ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
5 December 2001 *

In Case T-219/01 R,

Commerzbank AG, established in Frankfurt am Main (Germany), represented by H. Satzky and B.M. Maassen, lawyers,

applicant,

v

Commission of the European Communities, represented by S. Rating, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for interim measures in the form, first, of suspension of the operation of the Commission's decision of 17 August 2001 refusing the applicant access to certain documents relating to the abandonment of the procedure against other banks in Case COMP/E-1/37.919 — bank fees for currency exchange in

* Language of the case: German.

the Euro zone stayed and, second, of suspension of the procedure for applying Article 81 EC in the same case in so far as the applicant is concerned,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal background

1 On 23 May 2001 the Commission adopted Decision 2001/462/EC, ECSC on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21), which repealed Commission Decision 94/810/ECSC, EC of 12 December 1994 (OJ 1994 L 330, p. 67).

2 The third and sixth recitals of that decision provide first that the conduct of administrative proceedings should be entrusted to an independent person, the hearing officer, with experience in competition matters and the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings,

and secondly that in order to ensure the independence of the hearing officer, he should be attached, for administrative purposes, to the member of the Commission with special responsibility for competition. Furthermore, transparency as regards his appointment, termination of appointment and transfer should be increased.

3 According to Article 5 of Decision 2001/462, the role of the hearing officer is to ensure that the hearing is properly conducted and to contribute to the objectivity of the hearing itself and of any decision taken subsequently with regard to the administrative proceedings in competition matters. He is to seek to ensure in particular that, in the preparation of draft Commission decisions in connection with such proceedings, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements related to the gravity of any infringement.

4 Article 8 of the Decision provides:

'1. Where a person, an undertaking or an association of persons or undertakings has received one or more of the letters [from the Commission] listed in Article 7(2) [including those accompanying a statement of objections] and has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of the right to be heard, access to those documents may be sought by means of a reasoned request.

2. The reasoned decision on any such request shall be communicated to the person, undertaking or association that made the request and to any other person, undertaking or association concerned by the procedure.'

Facts and procedure

5 At the beginning of 1999 the Commission initiated an investigation procedure against some 150 banks, including the applicant, established in seven Member States, that is to say Belgium, Germany, Ireland, the Netherlands, Austria, Portugal and Finland, because it suspected that the banks concerned had agreed among themselves to maintain the bank fees for exchanging the currencies of the euro zone at a certain level.

6 On 3 August 2000 the Commission sent a statement of objections to the applicant as part of that investigation.

7 On 24 November 2000 the applicant submitted its observations in this regard.

8 The applicant's views were heard at a hearing in connection with that investigation on 1 and 2 February 2001.

9 It is apparent from the Commission's press releases, dated respectively 11 April, 7 and 14 May 2001, that the Commission decided to terminate the infringement procedure opened against the Netherlands, Belgian and some German banks. The Commission took that decision after those banks had lowered their fees for exchanging currencies of the euro zone.

10 The Commission's press release of 31 July 2001 states that the Commission decided to terminate the infringement procedures which it had initiated against the Finnish, Irish, Belgian, Netherlands and Portuguese banks and some German banks.

11 By letter dated 15 August 2001 addressed to the hearing officer of the Commission, the applicant asked to be informed of the circumstances which had led to the termination of the procedure in the parallel cases. The applicant also indicated that it considered additional access to the files essential, especially as regards the documents of the procedure relating to the German and Netherlands banks. For purposes of its defence, the applicant sought in particular to know why the procedure against the GWK bank had been closed, whereas according to the statement of objections that bank had supposedly played an important role in the alleged infringement and had not reduced its bank fees for exchanging currencies of the euro zone in Germany.

12 By a first letter dated 17 August 2001, the hearing officer rejected that request for access to the said documents (hereinafter the 'contested decision'). The refusal was justified as follows:

'According to established case-law, consultation of the file in the course of competition proceedings before the Commission serves a specific function. It is intended to permit an undertaking accused of having infringed Community competition law to defend itself effectively against the objections made by the Commission. That condition is met only if the undertakings have access to all the documents contained in the procedure file, in other words the documents relating to the procedure with the exception of confidential documents and the administration's internal documents. It is in this way that "equality of arms" is established between the Commission and the defence.

In the present case, Commerzbank has been allowed access to the documents of procedure COMP/E-1/37.919 and to other documents contained in parallel files

but relevant to the "German banks" procedure. In so doing, account has been taken of your right to mount an unlimited defence against the objections made by the Commission.

The circumstances that led to the suspension of the procedure involving other banking establishments in other Member States are the subject of parallel but separate Commission documents, which in principle are not accessible to the German banks. Nor is it evident how the information requested could be of importance to the defence of your client. In these circumstances, your request for additional access to the file must therefore be refused, in accordance with the case-law of the Court of First Instance in the *Cement* Cases.

Nor are we able to accede to your request regarding the documents on the suspension of the COMP/E-1/37.919 procedure opened against some German banks. The information relating to particular establishments, in so far as it has not been published by the Commission, is confidential and hence cannot be accessible to other parties in the procedure.

This decision has been adopted in accordance with Article 8 of the Decision [2001/462].'

13 By a second letter, also dated 17 August 2001, the hearing officer stated the following:

'... the Commission sees no reason to postpone the transmission of a draft final decision in procedure COMP/E-1/37.919, which is expected to take place between the beginning and middle of September of this year.'

14 By application lodged at the Registry of the Court of First Instance on 24 September 2001, the applicant brought an action for annulment of the contested decision. On the same date it submitted to the Court the present application for interim measures in the form, first, of suspension of the operation of the contested decision and, second, of suspension of the procedure for applying Article 81 EC in Case COMP/E-1/37.919 — bank fees for currency exchange in the Euro zone: Germany (Commerzbank AG).

15 On 5 October 2001 the Commission submitted its observations on the present application for interim measures.

16 On 17 October 2001 the applicant was invited to submit its observations on the question of the admissibility of the action in the main proceedings and of the application for interim measures.

17 On 23 October 2001 the applicant submitted its observations in that regard.

Law

18 Pursuant to the combined provisions of Articles 242 EC and 243 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any other necessary interim measures.

19 Pursuant to the first subparagraph of Article 104(1) of the Rules of Procedure of the Court of First Instance, an application to suspend the operation of a measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. That rule is not a mere formality, but presupposes that the action as to the substance, from which the application for interim measures is derived, is capable of being heard by the Court of First Instance.

20 According to settled case-law, in principle the issue of the admissibility of the main application must not be examined in proceedings relating to an application for interim measures so as not to prejudge the substance of that case. Where, however, it is contended that the main application from which the application for interim measures is derived is manifestly inadmissible, as in this case, it may prove necessary to establish the existence of certain factors which would justify the prima facie conclusion that the main application is admissible (orders of the President of the Court of Justice in Cases 376/87 R *Distrivet* v *Council* [1988] ECR 209, paragraph 21, and C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council* [2000] ECR I-8797, paragraph 34; order of the President of the Court of First Instance in Case T-222/99 R *Martinez and de Gaulle* v *Parliament* [1999] ECR II-3397, paragraph 60).

21 In the present case the President of the Court considers that it is necessary to ascertain whether factors exist which would justify the prima facie conclusion that the main application is admissible.

Arguments of the parties

22 The Commission submits out that it is for the judge hearing the application for interim relief to establish that, prima facie, the main application presents features on the basis of which it is possible to conclude with a high degree of probability that the main action is admissible. In the present case, however, the Commission contends that the main action is manifestly inadmissible.

23 As regards the admissibility of the application for interim relief, the Commission maintains that under the second head of that application the applicant is seeking the suspension of the infringement procedure in progress in Case COMP/E-1/37.919 in order subsequently to obtain access to the file. The possibility of bringing proceedings before the Community Courts with the aim of ensuring access to the file in connection with an infringement procedure that is in progress was the subject of the judgment in Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667 (hereinafter the '*Cimenteries CBR* judgment'), paragraphs 38 and 39, in which, according to the Commission, the Court of First Instance denied that such a possibility existed.

24 According to the Commission, the first head of the application for interim relief is aimed at obtaining suspension of the operation of the contested decision denying the applicant access to certain documents. Given that the second head of that application is inadmissible, the Commission submits that this first head is isolated and no longer has a purpose. Moreover, in the defendant's submission, it is aimed at obtaining the adoption of a measure that is manifestly devoid of effect, namely the suspension of the operation of a negative decision, which would not oblige the Commission to grant the applicant what it is seeking, namely access to the file. The measure requested cannot therefore be ordered in the context of proceedings for interim relief. In the Commission's submission, the first head of the application for interim relief is therefore also inadmissible.

25 According to the Commission, the fact that the applicant strives to demonstrate the admissibility of the heads of its application for interim relief by alleging differences between the facts underlying the *Cimenteries CBR* judgment and those in the present case would not justify diverging from the said judgment, even supposing that such differences existed. In the defendant's submission, the facts of the present case largely correspond to those in the *Cimenteries CBR* judgment. According to the Commission, the applicant does not explain how the amendment of the terms of reference of the hearing officer by Decision 2001/462 can lead to a different conclusion.

26 Consequently, according to the Commission, there is no reason to depart from the principle that a refusal to grant access to the file in an infringement procedure cannot be the subject of an isolated application. The Commission contends that the main application is therefore manifestly inadmissible.

27 The applicant claims that the main application is admissible. In its submission, the contested decision is open to challenge, given that it produces binding legal effects that harm the applicant's interests by adversely affecting its legal position. Furthermore, it maintains that Decision 2001/462 changed the previous legal situation on the admissibility of an isolated application against refusals to grant access to the file.

28 In that regard, the applicant relies on the term 'decision' chosen by the Commission in Decision 2001/462 and on the wording of Article 8 thereof, which expressly authorises the adoption of a decision on access to the file. According to the applicant, the establishment and organisation of the procedure provided for in Article 8 can only lead to the conclusion that what is concerned is a decision within the meaning of Article 249(4) EC.

29 The fact that since the adoption of Decision 2001/462 the refusal to grant access to the file is a decision capable of being challenged is also evident, according to the applicant, from the objective of the harmonisation of laws in Europe by means of Community provisions. An exhaustive comparison of systems of law shows, according to the applicant, that in the Member States where only the procedure of judicial remedies is available the concept of an administrative act does not extend beyond that of an act creating a legal situation. Furthermore, under Community law a broad interpretation of the concept of 'decision' is necessary in order to guarantee effective legal protection.

30 In that regard, several factors make it possible, in the applicant's submission, to compare the present situation with that which gave rise to the judgment in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965. The applicant contends that the refusal to grant access to the file constitutes a legal act by which the Commission expresses its final decision. It is not merely a preparatory act. Using the dual terms 'preparatory/final', it is necessary, in the applicant's submission, simply to determine whether the action against a final decision will provide sufficient legal protection against decisions taken in the course of the procedure. According to the applicant, the Court indicated the existence of that criterion in its judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 24.

31 The applicant contends that an action brought merely against the final decision does not provide sufficient protection against a procedural decision. Such a procedural decision has direct effects on the outcome of the procedure initiated by the Commission. The applicant hopes that wider access to the file will provide it with additional grounds of defence, given that access to the file will enlighten it on the reasons which led the defendant to close the procedure against numerous co-defendants. According to the applicant, this information is essential to its defence.

32 The applicant submits that if it is authorised to bring proceedings only against the Commission's final decision it will be deprived of the opportunity to prevent a bad decision from being taken. It claims that for that reason it would lose a level of jurisdiction. Similarly, the principle of procedural economy justifies authorisation to have access to the file.

Findings of the President of the Court

33 As regards the arguments which are put forward by the applicant in support of its conclusion designed to demonstrate that the contested decision is open to challenge in its own right, it must be pointed out at the outset that in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle, open to review only if it is a measure definitively laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for that final decision (judgments in Cases T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 27, and T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 51).

34 Access to the file in competition cases is intended to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their

views effectively on the conclusions reached by the Commission in its statement of objections (judgment in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 75). Access to the file is thus one of the procedural guarantees intended to protect the rights of defence and to ensure, in particular, that the right to be heard provided for in Article 19(1) and (2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and Article 2 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18) can be exercised effectively. Observance of those rights in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings (judgments in *Cimenteries CBR*, paragraphs 38 and 39, and in Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, paragraph 49).

35 Due observance of that general principle requires that the applicant 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 (judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraphs 9 and 11).

36 It follows from all the foregoing considerations that, even though they may constitute an infringement of the rights of defence, Commission measures refusing access to the file produce in principle only limited effects, characteristic of a preparatory measure forming part of a preliminary administrative procedure (judgment in *Cimenteries CBR*, paragraph 42). Only measures immediately and irreversibly affecting the legal situation of the undertakings concerned would be of such a nature as to justify, before completion of the administrative procedure, the admissibility of an action for annulment.

37 In that regard, the applicant's assertion as to urgency, according to which the adoption of a final decision fining it is imminent, cannot be relevant to the present examination, because in any event that assertion is insufficiently precise in that it reveals nothing as to the content of any decision regarding the applicant.

That assertion does not therefore make it possible to distinguish the present case significantly from that which gave rise to the judgment in *Cimenteries CBR*.

38 Any infringement of the right of an addressee of a statement of objections, in the present case the applicant, effectively to put forward its views on the objections made by the Commission and on the evidence intended to support those objections is capable of producing binding legal effects of such a nature as to affect the applicant's interests only if and when the Commission has adopted a decision finding the existence of the infringement of which it accuses the applicant. In reality, until a final decision has been adopted, the Commission may, in view, in particular, of the written and oral observations of the applicant, abandon some or even all of the objections initially raised against it. It may also rectify any procedural irregularities by subsequently granting access to the file after initially declining to do so, so that the applicant has a further opportunity to express its views, in full knowledge of the facts, on the objections notified to it.

39 However, if, for the sake of argument, the Court were to recognise, in proceedings against a decision bringing the procedure to a close, that a right of full access to the file existed and had been infringed, and were therefore to annul the Commission's final decision for infringement of the rights of defence, the entire procedure would be vitiated by illegality. In such circumstances, the Commission would be obliged either to abandon all proceedings against the applicant or to resume the procedure, giving the applicant a further opportunity to give its views on the objections raised against it in the light of all the new information to which it should have been granted access. In the latter situation, a properly conducted *inter partes* procedure would be sufficient to restore fully the rights and privileges of the applicant (judgment in *Cimenteries CBR*, paragraph 47).

40 It must be noted that, despite the fact that Decision 2001/462 aims to guarantee the independence of the hearing officer, the applicant has not put forward any weighty considerations that would enable the Court to hold that the case-law cited above on access to the file in competition cases is no longer applicable.

41 It follows from the foregoing considerations that the contested decision, by refusing the applicant access to certain documents relating to the abandonment of procedure COMP/E-1/37.919 against other banks, is not capable of producing legal effects of such a nature as to affect the applicant's interests immediately, before any decision finding an infringement of Article 81(1) EC and possibly imposing a penalty on it is adopted (see, to that effect, judgment in *Cimenteries CBR*, paragraph 48).

42 As to the second head of the application for interim measures, which relates to the suspension of the procedure for applying Article 81 EC, the judge hearing an application for interim relief cannot in principle accede to a request for interim measures seeking to prevent the Commission from exercising its powers of investigation after the opening of an administrative procedure and even before it has adopted the definitive acts whose operation is sought to be avoided. If such measures were adopted, the judge hearing the interim application would not be reviewing the activity of the defendant institution but assuming the role of that institution in the exercise of purely administrative powers. Consequently, the applicant is not entitled to request under Articles 242 EC and 243 EC that the defendant institution be prohibited, even provisionally, from exercising its powers in the course of an administrative procedure (see orders of the President of the Court of First Instance in Case T-543/93 R *Gestevisión Telecinco* v *Commission* [1993] ECR II-1409, paragraph 24, and, to that effect, in Case T-395/94 R II *Atlantic Container and Others* v *Commission* [1995] ECR II-2893, paragraph 39). Such an entitlement could only be recognised if the application were to present evidence from which the judge hearing the interim application could find that there were exceptional circumstances justifying the adoption of the measures requested (see, in that connection, order of the President of the Court of First Instance in Case T-52/96 R *Sogecable* v *Commission* [1996] ECR II-797, paragraphs 40 and 41).

43 In that regard, it must be observed that in the present case the applicant has not put forward any evidence of exceptional circumstances which could justify the adoption of the measure sought, namely suspension of the procedure for applying Article 81 EC. The second head of the application for interim measures cannot be declared admissible on this basis.

44 Consequently, in the absence of weightly considerations enabling the Court to consider that the action in the main proceedings is admissible, the present application for interim measures must be declared inadmissible.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. The costs are reserved.

Luxembourg, 5 December 2001.

H. Jung
Registrar

B. Vesterdorf
President