shows a loss of €0.042 per cheque drawn for the Caisses d'Epargne, not counting administrative gains, and one of €0.015 per cheque drawn if the latter are taken into account, and a loss per cheque drawn of €0.055 and €0.028 respectively for Crédit Agricole.

472. However, these calculations are not relevant to assess the net result of the switch to the EIC of these banks since they disregard the treasury gains they made due to the EIC.

473. Furthermore, regarding Crédit Agricole, the study is based on the average amount of interbank cheques drawn between 2002 and 2006. But in order to study the bank's incentives to agree to switch to the EIC, it should be based solely on the data it had at its disposal when the agreement was concluded in 2000, the only valid data for formulating its bargaining position during the CIR negotiations, even if the bank's assessments were necessarily forward-looking. In this respect, the internal assessing performed by Crédit Agricole at the time, which is included in the evidence, allows one to weigh up the bank's real incentives to agree to dematerialised cheque clearing with greater precision that a reconstruction a posteriori of the outcome of its switch to the EIC.

474. By the same token, although the economic study of 30 October 2009 calculates the minimum amount of the CEIC required to offset the losses claimed by Crédit Agricole, this time taking into account the treasury gains it recorded and the CEIC charges passed on to customers estimated at 42% (points 60 et seq. and annex B), this assessment has no relevance since both it and the previous assessments are based:

a. firstly on data relating to the period from 2002 to 2006, thus later than the CIR negotiations, and

b. secondly on the false assumption that passing the benefit of swifter exchanges on to remitting customers prevents the bank from paying itself on the remitted sums by investing them for its benefit, proportionally to the repercussion, whereas that is only true for sums encashed by customers who optimise their cash management.

475. Therefore, in view of the aforementioned errors in method, the analyses put forward by the parties do not conclusively demonstrate that at least one of the banks concerned would have incurred a loss by switching to the EIC.

[23] The data presented in the study is not backed up by any conclusive documentary evidence.

♦ Methodology for evaluating the economic outcome of the switch to the EIC

476. Even though the burden of proof rests with the parties regarding the exemptability of a competition-restricting practice, the individual outcome of the switch to the EIC for the banks will nonetheless be studied according to the method detailed here below.

477. The simulations will be based on data obtained during the enquiry or provided by the parties during the procedure, or, failing that, on calculation assumptions common to all the banks. When submitted, the data will be that the banks had at their disposal at the time of the CIR meetings. Failing which, the available data for the year closest to the period 1999/2000 will be used. If no data is available, several calculation assumptions will be tested, in order to make allowance for this uncertainty, in accordance with the arguments put forward by the banks during the procedure[24]. All the data used thus stems from the case file submitted to adversarial debate.

➢ Assessment of the average treasury loss per cheque drawn (P):

478. The average treasury loss per cheque drawn corresponds for each bank to the product of the average amount of cheques drawn that the bank was unable to invest on its own behalf (T), to the time saved by accelerated interbank payments (A, stated in business days), and hence, to the debit of cheques from the issuers' accounts, to the interest rate (i) at which the bank could invest these sums for its own benefit.

The sums the banks were unable to invest on their own account following the EIC (T):

479. A proportion of the amount of cheques drawn did not entail a treasury loss for the issuing bank due to the switch to the EIC, despite the accelerated debit of the bank caused by the switch to the EIC: this comprises firstly the cheques of customers whose accounts are overdrawn [25], and secondly, the cheques of customers who optimise their cash management, that is to say who credit their accounts at the last moment just before the cheque is debited, thus preventing the bank from investing the corresponding amount for its own benefit. This last case primarily concerns the banks' business customers.

480. So the higher the proportion of overdrawn customers, the smaller the treasury loss of the issuing bank due to the switch to the EIC. This is all the more true as the bank can charge its customer overdraft interests if the cheque is debited earlier. Similarly, the higher the proportion of customers who manage their accounts efficiently, the smaller the fund loss of the issuing bank.

481. These factors were not taken into account by the CIR.

482. Amount T can be calculated with the following formula:

T = average amount of cheques drawn * proportion (in value) of creditor customers who do not optimise their cash management

483. Like the average amount of cheques remitted, the average amount of cheques drawn was communicated, for each bank, during the procedure (see point 3 here above). Certain banks did not communicate the data pertaining to the period 1999/2000, which is the only relevant data to assess their incentives to switch to the EIC at the time of the CIR negotiations. In this case, the oldest data in the case file should be retained.

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[24] The data used is reproduced in annex A of this decision.

[25] A cheque issued from an overdrawn current account is not necessarily a non-sufficient fund (NSF) cheque, since a large proportion of customers benefit from overdraft facilities.

484. Generally speaking, one can consider that only large undertakings that have a cash management service can optimise their cash management. During the procedure, the parties communicated the breakdown in value of cheques drawn between business and private customers.

485. The parties did not submit any convincing evidence, and most of them did not submit any specific assumptions, that would enable an assessment, for each of the banks, of the proportion of cheque issuing (or remitting) business clients that optimise their cash flow. Likewise, with the exception of Crédit Agricole, the banks did not provide any evidence allowing one to assess the proportion of cheque-issuing private clients with overdrawn accounts.

486. The parties assert that the proportion, in value, of customers who optimise their cash flow is higher for remitting than for issuing cheques, since most remitting customers are merchants, among which the largest remitting clients, just like mass distribution companies, have their own cash management service.

487. The economic studies of 26 May 2008 and 30 October 2009 submitted by the parties, as well as the study carried out by Microeconomix on behalf of HSBC, question the possibility for cheque issuers to optimise their cash management, not least because they cannot know in advance whether the issued cheque will be an interbank or an intrabank one (thus debited sooner). Cash optimisation on issuance can however be achieved, for instance when the company negotiates with its bank an issuing value date later than the payment date, or if it issues a large volume of cheques, by means of statistical cash management tools that evaluate the estimated date of the debits.

488. Furthermore, the economic study dated 30 October 2009 specifies that the vast majority of Caisse d'Epargne customers did not manage their cheque issuances with a cash flow optimisation logic; only 10.5% in value of cheques issued by companies correspond to a customership that optimises its cash flow. The same is thought to be true of Crédit Agricole customers; only 20%, in value, of cheques issued by companies correspond to a customership that optimises its cash flow (point 146 of the study, classification mark 34980).

489. On this point, several assumptions will be tested to estimate the individual result of each bank in order to respond to the parties' objection. One should nonetheless point out that the above assessments submitted by the banks are debatable, inasmuch as they are based on an assumption whereby companies optimising their cash flow are those that have an account in debit.

The acceleration of interbank payments (A):

490. The greater the acceleration of exchanges, the greater the treasury loss of the issuing bank, because this loss equals the product of the sums presented for crediting to the cheque issuers' accounts, debited sooner, which the bank has been deprived of for the period equal to this acceleration.

491. This acceleration was initially valued between 1.1 and 1.6 business days by the CIR's select working group (classification mark 924). This is probably overestimated because it does not factor in the existence of a category of large remitters, cashing high volumes of cheques, who benefited from the acceleration of interbank payments mainly for clearing 'non-local' cheques (see point 81), if, before the EIC, they made use of subcontractors working through the night so that the cheques could be exchanged the day after the business day on which the customer issued them.

492. The parties provided no evidence for assessing the actual acceleration of interbank payments as observed in 2002. The economic studies dated 26 May 2008 and 30 October 2009 are based on an assumed acceleration of 1.2 business days.

493. On this point, several assumptions will be tested to estimate the individual result of each bank in order to factor in the entire range of estimates made by the CIR.

The investment rates of the sums concerned (i):

494. The CIR used an annual percentage rate of 3%, making it a day rate (i) of 0.012% (on the basis of 250 business days per annum). This assessment was not challenged during the procedure.

495. The average treasury loss is then the result of the following formula:

$$P = T * A * i.$$

- Assessment of the average treasury gain per cheque remitted (G):

496. The gain on the remitting portion is symmetrical to the treasury loss on the drawn portion of the banks. The average treasury gain per cheque remitted corresponds for each bank to the product of the average amount of cheques remitted that the bank was able to invest on its own behalf (R), on the time saved by accelerated interbank payments, and hence, on the credit of the cheques to the beneficiaries' accounts (A expressed in business days) and on the daily interest rate at which it could invest these sums for its own benefit (i).

The sums the banks were able to invest on their own account after the EIC (R):

497. Symmetrically to the effect observed on the banks' drawn portion, the cheques of customers with overdrawn accounts or those who optimise their cash flow did not bring about any treasury gains for the remitting bank due to the switch to the EIC (at least equal to the overdraft before encashment of the cheque for the former).

498. So the higher the proportion of overdrawn customers, the smaller the treasury gain of the remitting bank due to the switch to the EIC. By the same token, the higher the proportion of customers who efficiently manage their cash, the smaller the cash gain[26].

499. Amount R can be calculated with the following formula:

R = average amount of cheques remitted * proportion (in value) of remitting customers with accounts in credit who do not optimise their cash flow

500. These factors were discarded by the CIR and the parties submitted no conclusive evidence, nor, for the most part, did they provide their own hypotheses for assessing the amounts

[26] As was pointed out above (point 474), the share of the benefit of accelerated exchanges passed on to customers who optimise their cash flow by means of accelerated encashment times is significant. If the bank chooses to pass on only part of this acceleration, it will be able to invest the sums concerned for its own benefit for the corresponding period. So the higher the acceleration's repercussion, the smaller the recorded treasury gain. One cannot however find out the proportion passed on, and what's more, which varies according to the banks or even the customers, that would have been observed if the EIC had been introduced without the CEIC. Similarly, the share of the benefit of the acceleration that the banks actually passed on to their customers after the introduction of the EIC with the CEIC has not been determined. In the economic study dated 30 October 2009, the parties suggested adopting the following assumption whereby the banks retained 15% of the benefit of acceleration and took the view that this share would have been smaller, or even nil, if the switch to the EIC had not gone hand in hand with any compensatory mechanism (point 41 of the study). So for the purposes of this assessment, we shall assume that the entire benefit of the accelerated exchanges was passed on, since an effect equal to a partial passing on thereof can be studied by reducing the proportion of remitting customers who optimise their cash flow.

concerned. under such conditions, one will test a reasonable assumption of 5% of private accounts overdrawn, as well as several scenarios regarding the proportion of customers who optimise their cash flow.

501. The following formula therefore provides the average treasury gain per cheque remitted:

$$G = R * A * i.$$

♦ Overall assessment of the switch to the EIC without a clearing mechanism:

502. This assessment is equal to the difference between the treasury gain and the treasury loss of each bank, adjusted by the administrative gains generated by the switch to the EIC and by the necessary investments for setting up the new system.

Investments made for the switch to the EIC:

503. It is necessary to factor in the initial investments made by the banks to set up the EIC. Initial non-recoverable investments made by either party and the constraints necessary to commit and make a return on an investment aimed at boosting the efficiency of a company must be factored in for the analysis carried out in accordance with article 81(3) EC (in this respect see the guidelines of the Commission of 27 April 2004 op.cit. point 44).

504. The banks provided no valuation of the investments they made at the time of the switch to the EIC, with the exception of LCL (total investments of [75–100 million francs], written off within an annual range of [25–50 million francs] classification mark 36523), BNP Paribas, HSBC and the Banques Populaires. The latter three did not produce any documentary evidence to back up their estimates. The economic study of 26 May 2008 states that these investments are thought to amount to '*several million euros*', as much a 20 million euros for certain banks (point 2.43).

505. In the case in point, one should nonetheless take into account, not the total amount of investments made for the switch to the EIC, but the net amount of the investments that should have been made had the EIC not come to fruition. Because without the switch to the EIC, the duplicated paper exchange system for cheques in euros would have been necessary during the period when both currencies coexisted, which would have been costly, as the Banque de France explained in its hearing of 1 July 2008 (classification marks 8998 et seq.).

506. That being the case, one could legitimately ignore the initial investments made by the banks, for which there is no evidence that they would have been heavier that those that would have been made without the switch to the EIC. Moreover, while both the remitting and issuing banks had to agree to invest for the switch to the EIC, one could contend that the position of the banks in relation to one another in terms of economic assessment is not distorted by not factoring in the initial investments, which weighs down the results of all banks without distinction.

Average administrative gains per cheque:

507. At the time of the CIR's negotiations, the administrative gains expected of the switch to the EIC had been estimated at 90 million euros per annum for the banking sector as a whole (point 713), or €0.027 per cheque processed.

508. During the procedure, certain banks submitted internal calculations of the expected administrative gains, per cheque drawn (Gt) or issued (Gr), from the switch to the EIC.

509. The economic study of 26 May 2008 estimates the administrative gains between €0.009 and €0.012 per cheque drawn (§2.42 et seq.). However, contrary to the calculations in this

study, there is no need to subtract the amount of the ancillary fees to assess the administrative gains recorded by the issuing banks. This is because these fees, apart from the archiving fee, are only debited for a small proportion of cheque images, if the form circulates, if the cheque image is rejected, if a SIT error occurs or if information by fax is requested, whereas the expected savings on dematerialisation concern the standard processing of cheques[27]. Moreover, certain fees compensate the remitting bank for the cost of a transaction previously taken on by the issuing bank. They therefore do not represent an additional cost for the issuing bank compared with the expenses incurred before the EIC, unless its costs were lower than the fee.

510. The study of 30 October 2009 for its part assumes an average efficiency gain of €0.027 per cheque drawn (point 35 of the study dated 30 October 2009).

The overall assessment:

511. The economic assessment, for each bank, of the switch to the EIC without the clearing mechanism can be calculated with the following formula:

Assessment without the CEIC = number of cheques drawn * (-T + Gt)
+ number of cheques remitted * (R + Gr)

512. The economic assessment, for each bank, of the switch to the EIC with a CEIC of €0.043 can be calculated with the following formula:

Assessment with the CEIC = Assessment without the CEIC
+ 0.043*(number of cheques drawn – number of cheques remitted)

♦ Simulation of the individual outcomes of the switch to the EIC for the banks[28]

513. The assessments here below that include assumptions of alternative calculations bear out the analysis concluding that there is no need for a fixed fee per transaction like the CEIC to create the necessary incentives to switch to the EIC. As a rough guide, the result of the switch to the EIC with the CEIC, disregarding the passing of this fee on to customers, is presented in the tables here below.

[27] For its internal assessment, Crédit Mutuel thus included in its administrative gains the savings made through the sorting speed, the packaging of remittances, the shuttle and the return processing (classification mark 2521). As for Crédit Agricole, it included the lower costs of data entry and the switch to the cheque sorting scanner (classification mark 1523).

[28] Due to the distinctive features of this bank, the switch to the EIC for the Banque de France was not tested with the simulations presented here. This is because the Banque de France is very predominantly a remitting bank in terms of volume (with over 100 times more cheques remitted than cheques issued), and as a result loses out with the introduction of the CEIC. Furthermore, since its customers are essentially businesses that optimise their cash flow, the EIC did not entail significant treasury gains for it on remittance or significant losses on issuance. In addition, its administrative gains are all the greater as it was able to scale down its network of branches, previously at the disposal of banks as clearing houses (a saving that is hard to quantify).

➢ Study of the impact of accelerated interbank exchanges

514. The assessment here below was made with the assumption of an acceleration in interbank payments (A) of 1.4 business days, that is, the average estimate adopted by the CIR, 5% of overdrawn private customers and 25% (in value) of businesses who optimise their cash flow when issuing and remitting. Furthermore, the individual data provided by the parties is retained regarding the number and average amount of cheques issued and remitted [29], the proportion of businesses in the drawn and issued amounts, and the administrative gains. In the absence of any figures, the assumption of an average administrative gain per cheque drawn of €0.027 was adopted[30].

(in millions of euros)	**Assessment without the CEIC**	**Assessment with the CEIC at €0.043**
Banques Populaires	**18.4**	**11.6**
La Poste	**2.3**	**21.6**
BNP	**10.8**	**3.0**
Caisses d'Epargne	**4.9**	**14.9**
Crédit Mutuel	**5.6**	**6.7**
CIC	**5.0**	**-0.1**
Crédit Agricole	**7.9**	**17.8**
Crédit Lyonnais	**13.6**	**9.5**
Crédit du Nord	**3.5**	**1.1**
HSBC	**0.9**	**-1.5**
Société Générale	**3.5**	**1.1**
Total	**76.4**	**85.8**

515. This table shows that:

- none of the predominantly issuing banks in terms of volume, namely La Poste, Crédit Agricole, Crédit Mutuel and the Caisses d'Epargne has a negative result without the clearing mechanism. Yet they are the ones that benefited from a fixed fee on each cheque remitted;
- the assessment of HSBC, a predominantly remitting bank in terms of volume, which was positive in the absence of the CEIC (a gain of 1 million euros per annum), becomes negative solely due to the introduction of this fee; the same goes for CIC;

[29] The data on the volumes of cheques relate to 2002 (G-SIT), the average amounts of the cheques are calculated on the basis of the amount communicated by the banks for the nearest year to 2000 (that of the CIR agreement), adjusted with the inflation observed over the corresponding period.

[30] The data used were processed in order to obtain consistent data for all the banks and are reproduced in the annex hereto; the figures are rounded to the nearest decimal place.

- the assessment without the CEIC of certain predominantly remitting banks in terms of volume, such as Société Générale, Crédit du Nord, HSBC or CIC, is less favourable than that of predominantly issuing banks in terms of volume, such as Crédit Agricole or Crédit Mutuel.

516. The results do not change in substance if we assume an accelerated interbank payments time of 1.2 business days, as put forward by the banks in the economic study of 30 October 2009, which, as stated earlier, reduces the treasury losses of the banks' drawn portion and the gains of their remitted portion. On that assumption, the results of all the banks are positive without a clearing mechanism. Furthermore, HSBC's assessment becomes negative solely due to the introduction of the CEIC, falling from +1 to -1.4 million euros. Likewise for CIC, which falls from +4.8 to -0.2 million euro. Conversely, the assessment of predominantly issuing banks in terms of volume, which is positive without the clearing mechanism, improves significantly with the introduction of the CEIC.

517. The results do not change either in substance if we assume an accelerated interbank payments time of 1.6 business days, which is the maximum considered by the CIR. So as stated earlier, a greater acceleration increases the treasury losses of the banks' drawn portion and the gains of their remitted portion. On that assumption, the results of all the banks are positive without a clearing mechanism. The assessment of the predominantly issuing banks in terms of volume thus improves with the introduction of the CEIC, unlike that of predominantly remitting banks, since HSBC's result becomes negative solely because of the introduction of the CEIC, falling to -1.6 million euros.

➢ Study of the impact on cash flow optimisation

518. An alternative assessment can be made to take account of the argument put forward by the banks in their observations, asserting that the number of companies that optimise their cash flow when issuing is lower than that of those that do so when remitting, especially if the number of remitting businesses is different from that of issuing businesses, and more particularly includes mass distribution companies, which generally has a cash management department (in this respect see the economic study of 9 March 2010 attached to the parties' observations, points 30 et seq.).

519. The assessment here below factors in the same assumptions than the previous one (point 514), except for the proportion (in value) of businesses that optimise their cash flow when issuing and the proportion (in value) of businesses that optimise their cash flow when remitting, here respectively estimated at 10% and 40%:

(in millions of euros)	Assessment without the CEIC	Assessment with the CEIC at €0.043
Banques Populaires	**9.7**	**3.0**
La Poste	**1.7**	**21.0**
BNP	**5.6**	**-2.2**
Caisses d'Epargne	**2.8**	**12.7**
Crédit Mutuel	**3.3**	**4.4**
CIC	**1.1**	**-3.9**
Crédit Agricole	**2.0**	**12.0**
Crédit Lyonnais	**11.9**	**7.8**
Crédit du Nord	**1.1**	**-1.4**
HSBC	**-1.5**	**-3.9**
Société Générale	**-1.4**	**-3.7**
Total	**36.3**	**45.7**

520. According to the assumption retained, which tallies with the arguments put forward by the banks:

- none of the predominantly issuing banks in terms of volume, namely La Poste, Crédit Agricole, Crédit Mutuel and the Caisses d'Epargne, has a negative result without the clearing mechanism.
- two banks have a negative result without a clearing mechanism, namely HSBC and Société Générale, predominantly remitting banks in terms of volume, for which the introduction of the CEIC generated greater losses;
- three predominantly remitting banks in terms of volume, namely BNP, CIC and Crédit du Nord, lose out due to the CEIC being paid to predominantly issuing banks;
- the assessment without the CEIC of certain predominantly remitting banks in terms of volume, such as Société Générale, Crédit du Nord, HSBC or CIC, is less favourable than that of predominantly issuing banks in terms of volume, such as Crédit Agricole or Crédit Mutuel.

♦ Conclusion on the economic assessment of the switch to the EIC

521. When they took part in the CIR meetings, the banks probably did not carry out an individual assessment based on such precise economic assumptions. At the time of their decision to create the EIC, the banks were thus in a state of uncertainty concerning the precise consequences of the switch to the EIC, for themselves or their competitors.

522. However, the above simulations corroborate the lessons learned from an examination of the CIR working documents, as well as from the banks' internal assessments.

523. Indeed, they tally with the internal calculations of Crédit Agricole and Crédit Mutuel, predominantly issuing banks in terms of volume, which had predicted a net gain from the

switch to the EIC (disregarding the assumption of a disappearance of value dates, see point 443).

524. But above all, they also confirm that, whatever the calculation assumptions made by the CIR, the effects of introducing a fixed fee would vary greatly according to the volumes and values of the cheques issued and remitted by each bank, consequently weighing down the results of certain banks even though their position after the switch to the EIC in terms of treasury balance was less favourable that their competitors (like HSBC or Société Générale), whereas conversely, certain banks saw their particularly favourable results improve still further with the introduction of the fee (Crédit Agricole or Caisse d'Epargne).

525. The inconsistent introduction of a fixed fee, in terms of the banks' individual incentives to agree to switch to the EIC, is thus confirmed, since the predominantly cheque issuing banks in terms of volume were not necessarily predominantly cheque issuing banks in terms of value. The CEIC weighs down the results of banks that issue cheques amounting to a substantial value and remit a large volume of cheques, such as HSBC, Société Générale, CIC, Crédit du Nord and BNP. Furthermore, the CEIC greatly improves the result of the switch to the EIC for other banks that issue a large volume of cheques. This result was already positive before this fee was introduced.

No reconsideration of the CEIC in 2004

526. The conditions of the switch to the EIC, and thus the introduction and the amount of the CEIC, were supposed to be reconsidered after three years. The minutes of the CIR meeting on 3 February 2000 also mention that '[the chairman of the CIR] *points out that the conditions proposed to the Commission will apply from 1 January 2002, and will be valid for 3 years, that is until 31/12/2004, and proposes a meeting in the autumn of 2004 to fix the terms that will apply from 1/1/2005 further to an assessment of the previous 3 years and the observed trends in balances compared with current balances.*' (classification mark 942).

527. However, this fee, charged from 1 January 2002, was only abolished on 4 October 2007, retroactive to 1 July 2007 (see point 128). The banks did not meet at the end of 2004 to reconsider the conditions introduced in 2000 for the switch to the EIC. The CEIC was thus abolished in the context of the enquiry launched by the services of the Conseil de la concurrence, a few months before the Statement of objections, dated 14 March 2008.

528. While the introduction of the CEIC entailed an additional cost for predominantly remitting banks in terms of volume, which were only partly compensated by the administrative gains derived from the system (see point 524), the parties fail to explain why these banks did not seek to renegotiate the principle or amount of the CEIC at the deadline set by the CIR, that is to say by the banks themselves.

529. Questioned during the meeting as to the reasons for the CEIC being maintained after 1 January 2005, the banks confined themselves to stating that the CEIC was deemed a '*minor matter*' by the institutions concerned and that at the time they were engaged in the setting up of the Pan-European direct debit system (SEPA).

530. There again, the fact that the predominantly remitting banks did not seek to renegotiate can only have two plausible explanations: either the administrative gains made by predominantly remitting banks covered at least the cost of introducing the CEIC, or all or part of this expense was passed on to remitting customers, as part of the post-2002 renewal of multiannual service contracts entered into with client companies or of the modification in the banks' standard tariff conditions, so as to offset the loss incurred in paying the CEIC.

Conclusion on the CEIC

531. It follows from all the foregoing that the parties have not provided proof, as they are required to do with regard to the justification of a practice constituting, as in the case in point, a restriction of competition by object, that the introduction of a clearing mechanism, in the form of a fixed interbank fee paid per transaction by the remitting bank to the issuing bank, was necessary to give all the banks the essential incentives to switch to the EIC. Consequently, and without the need to examine whether the other conditions of exemption provided for in article 81(3) EC and article L.420-4 of the Commercial Code are satisfied, this practice cannot be exempted on the grounds of these provisions.

b) As regards the CSCs (fees for related services)

532. The exemptability of the CSCs will be examined below in comparison with each of the four conditions stipulated in articles L.420-4 of the Commercial Code and 81 EC.

On economic progress

533. The parties assert that, as for the creation of the CEIC, the introduction of CSCs contributed to easing the switch from the former interbank cheque clearing system to the dematerialised cheque image exchange system.

534. It has been demonstrated here above (see points 399 et seq.) that the switch to the EIC constituted economic and technical progress for cheque management in France.

535. In order to cut the cost of processing cheques, the dematerialised clearing system entailed halting the physical circulation of cheques as soon as possible, in the case in point at remitting bank level. Consequently, certain costs, such as cheque archiving, previously borne by the issuing banks, were transferred to the remitting banks, since the purpose of the CSCs was precisely to offset this transfer of expenses.

536. Furthermore, the dematerialisation of cheques entailed new expenses for the banks, such as the processing of rejected cheque images and requests for information by fax sent by the drawn banker to the remitting banker, or even the processing of cancelled transactions incorrectly cleared via the SIT. In order to ensure the smooth running of the EIC system, it thus appeared necessary for the banks taking part in the clearing operations to agree on the modalities for the apportionment of costs or the compensation for services rendered by one of them to the other.

537. The purpose of the CSCs is to offset the costs incurred by a bank relating to a transaction initiated by another banking institution or its customer, and thereby transfer the financial charge of a transaction to the persons initiating it (payer/issuing bank pair or beneficiary/remitting bank pair). Such an allocation, among other things, gives the participants in the cheque payment system an incentive to eliminate their payment errors or incidents, because they bear the cost thereof, and hence it encourages efficient use of this means of payment.

538. In this respect, the European Commission – in its aforementioned "SEPA" working document of 30 October 2009 – acknowledges that an interbank fee is justified by the objective of allocating costs to the person responsible for the transaction generating them. It also states, with regard to "R transactions", that is, transactions that cannot be executed normally (a rejected transaction, for instance for insufficient funds, cheque cancellation, formal error, etc.): '*The costs relating to R transactions may be intended to allocate the costs to users of the system who initiated the R transaction. If the participants in the system*

are confronted with the financial consequences of their own actions, they are given adequate incentives to avoid errors, and the financial contributions are then equitably allocated among the users. In principle, application of a MIF per R transaction may facilitate this allocation' (point 39).

539. So, it is an established fact that CSCs have contributed to economic progress through the switch to a dematerialised clearing system for interbank cheques.

On the necessity

On the essential nature of CSCs

540. The parties assert that CSCs were essential to achieving economic progress through the switch to the EIC if this entailed a delinking between the responsibility for a transaction and its administrative cost, whereas the hypothesis of a bilateral negotiation on the amount of related fees came up against the large number of participants in the cheque system, resulting in disproportionate transaction costs.

- ♦ The necessity of interbank fees

541. The necessity of adopting an interbank fees system to finance related transactions is established, on the one hand, by the delinking between the responsibility for a transaction and its administrative cost and, on the other, by the absence of alternative arrangements for offsetting the costs incurred by the banks.

542. On the first point, it is necessary to verify that the purpose of each of the fees is to remunerate a service rendered by one bank to another and, hence, allocate the cost of the transaction to the person responsible for it.

543. The archiving of cheques, previously assumed by the issuing banks, was transferred to the remitting banks with the switch to the EIC. One can consider that the payer/issuing bank pair is responsible for this, since each cheque exchanged is archived independently of any viewing of the image of the cheque. The archiving fee, which offsets the cost of the archiving completed by the remitting bank, transfers the expense of the transaction to the cheque system participants who initiate it.

544. The fee for circulating cheques is paid by the drawn banker to the remitting banker in four cases: non-standard cheques; cheques circulating in accordance with the indications of the drawn banker; cheques circulating in respect of random circulation; and cheques in excess of €5,000. In the first two cases, the physical circulation of the cheque is directly chargeable to the drawn banker. In the last two cases, the circulation of cheques results from the application of rules laid down in common by the banks, aiming among other things to ensure the control and security of the EIC system. One can however consider that the cost of circulation of a cheque worth a large amount should be borne by the payer who issued it. Therefore, in most cases, the payer/issuing bank pair initiates circulation of the cheque forms. However, due to the dematerialisation of cheque processing, the remitting bank bears the expense of forwarding the cheque to the physical cheque exchange centre in Paris. The fee for a circulating cheque image, which offsets the cost borne by the remitting bank if it is thus forwarded, transfers the expense of the transaction on to the payer/issuing bank pair that initiated it.

545. Rejected cheque images are more often than not chargeable to the payer/issuing bank pair that issues a cheque from an account with insufficient or unavailable funds, or one that cancels a cheque or even issues a cheque that is irregular in its form or fraudulent. Now, on account of the dematerialisation of cheque processing, the remitting bank bears the cost of

cross-checking the rejected cheque image generated by the SIT against the corresponding cheque form. The fee on cheque image rejection paid by the drawn banker thus remunerates the service rendered by the remitting bank.

546. Requests for information by fax are made by the issuing bank (possibly at the payer's request), but their expense is borne by the remitting bank that archived the cheque. Fees on requests for information by fax, which offset the cost of search and faxing borne by the remitting bank, transfer the expense of the transaction on to the payer/issuing bank pair that initiated the transaction.

547. Lastly, fees on cancellations of transactions incorrectly cleared (AOCT) offset the costs borne by the banks when they reverse a transaction initially incorrectly ordered. The fee on cancellation of a cheque image is paid by the remitting bank which, when it notices such an error, asks the issuing bank to cancel the incorrectly cleared transaction. The fee on cancellation of a rejected cheque image is paid by the issuing bank which, when it incorrectly rejects it, asks the remitting bank to cancel this transaction.

548. As stated in the CIR select working group report of 28 December 1999 on transactions relating to cheque image exchanges: '*the number of such transactions can be reduced through thorough controls of transactions before they are initiated. It is thus normal for the institution initiating such transactions, which put a significant workload on the institution that receives them, to pay a fee for each cancellation of an incorrectly cleared transaction*' (classification mark 1433). Cancellation fees for incorrectly cleared transactions thus transfer the cost of the transaction on to the bank that made the error.

549. Regarding the absence of alternative clearing arrangements, it should be pointed out that, in view of the characteristics of the cheque payment system, the bank's remuneration by charging its customer does not optimize the allocation of transaction-related costs to the users of the cheque system. This is because, in the absence of an extended contractual relationship between the issuer of a cheque and its beneficiary, the remitting parties cannot always re-invoice the cost of a related transaction for which they are not responsible; for instance when a bad cheque is issued. Regarding unusual transactions (error, rejection, etc.), their cost cannot easily be passed on, for instance on the price of goods sold by merchants. Since a private allocation of costs between payer and beneficiary is complex or even impossible in practice, the financial expense of a transaction can only be efficiently transferred to the party responsible for it by means of an interbank fee.

- The necessity of multilateral fees

550. The necessity of adopting a multilateral fee system in preference to bilateral fees was recognised by the national and EU competition authorities within the framework of decisions relating to interchange fees.

551. In its aforementioned decision No. 88-D-37, GIE CB, the Conseil de la concurrence noted that: '*determination, by the grouping, of the applicable pricing conditions between member institutions is necessary in order to ensure that the interbank payment system functions properly; that without the intervention of the grouping, each of its members would indeed have to negotiate, with all the others, the amount of the remuneration it intends to be paid in its capacity as a bank of holders; that the efficiency and profitability of the interbank card payment network would thereby be compromised, as would the ensuing economic progress; that the principle whereby the grouping sets interchange pricing consequently comes under article 51 2°* [now article L.420-4 of the Commercial Code]'.

552. The reduction in negotiation and transaction costs was also advanced by the European Commission to justify the essential nature of a multilateral interchange agreement in its aforementioned Visa decision of 22 November 2002. The Commission states that, in view of these costs, '*bilateral interchange fees though theoretically possible, would result in higher and less transparent fees. This is in its turn likely to lead to higher merchant fees. For this reason, a default fallback MIF is necessary for cases where two banks have not been able, or have not tried, to reach a bilateral agreement*' (point 101).

553. In the absence of a multilateral agreement on the allocation of new costs and the compensation of expense transfers between the banks generated by dematerialised exchanges, the efficiency gains arising from the switch to the EIC would have been significantly cut back by the cost of each pair of banks negotiating bilateral fees. This is because a large number of bilateral negotiations (several hundreds of thousands) would have had to be concluded, given the number of participants involved, and any quantitative revaluation would have needed all these agreements to be renegotiated.

♦ The necessity of fixed fees

554. CSCs remunerate a service rendered by one bank to another, the cost of which is not related to the amount of the cheque issued, but to a fixed cost, the amount of which depends on the nature of the related transaction made by the bank. So, unlike a fee the purpose of which would be to make up for treasury imbalances, the unit nature of CSCs is justified, in view of their purpose.

555. It follows from all the foregoing that the essential nature of CSCs in order to make the expected efficiencies is established.

Regarding the proportionate amount of CSCs

556. In its aforementioned decision No. 88-D-37, GIE CB, the Conseil de la concurrence noted, with a view to refusing to exempt the interbank fee introduced by the relevant grouping's members because of its contribution to economic progress, that its price was applicable uniformly to all financial institutions regardless of their particular circumstances, and for this reason considered the arrangements adopted for its introduction non-compliant '*with the goal of economic progress*', on the grounds that they in fact prevented the grouping's members '*from granting their retail customers fee rates based on objective criteria and more particularly connected to the efforts of retailers to cut the risk of fraud and misuse*'.

557. With regard to interbank fees, the European Commission also refers to the objectivity and transparency of the criteria used to set its amount. In its Visa decision of 22 November 2002, it emphasizes that the level of the MIF submitted to it for review does not exceed '*the cost of the specific services on which its calculation is based*', as substantiated by a cost study conducted on a representative sample of Visa members and verified by an independent expert (point 92). In the GSA case, the Commission asked the banks to review periodically the amount of the interbank clearing fee using the processing cost achieved by the most efficient bank, as assessed by an independent expert (see GSA decision of 21 October 1999, point 30).

558. In this respect, the parties underscore the difficulty of costing related services at the time the CSCs were created, insofar as, with regard to new services connected to the setting up of the EIC, the banks could not know the costs related to these services in 1999.

559. While it is true to say that the costs relating to transactions financed by the CSCs could not be calculated with any precision in 1999, the CIR had planned to review the conditions of

the switch to the EIC, and therefore the amount of the CSCs, after a period of three years. Furthermore, article 4.6.3 of the aforesaid industry agreement on exchanges of cheque images dated 9 July 2003, stipulated that consultations on the amount of the CSCs should be organised at least every three years, and for the first time in the quarter following the adoption of the agreement, and be '*based on the costs estimated by sample of 'contracting institutions deemed representative by the signatories*' (see point 1225 above). This revaluation however was only done in November 2007, retroactive to 1 July of that year, after a study commissioned from the firm Latham and Watkins of all the costs of the CSCs, except the fees for incorrectly cancelled transactions (see same point).

560. With the exception of the fee for circulating cheques, the amount of which had been set at a higher level than the actual costs of the transaction to act as a deterrent, the amount of the CSCs was set after the 2007 revaluation by reference to the median cost borne by the banks.

561. On this point, the Caisses d'Epargne assert that, regarding multilateral fees, their level can legitimately be set according to the average cost borne by all the banks, failing which excessively heavy expenses would be created for the less efficient banks. Crédit Agricole and LCL stress that setting fees too low would have penalised the least efficient remitting banks, which would have led to a refusal to take on this responsibility, and, consequently, to the failure of the switch to the EIC.

562. One should thus examine what objective criteria can be adopted to determine the amount of interbank fees for services rendered within the framework of the cheque payment system.

563. Due to the multi-faceted dimension of the market, the CSCs represent both a *cost incurred by the bank buying a service from another*, part of which, as pointed out above, can be passed on to the final customer, and a *revenue* for a bank in exchange for rendering a service to another bank. Inasmuch as one accepts the principle of joint fee-setting, it is therefore important that they should minimise the impact on customers and encourage the banks to be more efficient in providing these services. In particular, the fact of passing fees on to consumers should not inflate the cost of the corresponding services.

564. The method recommended by the European Commission in the GSA case is to set the fee according to the cost of processing achieved by the most efficient bank. A fee indexed on the cost of the most efficient bank is preferable, because it minimises the knock-on effect on consumers by cutting costs liable to have an impact on the prices charged to customers.

565. Moreover, the choice of a reference price has only a relatively limited impact on the banks' incentives to minimise the cost of providing the services corresponding to the various related fees. Indeed, regardless of whether they receive or pay the fees, they all have an incentive to cut the costs of these services to increase their revenue stream or curb their losses.

566. It follows from the foregoing that the interbank fees for services rendered must, barring particular circumstances, be set in reference to the processing cost achieved by the most efficient bank.

567. In the case in point, given the new rule based on the cost of the most efficient bank, and by measure of temperament, the proportional nature of CSCs will be accepted when it has been established that they have been set at average cost level (reference used by the banks to set the amount of certain CSCs during the CIR negotiations) or median cost level (reference used at the time of the revision of the fee amount in 2007), subject to examining the particular circumstances (such as the fee on a circulating cheque image, which was set

to act as a deterrent). It is indeed acknowledged that these reference costs helped achieve a consensus of the various economic agents as to the level of the fee to adopt. One should nonetheless point out that the next periodic adjustment of the CSCs should have been an opportunity for the banks to set it according to the cost of the most efficient bank.

♦ The fee on rejected cheque images

568. The fee for rejected cheque images was set at 3 euros by the CIR. It was not changed during the 2007 price review.

569. The parties assert that the fact that this fee remained unchanged further to the assessment carried out by the Latham and Watkins firm in 2007 proved that it had been set at the same level as the actual costs as from 2002.

570. It follows from the above that the fee matches the median cost of the transaction for the banks, as observed in 2007. Inasmuch as there is no evidence that this cost varied between 2002 and 2007, is can be deemed proportionate to the achievement of the expected efficiencies.

♦ Fees on requests for information by fax

571. These three fees were set by the CIR respectively at 2.7 euros (one-sided fax); 3 euros (two-sided fax) and 7 euros (one-sided fax + original copy). They were considerably reduced in 2007, and now stand at 1 euro for the first two and 4.12 euros for the third.

572. Crédit Agricole and LCL assert that the cost of issuing a copy of the cheque to the drawer rose as a result of the EIC: whereas the search was formerly carried out by the issuing bank directly from the customer's bank statement, the remitting bank must now extract from its archives the cheque remittance in question, using the code of the clearing transaction transmitted by the SIT. The cost of this service after the reform is not thought to have been assessed with precision in 1999.

573. The Banques Populaires, Crédit Agricole and LCL moreover contend that the new assessment of the reduction in these fees in 2007 can be explained by technological advances, which have cut the cost of fax services. They point out that the widespread use of digital archiving enabled automation of the fax extraction and sending process from a request transmitted by the SIT, and thereby reduced the cost of the transaction that previously required manual handling of the paper cheque in the archives.

574. The CIR select working group report on transactions relating to the Cheque Image Exchange of 28 December 1999, which proposed the setting of fees for requests for information by fax at the level eventually adopted by the banks, points out that: '*The group deemed that in general the workload falling to the remitting banker was of the same order of magnitude for an unpaid cheque as for a fax request. It suggests that the same price be set for all rejected cheques and for fax requests, on the understanding that the technical tools should enable to set distinct prices for these two tasks if new circumstances arose*' (classification mark 1432). At the time the EIC system was set up, the tasks carried out by the remitting bank for a fax request were thus similar to those carried out for a rejected cheque image.

575. In this case, the amount of fees for fax information could be considered proportionate to the achievement of the expected efficiencies.

♦ Fees on cancellation of an incorrectly cleared transaction (hereinafter AOCT)

576. These fees were set at €0.61 by the CIR. This amount was not examined during the 2007 revaluation.

577. The parties assert that these fees were set at the same level as the AOCT fees on other means of payment processed by the SIT, since they are similar transactions.

578. However, interbank fees cannot be set by analogy, but should, as pointed out above (points 556 et seq.), be set according to objective criteria based on the costs of the services rendered. Therefore, the circumstance whereby the fees are common to all AOCT transactions does not establish their proportionate nature, in the absence of any justification by the banks as to the procedures followed to set this amount.

579. In this case, the banks do not demonstrate the proportionate nature of the AOCT fees charged since 1 January 2002. Consequently, these fees cannot be exempted under articles 81(3) EC and L.420-4 of the Commercial Code.

♦ The archiving fee

580. This fee was set at €0.003 (0.019 F) by the CIR. Although it was deducted from the CEIC, it was abolished on 1 July 2007, without any justification on the part of the banks.

581. The Banque de France asserts that this fee is in line with the average cost of archiving.

582. The report on transactions relating to the Cheque Image Exchange of 28 December 1999 states that the production cost of archiving observed for institutions that are members of the CIR select working group '*stands between 0.01 and 0.03 F per cheque*' (classification mark 1430).

583. In that case, the amount of the archiving fee could be considered proportionate to the achievement of the expected efficiencies.

♦ The fee on circulating cheque image

584. This fee was set at €0.15 by the CIR. It was lowered to €0.12 in 2007.

585. The parties assert that they chose dissuasive pricing, based on the cost price of the least efficient banks. They explain that the fee for circulating cheques is not only intended to cover the cost borne by the remitting banks but also to dissuade issuing banks from returning circulating cheques, in order to ensure the efficiency of the system. Crédit Agricole and LCL explain that the circulation of cheques was still possible after the EIC, even for cheques compliant with the system's standards, at the request of the issuing bank or on the initiative of the remitting bank in respect of random circulation. The first years of the EIC system were indeed characterised by a significant rate of circulating cheques compared with that observed currently, demonstrating the need for a dissuasive mechanism.

586. The report on transactions relating to Cheque Image Exchanges dated 28 December 1999 points out that the fee '*is at the top end of the range of cost price observed in the institutions, but this choice is intentional to avoid the number of circulating cheques rising too high*' (classification mark 1431). During the 2007 price adjustment, the banks opted to set the fee at the median (the cost of the least efficient bank being €0.025).

587. The banks' choice is justified, inasmuch as the initial dissuasive fee encouraged the system's players to avoid circulation of cheque forms, contrary to the very purpose of the EIC that introduced the dematerialisation of cheques, and a source of costs. A fee set at a

dissuasive level thus maximised the efficiencies generated by the new system, within the framework of the EIC launch phase. Furthermore, the level set by the CIR in 2000 was not excessive as long as it did not exceed the actual cost price observed in certain institutions. At the end of the traditional launch phase of the EIC, and since the goal of reducing the circulation of cheque forms had been achieved, the banks were justified in aligning the fee with the median cost adopted for the other CSCs.

588. It follows from the above that the level of the fee for circulating cheques set by the CIR was proportionate to the efficiencies expected of it.

589. It follows from all the foregoing that the CSCs, with the exception of AOCT fees, the amount of which was set according to criteria unrelated to the goals pursued by the agreement under review, were reasonably necessary to achieve the efficiencies expected of it.

On the sharing of profits

590. The parties assert that an equitable portion of the profits gained by the banks from the switch to the EIC, to which the CSCs contributed, was passed on to consumers in the form of accelerated crediting of customers' bank accounts when remitting cheques, and a higher level of security in cheque transactions.

591. It follows from the foregoing that the CSCs were necessary to make the corresponding efficiencies, on the one hand, by saving on the cost of negotiations and transactions with bilateral fees and, on the other, to optimise the apportionment of the cheque payment system's costs among its.

592. As stated in the guidelines of the European Commission with regard to the application of aforesaid article 81 (3) of the treaty: '*The second condition of Article 81(3) incorporates a sliding scale. The greater the restriction of competition found under Article 81(1) the greater must be the efficiencies and the pass-on to consumers. This sliding scale approach implies that if the restrictive effects of an agreement are relatively limited and the efficiencies are substantial it is likely that a fair share of the cost savings will be passed on to consumers. In such cases it is therefore normally not necessary to engage in a detailed analysis of the second condition of Article 81(3), provided that the three other conditions for the application of this provision are fulfilled.*' (point 90).

593. In the case in point, it should be stressed that the CSCs only apply to transactions relating to the cheque clearing system, and are thus not debited for most of the transactions made within the framework of the new EIC system. Moreover, regarding remuneration for services rendered, the restrictive effects on competition are confined to the impossibility for each bank to negotiate a lower fee individually with its competitors when its costs are below the median, thereby depriving its customers of the benefit of more competitive prices, inasmuch as the CSCs are in the end passed in part or in full on to the users of the cheque system.

594. Regarding the efficiency gain from optimised allocation of costs between the system's users, one can consider that the CSCs, with the exception of the AOCTs, retain an equitable portion of the resulting profit for consumers insofar as their amount is based on objective and transparent criteria and does not exceed the cost of the service rendered, as pointed out earlier. This analysis notably tallies with that developed by the European Commission in the Visa decision of 22 November 2002 (see preamble 92 to the decision).

595. With regard to the savings on the costs of bilateral transactions, one can also consider that the CSCs retain an equitable portion of the resulting profit for consumers. In the bilateral

negotiations scenario, the transaction costs could be passed on to consumers, directly through higher account charges, or indirectly, by raising the price of other banking services (cross subsidies). The fact that bilateral transaction costs are not passed on to consumers probably represents a greater gain than any additional expenditure generated by the fact that the bank paying a multilateral fee is unable to set the price of its services on the basis of its individual costs alone, when they are below the fee.

596. It follows from the foregoing that the CSCs should be regarded as retaining an equitable portion of the efficiencies expected of it for users of the cheque system.

On the absence of elimination of competition

597. The competition between the banks was not eliminated on the cheque issuing and remitting markets by the introduction of CSCs. That is because the CSCs do not directly determine relations between banks and their customers, and the banks are still free to determine the terms and conditions and the level of remuneration they demand from their customers for cheque issuing and remitting services. Banks paying the fees are still free to pass all or part of the cost of the CSC on to their customers, and can compete on other pricing aspects of cheque issuing and remitting services.

Conclusion on the CSCs

598. It follows from all the foregoing that the fees on rejected cheque image, fees for requests for information by fax, the archiving fee and the circulating cheque image fee can benefit from the exemption provided for in articles 81(3) EC and L.420-4 of the Commercial Code.

599. Conversely, AOCT fees are not liable to benefit from the exemption provided for in articles 81(3) EC and L.420-4 of the Commercial Code, since the banks have not demonstrated that their amount was proportionate to the achievement of the expected efficiencies.

D. ON THE IMPUTABILITY OF PRACTICES

1. ON THE IMPUTABILITY OF PRACTICES AT LA BANQUE POSTALE

600. La Banque Postale contends that the retained objections cannot be notified to it, because it has only been in existence under its current name and corporate purpose since 2005, namely after the CIR meetings.

a) Applicable law

601. The rules developed by national and EU case law that govern the imputability of infringements of competition law in the event of corporate restructuring are based on the principle of personal responsibility, completed by the criterion of economic continuity.

602. When a legal entity infringes competition rules, it is answerable for this infringement, according to the principle of personal responsibility (in this respect, see the judgments of the European Court of Justice of 8 July 1999, Commission/Anic Partecipazioni, C−49/92 P, Rec. p. I−4125, point 145, and of 16 November 2000, Cascades/Commission, C−279/98 P, Rec. p. I−9693, point 78).

603. A legal entity that has not committed an infringement may nonetheless be penalised in certain circumstances, on the grounds of economic continuity. Because '*if no possibility of imposing a penalty on an entity other than the one which committed the infringement were foreseen, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes. This would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties*' (judgment of the European Court of Justice of 11 December 2007, ETI and others, C−280/06, Rec. p. I−10893, point 41).

604. This is the case when the person committing the infringement ceases to have legal existence after committing the infringement (see judgment Commission/Anic Partecipazioni, op.cit. point 145). As stipulated in the case law of the national supreme courts: '*the financial penalties provided for in article L.464-2 of the Commercial Code apply to companies engaging in prohibited anticompetitive practices (...), when the person running the company has ceased to exist legally before being called to answer for them, the practices are attributed to the legal entity to which the company was legally transferred, and failing such a transfer, to the entity ensuring its economic and functional continuity*' (judgment of the Paris Court of Appeal of 14 January 2009, Eurelec; see also the judgment of the Final Court of Appeal of 20 November 2001, company Bec Frères).

605. This is also the case when the person that committed the infringement has ceased to exist economically after committing it (in this respect, see the judgements of the European Court of Justice, Aalborg Portland/Commission, op.cit. points 355 to 359, and ETI, op.cit. points 41 to 52). The European Court of Justice stresses: '*With regard to the latter, it is worth noting that a penalty imposed on an undertaking that continues to exist in law, but has ceased economic activity, is likely to have no deterrent effect.*' (judgment ETI, op.cit. point 40).

606. In this second case, the EU judge pointed out that '*where two entities constitute one economic entity, the fact that the entity that committed the infringement still exists does not as such preclude imposing a penalty on the entity to which its economic activities were transferred. In particular, applying penalties in this way is permissible where those entities have been subject to control by the same person within the group and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions.* . (same judgment, points 48 and 49). This case law is based on the fact that competition law governs corporate activities, and that the notion of company, as defined by EU case law, encompasses any entity engaged in an economic activity, regardless of its legal status and funding method. In the ETI case, the new operator was penalised, even though the former one had not ceased to exist legally, and had retained an economic activity in another economic sector, since the two entities were held and placed under the supervision of the same public authority.

607. So, the criterion of economic continuity applies not only '*when the legal entity responsible for running the company has ceased to exist legally after committing the infringement* ' but also '*in the case of internal restructuring of a company when the initial operator does not necessarily cease to have legal existence but is no longer engaged in an economic activity on the market in question and with regard to the structural links between the company's initial operator and its new operator*' (Court judgement of 30 September 2009, Hoechst/Commission, T-161/05, not yet published in the Collection, point 52).

608. Attributing an infringement committed by the former operator to the new operator is, in certain circumstances, an option offered by case law to the competition authority, not an obligation (same judgment, point 64).

b) Assessment in the case in point

609. In this particular case, the creation of interbank fees debited for cheque clearing transactions in the EIC system and their pricing was decided on by the banks at the CIR meeting of 3 February 2000, which was attended by the representative of La Poste (see points 76 above). The agreement was then implemented by La Poste until it transferred its banking activities to its subsidiary La Banque Postale in respect of the banking activities of this publicly-owned institution. La Banque Postale was incorporated in December 2005 by changing the name of the company Efiposte, a subsidiary of La Poste engaged in the business of receiving, transmitting and executing financial orders, and by extending its corporate purpose to encompass banking operations. This is the entity that implemented the contentious collusion from December 2005, a fact not contested by La Poste.

610. Pursuant to the aforementioned EU case law, the fact that La Poste had not ceased to exist legally does not prevent La Banque Postale from being sanctioned due to the infringements in question committed by La Poste prior to 2005, given the fact that on the one hand, the latter no longer operates on the cheque market concerned by this procedure and, on the other, that there are structural ties between La Poste and La Banque Postale. The position of La Banque Postale is in every respect comparable to that of the companies implicated in the ETI case. Indeed, following the internal restructuring of this publicly-owned institution in 2005, La Poste, albeit still having legal existence and retaining an activity in another economic sector, transferred all its banking activities to its subsidiary La Banque Postale. Moreover, it should be pointed out that La Banque Postale is a wholly-owned subsidiary of La Poste; the two companies thus are deemed to constitute a single company within the meaning of competition law. Finally, at the time La Banque Postale was incorporated, the two entities were controlled by the state and placed under the supervision of a single public authority, the minister for economy.

611. Furthermore, it should be pointed out that attributing the practices at issue to La Banque Postale does not compromise its rights of defence, since it has been duly notified of the objections and was able to submit its observations as provided for by article L.463-2 of the Commercial Code. Lastly, this imputation is not detrimental to the interests of the company, since the financial penalty is capped, pursuant to article L.464-2 of the Commercial Code, at the group's consolidated turnover excluding tax, or in the case in point, the turnover of the La Poste group, in which the accounts of La Banque Postale are consolidated.

612. It follows from the foregoing that La Banque Postale must answer for the grievance notified to it.

2. ON THE IMPUTABILITY OF PRACTICES AT LCL

613. Crédit Agricole and LCL contend that the practices at issue cannot be attributed to LCL as from 19 June 2003, the date on which it was taken over by Crédit Agricole SA. These banks assert that LCL can no longer be deemed an independent entity from that date onwards since it is a wholly-owned subsidiary of Crédit Agricole SA and most of the members of LCL's management bodies have responsibilities in the Crédit Agricole group and Crédit Agricole SA.

614. It emerges from EU case law that the conduct of a subsidiary can be attributed to the parent company, all the more particularly when this subsidiary, albeit a distinct legal person, does not determine its market behaviour autonomously, but it essentially applies the instructions

it receives from the parent company, more particularly with regard to the economic, organisational and legal ties uniting these two legal entities. The absence of independent conduct is assumed when the subsidiary is wholly owned by the parent company. In that case, the competition authority may '*subsequently consider the parent company as being jointly and severally liable for the fine imposed on its subsidiary, unless said parent company, on which the onus is to rebut this presumption, can provide sufficient evidence that its subsidiary acts autonomously on the market*' (see the judgment of the European Court of Justice of 10 September 2009, Akzo Nobel and others v. Commission, C-97/08, not yet published in the Collection, points 58 to 61).

615. The European Court of Justice also pointed out that, when a company engaged in such practices is taken over by a group within which it continues to pursue the incriminated activity in its capacity as a subsidiary, it must itself answer for its infringements committed prior to the takeover (see judgment Cascades/Commission, op.cit. point 79).

616. In the case in point, the conclusion of the agreement of 3 February 2000 and its implementation up to 19 June 2003 are attributable to LCL, since this company continues, as a subsidiary of Crédit Agricole SA, to engage in the banking activity within the framework of which these practices were conducted.

617. Crédit Agricole SA acquired the entire capital of LCL on 19 June 2003. Consequently, and although it is claimed that from that date LCL no longer determined its market conduct independently, Crédit Agricole SA will thus be considered jointly and severally liable to pay the fine imposed on its subsidiary for implementing the agreement in the period after 19 June 2003.

3. ON THE IMPUTABILITY OF PRACTICES AT BPCE

618. When the person committing the infringement has ceased to exist legally after committing it, the practices are attributed to the legal entity to which the company was legally transferred (see the judgment of the Paris Court of Appeal, Eurelec, op.cit. point 604 above).

619. Therefore, in the case of a planned merger of the legal entity, the practices must be attributed to the company that legally takes over from the incriminated company, that is, the acquiring company (in this respect, see decision No. 07-D-11 of 28 March 2007 on contentious practices in connection with the public roadwork contracts awarded by the *Conseil général de la Marne*, the Reims city council and the Reims district council, point 97).

620. In the case in point, Banque Fédérale des Banques Populaires (which became BP Participations in 2009) and Caisse Nationale des Caisses d'Epargne (which became CE Participations in 2009) were merged and absorbed on 5 August 2010 by Banques Populaires Caisses d'Epargne (BPCE), as the banks concerned point out. The practices engaged in by Banque Fédérale des Banques Populaires and Caisse Nationale des Caisses d'Epargne must therefore be attributed to BPCE.

E. ON THE FINANCIAL PENALTIES

1. ON THE PROTECTION OF THE PARTIES' LEGITIMATE EXPECTATIONS

621. Crédit Mutuel and CIC contend that imposed financial penalties would be contrary to the principle of legitimate expectations. These banks assert the absence of a reaction from the DGCCRF (General Directorate for Competition Policy, Consumer Affairs and Fraud Control), further to discussions with banking sector representatives about the introduction of the CEIC during the course of 2002, created legitimate expectations on the part of the banks in respect of the legality of this fee.

622. The conditions for application of the EU law principle on the protection of legitimate expectations are however especially strict. Under EU case law, the right to invoke this principle extends to any private individual finding themselves in a situation from which it emerges that the administration raised well-founded expectations. No one can invoke a violation of this principle without precise, unconditional and corroborating assurances from authorized and reliable sources, provided by the administration (see for instance for due application of this principle to competition law, the court judgments of 30 April 2009, Nintendo, T-13/03, not yet published in the Collection, point 203, and of 29 April 2004, Tokai Carbon and others, T−236/01, T−239/01, T−244/01 to T−246/01, T−251/01 and T−252/01, Rec. p. II−1181, point 152).

623. In the case in point, by not following up on the discussions with the banks during the course of 2002, the DGCCRF, which moreover had no authority to qualify anticompetitive practices, in no way provided any precise, unconditional and corroborating assurances liable to raise legitimate expectations among the banks. The claim of violation of the principle of protection of legitimate expectations must therefore be ruled out.

2. ON THE MAXIMUM FINANCIAL PENALTIES

a) On the applicable law

624. Article L.464-2(I) of the Commercial Code, in its wording taken from the law No. 2001-420 of 15 May 2001 on the new economic regulations (hereinafter "NER law") stipulates that '[i]*f the offender is not a company, the maximum amount of the penalty is 3 million euros. The maximum amount of the penalty for a company is 10% of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the accounts of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account is that shown in the consolidated or combined accounts of the consolidating or combining company.*'.

625. When the observed practices constitute a continued practice, starting before and ending after the entry into force of the NER law and if the Conseil de la concurrence was referred to after the said date, the applicable provisions are those of the NER law (on this point, see the judgment of the Final Court of Appeal of 14 March 2006, SAS Privileg).

626. In this particular case, the ex officio proceedings initiated by the Conseil de la concurrence on 29 April 2003 post-date the entry into force of the NER law. This referral concerns a practice established by the agreement of 3 February 2000 concluded within the CIR, which was implemented until 1 July 2007 as far as collection of the CEIC was concerned, and

which still applies as far as collection of AOCT fees are concerned. The provisions of the NER law thus apply.

b) On the relevant turnover for application of the legal limit

627. Société Générale, Crédit Agricole, LCL, Banques Populaires, BNP, and HSBC contend that, given the specifics of their activity, "*net banking income*" (or net operating income) is the figure that should be taken into account, since it is the one that is closest to the notion of turnover for the banking sector.

628. Crédit Agricole and LCL assert that using net banking income as a basis for any fine would more particularly result in taking into account interests received from interest rate swaps while discounting the interests paid out in compensation, whereas the income from such transactions is solely the difference between interests paid and interests received. They point out that in 2008, LCL recorded swaps amounting to 9,499 billion euros of interest received (included in its gross operating (or 'bank') income), whereas the net income from these transactions was only 243 billion euros.

629. The turnover heading in the financial statements of certain credit institutions, on account of their distinctive accounting and tax characteristics, is either not stated (which is the case for Caisses d'Epargne), or it is much lower than the turnover stated elsewhere. In that case, one should take into account a figure adapted to the specifics of the banking sector to assess the maximum fine within the meaning of the aforesaid article L.464-2 of the Commercial Code.

630. Net banking income is the difference between bank operating income and expenses excluding interests on doubtful loans but including allocations to and reversals of provisions for depreciation of securities. According to the INSEE definition, it measures the specific contribution of banks to the increase in national wealth and as such is comparable to the added value created by non-financial undertakings[31]. Net banking income cannot thus be considered equivalent to a turnover, which comprises gross revenues, not revenues net of expenses.

631. The regulators approved the analysis of the Conseil de la concurrence in its decision No. 00-D-28 of 19 September 2000 on competitive conditions in the mortgage credit sector, which had taken the view that, when the turnover of a banking institution was not stated in the tax package or was significantly lower than the amount disclosed elsewhere on account of its accounting and tax characteristics, the maximum financial penalty should be based on the sum of the bank operating income items, making up the *"gross banking income"* and representing the economic activity of these companies (see the judgments of the Paris Court of Appeal of 27 November 2001 and the Final Court of Appeal of 23 June 2004).

632. In addition, under merger law, article 5 of Council regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation, Official Journal L 24, p. 1) stipulates that, for credit institutions and other financial institutions, the turnover is replaced by the sum of the following income items, after deduction, where applicable, of value added tax and other taxes directly related to those items: interest receivable and similar income, income from securities (income from shares and other variable yield securities, income from investment, income from shares in affiliated undertakings), fees receivable, net profit on financial operations and other operating income. These provisions tally with the notion of gross income, not net income.

[31] INSEE Internet site

633. That being the case, in the absence of turnover, the gross banking income of the companies in question will be retained to assess the maximum financial penalty provided for by article L.464-2 of the Commercial Code.

634. It should however be recalled that the reference to turnover in article L.464-2 of the Commercial Code only serves to set the maximum amount of the fine incurred by companies having engaged in anticompetitive practices. Subject to this legal ceiling, it is only stated that the fine must be proportional to the seriousness of the alleged facts, the extent of the damage to the economy, the circumstances of the penalised organisation or company or its controlling group and whether or not it has reoffended. So, to establish the amount of financial penalties, the Autorité de la concurrence takes account of numerous factors not confined to turnover, and more particularly, with regard to the individualised financial penalties pronounced, of each company's ability to pay.

635. In its decision No. 09-D-05 of 2 February 2009 on practices prevalent in the temporary work sector, confirmed by the judgment of the Paris Court of Appeal of 26 January 2010, the Conseil de la concurrence stated that, to set the amount of a fine, '*With respect to the assessment of the circumstances of a company liable to be sanctioned, it must naturally take account of its financial capacity, which may at times be fairly unrelated to sales, even if in other cases it is closely related*'. In this case, the Conseil adopted the gross margin of temporary employment agencies to assess their ability to pay, since the reported turnover included salaries and contributions paid to temporary workers, unlike the gross margin, which in substance reflected the price of the services for which user companies were invoiced.

636. In the case in point, the banks' arguments will be adopted, not to calculate the official maximum as stated above, but to ensure that the pronounced financial penalties are proportionate to their ability to pay, which is better reflected, given the particular characteristics of the banking sector, by their net banking income than by their turnover and declared in the tax package or gross banking income.

3. ON THE CRITERIA FOR DETERMINING FINANCIAL PENALTIES

637. Article 464-2(I) of the Commercial Code stipulates that '*fines are proportionate to the seriousness of the alleged facts, the extent of the damage to the economy, the circumstances of the penalised organisation or company or its controlling group and whether or not it has reoffended with regard to this section. They are determined individually for each penalised company or organisation and substantiated for each financial penalty*'.

638. The following shall be dealt with in turn:

- the seriousness of the practices;
- the extent of the damage to the economy;
- whether or not the company has reoffended;
- the individual circumstances of the companies.

a) On the seriousness of the practices

The parties' arguments

639. The parties contend that the agreement introducing the CEIC cannot be qualified as a serious offence under competition law.

640. The Banque de France, Banques Populaires, Crédit Agricole and LCL assert that the banks did not intend to engage in anticompetitive practices when they decided to institute the CEIC. The parties state that the competition authorities had not hitherto posited the general principle of unlawfulness of this type of fee, which had been the subject of exemptions on numerous occasions. They also underline the complex technical problem of the interbank fees at issue. HSBC for its part invokes '*legitimate doubt*' and asserts that it was reasonable for it to be unaware that the practices at issue were liable to be qualified as restrictive to competition.

641. The parties contend that the agreement of 3 February 2000 cannot be compared with a price-fixing agreement, like the Helsinki agreement that gave rise to the Commission's decision of 25 March 1992. They stress the fact that this fee was not counterpart for a service but had a compensatory objective. They state that this fee was not intended to be passed on prices and that the rise in prices noted by the investigation services – which does not solely reflect this passing on – is lower than the amount of the fee.

642. With regard to the duration of the practices, Société Générale states that the CEIC was conceived as a temporary fee. The parties claim that they put an end to the CEIC and proceeded with the revision of CSCs on their own initiative in 2007.

643. The parties assert that the practice was not a secret. They assert that the agreement was entered into at the instigation and in full knowledge of the public authorities. The parties state that the DGCCRF had been informed of the switch to the EIC in April 2002. Société Générale points out that the parties, fully aware of the issues that certain interbank fees could raise with regard to competition law, wanted to act transparently vis-à-vis this authority.

644. The Banque de France, Banques Populaires and Crédit du Nord state that competition on the cheque remitting market continued to be vigorous, and that the agreement did not raise any barriers to entry on this market, as borne out by two new players, Axa Banque and ING Direct.

645. With regard to the distinctive features of the market concerned, Société Générale contends that the banking monopoly and the automatic nature of collection of the CEIC could not be upheld to characterise the seriousness of the practices since they stemmed from legal and regulatory provisions. Furthermore, it underscores the constant decline in the use of cheques in France.

Appraisal in the case in point

646. According to established case law, the Autorité de la concurrence can carry out an overall assessment of the seriousness of the alleged practices, such as damage to the economy, as long as it takes account, in an individual manner, of the circumstances of each company and its personal contribution to the practices (see, among others, the judgments of the Final Court of Appeal of 22 November 2005, Dexxon Data Media, and the Paris Court of Appeal of 19 January 2010, AMD Sud-Ouest; of 24 June 2008, France Travaux; of 20 November 2007, Carrefour; of 25 April 2006, company Sade and of 8 September 1998, Adecco).

The nature of the practices engaged in

647. In its judgment of 4 April 2006, *Etablissements horticoles Georges Truffaut*, the Paris Court of Appeal underscored the fact that '*the practices that, intentionally or not, hampered free market pricing and artificially caused prices to rise are by nature particularly serious, in that they deprive consumers of the benefit they are entitled to expect from smooth market operation in favour of the person that committed the infringement*'.

648. In the case in point, the contentious agreements constitute horizontal collusion, deemed one of the most serious anticompetitive practices.

649. One should however make a distinction between infringements according to whether they relate to the introduction of the CEIC or AOCT fees that, due to the very nature of each fee, do not have the same degree of seriousness. AOCT fees remunerate a service rendered on an ad hoc basis by one bank to another. Conversely, the CEIC, charged by issuing banks for each interbank cheque transaction, does not correspond to any service rendered to the remitting banks, nor to any particular cost incurred by the issuing banks. This fee artificially inflates the cost of the cheque remittance, thereby indirectly affecting prices.

650. In this particular case, the parties did not demonstrate that the amount of the AOCT fees was proportional to the achievement of expected efficiency gains. Unlike the CEIC, these fees are not challenged in their principle, but in their amount, for lack of any evidence submitted by the parties in this respect. So, the infringement committed on account of common setting of the AOCT fees is significantly less serious than that committed with the creation of the CEIC.

651. In addition, the following circumstances, common to both types of fee, must be taken into account in the defence of all the offending parties, to temper the seriousness of their practices.

652. Firstly, the agreement is not one on final prices.

653. As the parties point out, the disputed agreement is different from the Helsinki agreement, whereby the banks colluded on the principle of charging merchants a fee for Eurocheque payment, and was the subject of a fine imposed by the European authorities. In this case, it should be noted that the collusion did not relate directly to the level of final prices, since it confined itself to fixing the principle of a fee charged to merchants, without setting its amount, thereby maintaining the possibility of competition on prices between the banks vis-à-vis the merchants (judgment of the regional court of 23 February 1994, Bank card consortium 'CB' and Europay International SA, T-39/92, Rec. p. II-00049, point 143 et seq., reversing Commission decision 92/212/EC of 25 March 1992).

654. In the case in point, the parties were not required under the terms of their agreement to pass on to their customers the amount of fees paid. However, invoicing the direct or indirect cheque remitting service is linked to the expenses incurred by the remitting banks. Since the balance of the CEIC received and paid represents a net expense for predominantly remitting bankers in terms of volume (number of cheques), this supplementary cost necessarily affected the direct or indirect pricing of the cheque remitting service, or, given the specifics of bank service pricing, the overall balance of the bank's relationship with its customer. So, the introduction of the CEIC favoured an upward adjustment of the price of banking services, preventing price setting by the free market.

655. While the passing on of fees was observed in practice, the agreement was limited in its principle to interbank relations, which mitigated its seriousness.

656. Secondly, the agreement of 3 February 2000 was concluded within the framework of negotiations on the switch to the EIC, a general interest project that was actively backed by the Banque de France. While the role of the latter does not suffice to characterize the existence of a constraint liable to exempt the colluding parties from their responsibility (see points 300 et seq.), the fact remains that the Banque de France, the licensing authority for banking institutions, played an influential part in the conclusion of the agreement, in particular by proposing a compromise on the amount and duration of the CEIC (see point 101 above).

657. Lastly, the agreement cannot be likened to a secret cartel. The Banque de France for instance informed some of its customers, including the Treasury, within the framework of renegotiations of tariffs further to the introduction of the CEIC. In addition, as noted earlier (see point 623), the parties did not seek to conceal the terms of their agreement vis-à-vis the DGCCRF, even if the discussions only took place in April 2002, two years after the agreement of 3 February 2000, and three months after the came into force.

The parties' knowledge of the anticompetitive nature of the practices

658. Both national and the EU competition authorities have already given a decision on several occasions on the legality of interbank fees in the eyes of competition law, even before the practices at issue were engaged in.

659. In its aforesaid decision No. 88-D-37 of 15 October 1988, which the banks did not contest, the Conseil de la concurrence considered that the interchange fees set by the 'CB' bank card economic interest group were restrictive of competition. While the decision does not stipulate it, the reasoning followed indicates that the practice was categorised on account of its object, since the effects of the interbank fee were not analysed. Furthermore, the Conseil had rejected the possibility of exempting the fees at issue.

660. At community level, the European Commission stated that it considered any agreement on a multilateral interbank fee to be a restriction on competition under article 81(1) EC in its aforesaid announcement of 27 September 1995. The Commission applied these principles in its aforesaid GSA decision, given on 8 September 1999, several months before the agreement of 3 February 2000 that is the subject of this procedure. These principles were reaffirmed in subsequent Commission decisions on the Visa and Mastercard cases, in which the debate centred on the combination of all the necessary conditions of exemption of the agreement (see points 341 et seq. above).

661. So, both at the time the CIR agreement was being negotiated and at the time it was implemented, the banks could not be unaware that multilateral interbank fees were subject to competition rules and that they were assessed on a case-by-case basis by the competition authorities, more particularly with regard to possible exemption.

662. The circumstances in this instance therefore differ from those of the Atlantic Container case put forward by HSBC, in which the Court of First Instance of the European Communities ruled out a financial penalty on the grounds of a body of mitigating circumstances, among which the fact that the contested decision was the first one in which the Commission had directly assessed the legality of practices such as those at issue, that this assessment raised complex legal issues, that it was not a traditional form of unfair practice and lastly, that the parties had every reason to believe, during the administrative procedure, that the Commission would not fine them (judgment of 30 September 2003, T-191/98, Rec. p. II-3275, points 1603 et seq.).

663. Therefore the argument put forward by the banks with regard to the doubts they entertained at the time of the CIR negotiations regarding an assessment of the compliance of the fees at issue with competition law cannot be admitted to rule out application of a financial penalty. The Autorité will nevertheless take this factor into account in setting the basic amount of the fines, in its assessment of the context in which these practices were engaged in.

The duration of the practices

664. The duration of the practices varies according to the type of fee concerned. The CEIC was charged between 1 January 2002 and 1 July 2007. The AOCT fees have been charged continually since 1 July 2002 and have not been adjusted since. Furthermore, it should be stressed that these fees were not reviewed as provided for in the agreement of 3 February 2000 at the end of the three-year period following their introduction (see points 119 and 126).

665. Moreover, although the CEIC was abolished in autumn 2007, the banks put a stop to their restrictive practice at an advanced stage of the investigations by the Autorité de la concurrence, under the pressure of the ongoing enquiry. This cannot therefore be deemed a mitigating circumstance, but rather the normal behaviour of the implicated companies.

666. Viewed in this light, the duration of the practices at issue, engaged in for over five years, can be regarded as relatively long.

The affected market

667. The fees at issue were debited for all interbank cheques exchanged in France.

668. Indeed, the agreement was concluded within the CIR by the twelve biggest credit institutions in the retail and commercial banking sector, which at the time represented more than 80% of interbank cheques issued and remitted (see point 66). The fees were debited by all the credit institutions participating in the interbank cheque payment system, the CIR members acting as agents for all the banks operating in France in this respect (see point 76 above).

669. It should be stressed that banking services are of paramount importance both for consumers and for businesses, in other words for the economy as a whole. Among these services, the cheque represented one of the main means of payment used in France during the period in question, even if it declined for the duration of the practices, falling from 37% of scriptural payments in 2000 to 26% in 2006 (see point 24 above).

670. Due to the characteristics of the quadripartite system specific to the cheque, the fees necessarily affected the various facets of the market, namely the cheque remitting market and the cheque issuing market (see in this respect the analysis in points 254 et seq. above). Now, the cheque is a sector in which competition is limited by a number of characteristics.

671. Firstly, it should be recalled that the choice of users of the cheque system is entirely constrained by the banking monopoly: both drawers and beneficiaries can only obtain this service from credit institutions (point 27 above). This situation characterises the existence of a captive customer base in the economic sense.

672. Secondly, there is no perfect substitutability between the various means of payment, which would allow users of banking services to dispense with the cheque. The cheque is used in preference to the bank card for important purchases (point 24 above). Furthermore, since cheques are issued free of charge, unlike the bank card for instance, they are a preferred means of payment for part of the clientele, and more particularly low-income customers.

This lack of perfect substitutability means that, on the other side of the market, most merchants, and more particularly the superstores, cannot dispense with the cheque remitting service.

673. Thirdly, the cheque sector is characterized by opaque pricing and a mismatch in information between the bank and its customer. In an article on competition in means of payment, Chair Philippe Nasse stressed that: '*the main feature of this competition is that it operates in almost total obscurity as to the prices actually paid, and the links between these prices and the costs incurred. This obscurity reigns over the buyer and probably the vendor too, but not over the drawer or the acquirer: the banks have ways of finding out their costs and receipts with precision*' (Banking, Finance & Competition symposium, 30 November 2006, Concurrences No. 1, 2007 p. 63). In its report of 22 September 2009 on banking terms, the European Commission too denounces the lack of transparency of current account management charges, which include the cheque service. The report points out that French bank charges stand out as among the most complex and least transparent of all banks' in the European Union (SEC(2009) 1251, p. 16 et seq.). In their report on the pricing of banking services submitted to the minister for the economy, industry and employment of 8 July 2010, Mr Constans and Mr Pauget also point out the lack of transparency and the complexity of bank charges in France. In this respect they underscore the impact of cheap or free services, in particular the cheque, on the banking service pricing system: the cheque management costs '*weigh on (...) other banking services on a day-to-day basis and accentuate cross-funding phenomena*' (page 21).

674. This lack of transparency is particularly significant in the cheque sector, because, besides the phenomenon of cross-funding, most customer services are invoiced indirectly (via value dates for instance). The information asymmetry between the bank and its customer is such that most customers do not know the actual cost of the services or the invoicing method used. So, even business customers, who are generally better informed than private customers, often believe that the management of means of payment is provided 'free of charge' by the banking sector, whereas the indirect prices they pay are far higher than those paid by businesses that have negotiated a per-transaction charge with their banks instead of indirect charges. Only a minority of companies, in particular the very big remitting companies like the mass retailers who cash several million cheques a year, are able to reduce this information asymmetry, for instance by calling for tenders and negotiating a unit price for the cheque remitting service.

675. The distinctive features of the market show that the practices took place on a market where competition is already low due to the banking monopoly and opaque pricing and in relations where the bilateral rationale of price-fixing is difficult to apply.

The effect on public funds

676. The introduction of an interbank fee weighing on the costs of the cheque remitting service automatically affects public funds. The Banque de France, provider of cheque remitting services for the Treasury, states that in pursuance of article 114 of the agreement entered into with the State on 26 April 2002 for the management of the Treasury account, is required to pass on to the public accounts bank charges such as interbank fees, paid on transactions made on behalf of the Treasury (see the observations in response to the Statement of objections, classification mark 6808).

b) On the extent of the damage to the economy

Regarding the CEIC

677. The parties criticise the methods used to assess damage to the economy proposed by the investigation services in the report of 18 August 2009.

678. However, it emerges from established case law that the Autorité de la concurrence is not required to put an accurate figure the extent of damage to the economy (see, for instance, the judgment of the Paris Court of Appeal of 19 January 2010, AMD Sud-Ouest, op.cit., as well as the judgments of 26 January 2010, Adecco France S.A.S., 23 March 2010, S.E.M. G.E.G., and 28 January 2009, Epsé Joué Club, op.cit.). In its Epsé Joué Club judgment, the Paris Court of Appeal stipulates: '*the damage to the economy does not merely amount to an objective and measurable loss, but should be assessed in relation to the extent of the market affected by the practices, of the duration and of the cyclical or structural effects thereof*'.

679. On an introductory note, it should be stated that, contrary to what the parties claim, the damage to the economy should be assessed in relation to the competitive conditions that would have prevailed had the switch to the EIC not included a CEIC, and not the conditions that would have been observed if the manual cheque clearing system had been maintained. This is because, as was pointed out earlier, it has not been established that the CEIC was necessary for the switch to the EIC. The damage to the economy cannot thus be mitigated by the gains derived from the dematerialisation of exchanges, which in no way relate to the restrictive practice at issue.

680. Besides the duration of the practices and the structural lack of competition on the affected market, analysed above (points 664 et seq.), several factors can be retained to assess the extent of the damage to the economy.

The size of the affected market

681. As emphasised above (point 668), the quadripartite cheque system was affected in its totality by the introduction of the CEIC, since this fee was charged on all interbank cheques cleared by credit institutions in France.

682. The volumes of cheques concerned for years 2002 to 2006, the only data available in the case file, are as follows:

2002	3,487,501,308
2003	3,465,211,009
2004	3,300,843,748
2005	3,233,432,426
2006	3,100,666,135

G-SIT

683. In view of the impenetrability of bank charges, it is impossible to accurately evaluate the value of sales made by the banks for the cheque issuing and remitting services affected by the practices at issue.

684. It should however be recalled that cheques represented 37% of scriptural payments in France in 2002, and 26% in 2006. They thus necessarily represented a considerable

proportion of the banks' costs relating to the management of their customers' means of payment or of their credit flows. Since banking service charges are linked to the banks' costs, the cheque thus represented a significant part of the price charged for these services, within the framework of the overall balance of the relationship between the bank and its customer.

The potential anticompetitive effects on the market

685. The amounts of CEICs collected when this fee was in force are as follow (in euros):

2002	147,420,380
2003	146,585,462
2004	142,476,313
2005	136,716,644
2006	131,018,862
*1 January to 1 July 2007 **	*62,650,000 **
Total	766,867,661

Sources: G-SIT; figures estimated by the Autorité for the first half of 2007 (*)

686. It is necessary to establish whether this fee, which was an operating expense affecting the results of the remitting banks, was passed on in the form of an increase in prices, either that of cheque remittances or that of other banking services (through cross-funding). It is also necessary to examine whether the CEIC reduced supply on the cheque remitting market, in view of the higher costs borne by the banks to provide this ensuing service.

687. The loss borne by consumers due to an increase in prices (or prices being maintained at an artificially high level) is in this instance all the heavier as the remitting parties are captive customers of the banking monopoly: the price elasticity of demand for cheque remitting services is indeed virtually nil, because, since remitting parties accept cheque payments, they have to use the services of banking institutions to cash these cheques. Now, all these institutions are forced to pay the CEIC.

♦ The increase in the price of cheque remittances

688. For each cent passed on (out of the 4.3 cents of the CEIC), the additional charge for customers represents between 30 and 35 million euros a year if one only counts the volumes of interbank cheques exchanged on the market (see point 682 above). Now, the increase in the prices charged to customers affected interbank cheques evenly, giving rise to the collection of the CEIC (80% of cheques remitted), and interbank cheques, not giving rise to the payment of this fee if remitted and encashed by the same institution (20% of cheques remitted). So one can take the view that, for each cent passed on, the rise in the price paid by customers amounts in reality to roughly 220 million euros over the period in question[32].

[32] While it is true that the CEIC was not passed on when it was introduced on 1 January 2002, but only as and when service contracts between banks and their customers were renewed for instance, this price inertia was also observed when the CEIC was abolished in autumn 2007, this not resulting in an instantaneous reduction in cheque remitting prices, all the more so as no measures were taken to publicise the abolition of the CEIC.

689. Numerous documents in the case file point to the CEIC being passed on to remitting customers. This price rise is not easy to quantify however, especially since it did not always give rise to an observable rise in a unit price. Because cheque remittances are sometimes charged on the outstanding amount of the cheque (ad-valorem fees corresponding to a percentage debited on the handled amounts). It can also take the form of value days imposed on remitting parties, or other forms of invoicing. Finally, the existence of cross-funding hampers very precise estimations of tariff fluctuations.

690. Furthermore, as the switch to the EIC enabled the banking sector to make cost savings on account of dematerialised and accelerated exchanges, the fact that the price of cheque remitting services was not renegotiated does not prove that the CEIC had no effect: in that case, the price reduction factor constituted by the switch to the EIC is cancelled out by the price rise factor represented by the CEIC.

691. In this respect one should make a distinction according to the different categories of remitting customers.

- The *Trésor Public* (Treasury)

692. The total and direct passing of the CEIC on to the price of invoiced services is established in the case of the Treasury, the main customer of the Banque de France, and which represents nearly 5% of cheques remitted annually in France. Indeed the Banque de France, in its observations on the notified objections, indicates an amount of 36 million euros passed on to the *Trésor* over the period concerned (classification mark 7219).

- The "big remitters"

693. The extent of the passing of the CEIC on to "large remitters", that is, companies that annually remit a high volume of cheques, can be assessed on the basis of the results of the price survey. This survey was conducted among 700 French companies, all having a cash management department. The polled companies represent an important part of the volume of cheques remitted in France (nearly 10%, excluding Treasury cheques), and according to the data retained by the expert, this represents close to 6% of cheques remitted en France, excluding Treasury cheques, or roughly 200 million cheques per annum.

694. A large proportion of these big remitters benefit from a unit price for the cheque remitting service. The price survey was able to establish that this category of companies on average incurred a significant rise in the unit price of cheque remittance. While some of them managed to avoid it, it should be stressed that this was only a minority of companies, who have great bargaining power vis-à-vis their banking institution given the volume of business represented by the millions of cheques they remit every year.

695. As stated in the expert appraisal report of 19 August 2009 (see p. 35 thereof, classification mark 31696), the observed price rise for each remitted cheque is between €0.017 and €0.0175 in the period 2001-2004, and between €0.0104 and €0.0158 in the period 2001-2006 based on the survey sample. In comparison, the average price of bank charges used by the expert was, in 2001, roughly €0.03 [33]. It should be pointed out that these observations only concern the changes in the nominal price of the cheque remitting service, and do not take into account price changes relating for instance to changes in value dates imposed on companies. They thus underestimate the actual rise in the prices imposed on bank customers. In this respect, the aforesaid report of 19 August 2009, which was not

[33] Inflation does not explain the price rise observed in the period, except on the margin.

contested on this point by the banks, gives an assessment of the price rise equivalent to the change in value dates, of €0.06 per cheque.

696. While it is not contested that the sample selected for the price survey is not representative of all companies using cheque remittance services, since large remitters such as mass retailers are over-represented, it was observed that the increase in the unit price for cheques remitted by the smallest remitters whose answers were analysed was always higher than that applied for the biggest remitters. This result indicates that the passing on of the CEIC was all the greater as the customers' volume of business was smaller. Hence, the rise noted by the expert can be considered as reducing the average rise incurred by companies on the market.

697. Many specific examples of the CEIC being passed in its entirety on to major undertakings also emerge from case documents such as letters or service agreements between banks and their customers.

698. In a letter dated 29 January 2001, CIC informs one of its customers, a remitter of several million cheques a year, that: '*interbank fees are charged either to the remitting bank or the issuing bank depending on the type of transaction. In all essentials, a fee of €0.04 per cheque remitted is charged to the remitting bank. This fee is reflected in an increase in the banking costs to which your invoicing is attached. In accordance with the rules of transparency, this commission will henceforth be passed on to you in due proportion, in the form of an additional charge on your current invoice*' (classification mark 3877).

699. Likewise, in a letter dated 30 October 2002, Crédit Lyonnais informed one if its customers, a company remitting several tens of millions of cheques a year, that: '*The technical and pricing components of this new offer are not comparable point by point with our previous proposal owing to the new cheque clearing arrangements between banks (the switch to the cheque image exchange system). Our new offer includes the additional costs of handling the cheque image exchange incurred by the remitting bank, which henceforth has to perform the functions of cheque dematerialisation and archiving while bearing higher interbank charges than in the previous system*' (classification mark 67).

700. In a letter dated 23 April 2002, BNP announces the passing of the CEIC on to a customer remitting several million cheques a year: '*As we advised you in our previous e-mail of 5 February, the banks have been invoiced since 1 January 2002 for the interchange fee on cheques remitted (…) In order to meet the deadlines we have agreed on, and pending your final agreement on our proposal of 5 February, we hereby confirm that from 1 July 2002, we will pass on to you this charge of €0.04 per cheque remitted in full*' (classification mark 3829).

701. As for Crédit Mutuel, the service agreement signed by the Banque de l'Economie du Crédit Mutuel with a customer remitting several hundreds of thousands of cheques per annum stipulates: '*The price of processing the cheque image is set at €0.031 excluding tax per cheque processed. To this is added the price of the interbank fee paid by the BECM, namely €0.04 excluding tax*' (classification mark 500).

702. Similarly, the investigation shows that the Banque de France invoiced the CEIC to two major public corporations, one remitting over one million cheques per annum (see the service agreement between the bank and the company, classification mark 13.197), the other remitting over ten million cheques per annum (see letter of 9 January 2004, announcing new prices further to a '*significant imbalance*' in its tariff, '*aggravated since the introduction of the EIC and of a fee of €0.04 paid by the remitting banker for remitted cheque images*', classification mark 13222).

703. Finally, several cases of falls in prices further to the abolition of the EIC in autumn 2007 conversely confirm the reality of the inflationary impact of the CEIC on the price of cheque remitting services. The study of the calls for tender that Société Générale responded to thus shows a fall in prices offered after October 2007 of up to 35% for offers relating to a volume in excess of 10 million cheques remitted annually (tele-collection), 18% for offers relating to an annual volume under 250,000 cheques, and 16% for offers relating to an annual volume of between 1 and 3 million cheques per annum (estimates based on data used in the LECG study of 26 May 2008 '*Analysis of calls for tender that Société Générale responded to between June 2002 and March 2008*', classification marks 6734 et seq.).

704. Similarly, and by way of example, among the numerous cases listed in the file, a major public corporation, a customer of the Banque de France, stated in its hearing before the investigation services that in 2008, it obtained a reduction in its cheque service in the form of more favourable value dates: '*the disappearance in 2008 of the CEIC had a positive effect because the Banque de France agreed to bring forward value dates from D+2 to D+1*' (classification mark 13292). This same company, also a customer of La Banque Postale, obtained from the latter a price reduction of €0.02 per cheque for the several million cheques it remitted annually (classification mark 25524). A company remitting several million cheques a year to Crédit du Nord benefited from new pricing conditions from 1 January 2008, the invoiced price falling from [€0.045- 0.07] per cheque to [€0.02-0.05], making a drop of [35-60]% compared with the price in early 2007 (classification mark 14208). The case of a CIC customer company, remitting several hundreds of thousands of cheques a year, and which benefited from a price reduction of between 15 and 40% on 1 January 2009, also mentions this reduction in price further to the abolition of the CEIC (classification mark 31568).

- Other businesses

705. The extent of the passing of the CEIC on to companies falling outside the big remitters category (small and medium-sized companies in particular), and which represent the majority of the volumes of cheques remitted in France annually, cannot be quantified since, barring exceptions, they are not invoiced for the cheque remitting services singly, but indirectly, in particular via value days.

706. It is certain however that this category of businesses, which has little bargaining power vis-à-vis their banks compared to that of the big remitters, and which moreover is not well informed of the indirect methods for invoicing banking services and their actual price, which sustained the highest price rise due to the CEIC. As pointed out earlier (point 696 above), the results of the price survey showed that the extent of the passing on of the CEIC was inversely proportional to the volume of cheques remitted by the companies concerned. This category of companies was all the less able to object to a price rise as, unlike the very big remitters who issue calls for tender, it does not engage in competitive procurement with banking institutions to choose a cheque remitting service provider.

- Retail clients

707. Like the small and medium-sized businesses, the extent of the passing on of the CEIC to private individuals, who represent approximately 15% of the volumes of cheques remitted in France annually, cannot be quantified since, barring exceptions, they are not invoiced for the cheque remitting services singly, but indirectly, in particular via value days. There

again, the banks were all the more in a position to pass the fee on to their customers as private individuals do not have any bargaining power vis-à-vis their bank, and they are not well informed of the indirect methods of remuneration for banking services.

708. It should be pointed out that when the CEIC was not passed on in the form of a rise in nominal prices, but rather as an increase in the remuneration of banks in the form of a float, by cashing cheques slower than was made possible by the acceleration of interbank payments further to the dematerialisation of exchanges, or even by increasing value days imposed on customers; only customers who optimise their cash flow and overdrawn customers suffered a direct and quantifiable damage. This is because slower encashment of cheques deprived optimising customers of the possibility of investing the sums they encashed more quickly for their own benefit, and prevented overdrawn customers from reducing their bank account overdraft more quickly to cut bank charges on overdrafts (*agios*). As for the other customers, they sustained a loss that is harder to monetise. Since they paid money into their accounts less quickly, certain customers put off a major expense or even abandoned it. They thus suffered a loss in usefulness that is hard to quantify, but is real.

709. Generally speaking, certain internal bank documents in the case file show an intention to pass the cost of the CEIC on to all their customers indiscriminately. This is for instance the case of the memo on '*cheque images: Arguments and questions and answers*' handed over to the members of the CIR select working group further to the meeting of 10 May 2000, and which, regarding the additional costs incurred by the banking sector following the introduction of the CEIC, states: '*transfer to the remitting customer…*' (classification mark 4264). The same goes too for the minutes of an internal meeting in Crédit Mutuel on 10 January 2001, which states that '[a]*lthough it is designed to be passed on to the remitting customer, it weighs on the operating statement of the remitting banker*' (classification mark 4263). Likewise, in his hearing before the investigators on 12 July 2005, the representative of Crédit Agricole stated: '*CA's position regarding the passing on of the* [CEIC] *consists is saying that since customers benefit from shorter processing times and since CA bears an additional expense, it is normal for this expense to be passed on, but it is up to the regional head offices to decide whether or not to pass on the interbank fee*' (classification mark 4264).

- Less choice in the cheque remitting services offer

710. When the CEIC was not passed on in full to remitting customers, the profitability of the cheque remitting services offer was thus reduced, which was liable to reduce the incentives of banks to compete with one another on the cheque remitting market, to the detriment of the big remitting companies. This effect was particularly noticeable for Société Générale, who turned down the offer of one of its very big remitters, which had offered to transfer all of its cheque remittances to the bank on the condition that the CEIC be deducted from the price of the remittance, on the grounds that such a service could only be loss-making (classification mark 3770). Conversely, the data in the aforesaid study of 26 May 2008 shows that Société Générale started responding again to remitting companies' calls for tender after the CEIC was abolished: its response rate between October 2007 and March 2008 is thus 50% higher than the average rate recorded in the periods from March to October in the years in which the fee was charged.

Regarding AOCTs (fees for cancellations of incorrectly cleared transactions)

711. With regard to AOCT fees, it should be recalled that their exemption is refused not on the principle of these fees, but because their proportionate nature has not been demonstrated.

In the absence of any information on this point, one cannot determine the level of fees that would cover the actual cost incurred by banks in such operations. Consequently, the damage to the economy cannot be quantified with precision.

712. Nevertheless, there is no doubt that the damage caused by the introduction of AOCT fees to clear cheques is significantly less extensive than the damage caused by the introduction of the CEIC.

713. AOCT fees are deducted on a minority of interbank cheque clearing operations, and their potential anticompetitive effect is limited, both due to the amount of fees collected and to the nature of the practice.

714. The amounts of AOCT fees collected between 2002 and 2006 are as follows:

	Cancellation of cheque images	Cancellation of the rejection of cheque images
2002	605,346	358,284
2003	331,926	18,803
2004	279,553	6,456
2005	150,913	4,983
2006	123,196	54,151
Total	1,490,934	442,677

Source: G-SIT

NB: figures after 2006 do not appear in the file.

715. The amount of these fees represents less than 0.3% of the CEIC collected over the same period.

716. These fees are an operating expense weighing on the banks' results, part of which can be passed on to end customers, through direct or indirect invoicing. Since the amount of the fees was not set according to an objective criterion based on the actual costs of the services, the practice is likely to lead to a rise in the costs of banks and, indirectly, to inflated prices of banking services if the fees are higher than the actual costs. However, unlike the CEIC, the total amount of which corresponds to an artificial cost imposed on the remitting banks, only a fraction of the AOCT fees, namely the difference between their price and the actual cost of the service, represents an additional cost imposed on the bank that has to pay these fees, liable to entail damage to the economy.

c) On repeat offences

717. Crédit Mutuel, the Caisses d'Epargne, Société Générale, Crédit Agricole and LCL assert that the practices sanctioned by the aforesaid decision of the Conseil de la concurrence No. 00-D-28 of 19 September 2000, are of a different nature from the practices at issue in the case in point and that they took place on a different market. Furthermore, they contend that repeat offending cannot be retained since the first offence had not been sanctioned when the new practices were engaged in.

718. As the Conseil stressed in its decision No. 07-D-33 of 15 October 2007 on practices engaged in by France Télécom in the broadband Internet access sector, the repeat offence

referred to by article L.464-2 of the Commercial Code is an aggravating circumstance justifying a heavier fine more particularly with a dissuasive aim as pursued by its policy of financial penalties (point 112 of the decision).

719. Repeat offending can be established if four conditions are met:

a. a previous breach of competition law must have been recorded before the new practices are committed;

b. the latter must be identical or similar to the one previously recorded;

c. the latter must have been ruled final on the date on which the Autorité de la concurrence rules on the new practices;

d. the period between the previous recorded breach and the new practices must be factored in to provide a proportionate response to the propensity of the company to disregard competition rules (see decision No. 09-D-36 of 9 December 2009 on practices engaged in by Orange Caraïbe and France Télécom on different electronic communications services markets in the overseas departments of Martinique, Guadeloupe and French Guyana).

On the existence of a previous recorded breach

720. The argument whereby the practices started before a previous breach was recorded does not suffice to deprive the Autorité de la concurrence of the possibility of retaining repeat offence on the grounds of aggravating circumstances, when the practices, continual in nature, continued after this initial breach was officially established.

721. For instance, in its decision No. 07-D-50 of 20 December 2007 on practices in the toy distribution sector, the Conseil de la concurrence accepted repeat offence regarding the practices engaged in from 2000 to 2003, in view of a breach recorded on 25 September 2003, and on the grounds of facts established subsequent to this official record (October-December 2003). This solution was ratified by the Paris Court of Appeal in its judgment of 28 January 2009.

722. EU case laws follow a similar reasoning. In a case against the company Lafarge, the judges considered that the Commission was right to accept subsequent offence as an aggravating circumstance, since in the case in point, the company had continued to take part in the cartel at issue for over four years after the decision adopted in a previous case (Court judgment of 8 July 2008, Lafarge/Commission, T-54/03, Rec. p. II-120, points 738 and 739, confirmed by Court judgment of 17 June 2010, C-413/08, not yet published in the Collection, point 91).

723. In the case in point, one should recall that, although the offending parties entered into an unlawful agreement on 3 February 2000, namely prior to the aforesaid decision of the Conseil de la concurrence n° 00-D-28, they nonetheless implemented it from 1 January 2002 until 1 July 2007, regarding the CEIC, and from 1 July 2002 onwards regarding the AOCTs, in other words, for a period of over five years after the offence was recorded. Crédit Mutuel, the Caisses d'Epargne, Société Générale, Crédit Agricole, BNP and LCL – Le Crédit Lyonnais thus continued to engage in anticompetitive practices in connection with this case even though a previous offence under competition law had been recorded against them by the Conseil de la concurrence.

On the definitive nature of the recorded offence on the date of this decision

724. Decision No. 00-D-28 is final, because it was confirmed by the Paris Court of Appeal in its judgment of 27 November 2001, which was the subject of an appeal that was rejected by the Final Court of Appeal (judgment of 23 June 2004).

On the identity or similarity of the practices

725. Subsequent offence concerns cases in which a company previously sanctioned for a particular type of conduct again engages in identical or similar practices. The charge of subsequent offence can be made when the practices are identical or similar in their very anticompetitive nature.

726. In the case in point, it should be noted that the practices referred to in decision No. 00-D-28 and those pursued in connection with this case under article L.420-1 of the Commercial Code and article 81 EC are similar by object. Even if the affected markets are different, the practices previously sanctioned under article 7 of order No. 86-1243 of 1 December 1986 also sought to restrict competition in the banking sector: this was a horizontal cartel on the mortgage credit retail market aimed at restricting the possibility of renegotiating mortgage loans.

727. In the light of all the circumstances in the case in point, the charge of subsequent offence can therefore be made against Crédit Mutuel, Caisses d'Epargne, Société Générale, Crédit Agricole, BNP and LCL, and consequently, a 20% increase can be applied to calculate the fine imposed on them, taking into account the fact that only the continued breach resulting from the cartel arranged in 2000 characterises such subsequent offence.

d) On the individual circumstances of the companies.

728. Apart from the individual factors based on the position of each bank on the market and their size and economic power, which will be examined below in connection with the explanation of how the fines are calculated (see point 751), it is necessary to examine whether other factors should be taken into account to match the fines with their individual circumstances.

On the conduct of the parties during the CIR negotiations

♦ On opposition to the CEIC during the CIR talks

729. Banques Populaires, the Banque de France and Crédit du Nord assert that they opposed the principle of the creation of the CEIC. HSBC contends that, owing to its marginal position on the cheque market, it carried no weight in the CIR negotiations and contented itself with adopting a passive and reserved attitude, hoping that the ensuring compromise would not be too detrimental to it.

730. However, while the leading role of a company constitutes an aggravating circumstance for matching the fine to its individual characteristics (Final Court of Appeal, 18 February 2004, OCP Répartition), the fact that a company expressed reservations or adopted a position of follower when an agreement restricting competition was reached cannot conversely be taken into account as a mitigating circumstance, since the said company was not the subject of an irresistible constraint, since it approved the conclusion of the agreement and it applied it.

731. The only thing that could be considered mitigating circumstances would be if the company could demonstrate that its participation in the breach was substantially diminished, not least because it effectively refrained from implementing the agreement at issue in acting in a competitive manner on the market (*franc tireur*) (see, for a similar solution, point 29 of the Commission's guidelines for a calculation of the fined imposed pursuant to article 23(2), a), of regulation (EC) No. 1/2003 (JO 2006, C 210, p. 2)).

732. It follows from this that the argument put forward cannot mitigate the fine.

♦ On the instigating role of the breach

733. In the case in point, it emerges from the minutes of the CIR meetings that five banks clearly came down in favour of the introduction of a fixed interbank fee paid by the remitting bank to the issuing bank: Crédit Agricole, Crédit Mutuel, La Poste, Caisses d'Epargne and BNP, whereas the other parties to the negotiation expressed their reservations. At the meeting of 1 July 1999, the representative of the Caisses d'Epargne states that they are '*in favour of the first solution submitted by the working group, based on (…) a fixed fee of 0.50 francs paid by the remitting bank to the issuing bank*'. The representative of the Crédit Agricole similarly said it was '*in favour of*' this solution. The representative of La Poste states that his institution '*preferred the D+1 solution with a fee*'. The representative of Crédit Mutuel for his part said it was '*favourable to payment at D+1 and (...) would be open to the suggestion of the Banque de France to moderate the amount of the fee*'. Lastly, the representative of BNP states it was '*resolutely for the EIC and the fixed fee paid by the remitting bank*' (see the minutes of this meeting, classification mark 930 et seq.; see also point 102 above).

734. The role played by these five banks does not qualify them as leaders (or instigators) of the agreement, which concerns companies representing a significant persuasion role or having special and material responsibility in the operation of the agreement (in this respect, see the aforesaid judgment of the Final Court of Appeal dated 18 February 2004, and for a similar analysis in European law, the judgments of the Court of First Instance of 15 March 2006, BASF/Commission, T-15/02, Rec. p. II-497, point 374, and 8 September 2010, Deltafina/Commission, T-29/05, not yet published in the Collection, point 332).

735. In the case in point, the five banks nonetheless played an active part in convincing their partners within the framework of the CIR negotiations that led to the creation of the fees at issue. So a 10% increase will be applied to calculate the fine imposed on Crédit Agricole, Crédit Mutuel, Banque Postale, the Caisses d'Epargne and BNP, which actively defended the introduction of the fee during the CIR negotiations

On the absence of profit derived from the agreement

736. HSBC, Banques Populaires, the Banque de France, Société Générale and the Caisses d'Epargne assert that they derived no benefit from the agreement, or even lost out financially from it since, as predominantly remitting banks in terms of volume (number of cheques), they were net contributors of the CEIC.

737. However, the Paris Court of Appeal notes that, while the explosion in profits is an aggravating factor for matching the fine to individual circumstances, the opposite is not admissible (see the judgment of 19 January 2010, AMD Sud-Ouest, op.cit.). While the amount of the fine should be proportionate to the seriousness of the practices and the damage to the economy, both of which can only be assessed by factoring in the profit derived by the members of the cartel at issue, the fact that a company derived no benefit from a practice restrictive of competition cannot be a hindrance to imposing a fine and

cannot be accepted as a mitigating circumstance (see, for a similar analysis made by the European judge, the Court judgment of 25 June 2010, Imperial Chemical Industries Ltd, T-66/01, not yet published in the Collection, point 443).

738. In any event, it should be pointed out that the reality of the alleged loss is in no way established, given the possibility the remitting banks had of passing all or part of the fees on to their customers, which they did at least in part.

739. It follows from this that the argument put forward cannot mitigate the fine.

On the position of the parties on the market in question

740. HSBC invokes its marginal position on the cheque market.

741. As emerges from the evidence collected during the investigation (see point 66 above), HSBC's position on the cheque market is significantly more modest, in terms of volume of cheques issued and remitted, than that of the other implicated banks.

742. When it sets the amount of the fines, the Autorité can factor in the influence the company could exercise on the market, more particularly owing to its size and economic power. Turnover is usually an indicator in this respect (see, for a similar analysis made by the European judge, the judgment of the European Court of Justice of 7 June 1983, Musique Diffusion française and others v. Commission, 100/83 to 103/83, Rec. p. 1825, points 120 and 121, and by the national judge, the judgment of the Paris Court of Appeal of 16 September 2010, Raffalli & Cie SARL). One can also take into account the fact that turnover only partially reflects the particular position of a company on the market affected by the practices at issue, and the company's share of the said market can also be taken into account to determine the amount of the fine. Similarly, the aforesaid Commission's guidelines stipulate that the basic amount of the fine is based on the company's sales of goods or services directly or indirectly related to the breach, thereby reflecting the company's position on the market affected by the practices.

743. In the case in point, in order to factor in both the size and the economic power of the offending banks and their specific position on the cheque market, it is appropriate to base the amount of the basic fine on net banking income, generated only on national territory, which should be combined, in equal proportions, with each bank's share of the cheque issuing and remitting market.

On the passing on of the CEIC

744. The Banques Populaires, Crédit du Nord, La Banque Postale, Société Générale, the Caisses d'Epargne and CIC state that they did not raise their unit prices during the period in question. The Banque de France for its part states that it gave its main client, the *Trésor public*, the benefit of a shorter cheque encashment time.

745. It follows however from what was stated earlier that the CEIC was passed on in a variety of forms, directly (higher unit price of cheque remittance) or indirectly (changing the value date imposed on customers, higher service package prices, transaction commission or other banking services charged to customers). That being the case, the fact that the bank did not resort to one particular means of way on the CEIC does not rule out the fact that it could use another means.

746. Hence, none of the aforementioned banks can demonstrate that they did not pass the CEIC on to their customers, or that this was more moderate than that done by the participants in the agreement.

747. In any event, the Autorité de la concurrence is not required to prove that each offending company individually contributed to damaging the economy. The assessment of the damage to the economy indeed results from an overall approach (see among others the judgment of the Paris Court of Appeal of 28 January 2009, Epsé Joué Club, op.cit.).

On the initiative to abolish the CEIC

748. The Banques Populaires assert that the CEIC was abolished further to a letter it took the initiative to send to the governor of the Banque de France. The Banque de France for its part asserts that it invited the banks to abolish the fee in a letter dated 20 July 2007.

749. As recalled in point 665 above, the CEIC was abolished in autumn 2007 at an advanced stage of the investigation by the services of the Autorité de la concurrence, under the pressure of the ongoing enquiry. This cannot therefore be deemed a mitigating circumstance, but rather the normal behaviour of the implicated companies.

4. ON THE AMOUNT OF THE FINES

a) On the fine calculation method

750. To fix the basic amount of the fine, the European Commission, like most of the competition authorities in Europe, use the value of sales of goods or services made by the company, with regard to the breach on the geographical market concerned. The Autorité de la concurrence subscribes to this convergent approach, because it better adjusts the financial penalty to the economic reality of the breach. However, in the case in point, because of the specifics of the banking sector, it is impossible to accurately determine the value of sales made by the banks for the cheque issuing and remitting services in the period at issue. This value cannot be quantified, in view of the various direct and indirect pricing systems for these services, and the existence of important cross-subsidies with other banking services.

751. In that case, the basic amount of the fine will be based on two factors, namely, each bank's market share of the cheque issuing and remitting market, and the net banking income achieved by each bank solely on the national territory. The first factor accounts for the specific position of each bank on the affected market. The second factor takes into account the size and economic power of each bank, and hence their ability to pay. It also takes into account the fact that the effect of the practices at issue extended beyond the cheque market and affected all banking activities in question, due to the specific pricing systems for the said activities (cross-subsidies).

Regarding banks other than the Banque de France

752. To set the basic fine, it is relevant to consider the data of the last full year in which the practices were engaged in, namely 2006 for the CEIC and 2009 for AOCT fees.

753. However, certain banks failed to communicate any data on their 2009 net banking income. In that case, the net banking incomes of 2006, for which the Autorité has homogeneous data in the file, will be adopted to fix the fines applicable with regard to both the CEIC and the AOCT fees.

754. Furthermore, the market share taken into account will be the share of volumes of intra- and inter-bank cheques issued and remitted, compared with the volumes of cheques issued and remitted by all the offending banks (excluding the Banque de France) in 2008, the only

year for which the Autorité has comprehensive data communicated by the banks. It should be pointed out that the analysis of the volumes of interbank cheques issued and remitted by the banks in years 2002 to 2006 (data provided by G-SIT) demonstrates that the market shares of each of these institutions remained very stable in the period at issue.

755. Given the particular circumstances, the basic amount of the fine will thus be calculated by multiplying the share of the bank concerned on the cheque issuing and remitting market by the total national net banking income at issue (excluding the Banque de France), then by adding this to the national net banking income of the bank concerned. The same multiplier, fixed according to all the general criteria previously stated, will then be applied to this second intermediate figure. The basic amount of the fine will thus be calculated as follows: [(share of the bank concerned on the cheque issuing and remitting market x the total net banking income of the implicated parties) + the net banking income of the bank concerned] x the multiplier.

756. The 20% increase for the subsequent offence and the 10% increase for the active part played in the cartel will apply to the basic amount, where appropriate, to fix the individual fine, capped if necessary so as not to exceed the official ceiling of the fine applicable to each of the parties.

Regarding the Banque de France

757. The case of the Banque de France should be distinguished from those of the other offending banks since, in the absence of net banking income, it communicated its turnover restated to reflect receipts from its business activities. This is not homogeneous with those accepted earlier for the other banks. The fine will thus be calculated by applying a different multiplier to the turnover generated in 2006, to which a reduction will also be applied to allow for the fact that the latter's relative share of the cheque issuing and remitting market in 2008 was particularly small (3.02%).

b) On the individual financial penalties

For BNP-Paribas

758. The official maximum fine amounts to 92,376 million euros (the group's gross global banking income in 2007).

759. Since the bank's relative share of the cheque issuing and remitting market was 11.48% and its net banking income in 2006 was 10,778 million euros, the basic amount of the fine, determined according to the method explained above, is 48.68 million euros, which is increased by 20% on the grounds of subsequent offence and by 10% due to the active part the bank played in the conclusion of the agreement.

760. In the light of all these factors, the total amount of the fine imposed on BNP-Paribas is 63.28 million euros, namely 62.65 million euros in respect of its participation in the agreement on the CEIC and 0.63 million euros in respect of its participation in the agreement on the AOCT fees.

For BPCE, assuming the rights and obligations of BP Participations

761. The official maximum fine applicable to BP Participations amounts to 34,346 million euros (the group's gross banking income in 2005).

762. The bank's relative share of the cheque issuing and remitting market being 10.77%[34] and its net banking income for 2006 being 7,225 million euros, the final amount of the fine, imposed on BPCE assuming the rights and obligations of BP Participations, determined according to the method explained above, is 38.09 million euros, namely 37.71 million euros in respect of its participation in the agreement on the CEIC and 0.38 million euros in respect of its participation in the agreement on the AOCT fees.

For BPCE, assuming the rights and obligations of CE Participations

763. The official maximum fine applicable to CE Participations amounts to 45,437 million euros (the group's gross banking income in 2007).

764. Since the Caisses d'Epargne's relative share of the cheque issuing and remitting market was 8.68% and its net banking income for 2006 was 9,603 million euros, the basic amount of the fine, determined according to the method explained above, is 40.62 million euros, which should be increased by 20% on the grounds of subsequent offence and by 10% due to the active part the bank played in the conclusion of the agreement.

765. In the light of all these factors, the total amount of the fine, charged to BPCE assuming the rights and obligations of CE Participations, amounts to 52.81 million euros, namely 52.28 million euros in respect of its participation in the agreement on the CEIC and 0.53 million euros in respect of its participation in the agreement on the AOCT fees.

For Crédit Agricole

766. The official maximum fine amounts to 89,575 million euros (the group's gross global banking income in 2006).

767. Since the Crédit Agricole group, despite the request made in this respect, did not supply the national net banking incomes generated respectively by Crédit Agricole, excluding LCL, and by LCL, the group's national net banking income was broken down on the basis of the breakdown of the group's global net banking income. The group's national net banking income in 2006 was 10,439 million euros, which breaks down into 8,057 million euros for Crédit Agricole, excluding LCL, and 2,382 million euros for LCL.

768. Since the bank's relative share of the cheque issuing and remitting market was 24.02% and its net banking income in 2006, determined according to the method explained above, was 8,057 million euros, the basic amount of the fine is 63.80 million euros, which is increased by 20% on the grounds of subsequent offence and by 10% due to the active part the bank played in the conclusion of the agreement.

769. In the light of all these factors, the total amount of the fine imposed on Crédit Agricole SA is 82.94 million euros, namely 82.11 million euros in respect of its participation in the agreement on the CEIC and 0.83 million euros in respect of its participation in the agreement on the AOCT fees.

For LCL

770. The official maximum fine amounts to 89,575 million euros (the group's gross global banking income in 2006).

771. Since the Crédit Agricole group, despite the request made in this respect, did not supply the national net banking incomes generated respectively by Crédit Agricole, excluding

[34] The market share of the Banques Populaires is determined according to the data communicated for 2008, which, due to its incompleteness, has been adjusted on the basis of the data available for 2006.

LCL, and by LCL, the group's national net banking income was broken down on the basis of the breakdown of the group's global net banking income. The group's national net banking income in 2006 was 10,439 million euros, which breaks down into 8,057 million euros for Crédit Agricole, excluding LCL, and 2,382 million euros for LCL.

772. Since the bank's relative share of the cheque issuing and remitting market was 6.30% and its net banking income in 2006, was 2,382 million euros, the basic amount of the fine, determined according to the method explained above, is 17.44 million euros, which is increased by 20% on the grounds of subsequent offence.

773. In the light of all these factors, the total amount of the fine imposed on LCL is 20.93 million euros, namely 20.72 million euros in respect of its participation in the agreement on the CEIC and 0.21 million euros in respect of its participation in the agreement on the AOCT fees.

For HSBC

774. HSBC did not communicate the group's gross banking income for the period in question, stating that this figure does not exist for an English company. In any event, the amount of the fine does not exceed the highest global net banking income generated by the group in the period in question, namely 81,682 million euros for 2008.

775. Since the bank's relative share of the cheque issuing and remitting market was 1.23% and its net banking income for 2006 was 2,614 million euros, the final amount of the fine imposed on HSBC, determined according to the method explained above, is 9.05 million euros, namely 8.96 million euros in respect of its participation in the agreement on the CEIC and 0.09 million euros in respect of its participation in the agreement on the AOCT fees.

For CIC

776. The official maximum fine amounts to 14,769 million euros (the group's gross banking income in 2007).

777. Since the bank's relative share of the cheque issuing and remitting market was 6.12% and its net banking income for 2006 was 3,917 million euros, the final amount of the fine imposed on CIC, determined according to the method explained above, is 21.15 million euros, namely 20.94 million euros in respect of its participation in the agreement on the CEIC and 0.21 million euros in respect of its participation in the agreement on the AOCT fees.

For the Crédit Mutuel

778. The objections were notified to the *Confédération nationale du Crédit Mutuel*, a non-profit association. Pursuant to the aforesaid provisions of article L.464-2 of the Commercial Code, the ceiling for the fine applicable to this institution is therefore 3 million euros.

779. Since the bank's relative share of the cheque issuing and remitting market was 10.23% and its net banking income in 2006 was 6,373.7 million euros, the basic amount of the fine, determined according to the method explained above, is 34.90 million euros, which is increased by 20% on the grounds of subsequent offence and by 10% due to the active part the bank played in the conclusion of the agreement.

780. In the light of all these factors, the total amount of the fine imposed on Crédit Mutuel should amount to 45.37 million euros. Given the applicable legal ceiling, this fine is adjusted downwards to 3 million euros, namely 2.97 million euros in respect of its

participation in the agreement on the CEIC and 0.03 million euros in respect of its participation in the agreement on the AOCT fees.

For Société Générale

781. The official maximum fine amounts to 66,821 million euros (the group's gross global banking income in the sense of the merger controls carried out in 2007).

782. Since the bank's relative share of the cheque issuing and remitting market was 9.47% and its net banking income in 2006 was 10,570 million euros, the basic amount of the fine, determined according to the method explained above, is 44.56 million euros, which is increased by 20% on the grounds of subsequent offence.

783. In the light of all these factors, the total amount of the fine imposed on Société Générale amounts to 53.48 million euros, namely 52.94 million euros in respect of its participation in the agreement on the CEIC and 0.53 million euros in respect of its participation in the agreement on the AOCT fees.

For Crédit du Nord

784. The official maximum fine amounts to 66,821 million euros (the group's gross global banking income in the sense of the merger controls carried out in 2007).

785. Since the bank's relative share of the cheque issuing and remitting market was 1.69% and its net banking income for 2006 was 1,516 million euros, the final amount of the fine imposed on Crédit du Nord, determined according to the method explained above, is 6.98 million euros, namely 6.91 million euros in respect of its participation in the agreement on the CEIC and 0.07 million euros in respect of its participation in the agreement on the AOCT fees.

For La Banque Postale

786. The official maximum fine amounts to 20,829 million euros (the group's gross global banking income in 2008).

787. Since the bank's relative share of the cheque issuing and remitting market was 10.01% and its net banking income in 2006 was 4,612 million euros, the basic amount of the fine, determined according to the method explained above, is 29.88 million euros, which is increased by 10% on the grounds of the active part it played in concluding the agreement.

788. In the light of all these factors, the total amount of the fine imposed on La Banque Postale amounts to 32.87 million euros, namely 32.54 million euros in respect of its participation in the agreement on the CEIC and 0.33 million euros in respect of its participation in the agreement on the AOCT fees.

For the Banque de France

789. Since the turnover of the Banque de France was 212.8 million euros in 2006, the final amount of the fine, determined according to the method explained above, is 350,000 euros, namely 346,500 euros in respect of its participation in the agreement on the CEIC and 3,500 euros in respect of its participation in the agreement on the AOCT fees.

F. ON THE PRONOUNCEMENT OF AN INJUNCTION

790. Under article L. 462-6 of the French Commercial Code: '*The Autorité de la concurrence examines whether the practices referred to it fall within the scope of articles L. 420-1, L.420-2 or L. 420-5 or may be justified under article L. 420-4. Where appropriate, it pronounces financial penalties and injunctions*'. Article L. 464-2-I stipulates that '*The Autorité de la concurrence may order the interested parties to put an end to the anticompetitive practices within a specified time limit or may impose particular conditions (…)*'.

791. Pronouncement of injunctions on the merits of the case is subject to the principle of proportionality, which means that the pronounced measures must not exceed what is strictly necessary to put an end to the anti-competitive act. Pronouncement of injunctions nevertheless appears especially necessary when the anti-competitive act results from an agreement still in force on the date of the Autorité's decision.

792. In the case in point, the grievance notified on the grounds of AOCT fees results from the terms and conditions of interbank cheque clearing decided by the banks in their agreement of 3 February 2000. These fees are still applicable on the date of the Autorité's decision, their calculation method not having been modified since they were introduced.

793. That being the case, the Autorité de la concurrence has grounds to enjoin the parties to adjust the amount of the AOCT fees to ensure they are proportional to the efficiency gains expected of them, and hence, bring these fees into compliance with the provisions of article L.420-4 of the Commercial Code and the stipulations of article 101(3), TFUE. The banks should be asked to make this price adjustment within six months of notification of this decision, and fix the amount of these fees on the basis of the cost of processing AOCT operations achieved by the most efficient bank, as ascertained by a cost survey conducted with a representative sample of banking institutions and verified by an independent expert.

G. ON THE OBLIGATION TO PUBLISH

794. With a view to informing the participants and users of cheque issuing and remitting services of this decision, the offending parties shall be ordered to publish the summary of the decision set forth in the following point, at their expense and in due proportion to the pronounced financial penalties, in the editions of *Le Monde* and *Les Echos*.

795. Summary of the decision:

'*Further to the ex officio proceedings, the Autorité de la concurrence has just rendered a decision whereby it fines the Banque de France, BPCE (stemming from the merger between the Banques Populaires and the Caisses d'Epargne), La Banque Postale, BNP-Paribas, the Confédération Nationale du Crédit Mutuel, Crédit Agricole, Crédit du Nord, Crédit Industriel et Commercial (CIC), LCL, HSBC and Société Générale, a total of 384.92 million euros for collusion on the cheque market.*

The introduction of new interbank fees when cheque exchanges were dematerialised

When the new dematerialised interbank cheque clearing system was put in place (called Cheque Image Exchange, hereinafter EIC), the main banks on the market met to jointly work out the operating conditions of this new system. They jointly decided to create several

interbank fees, for which the compliance with competition law has been examined by the Autorité.

The Autorité de la concurrence has applied national law, as well as EU law, considering that the practices at issue had potentially affected the freedom for foreign banks to set up in France.

The Autorité de la concurrence holds the view that the cheque image exchange fee (CEIC) was anticompetitive

The CEIC is a fixed per-transaction fee of €0.043 per cheque, paid by the bank of the remitting party (the beneficiary of the cheque) to the bank of the issuing bank (issuer of the cheque). The banks presented it as designed to offset the treasury loss generated by accelerated interbank payments for cheques due to dematerialised exchanges, to the detriment of issuing banks. The latter, which are debited sooner, are deprived of the possibility of investing on their own account the sums corresponding to the cheques issued by the customers for as long as was previously possible. Conversely, the remitting banks, which are credited earlier, can invest the sums corresponding to the cheques deposited by their customers more quickly than previously.

This fee, charged on 80% of cheques exchanged in France between January 2002 and July 2007, was abolished in October 2007, at an advanced stage of the investigation by the Autorité de la concurrence and under the pressure of the ongoing enquiry.

The creation of the CEIC, which corresponds to no service rendered, had the effect of artificially increasing the costs borne by the remitting banks, which therefore directly or indirectly affected the pricing levels for banking services.

The Autorité deemed that there was no evidence to suggest that the switch to the EIC resulted in net losses for any of the participating banks, which could possibly have justified a mechanism whereby the loss-making banks would compensate the profit-making banks. Indeed, the treasury losses on drawn cheques were offset by the treasury gains on remitted cheques and by the savings on processing costs derived from the dematerialised exchanges.

In any event, the CEIC, since it was a fixed fee, did not really offset the gross losses of the issuing banks, which were related to the average amounts (rather than number) of the cheques exchanged by each bank, which vary greatly according to banking institution.

For this reason, the Autorité de la concurrence has not exempted this fee which consequently still falls under the ban imposed by competition rules.

The Autorité has exempted all the fees for related services with the exception of the so-called AOCT fees (cancellation of incorrectly cleared transactions).

Eight fees were created to remunerate the services newly rendered by one category of banks to another (such as processing rejected cheques) and to offset the transfers of expenses resulting from the dematerialisation of the cheque exchange system (such as the archiving of cheque forms).

Although the amount of each of these fees was fixed by common consent at a set level, the Autorité has nonetheless acknowledged that they could be exempted, except for the AOCT fees, since the offending banks did not demonstrate that the amount of the latter had any relation to the costs of the service rendered. Accordingly, the Autorité has enjoined the banks concerned to adjust them according to the costs of the most efficient bank.

Practices that fuelled a rise in the price of banking services

The banks passed on the CEIC, at least in part, either directly through increases in unit prices of cheque remittances (which was the case in particular for companies remitting a high volume of cheques, like the mass retailers), or indirectly by raising the price of other banking services (cross-subsidies). The direct and total passing on of the fee has been established for the Trésor Public*, the main client of the Banque de France, the total amount passed on over the period in question amounting to 36 million euros.*

In fact, although the dematerialised clearing system allowed banks to make substantial savings, consumers and companies could not fully benefit from this economic progress.

Banking services are extremely important both for companies and for consumers. Even though the use of cheques is in decline, the cheque is still one of the main means of payment used in France, and represented 26% of scriptural payments in 2006. Furthermore, these practices were engaged in on a market where competition is already reduced due to the banking monopoly and the opaqueness of pricing, recently underscored by the Constans/Pauget report on the pricing of banking services, submitted to the minister for economy, industry and employment in July 2010.

Fines fixed according to the seriousness of the practices, the damage to the economy and the individual position of each bank

In setting the amount of the fines, the Autorité de la concurrence has taken into account the seriousness and duration of the practices (horizontal cartel lasting over five years), but also three mitigating circumstances: the agreement is not one on final prices. It was concluded in the context of the switch to the EIC, a general interest project that was actively backed by the Banque de France; finally the "agreement" cannot be likened to a secret cartel.

It has also taken into account the damage to the economy (size of the affected market, effect on prices). The Autorité has calculated that, for each cent passed on, the rise in the price paid by customers amounts to roughly 220 million euros over the period in question.

Lastly, the Autorité has taken into account the individual position of each bank, and more particularly their position on the cheque market and their economic power.

It has raised the fine by 10% to take into account the fact that Crédit Agricole, Crédit Mutuel, La Poste, the Caisses d'Epargne and BNP played an active part in the conclusion of the agreement by supporting the introduction of the CEIC during the negotiations that led up to the introduction of the EIC system.

It has also raised the fine by 20% on the grounds of subsequent offence for Crédit Mutuel, the Caisses d'Epargne, Société Générale, Crédit Agricole, BNP and LCL, which had already been penalised in 2000 for collusive practices (decision No. 00-D-28 of 19 September 2000 on competitive conditions in the mortgage credit sector).

The following fines are imposed:

- *on Banque de France, a fine of 346,500 euros on the first count and 3,500 euros on the second.*
- *on BPCE, assuming the rights and obligations of BP Participations, a fine of 37,710,000 euros on the first count and 380,000 euros on the second;*
- *on BPCE, assuming the rights and obligations of BP Participations, a fine of 52,280,000 euros on the first count and 530,000 euros on the second;*

- *on La Banque Postale, a fine of 32,540,000 euros on the first count and 330,000 euros on the second;*
- *on BNP-Paribas, a fine of 62,650.000 euros on the first count and 630,000 euros on the second;*
- *on Crédit Agricole, a fine of 82,110,000 euros on the first count and 830,000 euros on the second;*
- *on Crédit Mutuel, a fine of 2,970,000 euros on the first count and 30,000 euros on the second;*
- *on Crédit du Nord, a fine of 6,910,000 euros on the first count and 70,000 euros on the second;*
- *on Crédit Industriel et Commercial, a fine of 20,940,000 euros on the first count and 210,000 euros on the second;*
- *on LCL, a fine of 20,720,000 euros on the first count and 210,000 euros on the second, for which Crédit Agricole will be deemed jointly and severally liable for 15,000,000 euros on the first count and 152,000 euros on the second;*
- *on HSBC, a fine of 8,960,000 euros on the first count and 90,000 euros on the second;*
- *on Société Générale, a fine of 52,940,000 euros on the first count and 530,000 euros on the second;*

The full text of the Autorité de la concurrence's decision de is available at: www.autoritedelaconcurrence.fr'.

H. ON THE COSTS OF EXPERT APPRAISAL

796. Under article L. 463-8(3) of the Commercial Code: "*The costs of expert appraisal shall be borne by the party requesting it or by the Autorité in the event that it is ordered at the request of the Case Officer. However, the Autorité may, in its decision on the merits of the case, pass the final cost on to the sanctioned party or parties in proportions it fixes*".

797. In the case in point, the cost of the expert appraisal, as decided in the conditions set out in points 7 to 10 above, by the general case officer in decisions dated 16 December 2008 and 17 February 2009, and paid by the Autorité de la concurrence, will be passed on, proportionately to the imposed fines, to the Banque de France, BPCE, La Banque Postale, BNP-Paribas, Confédération Nationale du Crédit Mutuel, Crédit Agricole SA, Crédit du Nord, Crédit Industriel et Commercial (CIC), LCL, HSBC and Société Générale.

DECISION

Article 1: It is an established fact that the Banque de France, BPCE(assuming the rights and obligations of BP Participations and CE Participations), La Banque Postale, BNP-Paribas, Confédération Nationale du Crédit Mutuel, Crédit Agricole, Crédit du Nord, Crédit Industriel et Commercial (CIC), LCL, HSBC, and Société Générale breached the provisions of article L. 420-1 of the Commercial Code and article 81 of the EC treaty, now article 101 of the Treaty on the Functioning of the European Union, on the grounds of collusion regarding the introduction of the interbank fee for cheque image exchanges (CEIC) and collection of said fee from 1 January 2002 to 1 July 2007.

Article 2: It is an established fact that the legal entities listed in article 1 have breached the provisions of article L.420-1 of the Commercial Code and article 81 EC on the grounds of collusion regarding the introduction of interbank fees for services related to the cancellation of incorrectly cleared transactions (AOCT) and collection of said fees from 1 January 2002.

Article 3: It is not an established fact that other practices referred to in the second objection notified, on fees for related services, are in breach of the aforementioned provisions.

Article 4: The following fines are imposed:

- on Banque de France, a fine of 346,500 euros on the first count and 3,500 euros on the second.
- on BPCE, assuming the rights and obligations of BP Participations, a fine of 37,710,000 euros on the first count and 380,000 euros on the second;
- on BPCE, assuming the rights and obligations of CE Participations, a fine of 52,280,000 euros on the first count and 530,000 euros on the second;
- on La Banque Postale, a fine of 32,540,000 euros on the first count and 330,000 euros on the second;
- on BNP-Paribas, a fine of 62,650,000 euros on the first count and 630,000 euros on the second;
- on Crédit Agricole, a fine of 82,110,000 euros on the first count and 830,000 euros on the second;
- on Crédit Mutuel, a fine of 2,970,000 euros on the first count and 30,000 euros on the second;
- on Crédit du Nord, a fine of 6,910,000 euros on the first count and 70,000 euros on the second;
- on Crédit Industriel et Commercial, a fine of 20,940,000 euros on the first count and 210,000 euros on the second;
- on LCL, a fine of 20,720,000 euros on the first count and 210,000 euros on the second, for which Crédit Agricole will be deemed jointly and severally liable for 15,000,000 euros on the first count and 152,000 euros on the second;
- on HSBC, a fine of 8,960,000 euros on the first count and 90,000 euros on the second;

- on Société Générale, a fine of 52,940,000 euros on the first count and 530,000 euros on the second;

Article 5: The legal entities referred to in article 1 are enjoined to adjust the amount of AOCT fees, within six months of notification of this decision, in order to put an end to the breach referred to in article 2. These companies are required to set the amount of these fees on the basis of the cost of processing AOCT transactions achieved by the most efficient bank, as checked by a cost study conducted on a representative sample of banks and audited by an independent expert.

Article 6: The legal entities referred to in article 1 shall have published the text set forth in point 795 of this decision, respecting the layout, in editions of newspapers *Le Monde* and *Les Echos*. They shall be published in a box in black print on a white background at least three millimetres below the following title, in bold print of the same size: *"Decision of the Autorité de la concurrence No. 10-D-28 of 20 September 2010 on prices and associated conditions applied by banks and financial institutions for processing cheques submitted for encashment purposes*". They may be followed by the wording whereby the decision was appealed against before the Paris Court of Appeal if such appeals were lodged. The legal entities concerned shall send a copy of these publications to the investigation office by registered letter as soon as they are published and no later than 20 November 2010.

Article 7: Pursuant to the provisions of article L.463-8(3) of the Commercial Code, the costs of expert appraisal decided by the General Rapporteur in decisions dated 16 December 2008 and 17 February 2009 shall be borne jointly and severally, and proportionately to the imposed fines, by the legal entities referred to in article 1.

Deliberation on the verbal report of Messrs Maximin Sanson and Cédric Nouël de Buzonnière and the intervention of Mrs Virginie Beaumeunier, General Rapporteur, by Mr Bruno Lasserre, President, Chair, Mrs Françoise Aubert, Mrs Anne Perrot and Mr Patrick Spilliaert, Vice-Presidents, Mrs Carol Xueref and Mrs Laurence Idot and Messrs Jean-Bertrand Drummen and Thierry Tuot, members.

The Meeting Officer,	The President, Chair
Marie Anselme Lienafa	Bruno Lasserre