JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

14 October 2004 *

In Case T-56/02

Bayerische Hypo- und Vereinsbank AG, established in Munich (Germany), represented by W. Knapp, T. Müller-Ibold and B. Bergmann, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities,

defendant,

APPLICATION for annulment of Commission Decision 2003/25/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty — (Case COMP/E — 1/37.919 (ex 37.391) — Bank charges for exchanging euro-zone currencies — Germany) (OJ 2003 L 15, p. 1),

* Language of the case: German.

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

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: H. Jung,

having regard to the written procedure, 14 October 2004,

gives the following

Judgment

Background to the dispute

Legislative framework

1 Article 109 (4) of the EC Treaty (now Article 123(4) EC) provides that, at the starting date of the third stage of European economic and monetary union (EMU), the Council is to adopt the conversion rates at which the currencies of the Member States which adopt the euro as a single currency in accordance with the EC Treaty ('the participating Member States') are to be irrevocably fixed and at which irrevocably fixed rate the ECU is to be substituted for those currencies.

2 Article 52 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank ('ECB') annexed to the EC Treaty (hereinafter 'the Statute of the ESCB') provides:

'Exchange of banknotes in Community currencies

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.'

3 At its meeting in Madrid on 15 and 16 December 1995, the European Council confirmed that the third phase of EMU would start on 1 January 1999, in accordance with Article 109j of the EC Treaty (now Article 121(4) EC).

4 The main elements of the legal framework relating to the introduction and use of the euro are defined in:

— 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);

— Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ 1998 L 139, p. 1).

5 Article 4 of Regulation No 1103/97 defines the rules applicable to the conversion between the euro and the monetary units of the participating Member States. It provides, in paragraph 3, that '[t]he conversion rates shall be used for conversions either way between the euro unit and the national currency units. Inverse rates derived from the conversion rates shall not be used.'

6 It follows from Articles 2 and 3 of Council Regulation No 974/98 that, as from 1 January 1999, the currency of the participating Member States is to be the euro, which is to be substituted for the currency of each participating Member State at the conversion rate.

7 Articles 10 and 11 of Regulation No 974/98 fix 1 January 2002 as the date on which banknotes and coins denominated in euro are to be put into circulation and issued.

8 Articles 5 to 9 of Regulation No 974/98 contain the transitional provisions applicable during the period 1 January 1999 to 1 January 2002 ('the transitional period').

9 Furthermore, on 15 May 1997 the Commission invited representatives of the banking sector, the public authorities and consumers to a Round Table on the practical aspects of the changeover to the euro (recital 40 to the contested decision). It follows, in particular, from the summary report drawn up following that Round Table ('Commission, Directorate General "Economic and Financial Affairs", Round Table on practical aspects of the changeover to the euro. Summary and conclusions', Document II/301/97 of 11 June 1997) that the representatives of the banks 'hoped that the exchange transactions between national banknotes of the various participating Member States could be charged during the transitional period: the currency exchange risk will admittedly have disappeared — which will reduce costs by approximately 20% — but the other processing costs will remain the same', a

desire to which the consumers' associations were opposed. During the Round Table, the Deutsche Bank stated that it intended during the transitional period to charge for the exchange of currencies to persons not holding accounts but to offer that service free of charge to its customers.

10 Following the Round Table of 15 May 1997, the Commission instructed a group of experts to examine whether, and how, the banks could demand remuneration for the services of converting the currencies of the participating Member States.

11 The relevant conclusions of the group of experts in respect of the transitional period are as follows (Report of the expert group on banking charges for conversion to the euro, 20 November 1997; document cited at recital 137 to the contested decision, footnote 56):

— for the exchange of banknotes in the currencies of the participating Member States, Article 52 of the Statute of the ESCB requires the central banks of the euro area to change at the irrevocable conversion rates the banknotes of the currencies of other participating Member States but there is no provision prohibiting commercial banks from invoicing that type of service;

— as regards transparency, the obligation to use the irrevocable conversion rates for every exchange transaction means that any commission must be identified separately from the irrevocable conversion rate and not concealed in a spread.

12 In a memorandum in Annex A to the Report of 20 November 1997, the group of experts states:

'19. For commercial banks, bureaux de change and others, there is no EU or national law preventing banks from charging for this service. From an economic point of view it cannot be denied that it is a "service" and unlike a book money conversion there is a legally different item which is exchanged.

...

Transparency

23. An important proviso to any proposition that charges can be made in certain cases (e.g. for the exchange of national banknotes and coin against other national banknotes and coin) is the requirement of transparency of pricing of the fee for the exchange. Currently banks and bureaux de change in a number of Member States price their exchange fee as an all inclusive "spread" between the "buy" and "sell" rates for the currency. With effect from introduction of the euro the quotation of such spreads would fail to qualify as an accurate use of the conversion rates under the [Article] 109 (4) regulation. Such spreads (i.e. spreads within denominations of the same currency) are likely to run counter to consumer laws at EU and/or national level. This proviso applies in any situation where a conversion fee is being demanded: it should be explicit rather than implicit.

...

Conclusions

...

— *Banknote and coin exchange in the* transitional period can be charged for, provided that the charge is transparently a handling charge.'

13 As to whether the banks intended to charge fees for exchanging banknotes of the participating Member States, the Experts' Report of 20 November 1997 states that most banks intended to charge such fees, although these should not be as high as those previously charged, owing to the disappearance of the currency exchange risk.

14 Repeating the positions expressed by the consumers' associations, the group of experts considered that the transition to the euro would be more readily accepted if the banks ceased to require payment for the conversion. The group of experts stated that they were in favour of a standard of 'good practice' for conversion without charge.

15 These factors were also set out in issue No 21 of *Cahiers de l'euro*, published by the Commission in 1998, on an unspecified date.

16 Following those consultations, 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 2 sets out, for the benefit of the banks, a number of principles of good practice on conversion without charge. Those principles do not concern services of exchanging banknotes and coin of the euro zone during the transitional period. Article 3 of the Commission Recommendation of 23 April 1998 is worded as follows:

'Article 3 — Transparency

1. For all conversions between any national currency unit and the euro unit and vice versa, and for all exchanges of banknotes and coin of participating Member States, banks should show clearly the application of the conversion rates in accordance with the provisions of Regulation (EC) No 1103/97, and should identify separately from the conversion rate any charges for any kind whatever which have been applied.

2. Where banks charge for conversion and exchanges which are not included in Article 2 or where banks do not implement one or more of the provisions of Article 2(b), they should provide clear and transparent information concerning those conversion charges or exchange charges by providing their customers with:

(a) prior (*ex ante*) written information on any conversion charges or exchange charges which they propose to apply, and

(b) specific information (*ex post*) on any conversion charges or exchange charges which have been applied, on bank and cardholder statements and any other means used for communicating with the customer. This information should demonstrate clearly to their customers the application of the conversion rates in accordance with the provisions of Regulation (EC) No 1103/97, with any conversion charges or exchange charges being identified separately from the conversion rate and from any other charges of any kind whatever which are applied.'

The contested decision

17 The present case concerns Commission Decision 2003/25/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty (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').

18 Among the 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 (hereinafter 'inter-bank currency exchange services') and, second, retail currency exchange services, provided to individuals and concerning small quantities of banknotes.

19 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 to the contested decision). This margin by comparison with the market reference rate is sometimes known as the 'rate margin'.

20 The addressees of the contested decision are five banks established in Germany:

— Commerzbank;

— Dresdner Bank;

— Bayerische Hypo- und Vereinsbank ('HVB' or 'the applicant');

— Deutsche Verkehrsbank (DVB);

— Vereins- und Westbank (VUW).

21 The applicant operates as a universal bank mainly in Germany. It came into being following the merger, on 1 September 1998, between Bayerische Hypotheken-und Wechselbank and Bayerische Vereinsbank AG. The applicant is the principal shareholder in VUW.

22 Early in 1999 the Commission initiated an investigation against approximately 150 banks, including the applicant, 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, the prices of currency exchange services for the currencies of certain participating Member States. 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.

23 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.

24 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.

25 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 (recital 22 to the contested decision).

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

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

— Commerzbank;

— DVB;

— HVB;

— Reisebank;

— Dresdner Bank ('Dresdner');

— VUW;

— Bayerische Landesbank Girozentrale;

— SEB Bank (formerly called BfG);

— Hamburgische Landesbank Girozentrale;

— Westdeutsche Landesbank Girozentrale;

— Landesbank Hessen Thüringen Girozentrale;

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

28 On 1 and 2 February 2001, the hearing officer heard the addressees of the statement of objections.

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

30 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.

31 The initiative for holding that meeting was said to be attributable to GWK. The 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 the German central bank would not provide a free currency exchange service to consumers (recital 60 to the contested decision).

32 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 Mr [A], an employee of GWK ('the [A] report') and Mr [B], an employee of Commerzbank ('the [B] report').

33 In the contested decision, the Commission first noted that the participants agreed to inform the Bundesbank (the German central bank) 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).

34 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 [A] 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).

35 Last, the Commission considered that the [A] and [B] 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 [B] report does not mention the amount of that commission, unlike the [A] 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 stated that its representative at the meeting of 15 October 1997 had recalled that 'some representatives of individual banks 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).

36 On the basis of that evidence, the Commission considered that 'the banks participating in the meeting of 15 October 1997 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).

37 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'.

38 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

39 The applicant was notified of the contested decision on 19 December 2001.

Procedure

40 By application lodged at the Registry of the Court of First Instance on 28 February 2002, the applicant brought the present action.

41 After being notified of the application, the Commission did not lodge a defence within the time prescribed. By letter lodged at the Registry on 25 June 2002, the applicant 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. The Registry notified that request to the Commission.

42 The Court must therefore give judgment by default. As the admissibility of the action is not in doubt and the formalities have been properly completed, the Court must consider whether the applicant's submissions appear to be well founded.

Form of order sought by the applicant

43 The applicant claims that the Court should:

— annul the contested decision in so far as it concerns the applicant;

— in the alternative, annul the fine or reduce the amount thereof;

— order the Commission to pay the costs.

Law

44 The main pleas put forward in the application concern the following matters:

— various breaches of the rights of the defence during the administrative procedure;

— infringement of Article 81 EC, owing to errors of law and of fact;

— the applicant's participation in the infringement;

— the imputability of the infringement;

— the reasons on which the contested decision is based;

— misuse of powers;

— the determination of the amount of the fine.

45 For the purposes of the present judgment by default, it is appropriate to examine as a matter of priority the pleas whereby the applicant disputes the existence of an agreement and challenges the accuracy of the findings of fact made by the Commission.

The findings of fact

46 The applicant claims essentially that no agreement on the ways of charging exchange commission and the amount of such commission was concluded at the meeting of 15 October 1997. It submits that the Commission has not demonstrated to the requisite legal standard the facts on the basis of which it concluded that there had been an infringement.

The agreement on the ways of charging exchange commission

Arguments of the applicant

47 First of all, the applicant claims that there has been a breach of the obligation to state reasons. As regards the agreement on the ways of charging exchange commissions, the contested decision is ambiguous and obscure, to the extent that the applicant finds it difficult to organise its defence.

48 The content of that alleged agreement does not emerge clearly from the contested decision, which is worded in such a way that it could be interpreted in two ways. According to the first interpretation, the alleged agreement has the sole objective of authorising proportionate remuneration, precluding any remuneration at a flat rate.

According to the second interpretation, the alleged agreement concerned the principle of dropping the currency margin and replacing it by a commission distinct from the rate of exchange and proportionate to the amount exchanged.

49 No matter what interpretation is applied, however, the applicant claims, essentially, that the fact of charging exchange commissions which are proportionate to the volume exchanged is solely the consequence of the introduction of irrevocable conversion rates. The introduction of those rates is at the origin of the dropping of the exchange margin system and of the transparency desired by the Commission and by the Bundesbank. Thus, neither of those interpretations permits the conclusion that there was an unlawful agreement.

50 As regards the interpretation that the contested decision is based on the argument that there was an agreement to drop the exchange margin system, the applicant admits that there was such an agreement, but denies that it was capable of restricting competition.

51 First, the dropping of the exchange margin system is the direct consequence of Article 4(3) of Regulation No 1103/97, as the Commission itself acknowledged in the contested decision (recitals 37 et seq. and 139 et seq. to the contested decision).

52 Next, the dropping of the exchange margin system is consistent with the Commission Recommendation of 23 April 1998, which pursued that objective. Consequently, an alleged agreement whereby the banks expressed their willingness to comply with that Commission recommendation could not have appreciable effects on competition and, moreover, should have been exempted. The fact that the Bundesverband deutscher Banken maintained in 1997 that the exchange margin was not in itself unlawful is immaterial (letter of 19 September 1997 from the

Bundesverband deutscher Banken to the Commission). In fact, that association subsequently accepted the Commission Recommendation of 23 April 1998.

53 Last, the Commission has failed to explain what the alleged agreement on the ways of charging exchange commissions consisted of. Admittedly, recital 113 to the contested decision indicates that the Landesbank Hessen Thüringen acknowledged that an agreement on the 'charging structure' had been concluded on 15 October 1997. However, it appears that the Landesbank Hessen Thüringen merely stated that it was 'difficult' to envisage a structure that was other than proportionate, referring in all likelihood to the dropping of the exchange margin. The Commission considered (recital 114 to the contested decision) that each bank must independently decide its commercial policy with regard to charging for its services, without giving a fuller explanation.

54 As regards the interpretation to the effect that the contested decision is referring to an agreement on proportionate commission, excluding any flat-rate component, the applicant submits that such an agreement never existed. The participants in the meeting of 15 October 1997 discussed the form which the future commissions which would succeed the exchange margin system might take. They did not manage to devise formulas extending beyond those already well known in the sector (proportionate commission, with or without a minimum volume or flat-rate commission).

55 It was for that reason that VUW's employee, Mr [C], who was present at that meeting, considered that the meeting had not been very informative. For the same reason, the [B] report states that there had been 'consensus' on the charging of exchange operations at a 'fixed price' (i.e. at the irrevocable conversion rate) 'plus or minus' a commission displayed separately. That observation, which indicates that the commissions would be calculated as a percentage, was intended to exclude the exchange margin system but not the flat-rate commissions.

56 In the applicant's submission, the [A] report (recital 88 to the contested decision) also confirms that point:

'Following a remarkably short discussion, all of those present were convinced that the exchange rate margin on euro-zone currencies was going to disappear and that both the value of the money changed and the commission charged would have to be clearly indicated.'

57 Likewise, according to the [B] report:

'The euro-zone currencies, without/with the fees/commissions, will be charged separately to the customer.

The fees/commissions will be calculated as a percentage of the corresponding amount.'

58 The applicant further claims that an agreement on the principle of an exclusively proportionate commission was never implemented. Like most of the participants in the meeting of 15 October 1997, the applicant charged a flat-rate remuneration in around 70% of exchange transactions. Such an agreement, 15 months before the start of the transitional period, would be a nonsense.

Findings of the Court

59 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 (see, to that effect, case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86; 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).

60 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 (see, to that effect, *ACF Chemiefarma* v *Commission*, cited above, paragraph 112; *Van Landewyck and Others* v *Commission*, cited above, paragraph 86; and *Bayer* v *Commission*, cited above, paragraph 68).

61 It follows that 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).

62 The Court must consider whether the applicant has adduced sufficient evidence of factors susceptible of calling in question the validity of the evidence on the basis of which the Commission established the existence of 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.

63 This last aspect of the impugned agreement was described at recitals 95, 96, 114, 115, 132 and 185 to the contested decision, as the Commission devoted the essential part of its analysis to the question of the fixing of the amount of the commissions.

64 The interpretation suggested by the applicant, namely that the infringement referred to in Article 1 of the contested decision concerning an agreement on 'the way of charging the exchange commissions' could relate to the dropping of the currency exchange margin, is not plausible. The unlawful nature of such an agreement would be directly contradicted by recitals 38 and 139 to the contested decision, which show that the dropping of the currency spread was the consequence of the entry into force of the irrevocable conversion rates.

65 The Commission stated that the 'irrevocable fixing of the exchange rates as from 1 January 1999 meant the abolition of the different buying and selling rates, i.e. the spread, as a means of expressing charges for the exchange of in-currency banknotes' (recital 38 to the contested decision). Furthermore, the Commission rejected the argument that the meeting of 15 October 1997 was held in order to examine the question of maintaining the spread during the transitional period, stating that '[a]s early as 1995 it was known that the exchange rates would be irrevocably fixed and that only those fixed rates should be used' and that '[t]he direct consequence of this is that the use of spreads would not be permissible, and that any charges should be explicitly and transparently shown' (recital 139 to the contested decision).

66 The Commission also stated that the entry into force of the irrevocable conversion rates had been at the origin of the part of the infringement relating to the fixing of the amount of the exchange commissions. Thus, in the part of the contested decision devoted to the legal assessment, the Commission considered that the agreement on prices had been concluded 'with the aim of achieving about 90% income recovery after the abolition of the spread on 1 January 1999' (recital 116 to the contested decision; see also recital 130).

67 As regards the evidence of the existence of an agreement on the principle of exclusively proportionate remuneration, the Commission stated (recital 95 to the contested decision):

'With regard to the retail business, [the [B] 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

— ... there will be a fixed exchange rate for in-currencies and the charges/fees will be calculated separately ...'"

68 The Commission notes that '[the [B] and [A] reports] correspond to the extent that the customer charges would be in a percentage form' (recital 96 to the contested decision).

69 Taken in isolation, however, those elements seem to be insufficient to establish the existence of a concurrence of wills on the principle of a commission exclusively proportionate to the volume exchanged. The passage in the [B] report on which the Commission relied (recital 95 to the contested decision) does not convincingly demonstrate the existence of an agreement aimed at the adoption of a standard for the presentation of exchange commissions common to all the participants to the meeting of 15 October 1997, for three reasons.

70 First, the interpretation of the [B] report which the Commission puts forward as proof of the existence of an agreement on the way of charging for exchange services was disputed during the administrative procedure by the participants in the meeting of 15 October 1997 (recital 112 to the contested decision). In consequence, unless supported by other evidence, the [B] report cannot be regarded as irrebuttable proof of the existence of an agreement on that point (see, by analogy, Case T-337/94 *Enso-Gutzeit* v *Commission* [1998] ECR II-1571, paragraph 91).

71 Second, the [B] report contains no evidence or decisive indicia on which it might be concluded that there was an agreement on the 'standardisation of ... charging structures', the expression used by the Commission at recital 114 to the contested decision. On the contrary, in the context of the present case, the passage in the [B] report on which the Commission relied lends itself to other interpretations which prima facie seem plausible in the light of the applicant's arguments.

72 The passage in question may very well be seen as reflecting the expression of consensus between the banks on the need to drop the exchange spread system owing to developments in the rules on the euro. As stated above, the obligation to use the irrevocable conversion rates had the consequence that it was necessary to use a mechanism for displaying the price of exchange services distinct from those rates.

73 Furthermore, the [A] report contains elements of such a kind as to cast serious doubt on, indeed to contradict directly, the interpretation whereby the Commission concluded that there was an agreement on the 'standardisation of ... charging structures' for exchange services. In particular, it follows from the [A] report that during the meeting of 15 October 1997 the banks wondered whether the mandatory use of the irrevocable conversion rates entailed the obligation for the banks to use the same level of commission when exchanging each of the national currencies or whether it would be possible to adopt a specific level of commission for each of those currencies. The Commission considered that '[a]s complete consensus was not reached concerning the use of a single percentage commission charge for all currencies or differentiated percentage commissions per currency, the participants decided to report to the Bundesbank that ... "Each of the banks present will decide for itself the form to be taken by its future charging structure"' (recitals 89 and 103 to the contested decision). This last extract from the [A] report therefore invalidates the theory that there was an agreement on ways of charging commissions.

74 Third, it must be held that, as the applicant submits, a 'percentage commission' (recital 115 to the contested decision) seems at first sight to be a natural way of expressing the price of exchange services. In that regard, it is permissible to observe that, in the contested decision, the Commission itself presented the commissions in the form of percentages when, in footnote 43 (recital 102 to the contested decision), it indicated the level of prices charged under the exchange margin system. Furthermore, a system of proportionate remuneration seems all the more understandable because the costs incurred by the banks in providing exchange services (transport, handling, storage) tend to increase with the volumes exchanged. Thus the adoption of a way of expressing prices in the form of a percentage of the amount exchanged seems at first sight to bear more relation to the nature of the services in question than to any agreement as to intention.

75 The Commission rejected the objections whereby the banks essentially advanced those arguments, on the ground that it was 'not a natural or logical step that each bank would individually have transposed the exchange margin into a percentage commission' and that '[i]ndeed, it seems that Deutsche Bank was initially

considering a free service' (recital 115 to the contested decision). However, its rejection of those objections is neither argued nor substantiated. As for the reference to the policy of Deutsche Bank, that policy is irrelevant, since it does not concern the way of charging for exchange services but the possible waiver by a competitor of remuneration for its services during the transitional period.

76 Nor can the contested decision be read as referring to an agreement whereby the banks proposed to adopt a way of charging that was strictly proportionate to the volume exchanged, to the exclusion of any fixed component. Indeed, the contested decision contains no unequivocal assertion in that regard. It also follows directly from recital 147 to the contested decision that the Commission was aware that certain banks were using a method of remuneration consisting of a fixed component (expressed as a minimum amount) and a component calculated as a percentage of the amount exchanged. Thus, when the Commission adopted the contested decision on 11 December 2001, a few days before the end of the transitional period, it was not unaware that several banks had made use of methods of remuneration using both a part that was proportionate to the volume exchanged and a fixed part.

77 In those circumstances, it must be accepted, in the light of the application, that the applicant has succeeded in demonstrating that the Commission has not established to the requisite legal standard that there was an agreement on the way of charging for currency exchange services. In the absence of proof of a meeting of wills on that point, Article 1 of the contested decision must be annulled in so far as it refers to an agreement whose object was 'to fix ... the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission)'. There is no need to examine the applicant's other complaints, in particular those relating to the absence of proof of the anti-competitive nature of the alleged agreement and the reasons on which the contested decision is based in that regard.

The agreement on the amount of exchange commissions

The contested decision

78 For the purpose of reconstructing the content of the discussions which took place at the meeting of 15 October 1997 and inferring the existence of a price-fixing agreement, the Commission relied on the [A] and [B] reports. According to the contested decision, it follows from those two reports that the participants examined the following questions relating to the transitional period:

— the principle of remuneration for currency exchange services (recitals 87 and 95 to the contested decision);

— the maintenance of the rate spread (recitals 93 and 95 to the contested decision);

— the application of a standard commission for all subdivisions of the euro or the application of a specific commission for each of them (recitals 89 and 95 to the contested decision);

— the calculation method (quotation of the direct or indirect rate) of exchange between subdivisions of the euro (recitals 90 and 95 to the contested decision);

— the interbank currency exchange services (recitals 91, 94 and 97 to the contested decision).

79 On the other hand, the [A] and [B] reports do not agree on whether the level of currency exchange commissions during the transitional period was discussed. The contested decision states, on the basis of the [A] report, that discussions took place concerning the fixing of an amount of around 3% or, at least, between 2% and 4% (recital 89 to the contested decision), whereas the [B] report contains no equivalent provision (recitals 96, 106 and 107 to the contested decision).

80 The Commission none the less considered that the [A] report was corroborated by the statements made by Bayerische Landesbank at the hearing (recitals 96, 107 and 119 to the contested decision).

81 In its legal assessment, the Commission considered that the participants in the meeting of 15 October 1997 agreed to fix the level of commission for currency exchange services during the transitional period at around 3% (recitals 102 and 104 to the contested decision).

82 The Commission rejected the objections of certain addressees of the statement of objections, including the applicant, that the evidence relied on was insufficient. It considered that the [A] report, which was contemporaneous to the meeting of 15 October 1997, was corroborated by the statements of Bayerische Landesbank and Commerzbank (recitals 118 to 120 to the contested decision).

83 Those undertakings claimed, to no avail, that the alleged agreement would have made no sense because it would have been premature, owing to the period between it and the beginning of the transitional period. However, the Commission considered that the [A] report showed that the participants believed that the arrival of the transitional period was imminent and rejected those objections (recitals 122 to 124 to the contested decision).

84 The banks in question maintained that they did not in practice apply a commission rate of around 3% and that they determined the amount of commission charged autonomously. The Commission rejected that objection, taking the view that the infringement was proved by documentary evidence and not by the undertakings' parallel conduct on the market and also that the agreement eliminated or substantially reduced uncertainty as to the conduct of competing banks, so much so that none of the participating banks charged rates lower than 3% (recitals 125 to 127 to the contested decision).

85 Last, the Commission rejected all the arguments whereby the banks in question attempted to show that the meeting of 15 October 1997 did not have as its object the conclusion of a horizontal price-fixing agreement.

86 It thus rejected the argument that the purpose of the meeting was to enable the undertakings to address the uncertainty surrounding the interpretation of Article 52 of the ESCB Statute. The Commission considered that the discussions which the participating banks might have had with the Bundesbank concerning Article 52 of the ESCB Statute did not concern the commissions to be charged during the transitional period (recitals 133 to 135 to the contested decision).

87 The Commission also rejected the argument that the meeting of 15 October 1997 sought to reduce the regulatory uncertainty surrounding the transition to the euro and thus followed on from the Round Table of 15 May 1997 organised by the Commission. It emphasised, in substance, that the Round Table did not deal with the question of the exchange commissions charged by the banks (see the Expert Group Report of 20 November 1997) (recitals 136 and 137 to the contested decision).

88 The Commission did not accept the argument that the purpose of the meeting was to address the question whether the banks would be able to keep the currency spread as a method of charging during the transitional period. It considered that since 1995 'it [had been] known that the exchange rates would be irrevocably fixed

and that only those fixed rates should be used'. The direct consequence of that situation, according to the Commission, was that the use of rate spreads would be prohibited from the start of the transitional period. It also stated, for the sake of completeness, that at the meeting of 15 September 1997 the Bundesbank had removed any doubt on that point (recitals 138 to 140 to the contested decision).

89 The Commission rejected the arguments whereby some banks sought to demonstrate that the purpose of the meeting of 15 October 1997 was interbank services and not retail currency exchange services. It found that the [B] report mentioned discussions relating to that type of service (recitals 141 to 143 to the contested decision).

90 As the anti-competitive object was thus established, the Commission did not consider it necessary to examine whether the implementation of the agreement in question had the effect of restricting competition. However, it stated, for the sake of completeness, that the amounts of the commissions charged by the addressees of the contested decision were between 3% and 4.5% (recitals 144 to 148 to the contested decision).

Arguments of the applicant

91 The applicant maintains that the Commission has not succeeded in establishing the facts which it alleges to exist. In substance, the applicant denies that there was any collusion on the price of the retail currency exchange commissions at the meeting of 15 October 1997. It also disputes the probative value of the evidence on which the Commission relies. It puts forward, in particular, a number of arguments in order to demonstrate 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. It further maintains that the agreement envisaged by the Commission would be pointless.

Findings of the Court

92 In the contested decision, the Commission considered that the discussion of the amount of exchange commissions constituted an agreement prohibited by Article 81 EC, so that there is no need to adjudicate on the lawfulness of the discussions relating to the legal and technical uncertainty prevailing in 1997 in regard, in particular, to the principle of remuneration for exchange services during the transitional period, to the dropping of the rate spread, to the method of calculation of the exchange (quotation of the direct or indirect rate) and to the use of a single commission rate for all the currencies of the participating Member States.

93 The Commission emphasised that the finding of infringement was based on documentary evidence (recitals 62, 120, 126, 142 and 158 to the contested decision). However, it is apparent that the evidence of the discussions relating to the fixing of the price of retail currency exchange commissions came from a single document, namely the [A] report. No other documentary evidence is put forward in the contested decision to show that discussions on that point took place.

94 However, the Commission considered, for the sake of completeness, that the [A] report was corroborated by two other pieces of evidence which were deemed to be probative, namely, first, the statements made at the hearing by two of the participants in the meeting in question and, second, the participants' conduct on the market.

95 Having regard to those matters, the Court must examine whether the applicant has succeeded in adducing, to the requisite legal standard, proof of the existence of circumstances of such a kind as to call in question the validity of the findings of fact made by the Commission concerning the existence of a concurrence of wills between the participants in the meeting of 15 October 1997 on the fixing of the price of the services in question in the light of the [A] report, the statements made by Commerzbank and Bayerische Landesbank and also the applicants' conduct on the market.

— The [A] report

96 The finding of infringement is based on the following documentary evidence, taken from the [A] report and reproduced at recital 89 to the contested decision:

'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%.'

97 That passage is obscure and, taken on its own, does not make it possible to understand how the change in the system of displaying exchange commissions could affect the 'income' generated by those commissions. It is therefore necessary to refer to the entire section from which that passage is taken, which is reproduced at recital 89 to the contested decision and is worded as follows:

'Differentiation in pricing between euro-zone currencies

The present pricing policy on the German exchange market was more or less the same for all banks. This meant, for example, that the Austrian shilling was bought and sold cheaply while the Italian lira was very expensive. Commerzbank's Mr ... felt that this price difference between the various euro-zone currencies must be allowed to remain. He argued that, as current margins could be seen as a result of market mechanisms, this price fixing could be copied over into a differentiated charging structure. On this point Mr ... (Bayerische Landesbank) said that the differentiation between currencies could only be justified because there were differing levels of exchange risk involved. This argument would no longer work after 1 January 1999 when all euro-zone currencies had to be seen as denominations of the euro. Mr ...

added here that it was not so much that the market mechanism had influenced current margin policy, but rather that this policy was the result of a tacit agreement on exchange rates. The EMI survey quoted by Mr ... which stated that the German banking system's costs would fall by only 10% with the introduction into circulation of the euro, showed that the price fixing on the exchange market was not caused by prices. This also indicated an oligopoly rather than a "polypoly".

Accordingly, the replacement of the current tacit differentiated-margin agreement by a tacit differentiated-commission agreement need not lead to major upheavals or loss of profits. Mr ... was in full agreement with this.

In the absence of a complete consensus at the meeting on whether a single commission fee or a commission fee for each currency should be introduced, the following would be reported to the Bundesbank:

"Each of the banks will decide for itself the form to be taken by its future charging structure."

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%.'

98 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 currencies of the participating Member States. 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 above extract shows that there was no agreement between the parties on that point.

99 The extract used by the Commission to prove the existence of an unlawful agreement calls for three observations.

100 First of all, by disappearance of the 'margins', the [A] report is apparently referring to the dropping of the rate spread system following the entry into force of the irrevocable conversion rates on 1 January 1999. The participants in effect agreed on the need to replace that system by the use of explicit exchange commissions distinct from the irrevocable conversion rate applied (see recitals 88, 93 and 95 to the contested decision).

101 Next, as the applicant has claimed, the reference to maintaining 90% of the 'income' generated by the 'margins' system must be understood in the light of the context of the meeting in question. That point does not refer to discussions seeking to guarantee a certain level of 'income' to the participants in the meeting but to the direct consequence of the disappearance of the currency exchange risk.

102 It follows from the application that the fixing of the irrevocable conversion rates led to the disappearance of the currency exchange risk at the start of the transitional period. Consequently, as the exchange rate fluctuations had disappeared, the costs

for operators providing currency exchange services previously occasioned by the volatility of the rates disappeared. In its report of 23 April 1997 (recital 75 to the contested decision; see annex 23 to the application), the EMI thus considered that the costs of the exchange services in Germany could be divided into four categories, in the following proportions:

— Currency exchange risk: 5% to 10%;

— Repatriation costs (insurance and transport): 5% to 10%;

— Transaction costs (wages; handling; administration): 70% to 85%;

— 'opportunity' costs (holding of stocks of foreign coin and banknotes): 5% to 10%.

103 The EMI reckoned that the disappearance of the currency exchange risk could lead to a reduction in costs — and therefore in the prices — of the currency exchange services in the order of 5% to 10%. Although the EMI report was not published in the Official Journal, it was widely distributed to the representative bodies in the banking sector, as indicated in recital 75 to the contested decision.

104 The result of the EMI analysis was not disputed, since at a Round Table organised by the Commission the representatives of the banking sector claimed that during the transitional period 'while exchange rate risk will disappear and thus reduce costs by some 20%, other costs will remain' (Round Table concerning the practical aspects of

the transition to the euro: synthesis and conclusion; figures mentioned at recital 41 to the contested decision).

105 The applicant's interpretation of the [A] report is therefore convincing. It must be accepted that the reference to 90% in the [A] report is to the reduction by approximately 10% of the costs of currency exchange services brought about by the disappearance of the exchange rate risk. Having regard to that reduction, the commissions received during the transitional period should also fall by 10%, so that those commissions could then cover 90% of current costs.

106 Last, as regards the passage in the [A] report which refers to a commission of around 3%, the applicant claims that at the most that is meant to represent the state of the market, in accordance with the EMI figures.

107 That argument appears to be well founded. In its report of 23 April 1997, the EMI provides an indication of the extent of the spread between purchase rate and selling rate and, for that purpose, distinguishes three groups of currencies:

— group 1 (Belgian franc (BEF), German mark (DEM), Dutch guilder (NLG), Austrian schilling (ATS) and French franc (FRF)): low spread, under 2%;

— group 2 (Pound sterling (GBP), Italian lira (ITL), Spanish peseta (ESP), Portuguese escudo (PTE), Swedish krona (SEK) and Irish pound (IEP)): average spread, between 2% and 4%;

— group 3 (Greek drachma (GRD) against all other currencies): high spread, above 5%.

108 Those figures support the applicant's claim that the reference to a level of exchange commission of 'around 3%', if such reference was actually made, appears in any event to reflect the state of the market rather than the existence of a horizontal price-fixing agreement.

109 The applicant also produced witness statements by persons who attended the meeting of 15 October 1997, Mr [C] (VUW) and Mr [D] (Hamburgische Landesbank), which show that although the question of the level of exchange commissions (which were to be reduced owing to the disappearance of the exchange risk) was raised at the meeting, it was, according to those witnesses, merely a very minor point which did not give rise to any discussion as regards fixing their amount.

110 In the light of the foregoing, it must be held that the [A] report does not appear to prove conclusively that there was any discussion of fixing the price of the currency exchange commissions at around 3%. The Court must therefore consider the other evidence cited by the Commission in the contested decision and also that adduced by the applicant in order to determine whether, on balance, that evidence shows that the Commission has adduced proof of the existence of a price-fixing agreement.

— The statements of Commerzbank and Bayerische Landesbank

111 According to the contested decision, the fact that the rate of commission was discussed as indicated in the [A] report is corroborated by the statements made by Commerzbank and Bayerische Landesbank at the hearing (recitals 96, 107 and 118

to 120 to the contested decision). At footnote 44 in the contested decision, the Commission also refers to the applicant's, Westedeutsche Landesbank's and Hamburgische Landesbank's replies to the statement of objections.

112 The Commission's conclusion that those statements confirm the argument relating to the existence of a concurrence of wills on price-fixing is open to discussion. Although the banks in question stated that 'some representatives of individual banks mentioned some figures, and these were somewhere between 2% and 4%' (recital 107 to the contested decision), none of those statements expressly confirms that there was any discussion of the fixing of a commission rate.

113 It is true, admittedly, that the fixing of a reference band or a target price may constitute a method of unlawful price-fixing, since in such circumstances the 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 to the contested decision and footnote 44) reflect — as stated above — the market prices as established by the EMI, are vague and very wide (the highest figure quoted is three times the lowest). Consequently, the probative nature of that evidence appears to be debatable.

— The participants' conduct on the market

114 For the sake of completeness, the Commission considered that after the meeting of 15 October 1997 the participants aligned their prices in accordance with the terms of the alleged agreement. At recital 145 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.

115 The applicant disputes the conclusions which the Commission draws from those rates. It claims, in essence, that the Commission concentrated solely on the commission rates and ignored in its analysis the flat-rate part of their remuneration. However, owing to the small amounts exchanged, that part has a significant impact on the amount of the remuneration charged. A correct analysis of the rates charged between 1998 and the transitional period shows that the Commission's findings are incorrect.

116 Those arguments appear to be relevant. In so far as the great majority of the services in question relate to amounts below EUR 200 (the statement of objections mentions 70%, see paragraph 9 of the statement of objections), 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 solely the rate of commission charged, which provides only a partial indication of the price borne by the consumer.

117 The details of the scales used by the applicant and other banks in 1999 are set out at paragraph 56 of the statement of objections. It is apparent from those various elements that the commissions charged vary significantly from one bank to another when the total cost of the exchange services (rate of commission and flat rate amount or minimum volume) is taken into account. As regards 2000, the applicant has produced a press article presenting the levels of commissions charged by the banks (annex 25 to the application). That document shows that to change DEM 100 the price of the exchange services charged by 21 German banks was between DEM 0 and DEM 25. To change DEM 1 000, the price spread was between DEM 0 and DEM 50. Expressed as a percentage, those figures show that the findings of fact made by the Commission (recitals 147 and 148 to the contested decision) to the effect that the addressees of the contested decision aligned their prices within a range of 3% to 4.5% were incorrect. There is no evidence on which it might be definitively concluded that the convergence of prices towards a 'band' was caused by anything other than the normal play of market forces. On the contrary, since the

start of the transitional period, commissions fell significantly, which may be explained by the disappearance of the currency exchange risk. That tendency lasted until the end of the transitional period, which corresponds to the disappearance of the market in exchange services for the currencies of the participating Member States.

118 Consequently, the evidence on which the Commission considered that the [A] report was corroborated by parallel conduct of the participating banks on the market is not convincing.

119 All of the evidence just examined permits the conclusion that the Commission has 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. It follows that the pleas alleging that those findings of fact are incorrect and that the inculpatory evidence is not probative must be declared founded.

120 The contested decision must therefore be annulled, without there being any need to examine the other pleas in law.

Costs

121 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. As the applicant has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls Commission Decision 2003/25/EC of 11 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/E — 1/37.919 (ex 37.391) — Bank charges for exchanging euro-zone currencies — Germany) in so far as it concerns the applicant;**

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

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 14 October 2004.

H. Jung P. Lindh

Registrar President

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