JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

7 June 2006 *

In Joined Cases T-213/01 and T-214/01,

Österreichische Postsparkasse AG, established in Vienna (Austria), represented initially by M. Klusmann, F. Wiemer and A. Reidlinger, and subsequently by H.-J. Niemeyer, lawyers, with an address for service in Luxembourg,

Bank für Arbeit und Wirtschaft AG, established in Vienna, represented by H.-J. Niemeyer, lawyer, with an address for service in Luxembourg,

applicants,

v

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

defendant,

* Language of the case: German.

APPLICATIONS for annulment of the decisions of the hearing officer of 9 August 2001 and of 25 July 2001, respectively, to transmit to an Austrian political party (the Freiheitliche Partei Österreichs) the non-confidential versions of the statements of objections relating to a proceeding under Article 81 EC on the fixing of bank charges (COMP/36.571 — Österreichische Banken),

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: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 21 October 2004,

gives the following

Judgment

Legal context

Regulation No 17

1 Article 3(1) and (2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), provides:

'1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article [81] or Article [82] of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are:

...

(b) natural or legal persons who claim a legitimate interest.'

2 Article 19(2) of Regulation No 17 provides that '[a]pplications to be heard on the part of such persons shall, where they show a sufficient interest, be granted'.

3 Article 20 of Regulation No 17, relating to professional secrecy, provides in, paragraph 1 thereof, that information acquired as a result of the application of various provisions of that regulation 'shall be used only for the purpose of the relevant request or investigation' and, in paragraph 2 thereof, that 'without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy'.

Regulation No 2842/98

4 On 22 December 1998, the Commission adopted Regulation (EC) No 2842/98 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18), which replaced Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47). Regulation No 2842/98 distinguishes, for the purposes of participation in infringement proceedings by parties other than those to which the Commission has addressed objections, between 'applicants or complainants', 'third parties having sufficient interest' and 'other third parties'.

5 With regard to applicants or complainants, Articles 6, 7 and 8 of Regulation No 2842/98 provide:

'*Article 6*

Where the Commission, having received an application made under Article 3(2) of Regulation No 17 ..., considers that on the basis of the information in its possession there are insufficient grounds for granting the application or acting on the complaint, it shall inform the applicant or complainant of its reasons and set a date by which the applicant or complainant may make known its views in writing.

Article 7

Where the Commission raises objections relating to an issue in respect of which it has received an application or a complaint as referred to in Article 6, it shall provide an applicant or complainant with a copy of the non-confidential version of the objections and set a date by which the applicant or complainant may make known its views in writing.

Article 8

The Commission may, where appropriate, afford to applicants and complainants the opportunity of orally expressing their views, if they so request in their written comments.'

6 Article 9(1) and (2) of Regulation No 2842/98 provides:

'1. If parties other than those referred to in Chapters II [parties to which the Commission has addressed objections] and III [applicants and complainants] apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject-matter of the procedure and shall set a date by which they may make known their views in writing.

2. The Commission may, where appropriate, invite parties referred to in paragraph 1 to develop their arguments at the oral hearing of the parties against which objections have been raised, if they so request in their written comments.'

7 Lastly, Article 9(3) of Regulation No 2842/98 provides that the Commission may afford 'to any other third parties' the opportunity of orally expressing their views.

8 As regards the confidentiality of information acquired in infringement proceedings, Article 13(1) of the regulation provides that information shall not be communicated in so far as it contains business secrets or other confidential information, whilst the Commission must make appropriate arrangements for allowing access to the file, taking due account of the need to protect such secrets or information.

Decision 2001/462

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

10 Article 1 of Decision 2001/462 states that the hearing officer must 'ensure that the effective exercise of the right to be heard is respected in competition proceedings before the Commission under Articles 81 [EC] and 82 [EC]'.

11 In addition, the first and second paragraphs of Article 9 of Decision 2001/462, which replaced Article 5(3) and (4) of Decision 94/810, whose wording was practically identical, provide:

'Where it is intended to disclose information which may constitute a business secret of an undertaking, it shall be informed in writing of this intention and the reasons for it. A time-limit shall be fixed within which the undertaking concerned may submit any written comments.

Where the undertaking concerned objects to the disclosure of the information but it is found that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision which shall be notified to the undertaking concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than one week from the date of notification.'

The facts

Background to the dispute

12 The applicants, Österreichische Postsparkasse AG (Case T-213/01) and Bank für Arbeit und Wirtschaft AG (BAWAG, Case T-214/01), are Austrian credit institutions.

13 On 6 May 1997 the Commission became aware of a document entitled 'Lombard 8.5' and, in the light of that document, commenced upon its own initiative an infringement proceeding under Article 81 EC against the applicants and six other Austrian banks pursuant to Article 3(1) of Regulation No 17.

14 By letter dated 24 June 1997, an Austrian political party, the Freiheitliche Partei Österreichs (FPÖ), sent the document 'Lombard 8.5' to the Commission and asked it to commence an investigation procedure against eight Austrian banks — which include the applicant in Case T-214/01, but not the applicant in Case T-213/01 — with a view to a declaration of an infringement of Articles 81 EC and 82 EC. It based its application on the fact that, in its capacity as a political party, its role was to monitor free access to the common market and the realisation of unrestricted competition.

15 By letter dated 26 February 1998, the Commission informed the FPÖ, in accordance with Article 6 of Regulation No 99/63 (now Article 6 of Regulation No 2842/98), that it intended to refuse its application. The Commission stated that only persons or associations of persons with a legitimate interest within the meaning of Article 3(2) of Regulation No 17 were entitled to make an application and that, for that, the applicant '[had to] be [affected] or be likely to be affected as an economic actor by the restriction of competition'. A general interest relating to the protection of the legal order was not sufficient to constitute a legitimate interest in that regard.

16 The FPÖ replied, by letter dated 2 June 1998, that it was involved, as a political party and through many members, in day-to-day economic life, that it carried out numerous banking transactions every day and that it had therefore suffered economic damage as a result of the practices complained of. Consequently, it showed a legitimate interest within the meaning of Article 3(2) of Regulation No 17. For those reasons, it again applied to participate in the infringement proceeding and thus to be informed of the objections.

17 In June 1998, the Commission carried out investigations of several Austrian credit institutions, including the applicants.

18 On 16 December 1998 the banks involved in proceeding COMP/36.571 sent to the Commission a joint summary of the facts, accompanied by 40 000 pages of supporting documents. In a preliminary note, they asked the Commission to treat that summary as confidential, stating that 'the Commission [was] asked, under Article 20 of Regulation No 17/62, not to disclose its content to third parties'.

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

20 At the beginning of October 1999, the Commission informed the applicants orally of its intention to transmit the statement of objections of 10 September 1999 to the FPÖ in accordance with Article 7 of Regulation No 2842/98.

21 By letters of 6 and 12 October 1999, the applicants contacted the Commission, opposing the transmission of the objections. They maintained that the FPÖ did not have a legitimate interest within the meaning of Article 3(2) of Regulation No 17 and could not therefore be regarded as an applicant within the meaning of that provision. They also expressed their fears that the FPÖ might abuse the objections for political ends.

22 By letters of 5 November 1999, the staff of the Directorate-General (DG) for Competition replied to the applicants, stating that the FPÖ was a customer of banking services and that there was therefore an obligation under Article 7 of Regulation No 2842/98 to transmit to it a non-confidential version of the objections. In those letters, the applicants were sent a list of the passages of the statement of objections of 10 September 1999 that were not to be communicated, which provided for the names and posts of certain individuals to be removed and replaced by a generic description of their functions ('list 1'). Those letters also indicated that Annex A to the statement of objections, which contained a list with references to the documents attached to that statement of objections but not the documents themselves, was to be transmitted. According to those letters, the hearing officer could be contacted in the event of disagreement.

23 By letters of 17 and 18 November 1999, the applicants contacted the hearing officer in order again to protest against the proposed transmission to the FPÖ of the statement of objections of 10 September 1999. In the alternative, the applicants stated that all information relating to the identity of the undertakings concerned should be removed from the version of the statement of objections to be transmitted. The applicant in Case T-213/01 also requested the removal of all information on interest, fees and commercial conditions applied by the banks.

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

25 By letters of 21 November 2000, the Commission sent the applicants a supplementary statement of objections, in which it alleged that they had concluded anti-competitive agreements with other Austrian banks relating to bank fees for exchanging currencies for euro.

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

27 By letter of 13 March 2001, the FPÖ reiterated its request, claiming that, by letters of 5 October 1999 and of 16 March 2000, the Commission had notified it that non-confidential versions of the objections would be transmitted, but that such transmission had never taken place. The FPÖ also stated that it had not been informed of the hearings and had therefore been excluded from essential stages of the procedure, which infringed its right to be heard and to be involved in the proceeding. The FPÖ therefore reiterated its request for the statements of objections and the written comments on those statements made by the banks concerned to be transmitted and also asked to be permitted to make its comments and to participate in an additional hearing.

28 By letters dated 27 March 2001, the hearing officer informed the applicants that the FPÖ had repeated its request to obtain the statements of objections and that he intended to respond favourably. As regards the confidential information to be removed from the statement of objections of 10 September 1999, the hearing officer attached list 1 and also rejected the requests made by the applicants in their letters of 17 and 18 November 1999 relating to the removal of the banks' identities. The hearing officer also rejected the request made by the applicant in Case T-213/01 concerning the removal of certain other information. As regards the supplementary statement of 21 November 2000, on which the applicants had not yet commented, the hearing officer transmitted a list of passages (hereinafter 'list 2') which provided for the names and posts of certain individuals to be removed and replaced by a description of their functions. He informed the applicants that it was possible to make comments in that regard.

29 By letter dated 18 April 2001, the applicant in Case T-214/01 again objected to the transmission of the statements of objections to the FPÖ and asked the Commission to specify the reasons for which it suddenly considered that it had to accede to the FPÖ's request. Similarly, by letter of 24 April 2001, the applicant in Case T-213/01 reiterated its opposition to such transmission and, in the alternative, argued that, in the event that there were an obligation to transmit the objections, the statement of objections of 10 September 1999 should be strictly anonymous. On the other hand, it stated that the statement of objections of 21 November 2000 did not contain business secrets or other confidential information other than those which the hearing officer proposed to remove in list 2.

30 By letters of 5 June 2001, the hearing officer confirmed the obligation to transmit the objections to the FPÖ. As regards the confidential information to be protected, the hearing officer drew the attention of the applicant in Case T-214/01 to the fact that it had not made any comments in its previous letter concerning the information contained in lists 1 and 2 and that, consequently, he understood that it was not raising any major legal objection against non-confidential versions of the objections being transmitted to the FPÖ. As far as the applicant in Case T-213/01 was concerned, he notified it that he understood from its last letter that it agreed with the contents of lists 1 and 2, apart from the question of the anonymity of the statement of objections of 10 September 1999. The hearing officer also asked it to submit comments and informed it that, in the event of a refusal, a decision would be adopted pursuant to Article 5(4) of Decision 94/810 (now the second paragraph of Article 9 of Decision 2001/462).

31 By letter of 25 June 2001, the applicant in Case T-214/01 reiterated its request to the hearing officer for the objections not to be transmitted and asked to be informed of further developments in the proceeding.

32 By letter dated 25 June 2001, the applicant in Case T-213/01 asked the Commission to clarify the situation in the case, inviting it inter alia to take a decision against which an action could be brought.

Contested decision in Case T-214/01

33 By letter of 25 July 2001, the hearing officer adopted the decision closing, in regard to the applicant in Case T-214/01, the procedure relating to the transmission of the statements of objections of 10 September 1999 and of 21 November 2000 to the FPÖ ('the contested decision in Case T-214/01'). That letter reads as follows:

'Further to your letter [of 25 June 2001], I have re-examined the case and its possible legal consequences. I have summarised the findings of that examination as follows:

1. I uphold my previous view regarding the FPÖ's right to make an application. A final decision has already been made on this matter by Mr Van Miert and Mr Monti in 1999. I do not think that their decision — which is a measure of organisation of procedure — is a decision against which an isolated action could be brought, but is at the very most contestable only in an action brought against the Commission's decision to close the main proceedings.

2. Decision 2001/462 ... does not allow any other solution to be adopted. Article 9 of that decision gives the hearing officer the power to decide, on behalf of the Commission, whether certain information contained in the documents in the file constitute[s] business secrets and [is] therefore protected against disclosure. However, the hearing officer is not competent to decide whether a natural or legal person within the meaning of Article 3(2) of Regulation No 17 is entitled to make an application seeking to bring infringements to an end. Such a competence cannot be based on mutatis mutandis application of Article 9 of Decision 2001/462 either ...

In the light of the foregoing, I regretfully refuse as inadmissible the request you have made on behalf of BAWAG for the objections and the supplementary objections not to be transmitted to the FPÖ.

Please inform me within one week of receipt of this letter if you intend to bring an action in this case and to make an application for interim measures. The documents mentioned will not under any circumstances be transmitted to the FPÖ before the expiry of this one-week time-limit.

...'

Contested decision in Case T-213/01

34 By letter of 9 August 2001, the hearing officer adopted the decision closing, in regard to the applicant in Case T-213/01, the procedure relating to the transmission of the statements of objections of 10 September 1999 and of 21 November 2000 to the FPÖ ('the contested decision in Case T-213/01'). That decision states: 'Following a further examination of the facts and points of law, we have decided to resolve the issues on which your principal and the Commission disagree as was indicated in our letter of 5 [June] 2001.'

35 First of all, the hearing officer stated that the member of the Commission with responsibility for competition decides on a third party's status as an applicant within the meaning of Article 3(2) of Regulation No 17. The decision in favour of the FPÖ had already been taken by Mr Van Miert in 1999 and was then confirmed by Mr Monti, which is why the question did not need to be re-examined in the absence of new facts (point 1 of the contested decision). Furthermore, recognition of the

FPÖ's status as an applicant constituted a procedural act which could not be the subject of separate legal proceedings, since that act could be challenged only as part of an action brought against the Commission's decision terminating the proceeding (point 2 of the decision).

36 Secondly, the hearing officer pointed out that recognition of status as an applicant within the meaning of Article 3(2) of Regulation No 17 entails the obligation to transmit to it a non-confidential version of the objections pursuant to Article 7 of Regulation No 2842/98. The fact that the proceeding was opened on the Commission's own initiative or as a result of an application made under Article 3 was of no importance in that regard (point 2 of the decision).

37 Thirdly, the hearing officer ruled on the information to be removed from the statements of objections of 10 September 1999 and 21 November 2000 in order to pay due regard to business secrets and other confidential information (point 4 of the decision). Thus, he decided to remove all the data and information appearing in lists 1 and 2 to which the applicant in Case T-213/01 had agreed in its most recent letter. On the other hand, the hearing officer considered that the applicant's identity did not constitute a business secret or confidential information to be protected (point 4(a) of the decision). Similarly, with respect to information regarding commercial policy contained in the statement of objections of 10 September 1999, the hearing officer stated that it was not necessary to delete that information, since it was statistical data dating back several years (point 4(b) of the decision).

38 The hearing officer concluded 'that the current adapted version of the statement of objections of 10 September 1999 and of the supplementary statement of objections of 21 November 2000 must be transmitted to the FPÖ, with a view to its adopting a position in the current Case COMP/36.571 — Austrian banks' and that 'this decision has been taken pursuant to [the second paragraph of] Article 9 of Commission Decision 2001/462'. Lastly, the hearing officer asked the applicant to let him know, within one week of notification of his decision, whether it intended to

bring proceedings against the decision and to apply for an interim measure against the implementation of the said decision, stating that the Commission would not transmit the abovementioned statements of objections to the FPÖ before the expiry of that period.

Procedure and forms of order sought

39 By applications lodged at the Registry of the Court of First Instance on 19 September 2001, the applicants brought the present actions for annulment of the contested decisions.

40 By separate documents lodged at the Registry of the Court of First Instance on the same date, the applicants lodged applications for suspension of operation of the contested decisions and, in the alternative, an order enjoining the Commission not to transmit to the FPÖ the statements of objections of 10 September 1999 and of 21 November 2000 in Case COMP/36.571.

41 By order of 14 December 2001, after hearing the parties, the President of the Fifth Chamber ordered that Cases T-213/01 and T-214/01 be joined.

42 By orders of 20 December 2001 in Case T-213/01 R *Österreichische Postsparkasse* v *Commission* [2001] ECR II-3967 and in Case T-214/01 R *Bank für Arbeit und Wirtschaft* v *Commission* [2001] ECR II-3993, the President of the Court of First Instance dismissed the applications for interim measures made by the applicants, taking the view that the requirements relating to urgency were not fulfilled and that the balance of interests did not lean in favour of suspending the operation of the contested decisions, and ordered that costs be reserved.

43 In January 2002, the Commission transmitted to the FPÖ the versions of the statements of objections prepared as non-confidential.

44 By separate document lodged at the Registry of the Court of First Instance on 12 February 2002, the applicant in Case T-214/01 submitted a statement of observations in the main proceedings containing new facts of which it had become aware after submitting its reply. By letter lodged at the Registry of the Court of First Instance on 13 February 2002, the applicant in Case T-213/01 endorsed that statement of observations in full. On 15 March 2002 the Commission submitted observations on those documents.

45 By letters of 30 March 2004 and 16 July 2004, within the framework of measures of organisation of procedure, the Court of First Instance asked the Commission to produce certain documents and to answer written questions. The Commission acceded to those requests within the prescribed period.

46 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure.

47 The parties presented oral argument and replied to the Court's questions at the hearing on 21 October 2004.

48 The applicant in Case T-213/01 claims that the Court should:

— annul the decision of the hearing officer of 9 August 2001;

— order the Commission to pay the costs.

49 The applicant in Case T-214/01 claims that the Court should:

— annul the decision of the hearing officer of 25 July 2001;

— order the Commission to pay the costs.

50 In the two cases, the Commission contends that the Court should:

— dismiss the actions as inadmissible and, in any event, as unfounded;

— order the applicants to pay the costs.

Admissibility

51 The Commission raises three pleas of inadmissibility, the first alleging that the actions have no purpose because the objections had actually been transmitted to the FPÖ, the second alleging that the contested act has no legal effects on the interests of the applicants and the third alleging that the actions had been brought belatedly.

The plea alleging that the action has no purpose following the actual transmission of the statements of objections to the FPÖ

52 The Commission claims that the sole purpose of the actions is to prevent transmission to the FPÖ of any version whatsoever of the statements of objections and, in the alternative, the non-confidential versions prepared by the hearing officer. However, the statements of objections were transmitted to the FPÖ in January 2002. The action has therefore become devoid of purpose on account of that transmission in accordance with Article 113 of the Rules of Procedure.

53 The Court observes that 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 contested measure being annulled (Case T-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039, paragraph 14). Such an interest exists only if the annulment of the measure is of itself capable of having legal consequences (Case 53/85 *Akzo Chemie* v *Commission* [1986] ECR 1965, ('*Akzo*'), paragraph 21).

54 In that regard, it should be noted that under Article 233 EC the institution whose act has been declared void is required to take the necessary measures to comply with the judgment. Those measures do not relate to the elimination of the act from the Community legal order, because the very annulment by the Court has that effect. They are concerned in particular with eradicating the consequences of the act in question which are affected by the illegalities found to have been committed. The annulment of an act which has already been carried out is still capable of having legal consequences. The act could have produced legal effects during the period when it was in force and those effects are not necessarily eradicated by its annulment. Similarly, the annulment of an act can allow future repetition of the illegality affecting the act to be avoided. For those reasons, a judgment annulling an act is the basis upon which the institution concerned may be led to restore the

applicant sufficiently to his original position or avoid the adoption of an identical act (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 32, and Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 41).

55 In the present case, the fact that the statements of objections were transmitted to the FPÖ after the actions seeking to challenge the lawfulness of the decisions on the basis of which those statements were transmitted had been brought does not render those actions devoid of purpose. The annulment of the contested decisions is of itself capable of having legal consequences for the applicants' situation, in particular by preventing a repetition by the Commission of the practice complained of and by rendering unlawful the use of the statements of objections improperly communicated to the FPÖ (*Akzo*, paragraph 21).

56 The arguments put forward by the Commission alleging that the action has no purpose following the actual transmission of the statements of objections to the FPÖ must therefore be rejected.

The plea alleging that the contested acts have no legal effects

Arguments of the parties

57 The Commission points out that the contested decision in Case T-213/01 contains only a single decision-making act, the position taken by the hearing officer on the confidentiality of the information contained in the statements of objections to be transmitted to the FPÖ. The only element that could 'entail consequences' for the applicant would be the transmission of certain confidential documents to an applicant or a third party, as can be seen from the judgment in *Akzo*. In Case T-214/01, the contested decision did not deal with this question, which had already

been settled. In its letter of 18 April 2001, the applicant had accepted that the versions of the statements of objections did not contain confidential information. In the view of the Commission, the contested decision in that second case related only to the rejection by the hearing officer of the applicant's request of 25 June 2001 for a re-examination of the FPÖ's recognised right to obtain a non-confidential version of the statements of objections. That decision was devoid of any binding legal effect vis-à-vis the applicant.

58 The Commission claims that recognition of the FPÖ's status as an applicant does not have legal effects on the applicants since, if the Commission had taken a decision in that regard, it would only constitute a measure of organisation of procedure which could not be the subject of separate legal proceedings from those brought against the final decision establishing the infringement (Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, ('*Cimenteries*'), paragraph 28).

59 Similarly, the Commission points out that the right to transmit non-confidential versions of the statements of objections to the FPÖ follows automatically from Article 7 of Regulation No 2842/98. The applicants are not therefore contesting a decision affecting them directly, but Article 7 of that regulation.

60 The applicants claim that the actions are admissible because they are directed against decisions which produce binding legal effects and which are therefore acts open to challenge.

61 In Case T-213/01, the transmission of the statements of objections to the FPÖ affects the applicant's right to the confidential treatment of business secrets and other confidential information set out in those statements, which affects its legal situation irreversibly and could therefore be subject to separate legal proceedings (*Akzo*, and order of the President of the Court of First Instance in Case T-353/94 R *Postbank* v *Commission* [1994] ECR II-1141, paragraph 25).

62 In Case T-214/01, the contested decision set forth the point of view of the hearing officer on the transmission of the statements of objections to the FPÖ. That decision was taken on the basis of Decision 2001/462, which provides that decisions by the hearing officer to communicate objections to a third party may be contested. The communication of even a non-confidential version of the objections would cause irreversible harm to the undertaking concerned. Furthermore, the version of the statement of objections of 10 September 1999 to be transmitted to the FPÖ would in any event include much confidential information covered by the guarantee of confidentiality, such as the names of the individuals and banks involved in the proceeding. The order of the President of the Court of First Instance of 20 December 2001, given in the interlocutory proceedings, was thus based on the view that the contested measure could change the applicant's legal position.

63 The applicants claim that recognition of the FPÖ's status as an applicant within the meaning of Article 3(2) of Regulation No 17 and the FPÖ's right to have the objections transmitted to it are subject to judicial review. The Court stated in *Akzo* that the transmission of objections was subject to such review not only as regards the extent of the information to be protected, but also in principle. Moreover, because of the serious infringement, which could result from the transmission of the objections, of the rights to be presumed innocent and to the protection of personal data laid down in Articles 8 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter'), recognition of a third party's status as an applicant cannot fall within the discretion of the Commission, but is subject to the conditions laid down in Article 3(2) of Regulation No 17 and Article 7 of Regulation No 2842/98, which may be reviewed before the Court of First Instance.

Findings of the Court

64 According to settled case-law, only measures which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position may be the subject of an action for annulment under

Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and *Cimenteries*, paragraph 28).

65 In principle, a provisional measure intended to pave the way for the final decision is not therefore a challengeable act. However, according to case-law, acts adopted in the course of the preparatory proceedings which were themselves the culmination of a special procedure distinct from that intended to permit the Commission to take a decision on the substance of the case and which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position, also constitute acts open to review (*IBM* v *Commission*, paragraphs 10 and 11).

66 Thus, it follows clearly and unequivocally from case-law that the Commission's decision notifying an undertaking involved in infringement proceedings that the information transmitted by that undertaking does not qualify for the confidential treatment guaranteed by Community law and may therefore be communicated to another complainant has legal effect in relation to the undertaking in question, bringing about a distinct change in its legal position, inasmuch as it withholds from the latter the protection provided by Community law and is definitive in nature and is independent of the final decision establishing an infringement of the rules on competition. Furthermore, the opportunity which the undertaking has to bring an action against a final decision establishing that the rules of competition have been infringed is not of such a nature as to provide it with an adequate degree of protection of its rights in the matter. On the one hand, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. On the other hand, if an action is brought against that decision, it will not in any event provide the applicant with the means of preventing the irreversible consequences which would result from improper disclosure of certain of its documents (*Akzo*, paragraphs 18 to 20). An action for annulment may therefore be brought against such a decision.

67 The present actions seek the annulment of the decisions of the hearing officer of 25 July 2001 and of 9 August 2001 to transmit to the FPÖ non-confidential versions of the statements of objections relating to a proceeding under Article 81 EC on the fixing of bank charges (COMP/36.571 — Austrian banks), contrary to the position taken by the applicants, which were mentioned in those statements and which were opposed to their transmission to the FPÖ.

68 The applicable rules recognise that third parties who claim a legitimate interest have the right to have a non-confidential version of the statement of objections transmitted to them in order to be able to make known their views in writing. For example, Article 3(1) and (2) of Regulation No 17 provides that natural or legal persons who claim a legitimate interest are entitled to make application in order to seek a declaration by the Commission that Articles 81 EC and 82 EC have been infringed. Article 7 of Regulation No 2842/98 also states that where the Commission raises objections relating to an issue in respect of which it has received an application on a complaint, it must provide an applicant or complainant with a copy of the non-confidential version of the statement of objections so that the applicant or complainant may make known its views in writing.

69 None the less, under the second paragraph of Article 9 of Decision 2001/462, where the undertaking involved in infringement proceedings under Articles 81 EC and 82 EC objects to the disclosure to a third party of information likely to constitute business secrets and where the information is considered by the Commission not to be protected and where it may therefore be disclosed, that finding must be stated in a reasoned decision which is to be notified to the undertaking concerned.

70 In the present case, the contested decision in Case T-213/01 brings to an end the procedure relating to the transmission to the FPÖ of the 'current adapted version' of the statement of objections of 10 September 1999 and of the supplementary statement of objections of 21 November 2000. That decision rejects both the applicant's opposition to the transmission of those documents to the FPÖ and the confidential treatment claimed by the applicant in respect of certain information contained in the documents. The contested decision in Case T-214/01 rejects

definitively the applicant's opposition to the transmission to the FPÖ of the statements of objections in question. The two decisions were taken on the basis of the second paragraph of Article 9 of Decision 2001/462, which provides that where the undertaking concerned objects to the disclosure of the information but the hearing officer finds that the information is not protected and may therefore be disclosed, that finding must be stated in a reasoned decision which is to be notified to the undertaking concerned, the decision specifying the date after which the information will be disclosed, which may not be less than one week from the date of notification. In the present case, the hearing officer asked the applicants to let him know, within one week, whether they intended to bring proceedings and to apply for an interim measure. He indicated that the abovementioned statements of objections would not be transmitted to the FPÖ before the expiry of that period.

71 The contested decisions are therefore the culmination of a special procedure distinct from the general procedure under Article 81 EC, laying down the Commission's definitive position on the question of the transmission of non-confidential versions of the statements of objections to the FPÖ. Those decisions necessarily require the FPÖ first to be recognised as having the status of an applicant claiming a legitimate interest within the meaning of Article 3(2) of Regulation No 17 since it is from that status that the FPÖ's right to the statements of objections transmitted to it stems from Article 7 of Regulation No 2842/98.

72 As a result, in their actions the applicants may contest both the hearing officer's decision to transmit the non-confidential version of the statements of objections to the FPÖ and the key element forming the basis for that decision, namely recognition by the Commission of the FPÖ's legitimate interest in accordance with Article 3(2) of Regulation No 17. Failing that, the applicants would not be able to prevent the objections raised against them by the Commission from being communicated to a third party which has made an application or a complaint and which does not have

the legitimate interest required by the Community rules or — in the event that such transmission has already taken place — to request that the use of the information in question by that third party be declared unlawful.

73 In the light of the foregoing, the plea of inadmissibility alleging that the contested decision in Case T-214/01 and the positions taken by the hearing officer in the contested decision in Case T-213/01 relating to the recognition of the FPÖ's status as an applicant and the FPÖ's right to the statements of objections transmitted to it must be rejected.

The plea alleging that the actions were brought out of time

Arguments of the parties

74 The Commission claims that the contested decisions have only confirmatory nature as regards recognition of the FPÖ's status as an applicant and the FPÖ's right to be transmitted the statements of objections. The actions are therefore out of time in that respect.

75 As regards recognition of the FPÖ's status as an applicant within the meaning of Article 3(2) of Regulation No 17, the Commission states that it adopted a final decision on this point in 1999, having informed the applicants by letters of 5 November 1999. In his letter of 27 March 2001, the hearing officer merely confirmed that the FPÖ's interest in making an application had been recognised and reiterated his explanation to that effect. In any event, even if the letter of 27 March 2001 contained a decision in that regard, it had not been contested by the applicant either. Lastly, in their applications the applicants themselves recognised that the contested decision merely 'confirms' the procedural position conferred on the FPÖ by a previous decision.

76 As regards the FPÖ's right to have the statements of objections transmitted to it, the Commission claims that it had already notified the applicants, orally at the beginning of October 1999 then by letters of 5 November 1999, that it intended to proceed in accordance with Article 7 of Regulation No 2842/98. Consequently, even if the Commission had adopted a 'decision' concerning the FPÖ's right to receive the statement of objections and if that decision had been an act open to challenge, the contested decision merely confirms it in that regard and cannot therefore be the subject-matter of legal proceedings.

77 The applicants claim that the actions are not out of time. Only the contested decisions lay down the Commission's final position concerning the FPÖ's status as a complainant and the transmission of the statements of objections to the FPÖ, whilst all earlier letters from the hearing officer and the Commission staff are merely preparatory measures. Therefore, those decisions bringing to an end the procedure relating to the transmission of the statements of objections to the FPÖ are not purely confirmatory acts.

Findings of the Court

78 The Court has held above that in the present actions brought against the final decisions bringing to an end the special procedures relating to the transmission of the statements of objections to the FPÖ, the applicants may challenge the element forming the basis for those decisions, namely recognition by the Commission of the FPÖ's legitimate interest and status as an applicant within the meaning of Article 3(2) of Regulation No 17, from which stems its right to receive the non-confidential version of the statements of objections in accordance with Article 7 of Regulation No 2842/98.

79 Consequently, the Commission cannot reasonably claim that the applicants should have brought an action against different interim measures taken in the context of those procedures relating to the transmission of the statements of objections in

order to infer that the present actions — brought against the decisions closing those procedures — may not contest the interim measures on the basis of which those decisions were adopted.

80 In the light of the foregoing, the plea of inadmissibility alleging that the actions were brought belatedly must be rejected.

Substance

81 The applicants rely on seven pleas in law in support of their actions. The first and second pleas concern the infringement of Article 3(2) of Regulation No 17 and of Article 6 of Regulation No 2842/98 and a failure to state reasons. The third plea concerns the breach of the principle of procedural economy. The fourth plea is based on the infringement of the rights of the defence as a result of the belated transmission of the objections to the FPÖ. The fifth plea concerns the time-barring of the FPÖ's right to be involved in the proceeding. The sixth plea is based on the infringement of Article 20(2) of Regulation No 17 in conjunction with Article 287 EC in so far as the transmission of the objections to the FPÖ infringed their right to confidentiality in respect of their business secrets. Lastly, the seventh plea concerns the breach of the principle of the protection of legitimate expectations.

The first and second pleas, concerning infringement of Article 3(2) of Regulation No 17 and of Article 6 of Regulation No 2842/98 and a failure to state reasons

82 The applicants claim that the hearing officer's decision to transmit the statements of objections to the FPÖ is unlawful in so far as the FPÖ cannot be regarded as an applicant within the meaning of Article 3(2) of Regulation No 17 and Article 6 of Regulation No 2842/98.

83 In support of their argument, the applicants contend, first of all, that there is no causal link between the application made by the FPÖ and the opening of the proceeding, secondly that the FPÖ does not show a legitimate interest within the meaning of those provisions, and thirdly that the Commission has neither verified nor stated reasons for the existence of such an interest on the part of the FPÖ.

The first limb, concerning the absence of a causal link between the application made by the FPÖ and the opening of the proceeding

— Arguments of the parties

84 The applicants claim that the FPÖ is not an applicant within the meaning of Article 3(2) of Regulation No 17 and Article 6 of Regulation No 2842/98 on the ground that its application is not the basis for the infringement proceeding. Article 3(1) of Regulation No 17 lays down that the Commission open a proceeding 'upon application or upon its own initiative'. Where a proceeding has been opened upon the Commission's own initiative, the Commission's decision is no longer taken 'upon application'. In the present case, the FPÖ had made its application only two months after the Commission had opened a proceeding upon its own initiative. Consequently, the FPÖ cannot be accorded status as an applicant within the meaning of Article 3(2) of Regulation No 17, since that party can at the very most be regarded as a third party having a sufficient interest within the meaning of Article 19(2) of Regulation No 17 and Article 9(1) of Regulation No 2842/98.

85 The applicants further claim that the Commission fails to recognise the difference between a formal complaint and the informal transmission of the details of an infringement. Only a formal complaint gives rise to procedural rights.

86 The Commission contests the arguments put forward by the applicants, which it considers to be erroneous and unfounded. For example, it is not important whether the proceeding has been opened upon the Commission's own initiative or following a complaint made pursuant to Article 3(2) of Regulation No 17. Formal infringement proceedings are opened only by the statement of objections and occur well after the right to make an application has been recognised. In the present case, the Commission opened the infringement proceeding on 10 September 1999, when it adopted the initial statement of objections, two years after the application made by the FPÖ. In any event, when the FPÖ made its application, it had been unaware of the existence of any proceeding, since the Commission had kept the preparatory work secret in order to ensure that the investigations conducted in June 1998 were effective.

87 Lastly, the distinction between formal complaints and informal accusations, suggested by the applicants, is unfounded. A complainant claiming a legitimate interest has rights before the proceeding is opened and even if such a proceeding has not been opened, such as the right to bring an action for annulment under Article 6 of Regulation No 17.

— Findings of the Court

88 Article 3(1) of Regulation No 17 provides that where the Commission, 'upon application or upon its own initiative', finds that there is infringement of Article 81 EC or Article 82 EC, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

89 In accordance with Article 3(1) and (2) of Regulation No 17 and Articles 6 and 7 of Regulation No 2842/98, the 'applicant' is a natural or legal person who, claiming a legitimate interest, asks the Commission to find that there is an infringement of Article 81 EC or Article 82 EC. Moreover, the abovementioned provisions of Regulation No 2842/98 describe such an applicant as a 'complainant' for the

purposes of applying Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302), Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ 1986 L 378, p. 4) and Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1). Under those provisions, the Member States are also authorised, without needing to rely on any interest, to make such 'applications' or 'complaints' seeking a declaration that the abovementioned rules of competition law have been infringed.

90 The applicants essentially maintain that, where an infringement proceeding is opened upon the Commission's own initiative, a third party should no longer be granted status as an applicant. That argument cannot be accepted, however.

91 Regulations No 17 and No 2842/98 do not require, for the purposes of recognition of status as an applicant or a complainant, the application or complaint in question to form the basis for the Commission opening an infringement proceeding, and in particular the preceding investigation phase. Natural or legal persons claiming a legitimate interest in seeking a declaration from the Commission that there is an infringement of the rules on competition may therefore make an application or complaint for that purpose even once the preliminary investigation phase of the infringement proceeding has been opened upon the Commission's own initiative or upon application. Otherwise, persons having such a legitimate interest would be prevented, in the course of the proceeding, from exercising the procedural rights associated with status as an applicant or complainant.

92 The applicants' argument would effectively impose on third parties an additional condition that is not provided for in Regulations No 17 and No 2842/98. Recognition of status as an applicant or complainant would depend not only on an application being submitted or a complaint being lodged and a legitimate interest being shown in that regard, but also on the fact that the Commission did not open

its investigation into the infringement complained of. It should also be noted that, given that the opening of the investigation is normally kept secret in order to ensure that the action to be taken is effective, third parties having a legitimate interest will not normally be able to find out whether or not the Commission has already opened an investigation into the agreements or practices in question.

93 Thus, in the present case, the submission of the FPÖ's application immediately followed the opening of the investigation procedure upon the Commission's own initiative. The FPÖ submitted its initial application on 24 June 1997, seven weeks after the investigation procedure had been commenced on 6 May 1997. It is not apparent from the documents before the Court that the Commission had announced that this investigation had been opened.

94 In the light of the foregoing, it should be concluded that the fact that the investigation relating to the infringement allegedly committed by the applicants had been opened before the FPÖ had submitted its application cannot preclude recognition of the FPÖ's status as an applicant within the meaning of Article 3 of Regulation No 17 and Article 6 of Regulation No 2842/98.

95 Lastly, the difference between a formal complaint and the 'informal transmission of the details of an infringement', relied on by the applicants, is not relevant for the purposes of the present cases. It can be seen from the documents before the Court that in this instance the FPÖ did not merely provide information to the Commission, but requested the opening of an investigation with a view to obtaining a declaration of an infringement of Articles 81 EC and 82 EC and requiring the banking establishments concerned to bring such infringement to an end and to impose fines on them.

96 It follows that this first limb must be rejected.

The second limb, concerning the failure by the FPÖ to show a legitimate interest within the meaning of Article 3(2) of Regulation No 17

— Arguments of the parties

97 The applicants claim that the FPÖ may not be regarded as an applicant because the economic interest relied on by the FPÖ does not constitute a legitimate interest within the meaning of Article 3(2) of Regulation No 17.

98 First of all, they allege that being a customer of banks is merely a pretext and that the FPÖ's interest is solely political. The FPÖ seeks to have access to the statements of objections for the sole purpose of exploiting them politically. The events that occurred following the transmission of the statements of objections to the FPÖ confirmed this finding. Consequently, the FPÖ's interest is in no way 'legitimate' within the meaning of Article 3 of Regulation No 17.

99 Secondly, the applicants claim that in any event simply being a customer of banks does not make it possible to recognise the FPÖ as having a legitimate interest. The legitimate interest referred to in Article 3(2) of Regulation No 17 requires the alleged anti-competitive behaviour to be liable to affect the economic interests of the applicant in the sense that it must operate on the market in question in order to be able to claim personal harm. Thus, up to now, the Commission has confined recognition of such a legitimate interest to natural or legal persons 'harmed in their business activities' by anti-competitive behaviour. It has even tended to give a strict interpretation to the notion of legitimate interest, refusing to recognise such an interest in the case of competitors that were not active on the same market as the undertaking involved in the proceeding. The Commission's position in the case at issue thus represented a radical departure in its practice. Neither the Commission nor the Court of First Instance has yet recognised a legitimate interest within the meaning of Article 3(2) of Regulation No 17 in the case of final retail customers,

such as customers of banks. In this connection, the reference made by the Commission to the Greek ferries case (see paragraph 103 below) is misleading because in that case it did not authorise the transmission of the objections to final customers.

100 Thirdly, the applicants claim that a broader interpretation of legitimate interest would pave the way for an *actio popularis*, which would have harmful consequences. First of all, the Commission would be forced to examine and deal with a multitude of complaints and, in addition, the fact that any consumer would be allowed access to the objections and to attend the hearing would make it impossible to implement proceedings promptly. Furthermore, that could lead to abuse, in particular in proceedings with repercussions for the general public, since anyone could have access to the objections solely because they were a final customer.

101 Secondly, such an interpretation runs counter to the logic of Regulations No 17 and No 2842/98. By drawing a distinction between 'applicants showing a legitimate interest' (Articles 6 and 7 of Regulation No 2842/98), 'third parties having sufficient interest' (Article 19(2) of Regulation No 17 and Article 9(1) of Regulation No 2842/98) and 'other third parties' (Article 9(3) of Regulation No 2842/98), the legislature has established a scale according to the intensity of the harm caused to the economic interests of third parties. That distinction would be pointless if any final customer were regarded as an applicant showing a legitimate interest within the meaning of Article 3 of Regulation No 17. The final customer has the opportunity to report undertakings that he suspects of anti-competitive cartels, and his interest in participating in the proceeding can be safeguarded, if he shows a 'sufficient interest', by being heard and notified by the Commission about the progress of the proceeding, but without classifying his report as a complaint within the meaning of Article 3(2) of Regulation No 17 and without transmitting to him the statements of objections. The protection of consumers by competition law cannot therefore extend as far as recognising that in principle they have a legitimate interest unless additional aspects come into play.

102 The Commission contests the applicants' arguments as being unfounded. The FPÖ, as a recipient of banking services, is affected by the alleged cartel and consequently has a legitimate interest in submitting an application within the meaning of Article 3(2) of Regulation No 17, whilst any political interest on its part is irrelevant for the purposes of recognition of that status. In the event that the FPÖ has a legitimate interest within the meaning of Article 3 of Regulation No 17, the Commission cannot be required to investigate the existence of other reasons on its part.

103 As regards the FPÖ's economic interest, the Commission claims that the additional condition relied on by the applicants of 'being active in the area of activity concerned' has no legal basis. Competition law is designed to protect the consumer who, for that reason, has a legitimate interest in making a complaint if he is affected by behaviour on the market. Moreover, the Commission's practice confirms this principle (see, for example, its Decision 1999/271/EC of 9 December 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/34466 — Greek Ferries) (OJ 1999 L 109, p. 24)). That does not mean, however, that it treats the legitimate interest within the meaning of Article 3(2) of Regulation No 17 as a 'popular interest on which all and sundry can rely'. Not all final customers have an interest in principle in making an application, but only final customers directly affected by the cartel. In the present case, the Commission has stated that the FPÖ was not affected by the proceedings as 'all and sundry', but that its economic interests were directly affected as a customer of banking services by a cartel covering all aspects of those services.

104 The Commission also considers that the issue of the difficulties raised by administrative procedures involving several complainants and the arguments relating to acceptance of 'popular complaints' are not at all connected with the legitimate interest in making an application in accordance with Article 3(2) of Regulation No 17. Moreover, the applicants' observations regarding the rights of third parties having a 'sufficient' interest are not relevant. Regulation No 2842/98 protects the procedural position of the complainant, which is much better than the position of other third parties involved in the proceeding.

105 Lastly, the Commission claims that, in any event, the question of recognition of the FPÖ's procedural status is irrelevant in the present case since it can in any event transmit non-confidential versions of the statements of objections even to persons not involved in the proceeding if it considers it useful. Consequently, even if the Court were to find that the FPÖ did not have a legitimate interest in making an application within the meaning of Article 3(2) of Regulation No 17, it would fall within the Commission's discretion to transmit to it non-confidential versions of the statements of objections (order in Case T-353/94 R *Postbank* v *Commission*, paragraph 8).

— Findings of the Court

106 For the purposes of the present case, participation in infringement proceedings by natural or legal persons other than undertakings against which the Commission has raised objections is governed by Regulations No 17 and No 2842/98. Those regulations draw a distinction in that regard between, first, an 'applicant or complainant who has shown a legitimate interest', to whom the Commission must provide a copy of the non-confidential version of the objections, where it raises objections relating to an issue in respect of which it has received the application or complaint in question (Article 3(1) and (2) of Regulation No 17 and Articles 6 to 8 of Regulation No 2842/98); secondly, 'third parties having a sufficient interest' who, if they apply to be heard, have the right to be informed by the Commission in writing of the nature and subject-matter of the procedure and to make known to the Commission their views in writing (Article 19(2) of Regulation No 17 and Article 9(1) and (2) of Regulation No 2842/98); thirdly, 'other third parties', to which the Commission may afford the opportunity of orally expressing their views (Article 9(3) of Regulation No 2842/98). The legislature has thus established a scale according to which the degree of participation in infringement proceedings by these various third parties is determined by the intensity of the harm caused to their interests.

107 In the light of the foregoing, it should be concluded that any applicant or complainant who has shown a legitimate interest has the right to receive a non-confidential version of the statement of objections. As regards third parties having a sufficient interest, it cannot be ruled out, in accordance with Article 9(1) of Regulation No 2842/98, if the circumstances of the case justify it, that the Commission might, without being required to do so, transmit to them a non-confidential version of the statement of objections so that they are in a proper position effectively to send it their comments on the alleged infringements forming the subject-matter of the proceeding in question.

108 Beyond the two scenarios described in the preceding paragraph, provision is not made in Regulation No 17 and Regulation No 2842/98 for the Commission to transmit the statement of objections to legal or natural persons other than undertakings against which those objections have been raised.

109 In the present case, the Commission conferred on the FPÖ the capacity of applicant in the infringement proceeding brought against undertakings including the applicants. The question therefore arises whether the FPÖ had a legitimate interest within the meaning of Article 3(2) of Regulation No 17.

110 In its letter of 2 June 1998, the FPÖ claimed that it had been economically harmed, as a final customer of Austrian banking services, by the cartel complained of. The fact that in its first application of 24 June 1997 the FPÖ relied on a general interest, such as the safeguarding of the legal order, could not deprive it of the opportunity, in order to show a legitimate interest within the meaning of Regulation No 17, subsequently to exploit its capacity as a customer of the banks against which the proceeding had been brought, and the economic damage that it had allegedly suffered as a result of the agreements in question.

111 However, the applicants essentially claim that being a final customer of banking services is not sufficient in itself to show the existence of a legitimate interest, which exists only for an applicant which operates in the relevant market and which is harmed in its business activities by the alleged anti-competitive behaviour.

112 It should nevertheless be noted that the Court of First Instance has already ruled that an association of undertakings could claim a legitimate interest in making an application within the meaning of Article 3 of Regulation No 17 even if it was not directly concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided, however, that among other things the conduct complained of is liable adversely to affect the interests of its members (Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraph 28).

113 More specifically with regard to final customers who purchase goods or services, the Commission claims that its current practice shows that the consumer has a legitimate interest in lodging a complaint if it is concerned by anti-competitive behaviour on the market. However, in response to the Court's questions, the Commission has itself acknowledged that no final consumers had obtained a non-confidential version of the objections after a decision on their legitimate interest had been taken. The FPÖ was therefore the first final customer which the Commission recognised as having a legitimate interest within the meaning of Article 3 of Regulation No 17 and therefore as having the right to be transmitted the statement of objections.

114 The Court of First Instance considers that there is nothing to prevent a final customer who purchases goods or services from being able to satisfy the notion of legitimate interest within the meaning of Article 3 of Regulation No 17. The Court considers that a final customer who shows that his economic interests have been harmed or are likely to be harmed as a result of the restriction of competition in question has a legitimate interest within the meaning of Article 3 of Regulation No 17 in making an application or a complaint in order to seek a declaration from the Commission that Articles 81 EC and 82 EC have been infringed.

115 It should be pointed out in this respect that the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers. That purpose can be seen in particular from the wording of Article 81 EC. Whilst the prohibition laid down in Article 81(1) EC may be declared inapplicable in the case of cartels which contribute to improving the production or distribution of the goods in question or to promoting technical or economic progress, that possibility, for which provision is made in Article 81(3) EC, is inter alia subject to the condition that a fair share of the resulting benefit is allowed for users of those products. Competition law and competition policy therefore have an undeniable impact on the specific economic interests of final customers who purchase goods or services. Recognition that such customers — who show that they have suffered economic damage as a result of an agreement or conduct liable to restrict or distort competition — have a legitimate interest in seeking from the Commission a declaration that Articles 81 EC and 82 EC have been infringed contributes to the attainment of the objectives of competition law.

116 Contrary to the claims made by the applicants, this finding does not effectively render the notion of legitimate interest meaningless by making it excessively broad or pave the way for an alleged '*actio popularis*'. Acknowledging that a consumer who can show that his economic interests have been harmed as a result of a cartel complained of by him may have a legitimate interest in this regard within the meaning of Article 3(2) of Regulation No 17 is not the same as considering that any natural or legal person has such an interest.

117 Similarly, the applicants' arguments concerning the increased number of complaints and difficulties with administrative procedures that would stem from recognition of status as an applicant or complainant for final customers cannot be accepted either. As the Commission rightly claims, those objections cannot be legitimately relied on in order to restrict recognition of a legitimate interest for a final customer who shows that he has been economically harmed by the anti-competitive practice that he complains of.

118 Lastly, contrary to the claims made by the applicants, and as the Commission points out, where the applicant shows a valid legitimate interest, the Commission cannot be required to investigate the possible existence of other reasons in respect of the applicant.

119 Consequently, it must be concluded that the FPÖ could validly rely on its capacity as a customer of banking services in Austria and the fact that its economic interests were harmed by anti-competitive practices in order to show a legitimate interest in making an application for a declaration by the Commission that those practices constituted an infringement of Articles 81 EC and 82 EC.

120 This second limb, alleging that the FPÖ does not have a legitimate interest within the meaning of Article 3(2) of Regulation No 17, should therefore be rejected.

The third limb, concerning the Commission's failure to investigate and to state reasons for the existence of a legitimate interest on the part of the FPÖ

— Arguments of the parties

121 The applicants plead that the Commission did not verify or state reasons to show that the conditions laid down in Article 3(2) of Regulation No 17 and Article 7 of Regulation No 2842/98 were satisfied in the present case. Thus, first of all, the Commission did not in any way demonstrate that the FPÖ showed a legitimate interest, since it did not investigate whether the FPÖ had carried out banking transactions with the banks concerned, what services it had used and why its interest went beyond a 'sufficient' interest or 'other' interest. Merely stating that it had bank accounts is not sufficient to recognise that the FPÖ has the status of applicant,

particularly since that fact was already known by the Commission when it adopted the decision refusing the application on 26 February 1998. Secondly, the Commission did not explain how the complaint made by the FPÖ had the characteristics of an application within the meaning of Article 3 of Regulation No 17, nor did it set out the reasons in favour of recognising a legitimate interest on the part of the FPÖ, since it had initially taken the contrary view and the FPÖ had failed to assert its interest in being involved in the proceeding through its inactivity over more than two years.

122 The applicants also point out that, in *Cimenteries*, the Commission had drawn a distinction between two types of objection according to the market concerned and had communicated the objections differently depending on the markets in which the undertakings concerned operated (*Cimenteries*, paragraphs 4 to 7). The Commission should therefore also have established and stated reasons for the FPÖ's economic interest in the present case with reference to the different banking markets concerned. In addition, the hearing officer was required, before transmitting the statement of objections, to investigate whether the FPÖ had a legitimate interest, rather than taking the view that the matter had already been decided by the letter of 5 November 1999 from the Commission's Competition DG. Not only does Regulation No 2842/98 fail to provide any indication as to the alleged binding internal effect of that position adopted by the Competition DG, but Decisions No 94/810 and No 2001/462 on the terms of reference of the hearing officer to a large extent gave the hearing officer responsibility for matters relating to the right to be heard (see, inter alia, Article 4(1) and (2)(b) of Decision No 2001/462).

123 The Commission claims that the applicants' criticisms are irrelevant since recognition of the FPÖ's legitimate interest is a simple measure of organisation of procedure which does not produce legal effects vis-à-vis the applicants. Consequently, the assertions concerning the burden of proof are unfounded since this matter concerns only the Commission and the applicant, that is the FPÖ. In any event, it was not necessary in this instance to describe the banking service actually used by the FPÖ since the alleged cartel covered all aspects of the Austrian banking system.

— Findings of the Court

124 First of all, as regards the applicants' argument relating to the obligation to investigate the FPÖ's legitimate interest and the corresponding burden of proof on the Commission in that regard, it should be noted that, under Article 3(2) of Regulation No 17, third-party applicants or complainants must show that they have a legitimate interest in obtaining a declaration that the provisions of Article 81 EC or Article 82 EC have been infringed. The Commission is therefore under an obligation to investigate whether the third party satisfies that condition.

125 In the present case, it can be seen from the correspondence exchanged between the Commission and the applicants in the course of the administrative procedure that the Commission recognised the FPÖ's legitimate interest by reason of its capacity as a customer of banking services in Austria. However, it is not apparent from the documents before the Court that the Commission requested from the FPÖ documents to show that it was actually a customer of the banks involved in the proceeding in question and that it had been charged concerted bank fees on its accounts on the basis of the cartels in question. In response to the Court's questions, the Commission confirmed that fact, acknowledging that it had neither carried out any investigation nor deemed it necessary to require the evidence offered by the FPÖ concerning the party's legitimate interest within the meaning of Article 3 of Regulation No 17 actually to be produced. However, the Commission justified its position by claiming that it was clear that the FPÖ was a customer of the banks concerned and that, in view of the size of those cartels, it was undeniable that the agreements reached between the banks 'would inevitably have caused economic harm' to the FPÖ and 'were bound to have caused it damage'.

126 As regards the FPÖ's capacity as a customer of banking services, the Court considers that it was perfectly logical to take the view that, for the management of its activities, that political party had to have had various bank accounts and carried out regular banking transactions in Austria. Indeed, throughout the administrative procedure, the applicants never contested the fact that the FPÖ used such banking services.

127 As regards the extent of the practices complained of, it is clear from the statement of objections of 10 September 1999 that the cartels which are the subject-matter of the proceeding concerned 'all services' typically provided to individuals and to undertakings by universal banks (deposits, loans, payment transactions, etc.) (point 10 of the statement of objections) and that the agreements concluded 'were comprehensive as regards their content, highly institutionalised and closely interconnected, and they covered all of Austria "down to the smallest village"' (point 42 of the statement of objections). In addition, according to that statement of objections, a very large number of banks participated in the practices in question (point 383 of the statement of objections). Thus, those to whom the statement of objections was addressed had 'an important role in the Austrian banking market because of their size' (point 383 of the statement of objections). They were the main Austrian banks and banking groups, whose combined market shares represented 99% of the Austrian market (point 10 of the statement of objections). Furthermore, it is clear from Annex A to that statement of objections, which lists all the banking entities that attended the different meetings, that there were many more banking institutions involved in the cartels than the eight to which the objections were addressed.

128 The statement of objections of 21 November 2001 was sent to the same recipients as the statement of objections of 10 September 1999, as far as the cartel relating to the setting of exchange rates for notes and coins in the euro zone was concerned. The same considerations set out above regarding the size of the cartel are therefore applicable to the cartel referred to in that statement of objections.

129 The practices alleged in the administrative procedure in question were therefore widespread, covering all aspects of the Austrian banking system and all of Austria. The agreements alleged in the statements of objections were therefore inevitably liable to cause economic harm to the FPÖ, as a customer of Austrian banking services.

130 Moreover, the Court finds that whilst it is true that the bank identified by the applicant at the hearing — the bank owned by the Government of the Land of Carinthia — as the bank with which the FPÖ had held its accounts, was not one of the eight to which the contested decision was addressed, that bank was still one of the banking entities mentioned in Annex A to the statement of objections of 10 September 1999 which had usually attended the meetings relating to the cartels in question.

131 The applicants' argument that the Commission should have given express reasons for the FPÖ's economic interest with reference to each of the different banking markets concerned cannot be accepted. As has been pointed out, recognition of a final customer's status as an applicant or complainant depends on the likelihood that they will suffer economic damage as a result of the practices in question, and not therefore on their participation in each of the product markets which have been investigated by the Commission (see paragraphs 112 and 114 above). Furthermore, it should be noted that the applicants cannot base their arguments on the practice followed by the Commission in the administrative procedure in *Cimenteries*. In that case, the Commission had drawn a distinction between the alleged conduct at international level and the conduct relating to each national market affected, and the chapters of the statement of objections concerning the latter were sent only to the addressees of the objections established in the Member State in question (*Cimenteries*, paragraph 6). The statement of objections at issue in the present cases made reference only to a single geographical market, the market consisting of all of Austria.

132 Lastly, the applicants' argument that the hearing officer should himself have investigated whether the FPÖ had a legitimate interest before transmitting the statement of objections should also be rejected. In accordance with Article 7 of Regulation No 2842/98, the transmission of the statement of objections to the applicant or to the complainant stems necessarily from recognition of such status to a third party having a legitimate interest. Under Decision 2001/462, the hearing officer must only ensure that the hearing is properly conducted and contribute to the objectivity of the hearing itself and of any decision taken subsequently (Article 5), decide on applications to be heard from third parties (Articles 6 and 7) and

requests for access to the file (Article 8), and ensure that protected information which may constitute business secrets of undertakings is not disclosed (Article 9).

133 It follows that, having regard to the circumstances of the present case, the Commission has not failed to comply with the obligation to investigate the existence of a legitimate interest on the part of the FPÖ within the meaning of Article 3(2) of Regulation No 17.

134 Secondly, as far as compliance with the obligation to state reasons is concerned, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 16, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

135 In the present case, it is clear from the background against which the contested decisions were adopted and, in particular, from the content of the letters of 5 November 1999 from the staff of the Competition DG and of 27 March 2001 from the hearing officer, which stated that the FPÖ was a customer of banking services, that the contested decisions implicitly recognised that the FPÖ had a legitimate interest within the meaning of Article 3(2) of Regulation No 17 as a final customer of the Austrian banking services affected by the practices complained of.

136 In this case, in the light of the characteristics and the extent of the practices complained of, such a statement of reasons must be regarded as adequate.

137 The applicants' complaint cannot therefore be accepted.

138 In the light of the foregoing, this third limb, according to which the Commission failed to fulfil the obligations to investigate and state reasons for the existence of a legitimate interest on the part of the FPÖ, is unfounded.

139 The pleas concerning infringement of Article 3(2) of Regulation No 17 and Article 6 of Regulation No 2842/98 and a failure to state reasons must therefore be rejected.

The third, fourth and fifth pleas, concerning infringement of the principle of procedural economy, the rights of the defence and the time-barring of the FPÖ's right to be involved in the proceeding

140 The applicants claim that, if the FPÖ had a right to have the statement of objections transmitted to it, such transmission at this stage of the proceeding would, first of all, be unlawful because the FPÖ's right to be involved in the proceeding was time-barred and, secondly, would constitute a breach of the principle of procedural economy and of the rights of the defence.

The first limb, concerning the time-barring of the FPÖ's right to be involved in the proceeding

— Arguments of the parties

141 The applicants claim that even if the FPÖ had a right to have the statements of objections transmitted to it and to be involved in the proceeding, that right is time-

barred. Since its application was refused in February 1998, the FPÖ had not taken any steps to become involved in the proceeding before the hearings and, through its lack of interest, it had therefore waived its right.

142 In addition, the applicants claim that even though the belated communication of the objections can be attributed to the Commission, the principle of time-barring is also applicable. The Commission no longer has the right to transmit the objections in accordance with the general principle that the administrative authority must exercise its powers in reasonable time (Case 45/69 *Boehringer* v *Commission* [1970] ECR 769, paragraph 6). Unlike decisions closing proceedings as to the substance, which require an extended preparatory inquiry, the question of granting access to the file to third parties could have been examined and decided at any time, before the hearings took place. At that stage of the procedure, the Commission could only refuse the FPÖ's participation since the objections had been sent to the banks concerned, the hearings had already taken place, the facts were determined and the proceeding was practically closed. Consequently, that transmission, the essential function of which was to allow the complainant, before the hearing, to contribute to the determination of the facts and to prepare for the hearing, would have no purpose.

143 The Commission considers that these arguments are irrelevant. The FPÖ did not waive its rights since it did not know that the objections had been adopted. In addition, the FPÖ did not forfeit its right to obtain the objections by failing to claim its interest immediately and by not attending the hearings, since a person who has been recognised as an applicant may become involved as long as the procedure has not been completed and the Commission has not sent a preliminary draft decision to the Advisory Committee on Restrictive Practices and Dominant Positions. In the present case, the procedure has not been completed, since no final decision has been adopted and the Commission may still modify the objections initially raised in the light of comments made by the parties, including the FPÖ.

— Findings of the Court

144 First of all, according to the letter of 13 March 2001 transmitted by the FPÖ to the Commission, the FPÖ was not informed of the progress of the procedure or of the dates of the hearings. Thus, that letter explains that, by letters of 5 October 1999 and of 16 March 2000, the Commission had notified it that it would receive a non-confidential version of the statement of objections but that, because it had not been transmitted to it, the FPÖ had contacted the Commission, which had informed it that the hearings had already taken place and the proceeding was going to be closed. The FPÖ then requested the immediate transmission of the objections and the opportunity to make comments and to attend an additional oral hearing.

145 Furthermore, it is clear from the abovementioned letters from the Commission of 5 October 1999 and of 16 March 2000, produced by the Commission at the request of the Court of First Instance, that the Commission had notified the FPÖ that it would receive the objections without delay, even stating, in the letter of 5 October 1999, that '[it would endeavour] to send [it] that non-confidential version in the second half of this month' and, in the letter of 16 March 2000, that 'it [had] not yet been possible to transmit ... the non-confidential version of the statement of objections as the Directorate-General for Competition had planned ... because there [were] issues relating to business secrets which [had] not yet been definitively resolved'. Consequently, the party cannot be accused of having failed to take any steps previously to obtain the objections since, in view of these notifications, the FPÖ could reasonably expect to receive that transmission in order to exercise its right to be heard and to be involved in the proceeding.

146 Consequently, the applicants' argument that the FPÖ had waived its right to be transmitted the objections cannot be accepted.

147 The applicants claim that, in any event, at this stage of the procedure, the FPÖ's right was time-barred and, therefore, the Commission was no longer entitled to transmit statements of objections to it.

148 Regulations No 17 and No 2842/98 do not lay down a specific time-limit within which a third-party applicant or complainant showing a legitimate interest must exercise its right to receive the objections and to be heard in infringement proceedings. Thus, Articles 7 and 8 of Regulation No 2842/98 merely provide that the Commission must transmit the objections to the applicant or complainant and set a date by which the applicant or complainant may make known its views in writing, whilst that third party is also able to express its view orally if it so requests. In addition, Decision 2001/462 allows the applicant or complainant to be heard at any point in the procedure, expressly stating in Article 12(4) that, in view of the need to ensure the right to be heard, the hearing officer may 'afford persons, undertakings, and associations of persons or undertakings the opportunity of submitting further written comments after the oral hearing' and must fix a date by which such submissions may be made. It follows that an applicant or complainant's right to be transmitted the objections and to be heard in the administrative procedure to find an infringement of Articles 81 EC and 82 EC may be exercised while the procedure is in progress.

149 In addition, Article 10(3) of Regulation No 17 provides that the Advisory Committee on Restrictive Practices and Dominant Positions must be consulted prior to the taking of any decision following upon a procedure to find infringements of Articles 81 EC and 82 EC. It is settled case-law that such a consultation represents the final stage of the procedure before the adoption of the decision (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 35). Therefore, as long as the Advisory Committee on Restrictive Practices and Dominant Positions has not delivered the opinion provided for in Article 10(6) of Regulation No 17 on the preliminary draft decision transmitted by the Commission, the applicant or complainant's right to receive the objections and to be heard cannot be regarded as time-barred. Until the advisory committee has delivered its opinion, there is nothing to prevent the Commission examining the comments made by third parties and then modifying its position in the light of those comments.

150 In the present case, it is not disputed that, when the contested decision was adopted, the Commission had not yet sent the preliminary draft decision to the committee. It follows that when the contested decision was taken, the FPÖ's right to receive the objections and to be involved in the proceeding was not time-barred.

151 Lastly, as regards the applicants' argument that the Commission was not entitled to transmit the statement of objections, having failed to adopt a decision within a reasonable time, it should be pointed out that in the case at issue the applicants' constant opposition to the transmission of the objections to the FPÖ was largely the reason for the extended duration of the procedure relating to the transmission of objections. The applicants cannot rely on a situation that they helped to create themselves. Nor have the applicants shown that the procedure relating to the transmission of the objections to the FPÖ caused any delay in the adoption of the decision finding an infringement which was liable to prejudice their rights of defence. The applicants merely rely on future and hypothetical situations which cannot give grounds for any such prejudice (see paragraph 161 below).

152 The complaint that a reasonable time had passed cannot therefore be accepted either.

153 In the light of the foregoing, the applicants' arguments that the FPÖ's right to be involved in the proceeding is time-barred must be rejected.

The second limb, concerning infringement of the principle of procedural economy and the rights of the defence

— Arguments of the parties

154 The applicants claim that the transmission of the objections at this stage of the procedure breaches the principle of procedural economy and their rights of defence.

155 In the view of the applicants, the possibility of transmitting the objections to any applicant until the preliminary draft decision closing the proceeding is drafted prevents the Commission from conducting the proceeding promptly. If third parties provide further information, the undertakings have to be heard again and the procedure is delayed, in contravention of the principle of procedural economy.

156 In addition, belated transmission also constitutes a breach of the applicants' rights of defence. If the transmission of the objections did not allow the FPÖ to express its views, it was not necessary to transmit the objections to it, a simple informal communication on the progress of the procedure being sufficient. If, on the other hand, the FPÖ expressed its views and the Commission gave those to whom the objections were addressed another opportunity to defend themselves, the proceeding would be unduly extended, contrary to the interests of the undertakings concerned, preventing them from organising their defence. Lastly, if the Commission did not give the undertakings another opportunity to express their views after the FPÖ became involved, the rights of the defence are likewise breached since the undertakings could find out about that involvement only in a court action against the subsequent decision. Consequently, granting third parties the power to influence proceedings by choosing when they become involved would unreasonably affect their rights of defence.

157 Lastly, in the view of the applicants, the Commission did not even explain why it was expecting that the transmission of the objections to the FPÖ would produce additional evidence for the preliminary investigation since, up to that point, the FPÖ had not made any contribution to the determination of the facts.

158 The Commission considers that these arguments are unfounded. The transmission of objections does not hinder the normal progress of the procedure when the Commission has not sent the preliminary draft decision to the members of the advisory committee, as in the present case. In addition, Article 7 of Regulation No 2842/98 protects third parties who have made an application pursuant to Article

3(2) of Regulation No 17 and this procedural position is much better than that of other third parties to the proceeding. The Commission is not therefore authorised to restrict such third parties' right to be heard.

— Findings of the Court

159 The arguments put forward by the applicants cannot be accepted.

160 First of all, as regards the complaint relating to the requirements of procedural economy, it should be pointed out that the FPÖ's right to receive the statement of objections cannot be regarded as time-barred while the administrative procedure is still in progress and the advisory committee has not yet received the preliminary draft decision as to the substance. Consequently, considerations of procedural economy cannot legitimately be relied on to restrict the applicant or complainant's right to receive the statement of objections.

161 Secondly, as regards the applicants' argument concerning the breach of their rights of defence as a result of the belated transmission of the objections to the FPÖ, it should be stated that in the present case the applicants rely only on future and hypothetical situations in which their rights of defence could purportedly be breached as a result of the belated transmission of the objections to the FPÖ. The protection of the rights of the defence must be assessed on the basis of the situation of fact and of law existing at the time when the contested decision was taken (see, to that effect, Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87). It cannot therefore be evaluated by reference to future and hypothetical events.

162 The complaint concerning the breach of the rights of the defence is therefore unfounded.

163 Lastly, the argument put forward by the applicants according to which the Commission did not explain why it was expecting that the transmission of the objections to the FPÖ would produce additional evidence for the proceeding is irrelevant. Articles 7 and 8 of Regulation No 2842/98 do not make the transmission of the objections to applicants or complainants who satisfy the criteria laid down in Article 3(2) of Regulation No 17 dependent on those third parties subsequently offering the Commission contributions to the determination of the facts at issue in the proceeding.

164 It follows that the arguments concerning the breach of the principle of procedural economy and the rights of the defence are unfounded.

165 In the light of the foregoing, the third, fourth and fifth pleas raised by the applicants should be rejected in their entirety.

The sixth plea, concerning infringement of Article 20(2) of Regulation No 17 in conjunction with Article 287 EC in so far as the transmission of the objections to the FPÖ infringes the right to confidentiality of business secrets

166 The applicants claim that the contested decisions are unlawful because the statements of objections to be transmitted to the FPÖ contain business secrets and other confidential information vis-à-vis that third party, in contravention of their rights to confidentiality of their business secrets under Article 20(2) of Regulation No 17 in conjunction with Article 287 EC.

Admissibility

— Compliance with the conditions laid down in Article 44(1)(c) of the Rules of Procedure

167 The Commission contests the admissibility of this plea, claiming that the applications in the present cases do not comply with the conditions laid down in Article 44(1)(c) of the Rules of Procedure. Thus, in Case T-213/01 the applicant merely sets out legal principles without indicating the facts and linking them to a rule and without putting forward reasons to justify the confidential nature of the information in question. Similarly, in Case T-214/01 the applicant merely refers, in its reply, 'to a large amount of information' which is covered by confidentiality (point 44) and to 'considerable evidence' submitted to the Commission (point 49), without citing a single passage from the statements of objections in respect of which it could request confidential treatment.

168 The Court notes that Article 44(1)(c) of the Rules of Procedure provides that any application must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to exercise its power of judicial review. It is necessary, in order for an action to be admissible under that article, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20).

169 As far as Case T-213/01 is concerned, it is clear from the wording of points 18 and 29 of the application that the applicant contests the Commission's refusal to take the view that confidential treatment should be given to the information relating to the identity and the extent of the applicant's participation in the cartel, and the information cited verbatim in the statements of objections taken from the

documents annexed thereto in respect of which the guarantee of confidentiality had been requested (see paragraph 18 above). In addition, the reasons why the applicant considers that this information should be confidential can be discerned satisfactorily from its written pleadings.

170 As far as Case T-214/01 is concerned, the applicant claimed in its application that the Commission is required not to disclose information that it has acquired which is covered by professional secrecy, pointing out that the statements of objections include business secrets and claiming that, in the present case, its right to the non-disclosure of the information contained in the statements of objections would be irreparably infringed if the objections were transmitted to the FPÖ (see application, points 44 to 46). The applicant has pointed out inter alia that the 'non-confidential' version of the objections prepared by the hearing officer was made anonymous only inadequately (see application, point 17). The applicant subsequently clarified and developed that complaint in its reply, pointing out in particular that the Commission should have removed from the objections all names of persons and banks (see points 44 to 49).

171 It follows that the arguments put forward by the applicants satisfy the requirements laid down by Article 44(1)(c) of the Rules of Procedure.

172 That plea of inadmissibility must therefore be rejected.

— Compliance with the conditions laid down in Article 48(2) of the Rules of Procedure

173 In Case T-213/01, the Commission contests the admissibility of the applicant's arguments relating to the confidentiality of all the objections vis-à-vis the FPÖ and the reliance on Articles 8 and 48 of the Charter, on account of belated submission, in

accordance with Article 48(2) of the Rules of Procedure. In Case T-214/01, it claims that the arguments put forward by the applicant in its reply according to which those versions contain confidential information constitute a new and therefore late plea in law.

174 The Court points out that Article 48(2) of the Rules of Procedure prohibits parties from introducing a new plea in law in the course of proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure.

175 In the present case, the applicant in Case T-213/01 claimed in its reply that all the objections are confidential vis-à-vis the FPÖ in so far as that political party could not show a legitimate interest within the meaning of Article 3(2) of Regulation No 17 and that it therefore had no legal basis for having access to the statements of objections. Similarly, the applicant relied on the principles set out in Articles 8 and 48 of the Charter in order to reinforce its argument, contained in the application, that in so far as the FPÖ does not have a legitimate interest within the meaning of Article 3 of Regulation No 17 and does not therefore have the status of applicant or complainant, all the objections should, in accordance with those principles, be treated as confidential vis-à-vis the FPÖ. The Court considers that the applicant's arguments are duly related to the matters of law which have come to light in the course of the procedure.

176 As regards Case T-214/01, it is sufficient to note that, as has been stated (see paragraph 170 above), the abovementioned arguments contained in the reply merely clarify and develop the complaint put forward by the applicant in its application.

177 The plea of inadmissibility based on Article 48(2) of the Rules of Procedure must therefore be rejected.

Substance

— Arguments of the parties

178 The applicants claim that the transmission of the objections to the FPÖ infringes Article 20(2) of Regulation No 17 in conjunction with Article 287 EC since the statements of objections to be transmitted to that party contain business secrets and other confidential information.

179 The applicants claim that all the information contained in the objections is confidential vis-à-vis the FPÖ. Under Articles 8 and 48 of the Charter, all the objections should be regarded as confidential vis-à-vis third parties who do not have a legitimate basis laid down by law, so as not to impinge on the presumption of innocence. In the present case, the Commission has not shown that the FPÖ had a legitimate interest and, consequently, all the objections are confidential. In addition, the objections were not raised at the end of an inter partes procedure and, as a result, if the FPÖ had access to them, it could draw unjustified conclusions and have the applicants found guilty in advance.

180 Furthermore, in the view of the applicants, that confidentiality is particularly necessary vis-à-vis the FPÖ since its action does not seek to protect its own interests as a customer, but only to uphold political interests. The Commission does not have the legal means to prevent the objections transmitted being abused, since an action for damages brought against the Commission would not allow harm to the applicants' reputation to be repaired. Consequently, the applicants' legitimate interest in the objections being kept secret should prevail over the FPÖ's purported interest. In addition, the applicants confirm that, after transmission, the FPÖ actually exploited the objections for political ends, providing them to the press and giving a distorted view of their content and their significance. For example, in a television interview on 27 January 2002, the Governor of the Land of Carinthia, a member and former chairman of the FPÖ, J. Haider, explained the content of the statements of objections transmitted by the Commission and made accusations

against the banks concerned. Those accusations were then reported on various internet websites, including the FPÖ website. On 1 February 2002 Mr Haider reiterated his accusations at a press conference. These statements were reproduced by the Austrian media, which published articles quoting extracts from the statement of objections of 10 September 1999 verbatim. The names of the applicants were mentioned several times. The applicants were therefore powerless, on account of the media condemnation, against a loss of customer confidence.

181 Lastly, the applicants claim that, since the transmission of the objections in the present case could no longer fulfil its essential function, which was to enable the complainant to prepare for the hearing (see, to that effect, Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 10), because the hearing had already taken place, the Commission wrongly weighed the interests at stake, making the applicants' legitimate interest in the objections being kept fully secret subordinate to the formal compliance with a right of access to the file claimed by the FPÖ.

182 In the alternative, the applicants claim that the supposedly non-confidential versions of the statements of objections to be transmitted to the FPÖ contain much information in respect of which they are entitled to demand confidentiality.

183 Thus, first, the applicant in Case T-213/01 claims that the information contained in points 216, 218 and 219 of the statement of objections of 10 September 1999, concerning the manner and the extent of its participation in the cartel, should be treated as confidential vis-à-vis the FPÖ. The Commission's claim that that information does not constitute business secrets, since the FPÖ already knew the applicant's identity, is not correct because the FPÖ had not mentioned it in its application. Secondly, the information from the documents transmitted voluntarily by the applicant and quoted in the statement of objections is also confidential in accordance with Article 13(1) of Regulation No 2842/98 and the Commission notice

on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ 1997 C 23, p. 3). The decision by the hearing officer not to transmit those documents is not sufficient to guarantee their confidentiality since they are reproduced verbatim in the statement of objections.

184 In Case T-214/01, the applicant states that the hearing officer wrongly refused its application of 18 November 1999 to remove the names of the persons and banks concerned, taking the view that only business secrets enjoy confidential treatment. It adds that the statements of objections contain much other information covered by the guarantee of confidentiality.

185 The Commission considers that these arguments are entirely unfounded.

— Findings of the Court

186 The applicants claim that all the information contained in the statements of objections is confidential vis-à-vis the FPÖ because the FPÖ cannot show a legitimate interest within the meaning of Article 3(2) of Regulation No 17.

187 This complaint cannot be accepted. It has been held that in the present case the FPÖ had a legitimate interest in obtaining a declaration of the alleged infringement of Article 81 EC pursuant to Article 3 of Regulation No 17 (see paragraphs 110 to 118

above). Consequently, in accordance with Article 7 of Regulation No 2842/98, the FPÖ, in its capacity as an applicant, had the right to receive a non-confidential version of the statements of objections.

188 This finding likewise cannot be called into question by the arguments put forward by the applicants concerning the possible abusive exploitation of the objections by the FPÖ or on the basis of facts which came to light after the objections had actually been transmitted to the FPÖ.

189 First of all, the Commission is not required, on the basis of mere suspicions over the possible abusive use of the objections, to restrict the right to the transmission of the statements of objections under Article 7 of Regulation No 2842/98 enjoyed by a third-party applicant who properly shows a legitimate interest. Moreover, it should be noted that in the present case the Commission drew the FPÖ's attention to the fact that the objections were transmitted solely in the context and for the purposes of the infringement proceeding. Thus, it can be seen from the letter from the hearing officer of 30 January 2002 that the Commission informed the FPÖ that the sole purpose of transmission was to make it easier for it to exercise its rights as an applicant, that the objections reflected the provisional opinion of the Commission, that any use of the documents or of their content for purposes unconnected with the proceeding was prohibited and that the banks involved in the proceeding — which had contested the objections — should be regarded as not guilty for as long as the Commission has not taken a decision on the procedure dealing with the substance.

190 Secondly, as regards the facts which came to light after the objections were transmitted to the FPÖ, it should be pointed out that the lawfulness of an act must be assessed on the basis of the situation of fact and of law existing at the time when that decision was adopted, so that the validity of a decision cannot be affected by acts subsequent to its adoption (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 16, and Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 49). These events cannot therefore be effectively relied on to contest the merits of the contested decision.

191 Lastly, the applicants' argument that in the present case the transmission of the objections could no longer fulfil its essential function, which was to enable the complainant to prepare for the hearing, for the reasons set out in paragraph 148 above, must also be rejected.

192 It follows that the applicants' arguments concerning the confidentiality of all the objections vis-à-vis the FPÖ cannot be accepted.

193 In the alternative, the applicants claim that certain information contained in the statements of objections is confidential vis-à-vis the FPÖ.

194 Thus, the applicant in Case T-213/01 alleges that the information contained in points 216, 218 and 219 of the statement of objections of 10 September 1999 regarding its identity and the manner and extent of its participation in the cartel should be regarded as confidential and therefore removed from the versions of the statements of objections to be transmitted to the FPÖ.

195 As far as the applicant's identity is concerned, the applicant does not explain why its name is of a confidential nature. This complaint must therefore be rejected because it is unsubstantiated. Moreover, it should be noted that before the statement of objections was transmitted to the FPÖ, the applicant had already been named as one of the defendants in the class action brought against these same practices in the United States of America. Similarly, at the hearing in the proceedings for interim relief, the applicant did not deny that its name had already been mentioned by the press in connection with the case at issue. It follows that, contrary to the claims made by the applicant, its alleged participation in the investigations in question was already known to the public. In the light of the foregoing, it must be concluded that the fact that the applicant's name did not appear in the application submitted by the

FPÖ to the Commission on 24 June 1997 is not in itself sufficient for its name to constitute confidential information for third-party applicants.

196 The complaint relating to the confidential nature of the applicant's identity cannot therefore be accepted.

197 First of all, as regards the information concerning the extent of the participation by the applicant in Case T-213/01 in the practices complained of, the abovementioned points of the statement of objections of 10 September 1999 contain references to posts held by persons working for the applicant who attended anti-competitive meetings. The applicant does not explain, however, to what extent those references harm its interests or why those references should be treated as confidential vis-à-vis third-party applicants.

198 Secondly, as regards the banking conditions mentioned in point 219 of the statement of objections of 10 September 1999, which were purportedly discussed at a meeting between the banks in question, it should be observed that sensitive commercial information of the undertakings involved in the infringement proceeding constitutes confidential information capable of enjoying the guarantee of confidentiality. Article 287 EC refers expressly to 'information about undertakings, their business relations or their cost components' as information covered by professional secrecy.

199 It is important to note, however, that the confidential nature of such information can reasonably be ruled out on account of the age of the information in question (orders in Joined Cases T-1/89 to T-4/89 and T-6/89 to T-15/89 *Rhône-Poulenc and Others* v *Commission* [1990] ECR II-637, paragraph 23, and in Joined Cases T-134/94, T-136/94 to T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1996] ECR II-537,

paragraph 24). In the present case, it can be seen from points 216, 218 and 219 of the statement of objections of 10 September 1999 that the information at issue essentially concerns minimum interest rates for loans for different banking products which were ostensibly granted by the applicant and the other banks in question in April 1996. Consequently, since that information goes back more than five years before the adoption of the contested decision, the hearing officer was legitimately able to conclude in the decision that the information had taken on a historical nature and that it could therefore be communicated to the FPÖ.

200 It follows that the arguments made by the applicant in Case T-213/01 concerning the confidential nature of the information contained in points 216, 218 and 219 of the statement of objections of 10 September 1999 must be rejected.

201 In addition, the applicant in Case T-213/01 claims that the information cited verbatim in the statements of objections taken from the documents annexed to those statements in respect of which the guarantee of confidentiality was granted should also be regarded as confidential.

202 However, the applicant merely raises this argument without identifying what information this is, in which parts of the statements of objections it can be found, and for what precise and specific reasons that information is capable of enjoying the guarantee of confidentiality.

203 It must therefore be concluded that the arguments put forward by the applicant in Case T-213/01 concerning the confidential nature of certain information contained in the objections are unfounded.

204 The applicant in Case T-214/01 claims that the hearing officer should have removed the names of the persons and banks concerned. However, the applicant was expressly mentioned in the application submitted by the FPÖ to the Commission on 24 June 1997. Similarly, it was also one of the defendants in the class action brought in the United States of America. Furthermore, as regards the names of the persons concerned, it is important to note that the identity of those persons did not appear in the non-confidential versions of the statements of objections which, as has been stated, make reference only to the posts held or the generic functions performed by those persons (see paragraph 197 above).

205 Lastly, the applicant in Case T-214/01 also claims that the statements of objections contain much other information covered by the guarantee of confidentiality. It need only be stated in this regard that the applicant has not identified that information in any way or given reasons for its supposed confidential nature.

206 In the light of the foregoing, it must be concluded that the complaints made by the applicant in Case T-214/01 concerning the confidential nature of certain information contained in the statements of objections in question must also be rejected.

207 It follows that the sixth plea, concerning infringement of Article 20(2) of Regulation No 17 in conjunction with Article 287 EC, must be rejected.

The seventh plea, concerning breach of the principle of the protection of legitimate expectations

Arguments of the parties

208 The applicants claim that the transmission of the statements of objections to the FPÖ also breaches the principle of the protection of legitimate expectations. They cooperated with the Commission in the joint reconstruction of the facts, having provided a large number of documents on the condition that that information was not to be made available to third parties. However, in the objections the Commission quoted verbatim passages from those documents which had been transmitted under the seal of confidentiality. By allowing the FPÖ to have access to them, the Commission failed to have regard to the position of legitimate expectation in which it had placed the banks as regards the confidentiality of that information (Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019, 1032). The argument put forward by the Commission also runs counter to its notice on the internal rules of procedure for processing requests for access to the file, cited above, which refers to the need to protect information for which confidentiality has been requested, including 'certain types of information communicated to the Commission, ... such as documents obtained during an investigation which form part of a firm's property and are the subject of a non-disclosure request' (point I A 2, second paragraph, of the notice).

209 The Commission observes that Article 7 of Regulation No 2842/98 recognises that any complainant has the right to be sent a non-confidential version of the objections. All the assurances regarding the protection of the parties' confidentiality relating to information provided willingly by the banks concerned cannot have any bearing on that right.

Findings of the Court

210 It is settled case-law that the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the Community administration has caused him to entertain legitimate expectations (Case 265/85 *Van den Bergh en Jurgens* v *Commission* [1987] ECR 1155, paragraph 44, and Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 74). However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration (Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 68, and Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59).

211 It should be noted that, in a preliminary note enclosed with the joint summary of the facts submitted to the Commission on 16 December 1998, the applicants and the other banks involved in the proceeding requested that the summary be treated as confidential vis-à-vis third parties. However, it is not apparent from the file that the Commission gave the applicants the assurance that it would not communicate the information contained in that summary to third-party applicants. Furthermore, the applicants have not produced any arguments or evidence to prove that there exists an agreement on the part of the Commission concerning purported strictly confidential treatment of those annexes.

212 Accordingly, it cannot legitimately be claimed that the principle of the protection of legitimate expectations has been breached.

213 That finding cannot be called into question by the fact that the hearing officer expressly stated in list 1 that the documents enclosed with the statement of

objections of 10 September 1999 would not be transmitted to third-party applicants. The content of that list could not cause the applicants to entertain legitimate expectations since, apart from the fact that it refers strictly to the annexed documents as such, the detailed statement in that list 1 of the specific points of the statement of objections that were to be notified never included the removal or the concealment of the extracts of those annexes reproduced in the statement. Lastly, contrary to the claims made by the applicants, the Commission notice on the procedure for processing requests for access to the file, cited above, does not establish an absolute right to confidentiality for documents which form part of a firm's property and are the subject of a non-disclosure request by the undertaking in respect of third parties.

214 The seventh plea must therefore be rejected as being unfounded.

215 In the light of the foregoing, the actions must be dismissed in their entirety.

Costs

216 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

217 In view of the circumstances of the present case, in particular the fact that the Commission has been unsuccessful in its claims on the admissibility of the actions,

the Commission must be ordered to pay the costs arising from the pleas relating to admissibility, which the Court fixes at one third of the costs relating to the main proceedings. The applicants must pay two thirds of the costs relating to the main proceedings and all the costs relating to the proceedings for interim relief.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the actions;**

2. **Orders the applicants to pay two thirds of the costs relating to the main proceedings and all the costs relating to the proceedings for interim relief;**

3. **Orders the Commission to pay one third of the costs relating to the main proceedings.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 7 June 2006.

E. Coulon	P. Lindh
Registrar	President