# JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

27 September 2006 *

In Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP,

**Dresdner Bank AG,** established in Frankfurt am Main (Germany), represented by M. Hirsch and W. Bosch, lawyers,

**Bayerische Hypo- und Vereinsbank AG,** formerly Vereins- und Westbank AG, established in Munich (Germany), represented initially by J. Schulte, M. Ewen and A. Neus, and subsequently by W. Knapp, T. Müller-Ibold and C. Feddersen, lawyers,

**Bayerische Hypo- und Vereinsbank AG,** established in Munich, represented initially by W. Knapp, T. Müller-Ibold and B. Bergmann, and subsequently by W. Knapp, T. Müller-Ibold and C. Feddersen, lawyers,

**DVB Bank AG,** formerly Deutsche Verkehrsbank AG, established in Frankfurt am Main, represented by M. Klusmann and F. Wiemer, lawyers,

* Language of the case: German.

**Commerzbank AG,** established in Frankfurt am Main, represented by H. Satzky and B. Maassen, lawyers,

applicants,

v

**Commission of the European Communities,** represented by T. Christoforou, A. Nijenhuis and M. Schneider, acting as Agents,

defendant,

APPLICATION by the Commission to set aside the judgments of the Court of First Instance of 14 October 2004 in Case T-44/02 *Dresdner Bank* v *Commission*, not published in the ECR, Case T-54/02 Vereins- und Westbank v *Commission*, not published in the ECR, Case T-56/02 *Bayerische Hypo- und Vereinsbank* v *Commission* [2004] ECR II-3495, Case T-60/02 *Deutsche Verkehrsbank* v *Commission*, not published in the ECR, and Case T-61/02 *Commerzbank* v *Commission*, not published in the ECR, delivered in default,

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

composed of H. Legal, President, P. Lindh and V. Vadapalas, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 31 May 2006,

gives the following

## Judgment

### Background to the dispute

1 The present case concerns Commission Decision 2003/25/EC of 11 December 2001 relating to a proceeding under Article [81 EC] (Case COMP/E-1/37.919 (ex 37.391) — Bank charges for exchanging euro-zone currencies — Germany) (OJ 2003 L 15, p. 1; 'the contested decision').

2 Among currency exchange services, it is necessary to distinguish the conversion of bank money and the exchange of coin and banknotes or 'currency exchange'. This latter type of service, which alone is relevant for the purposes of the present action, may be further broken down into two categories: first, large-scale currency exchange, which allows the banks to exchange large quantities of banknotes ('interbank currency exchange services') and, second, retail currency exchange services, provided to individuals and concerning small quantities of banknotes.

3 Before the introduction of the euro, the remuneration of currency exchange services did not generally give rise, in Germany, to a separate charge: the price of those services was included in the rates at which the credit institutions and bureaux de change purchased the currency from and sold it to their customers. On purchase, the rate was lower than the market reference rate and on sale it was higher than that rate (recital 38 in the preamble to the contested decision). This margin by comparison with the market reference rate is referred to below as 'the rate margin'.

4 Early in 1999, the Commission initiated an investigation against approximately 150 banks, including the applicants, established in seven Member States, namely Belgium, Germany, Ireland, the Netherlands, Austria, Portugal and Finland. It suspected the banks of having agreed to fix, during the transitional period between 1 January 1999, the date of the introduction of the euro as a single currency, and 1 January 2002, the date on which paper money denominated in euro ('the transitional period'), the prices of currency exchange services for the currencies of certain Member States participating in the euro zone. Although the investigation was initially undertaken under a single case number, the Commission proceeded with its investigation by initiating separate proceedings on the existence of cartels in the Member States concerned.

5 From 8 February 1999, the Commission requested information from three associations of German banks, in accordance with Article 11 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), principally concerning the remuneration of currency exchange services.

6 On 16 and 17 February 1999, the Commission carried out investigations at the head offices, in Frankfurt am Main, of Dresdner Bank and Deutsche Bank.

7 On 19 October 1999, the Commission sent a questionnaire to approximately 240 banks in the euro zone, requesting them, in accordance with Article 11 of Regulation No 17, to provide data on the exchange commissions charged before and after the introduction of the euro. That questionnaire was sent to 42 German banks, including the addressees of the contested decision (recitals 22 to 24 to the contested decision).

8 On 20 and 21 October 1999, the Commission carried out investigations in the Netherlands, at the head office of GWK Bank ('GWK') (recital 21 to the contested decision).

9 By letters of 3 and 10 August 2000, the Commission sent a statement of objections to the following banks:

— Commerzbank;

— Deutsche Verkehrsbank (DVB);

— Bayerische Hypo- und Vereinsbank (HVB);

— Reisebank;

— Dresdner Bank;

— Vereins- und Westbank (VUW);

— Bayerische Landesbank Girozentrale;

— SEB Bank (formerly called BfG);

— Hamburgische Landesbank Girozentrale;

— Westdeutsche Landesbank Girozentrale (West LB);

— Landesbank Hessen Thüringen Girozentrale;

— GWK and its parent companies Fortis NV, Fortis Services Nederland NV and Fortis Bank Nederland NV.

10 On 1 and 2 February 2001, the Hearing Officer heard the addressees of the statement of objections.

11 On 11 December 2001, the Commission adopted the contested decision.

12 According to the contested decision (recital 2), the banks which participated in the meeting which took place on 15 October 1997 at DVB in Frankfurt am Main ('the meeting of 15 October 1997') agreed to a commission of about 3% for the buying and selling of euro-zone banknotes during the transitional period.

13 The initiative for holding that meeting was said to be attributable to GWK. The contested decision states that GWK urged Reisebank, at a meeting held on 29 April 1997, to begin discussions with other German banks, with the primary aim of ensuring that Deutsche Bundesbank, the German central bank, would not provide a free currency exchange service to consumers (recitals 60 and 63 to 68 to the contested decision).

14 The documentary evidence of the infringement is to be found, according to the contested decision (recital 62), in the reports of meetings and telephone conversations found during the inspection at the premises of GWK, in particular the reports of the meeting of 15 October 1997 drawn up by an employee of GWK ('the GWK report') and an employee of Commerzbank ('the Commerzbank report').

15 In the contested decision, the Commission first noted that the participants agreed to inform Deutsche Bundesbank that from 1 January 1999 they would 'carry out the exchange of euro-zone banknotes at the fixed exchange rates and charge an explicit commission' (recital 88 to the contested decision).

16 Next, the Commission stated (recital 89 to the contested decision) that the participants in the meeting of 15 October 1997, having been unable to agree on the principle of a single tariff, 'set themselves the common target of replacing the exchange margins by percentage commission(s) such as to recover 90% of the exchange margin income. This would amount to an overall commission of about 3%'. On the basis of the Commerzbank report, the Commission thus stated that 'there was consensus on the use of fixed exchange rates for in-currencies (i.e. no buying and selling rates) with charges/fees to be calculated as a percentage commission' (recital 95 to the contested decision).

17 Last, the Commission considered that the GWK and the Commerzbank reports each indicated an agreement on remuneration for currency exchange services in the form of a commission expressed as a percentage of the amount exchanged. The Commerzbank report does not mention the amount of that commission, unlike the GWK report, which states an amount of approximately 3%. However, the Commission took into consideration the fact that, at the hearing on 1 and 2 February 2001, Bayerische Landesbank Girozentrale stated that its representative at the meeting of 15 October 1997 had recalled that 'some representatives of individual banks [had] mentioned some figures, and these were somewhere between 2 and 4%', although he could not remember an amount of 3% (recital 96 to the contested decision).

18 On the basis of that evidence, the Commission considered that 'the banks participating in the meeting of 15 October 1997 [had] agreed to introduce an overall

commission of about 3% (to achieve 90% income recovery) after 1 January 1999' and that that agreement 'had both the object and effect of restricting competition in the Community' (recitals 120 and 128 to the contested decision). That agreement was concluded for the transitional period (recital 173 to the contested decision).

19 According to Article 1 of the contested decision, Commerzbank, Dresdner Bank, HVB, DVB and VUW infringed Article 81(1) EC 'by participating in an agreement whose object was to fix (a) the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and (b) a target price level of about 3% (to achieve 90% exchange margin income recovery) during the transitional period beginning on 1 January 1999'.

20 Taking the view that this was a serious infringement which had lasted approximately four years, the Commission imposed the following fines (Article 3 of the contested decision):

| | |
|---|---|
| Commerzbank | EUR 28 000 000 |
| Dresdner Bank | EUR 28 000 000 |
| HVB | EUR 28 000 000 |
| DVB | EUR 14 000 000 |
| VUW | EUR 2 800 000 |

## Procedure

21 By different applications lodged at the Registry of the Court of First Instance between 26 February 2002 and 1 March 2002, Dresdner Bank, VUW, HVB, DVB and Commerzbank each brought an action against the contested decision (Cases T-44/02, T-54/02, T-56/02, T-60/02 and T-61/02).

22 After being notified of the application, the Commission did not lodge a defence within the time prescribed. By letters lodged at the Registry between 25 June 2002 and 2 July 2002, the applicants requested the Court to give judgment by default, in accordance with Article 122(1) of the Rules of Procedure of the Court of First Instance.

23 By judgments delivered in default on 14 October 2004 ('the judgments by default'), the Court of First Instance annulled the contested decision in respect of each of the applicants. The Court considered, on the basis of the applications, that the Commission had not adduced to the requisite legal standard proof of the existence of the agreement which it claimed to exist, relating both to the fixing of the prices for currency exchange services of the euro-zone currencies and also to the ways of charging those prices. The Court held that the pleas alleging that those findings of fact were incorrect and that the inculpatory evidence was not probative must be declared founded, without examining the other pleas in the actions.

24 By documents lodged at the Registry of the Court of First Instance between 27 November 2004 and 4 December 2004, the Commission applied to set aside the judgments by default, in accordance with Article 122(4) of the Rules of Procedure.

25 On 14 January 2005, VUW merged with HVB, which thus succeeded to VUW's rights in Case T-54/02 OP.

26 By documents lodged at the Court of First Instance between 11 and 21 February 2005, the applicants lodged their observations on the application to set the judgments aside, in accordance with Article 122(5) of the Rules of Procedure.

27 By order of 12 July 2005, after the parties had been heard, Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure.

28 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, invited the parties to answer certain questions. The parties complied with those requests.

29 The parties presented oral argument and answered the questions put by the Court at the hearing on 31 May 2006.

**Forms of order sought by the parties**

30 In all the cases, the Commission claims that the Court should:

— set aside the judgments by default;

— dismiss the actions in their entirety;

— order the applicants to pay the costs, including those relating to the application to set the judgments aside.

31 In Case T-44/02 OP, Dresdner Bank contends that the Court should:

— dismiss the application to set aside and uphold the judgment by default;

— order the Commission to pay the costs, including those relating to the application to set aside.

32 In Cases T-54/02 OP and T-56/02 OP, HVB contends that the Court should:

— uphold the judgments by default;

— dismiss the applications to set aside;

— order the Commission to pay the costs, including those relating to the applications to set aside.

33 In Case T-60/02 OP, DVB, after explaining the meaning of its written submissions at the hearing, contends that the Court should:

— dismiss the application to set aside as inadmissible in part;

— dismiss the application to set aside as unfounded;

— order the Commission to pay the costs, including those relating to the application to set aside.

34 In Case T-61/02 OP, Commerzbank contends that the Court should:

— dismiss the application to set aside;

— order the Commission to pay the costs.

**Law**

I — *The application to set aside*

35 In support of its claim that the judgments by default should be set aside, the Commission put forward a number of objections to the conditions in which the Court of First Instance exercised its power of review, in particular as regards the requirements relating to the taking of evidence.

36 In Cases T-54/02 OP and T-56/02 OP, HVB contends that the Commission is misled as to the nature of the application to set aside, the purpose of which is not to correct any errors of law affecting the judgment by default.

37 When requested to specify the scope of its written pleadings at the hearing, the Commission requested that its claim that the judgments by default should be set aside be interpreted as requesting the Court to reconsider those judgments in the light of its application to set aside. After hearing the applicants, the Court of First Instance took note of that information.

38 As the Commission has thus explained the meaning of its claims, the Court considers that it is no longer necessary to rule on HVB's objections relating to the purpose of the application to set aside.

39 Furthermore, DVB and Commerzbank maintain that the application to set aside is inadmissible in part. They submit that the Commission sought to extend the subject-matter of the dispute by responding to submissions other than those on which the Court of First Instance adjudicated in the judgments by default. They maintain that the application to set aside must be limited to refuting the pleas analysed in the judgments by default.

40 DVB and Commerzbank claim, first, that any plea by the defaulting party which does not observe that limit is out of time and, consequently, inadmissible under Article 48(2) of the Rules of Procedure.

41 They contend, second, that the default procedure and the procedure involving an application to set aside a judgment delivered by default are designed to sanction the defaulting party and not to give it a 'second chance'. In that regard, DVB states that, in the event that the Court should decide to set aside the judgment by default, it would then have to examine the other pleas in the action without taking into consideration the arguments of the defaulting party relating to those other pleas. Any other solution would amount to favouring the defaulting party by allowing it a considerable time to prepare its defence after becoming aware of the position of the Court of First Instance.

42 At the hearing, the Commission disputed that interpretation.

43 The Court emphasises that the purpose of the procedure to set aside provided for in Article 122(4) of the Rules of Procedure is to allow the Court to re-examine the case on an inter partes basis without being bound by the outcome of the judgment by default. In the absence of any provision to the contrary in the Rules of Procedure, the applicant to set aside is, in principle, free as to the arguments it chooses to raise, without being limited to refuting the grounds of the judgment by default.

44 In the light of the purpose of the procedure to set aside, the prohibition on introducing new pleas in law laid down in Article 48(2) of the Rules of Procedure cannot, contrary to what DVB and Commerzbank suggest, be interpreted as prohibiting the applicant to set aside from introducing new pleas in law which it would have been able to introduce at the defence stage. As the Commission correctly observed, such an interpretation of Article 48(2) of the Rules of Procedure would make no sense, as it might lead to a procedural impasse in the event that the application to set aside were well founded: the Court, while finding that it is not possible for it to confirm the outcome in the judgment by default to the effect that one of the pleas in law is well founded, would be unable to adjudicate on the other pleas in the application, in observance of the inter partes principle.

45 The application to set aside is therefore admissible.

## II — *Summary account of the pleas in the application*

46 The applicants dispute, primarily, the existence of an infringement of Article 81 EC. They deny the existence of an agreement on price fixing and of the structure of

commission on currency exchange, relying on various material errors and inaccuracies affecting the finding of the facts made by the Commission and, in particular, the existence of a concurrence of wills on those points.

47 The applicants then maintain that the conditions for the application of Article 81 EC are not satisfied, in so far as the alleged agreement has no anti-competitive effect and is not capable of affecting trade between Member States.

48 The applicants also dispute the conduct of the administrative procedure. They rely in that regard on various breaches of the rights of the defence, and in particular on the right to be heard. They maintain that the Commission investigated only the inculpatory evidence, in breach of the principle of respect for the presumption of innocence.

49 In Cases T-54/02 OP, T-56/02 OP and T-60/02 OP, HVB and DVB maintain that the Commission committed an abuse of powers.

50 In Case T-56/02 OP, HVB disputes the conditions in which the Commission imputed to it responsibility for VUW's conduct.

51 The applicants dispute the Commission's decision to abandon the proceedings against certain addressees of the statement of objections — in particular the instigator of the meeting of 15 October 1997 — in exchange for their commitment to reduce their prices. Apart from the fact that certain applicants expressed doubts as to the Commission's power to adopt such decisions, they claim that the Commission acted in an opaque, arbitrary and discriminatory manner.

52 Last, in the alternative, the applicants submit that the fines should be cancelled or reduced, relying on a number of breaches of the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) and also of the principle of proportionality.

## III — *The existence of an anti-competitive agreement*

### A — *Preliminary observations*

53 It is settled case-law that, in order for there to be an agreement within the meaning of Article 81(1) EC, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256, and Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 67; see also, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112; and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86).

54 As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (*Bayer* v *Commission*, paragraph 68; see also, to that effect, *ACF Chemiefarma* v *Commission*, paragraph 112, and *Van Landewyck and Others* v *Commission*, paragraph 86).

55 The concept of an agreement within the meaning of Article 81(1) EC, as interpreted by the case-law, centres round the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention (*Bayer* v *Commission*, paragraph 69).

56 In the present case, the Court must consider whether the applicants succeed in calling into question the Commission's finding that there was a concurrence of wills between the participants in the meeting of 15 October 1997 on the fixing of the ways of charging currency exchange commissions.

B — *The taking of evidence and the scope of judicial review*

57 The applicants maintain that no agreement on the level and structure of currency exchange commissions was concluded at the meeting of 15 October 1997. They submit that the Commission has not adduced evidence of the facts on the basis of which it concluded that such an infringement existed.

58 The Commission maintains that, for the purpose of interpreting a decision applying Article 81 EC, the Court is required to take into account its wording and also its context and its aims, in accordance with the 'practical effect' principle (Case 337/82 *St. Nikolaus Brennerei* [1984] ECR 1051, paragraph 10; Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 11; and Case C-151/98 P *Pharos* v *Commission* [1999] ECR I-8157, paragraph 19). That need is even greater when the agreements and practices prohibited by Article 81 EC often assume a clandestine character, so that their existence can be inferred only on the basis of a large number of indicia considered together (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 55, and Opinion of Advocate General Ruíz-Jarabo Colomer in Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, at I-9193). Thus, the Court could not go so far as to require that the documentary evidence upheld in the contested decision constitutes 'irrefutable evidence' of an infringement. The case-law requires only the submission of sufficient evidence (Case T-337/94 *Enso-Gutzeit* v *Commission* [1998] ECR II-1571, paragraphs 94 and 153). Any manifest error is precluded if the assessment of the facts made by the Commission is more likely than that proposed by the applicants.

59 The Court recalls that, as regards the production of evidence of an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of the facts constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58, and Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 86).

60 Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine.

61 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention on Human Rights, which is one of the fundamental rights which, according to the case-law of the Court of Justice, reaffirmed in the preamble to the Single European Act, by Article 6(2) of the Treaty on European Union and in Article 6(2) EU, are general principles of Community law. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 175 and 176).

62 Thus, the Commission must show precise and consistent evidence in order to establish the existence of the infringement (see, to that effect, Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 43, and the case-law cited).

63 However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission ('PVC II')*, paragraphs 768 to 778, and in particular paragraph 777, confirmed on the relevant point by the Court of Justice, on appeal, in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschaapij and Others* v *Commission*, paragraphs 513 to 523).

64 As anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted.

65 The existence of an anti-competitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraphs 55 to 57).

66 As regards the scope of judicial review, it is necessary to draw attention to the essential difference between factual matters and findings, on the one hand, which may be found to be inaccurate by the Court in the light of the arguments and evidence before it, and, on the other hand, economic appraisals (Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 62).

67 While it is not for the Court to substitute its economic appraisal for the Commission's, it is under a duty not only to establish whether the evidence relied on is factually accurate, reliable and consistent but also to examine whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39).

C — *The agreement relating to the amount of exchange commissions*

1. Arguments of the parties

68 The applicants deny any collusion on the price of the retail currency exchange commissions at the meeting of 15 October 1997. They maintain that the purpose of the meeting was to remove certain regulatory and technical uncertainties connected with the transition to the euro and principally affecting interbank currency exchange services. They further maintain that the agreement envisaged by the Commission would be pointless. It is absurd that banks representing only a small market share could seek to conclude an agreement designed to fix the prices of exchange services during the transitional period more than a year before that period began.

69 The Commission contends that it has adduced evidence of the existence of a horizontal price-fixing agreement. The banks which participated in the meeting of 15 October 1997 agreed to make their customers pay for currency exchange services in order to ensure that none of them would offer such services free of charge. They thus arrived at an agreement on the principle of remuneration for those services, which gave rise to the two agreements referred to in the contested decision. The origin of the infringement goes back to the threat that Deutsche Bundesbank, Deutsche Bank and other commercial banks would offer the public exchange

services free of charge. It was in reaction to that threat that GWK sought to persuade the German banks not to opt for free currency exchange and, to that effect, contacted Reisebank (recitals 58 to 97 and 108 to 111 to the contested decision).

70 In the course of the hearing, the Commission explained that the infringement might also be taken to be the consequence of the collusion between three of the four main German universal banks for the purpose of responding to the threat represented by the prospect that their main competitor, Deutsche Bank, would offer currency exchange services free of charge during the transitional period. Given the economic weight and the pre-eminence of those four banks on the German market, an agreement between Dresdner Bank, HVB and Commerzbank to exclude free currency exchange services would, from that aspect, have given the other economic operators a signal encouraging them to adopt the same conduct on the market.

71 In the Commission's submission, the banks thus arrived at an agreement on the principle of remuneration for currency exchange services which gave rise to the two agreements referred to in the contested decision. Once the principle of remuneration was accepted, the banks had every interest in also agreeing on the ways of charging for those services and also on the price. The agreements on the ways of charging the currency exchange commissions and the fixing of the amount pursued an anti-competitive object. Accordingly, the agreement in question is caught by the prohibition in Article 81(1) EC, without there being any need to examine its effects on competition.

72 Apart from the documentary evidence relating to the discussions which took place at the meeting of 15 October 1997, the existence of that agreement follows from the general background against which that meeting took place. The Commission states, in particular, that great importance must be ascribed to the evidence of the preparations for the meeting of 15 October 1997. As regards the regulatory context,

the Commission submits that the uncertainties which may have existed concerned a number of technical questions caused by the introduction of the euro. None the less, none of those uncertainties could justify an agreement on the level of prices.

73 The applicants raise the objection that that theory of an agreement on the principle of remuneration for exchange services is not set out in the contested decision, but was first developed by the Commission at the stage of its application to set the judgments aside and explained at the hearing. The Commission cannot thus amend the contested decision ex post facto. HVB (Cases T-54/02 OP and T-56/02) OP) and DVB (Case T-60/02 OP) contend that that amounts to a new argument which is therefore inadmissible.

2. Findings of the Court

(a) The interpretation of the contested decision and the existence of an infringement relating to the existence of an agreement on the principle of precluding free currency exchange services

74 It must be determined whether, as the Commission claims, the contested decision refers not only to an agreement on the fixing of the amount of commissions and the ways of charging such commissions, but also to a second agreement, underlying the first, the object of which is to preclude, among the participants, free currency exchange services during the transitional period.

75 According to Article 1 of the contested decision, the infringement found concerned the applicants' participation 'in an agreement whose object was to fix (a) the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission) and (b) a target price level of about 3% (to achieve 90% exchange margin income

recovery) during the transitional period beginning on 1 January 1999'. The operative part of the contested decision therefore makes no reference to an agreement on the principle of remuneration or, more precisely, on the principle of precluding free exchange services.

76 Likewise, the grounds of the contested decision reveal no analysis on which it might be concluded that the Commission considered that an agreement having such an object constituted an infringement of Article 81 EC. In its written submissions, the Commission none the less stated that the unlawful nature of the agreement in question followed from the fact that the banks participating in the meeting of 15 October 1997 had agreed to charge commission in the form of a percentage, as clearly followed from recital 115 to the contested decision. However, that recital is worded as follows:

'It was not a natural or logical step that each bank would individually have transposed the exchange margin into a percentage commission. Indeed, it seems that Deutsche Bank was initially considering a free service. In any case, the issue is not what may or may not be the most economically rational charging structure, but whether there was an agreement between banks on the charging structure.'

77 It must be held that those grounds do not permit the view that they refer to an agreement on the principle that currency exchange free of charge is to be precluded. Nor was the Commission able to indicate at the hearing what grounds of the contested decision supported the theory of the existence of such an agreement. Thus, even on the assumption that the Commission intended, by implication, to find in the contested decision the theory of an agreement that currency exchange free of charge was to be precluded, it must be held that the reasoning in the contested decision on that point would in any event be insufficient by reference to Article 253 EC to allow the addressees to be aware of the grounds of the decision adopted and the Court to exercise its power of review.

78 The Commission cannot alter the object of a decision on the occasion of written or oral explanations given subsequently when the decision is already the subject of proceedings brought before the Community judicature (see Case T-16/91 RV *Rendo and Others* v *Commission* [1996] ECR II-1827, paragraph 45, and the case-law cited).

79 It cannot therefore claim that there was an unlawful agreement which was not expressly referred to in the contested decision and on which the applicants did not have the opportunity to be heard, as required by the principle of respect for the rights of the defence.

80 Furthermore, it is not for the Court to substitute itself for the Commission and consider of its own motion whether, in the present case, there are exceptional circumstances such as to establish the existence of an agreement on the principle that free currency exchange services are to be precluded.

81 Consequently, the Commission's allegations on that point must be rejected.

(b) Evidence of an agreement relating to the amount of exchange commissions

82 It is necessary to examine the arguments and evidence relating to the circumstances forming the background to the meeting of 15 October 1997 before considering the direct evidence of the discussions which took place at that meeting and the Commission's observations concerning the implementation of the agreement in question.

The evidence relating to the background to the meeting of 15 October 1997

— The market shares of the banks which participated in the meeting of 15 October 1997

83 Dresdner Bank, Commerzbank, VUW and HVB claim, in substance, that even on the assumption that the Commission correctly identified the relevant market, the aggregate shares of the participants in the meeting of 15 October 1997 are far below the estimate of between 70 and 80% stated in the GWK report and repeated at recital 87 to the contested decision. Not having the necessary economic power to be able to influence the market and conclude a price-fixing agreement, the applicants maintain that the theory of a horizontal price-fixing agreement makes no sense.

84 The Commission claims that, as the agreement in question pursued an anti-competitive object, it was not required to analyse the applicants' market shares or the effect of the agreement on the market. Accordingly, the applicants' arguments relating to market shares are irrelevant.

85 The Court observes that the arguments relating to the evaluation of market shares affect the existence of a horizontal price-fixing agreement in so far as the absence of sufficient market power would render such an agreement less likely. Those arguments also affect, indirectly, the reliability of the GWK report, which is disputed by the applicants and will be examined below. The Court must therefore ascertain the merits of those arguments, which cannot be held irrelevant.

86 In the statement of objections, the Commission had, first, set out on its own behalf the estimate of the market shares of the participants in the meeting of 15 October 1997, which was put at between 70 and 80% (statement of objections, point 79) in the GWK report and, second, established on the basis of its investigation that five banks (Deutsche Bank, Hypo- und Vereinsbank, Dresdner Bank, Commerzbank and Hamburger Sparkasse) together held 65% of the market in exchange services. After the applicants disputed those figures during the administrative procedure, the contested decision contains no precise estimates of the market shares of the addressees of the contested decision or of the participants in the meeting of 15 October 1997. None the less, it refers, at recital 87 to the contested decision, to the GWK report, according to which '[t]he banks present at [the meeting of 15 October 1997] represented between 70 and 80% of the German retail exchange market'.

87 It is apparent in that regard, first, that the Commission and the applicants are agreed that the evaluation of the volume of currency exchanged in Germany in 1998 which is set out in the contested decision is inaccurate. Instead of the EUR 6.8 billion indicated in the contested decision (footnote 7 to recital 14), the total volume of currency exchanged came to EUR 13.203 billion, according to Deutsche Bundesbank's statistics for 1998. Those figures correspond, moreover, to those contained in the report of the European Monetary Institute (EMI) of 23 April 1997 mentioned at recital 75 to the contested decision. At the hearing, the Commission acknowledged that it had misinterpreted the figures in footnote 7 to the contested decision. That material inaccuracy is not insignificant in the present case, since it has the effect that the weight on the market of the participants in the meeting of 15 October 1997 is overestimated. That discrepancy is even more marked if reference is made to recital 14 to the contested decision, according to which for the currencies of the 15 Member States 'the total value of currencies bought and sold in 1998 was approximately EUR 2.1 billion'.

88 Second, the aggregate parts held by the applicants on the market for retail currency exchange services, all currencies, in Germany (1997) are evaluated by the applicants and by the Commission at 4.68% according to the criterion of the number of bank agencies, at 16.46% according to the criterion of the banks' total balance sheets and at 15.24% according to the criterion of the volume of currency exchange transactions. It must be emphasised that those evaluations concern only the supply by credit establishments and do not take into consideration that from other operators, in particular bureaux de change.

89 Third, the applicants and the Commission are agreed that, by reference to all the participants in the meeting of 15 October 1997, the applicants represented a very widely preponderant share of the volume of currency exchange transactions. In its answers to the written questions put by the Court, the Commission maintained that the market shares of the other banks present at the meeting were not significant. At the hearing, Commerzbank estimated that the applicants represented a minimum of 90% of the volume exchanged by all the participants in the meeting. None of the parties sought to dispute that estimate, of which formal note must therefore be taken.

90 On the basis of those factors, it is clear, first of all, that the evaluation of the market shares set out in the GWK report and referred to at recital 87 to the contested decision is inaccurate, since it patently exaggerates the economic power on the relevant market of the banks present at the meeting of 15 October 1997.

91 However, that inaccuracy does not suffice to invalidate the theory of the existence of a horizontal price-fixing agreement. None the less, it is of such a kind as to reduce the likelihood of such an agreement. The fact that the participants in the meeting of 15 October 1997 represented, at the most, only some 17% of the offer from credit establishments alone may raise doubts as to the existence of a horizontal price-fixing agreement. Nor does the contested decision refer to any particular circumstance relating, for example, to the structure of the relevant market that might allay those doubts.

— The regulatory uncertainties

92 The applicants claim that the object of the meeting of 15 October 1997 was not to conclude an unlawful agreement but to examine the impact of the rules relating to the transitional period on the organisation of currency exchange services. They maintain, in essence, that at the material time three broad series of questions had not yet received a definitive answer.

93 The first concerns the application of the irrevocable conversion rates to currency exchange transactions.

94 The second concerns the principle of remuneration for currency exchange and more particularly the question whether the rule in Article 52 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank annexed to the EC Treaty ('the Statute of the ESCB'), on 'at par' exchanges by the central banks, means that the banking establishments are required to exchange fiduciary currency free of charge during the transitional period.

95 The third concerns the procedures for remuneration for currency exchange and relates, in particular, to the technical consequences of the abandonment of the quotation of the direct rate (DEM 1 = EUR x) in favour of the quotation of the indirect rate (EUR 1 = DEM y) imposed by Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1) and of the replacement of implicit commissions in favour of explicit commissions, posted independently of the rate, in particular for interbank transactions. A further question discussed was whether the level of commission would be the same for all national denominations of the euro or would vary, according to the particular supply and demand in respect of each of them.

96 The Commission observes, in essence, that by 15 October 1997 there was scarcely any regulatory uncertainty as to the consequences of the transition to the euro. It maintains that in 1995 'everyone knew' that from 1 January 1999 the exchange rates between the currencies of the participating Member States would be replaced by irrevocable conversion rates and that the use of spreads would no longer be permissible (recital 139 to the contested decision). At the beginning of 1997, the question preoccupying the industry was whether the banks could, during the transitional period, continue to demand remuneration for currency exchange services for the currencies of the participating Member States and, if so, according to what procedures. The origin of the infringement goes back to the threat that Deutsche Bundesbank, Deutsche Bank and other commercial banks would offer free exchange services to the public. It was in reaction to that threat that GWK sought to persuade the German banks not to opt to provide currency exchange services free of charge and, for that purpose, contacted Reisebank (recitals 58 to 97 and 108 to 111 to the contested decision).

97 The Court considers that it is therefore necessary to ascertain whether, as the applicants claim, the context of the meeting of 15 October 1997 was dominated by regulatory uncertainties relating to the consequences of the introduction of the bank money euro from 1 January 1999 or whether, as the Commission maintains, the only remaining uncertainties were of a commercial nature and related to the threat that Deutsche Bank and Deutsche Bundesbank would offer currency exchange services free of charge.

98 It is true that, since the Madrid European Council of 15 and 16 December 1995 and certainly since the adoption of Regulation No 1103/97 on 17 June 1997, virtually no doubt could remain as to the application of the irrevocable exchange rates during the transitional period, as may be seen from recitals 34 to 37 and 139 to the contested decision.

99 However, it cannot be inferred that there was no other uncertainty as to the way in which currency exchange could be carried out during that period. The consultations between certain German banks and Deutsche Bundesbank recorded at recitals 52 to 61 to the contested decision show that it was only from 15 September 1997 that Deutsche Bundesbank was able to inform those banks clearly that it would no longer be possible to maintain the currency spread system during the transitional period. According to the contested decision, it was in that context that GWK and DVB decided to arrange a meeting between several banks in order to discuss that development (recitals 81 to 84 to the contested decision).

100 It is apparent, moreover, that in 1997 one of the main questions to be resolved concerned the remuneration of the currency exchange services owing to the problems in interpretation of Article 52 of the Statute of the ESCB, which states that 'following the irrevocable fixing of exchange rates, the Governing Council shall take the necessary measures to ensure that banknotes denominated in currencies with irrevocably fixed exchange rates are exchanged by the national central banks at their respective par values'.

101 The Commission considered it appropriate, on 15 May 1997, to convoke a round table in order to examine the practical aspects of the introduction of the euro. Following that round table, the Commission instructed a group of experts to examine, in particular, whether and how the banks could demand remuneration for those services.

102 The conclusions of that group of experts were delivered on 20 November 1997, that is to say, after the meeting of 15 October 1997 (see document cited at recital 137 to the contested decision, footnote 56). According to those conclusions, for the exchange of euro-zone banknotes, Article 52 of the Statute of the ESCB requires the central banks to exchange the banknotes of the currencies of other participating Member States at the irrevocable conversion rates, but there is no provision prohibiting commercial banks from charging for that type of service. The group of experts did not accept the idea of adopting Community rules governing the

remuneration of conversion transactions and currency exchange services. It stated that it was in favour of adopting 'good practice principles'. The group of experts considered it desirable to favour price transparency, which requires that the irrevocable exchange rates be used for every exchange transaction and that any commission charged be identified separately.

103 After the meeting of 15 October 1997, those conclusions were, in substance, set out in Commission Recommendation 98/286/EC of 23 April 1998 concerning banking charges for conversion to the euro (OJ 1998 L 130, p. 22; 'the Commission Recommendation of 23 April 1998'), Article 3 of which provides that banks which practise currency exchange during the transitional period 'should show clearly the application of the conversion rates in accordance with the provisions of Regulation ... No 1103/97, and should identify separately from the conversion rate any charges [of] any kind whatever which have been applied'.

104 Furthermore, it follows from the documents in the file that certain banks, in particular Reisebank, did not become aware until afterwards of those discussions concerning the regulatory environment of the transitional period. It also follows from the report drawn up by GWK following its meeting with Reisebank on 29 April 1997 that Reisebank believed at the time that the rules on the euro would not affect its activities until after the transitional period, with the introduction of the fiduciary euro (recitals 63 to 68 to the contested decision).

105 It also appears that the rules applicable to currency exchange services during the transitional period were not yet firmly defined at the time of the meeting of 15 October 1997 and still gave rise, notably under the aegis of the Commission, to consultations between representatives of the central banks, the banking sector and consumer organisations. It cannot therefore be denied that the meeting of 15 October 1997 took place in a context of regulatory uncertainty, in which the principal issue at stake was whether and how currency exchange services could still be remunerated during the transitional period.

106 The threat that Deutsche Bundesbank would offer free currency exchange services follows directly from Article 52 of the Statute of the ESCB. It must none the less be held that, at the material time, all the practical procedures for the implementation of that provision had not yet been adopted. Thus, for example, the report of the group of experts on bank charges for conversion to the euro, dated 20 November 1997 (see paragraph 102 above), thus indicated that although most central banks then envisaged exchanging banknotes of other Member States of the euro zone free of charge only against their own banknotes, some (for example, Banque de France) proposed to accept the free exchange of banknotes in both directions (pp. 4 and 7 and Annex B, Table 2).

107 Furthermore, it follows more generally from the work of the group of experts that most banks then intended to continue to require remuneration for currency exchange services during the transitional period, notwithstanding the fact that the prices of those services would need to fall owing to the disappearance of the exchange risk. Deutsche Bank, on the other hand, stated at the round table of 15 May 1997 (see paragraph 101 above) that it envisaged providing account conversion transactions free of charge, for cheques denominated in euro and also for 'other types of conversion', although 'it want[ed] to be able to charge non-customers for exchanging banknotes of participating countries during the transitional period, although charges would be lower than now and could be a fixed amount rather than percentage charges' (Round table on the practical aspects of the changeover to the euro: Summary and conclusions, p. 5).

108 That state of affairs notwithstanding, it cannot be denied that the perpetual nature of the income which the banks derived from currency exchange services was, for the transitional period, threatened both by the possibility that the central banks would offer such services free of charge and by the possibility that some banks, like Deutsche Bank, might have envisaged doing likewise for their customers. That threat was more serious for banks whose main activity was currency exchange — such as GWK and Reisebank — than for those — in particular Dresdner Bank, HVB and Commerzbank — for which those transactions constituted only a marginal activity.

— The discussions preparatory to the meeting of 15 October 1997

109 The applicants object to the use as inculpatory evidence of certain documents relating to the contacts between GWK and Reisebank during the months preceding the meeting of 15 October 1997. They observe that, as most of those documents originated with GWK, they could only be used against that bank. They submit, in any event, that those documents cannot serve to prove the existence of an unlawful price-fixing agreement.

110 The Commission contends that the contested decision relies on a number of documents relating to the discussions preparatory to the meeting of 15 October 1997 which constitute evidence or, at least, indicia of the infringement. Although those documents do not support the conclusion that there was an agreement, they help to demonstrate that the meeting of 15 October 1997 had an anti-competitive aim.

111 The Court observes that the documents mentioned by the Commission in the contested decision and referred to by it in the context of the present proceedings are five in number, namely:

— the minutes of a meeting held on 29 April 1997 between Reisebank and GWK (recitals 63 to 67 to the contested decision);

— a fax from GWK to Reisebank, dated 5 May 1997, containing a copy of GWK's answers to an EMI inquiry into currency exchange (recitals 69 to 75 to the contested decision);

— a letter of 25 July 1997 sent to Landeszentralbank Hessen by Commerzbank, DVB, West LB and Reisebank, in which they expressed their reservations about the obligation on Deutsche Bundesbank to buy in-currencies free of charge (recital 55 to the contested decision);

— the minutes of a meeting held on 11 August 1997 between Reisebank, DVB, GWK and Landeszentralbank Hessen (recitals 76 to 80 to the contested decision);

— a record of a telephone conversation on 29 September 1997 between GWK and DVB (recitals 81 to 83 to the contested decision).

112 The content of those documents and their interpretation were not disputed by the applicants. On the other hand, they maintain that those documents cannot be used against them.

113 In that regard, it must be emphasised that all of those documents were drawn up before the meeting of 15 October 1997 and are relevant only in so far as they may constitute indicia of the circumstances that preceded the alleged infringement.

114 Furthermore, it must be observed that four of those documents come directly from GWK and might be relevant for the purpose of determining its role as instigator of the meeting of 15 October 1997. They contain no evidence of and shed no light on the intention of the banks other than GWK and, possibly, Reisebank at the meeting of 15 October.

115 As regards the relevance of the letter sent to Landeszentralbank Hessen on 25 July 1997, that letter does no more than demonstrate the state of the consultations between the banks and the representatives of Deutsche Bundesbank in the context of the uncertainty referred to above.

116 Thus, those documents, which relate only to GWK's role as instigator, contain no probative indicia in respect of the conclusion of a price-fixing agreement during the meeting of 15 October 1997.

The direct evidence relating to the meeting of 15 October 1997

117 Although the Commission has emphasised that the finding of infringement rests on a number of pieces of documentary evidence (recitals 62, 120, 126, 142 and 158 to the contested decision), it follows from the contested decision that, as regards the agreement fixing the price of currency exchange services, there is only one piece of direct documentary evidence of the content of the discussions which took place during the meeting of 15 October 1997: the GWK report. The Commission considered that that report was corroborated by the declarations made during the administrative procedure by two other participants in the meeting of 15 October 1997 and also by the banks' conduct on the market, which, it submits, shows that the price-fixing agreement was implemented. The Court must therefore examine, in turn, those three categories of evidence in order to ascertain their probative nature.

— The GWK report

118 The applicants dispute the probative value of the GWK report. Dresdner Bank and HVB (Cases T-54/02 OP and T-56/02 OP) produced the testimony of persons present at the meeting of 15 October 1997 which deny that there was any discussion of a price-fixing agreement.

119 The Commission contends that the GWK report clearly shows that, in spite of their disagreement on the principle of a single commission for all national denominations of the euro, the banks present agreed on the principle of a commission of approximately 3%. When they met, between April and October 1997, the banks were uncertain as to their future pricing policy for currency exchange services. The mere fact that they discussed and agreed on remuneration of approximately 3% considerably reduced that uncertainty. Discussions of that nature constitute an agreement having as its object the restriction of competition within the meaning of Article 81(1) EC.

120 The Commission maintains that the testimony obtained for the purposes of these proceedings has less probative value than that of documents contemporaneous with the facts, like the GWK report.

121 The Court recalls that, in order to assess the probative value of a document, regard should be had first and foremost to the credibility of the account it contains and, in particular, to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission ('Cement')* [2000] ECR II-491, paragraph 1838).

122 The passage in the GWK report on which the Commission relied is worded as follows:

'The banks present at the meeting expressed the intention of replacing their present income from margins with income from commission fees up to a level of approximately 90%. According to the banks, this would amount to a global commission of approximately 3%.'

123 In the first place, that passage does not explain why a change in the system of presenting prices consisting in abandoning a system of implicit prices (the rate margin) in favour of a system of explicit prices (commissions) could affect the revenue which the banks derive from those services. In the absence of other explanations, it must be considered that the choice between those two ways of expressing prices has no influence on the level of those prices. It is therefore necessary to refer to the entire section of the GWK report from which what the Commission deems to be the incriminating passage is taken in order to ascertain its impact.

124 It is apparent upon reading that section of the GWK report that the section concerns the consequences of the disappearance of the rate margin following the entry into force of the irrevocable conversion rates on 1 January 1999. In particular, that section addresses the question whether the banks would be able, during the transitional period, to continue to charge for currency exchange services according to the specific characteristics of the market existing for each of the currencies or whether the arrival of the fiduciary euro on 1 January 1999 would entail the use of the same level of commission for each of the national denominations of the euro.

That section therefore does not deal with the question of the determination of the amount of the commissions but with whether there should be a single level of commission applicable to all the former national currencies concerned or as many levels as there were currencies. The GWK report shows that there was no agreement between the parties on that point.

125 In the second place, that section of the GWK report indicates that the participants in the meeting of 15 October 1997 were agreed that it would be necessary to replace the rate margin system by the use of explicit exchange commissions distinct from the irrevocable conversion rates (see recitals 88, 93 and 95 to the contested decision). It cannot be concluded from such a declaration, however, that there was a price-fixing agreement since the abandonment of the rate margin was not the consequence of the will of the banks but what was then the very probable result of a regulatory evolution still under development which would subsequently take concrete form in the Commission Recommendation of 23 April 1998.

126 In the third place, the reference in the relevant passage from the GWK report to the maintenance of 90% of revenue generated by the margin system cannot be read in isolation from the regulatory context of the meeting of 15 October 1997.

127 In that regard, it is common ground that the entry into force of the irrevocable conversion rates had the consequence that the risk of exchange disappeared, a risk which the EMI, in a report of 23 April 1997 cited at recital 75 to the contested decision, considered to represent between 5 and 10% of the costs of the currency exchange services. The EMI considered that the irrevocable conversion rates would have the consequence of reducing both the costs and, consequently, the prices of currency exchange services by approximately 5 to 10%.

128 Likewise, at the round table held on 15 May 1997 (see paragraph 101 above), the representatives of the banking sector claimed that, during the transitional period, 'while exchange rate risk [would] disappear and thus reduce costs by some 20%, other handling costs [would] remain' (Round table on the practical aspects of the changeover to the euro: Summary and conclusions; figures mentioned at recital 41 to the contested decision; see also the Commission document entitled 'Report to the round table on the practical aspects of the changeover to the euro', document II/237/97, EN rev, 4).

129 Thus, the impugned passage from the GWK report, in envisaging that 90% of the banks' revenue would be maintained, may be understood as referring to the reduction of approximately 10% in the costs of exchange rate services caused by the disappearance of the exchange risk. Such a reduction in costs ought to be reflected in the level of the price, which should also fall by approximately 10% owing to the entry into force of the irrevocable conversion rates. That estimate of developments in prices caused by the introduction of the euro cannot be considered to be the result of the wills of the banks present at the meeting.

130 In the fourth place, as regards the sentence in the GWK report in which there is a direct reference to a level of commission in the order of 3% ('According to the banks, that would represent an overall commission of approximately 3%'), it is true that the reference to a future price level during a meeting between competing undertakings may found a presumption of the existence of a price-fixing agreement. In this case, however, the applicants claimed that that reference was not only inaccurate but, in addition, merely reflected the publicly available information on the state of the market mentioned by the EMI in its report of 23 April 1997.

131 Although the impugned passage from the GWK report is therefore neither clear nor wholly unambiguous, it must be observed, as stated at recital 105 to the contested

decision, that that report states that the prospect that Deutsche Bank might offer exchange services free of charge constituted 'a much more serious threat than the provision of services free of charge by the Landeszentralbanks (which were not equipped for it)'. According to the report, that could 'undermine the position agreed at the meeting on a commission fee of approximately 3% (90% of present income)'. In the context of the overall assessment of the evidence, account must be taken of the fact that that passage may tend to accredit the theory that there was an agreement on the level of commissions.

132 As regards the reliability of the GWK report, it has been observed above that it contained a significant exaggeration of the market shares of the banks present. The applicants also claim that as its author was not a German speaker, he may have been mistaken as to the meaning of the discussions at the meeting. Furthermore, as GWK took the initiative for the steps leading to the meeting of 15 October 1997, the author of that document would have had a personal interest in embellishing the facts in order to present his superiors with a result in keeping with their expectations. In that regard, it is important to note that a GWK internal memorandum, dated 20 October 1997 (Annex 16 to the statement of objections), describes an agreement on 'the future pricing of exchange operations concerning the currencies of the euro zone' concluded in May 1997 between GWK and the main Netherlands banks. That agreement is stated to fix currency exchange commissions at 3.8%. That amount corresponds to the information provided by GWK to the EMI (recital 72 to the contested decision) and then forwarded to the Reisebank by fax of 5 May 1997, as mentioned above. Those circumstances raised the question whether GWK sought to favour a price-fixing agreement in Germany, like the agreement of May 1997 referred to in respect of the Netherlands in that internal memorandum.

133 Last, it is common ground that the GWK report is a purely internal memo which was not distributed among the applicants until the administrative procedure, so that they were unable to distance themselves from what was stated in it in order to eliminate any risk of ambiguity as regards the interpretation of what was said at the meeting of 15 October 1997.

134 In conclusion, it must be held that, in referring to an agreement on a commission of 3%, the GWK report may, at the most, constitute an indicium giving rise to a suspicion of the existence of a concurrence of wills between the banks present at the meeting of 15 October 1997. However, in the light of the factors which have just been analysed, that document cannot suffice to establish to the requisite legal standard the existence of such a concurrence of wills.

— The declarations of certain banks during the administrative procedure

135 According to the contested decision, the fact that the rate of commission was discussed as indicated in the GWK report is corroborated by the statements made by Commerzbank and Bayerische Landesbank Girozentrale at the hearing (recitals 96, 107 and 118 to 120 to the contested decision). At footnote 44 to the contested decision, the Commission also refers to Commerzbank's, HVB's and VUW's, West LB's and Hamburgische Landesbank Girozentrale's replies to the statement of objections. In its application to set aside, moreover, the Commission referred to Reisebank's response to the statement of objections, mentioned at recital 68 to the contested decision.

136 As regards the latter document, the Court notes that recital 68 to the contested decision states that Reisebank recognised that it 'was not aware of the major changes in forex business involving in-currencies during the transitional period'. That declaration clearly does not constitute an indicium of the existence of a concurrence of wills on price fixing.

137 While it appears that the banks in question stated that 'some representatives of individual banks [had] mentioned some figures, and these [had been] between 2 and 4%', for example (recital 107 to the contested decision), none of those declarations

can suffice to confirm the theory of the existence of a concurrence of wills on fixing a commission rate. It is true, admittedly, that the fixing of a reference band or a target price level may constitute a mode of unlawful price fixing, since, in such a circumstance, prices are no longer the result of autonomous decisions taken by the operators but of their concurrence of wills. However, the figures mentioned ('between 2 and 4%'; 'around 3%'; 'between 2 and 6%'; see recital 107 to the contested decision and footnote 44) reflect — as stated above — the market prices as established by the EMI; those figures vary widely (the highest figure quoted is three times the lowest), which contributes to their lack of precision. Consequently, those declarations show that, at the meeting, some banks referred to the level of commissions in terms which do not permit the conclusion beyond all reasonable doubt that there was a concurrence of wills on the joint fixing of their respective prices.

The findings relating to the implementation of the agreement on the amount of exchange commissions

138 After indicating that as the agreement had as its object the restriction of competition there was no need to demonstrate its effects, the Commission considered, in any event, that after the meeting of 15 October 1997 the participants aligned their prices in accordance with the terms of the alleged agreement. At recitals 147 and 148 to the contested decision, it cites the rates applied by Dresdner Bank, Commerzbank, HVB, VUW, GWK and Reisebank. Those rates are between 3 and 4.5% and some banks also charge a fixed amount.

139 The applicants contend that the prices observed during the transitional period demonstrate that there was no agreement; the Commission disagrees.

140 The examination of the actual rates of commission must take into consideration both the proportionate component and the fixed component of the commissions actually charged. In so far as the great majority of the services in question relate to amounts below EUR 200 — the statement of objections mentions 70% (paragraph 9) — the charging of flat-rate commissions of DEM 5 or 10 or of a minimum volume of exchange has a considerable impact on the amount actually charged by the banks when it is expressed as a percentage. The Commission was therefore not entitled to confine itself to examining the rate of commission charged, which provides only a partial indication of the price borne by the consumer.

141 In the context of the measures of organisation of procedure, the Court requested the Commission to produce, in the form of a table, the data relating to the actual level of commissions charged in 1999 by the banks present at the meeting of 15 October 1997, for amounts exchanged of EUR 25, 50, 100 and 200. It is apparent from the table thus produced by the Commission that the actual rates of commissions vary markedly from one bank to another. Thus, for exchanging EUR 20, the level of actual commission rates varied from 3 to 30%, that is to say, a margin of 1 to 10. That margin tended to decrease as the amount exchanged increased. Thus, for EUR 200 exchanged, the actual commissions varied from 2 to 4.5%, that is to say, a margin of 1 to 2.25. The applicants did not dispute those data.

142 It must be concluded that the Commission, in finding at recitals 147 and 148 to the contested decision that the applicants had aligned their prices within a range of 3 to 4.5%, relied on incorrect data. The data available to the Commission when it adopted the contested decision do not support the allegation of a convergence in the prices charged by the applicants imputable to the implementation of the alleged agreement.

Conclusion

143 Following a global assessment, it is apparent from those elements that the instigator of the meeting of 15 October 1997 may have acted with the intention of favouring the conclusion of a price-fixing agreement in reaction to the twofold threat of an increase in the competitive pressure that might result from the provision of currency exchange services free of charge during the transitional period by Deutsche Bundesbank and by Deutsche Bank.

144 None the less, the direct evidence relating to the meeting of 15 October 1997 is not sufficient for it to be considered, without any reasonable doubt remaining on that point, that the banks present concluded such an agreement. Although the elements cited by the Commission demonstrate that some of the banks present referred to the approximate level of commissions — which were in fact a matter of public knowledge — during the meeting, those indicia do not suffice to support to the requisite standard of proof the theory that there was a concurrence of wills on the common fixing of those prices.

145 In that regard, attention must be given to the regulatory and technical uncertainties of the time connected with the very special context of the introduction of the euro and with the multiple consultations then taking place between the banking sector, the Commission, the monetary authorities and consumers' associations. Owing to that context, it is impossible to reject the applicants' claim that their concertation consisted in pointing out the consequences of the regulatory evolution on their currency exchange activity during the transitional period and, if necessary, alerting Deutsche Bundesbank to the difficulties which the operators in the sector faced owing to that evolution.

146 Furthermore, the theory of the existence of a price-fixing agreement is undermined by the fact that the banks present at the meeting of 15 October 1997 represented at

the most some 17% of the supply of currency exchange services offered by credit institutions alone.

147 Last, the data in the Commission's possession concerning the level of prices applied during the transitional period contradict the observation that the prices observed in 1999 revealed the implementation of an agreement.

148 Accordingly, it must be held that the Commission has not succeeded in demonstrating to the requisite legal standard the existence of a concurrence of wills on the fixing of the amount of exchange commissions during the meeting of 15 October 1997.

D — *The agreement on the ways of charging exchange commissions*

149 The part of the infringement relating to the ways of charging commissions was set out at recitals 95, 96, 114, 115, 132 and 184 to the contested decision, as the Commission devoted the essential part of its analysis to the question of the fixing of the amount of commissions. In particular, the Commission expressed its views in the following terms on the proof of the existence of an agreement on the principle of exclusively proportionate remuneration (recital 95 to the contested decision):

'With regard to the retail business, [the Commerzbank report] note[s] that there was consensus on the use of fixed exchange rates for in-currencies (i.e. no buying and selling rates) with charges/fees to be calculated as a percentage commission. The calculation for converting between in-currencies would be decided by each bank individually: ...

Concerning rating/pricing in forex business in phase 3a (1 January 1999 to 1 January 2002) of EMU, consensus was reached on the following points:

(1) Private customer business

...

— Charges/fees will be calculated as a percentage amount of the exchange value.

...'

150 According to the contested decision, the Commerzbank and GWK reports 'correspond to the extent that the customer charges would be in a percentage form' (recital 96 to the contested decision). Those elements were, in substance, reiterated at recital 106 to the contested decision. Furthermore, at recitals 114 to 116 to the contested decision, the Commission responded to the parties' arguments as follows:

'The transparent and explicit display of charges does not require any standardisation of prices, charging structures or other service concepts in the banking sector. Each bank must independently decide its commercial policy with regard to charging. If a

customer bank charge is to be implemented at all, then the charging policy — including charging structure — must be determined independently by each bank.

It was not a natural or logical step that each bank would individually have transposed the exchange margin into a percentage commission. Indeed, it seems that Deutsche Bank was initially considering a free service. In any case, the issue is not what may or may not be the most economically rational charging structure, but whether there was an agreement between banks on the charging structure.

In the present case, there was an explicit agreement between banks on an overall commission of about 3% with the aim of achieving about 90% income recovery after the abolition of the [exchange] spread on 1 January 1999.'

1. Arguments of the parties

151 The applicants dispute the existence of an agreement consisting in demanding commissions expressed as a percentage. Their arguments are of two types. First, they maintain that the evidence adduced by the Commission is insufficient. Second, they suggest an alternative explanation: at the meeting of 15 October 1997, the banks all acknowledged that the entry into force of the irrevocable conversion rates would mean that the currency margin would be abandoned in favour of a mechanism of explicit charging of commissions. What took place was therefore not an agreement within the meaning of Article 81(1) EC but a discussion on the regulatory evolution.

152 The Commission contends that the finding of the agreement on the charging procedures is supported by the Commerzbank report, the content of which is particularly clear: '[c]harges/fees will be calculated as a percentage amount of the exchange value' and 'will be calculated separately'. That statement is confirmed by the GWK report, which states that the commissions would be calculated 'as a percentage amount of the exchange value'.

153 The Commission also asserts that the contested decision relies on a number of reports drawn up by GWK before the meeting of 15 October 1997. Apart from the GWK documents referred to above, the Commission refers to Landesbank Hessen Thüringen Girozentrale's response to the statement of objections (recital 113 to the contested decision).

154 The applicants object to the use against them of the latter documents, to which the Commission refused to grant access during the administrative procedure.

2. Findings of the Court

155 As regards the complaint relating to the use of inculpatory evidence on which the applicants did not express their views, the Court recalls that respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts, objections and circumstances alleged by the Commission (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 11, and Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 25).

156 The statement of objections must contain an account of the objections couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to take cognisance of the conduct complained of by the Commission. It is only on that condition that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them to defend themselves properly, before the Commission adopts a final decision (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 42).

157 In principle, only documents cited or mentioned in the statement of objections constitute valid evidence (Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 55, and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 34; see also, to that effect, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 21).

158 A document cannot be regarded as an inculpatory document unless it is used by the Commission in support of its finding of an infringement by an undertaking. In order to establish a breach of the rights of the defence, it is not sufficient for the undertaking in question to show that it was not able to express its views during the administrative procedure on a document used in a given part of the contested decision. It must demonstrate that the Commission used that document in the contested decision as evidence of an infringement in which the undertaking participated.

159 In the present case, the Commission stated that, in its response to the statement of objections, Landesbank Hessen Thüringen Girozentrale admitted 'having entered

into an agreement on the charging structure for the transitional period at the meeting of 15 October 1997' (recital 113 to the contested decision). In spite of the fact that that alleged admission appears in the section entitled 'Arguments of the parties in relation to the interpretation of the facts', the Commission used that statement as inculpatory evidence in the contested decision and relied on it as such in its written submissions.

160 However, the Commission acknowledged in its answer to the written questions put by the Court that none of the applicants had had access to the responses of the other addressees of the statement of objections. It follows that the Commission breached the applicants' rights of defence by relying on documents to which the applicants did not have access during the administrative procedure. Those documents must therefore be excluded as evidence (Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 338; see also, to that effect, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 24 to 30, and *Cement*, paragraph 382).

161 As regards the other evidence cited by the Commission, it consists of documents previously examined in the context of the analysis of the findings relating to the price-fixing agreement. Those documents are only indirectly relevant for the purpose of establishing what was discussed at the meeting of 15 October 1997. They all relate to the period preceding that meeting and serve, at the most, to establish the role of instigator played by GWK. Those documents are insufficient to demonstrate a concurrence of wills between the applicants and GWK on the conclusion of an agreement pursuing a manifestly anti-competitive object.

162 As regards the direct evidence of the agreement on the charging structure, it must be observed that, given the very particular context of the present cases, which was connected with the introduction of the euro, the interpretation of the GWK and Commerzbank reports suggested by the Commission raises serious doubts.

163 The existence of an agreement on the ways of charging commissions is closely linked to the existence of the price-fixing agreement, of which it constitutes an ancillary part. As the Court has found that the Commission had not adduced to the requisite legal standard evidence of the existence of a price-fixing agreement, the validity of the findings and assessments relating to the alleged agreement on the ways of charging commissions is equally undermined.

164 In so far as the contested decision rests on the finding of a concurrence of wills on the use of explicit commissions expressed as a percentage, it must be borne in mind that the will of the banks present at the meeting of 15 October 1997 is unconnected with the abandonment of the system of implicit commissions then in force. The adoption of explicit commissions flows from the legal framework relating to the introduction of the euro. Accordingly, the Commission could not rely on a literal interpretation of the reference in the Commerzbank report to a 'consensus' between the banks on the use of the irrevocable conversion rates and the corresponding disappearance of the currency margin (see, in particular, recitals 95 and 106 to the contested decision). That passage may, on the contrary, be taken as the common manifestation of awareness of a change induced by the regulatory measures governing the introduction of the euro and subsequently given concrete form in the Commission Recommendation of 23 April 1998.

165 Furthermore, the very existence of an agreement on a structure of commission strictly proportionate to the amount exchanged is inconsistent with the findings in the contested decision to the effect that numerous banks were using mixed structures, combining a fixed component with a variable component (recital 147 to the contested decision). Thus, the data available to the Commission show that during the transitional period the applicants were using different commission structures, some using exclusively proportionate commissions while others maintained a mixed structure until the end of that period.

166 Accordingly, it must be held that the Commission has not succeeded in demonstrating to the requisite legal standard the existence of the facts constituting a concurrence of wills showing an agreement on the ways of charging exchange commissions during the meeting of 15 October 1997.

E — *General conclusion*

167 The Commission has not established to the requisite legal standard the existence of an agreement on the fixing of the prices for currency exchange services of the euro-zone currencies during the transitional period and on the ways of charging those prices. It follows that the pleas alleging that those findings of fact by the Commission are incorrect and that the inculpatory evidence is not probative must be declared founded.

168 In the light of the foregoing, the inter partes examination of the action does not alter the outcome of the proceedings in default. It follows that the application to set aside the judgments by default must be dismissed, without there being any need to examine the other pleas in the action.

**Costs**

169 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if these have been applied for in the successful party's pleadings. As the Commission has been unsuccessful in its application to set aside the judgments by default, it must be ordered to pay the costs, in accordance with the forms of order sought by the applicants.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

**1. Dismisses the application to set aside the judgments by default;**

**2. Orders the Commission to pay the costs.**

Legal Lindh Vadapalas

Delivered in open court in Luxembourg on 27 September 2006.

E. Coulon H. Legal

Registrar President

Table of contents

Background to the dispute ..... II - 3574

Procedure ..... II - 3579

Forms of order sought by the parties ..... II - 3581

Law ..... II - 3583

I — The application to set aside ..... II - 3583

II — Summary account of the pleas in the application ..... II - 3585

III — The existence of an anti-competitive agreement ..... II - 3587

A — Preliminary observations ..... II - 3587

B — The taking of evidence and the scope of judicial review ..... II - 3588

C — The agreement relating to the amount of exchange commissions ..... II - 3591

1. Arguments of the parties ..... II - 3591

2. Findings of the Court ..... II - 3593

(a) The interpretation of the contested decision and the existence of an infringement relating to the existence of an agreement on the principle of precluding free currency exchange services .. II - 3593

(b) Evidence of an agreement relating to the amount of exchange commissions ..... II - 3595

The evidence relating to the background to the meeting of 15 October 1997 ..... II - 3596

— The market shares of the banks which participated in the meeting of 15 October 1997 ..... II - 3596

— The regulatory uncertainties ..... II - 3599

— The discussions preparatory to the meeting of 15 October 1997 ..... II - 3604

The direct evidence relating to the meeting of 15 October 1997 II - 3606

— The GWK report ..... II - 3607

— The declarations of certain banks during the administrative procedure ..... II - 3612

The findings relating to the implementation of the agreement on the amount of exchange commissions ..... II - 3613

Conclusion ..... II - 3615

D — The agreement on the ways of charging exchange commissions ..... II - 3616

1. Arguments of the parties ..... II - 3618

2. Findings of the Court ..... II - 3619

E — General conclusion ..... II - 3623

Costs ..... II - 3623