

The applicant did not take part in the meeting on 15 October 1997. The employee of the applicant who was sent an invitation to attend that meeting was not granted permission by his superior to take part in it. An employee of the Vereins- und Westbank, in which the applicant has a majority shareholding, had been the only person attending on the applicant's behalf. The Vereins- und Westbank conducts itself in the market quite independently of the applicant, and the links between the two banks from the standpoint of company law cannot therefore constitute the basis for any presumption concerning the attendance by an employee of that bank at the meeting complained of.

In assessing the amount of the fine, the Commission manifestly departed from its own guidelines and infringed the requirement of equal treatment.

Neither in the communication concerning the heads of complaint nor in the context of the hearing before the official nominated to conduct the same was there any suggestion that the applicant itself had taken part in the alleged agreements. The Commission should have indicated the change in its point of view to the applicant prior to adopting its decision.

The applicant's rights of defence were infringed, since the applicant was not given full access to the file. In particular, it was not able to inspect the comments made by the other parties involved or the files in the parallel procedures, despite the fact that the applicant had well-founded reasons to suspect that those files contained material which would have been material to its defence.

The decision is lacking in an adequate statement of reasons, since, in respect of a series of points, it does not contain any considerations capable of being verified. In particular, no reasons were given for the attribution to the conduct of the representative of the Vereins- und Westbank of the failure to apply the rules concerning mitigating factors or for the deviation from the principle that the initiators of a cartel should not enjoy the benefit of the non-imposition of a fine.

The conduct of the Commission in the course of the procedure shows that it did not act with a view to punishing an infringement of the rules on cartels but rather with a view to lowering, for political reasons, the charges for exchanging currencies, which it regarded as too high. Those banks which, faced with that pressure, declared themselves willing to lower the charges had been removed from the procedure, regardless of their role in the alleged infringement of the rules on cartels. The Commission thus misused the provisions of competition law in order to regulate prices, which it was not in its power to do. This constitutes a misuse of discretionary powers.

Action brought on 1 March 2002 by Deutsche Verkehrsbank AG against the Commission of the European Communities

(Case T-60/02)

(2002/C 109/123)

(Language of the case: German)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 1 March 2002 by Deutsche Verkehrsbank AG, of Frankfurt am Main (Germany), represented by M. Klusmann and F. Wiemer, lawyers.

The applicant claims that the Court should:

- annul the contested decision in so far as it concerns the applicant;
- alternatively, reduce the fine imposed on the applicant by the contested decision to a reasonable amount;
- order the defendant to pay the costs.

Pleas in law and main arguments

The claim is directed against Decision C(2001) 3693 of 11 December 2001, adopted in Case COMP/E-1/37.919 (ex 37 391) — Bank charges for currency exchange within the Euro zone, by which the Commission found that the applicant had participated in an agreement during the period from 1 January 1999 to 31 December 2001 (the period leading up to the change-over to the euro) concerning the charging of a percentage commission targeted at around 3 % as a fee for exchanging bank-notes in the participant currencies, and imposed on the applicant a fine of 14 million euros.

The applicant pleads as follows:

It does not carry on foreign-exchange end transactions of the type concerned in this case; instead, it engages exclusively in inter-bank trading, i.e. wholesale trading in currencies and foreign exchange, and therefore in cashless trading in foreign currencies.

The Commission used evidence on which the applicant was not given a chance to comment at a hearing conducted in accordance with the law. The Commission refused to allow access to exonerating documents. It arbitrarily discriminated against the applicant in the context of the decision concerning an informal cessation of the procedure.

The decision constitutes a misuse of discretionary powers, inasmuch as the Commission pursued extra-legal political objectives, namely the making of a gesture to the public in connection with the introduction of the euro. For as long as applications made in the current administrative proceedings in Case T-216/01 R had not been determined and remained pending, the adoption of a definitive decision was not permissible.

It has not been shown that there has been any tangible adverse effect on trade between Member States.

The applicant participated neither in an agreement on the type of charges to be made nor in any agreement on the amount of a target price. The commission system could not have been the subject of any concerted agreement, if only because, prior to the entry into force of Regulation No 1103/97, there had been no legally permissible alternative to it. The evidence relied on by the defendant is unproductive and self-contradictory. The last piece of evidence produced by the defendant dates from 15 October 1997, i.e. some four and a half years before the conclusion of the alleged agreement. Since then, there has been no contact between the banks concerned. A representative of the German Bundesbank had taken part in the alleged cartel meeting, and the Bundesbank had been officially informed of the results of that meeting.

As to the duration of the alleged agreement, the decision is in itself contradictory, since the operative part of the decision is based on a different duration from that on which the calculation of the fine is based.

The basic amounts used for the calculation of the fine are arbitrary and disproportionate.

**Action brought on 1 March 2002 by Commerzbank AG
against the Commission of the European Communities**

(Case T-61/02)

(2002/C 109/124)

(Language of the case: German)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 1 March 2002 by Commerzbank AG, of Frankfurt am Main (Germany), represented by H. Satzky and B. Maassen, lawyers.

The applicant claims that the Court should:

- annul the Commission's decision of 11 December 2001, addressed to the applicant and received by it on 20 December 2001, in Case COMP/E-1/37.919 (ex 37.391), concerning the imposition of a fine;
- order the Commission to pay the costs.

Pleas in law and main arguments

The Commission infringed the applicant's rights of defence. It afforded the applicant no opportunity to learn of the criteria according to which it discontinued certain parallel procedures. The Commission did not insist on reductions in charges in every case, and treated various banks differently as regards the amount of the reductions in charges. It should have told the applicant which non-discriminatory criteria it was applying in deciding whether to continue or to discontinue the procedure. Moreover, the Commission's decision contained new incriminating evidence compared to the points raised in the heads of claim served, and the applicant was not given a chance to comment on that new evidence. Lastly, the applicant was refused access to the files in the parallel procedures. The Commission attached greater importance to the rapid imposition of a fine for political reasons than to a fair hearing.

The applicant denies that any anti-competitive agreements were concluded at a meeting held on 15 October 1997 between foreign exchange dealers. The subject-matter of that meeting was market trends and a discussion of matters which were generally known. That discussion formed part of a series of conferences held during the period from 1996 to 1998 for the purposes of preparing for the introduction of the euro, which were also frequently attended by representatives of the central banks and sometimes by representatives of the Commission. As is apparent from internal documents, the applicant had adopted an autonomous decision to charge a percentage fee even before the meeting of 15 October 1997 took place. The Commission's complaint is inconclusive, and the Commission does not describe the content of the alleged agreement. The evidence produced in that regard by the Commission, especially the internal memorandum of an employee of the Netherlands GWK Bank N.V., is inappropriate. The Commission's decision shows a lack of technical knowledge and objectivity. The Commission failed to recognise the difference between dealing in foreign notes and coins and foreign exchange dealing, and did not take account of the legal situation prevailing at the time; moreover, it represents the facts in a one-sided way which is detrimental to the applicant.
