

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

Dresdner Bank AG and Others

v

Commission of the European Communities

(Competition — Article 81 EC — Price-fixing agreement and ways of charging for
currency exchange services — Germany — Evidence of the infringement —
Application to set aside judgments by default)

Judgment of the Court of First Instance (Fourth Chamber), 27 September 2006 II - 3572

Summary of the Judgment

- 1. Procedure — Application to set aside judgments by default
(Rules of Procedure of the Court of First Instance, Art. 48(2) and 122(4))*
- 2. Competition — Agreements, decisions and concerted practices — Agreements between
undertakings — Concept
(Art. 81(1) EC)*
- 3. Competition — Administrative procedure — Commission decision finding an infringement
(Art. 81(1) EC)*

4. *Community law — Principles — Fundamental rights — Presumption of innocence*
5. *Competition — Administrative procedure — Commission decision finding an infringement — Judicial review*
6. *Competition — Agreements, decisions and concerted practices — Proof*
7. *Competition — Administrative procedure — Observance of the rights of the defence — Statement of objections — Necessary content*
8. *Competition — Administrative procedure — Observance of the rights of the defence*

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

well founded: the Court, while finding that it is not possible for it to confirm the outcome in the judgment by default to the effect that one of the pleas in law is well founded, would be unable to adjudicate on the other pleas in the application, in observance of the inter partes principle.

(see paras 43, 44)

In the light of the purpose of the procedure to set aside, the prohibition on introducing new pleas in law laid down in Article 48(2) of the Rules of Procedure of the Court of First Instance cannot be interpreted as prohibiting the applicant to set aside from introducing new pleas in law which it would have been able to introduce at the defence stage. Such an interpretation of that article would make no sense, as it might lead to a procedural impasse in the event that the application to set aside were

2. In order for there to be an agreement within the meaning of Article 81(1) EC, it is necessary and sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way. 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. It follows that the concept of an agreement within the meaning of Article 81(1) EC 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.

(see paras 53-55)

3. As regards the production of evidence of an infringement of Article 81(1) EC, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of the facts constituting an infringement.

(see para. 59)

4. The principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention on Human Rights is one of the fundamental rights which, according to the case-law of the Court of Justice, reaffirmed in the preamble to the Single European Act, by Article 6(2) of the

Treaty on European Union and in Article 6(2) EU, are general principles of Community law.

Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments. That principle must be taken into account in the context of an action for annulment of a decision imposing a fine. Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point.

The Commission must therefore show precise and consistent evidence in order to establish the existence of the infringement. However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that require-

ment. The existence of an anti-competitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

(see paras 60-63, 65)

6. In order to assess the probative value of a document material to a finding of infringement of the competition rules, regard should be had first and foremost to the credibility of the account it contains and, in particular, to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable.

(see para. 121)

5. As regards the scope of judicial review of Commission decisions applying the competition rules, there is an essential difference between factual matters and findings, on the one hand, which may be found to be inaccurate by the Court in the light of the arguments and evidence before it, and, on the other hand, economic appraisals. In that regard, while it is not for the Court to substitute its economic appraisal for the Commission's, it is under a duty not only to establish whether the evidence relied on is factually accurate, reliable and consistent but also to examine whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.

(see paras 66, 67)

7. Respect for the rights of the defence requires that an undertaking to which the Commission has addressed a decision finding an infringement of the competition rules must have been afforded the opportunity to make known its views on the truth and relevance of the facts, objections and circumstances alleged by the Commission.

The statement of objections must contain an account of the objections couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to take cognisance of the conduct complained of by the Commission. It is only on that condition that the statement of objections can fulfil its function under the Community

regulations of giving undertakings all the information necessary to enable them to defend themselves properly, before the Commission adopts a final decision.

In principle, only documents cited or mentioned in the statement of objections constitute valid evidence.

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

(see paras 155-157)

(see para. 158)