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Press and Information

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Judgment of the Court of First Instance in Case T-301/04

Clearstream Banking AG and Clearstream International SA v Commission

THE COURT OF FIRST INSTANCE DISMISSES THE ACTION BROUGHT AGAINST THE COMMISSION'S DECISION FINDING THAT CLEARSTREAM UNLAWFULLY REFUSED TO PROVIDE CERTAIN FINANCIAL SERVICES TO EUROCLEAR

Clearstream abused its dominant position on the market in the provision of primary clearing and settlement services related to securities issued in Germany

General information in the Commission's decision concerning the clearing and settlement of securities transactions

Clearing and settlement are complementary processes which take place following the trading of a security.

Clearing occurs between trading and settlement. It ensures that the seller and the buyer have agreed on an identical transaction and that the seller is entitled to sell the securities in question. Settlement is the final transfer of the securities and funds between the buyer and the seller, as well as the inclusion of the corresponding account entries.

Primary clearing and settlement are carried out by the financial institution which keeps the securities in final custody, whereas secondary clearing and settlement are carried out by intermediaries, that is operators, including lending institutions, other than the entity with custody of the securities.

Three categories of providers of clearing and settlement services can be identified: first of all, central securities depositories (CSDs) which provide, in their country of origin, primary clearing and settlement services for transactions concerning securities in their custody but which may also offer services as an intermediary concerning cross-border clearing and settlement transactions where the place of primary deposit of securities is in another country; second, international central securities depositories (ICSDs), the main activity of which is clearing and settlement in an international context and which have recourse, as intermediaries, to the services of CSDs; and finally banks, which offer, also as intermediaries, services to their customers concerning securities transactions.

Clearstream International SA (CI) is a holding company which is the parent company of Clearstream Banking AG (CBF), established in Frankfurt am Main (Germany) and Clearstream Banking Luxembourg SA (CBL). The Clearstream Group provides clearing, settlement and custody services concerning securities.

CBL and Euroclear Bank SA (EB), established in Brussels (Belgium), are the only two ICSDs currently operating in the European Union. CBF is the only financial institution in Germany entitled, as a CSD, to hold securities issued under German law in final custody and to provide primary clearing and settlement services related to them. It has a factual monopoly on the relevant market and is therefore in a dominant position on that market.

In 2004, the Commission adopted a decision in which it alleged that CBF and CI abused their dominant position, first, by refusing to provide primary clearing and settlement services to EB in reasonable time and by discriminating against it and, second, by applying discriminatory prices to EB. The Commission also ordered the two companies to refrain in future from repeating the infringements found to have taken place.

Judgment of the Court of First Instance

CBF and CI brought an action before the Court of First Instance against the Commission's decision.

In today's judgment the Court points out, first, that the persons requesting post-transaction processing services are not the sellers or buyers of the securities themselves and there is no contractual relationship between them and the central depository of the security. The latter has as customers only lending agencies and other financial intermediaries. Consequently, the persons requesting clearing and settlement services offered by CBF are intermediary depositories such as CSDs and ICSDs who are unable to provide their services, in relation to securities issued in Germany, to their own customers if they cannot make use of CBF's services.

Second, the Court holds that CBF's custody monopoly in respect of securities issued under German law results in a monopoly of post-transaction processing of those securities. It notes in that regard that clearing and settlement are possible only in relation to securities that are kept in custody.

With regard to the question whether CBF and CI have abused their dominant position, the Court finds that they failed to provide a justification for the two years EB had to wait before obtaining a computerised link that is part of CBF's everyday business and is usually granted by it to its customers within the space of a few months, which was the case for example for CBL. The Court rejects CBF and CI's explanation that the reason why EB was not granted access was that it had not carried out the preparations necessary for such access.

Concerning CBF and CI's argument that their conduct must be examined in the light of the rejection of CBF's request for access to Euroclear France in respect of all French securities and of the complete renegotiation of their contractual relations with EB, the Court points out that, while undertakings in a dominant position are entitled to protect their commercial interests, they nevertheless have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market.

The Court holds that the late provision of the services in question was likely to cause EB a competitive disadvantage. Consequently, the applicants may also not justify their conduct on the two grounds mentioned. In addition, since those two issues were raised more than a year after EB's request for access, their inclusion in the negotiations on the grant of access to EB can be regarded as an abuse.

The Court also notes that the conduct of an undertaking in a dominant position may be regarded as an abuse within the meaning of Article 82 EC even in the absence of any fault. The applicants' argument that they did not pursue an anti-competitive objective is therefore irrelevant to the legal assessment of the facts.

Finally, the Court holds that the primary clearing and settlement services for the cross-border transactions provided by CBF to the ICSDs and the CSDs are equivalent services. Consequently, the charging of a higher price to EB than to the national CSDs for equivalent services constituted discriminatory pricing prohibited by Community law.

Taking into account the above considerations, **the Court dismisses the action brought by CBF and CI in its entirety.**

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

Unofficial document for media use, not binding on the Court of First Instance.

Languages available: DE, EN, FR, PL, RO, SL

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-301/04>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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