JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

9 September 2009 *

In Case T-301/04,

Clearstream Banking AG, established in Frankfurt am Main (Germany),

Clearstream International SA, established in Luxembourg (Luxembourg),

represented by H. Satzky and B. Maassen, lawyers,

applicants,

* Language of the case: German.

Commission of the European Communities, represented initially by T. Christoforou, A. Nijenhuis and M. Schneider, and subsequently by A. Nijenhuis and R. Sauer, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision C(2004) 1958 final of 2 June 2004 relating to a proceeding under Article 82 [EC] (Case COMP/38.096 — Clearstream (Clearing and Settlement)),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, M. Prek (Rapporteur) and V.M. Ciucă, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 8 October 2008,

gives the following

Judgment

Facts

1 The second applicant, Clearstream International SA ('CI'), which has its principal office in Luxembourg, is a holding company and the parent company of the first applicant, Clearstream Banking AG ('CBF'), established in Frankfurt am Main (Germany), and of Clearstream Banking Luxembourg SA ('CBL'). The Clearstream group provides clearing, settlement and custody services in relation to securities. CBL and Euroclear Bank SA ('EB'), established in Brussels (Belgium), are the only international central securities depositories currently operating in the European Union. CBF is the central securities depository in Germany and currently the only bank having the status of a securities depository bank (*Wertpapiersammelbank*).

2 On 22 March 2001, the Commission of the European Communities launched an ex officio investigation into the clearing and settlement services by sending a first series of requests for information to a number of bodies, followed by additional requests focused on possible abusive conduct by CI and CBF.

3 On 28 March 2003, the Commission sent a statement of objections to the applicants, to which they responded on 30 May 2003. The hearing took place on 24 July 2003. As an interested third party, EB gave its opinion on the definition of the market at the hearing and in response to a Commission request for information.

4 The applicants were given access to the Commission's file on 14 April and 3 November 2003. By letter of 17 November 2003, the Commission drew the applicants' attention to the manner in which it intended to use certain items included in the file after access had been given to it on 14 April 2003, and the information concerning the costs provided by the applicants following the July hearing, and invited them to submit their comments. The applicants replied by letter of 1 December 2003.

Contested decision

5 On 2 June 2004, the Commission adopted Decision C(2004) 1958 final relating to a proceeding under Article 82 [EC] (Case COMP/38.096 — Clearstream (Clearing and Settlement)) ('the contested decision'). In that decision, it claims that the applicants infringed Article 82 EC, first, by refusing to supply primary clearing and settlement services to EB and by discriminating against it and, second, by applying discriminatory prices to EB.

6 The contested decision contains general information on clearing and settlement of securities transactions, the main elements of which are set out below.

7 The processes involved in the buying and selling of securities necessitate permanent monitoring of the ownership of the securities concerned in order to ensure legal certainty where ownership is transferred upon purchase or sale and to ensure ongoing service of the instrument. For that reason, trading of a security must be followed by a certain number of additional steps.

8 Clearing is the process which occurs between trading and settlement. It ensures that the seller and the buyer have agreed on an identical transaction and that the seller is entitled

to sell the securities in question. Settlement is the final transfer of the securities and funds between the buyer and the seller, as well as the inclusion of the corresponding account entries.

9 There are three types of providers of clearing and settlement services:

— the central securities depository (CSD) is an entity which holds and administers securities and which enables securities transactions, such as the transfer of securities between two parties, to be processed by book entry; in its home country, the CSD provides clearing and settlement services in relation to transactions in securities in its safekeeping (final custody); it may also offer services as an intermediary in relation to cross-border clearing and settlement transactions where the place of primary deposit of securities is in another country;

— the international central securities depository (ICSD) is an institution whose core business is clearing and settlement in an international environment; it carries out clearing and settlement of international securities or of cross-border transactions in domestic securities;

— banks, as intermediaries, providing their customers with services relating to transactions in securities, those transactions being, in the European Union, mainly domestic.

10 All the securities must be physically or electronically deposited with one institution for safe custody there.

11 In Germany, the Depotgesetz (German law on the custody of securities) provides for two types of final custody of securities: collective custody and individual custody. In the case of collective custody, fungible and technically suitable securities of the same type, deposited by several depositing parties and/or owners, are kept in a single collective holding.

12 For the purposes of the contested decision, and in particular the definition of the market, the Commission makes a distinction between 'primary' and 'secondary' clearing and settlement services.

13 Primary clearing and settlement are, according to the contested decision, carried out by the same entity with which the securities are kept in final custody and whenever a change in the holding occurs on the securities accounts held by it.

14 Secondary clearing and settlement are, according to the contested decision, carried out by intermediaries, that is operators other than the entity in which the securities are held in custody (in the present case, the banks, the ICSDs and the non-German CSDs).

15 Secondary clearing and settlement encompass either internalised transactions, that is where a transaction has taken place between two customers of the same intermediary, making it possible for the transactions to be carried out in the books of that intermediary without any corresponding entries being made at CSD level, or mirror transactions by which the financial intermediaries make the account entries necessary to reflect the result of the clearing and settlement carried out by the CSD in their customers' accounts. In the second case, the intermediaries may provide clearing and settlement services to their customers only if there is a contractual link with the CSD system.

16 Depending on need, access by the intermediary depositories to the central depository can be direct, as a member or a customer, or indirect, through an intermediary. In the present case, the link between CBF and its customers is established by the CBF settlement system, constituted by Cascade and Cascade RS. Cascade is a computerised system which allows for the entry and matching of settlement instructions and is also the settlement platform for such instructions. Cascade RS (Registered Shares) is a subsystem of Cascade which allows CBF's customers to enter the specific data required by the registration and deregistration process for registered shares. There are two types of access to Cascade and Cascade RS: manual access (also called 'online') and completely automated access by means of file transfer.

17 According to the contested decision (recitals 196 to 198), the relevant geographic market is Germany as the securities issued under German law are placed in final custody in Germany.

18 The Commission states that, under Paragraph 5 of the Depotgesetz, all the securities held in collective custody in Germany must be held in a recognised bank securities depository and that currently the only depository of this kind in Germany is CBF. Explaining that collective custody is the most common form of custody of securities in Germany, it notes that according to the applicants themselves 90% of existing German securities are deposited with CBF (recitals 23 to 25 of the contested decision).

19 With regard to the definition of the relevant market in this case, the Commission states (recitals 199 to 200 of the contested decision) that for intermediaries which require direct access to CBF, indirect access to CBF is not a substitute solution. The provision by CBF of primary clearing and settlement services to customers who have accepted the general conditions occurs on a market separate from the provision of the same services to CSDs and ICSDs. For intermediaries which require primary clearing and settlement services in order to be able efficiently to provide secondary clearing and settlement services, secondary clearing and settlement are not a valid economic alternative. For those intermediaries, primary clearing and settlement services provided by entities other than CBF are not a valid alternative. It concludes that there is no substitutability

either on the demand side or on the supply side, since the intermediaries cannot easily opt for another provider or for indirect access to the services in question and no other company would be in a position, in the near future, to provide the same services.

20 Consequently, the Commission defines the relevant market as that of the provision by CBF to intermediaries such as CSDs and ICSDs of primary clearing and settlement services for securities issued under German law (recital 201 of the contested decision).

21 The Commission concludes that CBF has a dominant position on the relevant market, since primary clearing and settlement of transactions concerning securities issued and kept in collective custody under German law are carried out by CBF, as the only securities depository bank in Germany. According to the Commission, that position of CBF on the German market was not, at the material time, constrained by any effective competition. In addition, on account of numerous major obstacles to new market entries, the possibility of new entries exercising competitive constraints on CBF in the foreseeable future can, according to it, be excluded (recitals 206, 208 and 215 of the contested decision).

22 According to the contested decision (recitals 154, 216, 301 and 335), the applicants' abusive conduct took the form of:

— refusing to supply primary clearing and settlement services for registered shares by denying direct access to Cascade RS, and discriminating against EB in relation to the supply of those services; the refusal to provide direct access to Cascade RS and

unjustified discrimination in that regard are not two separate infringements, but rather two manifestations of the same behaviour, as the unjustified discrimination exists because, for almost two years, the applicants refused to provide EB with the same services as those they supplied rapidly to other comparable customers in equivalent situations;

— applying discriminatory prices to EB for primary clearing and settlement services, by charging them, for equivalent services, prices higher than those charged to other comparable customers (the CSDs and ICSDs which still carry out cross-border transactions), without an objective justification.

23 The Commission concludes that the refusal to supply EB with direct access to primary clearing and settlement services for registered shares harms innovation and competition in the provision of cross-border secondary clearing and settlement services and ultimately consumers within the single market (recitals 228 to 237 of the contested decision).

24 The contested decision also states (recitals 338 and 339) that Germany is a substantial part of the Community. In addition, trade between Member States is affected as a result of the cross-border nature of the provision by CBF to EB of primary clearing and settlement services for securities held in collective custody in Germany. The large volume of transactions conducted by EB in German securities demonstrates that there is a substantial effect on trade between Member States.

25 The operative part of the contested decision reads as follows:

'*Article 1*

[CBF] and [CI] have infringed Article 82 [EC] by:

(a) refusing to supply primary clearing and settlement services for registered shares to [EB] and its predecessor from 3 December 1999 to 19 November 2001, in an unjustified manner and for an unreasonable period of time, and by discriminating against [EB] and its predecessor during the same period of time regarding the provision of primary clearing and settlement services for registered shares;

(b) applying discriminatory prices to [EB] and its predecessor for the primary clearing and settlement services provided to them, between 1 January 1997 and 1 July 1999 in the case of [CBF], and between 1 July 1999 and 1 January 2002 in the case of [CI] and [CBF].

Article 2

[CBF] and [CI] shall refrain in future from repeating any act or conduct contrary to Article 82 [EC], as described in Article 1 of this decision.

Article 3

This decision is addressed to:

1. [CBF]

2. [CI]

…'

Procedure and forms of order sought by the parties

26 By application lodged at the Registry of the Court of First Instance on 28 July 2004, the applicants brought the present action.

27 On 26 October 2005, the applicants produced a letter with an annex containing the brochure *Internalisation of Settlement*. On 10 November 2005, the Court decided to place that letter in the case-file. On 29 November 2005, the Commission submitted its observations on that decision of the Court. On 14 December 2005, the Court decided to place those observations in the case-file.

28 Since the composition of the Chambers of the Court had been changed, the Judge-Rapporteur was assigned to the Fifth Chamber, to which the present case was, accordingly, allocated.

29 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure.

30 The oral arguments of the parties and their responses to the questions put to them by the Court were heard at the oral hearing on 8 October 2008.

31 The applicants claim that the Court should:

— annul the contested decision in so far as it finds that there has been abuse of a dominant market position and in so far as it imposes an obligation on them to discontinue it;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

33 The applicants base their action on four pleas in law. First, they dispute the definition of the relevant market and the existence of a dominant position. Second, they deny that their conduct was abusive, both with regard to the refusal to provide services and the prices applied to EB. Third, they claim that CBF's unlawful behaviour cannot be imputed to CI. Fourth, they challenge the lawfulness of the contested decision on account of its vagueness.

1. *The first plea in law, alleging an erroneous definition of the relevant market in services and that the applicants did not hold a dominant position*

Arguments of the parties

34 The applicants and the Commission agree that the relevant geographic market is Germany.

35 However, according to the applicants, the definition of the relevant market stems from the fact that the securities deposited — and not the securities issued, as stated in the contested decision — under German law are deposited in Germany.

36 With regard to the relevant market in services, the applicants contest the distinction made by the Commission between primary and secondary post-transaction securities processing services. The definition of the relevant market should be carried out solely on the basis of the service which is offered on the market, namely the transfer of the right of ownership of the securities sold. That post-transaction processing is carried out only once and for the benefit of the parties to the transaction alone. Even where CBF carries out that processing, it does not provide 'primary' services, but only existing clearing and settlement services. The Commission wrongly considered that, in that case, the intermediary depositories must first obtain a service from CBF in order to be able to provide that service again themselves. In reality, they merely send CBF the instructions and the remuneration of the parties to the transaction and enter the processing carried out by it in their books.

37 According to the applicants, when defining the relevant market the contested decision wrongly proceeds from the perspective of the intermediary depositories. In reality, those requesting the services in question are sellers and buyers of securities who, because they do not hold those securities directly, request the service consisting of transfer of ownership. Intermediary depositories seek post-transaction processing services only if they themselves were parties to a securities transaction, but in that case they do not function as intermediary depositories. In addition, adopting the perspective of the intermediary depositories would contradict some of the Commission's earlier decisions.

38 The applicants dispute that the market comprises a vertical supply chain in which the processing of the transaction by CBF and by the suppliers of secondary services takes place at two different levels. In its response, the Commission also contradicts itself on that point. The applicants maintain that there is a single market in clearing and settlement services for German securities, at one level only, on which CBF competes with EB and other undertakings for the same final customers.

39 According to the applicants, the providers of clearing and settlement services are all direct (final depository) or indirect (intermediary depository) holders of the securities concerned, who may transfer ownership. Since the nature and content of their services

are identical, it is irrelevant whether persons seeking those services approach the final depository or intermediary depositories. They tend to approach intermediary depositories even more often than the final depository. Consequently, CBF is not the only provider on the services market in question, but is in competition with all the intermediary depositories of those securities, a fact also admitted, at least in principle, by the Commission.

40 In that context, CBF and the various intermediary depositories compete with one another, but the latter are also customers of CBF. Access by the intermediary depositories to the final depository, entailing the opening of an account and the establishment of lines of communication, is the basis for both a vertical and a horizontal relationship of competition between the customers. The possibility that certain relationships between the undertakings may have the effect of creating competition between them has already been admitted in an earlier Commission decision.

41 The applicants claim that, in Germany, the Depotgesetz requires only that collective custody of collective certificates — and not, as the Commission contends, collective custody in general — take place in a securities depository bank, that is to say, the CBF. In addition, the function of the CSD in relation to such collective custody of collective certificates is one of supervision and concerns only the link between the shares of the collective holding and their owners in the context of custody. Even for that type of securities, and where the intermediary depository satisfies the conditions in relation to them, the clearing and settlement services are provided only by the intermediary depository, without any involvement by CBF, which continues to be the direct holder of the securities. CBF's monopoly of custody in respect of the collective securities placed in collective custody does not imply any monopoly over the post-transaction processing of securities transactions. Moreover, the applicants have never alleged, as maintained by the Commission, that the intermediary depositories depend on the 'assistance' of the final depository for the transfer of ownership of the shares of the collective securities.

42 The Commission did not take into account the possibility of internal processing, involving settlement by an intermediary depository, based if necessary on the opening of new accounts with it. Owing to the increase in that type of processing, the number of CBF customers has been falling for a number of years. In that regard, the applicants

refer to the brochure *Internalisation of Settlement* which explains the workings and importance of that type of processing. They add that the legislation concerning the Frankfurt am Main Stock Exchange, cited by the Commission as protecting CBF against that type of competition, has been amended and that it is, in any case, not applicable to the private trade in securities at issue in the present case.

43 The applicants claim that, as there is no distinct market in primary post-transaction processing services, the additional distinction made by the Commission between, first, customers who have agreed to the general terms and conditions, also being intermediary depositories, and, second, the CSDs and the ICSDs, which require direct access to CBF, is irrelevant. Furthermore, such a distinction cannot be derived from Case 22/78 *Hugin Kassaregister and Hugin Cash Registers* v *Commission* [1979] ECR 1869.

44 In that regard, first, the applicants claim that CBF does not provide post-transaction processing services to the three categories of customers mentioned above. Second, they argue that, as intermediary depositories, those three categories obtain from CBF essentially the same services, but also compete with it concerning clearing and settlement. That is what the Commission itself confirmed in its communication of 28 April 2004 to the Council and the European Parliament, 'Clearing and settlement in the European Union — The way forward' (COM(2004) 312 final). By contrast, the manner in which those services are provided, and consequently their costs, can differ, in the light of different customer requirements. That explains why direct access to CBF is more important for some customers than others, but does not permit the conclusion that those customers belong to different markets.

45 Finally, the Commission has not reached any finding as to the competitive relationships which in fact exist between final and intermediary depositories in the field of clearing and settlement services, as suggested by the applicants, EB and third parties.

46 The Commission contends that those arguments should be rejected.

Findings of the Court

47 It should be noted, at the outset, that in so far as the definition of the product market involves complex economic assessments on the part of the Commission, it is subject to only limited review by the Community judicature. However, this does not prevent the Community judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which contains all the relevant data that must be taken into consideration in appraising a complex situation and is capable of substantiating the conclusions drawn from it (see Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 482, and the case-law cited).

48 In that regard, according to settled case-law, for the purposes of investigating the possibly dominant position of an undertaking on a given product market, the possibilities of competition must be judged in the context of the market comprising the totality of the products or services which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products or services. Moreover, since the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and to behave to an appreciable extent independently of its competitors and its customers, an examination to that end cannot be limited solely to the objective characteristics of the relevant services, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 37; Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 62; and Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraph 91).

49 The concept of the relevant market implies that there can be effective competition between the products or services which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products or services forming part of the same market in so far as a specific use of such products or services is concerned (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 28).

50 In order to arrive at the disputed definition of the market in services in the present case, the Commission took into account the substitutability of the services on the demand side, on the one hand, and the supply side, on the other. In that regard, it is apparent from the Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5, paragraph 7) that '[a] relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. In addition, as is stated in paragraph 20 of that notice, supply-side substitutability may also be taken into account when defining the relevant market in those situations where that substitutability has effects equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

51 The Commission begins its analysis with the question, which it regards as conclusive, of the possible demand-side substitutability of the services, that is by the intermediary depositories such as the CSDs and ICSDs. The Commission carried out several tests of substitutability by analysing the various possibilities on the relevant market in services. In that context, it took into account the point of view of the various market participants and that of the applicants.

52 First, the applicants claim that the persons seeking post-transaction processing services are the sellers and buyers of securities.

53 That argument is not persuasive. It is apparent from the contested decision (recital 122) that, according to the applicants themselves, CBF has three different classes of customer for settlement services, that is customers who have agreed to the general terms and conditions ('general terms and conditions customers', mainly the banks), the non-German CSDs and the ICSDs. The applicants state, moreover, in the application, that CBF has as customers only lending agencies and other financial intermediaries. It follows that, as the Commission points out, there is no contractual relationship and therefore no legal relationship between the parties to the transaction and CBF. The contractual link is only between CBF and the intermediary depository and between the latter and its customer, which is party to the transaction. The clearing and settlement services provided by CBF to the intermediary depositories are provided in return for a separate remuneration and enable the latter to comply with their own obligations vis-à-vis their customers.

54 The Court rejects the applicants' argument that there is a general market in clearing and settlement services, in which those seeking services are the parties to the transaction (including the intermediary depositories when they act on their own behalf). As is pointed out in recital 34 of the contested decision, the parties to the transaction are persons seeking services from intermediaries which hold the securities in their name and on behalf of their customers with the final depository. Moreover, with regard to the majority of securities issued under German law and apart from the possibilities of internalisation, the intermediaries cannot provide full clearing and settlement services, since they are not the final holders of those securities. By contrast, CBF cannot provide its services to those same parties because they do not hold a securities account with it. By acting on behalf of parties to the transaction, the intermediary depositories are carrying on an independent business of providing services (see, to that effect, *British Airways* v *Commission*, paragraph 48 above, paragraph 93).

55 The applicants' claim that viewing matters from the point of view of the intermediary depositories conflicts with some earlier Commission decisions is irrelevant. The present case can be distinguished from the facts of the cases relied upon by the applicants. In any case, it must be noted that the Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other undertakings, other product and service markets or other geographic markets at different times (Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission* [2003] ECR II-4251, paragraph 191). Thus,

the applicants are not entitled to call the Commission's findings into question on the ground that they differ from those made previously in a different case, even where the markets at issue in the two cases are similar, or even identical (Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 118; see also, to that effect, Case T-282/06 *Sun Chemical Group and Others* v *Commission* [2007] ECR II-2149, paragraph 88).

56 In addition, the applicants contest the Commission's finding that the provision by CBF of primary clearing and settlement services to general terms and conditions customers, which are also intermediary depositories, constitutes a market separate from that of the provision of services to CSDs and ICSDs (recital 149 et seq. of the contested decision). On the basis of information communicated by the applicants concerning the nature of the services provided, their cost, the basic agreements and the actual demand emanating from the categories of customer, the Commission could reasonably arrive at that conclusion. The Commission thus found that, if the services provided to that category of customer represented a valid alternative for the CSDs and ICSDs, they would normally have recourse to those services, given the much lower price charged to general terms and conditions customers. Moreover, in contrast to the ICSDs and the non-German CSDs, many general terms and conditions customers are banks located in Germany dealing with domestic transactions. The applicants do not provide any evidence capable of invalidating the Commission's assessment of that question. It should also be held that, while, in the contested decision, the Commission indeed refers to *Hugin Kassaregister and Hugin Cash Registers* v *Commission*, paragraph 43 above, it does not do so in the context of the distinction between general terms and conditions customers and the CSDs and ICSDs. The applicants' latter argument is therefore irrelevant.

57 The Commission was thus entitled to find that intermediary depositories such as CSDs and ICSDs were seeking the clearing and settlement services offered by CBF.

58 Second, the applicants criticise the Commission's analysis that there is no supply-side substitutability since no company other than CBF will be in a position, in the near

future, to provide primary clearing and settlement services of the kind required by intermediaries such as CSDs or ICSDs for trade in securities issued under German law and kept in custody by it (recital 200 of the contested decision). They maintain that the market is constituted, on the supply side, by all the custodians, direct (final depository) or indirect (intermediate depository) of the securities concerned which may transfer ownership, and with which CBF is therefore in competition.

59 In that regard, the applicants argue that it is not collective safe custody in general which must take place in a securities depository bank, but only the collective custody of collective documents which incorporate a number of rights that are not in material form but exist only as virtual parts of the whole. In that context, CBF's custody monopoly does not imply any monopoly of post-transaction securities processing.

60 That argument must be rejected. First, the distinction between collective documents and individual securities does not alter the fact that CBF is, according to its own statements, the depository for 90% of all existing German securities (recital 170 of the contested decision). In addition, in the application, the applicants confirm that issuers mainly issue their securities in the form of collective documents. Second, as the Commission found in recital 137 of the contested decision, even if the decision concerns only clearing and settlement services, they cannot be entirely separated from custody, since clearing and settlement can take place only in relation to securities that are kept in custody. It should be pointed out, furthermore, that the applicants had themselves confirmed the link between CBF's custody monopoly and rapid and secure settlement. Thus, the applicants stated that, '[w]here intermediary custodians — for example financial intermediaries but also ICSDs, custodian banks etc. — [were] unable to perform clearing and settlement, it … indeed [had to] be performed by the final custodian [the CSD]' and that '[a]ll German fungible securities — representing more than 90% of existing German securities — [were] deposited in the vaults of CBF, allowing prompt and secure book-entry settlement' (recitals 165 and 170 of the contested decision).

61 In addition, the applicants' argument that the market must be defined on the basis of the fact that the securities deposited, and not those issued, under German law are deposited in Germany is contrary to their statements made during the administrative procedure. It follows in particular from recitals 23 and 197 of the contested decision that, according to their reply of 30 May 2003 to the statement of objections, securities issued under German law are, in practice, deposited in Germany, which is not the case with non-German securities and that, 'in practice, collective custody is the most common form of custody in Germany'. The Commission was, consequently, correct in holding that the relevant market concerned securities issued under German law.

62 With regard to the foregoing, the Commission was entitled to hold, also with regard to the supply side, that there was no substitutability in respect of the services in question. With the exception of internal processing, therefore, the full service of clearing and settlement requires the transaction to be entered with the final depository of the securities, in this case CBF, with the result that no other company in Germany can currently compete in relation to that specific stage of the provision of the service.

63 Admittedly, as the Commission found in recital 312 of the contested decision, CBF, when operating as an intermediary, can find itself in competition with other intermediary depositories in relation to a cross-border transaction in securities issued under a law other than German law. That is, moreover, in conformity with the potential competitive situation on the market in cross-border settlement services as described in the communication COM(2004) 312 final (pp. 5 and 6). However, the market concerned by the contested decision is that in securities issued under German law, the vast majority of which are held by CBF in collective custody as a securities depository bank. Thus, in their reply to the statement of objections of 30 May 2003, reproduced in recital 30 of the contested decision, the applicants stated:

'Only the [securities depository bank] can carry out the transfer of title. Hence the mere possession for third parties is not sufficient; the cooperation of a [securities depository

bank] as final custodian in the clearing and settlement by a subcustodian of instruments eligible for central custody goes beyond this.'

64 Moreover, it should be recalled that, although the existence of a competitive relationship between two services does not presuppose complete interchangeability for a specific purpose, it is not a precondition for a finding that a dominant position exists in the case of a given service that there should be a complete absence of competition from other partially interchangeable services as long as such competition does not affect the undertaking's ability to influence appreciably the conditions in which that competition may be exerted or at any rate to conduct itself to a large extent without having to take account of that competition and without suffering any adverse effects as a result of its attitude (*Michelin* v *Commission*, paragraph 48 above, paragraph 48).

65 In the present case, the services provided by CBF are part of a specific demand and supply situation. The intermediary depositories are unable to provide their services if they cannot make use of CBF's services. It follows from the case-law that a sub-market which has specific characteristics from the point of view of demand and supply and which offers products which occupy an essential and non-interchangeable place in the more general market of which it forms part must be considered to be a distinct product market (see, to that effect, Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraphs 55 and 56).

66 In that context, it is sufficient if a potential or even a hypothetical market could be identified, which is the case where the products or services are indispensable to the conduct of a particular business activity and where there is an actual demand for them on the part of undertakings which seek to carry on that business activity. It is therefore decisive that two different stages of production can be identified and that they are interconnected in that the upstream product is indispensable for supply of the downstream product (see, to that effect, Case C-418/01 *IMS Health* [2004] ECR I-5039, paragraphs 43 to 45, and *Microsoft* v *Commission*, paragraph 47 above, paragraph 335).

67 It follows from the above considerations that the applicants have not established that the Commission's conclusion that there is neither demand-side nor supply-side substitutability (recital 200 of the contested decision) was manifestly erroneous.

68 Since the Commission did not make a manifest error in the identification of the persons seeking and providing services, the distinction between primary and secondary clearing and settlement services appears justified. Furthermore, the applicants do not produce any evidence capable of invalidating the assessment made in this case by the Commission, based on information obtained directly from the market participants and from the applicants.

69 In that regard, the applicants' arguments based on internalised processing should be rejected. Internalised processing is a service performed by intermediary depositories. In a market divided into primary and secondary clearing and settlement services, that type of processing forms part of secondary services and, as such, is not part of the relevant market and is not the subject of the contested decision. It is apparent from recitals 35 and 166 of the contested decision that the market participants regard internalised transactions as exceptional cases arising from circumstances over which the intermediary has no control and that there is no possibility for the investor to choose between those two categories of services. The Commission correctly concludes that internalised services are not in general a valid substitute for primary clearing and settlement services (recitals 164 to 168 of the contested decision).

70 With regard to the brochure *Internalisation of Settlement* produced by the applicants, it does not contain any evidence supporting their argument. On the contrary, it confirms the findings contained in the contested decision concerning the conditions which must be satisfied by internalised transactions and contains an annex with the information concerning the possible restrictions on that type of processing in various countries, indicating that in Germany the Börsenordnung (legislation governing the Frankfurt am Main Stock Exchange) requires that clearing and settlement services are provided by a CSD and that internalised processing remains an exception. In any case, as the

Commission points out, that brochure does not specifically concern the situation in Germany and relates to a period of time after that in question in the contested decision.

71 In addition, the applicants' argument that Paragraph 16(2) of the Börsenordnung, cited by the Commission in the contested decision (recital 27), has been amended, and that, in any case, it does not apply to the private trading of securities at issue in the present case, must be rejected. In fact, the parties agree that that amendment entered into force after the period at issue in the contested decision. In addition, that reference in the contested decision served only as an example of the stock exchange rules which strengthen CBF's position with regard to stock exchange transactions in general.

72 Third, the applicants' argument that the Commission did not make any finding with regard to the actual competitive relationships which exist between final depositories and intermediaries in relation to clearing and settlement services must be rejected. Those relationships are examined by the Commission throughout its economic analysis and in particular, having regard to the above considerations, in the part concerning the question of supply-side and demand-side substitutability. Furthermore, as it stated itself, the Commission, in recitals 176 to 189 of the contested decision, considered EB's arguments and the Bundesbank's brief presentation at the hearing.

73 Having regard to all the foregoing, it must be held that the applicants have failed to establish that the Commission made a manifest error of assessment when holding that the relevant market was the provision by CBF, to intermediaries such as the CSDs and ICSDs, of primary clearing and settlement services in respect of securities issued under German law, over which CBF has a de facto monopoly and is therefore an indispensable commercial partner.

74 Consequently, the first plea in law must be rejected.

2. *The second plea in law, alleging that there was no abuse of a dominant position*

75 There are two parts to this plea in law. First, the applicants claim that they did not abusively deny EB access to Cascade RS, and that there was no abusive discrimination against EB. Second, they claim that the prices applied to EB were not discriminatory.

The first part, alleging that there was no abusive refusal of access or abusive discrimination by the applicants

Arguments of the parties

76 The applicants deny having abusively refused EB access to Cascade RS. They maintain that the preparation and negotiation of the granting of access had been particularly difficult for reasons relating to EB. First of all, between August 1999 and January 2000, only preliminary discussions took place, EB having requested access only on 28 January 2000. Next, between February and November 2000, the grant of access on the date envisaged was missed because EB was not prepared. Finally, between December 2000 and November 2001, difficulties were encountered in the negotiations on the grant of that access because of the reorganisation of the business and economic relations between the applicants and EB.

77 The applicants consider that the Commission's position is based on a misunderstanding of the system of processing of registered shares by CBF. Thus, the contested decision does not refer to one of the two settlement functions performed by Cascade RS. Also,

the Commission forgets that there are two separate types of access to Cascade and Cascade RS which require different data — settlement data must be transferred to Cascade and shareholder data to Cascade RS. The applicants add that, in those two cases, that transfer can be carried out manually or by automated means and that it is for the intermediary depository concerned to choose the type of access to be set up.

78 It follows clearly from the letters of 3 August and 29 October 1999 and of 31 January 2000, referred to by the Commission, that EB wanted to transfer the settlement data relating to the registered shares, by means of access to Cascade (Registered Shares), in an entirely automated fashion, and the shareholder data, by means of access to Cascade RS, manually, even if manual access to Cascade had also been proposed and could have been granted immediately. The Commission did not distinguish between those two types of access and also made no distinction between manual access to Cascade RS and its additional 'Power of Attorney' function, which does not assume any transfer of shareholder data by the user, but involves automated registration by Cascade RS itself.

79 The applicants claim that they had already relied on those arguments in the administrative procedure, in particular in the documents dated 1 December 2003, extracts from which are reproduced in the annex to the reply, and of 30 May 2003. The letters referred to also corroborate the applicants' argument that it would have been possible for EB, already before March 2002, to obtain automated access to Cascade RS. They specify, furthermore, that the 'Power of Attorney' function and automated registration are not synonyms for access for the purposes of transferring shareholder data.

80 Combining the two types of access requested by EB is one of the reasons for the technical complexity of the preparation of EB's access to CBF's system of processing. Entirely automated access would require important changes in computer systems, detailed planning and numerous series of tests. For that reason and in order to enable intermediary depositories to plan and prepare, automated access is set up and modified

by CBF only on specific launch dates on two occasions each year. EB sought launch dates of April or September 2000.

81 It also follows from the communications between EB and CBF that it was because of EB's lack of preparation that the access in question was not possible on the two intended launch dates. In that regard, the applicants maintain that even the Commission recognised that EB had concluded that, after April 2000, the nearest possible date for which CBF could grant access was September 2000. EB therefore wished to postpone not only the form of automation called 'RTS' (real-time settlement), but also the setting-up of entirely automated access for the transfer of the settlement data so that they could be set up together. In September 2000, CBF carried out all the tests and preparations (in particular, the training of EB staff on 11 September 2000 — the relevant documentation relating to that training is annexed to the reply) and granted and made available access to EB for five working days in accordance with its request, as EB also acknowledged. According to the applicants, that grant of access was not followed up because EB failed to complete the necessary preparations on time. The exceptional grant of access planned for 30 October 2000 was also missed for the same reason and EB postponed it until 1 December 2000.

82 According to the applicants, the Commission also fails to take into account the fact that the CBF practice during the period of time in question of having the name of the acquirer of the registered share (economic owner) entered in the issuer's share register instead of that of the nominee or mandated shareholder (legal owner/nominee) presented serious problems for EB. That is clear from the various communications referred to by the Commission and from EB's behaviour after the grant of access, when it did not make use of manual access to Cascade RS and did not transfer the shareholder data.

83 In support of the arguments concerning the two types of access which EB requested from CBF, its refusal to have the registered shares registered under the name of the economic owner and EB's responsibility for the failure to grant access, the applicants proposed as evidence the testimony of the head of CBF's Clearing and Settlement Department at the material time.

84 Second, the applicants maintain that, between December 2000 and November 2001, negotiation of the grant of access was linked to the negotiation by CBF and EB of other questions. In particular, CBF postponed EB's access from October to November 2001 in response to the rejection of its request for access to Euroclear France in respect of all the French securities. CBF acted on a 'quid pro quo' basis and not in an abusive manner. In their response to the Commission's request for information, the applicants did not mention that problem because the question asked concerned the CSDs and not the ICSDs. Furthermore, the Commission's arguments on that point are contradictory.

85 Contrary to what is stated by the Commission, questions concerning remuneration and the provision of further special services are closely related to EB's access to the CBF system and were perceived as such by the two companies. In an internal memorandum of 15 March 2001, relied on by the applicants and annexed by the Commission to its defence, EB even suggested access should be used solely as an argument in relation to price negotiations. The Commission also recognised that, in the negotiations, EB was pursuing several goals at the same time. In that context, EB opposed only the inclusion of the question of amendment of the Bridge agreement.

86 EB wanted a complete reorganisation of the complex and reciprocal economic relations between CBF and itself. The applicants base that argument on the documents concerning the meetings between the two companies of 23 October 2000 and 21 March 2001. They claim, in that regard, that the Commission does not contest the content of the e-mail relating to the first meeting. In addition, the renegotiation was dictated by commercial considerations and was therefore objectively justified. The applicants also claim that the discussions on all those questions were opened at the same time. In those circumstances, they cannot be criticised for having wanted to assert their own interests during those discussions or for having procrastinated with regard to EB.

87 The applicants maintain that there was no abuse in the form of a barrier to entry — no such barrier was intended and none took effect. First, even if they had delayed the grant of access that would not justify a finding of an abuse within the meaning of Article 82 EC since they had not pursued an anti-competitive goal. Thus, the Commission does not

put forward any evidence to justify its conclusion that the applicants postponed the grant of access in order to prevent a competitor of CBL from providing its services efficiently. In reality, CBL obtained the same access some time later than EB, in March 2002.

88 Second, with regard to the effect of the barrier to entry, the applicants consider that there is an abuse of a dominant position only where the competitive opportunities of the undertaking allegedly subject to the barrier to entry were or may be substantially affected. A delay in the adoption of a measure is only equivalent to a refusal to adopt if it has the same restrictive effect. It must at least be capable of preventing or hindering access by competitors to the dominated market or of eliminating them from the market. In addition, the reference in the contested decision to earlier Commission decisions is not relevant since, unlike in the present case, they are based on that special restrictive effect. In the light of those criteria, the applicants did not act abusively within the meaning of Article 82 EC.

89 The Commission has not proved that EB has suffered such a competitive disadvantage. In reality, EB and CBL have indirect access to CSDs in Europe in the majority of cases. The intermediary function operates even at several levels, those levels being, at least potentially, in competition with one another. Indirect access does not manifestly constitute a competitive disadvantage. Even the price difference does not affect the decision of an intermediary depository to opt for direct or indirect access to CBF.

90 In addition, the Commission wrongly based its argument on the importance of the registered shares in Germany, without taking into account the importance of German registered shares for EB. It did not take into account the fact that EB carries out clearing and settlement only in commercial transactions concerning privately traded securities and above all in the context of trading in bonds. In that type of business and in particular with regard to EB's activities, German registered shares are of almost no practical importance and are not an indispensable part of the full clearing and settlement service which it proposes. Admittedly, the share of EB transactions with CBF has increased since EB became able at the end of 2002 to have the legal owners registered. However,

the number of registered shares of EB deposited with CBF, which was around 1% in 2002, fell to 0.24% in 2004. In addition, the figure of USD 9.2 million savings on transaction costs for registered shares which EB could have made by switching to direct access is unlikely.

91 Finally, the applicants claim that EB did not suffer any discrimination at the hands of CBF. They maintain that the central Austrian and French depositories obtained their access more swiftly because they wanted manual access which could be granted at any time and relatively quickly. With regard to CBL, it had already carried out all the necessary technical preparations when access was granted. In that regard, the applicants add that, in order to compare the time which elapsed between the request for and grant of access, it is not the comparability of the services provided which must be taken into account but only the type of access, the setting-up dates which derive from that and the possible technical problems which may arise.

92 The Commission contests those arguments and adheres to the arguments stated in the contested decision.

Findings of the Court

93 It should be observed, first, that it follows from consistent case-law that, although as a general rule the Community judicature undertakes a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, the review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers (*Microsoft* v *Commission*, paragraph 47 above, paragraph 87, and the case-law cited).

94 Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Court cannot substitute its own assessment of matters of fact for the Commission's (see *Microsoft* v *Commission*, paragraph 47 above, paragraph 88, and the case-law cited).

95 However, while the Community judicature recognises that the Commission has a margin of appreciation in economic or technical matters, that does not mean that it must decline to review the Commission's interpretation of economic or technical data. The Community judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (see *Microsoft* v *Commission*, paragraph 47 above, paragraph 89, and the case-law cited).

96 It is in the light of those principles that the various arguments submitted by the applicants should be examined.

— The date of the request for access

97 The contested decision refers to, and reproduces, certain passages of the e-mails exchanged between EB and CBF during the period in question. Admittedly, it must be held that there is no evidence in any of those e-mails of a formal request by EB for access to CBF. Thus, the e-mail of 3 August 1999, which the Commission considers EB's request for access to Cascade RS, shows that EB asked technical questions and requested information concerning the steps to follow in order to set up such access. EB raises in that e-mail, in particular, the question of how to implement that direct access in practice. However, it follows from the reading of that excerpt from the e-mail that numerous discussions took place between those two companies with regard to EB's access and that those discussions could lead it to believe that it was not necessary to

make a formal request. In addition, following EB's repeat request by e-mail of 24 September 1999, CBF's answer of 19 October 1999 suggests as much by addressing the technical conditions for the grant of access concerning the transfer of shareholder data. Furthermore, in the e-mail of 20 September 1999, EB notes that several of its requests remained unanswered, including the question of the direct link with Cascade RS.

98 The applicants' argument that that request for access was made at the meeting of 28 January 2000 is not convincing. It follows from the minutes of that meeting that the two companies discussed rather the methods of implementing access, from which it may be concluded that they considered that a valid request for access had already been made. That is confirmed by the letter of 3 February 2000, which states that EB considered that the last meeting between those two companies enabled them 'to start moving' on the question of access to certain services, including access to Cascade RS and RTS automation.

99 It follows from the foregoing that the Commission was entitled to conclude on the basis of the correspondence between EB and CBF that a request for access had been made on 3 August 1999.

— The alleged errors of interpretation by the Commission with regard to the types of access requested by EB

100 First, contrary to what is argued by the applicants, the Commission did not find in recital 48 of the contested decision that there was only one type of access to CBF's system of processing of registered shares. On the contrary, it follows from the contested decision that the Commission referred to access to the Cascade RS subsystem, which it clearly distinguished from the Cascade system, and that it differentiated between the two possible types of access, manual access (also called 'online' access) and automated access (recitals 46 and 48 of the contested decision).

101 Second, the applicants claim that the Commission wrongly interpreted the e-mails exchanged between the parties. Correctly interpreted, they show that the principal problem was not the request for manual access to Cascade RS, but the request for automated access to Cascade and the combination of those two types of requested access. Those arguments are based principally on an interpretation of the e-mails in question which differs from that of the Commission.

102 It is apparent from the contested decision that the question analysed during the administrative procedure was that of direct access to Cascade RS, since EB already enjoyed access to Cascade for bearer shares and since at that time it had requested direct access to CBF in respect of registered shares. The contested decision is thus based on the finding that EB had requested direct access to Cascade RS, that CBF had responded that manual access could be granted quite easily and that the access finally granted on 19 November 2001 was manual. The Commission concluded from this that EB waited for more than two years to obtain access which, according to CBF, could be easily set up.

103 In reaching such a finding, the Commission correctly interpreted the e-mails exchanged between the parties. If, as maintained by the applicants, in order to gain access to primary clearing and settlement services for registered shares, EB had to obtain, apart from its already existing automated access to Cascade for bearer shares and manual access to Cascade RS, another form of access to Cascade for registered shares and if such a combination proved to be a problem for CBF, it would have been reasonable, in the negotiations between the two companies, to indicate that to EB, or possibly even to propose to it an alternative solution, all the more so since EB requested information in its e-mail of 3 August 1999 as to how to 'practically implement this direct access'.

104 It must be observed, on the basis of the correspondence exchanged by the two companies, that at no time did CBF inform EB of a potential problem linked to the grant of two separate forms of access, one manual and one automated. Separate access to

Cascade was in fact never mentioned and the entire negotiation between the applicants and EB related to the question of access to Cascade RS. When, in the e-mail of 19 October 1999 (recital 52 of the contested decision), CBF refers to the important system changes and the analyses necessary for an automated link, it is responding to EB's questions concerning RTS automation. By contrast, in the same e-mail, CBF also states, concerning direct access to Cascade RS, that manual access can be arranged quite easily. The applicants refer to the different types of access to Cascade and Cascade RS only in their response to the Commission of 1 December 2003, that is once access to Cascade RS had been granted. In addition, the applicants only refer to them (in the text and in an annexed table) but do not claim that one type of access in particular or the combination of the two was a problem for them.

105 Moreover, according to recital 256 of the contested decision, during the administrative procedure the applicants considered that EB already enjoyed online access to Cascade in August 1999 and that the grant of online access to Cascade RS would have been sufficient to put EB in the position of being able to process registered shares directly through CBF. They also stated that when EB was granted access to Cascade RS it was 'only possible manually... for technical reasons' (recital 258, fourth indent, of the contested decision) and did not mention any problem linked to automated access to Cascade or to the combination of both forms of access. In addition, the note annexed to CBF's letter of 24 May 2002, entitled 'Processing of registered shares in Germany', which the Commission attached to its defence, describes the processing of registered shares and refers only to Cascade RS.

106 In any case, even if technically there are two ways of accessing Cascade RS that could not change the assessment of the facts made during the administrative procedure. The applicants' explanation that automated access required important changes to the computer systems, detailed preparation and numerous series of tests and, consequently, could be granted on only two occasions per year cannot reasonably justify a two-year wait for a link which is part of CBF's everyday business and which it usually grants within the space of a few months. By way of comparison, CBL had, according to the applicants, requested exactly the same combination as EB and obtained access in only four months. The applicants state that that was possible because CBL had carried out all the preparations required for access. That explanation contradicts the applicants' argument that it was difficult for them to agree to EB's request for access,

within a reasonable time, because of its specific request to combine two separate forms of access. In addition, the applicants themselves claim that the two types of access can be combined as desired and that it is the customer who decides which type of access to CBF he wishes to obtain.

107 The applicants also claim that manual access to Cascade had been proposed and could have been installed immediately. However, as stated by the Commission, they do not produce any proof in that regard. Nor is there any evidence in the extracts from correspondence between the two companies. Consequently, the Commission was correct to consider that the applicants could not reasonably argue that they had offered manual access to Cascade and that EB had refused it and insisted on automated access (recital 258, first indent, of the contested decision).

108 The applicants' argument concerning the additional 'Power of Attorney' function of Cascade RS is irrelevant. The access which was given to EB in November 2001 was manual and the 'Power of Attorney' function was available only from March 2002. Consequently, that cannot affect the Commission's factual assessment.

109 Finally, the same applies to the argument concerning the settlement function of Cascade RS. That is a technicality which had not been mentioned in the correspondence between the two companies and which, therefore, even if established, is not capable of affecting the Commission's factual assessment.

110 In the light of the foregoing, it must be held that the Commission was correct to consider, on the basis of the correspondence between the two companies and the information which had been provided to it during the administrative procedure, that EB had requested access to Cascade RS and that it did not insist on a specific type of access.

111 In those circumstances, the applicants' argument cannot be accepted.

— The argument that EB did not carry out all the preparations necessary to enable access to be granted

112 The various arguments put forward by the applicants to justify the failure to grant access to EB earlier because it did not carry out all the necessary preparations are not convincing.

113 First, that is the case with regard to the argument concerning the possibility of granting automated access only on the launch dates, that is twice per year, in spring and autumn. The principle of launch dates is, according to the applicants themselves, bound up with automated access which, in the light of the foregoing considerations, was not a decisive factor in the present case. Moreover, that principle does not emerge from the correspondence reproduced in the contested decision. While it is true that, as argued by the applicants, the EB vice-president wrote that for CBF the next possible date after April 2000 was only September 2000 (e-mail of 31 January 2000), it is evident that after September 2000 the principle of launch dates was completely abandoned. Thus, the next possible dates envisaged were 30 October and 4 December 2000. In addition, by e-mails of 30 September and 13 October 2000, CBF had invited EB to notify it of the date from which it believed it would be ready for access, requesting 3 weeks or 15 days prior notice, respectively. No restriction with regard to launch dates was mentioned in those documents. For example, in its message to CBF of 4 December 2000, which was the date adopted for the grant of access but which was not complied with by CBF, EB wrote that it may have to postpone that launch to the beginning of the following year. Finally, EB obtained access on 19 November 2001.

114 While the expressions 'launch date' or 'launch' recur frequently in the correspondence between the two companies, they do so as synonyms for the date on which access is

granted. It should therefore be examined whether EB did all that was necessary for access to be granted irrespective of the principle of launch dates, as stated by the applicants, namely of just two possibilities per year.

115 Second, the applicants argue that the delay was due to EB's opposition to CBF's practice during the period in question of having the acquirer of the registered shares registered in the issuer's share register instead of the name of the legal owner. In the contested decision (recital 255), the Commission considered that the applicants had not proved that EB's comments concerning its preferred registration mechanism were capable of preventing or delaying the grant of direct access to Cascade RS. It should be added in that regard that there were also comments from CBF, not only from EB. It is established that CBF had also referred to the problem, in particular in its e-mail of 19 October 1999 in which it explains that, in order to have direct access to the system, EB would have to agree to enter all the personal data of every owner and/or investor. In addition, according to the minutes of the meeting of 28 January 2000 between the two companies (e-mail of 31 January 2000), that question had been discussed at that meeting and EB had proposed a solution which CBF seems not to have refused. Moreover, the applicants recognise that, even during the period which followed the grant of access to EB and until the creation of the 'Power of Attorney' function which resolved that problem in 2002, EB did not make use of manual access to Cascade RS for shareholder data and did not transmit that data. As the Commission correctly contends, that proves that access could be granted without the question of registration of the legal owner being resolved.

116 Third, the argument that EB postponed the access which was to be granted in April, September and October 2000 is analysed at length in the contested decision. Thus, in the first place, the Commission was correct in finding that there was nothing in the e-mail of 31 January 2000 to suggest that EB was not ready for access in April. It states merely in that e-mail that, after April, the next possible launch date for CBF would be September. When, in its e-mail of 31 March 2000, it writes that it was at not at that stage able to launch for April, it refers only to the RTS system and not to access to Cascade RS. Moreover, in its response of 3 April 2000, CBF gives its agreement to postpone the launch of the automated RTS system while asking whether, with regard to direct access to Cascade RS, their undertaking concerning the September 2000 launch still held (recitals 57, 59 and 60 of the contested decision). The applicants' argument that EB stated in the e-mail of 31 January 2000 that it wished to implement the link at the same

time as the RTS automated system and that it consequently wished to postpone both of them therefore contradicts the understanding of the situation which CBF had at the material time.

117 In the second place, the applicants' argument that CBF had carried out the preparations (including a training course at EB's premises) and opened access to Cascade RS on 18 September 2000, which EB was not able to use because it had not completed the preparations in time, also appears unconvincing. Admittedly, it is true that, in its e-mail of 12 September 2000 to EB, CBF adopted the position '[a] few days before [EB] is starting to use Cascade RS'. However, it asked when EB would begin to use Cascade RS and when the planned account would be available for registered shares. EB replied by e-mail of 15 September 2000 that the transfer was envisaged for 30 October but that it might be postponed. Also, in an EB internal mail of 19 September 2000, EB refers to that non-active access and states that it would have to be closed until the 'actual launch date' (recitals 62 to 64 of the contested decision). It follows that the Commission is correct to argue that the access to Cascade RS granted on 18 September 2000 was not an active form of access to Cascade RS, and therefore operational online, and that it was granted in an unexpected way. The applicants also argue that EB had stated that it would respect the September deadline. However, as the Commission points out, they do not provide any evidence to that effect. In that regard, the Powerpoint presentation for training of EB personnel of 11 September 2000 and the exchange of e-mails which followed prove only that that training course took place, a fact not contested by the Commission, but they do not allow the inference that EB had been informed of a precise date for the grant of its access.

118 In addition, following the failure to gain access, CBF communicated to EB some conditions to be satisfied before access could be granted, including the informing of customers and EB's indication of the intended date 3 weeks or 15 days beforehand (by e-mails of 30 September and 13 October 2000 respectively, reproduced in recitals 65 and 67 of the contested decision). Those conditions were not satisfied before access was granted in September 2000. In any case, as the Commission argues and having regard to paragraph 117 above, such access cannot be considered as operational.

119 In the third place, the Commission acknowledges that the reason why access could not be granted on 30 October 2000 was indeed that EB was not ready, but submits that it took that factor into account in the contested decision. According to the contested decision, on 16 October 2000, EB informed CBF that it was not ready for the launch of 30 October, but that it would probably be ready for December 2000. By e-mail of 15 November 2000, complying with the period of notice requested, it confirmed that access could be granted on 4 December 2000 (recitals 68 and 69 of the contested decision). On the basis of that information, the Commission found that EB desired that one-month postponement. It was however correct in finding that that fact did not bring CBF's dilatory behaviour — which moreover persisted until 19 November 2001 — to an end (recital 264 of the contested decision).

120 In the light of the foregoing, it must be held that, while EB did desire a one month's delay, EB had still not obtained access to Cascade RS more than a year after its request, and the applicants have not provided any convincing reasons for this. Consequently, their argument cannot be accepted.

— The argument based on the renegotiation of contractual relations between the applicants and EB

121 The new date fixed for the grant of access was 4 December 2000. On 17 November 2000, following a telephone conversation between the persons in charge of the project in the two companies, in which CBF informed EB that access could not be granted on time, EB wrote to CBF asking it to give it more information on the reasons for that refusal (recital 73 of the contested decision).

122 Following that e-mail, CI entered into the negotiations between EB and CBF. On 1 December 2000, CI sent a fax to EB referring to the ongoing discussions and

negotiations concerning EB's request to adjust the fees applicable to the settlement services provided to it by CBF. That fax (recital 74 of the contested decision) states as follows:

'In view of these circumstances, I am glad to inform you that we are prepared in principle to sign an agreement with EB that not only addresses the issue of our analysis of the current settlement processes, but also takes into consideration your request for a reduction in fees and additional services. Consequently, we must negotiate a new agreement. We should also seize the opportunity to discuss the requests and new services required by us from [EB]. The negotiations should commence as early as feasible and should be successfully finalised by the middle of next year.'

123 The message of 4 December 2000 from EB to CBF (recital 75 of the contested decision) reads as follows:

'We have been trying for two weeks now to get a status on our access to Cascade RS. Despite several phone calls and mails, we did not receive any information as to the cause of the delay of our access nor as to the estimated date on which we could access Cascade RS … We were surprised by the decision by CBF to postpone our access to Cascade RS despite us giving CBF the required two weeks' notice and giving us at first a green light. We are now concerned by the lack of feedback … as to the reason [for] the delay and the estimated resolution time to the "technical problems" you encounter.'

124 By letter of 22 January 2001, EB wrote to CI that it had 'also been told in late December that [CBF] had changed its mind and [that] it would after all not give [EB] access to its registered shares system, which is however open to other customers of [CBF]'. EB also considered that it was a form of discrimination which affected its ability to provide services to its customers (recital 78 of the contested decision).

125 In a fax to EB of 24 January 2001 (recital 79 of the contested decision), CI completely rejected the allegation of discrimination. It also mentions in that fax a meeting of 23 October 2000 between the two companies at which the issue of comparing EB fees with the fees paid by the German banks was discussed. That fax also reads:

'With respect to CBF's registered share system we are willing to include this in our forthcoming negotiations. However, we must point out that the registered share service is available from several providers and therefore CBF has no exclusive position in the German market. Again, please note that [CBL] does not have direct access to CBF's registered shares scheme either. Again, your argument of discrimination is without merit … With regard to your specific request to solve the fee reduction issue and the registered share service issue, we are pleased to start the overall renegotiation of the contract (including your request for fee reductions and additional services) at the beginning of March …'

126 In the same fax, CI wrote that '[d]uring [the] meeting of 23 October 2000 [EB and it] committed [themselves] to work together in renegotiating a new link contract that will resolve the outstanding issues in the current contract, as well as addressing [EB's] request for lower commission', that '[EB's] commitment to enter into negotiations [had been] ratified … in [its] letters' and that '[t]hese two letters … [had] confirmed [EB's] understanding that the issue of fee reductions was part of the overall negotiation of the new contract and that there were no other conditions attached to either of [those] two letters'. With regard to EB's specific request to resolve the problem of reduction of the commissions, CI stated that it was inclined to start the overall renegotiation of the contract at the beginning of March (recital 113 of the contested decision).

127 On 10 July 2001, CBF stated by telephone to EB that it did not have a problem concerning direct access to registered shares settlement as long as Sicovam (that is the French CSD) granted access to CBF for more French shares (recital 82 of the contested decision).

128 An EB internal memorandum of 15 March 2001, annexed to the defence, contains the strategy to be followed by it at the meeting with CBF of 21 March 2001. It states for example that, for EB, the original objective of the discussions with CBF was to renegotiate the fees and the second objective to obtain access to Cascade RS. EB wished, moreover, to maintain the current contract while trying to achieve the other two objectives. The memorandum estimates that savings of EUR 2 million would result from the reduction of fees and of USD 9.2 million from access to Cascade RS. By contrast, the memorandum concludes that, for EB, access to Cascade RS was more critical than obtaining a reduction in fees, keeping a 'special' contract had certain advantages which it wanted to maintain and fee reductions could be discussed at a later stage.

129 In addition, according to the minutes of that meeting of 21 March 2001, annexed to the rejoinder, EB regarded pricing as the fundamental issue to be negotiated and wanted all the issues to be negotiated within the scope of the agreement which applied at the material time, whereas CBF wanted to negotiate the whole package rather than individual issues.

130 It must be held, on the basis of the correspondence and of the documents referred to above, that even if EB had raised the question of the reduction of the fees and of additional services, it was indeed the applicants, and not EB, which wanted the issue of direct access included in the renegotiation of their contractual relations. While EB, as the Commission also acknowledges, pursued several objectives in its discussions with CBF, it considered that the potential savings arising from access to Cascade RS were much bigger than those linked to the reduction in fees. It could not be in EB's interest to include the question of the grant of access in the renegotiation of its contractual relations with CBF; it wished rather to obtain access on the basis of the contract which already applied and to negotiate a possible reduction in fees thereafter. Therefore, the applicants' argument on that point must be rejected.

131 The applicants also claim that CBF postponed the grant of access to EB from October to November 2001 because its request for access to Euroclear France (formerly Sicovam) in respect of all the French securities had been rejected.

132 In that regard, it should be recalled that, according to settled case-law on the application of Article 82 EC, whilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, it has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market (*Michelin* v *Commission*, paragraph 48 above, paragraph 57). Similarly, whilst the fact that an undertaking is in a dominant position cannot deprive it of its entitlement to protect its own commercial interests when they are attacked, and whilst such an undertaking must be allowed the right to take such reasonable steps as it deems appropriate to protect those interests, such behaviour cannot be allowed if its purpose is to strengthen that dominant position and thereby abuse it (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 55, and the case-law cited).

133 It therefore follows from the nature of the obligations imposed by Article 82 EC that, in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings (Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 139).

134 Consequently, the applicants may not invoke the rejection of CBF's request for access to Euroclear France in respect of all the French securities or the renegotiation of contractual relations with EB in order to justify their conduct. As an undertaking in a dominant position, CBF had a particular responsibility not to allow its conduct to impair genuine undistorted competition on the common market.

135 Moreover, it should be noted that CBF's request for access to the French CSD could not be relevant for the present proceedings before January 2001 (the date on which EB acquired Sicovam, which then became Euroclear France), that is a year and a half after EB's request for access.

136 On the basis of the case-law cited above, it must be concluded that the applicants acted abusively in including the renegotiation of their contractual relations and the request for access to the French CSD in the negotiations on the grant of access to Cascade RS, at a time when they had already been under way for more than one year. In addition, the interests of CI, the parent company of CBL, which is the sole ICSD in the European Union apart from EB, seem to emerge quite clearly from the correspondence and from the minutes of meetings between EB, CBF and CI. Ultimately, access to Cascade RS was granted to EB without an overall agreement having been reached by the parties.

137 With regard to the applicants' statement that the discussions with EB on the grant of access were begun only in autumn 2000, that is in the same period as those concerning the reduction in fees and the extension of special services, it suffices to find that this contradicts their previous arguments concerning the period from February to November 2000.

138 Consequently, the applicants' arguments on this point must be rejected in their entirety.

— Lack of an abuse through a barrier to entry

139 The applicants maintain that a possible delay in the grant of access does not justify the allegation that they committed an abuse under Article 82 EC, since they did not pursue any anti-competitive objective. Furthermore, they consider that there is an abuse of a dominant position only where the competitive opportunities of the undertaking allegedly subject to a barrier to entry were or could be substantially affected.

140 According to settled case-law, the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in

question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition (*Hoffmann-La Roche* v *Commission*, paragraph 49 above, paragraph 91; see also Case T-203/01 *Michelin* v *Commission*, paragraph 132 above, paragraph 54, and the case-law cited).

141 Accordingly, the conduct of an undertaking in a dominant position may be regarded as an abuse within the meaning of Article 82 EC even in the absence of any fault (Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 70).

142 Consequently, the applicants' argument that they did not pursue an anti-competitive objective is irrelevant to the legal characterisation of the facts. In that context, proving that it was the applicants' objective to postpone the grant of access in order to prevent a customer and competitor of the Clearstream group from providing its services effectively may reinforce the conclusion that there is an abuse of a dominant position but is not a condition for such a finding.

143 It should also be noted that, in the present case, access was refused to EB which was, at the same time, a customer of CBF on the German market for securities in collective custody, but also a direct competitor of CBL — a sister company of CBF and the only other ICSD in the European Union — on the downstream market for clearing and settlement of cross-border securities transactions. While the contested decision does not establish that the applicants intended to cause EB a competitive disadvantage, it assesses on the other hand the reasoning for and consequences of that refusal to provide services in the context of EB's position and that of the entire Clearstream group on the relevant market. Thus, the Commission puts forward various indicia to suggest that the applicants' intention was to exclude EB from the provision of their services and, therefore, to hinder competition in the provision of cross-border secondary clearing and settlement services (recitals 234 and 300 of the contested decision). However, given that the abuse of a dominant position is an objective concept, it is not necessary to rule on that point.

144 The effect referred to in the case-law cited in paragraph 140 above does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (Case T-203/01 *Michelin* v *Commission*, paragraph 132 above, paragraph 239).

145 It must therefore be examined whether the Commission has proved in the present case that the applicants' conduct tended to restrict competition on the market in secondary clearing and settlement services.

146 As explained in relation to the examination of the first plea in law, the contested decision shows that the Commission carried out a full analysis of the market in services. On that basis, the Commission was entitled to conclude that CBF held a de facto monopoly and was therefore an indispensable trading partner in the provision of primary clearing and settlement services on the market in question. In addition, it found that the barriers to entry on that market, in terms of regulations, technical requirements, interest by market participants, cost of entry, cost for consumers and likelihood of being able to provide competitive products, were so significant that the possibility of new market entries exercising a competitive constraint on CBF in the foreseeable future could be excluded (recitals 205 to 215 of the contested decision).

147 In that regard, it follows from the case-law of the Court of Justice that, in order to find the existence of an abuse within the meaning of Article 82 EC, the refusal of the service in question must be likely to eliminate all competition on the market on the part of the person requesting the service, such refusal must not be capable of being objectively justified, and the service must in itself be indispensable to carrying on that person's business (Case C-7/97 *Bronner* [1998] ECR I-7791, paragraph 41). According to settled case-law, a product or service is considered necessary or essential if there is no real or potential substitute (see Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 208, and the case-law cited).

148 With regard to the condition of elimination of all competition, it is not necessary, in order to establish an infringement of Article 82 EC, to demonstrate that all competition on the market would be eliminated, but what matters is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It is for the Commission to establish such a risk of the elimination of all effective competition (*Microsoft* v *Commission*, paragraph 47 above, paragraphs 563 and 564).

149 In the present case, the Commission decided, in accordance with those considerations (recitals 168, 226, 228, 231 and 234 of the contested decision), first, that the applicants had a de facto monopoly with regard to the provision of primary clearing and settlement services on the relevant market and that EB could not duplicate the services which it was requesting. It found, second, that as an ICSD, EB offered its customers a single point of access to a large number of securities markets and therefore an innovative secondary clearing and settlement service, on a European scale, with regard to cross-border transactions in securities within the single European market, and that the investors who wished to use the 'single gateway' of an ICSD had essentially a choice between CBL and EB. According to the Commission, access to CBF was indispensable to EB in order to be able to provide those cross-border secondary clearing and settlement services, and the applicants' refusal to provide it with primary clearing and settlement services for registered shares hindered EB's capacity to provide comprehensive, pan-European and innovative services. That harmed innovation and competition in the provision of cross-border secondary clearing and settlement services and ultimately the consumers within the single market. Finally, the Commission held that the applicants' conduct could not be objectively justified.

150 The Commission found, furthermore, that the refusal to provide direct access to Cascade RS and the unjustified discrimination in that regard are not two separate offences but rather two manifestations of the same course of conduct, since the unjustified discrimination exists because CBF refused to provide EB with services which were the same as or similar to those which it provided to comparable customers. The refusal to provide services thus established is, according to it, reinforced by the finding that there was unjustified discriminatory conduct by CBF's customers.

151 Those findings are not invalidated by the various arguments put forward by the applicants in that regard. Thus, contrary to the applicants' statements, the Commission was correct in finding that the period of time required to obtain access considerably exceeded that which could be considered as reasonable and justified, thus amounting to an abusive refusal to provide the service in question, capable of causing EB a competitive disadvantage on the relevant market. By way of comparison, CBL, a direct competitor of EB, had obtained access to Cascade RS in only four months. In addition, concerning the applicants' argument that at the material time CBL did not have access to CBF either, it must be pointed out that CBL made that request only once access to Cascade RS had already been granted to EB (recital 236, second indent, of the contested decision).

152 The argument alleging that the Commission did not prove that indirect access to CBF constituted a competitive disadvantage for EB and that EB and CBL in most cases had indirect access in Europe to CSDs has already been examined in the context of the first plea in law, with regard to the question of supply-side substitutability. It must be borne in mind, on that issue, that before requesting access to Cascade RS, EB enjoyed indirect access to CBF through the intermediary of the Deutsche Bank. However, on the basis of the information provided by the market participants, the Commission was correct in finding that such indirect access posed a number of disadvantages, that is longer deadlines, greater risk, higher costs and potential conflicts of interest (recital 139 of the contested decision). In addition, the argument concerning possible indirect access to CSDs present on other geographic markets is not relevant, since the factual assessment concerns only the relevant geographic market in the present case, which is Germany.

153 With regard to the applicants' argument concerning the irrelevance of the reference, in the contested decision, to the earlier decisions of the Commission because they are based on a special restrictive effect which is absent in the present case, it suffices to recall the case-law referred to in paragraph 55 above.

154 With regard to the importance of the EB registered shares deposited with CBF and to the potential savings for EB linked to obtaining access to Cascade RS, it is necessary to stress, as the Commission does, the importance — which cannot be contested in the context of current market conditions — of being able to offer customers the services

linked to the German registered shares. Furthermore, the importance of the service provided by CBF can be assessed only on the basis of the volume of transactions carried out in relation to EB, which does not necessarily correspond, or even correspond at all in most cases, to the volume of shares deposited with CBF. In any case, if the small volume argument can affect the choice between automated and manual access, even a small amount of transactions in registered shares, above all in the light of their importance, can justify direct access to CBF's system of processing. Furthermore, the applicants do not offer any estimate based on the value of the transactions carried out, but merely put forward figures concerning the proportion of registered shares deposited with CBF, without providing any proof. In the same way, they propose another calculation method in order to determine the significance of that EB shareholding, which is not borne out by any official document or any specific basis of calculation.

155 Consequently, the applicants' argument on that point must be rejected in its entirety.

— The alleged absence of discrimination against EB

156 All the elements of the response to this argument have already been set out in the foregoing paragraphs. Thus, it suffices to point out, with regard to EB's alleged request for automated access to Cascade and manual access to Cascade RS, that CBL obtained access to Cascade RS in only four months even though it had, according to the applicants themselves, requested the same combination as EB (see paragraphs 106 and 151 above). The applicants have not proved their allegation that EB failed over a period of more than one year to carry out the preparations necessary for access to be granted (see paragraphs 112 to 120 above). Finally, the applicants do not deny that the Austrian and French CSDs obtained access to Cascade RS without delay. It is apparent from the information received during the administrative procedure and detailed in the contested decision that CBF did not provide any clearing and settlement services to the ICSDs which it did not provide to the national CSDs (recitals 133 and 296 of the contested decision). With regard to the type of access, it must be noted that the access granted to EB in November 2001 was manual, just like that granted to national CSDs.

157 Consequently, it must be concluded that the Commission was correct in finding that EB had suffered discrimination concerning the provision of primary clearing and settlement services in relation to registered shares.

158 In the light of the foregoing, that part of the second plea in law must be rejected as unfounded.

The second part, alleging the lack of discriminatory pricing

Arguments of the parties

159 The applicants maintain that there was no abusive discrimination in the setting of prices for EB. In particular, it is not possible to compare CSDs and ICSDs since they represent two different groups of customers. Both the combinations of requested services and the costs attributable to them differ.

160 First, it follows from the case-law of the Court of Justice that the structure of the market can justify the distinction between different categories of customer. In the present case, the Commission disregarded the decisive differences between the functions of CSDs and ICSDs and between their business models. In particular, in contrast to CSDs, ICSDs are not exempt from risk since they are not subject to surveillance by the State aimed at securing the free movement of capital and because they are able to carry out transactions in different currencies.

161 Second, the volume of transactions which CBF has to process for the ICSDs is much greater than that carried out for the CSDs and, consequently, the degree of standardisation and automation is much higher in relation to ICSDs, requiring the use of certain special programmes. Indeed, 76% of the overall costs relate to the processing of transactions for the ICSDs, giving rise to an increase in the cost of the treatment of data.

162 Third, EB benefits from some special services, referred to in recital 131 of the contested decision. The annual fee of EUR 125 000 is charged in respect of those services. Those services are not linked to clearing and settlement but only to the custody and issuing of securities. In that regard, the applicants produce, as an annex to their reply, a letter of 29 August 1996 addressed to EB. The applicants insist on the correctness and relevance of the classification and of the separation between the settlement services and the special services, and claims that the latter are provided only to EB. The changes in the holdings resulting from the deposit of securities by their bearer, their release to the bearers, and from increases or reductions in issuers' capital are linked to the custody of the securities and not to clearing or settlement concerning transactions in those securities.

163 Fourth, an agreement signed in 1997 between CBF and EB's predecessors specifies certain activities solely in relation to EB, the special value of which is acknowledged by EB in its internal memorandum of 15 March 2001. The Commission did not however take into account all the information in its possession.

164 Fifth, CBF must bear the costs of insurance against civil liability in respect of the special risks of liability linked to the two ICSDs. In that regard, the applicants maintain that, contrary to what is asserted by the Commission, the costs stated under the heading 'Overhead corporate' for EB are six times higher than those stated for all the CSDs and 1.7 times higher than the costs stated for CI. Those special risks are related to the large volumes of ICSD transactions, as the applicants already pointed out in their statements of 1 September and 1 December 2003, extracts from which are annexed to the reply. In addition, the sharing of the insurance costs is justified by the damage claims which are more common in the case of ICSDs.

165 Sixth, 99.01% of the transactions processed at night for the central depositories are for the benefit of the ICSDs, creating additional costs. By contrast with the CSDs, the results relating to the ICSDs are made available to them during the night. In that regard, the applicants annex to the reply a table showing the remuneration arising from the transactions, calculated on the basis of the overall costs and the volume of transactions attributable to the ICSDs or the CSDs, but which makes no distinction between transaction costs according to whether the processing took place at night or during the day, since the costs of the special supervision of the additional programmes implemented only for the ICSDs and of the data services resulting from the large volume of transactions are incurred both in processing at night- and day-time.

166 The applicants also maintain that the Commission incorrectly calculated the price difference found to exist in the present case. Since the annual fee is not remuneration for settlement services and since CBF grants EB reductions based on quantity, the price difference which must be justified by proof of the corresponding costs amounts to between 2% and 5% and not 20%. In addition, the Commission refuses to acknowledge the special costs incurred by CBF which objectively justify that price difference, evaluated by the applicants at an amount between EUR 0.10 and EUR 0.25.

167 Finally, the Commission did not analyse or respond to the question whether the setting of the prices charged to EB by the applicants led to a competitive disadvantage for EB. According to the applicants, the best proof of the fact that EB did not suffer a competitive disadvantage is that EB did not pass on the price reduction to its customers.

168 The Commission contends that that argument should be rejected.

Findings of the Court

169 Discriminatory pricing by an undertaking in a dominant position is prohibited by subparagraph (c) of the second paragraph of Article 82 EC, which refers to abuse consisting in 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.

170 Thus, according to the case-law, an undertaking may not apply artificial price differences such as to place its customers at a disadvantage and to distort competition (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 160, and *Deutsche Bahn* v *Commission*, paragraph 65 above, paragraph 78).

171 It should therefore be ascertained whether, in the present case, the facts on which the Commission concludes that the applicants have engaged in discriminatory pricing are substantively correct and whether they are capable of supporting the conclusion that dissimilar conditions were applied to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

172 According to the Commission, the ICSDs and the CSDs constitute two groups of comparable customers since they each provide secondary clearing and settlement services for cross-border transactions in securities issued under German law, and since the content of the primary clearing and settlement services for cross-border transactions which CBF provides to them is equivalent. On the basis of the information provided by the applicants themselves, the Commission concluded that the CSDs and the ICSDs benefit from comparable services and that there are no clearing and settlement services that CBF provided to ICSDs which it did not provide to CSDs (recitals 128 and 133 of the contested decision).

173 The parties do not dispute that CBF charged EUR 5 per transaction to the national CSDs whereas, between the end of 1996 and 1 January 2002, it charged EB a basic price of EUR 6 per transaction and an annual fee of EUR 125 000.

174 Regarding the first plea in law, the applicants state that the three categories of CBF customers (CSDs, ICSDs and general terms and conditions customers) receive from it essentially the same services, since they are all linked to it as intermediary depositories, but that the price difference reflects how the process operates, which can differ depending on the different needs of each of its customers. It must however be held that that argument frequently contradicts other statements made during the administrative procedure and in the proceedings before the Court.

175 Thus, in the first place, the applicants maintain that the fee of EUR 125 000 relates only to custody and to the issuing of securities. In support of that argument, they annex to the reply a letter of 29 August 1999 from the predecessor to CBF to the predecessor to EB informing the latter of the prices applied by the former from 1 January 1997. However, that letter makes clear that the price of EUR 125 000 was charged for the special services (see also recital 131 of the contested decision), whereas it is specified that for custody services the prices applied were 'normal'.

176 In addition, the applicants list some activities concerning EB alone pursuant to an agreement signed in 1997 between the predecessors to CBF and EB.

177 However, the applicants do not establish how the various special services to which they refer differ from those provided to the ICSDs and the CSDs in general. In that regard, it must be held, first, that during the administrative procedure they stated, with regard to the CSDs, that in addition to standard services certain settlement services, as listed, were provided in response to specific needs of the CSDs (concerning cross-border transactions) on the basis of individual agreements. Second, with regard to the ICSDs, the applicants stated that 'ICSDs receive both standard services as well as special

services comparable to [those] offered to CSDs' and that, compared to CSDs, certain special services, as listed, are not required by ICSDs (recitals 125 and 128 of the contested decision).

178 It follows that, in addition to the standard services provided to the general terms and conditions customers, some additional services are provided to CSDs and ICSDs on the basis of their specific need for processing of cross-border transactions.

179 In that regard, the applicants' argument concerning the different functions of the CSDs and the ICSDs must be rejected, since, as far as the securities issued under German law are concerned, the non-German CSDs and the ICSDs operate at the same level and require the same primary services from CBF. The Commission therefore correctly concluded that the content of primary clearing and settlement services for cross-border transactions provided by CBF to the CSDs and the ICSDs was equivalent (recital 307 of the contested decision). Furthermore, the applicants do not establish how paragraph 120 of the judgment of the Court of Justice in Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, to which they refer, is relevant to the distinction between the various categories of customers concerned in the present case.

180 In the second place, the applicants maintain that between 1998 and 2002 the volume of EB's transactions was 18 times greater than the volume of transactions of all seven national CSDs and that, therefore, the level of standardisation and automation is much higher for the services provided to ICSDs than it is for those provided to CSDs. However, as the Commission correctly contends, that argument in fact points to the opposite conclusion, that is that, after having borne a possible initial cost of automation, a higher level of automation generally leads to a price reduction rather than a price increase. By way of example, it follows from recital 127 of the contested decision that three non-German CSDs saw their fees reduced because of the shift from purely manual processing to completely automated procedures.

181 In the third place, the applicants claim the price difference was justified since CBF had to bear certain costs peculiar to ICSDs, linked to night-time processing, to the large volume of transactions and to a contract of insurance against civil liability for the specific risks faced by ICSDs.

182 It must be held that the evidence in support of those arguments submitted by the applicants in the context of this plea in law is not conclusive. Among other evidence, there are annexed to the reply extracts from the applicants' documents of 1 September and 1 December 2003 and an annex to the document of 1 September 2003, addressed to the Commission in response to its requests for information.

183 The document annexed to the 1 September 2003 document contains the breakdown of costs for the period from January to August 2002 and therefore does not concern the period in which discriminatory pricing was held to have occurred. In addition, the price applied to EB from 1 January 2002 was reduced to EUR 3. According to the applicants' response to the Commission's request for information of 12 September 2002, annexed to the rejoinder, CBF's profit margin concerning ICSDs was, even after that reduction, comparable to that concerning the CSDs. That breakdown cannot therefore in any event justify the difference in prices alleged during the relevant period.

184 With regard to the extracts from the documents of 1 September and 1 December 2003, they are thus more in the nature of further arguments of the applicants than documents with any probative value.

185 It should be noted, in that regard, that although the burden of proof of the existence of circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to

show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted (*Microsoft* v *Commission*, paragraph 47 above, paragraph 688).

186 According to the contested decision, during the administrative procedure, the Commission had requested the applicants on several occasions to justify the price differences applied during the period concerned and in particular to provide it with details of the costs in each case, broken down by transaction. It is common ground between the parties that the applicants never sent it such a cost breakdown. Also, the list of services produced by the applicants was, according to the Commission, inconsistent and contradictory (recitals 134 and 313 of the contested decision).

187 Furthermore, the applicants' arguments with regard to night-time processing, the large volumes of transactions and the civil liability insurance with regard to EB were all analysed and rightly rejected in the contested decision. While some documents on which that analysis is based are referred to in the contested decision, they have either not been submitted for the purposes of the present case or, if submitted, are not conclusive (see paragraphs 183 and 184 above). Those statements by the applicants which are not founded on any evidence backed up by figures are not convincing, some being illogical and even contradictory. Thus, the applicants have not been able to show how the large volumes of transactions, which indeed explain the higher degree of automation, have led to the increase in costs per transaction. Similarly, they do not explain why they entered into a civil liability insurance contract to cover the risks concerning ICSDs but do not produce a copy of the insurance contract. With regard to night-time processing, while that argument could in itself constitute a justification, the applicants' arguments on that point must however be rejected. The applicants state that the calculation which they annex to the reply does not distinguish between transaction costs according to whether the processing took place at night or during the day, since the costs of the special supervision of the additional programmes implemented only for the ICSDs and of the data services resulting from the large volume of transactions are incurred both in processing at night- and day-time. First, they thereby confuse the additional costs engendered by the factors referred to in the previous arguments with the additional costs resulting from night-time processing. Second, they do not produce any cost calculation broken down according to volume of transactions processed at day and night or recipient of the services, EB or the CSDs.

188 As a result, the applicants' arguments are not capable of calling into question the Commission's assessment that the applicants have not shown that the prices applied to EB were based on the real additional costs borne by them in respect of EB alone.

189 In the fourth place, the applicants' argument that the Commission wrongly calculated the price difference which they are called upon to justify must also be rejected. On the basis of the description of the services characterised by the applicants as special services other than settlement (recital 131 of the contested decision), at least some of those services covered by the fee of EUR 125 000 appear to be linked to the service of settlement. In any case, it should be held that, in addition to the normal per transaction fee, CBF charged EB that additional fee in respect of services received by EB and the CSDs, which was not however charged to the CSDs, which nevertheless received a larger number of special services than the ICSDs. Thus, the per transaction price as a whole which was actually paid by EB was higher than the nominal per transaction fee of EUR 6, and the discrimination suffered by EB therefore exceeded the 20% difference in the prices charged to EB and those charged to certain CSDs (recital 306 of the contested decision). With regard to the quantity reduction applied to EB, it should rather have reduced the prices for EB to a level lower than that charged to other comparable customers.

190 In the light of the foregoing, it must be held that the Commission did not commit an error of assessment in finding that the applicants applied discriminatory prices to EB contrary to subparagraph (c) of the second paragraph of Article 82 EC.

191 Finally, the applicants claim that the Commission did not analyse or respond to the question whether the setting of the prices charged by the applicants to EB caused it to suffer a competitive disadvantage.

192 As pointed out by the Court of Justice, the specific prohibition of discrimination in subparagraph (c) of the second paragraph of Article 82 EC forms part of the system for ensuring, in accordance with Article 3(1)(g) EC, that competition is not distorted in the

internal market. The commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words, between suppliers or customers of that undertaking. Co-contractors of that undertaking must not be favoured or disfavoured in the area of the competition which they practise amongst themselves. Therefore, in order for the conditions for applying subparagraph (c) of the second paragraph of Article 82 EC to be met, there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words, to hinder the competitive position of some of the business partners of that undertaking in relation to the others (Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraphs 143 and 144).

193 In that regard, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually (*British Airways* v *Commission*, paragraph 192 above, paragraph 145).

194 In the present case, the application to a trading partner of different prices for equivalent services continuously over a period of five years and by an undertaking having a de facto monopoly on the upstream market could not fail to cause that partner a competitive disadvantage.

195 In the light of all the foregoing, that part of the second plea in law and, therefore, the second plea in law in its entirety must be rejected.

3. *The third plea in law, alleging the erroneous attribution of CBF's infringement to CI*

Arguments of the parties

196 The applicants claim that the Commission never found that the second applicant, CI, held a dominant position and that, consequently, it could not abuse such a position.

197 The Commission rejects that argument.

Findings of the Court

198 It should be recalled that the anti-competitive conduct of an undertaking can be attributed to another undertaking where it has not decided independently upon its own conduct on the market, but carried out, in all material respects, the instructions given to it by that other undertaking, having regard in particular to the economic and legal links between them (Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27). Thus, the conduct of a subsidiary may be attributed to the parent company where the subsidiary does not decide independently upon its own conduct on the market but carries out, in all material respects, the instructions given to it by the parent company (Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraphs 132 and 133).

199 In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a rebuttable presumption that the parent company exercises decisive influence over the conduct of its subsidiary (see, to

that effect, Case 107/82 *AEG-Telefunken* v *Commission* [1983] ECR 3151, paragraph 50) and that they therefore constitute a single undertaking for the purposes of competition law (judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission* (not published in the ECR), paragraph 59). It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent (Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136; see also, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925 ('*Stora*'), paragraph 29).

200 In that regard, it must be noted that, while it is true that at paragraphs 28 and 29 of *Stora*, paragraph 199 above, the Court of Justice referred not only to the fact that the parent company owned 100% of the capital of the subsidiary but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned by the Court of Justice for the sole purpose of identifying all the elements on which the Court of First Instance had based its reasoning before concluding that that reasoning was not based solely on the fact that the parent company held the entire capital of its subsidiary. The Court of Justice expressly stated, in paragraph 29 of *Stora*, paragraph 199 above, that 'as that subsidiary was wholly owned, the Court of First Instance could legitimately assume, as the Commission has pointed out, that the parent company in fact exercised decisive influence over its subsidiary's conduct', and that, in those circumstances, it was for the appellant to rebut that 'presumption' by adducing sufficient evidence.

201 In the present case, since CI holds 100% of the capital of CBF, it is for it to adduce evidence of independent behaviour by CBF such as to rebut that presumption, and it has failed to do so. The applicants do not in fact deal in their written pleadings with whether the subsidiary CBF had decided and/or decided independently upon its own conduct on the market rather than carrying out the instructions given to it by the parent company.

202 Nor did the applicants dispute the Commission's statement, in the defence, referring to recitals 235 and 271 et seq. of the contested decision, first, that in its business publications Clearstream presents itself as a single entity and, second, that the facts set out in the contested decision show that CI influenced the behaviour of CBF, which did not therefore act independently, and even that CI occasionally acted on behalf of its German subsidiary.

203 With regard to the applicants' argument that the Commission never found that CI was an undertaking occupying a dominant position on the relevant market, it suffices to hold that that is based on the false assumption that CI has not been held to have committed any infringement. According to recital 224 et seq. and Article 1 of the contested decision, CI itself was found to have committed an infringement, by virtue of the economic and legal ties linking it to CBF which enabled it to determine CBF's conduct on the market (see, to that effect, *Metsä-Serla and Others* v *Commission*, paragraph 198 above, paragraph 34).

204 Consequently, the third plea in law must be rejected as unfounded.

4. *The fourth plea in law, alleging that the contested decision lacks precision*

Arguments of the parties

205 The applicants maintain that by specifying, in Article 1 of the contested decision, the start of the unlawful refusal to provide the services in question as 3 December 1999 the Commission did not take into account the period of four months from the making of the request for access during which, as stated by it in its reasoning, that refusal was not abusive.

206 Article 2 of the contested decision is said to be unlawful because its wording is too imprecise, in particular concerning the actual conduct from which the applicants must abstain. Also, that article is said to be rather unclear in German and to contradict the reasoning of the contested decision. Thus, it could be understood to mean that the applicants must abstain only from the acts described in Article 1 which infringe Article 82 EC, without however specifying which ones.

207 The applicants infer from the explanations given by the Commission in its defence that the operative part of the contested decision concerns only the applicants' conduct vis-à-vis EB and not vis-à-vis other undertakings. The Commission rejects a broad interpretation of Article 2 of the contested decision, which therefore does not affect bearer shares.

208 According to the Commission, the wording of Article 2 of the contested decision is not imprecise in the way suggested by the applicants.

Findings of the Court

209 In the first place, the applicants' argument that the Commission did not take account of a four-month period in determining the duration of the infringement is not well founded. The date of EB's first request for access to Cascade RS as found by the Commission and confirmed in paragraphs 97 to 99 above is 3 August 1999, whereas Article 1 of the contested decision fixes the start of the infringement as 3 December 1999. It follows that the Commission indeed deducted the four months, that is to say, the maximum length of time regarded by it as reasonable in order to grant the access requested, from the total duration of the infringement found to exist in the present case. Consequently, there is no contradiction between the reasoning of the contested decision and its operative part.

210 In the second place, with regard to Article 2 of the contested decision, it should be borne in mind that the Commission indicates in the operative part of a decision the nature and extent of the infringements which it sanctions or determines and that, in principle, as regards in particular the scope and nature of the infringements, it is the operative part, rather than the statement of reasons, that is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in the contested decision (Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 43).

211 In the present case, there is no ambiguity at all in the wording of the operative part of the contested decision. It is clear that the Commission found, in Article 1, that the refusal to supply primary clearing and settlement services in respect of registered shares and the discriminatory behaviour towards EB, on the one hand, and the application to EB of discriminatory prices, on the other hand, were contrary to Article 82 EC. Article 1 of the decision specifies the nature and duration of the infringements and who committed them.

212 In Article 2, the Commission orders the applicants to refrain in future from committing the infringements referred to in Article 1. Its wording, read in conjunction with the wording of Article 1, is therefore very clear.

213 Consequently, the fourth plea in law must be rejected as unfounded.

214 It follows from all the above considerations that the action must be dismissed in its entirety.

5. *The request for examination of a witness*

215 The applicants offer to present evidence, through the testimony of the head of CBF's Clearing and Settlement Department at the material time, in support of some of their statements, that is in relation to the type of access requested by EB, its refusal to have the registered shares registered in the name of the economic owner and EB's involvement in the blockage of access.

216 In that regard, it should be borne in mind that the Court of First Instance is the sole judge of whether the information available concerning the cases before it needs to be supplemented (see Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 67, and the case-law cited).

217 Even where a request for the examination of witnesses, made in the application, refers precisely to the facts on which and the reasons why a witness or witnesses should be examined, it falls to the Court of First Instance to assess the relevance of the application to the subject-matter of the dispute and the need to examine the witnesses named (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 70).

218 In the present case, the Court has been able to rule on the basis of the pleas in law and the arguments presented in the course of both the written and oral procedure. Consequently, the applicants' request for the examination of a witness must be rejected.

Costs

219 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Clearstream Banking AG and Clearstream International SA to pay the costs.**

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 9 September 2009.

[Signatures]

Table of contents

Facts . . . . . II - 3166

Contested decision . . . . . II - 3167

Procedure and forms of order sought by the parties . . . . . II - 3174

Law . . . . . II - 3176

1. The first plea in law, alleging an erroneous definition of the relevant market in services and that the applicants did not hold a dominant position . . . . . II - 3176

Arguments of the parties . . . . . II - 3176

Findings of the Court . . . . . II - 3180

2. The second plea in law, alleging that there was no abuse of a dominant position . . . . II - 3189

The first part, alleging that there was no abusive refusal of access or abusive discrimination by the applicants . . . . . II - 3189

Arguments of the parties . . . . . II - 3189

Findings of the Court . . . . . II - 3194

— The date of the request for access . . . . . II - 3195

— The alleged errors of interpretation by the Commission with regard to the types of access requested by EB . . . . . II - 3196

— The argument that EB did not carry out all the preparations necessary to enable access to be granted . . . . . II - 3200

— The argument based on the renegotiation of contractual relations between the applicants and EB . . . . . II - 3203

— Lack of an abuse through a barrier to entry . . . . . II - 3208

— The alleged absence of discrimination against EB . . . . . II - 3213

The second part, alleging the lack of discriminatory pricing . . . . . II - 3214

Arguments of the parties . . . . . II - 3214

Findings of the Court . . . . . II - 3217

3. The third plea in law, alleging the erroneous attribution of CBF's infringement to CI . . II - 3224

Arguments of the parties . . . . . II - 3224

Findings of the Court . . . . . II - 3224

4. The fourth plea in law, alleging that the contested decision lacks precision . . . . . II - 3226

Arguments of the parties . . . . . II - 3226

Findings of the Court . . . . . II - 3227

5. The request for examination of a witness . . . . . II - 3229

Costs . . . . . II - 3230