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⁽¹⁾ Text with EEA relevance

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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 11 June 2002

relating to a proceeding under Article 81 of the EC Treaty

(Case COMP/36.571/D-1: Austrian banks — ‘Lombard Club’)

(notified under document number C(2002) 2091)

(Only the German text is authentic)

(2004/138/EC)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962 first Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by Regulation (EC) No 1/2003⁽²⁾ and in particular Articles 3 and 15 thereof,

Having regard to the Commission decision of 11 September 1999 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission in accordance with Article 19(1) of Regulation No 17 and with Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty⁽³⁾,

Having regard to the final report of the Hearing Officer in this case⁽⁴⁾,

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

Whereas:

1. INTRODUCTION

(1) There was in the past in Austria a long tradition of agreements, mainly about interest rates and charges/fees, among Austrian banks, based well into the 1980s in some measure on statute law⁽⁵⁾. Over the years the banks had created a close network of committees covering every conceivable subject within which, up until the unannounced investigation by the Commission in June 1998, they regularly (every fourth working day on average) coordinated their conduct with respect to every essential factor of competition. Being aware of the relevance of these agreements from an antitrust point of view, they tried (largely in vain as it turned out), through a mixture of evasiveness, deception and the destruction of records, to cover up or eradicate all traces of their meetings.

(1) OJ L 13, 21.2.1962, p. 204/62.

(2) OJ L 1, 4.1.2003, p. 1.

(3) OJ L 354, 30.12.1998, p. 18.

(4) OJ C 48, 24.2.2004.

(5) On 1 January 1994, the date of Austria's accession to the European Economic Area, the last remaining legal bases for all the agreements were removed.

(2) In establishing the facts, the Commission was able to rely on a large number of seized original documents dating from the relevant period such as minutes of meetings, memoranda, records of telephone conversations, correspondence, etc. The express object, and profound effect, of these agreements was to restrict competition. This constitutes a clear, unequivocal infringement of Article 81 of the EC Treaty, which must be punished by a fine.

(3) The structure of this Decision is as follows: by way of introduction, a few features of the Austrian banking market which are essential to an understanding of this case are described (section 2). This is followed by a brief description of the most important banks and bank groupings involved, being addressees of this Decision, and of the products/services covered by the cartel (section 3). After a brief review of the main procedural steps (section 4), the background to and organisational structure, functioning and object of the rounds of talks/committees in the Lombard network are discussed (section 5). There follows a chronological account of the main cartel meetings between 1994 and 1998 (sections 6 to 11). A separate section is devoted to selected special committees (section 12). The main arguments put forward by the undertakings are then discussed. The legal assessment of the facts (section 14), some reflections on procedural issues (section 15) and a discussion of the necessary penalties (section 16) are to be found at the end of the Decision.

2. THE AUSTRIAN BANKING MARKET

(4) The very high level of public ownership in Austrian banks until recent times may help explain why the pursuit of profit took a back seat to the quest for increased turnover and higher market share. On their own admission, the responsible banking executives were not able to make calculations based on business economics⁽⁶⁾. In the consumer lending sphere in particular this led, against a background of stagnating demand for credit, to oversupply⁽⁷⁾ and hence to declining interest margins for the banks.

(6) 42.290 (RLB).

(7) In terms of population size, the number of bank branches and bank employees in Austria is well above the EU average. Banks have basically two main sources of profit: net interest income, by far the largest source of income, and the profit from service transactions and commission business. In a nutshell, oversupply and weak demand for credit in Austria were bringing pressure to bear on interest margins and hence making possible only slight increases in net interest income, whereas commission income was enjoying dynamic growth.

- (5) Competition which leads to declining margins, to the point where prices fall below average costs, is normally considered by the undertakings concerned to be 'destructive'. In such circumstances the undertakings are faced basically with two alternatives. Either the steady decline in earnings leads to a shakeout (exit from the market or capacity reduction as a result of a merger) or the various players on the market try to restrict, as far as possible, the competition induced by the oversupply and thus to slow down or even stop the collapse in prices. The upshot is excessive prices and the artificial maintenance of inefficient market structures.
- (6) The Austrian banks opted, at least in part, for the second alternative. Since, owing to the, in the banks' view, 'uncontrollable risk', the possible scenario of a shakeout was not only regarded by the banks as a suitable starting point for business initiatives but also aroused 'fear' ⁽⁸⁾, the banks strove to achieve 'disciplined' and 'orderly' competition brought about by agreement ⁽⁹⁾. Cartel agreements proved to be a welcome means by which to combat so-called 'destructive, cut-throat competition', or free competition, as it might simply be termed ⁽¹⁰⁾. Episodes of more or less unrestricted competition used, however, to be described by the banks as 'hyperactivity'. Charges were seen in this context, not so much as a factor of competition, but more as 'a joint earnings opportunity', to the detriment of customers ⁽¹¹⁾. In fact, the Austrian banks' endeavours to achieve improvements in their margins by means of coordinated action, i.e. jointly at the expense of the consumer instead of individually at the expense of competitors, run like a leitmotif through this investigation. One bank itself admits that the cartel had the effect of preventing the necessary shakeout ⁽¹²⁾.
- (7) Because of the extensive standardisation of products, the publication ('posting at the counter') of interest rates, and regular price comparisons by the media and consumer bodies, the Austrian banking market is on the whole highly transparent. In order to increase this transparency still further, to be better able to monitor compliance with the cartel agreements and to minimise the effectiveness of any secret competition, e.g. through deviations

from published interest rates, Austrian banks regularly carried out extensive checks, 'competition-monitoring exercises', on their competitors and reached agreement on 'ongoing direct contact in respect of departures' from agreements 'which are presumed/alleged to exist by customers/supposedly established' ⁽¹³⁾. 'Should offers come to light which are at variance with the (agreed) principles', one of the cartel members assumed responsibility for 'coordination and clarification of the facts' ⁽¹⁴⁾. That such checks were the rule can be seen from the minutes of a cartel meeting in July 1994, according to which the Bank Austria representative proposed that 'competition-monitoring exercises be dispensed with in August' ⁽¹⁵⁾. In many cases, though, the temptation for the banks concerned to undercut the agreed rates and thereby increase their market share proved too great.

3. UNDERTAKINGS AND PRODUCTS CONCERNED

- (8) Almost all credit institutions from every major segment ⁽¹⁶⁾ took part in the conduct at issue. After the long-overdue shakeout, four bank groupings are now in a strong position on the Austrian banking market: HypoVereinsbank-owned Bank Austria, the savings bank grouping together with Erste Bank, the agricultural credit cooperative grouping together with Raiffeisen Zentralbank, and Bank für Arbeit und Wirtschaft/Postsparkasse. Some distance behind is the credit union grouping together with ÖVAG.

⁽⁸⁾ 41.916 (Erste). A shakeout occurred only sporadically and slowly (1990 merger between Zentralsparkasse and Länderbank, 1992 merger between Girocentrale and Österreichisches Creditinstitut, 1997 acquisition of Creditanstalt by Bank Austria and of GiroCredit by Erste Bank).

⁽⁹⁾ For evidence see Section 5.4.

⁽¹⁰⁾ See footnotes 141 and 283 and footnotes 130, 152, 168, 280 and 350.

⁽¹¹⁾ See recital 279.

⁽¹²⁾ 41.570 (BA).

⁽¹³⁾ 23.274 et seq.

⁽¹⁴⁾ 23.178 et seq.

⁽¹⁵⁾ 20.743 et seq.

⁽¹⁶⁾ In Austria a distinction is made between single-tier segments, as in the case of joint stock banks (Aktienbanken), provincial mortgage banks (Landes-Hypothekenbanken), building societies (Bausparkassen) and specialised banks, and multi-tier, or 'decentralised', segments. Savings banks (Sparkassen) and credit unions (Volksbanken) have a two-tier structure, and agricultural credit cooperatives (Raiffeisenbanken) have a three-tiered one. Within these multi-tiered segments, which call themselves 'bank groupings' (Bankengruppen), the respective lead institution performs coordination functions for the line of business carried on. The multifarious relationships and mutual rights and obligations between lead institutions and individual sector members are governed by the Banking Act (Bankwesengesetz).

(9) This Decision is addressed to the following credit institutions ⁽¹⁷⁾:

- a) Bank Austria Aktiengesellschaft (hereinafter called BA)

Following BA's merger with Creditanstalt AG (hereinafter called CA) ⁽¹⁸⁾ on 23 September 1998, BA is now the largest bank grouping in Austria. As a result of an assets merger in early 2001, Bayerische Hypo-Vereinsbank AG (hereinafter called HVB) acquired sole control of the entire BA grouping ⁽¹⁹⁾. The BA grouping's market share comes to approximately 25 %. In the whole of Austria the grouping has some 470 branches and employs around 13 000 people;

- b) Erste Bank der österreichischen Sparkassen AG (hereinafter called Erste)

Since it merged with GiroCredit Bank Aktiengesellschaft der Sparkassen on 4 October 1997 ⁽²⁰⁾, Erste has been the lead institution in the savings bank grouping, which consists of some 70 savings banks ⁽²¹⁾, and the second-largest banking group in Austria. The market share of the savings bank grouping together with Erste comes to approximately 30 % ⁽²²⁾. The grouping has some 1 500 branches in Austria and employs around 24 000 people;

- c) Raiffeisen Zentralbank Österreich AG (hereinafter called RZB)

RZB is the lead institution of the Austrian agricultural credit cooperative grouping. This is three-tiered in structure ⁽²³⁾ and has over 2 350 branches. The agricultural credit cooperative grouping has a market share of approximately 22 % and employs about 20 000 people. Besides its function as representative of the agricultural credit cooperative grouping, RZB engages in banking business itself, focusing on foreign business and looking after large customers ⁽²⁴⁾;

- d) Bank für Arbeit und Wirtschaft Aktiengesellschaft (hereinafter called BAWAG)

Since December 2000 BAWAG has been the principal shareholder in Österreichische Postsparkasse Aktiengesellschaft (PSK) ⁽²⁵⁾. As a result of the extensive organisational convergence between the two institutions, the BAWAG-PSK grouping has more than 2 000 branches throughout Austria and a market share of approximately 10 %, some 5 % of which is accounted for by BAWAG and 5 % by PSK ⁽²⁶⁾.

- e) Österreichische Postsparkasse Aktiengesellschaft (hereinafter called PSK).

PSK is (following a merger with effect from 1 October 1998) legal successor to Bank der Österreichischen Postsparkasse Aktiengesellschaft (hereinafter called PSK-B);

⁽¹⁷⁾ For descriptions of the Austrian banking market, see *inter alia* Commission decisions COMP/M.2125, HypoVereinsbank/Bank Austria, recital 21, COMP/M.2140, BAWAG/PSK, recital 9 and COMP/2402, Creditanstalt/RZB/JV, recital 15. The market shares mentioned further on in this section relate to retail banking and corporate banking (lending and deposit sides) and were obtained from the public versions of the abovementioned decisions, annual reports, publications and other publicly available sources. Although in terms of its scope the Lombard network goes far beyond retail and corporate banking, covering all essential competition parameters (see below), these market shares give a representative picture of the overall market positions of the banks and bank groupings concerned.

⁽¹⁸⁾ References in this Decision to 'CA' are to be read as references to Creditanstalt-Bankverein, which was subsequently renamed Creditanstalt AG, prior to the merger.

⁽¹⁹⁾ COMP/M.2125, HypoVereinsbank/Bank Austria.

⁽²⁰⁾ References in this Decision to 'GiroCredit' are to be read as references to GiroCredit Bank Aktiengesellschaft der Sparkassen before the merger. References to 'Erste' are, in respect of the period before 4 October 1997, to be read as references to Erste österreichische Spar-Casse Bank, and in respect of the period after that date, as references to Erste Bank der österreichischen Sparkassen AG.

⁽²¹⁾ Within the savings bank grouping there are special links which confer on it a group-like structure. All Austrian savings banks hold shares in Erste, which in turn has holdings in a number of savings banks. In its capacity as lead institution, Erste is required to perform various services for the savings banks affiliated to it, which result in a dense network of mutual rights and obligations.

⁽²²⁾ The market share of Erste on its own comes to approximately 7 %.

⁽²³⁾ The first tier comprises some 615 legally independent local agricultural credit cooperatives, which are engaged mainly in the business of retail banking and corporate banking for small and medium-sized enterprises. As the second tier they operate at the level of the Austrian provinces eight regional provincial agricultural credit cooperatives (Raiffeisen-Landesbanken — RLB), the shares in which are held by the primary banks. The RLB themselves engage in retail banking and corporate banking business and act as clearing houses for the primary banks, supplying extensive business and consultancy services to them. The third tier consists of RZB, more than 80 % of the shares in which are held by the RLB. Although the agricultural credit cooperatives are legally independent entities not subject to directions from the RLB and/or RZB, they have, owing to the united front they present in the market and the regionality principle, a restricted competitive relationship with one another.

⁽²⁴⁾ The market share of RZB on its own comes to approximately 2 %.

⁽²⁵⁾ Since 1 December 2000 74,82 % of PSK's share capital has been held by BAWAG and 25,18 % by KSP Unternehmensbeteiligungsgesellschaft mbH; see COMP/M.2140, BAWAG/PSK.

⁽²⁶⁾ BAWAG and PSK continue to operate, however, as legally independent limited companies and banking institutions.

- f) Österreichische Volksbanken AG (hereinafter called ÖVAG)

ÖVAG is the lead institution in the two-tier credit union sector, which consists of approximately 60 independent credit unions at the primary level. The credit unions cooperate closely in important areas such as organisation and marketing and are in turn majority shareholders of ÖVAG. The market share of the credit union grouping comes to approximately 7 %⁽²⁷⁾. The grouping has some 600 branches in Austria and employs about 5 000 people;

- g) NÖ Landesbank-Hypothekenbank AG (hereinafter called NÖ Hypo)⁽²⁸⁾

Since 1 January 1997 NÖ Hypo has been a member of the ÖVAG group⁽²⁹⁾. It is active primarily in Vienna and Lower Austria. Its market share there is reckoned not to exceed 2 %⁽³⁰⁾.

- h) Raiffeisenlandesbank Niederösterreich-Wien reg Gen mbH (hereinafter called RLB)

In 1997 (immediately after the transfer to it of the banking business of Raiffeisenbank Wien reg Gen mbH) Raiffeisenbank Wien AG (RBW) was merged with, and re-registered as, its principal shareholder RLB⁽³¹⁾. The sphere of activity of RLB/RBW is confined to the federal capital Vienna, where it has a market share of about 5 %.

- (10) The abovementioned banks or bank groupings offer in the areas of retail banking and corporate

banking⁽³²⁾ all the products and services which are typically provided by universal banks. As will be shown in the sections that follow, the Austrian banking cartel related to the whole range of these products and services, from savings and lending rates⁽³³⁾ to charges and fees, and covered further factors of competition such as advertising, contact with media/consumer representatives and calculation bases.

- (11) There has been a sharp increase in recent years in the volume of loans granted to manufacturing and services enterprises for investment purposes (in 1997 it grew by 14 %). This is attributable among other things to the increased export activity of this category of borrowers, whether they be large or small/medium-sized enterprises.

- (12) In 1999 deposits by foreign non-banks with Austrian credit institutions totalled some EUR 26 billion and loans granted by Austrian credit institutions to foreign non-banks amounted to approximately EUR 36 billion. In February 2002 Austrian credit institutions maintained some 380 000 savings deposit accounts on behalf of foreign customers⁽³⁴⁾.

⁽³²⁾ Definitions: 1. Retail banking: (a) deposits: customers can dispose of sight deposits at any time (these generally consist of low-interest-bearing current, payroll and pension accounts). Savings deposits are cash deposits in accounts which, unlike sight deposits, serve investment purposes and they can be withdrawn on production of a 'capital savings booklet' (in the case of 'variable' savings deposits, the interest payable may be altered by the credit institution in the light of money and capital market developments, while 'fixed-interest' savings deposits have an agreed duration and interest rate). 'Preferential rates' may be offered for deposits (which may then be called 'bonus-carrying' deposits). Charges/fees may be levied, e.g. for maintaining an account, entering amounts into an account, cheque transactions or the use of ATM cards; (b) loans: these cover personal loans (including building loans and mortgages), 'works council members loans' (both in Austrian schillings and in foreign currency) and charges/fees (in particular the 'handling fee'); (c) other areas are payment transactions, in particular transfer charges (both in Austria and cross-border) and security transactions (e.g. custody charges, buying and selling fees). 2. Corporate banking can be subdivided into banks and non-banks: (a) the former category comprises interbank business (interbank charges, for both domestic and cross-border payment transactions, including value-date rules, and for letters of credit), federal financing and bill discounting/collection charges; (b) non-banks corresponds, with regard to deposits, to retail banking. In the case of loans, there are both operating loans (including the 'fixed advance' or 'cash advance', a short-term loan to the most creditworthy corporate customers, in both domestic and foreign currency, where the interest rate is based on the money market and is fixed, as is the duration) and investment credit; (c) other services in the corporate banking sphere are payment transactions, export financing (in particular the 'house bank margin' and the 'house bank margin commission'), documentary business and security issues.

⁽³³⁾ The word Konditionen (conditions) is often used in the original (German) version of the documents cited in this Decision to mean 'interest rates' or 'rates', and has been so translated here.

⁽³⁴⁾ Source: OeNB.

⁽²⁷⁾ The market share of ÖVAG on its own comes to less than 1 %.

⁽²⁸⁾ 'NÖ' is an abbreviation of Niederösterreich (the province of Lower Austria).

⁽²⁹⁾ Before that, the province of Lower Austria was NÖ Hypo's sole shareholder. ÖVAG and NÖ Hypo continue to operate as limited companies and banking institutions.

⁽³⁰⁾ Like the other seven provincial mortgage banks (Landes-Hypothekenbanken), NÖ Hypo is an ordinary member of the Association of Austrian Provincial Mortgage Banks (Verband der österreichischen Landes-Hypothekenbanken, hereinafter called Hypo-Verband).

⁽³¹⁾ Before this, RLB had carried out transactions for its own account to only a very limited extent. References to 'RBW' are, in respect of the period before the re-registration, to be read as references to Raiffeisenbank Wien reg Gen mbH.

4. THE PROCEEDING

4.1. The cause

(13) In April 1997 (...), a member of the management board of an Austrian bank committed suicide. He left a note which he sent, along with a number of enclosures, to the Public Prosecutor's office and to opposition parties. Among the enclosures was a list of 13 measures to improve banks' earnings on which 'Lombard 8.5.' had been written by hand.

(14) On 6 May 1997 the Commission became aware of the existence of this document, clearly the agenda for, or record of, a meeting held on 8 May 1996⁽³⁵⁾, and prepared the ground for an investigation into suspected competition-restricting agreements and/or concerted practices. On 30 June 1997 the Freedom Party lodged a complaint, invoking Article 3 of Regulation No 17, against eight Austrian credit institutions for suspected competition-restricting agreements.

4.2. The inspections

(15) On 23 and 24 June 1998 Commission officials, accompanied by officials from the Federal Austrian Ministry for Economic Affairs, carried out, on the basis of Commission decisions of 18 June 1998, unannounced inspections on the premises of, among others, BA, CA, Erste, RZB, PSK and BAWAG.

(16) Since PSK opposed the inspection, officials of the Federal Ministry for Economic Affairs, armed with an order of the President of the Cartel Court, carried out a search of the bank's premises pursuant to Article 142(4) of the Austrian Code of Criminal Procedure, read in conjunction with Article 4(5) of the EU Competition Act (BGBl 627/94 and BGBl 175/1995).

(17) In the course of the inspections and search, the officials of the Commission and of the Federal Ministry for Economic Affairs found extensive written evidence (lists of participants, records of meetings, memoranda, internal notes, etc.) which confirmed the suspicion about the existence of prohibited agreements and/or concerted practices.

⁽³⁵⁾ The document was subsequently found in the course of the inspections. It is a list drawn up (by BA) of measures decided on at the Lombard Club meeting on 8 May 1996; see recital 248.

4.3. Requests for information

(18) On 21 September 1998 the Commission sent to most of the credit institutions referred to at (15) and to other credit institutions and associations requests for information pursuant to Article 11 of Regulation No 17. The addressees were asked therein to furnish the dates of, and names of participants in, the committee meetings⁽³⁶⁾ and to submit the documents that were available to them.

4.4. The undertakings' reaction

(19) After receiving the requests for information, the largest banks concerned requested a meeting with the Commission's Director-General for Competition and offered, at that meeting, their 'cooperation' in establishing the facts. This 'cooperation' was such that the banks, instead of answering the requests for information, would state the facts 'voluntarily' and waive their right to a hearing. In return, the Directorate-General for Competition would not insist on the requests for information being answered and would impose only a 'moderate' fine. The Director-General welcomed in principle the banks' willingness to cooperate, but rejected the idea of a deal between the banks and the Commission, pointing out that the proceeding would run its course like any other. The requests for information would therefore have to be answered on time and in full.

(20) With regard to the 'voluntary' statement of the facts as proposed by the banks, the Director-General said that the banks naturally remained at liberty, independently of the timely and complete answering of the Commission's requests for information, to communicate facts which were not covered by those requests. The Commission would consider in each individual case whether such communications of facts were involved and, if this was indeed the case, whether those facts were of such a nature as to make a substantial contribution to the establishment of an infringement and hence could form the subject matter of possible fine-reducing 'cooperation'.

(21) All the addressees subsequently answered the requests for information. Some took the view in this connection, regarding the major part of the request for information addressed to them, that they were under no obligation to reply and that they were therefore submitting the relevant documents and answering the relevant questions voluntarily as part of the abovementioned 'cooperation'. The Commission rejected this interpretation of the law as being incorrect.

⁽³⁶⁾ See section 5.2.

(22) Soon afterwards the largest banks concerned transmitted to the Commission a document described as a 'joint exposition of the facts' in which they set out at length the historical background to the cartel and summarised briefly and assessed from their point of view the content of the individual committee meetings as apparent from the documents which had been seized or the transmission of which had been requested. At the same time they again submitted the documents which had been seized by the Commission and those the transmission of which had been requested pursuant to Article 11 of Regulation No 17. In order that it might assess any added value that these documents submitted with the exposition of the facts might represent for the ongoing investigation, the Commission asked the banks to indicate whether any of these documents were not yet known to the Commission, and if so which. The banks, however, considered this to be neither feasible nor necessary.

(23) On 13 September 1999, the Commission transmitted to the banks concerned the statement of objections of 11 September 1999. After access had been granted to the file and the banks had made written submissions, a hearing was held on 18 and 19 January 2000. On 22 November 2000 the Commission transmitted to the banks concerned the supplementary statement of objections of 21 November 2000.

(24) On 5 February 2001 all the banks concerned transmitted to the Commission a document described as a 'supplementary exposition of the facts' (together with a number of further documents) in which they set out from their own point of view the facts portrayed in the supplementary statement of objections. After access had been granted to the file and the banks had made written submissions, a second hearing was held on 27 February 2001.

5. BACKGROUND TO, AND CREATION, FUNCTIONING AND OBJECT OF, THE 'LOMBARD' NETWORK

(25) Before giving a chronological account of cartel meetings during the years 1994 to 1998 (see section 7), the historical background to, and the organisation, functioning and object of, the Lombard network will be briefly described here.

(26) The Commission's knowledge is directly based on documents dating from the relevant period, records of meetings, internal memos, correspondence, etc., which were either seized in the course of the unannounced inspections or submitted in response to requests for information ⁽³⁷⁾.

5.1. Background

(27) The 1979 Austrian Banking Act provided for the possibility for specialist banking associations or for banks themselves to conclude agreements on the interest rate for savings deposits terminable both at three months' notice (base rate agreement ⁽³⁸⁾) and at a freely agreed period of notice (credit interest agreement ⁽³⁹⁾) and on advertising (competition agreement ⁽⁴⁰⁾). The generally poor profitability of Austrian banks in the early 1980s elicited a reaction from the legislator in the form of an amendment to the 1986 Banking Act and from banks themselves in the form of the establishment of a target-rate cartel for lending and deposit rates (regulative agreements, 1985). Several committees, Lending Rates Committee, Deposit Rates Committee, Minilombard Committee, came into being at that time.

(28) In the summer of 1989 the regulative agreements were annulled ⁽⁴¹⁾. Since, however, the credit institutions found it difficult to set their rates meaningfully without recourse to binding agreements, they continued to conclude agreements on lending and deposit rates within the network.

(29) The relevance of such agreements from an antitrust point of view was already known at that time.

(30) On 1 February 1991 the Association of Austrian Chambers of Labour lodged an application with the Restrictive Practices Court, asking it to require a total of nine banks to notify, as a cartel, the introduction or raising by them of current account charges. In the Association's opinion, the uniform introduction or raising of such charges on 1 January 1991 could be attributed only to a cartel agreement.

(31) The Court having found for the Association, the banks concerned lodged an appeal against its decision before the Higher Restrictive Practices Court, which described the agreement on the joint action or the coordination of that action in respect of the introduction or raising of the charges as conduct which served only '(...) to restrict competition for customers interested in holding or opening current accounts' ⁽⁴²⁾.

⁽³⁸⁾ See Article 20(2) of the 1979 Banking Act.

⁽³⁹⁾ See Article 20(3) of the 1979 Banking Act; no such agreements have been concluded since 1980.

⁽⁴⁰⁾ See Article 21(9) of the 1979 Banking Act.

⁽⁴¹⁾ See Grubmayr, *Die Ausnehmungen der Banken, Versicherungen und Genossenschaften aus dem Kartellgesetz* (1991) p. 8 et seq. Only the competition agreement and the base rate agreement remained in force until the end of 1993.

⁽⁴²⁾ Higher Restrictive Practices Court 9 September 1991, Oct 7/91 — Current account charges — WBL 1991, pp. 394, 396.

⁽³⁷⁾ The sources of verbatim quotations are cited in a footnote at the end of the last paragraph dealing with the relevant meeting.

- (32) In view of Austria's impending accession to the European Economic Area (EEA), increasing attention was being paid to European antitrust law. In September 1992, for instance, an article, entitled 'Bankenkartelle im EWR', in the leading banking periodical explained the effects of Austrian accession to the European Economic Area. After a detailed description of the relevant case-law of the European Court of Justice and of the decision-making practice of the Commission, the author concludes that 'the Austrian banking industry (would) be well advised to consider the compatibility with the EEA of the various agreements, decisions, circulars, recommendations (...). Such agreements will therefore have to be amended in advance of accession to the EEA or they will have to be dispensed with altogether' ⁽⁴³⁾.
- (33) Again in 1992 there appeared in the omnibus volume *Banken im Binnenmarkt*, edited by a leading academic, an article dealing in depth with the subject of 'EEC antitrust law and banks'. In this it was pointed out that the inter-State clause is 'normally interpreted very broadly' by the Community institutions and is applied 'at all events where' a cartel 'covers the whole territory of a Member State'. The author came to the conclusion that agreements on rates, should there still be any in force following the expiry of the regulative agreements, were inadmissible under antitrust law in both the European Economic Area and the Community. An exempting of such agreements by the Commission was 'altogether unrealistic' ⁽⁴⁴⁾.
- (34) When, in September 1993, the media learned of a strategy paper concerning uniform calculation bases and minimum interest rates drawn up jointly by BA, CA, Erste, RZB, ÖVAG, PSK and BAWAG (see recital 74), a representative of the Vienna Chamber of Labour publicly accused the banks of having concluded a cartel agreement. The banks denied the allegation, stating that there had been no board resolutions to that effect. In a letter to CA dated 28 March 1993, Bank für Tirol und Vorarlberg expressed the view that, given 'the unexpected publication of the paper under the caption "concerted practice" ..., further thought (would) have to be given to the specific form any action (would) take' ⁽⁴⁵⁾.
- (35) Despite the manifest incompatibility of their agreements with Community antitrust law, one only has to look at the articles in publications on the subject mentioned at recitals 32 and 33, the banks were unimpressed by the imminent applicability of the Community competition rules. As regards the competition agreement, for example, which restricted the advertising of interest rates and was accordingly described in one of the abovementioned articles as 'doubtless subject in its entirety to the EEC cartel ban', it was proposed in December 1993 that these agreements should be maintained even after 1 January 1994. In the course of a conversation at the end of December 1993 between the (representatives) of BA, CA and RZB, it transpired that CA, RZB and PSK wished to maintain the agreements, while BAWAG did not. BA's (representative) accordingly wrote in his record of the meeting that 'talks had to be held with (...) (BAWAG's representative) as soon as possible' ⁽⁴⁶⁾. In fact, avoidance of advertising interest rates was a regular feature of the agreements subsequently concluded between the Austrian banks.
- (36) Austria acceded to the European Economic Area on 1 January 1994. The 1994 Banking Act entered into force on the same day, removing the last remaining statutory bases for any coordination between the credit institutions. On 1 January 1995 Austria became a member of the European Union.
- (37) But the banks did not terminate their agreements despite the fact that they manifestly infringed EEA/EC antitrust law, continuing instead with the numerous existing rounds of talks even after 1 January 1994. The Lombard network thus remained in existence and served to an unlimited extent as a vehicle for the many arrangements and agreements between the participating banks. The latter took the view that cartel agreements 'had always been part' ⁽⁴⁷⁾ of banking and they therefore did not in the least intend to change this now simply because of the applicability of European antitrust law.
- (38) The Austrian public was still suspicious, and in connection with changes to rates and charges, accusations of 'cartel-like pricing policies' ⁽⁴⁸⁾ and of 'manifest agreements' ⁽⁴⁹⁾ were repeatedly being made in public and the question was raised of the existence of 'interest rate agreements' ⁽⁵⁰⁾.
- (39) Numerous documents show in fact that the banks were actually aware of the relevance of their agreements from an antitrust point of view.

⁽⁴³⁾ Gugerbauer, Die kartellrechtliche Bankenbereichsausnahme im EWR, Österreichisches Bank-Archiv 9/92, p. 770 et seq.

⁽⁴⁴⁾ T. Eilmansberger, EWG — Kartellrecht und Banken, in S. Griller, ed., *Banken im Binnenmarkt* (1992), p. 711 et seq.

⁽⁴⁵⁾ Profil of 20 September 1993, 2767; 2413, 2417.

⁽⁴⁶⁾ 26.309; 25.111.

⁽⁴⁷⁾ 43.101 (BA).

⁽⁴⁸⁾ Austria Presse Agentur (APA) of 27 January 1994.

⁽⁴⁹⁾ APA of 1 September 1994.

⁽⁵⁰⁾ Salzburger Nachrichten of 25 November 1997.

- (40) During a committee meeting in October 1994 about the increasing of transfer charges, 'reference was made to the antitrust aspects (in business with customers)' and it was stated that 'in the EU a fundamentally different (from the Austrian) legal interpretation of the issue prevailed. The legal departments of the various institutions ought to look into this EU issue' ⁽⁵¹⁾.
- (41) During talks in November 1994 about charges for cross-border payment transactions, it was stated that 'the question whether the banks, in setting an interbank rate, were infringing the Restrictive Practices Act could not be answered immediately' ⁽⁵²⁾.
- (42) During talks in March 1995 it was stated, in connection with the conduct of such rounds of talks, that 'the possible consequences of EU antitrust law (would) have to be examined in due course' ⁽⁵³⁾.
- (43) During talks in May 1995, again on the subject of price coordination between banks, a report (clearly an internal GiroCredit document) was discussed which examined the question 'whether the regular discussions in the Cross-border Transactions Committee, during which interbank pricing was coordinated between Austrian banks, were questionable from an antitrust point of view'. The report concludes that 'a restriction of competition may also be seen under EU law in the agreeing of interbank prices'. This could 'result in the initiation of investigation proceedings by the European Commission and the imposition of heavy fines' ⁽⁵⁴⁾.
- (44) On 24 May 1996 a 'bank management board member who wishes to remain anonymous' confirmed in a statement to Austria Presse Agentur that there was 'a desire in banking circles for definite agreements', but admitted that the interest rate agreements common in the 1980s (see recital 27) were now no longer possible 'for reasons of antitrust law' ⁽⁵⁵⁾. The board member in question omitted to mention, though, that these inadmissible agreements still remained fully in force.
- (45) During talks in October 1996 the participants came to conclusion that none of the variations on the theme with which they were concerned there 'provided a solution to the antitrust problem' ⁽⁵⁶⁾.
- (46) The awareness of the antitrust problem to which their agreements gave rise finally induced the institutions involved to concern themselves with taking practical precautionary measures.
- (47) During talks in November 1997 one participant suggested that, as a precaution, in future 'no more minutes should be kept of such meetings'. The legal department of one institution was consulted on the matter. The down-to-earth recommendation of the lawyers consulted could not have been clearer: 'Destruction of all existing records' ⁽⁵⁷⁾.
- (48) Further proposals to camouflage the agreements were the 'renaming (e.g. market observations)' ⁽⁵⁸⁾ of internal memoranda on the subject and their return to their author for 'subsequent destruction' ⁽⁵⁹⁾. Records and minutes were now marked 'Strictly confidential' ⁽⁶⁰⁾.
- (49) During talks in May 1998 a participant again mentioned that his attention had been drawn by his institution's legal department 'to the problem of minutes ... in the light of competition reservations'. 'Therefore, no minutes of these talks (would) be kept' ⁽⁶¹⁾.
- (50) In a radio interview in February 2000, (a representative) of one of the banks concerned admitted that the Austrian banks would 'have to put an end' to their agreements. Because they had not done so, however, 'we shall have to pay the price' ⁽⁶²⁾.

5.2. The individual committees, their relationship with one another and the role of the lead institutions

- (51) The agreements were comprehensive as regards their contents, highly institutionalised and closely interconnected, and covered the entire country, 'down to the smallest village', as one institution aptly put it ⁽⁶³⁾. For every banking product there was a separate committee on which the competent employee at the second or third level of management sat. In practice, however, this separation as regards contents was not strictly adhered to. Sometimes, substantively related topics which were covered by more than one committee were dealt with in one and the same committee. The individual committees were part of an organisational whole.

⁽⁵¹⁾ 6867; 6884 and 85; 6888; see recital 347.

⁽⁵²⁾ 8586 et seq.

⁽⁵³⁾ 21.251 et seq.

⁽⁵⁴⁾ 8523 et seq.; 8569 et seq.; 8573 et seq.; 32.223 et seq.

⁽⁵⁵⁾ 39.

⁽⁵⁶⁾ 21.361 et seq.

⁽⁵⁷⁾ 1564 et seq.

⁽⁵⁸⁾ 12.175 et seq.

⁽⁵⁹⁾ 14.342; 14.259.

⁽⁶⁰⁾ e.g. 21.189.

⁽⁶¹⁾ 4359 et seq.

⁽⁶²⁾ On the ORF's 'Journal zu Gast' programme, quoted in the press on 21 February 2001.

⁽⁶³⁾ 41.519 (BA).

- 1) Lombard Club, specialist committees, special committees and regional committees ⁽⁶⁴⁾
 - a) Each month (apart from the holiday month of August) [senior representatives] of the largest Austrian banks got together as the top-level body (Lombard Club). In addition to matters of general interest that were clearly neutral from a competition point of view (as indicated by the presence of representatives of the Austrian National Bank (OeNB), [they] discussed changes in interest rates, advertising measures, etc.
 - b) One level down were the product-based specialist committees. The most important ones were the 'Lending Rates Committees' and the 'Deposit Rates Committees', which, as their names suggest, dealt with lending and deposit interest rates and were convened either separately or jointly (Lending and Deposit Rates Committees). A constant flow of information took place in particular between these committees and the Lombard Club at the top. [A representative of a bank] thus transmitted the conclusions reached in the Lombard Club to [a representative of a bank] on the Deposit Rates Committee, who for his part would 'take them into account on Monday at the Federal Lending and Deposit Rates Committee' ⁽⁶⁵⁾.
 - c) Both the Lombard Club and the Vienna Lending and Deposit Rates Committees sent out signals to the diverse and numerous 'regional committees', which held regular meetings in every province of Austria. In some provinces even, the hierarchical structure of 'Lombard' and specialist committees was replicated.
 - d) The views expressed in the provinces flowed in the opposite direction back to meetings of the 'Federal Lending and/or Deposit Rates Committees', in which bank representatives from Vienna met with their opposite numbers from the provinces and whose decisions were in principle valid for the whole of Austria.
 - e) For, *inter alia*, corporate banking, retail banking business involving the self-employed, mortgage lending and building loans, there were separate special committees (namely the Minilombard Committee, the Key Account Management Committee, the Liberal Professions Lending Rates Committee, the Mortgages Committee and the Building Loans Deposit Rates Committee).
 - f) Lastly, there took place at regular intervals a large number of further committee meetings on matters of relevance from a competition point of view: in the 'Treasurer Committee', federal financing and interest rate questions were discussed; in the various payment transactions committees (in particular the Payment Transactions Committee, the Cross-border Transactions Committee and the Organising Committee of Austrian Credit Institution Associations), fees and charges for payment transactions were among the matters discussed; in the 'Export Financing Committee', matters of export financing were discussed, along with other matters; and in the 'Securities Committee', minimum fees, charges and interest rates were discussed.
 - g) From all these special committees there stands out the 'Controller Committee', on which [representatives] of the controlling departments of the leading Austrian banks sat. It was at meetings of this committee that, for instance, uniform calculation bases and joint proposals for improving earnings were drawn up. The banks thereby increased the mutual transparency of their respective cost and calculation factors.
- (52) Between all these committees concerned primarily with lending and deposit rates and with charges/fees, a regular flow of information took place. Discussions in one committee were often held over pending agreement in another. Lastly, the higher-ranking nature of the Lombard Club meant that, in controversial cases, its guidance was awaited, while in the case of less important decisions confirmation 'at the next Lombard' was 'considered unnecessary' ⁽⁶⁶⁾.
- (53) With a view to extensive, countrywide implementation of (or for the purpose of coordination with) the agreements concluded in the abovementioned Vienna committee meetings, there was also a regular flow of information to the various regional committees in the provinces and from the latter to the central committees in Vienna. Occasionally the regional committees themselves sent representatives to Federal Lending and/or Deposit Rates Committee meetings. A certain employee of a Carinthian bank thus attended federal committee meetings regularly 'as representative for Carinthia' with a view to reporting back to the 'Carinthian Banking Committee' ⁽⁶⁷⁾.
- (54) The results achieved in the various committees were transmitted within each institution to the managing board, where they were either translated into action immediately or fed into the decision-making process.

⁽⁶⁴⁾ The subheadings in italics are intended only to assist the reader and have no legal significance.

⁽⁶⁵⁾ 1914.

⁽⁶⁶⁾ See recital 306.

⁽⁶⁷⁾ 23.051, 23.053.

- (55) The importance to the institutions concerned of this close network of regular and comprehensive coordination measures and agreements can also be described in quantitative terms. During the period covered by this investigation (1 January 1994 to the end of June 1998), in Vienna alone, i.e. excluding the numerous regional committee meetings, at least 300 meetings took place. In terms of working days, this means that, in Vienna alone, a meeting took place every four days.
- (56) Lastly, even outside this institutionalised network, numerous contacts took place between representatives of the banks concerned, sometimes at the highest level, on interest rates and charges/fees.
- (57) The banks were also anxious to avoid competition from competitors in other, closely related industries. So as not to see the agreements reached between the banks on building loan rates 'thwarted by cheaper offers by insurance companies', it was agreed that 'talks on the subject should be held with the insurance companies' ⁽⁶⁸⁾.
- 2) The role of the lead institutions of the savings bank, agricultural credit cooperative and credit union groupings: intra- and inter-grouping coordination
- (58) At this point the special part played in the network by the lead institutions Erste (ex-GiroCredit), RZB and ÖVAG must be examined. Their historical, well-practised role as coordinator and representative of their respective bank groupings on the Austrian banking market was directly utilised for the smooth functioning of the Lombard network. Firstly, they organised the mutual transfer of information between Vienna and the provinces within the respective bank groupings, and secondly they represented the interests of their grouping vis-à-vis the other groupings in the cartel.
- (59) In ensuring the systematic, seamless feedback of information between the Vienna and regional committees, the well-coordinated communication channels played an important role. While in the case of the large banks, with their countrywide presence, these information channels ran between the head offices in Vienna and the provincial head offices, in the case of the multi-tier bank groupings recourse was had to specially created internal information and representation mechanisms.
- (60) In its capacity as lead institution, GiroCredit/Erste took care of the flow of information to and from the institutions of the savings bank grouping in the provinces. Within the agricultural credit cooperative and credit union groupings, this task fell respectively to RZB and ÖVAG in their capacity as lead institutions. Details and illustrative examples of these ingenious representation and information mechanisms are to be found in Section 12.3 below.
- (61) At the same time, the lead institutions represented not only their own interests at cartel meetings but those of their respective groupings as well. The other cartel members perceived the lead institutions in this connection as being representatives of their respective groupings. The agreements were therefore reached not only between the individual institutions themselves but also between the groupings, as can be seen from the following examples.
- (62) BAWAG, for instance, announced its decision on a prospective cut in interest rates 'by fax to the other sectors, which will then take their lead from it' ⁽⁶⁹⁾; first of all, 'opinion formation' took place 'in the individual sectors' before 'further negotiations' could take place between the groupings ⁽⁷⁰⁾; before the agreed measure was implemented, there also took place a 'consultation by telephone with the other sectors' ⁽⁷¹⁾; at a Consumer Lending Rates Committee meeting 'the request' was made, addressed to GiroCredit, RBW ⁽⁷²⁾ and ÖVAG, 'to all sectors to get the provincial talks going' ⁽⁷³⁾; and on another occasion 'the agricultural credit cooperative sector (was) requested to do more to rein in offers by small cooperatives' ⁽⁷⁴⁾. ÖVAG, for example, informed the other cartel members as follows: 'CU sector: KSB (capital savings accounts) lower' ⁽⁷⁵⁾, or 'credit union sector favours 1/2 % cut ...' ⁽⁷⁶⁾; 'GiroCredit/savings banks' informed the other cartel members of a 'cut in bonus-carrying deposits coordinated with provincial savings banks' ⁽⁷⁷⁾; in early 1997 it was established to the satisfaction of cartel members that 'the cuts agreed' at the end of 1996 had 'in the meantime been implemented by all sectors' ⁽⁷⁸⁾.

5.3. The pattern followed by committee meetings

- (63) Cartel members constantly strove, especially at meetings of those committees which dealt explicitly with interest rates, to reach a consensus on the setting of rates. As described in detail in sections 7 to 11, these meetings all followed a very similar pattern.

⁽⁶⁹⁾ 36.339; 14.321; 1286 et seq.; 2314.

⁽⁷⁰⁾ 1278; 790; 13.175; 1972; 14.431; 12.102.

⁽⁷¹⁾ 14.634.

⁽⁷²⁾ As a rule RZB represented the agricultural credit cooperative grouping at committee meetings. In the case of Vienna Lending and Deposit Rates Committee meetings, this role was occasionally performed by RLB/RBW.

⁽⁷³⁾ See recital 257.

⁽⁷⁴⁾ 20.210 et seq.

⁽⁷⁵⁾ 20.764 (CU stands for credit union).

⁽⁷⁶⁾ 20.952.

⁽⁷⁷⁾ 20.757.

⁽⁷⁸⁾ 4231; 14.370.

⁽⁶⁸⁾ 23.178 et seq.

- (64) Often what occasioned such meetings was a change in the key lending rates⁽⁷⁹⁾ by the National Bank, whereupon the banks would promptly meet 'for the joint clarification of measures to be taken'⁽⁸⁰⁾. In many cases the banks reacted to a lowering, say, of the key lending rates by immediately reducing deposit rates without at the same time reducing lending rates, claiming that 'against a background of changing interest rates' they could 'earn a profit only through asymmetrical interest rate adjustments'⁽⁸¹⁾. Such an 'asymmetrical' passing-on⁽⁸²⁾ of key lending rate reductions, which resulted in substantial interest earnings for the banks (at the expense of the consumer), called, if it was to be successful, for prior coordination between the banks. The coordinated delaying of lending rate cuts was therefore the 'declared aim of all committee meetings on the subject'⁽⁸³⁾.
- (65) The representative of the 'host' institution would start the proceedings by asking for 'contributions on current interest rate developments'⁽⁸⁴⁾, whereupon one participant after another would say what reaction (i.e. a certain rate reduction or increase) his institution considered appropriate at that time, 'subject to coordination with the other institutions'⁽⁸⁵⁾. Sometimes meetings began with a debriefing about earlier joint actions. After all opinions and proposals, such as a reduction in the interest rates for one product 'in exchange for an agreement'⁽⁸⁶⁾ on another product, had been put forward (and sometimes for the time being 'supported by all those present'⁽⁸⁷⁾ or 'flatly rejected by almost all those present'⁽⁸⁸⁾), negotiations began on the joint manner of proceeding. Occasionally, individual banks had already 'fully coordinated' their positions in advance of the cartel meeting, as in the case of the '[...] talks' prior to a Deposit Rates Committee meeting in July 1995⁽⁸⁹⁾. Finally, the proposals would be 'put to the vote'⁽⁹⁰⁾ or agreement would be reached on a 'compromise'⁽⁹¹⁾.
- (66) The negotiations regularly produced concrete results. The banks then stated in minutes and memoranda, for example, that 'after tough negotiations (...) the following result was achieved'⁽⁹²⁾; 'agreement was reached on a general cut in rates'⁽⁹³⁾; maximum interest rates 'were agreed'⁽⁹⁴⁾; the rate rise for commercial loans was 'agreed between the big Vienna banks as follows'⁽⁹⁵⁾; 'for Austria as a whole, (interest rates were) agreed'⁽⁹⁶⁾; specific minimum rates were 'fixed or endorsed'⁽⁹⁷⁾ or 'coordinated'⁽⁹⁸⁾ as guidelines; a 'consensus' was reached on the reduction of rates⁽⁹⁹⁾; after fairly lengthy discussions, 'a general interest rate cut was finally imposed'⁽¹⁰⁰⁾; 'there was unanimity' on an interest rate cut⁽¹⁰¹⁾; 'agreement' was reached on the cutting of deposit rates and on the introduction of a 'minimum handling fee'⁽¹⁰²⁾; it was decided 'to stop advertising interest rates'⁽¹⁰³⁾; the 'following interest rate cuts were decided' on the deposit side⁽¹⁰⁴⁾; the 'following agreements were made' for foreign currency loans⁽¹⁰⁵⁾; and participants would 'put the agreed recommendations into practice in their respective areas'⁽¹⁰⁶⁾.
- (67) The banks did not always succeed in reaching a consensus immediately. The common decision-making process often went, for purposes of 'preliminary decision-making'⁽¹⁰⁷⁾, 'reaching further agreement'⁽¹⁰⁸⁾, 'refining'⁽¹⁰⁹⁾, 'pre-coordination'⁽¹¹⁰⁾ or 'final coordination'⁽¹¹¹⁾, through several committee meetings (involving mostly the Vienna Lending and/or Deposit Rates Committee, the Minilombard Committee, the Federal Lending and/or Deposit Rates Committee and the Lombard Club)⁽¹¹²⁾.
- (68) If the close, intensive coordination within the network itself proved insufficient, interest rates had to be 'finally negotiated'⁽¹¹³⁾ outside the competent committees, either as part of 'various discussions and agreements', 'further telephone conversations'⁽¹¹⁴⁾, 'telephone contacts between the institutions'⁽¹¹⁵⁾, or '(senior staff) phoning each other and discussing a coordinated approach as soon as possible'⁽¹¹⁶⁾.
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- (79) The key lending rates are the rates at which the National Bank makes central bank money available to credit institutions. See, for example, footnotes 144, 153, 157, 216, 217, 244, 261, 285 and 319.
- (80) See, for example, footnote 144.
- (81) 38.174.
- (82) See, for example, 26.489, 26.491, 38.174 or 31.640 et seq.
- (83) 14.439.
- (84) 20.801.
- (85) See footnote 246.
- (86) 26.726.
- (87) See, for example, footnote 224.
- (88) See, for example, footnote 160.
- (89) 15.431; 20.755.
- (90) See, for example, footnote 160.
- (91) See, for example, footnote 225.
- (92) 26.726.
- (93) See, for example, footnote 144.
- (94) See, for example, footnote 154.
- (95) See, for example, footnote 195.
- (96) See footnote 210.
- (97) See footnote 217.
- (98) See footnote 292.
- (99) See footnote 217.
- (100) See footnote 247.
- (101) See footnote 262.
- (102) See footnotes 279 and 309.
- (103) See footnote 288.
- (104) See footnote 342.
- (105) See footnote 344.
- (106) 23.178.
- (107) See footnote 216.
- (108) See footnote 216.
- (109) See, for example, footnote 271.
- (110) See, for example, footnote 210.
- (111) See footnotes 216 and 304.
- (112) See, for example, recital 187 et seq.
- (113) See footnote 264.
- (114) See, for example, footnotes 262 and 332.
- (115) See footnote 263.
- (116) See, for example, footnotes 277 and 189.

- (69) If agreement was reached for each banking product concerned, 'implementation dates' or the particular 'deadline for implementing interest-rate cuts' was 'agreed' ⁽¹¹⁷⁾. Sometimes, before implementation took place there was a further 'telephone consultation with the other sectors' ⁽¹¹⁸⁾.
- (70) Even the provision of information to the public on the particular measures that had been agreed was the subject of a 'coordinated approach' ⁽¹¹⁹⁾ on the part of the banks.
- (71) Sometimes, however, the banks were unable to reach agreement in the end, recording this, for example, as follows: 'No agreement on rates (was) reached at the Lombard meeting' ⁽¹²⁰⁾; with respect to capital savings accounts, 'initially no unanimous agreement' could be reached ⁽¹²¹⁾; the banks were in the end unable 'to come to any unanimous decision' and therefore had to 'negotiate further' at another meeting ⁽¹²²⁾; the joint attempt to make reductions in cash advances seemed 'for the time being to have failed' ⁽¹²³⁾; and it was 'on the whole not possible to achieve the ambitious goals set (for lending rates) at the last talks' ⁽¹²⁴⁾.
- (72) Those institutions, which from time to time changed interest rates without prior coordination, caused 'turmoil' in the relevant committee and were subjected to some sharp criticism from competitors. Such 'completely surprising' measures, because they were 'obviously kept secret', were 'regarded as not very appropriate by all the other banks' inasmuch as they 'contradicted the stated objective of all the relevant committee meetings' ⁽¹²⁵⁾. If therefore an institution thought it necessary to carry out 'surprising interest rate changes', then at least 'immediate information should be provided to all members of the Lending Rates Committee'. In such cases, all the other institutions could do was agree on a common reaction to such steps, described as a 'breaking of ranks'. The anger at this occasional 'breaking of ranks' by BAWAG was so great in one instance that the bank was even threatened with exclusion from the cartel ⁽¹²⁶⁾.

5.4. The object

- (73) The object of the agreements at issue was to restrict and distort competition between the undertakings concerned in relation to the matters dealt with by the committees. The agreements and concerted measures were intended, at the expense of consumers, to improve the banks' earnings. A departure from the cartel agreements, which, in the banks' view, safeguarded 'reasonable competition', would, on the other hand, lead to an 'erosion of margins' ⁽¹²⁷⁾. The banks themselves repeatedly expressed this aim in as many words, as can be seen from the following examples.
- (74) The strategy paper referred to at (34) drawn up jointly by BA, CA, Erste, RZB, ÖVAG, PSK and BAWAG suggests a 'displacing and limiting' of competition 'to a bearable level'. As a 'mistake' to be 'jointly avoided' in future, the banks identify 'price competition' inasmuch as it can be 'immediately engaged in by competitors'. The measures which should be 'jointly taken' included in particular the introduction of 'new charges and commissions' (such as a handling, transaction or custody charge) ⁽¹²⁸⁾.
- (75) The Federal Deposit Rates Committee meeting of 22 February 1995 was declared open with the following words: 'The exchange between banks of experience in relation to interest rates has in the past repeatedly proved to be a useful means of avoiding uncontrolled price competition. Today's Federal Deposit Rates Committee meeting (...) should thus likewise ensure a purposive and reasonable manner of proceeding in shaping all banks' terms of business. The way in which interest rates are currently being set shows very clearly that it is again necessary for us to sit down together and counteract problematic price developments. I hope that you will succeed today (...) in stopping these upward trends in interest rates. (I) hope, in the interests of your institutions, that constructive solutions will be found' ⁽¹²⁹⁾.
- (76) With a view to 'easing the existing cut-throat competition' ⁽¹³⁰⁾, it was necessary, through 'disciplined market behaviour' and in particular through 'full compliance' with 'coordinated (...) minimum interest rates', to restrain 'exaggerated competition' ⁽¹³¹⁾.
- (77) The express 'object' of the Federal Lending Rates and Deposit Rates Committees was, among other things, 'to establish as far as possible a coordinated approach both in the lending and in the deposit sphere' ⁽¹³²⁾ and 'to find as uniform an approach as possible to reducing lending rates' ⁽¹³³⁾.

⁽¹¹⁷⁾ See footnotes 155 and 226.

⁽¹¹⁸⁾ 14.634.

⁽¹¹⁹⁾ See, for example, footnote 155.

⁽¹²⁰⁾ See, for example, footnote 167.

⁽¹²¹⁾ See footnote 218.

⁽¹²²⁾ See footnote 244.

⁽¹²³⁾ See footnote 311.

⁽¹²⁴⁾ See footnote 351.

⁽¹²⁵⁾ See footnote 233.

⁽¹²⁶⁾ See, for example, footnotes 210, 215, 233, 234, 242 and 283.

⁽¹²⁷⁾ e.g. 2560.

⁽¹²⁸⁾ 108; 136 to 138.

⁽¹²⁹⁾ 1991.

⁽¹³⁰⁾ 3507 et seq.

⁽¹³¹⁾ 2535 et seq.

⁽¹³²⁾ See recitals 190.

⁽¹³³⁾ See recitals 241.

- (78) The banks' economic interest in these agreements was set out in a memorandum concerning the Special Consumer Lending Rates Committee meeting of 30 April 1996: 'Should the specified minimum rates be enforced, this would be de facto tantamount to a rate increase and a widening of margins' ⁽¹³⁴⁾. A further example of the benefits derived by the banks to the detriment of consumers is provided by the 'asymmetrical' passing-on of key lending rate reductions ⁽¹³⁵⁾ in the form of an immediate cut in deposit rates without a simultaneous cut in lending rates. The banks were aware that 'against a background of changing interest rates' they could 'earn a profit only through asymmetrical interest rate adjustments' ⁽¹³⁶⁾. Such coordinated delays in reducing lending rates resulted in substantial interest earnings for the banks and was thus the 'stated objective of all the relevant committee meetings' ⁽¹³⁷⁾.
- (79) The renunciation of advertising lending and deposit rates, agreed by the banks, was aimed at 'counteracting the heated competitive situation' and 'avoiding' competition between banks 'at this information level' ⁽¹³⁸⁾.
- (80) According to a file note dated 7 March 1997 the committees served to 'advise on measures to stem competition in the field of private financing, which has since become highly undisciplined once more. (...) All bank representatives therefore wish to see a return to rather more orderly competition' ⁽¹³⁹⁾.
- (81) In a file note on the Vienna Lending Rates Committee meeting on 5 May 1997 it is stated that: 'On 5 May 1997 a Vienna Special Lending Rates Committee meeting took place with a view to setting once more minimum limits for lending rates in the case of personal loans and minimum margins for fixed-interest loans and foreign-currency loans in order to optimise income' ⁽¹⁴⁰⁾. In another note on this meeting it is stated that: 'The dramatic decline in the lending margin has induced the representatives of the Vienna institutions to hold countless "coordination meetings" aimed especially at coming to grips with the recent "hyperactivity" and dumping prices' ⁽¹⁴¹⁾.
- (82) The competition-restricting purpose of the committees is not even disputed by some banks.
- (83) To sum up, it is clear from their own evidence that the banks concerned strove to bring about among themselves, through their 'useful' and 'constructive' agreements, 'controlled', 'reasonable', 'standardised', 'disciplined', 'eased', 'sensible', 'displaced', 'limited', 'moderate' and 'orderly', all euphemisms for distorted and restricted, competition.

6. CHRONOLOGY OF EVENTS: INTRODUCTION

- (84) The following sections describe how the institutionalised and interconnected network of numerous, wide-ranging committees led to a situation where the institutions concerned regularly and continuously jointly coordinated their behaviour on the market.
- (85) The description takes the form of a chronology of events, starting in January 1994, the point at which Austria acceded to the European Economic Area.
- (86) It focuses on those committees which were broadest in scope and the most closely interlinked in operational terms: the 'Lombard Club', the 'Minilombard Committee', the 'Federal Lending and/or Deposit Rates Committees', and the 'Vienna Lending and Deposit Rates Committees' (including the 'Consumer Lending Rates Committee' and the 'Liberal Professions Lending Rates Committee'). The other committees are either dealt with alongside these at the relevant points or mentioned in a separate section after the chronology of events. For reasons of space, however, it is not possible within the confines of this Decision to mention or describe all the committees in the network, and less still all the meetings ⁽¹⁴²⁾.

7. CHRONOLOGY OF EVENTS: 1994

February to March: 'asymmetrical' passing-on of the cut in the key lending rates — agreement to cut deposit rates and maintain lending rates; avoidance of competition in respect of building loans

- (87) After the Austrian National Bank cut the discount rate ⁽¹⁴³⁾ on 12 February, a Vienna Deposit Rates Committee meeting was held on 18 February on BA's

⁽¹³⁴⁾ 2582.

⁽¹³⁵⁾ See, for example, 26.489, 26.491, 38.174 or 31.640 et seq.

⁽¹³⁶⁾ 38.174.

⁽¹³⁷⁾ 14.439.

⁽¹³⁸⁾ 13.704 and evidence at recital 128.

⁽¹³⁹⁾ 2565.

⁽¹⁴⁰⁾ 36.030 et seq.

⁽¹⁴¹⁾ 20.682.

⁽¹⁴²⁾ A footnote, the reference is at the end of the last paragraph dealing with the relevant committee in each case, indicates where to find quotes (the arabic numerals refer to the page numbers of the investigation file).

⁽¹⁴³⁾ i.e. the interest rate paid by the national bank on the purchase of bills of exchange or securities which are not yet mature, for the period running from the date of purchase to the date of maturity. The Austrian National Bank's discount rate has not existed since 1 January 1999, when it was replaced by the base rate.

premises 'for the joint clarification of measures to be taken in respect of savings and current account deposits'. At the meeting 'agreement was reached on a general cut in rates': base rate to be cut to 2,25 % (BAWAG 0,25 % above that), premium-aided savings products to 4,75 %, capital savings accounts by 0,25 %, substitute products by 0,25 % each, special rates to 4,75 % in Vienna and 5 % in the provinces, and current account interest rates by 0,25 % on the debit and credit sides ⁽¹⁴⁴⁾.

(88) It was decided to start implementing these cuts in the week beginning 7 March. By cutting interest rates in a coordinated manner the banks were in a position to reap substantial additional profits ⁽¹⁴⁵⁾. On 8 March [senior representatives of Erste] decided, expressly referring to the need to keep in step with the bank's competitors, to cut the overdraft and credit rates by the agreed 0,25 %. [Senior representatives of BAWAG] also referred in [their] reduction decision to the 'round of interest cuts'. CA also cut its rates during the agreed period. According to an internal memo to [senior representatives of NÖ Hypo] entitled 'Cut in savings deposit rates by 9 March 1994', a telephone survey among the banks involved had shown 'that competitors will stick essentially, with small variations, to this target [set by the Deposit Rates Committee]' ⁽¹⁴⁶⁾.

(89) Following the Vienna Deposit Rates Committee meeting, (...) representatives of the various banks met on 23 February in the Minilombard Committee. They agreed not to cut lending rates and to 'put a limit of five years if possible, seven or eight years at the most, on the fixed interest rates increasingly demanded by customers ...' ⁽¹⁴⁷⁾.

(90) An internal report of 22 February to [senior representatives of CA] states: 'The eight main Vienna banks ⁽¹⁴⁸⁾ have agreed, even in emergencies, not to pay above cash-market rates for option contracts (if this can be maintained, a new minimum margin will be introduced)' ⁽¹⁴⁹⁾.

(91) At their monthly Lombard Club talks on 9 March the [assembled representatives] agreed that '[representatives] of the five new building loan banks' should 'discuss the principles of a rational lending rates policy' ⁽¹⁵⁰⁾. These were the banks set up between 1993 and 1995 by BA,

BAWAG, CA and Erste, among others, for the specific purpose of granting building loans ⁽¹⁵¹⁾. These specialist banks were set up following the partial exemption from capital gains tax of securities (debentures) issued to refinance commercial building loans. A committee covering this field was set up in the same spirit as the existing committees covering all other areas of banking, in order to 'avoid destructive competition between building loan banks' ⁽¹⁵²⁾. The first meeting of the 'Building Loans Group' (sometimes also referred to as the Building Loans Deposit Rates Committee) appears to have taken place on 6 February 1995.

April to June: discussions on cutting interest rates, 'divergence' in savings deposit rates, fixed interest rates — the need for 'joint decisive action' to improve earnings

(92) On 15 April the Austrian National Bank cut the key lending rates again. 'Individual telephone conversations' immediately followed between NÖ Hypo, PSK and Erste, as did an 'informal consultation' between CA, BA, Erste, BAWAG and RBW, during which it was 'unanimously found' that another cut in savings deposit rates should not follow this key rate cut ⁽¹⁵³⁾.

(93) Although 'on the telephone, the sectors agreed not to take any measures to cut rates for savings and current account deposits', Bank Austria used the Vienna Deposit Rates Committee meeting of 25 April 'to discuss possible cuts none the less'. After a lengthy discussion 'it was agreed', 'so as to steady' the rates 'which had recently been getting out of hand once again', to 'keep to a kind of moratorium' for new savings deposits and to pay no more than 4,5 % interest in the Vienna area and 4,75 % in the provinces. Compliance with this agreement was to be monitored through 'closer observation of competitors' ⁽¹⁵⁴⁾.

(94) The matter was also discussed in the Deposit Rates Committee on 16 May. This episode illustrates how the banks deliberately acted together to the detriment of consumers. The banks were particularly concerned to avoid 'a widespread' cut in savings rates, which would 'exceed the cut posted at the counter', because they would then have to lower lending rates and thus pass on the cut in key lending rates to consumers. If savings rates had to be cut, then this should be done 'with as little publicity as possible', especially as regards the 'bonus-carrying' savings deposits which 'did not require posting'. In order to keep consumers in the dark, the

⁽¹⁴⁴⁾ 1310 et seq.; 14.491 et seq.; 12.041 et seq.

⁽¹⁴⁵⁾ In this case amounting to several tens of millions.

⁽¹⁴⁶⁾ 38.167; 38.157; 38.159.

⁽¹⁴⁷⁾ 14.251; 1238.

⁽¹⁴⁸⁾ i.e. CA, BA, RZB, BAWAG, PSK, GiroCredit, Erste and ÖVAG.

⁽¹⁴⁹⁾ 26.398.

⁽¹⁵⁰⁾ 1203.

⁽¹⁵¹⁾ CA — 3 Banken Beteiligungsfonds Aktiengesellschaften; Bank Austria Wohnbaubank Aktiengesellschaft; S-Wohnbaubank Aktiengesellschaft; Hypo-Wohnbaubank Aktiengesellschaft; Raiffeisen Wohnbaubank Aktiengesellschaft; IMMO-Bank Aktiengesellschaft; BAWAG Wohnbaubank Aktiengesellschaft.

⁽¹⁵²⁾ 19.565 et seq.

⁽¹⁵³⁾ 2474; 14.336.

⁽¹⁵⁴⁾ 14.485; 12.369.

banks' representatives agreed on an 'approach on talking to the press' whereby, for example, a general savings interest rate cut would be said to be 'impossible' and attention would be drawn to the 'unchanged posted rates'. In the end, however, the 'coordinated approach' was a failure because an 'apparently unfortunate statement on the subject' issued by one of the institutions undermined the joint PR effort and a general cut was subsequently reported on TV.

(95) The maximum rates for new savings deposits discussed on 25 April (see recital 93) were confirmed and 'recommendations were unanimously adopted': interest rates for savings bonds should be 'made to diverge', with interest rates for one-year savings accounts reduced by 0,25 % and rates for five-year accounts raised by 0,25 %. It was 'agreed that these measures should be implemented this week and next, and by Whitsun (i.e. 22/23 May) at the latest'. (PSK had until 26 May) ⁽¹⁵⁵⁾.

(96) Things turned out differently, however. There was public criticism of the prematurely announced (see recital 94) cut in savings rates, so that it was not possible to 'implement the recommendations of the Deposit Rates Committee meeting on 16 May 1994 to the extent planned' ⁽¹⁵⁶⁾.

(97) The Minilombard Committee (for corporate banking) met directly after this Deposit Rates Committee meeting and talked about not lowering lending rates in response to the cut in key interest rates. The 'absolute minimum rate' for operating loans was set at 8 % ⁽¹⁵⁷⁾.

(98) The Deposit Rates/Consumer Lending Rates Committee meeting (held jointly with a Liberal Professions Lending Rates Committee meeting) of 21 June illustrates how information was exchanged between the Vienna committees and the provinces. As with every lending and deposit rates meeting, the representative of RZB obtained data on the current interest rate situation from the

regional offices, in this case with the planned 'divergence' in savings bond rates particularly in mind ⁽¹⁵⁸⁾. The logistics of this exchange of information within the agricultural credit cooperative grouping was described in a letter from the Carinthia Raiffeisenlandesbank to the Vienna head office (RZB): 'RZB informs us of the progress and conclusions of the various bank committees in Vienna, such as the Deposit Rates Committee and Lombard meetings. So that we can pass on this information as quickly as possible to the agricultural credit cooperatives in Carinthia, I would ask you to ensure that management informs the Carinthia representative directly and that the agricultural credit cooperative department of our institution is informed by the same post or by fax' ⁽¹⁵⁹⁾.

(99) The abovementioned 'divergence' was the main subject of discussion at this Deposit/Consumer Lending Rates Committee meeting. It was advocated by BA in particular. Raising the rates for five-year savings accounts, however, was 'flatly rejected by almost all those present', since they were afraid that this time they would also have to raise the savings rates for bonus-carrying deposits, which would 'nullify the recently implemented interest rate cuts'. In the end, the proposed 'divergence' was 'put to the vote'. BA and GiroCredit voted in favour, PSK, BAWAG, RZB and NÖ Hypo against. Erste and CA would follow the lead given by BAWAG.

(100) Another problem that the banks had to discuss in this meeting was the growth in demand from consumers for fixed-interest loans. Setting a fixed interest rate for the entire duration of the loan would bind the banks to that rate and they would no longer be able to respond to changes in the refinancing rates. They therefore needed to come to an arrangement to deal with the growing demand for this form of lending, unfavourable from the banks' point of view: 'All the banks represented (...) agree that where possible fixed interest rates should no longer be quoted at all'. As regards rates for mortgage loans, CA, BA and BAWAG, among others, would, in accordance with the 'opinion of the committee', raise the rates to 7,25 % in July. A further increase to 7,5 %, however, was only 'agreed on in principle', since its implementation was 'viewed with scepticism'. The discussion was finally brought to a close with a reference to 'sticking to the agreed maximum rate of 4,25 % for fresh funds' ⁽¹⁶⁰⁾.

⁽¹⁵⁵⁾ 14.483; 14.734 et seq.; 491; 12.212 et seq.; 26.473, 26.475 and 38.174.

⁽¹⁵⁶⁾ 2020; 26.499.

⁽¹⁵⁷⁾ 1235.

⁽¹⁵⁸⁾ 2019.

⁽¹⁵⁹⁾ See 2018.

⁽¹⁶⁰⁾ 14.474; 706.

(101) The Minilombard Committee met two days later. It found that for fixed advances, instead of the 'minimum rate agreed some time previously' of VIBOR + 0,5 %⁽¹⁶¹⁾, more favourable interest rates were occasionally being offered. The Vienna institutions were therefore urged to ensure that, as on previous occasions, the '[representatives] decide at the next Lombard meeting' 'not to tolerate' the undercutting of the agreed minimum interest rate 'any longer'⁽¹⁶²⁾. The handwritten comment 'too early' on this memo suggests, however, that it was considered premature for the [representatives] to deal with this matter at that time (in fact the [representatives] were unable to reach an agreement at the following meeting, see recital 104). Further items discussed were the maximum fixed-interest period (it was to be seven years, and in the event of early repayment a suitable penalty was to be payable) and the 0,5 % house bank margin (for details see section 12.1), where it was considered that joint action should be taken to counteract the 'frequent attempts of exporters' to 'bring the margins down'. Finally 'it was agreed to make a discreet cut in the prime rate (...) to around 9,75 % in the course of July'⁽¹⁶³⁾.

(102) During this phase the institutions seem not to have stuck very closely to the agreements made in respect of some products. Although in the case of savings deposits (employee group rates) 'all the major banks were sticking to the agreed interest rates' (even BAWAG was 'very disciplined and very cooperative'), in other areas a 'lack of discipline in setting terms' was observed, which had again taken 'the same forms as at the time when the regulative measures ceased to apply'⁽¹⁶⁴⁾. 'Joint decisive action to improve margins' therefore seemed necessary. However, the general assessment was that 'the right moment for binding agreements would come only once the (likely to be rather poor) half-yearly results [1994] were presented'. Only then could 'more discipline, emanating from the Lombard Club, be expected ...'⁽¹⁶⁵⁾.

(103) This meeting of the Lombard Club took place on 6 July. One of the subjects discussed by the [representatives] on this occasion can be identified from the internal memo written to brief CA's [representative], which states, 'Since we (referring to BAWAG and PSK) have not implemented the proposal of the Deposit Rates Committee (regarding "divergence", see recitals 97 and 99), pending a meeting between yourself and [...] [BAWAG's [representative]], the other institutions have not taken

any action either. Apparently, [...] [BA's [representative]] wants to speak to you'. They also discussed building advances and loans; CA, 'in cooperation with Bank Austria and Erste and in opposition to the findings of the Deposit Rates Committee' (see recital 100) proposed an immediate increase. Lastly, they discussed employee group rates for personal loans, for which, although the 'big banks usually stuck to the agreed interest rates', a one-off low rate below the agreed interest rates was being contemplated⁽¹⁶⁶⁾.

(104) However, 'no agreement on rates was reached at the Lombard meeting'⁽¹⁶⁷⁾.

July to September: joint reduction of deposit rates, joint retention of lending rates; joint preview of charge increases

(105) On 11 July the [representatives] of BA and CA met to talk about lending and deposit rates. In an internal memo dated 8 July, addressed to BA's [representative] in preparation for the meeting, it is stressed, 'that the price war in lending and deposit rates' must be 'stopped immediately'. Large-scale financing, rather than being carried out 'in destructive competition by one competitor', should instead be implemented 'in syndicate by the leading major banks' and with higher interest rates. Deposit rates should be cut (see recital 108)⁽¹⁶⁸⁾. CA's [representative] was likewise briefed by his subordinates before the meeting⁽¹⁶⁹⁾.

(106) On 13 July [a meeting took place at controller level]. [Representatives] for marketing/retail banking in the various banks also took part in this meeting 'so that genuinely feasible action could be discussed'. A 'rapid cut' in deposit rates was considered to be 'urgently required'. It was therefore suggested to [representatives] responsible for deposit rates that preferential rates be cut by 0,25 % by 1 August and that no more than 4,5 % interest be paid, coupled with a cut in interest rates for one-year savings accounts by 0,5 to 4 %. Criticism was also expressed of the fact that some 20 or 30 companies (the Top 30) were 'getting' the banks 'to outbid one another'⁽¹⁷⁰⁾. In order to prevent this form of competition in future, it was suggested that they draw up a list of these companies and deal with them in accordance with a 'code of conduct' or take joint action (syndicated financing).

⁽¹⁶¹⁾ The Vienna interbank offered rate was the rate at which banks could lend each other money in the short term, i.e. for a period of 3 to 6 months (three or six month VIBOR); it corresponded to the monthly average of the short-term rates published by eight credit institutions in Vienna; it was replaced on 1 January 1999 by the EURIBOR.

⁽¹⁶²⁾ 2467 et seq.

⁽¹⁶³⁾ 16.328.

⁽¹⁶⁴⁾ 14.249; 491.

⁽¹⁶⁵⁾ 15.773 et seq.; 12.210; 26.577.

⁽¹⁶⁶⁾ 2469 et seq.

⁽¹⁶⁷⁾ 34.645.

⁽¹⁶⁸⁾ 31.673.

⁽¹⁶⁹⁾ 26.588.

⁽¹⁷⁰⁾ This took the form of attempts by creditors to apply pressure on banks by pointing to more favourable offers by other banks.

- (107) Lastly, 'the Federal Deposit Rates Committee was asked to turn its attention to a comprehensive implementation process from the beginning of August' ⁽¹⁷¹⁾.
- (108) These 'talks on interest rate adjustments' (Federal Deposit Rates Committee) took place, taking express account of the 'talks held [at senior management level] [on 6 July]', on 25 July. BA presented its views, developed 'in full cooperation with Creditanstalt' (see recital 105) on a rate cut, on the basis of which the following 'recommendations were formulated': cut in the preferential rates by 0,25 % (as discussed a short while previously in the Controller Committee) — in 'a meeting between [...], [...] had also spoken' in favour of this option ⁽¹⁷²⁾, 'divergence' — in savings bonds (i.e. rate cut for one-year savings bonds and simultaneous increase for five-year bonds), cut in employee savings rates by 0,25 % and new maximum rates for medium-term notes. As recommended [at controller level], these measures were to be implemented as quickly as possible (by 1 August, if feasible), and it was agreed that mutual checks would not be undertaken in August 'so as to ensure smooth implementation'.
- (109) Lending rates were also discussed, and it was found that in the provincial capitals 'recommended rates were largely being followed', but that in rural areas lower rates were frequently offered, which practice should be 'stopped in the coming weeks'. The 'priority goal' of raising building loan rates by 1 August was discussed. While Erste, GiroCredit and RBW 'agreed with this proposal' or 'had taken this step', BAWAG was prepared to raise rates only together with CA, while CA was waiting for BAWAG. There was therefore greater need for coordination or, as the minutes put it, '[representatives at senior management level] would have to talk' ⁽¹⁷³⁾.
- (110) Two days later, on 27 July, high-level telephone calls took place between BA, CA, BAWAG, Erste and GiroCredit on the subject of a concerted cut in deposit rates. In an internal memo, BA's representative on the Lending and Deposit Rates Committees summarised these telephone conversations as follows: '[...] thinks that he is bringing [...] round to the idea of a savings rate cut as discussed [at the Federal Deposit Rates Committee meeting on 25 July, see recital 108], but just wants to be sure that PSK will lower its rates too. If so, then BAWAG will cut its rates this coming weekend.' The writer of this memo recommends that BA 'stick to its schedule, GC (GiroCredit) and EÖ (Erste) are pretty reliable partners' ⁽¹⁷⁴⁾.
- (111) On 2 August APA reported that 'the Austrian interest rate scene is changing once again': the big banks had cut deposit rates for one-year savings accounts and for preferential-rate deposits by 0,25 % on 1 August, while other banks planned to do the same by the middle of August. BA and BAWAG actually implemented the agreed 'divergence' in capital savings, with Erste due to follow suit (it did so on 10 August ⁽¹⁷⁵⁾). CA finally decided after all to raise building loan rates to 7,25 % as discussed ⁽¹⁷⁶⁾. Erste had already raised its rates for building loans on 29 June, explicitly stating as its reason that its 'main competitors' would 'also be raising their rates' ⁽¹⁷⁷⁾.
- (112) In September the time had also come for the banks to jointly discuss raising a number of charges the following year. At the Payment Transactions Committee meeting on 14 September the participants informed one another of the extent and timing of their planned increases in charges for maintaining accounts, accounting entries, cheque transactions and payment cards ⁽¹⁷⁸⁾.
- (113) Following a joint 'review of the cut in deposit rates' carried out in July at a meeting of the Controller Committee held on 7 September ⁽¹⁷⁹⁾, [representatives] met in the Minilombard Committee on 22 September. First, it was noted that for fixed advances, the maximum duration, agreed in June (see recital 101), of seven years was now being adhered to as far as possible 'by all the institutions'. It was not thought sensible to raise lending rates, else deposit rates would also have to be raised ⁽¹⁸⁰⁾.
- (114) The same conclusion was reached unanimously by those participating in the Vienna Lending and Deposit Rates Committee meeting the following day. No changes should be made 'so that the market remains calm'. It was counted 'a success' that the agreed preferential rates 'were being kept to', especially by the big institutions, as test deposits with competitors proved. As soon as the secondary market yield ⁽¹⁸¹⁾ exceeded 7,5 %, or by mid-November at the latest, another Lending and Deposit Rates Committee meeting should be held ⁽¹⁸²⁾.

⁽¹⁷¹⁾ 3669; 15.767; 31.686.

⁽¹⁷²⁾ 15.431.

⁽¹⁷³⁾ 20.743 et seq.; 2014 et seq.; 700 et seq.; 26.620.

⁽¹⁷⁴⁾ 26.458.

⁽¹⁷⁵⁾ 38.169.

⁽¹⁷⁶⁾ APA, 2 August 1994.

⁽¹⁷⁷⁾ 38.168.

⁽¹⁷⁸⁾ 22.165 et seq.

⁽¹⁷⁹⁾ 3662.

⁽¹⁸⁰⁾ 14.239 et seq.

⁽¹⁸¹⁾ The secondary market is the market for securities already in circulation (especially on the stock exchange). An average secondary market yield is regularly calculated from the yields of these securities.

⁽¹⁸²⁾ 16.358; 649; 15.755 et seq.; 14.470.

October to December: concerted rise in lending rates, avoidance of competing by advertising interest rates, confirmation of minimum charges for securities

(115) At (the) meeting [at controller level] on 25 October (...) an 'urgent need for action on the lending side' [was identified], where the banks should 'aim for interest rate rises for personal and corporate loans'. To this end, BA would call a meeting of the Minilombard Committee, in which [representatives at controller level] would take part. As regards the 'Top 30' customers, greater coordination in the area of syndicate financing was called for, so that rates could be improved (see recital 106) ⁽¹⁸³⁾.

(116) The 'rates table' for standard products drawn up and continually updated [at controller level] should be disseminated throughout the industry by means of 'decentralised information initiatives following a snow-ball system' ⁽¹⁸⁴⁾.

(117) The lending rate rises called for [at controller level] were then discussed in detail by the banks' representatives in respect of both retail and corporate banking.

(118) First, on 8 November, the Vienna Lending and Deposit Rates Committees met. They criticised the fact that individual institutions were not sticking to agreements made (whereas the Vienna banks were 'keeping to the agreed rates' for fixed-interest savings deposits). After an in-depth discussion it was decided not to change anything on the deposit side, while declarations of intent followed as regards the lending side: BAWAG's representative 'announced a rise in the interest rates for building loans', which 'decision would be influenced by the outcome of the Lombard meeting'. If BAWAG really were to implement this rise, BA announced directly that it would be prepared to raise its interest rates for building loans. The other participants contemplated raising rates by 0,15 to 0,5 %. Everyone agreed that, if questioned by the press or by the Association for Consumer Information for rate comparison purposes, they should in future stick to communicating only the (official) rates posted at the counter and not answer any further questions. In any case, those banks which posted the (higher) rates would 'be seen as forcing prices up' ⁽¹⁸⁵⁾.

(119) Lastly, the banks should in future avoid altogether advertising lending and deposit interest rates. To this end, ÖVAG proposed concluding a 'gentlemen's agreement' (...) in the Lombard Club, which proposal received 'broad support' from the other participants ⁽¹⁸⁶⁾. The purpose of these and other measures was 'to counteract the heated competitive situation' ⁽¹⁸⁷⁾.

(120) Next the Minilombard Committee members met on 16 November 1994. In agreement with the proposals of the Controller Committee, the 'unanimous opinion was that a general interest rate increase' of 0,5 % should be implemented 'as soon as possible', and by 1 December 1994. For fixed advances, a minimum margin of VIBOR + 0,5 % was 'considered necessary' ⁽¹⁸⁸⁾. So that these increases could be 'pushed through' by 1 December 1994, [senior management] should 'coordinate matters by telephone' ⁽¹⁸⁹⁾.

(121) At the 'Documents Committee' meeting on 17 November, documentary credit fees were discussed. It was pointed out that 'agreement had been reached years ago to charge rates which at least covered costs'. However, some banks had in the meantime been offering more favourable rates. The call for 'more price discipline' met with 'general agreement' and a 'special committee meeting' was called for to draw up 'lower limits' for these rates ⁽¹⁹⁰⁾.

(122) One of the subjects discussed at the Securities Committee meeting on 22 November was 'minimum fees' for handling shares and bonds. Already at the 'securities technique' working group on 25 November 1993, 'changes in the fees/minimum charges for buying and selling, custodian fees for securities, and custodian fees for own issues', together with 'the planned time schedule' for implementing them were subjects of joint discussion ⁽¹⁹¹⁾. BA had initially given the impression that it wanted to move away from the agreed minimum fees. At the meeting of 22 November this turned out to be a 'misunderstanding'; BA, now as ever, gave its 'full backing to the minimum fees'. Only for 'own-account placements going public' was BA considering not applying the agreed minimum fees. The representative of GiroCredit presented one of the market surveys carried out by his institution, which revealed that PSK and RBW (for domestic and foreign bonds), together with RZB (for domestic bonds) were clearly 'undercutting' the minimum fees ⁽¹⁹²⁾.

⁽¹⁸³⁾ 3971 et seq.

⁽¹⁸⁴⁾ 3971 et seq.

⁽¹⁸⁵⁾ 14.463 et seq.; 26.778; 36.331.

⁽¹⁸⁶⁾ 20.020 et seq.

⁽¹⁸⁷⁾ 13.704.

⁽¹⁸⁸⁾ 2461.

⁽¹⁸⁹⁾ 14.225.

⁽¹⁹⁰⁾ 19.701.

⁽¹⁹¹⁾ 9683.

⁽¹⁹²⁾ 4521 et seq.; 5562.

(123) On 23 November [a representative of CA] responsible for financing at the time reported to his [...] colleagues that in discussions with the members of the management boards of BA, RZB and GiroCredit on raising lending rates, they had been 'unanimous'. As far as CA was concerned, [a senior representative] would 'give definitive information on how to proceed after talking with [...] [a senior representative of BA]' ⁽¹⁹³⁾.

(124) The 'practical arrangements' for the rate rise for commercial loans agreed on in principle in the Minilombard Committee on 1 December were then 'agreed between the big Vienna banks as follows': a 0,5 % rate rise for all commercial loans by 1 January 1995 and a minimum interest rate for operating funds loans and investment loans of 8,5 % ⁽¹⁹⁴⁾. Only BAWAG did not commit itself yet; the subject was to be discussed at the Lombard Club meeting on 7 December ⁽¹⁹⁵⁾.

(125) The subjects discussed at the Lombard Club meeting of 7 December can be identified from two internal memos to [the representative of CA] in preparation for the meeting. The authors first refer to the 'agreed' new rates and then raise the question of whether this has already been 'discussed in the local interest rate committees'. As regards deposit substitutes, BA had 'lowered' its rates 'to the agreed level', though BAWAG had been threatened with the issue of higher-interest CA medium-term fixed-rate notes, if it did not adjust its rates. BAWAG had responded by 'promising to adjust'. CA's [representative] was urged to 'speak to' BAWAG's [representative] again about 'lowering its savings-deposit substitutes to the agreed level' ⁽¹⁹⁶⁾. Finally the [representatives] agreed that the Minilombard Committee should discuss the adjustment of debit rates for commercial loans and cash advances ⁽¹⁹⁷⁾.

(126) On the same day as the Lombard Club meeting, a Controller Committee meeting took place, at which the 0,5 % rate rise for commercial loans decided on by the Minilombard Committee was reported. It was noted that the participants in the Treasurer Committee and Key Account Management Committee were not sticking to the 'principles' agreed [at controller level]. [Representatives at controller level] should therefore take part in Treasurer Committee meetings in future.

8. CHRONOLOGY OF EVENTS: 1995

January and February: joint increase in lending rates and avoidance of an increase in deposit rates

(127) On 5 January Erste made an offer to a potential customer, who subsequently quoted it to CA in order to obtain a similarly favourable offer from it. The relevant CA employee noted in writing beside the Erste offer of 'special deposit rate of 5 %' that there was an 'agreement E (i.e. Erste), BA, CA' to pay only 4,25 % for such special deposits (Dispo deposits). The Erste employee had agreed to reduce the 'special deposit rate as from 3,3. to 4,25 %' ⁽¹⁹⁸⁾.

(128) In terms of 'formal' agreements, 1995 began with a Vienna Lending and Deposit Rates Committee meeting held at 10.00 on 10 January. As far as special variable interest rates are concerned, a maximum interest rate of 5 % or, as from ATS 1 million in new funds, 5,25 % was 'agreed', so as 'not to further stoke up competition', though reference was also made to the lack of discipline in implementing agreements. Reference was likewise made to the 'decision' of the Vienna Lending and Deposit Rates Committee on 8 November 1994 (see recitals 118 and 119) according to which, in response to enquiries from the media and consumer representatives, only the (official) posted rates, and not the (lower) special rates, should be made public, so as to ensure that competition between the banks was 'avoided via this information level'.

(129) As far as lending rates were concerned, the majority of the participants favoured an increase of 0,5 %. Only BAWAG had problems with building loans and consumer instalment loans and said it would therefore not be prepared to see an increase until the end of the quarter. The 'final decision' on the increase was therefore to be taken 'at the Lombard Club meeting on 18 January 1995, so that a uniform increase is introduced in respect of existing and new positions. The increase is to be applied as from the beginning of February 1995'. In sending the report on this committee meeting to [a senior representative], the CA participant accordingly added the following handwritten note: 'Important item on agenda 18.1. Lombard' ⁽¹⁹⁹⁾.

(130) The Treasurer Committee was then convened for 14.30. 'In order to get the new year off to a productive start', the meeting was to include discussion of 'short-term lending and deposit rates'. Those participants who did not themselves have any direct influence on the shaping of rates for fixed advances should take with them 'an appropriate person responsible for key account management', for example the relevant member of the Key Account Management Committee ⁽²⁰⁰⁾.

⁽¹⁹³⁾ 2466.

⁽¹⁹⁴⁾ 1226; 2343.

⁽¹⁹⁵⁾ 172.

⁽¹⁹⁶⁾ 1226; 2343; 36.334.

⁽¹⁹⁷⁾ 1197.

⁽¹⁹⁸⁾ 36.335.

⁽¹⁹⁹⁾ 1998 et seq.; 12.086; 2321; 2325; 14.455; 1296 et seq.

⁽²⁰⁰⁾ 1318.

- (131) With a view to the 'increase of $\frac{1}{2}$ % in personal loans, which is to be dealt with in the Lombard', the CA on 11 January sent a fax marked 'urgent, confidential' to Oberbank (Salzburg), BTV (Tyrol) and BKS (Carinthia) 'to be coordinated in the local interest rate committees' ⁽²⁰¹⁾.
- (132) The Lombard Club meeting on 18 January agreed on the interest rate increase proposed by the representatives of the Vienna Lending and Deposit Rates Committees. The Erste [representative] reported in an internal memo on the meeting that 'old and new commercial loans are to be raised by 0,5 % and new personal loans by 0,25 to 0,5 %' ⁽²⁰²⁾. Erste itself introduced the agreed 0,5 % increase for old and new commercial loans on 1 February, but did not introduce the increase on personal loans, since BAWAG was 'prepared to discuss this' only as from February ⁽²⁰³⁾.
- (133) This was done at the beginning of February: BAWAG decided on the increase in interest rates, so that BA, Erste, RBW, PSK-B and other banks were also able to 'introduce an increase for old and new loans of up to $\frac{1}{2}$ %' ⁽²⁰⁴⁾.
- (134) On 24 January the members of the Securities Committee decided to set up a 'working party BA, EÖ, RZB, BAWAG, GIRO and PSK' which, at the invitation of CA, was to provide advice on the fees to be charged for the ad hoc business appraisals carried out by the banks ⁽²⁰⁵⁾.
- (135) At the Controller Committee meeting on 7 February, the banks reported on the agreed 0,5 % interest rate increases for commercial and personal loans. As regards deposit rates, the 'current specimen calculation' was first discussed. Satisfaction was expressed at the fact that in Vienna the agreed terms for savings deposits were 'holding', though the 'lack of price discipline' outside Vienna as regards special rates was criticised. BA suggested that this problem should be solved by partitioning off individual regional markets and, for example, 'regarding Tyrol and Carinthia as individual markets and not transferring the price policy there to Austria as a whole'.
- (136) Since in the [...] estimation [made at controller level] the interest rate curve for 1995 and 1996 would be less favourable than in 1994, there was 'a need for action in order to avoid a deposit rate increase'. The 'decision' was therefore taken to 'prevent deposit interest rate increases'. The personal loan increase should be 'pushed through', and the banks should 'exchange by fax' and then 'discuss on 2.3.1995 [date of the next Controller Committee meeting]' proposals concerning deposit rates. Lastly, Erste requested 'exchange of experience' on cost control and investment budgeting: 'BA and PSK will carry out exchange of experience' ⁽²⁰⁶⁾.
- (137) 'Interest rate developments regarding deposit rates' were also discussed at the Lombard Club meeting held on 8 February ⁽²⁰⁷⁾.
- (138) On 8 February, [representatives] responsible for corporate customers at BA, CA, Erste, GiroCredit and RZB held 'informal discussions'. As a 'direct objective' for fixed-date advances, it was decided to set a lower limit of VIBOR + $\frac{3}{8}$ %. The participants wanted 'to win the others over as well' to this project at the forthcoming Minilombard meeting on 23 February (see recital 145) and subsequently make sure that the result achieved was 'safeguarded by holding committee meetings in the provinces'. The minimum rate thus established and secured should then 'be maintained for at least two months', and if there were any problems in individual cases, there would have to be 'increased coordination' ⁽²⁰⁸⁾.
- (139) On the same day, what was evidently the first meeting of the Building Loans Committee also took place. The Commission does not have any minutes or memos relating to it ⁽²⁰⁹⁾.
- (140) On 17 February, the bank representatives met in the Vienna Lending and Deposit Rates Committee 'to pre-coordinate the forthcoming Federal Deposit Rates Committee meeting on 22.2.' (see recital 142). They reached 'agreement regarding bonus-carrying savings deposits'. 'For Austria as a whole', interest rates of 5 % for newly acquired customers and 5,25 % where a competing offer had to be fended off were 'agreed'. BAWAG also informed its competitors that it would raise savings account rates at the same time as the personal loan increase. Since BAWAG had evidently taken this decision without prior agreement with its competitors, this piece of information came as a 'complete surprise' to the other participants at the meeting ⁽²¹⁰⁾.

⁽²⁰¹⁾ 2327; 2333.

⁽²⁰²⁾ 1194.

⁽²⁰³⁾ 1195.

⁽²⁰⁴⁾ 12.387.

⁽²⁰⁵⁾ 19.185.

⁽²⁰⁶⁾ 3618 et seq.

⁽²⁰⁷⁾ 17.308; 17.311.

⁽²⁰⁸⁾ 36.338.

⁽²⁰⁹⁾ 19.532.

⁽²¹⁰⁾ 2993; 1292.

(141) CA made a slip-up in February. Despite the proposal, discussed on several occasions with competitors, that advertising would no longer make reference to interest rates, CA's advertising department (acting against the objections of the personal loans department) advertised building loans with interest rates. In the estimation of the personal loans department, this could have the undesired consequence of leading to a 'new round of interest rate competition' between the banks, quite apart from the loss of 'credibility' on the part of CA with its competitors, since CA had always advocated a policy of no advertising. However, things were perhaps not so bad, since the advertising that had been criticised was confined to Carinthia and since, on 'the principal market of Vienna', (as agreed) 'interest rates were no longer being advertised in newspapers' ⁽²¹¹⁾.

February and March: negotiations on an increase in deposit rates, agreement on fixed advances and erosion of confidence in assurances given by BAWAG

(142) The abovementioned meeting of the Federal Lending and Deposit Rates Committee was held on 22 February. As some time had elapsed since the previous meeting of the Federal Lending and Deposit Rates Committee on 25 July 1994 (see recital 108), RZB, acting as the host, made a few introductory remarks in which it stated that 'interbank exchanges of experience regarding rates' had so far proved to be 'a useful instrument for preventing uncontrolled price competition'. Although the banks had been able to improve their earnings through their coordinated increase in lending rates 'implemented throughout almost all of Austria' (see in particular recital 132), there was now a need to 'get together' and, as far as deposit rates were concerned, 'counter problematic price trends', in particular 'stop upward trends in interest rates'.

(143) The bank representatives accordingly set about finding 'constructive solutions' together, 'for the good of their institutions'. The issue was the 'completely surprising', because, unusually, it had not been agreed with competitors, 0,5 % increase in the rate on savings accounts carried out by BAWAG (see recital 140). CA and Erste said that they would 'fully match' this increase. BA tried to get these two banks to 'retreat from this position', but 'failed' to persuade them to do so. BA then informed the other participants that it would not match the BAWAG interest rate increases if other banks so decided. The credit unions and PSK supported the BA position, while NÖ Hypo adopted a 'wait-and-see position'. Following 'detailed discussion' all the participants finally 'agreed' to go along with the increase, while BA said it would 'decide only in the afternoon'.

(144) In addition, as regards special rates (savings accounts) in the Vienna area, 'a maximum interest rate of 5 %' (for new and old capital) was 'laid down'. As regards cash bonds, 'the participants in the discussion agreed' that they would not at present introduce any rate increases. The 'overall position' ultimately reached 'by agreement' was to try to get customers to opt for the savings account segment so as to 'try to prevent' an interest rate increase in the bonus-carrying area ⁽²¹²⁾.

(145) The next day, 23 February, a Minilombard meeting took place. As decided at the 'informal discussion' on 8 February (see recital 138), the participants 'agreed' to 'apply rigorously' in the case of fixed advances a minimum premium of $\frac{3}{8}$ %, a minimum period of one month and a minimum volume of ATS 10 million per transaction, starting on 8 March and initially limited to a few weeks (to be extended if there was 'appropriate discipline'). The 'local area of application' of this 'agreement' would, by means of 'regional agreements', also be 'extended to the eastern provinces': branches in the provinces 'should reach agreement in regional committee meetings' ⁽²¹³⁾.

(146) [A meeting took place at controller level] on 2 March in order to deal with the 'situation regarding lending and deposit rates' and reach agreement on whatever 'countermeasures' were necessary ⁽²¹⁴⁾.

(147) The Vienna Lending Rates Committee meeting on 13 March confined itself on this occasion to a detailed exchange of information on the current interest rate situation, since none of the banks thought a change in interest rates would be 'possible and opportune' in the immediate future. Instead, it was considered necessary to 're-establish eroded confidence in the statements of the BAWAG representatives'. As has been seen, BAWAG had made changes to interest rates without the prior agreement of its competitors (see recitals 140 and 143), and these had of course been 'regarded as not very appropriate by all the other banks'. If therefore any 'surprising interest rate changes' were made in future, then at least 'immediate information should be provided to all members of the Lending Rates Committee' ⁽²¹⁵⁾.

(148) On 14 March the [representatives] of Erste and BA met over an 'informal lunch'. 'In preparation' for this meeting, the relevant Erste senior staff were asked to state which issues from their respective business areas should be discussed at the meeting by the Erste [representative], e.g. 'aggressive rates policy' or 'allocation quotas for issues'.

⁽²¹²⁾ 14.326 et seq.; 1991; 1290 et seq.

⁽²¹³⁾ 14.223; 1221 et seq.

⁽²¹⁴⁾ 3610 et seq.

⁽²¹⁵⁾ 20.117; 1454.

⁽²¹¹⁾ 12.388.

April to June: joint reduction of deposit rates and avoidance of a reduction of lending rates

(149) On 30 March the Austrian National Bank cut the key lending rates (discount rate by 0,5 %, lombard rate by 0,25 %, with effect from 31 March). In response to this, the major Austrian banks did not take independent decisions, but convened a Vienna Deposit Rates Committee meeting on 31 March, at which (in coordination with the meeting of the Federal Lending and Deposit Rates Committee held on 7 April (see recital 152), the joint reaction to the cut in key lending rates was 'essentially agreed'. The participants were 'unanimously of the opinion' that the cut in key lending rates was the 'last chance' this year for a lowering of interest on savings deposits. The following approach was therefore agreed on: a 0,5 % cut in special rates and employee savings products, a 0,5 % to 0,25 % cut in capital savings accounts and a 0,5 % cut in premium savings products. PSK was reproached for its three-month savings account (because it was not in accordance with the agreements); it justified itself by arguing that 'this product was conceived as a special scheme and will be discontinued'.

(150) The next steps were laid down as follows: 'The preliminary decision-making process aimed at achieving this reduction' should, in the view of the participants, 'also involve the [controller level]'. Following discussion within the individual banks, there should then be 'telephone consultation at management board level' and, by the end of the 14th calendar week, 'transfer of information between those responsible'. The reductions were to be introduced during Holy Week. 'For the purpose of reaching further agreement' on the steps to be taken by the banks, a meeting of the Federal Lending and Deposit Rates Committee was convened on 7 April (see recital 152). 'Confirmation', or, in the event of any problems, the 'final coordination', was to be provided (...) at the next Lombard Club meeting on 19 April 1995 ⁽²¹⁶⁾.

(151) Amongst [the bank representatives], there was 'unanimous agreement' at the Minilombard meeting on 6 April that, despite the cut in key lending rates, interest rates on loans should not be reduced. The 'forthcoming reduction in deposit rates' (see the decisions taken at the meeting of the Federal Lending and Deposit Rates Committee held on 7 April (see recital 152) should 'as far as possible not be reflected in lending rates'. In the case of individual types of financing (current account and investment loans, bill discount, fixed advances, fixed-interest loans and credit by way of bank guarantee, house bank margin in export financing), specific minimum rates were 'fixed or endorsed as guidelines' ⁽²¹⁷⁾.

(152) At the meeting of the Federal Lending and Deposit Rates Committee held on 7 April, a 'consensus' was reached on the 0,5 % reduction in special rates (a reduction of only 0,375 % by BAWAG). In addition, 'in order to steady markets', 'maximum rates' were agreed in respect of special rates for new business (4,25 % as from ATS 500 000, 4,5 % as from ATS 1 million and 4,75 % as from ATS 5 million), and these maximum rates were also not to be exceeded by branch managers. The actual dates for the reduction 'vary somewhat, but are mostly concentrated in the next week'. BAWAG later reported that it wanted to introduce the reduction only after the Lombard Club had met on 19 April 1995.

(153) As regards capital savings accounts, by contrast, 'initially no unanimous agreement' could be reached. Although BAWAG held out the 'prospect' of a 0,375 % interest rate reduction, it would announce its final decision only on 10 April 'by fax to the other sectors, which will then take their lead from it'. Lending rates should remain unchanged ⁽²¹⁸⁾.

(154) At the Controller Committee meeting on 25 April there was also agreement that lending rates should remain unchanged. It was decided to pursue a joint extrapolation of earnings; for this purpose, the individual banks' extrapolations should be combined ⁽²¹⁹⁾. A meeting of experts should also work out a 'uniform approach' for the calculation of remaining maturities. Another group of experts should examine securities accounts statistics/market shares. As regards internal calculation methods in respect of special rates for savings accounts, Erste would draw up a discussion paper. A 'common solution' should also be found for the uniform classification of the 1 000 largest corporate customers ⁽²²⁰⁾.

(155) At the Securities Committee meeting held on the same day (25 April) the subject of discussion was the 'arrangement fees' charged to stock exchange participants by the OeKB, in its capacity as the clearing and settlement house for transactions on the Vienna stock exchange included in the arrangement ⁽²²¹⁾. The [...] OeKB [representative] 'called on everyone to accept the proposed arrangement fees [to be adjusted as a result of the introduction of the fully automatic trading system EQOS]'. The meeting then reached 'agreement with

⁽²¹⁸⁾ 36.339; 14.321; 1286 et seq.; 2314.

⁽²¹⁹⁾ See 2626.

⁽²²⁰⁾ 3598 et seq.

⁽²²¹⁾ All securities listed on the Vienna stock exchange for official dealing or regulated unofficial dealing are included in the arrangement. The transactions must therefore as a rule be settled in accordance with the provisions of the Arrangement Order. The execution of arrangement transactions is ensured by an arrangement security deposited by participants.

⁽²¹⁶⁾ 1288 et seq.; 250 et seq.; 14.447; 38.153; 20.139 et seq.; 4101.

⁽²¹⁷⁾ 2316; 14.219.

representatives of CA, RZB, BA, GC and Erste on the adjustment of arrangement fees'. In addition, the 'annual flat fees were agreed with the [representatives] of CA, BA, GC, Erste, RZB and ÖVAG' ⁽²²²⁾.

(156) Although the Commission does not have any minutes of the Building Loans Committee meeting held on 23 May, the agenda drawn up on 9 May includes reference to 'current developments' and to 'further common measures' ⁽²²³⁾.

(157) On 10 May, at their monthly Lombard Club meeting, the [representatives] discussed what from their point of view was the rather unsatisfactory trend in the interest margin. They agreed that 'deposit rates were at present too high (Bank Austria: in general, 1 % too high)'. For this reason [...] [BA [representative]] proposed a Deposit Rates Committee meeting to cap maximum interest rates'. This proposal was 'supported by all those present' ⁽²²⁴⁾. As regards commercial loans, it was also proposed that uniform risk premiums be established. For this purpose, the 'Controller Committee should make suggestions'.

(158) The Federal Deposit Rates Committee meeting which the [Lombard Club] thought appropriate with a view to bringing about a coordinated interest rate reduction took place on 19 May. Those present shared the opinion of [the Lombard Club] that 'a general interest rate reduction for deposits could not be avoided'.

(159) BA began by proposing that special interest rates should be reduced immediately, but could get 'no general agreement' on the matter. Similarly, its second suggestion, that there should first be a reduction in special interest rates and then a reduction in interest rates for capital savings accounts, 'was not accepted'. Finally, the following 'compromise' was agreed on: as from 20 June, all deposit rates should be reduced by 0,5 %. As from that time, the 'maximum rate' for special interest rates should be 4,5 or 4,75 %. 'Already now', moreover, the '5 % rate' should no longer be used for acquisition purposes. As a back-up measure, it was decided that, in the area of lending activity, 'no further advertising measures based on low interest rates or reductions in fees and charges' would be undertaken.

(160) So as to ensure that these decisions were also implemented in the provinces, it was agreed that the decisions would be 'passed on to the provincial committees and acknowledged by them'. Lastly, the measures decided on were to be 'coordinated once again and laid down' at the next Lombard meeting' on 7 June.

(161) As far as timing was concerned, BA would 'give the lead' and make a 0,5 % cut probably at the end of May. The other banks would, as agreed, 'have completed this measure' by 20 June. CA would follow BA's timing, an internal CA memo on the subject includes the handwritten remark that it should be clarified 'for when [CA] [representative] has agreed the reduction with [...] [BA [representative]]'. BAWAG once again broke ranks, since it wished to introduce the cut no earlier than the end of June. It should therefore be 'clarified at [senior management] level' whether it would be 'possible to ensure prompter implementation without taking account of BAWAG'.

(162) As far as lending rates were concerned, there was a 'minimum consensus' that no cuts should be implemented ⁽²²⁵⁾.

(163) Only a few days after the Federal Deposit Rates Committee meeting, a Vienna Deposit Rates Committee meeting was 'called at short notice' on 24 May in order to 'bring forward as far as possible' the 'originally envisaged date for the savings interest rate reduction' regarding the 'agreements reached at the Federal Deposit Rates Committee meeting' (see recital 161). The extent of the reduction should, 'as planned' and 'already firmly promised by most of the institutions', amount to 0,5 % and should result in the following savings account interest rate scale: 4 % for one year, 4,25 to 4,325 % for two years, 4,75 % for three years, 5,25 % for four years and 5,75 to 6 % for five years.

(164) For these 'interest rates cuts agreed at the last committee meeting', the 'following implementation dates were agreed': BA, CA and ÖVAG (for existing customers) 1 June, GiroCredit and NÖ Hypo 6 June, Erste 7 June at the latest, ÖVAG (posted rate) 9 June, and BAWAG and PSK in the second week of June ⁽²²⁶⁾.

(165) On the same day, top-level representatives of BA, BAWAG, GiroCredit, RZB and PSK met 'as a smaller group in the Minilombard Committee' for an informal 'exchange of banking experience' and to discuss 'the current situation'. Since the 'planned cuts' in deposit rates were likely to be 'the last ones for some considerable time', the increased margin which this made possible should 'be used to improve profits' and should on no account be passed on to consumers (i.e. there should be no reductions in lending rates). Although it was also important to 'increase margins on fixed advances', which would mean 'an improvement of a few million schillings in profits' for each bank, it was of 'greater importance' to avoid cuts in lending rates.

⁽²²²⁾ 4657 et seq.; 38.171; 38.172.

⁽²²³⁾ 19.534.

⁽²²⁴⁾ 1189 et seq.; 914 et seq.

⁽²²⁵⁾ 14.315 et seq.; 1284 et seq.; 914 et seq.; 26.500.

⁽²²⁶⁾ 14.445; 2308; 1282.

- (166) There was dissatisfaction with discipline in implementing the decisions jointly taken. 'Interest rate discipline' would therefore be the 'theme of the Lombard Club meeting in June'. It was generally agreed that better discipline could be expected only 'if compliance with minimum margins became a "point of honour" for management board members'. An internal CA 'confidential memo' refers to this issue as being a 'matter for the bosses' ⁽²²⁷⁾.
- (167) Lastly, 'the following items should be discussed and decided on at the Lombard meeting': 1. no lending rate cut; 2. no overdraft loans with interest rates based on VIBOR day-to-day money rates; 3. maximum seven-year term for fixed-interest loans; 4. maximum 10 year term for loans tied to secondary market yields; 5. no roll-over loans with short-term indicators; 6. minimum margins for fixed advances; and 7. lower limits for the house bank margin on export promotion loans ⁽²²⁸⁾.
- (168) In an internal memo sent to [...] [senior representatives of] CA [...] on 29 May, it is stated that current account interest rates of VIBOR day-to-day money +0,5 % must 'be prevented'. 'Contacts for this purpose' amongst banks had 'already [taken place] in the Minilombard and in the Treasurer Committee', in both of which 'there was agreement'. This should also be 'a priority topic' at the Lombard Club meeting on 7 June 1995 ⁽²²⁹⁾.
- (169) On 1 June 1995, BA and CA reduced their interest rates on savings deposits by the agreed (average) 0,5 %, and Erste followed suit on 6 June ⁽²³⁰⁾.
- (170) On 2 June, a meeting of the Controller Committee took place. On the agenda item 'interest rate developments, interest rate policy', the participating banks began by bringing one another up to date on the 'already implemented or ... planned cut in savings deposit rates by an average of 0,5 %'. It was then reported that customers had 'approached the banks' with a request for roll-over financing on a day-to-day money or three-month basis. This desire on the part of customers should not, however, be complied with, since otherwise a 'dangerous erosion of the margin in current account business' was to be feared. RZB 'declared itself ready' to draw up a proposal for calculating long-term loans on a VIBOR basis for the next meeting. GiroCredit presented its internal estimates of operating results (including a detailed breakdown) for the current year ⁽²³¹⁾.
- (171) The planned ⁽²³²⁾ discussion of the above topics which was to have taken place at the Lombard Club meeting on 7 June (which the BA and CA [representatives] did not attend) was apparently deferred to the Lombard Club meeting held on 12 July.
- June: breaking of ranks by BAWAG, general scolding and coordinated reaction*
- (172) A little later, events took an unusual turn. On 19 June, 'without prior notice', BAWAG cut interest rates on personal loans, this measure having been 'obviously kept secret' from its competitors. This prompted CA to 'convene a Consumer Lending Rates Committee meeting at short notice' in order at least to ensure 'coordination' of the reaction to this measure amongst the other competitors. The meeting took place on CA's premises on 21 June (in joint session with the Liberal Professions Lending Rates Committee) ⁽²³³⁾.
- (173) Feelings ran high at the meeting. BAWAG, which had already 'not complied with the dates prescribed' at the last Deposit Rates Committee meeting and which in addition had not provided appropriate information to competitors on the measures taken, was fiercely attacked by the other banks, particularly BA, CA and Erste. It was 'the unanimous opinion' that there was 'no justification' for this measure taken by BAWAG and that it 'contradicted the stated objective of all the relevant committee meetings' i.e. 'not to go along with' any cuts in interest rates on loans. Any 'such senseless competition' was downright dangerous.
- (174) The BAWAG representative attempted to justify himself by referring to 'underbidding allegedly routinely practised by other banks in the case of works council members loans', an argument which in turn triggered a series of mutual accusations and counter-accusations.
- (175) BAWAG's justification was rejected by the other participants. If there actually were any 'undercutting of the agreed rates', then it was 'more purposeful' to 'deal with them at the next committee meeting' and subsequently to 'make adjustments' than to 'break ranks' and thus 'further complicate' the already difficult profit situation. CA threatened to have BAWAG excluded from all Lending and Deposit Rates Committee meetings. Those present were asked 'to request [that steps be taken at senior management level] [...] to ensure' [...] that interest rates were 'laid down on the basis of the widest possible coordination within the industry'.

⁽²²⁷⁾ 3984; 2389 et seq.

⁽²²⁸⁾ 3984; 15.832 et seq.

⁽²²⁹⁾ 2310.

⁽²³⁰⁾ 3594.

⁽²³¹⁾ 2626; 27.014.

⁽²³²⁾ 38.161.

⁽²³³⁾ 2516.

(176) The practical outcome of this meeting was that BA, CA, Erste, RBW and others would 'at all events follow suit' on works council members loans, but would no doubt also have to reduce the other products by about 0,5 % as a result of the precedent set by BAWAG. It was also 'agreed' not to exceed the 6,75 % mark in the case of loans to the self-employed ⁽²³⁴⁾.

(177) At the Minilombard meeting the next day, no such feelings were evident amongst [the bank representatives]. In particular, 'there was unanimity' in concluding that there should be 'no general cut in interest rates in the commercial sphere' in the wake of the interest rate cut introduced by BAWAG in the consumer lending sphere. Those present 'decided' that they would submit to their respective [representatives] 'for the Lombard meeting' the 'recommendations for the laying-down of minimum interest rates' already agreed at their 'informal meeting' on 24 May (see recital 165) ⁽²³⁵⁾.

(178) At the Vienna Deposit Rates Committee meeting held on 29 June, BA suggested 'using the summer break for a further cut for bonus-carrying savings deposits', namely to 4,5 or 4,25 % (existing deposits) and to 3,5 % (others). Two variants were put forward for new business; of the two, 'the remaining representatives of the large Viennese banks' preferred 'the moderate variant (4,5 %). In the provinces, 'a similar approach should be urged in the local committee meetings'. A 'corresponding agreement [...] should be arranged at the next Lombard Club meeting (12 July)' ⁽²³⁶⁾.

July: agreement [at senior management level] on interest rate 'recommendations', criticism of CA

(179) On 3 July, [...] BA, CA, RZB and Erste [representatives] responsible for lending held a meeting. They 'confirmed the proposals of the Minilombard meeting on 22.6.1995 [see recital 177], i.e. at all events to comply with the relevant minimum margins'. In the case of option contracts, it should be endeavoured 'to impose a sensible minimum margin', since banks' interest rate policy in this area was at present 'senseless'. The subject should be discussed at the next Lombard meeting ⁽²³⁷⁾.

(180) Before the Lombard Club meeting on 12 July, the CA [representative] received a 'list of desiderata' and a memo from his staff setting out topics which should be 'brought up for discussion' at the Lombard Club meeting. In the case of municipal funding, for example, a minimum mark-up of $\frac{3}{8}$ % should be charged, and customers should not be granted any unilateral right of termination.

As regards building loans, neither indicator-linked terms coupled with interest rate ceilings nor fixed-interest agreements with interest rate ceilings should be offered. Lastly, the agreement not to carry out any general cut in lending rates was 'accepted as altogether practicable', though pressure would increase as a result of the reduction for bonus-carrying savings deposits discussed at the Vienna Deposit Rates Committee meeting on 29 June (see recital 178) ⁽²³⁸⁾.

(181) At the Lombard Club meeting on 12 July, the [representatives] agreed on the following 'recommendations': 1. 4,75 % ceiling for interest on savings deposits (special rates); 2. no lower-of clauses in loan agreements; 3. no operating loans tied to VIBOR; and 4. no SMY discounts. The 6,25 % ceiling for long-term capital savings accounts still needed 'further discussion', and the Erste [representative] accordingly instructed a relevant Erste [representative] to enter into 'talks with other CIs [credit institutions]' in this connection ⁽²³⁹⁾.

(182) Two days later the [representatives at controller level] held their regular committee meeting. It was confirmed that the abovementioned 'recommendations from the Lombard meeting should be implemented'. There then followed a detailed exchange of information on the banks' forecast annual profits for 1995. The meeting agreed, 'with a view to ensuring mutual comparability' in the assessment of opportunities, to come to 'a common understanding'. A calculation proposal was also exchanged for long-term loans based on VIBOR ⁽²⁴⁰⁾.

(183) At the Consumer Lending Rates Committee meeting on 19 July, the lack of interest rate discipline was deplored, with the recommended minimum interest rate of 6,75 % being undercut in loans to the self-employed in particular. There was criticism of CA's practice of using funds from the building loans bank to finance not only large-volume housing projects, but also the construction of private houses. This had not 'been provided for'. The other banks therefore 'demanded' that CA should no longer offer private customers such loans. The CA representative refused, but in an internal memo to [...] CA [senior representatives] pointed to the danger of 'being held up increasingly as the scapegoat for interest rate excesses' ⁽²⁴¹⁾.

⁽²³⁴⁾ 14.439 et seq.; 786 et seq.; 2398.

⁽²³⁵⁾ 14.218; 2407.

⁽²³⁶⁾ 27.037.

⁽²³⁷⁾ 36.443 et seq.

⁽²³⁸⁾ 2391 et seq.; 2387.

⁽²³⁹⁾ 1184; 3555.

⁽²⁴⁰⁾ See footnote 239.

⁽²⁴¹⁾ 14.437; 27.054.

July and August: breaking of ranks by BA and coordinated reaction

(184) On 15 July it was BA which 'broke ranks' and, without prior agreement, cut interest rates on bonus-carrying savings deposits by 0,5 %. The bank representatives accordingly met on 25 July 1995 for a Vienna Deposit Rates Committee meeting for joint 'discussion on further interest rate cuts'. The other banks agreed that they would 'follow this example' and implement a general 'slight' reduction (i.e. without changing the official posted rates) of 0,25 % for all existing holdings. At the high-interest end (5 % and above), each bank could 'at its own discretion' make whatever cuts it wanted. The cuts should be introduced by the end of the first week in August. BAWAG reckoned on saving ATS 40 million as a result of this coordinated interest rate cut.

(185) This episode exemplifies the close relationship between the committee meetings in Vienna and those in the provinces. At the Vienna Deposit Rates Committee meeting at issue here it was reported that the 'local discussions' in the capitals of the provinces had already 'indicated willingness to carry out the proposed interest rate cut'. It was therefore 'expected' that the banks in the provinces would 'fall in with this approach' and CA subsequently sent the minutes of the meeting 'to all the regional [representatives]'. Four days later the person hosting the Graz committee meeting proposed to his assembled competitors that 'in accordance with last week's Vienna Deposit Rates Committee meeting' they should cut rates 'also in Styria' ⁽²⁴²⁾.

August and September: joint cut in lending and deposit rates

(186) The reaction of the banks to the cut in key lending rates by the Austrian National Bank on 25 August illustrates once more how the joint decision-making process on changes in interest rates was carried out.

(187) On that very day, 25 August, possible reactions as regards deposit rates were discussed in an internal CA memo. However, the measures which CA would actually take depended 'on the decisions taken at the Vienna Lending and Deposit Rates Committee meetings' ⁽²⁴³⁾. On 30 August, CA called an 'informal Vienna committee meeting' in order to 'clarify the reactions of the individual banks'. While BA (with the support of GiroCredit) proposed cuts in both lending and deposit rates, the other banks were in favour of 'soldiering on', especially

since a cut had been introduced only in July (see recital 184). However, they made it clear that they would 'immediately match' any interest rate cut by BA.

(188) After fairly lengthy discussion, the banks were in the end unable 'to come to any unanimous decision'. The 'relevant decision' should therefore be taken at the meeting of the Federal Lending and Deposit Rates Committee specially convened for this purpose on 7 September. 'Opinion formation in the individual sectors should be completed' by then, so that it would be possible to 'negotiate further' on 7 September. If at that meeting it was 'decided to cut deposit rates in general', the Minilombard meeting scheduled for 8 September 1995 would work out a proposal [...] to be discussed at the Lombard Club meeting on 13 September ⁽²⁴⁴⁾.

(189) Two days later, on 1 September, top-level representatives of BA, BAWAG, RZB, GiroCredit and Erste met on CA's premises for 'informal discussions'. There was 'general acceptance of the proposals made' earlier at the informal Vienna committee meeting. Savings interest rates (and the interest rates on sight deposits and special 'Dispo' accounts) should be cut first, by 0,25 to 0,5 %, followed by selective cuts in interest rates on loans. The Minilombard meeting on 8 September should then 'work out the final proposal for the Lombard meeting in the following week' ⁽²⁴⁵⁾. On the same day, an Erste [representative] responsible 'officially' informed his opposite number in CA that Erste now 'preferred an interest rate cut variant covering lending and deposit rates', though this was of course 'subject to agreement with the other institutions' ⁽²⁴⁶⁾.

(190) The 'objective' of the meeting of the Federal Lending and Deposit Rates Committee held on 7 September was 'to establish an approach, based on as much agreement as possible, for both loans and deposits'. It emerged that the general feeling had changed substantially since the last discussion. Whereas most of the banks then had been in favour of 'soldiering on', the majority now (CA, Erste [as already evident above, recital 189], RBW, PSK-B, NÖ Hypo, Salzburger Sparkasse, WIF-Bank) was in favour of a general cut in interest rates for both loans and deposits. BA, GiroCredit, ÖVAG and Erste even advocated a 0,5 % cut for bonus-carrying savings deposits, 'but did not receive majority backing for this'. After fairly lengthy discussions, 'a general interest rate cut was finally imposed': a 0,25 % cut for all forms of savings deposit (including basic interest rate) followed by a similar cut in the current account area, and a 0,25 % cut for bonus-carrying savings deposits. The new maximum rates would therefore be 4 to 4,25 % (Vienna) and 4,25 % to 4,5 % (provinces).

⁽²⁴²⁾ 488 et seq.; 36.344; 38.175; 23.632.

⁽²⁴³⁾ 36.345 et seq.

⁽²⁴⁴⁾ 1278; 790; 13.175; 1972; 14.431; 12.102.

⁽²⁴⁵⁾ 2371; 1149.

⁽²⁴⁶⁾ 2374.

- (191) Interest rates on works council members loans were to be cut from 8,5 to 8 % or 8,25 %. However, BAWAG 'threatened' that, if the cut were 0,5 %, it would also cut the rate for building loans, with the result that the meeting decided on a cut of only 0,25 %. A 'clarification' regarding this matter was to be achieved the same day by means of 'tel. agreements Bank Austria, CA, PSK and Erste'.
- (192) As regards implementation dates, 'there were differences of opinion': BA wanted quick cuts, while the other banks wanted 'to await an appropriate decision (recommendation) from the Lombard on 13.9.1995' ⁽²⁴⁷⁾.
- (193) At the Minilombard meeting the following day, there was little to discuss in view of the 'earlier decisions taken in the Consumer Lending Rates Committee'. In the light of the cuts decided on, the standard and minimum rates for operating and investment loans were reset ⁽²⁴⁸⁾.
- (194) 'Pursuant to the interest rate cut of generally 1/4 % decided on at the Deposit Rates Committee meeting on 7.9.1995', CA cut its deposit rates by 0,25 %. It considered internally the deposit rate for cash bonds agreed with the other banks to be 'too high, but the competition (was) not ready for lower rates'. CA also cut its lending rates 'in view of the planned measures by our main competitors', in particular BA's intention, since confirmed, of cutting interest rates for operating loans, though only by 0,25 % ⁽²⁴⁹⁾. The interest rates for employee groups were also cut by 0,25 % 'in coordination with BAWAG, Bank Austria and Erste' ⁽²⁵⁰⁾. Erste also made the agreed 0,25 % cut in lending and deposit rates on 13 September, making express reference to the parallel approach adopted by 'all competitors'. NÖ Hypo likewise cut its rates on 14 September after the '[...] Lombard on 13.9' (see recital 195) had not decided otherwise ⁽²⁵¹⁾.
- (195) At the Lombard Club meeting on 13 September, the [representatives] discussed the interest rate cuts jointly decided on at the abovementioned meetings ⁽²⁵²⁾.
- (196) In an internal NÖ Hypo memo drawn up in September, the author discusses whether any 'deviation from the approach essentially coordinated in the Deposit Rates Committee meetings' made sense: in his opinion, any such conduct would not only lead to 'pointed remarks by competitors' representatives at various committee meetings', but 'could also result in action being taken, e.g. in sales of securities by our bank or in money market borrowings by our bank'. In view of these consequences, the author recommended 'going along with the cut both in savings deposits and also in the current account sphere' ⁽²⁵³⁾.
- (197) The Vienna Deposit Rates Committee meeting on 27 September provided the banks with their first opportunity for a joint assessment of the success of the interest rate cuts agreed. Except for 'a few minor exceptions', namely BAWAG and PSK, which had 'offered more than the agreed 4 1/4 %' for new money, the banks were 'essentially satisfied' with the implementation of their decisions. BAWAG promptly initiated the 'appropriate steps' to deal with the three branch offices which had offered more than the agreed 4,25 %. No precise conclusions could yet be drawn about the situation in the provinces because of a lack of 'handy overviews'.
- (198) There was, however, also criticism of the fact that some banks, BA and BAWAG were mentioned, had not yet implemented the agreed cuts for works council members loans and for special rates. These banks claimed that the delay was due to computer problems, but gave an assurance that they would 'catch up in the next few days'. The RBW representative, whose bank together with CA, ÖVAG, NÖ Hypo, PSK and Erste had cut rates on schedule, speculated that the regional sectors might 'not keep discipline' if the 'rates and terms agreed' in the Vienna Deposit Rates Committee, especially employee group rates, were not complied with by all the banks ⁽²⁵⁴⁾.
- October: need for joint action on lending to the self-employed and building loans: minimum rates and handling fee*
- (199) In the meantime, 'interest rate discipline had unravelled somewhat' as regards lending to the self-employed and building loans. The culprit was identified as Erste, which was charging only 5,625 % interest for a fixed-interest mortgage loan (one-year term). Erste defended itself by claiming that this was a 'temporary measure' which would 'not be extended'. Nevertheless, the other banks took the view that such interest rates were 'no longer justifiable'. There was therefore a need to 'settle the market'.

⁽²⁴⁷⁾ 14.309 et seq.; 36.058; 243 et seq.

⁽²⁴⁸⁾ 16.327; 14.310.

⁽²⁴⁹⁾ 2358 et seq.

⁽²⁵⁰⁾ 12.644.

⁽²⁵¹⁾ 38.151; 38.170.

⁽²⁵²⁾ 11.600 et seq.

⁽²⁵³⁾ 38.158.

⁽²⁵⁴⁾ 908 et seq.; 14.430.

- (200) For this purpose, at the Vienna Lending Rates Committee (meeting in joint session with the Liberal Professions Lending Rates Committee) on 25 October, the leading banks 'agreed on the minimum interest rates set out below'. In the case of fixed-interest building loans, the minimum rate should be 7 % (three-year term), 7,5 % (five years) and 8 % (10 years). If the borrower did not offer any mortgage collateral, an additional 0,5 % should be charged. In the case of lending to the self-employed, the minimum interest rates were 6,875 % for investment loans and 7,25 % for operating loans. 'Agreement was also reached on the following points': 1. no fixed interest rates for maturities under three years; 2. handling fee of at least 1 %, except for large amounts, where a flat-rate fee could be charged; and 3. no advertising of interest rates in the media. There was also discussion of charging an extra 1 % where loans were tied to secondary market yields.
- (201) Those present promised to 'pass on to the provincial banks not represented at the meeting' the conclusions arrived at. In view of the fact that these interest rates were still being undercut by a few banks, the minimum interest rates discussed should 'be the subject of the next meeting [at senior management level]' ⁽²⁵⁵⁾.
- (202) Since, at that time, more and more banks were offering their customers cash bonds with identical maturities instead of fixed-interest savings accounts, the banks 'agreed' to keep the interest rates for cash bonds close to those for similar fixed-interest savings accounts (not more than 0,125 % above them) ⁽²⁵⁶⁾.
- (203) Shortly thereafter, the CA department responsible for personal finance sent [...] CA [senior representatives] the 'draft on the setting of minimum rates for personal loans and loans to the self-employed'. The aim of this recommendation, which was 'to be discussed with the other banks and, if there is a consensus, adopted', was the 'calming-down' of the 'exaggerated competition' found to exist at that time. If the major banks stuck to these recommendations, this would also 'set an example' for smaller banks, although the latter must be expected to express 'constant disapproval'. However that may be, it would already be a positive step if only a few of the large banks (together with their subsidiaries) were to 'decide on a disciplined approach' ⁽²⁵⁷⁾.
- (204) At their meeting on 15 November, in an exchange of information regarding the forecast annual results for 1995, [representatives at controller level] gave a rather gloomy portrayal of the market situation. Within their respective banks, they would therefore 'try to push a deposit rate cut'. There would also have to be discussion of the 'interest rate problem ... at the next Lombard meeting'. As far as account maintenance charges were concerned, there would be 'banking discussions between BA and CA' in December with the aim of achieving a 'price increase' ⁽²⁵⁸⁾.
- (205) At the Building Loans Committee meeting on 5 December, following a detailed exchange of information on actual and planned issues and their terms of issue, the participants 'agreed' to 'keep unchanged' the relevant maturities (12/15 years) ⁽²⁵⁹⁾.
- December: joint cut in lending rates and, after a heated discussion, in deposit rates*
- (206) The reduction in the GOMEX rate ⁽²⁶⁰⁾ prompted the convening of a meeting of the Vienna Lending and Deposit Rates Committee on 5 December in order to jointly 'discuss the possibility of a cut in deposit rates'. If, as expected, the Austrian National Bank were to cut the key lending rates on 14 December, all the banks with the exception of BAWAG were in favour of a cut both in lending rates (by 0,25 %) and in deposit rates (by 0,375 to 0,5 %) before the end of 1995. It was agreed to convene a meeting of the Federal Lending and Deposit Rates Committee on 15 December, in order to establish a joint reaction to the expected measure to be taken by the Austrian National Bank and 'work out the final recommendation'. The possibility of an interest rate cut should also 'be discussed at the Lombard meeting [...] on 13.12.1995' ⁽²⁶¹⁾.
- (207) On 14 December the Austrian National Bank did in fact reduce the discount rate by 0,5 %, and this led immediately to the convening of the Federal Lending and Deposit Rates Committees on 15 December, as previously agreed (see recital 206).
- (208) As far as lending rates were concerned, 'there was unanimity' on an interest rate cut. There was less agreement on deposit rates. The discussion of this topic became 'increasingly aggressive', with BAWAG in particular becoming the 'main target of the aggression' on account of its 'inactivity'. BAWAG was the only bank to refuse to cut deposit rates before the end of the year. In view of BAWAG's obstinacy, the other banks took the view that they could 'no longer take BAWAG into consideration'. They therefore 'agreed' on the following measures: 1. no cut in current account rates (only BA was in favour of a 0,25 % cut), 2. reduction of some

⁽²⁵⁵⁾ 12.112; 2530; 793; 797 et seq.

⁽²⁵⁶⁾ 1996 et seq.

⁽²⁵⁷⁾ 2535.

⁽²⁵⁸⁾ 3543 et seq.

⁽²⁵⁹⁾ 19.540.

⁽²⁶⁰⁾ Interest rate for short-term money market and open market transactions.

⁽²⁶¹⁾ 905; 1967; 4104.

0,5 % for bonus-carrying savings deposits at the top end and 3. maximum interest rates for new money as from ATS 1 million of 3,75 % (Vienna) and 4 % (provinces). On capital savings accounts, however, it was possible to reach 'agreement only on a spread'.

(209) A number of details, not least the implementation date, had to be left in abeyance. 'Various discussions and agreements', in particular a 'further round of telephone coordination', were therefore still necessary. In order to ensure the 'coordination of the implementation measures', it was decided to set up for this purpose 'a contact point in CA', which was to start operating on 18 December ⁽²⁶²⁾.

(210) As regards the 'telephone contacts by the Vienna banks' planned for 18 December, CA's internal recommendation was 'to envisage the last week of December' as the period for holding the 'discussions on cuts' ⁽²⁶³⁾.

(211) At the Minilombard Committee meeting also held on 18 December 'all the institutions went along' with [the agreements reached at the Federal Lending and Deposit Rates Committee Meetings], though with the proviso that the 'decisions taken by the Deposit Rates Committee' had in most cases not yet been endorsed by the management boards. Furthermore, the final details of these decisions would be 'finally negotiated' only during the course of the day [i.e. during the 'round of telephone coordination', see recital 209] ⁽²⁶⁴⁾. Subject to the condition that deposit rates would also be cut, the participants finally 'decided the following': 1. lowering of the minimum rate for operating and investment loans to 8 %, 2. lowering of the prime rate by 0,25 % and 3. selective lowering of rates for existing holdings by up to 0,25 % ⁽²⁶⁵⁾.

(212) On 20 December an Erste representative on the Deposit Rates Committee informed his BAWAG opposite number of Erste's 'planned approach' (lowering of interest rates for capital savings accounts on 8 January 1996 and lowering of special rates on 15 January 1996) ⁽²⁶⁶⁾. PSK cut the basic interest rate and special interest rates on 19 January 1996 ⁽²⁶⁷⁾. CA cut the rates for personal loans (by 0,375 %) on 28 December 1995 ⁽²⁶⁸⁾. By 17 January 1996, 'all the institutions had cut their standardised savings deposits' (with the exception of BAWAG and ÖVAG, which would lower rates only between 19 and 21 January) ⁽²⁶⁹⁾.

(213) The 'banking discussions' regarding a 'price increase' for account maintenance charges (see recital 204) probably also went smoothly. CA and BA increased their account maintenance charges on 1 January 1996 ⁽²⁷⁰⁾.

9. CHRONOLOGY OF EVENTS: 1996

February and March: joint reduction of deposit rates

(214) The first formal round of talks in 1996 took place on 6 February on Erste's premises. After the heated and very emotional discussions in December 1995 (see recital 208), the atmosphere at the talks of the Vienna Lending and Deposit Rates Committee was 'surprisingly friendly'. BA and BAWAG avoided any discussion of 'recent events'. As regards substance, the participants were 'agreed' that as far as deposit rates were concerned there was an 'immediate need for a reduction', in particular in the case of savings deposits. Specifically, the base interest rate should be lowered to 1,75 % and current accounts by 0,25 %, and in the case of capital savings accounts the reduction should be between 0,25 and 0,5 %. For new funds, the maximum interest rate should be 4 %.

(215) The measures were to be put into practice 'in the first half of March'. Before then they were to be 'refined, in consultation with the lending rates representatives and the provinces' representatives' in the Federal Lending and Deposit Rates Committee on 26 February (see recital 221). The [...] measures [were also discussed] at the Lombard Club on 7 February. If 'this approach were to be speeded up', 'BAWAG would coordinate an appropriate acceleration [of the deadline for implementation] and also act as the convening bank'. As regards the Federal Lending and Deposit Rates Committee, RZB as usual requested the 'product [representatives] of the provincial central offices to report back' on the interest rate situation in the provinces and to give their opinion on the 'lower interest rate proposals touched on'.

(216) On the lending side, interest rates were not to be lowered (only BAWAG was contemplating a 0,25 % reduction). 'After a lively discussion', the proposal to press for the 'charging of a handling fee' as compensation for the low lending rates was accepted. This was to be initially at least 1 %, and subsequently at least 2 % (see recital 263). Here too, 'appropriate decisions in principle' ⁽²⁷¹⁾ were expected from the Lombard Club on 7 February.

⁽²⁶²⁾ 14.299; 12.530; 236; 2547.

⁽²⁶³⁾ 36.143 et seq.

⁽²⁶⁴⁾ 895.

⁽²⁶⁵⁾ 1214 et seq.; 16.326.

⁽²⁶⁶⁾ 496.

⁽²⁶⁷⁾ 4144.

⁽²⁶⁸⁾ 12.775.

⁽²⁶⁹⁾ 27.388.

⁽²⁷⁰⁾ See footnote 268.

⁽²⁷¹⁾ 1963 et seq.; 14.423; 2554; 230; 36.055.

- (217) On 29 (or 30) January BA's [representative] invited his opposite numbers from Erste, PSK, RZB and CA to dinner. The [representative] of BAWAG, who had also been invited, made his apologies at the last moment. The purpose of the meeting was to have a 'preliminary discussion' of the upcoming 'Lombard' ⁽²⁷²⁾.
- (218) However, since the [representatives] of BA and BAWAG were not present at the Lombard Club meeting on 7 February, no decisions could be taken. Instead, the talks were moved back one level. The Federal Lending and Deposit Rates Committee ⁽²⁷³⁾ was to secure 'as much approximation as possible to $3\frac{3}{4}$ to 4 %', especially with regard to the interest rate paid on savings deposits'. An 'adjustment to the basic rate of interest on savings' was also to be discussed in that forum. CA's [representative] was criticised by his Erste opposite number because CA in Salzburg had offered loans, *inter alia*, at VIBOR + 0,25 %. CA's [representative] announced that [senior representatives] had not authorised this rate and had moreover already issued an 'order to stop it immediately' ⁽²⁷⁴⁾.
- (219) At the Building Loans Committee meeting on 6 February there was first the usual detailed exchange of information about existing and proposed issues and the rates applied to them. The Hypo representative put forward a new loan product 'for discussion', the 'details to be discussed at the next Deposit Rates Committee meeting'. A specific 'working party' should be set up 'to discuss new financing models' ⁽²⁷⁵⁾.
- (220) To offset the increased withholding tax on building loans, the CA representative proposed that they should 'raise the discount to SMY to 1 %'. The amount of the discount for building loans was discussed at the following Building Loans Committee meeting on 27 February. CA proposed a discount of 0,875 %, and Erste, RZB, NÖ Hypo and BA ('if all banks apply 0,875 %') agreed; BAWAG argued for 0,75 %, as did ÖVAG, which however said it would 'also follow the other banks' ⁽²⁷⁶⁾.
- (221) At the Federal Lending and Deposit Rates Committee meeting on 26 February different variants of a reduction in savings interest rates were discussed. BA announced that it intended, from the end of the first week in March, to reduce the preferential rates by 0,25 %, the basic interest rate to 1,75 % and capital savings accounts by at least 0,25 %. Such a reduction 'would be supported by all competitors'. The deadline for implementation would be fixed by 'agreement between Bank Austria's and BAWAG's [representatives]'. To secure as early a deadline as possible for this reduction, BA proposed that 'the [representatives] should phone each other and discuss a coordinated approach as soon as possible'. They would then 'communicate' the results achieved 'by telephone to the [representatives] of the other institutions'. If it were not possible to reach agreement, discussions should be held on the subject 'at the next Lombard Club meeting on 13.3.1996'.
- (222) In the provinces too the banks were to 'hold negotiations with their competitors', for instance on the reduction of the maximum interest rate in Carinthia to 4,25 %, and in Styria to 4 % ⁽²⁷⁷⁾.
- (223) At the Lombard Club meeting on 13 March BAWAG's [representative] explained that he did not want the basic interest rate to fall below 2 %, although BAWAG had been 'urgently requested also to reduce the basic interest rate by 0,25 %'. CA's [representative], too, said that his institution would not go below the 2 % limit. In the case of the higher rates, a reduction of 0,25 % was to have been made by the end of April. However, agreement could not be reached on this point, which is why the discussion was again referred back to the experts: 'How to proceed will be decided by the Deposit Rates Committee on the morning of Friday 15.3.' ⁽²⁷⁸⁾.
- (224) At the Deposit Rates Committee meeting on 15 March the first item was the 'approval' of BA's interest rate cut. Subsequently, 'agreement' was reached to the effect that 'all large institutions' would reduce 'the interest rates for savings deposits' as follows: basic interest rate to 1,75 % (except BAWAG and CA, which had already insisted on 2 % at the Lombard Club meeting on 13 March), savings deposit preferential rates generally by 0,25 % (maximum interest rate 4 % in Vienna and 4,25 % in the provinces), group rates and sight deposit preferential rates generally by 0,25 %, and capital savings accounts generally by 0,25 %. BAWAG promised it would clarify by 20 March whether it was not after all prepared to reduce the basic interest rate to 1,875 %, since a joint maximum interest rate of only 3,75 % (instead of 4 %) would then appear realistic. With regard to CA's attitude to the base interest rate, Erste's representative considered in his report to [senior representatives] that a 'talk with [...]' [then a [...]] CA [representative]] would be 'very useful'.

⁽²⁷²⁾ 38.164.

⁽²⁷³⁾ The record refers erroneously to the Minilombard, but it is the Federal Lending and Deposit Rates Committee of 26 February 1996 which is meant (see recital 221).

⁽²⁷⁴⁾ 1181.

⁽²⁷⁵⁾ 19.543.

⁽²⁷⁶⁾ 19.545.

⁽²⁷⁷⁾ 12.125; 889 et seq.; 1296 et seq.; 27.405.

⁽²⁷⁸⁾ 38.165 et seq.; 1962; 21.639.

(225) The following deadlines for implementation were given: 20 March (ÖVAG), 22 to 29 March (BAWAG), 22 to 23 March (Erste), by end March (CA, GiroCredit and RLB-NÖ), and 22 March (PSK). However, it was agreed 'to hold further telephone conversations with each other about coordination' on 20 March 1996. At the next Vienna Lending and Deposit Rates Committee meeting on 17 April (see recital 229), 'acceptance of the measures', especially with regard to the lowering of the basic interest rate, and 'a further reduction of the maximum preferential rate from 4 % to 3,75 %' were to be discussed ⁽²⁷⁹⁾.

March to May: 'exaggerated' competition makes joint 'countermeasures' at the highest level essential; the 'May Agreement': minimum rates for loan interest, reduction of deposit interest rates and other 'restrictive measures'

(226) On 22 March the [Controller Committee] found at [its] regular meeting that there was too much competition between banks on interest rates. It was therefore appropriate jointly to draw up a 'proposal for the alleviation of cut-throat competition' ⁽²⁸⁰⁾ addressed to the [senior management] of each institution.

(227) [Senior management] admittedly were themselves aware of this situation. On 29 March the [representatives] of BA, CA, RZB and Erste met for 'talks initiated by [...] [the [representative] of BA]', at which they said they were prepared on behalf of their institutions in view of the marked downturn in the interest margin 'to stop [certain] rate variants where possible' (*inter alia*, overdrafts and investment loans on a VIBOR basis and lower-of rates) and in this respect 'to work on other large institutions' as well. They also promised 'to inform each other's management boards of any infringements' ⁽²⁸¹⁾.

(228) At the Lombard Club meeting on 10 April, too, the [representatives] complained about the decline in earnings. Among the large institutions, therefore, there was 'an increasingly recognisable readiness to return to minimum banking principles' ⁽²⁸²⁾.

(229) In the Vienna Lending and Deposit Rates Committee on 17 April the first thing to be analysed was the implementation of 'the round of interest cuts agreed' in March (see recital 224). It emerged that all institutions had stuck 'essentially to the agreements reached at that time'. Most institutions saw 'no room' for a further lowering of interest rates. On the lending side, the preferential measures started by some institutions had put pressure on retail lending interest rates. In particular, the reduction by BAWAG in the case of consumer instalment loans and loans to works council members led to 'turmoil in the interest rate talks'.

(230) The bank representatives complained that competition had 'in the meantime' assumed 'ruinous proportions'. The chief criticism was that the agreements on posted interest rates would be circumvented by granting generous powers to the respective branch [representatives]. This 'hyperactivity' in the lending sphere therefore had 'at least to be checked'. To this end, BA presented a list (by fax) of 'minimum interest rates' for each category of loan (e.g. consumer instalment loans 7 %, home loans 6,5 %, mortgage loans with a term of five years 6,5 %, investment loans for the self-employed 6,5 %). The remaining competitors were to 'communicate their agreement or non-agreement without delay to Mr [...] of Bank Austria'. Accordingly, the minimum interest rates were 'also [to be] discussed by [representatives] at the next Lombard and if need be agreed', in order to 'reduce hyperactivity in this segment' ⁽²⁸³⁾.

(231) On 18 April the Austrian National Bank unexpectedly lowered the discount and lombard rates by 0,5 % each, which resulted in a 'meeting arranged at short notice' of the Vienna Deposit Rates Committee on 19 April.

(232) The participants were first able to observe that as regards deposit interest rates 'all institutions (had) carried out in March the round of interest-rate reductions agreed at the time [see recital 224] and basically kept to the agreements made then'. The 'current structure of interest rates' could therefore be 'described as basically satisfactory' from the banks' point of view.

(233) BA then referred to 'the meeting [at senior management level] arranged for next Wednesday, at which in view of the unsatisfactory earnings situation of Austrian banks [...] countermeasures are to be discussed, at the highest level therefore'. Accordingly, BA informed the meeting, 'as a sign of its determination to improve interest margins', that it intended to discontinue its 7,25 % Super Protection Scheme (Super-Schutzaktion) as of 30 April and subsequently raise the interest rate to 7,75 %. It also announced that it intended to reduce preferential rates by 0,5 %, capital savings accounts by 0,5 %, the base interest rate by 0,25 % (to 1,5 %) and the current account standard rate to zero. The deadline for implementation was given as the period from 4 to 10 May. The remaining banks 'were basically of the same opinion' as regards preferential rates and savings accounts; by 'at the latest 10 May 1996 all sectors should have taken this step'.

⁽²⁷⁹⁾ 12.127; 12.407; 1958 et seq.; 14.420; 1267 et seq.

⁽²⁸⁰⁾ 3507 et seq.

⁽²⁸¹⁾ 1147.

⁽²⁸²⁾ 1178.

⁽²⁸³⁾ 12.129; 2577; 36.053; 1954 et seq.

- (234) As regards action to be taken, 'great importance [was] naturally attached to the meeting [at senior management level]', at which BA's [representative] would 'advocate earnings-oriented measures'. This 'special summit [...]' was, on 24 April, to 'decide parameters for an improvement in margins, the utmost importance [being attached] to competition in commercial business as well as to retail lending and deposit rates'. Subsequently, a 'nationwide lending and deposit rates committee' on 26 April (see recital 241) would 'in consultation with the provinces, clarify the room for manoeuvre regarding interest rates in the deposits sector' ⁽²⁸⁴⁾.
- (235) In an internal memo of 19 April an [...] Erste [representative] responsible for corporate banking, [...], was informed that preparations had been made to reduce the rates for old and new loans by 0,5 %. With regard to the Minilombard Committee meeting arranged for 23 April, however, [...] added a handwritten note on the internal memo to the effect that 'nothing had yet been decided, so there was nothing to implement'. On 23 April, [representatives of] the large banks [...] did jointly consider whether and how they should react to the cut in the key lending rates. It was 'unanimously established that following the cut in the key lending rates the previous week there was no need (and also no scope) to reduce lending rates in the commercial sector'. [...] therefore added in manuscript on the abovementioned memo: 'As decided at the Minilombard on 23.4.96: no reduction of interest rates' ⁽²⁸⁵⁾.
- (236) Furthermore, the Minilombard participants too were agreed that the 'perverse competition on rates should be normalised by drawing in lower limits ... within a year'. The individual institutions 'still differed however' about 'specifics'. Restriction of rate-setting power was mentioned as a 'reasonable approach', whereby only the respective management boards and senior management (and no longer the provincial directorates) would henceforth be allowed to undercut the break-even rates. It was also agreed that neither foreign currency loans nor VIBOR commitments in small-volume business (there was no agreement however as to how this should be defined) had anything 'to worry about', 'even in the retail sector'.
- (237) The 'restrictive measures' to be decided at the special Lombard Club meeting on 24 April were to include: reduction of the current volume of cash advances from ATS 170 million to ATS 70 million, avoidance of lower-of clauses, foreign currency loans only in large-volume commercial business, reduction of the rate-setting power, improvement of the house bank margin (export promotion), and avoidance of LIBOR commitments in small-volume business. Further action was to be taken as follows: after the special Lombard Club meeting on 24 April a Minilombard Committee meeting would draw up 'specific measures', which would then 'be decided', after the Federal Lending and Deposit Rates Committee meeting on 26 April, in the Minilombard on 2 May ⁽²⁸⁶⁾.
- (238) On 23 April [a representative] of CA's Retail Banking Division requested [representatives] in CA's City and Country Directorates 'to see that the reduction of savings deposit interest rates is implemented as consistently as possible'. A minimum rate lower than the agreed minimum rate was to be granted 'really in exceptional circumstances only' and 'in no circumstances passed on to branches'. The precise implementation deadlines would be made known 'after the talks with the other institutions'. Lastly, regional [representatives] in the provinces were requested 'to organise regional talks as soon as possible and to agree an identical level of interest rates. Better profit margins would benefit all of us!' ⁽²⁸⁷⁾.
- (239) The Commission was unable to find any record of the special Lombard Club meeting of 24 April itself. The RZB representative in the Federal Deposit Rates Committee recorded in his note of 26 April that at the special Lombard 'the current interest-rate situation in the retail and corporate customers sectors [had been] discussed' and '[it had been] decided as an initial step to stop advertising interest rates'. 'Further measures' would be drawn up by a 'retail lending working party in close cooperation with the Lombard Club' ⁽²⁸⁸⁾. An entry in BAWAG's [representative's] list of people to phone for 29 April shows, furthermore, that a 'round of bank talks' took place on 24 April, in which apparently the [representatives] of BA, RZB, CA and PSK (but not, according to its own information, BAWAG) took part ⁽²⁸⁹⁾.
- (240) An internal memo from this period submitted by BA records: 'Rates talks/[senior management] level (CA, BA, RZB, PSK) in the bag'. Any 'breaches of the [...] agreements' by other banks were to be notified immediately, but at the same time the bank concerned was also to be tackled about the breach without delay ⁽²⁹⁰⁾.

⁽²⁸⁴⁾ 14.411; 882; 36.051.

⁽²⁸⁵⁾ 36.048.

⁽²⁸⁶⁾ 14.201 et seq. 1206 et seq.

⁽²⁸⁷⁾ 36.160.

⁽²⁸⁸⁾ 1952.

⁽²⁸⁹⁾ 38.163.

⁽²⁹⁰⁾ 27.337.

- (241) Two days after the special Lombard Club meeting, the Federal Deposit Rates Committee met, 'whose main purpose was to find as uniform a *modus operandi* as possible for the reduction of deposit rates'. BA had 'taken over the lead' and notified the reduction of the basic interest rate by 0,25 % to 1,5 %, savings deposits preferential rates by 0,5 %, capital savings accounts by 0,5 %, the posted interest rate for sight deposits by 0,125 %, sight deposit preferential rates by 0,5 % and employee group savings deposits also by 0,5 %. CA explained that it 'intended to follow with a general interest-rate cut'. Erste and BAWAG too would make appropriate cuts. The maximum interest rate for new funds (in Vienna) was 'agreed' at 3,5 % (3,75 % for existing deposits). By 11 May 'all sectors are to be reduced', and in the 'regional banks' as well. A lending rates committee would 'advise further' on 30 April, in particular about fixed interest offers for retail customers, refraining from advertising interest rates, and minimum interest rates for lending ⁽²⁹¹⁾.
- (242) 'In preparation for the Lombard planned for 8 May' and 'on the basis of the [...] talks' in the special Lombard Club meeting, 'minimum rates [were] agreed' on 30 April at the Special Lending Rates Committee meeting in which '80 % of the Vienna market' (BA, CA, BAWAG, Erste, PSK and RBW) took part. The purpose, in view of the 'escalating competition' was to restore 'sense'.
- (243) The minimum rates devised for both variable and fixed interest business were not to be undercut by any institution. To this end, the institutions had first announced their individual 'calculable minimum rates', on the basis of which a common 'general proposal' was then determined for each product (consumer instalment loans 7,25 %; loans to works council members 7 %; building loans 5,75 %, mortgage loans 6,35 %; operating and investment loans for the self-employed 6,5 %; current accounts 9,5 %). Admittedly, an institution might be lower than the common general proposal for a particular product, but this appeared to be 'manageable on the whole'.
- (244) In fixed interest business a common procedure for setting rates was to be applied, whereby a premium of 0,25 % would be added to the lowest variable interest rate in a current year. Although this would bring 'good margins', it had to be acknowledged that for those institutions 'which do not want to keep to the agreements ... undercutting [was] made fairly easy'.
- (245) If these minimum rates were to be agreed by the [Lombard Club] on 8 May, they could come into effect as soon as 20 May and thus lead 'de facto to more interest and greater margins', even if 'smaller institutions [could be] expected to break ranks'. Further, the Lombard Club of 8 May had still to discuss the cessation of all special schemes by 30 June and the raising of posted interest rates to the March level, it being possible 'to live with small differences'.
- (246) To 'implement the result' of the 8 May Lombard Club meeting, finally, a Lending Rates Committee meeting was arranged for 10 May (see recital 251) ⁽²⁹²⁾.
- (247) On 8 May, immediately before the Lombard Club meeting on the same day, the 'round of bank talks' between [...] BA, RZB, CA and PSK (of 24 April; see recital 238) was continued, this time with BAWAG taking part. Among the subjects covered was the avoidance of fixed advances to retail customers, since this was not very attractive economically for the banks. A further informal round of talks on this subject took place on 18 July (see recital 270) ⁽²⁹³⁾.
- (248) At the meeting of the Lombard Club itself, the [representatives], on the basis of a proposal from BA, 'agreed [the following] basic matters': 1. a house bank margin (export financing) of not less than 0,25 % [the participants in the Export Financing Committee had already agreed this on 16 March 1995; see recital 340]; 2. advances in ATS or in foreign currency only from ATS 30 million ⁽²⁹⁴⁾ (minimum premium 3/8 %), above ATS 200 million minimum premium of 0,25 %, with maturing fixed tranches under ATS 30 million a minimum rate of 5,5 %; 3. no operating fund rates below 7 %; 4. no one-sided call facility for customers on fixed loans; 5. no lower-of clauses; 6. no fixed interest rates for maturities of more than 10 years; 7. no operating fund financing on a roll-over basis; 8. no lending schemes with aggressive rates, all current preferential rates to terminate by 30 June; 9. no advertising of interest rates in the media, mailings or window displays; 10. calling of a special meeting on building loans; 11. minimum rates for retail lending and loans to self-employed persons in the following categories: works council loans (7 %), consumer instalment loans (7,25 %), building loans (6,75 %), mortgage loans (6,25 %) and current accounts (9,5 %); 12. a handling fee of at least 2 %; 13. use of a new formula for calculating fixed interest loans in accordance with the proposals put forward at the Consumer Lending Rates Committee; 14. preparation of a minimum fees proposal for securities business and payments; and 15. rapid introduction of a new funding indicator ⁽²⁹⁵⁾.

⁽²⁹¹⁾ 14.287 et seq.; 12.131 et seq.; 12.140; 1952; 36.049.

⁽²⁹²⁾ 2046; 1144; 2582 et seq.

⁽²⁹³⁾ 38.162.

⁽²⁹⁴⁾ According to a document submitted by BA, the [representatives] agreed to ATS 20 million instead of ATS 30 million; 27.300.

⁽²⁹⁵⁾ 1172; 27.472; 14.407.

- (249) At [their] meeting on 13 May [senior representatives of] BA adopted these measures, which had been agreed with the other credit institutions ⁽²⁹⁶⁾.
- (250) Two days later the package of measures decided by the Lombard Club was discussed by the Linz Interest Rate Committee, which was responsible for Upper Austria. The BA representative reported that 'instructions had already been given in BA' to implement the package, and that a named member of BA's management board 'would not be allowing any exceptions for the present'. The representatives of BAWAG and GiroCredit also confirmed the content of the package. To ratify the decisions of the Lombard Club 'the Linz Interest Rate Committee should meet as quickly as possible and either decide to implement the paper referred to in Upper Austria or possibly decide to amend it' ⁽²⁹⁷⁾.
- (251) As already agreed at the Special Lending Rates Committee on 30 April (see recital 246), the banks' representatives met on 10 May in order to discuss the basic decisions [taken at senior management level] (and the earlier proposals from the Special Lending Rates Committee) concerning the specific 'implementation measures'. The following were discussed in detail: 1. implementation of the proposal in fixed-interest transactions to add a premium of 0,25 % to the lowest variable interest rate in a current year (see recital 244) by 20 May (except for current schemes); 2. foreign currency loans only above an equivalent of ATS 1 million, with at least a 2 % premium and a 2 % handling fee; 3. termination of all schemes by 30 June; 4. no advertising of interest rates; and 5. a handling charge of at least 2 % when granting loans. As regards items 1. to 4. 'all the institutions present promised to stick to and implement the above points' ⁽²⁹⁸⁾.
- (252) On 31 May CA's Central Office informed retail customer [representatives] in the regional offices about the individual minimum rates which from 1 July should 'no longer be undercut'. This would lead to a 'normalisation' of the recently 'very exaggerated competition on rates'. CA intended to make its contribution to this 'normalisation of the overheated competitive situation' by also implementing the advertising ban ⁽²⁹⁹⁾.
- (253) The extraordinary Export Financing Committee meeting of 15 May concerned itself with the 'fixing of the house bank margin' agreed [at senior management level] (see recital 248). It was 'unanimously emphasised' that the agreed 0,25 % was valid 'only for new business' and that existing agreements remained unaffected ('minimum margin however 12,5 basis points' ⁽³⁰⁰⁾) ⁽³⁰¹⁾.
- (254) On 24 May APA quoted a 'member of a bank management board who wishes to remain anonymous' as saying amongst other things that although it was not possible 'for reasons of antitrust law apart from anything else' to return to the formal interest rate agreements common in the 1980s (see recital 27), 'there is, in view of current market conditions, a growing desire in banking circles for definite agreements'. This 'desire' stemmed from low interest rates and weak demand for credit. These and other factors, APA went on, 'are, according to banking circles, feeding the call for a new code of conduct' ⁽³⁰²⁾.
- June: joint debriefing, countermanning the latest cut in lending rates, (new) agreement about minimum interest rates, after heated discussion, and about the introduction of the minimum handling charge*
- (255) At the meeting [...] in the Minilombard Committee on 4 June 'initial experience of the new system of rates [was already] available'. It emerged that the arrangements for fixed-interest advances were being 'adhered to' by the larger banks. Only the agricultural credit cooperatives were 'could not be kept under control': there was 'only 70 % observance' of the new arrangements in that sector. A further criticism was that 'in Salzburg, Upper Austria and Carinthia local committees [had] agreed other (lower) rates', which in part 'seriously' differed from the 'agreed rates'. It was therefore 'agreed' to push the 'regional interest rate talks ... to implement the agreed rates nationally'.
- (256) The banks' representatives subsequently discussed a few problems concerning the implementation of the agreements on fixed-interest advances. It was for instance 'agreed' that the agreed minimum volumes could be undercut in the case of individual tranches which together attained the minimum volume, or if the borrowers had strong links with each other. Further, the allocation of the minimum thresholds had hitherto been handled differently according to whether the credit line or the actual take-up was taken as the reference. This resulted in different premiums, which could 'naturally lead to distortions of competition'. What banks wanted to do was 'to proceed pragmatically' and henceforward take the estimated total volume as a basis. In addition, for fixed advances in Austrian schillings between ATS 10 million and 20 million there was to be a minimum premium of 1,5 % to prevent 'customers increasingly [switching] to foreign currency advances'.

⁽²⁹⁶⁾ 36.171.⁽²⁹⁷⁾ 42.234 et seq.⁽²⁹⁸⁾ 12.142; 14.407 (see footnote 295).⁽²⁹⁹⁾ 2585.⁽³⁰⁰⁾ NB: One basis point equals one hundredth of a percentage point.⁽³⁰¹⁾ 1171.⁽³⁰²⁾ 39.

Lastly, a 'strictly limited number' of customers known as 'money market participants' (large insurance companies, subsidiaries of foreign groups, energy suppliers, oil groups and certain companies with links to the Federal authorities were mentioned by name) were to be excluded from these agreements; these were to be able to negotiate different rates⁽³⁰³⁾. A little later, however, this agreement was again withdrawn (see recital 262).

municipalities, and emphasised that these should 'be pushed through'. To this end, BA was to prepare a 'paper setting out the objectives in this respect', in order 'to give appropriate substance to the efficiency of these bank talks'⁽³⁰⁵⁾. The 'paper setting out the objectives as regards rate-setting' was drafted at the Mortgages Committee meeting on 27 June: minimum premiums and minimum rates were established for each sector⁽³⁰⁶⁾.

(257) At the Consumer Lending Rates Committee meeting on 11 June the banks' representatives first reported on the implementation of the previously agreed measures. A handling fee of 2 % had already been introduced by GiroCredit, BAWAG (better than raising the interest rate), BA and Erste, or was about to be introduced very soon. Like the corporate customer [representatives] before them (see recital 255), the participants in the Consumer Lending Rates Committee were critical of the fact that the minimum lending rates in the provinces were lower than those agreed. All sectors were therefore requested 'to get the provincial talks going so as to achieve as wide an effect as possible'.

(261) As early as April CA had been criticised in certain media for charging an 'early repayment penalty', which borrowers have to pay if they repay a loan early. While this penalty in other banks was merely between 2 and 5 %, CA charged at least 5 % (in a specific case 18,5 % of the residual amount). The [representative] of CA's Retail Financing Division explained this problem in a memo to his [senior management], which for its part brought up the subject at the Lombard Club meeting on 12 June. The other [representatives] agreed in principle that their institutions' practice of simply demanding a small compensatory payment was 'wrong'. They were 'of course not fully informed' about the technical details, which was why an 'experts committee' would look into the problem. The [representatives] further agreed that preferential lending rates would terminate 'in general by the end of July'⁽³⁰⁷⁾.

(258) There was also 'a general wish' that the May interest rate cut should be 'made retroactive as widely as possible'. Specifically, during July (BA from 1 July, BAWAG at the beginning of August), interest rates were to be raised for consumer instalment loans to 9,25 %, for loans to works council members to 7,25 %, for home loans to 7,25 % (BAWAG to 6,875 %) and for building loans to 6,875 %. BAWAG would submit 'written offers tomorrow' in the Lombard Club. Lastly, it was complained that there were still 'problems' as regards the self-employed, who 'were still getting preferential treatment'. A stop should be put to this now: here too, as in the case of investment loans, interest of at least 6,5 % 'including handling fee' should from now on be charged. Foreign currency loans should be offered only from an equivalent of ATS 2 million, the premium up to ATS 5 million being 2 % on VIBOR and thereafter at least 1,5 %.

(262) On 25 June the participants in the Minilombard talks confirmed that the specific exemption for 'money market participants' agreed on 4 June (see recital 256) had in the meantime been cancelled. On this point they were to 'approach [senior management] and request agreement'. As an alternative to the specific exemption it was proposed, where credit was granted to a company which could raise capital without difficulty on the international markets as well, to take 'a joint decision in individual cases'⁽³⁰⁸⁾.

(259) 'Final agreement on how to proceed' should be reached at the Consumer Lending Rates Committee on 27 June (see recital 263)⁽³⁰⁴⁾.

(263) At the Consumer Lending Rates Committee meeting on 27 June the first business was the reaching of 'agreement' on the introduction of a '2 % minimum handling fee' for all retail lending products (instead of the previous 1 %, see recital 216). No agreement could be reached, however, on the minimum interest rate for loans to works council members, since BAWAG was not prepared to raise the handling fee or the interest rate. In view of this, the other banks withdrew their proposal. A new joint attempt was to be made in the autumn.

(260) The participants at the Mortgages Committee meeting on 18 June discussed 'reasonable rates' for assisted housing construction, commercial housing construction, existing loans and the Federal Government/provinces/

⁽³⁰⁵⁾ 19.778.

⁽³⁰⁶⁾ 19.780.

⁽³⁰⁷⁾ 1167; 776 et seq.

⁽³⁰⁸⁾ 37.683 et seq.

⁽³⁰³⁾ 14.195 et seq.; 15.826; 37.681 et seq.

⁽³⁰⁴⁾ 14.405; 773; 12.148.

- (264) The discussion on fixed interest rates was heated. Erste 'corrected the agreement on fixed interest rates' by putting forward an amended interest table and making this the 'condition' for sticking 'further to the agreements made' (see recital 242 et seq.). This behaviour 'aroused much indignation among those present'. Erste justified its conduct on the basis of apparent undercutting of the agreed minimum rates by individual competitors, to which the latter replied that in their case admittedly 'the measures were slower to take effect' but that basically everything was running to plan and that they should 'therefore stick to the agreements made in May'. After 'heated discussions it was agreed' to apply the minimum rates referred to by Erste to self-employed persons only and to do so only for a 'transitional period of 2 to 3 months'. In the case of building loans, however, Erste was not successful, since BAWAG had threatened in that case to withdraw 'its promise' to demand 6,75 % in interest for this type of lending, which in turn 'would have blown the May agreement apart'. Here too a new joint attempt was to be made at the beginning of September.
- (265) A further topic was the early repayment penalty already discussed in the Lombard Club (see recital 261). CA offered to make its calculation model available to the other banks. Towards the end of these talks, the banks discussed the introduction of a new 'handling fee' both for lending and for securities business. Lastly, there was dissatisfaction, as before, with the implementation of the agreements in the provinces. 'Repeated regional interest rate talks in each province' were to take place so as to discuss 'how to proceed in the regions'. BA stated in this connection that it had 'urged [its] provincial directorates to see that retail lending talks take place regularly' ⁽³⁰⁹⁾.
- June and July: joint successes and failures*
- (266) At the Controller Committee meeting on 28 June the bank representatives reported unanimously that the competitive situation in Vienna had 'calmed down', but that in particular in the western provinces 'commercially incomprehensible pricing was [still] to be found'. The domestic customer spread had reached an historic low. [A] detailed analysis [was made at controller level] on 29 July, in which [it was] explained that the measures jointly carried out in April and May had been an 'important first step towards stopping the collapse of the S-customer spread' but that the rise in fixed advances had been 'counterproductive'.
- (267) The 'introduction of the second stage of the rates policy' was therefore 'absolutely essential'. In particular, cash advances would have to be restrained. The 'agreements made concerning minimum rates' must moreover not result in 'those minimum rates becoming the standard rates on the market'. The Minilombard Committee should therefore 'carry out the second stage of the new rates policy in August.' ⁽³¹⁰⁾.
- (268) The Minilombard Committee met three days later and was 'characterised by general helplessness' in the face of the remarks [at controller level]. Those banks which had implemented the 'recommendations of the [Lombard]' had to accept 'clear setbacks'. The joint attempt to make large reductions in cash advances also seemed 'for the time being to have failed'. More specific measures were to be discussed at the next Minilombard Committee meeting ⁽³¹¹⁾.
- (269) At their meeting on 4 July the representatives of the building loan banks, after the usual detailed exchange of information on current and proposed issues and the associated rates, discussed the possibility of agreeing to the lending rates proposed by their parent institutions in the building finance sector. The participants concluded that it would be possible to reach 'an agreement only in the top-level talks or in the Mortgages Committee'. Increasing competition with the building societies was also discussed ⁽³¹²⁾. To avoid a 'confrontation', 'talks between the building loan banks and the savings banks' should be arranged ⁽³¹³⁾.
- (270) On 18 July CA's [representative] invited high-ranking representatives from BAWAG, BA, GiroCredit, Erste and RZB to further talks, earlier ones had taken place on 8 May (see recital 247), on the unfavourable developments from the banks' standpoint in fixed advances. These were being increasingly granted, contrary to their original purpose, to small firms and with short maturities, which in the banks' view made little economic sense. In future, this type of practice should therefore be stopped ⁽³¹⁴⁾.

⁽³¹⁰⁾ 4298 et seq.; 4306 et seq.; 4299 et seq.; 3487.

⁽³¹¹⁾ 14.192.

⁽³¹²⁾ In January 1999 APA reported that Raiffeisen Bausparkasse had carried out an interest-rate cut and a rate comparison which was severely criticised by its competitors (s-Bausparkasse, Wüstenrot). The five building societies had 'agreed not to publicise a comparison of their savings products. Raiffeisen had broken this agreement by publishing in the previous week and opened the way to fresh competition. With this policy, the building societies would beat even the banks, which themselves do not advertise rate comparisons', APA 21 January 1999; Die Presse 22 January 1999.

⁽³¹³⁾ 19.556 et seq.

⁽³¹⁴⁾ See footnote 292.

⁽³⁰⁹⁾ 36.041; 12.151; 773; 14.396.

(271) As part of a 'competition monitoring exercise', on 23 July CA staff obtained credit offers from seven banks in Vienna. 'Satisfactory results: minimum rates were not being undercut in a single instance. Clearly, competitors in Vienna are showing good discipline on rates' ⁽³¹⁵⁾.

(272) On 9 August BA convened a Vienna Deposit Rates Committee meeting 'to agree [preferential] interest rates'; the raising of interest rates for capital savings accounts was also discussed. After a few 'small corrections' (Erste, BA, CA and RBW had raised the two and three-year savings accounts by 0,25 %), the capital savings account market now presented 'a very uniform rates picture'. In the case of preferential rates for new business the agreed maximum rate of 3,5 % (in exceptional circumstances 3,75 %; see recital 240) was holding, and there had been only a few 'interest-rate deserters'. CA's proposal concerning the introduction of a new 'savings account fee' was also discussed. The date of introduction contemplated was 1997. BA, CA and Erste wanted to print a reference to this already in the savings account document. It was finally 'agreed' that this subject should be discussed again at the next Federal Lending and Deposit Rates Committee meeting in September 1996 ⁽³¹⁶⁾.

September: 'Aggressive rates' from Germany's Schoellerbank and the latter's possible inclusion in the talks as a response to this; correction of the agreement on lower limits to foreign currency loans

(273) In response to a reduction in the GOMEX rate the Consumer Lending Rates Committee met on 3 September: all the participating banks 'agreed' not to reduce interest rates in the retail lending sector.

(274) There was satisfaction at the fact that 'the interest rates agreed in June [had been] largely observed' and that 'aggressive rates' would be offered only by relatively small or regionally active institutions. A particularly awkward operator here (since its takeover by the Bayerische Vereinsbank ⁽³¹⁷⁾ in 1992) was Germany's Schoellerbank ⁽³¹⁸⁾, which in its attempts to gain a foothold on the market was resorting 'exclusively to aggressive rates'. Because it was not present at the talks, it was a 'foreign bank', there was however 'no possibility of agreement at all', which was why the Austrian banks were considering whether now to invite a representative of Schoellerbank to the next Consumer Lending Rates Committee meeting. However, the banks finally decided against Schoel-

lerbank taking part: the competitive pressure from Schoellerbank was 'still manageable', and it would be 'seen negatively' if 'Schoeller knows exactly what is being discussed in these committees'.

(275) In the case of foreign currency loans, the agreed lower limit of ATS 2 million was proving to be 'achievable only with difficulty'. A new minimum loan amount of ATS 1 million was therefore 'agreed'. There was also 'agreement' that in the case of fixed interest loans 'the recently agreed rates would not hold'. The 'following new minimum rates [were therefore] decided'. 6,375 % for a term of three years, 7 % for five years, 7,5 % for seven years and 7,75 % for 10 years. For self-employed persons the rates would be 0,25 % lower. In reply to media inquiries a 0,5 % higher rate of interest was always to be given.

(276) Lastly, BA stated that it intended to offer a higher interest special loan from the end of September to mid-November. Since this was in breach of the May agreement to stop special schemes (see recital 248), the announcement met with 'strong objections from the CA, Erste and ÖVAG representatives' ⁽³¹⁹⁾.

(277) In an internal memo from [a representative] of CA's Retail Financing Division to a member of the management board dated 6 September 1996, [a representative of] BAWAG, is described as 'an important interlocutor on rates' and 'a shrewd tactician and highly-skilled negotiator' in this field ⁽³²⁰⁾.

(278) At the Lombard Club meeting on 11 September, the [representatives] discussed the practice of granting cash advances to social security organisations. The provincial agricultural credit banks were criticised for not charging a premium, which was seen as 'aggressive pricing'. In future, minimum premiums were to be charged ⁽³²¹⁾.

September: the 'savings account fee' as a joint earnings opportunity

(279) 'The main item for discussion' at the Vienna Deposits Rates Committee meeting on 24 September was the introduction of a new savings account fee. So that this 'new joint earnings opportunity' could be taken, BA set out the most important details in a discussion document: it must be 'earnings optimal', must not allow 'exceptions' or 'opportunities for flight' and should be introduced 'immediately' and 'jointly'. In view of the 'great sensitivity' of this topic, only the principle was discussed at first (e.g. the amount of the fee to be between ATS 30 and ATS 60). Since the new fee aroused interest all round,

⁽³¹⁵⁾ 2522.

⁽³¹⁶⁾ 1259; 20.457.

⁽³¹⁷⁾ Since 1998, Bayerische Hypo- und Vereinsbank AG.

⁽³¹⁸⁾ Since 1998, SKWB Schoellerbank Aktiengesellschaft.

⁽³¹⁹⁾ 14.391 et seq.; 718; 2540.

⁽³²⁰⁾ 2526.

⁽³²¹⁾ 1450.

the subject was to be discussed in more detail at the forthcoming Federal Deposit Rates Committee meeting on 12 November. Until then specific 'proposed solutions' were to be developed and, if need be, customer acceptance already explored 'carefully and to a limited extent'. The '[representatives] in the Lombard Club' were also to be contacted ⁽³²²⁾.

September: debriefing — joint successes with lending and deposit rates for retail customers, dissatisfaction with the situation as regards corporate customers

(280) The participants at the Vienna Deposit Rates Committee meeting on 24 September were also 'satisfied with the current savings deposits situation, particular emphasis being given to the discipline adhered to on the Vienna market [maximum interest rate 3,5 %]. The 'deserters' in the regions were 'not felt to be dramatic'. Those institutions which 'contrary to the original consensus' had brought higher interest savings accounts onto the market 'now regret this step and are thinking of suitable corrections' ⁽³²³⁾.

(281) The banks had grounds for satisfaction not only in the deposits field but also where retail lending was concerned. At the Consumer Lending Rates Committee meeting on 8 October it was 'generally stressed that the agreed interest rates are holding. The minimum handling fee can also be implemented' ⁽³²⁴⁾.

(282) The situation was different, however, in the corporate customers sector, where the banks had not succeeded despite the 'efforts since the beginning of the year' in 'improving rates on a broad scale'. It was of course possible to achieve 'successes especially in the Vienna area', but the 'aggressive' rate policy of, in particular, local banks was leading to a 'crumbling of the agreed minimum margins'. Furthermore, the usual practice hitherto of agreeing minimum interest rates was proving to be counterproductive, since the market saw these as standard rates, as had been feared [at controller level] (see recital 267). For this reason, 'no specific rate recommendations (were) agreed this time' at the Mini-lombard meeting on 2 October ⁽³²⁵⁾.

(283) At the Lombard Club meeting on 9 October the [representatives] expressed their annoyance at the 'lack of discipline on rates'. '[...] [the [representative] of GiroCredit] will invite the 20 largest banks — more serious talks' ⁽³²⁶⁾.

October to December: joint reduction of deposit rates; no 'savings account fee' for the time being

(284) On 25 October the bank representatives met at an extraordinary Vienna Deposit Rates Committee meeting to discuss a reduction of the interest on capital savings accounts. A reduction of 0,25 to 0,5 % was approved by all except, once again, BAWAG, which was not ready to accept any reduction. The other banks, however, wanted to reduce the interest only if BAWAG could 'be induced [at senior management level] to change its mind'. The meeting therefore broke up this time without 'specific results'. The deliberations were to serve as a basis for the Federal Lending and Deposit Rates Committee meeting on 12 November (see recital 286), where 'an Austria-wide consensus' was to be found and 'suitable recommendations [prepared] for the [...] Lombard on 13 November' ⁽³²⁷⁾.

(285) At the Controller Committee meeting on 8 November Erste's representative reported that his bank's [senior representatives] had been requested in view of the 'aggressive rate policy of BAWAG and PSK to talk with BAWAG's and PSK's [...] [senior representatives] ... (Lombard Club?)'. Erste then suggested a reduction of savings interest by 0,25 to 0,5 %, which was 'gladly received' by the other banks. BA also volunteered 'to make an attempt along these lines at the next [senior management level] talks (mid-November)' ⁽³²⁸⁾.

(286) In 'preparation for the Lombard meeting on 13.11.1996' a Federal Lending and Deposit Rates Committee meeting took place on 12 November. BA announced, as it already had at the Controller Committee meeting (see recital 285), that it intended in the 'Lombard to propose a reduction of all savings deposit rates by a quarter of a percentage point (...)'. After thorough discussions the institution representatives agreed that the [representatives] in the Lombard Club should decide the following interest rate cut for savings deposits: bonus-carrying savings deposits by 0,25 %, short-term capital savings accounts by 0,25 % and long-term ones by 0,5 %. The result of the [...] in the Lombard Club would then 'be discussed' the following week at a Deposit Rates Committee meeting (see recital 289).

(287) Another topic of discussion was the introduction of the savings account fee (see recital 279). Internal discussions on this subject had shown that the introduction of such a fee would encounter legal difficulties and there was only 'any question of it in the context of a measure agreed at the broadest level'. There was also the danger that this fee could develop 'into a competition policy instrument'. There was no desire therefore to pursue the

⁽³²²⁾ 14.387 et seq.; 2497 et seq.; 1257.

⁽³²³⁾ See footnote 321.

⁽³²⁴⁾ 37.300.

⁽³²⁵⁾ 14.181; 864; 15.831.

⁽³²⁶⁾ 1713.

⁽³²⁷⁾ 1946; 14.282; 854; 1257.

⁽³²⁸⁾ 4250; 4320.

project for the time being. Furthermore, if the anonymity of savings accounts was withdrawn, new savings account documents would have to be drawn up anyway, which would represent an 'ideal opportunity' for the introduction of such a fee ⁽³²⁹⁾.

(288) At the [...] Lombard Club meeting on 13 November the already discussed reduction of capital savings account interest by 0,25 to 0,5 % and a general reduction of bonus-carrying savings deposits by 0,25 % was 'agreed' ⁽³³⁰⁾. [A representative] of CA's Retail Lending Division reported on the same day to a member of CA's management board that there was 'as much agreement as possible between CA and BA on rates' ⁽³³¹⁾.

(289) After the 'Lombard Club [had] given the green light to a savings deposit reduction this year', 'talks on agreement in this area' took place on 18 November, as had already been agreed at the Federal Lending and Deposit Rates Committee meeting on 12 November (see recital 286). At these, 'virtually all' bank representatives announced that they intended to implement the 0,25 % reduction (for long maturities) 'as soon as possible'. The maximum preferential rate was therefore to be 3,25 % (in the Vienna area) or 3,5 % (in the provinces). The following implementation deadlines were given: Erste 30 November to 4 December, CA 5 December, BA 25 to 29 November, PSK by mid-December, GiroCredit end of November/beginning of December, Hypo-Verband 30 November to 5 December, ÖVAG 1 December and RBW 4 December. BAWAG would 'go along with the plan by the end of the year, after a short delay' ⁽³³²⁾.

(290) The next day, 19 November, saw the first meeting for some time of the Liberal Professions Lending Rates Committee: its 'inclusion in the Consumer Lending Rates Committee had not proved very worthwhile'. It was discussed whether 'to adhere to yesterday's decisions by the Deposit Rates Committee', i.e. to reduce the maximum preferential rates to 3,25 % or 3,5 % (see recital 289). As regards lending rates, the intention was to try not to grant operating loans under 6,25 % and other financing under 6 %, to charge an advisory fee of at least 1 %, and to offer no fixed interest loans with less than three years' maturity and no foreign currency loans with an equivalent value of less than ATS 1 million. NÖ Hypo was criticised for its 'current rates for doctors', but

was able to refute this criticism by pointing out that 'the material was sent out to Vienna doctors without specifying rates' ⁽³³³⁾.

(291) On the same day the participants in the bank talks on securities discussed possible dual valuation/pricing (both in ATS and in euro) for portfolio lists. This would lead basically to more transparency for customers but also to higher costs for banks. The participants were 'agreed that in this area competition between banks should be avoided and an effort made to apply a uniform course of conduct for Austrian banks' ⁽³³⁴⁾. For the period up to 31 December 1998 a 'joint proposal' was made a little later to the effect that portfolio lists were to be valued only in ATS and any reference to the euro was to be dropped. For the period up to December 2001 the banks ultimately could not agree on a common line, but dual valuation/pricing was 'recommended by the majority' (i.e. all banks except CA) ⁽³³⁵⁾.

(292) At their meeting on 28 November the representatives of the building loan banks were worried about future new areas of business, since it was to be expected that in future the volume of credit issued by building loan banks would be smaller. To 'avoid destructive competition between building loan banks', the latter would switch to other areas of business such as the financing of municipal infrastructure ⁽³³⁶⁾.

(293) On 11 December [a meeting took place at controller level] in order to exchange detailed information concerning the 'expected results for 1996, and budgets and general conditions for 1997' ⁽³³⁷⁾.

10. CHRONOLOGY OF EVENTS: 1997

January: a good start

(294) 1997 began for the banks with the welcome realisation that 'the cuts agreed' at the end of 1996 (see recitals 288 and 289) had 'in the meantime been implemented by all sectors'. The 'interest rate cuts' had also been 'implemented' in the provinces. The market situation was therefore 'considered' by the participants in the Vienna Deposit Rates Committee meeting on 27 January 'to be essentially satisfactory' and the 'interest rate talks at the start of the year went smoothly on the whole' ⁽³³⁸⁾.

⁽³²⁹⁾ 848 et seq.; 14.285 et seq.; 3301 et seq.; 1942 et seq.; 1253; 27.543.

⁽³³⁰⁾ 842 et seq.

⁽³³¹⁾ 2544.

⁽³³²⁾ 842 et seq. (see footnote 330); 14.282.

⁽³³³⁾ 14.498.

⁽³³⁴⁾ 4471.

⁽³³⁵⁾ 35.837.

⁽³³⁶⁾ 19.565 et seq.

⁽³³⁷⁾ 2637; 1376 et seq.

⁽³³⁸⁾ 4231; 14.370.

February and March: uniform cut in deposit rates and concerted measures to 'contain excessive competition' in respect of lending rates, readiness to return to a moderate rates policy

brief discussion not to touch' the current rate, which as a rule was 1,5 %. The public should be put in the picture 'by means of "confidential" information from APA. Coordination by BA's marketing department'.

- (295) On 6 February representatives of the building loan banks held their regular meeting. BA's representative suggested raising to 1 % the secondary market yield markdown of 0,875 % as applied up to then by all building loan banks in accordance with their agreement (see recital 220). The participants 'agreed that an adjustment of this kind should be made uniformly by all the building loan banks. The beginning of 1998 was mentioned as a possible date for implementation.' All participants also 'agreed that early return [of a loan] by a customer should be linked to a deduction'. Lastly, the banks announced the volumes they planned to loan in 1997 ⁽³³⁹⁾.
- (296) The Vienna Special Deposit Rates Committee, meeting on 14 February, discussed the preparation of a further cut in savings deposit rates of between 0,25 % and 0,5 % at the end of March. The banks were to come up with an internal position in time for the Federal lending and deposit rates talks on 24 February ⁽³⁴⁰⁾.
- (297) At the Lombard meeting [...] on 19 February 'it was agreed to work towards a cut of up to 1/2 % in high-yield savings deposit rates in the Deposit Rates Committee'. There is a good example here of the flow of information between the Lombard Club and the specialised committees, in this case the Federal Lending and Deposit Rates Committees: RZB's [representative] informed RZB's representative on the Deposit Rates Committee of the conclusion reached by the Lombard Club, since it was to be 'considered at the Federal lending/deposit rates meeting' ⁽³⁴¹⁾.
- (298) Accordingly, at the Federal lending/deposit rates meeting on 24 February, the 'following interest rate cuts were decided' on the deposit side, which were to take effect 'throughout Austria' in the week 10 to 14 March: 0,25 % cut in fixed rates (0,5 % where maturity exceeded four years), 0,25 % cut in special rates and in group and employee savings rates (maximum rate for new business 3 %, or 3,5 % in the provinces, and for old business 3,25 %). As regards the base rate, 'it was agreed after a
- (299) Concerning lending rates, complaints were made that the fixed interest rates of some institutions, 'contrary to what was discussed and agreed in spring 1996, in talks which took place at the wishes of [senior management]', lay under the variable rates (instead of adding a 0,25 % deduction for each year of duration to the lowest variable interest rate, see recitals 244 and 248). A 'separate meeting' would therefore be called in March in order to 'work out a solution' (see recital 301). CA had already produced an internal memo listing some 'blatant violations of the competition principles' formulated 'in the summer of 1996' in respect of lending rates, for example, spreads for foreign currency loans of below 1,5 % ⁽³⁴²⁾.
- (300) CA also complained about an advertising campaign by BAWAG which mentioned rates. This was in breach of the '[senior management's] decision' (see recital 248) ⁽³⁴³⁾.
- (301) Since competition between banks in the retail banking sector had 'meanwhile (become) very undisciplined again, it was necessary to meet again shortly after the Federal talks' [see recital 299] in order to 'discuss ways of containing' this competition. 'All the banks' representatives wished to return to a somewhat more orderly competitive situation'. The participants in the Vienna lending rates meeting on 7 March 1997 next identified a number of 'disturbing offers' on the market, whose negative impact was 'intensified' by the fact that these 'disturbing' interest rates were being advertised in 'violation of previous agreements'.
- (302) 'In the light of the above, the following agreements (were) made': for foreign currency loans, the minimum amount of ATS 1 million, as it was then, was to be increased to ATS 1.5 million (mid-year) and then ATS 2 million (end of the year), and a handling fee of at least 2 % was to be charged. The minimum margin should be 2,5 %.
- (303) The joint decisions were then implemented. PSK, for example, set its maximum rate for new special-rate business at 3 % for Vienna and 3,25 % in the provinces, 'in line with the agreement in the Deposit Lending Rates Committee' (see recital 298) ⁽³⁴⁴⁾.

⁽³³⁹⁾ 19.573.

⁽³⁴⁰⁾ 1247.

⁽³⁴¹⁾ 1914.

⁽³⁴²⁾ 2560.

⁽³⁴³⁾ 1631 et seq.; 1245; 14.274; 14.360 et seq.; 15.716.

⁽³⁴⁴⁾ 15.716 (PSK).

- (304) Fixed-interest loans posed a particular problem since the new 'interest escalation clause' made it impossible to pursue the previous practice of 'attracting customers with a low entry-level rate and later increasing the initial margins by raising the interest rate'. A final interest rate therefore had to be determined at the time the contract was first concluded. The participants could 'not agree' on the wording or the amount of the future margin to be decided. Since, however, an agreement on the margin would 'irreversibly determine future interest-rate levels', it was agreed that a Special Lending Rates Committee meeting would be held on 21 March (see recital 306). At the same time, a 'specific recommendation' was to be 'prepared for the next Lombard meeting' ⁽³⁴⁵⁾.
- (305) At their meeting on 14 March the Securities Committee discussed the rates which should be charged in connection with new stock-exchange listings. The 'view was put forward that these should lie between 5 and 6 %' ⁽³⁴⁶⁾.
- (306) At the Special Lending Rates Committee meeting of 21 March, convened to produce 'specific recommendations to contain excessive competition', participants were first able to 'reach agreement' on the subject of foreign currency financing (see recital 302): the minimum amount loaned was to be increased from ATS 1 million to ATS 1,5 million by 1 July and to ATS 2 million by 1 October, there was to be a minimum margin of 2,5 % (in the eastern provinces 2 % at the branches' discretion, in the Tyrol and Vorarlberg 1,5 %) and a handling fee of 2 % as a rule. Confirmation '[...] at the next Lombard meeting was not considered necessary'.
- (307) The negotiations on fixed-interest loans and compliance with the advertising ban were less successful. BAWAG's position on the advertising of rates proved to be 'particularly entrenched'. It was not possible to come to an agreement.
- (308) Lastly, BA proposed introducing a new fee of ATS 50, which should be charged at any interest adjustment date ⁽³⁴⁷⁾.
- (309) At the Federal Lending and Deposit Rates Committee meeting on 11 April, criticism was expressed of the fact that the cut in deposit rates agreed in February (see recital 298) had 'not' been 'implemented uniformly', especially as far as preferential rates were concerned. The 'usual recriminations' ensued. In the end, it was 'agreed' that 'from now on they would stick strictly' to the maximum interest rates agreed.
- (310) As for lending, where 'poor market discipline' continued to prevail and joint interest rate fixing had 'slipped' from the banks' grasp, a series of 'rescue proposals' to 'resolve matters' were discussed. BAWAG appeared to be willing to withdraw its 'jubilee project', repeatedly criticised by the other institutions, in mid-1997, if the other banks also 'took steps to resolve the situation'. On the subject of raising rates for works council members loans, there should 'be separate talks between BA and BAWAG' and the other institutions would then follow suit, since the 'rate for works council members loans was always equally high in all the credit institutions'. 'In line with BA's proposal' (see recital 308) an 'interest rate monitoring fee' of ATS 50 should be charged. It should be possible to undercut the maximum rate of 3,25 % with central authorisation only. No fixed/variable interest rate combinations should be offered, and fixed-interest loans to private individuals should be available only for mortgage loans and only for the full term (except when loan maturity is more than 10 years).
- (311) The 'specific measures' were to be 'established' at a Special Lending Rates Committee meeting at the beginning of May ⁽³⁴⁸⁾.
- (312) This Special Lending Rates Committee meeting took place on 5 May 'with a view to re-setting minimum debit interest rates for private credit and minimum margins for fixed-interest loans and foreign currency loans in order to optimise income'. Since all those present were prepared 'to return to a reasonable rates policy', they were able to confirm or to formulate for the first time the following recommendations: the agreement reached at the Special Lending Rates Committee meeting on 21 March (see recital 306) in respect of foreign currency loans was confirmed. Fixed interest rates should be offered only for the full maturity (except for loans of more than 10 years, see recital 310) and only at the minimum rates (7 % for five years, 7,5 % for seven years, 8 % for 10 years, disparities not to exceed 0,5 %). As regards the interest rate monitoring fee of ATS 50, some institutions preferred to increase the existing 'loan account maintenance fee' by the same amount, rather than introduce a new fee (see recital 310). For variable-interest loans, a minimum of 6 % was to apply from 1 June or, for loans to self-employed people, 5,5 % or 6 % from 1 October 1997. New works council members loans were from then on no longer to be granted at less than 7 % (from 1 July). Lastly, they 'agreed that, as from 1.6.1997, no interest rates below the recommended minimums should be communicated to the media'. The banks thus hoped to 'control dumping prices' ⁽³⁴⁹⁾.

⁽³⁴⁵⁾ 2565; 14.360.

⁽³⁴⁶⁾ 4450.

⁽³⁴⁷⁾ 12.172; 36.168.

⁽³⁴⁸⁾ 2581; 14.270; 4383; 1600; 1243; 12.173.

⁽³⁴⁹⁾ 36.030 et seq.; 38.179 et seq.; 20.682, see footnote 141.

(313) In an internal memo apparently written to brief CA's [representative] for the Lombard Club meeting on 11 June, [a representative] of CA's private financing department analysed the situation in this area and noted 'exaggerated rates competition'. Implementation of the 'package of measures to improve market discipline' discussed in the Special Lending Rates Committee meeting on 5 May was likely, in the author's opinion, 'to fail as a result of BAWAG's refusal' to raise works council rates to 7 % and to discontinue the 'jubilee project' (as promised at the Federal Lending and Deposit Rates Committee talks on 11 April, see recital 310) ⁽³⁵⁰⁾.

June to September: joint success as regards deposit rates, but continuing problems with lending rates necessitate a new, step-by-step approach

(314) At the Federal Lending and Deposit Rates Committee meeting on 20 June, the usual story was to be heard. While the agreements on deposit rates (maximum interest for special-rate deposits 3,25 %, see recital 298) were 'largely holding', it was 'on the whole not possible to achieve the ambitious goals set [for lending rates] at the last talks'. The 'attempt to steady the lending-rate price war' was not crowned with success, the 'agreements were not being adhered to'. Only the 'agreements on foreign currency loans seem to be holding and therefore do not pose any problem at present'.

(315) In view of this, 'everyone agreed that impressive-sounding packages of measures did not hit their mark and it would be better to implement small-scale measures'. Accordingly, the 'following measures were agreed': BAWAG was now to allow the much criticised jubilee project to 'peter out' after all; no more press announcements were to be made without prior 'coordination'; and rates below 5,5 % were not to be announced.

(316) BA pointed out that directly before the changeover to the euro, fee increases would be 'very difficult to implement' and that they should therefore be carried out 'as quickly as possible' ⁽³⁵¹⁾.

(317) At the Liberal Professions Lending Rates Committee meeting on 24 June, BAWAG's special rate of 4,75 % offered to doctors for operating loans was criticised. Otherwise, 'considerable unity' prevailed on the subject of minimum rates to be charged: 5,75 % for operating loans, 5,5 % for investment loans, for loans linked to the secondary market yield, a 1,25 % spread, and for fixed-interest loans, a 1,5 % spread in relation to each reference rate ⁽³⁵²⁾.

(318) At the Federal Lending and Deposit Rates Committee meeting on 26 September, 'satisfaction' was expressed with the '[deposit] rate discipline', with only the Tyrol and Vorarlberg named as 'breakaway' provinces. However, as before, there was no cause for satisfaction with the development of the lending market, where 'agreements (had) not (been) adhered to'. It was highlighted as a 'problem' that 'not all participants were responsible for rates' and therefore were 'not solely authorised to take decisions' with respect to the agreements concluded at committee meetings. However, it was important for all participants to discuss specific rates with the representatives of their competitors who were also responsible in their own institutions for the setting of the rates discussed.

(319) Since, from the banks' point of view, the situation since the Federal Lending and Deposit Rates Committee talks on 20 June (see recital 314) had not improved, it was suggested that a meeting of the Controller Committee be convened to 'draw up an interest-rate scenario'. The result should then 'be presented at a Lombard meeting so that the market situation (can be) discussed at board level'. This proposal was 'unanimously accepted'. In addition, the banks wanted, in mid-November, 'after prior concertation in another meeting', to try, by increasing deposit rates by 0,5 %, to 'signal a rise', so that they could then implement an 'urgent increase' in lending rates. A 'detailed discussion of how to implement this was [scheduled for] mid-November' (see recital 323).

(320) Lastly, fees were again discussed in the light of the changeover to the euro, which was already looming. BA pointed out that fee increases would 'be very difficult to implement' just before the changeover, given the greater vigilance that was to be expected from 'price commissions', and should therefore be introduced 'as quickly as possible' ⁽³⁵³⁾.

November to January: concerted rise in long-term savings deposits, special rates and lending rates, ongoing discussion of the base rate and measures to conceal the agreements

(321) At their meeting on 4 November, the members of the Vienna Lending and Deposit Rates Committee came to the 'unanimous opinion' that the rates for capital savings accounts opened for a five-year term or longer should be raised by between 0,125 and 0,25 %. The banks also wanted to attempt to cut the base rate of 1,5 % by between 0,125 and 0,25 % and bonus-carrying savings deposits by 0,25 %, on the subject of which 'opinions

⁽³⁵⁰⁾ 36.362.

⁽³⁵¹⁾ 954; 1241 et seq.

⁽³⁵²⁾ 16.335; 21.132.

⁽³⁵³⁾ 1033; 14.262 et seq., 21.159.

were not absolutely identical'. On 13 November therefore, the Federal Lending and Deposit Rates Committee (see recital 323) should 'try to come to a unanimous opinion, giving reasons'.

(322) The banks then discussed the possible consequences of a complaint about suspected agreements lodged with the European Commission on 30 June 1997 against certain banks and subsequently commented on in detail by the Austrian media (see recital 14). In this connection, BA's representative recommended that they 'no longer keep any minutes' of committee meetings. Internal records of the talks should also be 'avoided or renamed' with unsuspicious-sounding names like 'market observations'. The legal department of a participating institution finally also advocated the 'destruction of all existing records'. In order to carry out such 'destruction', the writer of Hypo's internal report on the meeting asked all its recipients 'after reading [the report] to return it to the writer, who will see to its subsequent destruction' ⁽³⁵⁴⁾.

(323) At the Federal Lending and Deposit Rates Committee meeting on 13 November, the 'measures contemplated at the last meeting in the area of savings deposits' (see recital 318) were discussed again. The 'following results' were obtained. The committee was 'unanimously in favour' of raising the rates for capital savings accounts of five years or more by around 0,25 %. BA again suggested lowering the base rate to 0,25 %. As at the last Vienna Lending and Deposit Rates Committee talks on 4 November (see recital 321) 'no agreement' could be reached. However, the subject was 'not considered closed' but was 'still to be settled' and would 'be pursued further'. Lastly, BA, CA, Erste, PSK and BAWAG were determined to cut bonus-carrying deposits by 0,25 % before the end of the year. The agricultural credit sector, NÖ Hypo, ÖVAG and the representatives from the provinces (Carinthia, Styria and Salzburg), on the other hand, were 'sceptical'. However, what initially came out of the 'partly bilateral discussions' held alongside the committee meetings was that even these 'sceptics (would be) prepared to go along with this measure', if the big institutions were to implement the rise as agreed.

(324) As regards lending rates, all the institutions announced that they would raise the rate by between 0,25 % and 0,5 % for all private loans granted after 1 March 1998. Existing loans would be raised by 0,375 %, with the ceiling lying between 7 and 8 %. For private building loans the 'absolute minimum' was to be 6 % ⁽³⁵⁵⁾.

(325) At the payment transactions talks on the same day, as previously at the Federal Lending and Deposit Rates Committee meeting on 26 September (see recital 320), reference was again made to the 'major problem' of 'Consumer Association' ⁽³⁵⁶⁾, Chamber of Labour ⁽³⁵⁷⁾ and EU price monitoring commissions in connection with the changeover to the euro', which would make price increases 'more problematic' as of the summer of 1998. The representatives of all participating banks thus announced that they would increase fees for cheque cards to at least ATS 250 from 1998, for payment slips to ATS 10 (customer's bank) or ATS 20 (other bank) and for paying in cheques to ATS 9 to ATS 10 ⁽³⁵⁸⁾.

(326) In an interview given on 20 November 1997, BA's [representative] announced the planned rise in lending rates, likely to be 0,5 %. However, this announcement received public criticism, in response to which BA's [representative] declared that lending rates would not be raised any further that year. According to BA's [representative], the cut in the base rate, proposed by BA at the Federal Lending and Deposit Rates Committee meeting on 13 November 1997, was not an issue either.

(327) The press expressed suspicion, in connection with this planned rise in lending rates, that the banks had concluded agreements. However, 'the banks denied the existence of interest rate agreements' ⁽³⁵⁹⁾.

(328) On 18 December, CA's private financing department reported that 'most major competitors (BA, Erste, and BAWAG) (had) already [implemented] interest rate rises', as discussed at the Federal Lending and Deposit Rates Committee meeting on 13 November (see recital 324), and therefore proposed that CA also raise its lending rates. These rises would be carried out 'taking account of the approach intended by our main competitors' ⁽³⁶⁰⁾.

11. CHRONOLOGY OF EVENTS: 1998

(329) In the internal memo titled 'Information on the Lombard Club, 11.2.1998' to PSK's [representative], those responsible reported that all the Vienna institutions (with the exception of BAWAG) had lowered rates for savings deposits in January. The rates for long-term savings accounts were raised at the same time, as were the standard rates for consumer loans (up 0,5 %) (see recital 323) ⁽³⁶¹⁾.

⁽³⁵⁴⁾ 14.342; 12.175; 1564.

⁽³⁵⁵⁾ 12.178; 16.582; 1553; 14.258; 823.

⁽³⁵⁶⁾ VKI — Verein für Konsumenteninformation.

⁽³⁵⁷⁾ AK — Arbeiterkammer.

⁽³⁵⁸⁾ 22.189.

⁽³⁵⁹⁾ Die Presse on 21 November and Salzburger Nachrichten on 25 November.

⁽³⁶⁰⁾ 36.365.

⁽³⁶¹⁾ 3884.

March: successful concerted cut in preferential rates, but too great a discrepancy between Vienna and the provinces

Committee meetings in the light of competition reservations'. 'Therefore, no minutes of these talks would be kept' ⁽³⁶³⁾.

(330) On 5 March the banks' representatives met in the Vienna Lending and Deposit Rates Committee and were able to establish that the 0,25 % cut in preferential rates had, at least on the Vienna market, 'been implemented and adhered to by practically all market participants in January/February', so that the situation in the Vienna area could 'be described as stable and uniform'. However, as regards group and works council member rates, the cut had 'not [been implemented] completely as planned'. Participants were 'relatively uniformly' moving towards an interest rate cut for long-term capital savings accounts (maximum interest rate for seven-year capital savings accounts of 5 %). For loans, the banks' representatives reported that lending rates had been raised by around 0,5 % (see recital 324).

(331) At the Federal Lending and Deposit Rates Committee meeting on 22 April, the banks' representatives expressed satisfaction with the relatively uniform 3,25 % level of preferential deposit rates. While in the Vienna area special rates remained 'within the recently agreed parameters', the maximum interest rates agreed in the provinces were sometimes 0,5 % above them. This discrepancy was considered 'too wide'; they should thus attempt 'in regional talks to narrow the gap between Vienna and the provinces'. Specifically, the 'regional committees [should] make cuts in the provinces' and 'if possible, influence should be brought to bear at [senior management] level'.

(332) Lastly, BA and RBW were considering a cut in the base rate, although only 'in cooperation with all the other banks'. If 'all major institutions pursued a concerted course of action, a cut could likewise be made in the summer months'. The 'Fourth Vienna Committee', consisting of BA, CA, Erste and BAWAG, was to meet to discuss this subject. According to BA, however, this meeting did not take place. The next meeting was scheduled for 25 June 1998 ⁽³⁶²⁾.

(333) At the Controller Committee meeting on 19 May, BA's representative informed the other participants that his attention had been brought by his institution's legal department to 'the problem of minutes of Controller

12. SPECIAL COMMITTEES

12.1. Export Financing Committee, Export Lombard

(334) These committees dealt with issues, especially rates, in connection with export financing. Besides the main banks, which also sat on the other committees, foreign banks were represented at these talks by Centro Internationale Handelsbank AG (Centro), whose responsibility it was, following discussions in the Export Financing Committee, to 'brief the foreign banks accordingly'. Applications to take part from individual foreign banks were therefore rejected ⁽³⁶⁴⁾.

(335) The only exception (besides Schoellerbank, which was accepted owing to its intensified activities in this area) was the Internationale Bank für Außenhandel (IBA), which initially acted as a 'rate violator' and was subsequently included (in early 1994) in the Export Financing Committee, whose members thus hoped 'to make IBA see reason' ⁽³⁶⁵⁾.

(336) An important subject at many of the meetings was what was known as the house bank margin. This is the maximum margin (since 1994, 0,5 %), imposed by OeKB or by the Export Fund as the funding bodies for assisted loans, on the refinancing interest rate. Banks can offer their customers (exporters) rates below this margin, in which case it is naturally the banks which must make up the difference to OeKB/the Export Fund. The extent to which they undercut the maximum margin was thus an important factor of competition. The banks were therefore concerned to set 'minimum margins' among themselves, so as to bring about a 'certain abatement' of competition in this area too ⁽³⁶⁶⁾.

⁽³⁶³⁾ 4359.

⁽³⁶⁴⁾ 19.855; 19.858.

⁽³⁶⁵⁾ 19.797; 19.801; in 1992, they had already considered whether to invite ABN Bank Austria and West-LB, since at the time these institutions were 'particularly "actively" involved in export financing' and were undercutting the minimum margins agreed by the other banks (see recital 336). The problem was solved, however, by talking directly to the banks concerned, West-LB making a 'definite promise' to stop undercutting the agreed margins; 34.148; 38.177.

⁽³⁶⁶⁾ 19.805; 19.839.

⁽³⁶²⁾ 2049; 2480; 38.173; 4009.

(337) Back in 1992 the Export Financing Committee had 'concluded agreements on future minimum rates (house bank margin) for export credits', with a view to raising the rate from 0,125 to 0,25 % initially and 0,5 % ultimately. At the Export Financing Committee meeting on 27 January 1994 the participants first reported their 'success' in 'increasing the margins' and in introducing the 'guarantee commission' and the 'commitment commission', as 'recommended by the Lombard [...]'. However, there were still a number of 'offenders' and 'price violators', of which IBA was the most important (see recital 335). CA complained that it had lost a customer because two other institutions had operated 'with extreme (not agreed) rates' ⁽³⁶⁷⁾.

(338) The Austrian members of the Export Financing Committee were sceptical about the undertakings given by the foreign banks. Although their representative, Centro, had reported that 'the foreign banks, with one exception, had declared that they would likewise not undercut the minimum rates', the other banks had to recognise that some foreign banks 'occasionally undercut' the agreed margins. The promise communicated by Centro was 'therefore questioned' ⁽³⁶⁸⁾.

(339) At the meeting on 23 November 1994, criticism increased of those institutions which undercut 'agreed margins' to 'win over' new customers, and offered 'house bank bonuses'. CA complained that it kept losing business to competitors because, unlike other institutions, it adhered 'strictly to the agreements' ⁽³⁶⁹⁾.

(340) At the meeting on 16 March 1995 the participants emphasised the 'following minimum margins': 0,25 % for financing not requiring equity backing and 0,5 % where equity backing was required, in exceptional cases at least 0,375 % in any event; 0,375 % for G3/G9 loans ⁽³⁷⁰⁾ with an equity backing requirement of 20 %.

(341) The Export Financing Committee, meeting on 15 May 1996, discussed the 'fixing of the house bank margin' undertaken [at senior management level] (see recital 248). It was 'unanimously stressed' that the agreed rate of 0,25 % for business not requiring equity backing

'only [applied] to new business' and that existing arrangements remained unchanged (minimum margin still 12,5 basis points). For all other export credit business the 'full house bank margin' of 0,5 % applied ⁽³⁷¹⁾.

12.2. Payment transactions

(342) The Austrian banks kept up a regular exchange of information on both domestic and cross-border payment transactions. At the regular discussions in the Cross-Border Transactions Committee, made up of the big banks and representatives of the provincial and foreign banks, the levels of transfer charges, documentary credit fees and interbank fees, among other things, were set. The Organisational Committee of the Austrian Association of Credit Institutes (ORG) also discussed the level of transfer charges and interbank fees.

(343) At the Cross-Border Transactions Committee meeting on 21 April 1994, the participants came out in favour of increasing the transfer charges from ATS 70 to ATS 80. On 23 June 1994, 'all institutions (were to) agree and to set a date for implementation' (see recital 344). Adjustments in the fees for simple documentary credit in schillings and in foreign currency (interest rate and minimum fee in each case) were also 'unanimously adopted'. This outcome was communicated to ORG (see recital 347). The common 'rate of collection for cross-border payment transactions' (rate of collection) was to 'enter into force on 1 September 1994' following further discussion' at the next meeting of the committee. Lastly, rates for interbank fees and charges and settlements for cross-border payment transactions between residents were 'unanimously adopted' ⁽³⁷²⁾.

(344) At the Cross-Border Transactions Committee meeting on 23 June 1994, the participants first decided to increase the charges for transfers between domestic banks from ATS 70 to ATS 80 (see recital 343). The 'antitrust aspects were highlighted'. The discussions on the rate of collection advanced so well that 'agreement (could be) reached' at the next meeting (22 September 1994, see recital 345) and the 'final setting of the rate of collection (would) no longer (be) an obstacle' ⁽³⁷³⁾.

⁽³⁶⁷⁾ 19.792 et seq.; 38.176; 26.256.

⁽³⁶⁸⁾ 19.795; 19.800.

⁽³⁶⁹⁾ 19.808; 19.811.

⁽³⁷⁰⁾ The export financing system distinguishes 11 types of liability. G3 refers to tied loans and G9 to purchases of receivables (which together made up some 53 % of the National Bank's liability undertakings in 1997).

⁽³⁷¹⁾ See footnote 295.

⁽³⁷²⁾ 21.229 et seq.

⁽³⁷³⁾ 21.235.

- (345) The participants in the Cross-Border Transactions Committee on 22 September 1994 did indeed decide on the rate of collection. This sets the collection charge for cheques, exchange transactions and other simple remittances together with the value date for these instruments. The cheque collection fees set also apply to the direct debiting system in cross-border payment transactions. In connection with the collection rate, BA's representative pointed out that the rise in the collection fee for cheques drawn on domestic banks had 'already (been) discussed two years ago', but had then been 'postponed until after the increase in transfer charges'. Now that transfer charges had been increased (see recital 344), 'the Committee finally agreed to implement the increase [from ATS 30 to ATS 40] by 1.2.1995' ⁽³⁷⁴⁾.
- (346) The question 'whether the banks, in setting an interbank rate, were infringing the Restrictive Practices Act' was discussed at the meeting of the Cross-Border Transactions Committee held on 24 November 1994, but could not 'be answered immediately'. Separate talks were to be held on the subject ⁽³⁷⁵⁾.
- (347) At its meeting on 4 October 1994, the ORG, aware of the 'antitrust aspects', took note formally of the agreed increase in transfer charges (see recital 345). Those institutions 'not represented on the various bank committees' were also to be informed of the increase. At this meeting too, a member 'referred to the antitrust problem' and stressed that 'in the EU in principle a different legal interpretation of the issue prevailed'. The banks' legal departments should therefore 'look into this EU issue' ⁽³⁷⁶⁾.
- (348) In the Cross-Border Transactions Committee meeting on 2 March 1995 the participants agreed 'to examine in due course the possible consequences of EU antitrust law' on the rounds of talks ⁽³⁷⁷⁾. This was done in the context of an internal legal report produced by GiroCredit on 13 April 1995 (see recital 349).
- (349) At the Cross-Border Transactions Committee meeting on 11 May 1995, the 'antitrust aspects of an interbank price agreement' were discussed on the basis of an internal legal report dated 13 April 1995 obviously produced by GiroCredit. The report looked into the question whether the 'regular discussions in the Cross-Border Transactions Committee, during which interbank pricing was coordinated between the Austrian banks, were questionable from an antitrust point of view'. The report concludes that these arrangements qualify as restrictive agreements under both Austrian and EU competition law and refers finally to the possibility of the 'initiation of investigation proceedings by the European Commission and the imposition of heavy fines' ⁽³⁷⁸⁾.
- (350) On 15 April 1997 the members of the ORG 'unanimously' agreed to increase exchange charges for interbank transactions in the context of the 'collection rate' ⁽³⁷⁹⁾.
- (351) At their meeting on 22 April 1997, the members of the Cross-Border Transactions Committee 'unanimously decided' on the 'cross-border direct debiting system', as it was known ⁽³⁸⁰⁾.
- (352) The network established by the banks covered the entire country. In order to 'extend the geographical scope' of the agreements reached in Vienna 'to the provinces' and to ensure by way of such 'comprehensive' application that they had the 'widest possible effects', the banks set up numerous committees in all the provinces ⁽³⁸¹⁾. The task of these committees was to conclude restrictive agreements for their local areas, whether this involved implementing the agreements reached in the Lombard Club and the Vienna meetings or adapting them to the local situation, or acting on their own initiative.
- (353) Sometimes the hierarchy of the Lombard Club and the specialist committees was exactly reflected in the provinces. For example, the banks' representatives with responsibility for rates in Upper Austria came together

12.3. Regional committees

⁽³⁷⁴⁾ 21. 246 et seq.

⁽³⁷⁵⁾ See footnote 52.

⁽³⁷⁶⁾ For evidence in the file, see footnote 51.

⁽³⁷⁷⁾ See footnote 52.

⁽³⁷⁸⁾ 8523 et seq.; 8569 et seq.; 8573 et seq.

⁽³⁷⁹⁾ 7569 et seq.; 7503, 7507 et seq.

⁽³⁸⁰⁾ 8249 et seq.

⁽³⁸¹⁾ See recitals 145 and 257. These committees met in Burgenland, Carinthia (e.g. Klagenfurt, Villach), Lower Austria (e.g. Stockerau, Wr Neustadt, Hollabrunn, St Pölten), Upper Austria (e.g. Linz, Steyr, Wels), Salzburg, Styria (e.g. Graz, Weiz, Bruck/Mur), the Tyrol (e.g. Innsbruck) and Vorarlberg (e.g. Bregenz). Naming, or even more so describing, all the regional cartel meetings is beyond the scope of this Decision. This section therefore focuses on the functioning of the regional committees in the overall context of the network and their links with the talks organised in Vienna.

'in the Linz Lombard Committee' to 'coordinate building-loan rates'. Having reached agreement on that, they mentioned the need to cut the savings rate by 0,25 %, 'although (they would have to) wait for the conclusions of the next rates talks in Vienna and Linz' ⁽³⁸²⁾.

(354) In principle the rates agreed in the relevant regional committees, in the context of 'local agreements', applied in the provinces; as a rule they were somewhat lower than the rates agreed in Vienna. This disparity was from time to time considered by the banks to be 'too wide', so that it was decided to attempt 'in regional talks to narrow the gap between Vienna and the provinces'. Specifically, the 'regional committees (were to) make cuts in the provinces' and 'if possible, influence should be brought to bear at [senior management] level' ⁽³⁸³⁾. At the Minilombard meeting on 25 June 1996 it was 'jointly decided that the rates agreed on the spot would apply in the provinces' and that, despite diverging from the agreements reached in Vienna, they could be 'accepted as a provisional solution'. However, the objective remained to 'adapt them to the Vienna system' ⁽³⁸⁴⁾.

(355) To ensure systematic and seamless feedback, and thus a continuous and reciprocal flow of information, between the Vienna and Federal Lending and Deposit Rates Committees on the one hand and the regional committees on the other, the banks set up efficient communication channels. A distinction should be made in this respect between the single-tier and multi-tier bank groupings.

(356) Within the single-tier big banks operating across Austria, information was exchanged between the head office in Vienna and the regional head offices in the provinces. 'The Vienna institutions encourage regional representatives to implement gradually the terms agreed on the Vienna market' (Minilombard talks in Vienna on 25 June 1996) ⁽³⁸⁵⁾. To this end the 'provincial branches [of the big banks] (were to) hold regional talks' (Minilombard meeting in Vienna on 23 February 1995) ⁽³⁸⁶⁾. Information was exchanged, for example, by sending minutes of the Vienna meetings to regional [representatives] (e.g. Vienna Deposit Rates Committee meeting on 25 July 1995) ⁽³⁸⁷⁾. On 23 April 1996 [a representative] of CA's retail banking department (in Vienna) requested [CA representatives] in the provinces 'to organise regional committees as soon as possible and to agree an identical

level of interest rates'. With regard to the '1/2 % increase in retail lending rates to be discussed in the Lombard', CA (in Vienna) sent an 'urgent, confidential' fax on 11 January 1995 to Oberbank (Salzburg), BTV (the Tyrol) and BKS (Carinthia) 'requesting agreement in the local interest rate talks' ⁽³⁸⁸⁾. Lastly, BA had 'urged (its) regional managers to ensure that retail lending talks were held regularly' ⁽³⁸⁹⁾.

(357) In the multi-tier sectors, each bank grouping had set up its own internal information and representation system.

(358) In the agricultural credit cooperative grouping, the flow of information was managed by the lead institution, RZB. Its representative obtained information from all the regional offices, prior to every Vienna Lending and Deposit Rates Committee meeting, on the current interest rate situation in the provinces ⁽³⁹⁰⁾. The results of the Vienna talks were in turn passed on to the central banks in the provinces 'as quickly as possible' ⁽³⁹¹⁾. RLB passed on the results of talks attended by it to all agricultural credit cooperatives in Vienna and Lower Austria by way of circulars.

(359) The considerable logistics of this exchange of information within the agricultural credit cooperative grouping was described in a letter from the Carinthia central agricultural credit cooperative to the Vienna head office (RZB): 'RZB informs us of the progress and conclusions of the various bank committees in Vienna, such as the Deposit Rates Committee and Lombard meetings. So that we can pass on this information as quickly as possible to the agricultural credit cooperatives in Carinthia, I would ask you to ensure that management informs the Carinthia Agricultural Credit Association directly and that our department responsible for the agricultural credit cooperatives is informed by the same post or by fax' ⁽³⁹²⁾. Sometimes RBW took on this function, in which case the other banks considered it to represent the entire agricultural cooperative grouping. At the Vienna Deposit Rates Committee talks on 25 July 1995, for example, the following statement was addressed to RBW: 'the agricultural cooperative sector (is) requested to do more to reduce offers by small cooperatives' ⁽³⁹³⁾.

⁽³⁸²⁾ 23.178.

⁽³⁸³⁾ See footnote 362.

⁽³⁸⁴⁾ See footnote 308; 25.486.

⁽³⁸⁵⁾ See footnote 384.

⁽³⁸⁶⁾ See recital 145.

⁽³⁸⁷⁾ See footnote 242; 38.1754.

⁽³⁸⁸⁾ 2327; 2333.

⁽³⁸⁹⁾ See footnote 287 and recital 265.

⁽³⁹⁰⁾ 2019.

⁽³⁹¹⁾ See recital 98; however, the RZB representative also passed on the results of the Federal Lending and/or Deposit Rates Committee talks to other banks (such as WiF-Bank or Kathrein & Co Bank AG).

⁽³⁹²⁾ See 2018.

⁽³⁹³⁾ 20.210 et seq.

(360) Likewise, Erste (or GiroCredit), as the lead institution in the savings bank sector, provided for the flow of information to and from the regional savings banks.

(361) ÖVAG, as lead institution, represented the credit union grouping in the Vienna committees and passed on their conclusions to the credit union banks in the provinces by way of 'sector faxes' (called sector info) ⁽³⁹⁴⁾.

(362) The following examples, from Carinthia, Upper Austria and Styria respectively, illustrate how the decisions taken in Vienna sent a strong signal to the provinces and how much the Vienna/Federal Lending and Deposit Rates Committees and the regional committees mutually influenced each other.

(363) On 22 May 1995, three days after the Vienna Federal Deposit Rates Committee talks, the regular 'exchange of information' was held in Klagenfurt between banks operating locally. In January of that year, it had been agreed by this regional committee 'to wait for the Vienna decisions', and participants were now informed of the cuts and maximum interest rates decided in Vienna, and of the advertising ban. Regarding charges for payment transactions, they were still waiting for recommendations from Vienna, or more specifically for the results of the payment transaction talks to be held on 7 June 1995 ⁽³⁹⁵⁾.

(364) A few days after the May 1996 Lombard Club meeting, the package of measures adopted there were brought up in the Linz Interest Rate Committee responsible for Upper Austria. BA's representative was able to report that this package '(had) already (been) the subject of instructions issued within BA and [...] [a member of BA's management board]' would 'approve no exceptions at present'. The representatives of BAWAG and GiroCredit also confirmed the content of the package. To ratify the Lombard decisions, 'the Linz Interest Rate Committee' should 'meet as promptly as possible and decide either to implement the abovementioned paper in Upper Austria or at most to amend it' ⁽³⁹⁶⁾.

(365) At the July 1995 Vienna Deposit Rates Committee meeting, it was reported that 'local talks' in the regional capitals had already 'indicated that there was a willingness to cut interest rates as proposed'. It was therefore 'expected' that institutions in the provinces would 'follow this approach' and as a result CA sent the minutes of the

meeting 'to [...] [regional representatives]'. Four days later, the person 'hosting' the Graz talks suggested to his assembled competitors that they cut rates 'in Styria too, following the Vienna deposit rates meeting held last week' ⁽³⁹⁷⁾.

13. THE PARTIES' MAIN ARGUMENTS REGARDING THE FACTS

(366) The banks concerned do not contest the facts as set out in sections 7 to 12 above. However, they argue that the Commission has failed to take account (a) of the specific historical, societal, economic and social aspects of the cartel and (b) of the lack of discipline demonstrated by its members in implementing their agreements. These two key criticisms made by all the banks will be addressed in detail here. Their legal arguments are considered as part of the legal assessment.

13.1. The specific historical, societal, economic and social aspects of the Lombard network

3) The functioning of the committees

4) The banks' arguments

(367) The banks argue that some of the committees were set up decades before Austria's accession to the European Economic Area, when they had had a legal basis. They were typical of the political system existing in Austria at the time. It was therefore unrealistic to expect the banks simply to abandon these committees, rich in tradition and rooted deep in their understanding of their economic functioning, on Austria's accession to the European Economic Area. On the contrary, 'fear of the negative consequences of a too rapid, and in particular, a poorly prepared transition to free competition' was widespread. Without restrictive agreements, the banks would have 'driven' each other 'to ruin' ⁽³⁹⁸⁾, all the more so since the relevant bank managers were not in a position 'to take sufficient account in their commercial policy of calculation criteria that were self-evident in themselves' ⁽³⁹⁹⁾.

(368) In the banks' view, the committees should be seen in terms of a social phenomenon with a group dynamic, rather than as a forum for restrictive agreements. The banks refer to the 'social significance' ⁽⁴⁰⁰⁾ of the cartel talks and even identify 'social pressure' to take part. All

⁽³⁹⁴⁾ e.g. 21.159, 21.111, 20.944, 20.682.

⁽³⁹⁵⁾ See 643, 23.027.

⁽³⁹⁶⁾ 43.234 et seq.

⁽³⁹⁷⁾ 488 et seq.; 36.344; 38.175, 23.632.

⁽³⁹⁸⁾ 41.916 (Erste).

⁽³⁹⁹⁾ 42.290 (RLB).

⁽⁴⁰⁰⁾ 41.875 (Erste).

the banks would like their involvement in the cartel to be understood as a purely passive, commercially irrelevant (or in any event neutral as to its effects) presence at ordinary (but basically tiresome) sector events that they were obliged to attend. They 'wanted to be there' or 'take part' for reasons of social prestige⁽⁴⁰¹⁾.

- (369) ÖVAG and NÖ Hypo also argue that the Commission should have brought out more clearly in its description of the facts that in many instances the cartel decisions had already been taken by a 'narrower circle' consisting of BA, CA, RZB, Erste, GiroCredit and BAWAG prior to each committee meeting and then had merely been passed on to the smaller institutions at the talks. BA contradicted this view, stressing that (despite occasional coordination among the big banks before the meetings) the actual decisions were indeed taken at each committee meeting, with the active involvement of the smaller institutions.

Commission's standpoint

- (370) While the Commission is aware of the historical origin of many of the committees (see recital 27 et seq.), it notes that there had been no more general measures or agreements affecting competition on interest rates since the expiry of the regulative agreements in 1989, i.e. long before Austria's accession to the European Economic Area⁽⁴⁰²⁾. There can therefore be no question of a sudden disappearance of such measures for the banks (allegedly unprepared at 31 December 1993 and 'used to regulation from outside').

- (371) In the Commission's view, the numerous records of meetings that were obtained clearly show that the sole purpose of the talks was to restrict competition, seen as destructive and harmful, for the shared financial benefit of the banks. The documented statements by bank representatives in this context are numerous and will not be repeated here⁽⁴⁰³⁾. There are also numerous examples of internal instructions to keep to the cartel decisions⁽⁴⁰⁴⁾.

- (372) Moreover, the Commission does not find it credible that the banks spent years sending numerous members of staff to several hundred cartel meetings merely to boost individuals' social prestige. Whether the talks had social, psychological or group-dynamic aspects in addition to their (proven) anticompetitive object and effect can, in the Commission's view, be left open.

5) The role of the Austrian National Bank

6) The banks' arguments

- (373) All the banks consider it to be particularly important that the [representative] of the Austrian National Bank (OeNB) took part in the [representatives'] lunches in the context of the Lombard Club. The OeNB, they claim, approved the agreements made by the Lombard network (in which as good as all Austrian banks took part) and even actively promoted them by repeatedly calling for greater awareness of costs and earnings among the banks. The banks could only take such exhortations from the OeNB as a call for restrictive agreements and thus assume that their conduct was unobjectionable.

7) Commission's standpoint

- (374) The OeNB [representative] did take part in the monthly Lombard lunches [...], where a number of competition-neutral subjects were also discussed. However, the OeNB was not regularly represented on the numerous other, and at any rate on the central, committees in the network⁽⁴⁰⁵⁾.

- (375) The OeNB's statements as recorded in the minutes, urging the banks not to endanger their earnings capacity by an economically questionable commercial policy, can in no way be reinterpreted after the event as a call for restrictive agreements. The banks concerned remain responsible for all statements to the effect that an economically sound commercial policy could be achieved only through agreements with competitors to the detriment of the customer.

⁽⁴⁰¹⁾ According to the representatives of ÖVAG and NÖ Hypo at the oral hearing in January 2000.

⁽⁴⁰²⁾ With the exception of the base rate and competition agreements, which lost their legal basis only at the end of 1993.

⁽⁴⁰³⁾ See section 5.4.

⁽⁴⁰⁴⁾ See 36.048, 36.316 and the examples given in section 14.3.3.

⁽⁴⁰⁵⁾ Vienna and Federal Lending and/or Deposit Rates Committees (including the Consumer Lending Rates and Liberal Professions Lending Rates Committees), the Minilombard and Controller Committees.

13.2. The effects of the Lombard network on the Austrian banking market

8) The banks' arguments — Report

(376) The banks argue that the (uncontested) restrictive agreements, which were comprehensive and had been in place for years, had no influence at all on the Austrian banking market. A report commissioned by the banks concludes 'that between 1994 and 1998 the Austrian banking market corresponded to what would be expected in a situation of intense competition' ⁽⁴⁰⁶⁾.

(377) The report used a number of methods to reach its conclusion. First, market results (credit and savings interest) in Austria were compared with market results in Germany. Since, on average, they were found to be no less favourable for Austrian customers than for German, it was concluded that the agreements could not have had an effect in Austria. Moreover, Austrian banks were found to be less profitable than their German counterparts. While this was also true of the banks' productivity, this was claimed to be because staff costs were higher and institutions were small, and not because of anticompetitive agreements in Austria. Lastly, the report found that the interest rates actually charged to Austrian bank customers were (statistically speaking) based on the interbank rates and not on the target rates agreed in the cartel talks.

9) Commission's standpoint ⁽⁴⁰⁷⁾

(378) In the Commission's view, a comparison of the banking markets in two countries cannot produce a conclusion as to whether one of those two markets would have developed differently without the (proven) existence of agreements. The fact that Austrian bank customers, as regards one or other product, were no worse off on average than customers in Germany may seem comforting at first sight. However, it does not mean that, had competition not been restricted in Austria, customers would have found the same rates as under the impact of the proven restrictive agreements.

(379) Nor can it be concluded that the proven cartel had no impact in Austria because the Austrian banks achieved yields that on average were no higher than in Germany.

(380) In the Commission's view, the only factor that can decide the question of the agreements' impact is whether and if so to what extent the banks participating in the cartel were influenced by them when formulating their commercial policies, and especially when setting interest rates and charges/fees. The report finds (on the basis of sample surveys and statistical calculations of averages) that there was no noticeable influence.

(381) It must first be pointed out that the report does not consider all cartel discussions during which specific agreements were adopted ⁽⁴⁰⁸⁾. In one instance, it looked at changes in interest rates which had not been the subject of an agreement at all ⁽⁴⁰⁹⁾. As regards deposit rates, the report takes no account whatsoever of capital savings accounts and savings accounts with a minimum interest rate; it also focuses on the date of the cartel meeting instead of the agreed implementation time. However, the Commission's objections go beyond such shortcomings. Even supposing that the report were free of them, the banks gain nothing from its conclusions.

(382) On the basis of agreements for which there is documentary evidence (seven as regards lending rates, and thirteen as regards deposit rates), the report looks at whether the average values for consumer instalment loans and savings and loan schemes contracted by the banks (average values) corresponded to the target interest rates (target values).

(383) An analysis of the random samples shows, for consumer instalment loans, that on four reporting dates the average values were below the relevant target values, and on three dates, above them. However, the divergence was very small in each case (between 0,35 % and 1,22 %). The report obtained a similar result for savings and loan schemes.

(384) However, the report does not attribute the very clear alignment between the target and average values to the agreements, but to the fact that, in each of the cases examined, the interbank rate (reference interest rate) had also changed. It finds that the average values were geared solely to the interbank rate and not to the agreed target values. Its central assertion is thus that the target values

⁽⁴⁰⁶⁾ Report (43.186), recital 163.

⁽⁴⁰⁷⁾ The Commission obtained the opinion of an economist on the report. This opinion indicates a number of methodological and academic weaknesses in the report. The report's writer subsequently refuted this criticism. The Commission will not take account of the dispute between the experts in the following considerations, and will thus not go into the banks' criticisms of the quality of the opinion.

⁽⁴⁰⁸⁾ e.g. to increase consumer lending rates by 0,5 % in January 1995 or to cut savings rates in November/December 1996.

⁽⁴⁰⁹⁾ At the deposit rates talks on 19 May 1995 it was expressly decided not to change lending rates.

had 'no independent effect' on the average values and were 'in themselves' of no relevance to those values⁽⁴¹⁰⁾. The proven alignment between the target and average values, it claims, is explained purely by the fact that both are causally related to the reference interest rate. A direct causal relationship between the target and average values cannot therefore be statistically proven.

(385) In this (central) point, the report refutes an assertion that the Commission never made. The Commission never argued that the banks reached their agreements without taking any account of the reference interest rate. On the contrary, as a rule the agreements were geared precisely to coordinating reactions to changes in the reference rate (triggered by a change in the key lending rates). It is not contested that the reference interest rate is an important cost factor for deposit and lending rates. The Commission's reproach is not that the banks set agreed prices without taking account of external cost factors. Rather, the Commission (supported by an overwhelming volume of written evidence) accuses the banks of reacting in concert to changes in the reference interest rate.

(386) One of the objectives of their concerted approach was to pass on cuts in key lending rates to customers as early as possible where deposit rates were concerned but as late as possible where lending rates were concerned. The documentary evidence contains several examples of this practice, which the banks euphemistically referred to as an 'asymmetrical cut in interest rates'.

(387) On this point, the report merely makes estimates, according to which the delay in passing on cuts in key lending rates was on average much the same for both lending and deposit rates. It finds on balance that the banks did not make any earnings this way.

(388) The Commission would comment first that, as the report itself states, it was obliged to work with estimates. Second, these estimates relate exclusively to statistical averages. Third, the report is based on the false premise that the banks faced unrestricted competition and were not informed in advance of the plans of their competitors. Under such circumstances, the length of the delay in passing on changes in the key lending rates would indeed have been determined by the free play of market forces. As the report rightly states, 'when it is not known how competitors will react, it is always problematic to raise interest rates'⁽⁴¹¹⁾. Here, the report hits the nail on

the head since it was precisely this uncertainty about the conduct of competitors that the banks systematically eliminated, in particular as regards their reaction to changes in the key lending rates.

(389) Nor does the report's premise that the banks faced intense, hidden competition correspond with the evidence in the file. As already mentioned above, the banks made great efforts regularly to monitor, through test deposits, their competitors' compliance with the agreements. As far as charges/fees are concerned, the banks themselves refer in their written statements to the 'natural transparency' or 'full transparency' of the banking market⁽⁴¹²⁾.

(390) For all these reasons, the Commission cannot accept the report's conclusion that the regular restrictive agreements, of several years' standing and comprehensive in terms of both content and geographical scope, had no effect whatsoever on the Austrian banking market. It would be highly paradoxical if the banks had spent thousands of man-hours in several hundred cartel meetings agreeing on exactly the deposit rates, exactly the lending rates and exactly the charges/fees which free competition would have itself produced anyway.

(391) It is correct to say that, for a considerable proportion of the agreed interest rates, one or more of the cartel members did not implement the exact rate agreed or did not implement it at the exact time agreed. However, in the case of the Lombard network, this objection misses the point. Where target prices are agreed, we can speak of implementation when the actual prices applied move towards the target values (and not merely when they reach them exactly).

14. LEGAL ASSESSMENT

14.1. Applicability of competition law to the banking industry

(392) In the banks' view, the rule that horizontal agreements on prices represent in principle a clear and particularly serious breach of Article 81 of the EC Treaty should 'be seen in perspective' as far as the banking industry is concerned. The 'special economic context of the banking industry' made it 'necessary to adopt a more differentiated approach than is otherwise the case with price agreements'. In particular, the Commission had in its legal assessment overlooked the fact that the legal and economic considerations that in all other cases apply to competition 'understood in a neutral sense' must 'not be applied without closer scrutiny to the banking industry'⁽⁴¹³⁾.

⁽⁴¹⁰⁾ In recitals 103 and 104.

⁽⁴¹¹⁾ Report, recital 77.

⁽⁴¹²⁾ See recital 7.

⁽⁴¹³⁾ 42.303 (RLB), 42.229 (RZB).

- (393) In other words, the banks claim that they have a special role to play. In contrast to the conduct of undertakings in all other branches of the economy, their actions could 'not be assessed in terms of "normal" market-economy criteria' ⁽⁴¹⁴⁾.
- (394) This argument is not new. In the initial proceedings underlying the judgment of the Court of Justice of the European Communities of 14 July 1981 in the *Züchner* case, the relevant bank argued that, because of the vital role it played in international payments, the allegation against it was that it had imposed a concerted increase in transfer charges, it was, to a large extent, not subject to the competition rules. The Court of Justice expressly rejected this argument ⁽⁴¹⁵⁾.
- (395) Nor is the banks' objection that they must not be exposed to the free play of market forces or assessed on the basis of market-economy criteria, since this would result in insolvencies and hence 'disastrous consequences for the economy' ⁽⁴¹⁶⁾, convincing. Rather, the Commission shares the view of the participants at the OECD Round Table on this subject (1998), namely that it is desirable for unprofitable banks to exit from the market ⁽⁴¹⁷⁾. The Member States have adequate instruments at their disposal to ensure the orderly liquidation of even a large credit institution and to prevent a crisis in the system ⁽⁴¹⁸⁾. Community legislation also covers the eventuality of the market exit of credit institutions which are in crisis, with the adoption of a Directive on the winding-up of such credit institutions ⁽⁴¹⁹⁾. If a major insolvency should in fact threaten to develop into a crisis affecting the whole system, the Member States can provide direct support, within the limits set by the rules governing State aid ⁽⁴²⁰⁾.
- (396) However, it is certainly not permitted, and this is the only point at issue here, for undertakings themselves to limit competition through cartel agreements to a level which appears reasonable to them and thus, allegedly in the general interest, to improve their economic situation.
- (397) Finally, the banks also argued that the Commission had adopted an 'unclear' attitude to interest rate agreements in the past and that it was 'uncertain to this day whether the ban on agreements should apply to the banking industry'. This had created 'a situation of trust' in favour of the banks and had led to a 'confusing legal situation' for the banks ⁽⁴²¹⁾.
- (398) However, a look at case-law and administrative practice gives a different picture. In its Second Report on Competition Policy (1973), the Commission made it clear that Article 81 of the EC Treaty is applicable to agreements between banks, for example, as regards 'general terms', and that the question of the general application of Article 86(2) of the EC Treaty in this area does not arise ⁽⁴²²⁾. At all events, any doubts in this respect were removed in 1981, when the Court of Justice ruled that Article 86(2) could apply only if banks were operating a service of general economic interest with which they had been entrusted by a measure adopted by the public authorities ⁽⁴²³⁾. In response to this judgment, the Commission made it clear in the Eleventh Report on Competition Policy (1981) that agreements or concerted practices relating to interest rates, charges and similar parameters of competition were now definitely subject to Article 81(1) of the EC Treaty ⁽⁴²⁴⁾.
- (399) Accordingly, the Commission has consistently and clearly opposed horizontal agreements between banks relating to prices charged to bank customers. In 1989, for example, the Commission Member with special responsibility for competition publicly made clear his opposition to interest rate agreements between banks, stating that, as price agreements, they infringed Article 81(1) of the EC Treaty ⁽⁴²⁵⁾. In its Decision in the *Eurocheque: Helsinki Agreement* case ⁽⁴²⁶⁾, the Commission imposed a fine on the participants in an agreement relating to the charging of a commission.

⁽⁴¹⁴⁾ 42.082 (BAWAG).

⁽⁴¹⁵⁾ Case 172/80 [1981] ECR 2021, paragraphs 6 et seq.

⁽⁴¹⁶⁾ 42.228 (RZB).

⁽⁴¹⁷⁾ OECD, Enhancing the role of competition in the regulation of banks, DAFNE/CLP (98) 16, p. 9.

⁽⁴¹⁸⁾ *Crédit Lyonnais*, Commission Decision 98/490/EC of 20 May 1998, OJ L 8, 8.8.1998, p. 28.

⁽⁴¹⁹⁾ Directive 2001/24/EC of 4 April 2001, OJ L 125, 5.5.2001, p. 15.

⁽⁴²⁰⁾ See, for example, *Banco di Sicilia*, Commission Decision 2000/600/EC of 10 November 1999, OJ L 256, 10.10.2000, p. 21; *Crédit Lyonnais*, cited above; *Crédit Foncier*, Commission Decision 2001/89/EC of 23 June 1999, OJ L 34, 3.2.2002, p. 36.

⁽⁴²¹⁾ 41.579 (BA), 42.106 (BAWAG).

⁽⁴²²⁾ Second Report on Competition Policy, point 52.

⁽⁴²³⁾ Case 172/80 *Züchner* [1981] ECR 2021, paragraph 6.

⁽⁴²⁴⁾ Although, in three subsequent decisions (1986), the Commission did not expressly adopt a position on interest rate agreements, the Court of Justice confirmed in Case 267/86 *Van Eyke* [1988] ECR 4769 that Article 81(1) was applicable to interest rate agreements between banks.

⁽⁴²⁵⁾ Press release, 16 November 1989, IP/89/869.

⁽⁴²⁶⁾ OJ L 95, 9.4.1992, p. 50, essentially upheld by the Court of First Instance in Cases T-39/92 and T-40/92 *CB and Europay v Commission* [1994] ECR II-49.

(400) There was therefore no doubt that the ban on agreements applied fully to price agreements between credit institutions long before Austria acceded to the European Economic Area. Even if Article 81 of the EC Treaty were being applied for the first time to the banking industry in this Decision (which is not the case), the banks could not cite this fact in their defence, since the incompatibility of price agreements between competitors is expressly stipulated in Article 81(1)(a) of the EC Treaty and confirmed by established case-law⁽⁴²⁷⁾.

14.2. Commission's competence in respect of 1994

Argument put forward by the banks

(401) The banks argue that the Commission is not competent to take action on an infringement of Article 53 of the EEA Agreement committed in 1994 and, broadly, try to substantiate this as follows.

(402) Pursuant to Article 56 of the EEA Agreement, only the EFTA Surveillance Authority, and not the Commission, is competent to deal with cases relating to trade between the Community and an EFTA Member State (as opposed to between EU Member States) if the relevant undertakings have achieved more than 33 % of their EEA-wide turnover in the territory of the EFTA States. This was the case as regards the Austrian banks.

(403) Since the EFTA Surveillance Authority did not initiate any proceedings in 1994 against the relevant banks, there were no 'pending cases' (Article 172(2) of the Act of Accession of Austria, Finland and Sweden) which could have been transmitted to the Commission when Austria joined the Community. Consequently, the Commission was competent to deal with the agreements in question only as from 1 January 1995.

10) Commission's view

(404) The legal interpretation put forward by the banks would mean granting immunity for cartel infringements committed in the past. The Commission would be prevented from taking action on infringements of Com-

munity law, of which the EEA Agreement is part, committed by undertakings in new Member States⁽⁴²⁸⁾.

(405) Any such interpretation would thwart the full effectiveness of the EEA Agreement, and in particular the competition rules laid down in it. The setting-up of a system ensuring that competition is not distorted and that the rules thereon are equally respected is one of the objectives and principles specifically referred to in Article 1 of the EEA Agreement.

(406) However, the Court of Justice of the European Communities has not yet had to deal with this question⁽⁴²⁹⁾. Since the legal situation here has not yet been clarified, the Commission will waive the right to find that Article 53 of the EEA Agreement has been infringed in respect of 1994.

14.3. Article 81 of the EC Treaty

(407) The comments below on Article 81(1) of the EC Treaty and on the subsumption under that provision of the facts as set out in the previous sections are based on the following structure.

(408) By way of introduction, the case-law of the European lawcourts on the concepts of 'agreement' and 'concerted practice' is discussed (section 14.3.1). Particular attention is paid to the assessment of a 'complex infringement'.

(409) Building on this, there follows the legal qualification of the facts as a complex infringement of considerable duration comprising both agreements and concerted practices (section 14.3.2).

(410) In section 14.3.3 it is explained that the undertakings participating in the practices intended to restrict competition. The specific impact of the practices on the market is discussed.

⁽⁴²⁷⁾ See, for example, judgment of the Court of First Instance delivered on 20 March 2002 in Case T-16/99 *Lögstör Rör (Deutschland) GmbH v Commission*, [2002] ECR II-1633, paragraph 327.

⁽⁴²⁸⁾ The EFTA Surveillance Authority itself has no longer been able to take action on the matter since 1995; see Article 4 of the Agreement on Transitional Arrangements for a period after the Accession of certain EFTA States to the European Union, reproduced in Tichy/Dedichen, *Securing a Smooth Shift Between the Two EEA Pillars*, 32 CMLRev (1995), pp. 131, 136, and judgment of the Court of Justice in Case C-321/97 *Andersson v Sweden* [1999] ECR I-3551.

⁽⁴²⁹⁾ Court judgments relating to the implementation of directives by EFTA States before their accession to the EU seem in the present instance, to suggest that the Commission does not have competence in respect of 1994; see opinion of Advocate General Saggio in Case C-290/98 *Commission v Austria*, in which it was assumed that Austria was obliged to comply with Community law only as from the time of its accession to the EU.

(411) This is followed by comments on the effect of the practices on trade between Member States (section 14.3.4), on the undertakings found to have committed an infringement (section 14.4) and on the duration of the infringement (section 14.5).

14.3.1. *Agreement and concerted practice: case-law*

(412) According to the established case-law of the Court of Justice of the European Communities and of the Court of First Instance, there can be said to be an agreement within the meaning of Article 81(1) of the EC Treaty even if the parties have merely reached a general consensus regarding the course of action concerned. It is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way. The agreement need be neither written nor formal, nor does it have to have express penalties attached to it or be backed by implementing measures ⁽⁴³⁰⁾.

(413) By contrast, a concerted practice within the meaning of Article 81(1) of the EC Treaty does not presuppose that the parties have concluded an agreement on what each of them should or should not do specifically on the market. Instead, this concept focuses on those forms of coordination which knowingly substitute practical cooperation for the risks of competition, without the stage being reached where an agreement as described above (at recital 412) has been concluded ⁽⁴³¹⁾.

(414) Such cooperation does not require the working-out of an actual plan, but must be understood in the light of the concept inherent in the competition provisions of the EC Treaty according to which each economic operator must determine independently the policy he intends to adopt on the market. Although this requirement of independence laid down in the established case-law of the Court of Justice does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does strictly preclude any direct or indirect

contact between such operators the object or effect of which is either to influence the conduct on the market of competitors or to disclose to any such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting ⁽⁴³²⁾.

(415) Conduct can therefore be caught by Article 81(1) as a concerted practice if, although they have not agreed or decided beforehand how each of them should behave on the market, the parties deliberately follow or adapt themselves to a common strategy which promotes or facilitates the coordination of their conduct on the market. It is sufficient for the competitor, through his declaration of intention, to have removed or at least substantially reduced uncertainty as to the market conduct to be expected from him, which is to be assumed even where the declaration of intention ultimately proves to be not fully correct ⁽⁴³³⁾.

(416) Although the concept of a concerted practice presupposes conduct on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting competition. Subject to proof to the contrary, which it is for the relevant undertakings to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market. This is all the more so when they concert together on a regular basis over a long period, and also applies in cases where the participation of one or more undertakings in meetings with an anticompetitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors ⁽⁴³⁴⁾.

⁽⁴³⁰⁾ Case T-1/89 Rhône-Poulenc v Commission [1991] ECR II-867, paragraph 120; Joined Cases T-25/95 etc. Cimenteries CBR and Others v Commission [2000] ECR II-491, paragraph 2061.

⁽⁴³¹⁾ Case 48/69 ICI v Commission [1972] ECR 619, paragraph 64.

⁽⁴³²⁾ Established case-law; see Joined Cases 40/73 etc. Suiker Unie and Others v Commission [1975] ECR 1663, paragraphs 173 and 174; Case T-7/89 Hercules Chemicals NV-SA v Commission [1991] ECR II-1711, paragraph 258; Joined Cases T-305/94 etc. Limburgse Vinyl Maatschappij [1999] ECR II-931, paragraph 720.

⁽⁴³³⁾ Joined Cases T-25/95 etc. Cimenteries CBR and Others v Commission [2000] ECR II-491, paragraphs 1852 and 1898.

⁽⁴³⁴⁾ Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125, paragraph 121; Joined Cases T-202/98 etc. Tate & Lyle and Others v Commission [2001] ECR II-2035, paragraph 58; Joined Cases T-45/98 and T-47/98 Krupp Thyssen Stainless and Others v Commission, judgment delivered on 13.12.2001, not yet reported, paragraph 152; Case T-9/99 HFB and Others v Commission, judgment delivered on 20.3.2002, not yet reported, paragraph 284.

(417) According to established case-law, the Commission is not obliged, in the event of an infringement extending over a lengthy period, to classify it exclusively as an agreement or as a concerted practice, as in any event both those forms of infringement are covered by Article 81(1) of the EC Treaty, or to divide it into separate infringements⁽⁴³⁵⁾. Such a distinction may in fact prove unworkable or impractical because the infringement simultaneously displays features of both types of prohibited conduct, even if some of its manifestations may, looked at in isolation, fall into one category rather than the other. Both concepts subjectively involve forms of collusion which are of the same type and differ only in their intensity and forms of expression. It would in particular make no sense to divide a continuous, integrated and institutionalised pattern of behaviour which serves one purpose and one purpose only into several individual infringements.

(418) The Commission is therefore entitled to classify such a complex infringement as an agreement 'and/or' concerted practice, where, as a complex whole, the infringement includes elements which are to be classified as an 'agreement' and elements which are to be classified as a 'concerted practice'⁽⁴³⁶⁾.

(419) The divergent interests of the cartel members may result in a consensus not being reached on all matters or in some points being vaguely formulated or glossed over. Formal agreement may never be reached on every issue. Moreover, there may be internal conflicts, breaches of the rules by members and, in some cases, stiff competition, going as far as outright price wars. None of these factors results, however, in the conduct in question not constituting an agreement and/or concerted practice if these pursue a single, common and lasting purpose.

14.3.2. *Agreement and concerted practice: nature of the infringement in the present case*

(420) As explained at length above⁽⁴³⁷⁾, the banks concerned had created a dense network of more than 20 different committees which communicated with one another and some of which had overlapping terms of reference.

There were in addition a large number of regional committees throughout Austria. During the period covered by this investigation, over 300 different meetings, on average one every four working days, can be shown to have been held in Vienna alone (i.e. without taking the regional committees into account). In addition, it has been possible to prove that numerous contacts outside this institutionalised network took place between representatives of the undertakings concerned, sometimes at the highest level.

(421) Especially at meetings of those committees which dealt explicitly with interest rates, participants always tried to reach a consensus on the setting of rates. The proceedings at these cartel meetings are summarised above in section 5.3 and described at length in sections 7 to 12 and will not be gone into again here.

(422) From a legal point of view, it is evident that those aspects of the practices which, as stages on the road to reaching a consensus, may not in themselves be qualified as an agreement within the meaning of Article 81(1) of the EC Treaty are at all events covered by the concept of concerted practice. What is involved in fact is a large number of actions with one and the same anticompetitive objective, each of which in itself meets the concept either of agreement or of concerted practice and takes the form of a single infringement of Article 81 of the EC Treaty.

(423) Through the ongoing, regular, institutionalised and comprehensive exchange of usually confidential information, the participating banks established a very high degree of mutual understanding, reciprocity and, at least conditional and partial, agreement on their current and future market conduct and thus systematically eliminated or at least very considerably reduced any uncertainty as to the competitive conduct of the other banks. Interest rate increases and decreases were actually negotiated between the banks. This applied not only to interest rates, but also to charges of all kinds, common calculation bases or advertising on the basis of interest rates. 'Going it alone' by individual banks was the exception here and drew immediate criticism, sometimes fierce, from the other banks.

(424) All these meetings and contacts had one and the same purpose, namely the distortion of competition (see section 14.3.3).

(425) The Commission therefore takes the view that the facts described in this Decision reveal a complex infringement of considerable duration to which the undertakings found to have committed an infringement were party.

⁽⁴³⁵⁾ Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij* [1999] ECR II-931, paragraph 696; Case T-9/99 *HFB and Others v Commission*, judgment delivered on 20.3.2002, not yet reported, paragraph 186.

⁽⁴³⁶⁾ Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij* [1999] ECR II-934, paragraph 697.

⁽⁴³⁷⁾ See section 5.2.

Those undertakings themselves participated in the main committee meetings⁽⁴³⁸⁾ and knew, or must have known, of the existence of other committee meetings. It would not make sense to divide this ongoing, common and, from the point of view of both subject matter and organisation, interconnected system of practices, which in its entirety was directed at distorting competition, artificially into its, in fact closely interwoven, component parts and thus to try to construct several separate infringements out of it.

14.3.3. *Object or purpose of the restriction of competition*

(426) As explained at length in section 5.4, the banks taking part in the practices at issue sought through the agreements, characterised by themselves as 'useful' and 'constructive', to avoid 'ruinous' competition with one another and instead to bring about among themselves 'controlled', 'reasonable', 'standardised', 'disciplined', 'eased', 'sensible', 'displaced', 'limited', 'moderate' and 'orderly', all euphemisms for distorted and restricted, competition⁽⁴³⁹⁾. The purpose of the practices was the agreeing and/or concertation of prices (interest rates and charges) and the restriction of advertising measures.

(427) The anticompetitive purpose is expressly admitted by some banks⁽⁴⁴⁰⁾.

(428) According to established case-law, for the purposes of applying Article 81(1) of the EC Treaty, there is no need to take account of the actual effects of an agreement or concerted practice once it appears that its aim is to prevent, restrict or distort competition within the common market⁽⁴⁴¹⁾.

(429) In principle, therefore, the actual effects do not have to be examined in this case.

(430) For the sake of completeness and clarity, however, it should be noted that the practices at issue did in fact have an effect on the Austrian banking market. In this context, it should be borne in mind that, in instances in which target prices are agreed, it may be said that they

have been implemented if the prices actually charged approach these target values (and not just if the targets are precisely achieved)⁽⁴⁴²⁾.

(431) In the first place, reference should be made to the specific examples of the implementation of various cartel decisions specified in the Facts. In addition, numerous internal memos demonstrate how the banks implemented cartel decisions or took the information obtained in the discussions into account in setting their own rates. For example, PSK set maximum interest rates 'in accordance with the agreement in the Deposit Rates Committee' and planned its marketing 'in relation to the fee considerations of fellow competitors'⁽⁴⁴³⁾, BAWAG raised credit interest rates 'in line with' the measures taken by the other banks in accordance with the agreement⁽⁴⁴⁴⁾, NÖ Hypo lowered its savings interest rates 'on the basis of the cuts agreed in the Federal Lending and Deposit Rates Committee and following telephone consultations with the other sectors'⁽⁴⁴⁵⁾ and 'in accordance with the measures recommended in the last two Deposit Rates Committee' meetings⁽⁴⁴⁶⁾, Erste lowered its lending interest rates 'in the light of the prior agreement in the Lending/Deposit Rates Committee' and changed its savings interest rates 'in line with fellow competitors'⁽⁴⁴⁷⁾ and increased the volume for fixed interest rate loans as 'agreed in the treasury round'⁽⁴⁴⁸⁾, GiroCredit lowered its lending interest rates 'in the light of the expected [because agreed in the Federal Lending and Deposit Rates Committee] behaviour of the other market participants'⁽⁴⁴⁹⁾, CA cut the interest rates for employee groups 'in coordination with BAWAG, Bank Austria and Erste' by 0,25 %⁽⁴⁵⁰⁾, CA's regional office in Salzburg cut its savings interest rates 'as agreed with the Salzburg institutions'⁽⁴⁵¹⁾ and CA Oberösterreich cut its savings interest rates in line with 'the agreed action of the Upper Austria banks'⁽⁴⁵²⁾.

(432) The banks themselves accordingly conceded that they tailored their own policies on rates to the knowledge on their competitors' plans obtained during the discussions⁽⁴⁵³⁾. One of the banks further expressly conceded in its comments that it had 'adapted' its competitive conduct to the plans of the other banks and had 'followed suite on the agreed arrangements'⁽⁴⁵⁴⁾.

⁽⁴³⁸⁾ Including the Vienna and Federal Lending and/or Deposit Rates Committees, the Consumer and Liberal Professions Lending Rates Committees, the Minilombard Committee and the Controller Committee.

⁽⁴³⁹⁾ For evidence, see the documents cited in section 5.4.

⁽⁴⁴⁰⁾ 42.206 (RZB).

⁽⁴⁴¹⁾ Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij* [1999] ECR II-931, paragraph 741; Joined Cases T 45/98 and T-47/98 *Krupp Thyssen Stainless GmbH and Others v Commission*, judgment delivered on 13.12.2001, not yet reported, paragraph 152.

⁽⁴⁴²⁾ See, for example, Commission Decision of 21 November 2001 in the *Vitamins* case, paragraph 728.

⁽⁴⁴³⁾ See footnote 344; 22.165 et seq.

⁽⁴⁴⁴⁾ 394.

⁽⁴⁴⁵⁾ 14.634.

⁽⁴⁴⁶⁾ 14.694, 14.648.

⁽⁴⁴⁷⁾ 47.135, 47.138.

⁽⁴⁴⁸⁾ 47.137.

⁽⁴⁴⁹⁾ 47.139.

⁽⁴⁵⁰⁾ 12.644.

⁽⁴⁵¹⁾ 23.493.

⁽⁴⁵²⁾ 23.239.

⁽⁴⁵³⁾ 16.893.

⁽⁴⁵⁴⁾ 42.742, 42.751 (ÖVAG).

(433) There was further conclusive evidence in the form of those documents secured in which the banks themselves, on the basis of checks on other banks regularly carried out by them, assessed the actual implementation of their agreements. In these, it is stated, for example, that 'all the major banks are sticking to the agreed interest rates [and] our policy [is] basic compliance with the reference figures' ⁽⁴⁵⁵⁾, all institutions had 'carried out the agreed interest rate cuts and stuck essentially to the agreements made' ⁽⁴⁵⁶⁾, 'recommended rates are being followed' ⁽⁴⁵⁷⁾, the banks were 'essentially satisfied' with the implementation of their joint decisions ⁽⁴⁵⁸⁾, there was 'not a single instance' of the agreed 'minimum rates being undercut' ⁽⁴⁵⁹⁾, the 'cuts agreed had in the meantime been implemented' ⁽⁴⁶⁰⁾, 'the interest rates agreed had been largely observed' ⁽⁴⁶¹⁾, the rates remained 'within the recently agreed parameters' ⁽⁴⁶²⁾ and the market now presented a 'very uniform rates picture' ⁽⁴⁶³⁾. The fact that compliance by one banking group amounted to 'only 70 %' was viewed critically ⁽⁴⁶⁴⁾. In its written comments, one of the relevant banks actually admits that the cartel participants 'only occasionally broke "interest rate discipline"' ⁽⁴⁶⁵⁾.

(434) Lastly, it seems improbable that the banks would have met regularly and so often, on average every four working days, if the meetings were entirely futile and ineffectual.

(435) As regards the regular and detailed exchange of information concerning calculation methods and parameters, particularly in the Controller Committee, its competition-restricting effect has to be deemed to be all the more significant as the banks' interest margins are thin ⁽⁴⁶⁶⁾.

(436) In the Commission's view, it is therefore established that the agreements at issue have had an effect on the market. It is neither possible nor necessary to quantify this effect precisely, that is, to determine what rates and charges/fees the banks would have applied had they determined their conduct on the market autonomously and independently of one another under conditions of undistorted

competition. As stated above, the report commissioned by the banks failed to show that the cartel had had no effect ⁽⁴⁶⁷⁾.

(437) The Commission is not unaware of the fact that in some areas of lending the much-vaunted 'interest rate discipline' frequently left much to be desired. Sometimes the banks had to endure setbacks in their common endeavour to improve margins or even admit to failure. A 'lack of discipline' led in some cases to 'price wars'. This does not mean, however, that the agreements did not have an effect on the market.

14.3.4. *Effect on trade between Member States*

(438) It is established case-law that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might appreciably prejudice the realisation of the aim of a single market in all the Member States ⁽⁴⁶⁸⁾.

(439) In order to establish the existence of such an influence on the pattern of trade, detrimental as it is to the attainment of the objectives of the single market between Member States, a comparison must be made between the actual situation and the hypothetical situation that would obtain if there were no restriction of competition, that is, assuming that there is undistorted competition. The question is solely one of whether the restriction, be it indirect and potential, may deflect the pattern of trade from its natural course ⁽⁴⁶⁹⁾. It is immaterial whether such influence is unfavourable, neutral or favourable. A prevention of imports is not necessary ⁽⁴⁷⁰⁾.

⁽⁴⁵⁵⁾ See footnote 165.

⁽⁴⁵⁶⁾ See footnote 282.

⁽⁴⁵⁷⁾ See footnotes 173, 180 and 185.

⁽⁴⁵⁸⁾ See footnote 254.

⁽⁴⁵⁹⁾ See footnote 314.

⁽⁴⁶⁰⁾ See footnote 338.

⁽⁴⁶¹⁾ See footnotes 319 and 323.

⁽⁴⁶²⁾ See footnote 362.

⁽⁴⁶³⁾ See footnote 315.

⁽⁴⁶⁴⁾ See recital 255.

⁽⁴⁶⁵⁾ See footnote 530.

⁽⁴⁶⁶⁾ See Commission Decision 96/438/EC of 5 June 1996 Fenex, paragraph 51, OJ L 181, 20.7.1996, p. 28.

⁽⁴⁶⁷⁾ See paragraphs 380 et seq.

⁽⁴⁶⁸⁾ Case C-219/95 P. Ferriere Nord v Commission [1997] ECR I-4411, paragraph 20; Joined Cases C-215/96 and C-216/96 Carlo Bagnasco and Others [1999] ECR I-135, paragraph 47.

⁽⁴⁶⁹⁾ Case 22/78 Hugin v Commission [1979] ECR 1869, paragraph 22; Joined Cases C-209 to 215/78 and 128/78 Van Landewyck v Commission [1980] ECR 3125, paragraph 172; Carlo Bagnasco and Others, *ibid.*, paragraph 48.

⁽⁴⁷⁰⁾ Case T-143/89 Ferriere Nord v Commission [1995] ECR II-917, paragraph 33; Case C-219/95 P Ferriere Nord v Commission, cited above, paragraphs 18 et seq.

(440) In this analysis, an overall assessment must be made as, although individual factors taken separately cannot result in such an influence, they can do so in their context⁽⁴⁷¹⁾. In particular, the agreements or practices must be viewed as a whole⁽⁴⁷²⁾. Account must be taken of the economic factors peculiar to the sector in question⁽⁴⁷³⁾.

(441) According to established, and recently confirmed, case-law, a cartel that covers the entire territory of the Member State is liable by its very nature to affect trade appreciably between Member States⁽⁴⁷⁴⁾. In assessing the appreciability of any such effects, the importance of the subject of the agreement/practice and the market position of the cartel members are relevant⁽⁴⁷⁵⁾.

(442) The Lombard network, consisting of a number of closely interwoven committees, covered the whole of Austria, included almost all Austrian banks, covered the whole range of banking products and services available in Austria, altered the conditions of competition throughout Austria, thus influenced market entry decisions taken by foreign banks and was consequently liable to influence trade between Member States to an appreciable extent.

11) Argument put forward by the banks

(443) The banks begin by complaining that the Commission has wrongly focused on the liability of the network to affect trade between Member States. In the banks' view, any such liability should be examined and proved in

isolation for each individual committee. The banks refer here to the judgment of the Court of First Instance in *VGB and Others v Commission*, which states that Article 81 of the EC Treaty 'applies only to agreements which contribute significantly to any closing-off of the market'⁽⁴⁷⁶⁾.

(444) The banks go on to argue that the Court of Justice had developed a specific test for assessing banking services in its judgment of 21 January 1999 in *Bagnasco*. The test had been applied by the Commission in its Decision in *Nederlandse Vereniging van Banken*⁽⁴⁷⁷⁾. Assessing discussions in each committee in isolation would, applying the criteria of the specific test, ultimately lead to the conclusion that most of the committees could not have had any appreciable effect on trade between Member States and should consequently be disregarded.

12) Commission's view

(445) The banks' argument is based on the premise that there was no interconnected system of agreements, but only a number of committees that were completely independent of one another. However, in view of the documentary evidence available, this premise is untenable. Viewing each individual committee in isolation, as the banks demand, would be possible only in the form of a hypothetical intellectual experiment, since, as amply demonstrated in the Facts, the committees were extremely closely interconnected with one another in terms of subjects covered and organisation. This is also evident from the fact that the distinction between the individual committees was not always strictly adhered to and sometimes topics from one area were dealt with in the committee responsible for another area. Any artificial division of the network into its individual components would bear no relation to the real facts and the impact of the cartel.

(446) As far as the judgment in *VGB and Others v Commission*, cited by the banks, is concerned, it demonstrates just the opposite of what the banks are arguing. The subject matter assessed by the Commission in the disputed Decision and subsequently by the Court of Justice was a whole body of decisions and agreements on the supply of floricultural products on the plaintiff's premises in Aalsmeer (Netherlands). This body of rules included provisions on user fees and trade agreements.

⁽⁴⁷¹⁾ Case C-250/92 *Gøttrup Klim* [1994] ECR I-5641, paragraph 54; *Carlo Bagnasco and Others*, cited above, paragraph 47.

⁽⁴⁷²⁾ Case T-77/94 *VGB and Others v Commission* [1997] ECR II-759, paragraph 126 among others.

⁽⁴⁷³⁾ Case 22/78 *Hugin v Commission*, cited above, paragraph 25.

⁽⁴⁷⁴⁾ Case C-309/99 *Wouters and Others*, judgment delivered on 19.2.2002, [2002] ECR I-1577, paragraph 95 with references to case-law. See also Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 49 (That effect is all the more appreciable in this case because the various types of import or export operations within the Community, as well as transactions between Community traders, require customs formalities to be carried out; emphasis added).

⁽⁴⁷⁵⁾ See, for example, Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, paragraph 181, where a market share of around 40 % was deemed sufficient for there to be an appreciable effect.

⁽⁴⁷⁶⁾ e.g. 41.887 (Erste); joint submission at hearing of 18 January 2000 (43.443).

⁽⁴⁷⁷⁾ Decision of 8 September 1999 (Cases IV/34.010, 33.793, 34.234 and 34.888, *Nederlandse Vereniging van Banken* and others), OJ L 271, 21.10.1999, p. 28.

- (447) The Court of First Instance held that the 'rules as a whole are liable to affect trade between Member States [...]. Since the trade agreements form an integral part of those rules, it is of no importance whether or not, in isolation, they affect trade between Member States to a sufficient extent' ⁽⁴⁷⁸⁾. This is precisely the situation which exists in the Lombard network.
- (448) The Court of First Instance then went on to look at five separate exclusive purchasing agreements which the plaintiff had concluded with Dutch wholesalers. In contrast to the parts of the body of rules mentioned in recital 446, the exclusive purchasing agreements did not, in the Court's view, have any direct link with the body of rules. The Court of First Instance therefore considered whether the five agreements might appreciably affect trade between Member States on the basis of the criterion usually applied to vertical agreements, namely the possible closing-off of the market. It was in this context, and not with regard to the body of rules as a whole, that the Court of First Instance, citing the judgment in *Delimitis*, discussed the possible 'significant [...] closing-off of the market' referred to by the banks.
- (449) Nor do the judgment in *Bagnasco* and the Decision in *Nederlandse Vereniging van Banken* provide any support for the legal view taken by the banks. In those cases, only comparatively minor services on the banking market, namely clauses in the general conditions of business regarding general guarantees (*Bagnasco*) and acceptance giro (*Nederlandse Vereniging van Banken*), were involved. The banking service constituted by 'general guarantees' does not, in and for itself, by its nature have any cross-border dimension and is, once again in and for itself, too minor to be able to affect trade between Member States. The same applies to acceptance giro, which the Commission expressly describes in its Decision as being a product of 'relatively limited importance'.
- (450) The difference compared with the Lombard network, which comprised not just one or other relatively minor marginal product, but all the closely interwoven aspects of banking, in particular savings interest rates, lending interest rates and charges, and did not allow free competition in respect of any fundamental parameter of competition, is in fact considerable.
- (451) To summarise, and on the basis of settled case-law, the proven comprehensive geographical and substantive coverage of the network, its undisputed anticompetitive purpose and its similarly proven impact throughout Austria, support the Commission's legal interpretation that the network consisting of a number of interconnected committees was liable to appreciably affect trade between Member States.
- (452) Contrary to the view taken by the banks, it is irrelevant in this context whether the individual participation of one or other undertaking in the practices appreciably affected trade between Member States. Since the Lombard network as a whole was liable to affect trade between Member States, the Commission does not need to show that the individual participation of one undertaking or another in and for itself also appreciably affected such trade ⁽⁴⁷⁹⁾.
- (453) The liability of the Lombard network to appreciably affect trade between Member States, as described above, will be illustrated below by a number of specific examples. These examples of the liability to have both a direct and an indirect impact concern the demand and the supply side.
- The demand side level
- (454) As stated above, deposits by foreign non-banks with Austrian credit institutions in 1999 amounted to some EUR 26 billion and loans granted by Austrian credit institutions to foreign non-banks to some EUR 36 billion. The comprehensive agreements by Austrian banks, in particular as regards savings and lending interest rates, were consequently liable to affect individuals and firms from other Member States, as savers and as borrowers, directly and to an appreciable extent.
- (455) Parts of the practices at issue either concern services of a cross-border nature, and for that reason alone are therefore capable of affecting trade between Member States ⁽⁴⁸⁰⁾, or are by their very nature closely related to cross-border goods flows. Agreements relating to cross-border payment transactions ⁽⁴⁸¹⁾, documentary business and the buying and selling of securities also fall within this category ⁽⁴⁸²⁾.

⁽⁴⁷⁹⁾ Case T-17/99, *KE KELIT Kunststoffwerk GmbH v Commission*, judgment of the Court of First Instance delivered on 20.3.2002, not yet reported, paragraph 58 among others.

⁽⁴⁸⁰⁾ Case 172/80 *Züchner* [1981] ECR 2021, paragraph 18.

⁽⁴⁸¹⁾ See, for example, 8166 et seq., according to which foreign transactions involving international investment funds are increasing disproportionately. Austrian residents transfer small amounts direct to foreign funds. The latter also receive small amounts by direct debit. See also 4660 and 4663 on the results of a cost comparison with the Federal Republic of Germany, in which distant giro transfers come out better than the Austrian giro system. No information that refers to the more favourable terms available in using such distant giro transfers is therefore to be passed on to customers.

⁽⁴⁸²⁾ In 1998, foreign nationals purchased ATS 205 billion worth of Austrian securities, and Austrian nationals purchased ATS 147 billion worth of foreign securities; *Die Presse*, 21 April 1999.

⁽⁴⁷⁸⁾ VGB, cited above, paragraph 126.

(456) Although other aspects of the practices do not have any natural connection with cross-border transactions, they do exercise an indirect influence thereon inasmuch as lending rates necessarily affect investment, and hence production, decisions both of subsidiaries of foreign firms and of Austrian firms in Austria.

(457) In this connection, account should be taken not only of Austria's very high export ratio⁽⁴⁸³⁾, but also of the traditionally close relationship between Austrian undertakings and their 'house bank', and hence of its particular importance as far as the raising of capital is concerned⁽⁴⁸⁴⁾. In 1998, direct investment by Austrian entrepreneurs in other Member States came to more than ATS 16 billion⁽⁴⁸⁵⁾.

(458) In the case of those undertakings which, because of their size, are able to turn to the international capital markets, the agreements at issue were, it is true, only 'to be adhered to to a limited extent'. The Austrian banks therefore discussed whether to expressly exclude such customers from the general agreements applying to all others and instead to take 'a joint decision in individual cases'⁽⁴⁸⁶⁾.

(459) The considerations set out at recital 456 above also apply to those aspects of the conduct which relate to interest rates for consumer lending. Such lending serves in particular to finance the purchase of consumer durables which are not made in Austria but are imported from other Member States, such as motor vehicles. It can therefore be assumed that such lending rates influence goods flows between Member States.

The supply side level

(460) The effects of the practices at issue are, however, not confined to the demand side. As will be shown in the paragraphs that follow, the practices may also influence competitive conditions on the supply side and hence affect trade between Member States.

(461) As already indicated at length above⁽⁴⁸⁷⁾, the practices related to almost all banking products and services. Moreover, almost all the Austrian banks were involved in at least some (and the largest banks in all) of the practices. The object of these comprehensive, country-

wide, long-term agreements was, departing from the optimum factor allocation to be expected under normal competitive conditions, to keep prices, and hence profits, at a level above that which would have prevailed under conditions of undistorted competition⁽⁴⁸⁸⁾. As the documents cited above at recital 433 by way of example show, according to their own estimates the banks succeeded in doing so to a not inconsiderable degree⁽⁴⁸⁹⁾.

(462) It is clear, therefore, from the comprehensive exposition in section 5.4 and sections 7 to 12 that the agreements had both as their object and, in some cases, as their effect the bringing-about or the maintenance, through collectively monopolistic pricing behaviour, of an exaggerated increase in prices and hence in profits. At the same time, the agreements preserved a clearly inefficient market environment. Foreign competitors have to take this into account when deciding whether and, if so, to what extent they should enter the Austrian market under these conditions. The agreements are accordingly also liable to deflect the pattern of trade from its natural course by influencing decisions to enter the market.

(463) Since the agreements had both as their object and, in some cases, as their effect the bringing-about or the maintenance of an exaggerated increase in prices and hence in profits, it is to be expected that the (domestic) cartel members will react to any undercutting of agreed interest rates by (foreign) non-members. Should, as a result of such competition, prices (and hence the cartel members' profits) threaten to come under pressure, the cartel members will seek to neutralise the competition, and hence to sustain the exaggerated price/profit increase, by tying in the foreign competitors. If there is no such threat, however, e.g. because the foreign competitors' market share is too small, no such tying-in will take place.

⁽⁴⁸³⁾ In 1998, exports accounted for 29,3 % of GDP; 64 % of all exports went to other EU countries; see footnote 482.

⁽⁴⁸⁴⁾ The Austrian capital market, on the other hand, traditionally plays no more than a subordinate role as far as the raising of capital is concerned.

⁽⁴⁸⁵⁾ See footnote 482; *Der Standard*, 27 April 1999, p. 21.

⁽⁴⁸⁶⁾ See footnote 308; 37.685.

⁽⁴⁸⁷⁾ See recital 8 and, more exhaustively, sections 7 to 12.

⁽⁴⁸⁸⁾ It is clear from their own documents that the banks wished to replace unrestricted, in their view 'destructive', competition by restricted, in their words 'controlled', 'reasonable', 'disciplined', 'eased', 'limited', 'moderate' or 'orderly', competition. For evidence, see the documents referred to in section 5.3.

⁽⁴⁸⁹⁾ See the following quotations from the documents obtained: all the major banks were sticking 'to the agreed interest rates' or were 'essentially sticking to the agreements reached', 'recommended rates were [...] being followed', the banks were 'essentially satisfied' with the implementation of their decisions, there was 'not a single instance' of the agreed 'minimum rates being undercut', the 'cuts agreed had in the meantime been implemented' and 'the interest rates agreed had been largely observed', which meant that the market now presented a 'very uniform rates picture'.

(464) In the export financing segment, foreign banks threatened, by undercutting the interest rates agreed between the Austrian banks, to 'soften their margins'. The Austrian banks accordingly felt bound either to include foreign banks, e.g. West-LB, ad hoc in the agreements or to formally admit them, first of all via the participation of a foreign-bank representative, to membership of the relevant committee (the Export Financing Committee, see section 12.1 for details). In the case of another foreign bank, the German Schoellerbank, the Austrian banks decided to admit it to the Export Financing Committee, as Schoellerbank had 'fairly strong activities' in this area.

(465) The matter was viewed differently in the personal banking field, where the German bank Schoeller tried to increase its market share by offering favourable interest rates. Owing, however, to its exclusion from the cartel in 1992, there were for the Austrian banks 'no possibilities of coordination' with Schoellerbank. The cartel members therefore considered reversing the exclusion and discussed the possibility 'of inviting Schoeller Bank representatives to the next Consumer Lending Rates Committee meeting'. Since Schoellerbank's market share in this segment was small, the banks 'came to the conclusion that the competitive pressure was still bearable for the large banks' and that on the whole 'it would be a bad thing if Schoeller knew exactly what was discussed at the meetings' ⁽⁴⁹⁰⁾.

13) Argument put forward by the banks

(466) The banks do not consider these examples significant. As far as the demand side is concerned, they argue that the link between financing and cross-border flows of goods is purely speculative. As regards the supply side, the Commission had not proved that trade between Member States was affected as a result of the closing-off of the market vis-à-vis foreign competitors.

14) Commission's view

(467) In the Commission's view, these arguments do not hold. In view of the major importance of the banks for the raising of capital by Austrian companies, the very high export ratio of such companies and the obvious link between financing costs and investment decisions, the possibility that comprehensive agreements on financing terms have a direct effect on cross-border flows of goods is sufficiently plausible.

(468) As far as the argument concerning the absence of any closing-off of the market is concerned, the legal view taken by the banks is misconceived in several respects.

In the first place, it is not necessary under established case-law for trade between Member States to be affected in an adverse sense. All that matters is whether there is an effect, whether favourable or unfavourable. Furthermore, the Commission is not required to prove the actual effect. The capacity to divert cross-border flows of goods from the natural direction is sufficient. Lastly, the banks are incorrect in taking the view that the capacity to produce such an effect exists only if market access is made more difficult for foreign competitors, i.e. if the market is closed off. Here once again, pursuant to the case-law cited above, the point is not whether market entry is prevented, but whether foreign undertakings are influenced in their market entry decisions ⁽⁴⁹¹⁾. In this context too, it should be noted that the agreements have, for a long time, prevented the development of efficient market conditions.

(469) To sum up, it can be said therefore that the network consisting of a number of closely interconnected committees was liable to have an appreciable effect on trade between Member States in view of its proven comprehensive geographic and substantive coverage, its undisputed anticompetitive purpose and its similarly proven impact throughout the territory of Austria. In addition, the network was liable, on the one hand, to affect behaviour on the demand side directly or indirectly geared to cross-border flows of goods and, on the other, market entry decisions on the supply side.

14.4. Undertakings found to have committed an infringement

14.4.1. Selection

(470) A very large number of banks were parties to the practices at issue. The addressees of this Decision have been singled out because of the particular frequency of their participation in meetings of the major committees: the Vienna and Federal Lending and/or Deposit Rates Committees (including the Consumer Lending and Liberal Professions Lending Rates Committees), the Minilombard Committee and the Controller Committee. In addition, with the exception of NÖ Hypo and RBW as from July 1997 RLB ⁽⁴⁹²⁾, they play an important role in the Austrian banking market because of their size.

(471) Individual banks object to the selection made by the Commission and argue that they are being discriminated against compared with those banks on which it is decided to impose no fine.

⁽⁴⁹¹⁾ See footnote 470.

⁽⁴⁹²⁾ RLB did not (prior to the merger) itself take part in the committees mentioned.

⁽⁴⁹⁰⁾ For evidence, see recital 274.

(472) The Commission cannot accept this argument. Contrary to the view taken by the banks, there is no infringement of the right to equal treatment if the Commission does not carry out proceedings against all the undertakings that may be involved in an infringement⁽⁴⁹³⁾, but that makes a selection on the basis of objective criteria.

14.4.2. Questions of attribution

(473) In the event of legal succession, for example, following a merger, the attribution of infringements of competition law committed by the defunct company devolves upon the legal successor⁽⁴⁹⁴⁾. Accordingly, for the purposes of this case, CA's conduct is to be attributed to BA, PSK-B's conduct to PSK and RBW's conduct to RLB. These attributions were not called into question by the relevant undertakings during the proceedings.

(474) As regards BAWAG/PSK and HVB/BA, the question of attribution does not arise, since the process of acquisition occurred after the infringement had ended and since PSK and BA were not, following their acquisition by BAWAG and HVB, simply incorporated into those undertakings, but continued and still continue their activity as their subsidiaries. PSK and BA are therefore liable themselves for their infringements and are themselves addressees of the decision to impose fines⁽⁴⁹⁵⁾. This too was not called into question during the proceedings.

(475) By contrast, attribution of the conduct of GiroCredit up to the time of acquisition of the majority of its shares by Erste in October 1997 (referred to hereinafter as the 'relevant time') is in issue. In the statement of objections, the Commission took the view that liability for the infringement committed independently by GiroCredit had, in view of the merger with Erste, been transferred to the latter. However, Erste asserts that the conduct by GiroCredit had to be attributed to BA, to whose group GiroCredit had belonged up until the relevant time and which itself had participated in the cartel.

(476) According to case-law, the natural or legal person in charge of the relevant undertaking at the time of the infringement is liable for its actions, even if at the time of adoption of the decision finding that there has been an infringement another person is responsible for the operation of the undertaking⁽⁴⁹⁶⁾.

(477) Under certain circumstances, however, the anticompetitive conduct of an undertaking can also be attributed to its parent company. This is possible where the subsidiary does not independently determine its market behaviour, but, mainly because of economic and legal ties to its parent company, has essentially followed its instructions. In such instances, the Commission can choose whether to attribute the infringement committed by the subsidiary to it or to the parent company⁽⁴⁹⁷⁾.

(478) In the present case, therefore provided that, up until the relevant time, GiroCredit did not independently determine its behaviour, but, primarily because of economic and legal ties to a parent company, essentially followed its instructions, the Commission could have chosen whether to attribute the infringement committed by GiroCredit to GiroCredit itself or to a parent company.

(479) The very numerous documents in the case-file do not provide any evidence that GiroCredit's business policy was influenced, or indeed determined, by a parent company. Analysis of the documents available, minutes of cartel meetings and internal GiroCredit documents, particularly in connection with its internal decision-making, shows clearly, in the Commission's view, that GiroCredit acted independently, on its own responsibility and without instructions in its own interests and in the interests of the savings bank group⁽⁴⁹⁸⁾. GiroCredit was thus solely responsible for the infringement committed by it.

⁽⁴⁹³⁾ See Joined Cases T-45/98 and T-47/98, Krupp Thyssen Stainless GmbH and Others v Commission, judgment delivered on 13.12.2001, [2001] ECR II-3757, paragraph 298 among others, and Case T-17/99, KE KELIT Kunststoffwerk GmbH v Commission, judgment delivered on 20.3.2002, [2002] ECR II-1647, paragraph 101 among others.

⁽⁴⁹⁴⁾ Case T-6/89 Enichem Anic SpA v Commission [1991] ECR II-1623.

⁽⁴⁹⁵⁾ Case C-279/98 P Cascades SA v Commission [2000] ECR I-9693, paragraph 79.

⁽⁴⁹⁶⁾ Joined Cases T-45/98 and T-47/98, Krupp Thyssen Stainless GmbH and Others v Commission, judgment delivered on 13.12.2001, [2001] ECR II-3757, paragraph 57 with other references.

⁽⁴⁹⁷⁾ Case T-65/89 BPB Industries Plc and British Gypsum Ltd v Commission [1993] ECR II-389, paragraph 154; Joined Cases 6 and 7/73 Istituto Chemioterapico Italiano SpA and Commercial Solvents v Commission [1974] ECR 223, paragraph 41; Case C-286/98 P Stora v Commission [2000] ECR-9925, paragraph 26; Case C-297/98 P SCA Holding v Commission [2000] ECR I-10101, paragraph 11.

⁽⁴⁹⁸⁾ See, for example, the documents cited in recital 431.

(480) In the light of these facts, the Commission therefore imputed GiroCredit's infringement to GiroCredit itself. Attribution to a parent company was not considered even as an alternative⁽⁴⁹⁹⁾. GiroCredit's responsibility for the infringement committed by it was subsequently, upon merger with Erste, transferred in full, under the rules of succession in title, to Erste.

(481) It follows from all these considerations that, under the rules on succession in title, Erste is liable for the fine which would have had to be imposed on GiroCredit in respect of an infringement committed by it on its own account. This liability is in addition to the liability for the infringement committed by Erste itself prior to the merger.

(482) NÖ Hypo has since January 1997 been an ÖVAG group member company. The Commission could, provided that NÖ Hypo had since that time not determined its conduct independently, but, mainly because of its economic and legal ties to ÖVAG, had essentially followed its instructions, have chosen whether to attribute the infringement committed by NÖ Hypo to it or to ÖVAG. However, there is no indication in any of the very numerous documents in the file of any influence over, or outside determination of, NÖ Hypo's business policy by ÖVAG. Analysis of the documents available, minutes of cartel meetings and internal NÖ Hypo documents, in particular in connection with its internal decision-making, shows clearly in the Commission's view that NÖ Hypo represented its own interests independently, on its own responsibility and without instruction⁽⁵⁰⁰⁾. It is also evident from the minutes of the meetings that representatives of NÖ Hypo took part in the committee meetings even after January 1997 until the end of the infringement. NÖ Hypo was therefore solely responsible for the infringement committed by it. The same applies to PSK-B in relation to PSK (before the merger)⁽⁵⁰¹⁾.

14.5. Duration of the infringement

(483) The practices at issue fell as of 1 January 1995 under Article 81(1) of the EC Treaty.

(484) The Commission assumes that no further committee meetings have taken place since the time of the investigations (June 1998) and that the infringement therefore ended at that time.

15. THE EXTENT OF AN UNDERTAKING'S DUTY TO REPLY

(485) The banks contend that they were under no obligation to reply to a large proportion of the questions asked in the requests for information, so that when they did answer the questions asked, or supply the papers requested, they did so voluntarily for purposes of the Commission notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases (the 1996 Leniency Notice), which applied at that time⁽⁵⁰²⁾.

(486) The banks argue broadly that the questions went beyond what was proper by asking for 'interpretation of the subject matter and purpose' of the talks between banks. The demand that they produce certain documents, such as entries in records or minutes of talks, was likewise inadmissible, because the production of such documents to the Commission would constitute a 'direct admission' on their part⁽⁵⁰³⁾.

(487) The Commission does not accept this view. It is settled case-law that, in order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession. This is so even if those documents may be used to show that it or another undertaking has engaged in anticompetitive conduct⁽⁵⁰⁴⁾. An undertaking has a right to silence only to the extent that it would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.

(488) It follows that the undertaking must comply with all requests for (a) factual information, such as details of those taking part in talks, and (b) documents already in existence, such as copies of invitations, agendas, minutes, internal records, reports, etc⁽⁵⁰⁵⁾.

⁽⁴⁹⁹⁾ In view of this fact, it does not matter whether BA itself or its share management company (Anteilsverwaltungsgesellschaft), Anteilsverwaltung-Zentralsparkasse Wien (AVZ), should have been regarded as the parent company. At the relevant time, AVZ held (a), including the undertakings controlled by it, 49,8 % of BA's voting capital and (b) 56,1 % of the voting capital of GiroCredit.

⁽⁵⁰⁰⁾ See, for example, the documents cited in recital 431.

⁽⁵⁰¹⁾ See management board minutes, file p. 3054 et seq.

⁽⁵⁰²⁾ OJ C 207, 18.7.1996, p. 4.

⁽⁵⁰³⁾ Joint presentation on the 1996 Leniency Notice at the hearing of 18 January 2000.

⁽⁵⁰⁴⁾ Judgment of the Court of First Instance in Case T-112/98 Mannesmannröhren-Werke v Commission [2001] ECR II-729, paragraph 65, with further references.

⁽⁵⁰⁵⁾ Mannesmannröhren-Werke, cited above, paragraph 70.

(489) The information and documents sought in the request for information made here were of precisely this kind. The Commission asked for dates and details of participants for precisely identified committees, the Lombard Club, the Controller Committee, or the Regional Committees as the case might be, and for other committees that were not identified by name. It also asked for existing documents that had been drawn up in connection with the talks. These questions referred to strictly factual matters: there can be no question of a 'blanket demand on the part of the Commission to admit that infringements had been committed' ⁽⁵⁰⁶⁾, as the banks contend. In the Commission's view, therefore, the questions without exception remained within the bounds traced out by the Court of Justice and Court of First Instance of the European Communities.

(490) In the light of the same case-law, the questions asked regarding the subject matter of cartel talks, as opposed to the decisions taken there, were likewise admissible. But there is no need to consider this point further here, since in this Decision the Commission in fact bases itself entirely on pre-existing documents ⁽⁵⁰⁷⁾.

16. REMEDIES

16.1. Article 3 of Regulation No 17

(491) Article 3 of Regulation No 17 states that where the Commission finds that there is infringement of Article 81(1) of the EC Treaty it may require the undertakings concerned to bring such infringement to an end.

(492) The Commission takes it that since the inspections were carried out there have been no further talks. However, in case it should prove that contrary to the Commission's understanding this is not so, the addressees should nevertheless be required to bring the infringement to an end ⁽⁵⁰⁸⁾.

(493) The addressees should also be required to refrain in future from any agreement or concerted practice which may have the same or a similar object or effect as the practices identified in this Decision.

16.2. Article 15(2) of Regulation No 17

16.2.1. Fault: intent

(494) The banks deny that there was any fault on their part, as they could not have known that the practices in which they engaged would infringe European antitrust law. In support of this contention they argue that: (a) the practices were approved and supported by the Austrian National Bank, and were merely a product of typically Austrian consensus politics; (b) until 1 January 2000 Austrian antitrust law did not specifically ban restrictive practices (*Verhaltenskartelle*); (c) the existence of the Lombard Club was a matter of public knowledge, and no action had ever been taken against it by the Austrian authorities; (d) the Commission's administrative practice with respect to interest-rate agreements, and consequently the legal position itself, had been unclear; (e) Austria is a recent Member State of the Community, and is still poorly acquainted with Community law; and (f) they could not have been aware that the agreements might affect trade between Member States. They claim, therefore, that they made an unavoidable error regarding the unlawfulness of the agreements.

(495) The Commission cannot accept this submission.

(496) On the historical origins of the committees and the participation of the Austrian National Bank the Commission has already stated its view (recital 370 et seq.). It will be sufficient here to point out once again that the Austrian National Bank's call to the banks to calculate their prices in a commercially responsible fashion cannot be reread as a demand that they conclude restrictive agreements. Furthermore, committees that were quite central to the network were not as a rule attended by the Austrian National Bank.

(497) As is explained in more detail in section 5.1, even before Austria entered the European Economic Area there were articles being published that discussed the application to banking of European competition law ⁽⁵⁰⁹⁾, including the concept of the potential effect on cross-border trade, which has traditionally been interpreted broadly. It is difficult to see why the banks in particular should have been unaware of these discussions, especially as every undertaking in an Member State of the Community, irrespective of the date of the accession of that country, is under an indisputable obligation to acquaint itself with the law in force, which may well differ in some respects from the domestic law.

⁽⁵⁰⁶⁾ 42.470 (BAWAG).

⁽⁵⁰⁷⁾ Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV* [1999] ECR II-931, paragraphs 451 et seq.

⁽⁵⁰⁸⁾ Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 195.

⁽⁵⁰⁹⁾ On the law and administrative practice, which are neither unclear nor confusing, see section 14.1.

(498) In fact the documents cited in section 5.1 show that the banks were fully aware that what they were doing was suspect from the point of view of competition law. Among other things, it is difficult to explain why else they should have decided to 'rename' and even to 'destroy' the records of the cartel.

(499) For the same reasons the Commission rejects the accusation put forward by the banks that the Commission wanted 'to make an example of the banking sector in one of the most recent Member States' ⁽⁵¹⁰⁾. Nor does it agree with the banks that that to impose a fine as a 'demonstration of its way of dealing with new Member States', given the planned accession of countries in central and eastern Europe, would in fact be 'counter-productive'.

(500) The regular lunches [at senior management level] in the Lombard Club framework may have been a matter of public knowledge. But that was not as a rule true of the very many other committees in the network. Nor is it the Commission's role to discuss whether action might or might not have been taken by national authorities. None of these factors releases the banks from fault.

(501) For an infringement to be intentional, it is sufficient that the undertaking could not have been unaware that the conduct complained of was aimed at restricting competition ⁽⁵¹¹⁾. But in this case not only were the relevant undertakings aware that their conduct had a restrictive object, they were also aware that it was incompatible with EC competition law. There can be no doubt, therefore, that the banks were acting intentionally for purposes of Article 15(2) of Regulation No 17 and the related case-law ⁽⁵¹²⁾.

16.2.2. General considerations

(502) Under Article 15(2) of Regulation No 17, the Commission may, by decision, impose on undertakings fines of from EUR 1 000 to EUR 1 000 000, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where, either inten-

tionally or negligently, they infringe Article 81(1) of the EC Treaty. In fixing the amount of the fine regard is to be had both to the gravity and to the duration of the infringement.

(503) The role played by each of the undertakings that took part in the infringement has to be assessed individually. In setting any fines account will have to be taken of any aggravating or mitigating circumstances. The 1996 Leniency Notice may also apply.

16.2.3. Basic amount of fines

(504) The basic amount of any fine is calculated to reflect the gravity and duration of the infringement.

16.2.3.1. Gravity

(505) The courts have consistently held that the gravity of infringements has to be determined by reference to numerous factors, such as the circumstances of the case, its context and the dissuasive effect of fines. There is no binding or exhaustive list of criteria that must be taken into account in every case ⁽⁵¹³⁾.

15) Nature of the infringement

(506) By their nature, price agreements constitute very serious infringements of Article 81(1) of the EC Treaty ⁽⁵¹⁴⁾. The Commission has to take account not only of the specific circumstances but also the general context of the infringement, especially if it is a manifest infringement of a particularly harmful type such as a horizontal price agreement. Banking services are of vital importance both to consumers and to businesses and hence to the whole economy. In so important a sector no tolerance can be shown to cartels, especially cartels as comprehensive and institutionalised as the Lombard network.

(507) The Commission accordingly considers the infringement of Article 81(1) of the EC Treaty to be of a very serious nature.

⁽⁵¹⁰⁾ 43.460 (written record of the hearing of 18.1.2000).

⁽⁵¹¹⁾ Case T-143/89 *Ferriere Nord v Commission*, cited above, paragraph 41; Case T-176/95 *Accinauto v Commission* [1999] II-1635, paragraph 119; Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others v Commission* [2001] ECR II-2035, paragraph 127.

⁽⁵¹²⁾ See footnote 510.

⁽⁵¹³⁾ Order of the Court of Justice in Case C-137/95 *P SPO and Others v Commission* [1996] I-1611, paragraph 54; Case C-219/95 *P Ferriere Nord v Commission*, cited above, paragraph 33.

⁽⁵¹⁴⁾ It is irrelevant in this respect whether the practices at issue were also aimed at market sharing or quantity restriction.

16) Implementation and impact of the cartel on the market

(508) The implementation and impact of the cartel may be taken into account, amongst a number of aspects, in cases where the practices at issue are not aimed directly at the restriction of competition, and consequently are caught by Article 81 of the EC Treaty only as a result of their practical effects ⁽⁵¹⁵⁾.

(509) The banks concerned took part regularly and frequently in several rounds of talks. The documents from the relevant period which have been seized clearly show how the banks implemented the agreements reached at those talks, or took account of the information they had obtained from their competitors at the talks when they came to take their own business decisions ⁽⁵¹⁶⁾.

(510) The same documents also show that the wide-ranging agreements reached over many years did have an impact on the market. The parties to the cartel had to accept reverses, and sometimes had to admit to one another that their efforts had failed, but this does not mean that the agreements had no effect on the market. It has already been explained, too, that the report drawn up for the banks does not show that the cartel had no impact ⁽⁵¹⁷⁾.

17) Size of the geographic market

(511) In view of the special circumstances of the present case and the context of the infringement, the comparatively limited size of the territory of Austria does not prevent the infringement being considered a very serious one ⁽⁵¹⁸⁾.

18) Submissions of the banks and the Commission's conclusion on the gravity of the infringement

(512) The banks put forward a number of arguments which in their view tend to reduce the gravity of the infringement: (a) it was concerned only with prices, and did not involve market sharing or quota arrangements; (b) its effect was felt only on the market of a small Member State; (c) its impact was only limited; (d) the Austrian National Bank

took part in the infringement; and (e) as a recent Member State, Austria was in a 'period of adjustment', and the Austrian banks could not adapt to the principle of unrestricted competition that applied in the Community 'from one day to the next' ⁽⁵¹⁹⁾.

(513) The nature of the infringement and its implementation and impact have already been discussed above. For reasons which have likewise already been set out, neither the very limited participation on the part of the Austrian National Bank nor the comparatively recent membership of Austria in the Community is a factor which would tend to reduce the gravity of the infringement ⁽⁵²⁰⁾.

(514) The Commission accordingly concludes that the undertakings to which this Decision is addressed have committed a very serious infringement of Article 81(1) of the EC Treaty.

19) Differentiation of the parties to the cartel

(515) The infringement is thus to be classified as a very serious one; within that category, the scale of the fines to be imposed makes it possible to differentiate between offenders so as to take account of their effective economic capacity. At the same time it allows a fine to be set at a level which ensures that it has a sufficiently dissuasive effect. A differentiated approach of this kind is especially desirable here, because there is a wide variation in the size of the undertakings or groupings that took part in the infringement.

(516) In this case account has to be taken of the special features of the Austrian market. It would be quite unrealistic to confine the importance of Erste, RZB and ÖVAG in the network, and their effective capacity to restrict competition at the expense of consumers, to the volume of their own individual business as commercial banks.

(517) The documents in the case make it impressively clear that these undertakings, in line with their role as leaders of their respective groupings, made an essential contribution to the effectiveness of the network throughout Austria via intensive flows of information within those groupings. They did not represent their own interests only, but those of their groupings as well, and were regarded as representatives of their groupings by the other parties to the cartel. The agreements were not just between the individual institutions but between the groupings as a whole ⁽⁵²¹⁾.

⁽⁵¹⁵⁾ Opinion of Advocate General Mischo in Case C-283/98 P *Mo och Domsjö v Commission* [2000] ECR I-9855, paragraph 101, and the argument in Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Others v Commission*, judgment delivered 13.12.2001, [2000] ECR II-3757, paragraph 199.

⁽⁵¹⁶⁾ See recital 430.

⁽⁵¹⁷⁾ See recitals 380 et seq.

⁽⁵¹⁸⁾ Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraph 62.

⁽⁵¹⁹⁾ The banks take the view that the infringement is only a 'minor infringement', or at most a 'serious infringement', within the meaning of the Commission guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 (the guidelines), OJ C 9, 1998, p. 3; see 43.459 (written record of the hearing of 18.1.2000).

⁽⁵²⁰⁾ See recital 374.

⁽⁵²¹⁾ See paragraphs (58) et seq.

(518) To ignore the groupings behind the institutions that headed them, that is to say the savings banks grouping, the agricultural credit cooperative grouping and the credit union grouping, would result in the fines being set at a level which did not do justice to the facts, which was out of touch with reality, and which had no dissuasive effect. The dissuasive effect will be sufficient only if in future the lead institutions refrain from engaging in cartel conduct as representatives of their groupings.

(519) The banks and banking groupings concerned can be divided into five categories on the basis of the available information on market shares⁽⁵²²⁾. The first category consists of GiroCredit (after the merger: Erste) including the savings banks grouping, and RZB including the agricultural credit cooperative grouping. The second category consists of BA and CA. The third consists of BAWAG, ÖVAG including the credit union grouping and Erste (before the merger with GiroCredit). PSK and PSK-B form the fourth category, while the fifth category consists of the smallest of the undertakings concerned, NÖ Hypo and RBW/RLB.

(520) On the basis of the relative importance on the relevant market of the undertakings and groupings of undertakings in each category, the Commission arrives at the following initial figures for the calculation of the fines:

GiroCredit/Erste (after merger) ⁽⁵²³⁾	EUR 25 million
RZB	EUR 25 million
BA	EUR 12,5 million
CA	EUR 12,5 million
Erste (before merger): ⁽⁵²⁴⁾	EUR 6,25 million
BAWAG	EUR 6,25 million

⁽⁵²²⁾ The market shares that the Commission has referred to here are shares of the market in private and corporate customer business (both lending and deposits), calculated on the basis of figures from the public versions of Commission decisions, from company reports, from publications and from other public sources. Private and corporate business are the banks' main product markets. Market shares calculated in this way consequently give a representative picture of the overall market position of the banks and banking groupings concerned, and provide an appropriate basis on which to divide them into categories.

⁽⁵²³⁾ With the merger between Erste and GiroCredit, Girocredit's role as leading institution of the savings bank sector, and hence also Girocredit's role in this respect within the Lombard network, was also transferred to Erste.

⁽⁵²⁴⁾ Erste had taken part in the cartel even before the merger with GiroCredit. Since during that period Erste had taken part in the cartel only as a commercial bank and not also as the leading institution of the savings bank sector, it was to be classified in the third category up to the merger on the basis of its own market share.

ÖVAG	EUR 6,52 million
PSK	EUR 3,13 million
PSK-B	EUR 3,13 million
NÖ Hypo	EUR 1,25 million
RWB/RLB ⁽⁵²⁵⁾	EUR 1,25 million.

16.2.3.2. Duration

(521) For purposes of these proceedings, the conduct in question lasted from 1 January 1995 to the end of June 1998, i.e. three-and-a-half years. The initial figures for the fines arrived at on the basis of the gravity of the infringement should accordingly be increased for duration by 35 %.

(522) Special considerations apply to GiroCredit and Erste. Up until the merger with GiroCredit in October 1997, Erste participated in the infringement only as a commercial bank, but after the merger it was involved also as the leading institution of the savings bank sector. The duration of the infringement by Erste solely as a commercial bank therefore amounts to only three years (1995 to 1997), whereas GiroCredit and, after the merger, Erste, also participated as the leading institution of the savings bank sector throughout the duration of the infringement.

16.2.3.3. Conclusion regarding basic amounts of fines

(523) The basic amounts of the fines should therefore be as follows:

GiroCredit/Erste (after merger)	EUR 33,75 million
RZB	EUR 33,75 million
BA	EUR 16,875 million
CA	EUR 16,875 million
Erste (before merger)	EUR 8,125 million
BAWAG	EUR 8,438 million
ÖVAG	EUR 8,438 million
PSK	EUR 4,129 million
PSK-B	EUR 4,219 million
NÖ Hypo	EUR 1,688 million
RWB/RLB	EUR 1,688 million.

⁽⁵²⁵⁾ Up until the merger with RBW, RLB is not found to have committed any infringement of its own, since RLB did not itself take part in the main committee meetings prior to the merger.

- (524) The next step is to take account of any aggravating or mitigating circumstances for each undertaking, and to apply the Leniency Notice if appropriate.

16.2.4. *Mitigating circumstances*

Mitigating circumstances invoked by all banks

- (525) Here again the banks draw attention to Austria's recent membership of the Community, the allegedly confusing legal position, and the participation of state bodies. The Commission has discussed these arguments above: for the reasons it set out there, it does not see mitigating circumstances in any of them ⁽⁵²⁶⁾.

- (526) All of the banks also draw attention to the difficult economic situation in the industry. They say that in their business policy they were not accustomed to pay sufficient attention to methods of calculation which might be quite evident in themselves ⁽⁵²⁷⁾. They also argue that they did not obtain any return from their participation in the cartel, and point out that they put an end to the talks once the inspections had been carried out.

20) The Commission's view

- (527) The Commission takes the view that any shortcomings there may be in the management of an undertaking do not constitute mitigating circumstances, even where they affect the earnings position of the undertakings concerned. In such a situation each undertaking ought to take steps independently to improve its own profitability, rather than entering into a restrictive agreement. Price cartels are inadmissible even if the undertakings do not receive cartel profits. In setting fines the Commission is under no obligation to take account of the poor financial position of an undertaking: to acknowledge such an obligation would be to confer an unjustified competitive advantage on those undertakings which are least well adapted to market conditions ⁽⁵²⁸⁾.

- (528) Furthermore, the characteristic of a competitive market is not that all undertakings will secure a return on capital, but that badly run undertakings will not be able to maintain their market position. Cartels retard the necessary restructuring of supply which takes place as unprofitable undertakings leave the market and the more profitable ones consolidate, something the banks themselves have conceded in this case. There is no mitigating circumstance here.

- (529) The ending of an infringement after inspections have taken place is something the Commission has to consider from case to case, in the light of the specific circumstances. There is no automatic relationship: the ending of an infringement is not always a mitigating circumstance, and its continuation is not always an aggravating circumstance ⁽⁵²⁹⁾. In view of the manifest character of the infringement, the fact that it was brought to an end following the inspections cannot be regarded as a mitigating circumstance within the meaning of the guidelines.

- (530) Nor is it a mitigating circumstance that during the period in question there were repeated instances of 'lack of discipline' or indeed price wars. Like many other cartels, the Lombard cartel went through good times and less good times, and had to endure crises on occasion. Some banks did repeatedly attempt to gain market share by undercutting or exceeding the agreed rates for short periods. But such conduct is typical of many cartels, and cannot be considered a mitigating circumstance. All the participants, including the occasional 'price breakers', profited to the same extent from the action decided jointly, and from the information they regularly exchanged on the future conduct on the market of their competitors. Even those banks that on occasion took commercial decisions that departed from the agreements were exploiting the cartel to their advantage.

Mitigating circumstances invoked individually by the undertakings concerned

- (531) Most of the banks argue either that they were not present at all committee meetings or that they had no real economic interest in the talks. Almost all the banks also represent themselves as small and insignificant.

- (532) RZB submits that it does only a limited amount of private customer or retail business, and consequently played only a passive role in the Lombard network. RZB concedes, however, that by organising the flow of information inside the agricultural credit cooperative grouping it helped to make the restrictive agreements effective.

- (533) Erste says it is indeed the second biggest banking group in Austria, but holds only small market shares, and was consequently without influence in the talks.

⁽⁵²⁶⁾ See Sections 14.1 and 16.2.1.

⁽⁵²⁷⁾ 42.290 (RBW).

⁽⁵²⁸⁾ Case T-9/99 HFB v Commission, judgment delivered 20.3.2002, [2002] ECR II-1487, paragraph 596.

⁽⁵²⁹⁾ Case T-31/99 ABB Asea Brown Boveri v Commission, judgment delivered 20.3.2002, [2002] ECR II-1881, paragraph 213.

- (534) PSK argues that it or its subsidiary PSK-Bank has only a minor role in credit business, and that its participation in the relevant committees was consequently meaningless and ineffective.
- (535) BAWAG argues that it took part in the talks only 'extremely reluctantly' and only 'owing to material constraints'; it 'did not really want to cooperate in the agreements'. 'Unlike most of the other participants in the committees' BAWAG followed its own policy on interest rates and prices, and 'while the other banks agreed a uniform reduction in interest rates' BAWAG 'never really allowed itself to be tied into the agreements'. In other words, it resisted all temptations, 'unlike some of its competitors, such as PSK, who broke loose from the "interest rate discipline" only occasionally' ⁽⁵³⁰⁾.
- (536) RLB draws attention to its small size, and the limited radius of action of RBW, which is confined to Vienna; it explains its participation in the federal committees by saying that RBW's representative was a universally esteemed specialist who for more or less altruistic reasons was only 'brought in as an expert for the Vienna market, and did not specifically represent the interests of RBW' ⁽⁵³¹⁾.
- (537) ÖVAG and NÖ Hypo say they confined themselves to passively taking note of the decisions already arrived at by the 'smaller banking circle' in the run-up to the committee meetings, and profiting by the social prestige associated with participation in the cartel talks.
- (539) In order better to evaluate the role in the network of each of the banks concerned, the Commission has carried out a detailed analysis of the most important committees in this respect too ⁽⁵³³⁾. BA/CA convened almost 60 % of all Vienna Lending Rates and Deposit Rates Committee meetings, over 40 % of all Federal Lending Rates and Deposit Rates Committee meetings, and about 30 % of all Minilombard and Controller Committee meetings. It is followed by Erste/GiroCredit with 20, 25 and 30 % respectively. RZB, PSK, BAWAG and ÖVAG convened about 10 % of all these meetings ⁽⁵³⁴⁾. An analysis of the documented proceedings of the cartel talks also indicates that the big banks or banking groupings played a comparatively greater part.
- (540) But this division of roles in the cartel meetings is not a factor that could be considered a mitigating circumstance for some or an aggravating circumstance for others. All participants profited to the same extent as a result of the action decided jointly and the information regularly exchanged on the future conduct of their competitors on the market. Even those banks who may on occasion have taken business policy decisions that departed from the agreements were exploiting the cartel to their advantage. It is true that some banks were repeatedly criticised by their competitors for departing from the agreements. But such isolated instances of aggressive price behaviour are not enough to show that those banks always acted independently ⁽⁵³⁵⁾. The documents show that those banks too, when they were determining their own business policy, took account of the information they had acquired at the talks regarding the future conduct of their competitors on the market.

The Commission's view

- (538) As has already been explained, it would not be realistic to confine the importance in the network of Erste, RZB and ÖVAG to the volume of their own business as commercial banks ⁽⁵³²⁾. The documents in the case make it amply clear that, in line with their role as lead institutions in their respective groupings, these undertakings made an essential contribution to the effectiveness of the network through the groupings' internal systems of communication. They did not represent their own interests only, but those of their groupings as well, and were regarded as representatives of their groupings by the other parties to the cartel. They cannot rely in their defence on the size of their own business.
- (541) Nor can any distinction be made between banks that took part in the cartel talks reluctantly and banks that were happy to do so. In so far as the role of the individual banks or groupings correlates with their market position, the appropriate differentiation has already been made when the banks were divided into categories. There is no scope for further increases or reductions.

⁽⁵³⁰⁾ 42.405, 42.407, 42.411, 42.419, 42.426 and 42.437 (BAWAG).

⁽⁵³¹⁾ 42.294 (RLB).

⁽⁵³²⁾ See recitals 58 et seq.

⁽⁵³³⁾ The Vienna and Federal Lending and Deposit Rates Committees (including the Consumer Lending Rates and Liberal Professions Committees), and the Minilombard and Controller Committees.

⁽⁵³⁴⁾ Though RZB and ÖVAG never convened Vienna Lending Rates or Deposit Rates Committees, and BAWAG never convened Federal Lending Rates or Deposit Rates Committees.

⁽⁵³⁵⁾ Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraphs 230 et seq.

16.2.5. *Intermediate outcome before application of 1996 Leniency Notice*

- (542) There are therefore neither aggravating nor mitigating circumstances. The basic amounts determined thus remain unchanged. Taking account of the corporate changes described and their implications for the attribution of infringements, the following are the preliminary basic amounts:

Erste (including GiroCredit and including Erste before the merger)	EUR 41,88 million
RZB	EUR 33,75 million
BA (including CA)	EUR 33,75 million
BAWAG	EUR 8,44 million
PSK (including PSK-B)	EUR 8,44 million
ÖVAG	EUR 8,44 million
NÖ Hypo	EUR 1,69 million
RLB (including RBW)	EUR 1,69 million.

16.2.6. *1996 Leniency Notice*

- (543) Under section D of the 1996 Leniency Notice, a significant reduction, of 10 to 15 % of the fine that would have been imposed, may be allowed for example where (a) 'before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement', or (b) 'after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations' ⁽⁵³⁶⁾.
- (544) All of the banks invoke this provision, claiming 'cooperation' in the investigation of the facts in the form of their replies to the requests for information and their joint exposition of the facts, or pointing to their decision not to contest the facts.

The requests for information

- (545) As already explained elsewhere, the Commission takes the view that the request to the banks to state the dates of committees and the names of those who attended them was in accordance with the relevant case-law, as

⁽⁵³⁶⁾ Sections B and C of the Leniency Notice are not relevant here, section B because the Commission had already carried out inspections, and section C because those inspections had provided sufficient evidence.

was the request that the banks hand over existing documents relating to committees. Facts and documents thus supplied may possibly be used to provide evidence that an undertaking has infringed competition; but contrary to the view of the banks, they are not equivalent to an admission.

- (546) Consequently, neither the information on the dates of meetings and persons who attended them nor the documents handed over were provided voluntarily. What is required by law cannot be voluntary, and by definition it does not qualify as 'cooperation', which would refer to voluntary collaboration in the common interest ⁽⁵³⁷⁾. In this Decision the Commission has based itself exclusively on documents already in existence, so that answers to questions regarding the subject matter of cartel talks did not represent any added value ⁽⁵³⁸⁾.

The joint exposition of the facts

- (547) The courts have consistently held that a reduction of the fine is justified only if the undertaking's conduct has enabled the Commission to establish the infringement more easily ⁽⁵³⁹⁾. The undertaking might for example have drawn attention to important facts that were not known to the Commission beforehand, and for which the Commission had not asked; or it might have given a particularly exhaustive answer to the request for information, if it is precisely that exhaustiveness that made it easier for the Commission to understand the significance of facts or documents and to draw the necessary inferences so as to establish the existence of the infringement and bring it to an end ⁽⁵⁴⁰⁾. To assist the Commission's investigation in a purely practical or logistical fashion, for example by submitting the documents in chronological or some other order, does not justify any reduction of the fine.
- (548) In the past, therefore, the Commission has granted reductions where an undertaking contributed (a) voluntarily, beyond what was legally required, (b) substantially and (c) to the ascertainment of important facts ⁽⁵⁴¹⁾.

⁽⁵³⁷⁾ Commission Decision of 18 July 2001, Graphite electrodes, OJ L 100, 16.4.2002, p. 1, recital 230.

⁽⁵³⁸⁾ Joined Cases T-305/94 etc. Limburgse Vinyl Maatschappij NV [1999] ECR II-931, paragraphs 451 et seq.

⁽⁵³⁹⁾ See, for example, Joined Cases T-45/98 and T-47/98 Krupp Thyssen Stainless and Others v Commission, judgment delivered 13.12.2001, [2001] ECR II-3757, paragraph 270; Case T-16/99 Lögstör Rör (Deutschland) v Commission, judgment delivered 20.3.2002, [2002] ECR II-1633, paragraph 351.

⁽⁵⁴⁰⁾ Case T-13/89 ICI v Commission [1992] ECR II-1021, paragraph 393.

⁽⁵⁴¹⁾ See Commission Decision of 21 October 1998, Pre-insulated pipe cartel, OJ L 24, 30.1.1999, p. 1, paragraph 177.

- (549) In autumn 1998, thus well before the submission of the joint exposition of the facts, the Directorate-General for Competition told the banks that the assessment of any fine would depend on the value added, over and above what was legally required, by the documents and information which the banks proposed to provide. The reduction in any fine would be in direct proportion to the added value.
- (550) The added value is easy to determine: it is the sum of, first, any facts that were not ascertained from the inspections, or from the documents that were provided or ought to have been provided in accordance with the duty to supply information (new facts), and, second, any explanations that facilitated the Commission's understanding of the case. Only new facts and explanations that assist better comprehension will make it easier for the Commission to establish the infringement.
- (551) Of the documents submitted with the joint exposition of the facts, the Commission has been unable to identify any which contain new facts. When asked by the Commission, the banks were likewise unable to identify any such documents. The documents submitted were either documents already seized by the Commission, or documents which had been provided or ought to have been provided in response to the requests for information. The documentation was voluminous, and was arranged in chronological order, but it contained no new facts, and for the Commission's purposes provided no added value. The same applied to the further documents supplied by BA shortly after the joint exposition of the facts had been submitted.
- (552) Furthermore, the banks had manifestly not supplied all of the documents requested by the Commission. The minutes of the Halle committee meeting, of 25 May 1998, for example, whose authenticity has not been contested, was supplied to the Commission only in January 2001, by a person who specifically requested that their identity be kept secret⁽⁵⁴²⁾. When answering the supplementary statement of objections the banks submitted minutes of meetings which ought to have been submitted in reply to the requests for information, and which had not been supplied with the joint exposition of the facts either⁽⁵⁴³⁾.
- (553) The joint exposition of the facts itself does go beyond the scope of the information requested. First, it gives a detailed account of the historical background to the network, something that had not been asked for in the requests for information⁽⁵⁴⁴⁾, and second, it summarises what took place at the individual committee meetings.
- (554) But the summary it gives tends to take the facts discernible in the documents and cast them in a much more innocent light, and conveys the impression that interest rates, charges and similar matters were only side-issues and seldom discussed. The many proven agreements and restrictive discussions of interest rates, charges and other parameters of competition are systematically passed over. In the summary of all the meetings of the Vienna and Federal Lending Rates and Deposit Rates Committees, Consumer Lending Rates and Liberal Professions Committees, and Minilombard and Controller Committees, there is not a single reference to a specific interest rate or charge.
- (555) The statement of objections, and the present Decision thereafter, show quite a different picture, entirely on the basis of documents from the relevant period. An example of the selective and cosmetic approach taken by the banks is their account of the Lombard Club meeting of 8 May 1996, according to which the meeting discussed only very general recommendations from the Austrian National Bank. But there is documentary proof that at that meeting the [representatives] discussed no less than 15 measures ranging from specific minimum interest rates for a wide range of banking products to minimum premiums and advertising restrictions; this fact goes unmentioned.
- (556) The joint exposition of the facts is also structured quite differently from the statement of objections and the present Decision: it looks at each committee in isolation, and in line with the banks' view that there was no institutionalised network it omits the many interconnections and cross-links between the committees. It even expressly denies that the Lombard Club had any steering function, something which emerges clearly from the documents.
- (557) Thus the joint exposition did not serve to clarify the facts; given the very numerous and unequivocal documents in the case that would have been unnecessary anyway; it seeks rather to evaluate them. But its evaluation is in direct contradiction with that of the Commission. The joint exposition certainly cannot be considered to constitute cooperation of a kind that might bring entitlement to a reduction of fines: it was drawn up for the banks' defence, and its presentation and evaluation differ drastically from those of the statement of objections and the present Decision.
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- ⁽⁵⁴²⁾ 45.949.
- ⁽⁵⁴³⁾ The fact that the present Decision does not maintain the objections put forward in the supplementary statement of objections changes nothing in this respect.
- ⁽⁵⁴⁴⁾ That account alone makes up one third of the joint exposition of the facts.

(558) A decision by an undertaking not to contest the facts set out in a statement of objections may well expedite the proceedings, or make it easier to establish and act against infringements, and may therefore justify a reduction in the fine ⁽⁵⁴⁵⁾.

(559) It is only logical in this case that the banks will not be contesting facts that are described entirely on the basis of documents which were seized on their premises or subsequently supplied by them in accordance with their duty to provide information. In view of the hundreds of minutes, records and similar documents seized, such a challenge would in any event be difficult to imagine. Nevertheless, if the facts had been disputed, and the Commission had had to argue against such a submission, Commission resources would have been tied up and the proceedings would have been prolonged. The banks' decision not to contest the facts did save work on the part of the Commission, and consequently justifies a reduction of the fines by 10 %.

16.2.7. Final amounts

(560) The Commission accordingly sets the fines imposed under Article 15(2) of Regulation No 17 as follows:

Erste (including GiroCredit and including Erste before the merger)	EUR 37,69 million
RZB	EUR 30,38 million
BA (including CA)	EUR 30,38 million
BAWAG	EUR 7,59 million
PSK (including PSK-B)	EUR 7,59 million
ÖVAG	EUR 7,59 million
NÖ Hypo	EUR 1,52 million
RLB (including RBW)	EUR 1,52 million,

HAS ADOPTED THIS DECISION:

Article 1

From 1 January 1995 to 24 June 1998, Erste Bank der oesterreichischen Sparkassen AG, Raiffeisenzentralbank Österreich Aktiengesellschaft, Bank Austria Aktiengesellschaft, Bank für Arbeit und Wirtschaft Aktiengesellschaft, Österreichische Postsparkassen Aktiengesellschaft, Österreichische Volksbanken-Aktiengesellschaft, Niederösterreichische Landesbank Hypothekenbank Aktiengesellschaft and Raiffeisenlandesbank Niederösterreich-Wien AG infringed Article 81(1) of the EC Treaty by taking part in agreements and concerted practices in

respect of prices, charges and advertising, with the object of restricting competition on the market in banking products and services in Austria.

Article 2

The undertakings referred to in Article 1 shall immediately bring to an end the infringement referred to in Article 1 in so far as they have not already done so.

They shall refrain in future from repeating any act or conduct which has the same object or effect as that infringement.

Article 3

For the infringement referred to in Article 1 the following fines are hereby imposed:

Erste Bank der oesterreichischen Sparkassen AG	EUR 37,69 million
Raiffeisen Zentralbank Österreich Aktiengesellschaft	EUR 30,38 million
Bank Austria Aktiengesellschaft	EUR 30,38 million
Bank für Arbeit und Wirtschaft Aktiengesellschaft	EUR 7,59 million
Österreichische Postsparkasse Aktiengesellschaft	EUR 7,59 million
Österreichische Volksbanken-Aktiengesellschaft	EUR 7,59 million
Niederösterreichische Landesbank-Hypothekenbank Aktiengesellschaft	EUR 1,52 million
Raiffeisenlandesbank Niederösterreich-Wien AG	EUR 1,52 million.

Article 4

The fines imposed in Article 3 shall be paid, within three months of the date of notification of this Decision, into the following Commission bank account:

Account No 642-0029000-95
IBAN code BE76 6420 0290 0095
SWIFT code BBVABEBB
Banco Bilbao Vizcaya Argentaria (BBVA) SA
Avenue des Arts/Kunstlaan 43
B-1040 Brussels.

⁽⁵⁴⁵⁾ Case T-347/94 *Mayr-Melnhof v Commission* [1998] ECR II-1751, paragraph 331.

After the expiry of that period interest shall be automatically payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,5 percentage points, i.e. a total of 6,75 %.

Article 5

This Decision is addressed to:

Erste Bank der oesterreichischen Sparkassen AG
Graben 21
A-1010 Wien

Raiffeisen Zentralbank Österreich Aktiengesellschaft
Am Stadtpark 9
A-1030 Wien

Bank Austria Aktiengesellschaft
Vordere Zollamtsstraße 13
A-1030 Wien

Bank für Arbeit und Wirtschaft Aktiengesellschaft
Seitzergasse 2-4
A-1010 Wien

Österreichische Postsparkasse Aktiengesellschaft
Georg-Coch-Platz 2
A-1018 Wien

Österreichische Volksbanken-Aktiengesellschaft
Peregringasse 3
A-1090 Wien

Niederösterreichische Landesbank-Hypothekenbank Aktiengesellschaft
Kremser Gasse 20
A-3100 St.Pölten

Raiffeisenlandesbank Niederösterreich-Wien AG
Friedrich Wilhelm Raiffeisenplatz 1
A-1020 Wien

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 11 June 2002.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 23 October 2003

relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement

Case COMP/C/38.170 — REIMS II renotification

(notified under document number C(2003) 3892)

(Only the Spanish, Danish, German, Greek, English, French, Italian, Dutch, Portuguese, Finnish and Swedish texts are authentic)

(Text with EEA relevance)

(2004/139/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by Regulation (EC) No 1/2003⁽²⁾, and in particular Articles 2, 6 and 8 thereof,

Having regard to the application for negative clearance and the notification with a view to an exemption submitted pursuant to Articles 2 and 4 of Regulation No 17 on 18 June 2001,

Having regard to the Commission decision of 14 April 2003 to initiate proceedings in this case,

Having regard to the summary of the application and notification published pursuant to Article 19(3) of Regulation No 17⁽³⁾,

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

Having regard to the final report of the Hearing Officer in this case⁽⁴⁾,

Whereas:

negative clearance pursuant to Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement or an exemption pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, upon the expiry of the exemption granted by the Commission in its decision of 15 September 1999 (the 1999 exemption decision)⁽⁵⁾.

- (2) The REIMS II Agreement is the instrument by which certain public postal operators (PPOs)⁽⁶⁾ collectively determine terminal dues. Terminal dues are the remuneration that PPOs pay each other for the delivery of incoming cross-border mail. The receiving PPO is remunerated by the sending operator for the delivery of the latter's cross-border mail.
- (3) In the Agreement, terminal dues are expressed as a percentage of domestic tariffs in the receiving country. The original REIMS II Agreement was first notified to the Commission in 1997. It received an exemption in 1999. According to the original REIMS II-Agreement, terminal dues were to increase over a transitional period until they reached a maximum of 80 % of domestic tariffs in 2001. In the 1999 Exemption Decision, however, the Commission only exempted the Agreement until the end of 2001 and limited the exemption to a level of terminal dues not higher than 70 % of domestic tariffs.

1. INTRODUCTION

- (1) On 18 June 2001, the REIMS II (remuneration of mandatory deliveries of cross-border mails) Agreement was notified to the Commission with a view to obtaining

(1) OJ L 13, 21.2.1962, p. 204/62.

(2) OJ L 1, 4.1.2003, p. 1.

(3) OJ C 94, 23.4.2003, p. 3.

(4) OJ C 48, 24.2.2004.

(5) Commission Decision 1999/695/EC in Case No COMP/36.748 — REIMS II) (OJ L 275, 26.10.1999, p. 17).

(6) PPOs are corporations or government departments with the primary obligation of providing universal postal services across the national territory, often at a unitary price. They are also obliged to provide international postal services passing international mail to PPOs in other countries for distribution abroad and delivering incoming international mail. In the context of the notified Agreement, PPO refers to both public and private postal operators which are subject to a universal delivery service obligation.

(4) In limiting the duration of the exemption until the end of 2001, the Commission stated that the final increase of 80 % of the domestic tariff should only take place after the Commission had had the opportunity to review the system on the basis of proper cost accounting data. The Commission also made the exemption subject to the fulfilment by the Parties of several conditions and obligations ⁽⁷⁾.

(5) The renotification in 2001 included a request for a renewal of the exemption. In the renotified version of the REIMS II Agreement, the 80 % level would not be reached until 1 January 2004 and two intermediate steps were introduced (73,3 % on 1 January 2002 and 76,6 % on 1 January 2003). A short summary of the notification was published in the *Official Journal of the European Communities* inviting third parties to comment ⁽⁸⁾. This was followed in April 2003 by the Notice pursuant to Article 19(3) of Regulation No 17 which set out the Commission's preliminary view and gave third parties an opportunity to comment on the proposed favourable approach.

2. THE PARTIES TO THE PROCEEDINGS

(6) Thirteen PPOs had signed the original REIMS II Agreement on 9 July 1997. Four more PPOs have since joined. At the date of the renotification on 18 June 2001, the 17 Parties to the REIMS II Agreement (the Parties) comprised: Österreichische Post AG, La Poste/De Post (Belgium), Post Danmark AS, Finland Post, La Poste (France), Deutsche Post, Hellenic Post ELTA, Iceland Post, An Post (Ireland), Poste Italiane, Entreprise des Postes & Télécommunications (Luxembourg), Posten Norge AS (Norway), CTT Correios de Portugal, Sociedad Estatal Correos y Telégrafos (Spain), Sweden Post, Swiss Post and Consignia plc, now Royal Mail Group plc (United Kingdom) ⁽⁹⁾. The REIMS II Parties are the incumbent PPOs in their respective States.

(7) The business of the Parties is the transportation and delivery of documents and goods. All of the Parties are universal service providers as defined in Article 2(13) of Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community

postal services and the improvement of quality of service ⁽¹⁰⁾ (the Postal Directive), as amended by Directive 2002/39/EC ⁽¹¹⁾ (the Amending Directive). Most of the Parties have been assigned a reserved sector to ensure their ability to provide the universal service. The Parties also provide other services which are not part of the universal postal service obligation.

3. LEGAL AND FACTUAL BACKGROUND

3.1. Remuneration for the delivery of incoming international mail items (terminal dues)

3.1.1. The UPU system

(8) Under the Universal Postal Convention (UPU Convention) ⁽¹²⁾, members of the Universal Postal Union (the UPU) ⁽¹³⁾, involving almost all countries in the world, agree to provide domestic delivery services for incoming cross-border mail. The obligation is a mandatory part of the UPU and underpins the worldwide postal network which exists today. Originally, PPOs did not compensate each other for cross-border mail because mail flows between countries were assumed to be in balance. However, in the 1960s, large imbalances in the flows of cross-border mail occurred with the result that PPOs in some countries were incurring delivery costs for incoming mail without generating sufficient revenue from outgoing mail to cover these costs.

(9) To compensate receiving PPOs, a system of payments, called terminal dues, was established in 1969. Under this system, a receiving PPO was paid a specified rate, based on weight, for incoming mail which it was required to deliver. However, this system resulted in a divergence between cost and remuneration ⁽¹⁴⁾.

⁽⁷⁾ See Article 2 of the 1999 Exemption Decision, op. cit.

⁽⁸⁾ OJ C 195, 11.7.2001, p. 11.

⁽⁹⁾ Swiss Post is not a notifying party since it has not signed the notification to the Commission.

⁽¹⁰⁾ OJ L 15, 21.1.1998, p. 14.

⁽¹¹⁾ OJ L 176, 5.7.2002, p. 21.

⁽¹²⁾ The Universal Postal Convention, agreed to and signed by governments at the UPU Congress, concerns the formation of a single postal territory, freedom of transit, standardisation of postage rates, the institution of arbitration proceedings and the establishment of terminal dues.

⁽¹³⁾ The UPU was founded in 1874 and forms the framework for postal relations between its members. The UPU is an organisation of governments and was recognised as a special agency of the United Nations in 1947.

⁽¹⁴⁾ See recital 9 of the 1999 Exemption Decision.

- (10) In 1989, a recommendation of the Conférence Européenne des Administrations des Postes et Télécommunications⁽¹⁵⁾ (CEPT), which was subsequently implemented through a number of bilateral agreements concluded between CEPT members, brought terminal dues closer to costs⁽¹⁶⁾. They were, nevertheless, still based on an average across the participating administrations and, as is generally recognised, did not cover costs⁽¹⁷⁾.
- (11) Since 1989, the UPU system has made progress in orienting terminal dues to costs. The 1999 Beijing UPU Convention contains special terminal dues provisions applicable to exchanges between industrialised countries⁽¹⁸⁾.
- (15) The first, second and third indents of Article 13(1) of the Postal Directive provide that:
- terminal dues shall be fixed in relation to the costs of processing and delivering incoming cross-border mail,
 - levels of remuneration shall be related to the quality of service achieved,
 - terminal dues shall be transparent and non-discriminatory’.

3.1.2.2. Liberalisation

- #### 3.1.2. The Postal Directive
- (12) The main regulatory framework with regard to cross-border mail and terminal dues, as far as Community law is concerned, is the Postal Directive.
- (13) The Postal Directive contains important provisions with regard to terminal dues and liberalisation of the outgoing cross-border mail market.
- #### 3.1.2.1. Terminal dues
- (14) With regard to terminal dues, recital 27 of the Postal Directive states that
- (16) To date, only two Member States (Sweden and Finland) have abolished their postal monopolies. PPOs in all other Member States benefit from a reserved area by virtue of national law in which they have the exclusive right to provide a range of postal services. The boundaries within which Member States are entitled to reserve specified postal services are indicated in the Postal Directive.
- (17) Article 7 of the Postal Directive defines the degree of liberalisation for both incoming and outgoing cross-border mail.
- (18) As far as domestic mail and the delivery of incoming cross-border mail are concerned the first subparagraph of Article 7(1) of the Postal Directive provides as follows:

‘the remuneration for the provision of the intra-Community cross-border mail service, without prejudice to the minimum set of obligations derived from Universal Postal Union acts, should be geared to cover the costs of delivery incurred by the universal service provider in the country of destination’.

To the extent necessary to ensure the maintenance of universal service, Member States may continue to reserve services to universal service provider(s). Those services shall be limited to the clearance, sorting, transport and delivery of items of domestic correspondence and incoming cross-border correspondence, whether by accelerated delivery or not, within both of the following weight and price limits. The weight limit shall be 100 grams from 1 January 2003 and 50 grams from 1 January 2006. These weight limits shall not apply as from 1 January 2003 if the price is equal to, or more than, three times the public tariff for an item of correspondence in the first weight step of the fastest category, and, as from 1 January 2006, if the price is equal to, or more than, two and a half times this tariff’.

⁽¹⁵⁾ The CEPT was a restricted subgroup of the UPU which, up to 1992, brought together both the regulators and the operators of the European postal and telecommunication authorities. In September 1992, a major reform of the CEPT was undertaken and the CEPT adopted a new constitution which reserved membership to regulatory authorities. The operators created their own organisation, PostEurope.

⁽¹⁶⁾ The CEPT system took account of total weight and number of items with payment based on a rate per item and a rate per kilogram. It recognised that the composition of mail in one direction may well differ from the composition in the other.

⁽¹⁷⁾ See, for example, recital 10 of the 1999 Exemption Decision. See also the judgment of the Court of Justice in Joined Cases C-147/97 and C-148/97, *Deutsche Post AG v GZS Gesellschaft für Zahlungssysteme mbH (GZS) and Deutsche Post AG v Citicorp Kartenservice GmbH*, [2000] ECR I-825, paragraph 54.

⁽¹⁸⁾ Article 48(2) of the 1999 UPU Convention fixes a ceiling of 60 % of the charge for a 20 gram letter in the domestic service.

(19) The conveyance of outgoing cross-border mail, however, is not included in the list of services which Member States may continue to reserve pursuant to Article 7 of the Postal Directive. Therefore that service is completely liberalised as of 1 January 2003. However, in order to safeguard the provision of the universal postal service, the fourth subparagraph of Article 7(1) of the Postal Directive provides that:

'To the extent necessary to ensure the provision of universal service, for example when certain sectors of postal activity have already been liberalised or because of the specific characteristics particular to the postal services in a Member State, outgoing cross-border mail may continue to be reserved within the same weight and price limits'.

- (20) The concrete consequence of that new regime, which applies from 1 January 2003, is that the conveyance of outgoing cross-border mail is open to competition unless the exception provided for in the fourth subparagraph of Article 7(1) applies.

4. THE REIMS II AGREEMENT

4.1. The exemption of the original REIMS II Agreement

- (21) The original REIMS II Agreement⁽¹⁹⁾ was notified to the Commission in 1997. On that occasion, after a preliminary examination, the Commission indicated to the Parties several aspects which had to be changed, adapted or clarified before it could consider adopting a positive attitude with regard to the Agreement.
- (22) The Parties, in order to qualify for exemption, prepared a first amendment to the REIMS II Agreement (the first Supplementary Agreement) which entered into force on 1 October 1998.
- (23) On 15 September 1999, the Commission granted an exemption pursuant to Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement until 31 December 2001. The Commission limited the increase of terminal dues to 70 % of the domestic tariffs. The Commission stated that the final increase to 80 % of the domestic tariffs should only take place after the Commission had had the opportunity to review the system on the basis of proper cost accounting data, which was not available in 1999.

4.2. Amendments to the REIMS II Agreement

- (24) Since the first notification to the Commission on 31 October 1997, the REIMS II Agreement has been amended by the Parties five times by means of supplementary agreements. Some of the amendments have been agreed by those Parties at their own initiative, while others have been agreed in order to meet the competition concerns expressed by the Commission in its evaluation of the REIMS II Agreement.

⁽¹⁹⁾ A brief explanation of the REIMS I Agreement and a detailed description of the REIMS II Agreement, as notified to the Commission in 1997, are set out in recitals 12 to 43 of the 1999 Exemption Decision.

- (25) The first Supplementary Agreement was signed on 22 September 1998 and related primarily to the link between terminal dues and quality of service and Level 3 access.
- (26) On 14 January 2000, the Parties signed the second Supplementary Agreement, the aim of which was, on the one hand, to implement the Commission's conditions set out in Article 2(1) of the 1999 Exemption Decision and, on the other hand, to take into account the accession of Swiss Post to the REIMS II Agreement.
- (27) On 4 April 2000, the Parties signed the third Supplementary Agreement, the key features of which were to ensure end-to-end quality of service and to review the quality of service standards. As regards the former, the third Supplementary Agreement contemplated the inclusion of the measurement of the performance of sending PPOs with respect to outgoing mail in a future model refinement and the application of appropriate quality-of-service targets and penalties as of 2002. As regards the quality-of-service standards, the previous version of the REIMS II Agreement identified two groups of REIMS II Parties, each one with a different quality-of-service target. The third Supplementary Agreement led to a convergence of those groups to a universal standard of 93 %.
- (28) On 7 June 2001, most of the Parties executed a fourth Supplementary Agreement. To date, 16 of the Parties have signed that Agreement. The main objective of the fourth Supplementary Agreement was to extend the transitional period by another three years. According to the fourth Supplementary Agreement, terminal dues would reach 80 % of domestic tariffs in 2004, accordingly two years later than planned. The 80 % rate would be replaced by 73,3 % in 2002 and by 76,6 % in 2003⁽²⁰⁾.
- (29) In addition to extending the transitional period, the Parties also agreed on a freeze of the domestic tariffs used as a basis for the calculation of terminal dues until the end of 2004. Consequently, increases of a Party's domestic tariff after 1 September 2001 will not be taken into account in the calculation of terminal dues for 2003 and 2004⁽²¹⁾. However, decreases of domestic tariffs are to be taken into account, so that the 'freeze' effectively creates a ceiling, but allows for downward adjustments⁽²²⁾.

⁽²⁰⁾ In view of the discounts that they will grant until the end of 2004 (see footnote 22 below), Deutsche Post AG and Poste Italiane SpA would only reach the full 80 % level in 2005.

⁽²¹⁾ Paragraph 3(4) of Annex 4 to the REIMS II Agreement as amended by Article 3(3) of the fourth Supplementary Agreement.

⁽²²⁾ Deutsche Post AG continues to grant the discount agreed in the third Supplementary Agreement until 31 December 2004. Poste Italiane SpA has also agreed to give a discount until that date: paragraphs 9 and 10 of Annex 4 to the REIMS II Agreement, as amended by the fourth Supplementary Agreement.

(30) The fourth Supplementary Agreement also introduced a 'geographic coverage' provision. If a Party whose domestic market is liberalised can prove that the geographical structure of incoming mail from a sending PPO has changed to such an extent that the percentage of the domestic tariff used under the REIMS II Agreement is insufficient to meet the costs incurred by the Party for the delivery of that mail, the Party can ask for a renegotiation of the terminal dues paid by that sending PPO⁽²³⁾.

(31) The REIMS II Agreement renotified to the Commission on 18 June 2001 was the consolidated version of the Agreement as amended by the first, second, third and fourth Supplementary Agreements.

(32) Finally, since its renotification to the Commission on 18 June 2001, the REIMS II Agreement has been amended again. On 24 January 2003 the Parties signed the fifth Supplementary Agreement, the purpose of which is to address the competition concerns identified by the Commission with regard to the renotified REIMS II Agreement, mainly relating to the level of terminal dues and to a low-cost alternative to terminal dues⁽²⁴⁾. The REIMS II Agreement which is the subject of this Decision is the REIMS II Agreement as amended by the first, second, third, fourth and fifth Supplementary Agreements.

4.3. The renotified REIMS II Agreement

(33) Recitals 34 to 50 contain a brief description of the contents of the REIMS II Agreement as notified by the Parties in the renotification of 18 June 2001.

4.3.1. Membership

(34) Membership of the REIMS II Agreement is open to public and private operators of a mandatory, universal postal service provided that they have or contract to have an obligation to provide this service to the other parties.

4.3.2. Purpose

(35) According to the Parties, the main aims of the REIMS II Agreement are to provide the Parties with fair compensation for the delivery of cross-border mail which reflects more closely the real costs of delivery of each Party, and to improve the quality of the cross-border mail service.

4.3.3. Products covered

(36) The REIMS II Agreement covers all mail items as defined in Article 8 of the UPU Convention (with the exception of 'M bags')⁽²⁵⁾.

4.3.4. Terminal dues

4.3.4.1. Principle

(37) The REIMS II Agreement links terminal dues to domestic mail tariffs in the country of destination and to the quality of service provided by the PPO that delivers the mail in that country. Under the renotified version of the REIMS II Agreement, terminal dues are to increase over a transitional period until they reach a maximum of 80 % of domestic tariffs in 2004, subject to penalties which are to accrue if the requisite quality-of-service target is not met.

4.3.4.2. Domestic tariffs serving as reference

(38) Domestic tariffs usually distinguish between different weight steps (for example, 20, 50 and 100 g for letters). According to the REIMS II Agreement, those different tariffs are converted, on the basis of a standard structure, into 'linear tariffs' for the purpose of calculating terminal dues.

4.3.4.3. Levels of terminal dues

(39) The REIMS II Agreement distinguishes between four different levels of terminal dues:

- a) Level 1: Priority mail items presented in mixed bags (which may contain letters, flats and packets). Terminal dues for such items are ultimately to be 80 % of domestic tariffs excluding VAT.
- b) Level 2: The delivering PPO may offer rebates on the Level 1 remuneration on the basis of work sharing/preparation of mail (for example by pre-sorting mail according to format or destination). The same discounts must be offered to all sending REIMS II PPOs when equal conditions are met.

⁽²³⁾ Article 11(4) to (7) of the REIMS II Agreement, as amended by Article 2(2) of the fourth Supplementary Agreement.

⁽²⁴⁾ See section 4.5.

⁽²⁵⁾ Bags containing bulk mail for one addressee.

- c) Level 3: All the Parties are obliged to grant each other access to the 'generally available domestic rates' (such as bulk rates for direct mail, printed matter or periodicals) in the country of delivery.
- d) Non-priority mail: The terminal dues to be applied to mail designated as 'non-priority' are 10 % less than the terminal dues for Level 1 mail.

4.3.5. *Transitional period* ⁽²⁶⁾

- (40) In the renotified REIMS II Agreement terminal dues are to be increased, subject to penalties which are to accrue if the required quality-of-service target is not met, over a transitional period as follows:

- a) 2002: 73,3 % of domestic tariffs;
- b) 2003: 76,6 % of domestic tariffs;
- c) 2004: 80 % of domestic tariffs.

4.3.6. *Quality of service/penalties system*

- (41) The REIMS II Agreement has introduced a system of quality-of-service standards for Level 1 and Level 2 mail in order to improve the quality of service. The standards are defined as the percentage of incoming cross-border mail which has to be delivered within one working day after the day of arrival ('J') in the office of exchange of the receiving PPO, provided that it arrives there before the latest arrival time ⁽²⁷⁾. For example a standard of '80 % J+1' means that 80 % of the incoming mail is to be delivered to its final destination within one working day after the day of arrival. The performance of the individual Parties is measured by means of a diagnostic system set up by the International Post Corporation (IPC) ⁽²⁸⁾.

- (42) A penalty system is applied when the agreed quality-of-service standards are not met. The level of terminal dues which would otherwise be payable is reduced by 1 1/2 %

where the actual result amounts to between 90 % and 100 % of the target to be reached and 3 1/2 % where the actual result amounts to between 80 % and 90 % of the target to be reached respectively for each percentage point by which the PPO concerned fails to reach the requisite quality-of-service standard ⁽²⁹⁾. In the worst case, if the result actually achieved by the delivering PPO amounts to no more than 80 % of the target, these penalties will thus reduce by half the terminal dues to which a PPO is entitled.

4.3.7. *Non-discrimination rule*

- (43) Under the REIMS II Agreement ⁽³⁰⁾ 'each Party shall apply the same rates of terminal dues to all other parties provided that the transactions are equivalent.' That means that, in principle, two REIMS II PPOs competing for outgoing cross-border mail in a given REIMS II country to another REIMS II country would bear the same costs for the delivery of this mail in the country of destination. The same rate, however, will not be available to non-REIMS II operators competing in the same market which will be obliged to pay the full domestic tariff in the country of destination, or the full international tariff in the country of origin, minus any available discount ⁽³¹⁾.

4.3.8. *Articles 43 and 49 of the 1999 UPU Convention*

- (44) Article 43 of the 1999 UPU Convention contains provisions on the treatment of domestic mail posted abroad, known as remail. Article 49(4) concerns terminal dues for incoming bulk mail. Under the renotified REIMS II Agreement, after the end of the transitional period, Article 43 and Article 49(4) of the 1999 UPU Convention are no longer to be applied between the Parties.

⁽²⁶⁾ The fifth Supplementary Agreement amends the transitional period and the terminal dues to be applied. See section 4.5.

⁽²⁷⁾ The 'latest arrival time' is the latest acceptable time of touchdown, permitting delivery of airmail items the next working day.

⁽²⁸⁾ The International Post Corporation is a company co-owned by a number of PPOs including, for Europe, all the REIMS II Parties plus the PPOs of the Netherlands, Cyprus and Norway and, outside Europe, the PPOs of the USA, Australia and Canada. The IPC provides administrative and practical services to the REIMS II Parties. The UNEX quality-of-service measurement system — which serves as the basis for the REIMS II quality targets and determines penalties — is operated by the IPC.

⁽²⁹⁾ For example, if the quality-of-service target provides that 90 % of incoming cross-border mail must be delivered the next day, and that the actual result is that only 87 % of the mail is delivered within this time, then only 97 % of the target is reached (87 is 97 % of 90). Thus, the loss of quality is 3 %. Since this figure is within the 90 % to 100 % range, a penalty of 1 1/2 % for each percentage point accrues. The penalty is thus $3 \times 1\frac{1}{2} \% = 4\frac{1}{2} \%$ of terminal dues payable. This means that the delivering PPO concerned is allowed to charge only 95 1/2 % (100 % - 4 1/2 %) of the full terminal dues to which it would otherwise be entitled. In 1998 when terminal dues for Level 1 amounted to 55 % of domestic rates, the PPO would thus receive terminal dues amounting to 52 1/2 % of domestic rates (namely 95 1/2 % of 55 %).

⁽³⁰⁾ Article 2(11) of the REIMS II Agreement.

⁽³¹⁾ This is the interpretation of this clause that the Parties have given in the course of the Commission's investigation.

4.3.9. Term

- (45) The REIMS II Agreement is entered into for an indefinite period of time. Any Party may, however, withdraw from the REIMS II Agreement at any time. Such withdrawal becomes effective at the end of the first full calendar year after notice has been given. In particular circumstances, a Party may also withdraw from the REIMS II Agreement by giving six months' notice.

4.3.10. Link between terminal dues and quality of service

- (46) The REIMS II Agreement establishes the principle that no increase in terminal dues is to take place during the transitional period if the quality of service of the Party concerned deteriorates. In order to determine whether that is the case, the quality-of-service performance in a given year is compared with the average quality-of-service performance achieved by that Party in preceding years. That rule does not apply to those PPOs for which transitional arrangements exist. It is also not to be applicable if the quality-of-service of a PPO deteriorates but still matches the relevant standard set by the REIMS II Agreement. Terminal dues may also be increased if it can be shown that a deterioration of a Party's quality of service is caused by special efforts undertaken by that Party to improve its delivery system and is only temporary in nature.

4.3.11. Level 3 access

- (47) The Parties are bound under the REIMS II Agreement to grant Level 3 access (namely access to domestic bulk mail rates) to each other. In order to facilitate such access, the 1999 Exemption Decision imposed a condition on the Parties to relax domestic regulations for other Parties where such regulations are not justified and would in reality bar the other Parties from access to domestic bulk mail rates. Where the domestic regulations concerned have been set by the State, the Parties must use their best efforts vis-à-vis the relevant national authorities to remove them⁽³²⁾.

⁽³²⁾ See Article 2(1)(b) of the 1999 Exemption Decision which also stated that: 'In order to facilitate this access, the Parties must relax domestic conditions for other Parties where those rules are not justified and could in practice bar other Parties from access to the domestic rates or (where it is not in their power to do so) they must use their best efforts vis-à-vis the relevant national authorities to remove those rules'.

- (48) All the tariffs and conditions relevant for Level 3 access have to be made available to all the Parties through a database managed by the IPC. The Parties have undertaken to update that database without delay when their respective tariffs and conditions change.

4.3.12. Bilateral agreements

- (49) The REIMS II Agreement provides that the Parties are free to conclude bilateral or multilateral agreements on terminal dues between themselves in which different conditions, in particular other levels of terminal dues, may be fixed. Where a Party grants another Party, or other Parties, lower terminal dues in such an agreement, it is obliged to apply the same terminal dues to all the Parties, provided the transactions are equivalent.

4.3.13. Late, lost and damaged mail

- (50) The Parties have introduced provisions on late, lost and damaged mail which establish a proper system for dealing with and analysing complaints.

4.4. Main market and other developments since the 1999 Exemption Decision

4.4.1. Improvements in cross-border mail quality of service

- (51) Recital 70 of the 1999 Exemption Decision states that 'The most substantial advantage which the (REIMS II) Agreement is expected to produce consists in a substantial increase in the quality of cross-border mail services'. The information gathered by the Commission in the course of its investigation upon renotification of the REIMS II Agreement shows that, since the exemption was granted, the overall quality of cross-border mail delivery provided by the Parties has improved. For most of the Parties in 2000, 2001 and 2002 there has been a substantial increase of quality in terms of J+1 delivery of incoming cross-border mail. Those quality increases are demonstrated in the table set out in Annex I.

4.4.2. Other important developments

- (52) The Commission's assessment of the renotified REIMS II Agreement must take into account the following developments:
- the cost data provided by the Parties showing the costs of delivery of cross-border mail items;

- b) the implementation of the REIMS II Agreement during the period of the exemption;
- c) the adoption by the European Parliament and the Council of the Amending Directive.

4.4.2.3. The Amending Directive

4.4.2.1. The Parties' cost data

- (53) Further to the implementation by the Parties of the obligation imposed in the 1999 Exemption Decision to introduce transparent cost accounting systems⁽³³⁾, the Commission has obtained data showing each Party's costs for the delivery of incoming cross-border mail items.
- (54) The cost data, which were not available at the time of the 1999 Exemption Decision, have permitted a more thorough evaluation by the Commission of the levels of terminal dues. The cost-to-revenue ratios⁽³⁴⁾ of the respective Parties are set out in the table in Annex II.

4.4.2.2. Implementation of the REIMS II Agreement

- (55) Regarding Level 3 access, the Parties contractually committed themselves to relax domestic regulations for other Parties where those regulations are not justified and to use their best efforts vis-à-vis the relevant national authorities to remove them where the regulations concerned have been set by the State.
- (56) The investigation carried out in the course of the current procedure has shown that, despite the amendments made to the REIMS II Agreement by the second Supplementary Agreement, Level 3 access does not function as desired by the Commission in the 1999 Exemption Decision. The reports submitted⁽³⁵⁾ indicate that although the Parties state that they do offer each other Level 3 access, there still are significant obstacles for accessing domestic bulk mail rates.

- (57) As referred to in recital 12, on 10 June 2002 the Postal Directive was amended by the Amending Directive, with a view to further liberalisation of the European postal markets.

- (58) One of the major amendments to the Postal Directive is that, as of 1 January 2003, Member States are not to include the market for outgoing cross-border mail in the reserved services⁽³⁶⁾ unless it is necessary to ensure the provision of the universal postal service. Accordingly, as from 1 January 2003, PPOs in principle face competition with regard to the forwarding of cross-border mail from one REIMS II country to another.

- (59) That new circumstance needs to be evaluated together with the fact that the REIMS II Agreement is only open to universal service providers⁽³⁷⁾ and that, although nothing in the Agreement prevents them from doing so, the Commission's investigation has shown that it is unlikely that the Parties will enter into identical or similar agreements on terminal dues with third parties.

- (60) As explained in detail below⁽³⁸⁾, the absence of access to REIMS II terminal dues for non-REIMS II parties could result in an elimination of competition within the meaning of Article 81(3)(b) of the EC Treaty. The Commission considers therefore that an exemption should not be granted in respect of the REIMS II Agreement unless non-REIMS II postal operators are granted access to REIMS II terminal dues at non-discriminatory conditions.

4.5. Amendments to the REIMS II Agreement following the renotification

- (61) On 24 January 2003, following discussions with the Commission, the Parties⁽³⁹⁾ signed the fifth Supplementary Agreement. That Agreement amends the notified REIMS II Agreement with regard to terminal dues to be applied during the transitional period and the introduction by the Parties of the international direct mail product.

⁽³³⁾ See Article 2(2)(a) of the 1999 Exemption Decision.

⁽³⁴⁾ The cost-to-revenue ratio indicates the ratio — expressed as a percentage — between the average cost of delivering one incoming cross-border mail item and the standard tariff for the corresponding domestic mail item.

⁽³⁵⁾ Article 2(2)(b) of the 1999 Exemption Decision obliges the Parties to provide annual reports on several issues including information on the implementation of Level 3 access.

⁽³⁶⁾ Article 7(1) of the Postal Directive.

⁽³⁷⁾ Article 9 of the REIMS II Agreement as notified on 18 June 2001.

⁽³⁸⁾ See section 9.4 on elimination of competition.

⁽³⁹⁾ The Agreement has not been signed yet by La Poste/De Post Belgium, Royal Mail UK and An Post Ireland. These Parties, however, are still signatories of the REIMS II Agreement as amended by the fourth Supplementary Agreement, any implementation of which is not covered by the exemption granted in this Decision.

4.5.1. *Level of terminal dues*

(62) The fifth Supplementary Agreement amends Annex 4 to the notified REIMS II Agreement both as regards the duration of the transitional period and the level of terminal dues to be applied. The duration of the transitional period has been extended from 31 December 2004 to 31 December 2006. The terminal dues to be applied from 1 January 2002 to the end of the transitional period have been amended as follows:

- a) 73,3 % for 2002;
- b) 74,5 % for 2003;
- c) 75,7 % for 2004;
- d) 78,5 % for 2005 and 2006.

4.5.2. *The international direct mail product (the IDM product)*

(63) As regards the introduction of a low-price alternative to terminal dues for bulk mail, Article 2 of the fifth Supplementary Agreement obliges the Parties to deliver international direct mail items forwarded by other Parties under the terms of the REIMS II IDM Agreement. Article 2 of the fifth Supplementary Agreement provides that that obligation is to enter into force six months after the Commission issues a second exemption decision for the REIMS II Agreement, although the Parties are free to provide the IDM product before that date.

(64) On 24 January 2003, the Parties ⁽⁴⁰⁾ signed the separate Agreement for the Delivery of REIMS International Direct Mail (the REIMS IDM Agreement) which creates the IDM product ⁽⁴¹⁾.

(65) The core product specifications of the IDM product are the following:

- a) common product specifications that obviate the need to conform with national product requirements;
- b) reference to delivery of direct mail as defined in Article 2(8) of the Postal Directive;

- c) a maximum weight of the item to be delivered of 2 kg;
- d) a minimum volume of 500 items;
- e) a best effort quality of service standard of J+5;
- f) pure cross-border mail product;
- g) UPU specifications for maximum and minimum size;
- h) pre-sorting is not required.

(66) The remuneration for the delivery of the IDM product is calculated as the lower of the domestic tariff for comparable unsorted mail and non-priority REIMS II terminal dues minus 7 %. If there is no unsorted bulk mail rate, the sorted bulk mail rate plus a mark-up of 3 % is to be used.

4.5.3. *Other amendments*

(67) Recitals 68 and 69 set out other minor amendments introduced by the fifth Supplementary Agreement at the initiative of the Parties.

(68) First, pursuant to Article 5 of the renotified REIMS II Agreement, after the end of the transitional period, Article 25 and Article 49(4) of the 1994 UPU Convention ⁽⁴²⁾ are no longer to be applied between the Parties. Article 5 of the REIMS II Agreement as amended by the fifth Supplementary Agreement now provides that: 'Nothing in the REIMS II Agreement shall keep a Party from applying Article 43 of the UPU Convention against another Party' ⁽⁴³⁾.

(69) Pursuant to Article 11 of the renotified REIMS II Agreement, any withdrawal from that Agreement takes effect at the end of the first full calendar year following the notice of the withdrawal. However, Article 11 of the REIMS II Agreement, as amended by the fifth Supplementary Agreement, provides that in particular circumstances, any Party may withdraw from the REIMS II Agreement by giving not less than six months written notice to the end of a calendar month.

⁽⁴⁰⁾ With the exception of Royal Mail Group plc and An Post.

⁽⁴¹⁾ International direct mail (IDM) is the name the Parties have given to this cross-border mail product.

⁽⁴²⁾ The renotified REIMS II Agreement refers to Articles 25 and 49 of the UPU Convention signed in 1994. The fifth Supplementary Agreement refers to the UPU Convention signed in 1999. In the 1999 UPU Convention, ex-Article 25 is Article 43.

⁽⁴³⁾ See section 4.3.8.

5. THE RELEVANT MARKETS

5.1. Product market

(70) The notified REIMS II Agreement concerns the markets for normal - as opposed to express - cross-border mail between the countries concerned, that is to say, cross-border mail exchanged between REIMS II countries. More specifically, the REIMS II Agreement covers all letter-post items as defined in Article 8 of the UPU Convention. That definition comprises items which weigh up to 2 kg. The importance of cross-border mail varies from country to country. In smaller Member States, cross-border mail generally represents a higher share of the overall mail market than in larger Member States. On average, cross-border mail has been estimated to represent well under 10 % of the overall mail market in the Community ⁽⁴⁴⁾.

(71) The relevant product market may be further divided into a market for the forwarding of outgoing cross-border mail, on which PPOs and private companies collect mail from customers in the originating country for delivery in other countries, and a market for delivery of incoming cross-border mail on which PPOs (and for a very small part other postal operators) offer mail delivery services for cross-border mail to PPOs and private mail companies.

5.1.1. Cross-border and domestic mail

(72) From the customer's perspective the outgoing cross-border mail market is separate from that of domestic mail since demand for mail services for international destinations cannot be satisfied by services for domestic destinations.

(73) From the supplier's perspective, international transportation involves different requirements (international line-haul, delivery in foreign countries) from those of domestic transportation.

(74) Unlike domestic mail, cross-border mail involves services in at least two different countries and, normally, the engagement of at least two service providers. International mail is therefore more complex logistically than domestic mail. Outgoing cross-border mail was

liberalised from 1 January 2003, while in the majority of Member States most domestic mail services, including the delivery service, are still reserved. The Commission has consistently treated outgoing cross-border mail as a product market distinct from the national market for the delivery of incoming cross-border mail ⁽⁴⁵⁾.

(75) A distinction should also be made between the 'normal' cross-border mail market and cross-border express delivery services which are substantially faster than normal cross-border mail and which may provide the customer with certain options such as proof of delivery, track and trace, insurance and the possibility of altering the destination of the consignment during its journey. They are also substantially more expensive. The Commission has recognised the distinction between normal and express delivery services in previous decisions ⁽⁴⁶⁾.

(76) The distinction between domestic and cross-border mail was reinforced by the changes to the Postal Directive introduced by the Amending Directive. From January 2003 outgoing cross-border mail is liberalised in all Member States where it is not necessary to maintain the monopoly in order to sustain the provision of the universal services. The new regulatory rules therefore expose PPOs to increased competition for the forwarding of cross-border mail from one Member State to another.

5.1.2. Geographic market

(77) The relevant geographic markets in the cross-border mail market coincide with national boundaries, as these mark the boundaries of national monopolies and the main players on each of the national markets are different. Pick-up and delivery is organised on a national basis within the countries concerned. Prices and pricing systems differ for every country, largely in relation to costs ⁽⁴⁷⁾.

⁽⁴⁴⁾ This figure is based on the analysis of the data on incoming and outgoing cross-border mail volumes provided by the Parties in their answers to the Commission's formal request for information of 6 August 2001.

⁽⁴⁵⁾ See Commission Decision 2001/892/EC in Case COMP/C-1/36.915 — *Deutsche Post AG* — Interception of cross-border mail (OJ L 331, 15.12.2001, p. 40) (*Deutsche Post II*), recitals 84 to 87.

⁽⁴⁶⁾ See for example, Commission decisions in Case No M.102, *TNT v Canada Post, DBP Postdienst, La Poste, PTT Post and Sweden Post*; Case IV/M.787, *PTT Post v TNT-GD Net*; Case No IV/M.843, *PTT Post v TNT/GD Express Worldwide*; Case IV/M.1168, *Deutsche Post v DHL*. See also recital 18 of the Postal Directive.

⁽⁴⁷⁾ See the decision in *Deutsche Post II*, recitals 84 to 87.

6. STRUCTURE OF THE MARKETS

6.1. Outgoing cross-border mail

6.1.1. Barriers to entry

- (78) According to the Parties, in order to compete in the outgoing mail market, a postal operator may require a local pick-up service and sales force in country A, access to a transport service from country A to B, and an agent in country B to put the mail in the regular mail-stream there. Any pick-up service can carry out these activities without significant additional expense. Technical barriers to entry are also low. However, if a company wishes to establish a universal collection service such as those established by the PPOs, this would require substantial investment. Moreover, postal monopolies, where still in place, provide a legal barrier to entry.

6.1.2. Market volumes of outgoing cross-border mail between REIMS II countries

- (79) The table in Annex III gives an outline of the dimension of the market, in terms of number of items sent to or received from REIMS II countries. It also gives an idea of the structure of the markets by indicating the market share of the incumbent and its main competitors.

6.2. Incoming cross-border mail

6.2.1. Barriers to entry

- (80) In order to compete on the incoming mail market to the extent that it is allowed under national law, a new entrant requires a distribution network. This can be prohibitively expensive if it intends to cover a whole country and starts from scratch. However, if the new entrant limits its service to delivery in one or several cities or to business mail, there will be much less of a barrier. Postal monopolies constitute a legal barrier to entry.

6.2.2. Market volume of incoming cross-border mail between REIMS II countries

- (81) Incoming cross-border mail continues to be reserved within the price and weight limits provided for in the Amending Directive. Accordingly the structure of the market tends to be far less competitive with the incumbents having very high market shares.

- (82) These differences were already present before the adoption of the Amending Directive, since outgoing cross-border mail had already been *de facto* or *de jure* liberalised in most REIMS II countries. The table in Annex IV sets out the incumbents' market shares and the name of their main competitors in the incoming cross-border mail markets in 2000. The table in Annex IV also shows how, already in 2000, the structure of the two markets was substantially different in many REIMS II countries.

7. THIRD-PARTY OBSERVATIONS

- (83) In the Notice published pursuant to Article 19(3) of Regulation No 17 ⁽⁴⁸⁾, the Commission set out details of the renotified REIMS II Agreement and indicated that it proposed to adopt a positive view.
- (84) In total, 10 replies were received by the Commission to that Notice. The most important comments are summarised in recitals 85 to 92.
- (85) One of the main concerns expressed by third parties concerns the lack of an effective low-cost alternative to paying terminal dues. It is argued that the conditions to be fulfilled for Level 3 access are unclear and that the IDM Agreement is not an adequate solution in that respect, as it only covers direct mail within the definition given in the Postal Directive. According to those third parties IDM also needs to be offered to third parties at non-discriminatory conditions, otherwise it will result in a serious restriction of competition.
- (86) Certain third parties allege that the quality improvements registered in the cross-border mail sector are only in part a consequence of the implementation of the REIMS II Agreement. According to them, improvements in domestic mail quality have been the main driver for the improvements in the quality of service.
- (87) According to one third-party it would be more efficient to have a network of bilateral agreements permitting PPOs to diversify terminal dues according to the quantity of mail sent by the counterparts and quality of service.
- (88) One commentator alleges that terminal dues should not be expressed as a percentage of domestic tariffs but expressed in absolute value and queried whether the figures indicated in the Notice pursuant to Article 19(3) of Regulation No 17 indeed represent a reliable proxy for the Parties' costs.

⁽⁴⁸⁾ See footnote 3.

- (89) Several third parties stated that there should be quality-of-service standards for non-priority and bulk mail as well.
- (90) Another third-party states that the 'geographic coverage' provision⁽⁴⁹⁾ opens the field to possible abuses in its application by the Parties. The third-party states that that provision could lead to pricing aimed at excluding new entrants.
- (91) Certain third parties state that the additional costs that third parties incur for having access to REIMS II terminal dues (in particular the costs related to the system for the measurement of the quality of service) need to be set out in detail and monitored carefully by the Commission.
- (92) Finally, according to the Irish postal regulator ComReg, the price-freeze provision⁽⁵⁰⁾ is inconsistent with the requirement that terminal dues be related to costs.
- (93) All comments received have been carefully reviewed and to the extent that the third-party comments reflect genuine competition concerns, the Commission's reasoning on the concerns raised is set out in the relevant parts of the legal assessment.

8. ARTICLE 81(1) OF THE TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT

8.1. Agreement between undertakings

- (94) All the Parties to the REIMS II Agreement are engaged in economic activities and are therefore to be considered as undertakings within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement. The REIMS II Agreement is thus an agreement within the meaning of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement. This was already established in the 1999 Exemption Decision.

8.2. Restrictions of competition

8.2.1. Price fixing

- (95) In the 1999 Exemption Decision, the Commission considered that the REIMS II Agreement constituted a restriction of competition falling within the scope of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement because it collectively established a common level of terminal dues expressed as a percentage

of the domestic tariff in the receiving country. The Commission concluded that, although the amounts in absolute terms were not fixed, the REIMS II Agreement had the effect of jointly fixing prices. By linking the price for the cross-border delivery service to the price for the domestic service, which is determined primarily by domestic considerations, the Parties eliminate or reduce their freedom to set the prices they charge for the delivery of incoming cross-border mail. In fact, the REIMS II Agreement eliminates any incentive to conclude separate agreements on a bilateral basis between the Parties, although contractually this remains possible.

- (96) The Commission's investigation following the Parties' request for renewal of the exemption has not revealed any reason to deviate from the assessment made in the 1999 Exemption Decision as regards the applicability of Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement. Indeed, as regards the collective agreement on the level of terminal dues, no REIMS II Party has entered into a bilateral agreement with another REIMS II Party. It is thus clear that all REIMS II Parties collectively adhere to the remuneration levels and the conditions of the REIMS II Agreement.
- (97) Furthermore, developments in postal markets have given rise to new competitive concerns in addition to those referred to in the 1999 Exemption Decision.
- (98) The markets for cross-border mail have evolved substantially in the last few years. To an increasing extent, PPOs within the Community and the EEA are in direct competition with each other and other postal operators on each other's home markets for outgoing cross-border mail.
- (99) The Postal Directive, as amended by the Amending Directive, has now removed outgoing cross-border mail from the area of service reserved to the universal service providers unless its revenues are necessary to finance the net cost of the universal postal service.
- (100) According to the REIMS II Agreement⁽⁵¹⁾, receiving PPOs are obliged to apply the same terminal dues to all other REIMS II parties. That means that all REIMS II PPOs sending mail from country A to country B are to pay the same terminal dues to the PPO in country B. The costs all REIMS II parties incur for the end-to-end cross-border service (mail from country A to country B) will

⁽⁴⁹⁾ See recital 30.

⁽⁵⁰⁾ See recital 29.

⁽⁵¹⁾ Article 2(11) of the REIMS II Agreement.

thus include the jointly agreed common terminal dues to be paid to the PPO of country B. As terminal dues account for the largest portion by far of total conveyance costs for cross-border mail ⁽⁵²⁾, competition between the Parties on the outgoing cross-border mail market in country A will be substantially diminished or even eliminated.

- (101) Therefore, the conclusion should be drawn that the restrictive effects of the REIMS II Agreement have expanded beyond the price-fixing identified in the 1999 Exemption Decision ⁽⁵³⁾ to competition between REIMS II Parties competing in the market for outgoing cross-border mail from one REIMS country to another. The Commission continues to consider the Agreement to have as its object or effect to prevent, restrict or distort competition within the common market. Consequently, Article 81(1) of the EC Treaty and Article 53(1) of the EEA Agreement still apply.

8.2.2. Membership restriction

- (102) Membership of the REIMS II Agreement is limited to postal operators (private or public) which operate a mandatory universal service. This could be interpreted as precluding other operators from benefiting from the same rates as the Parties to the REIMS II Agreement. However, nothing in the Agreement prevents the Parties from entering into identical or similar agreements on terminal dues with third parties. The condition for membership of the REIMS II Agreement thus does not appear to represent a restriction of competition in itself but would give rise to a restriction of competition if it prevented third-party postal operators from having access to REIMS II terminal dues.

8.3. Effect on trade

- (103) The REIMS II Agreement concerns the remuneration for the delivery of incoming cross-border mail services and therefore has an effect on trade between Member States and on trade between the contracting Parties to the EEA Agreement ⁽⁵⁴⁾.
- (104) In view of the importance of the REIMS II Parties on the markets for incoming cross-border mail between their respective countries, that effect should be regarded as appreciable.

9. ARTICLE 81(3) OF THE TREATY and ARTICLE 53(3) OF THE EEA AGREEMENT

9.1. Technical and economic progress

- (105) The Commission considers that the REIMS II Agreement produces improvements which fulfil the first prerequisite for exemption under Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement. The following improvements should be taken into consideration:

- a) increased correlation between terminal dues and the Parties' costs for the delivery of incoming cross-border mail; and
- b) improvement in quality of service for cross-border mail.

9.1.1. Cost-based terminal dues

- (106) The REIMS II Agreement has the effect of increasing the correlation between terminal dues and the Parties' costs for the delivery of incoming cross-border mail ⁽⁵⁵⁾.
- (107) If terminal dues do not cover costs, losses incurred delivering incoming cross-border mail have to be covered, making use of profits generated by domestic mail or outgoing cross-border mail services. Postal operators should be entitled to receive remuneration for the delivery of cross-border mail which covers the costs caused by that activity. A move towards a cost-based system allows the postal operators to maintain and improve their service of incoming cross-border mail delivery.
- (108) In light of the data on costs provided by the Parties, the Commission acknowledges that the arrangement on terminal dues in the fifth Supplementary Agreement increases the correlation between the Parties' costs for the delivery of incoming cross-border mail and the remuneration that they receive for the provision of this service.
- (109) As regards the 'price-freeze' provision, the multilateral nature of the REIMS II Agreement means that the terminal dues agreed by the 17 Parties cannot be fixed in relation to each Party's costs of processing and delivering incoming cross-border mail. As a consequence, it is more appropriate to look at the average of the Parties' costs rather than at their individual costs to assess if and to what extent terminal dues are fixed in relation to the costs of processing and delivering incoming cross-border mail.

⁽⁵²⁾ Source: Parties' answers to Commission's formal request for information of 6 August 2001.

⁽⁵³⁾ See recital 65 of the 1999 Exemption Decision.

⁽⁵⁴⁾ See decision in *Deutsche Post II*, recital 179.

⁽⁵⁵⁾ See recital 69 of the 1999 Exemption Decision.

- (110) In light of the matters referred to in recital 109, the Commission considers that the application of the 'price-freeze' clause, which in any event is to end after 2004, cannot be considered inconsistent with the above analysis regarding the correlation between REIMS II terminal dues and the Parties' costs.

9.1.2. *Improvement in quality of service*

- (111) The main improvement produced by the REIMS II Agreement is the observed increase in the quality of cross-border mail services, notably the delivery of incoming cross-border mail. The link between terminal dues payable to the receiving Party and improvements in the quality of service is a strong incentive to improve service quality.
- (112) The receiving Party may only claim higher terminal dues from the other Parties if it manages to meet the quality-of-service targets set out in the REIMS II Agreement. If the receiving Party does not meet the targets, penalties considerably reduce the terminal dues to which it is entitled.
- (113) The data gathered in the course of the proceedings show that since the 1999 Exemption Decision, the overall quality of service for the delivery of incoming cross-border mail by the Parties has improved substantially ⁽⁵⁶⁾.
- (114) It has been questioned whether those improvements in quality of service for cross-border mail have causes other than the implementation of the REIMS II Agreement, notably improvements in quality of domestic mail delivery.
- (115) The available data show, however, that, since the entry into force of the REIMS II Agreement, quality of service for cross-border mail has improved more than quality of service for domestic mail. For example in 1994 only 69,1 % of all cross-border letters were delivered within three days of posting (J+3). By 2001, that figure had risen to 92,0 % and by 2002 to 93,5 % ⁽⁵⁷⁾. At the same time the first paragraph of Article 17 of the Postal Directive provides that Member States are to lay down quality standards for national mail and ensure that

they are compatible with those laid down for intra-Community cross-border services, namely 85 % of J+3 ⁽⁵⁸⁾. Accordingly, in the period in which the REIMS II Agreement has been applied, cross-border mail has achieved a quality of service substantially higher than that imposed by the Postal Directive with respect to both domestic and cross-border mail ⁽⁵⁹⁾. That conclusion is also confirmed by the data on quality of service provided by the Parties. These data show that in the period 1999 to 2000 quality of service for the delivery of incoming cross-border mail has reached, in most Member States, a level which goes beyond what is imposed by the Postal Directive ⁽⁶⁰⁾.

- (116) No specific quality-of-service targets have been set for Level 3 access. However, the very essence of Level 3 access is that such mail should be treated like domestic mail. Where there are quality-of-service targets for domestic mail, they will thus be equally applicable to the relevant incoming cross-border mail. In addition, the REIMS II IDM Agreement introduces quality standards for the delivery of international direct mail.
- (117) The REIMS II Agreement will also stimulate the improvement of outgoing cross-border mail quality. Article 3(8) of the renotified REIMS II Agreement obliges the sending operators to use their best efforts to afford outgoing priority mail a quality of service which conforms to the standards set out in Annex 7 to that Agreement. Pursuant to those provisions the Parties aim at achieving a standard of 85 % J+1 by 2002, that is to say, 85 % of outgoing priority cross-border mail should arrive at the receiving operator's office of exchange within one working day after having been posted with the sending Party ⁽⁶¹⁾.

9.2. **Benefits for consumers**

- (118) The improvements referred to in recitals 105 to 117, in particular the better quality of service for cross-border mail, as well as the obligation for the Parties to give access to competing postal operators to REIMS II terminal dues at non-discriminatory conditions ⁽⁶²⁾, are beneficial for consumers. For the following reasons, the Commission considers that the REIMS II Agreement will allow consumers a fair share of the benefits resulting from it.

⁽⁵⁸⁾ See the Annex to the Postal Directive.

⁽⁵⁹⁾ The fact that REIMS contributed to the improvement of the quality of service in cross-border mail is specifically acknowledged in the 'Study on the Impact of Certain Aspects of the Application of the Directive 97/67/EC on the Postal Sector' conducted by Omega Partners for the Commission in August 2001.

⁽⁶⁰⁾ See Annex I to this Decision.

⁽⁶¹⁾ The target is slightly lower (80 %) for Greece, Iceland, Portugal and Spain.

⁽⁶²⁾ See section 4.4.

⁽⁵⁶⁾ See the table in Annex I.

⁽⁵⁷⁾ Source: UNEX official end-to-end results, Europe.

9.2.1. *Reduced cross-subsidisation*

- (119) To the extent that the increases in terminal dues result in remuneration which is closer to the actual costs of delivering the mail, the REIMS II Agreement will entail a reduction of possible cross-subsidisation. Since the users of domestic mail or outgoing cross-border mail would thus no longer (or at least to a lesser extent) have to contribute to the cost of delivering incoming cross-border mail, the PPOs will be able to adjust the tariffs for domestic mail and outgoing cross-border mail where appropriate.

9.2.2. *Increased quality of service*

- (120) Since terminal dues may only be increased if the quality of service improves, any increases in tariffs for cross-border mail due to the increase of terminal dues⁽⁶³⁾ would be accompanied by improvements in the service rendered or by the maintenance of the quality levels already achieved. Consumers may therefore be expected to get a fair share of the benefits if the quality of the service improves⁽⁶⁴⁾.

9.2.3. *Low-cost alternative to terminal dues for bulk mail*

- (121) The REIMS II Agreement itself provides two possibilities to reduce its financial impact, the Level 3 access and the IDM Agreement.
- (122) Whereas the level of terminal dues established pursuant to the REIMS II Agreement is a percentage of domestic tariffs for priority mail, Level 3 access offers the possibility of benefiting from reduced domestic tariffs for bulk mail. Level 3 mail is treated like domestic mail. That possibility is of particular significance for bulk mail but also for items such as newspapers.
- (123) The Commission's investigation with regard to Level 3 access has, however, shown the application of the Level 3 access to have been less than expected. One reason appears to be that as long as terminal dues are still comparatively low, there is no incentive for sending PPOs and their customers to avail themselves of Level 3 access. During the period in which the previous exemption was in force terminal dues paid by the Parties have

remained low because of the 70 % limit imposed in the 1999 Exemption Decision and because of the application of the penalties. The volume of cross-border bulk mail making use of Level 3 access is however progressively rising from only 34 million items in 1999 to more than 80 million items in 2001 and more than 120 million items in 2002.

- (124) The Commission therefore considers that Level 3 access, if implemented properly, constitutes a viable and less costly alternative to terminal dues for the delivery of cross-border bulk mail. Such alternative will contribute in a substantial way to passing on to consumers the benefits of the REIMS II Agreement. It appears therefore necessary to make the granting of the present exemption depend on satisfactory Level 3 access being granted, both to the Parties and to third-party competing postal operators⁽⁶⁵⁾, under the same terms set out in the 1999 Exemption Decision.

- (125) Furthermore, to address the Commission's concerns regarding the lack of harmonisation between the different domestic products for bulk mail, 15 out of the 17 Parties signed the REIMS II IDM Agreement on 24 January 2003.

- (126) The IDM Agreement introduces the first harmonised product for bulk mail which can be sold in almost all the REIMS II countries. The IDM Agreement is applicable only to a part of the overall bulk mail volumes, namely direct mail. According to estimates given by the Parties, of the more than 120 million items that REIMS II Parties have received as incoming Level 3 mail from other REIMS II Parties, around 75 % were direct mail items. The Commission therefore considers that the implementation of the IDM Agreement, together with an effective application of Level 3 access, will constitute low-price alternatives to terminal dues and will allow consumers a substantial share of the benefits produced by the REIMS II Agreement.

9.2.4. *Third-party access to terminal dues*

- (127) As will be explained in detail in recitals 145 to 157, the Commission considers that an exemption cannot be granted to the REIMS II Agreement unless third-party postal operators competing with the Parties in the outgoing cross-border mail markets from one REIMS II country to another are granted access to REIMS II terminal dues at non-discriminatory conditions.

⁽⁶³⁾ It is possible that increases in tariffs are decided by the national regulators on the basis of different circumstances than increases in terminal dues. Recital 120 is therefore valid also in these particular circumstances since such increases of tariffs are not causally linked to the increases of terminal dues.

⁽⁶⁴⁾ See recital 80 of the 1999 Exemption Decision.

⁽⁶⁵⁾ Third-party access to Level 3 rates also necessitates access for third parties to the IPC database in which all the tariffs and conditions relevant for Level 3 access are made available. See recital 48.

- (128) The main reason for that consideration is that exempting the REIMS II Agreement without avoiding important price discrimination to the detriment of third parties would result in a substantial elimination of competition in the recently liberalised market of outgoing cross-border mail forwarding. If third parties are not in a position to compete with the Parties for outgoing mail from one REIMS II country to another, insufficient competitive pressure would exist, ultimately resulting in a detrimental situation for consumers.
- (129) On the contrary, third-party access to REIMS II terminal dues on non-discriminatory conditions strengthens the likelihood of effective price and non-price competition by third-party operators which will pay much lower prices than before for the delivery of their incoming cross-border mail items.
- (130) Accordingly the choice of the consumer will be enriched with new offers that will most probably be attractive both on price and on non-price issues since third-party operators need to compete more aggressively in order to enter the market.

9.3. Indispensability

9.3.1. *The common level of terminal dues*

- (131) In order to qualify for an exemption pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, restrictions of competition must be indispensable to the attainment of the relevant objectives. That presupposes that the levels of terminal dues agreed upon by the Parties reflect the actual delivery costs. As explained in the 1999 Exemption Decision, the REIMS II Agreement does not establish a direct link between terminal dues and actual costs, but expresses terminal dues as a percentage of domestic tariffs.
- (132) Accordingly, the Commission considers that the conclusion of an agreement setting terminal dues at the same percentage of domestic tariffs and upon the same conditions for all the Parties continues to be indispensable in order to attain the benefits aimed at by the Parties. Although the Parties could have concluded bilateral agreements on terminal dues, it appears unlikely that such agreements would have attained as quickly and as efficiently the benefits in terms of quality of service improvements which the present Agreement produces.

- (133) Although the Commission accepts that the conclusion of the REIMS II Agreement may be considered indispensable for attaining the objectives pursued, it should be verified whether the level of terminal dues agreed is indispensable in this respect.
- (134) In the 1999 Exemption Decision the Commission considered that due to the lack of a cost accounting system enabling them to calculate precisely the cost of a particular service the Parties were not able to prove that 80 % of the domestic tariffs corresponded to the costs of delivering incoming cross-border mail ⁽⁶⁶⁾.
- (135) Since the 1999 Exemption Decision, the Parties have developed cost accounting systems which allow them to collect and elaborate accounting data on the costs of incoming cross-border mail delivery.
- (136) The cost data provided by the Parties show that approximately half of the parties have cost-to-revenue ratios lower than 80 % ⁽⁶⁷⁾.
- (137) Taking into account those elements, the Commission considers that the Parties have failed to demonstrate that 80 % of the domestic tariffs is a sufficiently accurate approximation of the cost of delivering incoming cross-border mail. Increasing terminal dues to 80 % is thus not indispensable for the achievement of the positive effects which the REIMS II Agreement is expected to produce.
- (138) On the other hand, the Commission accepts that the level of terminal dues should, on average, allow operators to cover their costs of delivery. An increased correlation between terminal dues and Parties' costs for the delivery of incoming cross-border mail is one of the improvements that the REIMS II Agreement produces. The Commission considers it to be justified to allow the Parties to apply, during the period covered by the present exemption, terminal dues corresponding, on average, to the weighted average of the Parties' costs over the entire period ⁽⁶⁸⁾.
- (139) The Commission also acknowledges that important investments have been made by the Parties in order to meet the quality targets set out in the REIMS II Agreement and that such investments have, on average, increased their costs for the delivery of incoming cross-border mail.

⁽⁶⁶⁾ See recitals 86 and 88 of the 1999 Exemption Decision.

⁽⁶⁷⁾ The relevant data are gathered from the Parties' answers to the Commission's request for information, which were received on 24 September 2001.

⁽⁶⁸⁾ Weighted average is obtained by multiplying the cost-to-revenue ratio of each Party by a weighting factor, which is obtained on the basis of the volumes of incoming cross-border mail processed, and then calculating the average value.

(140) Finally, the Commission also recognises that the terminal dues set out in the fifth Supplementary Agreement⁽⁶⁹⁾ are only the gross values to be applied and are subject to substantial reductions where penalties are applied. In that regard, in 2002 the application of the penalties system excluded 10 out of the 17 Parties from the application of the full terminal dues set out in the REIMS II Agreement.

(141) In light of the matters set out in recitals 131 to 140, the Commission considers that the terminal dues levels set out in the fifth Supplementary Agreement are indispensable in order to achieve the increases in quality of service as well as the increased correlation between terminal dues and the Parties' costs for the delivery of incoming cross-border mail.

9.3.2. The 'geographic coverage' clause

(142) The renotified REIMS II Agreement contains a 'geographic coverage' clause which provides that if a Party whose domestic market is liberalised can prove that the geographical structure of incoming mail from a sending PPO has changed to such an extent that the percentage of the domestic tariff used under the REIMS II Agreement is insufficient to meet the costs incurred by the Party for the delivery of that mail, the Party may ask for a renegotiation of the terminal dues paid by the sending PPO⁽⁷⁰⁾.

(143) That provision is aimed at avoiding an imbalance between the terminal dues received by the delivering PPO and its costs for the delivery of incoming cross-border mail. Such imbalances would reduce the correlation between the costs of the receiving PPO and the remuneration it receives thus eliminating one of the major improvements produced by the REIMS II Agreement. In the second place, such an imbalance could also have the effect of increasing the universal service burden of the receiving PPO thus possibly threatening its ability to fulfil its universal postal service obligation.

(144) The Commission therefore considers that, to the extent that the conditions for a renegotiation of the terminal dues are met and that the new terminal dues are proportionate to the new geographical cost structure of mail delivered by the invoking Party, the 'geographic coverage' clause is indispensable for the attainment of the improvements produced by the REIMS II Agreement.

9.4. Non-elimination of competition

(145) The REIMS II Agreement is only open to universal service providers⁽⁷¹⁾, which means that other postal operators are barred from being signatories to the Agreement. Although nothing in the REIMS II Agreement prevents the Parties from entering into identical or similar agreements on terminal dues with third parties, none have done so until now and several Parties have indeed stated that they do not have any intention to conclude such agreements.

(146) Given the restriction of competition between REIMS II parties for the outgoing cross-border mail from one REIMS II country to another as a result of the commonly agreed level of terminal dues and the non-discrimination clause contained in Article 2(11) of the REIMS II Agreement, there is a risk that that Agreement will eliminate competition on a substantial part of the market for outgoing cross-border mail from one REIMS II country to another.

(147) The Amending Directive has legally opened to competition outgoing cross-border mail in most Member States from 1 January 2003. Without access to delivery services on equivalent or more favourable terms in receiving countries, private competitors would be unable to compete on price with the sending REIMS II Parties for outgoing cross-border mail between REIMS II countries.

(148) At present, a private operator competing with a REIMS II Party in the markets for outgoing cross-border mail has two alternatives:

- a) turning the mail over to the sending PPO in the country of origin and paying the full international tariff; or
- b) transporting the mail itself to the receiving country where the mail is handed over to the incumbent REIMS II Party and the full domestic tariff is paid⁽⁷²⁾.

(149) Removing the national monopolies for outgoing cross-border mail while allowing the REIMS II Parties to deny competitors access on non-discriminatory terms for delivery of incoming cross-border mail would, therefore, negate the procompetitive impact of the market opening for outgoing cross-border mail.

⁽⁶⁹⁾ See section 4.5.

⁽⁷⁰⁾ Article 11(4) to (7) of the REIMS II Agreement as amended by Article 2(2) of the fourth Supplementary Agreement.

⁽⁷¹⁾ Article 9 of the REIMS II Agreement as amended by the fourth Supplementary Agreement.

⁽⁷²⁾ The only exception is Sweden where alternative providers of delivery services are being used.

- (150) If competition between the parties to an agreement is eliminated or severely curtailed, an exemption will depend on the intensity of third-party competition⁽⁷³⁾. Because none of the Parties have granted access to terminal dues on REIMS II terms to competing postal operators, it is very difficult, if not impossible, for the latter to compete on price with the Parties in the markets for outgoing cross-border mail between REIMS II countries, since they would always have to pay 100 % of the domestic tariffs in the country of delivery or the full international tariff in the country of origin.
- (151) In other words, the price that third parties must pay for delivery would always exceed the price for REIMS II Parties. There is thus insufficient competitive pressure from third parties which would help to neutralise the negative effects of the elimination of competition between the REIMS II Parties. In order to create a viable competitive alternative to the Parties for outgoing cross-border mail in REIMS II countries, competing postal operators should therefore be granted equal access to the terminal dues applicable to the Parties.
- (152) In the absence of such an opportunity for non-REIMS II parties, the restrictive effects of the REIMS II Agreement in the outgoing cross-border mail market could result in a possible elimination of competition within the meaning of Article 81(3)(b) of the EC Treaty and Article 53(3) of the EEA Agreement. Therefore, an exemption should not be granted in respect of the REIMS II Agreement unless non-REIMS II postal operators are granted access to the incoming cross-border mail delivery provided by the REIMS II Parties on conditions which are non-discriminatory as compared to those offered to the other Parties. Terminal dues and other conditions offered to third-party postal operators need not be better than those offered to the REIMS II Parties.
- (153) This analysis only applies to cross-border mail as defined in section 5 on market definition. Cross-border mail is a service which is distinct and separate from domestic mail. As a consequence, this analysis does not apply in the event that third-party operators request that domestic mail be delivered at terminal dues rates.
- (154) As mentioned in recital 152, third parties must be given access to REIMS II terminal dues under non-discriminatory conditions. As regards the remuneration for the delivery of outgoing cross-border mail conveyed by them, these operators should therefore be treated on a similar basis as REIMS II Parties.
- (155) That means that any unjustified difference between the treatment of third parties and that applied by the Parties to each other is not in line with that requirement.
- (156) In particular, the Commission considers justified that, in order to have access to REIMS II terminal dues, third-party postal operators should comply with operational requirements set forth in the REIMS II Agreement.
- (157) The Commission also considers justified that terminal dues payable by third-party postal operators may, in some cases, exceed those payable by the Parties. This is the case where the Parties are able to demonstrate that the cost of administering REIMS II, the cost of setting up and operating the quality-of-service monitoring system, the extra cost incurred by accepting mail items from non-UPU members and other such costs are not covered by the terminal dues paid by the sending operator. This is also the case where the Parties are able to demonstrate that the cost of handling mail items forwarded by third-party postal operators exceeds the costs of handling mail forwarded by the Parties.

9.5. Conclusion on Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement

- (158) For the reasons set out in recitals 105 to 157, the Commission considers that the requirements for exemption pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement are fulfilled, provided that certain conditions are met.

10. DURATION OF THE EXEMPTION CONDITIONS AND OTHER REQUIREMENTS IMPOSED BY THE COMMISSION

- (159) Article 8(1) of Regulation No 17 provides that a decision in application of Article 81(3) of the Treaty shall be issued for a specified period and conditions and obligations may be attached thereto.

⁽⁷³⁾ See Commission Decision 83/390/EEC in Case No IV/30.437 *Rockwell v Iveco* (OJ L 224, 17.8.1983, p. 19); judgment of the Court of Justice in Case C-75/84 *Metro SB-Grossmärkte v Commission* [1986] ECR 3021, paragraphs 34 to 46; Commission Decision 94/29/EC in Case No IV/29.420 *Grundig's EC distribution system* (OJ L 20, 25.1.1994, p. 15) recitals 39, 40 and 41.

10.1. Duration

(160) In the 1999 Exemption Decision the Commission limited the duration of the exemption to 31 December 2001 in order to make the exemption period come to an end before the final increase in terminal dues from 70 to 80 % of domestic tariffs was implemented. The reason was that the Commission had insufficient evidence that terminal dues had to be increased to a level of 80 % of domestic tariffs to enable the Parties to cover their costs.

(161) In the present case, however, the Parties' costs are known to the Commission. It is therefore appropriate that the exemption should cover a longer period of time than the previous one. Accordingly the exemption should be granted for a period of five years, from the date of the expiry of the previous exemption. The exemption period should therefore commence on 1 January 2002 and end on 31 December 2006.

10.2. Amendments to the REIMS II Agreement at the request of the Commission: level of terminal dues

(162) The Commission has come to the conclusion that the Parties have failed to demonstrate that 80 % of the domestic tariffs is a sufficiently accurate approximation of the costs of delivering incoming cross-border mail.

(163) The Commission therefore considered that Article 2 of the REIMS II Agreement should be amended so that terminal dues for priority mail to be applied during the period of the exemption are oriented to the weighted average of the Parties' costs for the delivery of inbound cross-border mail over the period from 1 January 2002 to 31 December 2006.

(164) The Parties have already amended the REIMS II Agreement in that respect. Following discussions with the Commission, on 24 January 2003, the Parties signed the fifth Supplementary Agreement.

(165) As referred to above⁽⁷⁴⁾, the fifth Supplementary Agreement amends Annex 4 to the notified REIMS II Agreement both as regards the duration of the transitional period and the level of terminal dues to be applied. The transitional period has been prolonged to 31 December 2006.

⁽⁷⁴⁾ See section 4.5.

(166) The terminal dues to be applied from 1 January 2002 to the end of the transitional period have been amended as follows: 73,3 % for 2002, 74,5 % for 2003, 75,7 % for 2004 and 78,5 % for 2005 and 2006. In that respect, the Commission considers that a more gradual progressive increase in terminal dues is a smoother and better solution than abrupt increases. The Commission has therefore evaluated the correlation between terminal dues and the Parties' costs with regard to the whole period of the exemption. In this respect, the Commission acknowledges that the average of the rates to be applied over the entire five-year period corresponds to the weighted average of the Parties' costs for the delivery of inbound cross-border mail⁽⁷⁵⁾.

(167) Having revised the cost data provided by the Parties with regard to the delivery of incoming cross-border mail and the data on quality of service achieved by the Parties in 2001 and 2002, the Commission considers that the average value of terminal dues applicable during the exemption period corresponds to the weighted average of Parties' costs for the inbound delivery of cross-border mail⁽⁷⁶⁾. Also, the Commission has taken into account that the terminal dues levels set out in the fifth Supplementary Agreement are only gross values and that the terminal dues actually payable are subject to substantial reductions where penalties are applied. In conclusion, the Commission considers that the terminal dues set out in the fifth Supplementary Agreement correspond to a sufficiently accurate approximation of the Parties' costs.

10.3. Conditions

(168) In light of the analysis developed in Section 9 on the applicability of Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, the Commission considers that, in application of Article 8 of Regulation No 17, an exemption should only be granted in respect of the REIMS II Agreement provided that certain conditions are met.

⁽⁷⁵⁾ The cost data in question are gathered from the answers to the Commission's request for information of 6 August 2001 and make reference to Parties' costs for the delivery of incoming cross-border mail in 2000.

⁽⁷⁶⁾ It has been specified by the Parties that the cost data submitted to the Commission do not include any profit margin.

10.3.1. *Non-discriminatory third-party access*

- (169) The Commission considers that, following the liberalisation of outgoing cross-border mail, the mechanism contained in the REIMS II Agreement for the remuneration of the delivery of incoming cross-border mail leads to price discrimination in favour of the Parties and to the detriment of third-party operators carrying outgoing cross-border mail from one REIMS II country to another.
- (170) Pursuant to Article 2(3) of the REIMS II Agreement, the REIMS II Party in the country of delivery charges REIMS II terminal dues for the delivery of mail items forwarded by any other REIMS II Party. Third-party operators engaged in forwarding outgoing cross-border mail must, however, pay the full domestic tariff for the delivery of the mail items in the country of destination.
- (171) In the light of the matters referred to in recitals 145 et seq., the Commission considers that each REIMS II Party should provide to any third-party postal operator competing with the REIMS II Parties for the provision of outgoing cross-border mail services in any other REIMS II country, delivery of incoming cross-border mail in its country at terminal dues and under conditions which are non-discriminatory as compared to those that the REIMS II Party offers to the REIMS II Party(ies) in the sender's country.
- (172) A detailed description of how the REIMS II Parties should grant third-party access in order to comply with this condition is set out in Annex V.

10.3.2. *Level 3 access*

- (173) As already referred to in the 1999 Exemption Decision, the existence of a viable low-cost alternative to terminal dues and in particular Level 3 access, are of considerable importance to the consumer, since direct mail and other types of commercial mail account for the most important part of cross-border mail. Enabling sending parties to benefit from the delivering operator's domestic tariffs for such mail is therefore essential to balance the negative effects of the REIMS II Agreement.
- (174) The investigation carried out has shown that Level 3 access is increasingly sought as the level of terminal dues rises. Accordingly, the Commission considers it necessary to include in this Decision the same requirement as in the 1999 Exemption Decision with regard to Level 3 access⁽⁷⁷⁾.

⁽⁷⁷⁾ Article 2(6) of the REIMS II Agreement obliges the Parties to grant such access to other Parties.

- (175) In order to facilitate Level 3 access, when such access is requested by another Party or by a third-party postal operator, the Parties should relax domestic conditions where those rules are not justified and could in practice bar the access to the domestic rates. Where it is not in their power to do so, the Parties should use their best efforts vis-à-vis the relevant national authorities to remove those rules.
- (176) In order to ensure that the Parties comply with that requirement and grant each other and third-party postal operators effective Level 3 access, it is necessary to make the exemption subject to a condition to that effect.
- (177) Moreover, the Commission has come to the conclusion that, in addition to the application of Level 3 access, there is a need for an increased degree of harmonisation as far as cross-border bulk mail exchanged between REIMS II countries is concerned.
- (178) The Commission considers that with respect to the part of bulk mail which falls under the definition of 'direct mail' contained in the Postal Directive, the IDM product may be considered a viable and less expensive alternative to terminal dues.
- (179) Level 3 access, delivery of international direct mail at IDM conditions and any other special bulk mail rates that the Parties will offer each other in the framework of the REIMS II Agreement should also be offered, under non-discriminatory conditions, to third-party postal operators competing with the Parties for outgoing cross-border mail from any REIMS II country to any other REIMS II country.
- (180) The Commission considers that the measures relating to Level 3 access and the IDM product provide both the Parties and their competitors in outgoing cross-border mail markets with low-cost alternatives to REIMS II terminal dues.
- (181) In order to ensure that the Parties comply with that requirement, it is necessary to make the exemption subject to a condition to that effect.
- (182) This Decision is without prejudice to the application of Article 82 of the Treaty and Article 54 of the EEA Agreement,

HAS ADOPTED THIS DECISION:

Article 4

Article 1

Exemption

1. Pursuant to Article 81(3) of the EC Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement are declared inapplicable to the REIMS II (remuneration of mandatory deliveries of cross-border mails) Agreement, as amended for the last time by the fifth Supplementary Agreement of 24 January 2003, from 1 January 2002 until 31 December 2006.

2. The exemption provided for in paragraph 1 shall be subject to compliance with the conditions set out in Articles 2 and 3.

Article 2

Level 3 access between the REIMS II Parties

The Parties to the Reims II Agreement shall take all the necessary steps in order to grant each other effective access to the generally available domestic rates in the country of delivery (Level 3 access). In order to facilitate such access, the Parties shall relax domestic rules for other Parties where such rules are not justified and could in practice prevent other Parties from having Level 3 access.

Where it is not in their power to relax domestic rules, the Parties shall use their best efforts vis-à-vis the relevant national authorities to remove those rules.

Article 3

Non-discriminatory third-party access to REIMS II terminal dues and conditions

The Parties shall grant third-party postal operators competing with the Parties for the provision of outgoing cross-border mail services in any other REIMS II country access to terminal dues and other special arrangements on the same conditions as those applied to other Parties, in accordance with Annex V.

This Decision is addressed to:

Österreichische Post AG Postgasse 8 A-1011 Wien	Poste Italiane SpA Viale Europa 175 I-00144 Rome
De Post/La Poste Muntcentrum/Centre Monnaie B-1000 Brussels	Entreprise des Postes & Télécommunications 8a, Avenue Monterey L-2020 Luxembourg
Post Danmark AS Headquarters Tietgensgade 37 DK-1566 Copenhagen V	Posten Norge AS Biskop Gunnerusgt 14 NO-0001 Oslo, Norway
Finland Post Corporation (Suomen Posti Oyj) Postintaival 7 FI-00230 Helsinki	CTT Correios de Portugal, SA Rua de José, 20 P-1166-001 Lisboa
La Poste Siège social 44 boulevard de Vaugirard F-75757 Paris Cedex 15	Sociedad Estatal Correos y Telégrafos, SA Vía de Dublín 7 E-28070 Madrid
Deutsche Post AG Zentrale Charles-de-Gaulle-Str. 20 D-53113 Bonn	Posten Sverige AB S-105 00 Stockholm
Hellenic Post ELTA 1 Apellou Street GR-10188 Athens	Royal Mail Group plc 148 Old Street London EC1V 9HQ, United Kingdom
Iceland Post Storhofdi 29 IS-110 Reykjavik, Iceland	An Post General Post Office O'Connell Street Dublin 1, Ireland

Done at Brussels, 23 October 2003.

For the Commission

Mario MONTI

Member of the Commission

ANNEX I

Quality-of-service improvements**(Business secrets)**

		REIMS penalty threshold 2001	On-time % performance 2001	REIMS penalty threshold 2002	On-time % performance 2002	Progress 2002 vs 2001
Österreichische Post	AT	93	[...] (*)	93	[...] (*)	[...] (*)
The Belgian Post Group	BE	93	[...] (*)	93	[...] (*)	[...] (*)
Swiss Post	CH	93	[...] (*)	93	[...] (*)	[...] (*)
Post Denmark	DK	93	[...] (*)	93	[...] (*)	[...] (*)
Finland Post Corporation	FI	93	[...] (*)	93	[...] (*)	[...] (*)
An Post	IE	93	[...] (*)	93	[...] (*)	[...] (*)
Iceland Post	IS	93	[...] (*)	93	[...] (*)	[...] (*)
Postes et Télécommunications	LU	93	[...] (*)	93	[...] (*)	[...] (*)
Posten Norge	NO	93	[...] (*)	93	[...] (*)	[...] (*)
Posten	SE	93	[...] (*)	93	[...] (*)	[...] (*)
Deutsche Post	DE	93	[...] (*)	93	[...] (*)	[...] (*)
La Poste	FR	90	[...] (*)	90	[...] (*)	[...] (*)
Royal Mail Group plc	UK	90	[...] (*)	90	[...] (*)	[...] (*)
Poste Italiane	IT	90	[...] (*)	90	[...] (*)	[...] (*)
CTT Correios de Portugal	PT	91,5	[...] (*)	93	[...] (*)	[...] (*)
Correos y Telégrafos	ES	85	[...] (*)	85	[...] (*)	[...] (*)
Hellenic Post ELTA	EL	80	[...] (*)	85	[...] (*)	[...] (*)

(*) Business secrets.

ANNEX II

Parties' cost-to-revenue ratios

Austria	
United Kingdom	
Spain	
Luxembourg	
Portugal	
Belgium	
Ireland	
Finland	
Norway	
Denmark	
France	
Greece	
Sweden	
Germany	
Italy	
Iceland	

ANNEX III

Structure of the outgoing cross-border mail markets ⁽¹⁾

	Market volume (× 1 000) ⁽²⁾	USP's share	Main competitors
Austria	8 500	[...] (*)	1. Deutsche Post AG; 2. TNT; 3. Globe Mail
Belgium	10 357	[...] (*)	1. La Poste Fr.; 2. TNT (Mailfast); 3. DHL International; 4. Royal Mail; 5. Belgian Mailhouse (A. Baeke)
Denmark	9 905	[...] (*)	1. DHL; 2. TNT; 3. IRS (International Remail System); 4. Deutsche Post AG; 5. Sweden Post
Finland	2 258	[...] (*)	1. DHL; 2. TNT; 3. UPS
France	31 900	[...] (*)	
Germany	25 997	[...] (*)	1. TNT; 2. UPS; 3. FedEx; 4. Logitrans; 5. Post Office International Services; 6. Swiss Post
Greece	3 102	[...] (*)	None
Iceland	3 310	[...] (*)	DHL
Ireland	6 110	[...] (*)	1. Royal Mail plc; 2. Deutsche Post World Net; 3. DHL; 4. TNT; 5. Transnet Ltd
Italy	11 092	[...] (*)	1. Swiss Post; 2. TNT; 3. DHL; 4. UPS; 5. Royal Mail
Luxembourg	4 821	[...] (*)	N/A
Norway	2 523	[...] (*)	1. DHL; 2. TNT
Portugal	3 979	[...] (*)	1. DHL; 2. TNT; 3. SEUR; 4. Chronopost
Spain	11 940	[...] (*)	1. DHL; 2. TNT; 3. SEUR; 4. Royal Mail; 5. IFCC
Sweden	6 361	[...] (*)	
Switzerland	17 032	[...] (*)	N/A
United Kingdom	45 271	[...] (*)	1. Deutsche Post; 2. La Poste Fr.; 3. Swiss Post; 4. Mercury International; 5. Pharos International Ltd

(*) Business secrets.

⁽¹⁾ The data contained in the table are contained in the business secrets Annex to the notification and relate to the year 2000.⁽²⁾ From REIMS II countries.

ANNEX IV

Structure of the incoming cross-border mail markets ⁽¹⁾

	Market volume (× 1 000) ⁽²⁾	USP's share	Main competitors
Austria	109 235	[...] (*)	
Belgium	119 478	[...] (*)	BD (Belgique Diffusion) Direct
Denmark	80 658	[...] (*)	1. DHL; 2. TNT; 3. Forbruger Kontaky; 4. Dansk Total Distribution; 5. Dansk Distributionscenter
Finland	34 536	[...] (*)	1. DHL; 2. TNT; 3. UPS
France	272 000	[...] (*)	
Germany	482 492	[...] (*)	1. Royal Mail; 2. TNT; 3. La Poste Fr.; 4. Swiss Post; 5. Mercury Post
Greece	22 085	[...] (*)	None
Iceland	1 870	[...] (*)	DHL
Ireland	124 700	[...] (*)	1. DHL; 2. TNT; 3. Erin Swiftpost Ltd 4. Transnet Ltd
Italy	168 491	[...] (*)	None
Luxembourg	26 912	[...] (*)	N/A
Norway	53 847	[...] (*)	None
Portugal	33 382	[...] (*)	1. DHL; 2. TNT; 3. SEUR; 4. Chronopost
Spain	134 196	[...] (*)	1. DHL; 2. SEUR; 3. UPS; 4. MRW; 5. TNT
Sweden	75 661	[...] (*)	
Switzerland	192 418	[...] (*)	N/A
United Kingdom	198 997	[...] (*)	1. DHL; 2. TNT 3. FedEx; 4. UPS; 5. Deutsche Post AG

(*) Business secrets.

⁽¹⁾ The data contained in the table are contained in the business secrets Annex to the notification and relate to the year 2000.⁽²⁾ From REIMS II countries.

ANNEX V

Non-discriminatory third-party access

Each REIMS II Party shall provide to any third-party postal operator competing with REIMS II Parties for the provision of outgoing cross-border mail services in any other REIMS II country delivery of inbound cross-border mail in its country at terminal dues and on conditions which are non-discriminatory as compared to those that the REIMS II Party offers to the REIMS II Party in the sender's country. This obligation is limited to mail from senders in REIMS II countries and to requests from third-party postal operators that:

- i) are entitled to provide outgoing cross-border mail services under the domestic rules applicable in the sender's country and provided that outbound cross-border mail has been liberalised for the mail items in question in the country in which the mail was produced and those through which it may have transited;
- ii) are competitors of the REIMS II Parties for the provision of these services; and
- iii) enter into an agreement with the delivering REIMS II Party, pursuant to which they agree to:
 - comply with REIMS operational conditions and requirements, including participation in the quality-of-service measurement systems ⁽¹⁾,
 - pay the terminal dues offered to the REIMS II Party in the sender's country plus an appropriate share of the cost of administering REIMS and the extra cost incurred by handling their mail as compared to mail from other REIMS Parties, if any,
 - pay the delivering REIMS II Party's domestic rates for mail items tendered under this obligation that fall under the exception set out below,
 - upon request, post adequate security for such payments,
 - endeavour to provide specimens of larger quantities of business mail items,
 - respect the reserved area of the REIMS II Party and provide all their incoming reserved mail to be delivered by the REIMS II Party.

This obligation does not apply to domestic mail. Furthermore, this obligation shall not apply to mail items that senders residing in the country of the delivering REIMS II Party post or cause to be posted in a foreign country with the object of benefiting from lower rates available through this obligation. Within the limits of the present and future case-law of the Court of Justice, the latter exception to the obligation shall apply both to mail items made up in the sender's country of residence and then carried across the frontier and to mail items made up in a foreign country.

The same conditions regarding third-party access apply to any other special arrangements on tariffs and rates to be applied between REIMS II Parties contained in the Agreement. This is in particular true as regards conditions of access to Level 3 rates and for delivery of cross-border direct mail in accordance with the REIMS II IDM Agreement. Such rates must be made available to third-party operators competing with REIMS II Parties for the provision of outgoing cross-border mail services in any other REIMS II country, on conditions which are non-discriminatory as compared to those that the delivering REIMS II Party offers to the REIMS II Party in the sender's country.

⁽¹⁾ Currently UNEX and Diagnostic.