ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
5 December 2001 *

In Case T-216/01 R,

Reisebank AG, established in Frankfurt am Main (Germany), represented by M. Klusmann and F. Wiemer, lawyers,

applicant,

v

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

defendant,

APPLICATION for interim measures in the form, first, of suspension of the operation of the Commission's decision of 14 August 2001 refusing the applicant access to certain documents relating to the abandonment of the procedure against other banks in Case COMP/E-1/37.919 — bank fees for currency exchange in

* Language of the case: German.

the Euro zone and, second, of suspension of the procedure for applying Article 81 EC in the same case in so far as the applicant is concerned,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal background

1 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ECSC on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21), which repealed Commission Decision 94/810/ECSC, EC of 12 December 1994 (OJ 1994 L 330, p. 67).

2 The third and sixth recitals of that decision provide first that the conduct of administrative proceedings should be entrusted to an independent person, the hearing officer, with experience in competition matters and the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings, and secondly that in order to ensure the independence of the hearing officer, he should be attached, for administrative purposes, to the member of the

Commission with special responsibility for competition. Furthermore, transparency as regards his appointment, termination of appointment and transfer should be increased.

3 According to Article 5 of Decision 2001/462, the role of the hearing officer is to ensure that the hearing is properly conducted and to contribute to the objectivity of the hearing itself and of any decision taken subsequently with regard to the administrative proceedings in competition matters. He is to seek to ensure in particular that, in the preparation of draft Commission decisions in connection with such proceedings, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements related to the gravity of any infringement.

4 Article 8 of Decision 2001/462 provides:

'1. Where a person, an undertaking or an association of persons or undertakings has received one or more of the letters [from the Commission] listed in Article 7(2) [including those accompanying a statement of objections] and has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of the right to be heard, access to those documents may be sought by means of a reasoned request.

2. The reasoned decision on any such request shall be communicated to the person, undertaking or association that made the request and to any other person, undertaking or association concerned by the procedure.'

5 On 30 May 2001 the European Parliament and the Council adopted Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). Article 19 of that regulation states that it is to enter into force on the third day following that of its publication in the *Official Journal of the European Communities* and that it is to be applicable from 3 December 2001.

Facts and procedure

6 At the beginning of 1999 the Commission initiated an investigation procedure against some 150 banks, including the applicant, established in seven Member States, that is to say Belgium, Germany, Ireland, the Netherlands, Austria, Portugal and Finland, because it suspected that the banks concerned had agreed among themselves to maintain the bank fees for exchanging the currencies of the euro zone at a certain level.

7 On 3 August 2000 the Commission sent a statement of objections to the applicant as part of that investigation.

8 On 27 November 2000 the applicant submitted its observations in this regard.

9 The applicant's views were heard at a hearing in connection with that investigation on 1 and 2 February 2001.

10 It is apparent from the Commission's press releases, dated respectively 11 April, 7 and 14 May 2001, that the Commission decided to terminate the infringement

procedure opened against the Netherlands and Belgian and some German banks. The Commission took that decision after those banks had lowered their fees for exchanging currencies of the euro zone.

11 By letters dated 16 May, 13 June and 25 July 2001 the applicant set out three commitment offers to the Commission, by which it undertook to reduce its fees for exchanging currencies of the euro zone. Those offers were all declined by the Commission.

12 The Commission's press release of 31 July 2001 states that the Commission decided to terminate the infringement procedures which it had initiated against the Finnish, Irish, Belgian, Netherlands and Portuguese banks and some German banks.

13 The applicant sent to the hearing officer a request for access to the documents indicating the conditions which made it possible to terminate the procedure against other banks involved in the investigation in question.

14 By a first letter dated 14 August 2001, the hearing officer rejected that request for access to the said documents (hereinafter the 'contested decision'). The refusal was justified as follows:

'According to established case-law, consultation of the file in the course of competition proceedings before the Commission serves a specific function. It is intended to permit an undertaking accused of having infringed Community competition law to defend itself effectively against the objections made by the

Commission. That condition is met only if the undertakings have access to all the documents contained in the procedure file, in other words the documents relating to the procedure with the exception of confidential documents and the administration's internal documents. It is in this way that "equality of arms" is established between the Commission and the defence.

In the present case, Reisebank AG and Deutsche Verkehrsbank AG have been allowed access to the documents of procedure COMP/E-1/37.919 and to other documents contained in parallel files but relevant to the "German banks" procedure. Account has therefore been taken of this right to mount an unrestricted defence against the objections made by the Commission.

The circumstances that led to the suspension of the procedure involving other banking establishments in other Member States are the subject of parallel but separate Commission documents, which in principle are not accessible to the German banks. Nor is it evident how the information requested could be of importance to the defence of your clients. In these circumstances, your request for additional access to the file must therefore be refused, in accordance with the case-law of the Court of First Instance in the *Cement* Cases.

Nor are we able to accede to your request regarding the documents on the suspension of the COMP/E-1/37.919 procedure opened against some German banks. The information relating to particular establishments, in so far as it has not been published by the Commission, is confidential and hence cannot be accessible to other parties in the procedure.

This decision has been adopted in accordance with Article 8 of the Decision [2001/462].'

15 By a second letter, also dated 14 August 2001, the hearing officer stated the following in response to the applicant's request for suspension of the administrative procedure:

'... the Commission sees no reason to postpone the transmission of a draft final decision in procedure COMP/E-1/37.919, which is expected to take place between the beginning and middle of September of this year.'

16 By letter dated 17 August 2001, the applicant made a further offer to the Commission, by which it undertook to reduce its bank fees for exchanging currencies of the euro zone, on the basis of two alternative formulas.

17 By letter of 14 September 2001 the Commission declined the latter offer.

18 By application lodged at the Registry of the Court of First Instance on 21 September 2001 the applicant brought an action for annulment of the contested decision. On the same date it submitted to the Court the present application for interim measures in the form, first, of suspension of the operation of the contested decision and, second, of suspension of the procedure for applying Article 81 EC in Case COMP/E-1/37.919 — bank fees for currency exchange in the Euro zone: Germany (Deutsche Verkehrsbank-Reisebank).

19 On 5 October 2001 the Commission submitted its observations on the present application for interim measures.

20 On 17 October 2001 the applicant was invited to submit its observations on the question of the admissibility of the action in the main proceedings and of the application for interim measures.

21 On 23 October 2001 the applicant submitted its observations in that regard.

Law

22 Pursuant to the combined provisions of Articles 242 EC and 243 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any other necessary interim measures.

23 Pursuant to the first subparagraph of Article 104(1) of the Rules of Procedure of the Court of First Instance, an application to suspend the operation of a measure is admissible only if the applicant is challenging that measure in proceedings before the Court of First Instance. That rule is not a mere formality, but presupposes that the action as to the substance, from which the application for interim measures is derived, is capable of being heard by the Court of First Instance.

24 According to settled case-law, in principle the issue of the admissibility of the main application must not be examined in proceedings relating to an application for interim measures so as not to prejudge the substance of that case. Where, however, it is contended that the main application from which the application for

interim measures is derived is manifestly inadmissible, as in this case, it may prove necessary to establish the existence of certain factors which would justify the prima facie conclusion that the main application is admissible (orders of the President of the Court of Justice in Cases 376/87 R *Distrivet* v *Council* [1988] ECR 209, paragraph 21, and C-300/00 P(R) *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council* [2000] ECR I-8797, paragraph 34; order of the President of the Court of First Instance in Case T-222/99 R *Martinez and de Gaulle* v *Parliament* [1999] ECR II-3397, paragraph 60).

25 In the present case the President of the Court considers that it is necessary to ascertain whether factors exist which would justify the prima facie conclusion that the main application is admissible.

Arguments of the parties

26 The Commission submits that it is for the judge hearing the application for interim relief to establish that, prima facie, the main application presents features on the basis of which it is possible to conclude with a high degree of probability that the main action is admissible. In the present case, however, the Commission contends that the main action is manifestly inadmissible.

27 As regards the admissibility of the application for interim relief, the Commission maintains that under the second head of that application the applicant is seeking the suspension of the infringement procedure in progress in Case COMP/E-1/37.919 in order subsequently to obtain access to the file. The possibility of bringing proceedings before the Community Courts with the aim of ensuring access to the file in connection with an infringement procedure that is in progress was the subject of the judgment in Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667 (hereinafter the

'*Cimenteries CBR* judgment'), paragraphs 38 and 39, in which, according to the Commission, the Court of First Instance denied that such a possibility existed.

28 According to the Commission, the first head of the application for interim relief is aimed at obtaining suspension of the operation of the contested decision denying the applicant access to certain documents. Given that the second head of that application is inadmissible, the Commission submits that the first head is isolated and no longer has a purpose. Moreover, in the defendant's submission, it is aimed at obtaining the adoption of a measure that is manifestly devoid of effect, namely the suspension of the operation of a negative decision, which would not oblige the Commission to grant the applicant what it is seeking, namely access to the file. The measure requested cannot therefore be ordered in the context of proceedings for interim relief. In the Commission's submission, the first head of the application for interim relief is therefore also inadmissible.

29 According to the Commission, the fact that the applicant strives to demonstrate the admissibility of the heads of its application for interim relief by alleging differences between the facts underlying the *Cimenteries CBR* judgment and those in the present case would not justify diverging from the said judgment, even supposing that such differences existed. In the defendant's submission, the facts of the present case largely correspond to those in the *Cimenteries CBR* judgment. In that regard, the Commission maintains in particular that the hearing officer has always been independent, and he certainly was at the time of the *Cimenteries CBR* judgment. According to the Commission, the applicant therefore does not explain why the issue of his independence should call into question the principle of the unchallengeable nature of preparatory acts before the adoption of the final decision.

30 The applicant claims that, contrary to the Commission's supposition, the interim application is aimed at obtaining an order preventing the Commission, temporarily and until the Court has given judgment in the main proceedings, from creating a *de facto* situation that would be irreversible. To that end, the applicant requests that the Commission be temporarily prohibited from submitting a draft decision to the advisory committee or the College of Commissioners with a view to the adoption of a final decision fining the applicant until the Court has given judgment on the application for annulment of which it has been seised in the main proceedings against the contested decision.

31 According to the applicant, the application in the main proceedings is not an action for the issue of directions, which would be inadmissible, but an application for annulment. Consequently, it is impossible for the interim application to be manifestly inadmissible by reason of the manifest inadmissibility of the action in the main proceedings, as the Commission claims.

32 Even under the traditional state of the law, according to the applicant, the Court had already ruled, in the order of the President of the Court of First Instance in Joined Cases T-10/92 R to T-12/92 R, T-14/92 R and T-15/92 R *Cimenteries CBR and Others* v *Commission* [1992] ECR II-1571, at paragraph 54, that an application for the annulment of a decision refusing access to the file was not manifestly inadmissible. Nor, therefore, can the interim application in the present case, according to the applicant, automatically be manifestly inadmissible by reason of the manifest inadmissibility of the application in the main proceedings, as the Commission maintains.

33 The applicant relies, in particular, on five pleas in support of its claim that the contested decision can be challenged in its own right. The first is based on the independence of the hearing officer. The second alleges irreversible adverse effect on the applicant's rights of defence. The third alleges loss of a level of jurisdiction inasmuch as the applicant's views on the inequality of treatment it allegedly suffered have not been heard. The fourth is based on the fact that the Commission allegedly announced as a certainty that it intended to adopt a decision fining the applicant. The fifth alleges infringement of Article 8 of Regulation No 1049/2001.

34 With regard to the independence of the hearing officer, laid down in the third and sixth recitals of Decision 2001/462, and to the express formalisation of the procedure for consulting the files, the applicant contends that those principles require that decisions based on Article 8 of Decision 2001/462 be actionable in their own right. In the applicant's submission, it is possible to guarantee the independence of the hearing officer and the autonomy of the hearing procedure only if decisions taken on the basis of the mandate of hearing officers can be the

subject of judicial review. In that regard, the applicant points out that since the *Cimenteries CBR* judgment the Commission has amended and strengthened the role of the hearing officer several times, and not only in Decision 2001/462.

35 As regards the alleged persistent and irreversible adverse effect on the applicant's rights of defence if the Commission adopts a decision fining the applicant without authorising the latter to consult the files requested, the applicant cites established case-law, in particular the judgment in Case C-303/90 *France* v *Commission* [1991] ECR I-5315, according to which all measures which produce binding legal effects and have a direct and irreversible adverse effect on the interests of the persons involved can be challenged in their own right before the Court. In the present case, the Commission announced, *inter alia* in its letter dated 14 August 2001, that it intended to adopt a decision fining the applicant in the immediate future, despite having refused it authorisation to consult the files.

36 Consequently, the applicant claims that it would suffer irreparable financial and non-material damage. That would constitute a manifest misuse of powers, as the applicant had repeatedly offered concessions at least as large as those of other banks exonerated in the parallel procedures. The applicant contends that the mere fact of publishing the operative part of the decision to impose a fine would cause it not only to lose its good reputation as a serious undertaking but also to suffer considerable financial disadvantages, given that in all likelihood consumers would exchange their currencies at other financial institutions. It should also be assumed, according to the applicant, that the applicant will also lose customers in other sectors of activity, given that this adverse publicity would impinge upon its entire operations. Finally, the applicant maintains that it would have to expect civil claims for damages.

37 On the other hand, the applicant maintains that if it were permitted to consult the files in question, it would probably discover evidence that exonerated it or established an illegal inequality of treatment against it. According to the applicant, it must therefore be apprised of the decisive facts to be found only in

the Commission's files and over which it alleges that the latter wishes to retain control despite the principle of the equality of arms.

38 As to the loss of a level of jurisdiction, the applicant states that its views have not been heard on the question of the inequality of treatment that occurred when the procedures against other banks were terminated. The applicant contends that a final decision was adopted without the applicant being able to complain about the inequality of treatment it suffered and without the advisory committee and the College of Commissioners being consulted on this point.

39 As to the announcement of a final decision, the applicant claims that, contrary to the situation in the *Cimenteries CBR* Case, the Commission announced with certainty, both in telephone conversations with the applicant and in the second letter dated 14 August 2001, that it would soon adopt a final decision fining the applicant.

40 Lastly, according to the applicant, the possibility of bringing separate proceedings against the contested decision also stems from Regulation No 1049/2001, and in particular from the second sentence of Article 8(1) thereof. According to the applicant, the provisions of that regulation are applicable to decisions taken by hearing officers pursuant to Article 8 of Decision 2001/462 refusing a request for access to the file. The applicant claims that it follows from the tenth recital of Decision 2001/462 that the latter must be implemented without prejudice to the general rules granting or excluding access to Commission documents.

41 Furthermore, in view of the eighth and twelfth recitals of Regulation No 1049/2001, the applicant claims that the latter regulation should also be applied to requests for access to the documents issued in connection with the hearing provided for in Article 19 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) and to decisions taken by the hearing officer pursuant to Article 8 of Decision 2001/462.

Findings of the President of the Court

42 With regard to the effect that Regulation No 1049/2001, on which the applicant relies, may have on the assessment of the present case, it must be observed at the outset that the said regulation will not be applicable until 3 December 2001. It is therefore on any view of no relevance to the present case.

43 As regards the four other arguments which are put forward by the applicant in support of its conclusion designed to demonstrate the admissibility of the main action and according to which the contested decision is capable of challenge in its own right, it must be pointed out that in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle, open to review only if it is a measure definitively laying down the position of the institution at the end of that procedure, and not a provisional measure intended to pave the way for that final decision (judgments in Cases T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 27, and T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 51).

44 Access to the file in competition cases is intended to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections (judgment in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 75). Access to the file is thus one of the procedural guarantees intended to protect the rights of defence and to ensure, in particular, that the right to be heard provided for in Article 19(1) and (2) of Regulation No 17 and Article 2 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty (OJ 1998 L 354, p. 18) can be exercised effectively. Observance of those rights in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be

respected in all circumstances, even if the proceedings in question are administrative proceedings (judgments in *Cimenteries CBR*, paragraphs 38 and 39, and in Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, paragraph 49).

45 Due observance of that general principle requires that the applicant must have been afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, objections and circumstances alleged by the Commission (judgment in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraphs 9 and 11).

46 It follows from all the foregoing considerations that, even though they may constitute an infringement of the rights of defence, Commission measures refusing access to the file produce in principle only limited effects, characteristic of a preparatory measure forming part of a preliminary administrative procedure (judgment in *Cimenteries CBR*, paragraph 42). Only measures immediately and irreversibly affecting the legal situation of the undertakings concerned would be of such a nature as to justify, before completion of the administrative procedure, the admissibility of an action for annulment.

47 In that regard, the applicant's assertion that the adoption of a final decision fining it is imminent cannot be relevant to the present examination, because in any event that assertion is insufficiently precise in that it reveals nothing as to the content of any decision regarding the applicant. That assertion does not, therefore, make it possible to distinguish the present case significantly from the one which gave rise to the judgment in *Cimenteries CBR*.

48 Any infringement of the right of an addressee of a statement of objections, in the present case the applicant, effectively to put forward its views on the objections made by the Commission and on the evidence intended to support those objections is capable of producing binding legal effects of such a nature as to

affect the applicant's interests only if and when the Commission has adopted a decision finding the existence of the infringement of which it accuses the applicant. In reality, until a final decision has been adopted, the Commission may, in view, in particular, of the written and oral observations of the applicant, abandon some or even all of the objections initially raised against it. It may also rectify any procedural irregularities by subsequently granting access to the file after initially declining to do so, so that the applicant has a further opportunity to express its views, in full knowledge of the facts, on the objections notified to it.

49 However, if, for the sake of argument, the Court were to recognise, in proceedings against a decision bringing the procedure to a close, that a right of full access to the file existed and had been infringed, and were therefore to annul the Commission's final decision for infringement of the rights of defence, the entire procedure would be vitiated by illegality. In such circumstances, the Commission would be obliged either to abandon all proceedings against the applicant or to resume the procedure, giving the applicant a further opportunity to give its views on the objections raised against it in the light of all the new information to which it should have been granted access. In the latter situation, a properly conducted *inter-partes* procedure would be sufficient to restore fully the rights and privileges of the applicant (judgment in *Cimenteries CBR*, paragraph 47).

50 It must be noted that, despite the fact that Decision 2001/462 aims to guarantee the independence of the hearing officer, the applicant has not put forward any weighty considerations that would enable the Court to hold that the case-law cited above on access to the file in competition cases is no longer applicable.

51 It follows from the foregoing considerations that the contested decision, by refusing the applicant access to certain documents relating to the abandonment of procedure COMP/E-1/37.919 against other banks, is not capable of producing legal effects of such a nature as to affect the applicant's interests immediately, before any decision finding an infringement of Article 81(1) EC and possibly

imposing a penalty on it is adopted (see, to that effect, judgment in *Cimenteries CBR*, paragraph 48).

52 As to the second head of the application for interim measures, which relates to the suspension of the procedure for applying Article 81 EC against the applicant, the judge hearing an application for interim relief cannot in principle accede to a request for interim measures seeking to prevent the Commission from exercising its powers of investigation after the opening of an administrative procedure and even before it has adopted the definitive acts whose operation is sought to be avoided. If such measures were adopted, the judge hearing the interim application would not be reviewing the activity of the defendant institution but assuming the role of that institution in the exercise of purely administrative powers. Consequently, the applicant is not entitled to request under Articles 242 EC and 243 EC that the defendant institution be prohibited, even provisionally, from exercising its powers in the course of an administrative procedure (see orders of the President of the Court of First Instance in Case T-543/93 R *Gestevisión Telecinco* v *Commission* [1993] ECR II-1409, paragraph 24, and, to that effect, in Case T-395/94 R II *Atlantic Container and Others* v *Commission* [1995] ECR II-2893, paragraph 39). Such an entitlement could only be recognised if the application were to present evidence from which the judge hearing the interim application could find that there were exceptional circumstances justifying the adoption of the measures requested (see, in that connection, order of the President of the Court of First Instance in Case T-52/96 R *Sogecable* v *Commission* [1996] ECR II-797, paragraphs 40 and 41).

53 In that regard, it must be observed that in the present case the applicant has not put forward any evidence of exceptional circumstances which could justify the adoption of the measure sought, namely suspension of the procedure for applying Article 81 EC as far as the applicant is concerned. The second head of the application for interim measures cannot be declared admissible on this basis.

54 Consequently, in the absence of serious evidence enabling the Court to consider that the action in the main proceedings is admissible, the present application for interim measures must be declared inadmissible.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim measures is dismissed.**

2. **The costs are reserved.**

Luxembourg, 5 December 2001.

H. Jung

Registrar

B. Vesterdorf

President