RÉPUBLIQUE FRANÇAISE

Autorité de la concurrence

Decision no. 12-D-17 of 5 July 2012 relating to practices observed in the sector of non-cash means of payment (direct debits, interbank payment orders, *télérèglements*[1], credit transfers and bills of exchange)

English version

of the *Décision n° 12-D-17 du 5 juillet 2012 relative à des pratiques relevées dans le secteur des moyens de paiements scripturaux (prélèvement, titre interbancaire de paiement, télérèglement, virement et lettre de change)*

The Autorité de la concurrence (Permanent Commission);

Having regard to the letters registered on 27 February 2009 and 28 July 2011 under numbers 09/0017 F - 10/0008 F and 11/0064 F, in which the *Fédération des entreprises du Commerce et de la Distribution* (Trade and Retail Federation – FCD) and the *Association pour la Défense des Utilisateurs des Moyens de Paiement Européens* (hereinafter ADUMPE – Association for the defence of users of European means of payment) referred practices, relating to the multilateral interchange fees charged in France for direct debits, interbank payment orders, *télérèglements*, credit transfers and bills of exchange, to the Autorité de la concurrence;

Having regard to the decision of 2 February 2011, in which the General Rapporteur separated from case 09/0017 F - 10/0008 F that part of the case relating to practices other than those concerning CB payment cards, registering it under number 11/0012 F, so that it could be investigated separately;

Having regard to the decision of 12 July 2011, in which the General Rapporteur separated from case 11/0012 F that part of the case relating to practices other than those concerning payment cards, registering it under number 11/0053 F, so that it could be investigated separately;

Having regard to the decision of 26 August 2011, in which the General Rapporteur joined together the investigations of the two referrals registered under numbers 11/0053 F and 11/0064 F;

Having regard to Articles 101 and 102 of the Treaty on the Functioning of the European Union;

Having regard to Book IV of the Commercial Code (*Code de commerce)*, as amended;

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[1] The *télérèglement* is similar to a direct debit, except that the debtor explicitly authorizes the debit *via* an electronic platform

Having regard to the decisions on business secrecy no. 11-DSA-357 of 29 November 2011, no. 11-DSA-358 of 29 November 2011, no. 11-DSA-359 of 29 November 2011, no. 11-DSA-360 of 29 November 2011, no. 12-DSA-73 of 24 February 2012, no. 12-DSA-74 of 24 February 2012, no. 12-DSA-91 of 24 February 2012, no. 12-DSA-75 of 24 February 2012, no. 12-DSA-112 of 29 February 2012, no. 12-DSA-76 of 24 February 2012, no. 12-DSA-113 of 29 February 2012, no. 12-DSA-77 of 24 February 2012, no. 12-DSA-78 of 24 February 2012, no. 12-DSA-92 of 24 February 2012, no. 12-DSA-79 of 24 February 2012, no. 12-DSA-101 of 29 February 2012, no. 12-DSA-80 of 24 February 2012, no. 12-DSA-82 of 5 March 2012, no. 12-DSA-114 of 29 February 2012, no. 12-DSA-81 of 24 February 2012, no. 12-DSA-94 of 24 February 2012, no. 12-DSA-83 of 24 February 2012, no. 12-DSA-84 of 24 February 2012, no. 12-DSA-102 of 29 February 2012, no. 12-DSA-85 of 24 February 2012, no. 12-DSA-86 of 24 February 2012, no. 12-DSA-111 of 29 February 2012, no. 12-DSA-90 of 21 February 2012, no. 12-DSA-97 of 24 February 2012, no. 12-DSA-110 of 29 February 2012, no. 12-DSA-115 of 5 March 2012, no. 12-DSA-188 of 15 May 2012, no. 12-DSA-189 of 15 May 2012, no. 12-DSA-190 of 15 May 2012, no. 12-DSA-191 of 15 May 2012;

Having regard to the declassification decisions no. 12-DEC-06 of 12 March 2012, no. 12-DEC-08 of 12 March 2012, no. 12-DEC-09 of 12 March 2012, no. 12-DEC-10 of 12 March 2012, no. 12-DEC-11 of 12 March 2012, no. 12-DEC-12 of 12 March 2012, no. 12-DEC-13 of 12 March 2012, no. 12-DEC-14 of 12 March 2012, no. 12-DEC-15 of 12 March 2012;

Having regard to the commitments proposed jointly by the banks BNP Paribas, Crédit Agricole, LCL, BPCE, Confédération Nationale du Crédit Mutuel, Crédit Industriel et Commerciale, HSBC France, la Banque Postale, Société Générale, Crédit du Nord and the Banque de France, and also the commitments proposed by their representative body, the *Fédération Bancaire Française* (French banking federation, hereinafter, "FBF");

Having regard to the replies to the market test submitted by Leroy Merlin, Bouygues Telecom, EDF, le Conseil du Commerce de France (French trade federation), UFC Que Choisir (consumer association), Allianz, *Confédération générale des petites et moyennes entreprises* (CGPME – Business federation for SMEs), ADUMPE, FCD, GDF SUEZ, Saur, Poweo, the *Agence centrale des organismes de sécurité sociale* (ACOSS – Central agency of social security bodies), Vivendi, Veolia, Canal+, Axa, SFR and Vinci Park;

The Case Officers, the General Rapporteur, the Government Commissioner and the representatives of the banks involved in the proceedings, the AFB (French banking association), the FBF, the FCD, the ADUMPE and their members, heard at the hearing held on 12 June 2012;

Adopts the following decision:

Disclaimer

The Autorité de la concurrence provides the present translation into English of its ***Décision n° 12-D-17 du 5 juillet 2012 relative à des pratiques relevées dans le secteur des moyens de paiements scripturaux (prélèvement, titre interbancaire de paiement, télérèglement, virement et lettre de change)*** 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.

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I. Findings

A. THE REFERRALS

1. By letters registered on 27 February 2009 and 28 July 2011, under respective numbers 09/0017 F - 10/0008 F and 11/0064 F, the *Fédération des Entreprises du Commerce et de la Distribution* (Trade and Retail Federation - hereinafter "FCD") and the *Association pour la Défense des Utilisateurs des Moyens de Paiement Européens* (Association for the Defence of Users of European Means of Payment – hereinafter – "ADUMPE") reported, to the Autorité de la concurrence, practices relating to the multilateral interchange fees charged in France for direct debits, interbank payment orders, *télérèglements*, credit transfers and bills of exchange.

2. Originally, the FCD's referral had a broader scope than the referral submitted by ADUMPE: it concerned interbank fees charged for all means of payment, with the exception of cheques, and certain contractual clauses imposed by payment card systems. The Autorité de la concurrence has already adopted decision no. 11-D-11 accepting commitments relating to practices implemented by *Groupement des Cartes Bancaires* (CB Banking Cards Grouping). This referral was then joined , by a Decision dated 3 May 2010, to the referral of the *Conseil du Commerce de France (*French Trade Council – hereinafter "CdCF") registered under number 10/0008 F, which only concerned interbank fees paid on CB payment card transactions and the standard contractual clauses defined by *Groupement des Cartes Bancaires*.

3. By Decision of 2 February 2011, the General Rapporteur separated from case 09/0017 F - 10/0008 F that part of the case relating to practices other than those concerning CB payment cards, registering it under number 11/0012 F, so that it could be investigated separately.

4. By Decision of 12 July 2011, the General Rapporteur separated from case 11/0012 F that part of the case relating to practices other than those concerning payment cards, registering it under number 11/0053 F, so that it could be investigated separately.

5. The cases registered under numbers 11/0053 F and 11/0064 F were then joined by decision of the General Reporter dated 26 August 2011. Both the initiating parties had reported practices between competing banks designed to set multilateral interbank fees, in particular those charged for direct debits, *télérèglements* and interbank payment orders (*titre interbancaire de paiement – TIP*), which were then passed on to merchants.

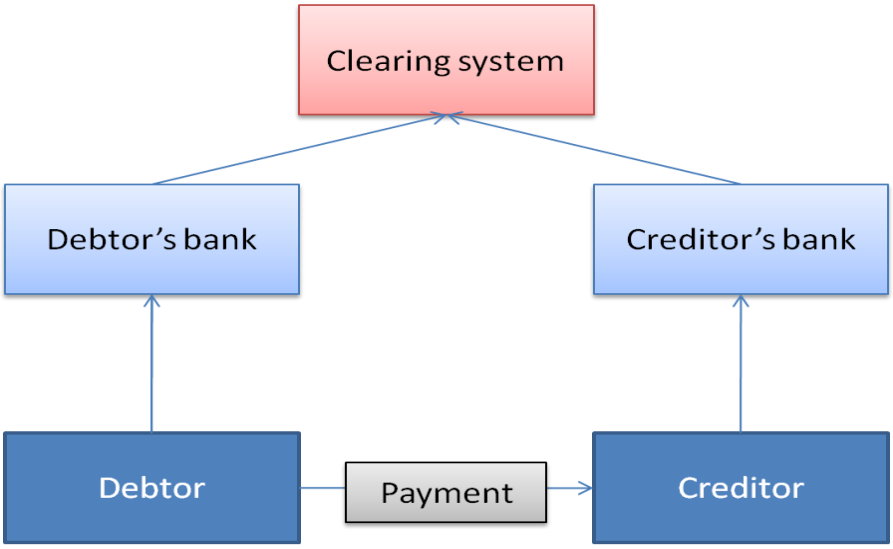
B. THE SECTOR CONCERNED

6. The Monetary and Financial Code (*Code monétaire et financier)* differentiates between fiduciary money, made up of coins and banknotes, and scriptural money, consisting essentially of cheques, payment cards, direct debits, credit transfers and bills of exchange.

7. The means of payment concerned by this decision are direct debits, interbank payment orders, credit transfers, bills of exchange and *télérèglements*. They are all non-cash means of payment and are all used within four-party systems, in that four players are involved in addition to the clearing system: the debtor, the debtor's bank, the creditor and the creditor's bank. This decision first provides a system overview diagram (1) and then describes in detail each of these means of payment (2).

1. A FOUR-PARTY SYSTEM

8. The diagram shows the different contractual relations between the various players:



9. In certain cases, interaction between the players gives rise to a payment:

- debtor's bank - debtor: the debtor's bank calculates the bank charges that the debtor will be required to pay when applying for or using a means of payment. For example, some banks may charge the debtor directly when a direct debit is set up. Corporate debtors may also be charged when they use their means of payment. In addition, the debtor may be charged when a transaction is rejected, due, for example, to insufficient funds in the account, or could have been rejected, but was finally authorised ("pushed through") by a customer relationship manager;
- clearing system - debtor's bank and/or creditor's bank: the clearing systems usually charge for use of the platform and for the services they provide to banks. Certain banks, including BNP Paribas and HSBC[2], have explained that the STET clearing system charges approximately 0.1 eurocent per transaction for both debit and credit transactions;
- creditor's bank - creditor: creditors' banks may charge for the collection of payments and for rejected transactions.

10. The clearing system is a platform on which financial institutions can communicate and exchange information and documents relating to a transfer of funds to or with other

[2] Replies received from HSBC and BNP Paribas to the additional questionnaire dated 18 January 2012

financial institutions. Financial institutions therefore use the clearing system to keep each other informed of the existence of transactions. The clearing system also calculates transaction balances between each pair of banks at regular frequencies – on every working day in the case of the French system.

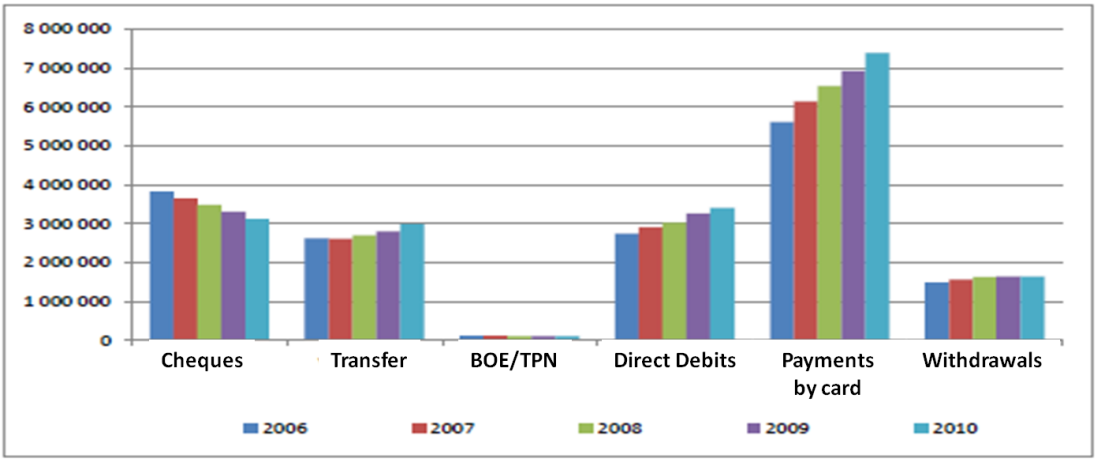
2. DIFFERENT MEANS OF PAYMENT

11. According to the Banque de France, 17 billion payment transactions were carried out by the private and corporate customers of French banks in 2010 (excluding cash payments and withdrawals by card), which is an increase of 3.9% in one year.

12. Direct debits, which were introduced as a means of payment at the end of the 1960s, were the second most popular means of payment in France in terms of volume in 2010. 3.3 billion direct debit transactions were made, ranking behind payment cards (7.4 billion transactions), but ahead of cheques (3.1 billion) and transfers (3 billion). They represent almost one fifth of all payments in terms of volume (19.2%). The popularity of this means of payment is constantly increasing, with volumes rising by more than 20% between 2006 and 2010.

13. Interbank payment orders were used for approximately 100 million transactions in 2010, representing 0.6% of transactions in terms of volume. Although use of *télérèglements* remains limited (18.4 million in 2010), this means of payment is making rapid progress, with an approximate year-on-year 20% increase since 2006. Furthermore, in terms of amounts, *télérèglements* represent approximately €300 billion per year, i.e., almost 40% of the total value of all direct debits in 2010. Lastly, several dozen million bills of exchange are used each year. However, in terms of volume, they have decreased by approximately 5% every year since the middle of the last decade.

Annual evolution of non-cash means of payment in France



a) The two categories of non-cash means of payment

14. There are two categories of non-cash means of payment. A report by the Inter-Network Commission (*Commission inter-réseaux* - hereinafter, "CIR") dated 2 December 1994 defines the two categories as follows:

"- those for which the debtor accepts that his agreement be tacit. This category encompasses standard direct debits (900 million/year) and accelerated direct debits (4 million/year),

*- those that the debtor wishes to expressly authorise. The main means of payment in this category is the cheque, with an estimated 1.5 billion/year used for remote payments, followed by interbank payment orders (125 million/year) and remote card payments (15 million/year). Two new products, electronic payment orders (*titre électronique de paiement – TEP) *and 'referenced' transfers, were created in 1994 for the same purpose. The TéléTIP (telephone payment order), currently being tested, can also be placed in this category"* (emphasis added).

(i) Means of payment that do not require the debtor's express authorisation for payment to be executed: direct debits

15. A brochure on domestic direct debits issued by the *Comité français d'organisation et de normalisation bancaires* (French banking organisation and standardisation committee – hereinafter CFONB) describes this means of payment as follows: "*an automated means of payment, more specifically suited for recurrent payments, that enables a creditor to collect payment from the debtor*"[3]. Unlike a cheque or payment card, a direct debit is initiated by the creditor himself, by sending a direct debit instruction to his bank. The issue of the direct debit order is conditioned upon the creditor having a national issuer number (*numéro national d'émetteur* - hereinafter NNE), which is allocated in accordance with the criteria defined by the banking industry. The creditor's bank will provide the creditor with this number.

16. In order to set up a direct debit, the creditor must be in possession of an initial mandate issued by the debtor or a direct debit request; the debtor must send a second mandate, the direct debit authorisation, to his own bank.

17. The creditor's bank verifies the technical compliance of the direct debit documents and then presents the direct debit data for clearing. The debtor's bank then receives the data and makes its own checks (existence of the account, existence of instructions, sufficient funds, etc). If all the conditions are satisfied, the transaction will be authorised and interbank settlement will take place on the due date, with the corresponding amount being debited from the debtor's account and credited to the creditor's account on that date.

18. However, the direct debit will be rejected by the debtor's bank if any of the conditions are not satisfied. It will inform the creditor's bank of the reason thereof, and will also pass this information on to the creditor. Direct debits may be contested by the debtor up to eight weeks after the due date and interbank settlement.

19. In France, there are two types of direct debits: standard direct debits, which account for most transactions of this type (over 90%) and accelerated direct debits. The difference between the two is the lead time required for clearing and interbank settlement: while standard direct debits require four days, this is reduced to two days for accelerated direct debits.

[3] p. 4 of the brochure, classification mark 8673

(ii) Means of payment that require the debtor's express authorisation for payments to be accepted: interbank payment orders, *télérèglement*, bills of exchange, credit transfers

Interbank payment orders

20. The interbank payment order ("TIP") was introduced in February 1988. It is a paper means of payment reserved for remote payments, and is described by the CFONB as a cheque substitute. Its originality lies in the fact that the creditor chooses when to collect payment, while the debtor keeps on expressly authorising each individual payment.

21. In practice, the interbank payment order is issued at the same time as the corresponding invoice, and is printed at the bottom of the invoice. Each interbank payment order displays some information, including the NNE, the details of the account to be debited[4], the amount to be paid and payment references. Just as with direct debit transactions, in order to issue an interbank payment order a creditor must have a NNE. When a debtor receives an interbank payment order, he must date and sign it to record his authorisation and send it to the address indicated by the creditor. Interbank payment orders are generally sent to a TIP processing centre. A TIP centre is made of two entities: a data processing bureau and the banking centre. The data processing bureau is the entity that physically processes the interbank payment orders, checking that they match the debtors' bank details, as shown on the bank identification slip (*relevé d'identité bancaire* - RIB). Ultimately, the data processing bureau is therefore responsible for the physical processing of interbank payment orders and their filing. The banking centre is responsible for ensuring compliance with the processing rules laid down by the CFONB.

22. Once an interbank payment order has entered the banking circuit, it will be processed in a similar way to direct debit transactions. The creditor's bank will carry out certain formal checks and will then send the interbank payment order for clearing. The debtor's bank will then run its own checks (bank account details, sufficient funds) and will pay the amount to the other bank. Unlike direct debits, which are paid on a due date, interbank payment orders are paid on sight. Interbank settlements therefore take place on the next working day after clearing, even if the due date, as stated on the invoice, falls after this date. This can work to the advantage of creditors: as Société Générale has explained: "*debtors using interbank payment orders often send them back before the due date stated on the invoice. This provides the creditor with early payment, generating increased cash flow*." Debtors have two calendar months in which to contest interbank payment orders, although in practice this is very rare.

23. Interbank payment orders have another specific feature: they can be used in conjunction with other means of payment. Interbank payment orders can be payable in cash at a Post Office. A cheque can also be sent with an interbank payment order as payment. In this case, the interbank payment order is not strictly speaking used as a means of payment, as it is the cheque that is presented for clearing, but rather as an accounting reconciliation tool for use by the creditor, which will also facilitate electronic processing of the cheque and the creation of a cheque image by the creditor's bank.

Télérèglements

[4] When a payment is first made by interbank payment order, the debtor must enclose a bank account identification slip (RIB) containing details of his bank account; this information will be printed on all subsequent interbank payment orders sent out by the same issuer.

24. *Télérèglements* were introduced in October 1997. This remote means of payment has replaced the electronic payment order (*titre électronique de paiement – TEP)*, which had been initially intended for use with the Minitel. A debtor can expressly authorise each payment, which will be debited straight from their account. Most *télérèglements* are made by companies in order to pay certain taxes and contributions; moreover, *télérèglement* is now mandatory for companies exceeding a certain turnover level. This method is also frequently used to pay VAT and corporation taxes.

25. As with direct debits and interbank payment orders, any creditor wishing to propose *télérèglement* must have an NNE. Only debtors who have signed a document expressly agreeing to pay via *télérèglement* can use this method. Such agreements are usually specific to individual creditors, although multi-creditor agreements may be entered into for payments to the Administration.

26. In practice, a creditor issues an invoice to inform the debtor of the amount to be paid and the due date. For payments to the Treasury, the *télérèglement* may be made after a return has been filed online. The debtor must then expressly agree to pay using one of the electronic methods proposed by the creditor (voice server, web server, etc.). These servers may be managed directly by the creditor (*télérèglement* type A) or, more rarely, by a TIP centre (*télérèglement* type B). Once the *télérèglement* server manager has recorded the debtor's agreement, it will file the transaction and send the *télérèglement* data to the creditor's bank. The *télérèglement* will then enter into the usual direct debit circuit: checks by the creditor's bank, presentation for clearing, checks by the debtor's bank and interbank settlement (on the next working day after presentation for clearing) or rejection of payment. The advantage of the *télérèglement* method is that once the debtor has expressly authorised payment via the authorisation server, the payment can be presented for clearing very quickly.

Bills of exchange

27. According to the definition by the CFONB: "*a bill of exchange is a document in which a person known as the "drawer" instructs another person known as the "drawee" to pay a set amount on an agreed date to a "payee", which is the drawer himself*." An electronic bill of exchange corresponds to the electronic form of the traditional bill of exchange.

28. Bills of exchange follow a particular process: the creditor issues an invoice and sends it to the debtor. At the same time, he sends the electronic bill of exchange to his own bank, also providing it with the debtor's bank details. The creditor's bank forwards the electronic bill of exchange to the debtor's bank, and the debtor's bank sends the debtor a notice reiterating the information contained in the electronic bill of exchange. The debtor may then agree or refuse to pay. If he agrees, the debtor's bank will settle with the other bank. If he refuses, the bill will be rejected. A debtor can also decide to only pay part of the amount requested.

The credit transfer

29. The CFONB defines domestic credit transfers as follows: "*any transfer of funds in Euros from an issuer account to a beneficiary account, provided both accounts are held in France and are denominated in Euros*"[5]. Customers can make the following types of credit credit transfer:

[5] CFONB brochure, available (in French) at: http://www.cfonb.org/Web/cfonb/cfonbmain.nsf/DocumentsByIDWeb/7JRDVV/$File/3-

- a standard transfer, when an account holder, called the payer, asks his bank to transfer funds from his own account to another account; this is a means of payment on sight;
- a *virement à échéance* (scheduled transfer), which may be "D-3" (cleared three working days before the due date) or "D-2" (cleared two working days before the due date). These are automated transfers that are settled on a previously agreed future date, after clearing; contrary to a standard transfer, which is a spot transaction, a scheduled transfer provides for settlement at a future date and is therefore also a credit instrument; the creditor's bank informs its customer that it has received an order for a transfer on a future date; this type of transfer was first introduced at the end of the 1980s and was abolished in the middle of the last decade;
- a *virement d'origine extérieur* (incoming international transfer – VOE*)*, which is a transfer issued by a bank located in another country to a bank located in France;
- a *virement de trésorerie* (treasury transfer - VSOT), which is a transfer carried out for cash management purposes between companies and, more specifically, between subsidiaries in the same group. Banks have informed us that this type of transfer was phased out in the middle of the last decade.

b) Charges

30. Each means of payment has its own specific features and different interbank charges apply.

(i) Charges payable by debtors

31. Traditional direct debit transactions are usually free of charge for debtors. However, large accounts may be charged a few euro cents per debit transaction, according to information in the hearing minutes of a firm that provides companies with independent financial request [6].

32. However, some banks charge debtors a fee for arranging direct debits. At its hearing in 2010, the consumer association UFC-Que Choisir stated that although approximately 40% of banks did not charge a fee for arranging a direct debit in 2010, 60% did charge approximately €6[7]. This information has been confirmed by the replies received from banks to a questionnaire sent out by the Investigation Services: although banks such as HSBC, BNP Paribas, La Banque Postale, LCL, Crédit du Nord and Société Générale do not charge for arranging a direct debit, other institutions do so, such as Crédit Mutuel (€9.75 for retail customers and self-employed/professional customers, €6.5 for corporate customers), CIC (€6.5) and some of the Crédit Agricole's regional banks ([31-39] of the 39 banks charge retail customers an average fee of €[6-10], [11-20] charge professional customers an average fee of €[6-10] and [0-10] charge corporate customers an average fee of €[0-5]).

33. Moreover, debtors are usually charged when a direct debit transaction is rejected, in particular when this is due to insufficient funds. Most banks charge a fee for rejected transactions due to lack of or insufficient funds that equals or is close to the maximum fees

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[6] Minutes of the hearing of bfinance on 20 January 2012, classification mark 8696.

[7] Minutes of the hearing of UFC-Que Choisir on 23 September 2011, classification mark 4840

set by Decree 2009-934 of 29 July 2009[8]. For example, Société Générale charges a fee for rejected transactions due to insufficient funds equal to the amount of the rejected transaction, but capped at €20 (€10 for customers of the Generis offer, designed for vulnerable customers). Crédit Mutuel and CIC charge a fee corresponding to the amount of the rejected transaction, capped at €20. Crédit Mutuel and CIC also charge customers a fee for transactions rejected for other reasons when the customer is a company (€12.25) or a professional (CIC only, €13). LCL and Crédit du Nord charge a fee for rejected transactions due to insufficient funds only, corresponding to the amount of the payment transaction and capped at €20, for all customers. HSBC has a similar policy, although the fee for companies and professional customers is capped at €19. BNP has a similar fee structure as LCL, except that retail customers are not charged for direct debits of less than €5 that are rejected due to insufficient funds. Most of the Crédit Agricole banks charge a fee for rejected transactions that ranges from €11 to €20, depending on the customer segment. Most of the banks in the Banques Populaires and Caisses d'Epargne networks also charge a fee for rejected transactions. La Banque Postale stands out, as its fees are capped at €10.3.

34. Other fees may be charged when the bank should have rejected the direct debit transaction due to insufficient funds but decided to authorise it (or "push it through") after assessment by a customer relationship manager. In that case, the bank charges an intervention fee (*commission d'intervention)*. The intervention fee is a "*sum received by the bank for a transaction resulting in an account irregularity requiring special treatment (presentation of an incorrect payment order, inaccurate bank details, lack of funds or insufficient funds, etc.)*"[9].

35. The amount of the special handling fee varies from bank to bank, but ranges from between €5 and €10. The banks usually cap the fee on a daily and/or monthly basis. The *Observatoire des tarifs bancaires* (Observatory on banking fees)[10] has calculated that the weighted average intervention fee as of 5 July 2011 was €8.29. The stakes are therefore high. Société Générale has stated that intervention fees on direct debit transactions, interbank payment orders and *télérèglements* represent between €60 and €90 million per year, 80-90% of which correspond to direct debit transactions, with the remaining 10-20% being accounted for by interbank payment orders and *télérèglements*. Crédit Agricole has estimated that income from intervention fees charged by its regional banks for direct debit transactions amounts to €[20-30] million. BNP Paribas has indicated ranges of €[20-40] million for direct debits, €[0-4] million for interbank payment orders and €[0-1] million for *télérèglements*. The other banks have communicated estimates for all means of payment collectively (including cheques and card transactions).

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[8] Monetary and Financial Code, article D133-6: "the fee charged by the payer's payment service provider for any payment incidents other than rejection of a cheque shall not exceed the amount of the rejected payment order, and shall be capped at €20". Payment incidents are defined in article D133-5 as "any rejection of a payment order received by the payer's payment service provider due to lack of funds or insufficient funds, irrespective of the means of payment used".

[9] 2010-2011 Annual Report of the *Comité consultatif du secteur financier* (Financial sector advisory committee – CCSF).

[10] Working Group operating under the aegis of the *Comité consultatif du secteur financier* (Financial sector advisory committee – CCSF), created by the *Loi de régulation bancaire et financière* (Banking and Financial Regulation Act) of 22 October 2010.

36. If a direct debit transaction is cancelled, most banks also charge the debtor a cancellation fee. Société Générale charges between €10 and €12 to cancel a direct debit transaction, depending on the type of customer (retail, professional, corporate), although customers who subscribe to the special Jazz service are exempt. La Banque Postale charges retail customers €12.8, but does not charge legal entities any cancellation fee. BNP Paribas, HSBC, LCL and Crédit Mutuel do not charge retail customers any cancellation fee. However, they do charge all or some of their business customers for this service: Crédit Mutuel only charges self-employed/professional customers (€20), HSBC and LCL charge professional customers and corporate customers (€10.5 and €13.5, respectively). BNP Paribas states in its standard terms and conditions for business customers (professionals and companies) that it charges approximately €10 (€9.8 for cancellation using a remote banking device, €10.5 for cancellation in a branch). Some of the banks in the Caisses d'Epargne and Banques Populaires networks charge a cancellation fee, between €10 and €15, depending on the bank and the customer segment. CIC and Crédit Agricole stand out in that they do not charge any of their customers a cancellation fee.

37. Debtors are not generally charged any fees in connection with interbank payment orders, unless the order requires manual processing in order to be paid, in which case a special handling fee will be charged, or the debtor has a key account, in which case a few euro cents may be charged. However, if an interbank payment order is rejected due to lack of funds, most banks charge a fee that is equivalent to the fee on rejected direct debit transactions.

38. Subscription to the *télérèglement* service is usually free of charge for debtors (only Crédit Mutuel and CIC charge key accounts a fee of €6.5). No fees are charged for the *télérèglement* itself, except in specific cases when an intervention fee is charged. The fees on rejected *télérèglements* are set according to the same rules as those for rejected direct debit transactions. However, it should be noted that Crédit Agricole does not charge debtors for rejected *télérèglements*, although most of its banks do charge for rejected direct debit transactions.

(ii) Charges payable by creditors

39. Creditors are usually billed each time they issue a direct debit request. For example, CA-CIB customers (Crédit Agricole group) are charged an average fee of €0.118 per interbank direct debit and €0.103 per intrabank direct debit, according to information received from the bank. LCL has stated that the standard fee for a standard four-day direct debit request €0.39 per transaction, although it has also stated that this fee is probably higher than average. HSBC charges an average fee for its main customers of €0.114 per interbank direct debit and €0.11 per intrabank direct debit. The average direct debit fee charged by Crédit du Nord is €0.18. BPCE informed us that its main banks charge different fees on interbank and intrabank direct debits, with an average fee of between €0.10 and €0.14 for interbank direct debits and of between €0 and €0.10 for intrabank direct debits. However, some banks charge a single fee, which ranges from between €0.068 and €0.12. La Banque Postale charges its main customers approximately €0.17 on average per direct debit, according to information received from the bank. It also seems that more indirect charges may apply, such as an activity charge.

40. As a general rule, creditors are also charged when a direct debit is rejected. Most of the banks' key accounts are usually charged between €0.7 and €1 per rejected transaction, irrespective of the reason.

41. Creditors are usually charged for interbank payment orders collected. Average fees include, for example: €0.082 by CACIB, €0.13 by HSBC, €0.267 (interbank payment order) or €0.243 (intrabank payment order) by La Banque Postale, or €0.09 and €0.11 by Crédit Mutuel-CIC. Bred, Natixis and Crédit Coopératif, the main entities in the BPCE group for the collection of interbank payment orders, charge an average fee of between €0.08, and €0.10 per order. Creditors are also charged if an interbank payment order is rejected. The fee tends to vary depending on the customer profile, ranging from between €0.70 and €1.2, although certain banks charge a dissuasive fee that in some cases is higher than €4.

42. Creditors are also charged for each *télérèglement* collection operation. To give an idea of the amounts charged, information received from CA-CIB suggests that the average rate is €0.142; Crédit Mutuel-CIC customers pay between €0.12 and €0.2. BPCE has stated that the average fees charged by its main entities range from between €0.10 to €0.26. In addition to the fee charged whenever an *télérèglement* is collected, creditors are also charged when *télérèglements* are rejected; the amounts are similar to those charged for rejected direct debits.

c) Operations that may be triggered as a result of the means of payment under review : AOCT and DRE

43. A so-called *annulation d'opération compensée à tort* (cancellation of an incorrectly cleared transaction – hereinafter AOCT) consists of a bank reversing a transaction initially incorrectly ordered, as explained in the glossary issued by GSIT[11], the consortium formed by banks to operate the SIT (interbank teleclearing system). This procedure allows the bank to cancel any transaction incorrectly presented for clearing that has already been cleared. An AOCT entails processing by the bank issuing the AOCT, and also by the other bank concerned by the incorrect transaction.

44. A *demande de restitution d'effets* (request for return of a bill – DRE) is a technical transaction carried out within the clearing system when an electronic bill of exchange has been incorrectly cleared. It is equivalent to the AOCT transaction for other means of payment.

C. PRESENTATION OF THE PARTIES

1. THE BANKS

45. Remote means of payment are essentially used by companies and private individuals. However, the banks play a key role as account holders. In accordance with European law, bank transactions can only be carried out by credit institutions, which must first be authorised to operate as a credit institution by a banking regulator.

46. In France, the definition of banking transactions is broad and, pursuant to Article L311-1 of the Monetary and Financial Code, covers: "*taking receipt of funds from the public, credit transactions, and the issue to customers or management of means of payment*".

47. The following institutions are concerned by these proceedings:

[11] http://www.gsit.fr/glossaire/fr/Annulation_d_une_operation_compensee_a_tort_AOCT.htm

a) The Banque de France (French central bank)

48. The Banque de France 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. The Banque de France also operates as a commercial bank, holding accounts for large companies and institutions. It also has a very small number of private customers.

b) BNP-Paribas

49. The BNP Paribas group 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 from its retail banking activities.

c) Société Générale

50. 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, a wholly-owned subsidiary since 2009. While Société Générale operates in the main banking business lines, retail banking represents its most important activity and accounts for some 50% of its net banking income.

d) Le Crédit du Nord

51. The Crédit du Nord group is a federation of seven regional banks, an asset management company and a stock broking firm. Société Générale acquired 100% of its capital on 11 December 2009.

e) Le Crédit Agricole

52. Crédit Agricole SA is a *société anonyme* (limited company) providing the functions of central administrative body for the Crédit Agricole network. It is majority owned by the regional Crédit Agricole banks (*caisses régionales du Crédit Agricole*).

53. The group operates in the sectors of retail banking, in France and at an international level, specialised financial services (asset management, insurance, private banking, consumer credit, leasing, factoring), corporate banking and investment banking.

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

f) LCL – Crédit Lyonnais

55. In 2003, Crédit Agricole SA acquired over 99% of Crédit Lyonnais (which became LCL in 2005). Operating under its own name, LCL is a retail bank in France for private individuals, professionals and companies, with a substantial urban presence. It offers a full

range of banking products and services, asset management and insurance products, and wealth management services.

g) BPCE group

56. The BPCE group is the second largest banking group in France.

57. It was formed through the merger of the Banques Populaires and Caisse d'Épargne groups, and operates in all the commercial banking and insurance sectors. The group has a three-tier structure:

    - the two cooperative banking structures, consisting of 19 Banques Populaires and 17 Caisses d'Epargne;
    - a central body, BPCE;
    - the subsidiaries, including Natixis, a listed entity that provides financing and investment banking, savings products and financial services, Crédit Foncier, La Banque Palatine, and the banks in the BPCE International and Overseas network.

h) HSBC (Hong Kong Shanghai Banking Corporation)

58. A UK 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.

59. Since 2000, HSBC France encompasses all the banks of the former Crédit Commercial de France (CCF) group: UBP, Banque Hervet, Banque de Picardie, Banque de Baecque-Beau. It operates in the retail banking, wholesale banking, asset management, insurance and private banking sectors.

i) La Banque Postale

60. La Banque Postale is a wholly-owned banking subsidiary of La Poste. It was formed pursuant to 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 extending its company objects to encompass banking transactions. La Banque Postale became a *société anonyme* (limited company) on 1 March 2010.

61. La Poste provides postal, parcel and express delivery services, as well as financial services.

j) Crédit Mutuel

62. Crédit Mutuel is a French cooperative bank. The Confédération Nationale du Crédit Mutuel, a non-profit association governed by the Law of 1 July 1901, constitutes the network's central administrative body.

63. The Crédit Mutuel group is made of 18 regional groups (bringing together 287 regional banks and 1,890 local branches), which hold the capital of the Confédération Nationale du Crédit Mutuel.

64. With its subsidiary, Crédit Industriel et Commercial, Crédit Mutuel is France's second largest retail bank and operates in the banking and insurance sector.

k) Crédit Industriel et Commercial (CIC)

65. Founded in 1859, Crédit Industriel et Commercial (hereinafter 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.

l) The French banking associations: the AFB and the FBF

66. The *Association Française des Banques* (French association of banks – hereinafter AFB) was created in July 1941 with the name *Association professionnelle des banques* (Professional banks association – hereinafter APB) pursuant to Law no. 2352 of 13 June 1941 on the regulation and organisation of the banking profession. It became the AFB in 1976. It represents commercial banks only, not mutual-interest or cooperative banking institutions. According to Article 2 of its Statute, the objectives of the AFB include:

- representing its members *vis-à-vis* third parties in areas falling within its remit;
- taking part in any court proceedings or actions in which it or any of its members are implicated or when this is in the general interest of its members;
- assisting with the amicable settlement of any disagreements that may arise between members (…).

67. In 2000, the banking industry decided to create a new professional body for both banks within the AFB and the networks of cooperative and mutual-interest banks, to represent and defend the interests of all banking institutions in France, irrespective of their status. The AFB's previous duties as the representative body for the banking sector were split between the two bodies: the *Fédération Bancaires Française* (French banking federation – hereinafter FBF) operates as the French banking industry's professional body, and is responsible for external relations and the examination and analysis of issues that concern all banking networks; the AFB continues to act as an employers' association for the banking industry.

2. THE NON-BANKING PARTIES : DEBTORS AND CREDITORS, THE USERS OF THE MEANS OF PAYMENT

68. Payments bring two categories of players into contact with each other: debtors and creditors. This is true even for remote payments, which may involve a direct debit transaction, interbank payment order, *télérèglement* or bill of exchange.

69. Debtors using these means of payment may be private individuals or businesses. In the course of their everyday lives, private individuals frequently use these means of payment in order to pay their gas or electricity supplier, their landline or mobile telephone operator or to pay their taxes, for example. Businesses also regularly use these means of payment in the course of their business activities, in order to pay their service providers and their social security and tax bills.

70. Creditors using these means of payment include large utility companies (electricity or gas), telephone operators (landline or mobile), social entities and the State itself. However, the

particular features of these means of payment make them unsuitable for one specific category of merchants. As a general rule, direct debit transactions, *télérèglements* and interbank payment orders are best suited to pay services that do not require the physical presence of the creditor and the debtor at the same time and in the same place. More specifically, direct debit transactions are designed for recurring payments. These features therefore exclude certain merchants, and in particular the more traditional distribution channels, from the category of creditors using the means of payment concerned by this decision.

D. THE EUROPEAN CONTEXT: THE SEPA

71. This case needs to be considered within the context of the introduction of a Single Euro Payments Area.

72. The SEPA (Single Euro Payments Area) is a European project, which builds on the introduction of coins and notes in Euros. The aim is to create a single range of means of payment in Euros that is common to all European countries, so that consumers, businesses, merchants and administrations can make payments under the same conditions anywhere in the European area as easily as they can in their own country. On 13 November 2007, the Council and the European Parliament adopted the Directive on payment services harmonising the legal framework governing payment services, and thus facilitating the introduction of SEPA instruments.

73. The SEPA comprises the Member States of the European Union as well as Iceland, Lichtenstein, Norway and Switzerland.

1. THE RANGE OF MEANS OF PAYMENT

74. The SEPA project aims to introduce a single range of non-cash payment instruments (credit transfers, direct debits, cards). This will enable businesses to issue and receive payments in Euros anywhere in the SEPA using the same means of payment, with the same payment cycles, levels of security and processing systems as in their home country.

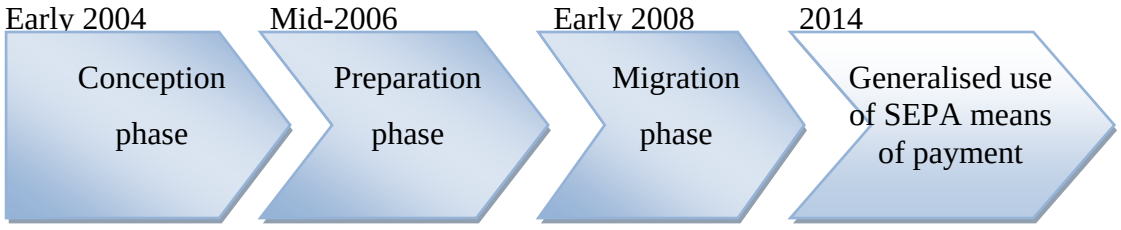
75. All credit transfers and direct debits will eventually be carried out using SEPA instruments, namely the SCT (SEPA Credit Transfer) and SDD (SEPA Direct Debit). It is anticipated that all payment cards will be compatible within a harmonised framework, the SEPA Card Framework.

76. As a result, two direct debit payment systems have coexisted in France since November 2010:

- national direct debits, requiring payment of an interchange fee of €0.122 for standard direct debits (and €0.182 for the rarely used accelerated direct debits), and
- SEPA direct debits, currently requiring payment of a domestic interchange fee of €0.122 or a cross-border fee of €0.088.

2. THE CALENDAR

77. The migration of national systems towards a pan-European SEPA system began in 2008 with the introduction of the SEPA Credit Transfer, followed by the introduction of the SEPA Direct Debit in 2010.



78. The "End-Dates" regulation no. 260/2012 provides that migration of national direct debit and credit transfer systems to pan-European SEPA systems will be completed as follows:

- by no later than ***1 February 2014***, all national credit transfers will have been phased out and replaced by the SEPA Credit Transfer;
- by no later than ***1 February 2014***, all national direct debit transactions will have been phased out and replaced by the SEPA Direct Debit;
- by no later than ***1 February 2016***, all "niche" products will have been phased out (for France, interbank payment orders and *télérèglements*).

3. MULTILATERAL INTERCHANGE FEES ASSOCIATED WITH THESE MEANS OF PAYMENT

79. Regulation (EC) no. 94/2009 of the European Parliament and the Council dated 16 September 2009 on cross-border payments in the Community introduced a set of measures designed to contribute to the success of the SEPA.

80. In order to facilitate migration to SEPA instruments by payment service providers (hereinafter PSPs), the regulation allowed, on a temporary basis, a multilateral interchange fee (MIF) to be charged on cross-border SEPA direct debits, setting the fee at €0.088 maximum, unless a lower MIF is agreed by the relevant payment service providers.

81. At the current time, the direct debit systems of 21 of the 27 Member States of the EU operate without any per-transaction MIF. This means that more than two thirds of direct debit transactions in the EU are executed without any MIF being charged on transactions[12]. A working document issued by the European Commission in 2009[13] states that domestic interchange fees are still charged on transactions in six Member States of the European Union: in Belgium (2 euro cents per transaction), Spain (less than 3 euro cents), Sweden (11 euro cents), France (12.2 euro cents), Portugal (23 euro cents) and Italy (25 euro cents). This means that, at the date hereof, the multilateral fees on direct debits charged in France are the third highest in Europe. MIFs are charged on R-transactions (transactions

[12] ECB Blue Book 2000-2007 - http://sdw.ecb.europa.eu/browse.do?node=2746

[13] http://ec.europa.eu/competition/sectors/financial_services/SEPA_working_document_en.pdf

that could not be properly executed, in particular rejected transactions) in five countries in the euro zone, two of which also charge per-transaction MIF.

82. Regulation (EU) no. 260/2012 of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in Euros and amending regulation (EC) no. 924/2009 clarified the legal framework applying to multilateral interchange fees.

83. Recital 20 of Regulation no. 260/2012 (also known as the "End-Dates Regulation") stipulates that "*it is important to provide legal certainty to the payments industry on business models for direct debits. Regulation of multilateral interchange fees (MIF) for direct debit is essential to create neutral conditions of competition between the PSPs, and so to permit the development of a single market for direct debits*."[14] (emphasis added).

84. The regulation provides for the complete phasing out of systematic interbank fees (Article 6 of Regulation 260/2012) by no later than 1 February 2017 for domestic direct debits, and by no later than 1 November 2012 for cross-border direct debits.

85. Article 8-1 of the aforementioned regulation also provides that no multilateral interchange fee shall be charged on direct debit transactions and no other agreed remuneration with an equivalent object or effect shall apply to direct debit transactions.

86. Furthermore, Article 8-2 provides that fees may be charged on R-transactions (also referred to as "exceptional fees" in this case), provided several conditions are complied with:

> *"a) the arrangement aims at efficiently allocating costs to the PSP which, or the PSU[15] of which, has caused the R-transaction, (…);*
>
> *b) the fees are strictly cost-based;*
>
> *c) the level of the fees does not exceed the actual cost of handling an R-transaction by the most cost-efficient comparable PSP that is a representative party to the arrangement in terms of volume of transactions and nature of services;*
>
> *d) the application of the fees in accordance with points a), b) and c), prevents the PSP from charging additional fees relating to the costs covered by those interchange fees to their respective PSUs."*

E. THE PRACTICES AT ISSUE

1. THE PRINCIPLE OF MULTILATERAL INTERBANK FEES

87. In France, multilateral interbank fees (also known as interchange fees) are charged on all debit transactions. Two types of interbank fees may be charged: per-transaction interbank fees, charged on each transaction, and interbank fees charged on exceptional transactions only (transaction rejected for insufficient funds, inexistent account, etc. and AOCT or DRE fees). In both cases, the amount of the fee is jointly set by the banks.

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[14] Regulation (EU) No. 260/2012 of the European Parliament and Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in Euros and amending Regulation (EC) No. 924/2009

[15] Payment service user – hereinafter PSU

88. Fees are systematically paid to the debtors' banks by the creditors' banks, with the exception of AOCT fees, which may be paid by both banks, and fees on credit transfers, which are paid by the debtors' banks to the creditors' banks.

2. BACKGROUND OF THESE COMMISSIONS

89. The practices at issue are based on decisions that, in many cases, are long-standing. By way of an example, the table below lists the various interbank fees and the date of their introduction:

Means of payment	**Date of decision introducing the fee**
Interbank payment orders paid in cash at Post Office branches	**Meeting of 3 June 1987 (fee effective from 1 February 1988)**
Interbank payment orders paid by an account debit transaction	**Meeting of 12 October 1987 (fee effective from 1 February 1988)**
Direct debit request with 4-day clearance (standard)	**Fee introduced in 1969**
Direct debit request with 2-day clearance (accelerated)	**Fee in existence since 1985 or earlier**
Electronic bill of exchange	**Decision of 22 November 1972 (effective from 1 January 1973)**
Return of electronic bill of exchange or notice of unpaid direct debit	**Decision of 22 November 1972**
Télérèglement	**Fee introduced in 1997**
Cancellation of an incorrectly cleared transaction (AOCT)	**Fee introduced in 1980**
Request for return of bill of exchange (DRE)	**Fee introduced in 1996**
Incoming international credit transfer	**Fee introduced in June 1995**
Scheduled credit transfer	**Meetings of 16 October 1985 and 15 April 1986 (effective from 1 January 1987)**

90. As a general rule, the per-transaction interbank fees were defined when the corresponding means of payment were introduced. In some cases, the fees have been revised, although always upwards (in Euros at current prices) as the following table shows:

Interbank Fee	**Introduced**	**Revised**	**Current Fee**
Standard direct debit request	**1969: FRF 0.25**	**1975 (FRF 0.60), 1978 (FRF 0.67), 1993 (FRF 0.75), 1995 (FRF 0.80)**	**€0.122 (FRF 0.80)**
Accelerated direct debit request	**1985 or earlier: FRF 1.10**	**1994 (FRF 1.20)**	**€0.183 (FRF 1.20)**
Interbank payment order	**1988: FRF 0.45**	**1996 (FRF 0.50)**	**€0.076 (FRF 0.50)**
Interbank payment order-cash	**1988: FRF 1.80**	**1996 (FRF 2.80)**	**€0.43 (FRF 2.80)**
Télérèglement	**1997: FRF 0.90**	**/**	**€0.137 (FRF 0.90)**
Electronic bill of exchange	**1973: FRF**	**/**	**€0.122 (FRF**

	0.80		**0.80)**
Incoming international credit transfer	**1994: FRF 10**	**1995 (FRF 12)**	**€1.829 (FRF 12)**
Rejection of direct debit, interbank payment order, *télérèglement*, bill of exchange	**1972 or earlier: FRF 2.50**	**1976 (FRF 4), 1994 (FRF 5)**	**€0.762 (FRF 5)**
AOCT	**1979: FRF 4**	**/**	**€0.61 (FRF 4)**
DRE	**1994: FRF 4**	**/**	**€0.61 (FRF 4)**

3. THE CONTEXT FOR THE INTRODUCTION OF INTERBANK FEES

91. The banks have explained that they entered into discussions in order to jointly determine fees, and that this "*constitutes one of the pillars of the interoperability of the French system*"[16]. According to BPCE: "*bank interoperability in France allows all banks to participate in the various payment systems under equivalent conditions and to provide their customers with access thereto. Fee differentiation could restrict bank interoperability, as it would mean that only the large debtor banks would be in a position to negotiate acceptable fee conditions, which would ultimately exclude smaller debtor banks from the direct debit system, which would be regrettable*"[17].

92. According to CASA LCL[18], the *Commission Inter-Réseaux* (Inter-Network Commission – hereinafter CIR) served as the forum within which banks agreed on interbank fees and decided to introduce new payment instruments. The documents we have received confirm that discussions took place in two phases. Firstly, the banks met in working groups under the authority of the CFONB, in order to examine the appropriateness of creating new means of payment and to set the corresponding fees. Secondly, this preparatory work was presented within the CIR, which has the authority to set the terms and conditions governing interbank exchanges.

a) The CFONB working groups

93. According to minutes dated 20 December 2011, Mr Yvon X…, currently Head of payment systems and market infrastructures at the Banque de France, and who has previously taken part in discussions within the CIR, explained that working groups operating under the authority of the CFONB were asked to define "*the principles and workings of means of payment within the banking circuits*". According to Mr X…, "*all the major means of payment were assigned to working groups headed by representatives of banks or of the Banque de France, all different*". For example, the Banque de France was placed in charge of the "regulation and compliance" committee.

94. The documents submitted as evidence have allowed us to identify at least six working groups, although they may not all still be active:

- a "clearing computer" working group[19], headed by Mr Y…;

[16] Classification mark 6792 (or 6941 in the non-confidential version (*version non confidentielle*, hereinafter VNC)

[17] Cote 5254.

[18] Classification mark 2447 (or 7913 in the VNC)

[19] Classification marks 3020-3 022

- a "credit transfers" working group[20], headed by Mr Z…, in charge of means of payment at the AFB. This group also had a "treasury transfers" subgroup;
- a "direct debit" and "interbank payment order" working group[21], headed by Mr A…;
- a working group responsible for "rules governing fee reviews and the harmonisation of existing and future products"[22], headed by Mr B…;
- a "TéléTIP" working group[23], headed by Mr B…

95. The minutes of the «credit transfers" working group meeting of 12 September 1985 state that the mission of these working groups is to "*design a new product, define its practicalities and assess its technical feasibility*"[24]. It emerges from the evidence collected that the banks' sales and marketing departments were also closely associated with the discussions that took place within these working groups[25], as evidenced by the minutes of 12 September 1985: "*after consulting their Sales and Marketing Departments, the members of the working group shared the resulting observations during a roundtable discussion*".

96. Interbank fees charged on means of payment were discussed within these working groups. For instance, the minutes of a meeting held on 8 July 1971, on the operation of the Clearing computer, state that "*the matter of fees charged for direct debit requests exchanged through the Clearing Computer was raised. The APB's Technical Commission on Banking Conditions proposed that the fee paid by customers for a direct debit request on magnetic tape (FRF 0.50 at the time) be equally shared between the bank presenting the direct debit request to the clearing computer and the recipient bank*"[26]. Likewise, the "credit transfers" working group stated that proposals concerning the creation of a scheduled credit transfer would be submitted to the CIR, including the payment of a fee to the recipient bank (therefore the beneficiary bank) of FRF 0.90 or FRF 0.60, depending on the time period between the interbank exchange and the due date[27].

97. It is clear that the working groups' mission also included preparatory work[28] to be recorded in "*a report sent to the members of the Commission*"[29]. The minutes of the CIR meeting held on 30 June 1992 record that "*it is agreed that the CIR will meet at the end of September to hear the progress report of the working group and provide additional guidance. It will then meet in November for the final report and decisions*"[30].

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[20] Classification mark 3112

[21] Classification mark 3142

[22] Classification marks 3147 and 3152

[23] Classification mark 3162

[24] Classification mark 3052

[25] Classification mark 3048

[26] Classification marks 3020-3021

[27] Classification marks 3059-3060

[28] Classification mark 3162

[29] Classification mark 3159

[30] Classification mark 3148

98. The minutes of the "credit transfers" working group held on 12 September 1985 state that "*a commercial policy-making body should now take responsibility for the second phase: assessment of commercial feasibility. Mr Z... has proposed that the matter be referred to the CIR, summarising the above observations, so that it can decide on the appropriateness of launching the product and, if applicable, determine the interbank conditions*" (emphasis added).

99. According to Mr X…, these working groups met frequently and still continue to meet under the aegis of the CFONB. More specifically, the «credit transfers" group has held several meetings at the offices of the AFB[31].

b) The Inter-Network Commission ("CIR")

100. According to the Banque de France, the CIR is an "*ad hoc [body] that does not report to any specific institution*"[32], "*bringing together the main institutions in the market and the Banque de France*". The CIR was first chaired by Mr C…, Head of IT at BNP and at the GSIT, in the 1980s. Over a long period of time the secretarial functions were also carried out by a BNP employee, usually Mr B…. However, its membership evolved with the restructuring that has taken place within the banking industry. According to the AFB, "*they were able to attend these meetings (...) as observers from time to time, to keep themselves informed about discussions between the banks on technical topics and new processing methods*"[33].

101. In October 1987[34], Mr Pierre D…, who was the chief executive officer of Crédit du Nord at the time, replaced Mr C… as chairman of the CIR. Mr D… stated that he "*chaired the CIR until 2002, standing down after the switch to the euro*"[35].

102. The various names given to this commission also point out the existence of joint agreements on interbank fees (levels of interbank fees and time between exchange and settlement), as the commission is also frequently called the *Commission chargée des conditions entre banques* (Commission responsible for conditions between banks) ()[36] or *... des conditions interbancaires* (... for interbank conditions)[37].

103. The minutes of 12 September 1985 show that the CIR had a dual mission: "*to give its opinion on the appropriateness of launching a new product and, if applicable, to determine the interbank conditions*"[38].

104. The minutes of the meeting of 15 April 1986 confirm this dual mission: at the meeting, "*the CIR approved:*

- the creation of the scheduled credit transfer,

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[31] Classification marks 3052, 3065

[32] Classification mark 2614

[33] Classification mark 6846

[34] Classification mark 3114

[35] Minutes of the hearing of Mr Pierre D… of 3 February 2012, classification mark 9379

[36] Classification marks 2966, 2971, 3109, 3127, 3151 and 3157

[37] Classification mark 3072.

[38] Classification mark 3052

- the amount of the fee to be paid by the Originating bank to the Recipient bank: FRF 0.60, excluding tax, for three-day clearance credit transfers and FRF 0.90, excluding tax, for two-day clearance credit transfers".

105. Likewise, the minutes of the CIR meeting of 11 July 1991 and 2 December 1994 report that the meeting determined the interbank conditions for treasury transfers (VSOT)[39] and for incoming international credit transfers, net of charges (VOE-VNF)[40]. Furthermore, the minutes of the CIR meeting of 17 October 1987 state that it had met to examine the following matters: "*possible changes to the conditions applied between banks for interbank payment orders paid by account debit, with effect from 1 February 1988, namely:*

- reduction of the lead time from two working days to one,

- reduction of the domiciliation fee paid by the presenting bank to the paying bank;

- introduction of a fee paid by the originating bank to the recipient bank for all automated credit transfers"[41].

106. Similarly, the CIR was also responsible for reviewing interbank fees. The record of the decisions taken by the CIR on 7 December 1987 states that "*it was agreed that the CIR would meet 6 months before expiry of this two-year period in order to decide whether there is a need to modify the level of the fee*"[42]. One example of a fee review dates back to 1992: at the meeting held on 30 June 1992, the CIR decided to increase the fee per direct debit request from FRF 0.67 to FRF 0.75[43], with effect from 1 January 1993. Likewise, on 29 March 1993, the CIR decided to increase the fee per accelerated direct debit request to FRF 1.20, with effect from 1 January 1994, and to also increase the fee for interbank payment orders from FRF 0.45 to FRF 0.50, with effect from 1 January 1996[44].

107. All minutes of the meetings were then sent to the members of the CIR. With the exception of the Banque de France, all the banks present at these meetings have stated that they have been unable to find their copies of these minutes.

4. INTERBANK CONDITIONS, AND MORE SPECIFICALLY INTERBANK FEES, WERE JOINTLY SET

108. The minutes of the "credit transfers" working group meeting held in February 1987[45] show that the banks agreed "*not to favour bilateral agreements, so as to foster bank interoperability*". However, the Banque de France has said that bilateral fee agreements are

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[39] Classification marks 3134-3135: "*Mr D… proposed a fee of FRF 5, excluding tax, which is the fee that has been approved by the commission. It will enter into application on the transfer creation date, scheduled for November 1992*".

[40] Classification mark 3159: Mr B… "*stated that the proposed decision was the creation, with effect from June 1995, of a transfer that can be cleared in the SIT and that meets the following characteristics*" including: "*the bank presenting the transfer, called an incoming international transfer, net of charges (*virement d'origine extérieure – virement net de frais – *VOE-VNF) in the SIT pays the recipient's bank a fee of FRF 10, excluding tax, per transfer*"

[41] Classification mark 3114

[42] Classification mark 2635

[43] Classification mark 3147

[44] Classification mark 3154

[45] Classification mark 3097 and 3098

"*possible in theory*"[46], and that it believes they may have "*a damaging impact on competition, in that they may exclude smaller institutions. The large institutions could be tempted to impose high fees on payments collected by small banks, and require that they only pay reduced fees for sums they themselves present for clearing*"[47]. Thus, it is argued that the current multilateral interbank fee system corrects an alleged imbalance between the banks, placing them all on an equal footing. The Autorité has broken down the information submitted as evidence according to means of payment, and has identified a dozen interbank fees that were jointly set by the banks, the professional bodies and the Banque de France; these fees are, moreover, systematically applied. Evidence of such agreements can also be found in the minutes of the working groups and the CIR, which report discussions on the joint setting of such fees.

a) Interbank fees on direct debit

109. Evidence collected[48] establishes the existence of an interbank fee on direct debits, set at FRF 0.25 by the APB's technical commissions in July 1969. This is established by means of a letter dated 21 July 1971, in which the representative of the "clearing computer" working group informed the Secretary General of the APB that "*when the Agreement and the Internal Regulations relating to the Clearing Computer were drawn up in July 1969, the applicable fee was set at FRF 0.50 per direct debit request sent by a customer to his bank on magnetic tape. The APB's technical commissions that set the amount to be paid by the customer also decided that the fee would be equally split, on a temporary basis, between the bank receiving the customer's instructions and the recipient bank that debits the corresponding account*"[49]. It is particularly interesting to note that this excerpt states that the "*APB's technical commissions*" set the amount of the customer's fee, in addition to the interbank fees; in other words, the amount paid by the creditor to his own bank. The Clearing Computer Internal Regulations provided at that time that "*any exchange of direct debit instructions will give rise to a fee of FRF 0.25 per transaction, plus the amount of the recovery of the financial activities tax, which will be paid by the presenting participant to the recipient participant*"[50].

110. In July 1971, discussions between the banks took place concerning a possible increase in the fee paid by the creditor bank to the debtor bank. These discussions were motivated by two main factors: firstly, the fact that "*on 11 January 1971, a new fee for a direct debit request remitted on magnetic tape of FRF 0.70, payable by the customer, came into effect pursuant to a decision of the Technical Commissions*", and, secondly, that as a result of studies, probably conducted internally within the banks, certain banks realised that the allocation of processing costs between the banks was not balanced and that the debtor bank bore between "*75% and 90%*"[51] of the cost. It is interesting to note that, as well as referring to interbank fees, this excerpt mentions the setting of a fee payable by the banks' customers per direct debit request (FRF 0.70).

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[46] Classification mark 4826 (or 4884 in the VNC)

[47] Classification mark 4826 (or 4884 in the VNC)

[48] Classification mark 3020

[49] Classification mark 3020

[50] Idem

[51] Classification mark 3021

111. It is difficult to establish whether these discussions led to any concrete action. The evidence collected reveals the amount of the interbank fee charged per direct debit transactions from December 1975. A letter from the APB dating from that time refers to a "*uniform increase to FRF 0.60 (excluding tax) of the amount paid over to the bank collecting a direct debit request presented to the clearing computer*"[52].

112. The Banque de France has stated that the interbank fee for direct debits was reviewed in 1978 and increased to FRF 0.67. This is confirmed by the minutes of the CIR meeting of 11 July 1991: "*Mr D… mentioned the meeting that the fee of FRF 0.67, excluding taxes, for four-day direct debit requests was set in 1978*"[53]. Crédit Agricole also noted at the CIR meeting held on 30 June 1992 that, at the time, this amount was equivalent to "*two thirds of a franc, which was the price of a postage stamp at the time*"[54].

113. This fee was subsequently increased to FRF 0.75 on 1 January 1993. The minutes of the CIR meeting held on 30 June 1992 report that "*the interbank fee for four-day direct debit requests will be increased from FRF 0.67 to FRF 0.75, with effect from 1 January 1993*."[55] According to the minutes of the CIR meeting of 29 March 1993, it was confirmed that this amount was only an "interim" fee, and that "*a specific fee exists for rejected direct debit instructions for payments to EDF. The Commission decided that, with effect from 1 January 1994, this specific fee will be abolished and that the standard fee will apply to rejected EDF direct debit requests*"[56]. At the same meeting the CIR decided to increase the fee for accelerated direct debit requests to FRF 1.20, with effect from 1 January 1994.

114. As stated in the minutes of the CIR meeting of 29 March 1993, the fee charged on four-day direct debits transactions was increased to FRF 0.80 in 1995[57]. It has remained unchanged ever since. The amount was converted into €0.122 at the time of the switch to the euro.

115. The interbank fee on accelerated direct debit request was introduced in 1985 or earlier, and set at FRF 1.10. It was increased to FRF 1.20 in 1994 and then converted into €0.183. It has remained unchanged ever since.

116. It should be noted that the only transactions that do not give rise to an interchange fee are monthly direct debit transactions for payments to the Treasury. Pursuant to the Law of 29 June 1971 introducing a monthly payment system for income tax and to Article 1681D of the *Code général des impôts* (General Tax Code *)*, such transactions do not entail "*any cost for the taxpayer*". In practice, this means that the Treasury is exempt from the interbank fee on direct debit transactions corresponding to monthly income tax payments. In its reply to a questionnaire, HSBC has confirmed that four-day direct debit transactions (code 180) and rejected direct debit transactions (code 580) for the Treasury are not subject to an interbank fee[58].

[52] Classification mark 3030

[53] Classification mark 3137

[54] Classification mark 3146

[55] Classification mark 3147

[56] Classification mark 3155

[57] Classification mark 3156

[58] Classification mark 2569

b) Interbank fees on *télérèglements*

117. According to information received from CASA LCL[59], CNCE[60] and the Banque de France[61], the interbank fee on *télérèglements* was introduced in 1997. It was set at FRF 0.90, and then converted to €0.137 at the time of the switch to the euro. It has remained unchanged ever since.

c) Interbank fees on electronic interbank payment orders

118. The minutes of the CIR meeting held on 29 March 1993 mention the "*introduction of a standard electronic interbank payment order (TEP) and an accelerated electronic interbank payment order with the same conditions with regard to timing and fees as the standard direct debit notice and the accelerated direct debit notice*"[62].

119. At the same meeting[63], the CIR decided to increase "*the fee per accelerated direct debit notice to FRF 1.20 with effect from 1 January 1994; the fee for accelerated electronic interbank payment orders shall be the same as the fee for accelerated direct debit notices*". It also increased the fee for standard direct debit notices and standard electronic interbank payment orders from "*FRF 0.75 to FRF 0.80 with effect from 1 January 1995*".

120. The CFONB[64] has stated that the accelerated electronic interbank payment order was replaced by the *télérèglement* in October 1997. The standard electronic interbank payment order was phased out in 2002.

d) Interbank fees on interbank payment orders (TIP)

121. According to the Banque de France, CASA[65] and Crédit Mutuel CIC, the interbank payment order (TIP) replaced the *titre universel de paiement* (universal payment order – TUP) on 1 February 1988[66].

122. On 9 October 1987, when the banks were considering introducing a FRF 0.90 interbank fee and a two-day lead time between exchange and interbank settlement, the CIR held a meeting in order to modify the interbank conditions governing interbank payment orders, to reduce "*the lead time from two to one working day*" and to reduce "*the domiciliation fee paid by the presenting banker to the domiciliary banker*"[67]. The minutes of this meeting state: "*a first round table discussion on the lead time resulted in an almost unanimous agreement to reduce this to one day; only Crédit Agricole maintained its reservations, based on internal organisational grounds, although it did not veto the decision.*

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[59] Classification mark 2448

[60] Classification mark 2481

[61] Classification mark 2615

[62] Classification mark 3153

[63] Classification mark 3154

[64] http://www.cfonb.org/Web/cfonb/cfonbmain.nsf/DocumentsByIDWeb/7JRDVV/$File/Le%20t%C3%A9l% C3%A9r%C3%A9glement.pdf; page 41.

[65] Classification mark 2447

[66] Classification mark 2632

[67] Classification mark 3114

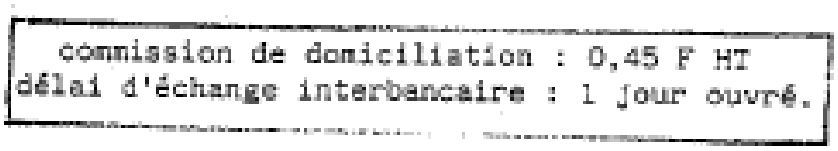
Discussions on the interbank fee were much more heated. Opinions expressed on both proposals (reduction of the lead time and interbank fee) can be broken down as follows:

Breakdown of opinions

1 day FRF 0.60 (excl. tax)	1 day FRF 0.40 – FRF 0.45 (excl. tax)	1 day FRF 0.30 – FRF 0.35 (excl. tax)
P et T	Banque de France	Paribas
Centre National des Caisses d'Epargne	Crédit du Nord	BNP
Crédit Mutuel	Crédit Commercial de France	Société Générale
Crédit Agricole	Crédit Industriel et Commercial	
Crédit Populaire	SLB	
	Crédit Lyonnais	
	SIBES	

(…)

Following a final exchange of opinions, and in view of the urgent nature of the decisions, given that the additional measures should ideally enter into application at the same time as the interbank payment order is introduced, which is scheduled for 1 February 1988, Mr. D… decided, in view of the issues at stake and despite the lack of unanimity, that the following financial and technical conditions would apply to interbank payment orders:


commission de domiciliation : 0,45 F HT
délai d'échange interbancaire : 1 jour ouvré.

domiciliation fee: FRF 0.45, excluding taxes.

interbank clearance period: one working day

123. In 1996, the interbank payment order fee rose from FRF 0.45 to FRF 0.50. At a meeting held on 29 March 1993: "*the participants agreed to consider that the amount of the interbank fee on interbank payment orders should not ultimately remain at such a low level, which is currently too far removed from the fee charged for accelerated direct debit transactions*"[68]. This amount was converted to €0.076 at the time of the switch to the euro and has remained unchanged ever since.

124. With regard to interbank payment orders payable in cash at Post Office branches, also introduced in 1988, the CIR decided that "*the creditor's bank will pay La Poste a fee of FRF 1.80 per interbank payment order in addition to the charges paid by the debtor*"[69]. On 15 December 1994, the CIR also approved a fee increase to FRF 2.80, with effect from 1 January 1996: "*the Commission approved the increase in the fee paid by the creditors' bank to La Poste for each interbank payment order paid in cash to FRF 2.80, excluding tax, with effect from 1 January 1996*".

[68] Classification mark 3154

[69] Classification mark 3161

e) Interbank fees on cancellation of incorrectly cleared transactions (AOCT)

125. The fee payable for the cancellation of an incorrectly cleared transaction (AOCT) involving means of payment other than cards and cheques was introduced in 1979, according to information received from CNCE[70]. The Banque de France has stated that the fee was FRF 4 at that time. According to Crédit Mutuel and CIC, the AOCT procedure was reviewed twice, on 24 September 1985 and 3 September 1991[71]. The AOCT fee was converted to €0.610 at the time of the switch to the euro, and has remained unchanged ever since.

f) Interbank fees on bills of exchange

126. CNCE[72] and the Banque de France[73] have stated that the fee on bills of exchange was introduced in 1973. This has also become confirmed by a letter sent by the APB to the Secretary General of the Banque de France, dated 22 November 1972. The fee was initially set at FRF 0.80, and was converted to €0.122 at the time of the switch to the euro. It has remained unchanged ever since.

g) Interbank fees on request for the return of bills of exchange (DRE)

127. A request for the return of a bill of exchange (DRE) is a transaction exchanged within the clearing system when a bill of exchange has been wrongly exchanged. For technical reasons, it is not an accounting transaction, although it has the same function as an AOCT transaction carried out for a wrongly cleared credit transfer, direct debit or ATM cash withdrawal. On 2 December 1994, the CIR decided "*in accordance with the proposal by the working group, that with effect from the date of its introduction a DRE will entail the payment by the issuer bank to the recipient bank of the same fee as is charged for AOCTs, which is currently set at FRF 4, excluding taxes*"[74].

128. The Banque de France has explained that this amount was converted to €0.610 at the time of the switch to the euro, and has remained unchanged ever since[75].

h) Interbank fees on credit transfers

129. It should be borne in mind that interbank fees on credit transfers are paid by the debtor's bank, unlike other fees. The credit transfer transaction, or credit transfer order, was introduced at the end of the 1960s. Credit transfers were free of charge until 1987. Until that time, no interbank fee was charged on this means of payment. In 1987, the "credit transfers" working group[76] raised the possibility of introducing a new type of "scheduled" credit transfer (*virement à échéance*), associated with an interbank fee to be paid by the

[70] Classification mark 2481

[71] Classification mark 2632

[72] Classification mark 2481

[73] Classification mark 2615

[74] Classification mark 3161

[75] Classification mark 2615

[76] Classification mark 3059

ordering bank to the recipient bank[77]. Scheduled credit transfers were available from the end of the 1980s until the middle of the last decade.

130. In 1995, the working group headed by Mr B… proposed to the CIR the introduction of an incoming international credit transfer (*virement d'origine extérieure*), and this was accepted by the CIR on 2 December 1994[78]. The introduction of this fee has been confirmed by Société Générale[79] and the Banque de France, which have stated that the fee "*was set at FRF 10*". It was then increased to FRF 12 in 1995[80] according to CM CIC, and was subsequently converted to €1.829[81].

131. Another type of credit transfer, the treasury transfer (*virement spécifique orienté trésorerie - VSOT*) was introduced at the beginning of the 1990s. The interbank fee on such transfers was set at FRF 5 in November 1992, and then converted into €0.762[82]. According to the parties, this means of payment and the associated interbank fee were phased out at the beginning of the new millennium.

i) Interbank fees on rejected transactions

132. According to the Banque de France[83], fees on rejected direct debit requests, bills of exchange, interbank payment orders and *télérèglements* were introduced "*at the same time as the fees on the corresponding transactions and were set by the CIR (in the 1970s for bills of exchange and direct debits, in 1988 for interbank payment orders, and in 1997 for télérèglement*s)".

133. The minutes of the *Commission des Relations Interbancaires* (Interbanking Relations Commission) meeting held on 15 November 1972 establish that fees on rejected direct debit transactions were introduced no later than at the end of 1972. At that time, "*it was decided that, whenever a [direct debit] request that has been duly recognised is returned, irrespective of the reason, the remitting party must be charged a fee of FRF 3.50 with FRF 2.50 reverting to the debtor's bank; this solution should encourage issuers to ensure that their data are fully up to date*"[84]. Thus, the fee on rejected direct debit transactions was FRF 2.50 in 1972.

134. Furthermore, the letter sent by the APB to the Banque de France on 22 November 1972 shows that the fee on unpaid bills of exchange was introduced no later than in 1972: "*the amount of the fee has been determined in such a way that the collecting bank receives (…) FRF 2.50 if a bill of exchange is returned (…), and the remitting bank is charged the same amount*"[85].

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[77] Classification mark 3074

[78] Classification mark 3159

[79] Classification mark 2520

[80] Classification mark 2632

[81] Classification mark 2615

[82] Classification mark 2967

[83] Classification mark 2616

[84] Classification mark 3024

[85] Classification mark 3025

135. The minutes of the CIR meeting held on 29 March 1993 show that fees on rejected bills of exchange, direct debit requests and interbank payment orders had been set at "*four francs since 1978*"[86]. In fact, the fee on unpaid bills of exchange and direct debit transactions had been increased to FRF 4 on 1 May 1976[87]. These fees on unpaid bills of exchange, direct debits and interbank payment orders were revised on 1 January 1994[88], on which date they were increased to five francs; in 1997, it was decided that the same amount would be charged for rejected *télérèglements*. This fee was converted to €0.762 at the time of the switch to the euro, and has remained unchanged ever since.

F. THE PRELIMINARY ASSESSMENT

136. In February 2012, the banks, the FBF and the AFB informed the Investigation Services that they were willing to propose commitments on the basis of the provisions of Article L464-2-I of the Commercial Code in order to bring an end to the practices denounced by the FCD and the ADUMPE.

137. The preliminary assessment of the practices, notified to the parties by the Investigation Services on 15 March 2012, consisted of an analysis and a presentation of the competition concerns, as set out below.

1. THE MARKET CONCERNED

a) The product markets

138. On the demand side, two types of end users can be identified on the means of payment markets: on the one hand, debtors - usually consumers[89] - who need payment instruments, and on the other hand, creditors, essentially merchants and public authorities, who wish to be able to collect the debts owed to them.

139. These two separate types of demand are particular in that they are inter-related. A decision by the European Commission in the so-called Visa II case[90] states that "*the usage of different payment systems (…) is determined by the inter-related decisions of consumers and merchants*". Accordingly, the use of a given means of payment is only possible provided the creditor proposes this means of payment and the debtor has the use of this means of payment and agrees to use it.

140. In view of this particularity, the definition of the markets in terms of products requires an examination of possible substitutes for direct debits, interbank payment orders and *télérèglements*, from the point of view of both the debtor and the creditor.

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[86] Classification mark 3155

[87] Classification mark 3031

[88] Minutes of the CIR meeting of 29 March 1993, classification mark 3156

[89] An exception can be made for *télérèglement*s, as they are used essentially by business debtors

[90] Decision COMP/29.373 of 24 July 2002, §46

(i) Substitutability of means of payment from the point of view of the debtor

141. From the point of view of a debtor, a direct debit transaction is the only means of payment that does not require the debtor's express authorisation. This means the direct debit is differentiated by its ease of use: the debtor is free from all material constraints when settling by direct debit, whereas the use of any other means of payment requires the debtor to carry out certain actions, such as filling in and sending an interbank bank payment order or a cheque. However, this ease of use can also make it difficult for consumers to retain control, which may lead to disputes: debtors do not have any control over the date or the amount of the payment, although creditors are required to provide debtors with this information.

142. Cheques and interbank payment orders are comparable means of payment from the point of view of a debtor. Both these payment instruments are paper means of payment, requiring the debtor to carry out similar actions, and allowing him to control the amount debited and the debit date. Credit transfers, *télérèglements* and card payments, which when used for recurring remote payments, which all have the advantage over cheques and interbank payment orders because they allow the user to control payment, are potentially feasible substitutes for interbank payment orders, provided they are proposed by the creditor.

143. In most cases, *télérèglement* is used only when this is the mandatory means of payment, and other means of payment cannot easily be substituted for it given its current usage. However, if this means of payment were more commonly offered to debtors it could be used as a substitute for interbank payment orders or cheques for remote payments.

(ii) Substitutability between means of payment from the point of view of the creditor

144. The creditors' preference lies with direct debit transactions. Firstly, the creditors initiate direct debit payment orders, whereas with other means of payment they are more dependent on the debtor's conduct. Moreover, creditors can easily anticipate the date on which funds will be credited to their account, which facilitates cash management. In addition, according to a member of the ADUMPE heard during the investigation, direct debits "*avoid the problem of forgotten payments, and therefore the need to send out payment reminders, which may result in customer incidents*"[91]. Lastly, another more recent advantage of payment by direct debit is that amounts can be billed electronically, in contrast to the interbank payment order, in particular, which requires a paper invoice to be sent out as the payment order is printed at the bottom of the invoice.

145. The general preference for direct debits is illustrated by the conduct of certain creditors, who more or less directly encourage use of this means of payment, such as [MEMBER H], who encourages his distributors to enter into contracts providing for payment by direct debit[92], EDF and the State, who sometimes offer extended payment deadlines for payments

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[91] Minutes of the hearing of [MEMBER H] on 4 November 2001, classification mark 5263

[92] Minutes of the hearing of [MEMBER H] on 4 November 2001: distributors are "*encouraged (…) to enter into contracts providing for payment by direct debit. There is no direct incentive for consumers in the form of lower rates, but distributors emphasise the benefits of direct debits, such as the impossibility of forgetting to pay, and the absence of paper invoices (environmental considerations), etc*." (classification marks 5263-5264)

by direct debit[93], and also [MEMBER G], which offers discounts for payments by direct debit[94].

146. The ADUMPE has summarised the situation regarding other means of payment as follows: "*if means of payment are ranked in order of preference, the most popular after direct debit is the* télérèglement*, followed by the interbank payment order, the cheque and, finally, the bank card, which is not generally recommended because of the high associated costs. However, in practice, customers who do not agree to pay by direct debit usually pay by interbank payment order or cheque*"[95]. The FCD has explained that "*when payments are not made directly at the point of sale, merchants prefer direct debit payments, followed by* télérèglements*, which could replace interbank payment orders*"[96].

147. The advantage of an interbank payment order, as compared to a cheque or a credit transfer, is that it facilitates accounts reconciliation between the payment and the invoice. This point was identified in Edgar Dunn's March 2011 study of the use of cheques in France, carried out on behalf of the CCSF[97].

148. It would therefore seem that the direct debit transaction does not have a close substitute from the point of view of the creditor. Of the other means of payment, the interbank payment order and the *télérèglement* seem to be slightly more advantageous than payments by card or cheque, both of which entail constraints relating to processing (cheques, credit transfers) or bank charges (payment cards).

(iii) Substitutability from the point of view of the offer

149. In the banking circuit, direct debits, *télérèglements* and interbank payment orders all require fairly similar processing by both the debtor's bank and the creditor's bank. The only difference is the checks carried out by the debtor's bank for each type of means of payment. However, cheques do require the remitting bank to use specific equipment, including, in particular, tools to create cheque images. Likewise, cheques impose specific requirements on the issuer bank, which is required to issue cheque forms and process cheque images in accordance with specific processes. Lastly, payment cards have their own infrastructure. The acquiring banks must provide dedicated card servers and, for point-of-sale transactions, must sell or lease a payment terminal to the merchant. The banks also need to distribute the cards to the cardholders.

150. It is therefore apparent that processing of the various means of payment by banks offering payment services is fairly similar for direct debits, interbank payment orders and *télérèglements*, whereas cheques and payment cards have different processing requirements.

151. It can also be noted that the costs incurred by banks in order to process transactions vary depending on the means of payment. Although the banks have conducted very few

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[93] Minutes of the hearing of ADUMPE on 12 September 2011, classification mark 4814

[94] Discussions following the hearing of ADUMPE, classification mark 7554: "[MEMBER *G] organises promotional campaigns to encourage payment by direct debit for one-year subscriptions, offering financial benefits, such as one month's free subscription, a 50% reduction for the first three months, etc.*"

[95] Minutes of the hearing of the ADUMPE on 12 September 2011, classification mark 4814

[96] Minutes of the hearing of the FCD on 5 October 2011, classification mark 4861

[97] http://www.banque-france.fr/ccsf/fr/publications/telechar/autres/rapport-utisisation-cheque.pdf, p.112-113.

comprehensive quantitative studies on this subject[98], both Société Générale and Crédit Agricole have reported that card costs for debtors' banks where probably relatively high compared to those incurred for other means of payment. Société Générale has stated that, in its opinion, "*the cheque is the most expensive non-cash means of payment for banks, ahead of payment cards, direct debits and finally interbank payment orders*"[99].

(iv) Conclusion on the definition of the product markets

152. Given the characteristics of the various means of payment from the point of view of debtors, creditors and banks, two specific markets for direct debit transactions could be defined: in which credit or payment institutions compete to sell direct debit payment services to debtors, on the one hand, and to manage incoming direct debit payments for creditors, on the other hand. Similarly, two equivalent markets could be defined for *télérèglements*. Lastly, a market for remote payment services for debtors paying by interbank payment order, cheque and card, and a market for services relating to the collection of remote payments by interbank payment order, cheque and card could be defined.

153. However, the question as to whether direct debits, interbank payment orders, cheques, payment cards, credit transfers and *télérèglements* are present in a single or in several relevant markets is still open to debate, given the types of practices that have raised competition concerns.

154. The Autorité de la concurrence has pointed out on several occasions, in connection with this type of behaviour, that "*it is not (…) necessary to precisely define the market, unlike in cases of abuse of dominant position, provided that the sector and the markets have been sufficiently identified to qualify the practices observed therein, and to attribute them to the operators that implemented them*." (See, for example, decision 05-D-27 of 15 June 2005 on practices observed in the albacore tuna sector, and aforementioned decision 07-D-41)"[100].

155. Likewise, the judgment of the Court of First Instance of 6 July 2000 in the Volkswagen v Commission case found that: "*the approach to defining the relevant market differs according to whether Article [101 of the TFEU] or Article [102 of the TFEU] is to be applied. For the purpose of Article [102 of the TFEU], the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. On the other hand, for the purposes of applying Article [101 of the TFEU], the reason for defining the relevant market, if at all, is to determine whether the agreement, the decision by an association of undertakings or the*

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[98] See, for example, the replies to the Investigation Services' question on the cost of using a card for issuer banks as compared to other means of payment (cash, cheque, transfer, direct debit) received from La Banque Postale ("*it is impossible at this stage to communicate accurate figures concerning the costs borne by issuer banks in connection with the use of each means of payment*", classification mark 4666), Boursorama ("*we are not in a position to give any precise information on this point, as this would require a very lengthy study*", classification mark 4680), Crédit Mutuel-CIC ("*Crédit Mutuel and CIC do not have any research on this subject considered from the point of view of the issuer bank*", classification mark 4706), etc.

[99] Minutes of the hearing of Société Générale on 13 October 2011, classification mark 5226

[100] Decision 09-D-17 of 22 April 2009 on practices implemented by the Basse-Normandie Regional Council of the *Ordre des pharmaciens* (French Pharmaceutical Association) § 40

concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (judgment of the Court of First Instance of 21 February 1955, SPO and Others v Commission, case T-29/92, ECR II-289, paragraph 274). Consequently, there is an obligation on the Commission to define the market in a decision where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (judgment of the Court of First Instance of 15 September 1998, European Night Services and Others v Commission, T-374/94, T-375/94 and T-384/94 and T-388/94, ECR II-3141, paragraphs 93 to 95 and 105" (judgment of the Court of First Instance of 6 July 2000, Volkswagen v Commission, case T-62/98, ECR II-2701, paragraph 230).

b) Definition of the geographic market

156. In its Notice on the definition of the market concerned[101], the European Commission recalls that: "*the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*".

157. In the case at issue, the transactions correspond exclusively to domestic transactions collected in France on which specific multilateral interchange fees are charged. Cross-border transactions can only be carried out using specific payment instruments such as the SEPA credit transfer or the SEPA direct debit, which both operate in accordance with specific standards.

158. In view thereof, the organisation of the market, the origin of the undertakings concerned and the very method of operation of the concerted practices confirm that the practices under review were carried out exclusively on French territory. The relevant geographic market is therefore the national market.

2. COMPETITION CONCERNS

159. The preliminary assessment has found that the banks and the AFB jointly decided to introduce and set interbank fees on transactions carried out by direct debit, interbank payment order, *télérèglement*, electronic bill of exchange or credit transfer and exceptional transactions (also known as R-transactions). On the basis of this assessment, the Autorité has found that these agreements and practices may restrict competition by object (a) and by effect (b).

[101] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03) Official Journal C372 of 09/12/1997 p. 0005 – 0013.

a) Preliminary assessment of the anti-competitive nature of the agreements and practices at issue in view of their object

(i) Principles

160. The fundamental objective of the competition rules is to enable all economic operators to independently determine the policy that they intend to adopt on the market (see judgment of the Court of Justice of 14 July 1981, Züchner, 172/80, ECR p. 2021, paragraph 13, and judgment of 4 June 2009, T-Mobile Netherlands and Others, C-8/08, ECR p. 1-4529, paragraph 32).

161. It is established case law that "*for there to be an agreement within the meaning of Article [101] of the Treaty, it is sufficient that the companies at issue have expressed their joint intention with regard to their conduct on the market*" (judgment of the Court of Justice of 15 July 1970, ACF Chemiefarma v Commission, 41/69, ECR p. 661, paragraph 112, and Court of First Instance of 20 April 1999, Limburgse Vinyl Maatschappij and Others v. Commission, T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECR p. II-931, paragraph 715). The concept of agreement presupposes the existence of a joint intention of at least two parties, the form of expression of which is not significant, provided it constitutes the faithful expression of the parties' intentions (judgment of the Court of First Instance of 26 October 2000, Bayer v Commission, ECR p. II-3383, paragraph 69, and of 27 September 2006, Dresdner Bank and Others v Commission, T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, ECR p. II-3567, paragraph 55).

162. When an agreement takes the form of meetings held by competing undertakings, there may be a breach of competition rules when the purpose of such meetings is to restrict, prevent or distort free competition and therefore to artificially organise the operation of the market (see aforementioned judgment of the Court of Justice of 28 June 2005, Dansk Rorindustri and Others v Commission, paragraph 145).

163. Such anti-competitive agreements are prohibited regardless of whether they are secret or not: although secret cartels within which competitors agree to set prices, share customers or markets or set production quotas, constitute some of the most serious breaches of competition rules provided by Article 101 of the Treaty on the Functioning of the European Union (TFEU), the same Article provides that any agreement the object of which is, in particular, to "*directly or indirectly fix purchase or selling prices or any other trading conditions*" is incompatible with the common market. Likewise, Article L420-1 of the Commercial Code expressly prohibits any concerted action, agreement or express or implicit cartel the purpose or effect of which is, in particular, to " *prevent price fixing by the free play of the market, by artificially encouraging the increase or reduction of prices*".

164. As early as 1995, the European Commission stated with regard to agreements entered into by bank operators concerning non-cash means of payment, in a Notice on the application of the EC competition rules to cross-border credit transfers[102], that although a bilateral interchange fee agreement does not breach the provisions prohibiting anti-competitive agreements, "*a multilateral interchange fee agreement is a restriction of competition falling under Article 85 (1) [*now Article 101, paragraph 1, of the TFEU*] because it substantially restricts the freedom of banks individually to decide their own pricing*

[102] OJEC 1995, C.251.68, p. 3.

policies". The Commission stressed that such a restriction is also likely to distort the behaviour of banks *vis-à-vis* their customers[103].

165. This analysis has since been reiterated by the European Commission with regard to direct debit transactions. In paragraph 12 of a working document dated October 2009, the Commission stated that: "*as MIFs [multilateral interbank fees] typically fix a floor under the prices banks charge to companies, they constitute a restriction of competition by object as by their very nature they are likely to restrict competition*"[104]. The fixing of such a threshold or "floor" restricts competition between creditors' banks.

166. The judgment of the Court of First Instance of the European Union dated 24 May 2012 in the MasterCard and MasterCard Europe v Commission case (case T-111/08), which dismissed the application for annulment of decision C (2007) 6474 of 19 December 2007 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (cases COMP/34.579 - MasterCard, COMP/36.518 EuroCommerce, and COMP/38.580 - Commercial Cards) has confirmed this analysis, stating in paragraphs 138 to 140 that *"(...) it should be noted that, in recitals 401 to 407 to the contested decision, the Commission stated that the MIF 'may, by its very nature, have the potential of fixing prices' (recital 405 to the contested decision). It also, correctly, refuted the applicants' arguments based on the MIF's pursuit of legitimate objectives or on the absence of an intention to restrict competition. It nevertheless decided, in recital 407 to the contested decision, not to 'reach a definite conclusion as to whether the [MIF of the MasterCard payment organisation] is a restriction by object within the meaning of Article 81(1) [EC]', on the ground that it was clearly established 'that the [MIF of the MasterCard payment organisation] [had] the effect of appreciably restricting and distorting competition to the detriment of merchants in the acquiring markets'.*

The anti-competitive object and effect of a decision by an association of undertakings are not cumulative but alternative conditions for assessing whether such a decision comes within the scope of the prohibition laid down in Article 81(1) EC. The alternative nature of that condition, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the decision, in the economic context in which it is to be applied (...).

In that regard, it is helpful to point out that Article 81(1)(a) EC expressly provides that measures which directly or indirectly fix purchase or selling prices constitute restrictions of competition, and that, according to the case-law, the purpose of Article 81(1)(a) EC is to prohibit undertakings from distorting the normal formation of prices on the markets (judgment of the Court of First Instance of 10 March 1992, ICI v Commission, T-13/89, ECR II-1021, paragraph 311)."

167. Lastly, the same judgment states that "*it is apparent from this analysis that the Commission could legitimately conclude, in recital 435 to the contested decision, that 'the [MIF of the MasterCard payment organisation] sets a floor to MSCs for both small and large merchants'*" (paragraph 163).

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[103] §40.

[104] http://ec.europa.eu/competition/sectors/financial_services/SEPA_working_document_en.pdf .

(ii) The Inter-Network Commission (hereinafter CIR) has been used to facilitate potentially anti-competitive practices

168. The preliminary assessment pointed out that it emerges from established case-law and decisional practice that "*an undertaking must strictly refrain from entering into direct or indirect contact with its competitors in order to discuss commercial policies and, in particular, the prices of the goods or services it offers on the market*"[105]. [Unofficial translation from the French].

169. However, the preparatory meetings of the working groups, and the negotiations conducted and decisions made within the framework of the CIR, enabled the parties to arrive at a consensus concerning multilateral interbank fees. These decisions were recorded in writing in the minutes of the meetings and in correspondence, which have been collected as evidence. This evidence clearly establishes that the banks expressed a joint intention to set the fees, which, in view of the aforementioned case-law, is sufficient to establish the existence of an agreement within the meaning of Article 101, paragraph 1, of the TFEU and, accordingly, Article L420-1 of the Commercial Code.

170. The CIR was also responsible for reviewing interbank fees. The preliminary assessment has concluded that decisions taken by the parties never resulted in a reduction of these bank charges and that, on the contrary, they consistently increased, even though the actual cost of processing transactions is, in all probability, much lower nowadays than at the time they were set, given, in particular, that the increased volume of transactions will have led to economies of scale and that all stages of processing have gradually become more automated.

171. The working groups and the CIR have therefore enabled the banks to elaborate and maintain an agreement fixing the interbank fees described above.

(iii) Competition analysis of multilateral interchange fees

172. In view of the preliminary assessment, it seems clear that these agreements are anti-competitive 'by object'.

173. Mr Pierre D… said that the interbank fee is "*an element of the creditor's bank's costs, which forms part of the charges paid by the creditor. In all probability, the existence of an interbank fee may have been used by certain creditors' banks in order to justify their rates, which is, moreover, understandable: for a bank, selling below the level of the interbank fee would be tantamount to selling below its production cost. (…). The CIR's aim was to establish a consensus between banks, while accepting that they may have different approaches to cost valuation*".

174. On the basis of the preliminary assessment, the observed agreements seem to have a single, shared objective, namely to control interbank pricing conditions by jointly determining every aspect of the pricing conditions applying to means of payment (agreements on fees and fee changes, the frequency of fee reviews, interbank exchange value dates, etc.) in order to soften competition between banks.

175. Due to their very nature, these practices are likely to impact on the fees that the banks charge their customers. Interbank fees constitute an additional cost for banks, which pay these fees themselves. It is obviously highly likely that this additional cost will be taken

[105] CJEC, Suiker Unie, 16 December 1975, joined cases, 114-73.

into consideration by the banks when determining their fees. Several banking institutions have, moreover, acknowledged that they pass on the interbank fees to their customers or that, at the very least, they take them into consideration when determining the fees they charge their creditor customers, in the same way as processing costs (see point b) below).

176. The per-transaction interbank fees correspond to maximum amounts, which are applied by default. None of the institutions questioned by the Investigation Services reported that they had entered into bilateral agreements replacing the default fees. On the contrary, the banks undertook "*not to favour bilateral agreements, so as to foster bank interoperability*"[106]. The Banque de France, which said that bilateral fee agreements are "*possible in theory*"[107], also stated that it believes they may have "*a damaging impact on competition, in that they may exclude smaller institutions. The large institutions could be tempted to impose high fees on payments collected by small banks, and insist that they only pay reduced fees for sums they themselves present for clearing*"[108].

177. Thus, it is argued that the current multilateral interbank fee system corrects an alleged imbalance between the banks, placing them all on an equal footing. Even supposing such an objective is established, this would in no way mitigate the resulting restriction on competition by object.

178. Likewise, Mr Pierre D….'s statement establishes a connection between interbank fees and fees charged to customers: "*the interbank fee is an element of the creditor's bank's costs, which forms part of the charges paid by the creditor*"[109] (emphasis added).

179. The connection between interbank fees and customers' fees is also clearly established in a letter sent by the "clearing computer" working group dated 21 July 1971, which states: "*lastly, it was agreed that a (relatively) high fee paid to the recipient bank would constitute a good line of argument when our customers attempt to obtain a reduced rate or free service for direct debit request remittances*"[110]. Additional evidence is provided in the form of the minutes of the CIR meeting held on 9 October 1987, at which the banks discussed the appropriateness of reducing the fee charged for interbank payment orders paid by account debit. The banks that were in favour of a substantial fee reduction raised the following arguments:

"- the target market for the interbank payment order is the 600 million remote settlements made by cheque, and in order to reach that market the interbank payment order must be competitive as compared to the cheque + payment slip processed on behalf of large creditors (the cost for EDF, i.e., FRF 1.35, excluding tax, can serve as a price index to calculate the total amount of costs likely to be borne by the issuer of an interbank payment order when proposing the wide-scale use of this means of settlement to its debtors);

- the industry is in danger of stifling development of the interbank payment order if it is too cautious and if it limits the reduction in the interbank fee; all the attributes of the interbank payment order need to be in place at the time of its launch, as it has been established that

[106] Classification marks 3097 and 3098

[107] Classification mark 4826

[108] Classification mark 4826

[109] Classification mark 9380

[110] Classification mark 3021

subsequent price manipulations are not usually sufficient to reverse a market trend"[111] (emphasis added).

180. Lastly, given that all the banks that are parties to these proceedings both issue and remit means of payment, none of them have been harmed by the setting of per-transaction fees, as they receive the interbank fee when they act as debtors' banks and pass the fees on their customers (see below) when they act as creditors' banks. This floor price for creditors guarantees that a minimum amount enters the banking circuit with each transaction, thus exacerbating the competitive harm caused by these restrictions of competition by object, and accordingly justifying the Instruction Services' concerns.

181. Exceptional transactions for which a jointly fixed multilateral fee is charged can equate to remuneration for the bank carrying out the services (processing of a rejected transaction, processing an AOCT request, etc.) rendered necessary by the error of the other bank or the other bank's customer. However, and by analogy with the above analysis of per-transaction fees, the fixing of exceptional multilateral fees is likely to constitute a restriction of competition insofar as the banks jointly set the amount of the standard interbank fees, irrespective of their cost price. These standard fees are also particularly likely to have an impact on the fees charged to the banks' customers for these incorrect payment transactions.

b) Preliminary assessment of the anti-competitive nature of the agreements and practices at issue in terms of effect

182. The actual and potential effects of interbank fees on customers' fees and, more broadly, on the competitive operation of this sector have been assessed, both qualitatively and quantitatively, on the basis of various documents submitted as evidence. It emerges from the evidence collected that interbank fees are passed on to the banks' fee-paying customers, i.e., the creditors in the case of fees on transactions and rejected transactions. The practices at issue are therefore likely to distort normal competition on the market due to their potential effects - which, in itself, would be sufficient to find that they breach the TFEU and the Commercial Code - and also due to their observed effects.

♦ **Qualitative evidence**

183. A number of qualitative elements establish the impact of interbank fees on customers' fees, including: statements made by the banks; the wording used by banks in connection with their fees, namely "interbank fee + X"; contractual clauses and clauses relating to the validity of the banks' offers; the existence, in some cases, of fees that differentiate between incoming payments depending on whether they are interbank or intrabank and the fact that, at times, the difference between the two is much greater than the difference between the costs (excluding interbank fees) associated with these two types of incoming payment.

i. Statements made by the banks

184. Firstly, several of the banks that have been heard have stated that per-transaction interbank fees could have an impact on creditors' fees, and this could be sufficient to establish the potential anticompetitive effect of such practices. The Banque de France and Société Générale have made particularly explicit references to the fact that interbank fees are

[111] Classification mark 3116

passed on to creditors: the Banque de France has stated that "*interbank fees have an impact on creditors, who bear this cost*"[112], and Société Générale has said that "*the creditor alone bears the interbank fee. The creditor's bank pays the fee on behalf of the creditor. Note that the fee is passed on without application of any volume-related margin*"[113] (emphasis added); lastly, according to La Banque Postale, "*the full amount of the fee is not passed on to merchants, because of the intensity of competition. The interbank fee is taken into consideration when determining the bank's costs, but it is only one of many cost elements*"[114].

ii. The wording used in connection with bank fees

185. Secondly, the Autorité has noted that in bills sent to two customers, [BANK 3] lists two separate items for both direct debits collected and rejected direct debit transactions[115]: the first item corresponds to "*[BANK 3]'s management charges*", while the second item corresponds to "*interbank fees*". The amount of this second item is €0.122 per direct debit and €0.762 per rejected direct debit transaction. These bills therefore show that interbank fees on direct debits were directly passed on in full to [BANK 3]'s two customers.

186. Likewise, within the framework of a consultation initiated by [MEMBER H] on 18 May 2001 concerning direct debit transactions and interbank payment orders, [BANK 6] submitted a fee proposal for the management of payments by direct debit and interbank payment order and of associated rejected transactions[116]. The fee schedule submitted by the bank shows a unit price in Euros per transaction collected or rejected, alongside which there is an approximate figure in French francs, expressed as 'CIP[117] + X'. This reference to the fee as the sum of the CIP and another component clearly demonstrates the role played by interbank fees. It is also interesting to note that the fee component that is added to the interbank fee is fairly low, as in all cases it represents less than 5% of the final fee proposed for payments by direct debit or interbank payment order and also for rejected transactions using these means of payment.

187. Similarly, in its reply to a call for tenders by EDF for the collection of payments by direct debit, [BANK 11] explained in its tariff offer that it would apply two principles when billing: firstly, "*a policy of transparency and a spirit of partnership*" and, secondly, a "*commitment that Electricité de France will benefit from the full amount of the reduction in CIPs as soon as this comes into effect*". It then set out its tariff formula: "*with effect from the date the new CIP is introduced:*
    - *adjustment of the interbank price in accordance with the following formula: new CIP + processing costs of €0.0045*
    - *Adjustment of the [BANK 11] intra-group price in accordance with the following formula: new CIP Inter*90% + processing costs of €0.0025*"[118].

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[112] Minutes of the hearing of the Banque de France on 15 September 2011, classification mark 4827

[113] Minutes of the hearing of Société Générale on 13 October 2011, classification mark 5229

[114] Minutes of the hearing of La Banque Postale on 14 October 2011, classification mark 4908

[115] Classification marks 5498 and 5121-5122

[116] Appendix 4 to the minutes of the hearing of the ADUMPE, classification marks 5296-5297

[117] *Commission interbancaire de paiement* (Interbank payment fee – hereinafter CIP) is a term that is frequently used within the industry to refer to interbank fees. It is probably used in reference to the name of the interbank fee charged on transactions using bank cards.

[118] Classification mark 5109

188. This offer by [BANK 11] is particularly explicit as regards the fact that the full amount of the per-transaction interbank fee is passed on to creditors. In the same document, the bank even suggests that EDF will save several million Euros if the CIP is adjusted to €0.06[119]. It should also be noted that in this particular case the interbank fee has an impact on the fees charged for incoming intrabank payments as well as incoming interbank payments.

189. Lastly, some of the evidence collected concerns SEPA direct debits, rather than domestic direct debits. In response to a call for tenders initiated by [MEMBER C], which asked banks to communicate their fees for the collection of SEPA direct debits (hereinafter SDD) according to different scenarios concerning interchange levels, several banks referred particularly explicitly to a connection between the level of interbank tariffs and the level of their fees. Accordingly, [BANK 8] explained that it would apply a fee for "same bank" SDD, i.e., intrabank SDD, corresponding to the "*interchange fee plus 0.01*" and a fee corresponding to the "*interchange fee plus 0.017*"[120] for "*other bank*" SDDs. [BANK 8] also mentioned a fee on rejected transactions corresponding to "*interchange fee plus 0.05*". Likewise, [BANK 14] explained that "*our price for SDD is 2.5 euro cents. Any additional charges for interbanking fees would thus be recharged to [Member C]*"[121], and [BANK 15] stated that in the event of the application of a different interchange fee of 12.2, 8.8, or 0 euro cents, the fee would be calculated on the basis of the following formula: *"€0.0185 + the new interchange fee*"[122]. Lastly, for rejected transactions [BANK 16] proposed a fee for the management of unpaid SDD of "*interchange + €0.175*"[123]. Although the various fees referred to in this paragraph do not concern national direct debit transactions, by analogy they do demonstrate the impact of interbank fees on the invoice sent to creditors.

iii. Contractual clauses relating to the validity of the banks' offers

190. Furthermore, several contractual documents show that tariffs payable by creditors are likely to change if the interbank fees are modified.

191. Limiting our examples to cases specifically concerning interbank payment orders, in its reply to a call for tenders initiated by EDF in 2005 for the management of incoming interbank payment orders, [BANK 8] set out its "principles" at the start of the section on prices, which included the following principle: "*the conditions and value dates stated in our offer are based on the interchange fees and interbank rules currently in force. Any change, whether upward or downward, to these rules and fees will be passed on in our prices, subject to one month's notice*"[124] (emphasis added). Similarly, [BANK 2] responded to the same call for tenders and stated in its tariff offer that "*any change to the SIT*[125] *rules concerning timing or settlement between banks, in either direction, is likely to have an impact on the proposed tariffs*"[126]. Lastly, [BANK 10] made its tariff offer subject to the

[119] Classification mark 5110

[120] Classification mark 5564

[121] Classification mark 5573

[122] Classification mark 5592

[123] Classification mark 5553

[124] Classification mark 5102

[125] *Système Interbancaire de Compensation*, the interbank clearing system in operation until 2008

[126] Classification mark 5105

following condition: *"[BANK 10] reserves the right to modify these fees in the event of any change to the interbank fees*"[127].

192. Comparable formulae to those quoted above can be found in documents submitted as evidence relating to direct debits only or to direct debits and interbank payment orders.

193. In reply to a call for tenders initiated by EDF in 2007 for the management of incoming direct debits, [BANK 3] explained that "*the prices corresponding to this offer is described in paragraph 11. It is stipulated that any drop in the interbank fee that may be decided will be passed on to you immediately*"[128]. In reply to this same call for tenders, [BANK 8] stated that "*the conditions and amounts stated in this offer are based on the interchange fees and interbank rules currently in force. They will be recorded in an agreement to be signed by the parties. Any change to such rules and fees will result in the termination of the agreement, subject to three months' notice*"[129]. Similar clauses can be found in replies submitted by several banks to another call for tenders initiated by the same creditor in 2001. For example, [BANK 9] stated in its financial proposal that "*any upward or downward variation in interbank fees will be passed on <u>automatically</u>*"[130] (emphasis added). Likewise, [BANK 6] claimed that its "*offer has been formulated on the basis of the legislation and interbank settlements currently in force. Any direct positive or negative financial consequences of any change to such legislation will be passed on in our tariff conditions from the date they come into force*"[131].

194. Similar documents submitted as evidence relating to a range of customers show the influence of interbank fees on fees charged to creditor customers. For example, in 2009 [MEMBER H] received a reply to a call for tenders from [BANK 1] in which the bank stated that it was "*currently studying the possibility of enabling large remitters to benefit from a reduced rate CIP. Whatever the outcome of this process, in the event of any change to the regulations governing interbank charges we undertake to <u>pass on any drop in the CIP in the price we charge for collection of direct debits/interbank SDD</u>*"[132] (emphasis added). The framework agreement entered into between [MEMBER B] and [BANK 3] in 2005 lists the various cases in which fees may be re-negotiated, which include "*new measures imposed by public authorities, or any change to the interbank exchange conditions decided by the banking industry, likely to that an effect on the economic or legal balance of the contracts*"[133]. Interbank fees are very probably included in the interbank exchange conditions that might be modified by the banking industry. [MEMBER E] has submitted several contracts it signed with banks, including a contract with [BANK 1], which provides that "*in the event of any change to the interbank exchange regulations, the service provider undertakes to pass on in full any reduction in the CIP over the remaining term of the contract*"[134], a contract with [BANK 11], which provides that "*in the event of any change to the interbank exchange regulations, the service provider undertakes to pass on in full any reduction in the CIP over the remaining term of the contract. More*

[127] Classification mark 5108

[128] Classification mark 5111. The emphasis is part of the original text.

[129] Classification mark 5113

[130] Classification mark 5114

[131] Classification mark 5128

[132] Classification mark 5385

[133] Classification mark 5472

[134] Classification mark 5859

specifically, the service provider undertakes to pass on in full any reduction in the CIP on direct debits in the price it charges for "interbank" direct debits, with effect from the day the new CIP takes effect, and to reduce the price it charges for "intra-group banking" direct debits if the "interbank" direct debit price falls below €0.1025 per direct debit transaction"[135], and a contract with [BANK 4] which provides that "*in the event of any change to the interbank exchange regulations or the interchange fees, the impact of such variation upwards or downwards will be passed on in full to [MEMBER E]"*[136].

iv. In some cases, differentiated fees for interbank and intrabank payments

195. Lastly, the passing-on of interbank fees to creditors is also evidenced by the fact that, for certain creditors and usually only for direct debits, banks may charge separate – and at times very different - rates for incoming interbank and intrabank payments.

196. Examples of this include the fee agreement entered into between [BANK 10] and [MEMBER H] in December 2006, which provides that €0.06098 will be charged for intrabank direct debits, while the rate for interbank direct debits is more than double that amount, ranging from €0.127 to €0.12958 depending on volume[137]. The 2009 tariff proposal submitted to [MEMBER H] by [BANK 1][138] shows that the fee charged by this bank prior to 2009 for intrabank direct debits was €0.05, while the rate for interbank direct debits was €0.1275. Although the tariff proposal offers a stable fee for intrabank direct debits and a slightly lower fee for interbank direct debits (between €0.125 and €0.126, depending on volume), the difference between the two is still very significant. [BANK 11] also charged [MEMBER H] different interbank and intrabank fees, with one bill dating from 2011 indicating a fee per intragroup direct debit of €0.092 and a fee for "fellow institutions" (i.e., interbank) of €0.125[139].

197. Other undertakings were also offered different interbank and intrabank fees. Accordingly, [MEMBER E] was offered reduced rates for incoming interbank payments by several banks, such as [BANK 1] (€0.0795, compared with €0.1209[140]), and [BANK 11] (€0.1025, compared with €0.1265[141]). Likewise, in 2009 several banks charged [MEMBER C] different rates depending on whether the direct debits were intrabank or interbank, although the difference between the two was minimal in some cases (two euro cents or less for [BANK 9], [BANK 11], [BANK 12] and [BANK 8][142]), and more substantial in other cases (6.65 euro cents for [BANK 1], and even 7.5 euro cents for [BANK 7]). One last example is the relationship between [customer 1] and [BANK 7]: the bank has explained that it charges this customer different rates depending on whether the direct debit is interbank (€0.099) or intrabank (between €0 and €0.03)[143].

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[135] Classification mark 5879

[136] Classification mark 5915

[137] Classification mark 5304

[138] Classification marks 5384-5385

[139] Classification mark 5434

[140] Classification mark 5860

[141] Classification mark 5880

[142] Classification mark 5526

[143] Classification mark 6720

198. Moreover, even when fees on incoming interbank and intrabank payments are identical, in some cases the proportion of intrabank payments is taken into consideration when determining the tariff. This is stipulated in a number of offers and contracts[144], and has also been reported by several banks in their replies to the questionnaire sent by the Case Officers on 1 December 2011. For example, BNP Paribas has stated that it usually charges a single fee for interbank and intrabank transactions, but then explained that "*in certain cases, in order to be more competitive when negotiating with certain customers, BNP Paribas may reduce its proposed fees, taking into consideration the intrabank transactions ("on us"), for example*"[145]. Likewise, La Banque Postale has explained that "*the proportion of intrabank direct debits is taken into consideration when determining the tariff, but this is only one of a number of pricing criteria* "[146], and LCL has said that in some cases it factors in the proportion of intra group direct debits[147].

199. In order to be able to correctly interpret the tariff differences between incoming interbank payments and incoming intrabank payments, we need to bear in mind the two factors that differentiate interbank payments from intrabank payments.

200. The first is the cost of processing by the creditor's bank: the two types of payment are processed in a slightly different way, mainly because the clearing system is an essential stage for incoming interbank payments, but not for intrabank payments. Nevertheless, differences in processing costs are minimal, approximately 0.1 euro cent, and cannot in themselves explain the difference of several cents observed in the fees charged.

201. It therefore seems highly likely that it is the second factor that explains the price differences described above, which is that per-transaction interbank fees are only charged on incoming interbank payments.

202. In all probability, interbank fees have an impact on the fees charged to creditor customers. An analysis of fees charged by banks to creditors points to the same conclusion.

♦ Quantitative evidence

203. The impact of interbank fees on fees charged to customers has already been analysed by the European Commission and the Autorité de la concurrence, more specifically with regard to payment cards.

204. In the above-referenced Visa-MIF judgment, the Commission explained that "*in practice, a large part of the MSC[148] is determined by the MIF»*[149] for incoming payments by card. Likewise, in its MasterCard judgment dated 19 December 2007, the Commission stressed that MIFs applied to card payment transactions were taken into consideration when calculating the fees paid by merchants for such payments: "*the multilateral rule fixes the*

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[144] See, for example, the 2001 the offer by [BANK 7] to EDF in which it basically explained that there was no real advantage in charging different fees depending on whether the transaction was interbank or not, given the bank's small market share, but nevertheless went on to state that the proposed price "*factors in our market share in the SIT*" (classification mark 5116). Likewise, the 2009 offer by [BANK 8] to [MEMBER H] explained that "*all our fees take into account the fact that the advices for direct debit drawn from our bank will be remitted to us in priority, which represents a share of [confidential %]*" (classification mark 5352)

[145] Classification marks 6783-6784

[146] Classification marks 6501 and 6502

[147] Classification mark 6750

[148] MSC : Merchant Service Charge

[149] §20 of the VISA-MIF Decision

level of the interchange fee rate for all acquiring fee banks alike, thereby inflating the base on which acquiring banks set charges to merchants. Prices set by acquiring banks would be lower in the absence of the multilateral rule and in the presence of a rule that prohibits ex post pricing. (...) This leads to a restriction of price competition between acquiring banks to the detriment of merchants (and subsequent purchasers)"[150]. The Court of First Instance of the European Union confirmed this analysis in the above-mentioned judgment T-111/08, stating in paragraph 134 that: *"(...) the view might reasonably be taken that by allowing transparency between acquiring banks as to the level of interchange fees applied to transactions, the MIF helps to ensure that all, or at least a substantial portion, of those fees are passed on to merchants, the acquiring banks being assured that the resulting increase in the amount of the MSC will not affect their competitive position."*

205. The Autorité de la concurrence similarly observed in its Decision 11-D-11 concerning the *Groupement des Cartes Bancaires* (CB Card Grouping) that fees charged by banks to merchants were generally equal to or higher than the interbank fees charged on card payment transactions[151]. The Autorité also observed with regard to interbank fees charged on card withdrawals that the evidence also suggested that this fee was passed on to the customers of the banks paying the fee, in this case the cardholders[152].

206. In the case in point, an analysis of the fees paid by creditors for payment transactions by direct debit, interbank payment order and *télérèglement* is necessary, followed by an analysis of the fees charged for corresponding rejected transactions.

207. In order to determine whether the interbank fees on direct debits, interbank payment orders and *télérèglements* have an impact on those charged to creditors, the Autorité sent a questionnaire to the banks on 1 December 2011 asking, in particular, for information about the fees they charge their main customers in terms of transaction volumes. On 18 January 2012, it sent an additional request for information about fees charged by the banks to their main creditor customers for rejected transactions[153].

208. The analysis concerns fees paid by the banks' main customers, as they are by definition the most competitive. Large customers have greater negotiating power because of the volume of incoming payments, and can therefore take advantage of competition between the banks. These negotiations generally take the form of calls for tender. Moreover, these large customers often use several banks, facilitating the comparison of prices and services offered by the banks and thus enhancing competition.

209. An analysis of the fees paid by the banks' largest customers was carried out to establish whether the interbank fees serve as a floor price. Note, however, with regard to direct debits that banks charge a certain number of creditors a single fee for interbank and intrabank direct debits. However, fees on intrabank direct debits can be up to €0.10 lower than those charged on interbank direct debits. A single fee computed by taking the average of these two transactions is therefore necessarily lower than the fee that would be charged on incoming interbank payments if separate fees were applied.

210. The analysis looked at the following institutions: the Banque de France, Crédit Mutuel-CIC, HSBC, BNP Paribas, La Banque Postale, Société Générale, Crédit du Nord, Crédit

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[150] §408 to 410

[151] §123 to 130

[152] §138-139

[153] The additional questions were not sent to the Banque de France. Moreover, the Autorité was not able to send them to Crédit du Nord, because its reply to the 1 December 2011 questionnaire was received too late.

Agricole (which supplied information on CA CIB), LCL and BPCE. In the case of BPCE, the analysis focused on the group's two main entities in terms of transaction volumes, namely Bred and Natixis. However, some banks did not provide all the data necessary to calculate an average price for incoming interbank payments; in view thereof, the results are only shown for those institutions that provided all the necessary data, i.e., the price and volumes of incoming interbank payments for each of their main customers. These institutions account for approximately 2/3 of all incoming interbank payments.

211. Subject to paragraph 209, the following table shows the average prices calculated for the different banks, compared to the interbank fees charged on direct debits, interbank payment orders and *télérèglements*, i.e., €0.122, €0.076 and €0.137, respectively:

Bank	Average price – standard direct debits	Average price – interbank payment orders	Average price – *télérèglements*
MIF, for the record	*€ 0.122*	*€ 0.076*	*€ 0.137*
[confidential]	€ 0.135	€ 0.135	€ 0.152
[confidential]	€ 0.125	€ 0.090	€ 0.135
[confidential]	€ 0.106	€ 0.119	NA
[confidential]	€ 0.120	€ 0.082	€ 0.183
[confidential]	€ 0.125	€ 0.178	€ 0.20
[confidential]	€ 0.117	€ 0.133	€ 0.161
[confidential]	€ 0.118	NA (> € 0.076)	NA
[confidential]	€ 0.130	€ 0.105	€ 0.265

212. The preliminary assessment found that average prices charged to large customers for interbank payment orders and *télérèglements* are almost always higher than the interbank fees. Only one exception was identified: the average price charged by one bank for *télérèglements* was €0.135, which is slightly less than the amount of the interbank fee charged for this means of payment (€0.137).

213. In the case of direct debits, and despite the above-mentioned reservation, average prices charged to large customers are always higher than or very close to (within 5%) the interbank fee. One bank stands out, in that its average fee paid by large customers is 13% below the interbank fee.

214. Moreover, processing costs borne by creditors' banks - i.e., costs excluding interbank fees - can be compared with the amount the banks charge their creditor customers.

215. The preliminary assessment concluded that processing costs borne by creditors' banks are in all probability fairly low, as suggested by BPCE's statement that: "*when a direct debit is processed normally (in other words, without any incidents requiring manual processing), the banks' work is minimal, given that most of the processes are automated: the creditor's bank checks the magnetic remittances it receives before presenting them for clearing*"[154]. Likewise, [BANK 11s]'s tariff proposal to EDF refers to a fee for interbank direct debits of "*new CIP + processing costs of €0.0045"* and a fee for interbank direct debits of *"new CIP + processing costs of €0.0025"*[155]. The cost of processing a direct debit by a bank therefore seems to be only approximately 0.25, or 0.45 euro cent, depending on whether it is interbank or intrabank. It is also apparent that the difference in processing costs corresponds to the amount charged by the clearing system to the two banks involved in the payment transaction. It emerges from this analysis that the fees charged to creditors greatly exceed the processing costs borne by the creditors' banks.

216. Lastly, it emerges from this analysis that the role of floor price played by interbank fees has been affected by the recent and slight competitive pressure exerted on customer fees as a result of the introduction of the SEPA. At its hearing, the independent financial services consultant summarised the situation perfectly: "*Over the past 18 months we have observed a clear shift in the banks' offers for direct debit transactions, which has led to lower customer fees than previously. In view of the move towards the SEPA and the adoption of associated European regulations, the banks, or at least some of them, are anticipating a reduction in interbank fees. Several banks seem to be using the 8.8 euro cent fee that is currently charged for cross-border transactions only as a reference point and negotiations are currently focusing on this amount. Some banks are even expecting lower interbank fees, and are positioning their offer accordingly, in order to attract customers*"[156].

217. To conclude, it is apparent that interbank fees on direct debit, interbank payment order and *télérèglement* transactions are also likely to restrict competition by effect.

Fees collected from creditors on rejected direct debit, interbank payment order and télérèglement transactions

218. The analysis of the fees charged to the largest creditors for rejected transactions elicits the following observations:

- firstly, it seems that certain creditor customers (less than 10% of the customers, according to information received from the banks) are exempt from fees on rejected transactions. This is all the more surprising given that the banks have stated that such operations correspond to a service provided to creditors;
- on the contrary, other creditor customers are charged particularly high fees for rejected transactions, which can range from between €1.5/€2 to around €10. The latter are probably dissuasive fees or fees designed to offset reduced fees charged for other services. This is probably the case for [Customer 12], which is not charged for incoming payments by HSBC, which has stated "*exempt, but unpaid transactions charged €3.05*"[157];

[154] Minutes of the hearing of BPCE on 20 October 2011, classification mark 5248

[155] Classification marks 5109-5110 (8847-8848 in the VNC)

[156] Classification mark 8695 (9388 in the VNC)

[157] Classification mark 6720 (9672 in the VNC)

- most other customers are charged between €0.70 and €0.90 for such transactions, which is close to or higher than the interbank fee charged on rejected transactions (€0.762). More specifically, BNP Paribas charges some of its creditors almost the exact amount (within a thousandth) as that of the interbank fee for rejected direct debit, interbank payment order or *télérèglement* transactions.

219. Accordingly, it is clear that interbank fees charged on rejected transactions may also serve as a floor price for fees charged to creditors for rejected direct debit, interbank payment order and *télérèglements* transactions.

220. In view of the foregoing, it is apparent that all interbank fees on direct debit, interbank payment order and *télérèglement* transactions and exceptional transactions are likely to have a significant impact on the fees charged by banks to their creditor customers.

221. The preliminary assessment therefore concluded that these interbank fees were likely to constitute restrictions on competition by object and/or by effect.

3. EVIDENCE PRODUCED BY THE BANKS IN SUPPORT OF THEIR POSITION

222. The banks have submitted evidence that they believe can justify the existence of interbank fees.

223. Several institutions have explained that per-transaction fees remunerate services provided by the debtor's bank to the creditor's bank, claiming that these services consist of processing debit transactions, carrying out all the necessary checks and implementing measures to combat fraud. Other banks have stated that per-transaction interbank fees might encourage the use of the most efficient means of payment as, for example, they reduce the costs for a debtor using a direct debit or interbank payment order rather than a cheque.

224. The preliminary assessment did not accept these arguments. When a bank processes a debit transaction, this benefits both the creditor and the debtor. There is nothing to justify only the creditor and creditor's bank bearing all the costs associated with the payment service. Moreover, the debtor already bears several types of costs associated with the means of payment under review. Lastly, the preliminary assessment expressed reservations as to the need to encourage debtors to use certain means of payment, such as direct debit, which has its own practical advantages and indisputably offers debtors a secure means of payment.

225. With regard to exceptional fees, the regulatory framework concerning SEPA direct debits and the principles reiterated in the Autorité's decision 11-D-11relating to Groupement des Cartes Bancaires accept that such fees are justified, provided they satisfy the following criteria:

- they are paid by the bank that is, or whose customer is, the initiator of the service;
- the amount is proportionate to the cost of the service and is set by reference to the most cost-efficient bank's costs.

226. The preliminary assessment found that AOCT and DRE fees could be justified in principle, but also observed that the banks failed to produce any studies in support of the amount of these fees.

227. In view of the fact that the banks have sought the benefit of the commitments procedure and have proposed (*see below*) to abolish per-transaction fees, the Autorité considered that

any further analysis of the arguments put forward by the banks in support of these fees would not achieve anything. As regards exceptional fees, in view of the fact that the banks have proposed to provide more detailed information on the services covered by these fees on rejected transactions and to conduct a cost study on all exceptional fees, these will be analysed in greater detail under the heading "Discussion".

G. IMPLEMENTATION OF THE COMMITMENT PROCEDURE

1. COMMITMENTS INITIALLY PROPOSED BY THE BANKS AND THE FBF

228. In order to allay the competition concerns raised in the preliminary assessment and in order to bring an end to the proceedings, the banks on the one hand, and the FBF on the other, proposed commitments to the Autorité de la concurrence on 6 April 2012. A summary of the competition concerns and the commitments proposed by the parties was posted on the Autorité's website on 10 April 2012, so that any interested third parties could submit their observations.

229. In the proposal, the parties suggested two phases. Initially, all interbank fees would be reduced by 50% from the entry into effect of the commitments (the commitments would enter into effect on the first day of the next calendar quarter following notification of the commitments decision, subject to a minimum lapse of two months between the date of notification and the first day of the calendar quarter).

230. As a result, the interchange fees would be adjusted as follows:
- the fee for domestic direct debits would fall from 0.122 to €0.061;
- the fees on interbank payment orders and *télérèglements* would fall from €0.076 to €0.038, and from €0.137 to €0.068, respectively;
- the fee for transactions involving bills of exchange would fall from €0.122 to €0.061.
- the fee for rejected transactions (direct debits, interbank payment orders and *télérèglements*) would fall from €0.762 to €0.381;
- the fee for DRE requests would fall from €0.610 to €0.305;
- lastly, the parties proposed that the AOCT fee for direct debits, interbank payment orders, *télérèglements* and credit transfers be aligned with the AOCT fee for card payments, which corresponds to a reduction of over 50% (from €0.610 to €0.290).

231. In the second phase, per-transaction interbank fees would be completely abolished with effect from 1 February 2014.

232. The banks also proposed that an independent economic consulting firm carry out a cost study on exceptional fees, and that they will adjust the amount of these fees in light of the findings of the study.

233. To summarise, the following changes to interbank fees in Euros were proposed in April 2012:

Means of payment	**Current fee**	**Proposed fee up to 31 January 2014**	**Proposed fee from 1 February 2014**

Standard direct debit / national SDD	0.122	0.061	0
Accelerated direct debit	0.183	0.091	0
Interbank payment order	0.076	0.038	0
Cash interbank payment order	0.43	0.215	0
Télérèglement	0.137	0.068	0
Bill of exchange	0.122	0.061	0
Incoming international credit transfer	1.829	0.915	0
Rejected direct debit (national and SDD)	0.762	0.381	Amount to be determined on the basis of the findings of the cost study
Rejected interbank payment order	0.762	0.381	
Rejected *télérèglement*	0.762	0.381	
Rejected bill of exchange	0.762	0.381	
AOCT - Interbank payment order	0.61	0.29	
AOCT - *télérèglement*	0.61	0.29	
AOCT - direct debit	0.61	0.29	
DRE	0.61	0.305	

234. Lastly, the banks proposed that the commitments be implemented during a four-year period.

235. In order to facilitate the implementation of the commitments proposed by the banks, the FBF proposed to inform its members of the commitments jointly entered into by the banks within 15 days of notification of the decision by the Autorité de la concurrence making them binding.

2. RESULTS OF THE MARKET TEST

236. On 10 May 2012, the following undertakings and organisations submitted observations: ACOSS (central agency of social security bodies), Allianz, ADUMPE, Axa, Bouygues Telecom, Canal+, CGPME (business federation for SMEs), le Conseil du Commerce de France (French trade federation), EDF, FCD, GDF SUEZ, Leroy Merlin, Poweo, Saur, SFR, UFC Que Choisir (consumer association), Veolia, Vinci Park and Vivendi.

237. Eurocommerce sent its observations to the Autorité on 14 May 2012, i.e., four days after expiry of the deadline by which third parties could respond to the market test. Its observations are therefore inadmissible and cannot be taken into consideration in the analysis of the commitments initially proposed by the parties.

238. In their observations, the undertakings and associations contested the appropriateness of a commitments procedure and the type of commitments proposed by the banks concerning the systematic fees, the inadequate nature of the commitments proposed by the banks concerning the exceptional fees, and, lastly, the time period proposed for implementation, the term of the commitments proposed by the banks and the procedures for controlling implementation of such commitments.

239. The undertakings observed, with regard to the substantive issues, that the proposals submitted by the banks and the FBF do not explain why the proposed commitments are appropriate and might resolve the competition problems that have been identified. They are of the opinion that additional commitments are essential in order to allay the competition concerns.

a) Observations received from the initiating parties and the members of the ADUMPE

(i) Commitments proposed by the banks concerning the systematic fees

240. The contributors observed that the commitments proposed for the systematic per-transaction fees "*suffer from a lack of justification*". They deplored the absence of any methodological considerations in support of the chosen date on which they will be abolished (1 February 2014) and the amount by which they will be reduced (halved) during the transition period.

241. All of the replies to the market test received from creditors or creditors' associations requested the immediate abolition of systematic transaction fees as the only solution that would allay the competition concerns raised in the preliminary assessment. Furthermore, the ADUMPE and certain undertakings such as SFR and Canal+ stated that they would like the banks to commit to return the sums collected, which correspond to the passing-on of interbank fees since the date on which the banks sought the benefit of the commitments procedure.

(ii) Commitments concerning exceptional fees

242. All of the contributors that submitted observations concerning this type of fee would like the banks to commit to differentiating between fees for rejected transactions on the basis of the cause of rejection, and to only apply interbank fees for rejected transactions when the event triggering the rejection is attributable to the creditor.

(iii) Proposed methods for adjusting the cost of exceptional fees charged on R-transactions

243. The contributors also stated that the banks should commit to carrying out a cost study within 3 to 6 months in order to calculate the amount of exceptional fees attributable to the creditor, publishing the study and providing the initiating parties and the Autorité de la concurrence's Investigation Services with sufficient information to assess its compliance with the criteria laid down in EU regulation 260/2012.

244. With regard to this last point, the undertakings requested that the banks provide evidence of compliance with the conditions laid down by (EU) regulation 260/2012 for the introduction of a fee on rejected transactions:

- costs are efficiently allocated;
- fees are strictly cost-based;
- the level of these fees does not exceed the actual processing costs;
- no other additional fees relating to the costs covered by these fees are charged;

- there is no viable alternative system with an equivalent object or effect.

245. Lastly, several undertakings also requested the suspension of all exceptional fees until completion of the cost study.

(iv) Procedures for implementing and controlling the commitments proposed by the banks

246. The creditors and creditors' associations consider that there is no reason for the banks to limit the term of their commitments relating to exceptional fees to four years, and that this time period has been set in a completely arbitrary manner.

247. Furthermore, the undertakings consider that the banks have sought to gain time by postponing the implementation of the commitments by proposing that they will take effect one calendar quarter after the possible decision. There is no objective reason that justifies such a delay to allay the competition concerns.

248. The undertakings also observed that the banks have not provided for any information measures or any mechanism for controlling implementation of the commitments. They consider it essential that a trusted third party be appointed to report to the Autorité on the implementation of the commitments.

(v) Commitments by the AFB/FBF

249. The creditors and the creditors' associations consider that the commitments proposal concerning interbank fees should be submitted jointly by the banks, the AFB and the FBF.

250. They also contest the fact that the FBF has stated it is "*in no way concerned*" by the competition concerns raised in the preliminary assessment, despite the fact that representatives of the APB professional body attended meetings, as is shown by the documents submitted as evidence. Many of the replies received to the market test suggested that the AFB and the FBF should act as guarantors for the effective implementation of the commitments by their members.

b) Observations from UFC-Que choisir

251. The observations received from the consumer association UFC-Que choisir concern, *inter alia*, the gradual increase in the amount of fees and the fact that the banks collect charges from consumers in addition to the interbank fees.

(i) The gradual increase in the amount of the fees

252. UFC-Que choisir observed that the majority of fees have increased considerably since the date they were introduced, even though two factors should have resulted in a drop in costs:

- economies of scale generated by the constant increase in volumes processed;
- the significant drop in the cost of automated transactions (processing costs and telecommunication costs), due to the development of computer technology and telecommunication networks.

253. According to UFC-Que choisir, this failure to pass on economies of scale in the fees paid by the invoicing party - and ultimately the consumer – was observed within the clearing

system. Up to the end of the 1980s, payments (including in particular direct debits) were cleared by a decentralised system of clearing houses. In 1992, the system was replaced by a single system, the *Système Interbancaire de Télécompensation* (Interbank teleclearing system – hereinafter SIT), which automated exchanges (involving credit transfers and direct debits) between the customer issuing the payment order and the recipient customer. This system was gradually extended to other means of payment in addition to credit transfers and direct debits: bank cards (from 1995), *télérèglements* since their introduction in 1997, and cheques from 2002. This means unit costs have been significantly reduced.

254. UFC-Que choisir also pointed out that the system was reviewed in a Banque de France publication[158], which stated that: "*the number of transactions exchanged and cleared using the SIT has constantly increased, which has significantly reduced transaction processing costs, given, in particular, the high proportion of fixed costs involved in this type of processing*". The same article stated with regard to fees: "*the economies of scale arising from the volumes processed (almost 45 million transactions per day on average in September 2002) enable the SIT to obtain particularly attractive rates, which are currently approximately € 0.0252 per transaction*".

255. Accordingly, if we look at the example of direct debits, the fee on this means of payment was increased in 1993 (to FRF 0.75) and again in 1995 (FRF 0.80), and has never been reduced since, although the SIT resulted in a drop in the cost of transactions for the banks.

256. UFC-Que choisir stated that, in 1995, the interbank fee on direct debits therefore represented 726 times the cost for a bank of clearing a direct debit in the SIT. It considers that this demonstrates that the levels of the fees set by the banks have no bearing whatsoever on the actual costs.

257. Lastly, the SIT was replaced by the CORE system in 2008. According to the Chief Executive Officer of the STET (which manages the CORE), it processes an average of 55 million payments per day, which has led to "*reduced charges*"[159]. UFC-Que choisir is of the opinion that, now more than ever before, the cost of clearing a transaction in CORE must be almost zero, although the fees have not been reduced in any way.

(ii) The impact of fees on consumers

258. According to UFC-Que choisir, consumers are charged for all means of payment, and this supplements the income received by the banks from interbank fees.

259. The consumer association observed that charging a fee for the cancellation of a direct debit is a recent invention of the banks, and that this type of fee did not exist before 2009. Until then, the banks charged a fee for any stop placed on a direct debit, irrespective of the reason or the type of stop (temporary or permanent).

260. The transposition of the payment services directive in 2009 prohibited banks from collecting stop payment fees on any means of payment. As they were no longer able to collect such fees on direct debits, most banks limited the scope of a stop payment and created an artificial distinction between stop payments (free of charge) – defined by the banks from this time onwards as a temporary suspension of a direct debit – and a new type of charge referred to as cancellation charge, which they have defined as a permanent cancellation of a direct debit, for which a fee is charged.

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[158] See Bulletin de la Banque de France, no. 107 of November 2002
[159] See http://journaldesgrandesecoles.com/stet-l%E2%80%99interbancarite-de-nouvelle-generation/

261. Consumers are also charged a rejection fee. UFC-Que choisir stated that, in France, a number of duplicate fees are charged on means of payment, including direct debit set up fees, payment clearance fees, payment rejection fees and payment cancellation fees.

3. COMMITMENTS MODIFIED DURING THE HEARING

262. In view of the observations made by the initiating parties and their members, and the Autorité's requests, the banks and the FBF modified their commitments at the hearing held on 12 June 2012. Several improvements were made to the proposal, many of which were significant. The final version of the proposal is appended to this decision as Annex 1.

263. The following modifications were made in response to the market test:

- the date of entry into effect of the commitments and the date on which systematic fees will be abolished have been advanced to 1 September 2012 and 1 September 2013, respectively;
- the banks undertake not to enter into agreements with other banks to charge multilateral interchange fees on the payment transactions referred to in these proceedings, or relating to any other remuneration with an equivalent object or effect to the abolished multilateral interchange fees;
- the banks undertake that, with effect from 1 September 2013, the multilateral interbank fees charged for rejected transactions will only remunerate the provision or transmission of information by the debtor's bank to the creditor's bank, when the latter has requested such a service on behalf of its customer. The debtor's bank will not be entitled to receive a rejected transaction fee from the creditor's bank if the creditor has not requested such information. Corresponding cost items will be listed in the terms of reference for the cost study that will be submitted to the Autorité de la concurrence for approval;
- in order to ensure that the fees on rejected transactions are strictly based on the cost of the service provided, the banks undertake to commission a cost study by an economic consulting firm that can provide guarantees of its impartiality and does not have any conflict of interest with any of the parties to the proceedings;
- the consulting firm's assignment will be to determine the costs that are strictly necessary when processing requests to cancel incorrectly cleared transactions (AOCT or similar) and requests for the return of bills of exchange (DRE), as well as the costs associated with rejected transaction fees. The study will look at direct debits and domestic SEPA credit transfers as well as interbank payment orders, *télérèglements* and electronic bills of exchange;
- the consulting firm’s terms of reference will stipulate that the cost study must take into consideration the conditions set out in Article 8-2 of (EU) regulation 260/2012, and in particular must enable the costs incurred by the bank with the best cost-efficiency ratio to be calculated. The study will look at a representative sample of banks, including the banks that have proposed the commitments, but with the exception of the Banque de France because of its atypical customer base;

- the banks will provide the Autorité with the terms of reference for the consulting firm's assignment by no later than 15 November 2012. On receipt, the Autorité will transfer the proposed terms of reference to the initiating parties, and will organise a hearing of all the parties to assess the appropriateness of the cost items listed in the terms of reference, with a view to approving the terms of reference or amended terms of reference by no later than 31 December 2012;
- the choice of the economic consulting firm and of an independent third party will be approved by the Autorité de la concurrence;
- the cost study must be completed and its results must be released by no later than 1 July 2013. The banks undertake to adjust the fees concerned by the cost study with effect on September 2013;
- in the event the cost study is not completed by 1 July 2013 or the study does not comply with the terms of reference as approved by the Autorité, the banks undertake to suspend application of the multilateral interbank fees concerned by the cost study with effect from 1 September 2013, until they can be adjusted on the basis of a study that the Autorité de la concurrence considers is compliant; the Autorité will make its decision known no later than 45 days after receipt of the said study;
- the commitments will be made for a period to expire on 1 February 2017, which is the final end-date provided in (EU) regulation 260/2012, which will then enter into full legal force.

II. Discussion

264. Pursuant to Article L464-2 (I) of the Commercial Code, the Autorité de la concurrence can "*accept commitments proposed by undertakings or organisations designed to allay its competition concerns that are likely to constitute anti-competitive practices, as referred to in Articles L420-1, L420-2 and L420-5*".

A. ON THE APPLICABILITY OF EUROPEAN UNION LAW

1. APPLICABLE LAW

265. Article 101 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") provides that "*the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*". Pursuant to the decisional practice of the Autorité de la concurrence, based in particular on the European Commission's Guidelines on the effect on trade concept contained in Articles 81 and 82 (now Articles 101 and 102 of the TFEU) of the EC Treaty (2004/C 101/07), three criteria must be satisfied in order to establish that practices

are likely to have appreciably affected trade between Member States: the existence of trade between Member States in the products concerned by the practice (first point), the existence of practices that may affect such trade (second point) and the sensitive nature of this influence (third point). The aforementioned European Commission Guidelines provide in paragraph 78 that "*horizontal cartels covering the whole of a Member State are normally capable of affecting trade between Member States. The Community Courts have held in a number of cases that agreements extending over the whole territory of a Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis by hindering economic penetration which the Treaty is designed to bring about*".

266. The Autorité de la concurrence recently recalled that an assessment of the sensitive nature of the effect on trade between Member States "*depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned*".

267. The aforementioned European Commission's Guidelines provide that there is a rebuttable positive presumption that any effect on trade is appreciable when the turnover in the relevant products exceeds €40 million.

2. APPLICATION TO THE CASE IN POINT

268. In the present case, the practices under review are horizontal agreements between banking institutions in the presence of a professional association in the sector of means of payment for the general public and merchants in France. These practices allegedly consist of the fixing of the amount of systematic fees charged for each means of payment on French territory. These agreements are entered into and applied at national level by internationally-sized companies, throughout the entire French territory.

269. When considering banking activities involving means of payment, the very nature of these payment transactions, which may also involve cross-border payments, needs to be borne in mind, as should the fact that recent European and national regulations, referred to above, are gradually putting in place a single banking market and the SEPA project. These various means of payment will therefore have a European dimension.

270. It should be noted, in addition, that non-cash means of payment other than cards and cheques accounted for over 40% of all payment transactions in terms of volume[160] in France in 2010. These payment transactions were exchanged through the French banking system, and also in the European and the international banking systems.

271. Furthermore, competition between banks in Europe requires any foreign bank wishing to penetrate the French market to be present on the retail banking market. Although foreign banks find it difficult to penetrate the national market for banking services for private customers, mainly because they do not have networks of local branches, this entry barrier is not as significant when accessing the market for banking services provided to corporate customers, who form the main potential customer base for foreign banks. This observation

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[160] Source Banque de France, 2010 ; http://www.banque-france.fr/fileadmin/user_upload/banque_de_france/Economie_et_Statistiques/Balances_des_paiements_et_Economie_Internationale/moyens-de-paiements-scripturaux-echanges-dans-et-hors-les-systemes-de-paiement-volumes.pdf

is supported by documents submitted as evidence containing fee proposals made to French creditors by foreign banks that have no or few branches in France[161].

272. Thus, in a reply to a call for tenders, a foreign bank stated that "*the interbank fees charged for the next three years (i.e., the term of the contract in question) and the fact that [the foreign bank] does not have a market share on the retail bank market in France, means that we are unable to submit a sufficiently competitive tender. Accordingly, (…) we have no choice but to withdraw our tender*"[162]. Likewise, another foreign bank stated that "*as [foreign bank] does not have a domestic network in France, we systematically pay interchange fees. To demonstrate our commitment (…) and our willingness to invest in this project [foreign bank] will bear the cost of processing direct debits and will charge (…) less than the interchange fee*"[163].

273. In the present case, the practices at issue seem to consist of the arrangement of horizontal agreements on fee conditions for domestic transactions that are likely to distort competition in the French market.

274. Such practices would seem to involve all the credit and payment institutions that handle interbank payments in France, and the relevant turnover easily exceeds €40 million.

275. All of the foregoing establishes that trade between Member States is likely to be significantly affected by the practices at issue.

276. The Autorité de la concurrence is therefore of the opinion that the practices at issue need to be examined in light of European competition law at the same time as national law.

B. ON THE RELEVANCE OF THE COMMITMENTS PROCEDURE

1. ARGUMENTS PUT FORWARD BY THE INITIATING PARTIES

277. At the hearing, the initiating parties orally contested the use of the commitments procedure.

278. The ADUMPE maintained that the fixing of multilateral interchange fees constituted a pricing agreement between bank institutions, which falls into the category of particularly serious forms of collusion for which the Autorité stated, in its Procedural Notice on Competition Commitments of 2 March 2009, that it will not apply the commitments procedure.

279. The FCD recalled the conditions described in the aforementioned Procedural Notice under which a commitments procedure is appropriate, and invited the Autorité to verify that all such conditions had been satisfied.

280. The two initiating parties also observed at the hearing that the banks had not attempted to justify either the principal or the amount of the multilateral interbank fees.

[161] Classification marks 5551 et seq., 5570 et seq., 5589 et seq. (7077 et seq., 7098 et seq., 7119 et seq. in the VNC)

[162] Classification mark 5527 (7042 in the VNC)

[163] Classification mark 5560 (7083 in the VNC)

2. ASSESSMENT

281. Article 5 of Council regulation 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles [101] and [102] of the TFEU provides that national competition authorities have the power to "*accept commitments*".

282. Article L464-2-I of the Commercial Code allows the Autorité de la concurrence to "*accept commitments proposed by undertakings or organisations designed to allay its competition concerns that are likely to constitute anti-competitive practices, as referred to in Articles L420-1, L420-2 and L420-5*".

283. In the Procedural Notice published on 2 March 2009 in order to clarify under what practical circumstances it might accept commitments and to summarise its decisional practice in the area, the Autorité has explained that it does not use this tool "*in cases where, in any event, the harm to economic public order calls for the imposition of a fine, which precludes* a priori *particularly serious forms of collusion, such as cartels and certain types of abuse of dominant position having already caused significant damage to the economy*" (paragraph 11; see also paragraph 6). It has also stated that this tool seems "*particularly appropriate*" in view of its current decisional practice, in cases where there are "*certain unilateral or vertical practices restricting market access*" (paragraphs 10 and 12).

284. The Autorité has also pointed out that use of the commitments procedure implies that several conditions must be satisfied. Firstly, the competition concerns raised by the practices at issue must "*be ongoing*" (paragraph 9; see also paragraph 5).In other words, the practices must have persisted or its impact on competition must continue to be felt on the day the undertakings at issue propose commitments and on the day on which the Autorité determines whether the commitments procedure is appropriate. Secondly, the nature and conditions of the practices at issue must be such that commitments guaranteeing that competition in the marketplace will be maintained or restored can satisfy concerns that need to be remedied on a long-term basis (paragraph 9; see also paragraphs 6 and 45). On this point, a mere commitment to bring an end to any practice likely to constitute a breach – and therefore to abide by the law – is of no value in itself, and commitments must go beyond this by guaranteeing that competition will be restored and maintained on a long-term basis through positive measures that directly modify the situation or practices of the undertaking or undertakings at issue on the market. This is why the commitments procedure is not appropriate, in particular, in the case of a cartel. Thirdly, as provided in the Commercial Code, the Autorité is under no obligation to accept and impose commitments (paragraph 40); it has to assess whether it is appropriate to do so in light of all the circumstances of the case.

285. In view of the foregoing, although use of the commitments procedure is not an option for cartels and, in theory, is not appropriate in cases involving horizontal agreements, vertical agreements or unilateral practices likely to be particularly serious in nature or that have already caused significant damage to competition and the economy, it may, however, be appropriate when, in view of the nature of the practices, the facts of the case and the current or potential impact on competition, the Autorité's main objective is to achieve the voluntary maintenance or restoration of competition in the marketplace (paragraph 6).

286. In the case in hand, although the practices at issue are horizontal agreements, they were not secret, which is a feature of cartels. As already stated, arguments have already been submitted to justify some of these agreements, and these have been examined in the preliminary assessment. Furthermore, although it seems, on the basis of the preliminary

assessment, that they may be anti-competitive by object, and not only by effect, and although they were implemented over a certain period of time, certain very specific circumstances need to be taken into consideration.

287. Firstly, the proposed commitments submitted by the parties to the proceedings were submitted at the same time as the European Parliament and the Council adopted European regulation 260/2012 of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in Euros and amending (EEC) regulation 924/2009, imposing the abolition of interchange fees subject to certain terms and conditions, and namely by the end-date of February 2017.

288. In view whereof, as a second point, it would be appropriate to accept the proposed commitments submitted by the undertakings at issue in order to bring about immediate changes to interbank relations and banks' relations with their customers without waiting for this end-date.

289. Lastly, these undertakings comprise the majority of the market players, which means that the implementation of the commitments procedure will guarantee a radical change to their conduct and will ensure that an effective competitive environment will be restored quickly and on a long-standing basis.

290. There is therefore a need to ensure that the proposed commitments, in their final version, satisfy the conditions laid down in the aforementioned Procedural Notice of 2 March 2009, in other words, that they will allay the competition concerns identified by the Autorité and that they are credible and verifiable. More specifically, the Autorité must ensure that the conditions under which the commitments will be implemented will ensure they are effective and guarantee a genuine rapid benefit for the operation of competition on the market.

291. The final commitments proposed by the banks and the FBF, which includes the members of the AFB, constitute a solution proportionate to the competition problems identified in the preliminary assessment, in that they provide for the ultimate abolition of multilateral interchange fees on means of payment, other than cards and cheques, as well as a complete overhaul of the fees charged for R-transactions. The implementation of these commitments will bring about an immediate change to interbank conditions for direct debits, interbank payment orders and *télérèglements*.

292. In addition, these commitments constitute significant progress. The amount of fees will be halved in less than two months, and their abolition will take place more than three years before the date provided in the SEPA program. The gradual implementation of commitments is not incompatible with the commitments procedure, as has been established by Decision 05-D-29 of 16 June 2005 on practices implemented by "Haras Nationaux" and Decision 07-D-43 of 10 December 2007 on practices implemented by EDF.

293. Furthermore, this procedure gives creditors immediate leverage, as they can now compare offers from competing banks within a secure legal framework, given that the ultimate abolition of fees is guaranteed. A final point of interest is that the Autorité has observed that some banks anticipated a drop in interbank fees on direct debits approximately two years ago and have reduced the rates offered to merchants as a result. It is therefore feasible that, in view of the future abolition of fees, banks will also adopt a more aggressive conduct in the market during the transition period and will not pass on all of the reduced fees that will still be charged during this period. If this is the case, the consequences of temporarily maintaining interchange fees will be even more minimal for creditors.

C. ON THE ASSESSMENT OF THE COMMITMENTS PROPOSED BY THE BANKS

1. ON THE IMPLEMENTATION OF THE COMMITMENTS

a) On the date of entry into force of the commitments

294. In their contributions, several creditors raised the issue of the date on which commitments will take effect, claiming that this is too late and cannot be justified by any technical constraints. They also argued that the banks' commitments proposal does not explain why at least two months are necessary between the notification of the decision and the effective date of the commitments.

295. It was established at the hearing that no technical constraints make any such lapse in time necessary before commitments become effective: the only task to be completed is an adjustment of the rules applied in the clearing system, which records transactions and interbank fee balances. This should normally be achieved in a relatively short period of time.

296. Furthermore, the banks were not able to provide evidence of any specific constraints requiring that the commitments only be implemented at the start of a calendar quarter. The banks have therefore modified their commitments to take into consideration observations made at the hearing. They have reduced the time lapse between notification of the decision and implementation of the commitments and have withdrawn the proviso that commitments will enter into effect on the first day of the calendar quarter. As a result, the date of entry into effect of the commitments has been set at 1 September 2012.

b) The transition period

297. The initial commitment proposed by the banks to abolish systematic fees addresses the competition concerns that neither the principle nor the amount of such fees is justified.

298. The banks propose that the process will consist of two phases: they anticipate a transitional period before the complete and final abolition of systematic fees, during which all systematic fees will be halved. The reason put forward for the two-phase process is that the financial stakes are high (as already stated, these fees represent more than €250 million every year). The ultimate abolition of transaction fees will require the banks to completely review their business models for financing the means of payment concerned by the decision.

299. Accordingly, the transitional period should enable banks to adjust their business models fairly rapidly and move towards a system that complies with the European and national competition laws and that is compatible with the principles laid down in regulation 260-2012.

300. The end-date of the transition period (1 February 2014) initially anticipated in the commitments corresponds to the "technical convergence date", or deadline, stipulated in the End-Dates Regulation for the migration of national direct debit and credit transfer systems towards a pan-European SEPA.

301. However, this migration date is a technical date that has no impact on the fees charged for means of payment (other than rejected or incorrect transactions). Therefore, the choice of 1 February 2014 is not based on any regulatory constraints and is, in all probability, merely symbolic.

302. In view of the observations made at the hearing and the requirement, within the framework of the commitments procedure, to rapidly allay the competition concerns in view of the circumstances of the case, the banks have modified their commitments proposal. As a result, the end of the transition period has been brought forward by five months compared to the initial proposal. The end of the transition period, which also corresponds to the date on which multilateral per-transaction fees will be abolished, is now scheduled for 1 September 2013.

2. ON THE AMOUNT OF THE SYSTEMATIC FEES

303. It is true that the banks failed to justify halving the systematic interbank fees during the transition period in their initial commitments proposal.

304. The banks have stated that they do not possess any internal or shared data concerning the costs of the means of payment examined in the referral, and acknowledged this during the investigation. The 50% reduction in the systematic fees cannot therefore be justified by any existing economic data.

305. At the hearing, the banks stressed that the fee proposed for direct debits during the transition period, €0.061, is almost one third less than the fee charged until 1 November 2012 for SEPA cross-border direct debits (€0.088), as assessed in an economic study.

306. Furthermore, the Autorité observes that the amount of €0.061 for direct debits is a maximum amount. This means that the maximum fee revenues for a full calendar year would amount to approximately €125 million, as compared to the current revenues for this means of payment of €250 million.

307. In view of this evidence, the Autorité considers that the immediate halving of systematic fees is acceptable, given that it is combined with a substantial reduction in the length of the transition period, which will end in just over one year, at which time the fees will be abolished.

308. Furthermore, the banks have undertaken not to enter into agreements with other banks to charge multilateral interchange fees on the payment transactions referred to in these proceedings, or any other remuneration with an equivalent object or effect to the abolished multilateral interchange fees. The banks have accordingly allayed the competition concerns on this point.

D. ON THE INTERBANK FEES CHARGED ON REJECTED TRANSACTIONS

309. In their initial proposal, the banks proposed a review of exceptional fees, including, in particular, fees on rejected transactions. However, they did not anticipate differentiating between fees on rejected transactions on the basis of the reason for the rejection, retaining the current *modus operandi*.

310. Almost all contributions received, in particular those from creditors and creditors' associations, asked that the identity of the party responsible for the rejection be factored in the architecture of the interbank fees on rejected transactions, which are currently paid by the creditor's bank irrespective of the reason for the rejection. This concern is also raised in Article 8-2 (a) of European regulation 260/2012 and the aforementioned 2009 working document of the European Commission.

311. The Autorité stated in the preliminary assessment that the interbank fees on rejected transactions can only be justified if they are charged to the party responsible for the rejection. This would contribute to the efficient functioning of payment systems, as it would discourage incorrect transactions.

312. This approach has been applied in the past by the Autorité de la concurrence, namely in decision 11-D-11 accepting commitments made by *Groupement des Cartes Bancaires* (CB Card Grouping) and making them binding. Moreover, it mirrors the approach laid out in the End-Dates Regulation 260/2012, which only allows interbank fees on R-transactions if several cumulative conditions are satisfied, one of which is that the fee must be charged to the party responsible for the error.

313. In the new commitments proposal, the banks suggest replacing the systematic interbank fees charged on rejected transactions by a different type of fee, which will be optional, in accordance with Regulation 260/2012.

1. THE OPTIONAL NATURE OF THE FEE

314. In their new proposal, the banks undertake that only the provision or transmission of information concerning the existence and reasons for a rejected transaction will be remunerated in the form of an interbank fee.

315. The provision or transmission of information concerning the existence and reasons for a rejected transaction would be a service provided by the debtor's bank to the creditor's bank when it requests such information on behalf of its customer. The fee for this service could not be collected if the creditor did not expressly request such information. Accordingly, the applicable interbank fee is optional and not systematically due on all rejected transactions.

316. The provision of information about the reason for a rejection can therefore be considered to be a non-mandatory service provided for the creditor. Regulation 260/2012 provides in Recital 20 that per-transaction MIFs on additional services are not prohibited "*where they are clearly and unequivocally distinct from the core direct debit services and where PSPs and PSUs are completely at liberty to offer or use such services*". By analogy, this can also be applied to MIFs charged on rejected transactions associated with additional optional services.

2. APPROPRIATENESS OF THE FEE IN LIGHT OF THE COSTS

317. It was agreed at the hearing that, subject to certain conditions, interbank fees associated with rejected transactions could remunerate the provision or transmission of information concerning the existence and reasons for the rejection. The conditions include the optional nature of the service and the proportionality of the amount of the interbank fee to the cost borne by the debtor's bank in order to provide this service. This will be the subject matter of the cost study to be organised (*see below*).

E. TIMEFRAME AND CONDITIONS FOR THE ORGANISATION OF THE COST STUDY ON EXCEPTIONAL FEES

318. The preliminary assessment observed, and the banks confirmed, that they could not justify the current amounts of exceptional fees. The Autorité has pointed out that, in accordance with its practice and the principle laid down in the End-Dates Regulation 260/2012, the amount of any multilateral fee must be strictly cost-based. A cost study therefore needs to be carried out before the fee amounts can be set, which the banks offered to do in their initial proposal.

319. However, most of the contributors to the market test deplored the fact that the commitments proposal did not contain information on the reference costs to be used to adjust the exceptional fees. Contributing creditors favour use of the costs incurred by the most cost-efficient bank.

320. Furthermore, comments were also received concerning the time period for completion of the cost study, claiming it is too long, and also concerning the conditions under which it will be carried out: the ADUMPE suggested the possibility of appointing an independent third party who will designate an independent economic consulting firm to conduct the cost study. The Government Commissioner underlined the need for "*additional written provisions covering the need for impartiality on the part of the economic consultant whose appointment may be confirmed by the Autorité de la concurrence*".

321. With regard to the cost reference to be used in the study, the Autorité de la concurrence has, in earlier cases, favoured use of the most cost-efficient bank's costs. This avoids the problem that the joint fixing of interbank fees might have an inflationary impact on the rates charged to the banks' customers. This method is also recommended in regulation 260/2012. Accordingly, the banks have agreed to stipulate that exceptional fees will be adjusted on the basis of the costs of the most cost-efficient bank, as established by the cost study. The commitments proposal uses the wording in Article 8-2 c) of the End-Dates Regulation.

322. With regard to the timeframe for the cost study, the wording adopted by the banks in the initial proposal was ambiguous: the banks proposed that the cost study be carried out "*in preparation for expiry of the term of these commitments*" (i.e., four years after notification of the commitments decision to the banks) and "*the technical convergence date set at 1 February 2014*". It was therefore unclear whether the banks were proposing that the cost study be carried out, and the fees adjusted, by 1 February 2014 or only in 2016.

323. In any event, the planned timeframe for completion of the cost study and adjustment of the exceptional fees appeared excessive, particularly in view of the fact that similar studies covering a similar type of fees have been carried out within a much shorter timeframe. Furthermore, it would be logical for the adjustment of the exceptional fees on the basis of the findings of the cost study to coincide with the abolition of the multilateral per-transaction fees.

324. With regard to the conditions under which the cost study will be conducted, the banks' proposal did not describe the selection procedure for the appointment of the consulting firm that will carry out the cost study. The banks provided additional details at the hearing, which they reiterated in the amended version of the commitments proposal.

325. In view of the observations made at the hearing, and in accordance with paragraph 35 of the Procedural Notice of 2 March 2009 on Competition Commitments, the banks modified their commitments and agreed that the terms of reference for the cost study would be

approved by the Autorité, which will organise a hearing of all the parties for this purpose, in the presence of the FCD and the ADUMPE, by no later than 31 December 2012.

326. In order to further confirm the serious nature of their commitments, the banks undertook, at the hearing, to suspend the application of multilateral interbank fees with effect from 1 September 2013 in the event the cost study is found to be non-compliant or is delayed.

F. TERM OF THE COMMITMENTS

327. Several contributors considered that the term of the commitments initially proposed by the banks with regard to exceptional fees (four years) was too short, and that, with regard to per-transaction fees, the commitments should be entered into for an unlimited time period.

328. Pursuant to the banks' initial proposal, the commitments would cease to be binding in 2016. This is after the date on which exceptional fees must comply with the conditions laid down in the End-Dates Regulation (1 February 2014), but before the deadline for the abolition of per-transaction fees on SEPA direct debits, which is 1 February 2017.

329. The Autorité considers that the scope of the commitments with regard to systematic fees should not be limited in time in view of the regulatory framework, which provides that they will be completely phased out on 1 February 2017. For that reason, the commitments should be entered into for a period to expire on 1 February 2017, which is the final end-date provided in Regulation 260/2012, which will enter into full legal force on that date.

330. With regard to the exceptional fees, the regulation provides that such fees must be set by 1 February 2014. The banks must comply with the conditions laid down in regulation 260-2012, which requires them to be based on costs. This means they need to be updated on a regular basis and relatively frequently (for example, every three years).

G. ADDITIONAL COMMITMENTS PROPOSED IN CONTRIBUTIONS

331. Several contributing creditors felt the banks should make additional commitments. The proposed additional commitments concern passing the reductions in interbank fees on the fees charged to creditors by the banks; the refund to creditors of fees collected since the banks sought the benefit of the commitments procedure; the non-substitution of the interbank fees by unilateral or bilateral fees; an undertaking not to introduce new systematic fees on new means of payment; and the publication of information, in particular for the banks' credit and debt customers.

332. The commitments procedure is only intended to allay the competition concerns identified in the preliminary assessment. The Autorité is therefore unable to address these issues, some of which, moreover, exceed its remit.

H. THE COMMITMENTS MADE BY THE FBF

333. Some of the practices at issue are attributable to the APB. At the hearing, the banks stated that the APB's activities were transferred to the AFB, which was founded in 1976. Although the FBF (*Fédération Bancaire Française*), which was founded in 2000, did not

play a direct role in the practices at issue, it has proposed commitments, appended hereto, in order to facilitate the implementation of the commitments proposed by the banks. The FBF represents a much larger number of banks than the AFB and can therefore guarantee that the entire banking sector will receive comprehensive information on the commitments.

334. To that end, the FBF has undertaken to inform its members of the commitments jointly made by the banks within 15 days of notification to the banks and the FBF of the decision, by the Autorité de la concurrence, which will make the commitments binding. This information will be communicated through a letter sent to the "heads" of each of its members, enclosing a copy of the Autorité's decision and the wording of the commitments. A copy of these letters will also be sent to the Autorité.

III. CONCLUSION

335. The Autorité considers that the commitments made by the banks and the FBF, which includes the members of the AFB, as improved or clarified at the hearings and recorded in writing in the final version sent on 20 June 2012, allay the competition concerns identified and are sufficient, credible and verifiable. It therefore accepts these commitments, will make them binding and thus bring an end to the proceedings.

DÉCISION

Article 1: The Autorité de la concurrence accepts the commitments made jointly by the banks BNP Paribas, Crédit Agricole, LCL, BPCE, Confédération Nationale du Crédit Mutuel, Crédit Industriel et Commercial, HSBC France, la Banque Postale, Société Générale, Crédit du Nord and the Banque de France, and by the *Fédération Bancaire Française* (FBF), which includes the members of the *Association Française des Banques* (AFB), which form an integral part of this decision and are appended hereto. These commitments will become binding with effect from notification of this decision.

Article 2: The banks that are parties to the proceedings and the FBF will provide the Autorité de la concurrence with proof of implementation of the commitments within two months of the date they enter into effect and once a year on the anniversary date of the date they enter into effect.

Article 3: The cases registered under numbers 11/0053F and 11/0064 are closed.

Deliberation on the basis of the oral report of Case Officers Ms Sarah Subremon and Mr Cédric Nouël de Buzonnière with contributions from Ms Virginie Beaumeunier, General Rapporteur, from Mr Bruno Lasserre, President, Chair, and Ms Françoise Aubert, Ms Anne Perrot, Ms Elisabeth Flüry-Hérard and Mr Patrick Spilliaert, Vice-Presidents.

Hearing Officer,	Chair,
Béatrice Déry-Rosot	Bruno Lasserre

Hogan Lovells letterhead

REFERRALS 11/0053 F AND 11/0064 F
JOINT COMMITMENTS BY THE BANKS BNP PARIBAS, CREDIT AGRICOLE, LCL, BPCE, CONFEDERATION NATIONALE DU CREDIT MUTUEL, CREDIT INDUSTRIEL ET COMMERCIAL, HSBC FRANCE, LA BANQUE POSTALE, SOCIETE GENERALE, CREDIT DU NORD AND BANQUE DE FRANCE (HEREINAFTER, THE "BANKS")

These commitments are made by the Banks pursuant to Articles L462-2, and R 464-2 of the Commercial Code in order to allay the competition concerns identified in the preliminary assessment relating to practices involving multilateral interbank fees charged on payments made by direct debit, *télérèglement*, interbank payment order, electronic bill of exchange or credit transfer, dated 14 March 2012.

These commitments are made by the Banks without prejudice to their rights, for the sole purpose of enabling the Autorité de la concurrence to close these proceedings by accepting their commitments and thus avoiding the need for litigation proceedings with regard to the cases joined under the numbers 11/0053 F and 11/0064 F. These commitments do not signify or imply any acknowledgement on the part of the Banks that the denounced practices referred to the Autorité de la concurrence by the initiating parties are justified or, *a fortiori*, that any breach or offence has been committed. These commitments are made on the understanding and in view of the confirmation, within the framework of discussions that have taken place with the Autorité de la concurrence during these proceedings, that the decisions of the Autorité de la concurrence that accept and make binding the commitments proposed by the undertakings in order to allay the competition concerns, pursuant to Article L464-2 of the Commercial Code, do not signify or imply that any breach of competition law has been established and admitted.

1 - COMMITMENTS

1. Pursuant to Article L464-2 of the Commercial Code, the Banks make the following commitments:

1.1 Direct debits and credit transfers

In anticipation of the end-date of 1 February 2017 provided by (EU) Regulation 260/2012:

a) the multilateral interbank fee charged on payment transactions made using a standard domestic direct debit (*AVP ordinaire)* will be reduced by half and set at €0.061 until 31 August 2013, and will be abolished on 1 September 2013; with a view to harmonising the conditions applying to standard domestic direct debits and domestic SDDs, the same fee will be charged for domestic SDDs until 31 August 2013, and will be abolished on 1 September 2013;

b) the multilateral interbank fee charged on payment transactions made using an accelerated domestic direct debit (*AVP accéléré*) will be reduced by half and set at €0.091 until 31 August 2013, and will be abolished on 1 September 2013;

c) the multilateral interbank fee charged on payment transactions made using an incoming international credit transfer, net of charges (*VOE VNF*) will be reduced by half and set at €0.915 until 31 August 2013, and will be abolished on 1 September 2013.

1.2 **Niche products**

In anticipation of the end-date of 1 February 2016 provided by (EU) Regulation 260/2012:

a) the multilateral interbank fee charged on payment transactions made using an interbank payment order will be reduced by half and set at €0.038 until 31 August 2013, and will be abolished on 1 September 2013;

b) the multilateral interbank fee charged on payment transactions made using an interbank payment order with cash payment will be reduced by half and set at €0.215 until 31 August 2013, and will be abolished on 1 September 2013;

c) the multilateral interbank fee charged on payment transactions made using an *télérèglement* will be reduced by half and set at €0.068 (rounded for technical reasons) until 31 August 2013, and will be abolished on 1 September 2013.

1.3 **Electronic bill of exchange**

Likewise, the multilateral interbank fee charged on payment transactions made using an electronic bill of exchange will be reduced by half and set at €0.061 until 31 August 2013, and will be abolished on 1 September 2013.

1.4 **Abolition of multilateral interbank fees**

The Banks undertake not to enter into agreements with other banks to charge multilateral interchange fees on the payment transactions referred to in subsections 1.1 to 1.3 above, or any other remuneration with an equivalent object or effect to the multilateral interchange fees that will be abolished in accordance with said subsections 1.1 to 1.3 above.

1.5 Rejected transactions, requests for the return of a bill of exchange (DRE) and cancellations

a) The multilateral interbank fee charged on rejected direct debits and special direct debits (EDF) will be reduced by half and set at €0.381. The same fee will also be charged for rejected domestic SDDs.

b) The multilateral interbank fee charged on rejected interbank payment orders and *télérèglements* will be reduced by half and set at €0.381.

c) The multilateral interbank fee charged on rejected electronic bills of exchange will be reduced by half and set at €0.381.

d) The multilateral interbank fee charged on requests for the return of bills of exchange will be reduced by half and set at €0.305.

e) The multilateral interbank fees charged on AOCT requests or similar transactions (such as a request to return a SEPA credit transfer or an account reversal for a SEPA credit transfer) will be set at €0.29, by reference to the cost study carried out on AOCT involving payment transactions by bank card.

f) The Banks undertake that with effect from 1 September 2013, the multilateral interbank fees charged on the rejected transactions referred to in subsections 1.5 (a) to 1.5 (c) above will only be paid to remunerate the provision or transmission of information relating to the existence or reasons for the rejection by the debtor's bank to the creditor's bank, when the latter has requested this service on behalf of its customer. The debtor's Bank will not be entitled to receive a rejected transaction fee from the creditor's bank if the creditor has not requested such information. Corresponding cost items will be listed in the terms of reference for the cost study that will be submitted to the Autorité de la concurrence for approval pursuant to subsection 1.6 (d) below.

1.6 Cost study

a) In order to ensure that the fees referred to in subsections 1.5 (a) to 1.5 (e) above are strictly based on the cost of the service provided, the Banks undertake to commission a cost study by an economic consulting firm that can provide guarantees of its impartiality and does not have any conflict of interest with any of the parties to the proceedings. A trusted third party will be asked to collect the cost data from the Banks and ensure it remains confidential.

b) The consulting firm's assignment will be to determine the costs that are strictly necessary when processing requests to cancel incorrectly cleared transactions (AOCT or similar) and requests for the return of bills of exchange (DRE), as well as the costs associated with rejected transaction fees, as defined in sub-section 1.5 (f). The study will look at direct debits and domestic SEPA credit transfers as well as interbank payment orders, *télérèglements* and electronic bills of exchange.

c) The consulting firm’s terms of reference will stipulate that the cost study must take into consideration the conditions set out in Article 8-2 of (EU) Regulation 260/2012, and in particular must enable the costs incurred by the bank with the best cost-efficiency ratio to be calculated. The study will look at a representative sample of banks, including the banks that have proposed the commitments, but with the exception of the Banque de France because of its atypical customer base. In the event a bank fails to provide the requisite cost data, suspension of the fees as provided in subsection 1.6 (g) below will apply to this bank only.

d) The banks will provide the Autorité with the terms of reference for the consulting firm’s assignment by no later than 15 November 2012. On receipt, the Autorité will transfer the proposed terms of reference to the initiating parties, and will organise a hearing of all the parties to assess the appropriateness of the cost items listed in the terms of reference, with a view to approving the terms of reference or amended terms of reference by no later than 31 December 2012.

e) The choice of economic consulting firm and of a trusted third party will be approved by the Autorité within 10 working days of the Banks' proposal. In the event approval of the proposed economic consulting firm (or trusted third party) is not granted, the Banks will propose a second economic consulting firm (or trusted third party) within 10 working days of the written notice informing the Banks that the first consulting firm (or third party) has not been approved. In the event approval is not granted a second time, the Autorité will appoint the economic consulting firm (or trusted third party) of its choice, after consulting the Banks, within 10 working days of the written notice informing the Banks that the second economic consulting firm (or trusted third party) has not been approved.

f) The cost study must be completed and its results must be released by no later than 1 July 2013. It will be forwarded to the Autorité de la concurrence within 48 hours of this date. The Banks undertake to forward to the Autorité, if requested and within three working days of the request, the cost data (broken down per bank and per cost item) on which the study was based, for its exclusive use. The Autorité will announce by no later than 30 July 2013 whether the study complies with the terms of reference it approved. The Banks undertake to adjust the fees referred to in sub-sections 1.5(a) to 1.5(e) above on the basis of the findings of the cost study, with effect on 1 September 2013.

The fees referred to in subsection 1.5 for domestic direct debits will be calculated to correspond to the equivalent adjusted fees for domestic SDDs. AOCT fees on domestic credit transfers will be calculated to correspond to the equivalent adjusted fees for domestic SEPA credit transfers.

g) In the event the cost study is not completed by 1 July 2013 or the study does not comply with the terms of reference as approved by the Autorité, the Banks undertake to suspend application of the multilateral interbank fees concerned by the cost study with effect from 1 September 2013, until they can be adjusted on the basis of a study that the Autorité de la concurrence considers is compliant; the Autorité will make its decision known no later than 45 days after receipt of the said study.

2 - GENERAL PROVISIONS

1. These commitments will enter into effect on 1 September 2012. If, however, the decision making them binding is notified after 31 July 2012, the commitments will enter into effect on the first day of the second month following notification to the Banks of the Autorité's decision making them binding.
2. These commitments are made for a period to expire on 1 February 2017, which is the final end-date provided in (EU) Regulation 260/2012, which will then enter into full legal force.
3. If, during this period, there is any material change in any of the laws or facts on the basis of which the appropriate nature of the commitments was assessed, including any due to any European developments, the Banks will be entitled to refer back to

the Autorité, requesting that it review or abolish these commitments, pursuant to paragraph 46 of the Procedural Notice of 2 March 2009.

Hogan Lovells letterhead

REFERRALS 11/0053 F AND 11/0064 F
COMMITMENT BY THE *FEDERATION BANCAIRE FRANCAISE*
(FRENCH BANKING FEDERATION – "FBF")

1. This commitment is made by the *Fédération Bancaire Française* (French Banking Federation – hereinafter, "FBF"). It supplements the commitments jointly made by BNP Paribas, Crédit Agricole, LCL, BPCE, Confédération Nationale du Crédit Mutuel, Crédit Industriel et Commercial, HSBC France, La Banque Postale, Société Générale, Crédit du Nord and the Banque de France (hereinafter, the "Banks") in order to allay the competition concerns identified in the preliminary assessment relating to practices involving multilateral interbank fees charged on payments made by direct debit, *télérèglement*, interbank payment order, electronic bill of exchange and credit transfer, dated 14 March 2012.

2. This commitment is made by the FBF without prejudice to its rights, for the sole purpose of enabling the Autorité de la concurrence to close these proceedings by accepting their commitments and thus avoiding the need for litigation proceedings with regard to the cases joined under the numbers 11/0053 F and 11/0064 F. This commitment does not signify or imply any acknowledgement on the part of the FBF (or the *Association Française des Banques*) that the denounced practices referred to the Autorité de la concurrence by the initiating parties are justified or, *a fortiori*, that any breach or offence has been committed. This commitment is made on the understanding and in view of the confirmation, within the framework of discussions that have taken place with the Autorité de la concurrence during these proceedings, that the decisions of the Autorité de la concurrence that accept and make binding the commitments proposed by the undertakings in order to allay the competition concerns, pursuant to Article L464-2 of the Commercial Code, do not signify or imply that any breach of competition law has been established or admitted.

3. Pursuant to Article L464-2 of the Commercial Code, the FBF makes the following commitment:

   The FBF will inform its members of the commitments jointly made by the Banks within fifteen (15) days of notification to the Banks and the FBF of the decision by the Autorité de la concurrence that makes the commitments binding. This information will be disseminated through a letter sent to the "heads" of each of its members, enclosing a copy of the Autorité's decision and the wording of the commitments. A copy of these letters will also be sent to the Autorité.