ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)

17 October 2005 *

In Case T-28/02,

First Data Corp., established in Wilmington, Delaware (United States),

FDR Ltd, established in Dover, Delaware (United States),

First Data Merchant Services Corp., established in Sunrise, Florida (United States),

represented initially by P. Bos and M. Nissen, and subsequently by P. Bos, lawyers,

applicants,

* Language of the case: English.

Commission of the European Communities, represented initially by R. Wainwright, W. Wils and V. Superti, and subsequently by R. Wainwright and T. Christoforou, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the fifth indent of Article 1 of Commission Decision 2001/782/EC of 9 August 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/29.373 — Visa International) (OJ 2001 L 293, p. 24),

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

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: E. Coulon,

makes the following

Order

Facts

1 First Data Corp. is the ultimate parent of FDR Ltd ('FDR'), through its wholly-owned subsidiary, First Data Resources Inc. It is also the ultimate parent of First Data Merchant Services Corp., through its wholly-owned subsidiary, First Financial Management Corp. Together those companies make up the First Data group ('First Data').

2 FDR is active in the payment card sector in Europe under the name of First Data Europe. In the United States, its parent company, First Data Resources, is one of the leading providers of processing services to issuers of those cards. In addition, First Data Merchant Services is one of the largest processors of payment transactions for so-called 'acquirers' on the United States market.

3 Visa International Service Association ('Visa') is a privately-owned, for-profit corporation owned by about 20 000 financial institutions all over the world which are members of that corporation. It operates the Visa card scheme.

4 On 31 January 1977, Visa (under its previous name of Ibanco Ltd) notified various rules and regulations governing Visa and its members to the Commission, applying for negative clearance or, in the alternative, an exemption under Article 81(3) EC.

5 Having sent a comfort letter to that undertaking on 29 April 1985, the Commission reopened the investigation, following a complaint against the multilateral interchange fee in the Visa card scheme, and the comfort letter was withdrawn on 4 December 1992.

6 On 14 October 2000, the Commission published a notice pursuant to Article 19(3) 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) inviting interested third parties to submit their observations in relation to its intention to adopt a favourable position, inter alia concerning the no-discrimination rule, the modified rules on cross-border services and the 'no-acquiring-without-issuing' rule (OJ 2000 C 293, p. 18). The applicants did not submit any observations further to that notice.

7 On 22 May 2001, representatives of First Data met representatives of Visa to present their plans to develop an acquiring business in Europe and to obtain membership of Visa. At that meeting, Visa indicated to First Data that, in order to obtain membership, two conditions had to be met: first, the applicant would have to be a financial institution and, second, it would have to be an issuer before commencing acquiring.

8 On 11 July 2001, First Data wrote to Visa asking for an application form for admission to Visa.

9 On 20 July 2001, Visa replied to First Data reminding it of the conditions for obtaining membership set out at the meeting of 22 May 2001.

10 On 9 August 2001, the Commission adopted Decision 2001/782/EC relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/29.373 — Visa International) (OJ 2001 L 293, p. 24; 'the contested decision').

11 The operative part of the contested decision states:

'*Article 1*

On the basis of the facts in its possession, the Commission finds no grounds for action under Article 81(1) of the EC Treaty and/or Article 53 of the EEA Agreement in respect of the following provisions of the notified rules and regulations governing the Visa International payment card scheme:

...

— the no-acquiring-without-issuing rule in sections 2.04 to 2.07 of the by-laws ...' 'the rule at issue').

Procedure

12 By application lodged at the Registry of the Court of First Instance on 4 February 2002, the applicants brought the present action.

13 By a separate document lodged at the Court Registry on 4 April 2002, the defendant raised a plea of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance.

14 By a document lodged at the Court Registry on 17 June 2002, Visa sought leave to intervene in support of the form of order sought by the Commission.

15 By letter of 4 July 2002, the applicants sought an order pursuant to Article 116(2) of the Rules of Procedure that the information contained in the fourth to seventh sentences of paragraph 6, the third sentence of paragraph 7 and the third and fourth sentences of paragraph 13 of their observations on the plea of inadmissibility, which contain trade secrets, be given confidential treatment.

16 By order of the Court of 7 January 2003, the decision on the plea of inadmissibility was reserved for the final judgment and the costs were reserved.

17 By order of 20 January 2003, Visa was granted leave to intervene in support of the form of order sought by the Commission. Non-confidential versions of the pleadings were supplied to it.

18 By document lodged on 12 February 2003, Visa submitted its objections to the request for confidential treatment. By document registered on 10 April 2003, the applicants lodged their observations on those objections.

19 By order of the Court of 14 August 2003, the request for confidential treatment was granted in relation to the information contained in the fourth to seventh sentences of paragraph 6, the third sentence of paragraph 7 and the third and fourth sentences of paragraph 13 of the applicants' observations on the plea of inadmissibility. The costs were reserved.

20 The composition of the Chambers of the Court of First Instance changed and the Judge-Rapporteur was assigned to the Third Chamber, to which this case was accordingly assigned.

21 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, requested the parties to lodge certain documents and put a number of written questions to them.

22 The applicants claim that the Court should:

— annul the contested decision, in so far as it concerns the rule at issue;

— order the Commission and Visa to provide information and/or documentation relating to the definition of a reasonable number of cards referred to in recital 18 and footnote 21 of the contested decision;

— order the Commission or Visa to provide a copy of the 'Cross-border Acquiring Planning and Implementation Guide' referred to in the defence;

— order the Commission to pay the costs;

— order Visa to pay the costs relating to the intervention.

23 The Commission, supported by Visa, contends that the Court should:

— dismiss the action as being inadmissible and/or unfounded;

— order the applicants to pay the costs.

24 By letter of 28 January 2005, Visa informed the Court of its decision to abolish the rule at issue with immediate effect in the European region of the Visa card scheme. In addition, Visa withdrew its intervention.

25 By letter of 3 February 2005, the Court requested the parties to submit their observations on Visa's withdrawal and on the issue whether the action had become devoid of purpose. The parties were also informed of the decision of the President of the Third Chamber to defer the hearing, which had been set for 24 February 2005, to a later date.

26 By order of 6 April 2005, following its withdrawal from the proceedings, Visa was removed from the Court Register as an intervener.

Law

27 Under Article 113 of the Rules of Procedure, the Court of First Instance, giving its decision in accordance with Article 114(3) and (4) of those Rules, may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with an action or declare, after hearing the parties, that the action has become devoid of purpose and that there is no need to adjudicate on it. Article 114(3) of the Rules of Procedure provides that the remainder of the proceedings is to be oral, unless the Court of First Instance otherwise decides.

28 After hearing the parties on the effect of the abolition of the rule at issue on the remainder of the proceedings, the Court considers that it has sufficient information and decides that the oral procedure which had been opened must be closed.

Arguments of the parties

29 The Commission contends that the action has become devoid of purpose and that the applicants no longer have a legal interest in bringing proceedings.

30 The applicants submit that neither Visa's abolition of the rule at issue nor its withdrawal as an intervener form sufficient reasons to discontinue the proceedings. They rely on three arguments.

31 First, they argue that there is no guarantee that Visa will not reintroduce the rule at issue or adopt a similar rule with equivalent effect. According to the applicants, the maintenance in force of the contested decision will facilitate such a step. They submit that, in the absence of a decision of principle by the Court, Visa may try to prevent First Data's entrance as an acquirer into the European region of the Visa card scheme.

32 Second, the applicants submit that they have an interest in pursuing this action in that the Court might rule in their favour, in particular because the Commission erroneously cleared the rule at issue without carrying out its own investigation into the purpose or effects thereof, including the eligibility rule requiring a banking licence. The applicants state that the action has not become devoid of purpose since

that requirement has remained in force following Visa's abolition of the rule at issue. The applicants submit that to become a pure acquirer, the requirement of a banking licence is not justified.

33 Third, the applicants submit that a decision by the Court, in particular a decision that the third plea of their application, alleging an error of law and/or fact in the Commission's finding that there was no appreciable restriction on competition, is well founded, will be able to serve as a basis for a possible claim for damages by First Data against Visa. The applicants contend that a decision by the Court finding that the Commission's clearance of the rule at issue was unfounded and, consequently, that the requirement of a banking licence was also unfounded will lead inexorably to the conclusion that both conditions were unlawful at the time of the contested decision and afterwards.

Findings of the Court

34 An action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. In order for such an interest to be present, the annulment of the measure must of itself be capable of having legal consequences or, in accordance with a different form of words, the action must be liable, if successful, to procure an advantage for the party who has brought it (see Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44, and the case-law cited).

35 In that respect, it should be borne in mind that the conditions governing the admissibility of an action must be judged, subject to the separate question of the loss of an interest in bringing proceedings, at the time when the application is lodged (see Case T-131/99 *Shaw and Falla* v *Commission* [2002] ECR II-2023, paragraph 29, and the case-law cited).

36 However, in the interest of the proper administration of justice, that consideration relating to the time when the admissibility of the action is assessed cannot prevent the Court from finding that there is no longer any need to adjudicate on the action in the event that an applicant who initially had a legal interest in bringing proceedings has lost all personal interest in having the contested decision annulled on account of an event occurring after that application was lodged.

37 For an applicant to be entitled to pursue an action seeking the annulment of a decision, he must retain a personal interest in the annulment of the contested decision (see Case T-159/98 *Torre and Others* v *Commission* [2001] ECR-SC I-A-83 and II-395, paragraph 30, and the case-law cited).

38 To the same effect, the Court of Justice has held, as regards the admissibility of an appeal, that it was entitled of its own motion to raise the objection that a party has no interest in bringing or in maintaining an appeal on the ground that an event subsequent to the judgment of the Court of First Instance removes the prejudicial effect thereof as regards the appellant, and declare the appeal inadmissible or devoid of purpose for that reason. For an applicant to have an interest in bringing proceedings the appeal must be likely, if successful, to procure an advantage to the party bringing it (Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13).

39 It is therefore necessary to consider whether the annulment of the fifth indent of Article 1 of the contested decision following the withdrawal of the rule at issue might have legal consequences to the advantage of the applicants (see, to that effect, Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 154).

40 In the present case, it must be considered that the applicants' legal interest in bringing an action, in so far as it existed, has ceased to exist because the rule at issue was abolished. A judgment of the Court annulling the fifth indent of Article 1 of the

contested decision could no longer bring about the consequences prescribed by Article 233 EC. Thus, even if the contested decision were annulled, the Commission could not take a new decision free from any possible errors noted by the Court, since the rule at issue no longer exists (see, to that effect, the order in Case T-13/96 *TEAM and Kolprojekt* v *Commission* [1997] ECR II-983, paragraphs 27 and 28).

41 That consideration is not invalidated by the applicants' arguments.

42 First, as regards the applicants' contention that Visa might adopt a rule similar to the one at issue, it should be borne in mind that a trader must show a vested and present interest in the annulment of the contested act (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 33) and that is not the case in this instance.

43 If the interest which an applicant claims concerns a future legal situation, it must be demonstrated that the prejudice to that situation is already certain. That is not the case in this instance, since the adoption of a similar rule by Visa is only a possible event which depends solely on the will of Visa. Thus, it is an interest which is purely hypothetical and therefore insufficient for there to be a finding that the applicants' legal situation would be adversely affected if the contested decision were not annulled.

44 Second, the applicants consider that any favourable decision by the Court would also have the effect of changing Visa's requirement that its members must hold a banking licence.

45 In that respect, it is sufficient to point out that Visa's rule requiring a banking licence is not the subject of the contested decision. Even if the Commission should have examined the rule at issue taking into account, on the basis of market conditions, the banking licence requirement, that would not affect the fact that that requirement is not the subject of the contested decision. Consequently, even if the fifth indent of Article 1 of the contested decision were annulled and the Commission were to re-examine the compatibility of the rule at issue with Article 81 EC, that would not automatically have any effect on the other rules governing the Visa card scheme.

46 Furthermore, there is nothing to prevent the applicants from disputing, by means of a complaint before the Commission, the Visa scheme membership rules, including in particular the requirement to be a banking institution, as the Commission contends moreover in its observations on the intervener's withdrawal.

47 Third, as regards the applicants' arguments that the annulment of the contested decision is necessary as the basis of their possible action for damages against Visa before the national courts, it should be noted, first of all, that that is also a future and hypothetical circumstance.

48 The consideration of the Commission's assessment, as regards the applicability of Article 81(1) EC, by a national court ruling on a potential action for damages against Visa is only a possibility.

49 It is admittedly true that acts of the Community institutions are in principle presumed to be lawful until such time as they are annulled or withdrawn (Case

11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17, and Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 53). Thus, when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission (*Masterfoods and HB*, paragraph 52).

50 However, negative clearance does not bind the national courts, even if it constitutes a fact which national courts may take into account in their assessment. It is apparent from Article 2 of Regulation No 17 that negative clearance means only, for the Commission, on the basis of the facts in its possession, that there is no need to intervene. Negative clearance does not therefore constitute a definitive assessment, nor in particular the adoption of a position which falls within the exclusive competence of the Commission. As Article 81(1) EC is directly applicable, as the Court of Justice has held on various occasions, it follows that individuals may rely on it before national courts and derive from it rights and, as national courts may also have other information on the particular circumstances of the case, they are naturally bound to reach their own opinion, on the basis of the information in their possession, on the applicability of Article 81(1) EC to certain agreements (Opinion of Advocate General Reischl in Case 37/79 *Marty* v *Lauder* [1980] ECR 2481, 2502, 2507; see also, to that effect, the judgment in *Marty* v *Lauder*, paragraph 13, and Case T-116/89 *Prodifarma and Others* v *Commission* [1990] ECR II-843, paragraph 70).

51 Next, it is for national courts, where the legality of the Commission's decision is in doubt, to make a reference for a preliminary ruling under Article 234 EC putting in issue the validity of the contested decision, so that in any case, in the event of a dispute, the applicants would by no means be deprived of the possibility of asserting their rights before the national court (see, to that effect, Case T-141/03 *Sniace* v *Commission* [2005] ECR II-1197, paragraph 40).

52 In any event, the applicants' legal situation would not be modified by the annulment of the part of the contested decision concerning the rule at issue. As the applicants themselves asserted in their answers to the written questions put by the Court, annulment of the contested decision would not give the applicants access to the acquiring scheme of the Visa network, since they do not possess a banking licence, as is apparent from their reply. Since the requirement of a banking licence in order to become a member of Visa is not the subject of the contested decision and the Court may not substitute its assessment for that of the Commission, annulment of the part of the contested decision relating to the rule at issue would not have any direct effect as regards the legality of the rule that members of Visa must be banking institutions. It must be recalled that, in an action for annulment under Article 230 EC, the Court of Justice and the Court of First Instance have jurisdiction to review lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Article 231 EC provides that, if the action is well founded, the act concerned must be declared void (Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, paragraph 38).

53 Under those circumstances, without there being any need to consider whether the applicants had a legal interest in the outcome of the case at the time when the application was lodged, it must be held that, in any event, the applicants no longer have a legal interest in pursuing the case. In the absence of any present and certain legal interest in bringing proceedings, it is therefore not necessary to adjudicate on the action.

Costs

54 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court.

55 In the present case, since the circumstances which led to the decision not to proceed to judgment are the result of an event that was independent of the conduct of the main parties to the proceedings, each main party must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. There is no need to adjudicate on this case.

2. The applicants and the Commission shall bear their own costs.

Luxembourg, 17 October 2005

E. Coulon — Registrar

M. Jaeger — President