Introduction

On 11 June 2002 the Commission concluded its first full-blown cartel inquiry into the banking sector by imposing fines totalling €124,26 million on eight Austrian banks for their participation in a wide-ranging price cartel dubbed the ‘Lombard Club’, covering the entire Austrian territory.

Prompted by press reports the Commission, supported by officials of the Austrian authorities, conducted simultaneous surprise investigations at several banks in June 1998. During those ‘dawn raids’ the Commission discovered hundreds of contemporaneous cartel documents — minutes of meetings, file notes, telephone notes, correspondence etc. On the basis of the vast amount of direct evidence about hundreds of cartel meetings since 1994, the Commission was able to reconstruct the highly sophisticated cartel network by using the banks’ own very words: the factual part of the Decision consists almost entirely of verbatim quotes (marked in this article in italics). This article summarises the Decision’s findings of fact and legal assessment (2).

The Lombard network

The cartel network was comprehensive: it covered essentially all banking products and services as well as advertising — or rather the absence thereof. It was highly institutionalised and closely interconnected, and covered the entire country — ‘down to the smallest village’, as one bank aptly put it. For every banking product there was a separate committee on which the competent employees at the second or third level of management sat. The individual committees were part of an organisational whole.

Each month the CEOs of the largest Austrian banks got together as the top-level body (‘Lombard Club’). One level down were the product-based specialist committees, most of which met in Vienna. These included the ‘Lending Rates Committees’ and the ‘Deposit Rates Committees’, which, as their names suggest, dealt with lending and deposit interest rates. Both the Lombard Club and the Vienna-based committees had a guiding function for the numerous ‘regional committees’, which held regular meetings in every province of Austria.

Within the Lombard network, a constant flow of information took place in particular between the various committees as well as between them and the Lombard Club at the top. In controversial cases, the Lombard Club’s guidance was awaited. Discussions in one committee were often suspended pending agreement in another. In addition, even outside this institutionalised network, numerous contacts took place between representatives of the banks concerned — sometimes at the highest level — on interest rates and charges/fees.

The cartel meetings

Often it was a change in the key lending rates by the Austrian Central Bank that prompted the banks to come together ‘for the joint reflection of measures to be taken’. Once all opinions and proposals were on the table, negotiations began on a joint manner of proceeding. The banks’ internal documents show that the negotiations regularly produced concrete results, including the deadline(s) for implementing the agreed measures. From time to time, the banks did not immediately succeed in reaching a consensus, and the common decision-making process often went through several meetings of different committees. At times, even the subsequent information of the public was arranged by means of ‘co-ordinated language’.

There were instances where even such intensive contacts did not suffice. The banks then had to resort to additional ‘various discussions and agreements’, ‘further telephone conversations’, ‘telephone contacts between the banks’, to ‘the managing directors [phoning] each other and [discussing] a co-ordinated approach as soon as possible’ or to ‘final negotiation’ outside the
competent committees themselves. Occasionally, however, the banks were ultimately unable to agree.

Those banks that, from time to time, changed interest rates without prior co-ordination caused ‘turnmoil’ in the relevant committee and were subjected to sharp criticism from their competitors. Such ‘completely surprising’ measures — since they had ‘obviously been kept secret’ — were ‘regarded by all the other banks as not very appropriate’ inasmuch as they ‘contradicted the stated objective of all the relevant committee meetings’. If, therefore, any bank really felt it had to undertake ‘surprising interest rate changes’, then at least ‘immediate information should be provided to all members of the Lending rates committee’.

**Article 81**

In the Commission’s analysis, the banks’ behaviour amounted to a single, complex infringement of Article 81 EC. Those aspects that do not qualify as agreements certainly constitute concerted practices, systematically eliminating uncertainty about the competitors’ next competitive moves. Given that most Austrian banks participated in the cartel to a certain degree the Commission has selected the addressees of the present decision on the basis of objective criteria, i.e., the intensity of their involvement in the most important committees.

In the view of the Commission, the sole purpose of this elaborate structure was to restrict competition with regard to its most important parameters in that sector. In their own internal documents the banks indeed expressed their desire to achieve, through their ‘useful’ and ‘constructive’ agreements, ‘controlled’, ‘reasonable’, ‘standardised’, ‘disciplined’, ‘eased’, ‘sensible’, ‘limited’, ‘moderate’ and ‘orderly’ competition.

Given the essentially national scope of the Lombard cartel, the decision sets out in particular detail the reasons why this comprehensive and all-encompassing cartel was apt at least potentially to restrict competition. Going beyond relying on the fact that the cartel covered the territory of an entire member state, the Commission assessed both the demand side (e.g., loans to and deposits from foreign customers, cross-border services, impact on exporting/importing businesses) and the supply side (e.g., influence of the cartel on entry decisions of foreign banks).

Addressing the banks’ arguments to the contrary, the Commission confirms that the cartel prohibition fully and without reservation applies to banks. The admittedly important role played by banks in any national economy does not dispense them from respecting the EC competition rules.

**Fines**

The Commission considered that the present infringement was of a very serious nature given that the cartel covered the entire territory and essentially all banking products and services. In addition, on the basis of abundant evidence the Commission arrived at the conclusion that the cartel decisions were either implemented or taken into account by the banks when they took their commercial decisions after cartel meetings. Thus, there could not be any doubt that the cartel did have an impact on the market — to the detriment of banking customers.

When determining the basic amounts of the fines the Commission took due account of the fact that the Austrian banking market is organised, for historical reasons, by ‘sector’. Within each of those banking groups (comprising savings banks and two types of co-operative banks, respectively), so-called umbrella institutions — each of which are important commercial banks in their own right — assume the task of internal co-ordination and representation vis-à-vis the other sectors. Within the Lombard network, those institutions participated not only in their own commercial interest but also as representative of their respective group. The Decision sets out in detail how relevant information was forwarded within each group, thus establishing how the umbrella institutions significantly contributed to the pan-Austrian impact of the cartel.

The Commission considered that there was no room for taking into account any mitigating circumstances. For example, the Commission found that the banks’ claim to have been unaware of the illegality of their cartel behaviour was at odds with internal documents that record the banks’ reflections about how to avoid or destroy traces of their meetings. Neither could the Commission accept as mitigating the fact that Austria joined the EU relatively recently.

Finally, with regard to the application of the 1996 Leniency Notice the Commission granted a 10% reduction because the banks had not contested the facts set out in the Statement of Objections. In this context, the Commission confirmed its established position that replies to Article 11 requests can be considered as relevant ‘co-operation’ under the 1996 Notice only to the extent that such replies go beyond the scope of the request concerned.