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

In Case T-213/01 R,

Österreichische Postsparkasse AG, established in Vienna (Austria), represented by M. Klusmann, F. Wiemer and A. Reidlinger, lawyers,

applicant,

v

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

defendant,

APPLICATION principally for suspension of the operation of Decision COMP/D-1/36.571 of 9 August 2001 and, in the alternative, for an order enjoining the Commission not to transmit the statement of objections of 10 September 1999

* Language of the case: German.

and the supplementary statement of objections of 21 November 2000 in Case COMP/36.571 to the Freiheitliche Partei Österreichs,

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

makes the following

Order

Facts and procedure

1 The applicant is an Austrian credit institution which operates its branches through agencies located in post offices in Austria; it has been part of the BAWAG group since the end of 2000.

2 On 6 May 1997 the Commission became aware of a document entitled 'Lombard 8.5' and, in the light of that document, commenced upon its own initiative a proceeding for infringement of Article 81 EC against the applicant and seven other Austrian banks pursuant to Article 3(1) 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).

3 By letter dated 24 June 1997, the Freiheitliche Partei Österreichs ('the FPÖ') sent the document 'Lombard 8.5' to the Commission and asked it to commence proceedings for infringement of Article 81 EC against eight banks, which did not include the applicant.

4 By letter dated 26 February 1998, the Commission informed the FPÖ, in the context of proceeding COMP/36.571 and in accordance with Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), that it intended to refuse its application. The Commission justified its position by stating that only persons or associations of persons with a legitimate interest, within the meaning of Article 3(2) of Regulation No 17, are entitled to make an application aimed at bringing an infringement to an end.

5 The FPÖ replied, by letter dated 2 June 1998, that the party and its members were involved in economic life and were therefore affected financially. It indicated that it carried out numerous banking transactions every day. For those reasons, it again applied to participate in the infringement proceedings and thus to be informed of the objections.

6 On 16 December 1998 the banks involved sent to the Commission, in connection with proceeding COMP/36.571, a joint summary of the facts, accompanied by 40 000 pages of supporting documents. In a preliminary note, they asked the Commission to treat this summary as confidential. The note stated:

'The attached summary of the facts may be consulted by all the banks involved in proceeding IV/36.571. The Commission is asked, under Article 20 of Regulation No 17/62, not to disclose its contents to third parties.'

7 By letter of 13 September 1999, the Commission sent the applicant the statement of objections of 10 September 1999, in which it alleged that the applicant had concluded anti-competitive agreements with other Austrian banks relating to the fees and conditions applicable to customers — both individuals and undertakings — and had thus infringed Article 81 EC.

8 On 6 October 1999 the applicant was given the opportunity to examine the file in the proceeding. On that occasion the Commission informed the applicant orally of its intention to transmit to the FPÖ all the objections drawn up in connection with the proceeding, in accordance with Article 7 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).

9 On the same date the applicant sent the Commission a letter indicating that in the applicant's opinion it was inadmissible to transmit a copy of the objections to the FPÖ. It maintained that the FPÖ could not claim a legitimate interest and could therefore not be treated as an applicant within the meaning of Article 3(2) of Regulation No 17.

10 The Commission replied by letter dated 5 November 1999. It indicated that the FPÖ, as the customer of a bank, had a legitimate interest in receiving the objections in accordance with Article 7 of Regulation No 2842/98. At the same time, it sent the applicant a list of the passages that were not to be communicated to the FPÖ.

11 The applicant replied by letter dated 17 November 1999 and again protested against the transmission of a copy of the statement of objections to the FPÖ and, in particular, against the provision of a full version of the statement apart from the blanking-out of the names of certain individuals named in that statement of objections or the replacement of their name by a description of their function, as

the Commission had accepted in its letter of 5 November 1999. As a result, the request from the FPÖ was not initially met.

12 On 18 and 19 January 2000 a hearing was held to examine the conduct complained of in the statement of objections of 10 September 1999. The FPÖ did not take part in that hearing.

13 The Commission sent the applicant a supplementary statement of objections on 21 November 2000, in which it alleged that the applicant had concluded anti-competitive agreements with other Austrian banks relating to bank fees for exchanging currencies for euros.

14 A second hearing took place on 27 February 2001, which again the FPÖ did not attend.

15 By letter dated 27 March 2001, the hearing officer informed the applicant that the FPÖ had repeated its request for a non-confidential copy of the statements of objections and that he intended to respond favourably. The hearing officer attached to his letter a list which, in his opinion, should protect business secrets and which provided for the names of various individuals and the descriptions of their functions to be deleted. The hearing officer also indicated that only Annex A to the statement of objections of 10 September 1999, which contained a list with references to all the documents attached to that statement of objections but not the documents themselves, was to be transmitted.

16 By letter dated 24 April 2001 the applicant again objected to the transmission of the statements of objections.

17 By letter of 5 June 2001 the hearing officer confirmed his view that the two statements of objections should be transmitted to the FPÖ, with the exception of some information on lists 1 and 2 annexed to that letter and which he deemed to be confidential. He added that the fact that the FPÖ had been accorded the status of an applicant could not be challenged in separate legal proceedings.

18 By letter dated 25 June 2001 the applicant asked the Commission to take a decision against which an action could be brought.

19 By letter of 9 August 2001 the decision in Case COMP/36.571 (the 'contested decision') was therefore notified to the applicant. It states *inter alia* the following:

'Following a further examination of the facts and points of law, we have decided to resolve the issues on which your principal and the Commission disagree as was indicated in our letter of 5 January 2001. Our decision is based on the following grounds:

1. It is not the hearing officer who assesses whether a person or association of persons is entitled to make application within the meaning of Article 3(2) of Regulation No 17 but the member of the Commission with responsibility for competition acting in the name of the Commission. The decision in favour of the FPÖ had already been taken by Mr Van Miert in 1999 and has since been confirmed by Mr Monti....

2. According the FPÖ the status of "complainant" in Case COMP/36.571 constitutes a procedural legal act which cannot be the subject of separate legal proceedings. On the contrary, this act can be challenged only as part of

an action brought against the Commission's decision terminating the proceeding. Recognition of the right to make an application within the meaning of Article 3(2) of Regulation No 17 means that, pursuant to Article 7 of Regulation (EC) No 2842/98..., a non-confidential version of the objections must be transmitted to the person making the application. The fact that the proceeding was opened on the Commission's own initiative or as a result of an application made under Article 3(2) of Regulation No 17 is of no importance. Contrary to your assertion, Article 7 of Regulation (EC) No 2842/98 is binding.

3. ...

4. In view of the foregoing, the question remains as to the information to be removed from the text of the statement of objections of 10 September 1999 and from the supplementary statement of objections of 21 November 2000 in order to pay due regard to your principal's legitimate interest in the confidential treatment of its business secrets and other confidential information.

(a) You suggested that the names of the Austrian banks involved be removed from the abovementioned documents. It should be noted that the identity of an undertaking involved in an alleged infringement does not constitute a business secret covered by Community law nor confidential information to be protected. Furthermore, blanking out the names of the banks involved would be of little use to them at present, as their identity will in any case be revealed in the Commission decision terminating the proceeding....

(b) All internal information likely to give information as to the current or future commercial policy of your principal must be removed from the version of the objections intended for the FPÖ. However, a stricter

yardstick must be applied in this regard, since the information dates back several years. For that reason, it is not necessary to delete any numerical data from the two statements of objections. In the interest of protecting individuals, all information that may identify the individuals concerned must be removed from the copy to be transmitted. This means that the names and functions of these persons must be rendered unrecognisable.

With a view to the preparation of a non-confidential version of the objections of 10 September 1999 and of the supplementary objections of 21 November 2000 for transmission to the FPÖ, the information shown on attached lists 1 and 2 must be deleted from the original texts in question. We understand from your letter in the present case that you agree with the contents of these lists, apart from the question of the anonymity of the first statement of objections.

In summary, we therefore conclude that the current adapted version of the statement of objections of 10 September 1999 and of the supplementary statement of objections of 21 November 2000 must be transmitted to the FPÖ, with a view to its adopting a position in the current Case COMP/36.571 — Austrian banks.

This decision has been taken pursuant to Article 9(2) of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21).

Please let us know, within one week of notification of this decision, whether your principal intends to bring proceedings against this decision before the Court of First Instance of the European Communities and to apply for an interim measure against the implementation of the said decision. The Commission will not

transmit the abovementioned statements of objections to the FPÖ before the expiry of this period of one week.'

20 By application lodged at the Registry of the Court of First Instance on 19 September 2001, the applicant brought an action for annulment of the contested decision.

21 By a separate document lodged at the Registry of the Court of First Instance on the same date, the applicant lodged this application for suspension of operation of the contested decision and, in the alternative, an order enjoining the Commission not to transmit the statement of objections of 10 September 1999 and the supplementary statement of objections of 21 November 2000 in Case COMP/36.571 to the FPÖ.

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

23 The parties were heard on 8 November 2001. At the end of the hearing, the judge hearing the application for interim measures asked the Commission to indicate whether it was prepared to accept an amicable solution by refraining from transmitting the statements of objections to the FPÖ until judgment had been delivered on the main action, on condition that the applicant consent, in return, to accelerate the procedure by abstaining from lodging a reply and by applying for priority treatment of the case by the Court of First Instance. The judge hearing the application for interim measures gave the Commission until 15 November 2001 to state its position.

24 By letter of 15 November 2001 the Commission stated that it could not accept the amicable arrangement proposed. However, the Commission announced, with regard to allegedly confidential information, that it would alter the references

concerning a high-ranking employee of the applicant in paragraphs 193 and 215 of the statement of objections of 10 September 1999 in the same way as had been done in the passages mentioned in list 1 of the annex to the hearing officer's letter of 5 June 2001.

25 By fax dated 27 November 2001, the applicant submitted its observations on the Commission's letter of 15 October 2001.

Law

26 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 necessary interim measures.

27 Under 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, may be heard by the Court of First Instance.

28 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application to suspend the operation

of a measure must be dismissed if any one of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30). The court hearing the application must also, where appropriate, balance all the interests involved (order of the President of the Court of Justice in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59).

1. *Admissibility*

Arguments of the parties

29 The Commission submits that it is for the judge hearing the application for interim measures 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 it is admissible. In the present case, however, the Commission contends that the main application is manifestly inadmissible.

30 In this regard, the Commission observes that the main application seeks annulment of the contested decision. It maintains that the only decision contained in the contested decision is the negative reply to the question whether information other than that listed in annexes 1 and 2 to the contested decision should be removed from the non-confidential versions of the statements of objections to be transmitted to the FPÖ, it having been established, in the view of the Commission, that such other information is not such that it must qualify for the confidential treatment ensured by Community law.

31 In order to contest that decision the applicant confines itself in its main application and in its application for interim measures to a statement setting out a list of legal principles, without indicating the facts, let alone linking them to a

rule. In the opinion of the Commission, that statement does not meet the conditions of Articles 44(1)(c) and 104(2) of the Rules of Procedure of the Court of First Instance.

32 According to the Commission, the application is also inadmissible inasmuch as the applicant is attempting to prevent any transmission of the statements of objections to the FPÖ before the decision as to the substance, irrespective of whether the names of the credit institutions involved are removed or not. However, transmission of non-confidential versions of the statements of objections to 'applicants' is compulsory under Article 7 of Regulation No 2842/98; it is not dependent on any decision and is not therefore open to challenge.

33 Moreover, the Commission points out that it had already notified the applicant, by letter dated 5 November 1999, that it intended to proceed in accordance with that provision. The present application does not seek the annulment of a decision that had been adopted at that time.

34 Lastly, any decision by the Commission to 'admit' the FPÖ as an 'applicant' would simply be a measure of organisation of procedure. Such a decision would have no legal effect that would impinge on the applicant's interests by bringing about a distinct change in its legal situation, so that it could not be the subject of a separate challenge. In his letter of 27 March 2001, the hearing officer merely confirmed to the applicant that the FPÖ's interest in submitting an application had been acknowledged and repeated his explanation in this regard. As far as acknowledgement of the FPÖ's interest is concerned, that letter does not constitute a new decision but a simple confirmation that cannot be challenged.

35 The applicant maintains that the application to suspend the operation of the contested decision is admissible. First, it contests the claim that a decision was taken by the Commission in its letter of 5 November 1999 with regard to the status of the FPÖ as an applicant. In this regard the applicant maintains that that

letter is signed by a director and not by the member of the Commission. Moreover, the hearing officer's letter of 27 March 2001 indicates that fresh developments in the case had led the Commission to come back to an issue that had been discussed during the second half of 1999, to which no definitive solution had been found. The question was whether the FPÖ had to be considered an applicant within the meaning of Article 3 of Regulation No 17. That question had not been finally resolved in 1999.

36 In the view of the applicant, the contested decision may, in particular, be challenged separately from the action against the Commission's final decision, because it has binding legal effects and harms the applicant's interests. The applicant's interest in requesting suspension of operation of the contested decision and, in the alternative, an order not to transmit the statements of objections is established.

37 The transmission to third parties of documents submitted to the Commission in the context of the investigation procedure may, according to the applicant, be challenged separately from the action against the Commission's final decision because such transmission could definitively and irreversibly affect the undertaking's right to have its business secrets treated confidentially. The transmission of the statement of objections to third parties is not simply a preparatory step in a decision terminating a proceeding. That is made clear in particular in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 20, and the order of the President of the Court of First Instance in Case T-353/94 R *Postbank* v *Commission* [1994] ECR II-1141, paragraph 25.

38 According to the applicant, the contested decision has legal effects that could definitively and irreversibly affect its right to the confidentiality of the information disclosed in the statements of objections. The possibility of bringing a separate action against the contested decision is therefore necessary to preserve the applicant's rights. Legal protection in the form of action against the decision terminating the proceeding would be too late.

Findings of the judge hearing the application for interim measures

39 As regards the Commission's argument that in its application for interim measures the applicant fails to comply with the conditions set out in Articles 44(1)(c) and 104(2) of the Rules of Procedure of the Court of First Instance, the Commission confines itself to contending that, in its application for interim measures, the applicant challenges the only decision contained in the contested decision — that is to say the negative reply to the question whether information in addition to that listed in annexes 1 and 2 to the contested decision should be deleted from the non-confidential versions of the statements of objections — by listing legal principles without indicating the facts, let alone relating them to any rule.

40 However, it is clear from a simple and coherent reading of the application for interim measures, particularly of paragraph 18 read in conjunction with paragraph 29, that the applicant has contested the Commission's refusal to regard the indication of the names and addresses of the undertakings participating in the proceeding as business secrets qualifying for confidential treatment and the fact that the Commission confined itself to deleting various names of persons and the descriptions of their functions.

41 It follows that the application for interim measures meets the requirements of Articles 44(1)(c) and 104(2) of the Rules of Procedure for an application for interim measures to be formally admissible.

42 As regards the plea of inadmissibility based on the alleged inadmissibility of the main application, the Court has consistently held that in principle this issue should not be examined in proceedings relating to an application for interim measures, so as not to prejudge the substance of the case. It may nevertheless be found necessary, when, as in this case, it is contended that the main application to

which the application for interim measures relates is manifestly inadmissible, to establish whether there are any grounds for concluding prima facie that the main application is admissible (orders of the President of the Court of Justice in Case 376/87 R *Distrivet* v *Council* [1988] ECR 209, paragraph 21; and Case C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council* [2000] ECR I-8797, paragraph 34; and order of the President of the Court of First Instance in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 121).

43 In this case, the judge hearing the application for interim measures considers that, in the light of the arguments put forward by the Commission, it is necessary to ascertain whether the action for annulment is manifestly inadmissible as alleged.

44 First, as regards the Commission's argument based on the manifest inadmissibility of the main action on the ground that the application for annulment does not comply with the requirements of Article 44(1)(c) of the Rules of Procedure, it is evident from reading paragraphs 18 and 29 of that application that the applicant expressed there the same claims as those set out in the application for interim measures and described in paragraph 40 above. It follows that, for reasons identical to those which led to the finding that the application for interim measures is admissible, the action for annulment does not appear to be manifestly inadmissible in the light of Article 44(1)(c) of the Rules of Procedure.

45 Furthermore, as regards the Commission's argument that the main action is manifestly inadmissible in that it is aimed at preventing any transmission of the statements of objections to the FPÖ, even non-confidential ones, it must be observed, first of all, that this argument rests essentially on the claims that the decision to recognise a natural or legal person's legitimate interest within the meaning of Article 3(2) of Regulation No 17 does not have autonomous legal effects and that the transmission of the statement of objections to such a person does not constitute a decision open to challenge but stems directly and automatically from Article 7 of Regulation No 2842/98.

46 It is necessary to ascertain whether, as the Court required in its judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, the contested decision constitutes a measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in its legal position, or is simply a preparatory measure, against the possible illegality of which an application relating to the decision terminating the proceeding would provide adequate protection.

47 In this regard, the decision to transmit the statement of objections to the FPÖ formally constitutes an act. That act presupposes a prior decision in which the Commission judged that the FPÖ qualified as an applicant within the meaning of Article 3(2)(b) of Regulation No 17 and that the FPÖ was therefore entitled, under Article 7 of Regulation 2842/98, to receive a copy of the non-confidential version of the statements of objections.

48 As to the decision determining the procedural position of the FPÖ, in its written observations the Commission is able to indicate only that this decision was taken in 1999. However, in his letter of 27 March 2001 the hearing officer indicates that fresh developments in the case led him to re-open a question discussed during the second half of 1999, to which no solution had been found. This was the request from the FPÖ to be considered an applicant within the meaning of Article 3 of Regulation No 17 and hence to be able to participate in the proceeding and obtain non-confidential versions of the statements of objections. It follows prima facie that it was only at the time of the contested decision that there was a decision determining the procedural position of the FPÖ.

49 As to the letters sent to the applicant by the Commission and the hearing officer before the contested decision, none of them announced that the Commission would automatically transmit non-confidential versions of the statements of objections to the FPÖ. On the contrary, all of those letters gave the applicant the opportunity to submit its observations on the versions of the said statements that might be transmitted. It follows that those letters appear to be preparatory acts,

whereas the contested decision contains, prima facie, the Commission's final position with regard to the transmission of versions of the statements of objections that the Commission considers to be non-confidential to the FPÖ (see, to that effect, the order in Case T-90/96 *Peugeot* v *Commission* [1997] ECR II-663, paragraphs 34 and 36).

50 These circumstances reinforce the prima facie conclusion that it was only when the contested decision was adopted that a distinct change could be brought about in the legal situation of the applicant and its interests affected.

51 It is undoubtedly correct that any transmission of documents is intended to facilitate the investigation of the case. In this regard, and apart from the fact that it cannot be excluded that the contested decision is definitive in nature, the latter must nevertheless be regarded as independent of any decision on the question whether Article 81 EC has been infringed. The opportunity which the applicant has to bring an action against a final decision establishing that the competition rules have been infringed is not of such a nature as to provide it with an adequate degree of protection of its rights in the matter (see, to that effect, Case 53/85 *AKZO Chemie* v *Commission*, cited above, paragraph 20). On the one hand, it is possible that the administrative proceeding will not result in a decision finding that an infringement has been committed. On the other hand, the possibility of bringing an action against that decision, if taken, will not in any event provide the applicant with the means of preventing the consequences of improper disclosure of the statements of objections in question.

52 In those circumstances, it cannot be excluded that the contested decision, in so far as it also relates to the transmission of the non-confidential versions of the statements of objections to the FPÖ, constitutes an act open to challenge and hence that it is admissible for the applicant to apply for its annulment under the fourth paragraph of Article 230 EC. Consequently, the admissibility of the present application for interim measures cannot be ruled out.

53 In the circumstances, the judge hearing the application for interim measures considers that it is necessary to examine whether the condition relating to urgency and the balancing of interests is fulfilled.

2. *Urgency and the balancing of interests*

Arguments of the parties

54 The applicant contends that the immediate implementation of the contested decision will cause it serious material and non-material damage that would be irreparable, even after annulment of the contested decision.

55 In the applicant's view, the non-confidential versions of the statements of objections that the Commission wishes to transmit to the FPÖ contain information which the applicant is entitled to demand should be kept confidential. The fact that the hearing officer intends to delete various individuals' names and the descriptions of their functions is not sufficient to ensure such confidentiality. At the hearing the applicant stated that other information should also be considered confidential. In that regard it referred in particular to the names of the addressees of the statements of objections. The applicant considers that the fact that the FPÖ did not name it in its complaint of 24 June 1997 suggests that the FPÖ does not know that the Commission has implicated it in these statements of objections. The applicant also refers to paragraphs 216, 218 and 219 of the statement of objections of 10 September 1999, which contain direct references to the functions of the individuals who attended certain meetings. In this case, those references would make it possible to identify directly the persons involved. In addition, paragraph 219 contains information on certain conditions applied by the banks, which in the applicant's view constitute business secrets.

56 Moreover, the fact that the Commission decided not to transmit some of the documents appended to the statements of objections does not, in the opinion of the applicant, prevent serious and irreparable damage being caused to the applicant in that the Commission quotes from those documents literally and at length in the statements.

57 The applicant maintains that its interest in confidential treatment of the information contained in the statements of objections stems basically from the fact that the objections were not formulated as a result of an adversarial procedure. The statements of objections do not reflect the extent to which the applicant defended itself against the accusations made against it. The unilateral nature of the content of the statements of objections and the possibility that the objections may be unfounded are not directly apparent to a third party and could lead the latter to draw unjustified and unfavourable conclusions with regard to the applicant, and even to condemn it in advance.

58 According to the applicant, that risk is particularly relevant in the context of a class action pending before the courts in the United States of America. In the context of such an action, the objections could be dissected by the plaintiffs without regard to their provisional and unilateral nature and without the applicant having any legal recourse in that regard. The Commission, like the applicant, has no legal means to prevent the statements of objections from being given or sold to the said plaintiffs once they have been transmitted to the FPÖ.

59 In those circumstances, the applicant claims that the immediate implementation of the contested decision will cause it serious and irreparable material and non-material damage. In its view, it is more than likely that the FPÖ will divulge the statements of objections or their contents and will discredit the applicant in the eyes of its customers and employees and of the public in general. This prior condemnation would lead to a loss of customers, to the benefit of other banks.

60 The implementation of the contested decision before judgment is given in the main proceedings would, according to the applicant, deprive the possible annulment of that decision in that judgment of any effect because it would then be impossible to go back on the transmission of the statements of objections. The FPÖ — and the public — would know of the objections.

61 Nor is it possible to deny urgency by reason of the fact that the applicant can choose to take legal action before the national courts, as the Commission contends. The Commission cannot, in the applicant's view, transfer judicial review to the national courts. Where, as in the present case, the interpretation of Article 3 of Regulation No 17 and Article 7 of Regulation No 2842/98 is in issue, the national courts are in any case obliged to seek a preliminary ruling from the Court of Justice.

62 The abovementioned consequences of immediate implementation of the contested decision gives the applicant an overwhelming interest in having the operation of the measure temporarily suspended and in the granting of an interim measure prohibiting the transmission of the statements of objections to the FPÖ.

63 The applicant submits that in the present case the Commission's interest in terminating the investigation procedure rapidly does not merit protection, since until now the Commission has failed to settle definitively the dispute between the parties dating from 1997, or at least from October 1999, on the legality of transmission. In any case the applicant cannot be blamed for the fact that it is only now that the Commission wishes to transmit the statements of objections, when the investigation is drawing to a close. In those circumstances, priority should be given to the applicant's interest in avoiding irreversible damage and preserving the status quo.

64 The Commission contends that the applicant's arguments with regard to the supposed urgency of its application for interim measures are based on circular reasoning. The applicant can oppose the transmission of the statements of objections to the FPÖ only if such disclosure would lead to 'irreversible non-material damage' as the applicant claims. According to the applicant's own statements, that could happen only if the versions of the statements of objections transmitted contained confidential information. The only confidential items of information in the versions whose transmission is contemplated in the contested decision are, according to the declarations made by the applicant at the hearing

preceding the adoption of the contested decision and in its application for interim measures, the names of the credit institutions concerned. The applicant justifies this claim by referring only to possible misuse of those names by the FPÖ for political purposes.

65 The names of the Austrian credit institutions involved are not, however, confidential. Any use the FPÖ made of them would therefore be irrelevant in the context of the present procedure.

Findings of the judge hearing the application for interim measures

Urgency

66 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party who requests the interim measure. It is for that party to adduce proof that it cannot await the outcome of the main action without suffering such damage (order of the President of the Court of Justice in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14; and orders of the President of the Court of First Instance in Cases T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 36; and T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 43).

67 Although, in order to establish the existence of serious and irreparable damage, it is not necessary to require absolute proof that the damage will occur and it is

enough for it to be foreseeable with a sufficient degree of probability, the applicant is still required to prove the facts opening up the prospect of such serious and irreparable damage (orders of the President of the Court of Justice in Cases C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67, and C-278/00 R *Greece* v *Commission*, paragraph 15).

68 In order to assess the alleged damage, it is necessary to distinguish between that which would be caused by disclosure of information that the applicant considers to be confidential and that which would result from the simple transmission of the statements of objections to the FPÖ, regardless of the allegedly confidential nature of the information.

— The disclosure of allegedly confidential information to the FPÖ

69 It should be remembered first of all that the information in question is contained in the versions of the statements of objections which, according to the Commission, are not confidential and which the Commission proposes to prepare and transmit to the FPÖ. The applicant claims that this information, in particular its name, should be deleted from the said versions. However, it must be pointed out that the applicant has not shown that the transmission to the FPÖ of versions of the statements of objections containing reference to the applicant's name could cause it serious and irreparable damage. That risk is all the less by reason of the fact that the applicant is already cited by name as one of the defendants in the class action now pending before the courts in the United States of America. Moreover, at the hearing the applicant did not deny that its name had already been mentioned in the press in connection with Case COMP/36.571. Lastly, although it is true, as the applicant points out, that its name did not appear in the complaint lodged with the Commission by the FPÖ on 24 June 1997, that fact is not sufficient to make its name confidential information.

70 At the hearing the applicant stated that other information contained in the non-confidential version of the statement of objections of 10 September 1999 should be regarded as confidential. The applicant referred in this respect to paragraphs 193, 215, 216, 218 and 219 of that statement of objections. As stated in paragraph 24 above, in its letter of 15 November 2001 the Commission agreed to amend paragraphs 193 and 215 in the manner requested by the applicant. Hence, the present examination should concentrate on paragraphs 216, 218 and 219 of the statement of objections in question.

71 As regards those paragraphs, which make direct reference to the functions of individuals, it should be remembered that, in accordance with settled case-law, only damage that may be caused to the applicant may be taken into consideration when examining the requirement as to urgency (order in Case T-13/99 *Pfizer Animal Health* v *Council*, cited above, paragraph 136). It follows that any damage to the personal reputation of certain employees of the applicant may not be taken into consideration when examining the said requirement, unless the applicant succeeds in showing that such damage is likely to cause serious harm to its own reputation. That is not the case here. The applicant merely makes statements about the supposed damage to the reputation of its employees without going into further detail in this regard and consequently without demonstrating a causal link between such possible damage and the alleged damage to its own reputation.

72 Furthermore, in paragraph 219 of the statement of objections of 10 September 1999, the Commission refers to certain conditions applied by the banks which, according to the Commission, had been discussed at a meeting on 30 April 1996. The applicant recognised by implication at the hearing that those facts, which date back five years, are no longer topical. Moreover, it has not shown how their disclosure could cause it serious and irreparable damage.

73 It must therefore be found that the applicant has not established that the disclosure of the information which it considers to be confidential could open up the prospect of serious and irreparable damage.

— The simple transmission of the statements of objections to the FPÖ, regardless of the allegedly confidential nature of the information

74 The serious and irreparable damage alleged by the applicant consists firstly in material damage, namely the loss of customers, and secondly in non-material damage, namely harm to its reputation. Such damage would stem from the prior condemnation which the applicant fears it would suffer in the eyes of third parties and from the probable production, according to the applicant, of the statements of objections in the class action in progress in the United States of America.

75 The alleged material damage, and more specifically the claimed loss of customers, is of a pecuniary nature in view of the fact that it consists in a loss of revenue. However, it is settled case-law that damage of a purely pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation (order of the President of the Court of Justice in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24, and order of the President of the Court of First Instance in Case T-168/95 R *Eridania and Others* v *Council* [1995] ECR II-2817, paragraph 42).

76 In accordance with those principles, the suspension sought in the present case would be justified only if it appeared that, without such a measure, the applicant would be exposed to a situation liable to endanger its very existence or to restrict its market share irreversibly. The applicant has provided no evidence which gives

grounds for considering that without such a suspension of operation it would find itself in such a situation.

77 In any event, it must be concluded that the loss of customers feared by the applicant constitutes purely hypothetical damage in that it assumes the occurrence of future and uncertain events, namely public exploitation of the statements of objections by the FPÖ for the purposes of denigration (see, to that effect, the orders of the President of the Court of First Instance in Cases T-239/94 R *EISA* v *Commission* [1994] ECR II-703, paragraph 20; T-322/94 R *Union Carbide* v *Commission* [1994] ECR II-1159, paragraph 31; and T-241/00 R *Le Canne* v *Commission* [2001] ECR II-37, paragraph 37).

78 As to the serious and irreparable damage that the applicant claims would result from the production of the statements of objections in the class action in progress in the United States of America, it must be concluded that this too constitutes purely hypothetical damage in that it presupposes, first, that the FPÖ will pass the said statements of objections to the plaintiffs in that class action and, secondly, that these documents will be admitted as evidence by the US courts.

79 As to the alleged non-material damage, it must be concluded that the applicant has not provided evidence to show, with a sufficient degree of probability, that there is a prospect of serious and irreparable damage to its reputation. The mere prospect, which in any case is hypothetical, that the FPÖ will use the statements of objections for political purposes or publicise non-confidential information about the applicant does not enable the judge hearing the application for interim measures to reach any other conclusion. It must be pointed out in this regard that, as in essence the hearing officer reminded the applicant in the letter of 27 March 2001, the transmission of the statement of objections to the complainant takes place solely within the context of and for the purposes of the proceeding initiated by the Commission. The complainant is therefore deemed to use the information contained in that statement in that context alone. In that regard, it must be concluded that any improper or deceitful use of the information contained in the statements of objections could, if necessary, be challenged before the national court.

80 It follows from the foregoing that the applicant has not established that the requirement of urgency is fulfilled. The dismissal of the present application for interim measures is justified on that ground alone.

The balancing of interests

81 In any event, the balancing of the applicant's interest in obtaining the suspension of operation sought, on the one hand, against the public interest in the implementation of decisions taken under Regulations No 17 and No 2842/98 as well as the interests of third parties directly affected by a suspension of operation of the contested decision, on the other, means that the present application must be dismissed.

82 In the present case, the Community interest in placing third parties whom the Commission has recognised as having a legitimate interest in applying under Article 3 of Regulation No 17 in a position to make appropriate observations on the objections raised by the Commission must take priority over that of the applicant to delay transmission of the statements of objections.

83 As the requirement of urgency is not fulfilled and the balancing of interests does not lean in favour of suspending the operation of the contested decision, the present application must be dismissed without there being any need to examine the other arguments adduced by the applicant to demonstrate that it has a prima facie case.

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, 20 December 2001.

H. Jung
Registrar

B. Vesterdorf
President