II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 July 1989

relating to a proceeding under Article 85 of the EEC Treaty (IV/31.499 — Dutch banks)

(Only the Dutch text is authentic)

(89/512/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to the applications for negative clearance and the notifications submitted by the Nederlandse Bankiersvereniging on 19 March 1985, 22 October and 27 November 1986 and 4 December 1987 concerning regulations, certain decisions and circulars issued by it and by the Vereniging van Deviezenbanken, the Stichting Bevordering Chequeverkeer, the Vereniging van Bemiddelaars in Onderhandse Leningen and the College van Overleg der Gezamenlijke Banken and concerning a number of agreements to which one of those organizations, the Vereniging voor de Effectenhandel or the Vereniging van Wisselmakelaars, is or was directly or indirectly party,

Having regard to the Commission Decision of 26 January 1987 to initiate proceedings in this case,

Having given the parties concerned, in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2], the opportunity of being heard on the matters to which the Commission had taken objection, and having regard to the written comments of the parties concerned and the oral comments thereon given at the hearing held on 25 November 1987,

Having published a summary of the provisions notified and in force [3], in accordance with Article 19(3) of Regulation No 17,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

(1) On 19 March 1985, 22 October and 27 November 1986 and 4 December 1987, the Nederlandse Bankiersvereniging (Dutch Bankers' Association) notified the Commission of regulations, decisions and circulars issued by it and certain other Dutch organizations operating in the financial sector and a number of agreements to which it or one of those organizations is or was directly or indirectly party. It asked the Commission to grant negative clearance, certifying that there are no grounds under Article 85 of the Treaty for action to be taken against the provisions notified, or alternatively to grant an exemption, on the basis of Article 85 (3), from the prohibition laid down in Article 85 (1).

[1] OJ No 13, 21. 2. 1962, p. 204/62.

[2] OJ No 127, 20. 8. 1963, p. 2268/63.

[3] OJ No C 282, 5. 11. 1988, p. 4.

A. The associations of undertakings concerned

(2) The Nederlandse Bankiersvereniging (NBV), set up in 1949 and having its registered office in Amsterdam, has the object of promoting the interests of banking in the Netherlands in the broadest sense of the word. According to its statutes, it endeavours to pursue this goal by:

— trying to ensure uniformity in the terms and conditions under which NBV members provide their services and in the definition of services and the charges attaching to them, so as to ensure greater transparency,

— promoting (while preserving healthy competition) the maintenance of a strong financial basis for Dutch banking and its members and, in that context, establishing minimum charges for relevant services.

Any individual, company or institution registered in the government register of credit institutions may be a member of the NBV.

There are some seventy members of the NBV, including most all-purpose (clearing) banks. Of the registered credit institutions, those which are not NBV members include, in particular, the cooperative banks affiliated to the Coöperative Centrale Raiffeisen-Boerenleenbank BV (Rabobank) (the Rabobank includes the great majority of cooperative banks in the Netherlands), the savings banks affiliated to the Nederlandse Spaarbankbond, and the Postbank NV (known, prior to 1 January 1986, as the Postcheque- en girodienst/Rijkspostspaarbank — PCGD/RPS) which is State-owned. They provide financial services which are comparable with those provided by NBV members.

(3) The Vereniging van Deviezenbanken (Association of Foreign Exchange Banks — VDB), set up in 1940 and having its registered office in Amsterdam, has the objective of promoting, in close consultation with the Dutch monetary authorities, the optimum execution of the transfer of payments between residents in the Netherlands and non-residents. According to its statutes, the VDB pursues this goal by trying to ensure alignment of the terms and conditions under which VDB members perform their services, with a view to promoting the maintenance of a sound financial basis for its members' business activity, while preserving healthy competition.

Membership of the VDB is open to private, public and unincorporated companies established in the Netherlands and to undertakings established abroad. They must be authorized, under the relevant Dutch legislation, to act as intermediaries in the transfer of payments between residents and non-residents. Such authorization has been given to the all-purpose banks (most NBV members are also members of the VDB), the Rabobank, the Postbank and the Bank der Bondsspaarbanken NV. With the exception of one bank (a 100 % subsidiary of the Dutch central bank), all such authorized institutions are members of the VDB, i.e. a total of some sixty.

(4) The Stichting Bevordering Chequeverkeer (Office for the Promotion of Cheque Transactions — SBC), set up in 1967 and having its registered office in Amsterdam, has the objective of promoting the use of cheques.

The banks affiliated to the SBC are the Rabobank, the members of the NBV and these banking insitutions accepted by the SBC board as affiliated banks.

These affiliated banks must have a given level of own capital or otherwise provide guarantees that they can discharge their obligations. Most of the banks affiliated to the SBC are also members of the NBV and/or the VDB.

(5) The Vereniging van Bemiddelaars in Onderhandse Leningen (Association of Intermediaries in Loans against Promissory Notes — VBOL), set up in 1951 and having its registered office in Amsterdam, has the objective of promoting the interests of intermediaries dealing in loans against promissory notes. According to its statutes, it pursues this objective by trying to ensure uniformity in the terms and conditions under which its members provide their services and by the definition of services and the charges attaching to them, so as to ensure greater transparency.

Membership of the VBOL is open to individuals and companies whose business is to act as intermediaries in the raising and placing of loans against promissory notes. About half of the members of the VBOL are also members of the NBV and the VDB. The major banking institutions are members.

(6) The College van Overleg der Gezamenlijke Banken (Interbank Consultative Committee — CVO), whose secretariat is in Amsterdam, was until 1 June 1989 the central body for dealing with matters jointly affecting the NBV, the Rabobank, the banks affiliated to the Nederlandse Spaarbankbond and the Postbank, and it provides coordination between these organizations. As from 1 June 1989, the CVO's activities have been taken over by the new Nederlandse Vereniging van Banken (Dutch Association of Banks), which will in pratice also take over the activities of the NBV and VDB. These associations however have not to date been wound up.

(7) The Vereniging voor de Effectenhandel (Association for Trading in Securities — VEH), set up in its original form in 1876 and having its registered office in Amsterdam, has the objective of promoting the interests of securities trading in the broadest sense. According to its statutes, it pursues this goal by providing a stock exchange room for carrying on

securities trading, by establishing and publishing prices and by drawing up rules and other provisions for securities trading, including minimum charges for commissions and rebates that are binding on its members.

Membership of the VEH is open to individuals and companies carrying on securities trading in the Netherlands.

A large number of VEH members are also members of the NBV and the VDB.

(8) The Vereniging van Wisselmakelaars (Association of Bill Brokers — VWM), set up in its original form in 1949 and having its registered office in Amsterdam, has the objective of promoting the interests of the money and exchange market in the broadest sense of the word.

Membership of the VWM is open to individuals and companies acting as brokers on the national and/or international money and/or exchange markets.

However, membership of the VWM is not compatible with membership of the NBV and the VDB. The VWM therefore does not include bill brokers who, as all-purpose or foreign exchange banks, are members of the NBV or VDB.

(9) A relatively close link exists between the VWM and the VDB (and NBV).

Under the statutes of the VWM, the VWM board may propose amendments to statutes and/or regulations only in consultation with the VDB, which also represents the NBV.

The VDB is also involved in the admission of new members to the VWM, having a right of veto.

B. The position of the relevant financial institutions in the financial sector in the Netherlands

(10) The share of the different categories of financial institution in the total deposits lodged with all Dutch financial institutions in the period 1982 to 1987 may be estimated as follows:

	(in %)
— all-purpose banks	50—55
— cooperative banks (Rabobank)	25—30
— savings banks (excluding RPS or Postbank)	± 10
— Postbank	10—15
— other institutions	0— 1

(11) The shares of these categories of financial institutions in the total assets of all Dutch financial institutions over the same period may be estimated as follows:

	(in %)
— all-purpose banks	60—65
— cooperative banks (Radobank)	20—25
— savings banks (excluding RPS or Postbank)	± 5
— Postbank	5—10
— other institutions	0— 5

C. The proceeding and the object of this decision

(12) On 5 February 1987, following notification by the NBV of various provisions in 1985 and 1986, the Commission sent the associations of undertakings listed under A above a statement of objections covering the vast majority of the provisions so notified.

The provisions covered by the statement of objections, described more fully in point D, concerned the charging by the relevant financial institutions of commissions, rates and margins, the application of value dates, the invoicing of certain costs, certain forms of soliciting of customers and certain exlcusive arrangements.

Some of the provisions concerned relations between financial institutions, others relations between financial institutions and their customers (private and/or business customers who are not financial institutions; hereinafter referred to as customers), while a number of the provisions concerned both types of relations.

(13) Following the statement of objections, discussions with the Commission and a hearing, the relevant parties withdrew or amended a large number of the provisions covered by the statement of objections.

(14) In this decision, the Commission grants exemption for two of the provisions thus amended and negative clearance for other amended provisions and for a number of unamended provisions in respect of which, on the basis of the information received, the Commission deemed amendment not to be necessary.

(15) In particular, the decision does not apply to:

— the general terms and conditions of banking recommended by the NBV to its members,

— agreements on interest rates,

— agreements concerning cooperation between financial institutions in respect of electronic transactions and bank cards,

— the provisions, established by the Stichting Bureau Kredietregistratie (Credit Registration Office), concerning the participation by companies to the credit registration system of this Office.

The Commission reserves its position on such provisions.

D. The provisions

(16) A distinction may be made in the other provisions between those which have been withdrawn outright, and those which have been maintained either as notified or amended.

1. *The provisions which have been withdrawn*

(17) The provisions which have been withdrawn are described briefly below. A more detailed description is given in the Annex.

(18) The provisions which have been withdrawn include firstly most of the regulations notified by the NBV.

The regulations, numbered from I to XIV, stipulated the minimum conditions (mainly minimum commissions) to be applied by financial institutions members of or affiliated to the NBV, VDB, SBC and VBOL, for the various services therein specified to which the regulations applied.

The following regulations or parts thereof have been withdrawn:

— Regulation I, Articles 1 to 14, concerning, amongst others, the passing on of costs and the rounding up of figures for commissions,

— Regulation II, concerning minimum commissions on a number of services generally provided in the transfer of payments,

— Regulation III, concerning minimum commissions on a number of internal payment services,

— Regulation IV, concerning minimum commissions in respect of Eurocheques and other guaranteed cheques,

— Regulation V, concerning minimum commissions on transactions in foreign banknotes and traveller's cheques,

— Regulation VI, concerning minimum commissions on foreign transfers,

— Regulation VII, concerning minimum commissions on services connected with letters of credit,

— Regulation VIII, concerning minimum commissions on services connected with bills of exchange and promissory notes,

— Regulation IX, concerning minimum commissions on the provision of various sorts of guarantees,

— Regulation X, concerning minimum commissions on services relating to collection,

— Regulation XI, concerning minimum commissions on various services, including services connected with securities,

— Regulation XII, concerning value dating,

— Regulation XIII: Regulation on transactions in foreign banknotes and Regulation on foreign exchange transactions which provided for minimum rates and margins for the purchase and sale of foreign banknotes and for other foreign exchange transactions, and the Regulation concerning the Noteringscommissie vreemd bankpapier (Foreign banknotes Quotations Committee) which provided for concertation on the fixing of rates and margins for the purchase and sale of foreign banknotes,

— Regulation XIV, concerning minimum commissions in respect of loans against promissory notes.

(19) An agreement between the NBV, the VDB and the VEH concerning minimum commissions on various services relating to securities, which was connected with Regulation XI, has also been withdrawn. The services in question were services performed by members of the NBV, VDB and VEH to foreign financial institutions.

(20) In addition to this agreement and the abovementioned regulations of the NBV, VDB, SBC and VBOL, the parties have also terminated the following provisions:

— a VWM regulation concerning minimum commissions to be charged by VWM members acting as intermediaries in certain financial transactions,

— an agreement betwee the VDB and VWM giving VWM members the exclusive right to act as intermediaries for VDB members in foreign exchange transactions,

— a VDB circular concerning the abolition of telex and postage charges between banks and providing for the passing on of such charges to customers,

— a NBV circular imposing strict limits on the gifts and bonuses offered on banking services.

(21) In the statement of objections, the Commission had informed the parties concerned that the

abovementioned provisions restricted competition and were not eligible for exemption under Article 85 (3).

The provisions restricted the scope for the undertakings concerned — on the basis of their own individual costs and profitability and profiting from the terms and conditions available on the market — to determine independently and individually, as part of their own commercial and business policy, the prices and other conditions to apply to the services they provided to customers or to other banks.

(22) On the basis of the information available to it at that time, the Commission had also informed the parties concerned in the statement of objections that the charging of various minimum commissions, as laid down in Regulations I to XIV listed in paragraph 18, resulted in discrimination.

In particular, different charges were prescribed for comparable banking services in the following cases:

— in the case of various services, different commissions were prescribed depending on whether the banking services were provided for banks that were members of the association concerned, for banks abroad or for others not members of the relevant association.

The commissions that had to be charged to banks abroad and to other non-members (including Dutch banks that were not members) were higher than those charged to members of the association concerned, and those for other non-members were in various cases higher than the commissions charged to banks abroad;

— in the case of transfers between residents and non-residents, commissions had to be charged which in most cases were higher than those stipulated for transfers between an account held by a resident in the Netherlands and one held by him in his own name abroad, even though the two banking services were entirely comparable;

— in the case of commissions charged on transfers between residents and non-residents, provision was made for an exception, to the effect that the commission did not have to be charged if the transfer involved securities transactions carried out via a VDB member. This meant that a VBD member did not have to charge any commission if the transaction was carried out through another VDB member, but did have to charge a commission if the transaction was carried out through a non-member, even though for the bank concerned there was no objective difference between the two types of transfer.

(23) In the statement of objections, the Commission had informed the parties concerned that the difference between the commission prescribed for transfer between residents' and non-residents' accounts, where both accounts were held with Dutch banks, and the zero rate of commission in effect charged for transfers between residents' accounts could not be attributed to a difference between the operations that had to be carried out for the two types of transfers and could not therefore be accounted for by cost differences.

The only additional operation for a transfer between a resident's and a non-resident's account as compared with one between two accounts of a resident was, according to the information provided by the NBV, the notification of the central bank. However, since, according to the information provided by the NBV, the cost of the notification of the central bank was only one of a number of costs on the basis of which the commission was prescribed, this single difference could not account for the level of commission prescribed for transfers between residents' and non-residents' accounts.

(24) In the statement of objections, the Commission had taken the view that the prescribing of the commissions referred to in paragraphs (22) and (23) meant that banks which were not members of the associations concerned and customers of their suppliers to whom transfers were made were placed directly or indirectly at a disadvantage in competition on the market for the services to be provided by them or the products to be supplied by them, because of the higher costs resulting from the charging of the commissions concerned.

(25) Since the parties concerned have withdrawn all the regulations providing for the abovementioned differences in commissions, there was no longer any need for the Commission to examine how far the commissions laid down in the regulations might be deemed to be discriminatory or unfair in other respects.

(26) In the written replies to the statement of objections, and in discussions with the Commission, the parties concerned proposed that certain minimum commissions to be charged to customers pursuant to the regulations be replaced by minimum commissions which banks would charge each other, with any commissions chargeable to customers being determined by the banks individually.

However, the parties have not been able to convince the Commission that such changes would meet the conditions for exemption under Article 85 (3). They have not shown that such agreements on inter-bank commissions would actually be necessary for the successful implementation of certain forms of cooperation, positive in themselves, between a

number of banks. The position of the Commission is that only in the exceptional cases, where such a necessity is established, may agreements on inter-bank commissions be capable of obtaining an exemption under Article 85 (3).

(27) The parties concerned withdrew most of the abovementioned provisions in whole or in part with effect from 1 January 1988 and withdrew all the remaining provisions with effect from 1 October 1988, with the exception of Regulation XI, Articles 5, 6 and 7, and Regulation XII concerning value dating, which were withdrawn with effect from 1 December 1988, and the Regulation on foreign exchange transactions, contained in Regulation XIII, which has only been withdrawn by VDB circular of 16 January 1989.

2. *The provisions that have not been withdrawn*

(28) The following provisions have been maintained by the parties concerned, either unamended or following amendment. The main amendments are also mentioned.

Regulation I (Introduction), Articles 15 to 19

(29) According to these provisions, documentary credits have to be dealt with in conformity with the uniform rules for documentary credits of the International Chamber of Commerce, and orders for acceptance and collections have to be dealt with in conformity with the uniform rules for collections of the International Chamber of Commerce. While a member is obliged to deal on behalf of another member with orders for acceptance and/or collections in respect of its own customers in the Netherlands, this obligation does not, according to the provisions, apply to orders that can be dealt with via the Staatsbedrijf der Posterijen, Telegrafie en Telefonie (PTT). Finally, the regulations have to be applied only by the members' establishments in the Netherlands.

(30) In response to the statement of objections, the parties concerned deleted the provisions concerning the passing on of charges to clients and the rounding up of figures of commission.

Regulation XIII (foreign exchange transactions), Regulation concerning the Valutanoteringscommissie

(31) According to this Regulation — in the version modified on the Commission's request and communicated to the VDB members by circular of 12 April 1989 — the Valutanoteringscommissie (Foreign Exchange Quotations Committee), whose members are appointed by the VDB board, is responsible for the daily fixing of reference middle rates for foreign currencies currently dealt in. The middle rates are used as a reference basis, in particular, in foreign currency transfers and are established for spot transactions and forward transactions (for various terms).

The reference rates are determined in conformity with the guidelines and procedure laid down in the regulation. These are that the Valutanoteringscommissie, on the basis of the latest market developments, puts forward at a daily meeting a proposal for the reference rate to be determined for that day. Foreign exchange banks and brokers may object to the rates thus proposed. Such objections may result in an adjustment of the reference rates if the objections are supported by actual bids or offers for the minimum amounts specified in the regulation. Such bids and offers must be actually carried out if someone accepts them.

(32) As originally notified, this regulation provided that the VDB board should establish minimum margins which VDB members had to add or deduct from the middle rates. The margins were included in the VDB regulation concerning foreign exchange transactions, referred to in paragraph (18), which stipulated that the margins, and the middle rates established during the fixing, had to be applied in foreign exchange transactions. Both this latter regulation, and the provisions concerning margins in the regulation concerning the Valutanoteringscommissie, have been withdrawn at the Commission's request.

Decision concerning uniform conditions for the hire of safes

(33) Under this CVO decision, the banks represented within the CVO have to apply uniform conditions when letting safes. These include a uniform maximum amount to which the bank's liability is limited in the event of damage or theft.

Decision concerning charges for the use of postage-paid envelopes

(34) Under this CVO decision, the banks represented within the CVO decided to negotiate jointly with the PTT authorities on the PTT-charges for the use of postage-paid envelopes which banks provide to their customers for their correspondence with them. This resulted in a uniform PTT charge.

Decision concerning the sale of gift vouchers

(35) Under this CVO decision, the banks represented within the CVO may not sell gift vouchers on behalf of

the local tourist organizations. These gift vouchers may be spent at a variety of local shops, at the choice of the recipient of the voucher. The CVO regards the sale of these vouchers as an ancillary activity that would be insignificant compared with other bank services and would involve disproportionate cost.

Circulars concerning simplified clearing procedures for cheques denominated in guilders and foreign currencies

(36) These VDB circulars provide for procedures and arrangements for simplified and more rapid clearing of cheques denominated in guilders or foreign currencies involving at least one party not resident in the Netherlands. The procedures are aimed at replacing, for the most widely-used foreign currencies, the labour-intensive procedure hitherto applied in the normal sending of cheques for collection. The rules contained in the circulars include rules on uniform value dates applicable in relations between banks and the stipulation that, where the value dates are exceeded, the receiving bank can request payment of interest from the other bank.

(37) In the version notified, the circular concerning cheques denominated in guilders provided not only for uniform value dates to be applied in relations between the relevant banks, but also for uniform value dates to be applied by the banks *vis-à-vis* their customers.

In the version notified, the circular concerning cheques denominated in foreign currencies provided not only for uniform value dates to be applied in relations between the relevant banks, but also for uniform value dates to be applied by the banks *vis-à-vis* the relevant foreign banks.

Since the Commission considers that the uniform value dates for customers and foreign banks are not necessary to ensure proper interbank cooperation in clearing cheques, as sought by the circular, the VDB has, at the Commission's request, withdrawn the uniform value dates for customers and for foreign banks.

Circular concerning forward transactions in foreign currencies

(38) This VDB circular suggests that VDB members carrying out forward transactions in foreign currencies with customers who are private individuals impose supplementary conditions. Such conditions would be in addition to the general conditions imposed by the banks. According to the text of these supplementary conditions, the customer should, if requested to do so by the bank, provide additional security, failing which the bank may effect the transactions immediately or consider it to be annulled. All the costs and damages arising from such annulment are then payable by the customer.

Circular concerning own-account dealing by foreign exchange dealers

(39) This VDB circular comprises a code of behaviour with regard to the organization of foreign exchange dealings by members. Under the code, an exchange dealer in an office or agency of a member may not carry out exchange transactions for his own account, without prior authorization for each transaction from his superior or management. If other employees of a member wish to carry out foreign exchange transactions, they must do so via the office in which they have an account, without the intermediary of the arbitrage department of their office or agency. If the member has only one establishment, the other employees must carry out transactions via an account with another, legally independent bank.

Circular laying down guidelines for Swift and other payment transfers in foreign currencies between foreign currency banks

(40) This VDB circular mainly contains rules to allow a transfer to be deemed to have been received on a given value date and provides a list of permanent foreign correspondents.

Agreement concerning open-open telephone lines

(41) This agreement between the VDB and the VWM (and the VDB circular implementing it) stipulates that open-open telephone lines may not be used. These are telephone connections between banks and bill brokers on which arbitragers from other banks can listen in. Such telephone lines are deemed to be prejudicial to the anonymity of the parties and to the confidentiality of agreements between them, which the parties regard as the fundamental principle governing the activity of a dealer.

Agreement concerning gifts and bonuses offered as an incentive to savers

(42) This agreement between the CVO and the organizations representing the retail trade provides for a code of behaviour concerning gifts and bonuses offered as an incentive to savers. The aim of the code of behaviour is to ensure that, in offering such gifts and bonuses to savers, the banks do not enter into

competition that is considered unfair against the retail trade, and it provides that in principle only banking-related goods and services should be offered to attract savers. The banks may also offer bonuses relating to recreational events (or subscriptions to or reductions on such events).

Agreement concerning transfers relating to fund-raising acceptances

(43) This agreement between the NBV, the Rabobank, the Nederlandse Spaarbankbond and the Postbank lays down a uniform commission to be charged by the drawee bank to the payee bank for handling certain types of transfers, namely fund-raising acceptances. These are transfers of a predominantly voluntary nature with a mainly charitable objective.

E. Observations by third parties

(44) The Commission has received observations from third parties in response to the publication, in accordance with Article 19 (3) of Regulation No 17, of a summary of the provisions which have been maintained in force. The observations caused the Commission to reserve its position on the provisions established by the Stichting Bureau Kredietregistratie concerning the participation of companies not established in the Netherlands to the credit registration system of the Stichting. For the rest the observations were not such as to lead the Commission to reconsider its position.

II. LEGAL ASSESSMENT

A. Article 85 (1)

1. *Undertakings and associations of undertakings*

(45) Banks, other financial institutions concerned and bill brokers are undertakings within the meaning of Article 85 (1). The NBV, VDB, SBC, VBOL, VEH, VWM and the CVO, which have such undertakings as their members, are associations of undertakings within the meaning of that same provision.

2. *Agreements between undertakings and decisions by associations of undertakings*

(46) The agreements which have been maintained in force are agreements between undertakings within the meaning of Article 85 (1). The regulations and decisions which have been maintained in force are decisions by associations of undertakings within the meaning of that same provision. This also applies to the circulars maintained in force, which have been drawn up by the relevant organizations on the basis of the powers conferred on them, and which are intended to influence the behaviour of the relevant members and affiliates.

3. *Restriction of competition*

3.1. The provisions which do not restrict competition

(47) The Commission considers that the following provisions do not restrict competition or do not restrict it appreciably and are, therefore, not prohibited by Article 85 (1).

(48) Regulation I (Introduction), Articles 15 to 19

These articles contain provisions on dealing with documentary credits and orders for acceptance and collection (see paragraph (29)).

Circular concerning own-account dealing by foreign exchange dealers

This circular contains a code of behaviour relating to the organization of foreign exchange dealings by VDB members (see paragraph (39)).

Circular laying down guidelines for Swift and other payment transfers — transfers in foreign currencies between foreign currency banks

This circular contains certain practical rules concerning certain transfers (see paragraph (40)).

Agreement concerning open-open telephone lines

This agreement lays down rules on the involvement of third parties in telephone connections between bill brokers and banks (see paragraph (41)).

The four abovementioned provisions do not concern charges and fees or other terms and conditions affecting competition and in their present form do not to any appreciable extent prevent the undertakings concerned from actually competing with one another.

(49) Regulation XIII (foreign exchange transactions), Regulation concerning the Valutanoteringscommissie

This Regulation, concerning the establishment of foreign exchange reference rates (see paragraphs (31) and (32)), in its present form no longer restricts competition to any appreciable extent. It results only in the fixing of middle rates which are used as a reference basis, particularly in financial and

commercial transactions. The rates are established on the basis of a procedure that takes account of supply and demand and in which actual trade in the relevant foreign currencies can and does take place. In the light of the information provided by the VDB to the Commission, particularly with regard to the real scope for arbitrage available to market participants in such a situation, the Commission considers that it can be concluded justifiably that the rates are established by procedures in which competition can play its role, and that market participants' decisions are also influenced by the rates determined at the same time, outside the framework of these procedures, in other transactions between different parties in the Netherlands and abroad.

Furthermore, the middle rates determined during the fixing are not mandatory. The banks, bill brokers and other market members are entirely free, in the light of the market situation and the nature of the transaction, to agree on whatever buying and selling rates they want. In so doing, they can choose between various options, such as the application of the middle rates or of more favourable or less favourable buying and selling rates, whether or not coupled with the charging of commissions.

(50) Decision concerning charges for the use of postage-paid envelopes

The decision concerning charges for the use of postage-paid envelopes (see paragraph (34)) does not appreciably restrict competition between the banks concerned. Providing clients with postage-paid envelopes does not have the character of an independent service for which there exists a separate market and is not related to any specific banking service. It may be assumed that the cost of providing clients with postage-paid envelopes forms part of the general costs of the banks concerned and is only a relatively insignificant part of such costs. In this connection it is relevant that the decision leaves the banks free to decide whether or not to provide their customers with postage-paid envelopes and that, in practice, the banks make use of this freedom in different ways.

In the light of the foregoing and taking into account the market position of the PTT in relation to postage-paid envelopes and having regard to the fact that, according to the information supplied by the parties to the Commission, the banks did not take similar decisions or conclude similar agreements for other products and services to be purchased by them, it appears justified to the Commission to conclude that the decision does not appreciably restrict competition between banks.

(51) Decision concerning the sale of gift vouchers

The decision concerning the sale of gift vouchers (see paragraph (35)) does not appreciably restrict competition between the banks concerned, since, as the parties concerned have also stated, the sale of gift vouchers should be regarded as a negligible ancillary activity on the part of the banks. Nor does the decision appreciably restrict competition between the traders selling the products to which the gift vouchers relate.

(52) Circular concerning forward transactions in foreign currencies

This circular concerning additional security to be provided by the customer in connection with forward transactions in foreign currencies (see paragraph (38)) does not appreciably restrict competition between banks, since the banks remain free to decide whether or not to request the additional security and, if necessary, to enter into consultation with the customer in order to find an arrangement that is more suitable to him.

(53) Agreement concerning gifts and bonuses offered as an incentive to savers

The agreement concerning gifts and bonuses offered as an incentive to savers (see paragraph (42)) does not appreciably restrict competition, since the banks remain free to offer gifts and bonuses in the form of goods or services falling within the area of the normal activities of banks and since, in addition, the agreement does not specify which activities have to be regarded as such.

3.2. The provisions which restrict competition

(54) The Commission considers that the following provisions restrict competition:

Decision concerning uniform conditions for the hire of safes

The decision (see paragraph (33)) restricts the scope for the undertakings concerned to determine independently, on the basis of their own costs and profitability and as part of their own commercial and business policy, the terms and conditions which they apply to their customers for the hiring of safes. It thus restricts competition between banks in the provision of this service.

(55) Circulars concerning simplified clearing procedures for cheques denominated in guilders and foreign currencies

These circulars, which provide for procedures and arrangements for simplified and more rapid clearing of cheques denominated in guilders and foreign currencies (see paragraph (36)), similarly restrict

competition, since they limit the scope for the banks concerned to agree, bilaterally with one another, even more simplified and rapid processing procedures and, consequently, also more favourable value dates. They are thus unable to make the best use of all the means that, in the absence of these circulars, would have been available for obtaining the best possible conditions in their bilateral relations with certain other individual banks, and from which their customers could benefit. Competition between the relevant banks for customers is thus indirectly restricted for the services concerned.

(56) Agreement concerning transfers relating to fund-raising acceptances

The agreement concerning transfers relating to fund-raising acceptances, which provides for an interbank commission on such transfers (see paragraph (43)), must also be deemed to restrict competition. The agreement restricts the scope for the relevant banks to agree bilaterally on reimbursements of costs in a way that is more favourable and thus similarly to make optimum use of all resources which would have been available to them without the agreement for obtaining as favourable conditions as possible in their bilateral relations with certain other banks, and passing these on to their customers. Competition between the relevant banks for customers is thus indirectly restricted for the services relating to the relevant transfers.

(57) The provisions referred to in paragraphs (54) to (56) restrict competition to an appreciable extent.

The banks involved in these provisions account for more than 90 % of total deposits and assets of the banks operating in the Netherlands.

4. *Effect on trade between Member States*

4.1. **The provisions which do not affect trade between Member States**

(58) In the Commission's view, the following provisions which restrict competition do not appreciably affect trade between Member States:

Decision concerning uniform conditions for the hire of safes

These provisions do not appreciably affect trade between Member States, since this service has, by its nature, little or no connection with trade between Member States in goods or services, and since, according to the information provided by the parties concerned, insignificant use is made of it by consumers from other Member States. Furthermore, branches of banks from other Member States established in the Netherlands (branches which form an integral part of such banks and which are therefore directly involved in trade in services between Member States) hardly ever offer safes for hire.

(59) Agreement concerning transfers relating to fund-raising acceptances

This agreement similarly does not have any appreciable effect on trade between Member States. The services concerned may be provided only between banks established in the Netherlands, with branches of banks from other Member States participating to no more than an insignificant extent. Furthermore, because of their predominantly charitable objective, the transfers concerned have little or no connection with trade in goods or services between Member States. Finally, it may be assumed that the drawees, which are the final consumers of the relevant interbank services, include no or virtually no drawees established in other Member States.

4.2. **The provisions which affect trade between Member States**

(60) Trade between Member States is affected by the circulars concerning simplified clearing procedures for cheques denominated in guilders or in foreign currencies.

Since this applies to the clearing of cheques in respect of which at least one non-resident in the Netherlands is involved, the circulars affect the transfer of payments and foreign exchange dealings between Member States.

B. **Article 85 (3)**

(61) The circulars concerning simplified clearing procedures for cheques denominated in guilders or foreign currencies meet the conditions required for exemption under Article 85 (3) for the following reasons.

1. *Improvement in the supply of banking services*

(62) The circulars result in an improvement in the payments system. The application of uniform procedures and the use of standard forms together with the fact that cheques no longer have to be sent for collection to the relevant banks, but may, after a short period, be debited by the drawee bank against the

bank concerned, simplify the activities of the banks. The centralization of the application of the clearing procedure by each bank at one or only a few of its offices also contributes to this. The clearing of cheques is thus carried out more rapidly.

2. *Benefit to consumers*

(63) Consumers receive a fair share of the improvements thus achieved, since the circulars result in the recipients of cheques being credited more rapidly than was the case with the normal collection procedures applied before the introduction of the simplified procedures.

3. *Indispensable nature of the restrictions*

(64) The uniform value dates indicate clearly within what period clearing has to take place and make it possible to apply the sanction provided for in the circular against banks which do not comply with such period, namely the requirement that the bank concerned pay the other bank interest on the amount of the cheque for the period by which the specified value dates are exceeded. These elements of the agreements are essential to ensure the reliability and hence the success of the simplified and more rapid clearing method.

4. *Scope for competition*

(65) The circulars do not afford the banks concerned the possibility of eliminating competition in respect of a substantial part of the services in question, since they do not directly govern relations between the banks and their customers. The banks remain free to determine the value dates which they apply to their customers. Furthermore, the value dates applied in clearing cheques are not the only area in which competition with regard to cheques takes place. Ultimately, the recipients of cheques have the choice between accepting cheques and other forms of payment.

C. **Articles 6 and 8 of Regulation No 17**

(66) Pursuant to Article 6 (1) of Regulation No 17, this Decision takes effect on 10 May 1988, the date on which the VDB sent the Commission the amended version of the circulars to which the exemption provided for in this Decision relates.

(67) Pursuant to Article 8 (1) of Regulation No 17, the exemption resulting from this Decision is granted for an initial period of ten years, having regard to the extent of the restrictions of competition and the possible changes which may result from technological development.

(68) In accordance with Article 8 (1), the VDB should be required to notify the Commission immediately of any direct or indirect addition or amendment to the circulars,

HAS ADOPTED THIS DECISION:

Article 1

On the basis of the facts known to it, the Commission finds no grounds for action to be taken under Article 85 (1) of the EEC Treaty against the following provisions notified by the Nederlandse Bankiersvereniging:

— Regulation I (Introduction), Articles 15 to 19,

— Regulation XIII (foreign exchange transactions), Regulation concerning the Valutanoteringscommissie, in the version communicated to the members of the Vereniging van Deviezenbanken by circular of 12 April 1989 of this association,

— Decision concerning uniform conditions for the hire of safes,

— Decision on charges for the use of postage-paid envelopes,

— Decision concerning the sale of gift vouchers

— circular concerning forward transactions in foreign currencies,

— circular concerning own-account dealing by foreign exchange dealers,

— circular laying down guidelines for Swift and other payment transfers in foreign currencies between foreign currency banks,

— agreement concerning open-open telephone lines,

— agreement concerning gifts and bonuses offered as an incentive to savers,

— agreement concerning transfers relating to fund-raising acceptances.

Article 2

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable for the period from 10 May 1988 to 9 May 1998 to the circulars drawn up by the Vereniging van Deviezenbanken concerning simplified clearance procedures for cheques denominated both in guilders and in foreign currencies.

Article 3

The Vereniging van Deviezenbanken is hereby required to inform the Commission forthwith of any direct or indirect addition or amendment to the circulars referred to in Article 2.

Article 4

This Decision is addressed to the following associations of undertakings and undertakings:

— Nederlandse Bankiersvereniging,
Keizersgracht 706,
1017 EW Amsterdam, Netherlands;

— Vereniging van Deviezenbanken,
Keizersgracht 706,
1017 EW Amsterdam, Netherlands;

— Vereniging van Wisselmakelaars,
Keizersgracht 706,
1017 EW Amsterdam, Netherlands;

— the members of the former College van Overleg van de Gezamenlijke Banken, which are, in addition to the Nederlandse Bankiersvereniging, the following:

— Coöperative Centrale Raiffeisen-Boerenleenbank BA,
Croeselaan 18,
3521 CB Utrecht, Netherlands;

— Nederlandse Spaarbankbond,
Singel 236,
1016 AB Amsterdam, Netherlands;

— Postbank NV
Haarlemmerweg, 506-512,
1014 BL Amsterdam, Netherlands.

Done at Brussels, 19 July 1989.

For the Commission
Sir Leon BRITTAN
Vice-President

ANNEX

The provisions referred to in paragraphs (18), (19), and (20) of the Decision related more specifically to the following conditions to be applied by the financial institutions concerned.

1. **Regulation I (Introduction), Articles 1 to 14**

These provisions contained various rules of a general character to be complied with by NBV, VDB, SBC and VBOL members when applying the other regulations. The rules related in particular to liability to the payment of commissions and charges and to the way in which commissions are mentioned on invoices. The rules also provided that all the amounts to be charged on the basis of the regulations had to be rounded up to the nearest 0,10 guilders or a multiple thereof and, furthermore, that, in applying the minimum commissions, the members must pass on to their clients all third-party costs such as postage, communication and correspondence costs.

2. **Regulation II (transfer of payments in general)**

This Regulation, which applied to NBV members, laid down minimum commissions for a number of services generally involved in the transfer of payments:

— commissions which the banks had to charge their customers for services relating to the receipt and processing of orders by telephone, cash transfers to accounts of third parties, payments to non-account-holders and the drawing of cheques on the bank concerned or on a bank abroad (Articles 1 to 5 and 9).

— commissions which the banks had to charge both customers and each other for services relating to cash credits (Articles 6 to 8).

3. **Regulation III (domestic transfer of payments)**

Under this Regulation, NBV members had to charge their customers minimum commissions for handling cheques denominated in guilders, other than ordinary and Eurocheques (Article 1), and for processing and carrying out payments in foreign currencies between residents, both by transfer and by cheque (Article 2).

4. **Regulation IV (Eurocheques)**

This Regulation, applicable to VDB and SBC members, laid down minimum commissions which the banks had to charge their customers for issuing Eurocheque cards (Article 1); for the cashing of Eurocheques of an amount greater than 500 guilders (Article 2); and for the cashing of cheques guaranteed by a bank abroad other than standard Eurocheques (Article 3).

5. **Regulation V (transactions relating to travel)**

Under this Regulation, VDB members had to charge minimum commissions:

— to their customers, for the buying or selling of foreign banknotes or traveller's cheques (Articles 1 and 2),

— to banks abroad, for the deposit with a VDB member of traveller's cheques of the foreign bank concerned (Article 3).

6. **Regulation VI (foreign transfer of payments)**

This Regulation required VDB members to charge minimum commissions:

— to their customers for the transferring or receiving of payments between residents and non-residents (Article 1); between an account held by a resident in the Netherlands and another in his own name abroad (Article 2); or between non-residents, irrespective of where the accounts were held (Article 3);

for services relating to a currency permit issued by the Dutch central bank (Article 4); for the conclusion and extending of forward transactions in foreign currencies (Article 5); and for the handling and returning of unpaid cheques (Article 6),

— to other banks for certain services specified in Articles 1 to 6.

Under the Regulation, the commission for the transfer or receiving of payments between residents and non-residents did not have to be charged on certain securities transactions that were carried out through a VDB member.

7. **Regulation VII (letters of credit)**

Under this Regulation, NBV members had to charge minimum commissions on various services relating to letters of credit (Articles 1 to 12). For the bulk of such services, the commissions were charged both to other banks and to customers.

8. **Regulation VIII (acceptances, underwriting and deferred payments)**

Under this Regulation, NBV members had to charge other banks and customers minimum commissions for accepting bills of exchange, signing promissory notes, underwriting bills of exchange, undertaking to carry out a payment at a future point in time or having such services carried out by third parties (Articles 1 to 3).

9. **Regulation IX (guarantees)**

Under this Regulation, NBV members had to charge customers and other banks minimum commissions for providing various sorts of guarantees and associated services (Articles 1 to 6).

10. **Regulation X (collections)**

This Regulation required NBV members to charge customers and other banks minimum commissions on a number of services relating to collection (Articles 1 to 4).

11. **Regulation XI (various services)**

Under these provisions, NBV members had to charge minimum commissions for various types of services.

This involved firstly administrative services provided to customers in respect of securities (Articles 1 to 3). With regard to the same and other administrative services provided to foreign professionals in respect of securities, Article 4 provided for a special rate of charge which had been agreed between the NBV, the VDB and the VEH at the initiative of the VEH.

Secondly, the provisions laid down minimum commissions which NBV members had to charge customers for services relating to the safe custody of goods, the hire of safes and the use of night safes (Articles 5 to 7).

Lastly, the provisions laid down minimum commissions which NBV members had to charge to customers and, in the case of some services, to other banks for a number of other services, such as the provision of banking information, acting as intermediary in the purchase of treasury bills and providing a bank reference to tenderers for public contracts (Articles 8 to 11).

12. **Regulation XII (fixing of value dates)**

This Regulation stipulated for NBV members the day as from which amounts to be debited and credited were to be entered in current accounts, i.e. were to be included in the calculation of interest.

According to this Regulation, amounts to be debited, or credited, between banks had to be debited, or credited, in the banks's accounts no later, or earlier, than the date of clearing, but in the banks's customers's current accounts one or more days later, or earlier, than that date.

13. **Regulation XIII (foreign exchange transactions)**

This Regulation consisted of several parts. The following parts have now been entirely withdrawn by the VDB:

13.1. *Regulation on foreign exchange transactions*

Under this Regulation, VDB members were not allowed, in carrying out foreign exchange transactions (other than the buying and selling of foreign banknotes), to charge their customers more favourable rates and margins than the rates established by the Valutanoteringscommissie or the minimum margins laid down in the Regulation.

Only if the transaction in a single foreign currency exceeded the equivalent of 250 000 guilders, and this was expressly requested by the customer, could a VDB member charge a more favourable rate and margin.

The Regulation also related to forward transactions (Articles 1 to 8).

13.2. *Regulation on transactions in foreign banknotes*

Under this Regulation, VDB members were not allowed, in purchasing and selling foreign banknotes, to charge customers more favourable rates and margins than the rates established by the Noteringscommissie vreemd bankpapier or the margins stipulated in the regulation.

Only if the equivalent value of the transaction exceeded 5 000 guilders could a VDB member charge a more favourable rate (Articles 1 to 4).

13.3. *Regulation concerning the Noteringscommissie vreemd bankpapier*

Under this Regulation, the Noteringscommissie vreemd bankpapier, whose four members were appointed by the board of the VDB, had the task of establishing daily the middle rates for foreign banknotes.

The four members of the Noteringscommissie were, in practice, representatives of four of the five largest banks (the Algemene Bank Nederland, the Rabobank, the Amsterdam-Rotterdam Bank and the Nederlandse Middenstandsbank), who agreed on the rates by telephone.

The Regulation also stipulated that the board of the VDB should establish the minimum margins by which VDB members had to reduce or increase the rates in aiming at the buying and selling rates to be applied by them. The margins were subsequently laid down in the regulation on transactions in foreign banknotes referred to under 1.13.2 above (Articles 1 to 4).

14. **Regulation XIV (regulation concerning the VBOL)**

Under this Regulation, VBOL members had to charge minimum commissions for acting as intermediaries for loans based on promissory notes and the assignment of such loans to third parties.

15. **Regulation concerning the VWM**

This Regulation provided in particular for uniform commissions, which VWM members had to charge, for acting as intermediaries in transactions involving treasury bills and minimum commissions for acting as intermediaries in bringing about national and international interbank deposits.

The Regulation stipulated expressly that VWM members were prohibited from charging lower commissions than those which were established in the Regulation itself or by the VWM in consultation with the NBV or the VDB. Nor could VWM members give refunds or rebates to their customers, with the exception of certain reductions which they could grant to VDB members on certain transactions involving foreign currencies.

16. **Agreement concerning acting as intermediary in foreign currency transactions**

An agreement had been concluded between the VDB and the VWM on the basis of which, if they called on third parties to act as intermediaries in foreign exchange transactions, VDB members:

— should only make use of services of VWM members in all cases in which they use the services of a bill broker established in the Netherlands (also in the case of international deposits),

— should not accept any domestic counterpart (except in the case of international deposits), if they made use of the services of a broker established abroad.

17. **VDB circular concerning telex and postage costs**

This circular provided that VDB members should abolish the charging of telex and postage costs to one another.

In accordance with the circular, such costs were to be continued to be passed on by VDB members to their customers.

18. **NBV circular concerning gifts and bonuses offered on banking services**

This circular contained a code of behaviour for NBV members on the basis of which money prizes could be offered only on the opening of saving accounts and not on the opening of payment accounts, the granting of loans, insurance brokerage and services relating to travel. In addition, the monetary prices could not amount to more than 7,50 guilders and could be offered only as part of promotion activities of limited duration. The circular was intended to serve the implementation of the much less far-reaching agreement concerning gifts and bonuses offered on banking services referred to in paragraph (42) of the Decision.